

ADVICE TO APPLICANTS

Guardianship & Administration Act 1993

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The two main orders that can be made by the South Australian Civil and Administrative Tribunal (the Tribunal) under the *Guardianship and Administration Act 1993* (the Act) are Guardianship Orders and Administration Orders. For more information about these orders, see [Information Sheets 4: Guardianship Orders](#) and [5: Administration Orders](#). This fact sheet is a guide for people considering applying for either of these orders.

BEFORE MAKING AN APPLICATION

A person considering making an application to the Tribunal for guardianship or administration should bear in mind that the Tribunal will need to be satisfied firstly, that:

- the person who is the subject of the application has a mental incapacity as defined in section 3 of the Act:
'...the inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs, as a result of -
(a) *any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration, of the brain or mind; or*
(b) *any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever,*

An applicant is expected to ensure the Tribunal is provided with medical evidence about the person's mental in/capacity.

The Tribunal will also need to be satisfied that:

- there is a need for the order, meaning there must be specific decisions to be made about particular issues or problems, (e.g. where the person lives,) and reasons why these decisions cannot be made informally, and
- the orders and/or decisions will benefit the person with the mental incapacity and that there is no less restrictive alternative to making an order.

The applicant will be expected to have taken into account whether existing informal arrangements are adequate and the desirability of not disturbing those arrangements.

MAKING AN APPLICATION

An application for guardianship or administration should be well thought out and well prepared. Applicants are advised to remember that they are asking the Tribunal to take away a person's rights to self-determination and autonomy, and to appoint another person (or body) to take on the responsibility of making serious decisions on the person's behalf. Orders sought:

- must respect, and be congruent with, the wishes of the person, unless this would be inconsistent with ensuring his or her proper care and protection
- should be part of an overall plan designed to assist the client
- should be viewed as a last resort to achieve outcomes
- must be the least restrictive alternative available in terms of client autonomy and self-determination, and
- should not disturb existing informal arrangements that are working well.

Office of the Public Advocate

The Public Advocate is
an independent statutory
officer accountable to the
South Australian
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Applicants for orders have a number of other responsibilities:

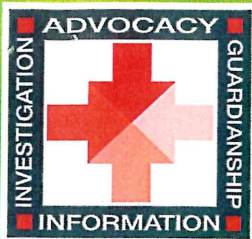
- arranging for the person who is the subject of the application to attend the hearing
- informing the Tribunal of all the interested parties who should receive notification of the hearing
- advising the Tribunal of any special arrangements needed, including an interpreter or any security considerations.
- If the application is for an order that requires the commitment of some other person or organisation, providing evidence of this willingness in the application. The relevant organisational representative or medical practitioner may be required to attend the hearing to verify this commitment and outline their proposed plan.
- Where the application is for additional orders under section 32 of the Act, providing evidence that, if such an order were not made, the health and safety of the protected person or the safety of others would be seriously at risk. *See Information Sheet 11: Section 32 orders*

PRESENTING AN APPLICATION TO THE TRIBUNAL

- The Tribunal is similar to but less formal than a Court. Decisions are made based on written evidence (e.g. medical reports) and information provided by those at a hearing. It is not a meeting or case conference where ideas can be debated and refined; clear information and plans are expected. The Tribunal will ask for information from the applicant, the person who the application is about (unless they are unable to attend), and key carers, friends or relatives of the person.
- The applicant must attend the hearing and is expected to present a coherent argument for the orders and/or decisions sought.
- The applicant should state the type, duration, and any limitations on the order they are seeking. A brief history should be given, including any changes that have led to an order being sought now (rather than earlier or in the future), examples of any behaviours that are causing concern, previous interventions attempted and their outcomes, etc.
- It is important that the applicant understands the difference between guardianship orders and administration orders, as the Tribunal will ask for specific information about the need for each separate order.
- Applicants must be aware that information provided to the Tribunal can be made available to all in attendance at the hearing. It is an essential principle of natural justice that any person who may be subject to an order or decision of the Tribunal be given the opportunity to respond to any submissions made.

See the Tribunal's website for applications forms and further information:

<http://www.sacat.sa.gov.au/>



WHAT IS THE OFFICE OF THE PUBLIC ADVOCATE

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Guardianship & Administration Act 1993

Advance Care Directives Act 2013

Consent to Medical Treatment & Palliative Care Act 1995

Mental Health Act 2009

WHY WAS THE OFFICE OF THE PUBLIC ADVOCATE SET UP?

The Office of the Public Advocate was created to promote and protect the rights of people with mental incapacity in South Australia. The Public Advocate is an independent statutory official accountable to the South Australian Parliament. The State Government funds the Office of the Public Advocate which exists to assist the Public Advocate fulfil statutory responsibilities.

