

Position statement

Protecting the human rights of adults with decision-making disabilities

DECISIONS ABOUT TREATMENT

The *Guardianship and Administration Act 1990* (the Act) specifies those people authorised to make a treatment decision for people with a decision-making disability. It is not always necessary to apply to the State Administrative Tribunal to have a guardian appointed to make a treatment decision if someone else specified in the Act meets the criteria to make the decision. However, a guardianship order may be sought when there are disagreements or when ethically contentious treatment is proposed.

The Office of the Public Advocate has developed the following information to ensure health professionals, service providers, family and friends are aware of the process to follow when treatment is being considered for a person with a decision-making disability. There are also general guidelines to use when considering whether or not an application for a guardianship order is required.

The guidelines include important information about the sterilisation of adults with decision-making disabilities. Sterilisation in these circumstances requires the authorisation of both the appointed guardian and the State Administrative Tribunal.

TREATMENT

In the Act the term 'treatment' is defined as any medical, surgical or dental treatment or other health care, including a life-sustaining measure and palliative care.

TREATMENT DECISION

A 'treatment decision' is defined as a decision to consent or refuse consent to the commencement or continuation of any treatment of the person.

URGENT TREATMENT

The term 'urgent treatment' is defined in the Act, at section 110ZH as treatment that in the opinion of the health professional, is needed to save the life of the person, to prevent serious damage to the person's health or to prevent the person suffering or continuing to suffer significant pain or distress.

Where the person needs urgent treatment, as defined above, the Act allows for the urgent treatment to be provided without the need for a health professional to obtain a treatment decision if the health professional believes it is not practicable to obtain that decision.

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URGENT TREATMENT AFTER ATTEMPTED SUICIDE

Where the person needs urgent treatment and the health professional believes this it is required as a result of an attempted suicide, the treatment can be provided even where this contradicts the treatment decision made in an Advance Health Directive or the treatment decision of a substitute decision-maker.

SUBSTITUTE DECISION-MAKING

The Act ensures that there are provisions for treatment decisions to be made for adults who are not capable of making reasoned decisions for themselves because of conditions such as dementia, an intellectual disability, psychiatric illness or an acquired brain injury.

The Act provides options for people to choose how treatment decisions will be made, if they ever lose capacity to make decisions for themselves. People can do this by making an Advance Health Directive or by appointing an enduring guardian. The Act also allows for substitute decision-makers to be appointed by the State Administrative Tribunal where a person has lost capacity. A person appointed by the State Administrative Tribunal to make personal, lifestyle and treatment decisions is known as a guardian.

Persons for whom a guardian is appointed lose the right to make decisions about those areas of their life for which the Tribunal gives the guardian authority. To protect a person's decision-making rights wherever possible, a guardian will be appointed only if it is considered necessary to safeguard the best interests of the person whose decision-making capacity is impaired and if other less restrictive options are not available or appropriate.

ADVANCE HEALTH DIRECTIVE

This is a legal document that a person 18 years of age or older, with full legal capacity can complete. It allows the person to provide or withhold consent for specific health care, medical, surgical or dental treatments or procedures, including life-sustaining measures and palliative care.

This document is then used if the person is unable to make a treatment decision at the time it is required due to loss of capacity.

ENDURING POWER OF GUARDIANSHIP

This is a legal document that a person 18 years of age or older, with full legal capacity can complete. It enables the person to appoint a person of their choice to make personal, lifestyle and treatment decisions on their behalf if they become unable to make these decisions for themselves.

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GUARDIANSHIP

The State Administrative Tribunal may appoint a guardian for a person if it is satisfied that the person:

- is 18 years of age or older
- is either:
 - incapable of looking after their own health and safety;
 - unable to make reasonable judgements about personal matters; or
 - in need of oversight, care or control in the interests of their own health and safety or for the protection of others; and
- is in need of a guardian.

PROCESS FOR OBTAINING A TREATMENT DECISION

The *Guardianship and Administration Act 1990* details the procedure to be followed by a health professional when treating a person who is incapable of making a treatment decision due to a decision-making disability.

The procedure for a health professional to follow to obtain a treatment decision on behalf of the person is stated in Part 9D Sections 110ZJ and 110ZD of the Act.

Service providers such as allied health professionals and paid support workers have no authority under the Act to make a treatment decision, whether this is to consent or withhold consent for treatment.

Service providers taking a person with a decision-making disability for a medical or allied health appointment should provide the treating health professional with the name and contact details of any legally appointed substitute decision-maker with authority to make a treatment decision on the person's behalf or the appropriate person in the hierarchy of treatment decision-makers.

HIERARCHY OF DECISION-MAKERS FOR TREATMENT

Under the Act, if a person has completed an Advance Health Directive (AHD) which covers the circumstances and treatment required, the health professional must follow the treatment decision in the Advance Health Directive. In very limited circumstances the Advance Health Directive may be considered invalid and the health professional may not follow the directive but instead, must consult the first person listed in the legislation who can make a treatment decision.

