Office of the PublicAdvocate

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 (the 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 who lacks the capacity to make reasoned decisions about the treatment. There are also general guidelines to use when considering whether-or-not an application for a guardianship order is required.

This paper also provides information about decision making for the provision of medical procedures that result in the termination of a pregnancy (abortion) and sterilisation.

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 or palliative care.

'Treatment' includes the provision of an abortion when treatments referred to in the *Public Health Act 2016*, section 202MB(2) are intentionally provided for the termination of a pregnancy [1]

In the Act, for the purpose of Part 9B – Advance health directives and Part 9E – Medical research, the term 'treatment' includes medical research. Medical research is **not** included in the definition of treatment when it is applied to other parts of the Act.

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. In the Act, for the purpose of

[1] In the *Public Health Act 2016*, section 202MB(2), the intentional termination of a pregnancy may be through the prescription, supply or administering of an abortion drug, or surgical or other procedure. If an abortion is the unintended result of a treatment, the *Public Health Act 2016* does not refer to it as the performance of an abortion.

Part 9B – Advance health directives, the definition of treatment decision is expanded to include participation in medical research.

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. Urgent treatment includes the performance of an abortion on a person if the abortion is urgently needed to save the person's life, to prevent serious damage to the patient's health or to save another foetus.

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.

Section 110ZS of the Act enables a researcher, in certain limited circumstances, to conduct medical research in relation to a research candidate (patient) who needs urgent treatment. For more information refer to the Office of the Public Advocate Position Statement: Decisions about medical research.

Urgent treatment after attempted suicide

Where the person needs urgent treatment and the health professional believes this 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 Tribunal where a person has lost capacity. A person appointed by the 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 or palliative care, and medical research.

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, treatment and medical research decisions on their behalf if they become unable to make these decisions for themselves.

Guardianship

The 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*, Part 9D Sections 110ZD and 110ZJ, details the procedure to be followed by a health professional to obtain a treatment decision when treating a person who lacks the capacity to make reasonable decisions about the proposed treatment.

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, who lacks the capacity to make reasonable decisions about health care, for a medical or allied health appointment are encouraged to 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.

For more information on the "Process for obtaining medical research decision" refer to the Office of the Public Advocate Position Statement: Decisions about medical research.

Hierarchy of decision-makers for treatment

Under the Act, if a person has completed an advance health directive 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 110ZD and 110ZJ 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.

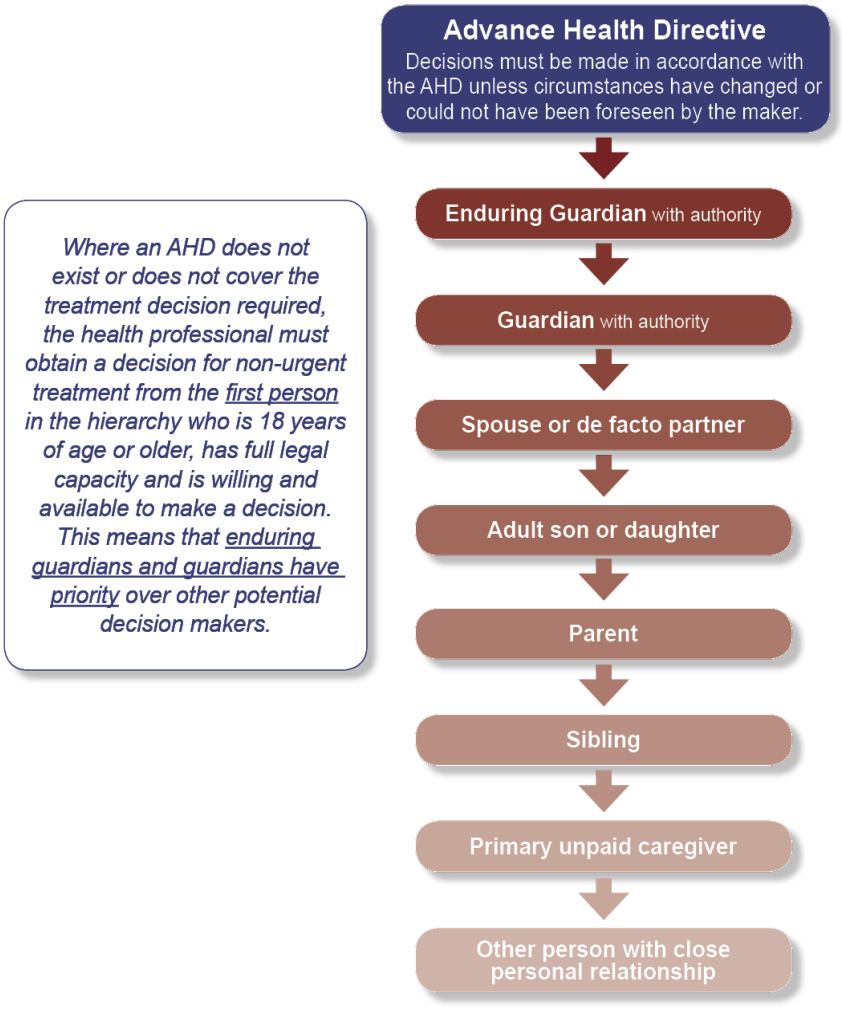
If all of these conditions are not met, for example if the person does not have capacity or is not available, the health professional can go to the next person in the hierarchy.