IS THE OFFICE OF THE PUBLIC ADVOCATE SEPARATE FROM THE SOUTH AUSTRALIAN CIVIL AND ADMINISTRATIVE TRIBUNAL?

Yes. The Office of the Public Advocate is independent of, and completely separate from, the South Australian Civil and Administrative Tribunal (the Tribunal).

WHO ARE THE CLIENTS OF THE OFFICE OF THE PUBLIC ADVOCATE?

The Office of the Public Advocate has three main client groups:

- people with mental incapacity / impaired decision-making capacity
- family, carers and friends of people with mental incapacity / impaired decision making capacity ;
- people and organisations with an interest in issues arising from mental incapacity.

WHAT DOES THE OFFICE OF THE PUBLIC ADVOCATE DO?

The Office of the Public Advocate has several legislative responsibilities:

Information and Education Service

The Office of the Public Advocate provides information and advice about issues that are or could be affecting a person with mental incapacity or impaired decision making capacity. The Office provides information about the operation of four pieces of legislation - the *Guardianship and Administration Act 1993*, the *Mental Health Act 2009*, the *Advance Care Directives Act 2013* and the *Consent to Medical Treatment and Palliative Care Act 1995*. It has produced a range of pamphlets and other resources, which are available from the website at www.opa.sa.gov.au.

Dispute Resolution

The *Advance Care Directives Act 2013* and the *Consent to Medical Treatment and Palliative Care Act 1993* authorise the Public Advocate to provide information, preliminary assistance, and mediation to assist in the resolution of disputes about advance care directives, (i.e. health, accommodation or personal decisions) and medical treatment decisions.

The Public Advocate is also authorised to make Declarations in relation to an advance care directive [See Information Sheet 27: Dispute Resolution Service](#)

Investigation

The Tribunal can direct the Public Advocate to investigate the circumstances of a person about whom it has received an application - a person who is believed to have a mental incapacity and to be at risk of some form of harm (physical, psychological or financial). The Office of the Public Advocate provides a report on the investigation to the Tribunal to assist the Tribunal make a decision.

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Guardian of Last Resort

When a guardian is needed to make lifestyle, accommodation and/or medical decisions for a person with a mental incapacity, and there is no other appropriate person to be appointed, the Tribunal may appoint the Public Advocate as guardian of last resort. [See Information Sheet 4: Guardianship Orders](#)

Advocacy

The Office of the Public Advocate undertakes some individual advocacy work but is mainly concerned with systems advocacy. The office speaks for and supports people with mental incapacity by reporting on situations that infringe upon their rights and interests. The Public Advocate can make recommendations to the Minister for Health, the Minister for Disability and the Attorney-General for legislative and/or operational change, and can require the Attorney-General to submit a report on any matter to both Houses of State Parliament.

HOW DOES THE OFFICE OF THE PUBLIC ADVOCATE DO ITS WORK?

The aim of the Office of the Public Advocate is to enhance the quality of life whilst safeguarding the health and wellbeing of those people in the community who are vulnerable to self-neglect, abuse or exploitation.

The Public Advocate and Office of the Public Advocate staff:

- work to increase the quality of adult guardianships across South Australia.
- foster strong partnerships with service providers and the community to enhance the lives and potential of clients.
- identify key areas of unmet, or inappropriately met, needs of mentally incapacitated persons, and take action for improvement.

The Public Advocate and Office of the Public Advocate staff are committed to the following values:

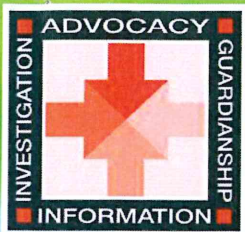
- the people with whom the office is involved deserve to be treated with courtesy, dignity and respect.
- working in partnership with others, to achieve the best possible outcomes for clients.

DOES THE OFFICE OF THE PUBLIC ADVOCATE HANDLE COMPLAINTS?

The Office of the Public Advocate is not a complaints body. Complaints about health or community services should initially be brought to the attention of the agency involved.

WHAT IF A PERSON HAS A COMPLAINT ABOUT THE OFFICE OF THE PUBLIC ADVOCATE?

If a person has a complaint about the Office of the Public Advocate, he or she should follow the procedures in the Complaints Policy. [See Information Sheet 20: Office of the Public Advocate Complaints Policy](#)



GUARDIANSHIP ORDERS

Guardianship & Administration Act 1993

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WHAT IS A GUARDIANSHIP ORDER?

