Role of the Public Advocate as guardian of last resort with authority to make treatment decisions

The *Guardianship and Administration Act 1990* (the Act) recognises that people who are not capable of making reasoned decisions for themselves may need additional support and assistance not only to ensure their quality of life is maintained, but also to protect them from the risk of neglect, exploitation and abuse.

Under the Act, the State Administrative Tribunal (the Tribunal) may appoint a guardian for a person with a decision-making disability. Guardians are substitute decision-makers who make personal, lifestyle, treatment and medical research decisions in the best interests of people who are not capable of making reasoned decisions for themselves due to conditions such as dementia, intellectual disability, mental illness or an acquired brain injury.

The Tribunal can appoint the Public Advocate as guardian of last resort only when there is no one else suitable, willing, and available to act as the person's guardian. The decision-making authority of the Public Advocate may be limited to specific areas such as treatment and accommodation (limited order) or it may apply to all areas of the person's life (plenary order).

When appointed guardian of last resort with the authority to make **treatment decisions**, the Public Advocate is responsible for making decisions about treatment proposed for the person.

In the Act, the term 'treatment' refers to any medical, surgical or dental treatment or other health care, including life-sustaining measures or palliative care.

However, the authority to make treatment decisions does not include treatment decisions for the performance of an abortion or sterilisation. Only the Tribunal may make a decision consenting to an abortion or sterilisation.

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.

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

When appointed as guardian with authority to make treatment decisions, the Public Advocate will:

- advise health care professionals that the Public Advocate has been appointed with authority to make treatment decisions for the represented person and must therefore be contacted to make such decisions on their behalf
- advise allied health staff and carers who are providing treatment for, or administering medication to the represented person, of the Public Advocate's treatment authority
- gather relevant information to assist in making decisions about the person's treatment or health care and the cost of such treatment or care, including the expressed views of the represented person or such views as can be gained by their previous actions (this information may be gathered from the person, family members, the treating practitioner, carers, service providers, the administrator or attorney of the represented person and other interested parties)
- obtain a copy of a valid advance health directive, where available
- make decisions about the person's treatment or health care.

The Public Advocate may also:

- request and/or attend case conferences and review meetings to discuss health care matters
- attend a medical appointment between the represented person and their treating doctor to gain more information regarding complex treatment decisions and the views of both parties
- request written reports following medical (or other health) reviews and assessments
- consider a second medical opinion as part of the process of making the treatment decision
- request a treatment plan, when the represented person is admitted to a health care facility or when major health concerns have been raised or diagnosed
- make complaints to appropriate authorities, on the person's behalf, about health care matters
- seek directions from the Tribunal regarding a person's treatment and health care, where appropriate
- apply to the Tribunal for medical research authority if there is no one else suitable, available or willing to make a medical research decision under Sections 110ZP and 110ZQ of the Act.

The Public Advocate does not take the place of relatives, friends, carers or other service providers assisting the person with the decision-making disability in day to day activities or attending medical appointments. It is important that the person continues to receive the services, support and care provided by service providers, family and friends.

The Public Advocate does not undertake the following in relation to treatment and health care decisions:

- make a treatment decision without information from the treating health professional about the proposed treatment
- make practical arrangements for medical appointments, such as transport arrangements
- attend routine medical appointments with the person
- provide or administer medications or treatments
- supervise the taking of medication or ensure medication/treatment compliance
- develop treatment or health care plans, or provide detailed referral information to new health care providers
- pay for medical reports or services, or negotiate fees for health care interventions, where such fees apply

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 (i.e. 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*.

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

For further information contact

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