The list of persons in Sections 110ZJ and 110ZD of the Act can be summarised as a hierarchy. When obtaining a treatment decision, the health professional must go to the first person in the hierarchy, who is 18 years of age or older, has full legal capacity, is reasonably available and is willing to make the decision.

If all of these conditions are not met, for example if the person does not have capacity or is not available, the health professional can go to the next person in the hierarchy.

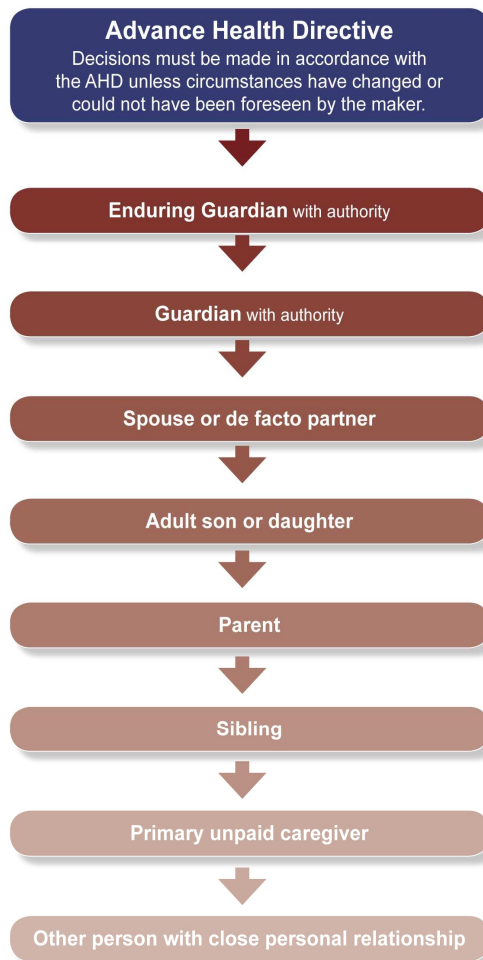


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HIERARCHY OF TREATMENT DECISION-MAKERS*

Where an AHD does not exist or does not cover the treatment decision required, the health professional must obtain a decision for non-urgent treatment from the first person in the hierarchy who is 18 years of age or older, has full legal capacity and is willing and available to make a decision.



*EXPLANATORY NOTES:

A health professional must consult the order above (spouse/de facto partner, adult child, parent, sibling) in seeking a treatment decision.

De facto partner: "It does not matter whether (a) the persons are different sexes or the same sex; or (b) either of the persons is legally married to someone else or in another de facto relationship." *The Acts Amendment (Lesbian and Gay Law Reform) Act 2002.*

A health professional does not have to seek a treatment decision from the eldest person within any category as there is no distinction in relation to age, therefore all adult children of a person have equal priority.

A person is to be regarded as maintaining a 'close personal relationship' with the person needing the treatment if the relationship is maintained through frequent personal contact and a personal interest in the welfare of the person needing the treatment.



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CAPACITY OF A PATIENT TO MAKE A TREATMENT DECISION

The responsibility for making sure that a person being provided with treatment understands the nature and consequences of the treatment proposed, and for obtaining a treatment decision from the correct person, lies with the treating health professional.

If the treating health professional does not believe the patient has the capacity to make the treatment decision then it is their responsibility to seek the treatment decision from the appropriate person.

STERILISATION

Sterilisation is not a procedure included within the definition of treatment, and specific authority is required in relation to sterilisation.

If sterilisation is being considered or proposed the *Guardianship and Administration Act 1990* states that an application to the State Administrative Tribunal must be made when an adult lacks the capacity to consent to a sterilisation procedure.

For more information refer to the Office of the Public Advocate Information Sheet: Sterilisation.

APPLICATION FOR A GUARDIANSHIP ORDER

It is the view of the Public Advocate that an application for a guardianship order should be made to the State Administrative Tribunal when:

- there is conflict about the adult's capacity to make a decision in relation to the proposed treatment, so the treating health professional requires clarification about capacity
- there is conflict between interested parties about who should be making a treatment decision
- there is no enduring guardian appointed and there is no one within the description of persons listed in section 110ZJ or section 110ZD to make a treatment decision
- the person authorised in the Act to make a treatment decision is unwilling or unable to perform this role or cannot be contacted in a reasonable timeframe
- the person for whom the treatment is proposed objects to the treatment
- notwithstanding the priority list in the hierarchy of treatment decision-makers, there are disagreements about what treatment will be in the best interests of the person
- an ethically contentious treatment or procedure is proposed, for example, clinical drug trials
- it is unclear whether the treatment is for an underlying medical condition or restraint (see the Office of the Public Advocate Position Statement: Restraint).

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FOR FURTHER INFORMATION CONTACT

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