A guardianship order is an order made by the South Australian Civil and Administrative Appeals Tribunal (the Tribunal), that appoints a guardian to make accommodation, health care and/ or lifestyle decisions on behalf of a person with a mental incapacity.

WHAT IS A LIMITED GUARDIANSHIP ORDER?

A limited Guardianship Order is where the Tribunal limits responsibility of the guardian to particular aspects of the person's care or welfare (such as accommodation only).

WHEN MIGHT A GUARDIANSHIP ORDER BE MADE?

Many people with mental incapacity do not need a guardian. They may be able to make their own decisions with support from those around them who may include family and friends. A guardian is only needed if these arrangements are ineffective, or non-existent, or where conflict is affecting the person's well-being. The Tribunal will only make a guardianship order when:

- the person has a 'mental incapacity' (damage, illness, disorder or impairment of the mind or brain, or inability to communicate), and
- the person cannot make reasonable decisions because of the incapacity, and
- there are decisions that need to be made and there is not a less restrictive way of these decisions being made.

In general, a family member or friend with a close and continuing relationship with the person, or a person responsible for the care of a person can consent to medical treatment if the person cannot consent themselves. A guardian for healthcare decisions will only be appointed where there is no other appropriate person who can make these decisions.

See Information Sheet 9: Consent to medical and dental treatment for people with impaired decision making capacity.

HOW LONG IS A GUARDIANSHIP ORDER MADE FOR?

Once a guardianship order is made, it remains in force until it is revoked or varied by the Tribunal. The Tribunal reviews guardianship orders at set periods, with a maximum of three years before review. An application can be made to the Tribunal to vary or to revoke the guardianship order sooner than the review date if there is a change in circumstances.

WHAT IF THERE IS AN ENDURING POWER OF GUARDIANSHIP OR ADVANCED CARE DIRECTIVE OR MEDICAL POWER OF ATTORNEY?

If a person with a mental incapacity has previously made an Advance Care Directive, Enduring Power of Guardianship, or Medical Power of Attorney, appointing someone to make decisions on their behalf, and there are no problems or conflict, there is no need for the Tribunal to appoint a guardian.

For further information see Information Sheet 8: Advance Directives in SA

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WHO CAN BE APPOINTED AS GUARDIAN?

The Tribunal can appoint a sole guardian or joint guardians. A guardian must be a natural person, that is: not a company or statutory body. Any person who cares for, or works with, the person on a professional basis cannot be appointed as his or her guardian. A guardian is preferably a family member or friend who knows the person well, and has an interest in and contact with that person. In situations where there is no family member or friend who can act as the person's guardian, the Tribunal can appoint the Public Advocate, as guardian of last resort.

In deciding whether to make an order, the Tribunal must consider:

- what the wishes of the person would have been if he or she had not become mentally incapacitated (where this can be determined);
- the present wishes of the person, if these can be expressed;
- whether or not existing informal arrangements are adequate, and should not be disturbed;
- which decision or order would be the least restrictive of the person's rights and personal autonomy, whilst still ensuring his or her proper care and protection.

WHAT DOES A GUARDIAN DO?

A guardian is legally responsible for making all, or some, of the person's lifestyle, accommodation, and healthcare decisions (the order sets out the extent of the guardian's responsibilities). When doing so, a guardian will:

- respect the person's wishes, and balance this with ensuring his or her proper care and protection;
- respect the person's cultural background,
- maintain confidentiality as far as possible;
- consider family relationships and consult with anyone who has a real interest in the person's wellbeing when making decisions.

WHAT ARE SECTION 32 POWERS?

A guardian can apply to the Tribunal for an additional order (a 'section 32' or 'special powers' order) if there is a serious risk to the person or to others which can be addressed using additional authority. A special powers order can authorise directing where the person is to live; detaining the person to that place, and/ or using force to administer treatment. *See Information Sheet 11: Section 32 powers*

CAN A GUARDIANSHIP ORDER BE REVIEWED OR APPEALED?

If a person disagrees with a decision or order of the Tribunal, they can apply to the Tribunal for a review of the decision. The review will be undertaken by senior members of the Tribunal who were not involved in the original decision. The review will be a fresh look at the decision, using the information provided when the order was made and any other relevant information accepted by the Tribunal. *For more information see Information Sheet 18: Reviews and Appeals*

A legal representation scheme is provided free of charge to the person under guardianship when the order is under review. The person is entitled to be represented by a lawyer and can be provided with a lawyer or arrange their own representation. Other parties to a review will need to make their own arrangements and payment for legal representation. Where the Public Advocate is guardian, and a person is unhappy with the guardian's decision, there are grievance procedures that can be followed. *See Information Sheet 20: Office of the Public Advocate Complaints Policy*