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.

Hierarchy of treatment decision-makers*

To be read in conjunction with ss.110ZD and 110ZJ of the *Guardianship and Administration Act 1990.* Note, in the flowchart below, an AHD may be in the prescribed form or a common law directive.



*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.*

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.

Abortion [2] [3]

When a pregnant adult is unable to make reasonable judgements about whether-or-not an abortion should be performed on them, and there is no relevant advance health directive, then interested parties may apply to the Tribunal for the Tribunal to make an abortion consent decision, unless urgent treatment is required. Only the Tribunal may make an abortion consent decision. Such a decision is made after the Tribunal has determined that the person is incapable of making reasonable judgments in respect of whether-or-not the abortion should be performed, and that the performance of an abortion is in their best interests. The represented person's wishes are considered in determining best interests.[4]

A guardian appointed for a person under the *Guardianship and Administration Act 1990* is **not** permitted to give consent to an abortion on the person's behalf.

However, if urgent treatment is required and it is not practicable for the health professional to obtain a decision from the Tribunal, health professionals may perform an abortion to save the patient's life, to prevent serious damage to the patient's health or to save another foetus.[5].

Sterilisation

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

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[2] Information about pregnancy choices including abortion is provided by King Edward Memorial Hospital at: https://www.kemh.health.wa.gov.au/Pregnancy-and-Birth/Abortion

[3] On 27 March 2024, the *Abortion Legislation Reform Act 2023* (WA**)** came into effect. The Department of Health provides information to health practitioners at: https://www.health.wa.gov.au/Abortion

[4] State Administrative Tribunal: Citation: C [2024] WASAT 50

[5] The requirements for a treatment decision in relation to the performance of an abortion is described in sections 110ZLA, 110ZI and 110ZNA of the *Guardianship and Administration Act 1990*. https://www.legislation.wa.gov.au/legislation/statutes.nsf/main_mrtitle_406_homepage.html

capacity to make reasonable judgements about the proposed sterilisation procedure requires the joint consent in writing of their guardian or enduring guardian and the Tribunal.

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

Voluntary Assisted Dying

A guardian cannot make a decision for a represented person under the *Voluntary Assisted Dying Act 2019*. Nothing in the *Guardianship and Administration Act 1990* authorises the making of a treatment decision, whether in an advance health directive or otherwise, in relation to voluntary assisted dying decisions.

Treatment decisions and the *Mental Health Act 2014*

Under the *Mental Health Act 2014* treatment means the provision of psychiatric, medical, psychological or psychosocial intervention intended (whether alone or in combination with one or more other therapeutic interventions) to alleviate or prevent the deterioration of a mental illness or a condition that is a consequence of a mental illness, and does not include bodily restraint, seclusion or sterilisation.

If a represented person for whom the Public Advocate is appointed, is detained under the *Mental Health Act 2014* as an involuntary patient; either in hospital under an involuntary treatment order or in the community under a Community Treatment Order the patient (represented person) can be provided with psychiatric treatment without informed consent being given by the Public Advocate. The treating psychiatrist can make these decisions, although ideally the treating psychiatrist would inform and discuss the treatment plan with the delegated guardian.

If the represented person for whom the Public Advocate is appointed, is a voluntary patient under the *Mental Health Act 2014*, the patient (represented person) is enabled by the Mental Health Act to make psychiatric treatment decisions for themselves if they have the capacity to do so. If the represented person is considered, by the treating psychiatrist, not to have capacity, the Public Advocate should make these treatment decisions on their behalf.

If the represented person has a physical condition (ie not a psychiatric condition), then consent to treatment would be provided by the delegated guardian as provided for in the *Guardianship and Administration Act 1990*.

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 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
- it is unclear whether the treatment is for an underlying medical condition or restraint (see the Office of the Public Advocate Position Statement: Restrictive Practices)
- there is conflict about who should make the decision for participation in medical research. For more information refer to the Office of the Public Advocate Position Statement: Decisions about medical research.

The Public Advocate publishes position statements on:

- **Decisions about treatment**
- Restrictive Practices
- The role of the Public Advocate as guardian of last resort with authority to make accommodation decisions
- The role of the Public Advocate as guardian of last resort with authority to make treatment decisions
- The role of the Public Advocate as guardian of last resort with authority to make contact decisions
- The role of the Public Advocate as guardian of last resort with authority to make treatment decisions: palliative care
- Decisions about medical research
- The role of the Public Advocate as guardian of last resort with authority to make decisions about restrictive practices
- Role of the Public Advocate as guardian of last resort with authority to make decisions about services: NDIS

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