

Office of the Public Advocate South Australia

PS Superannuants

26 August 2024

Welcome

- What is OPA?
- Documents and Authority for decision-making
 - Advance Care Directives
 - General and Enduring Power of Attorney
 - Guardianship
 - Consent Act
- Decision-making capacity
- Office of the Public Advocate's Dispute Resolution Service
- Office of the Public Advocate's Information Service
- Questions

What does the Public Advocate do?

The Public Advocate is appointed to:

- Promote the rights of people with impaired decision-making capacity.
- Help people with impaired decision-making capacity, their family, carers and friends.
- Provide information to South Australians.

The Public Advocate is

- An independent statutory officer.
- accountable to the South Australian Parliament.
- appointed for a 5-year term.

The Office of the Public Advocate (OPA) is separate from the South Australian Civil and Administrative Tribunal (SACAT).

Functions of the Public Advocate

The Public Advocate has functions within the following legislation:

- *Guardianship and Administration Act 1993* (G&A Act)
- *Consent to Medical Treatment and Palliative Care Act 1995* (Consent Act)
- *Advance Care Directives Act 2013* (ACD Act)
- *Mental Health Act 2000* (MH Act)

Functions of Public Advocate (2)

The key functions of the Public Advocate:

- Information (information sessions and information service)
- Dispute Resolution
- Guardian of Last Resort
- Investigation (as directed by SACAT)
- Advocacy (systemic and as guardian)

Terms

Document/Instrument	Made by	Role
Guardianship Order	SACAT	Guardian
Administration Order	SACAT	Administrator
Enduring Power of Guardianship	Person with capacity	Guardian → substitute decision-maker
Enduring Power of Attorney	Person with capacity	Attorney
Medical Power of Attorney	Person with capacity	Medical Agent → substitute decision-maker
Advance Care Directive	Person with capacity	Substitute Decision-Maker
Anticipatory Direction	Person with capacity	(no one appointed)

(General) Power of Attorney

- A General Power of Attorney is not commonly used.
- Legal document made by a person over 18 years of age (donor) if they have decision-making capacity (legally competent).
- The donor appoints one or more people (attorneys) to manage his/her financial and legal affairs.
 - It is invalid if the donor becomes legally incapacitated
 - Can be limited to certain aspects (e.g. Manage investments, sell property)
 - More than one person can be appointed – jointly and/or severally
 - Is useful, for example, if a person will be overseas for some time and needs someone to manage their financial and legal affairs while they are away.

Enduring Power of Attorney

- Commonly used.
- Can be made by a legally competent adult (over 18yo).
- Gives the same authority as a General Power of Attorney.
- Appoints one or more people to manage a person's financial and legal matters.
- Unlike the General POA – **it operates even if the donor becomes legally incapacitated** (that is, it endures throughout legal incapacity).
- Can give authority for the Attorney to act:
 - **As soon as the document is signed and witnessed** (no medical evidence required to activate the document unless to prove competency), OR,
 - **When the donor loses capacity** and is not able to manage their own financial and legal matters (requires medical evidence of incapacity to activate).
- Instructions as to when the document should be activated must be clear.

Enduring Power of Attorney (2)

- Unless the document instructs otherwise, the EPA must be activated by a medical practitioner, indicating that the person is not able to manage his/her own finances.
- An Attorney appointed under an EPA has the same authority as an Administrator, appointed by SACAT.
- Powers of Attorney (General or Enduring) do not authorise someone to make health, accommodation, or lifestyle decisions for the donor.
- Powers of Attorney only give authority to made decisions about financial and legal matters.

Administration Orders

- What if the person no longer has capacity to manage their financial and legal affairs? And,
 - has not appointed an Attorney by making an Enduring Power of Attorney,
 - there is no one able to assist informally (someone who is already a signatory to a bank account, joint bank account holder), and
 - there are financial or legal decisions to be made?
- An application can be made to SACAT (the Tribunal) for an **Administrator** to be appointed to manage the person's financial and legal matters.

Administration Orders (2)

- SACAT can only appoint an Administrator if it is satisfied that:
 - The person has impaired decision-making capacity (mental incapacity),
 - There are financial and/or legal decisions to be made,
 - The person is not able to make these decisions themselves, and
 - Informal arrangements are not adequate.
- Application to SACAT must include:
 - Medical or Psychological Report, completed by a GP/Geriatician, and
 - Evidence of the need for an Administrator to be appointed.

Accommodation, Health & Lifestyle

- Leaving financial and legal decisions, we now move on to decisions about:
 - Healthcare/medical decisions
 - Accommodation/housing, and
 - Other Personal decisions – sometimes referred to as Lifestyle decisions.

Legislative Change

- The *Advance Care Directives Act* (ACD) 2013 has been in operation since July 1st, 2014.
- The *Consent to Medical Treatment and Palliative Care Act* 1995 (Consent Act) was amended at the same time.
- Significant change to who could consent to medical treatment/health care for someone who had impaired decision-making capacity.
- Clarification of definition of decision-making capacity.
- Rights-based approach to decision-making.
- Terminology reflects modern family relationships (broader than next-of-kin).

Decision-Making Capacity

- Everyone is considered to have the ability (capacity) to make their own decisions – unless there is evidence to indicate otherwise.
- If someone has difficulty making a decision they may want or need to be supported to make it.
- A person should not be considered to have impaired capacity just because she/he makes an unwise decision – or one that someone else thinks is unwise.
- Capacity is **decision-specific** (and the ACD document is not formally “enacted” at any point).
- Having capacity means understanding, retaining and using the relevant information to make a decision, including understanding the consequences, and communicating your decision in some way.
- Impaired decision-making capacity, in respect of a particular decision, is not being capable of understanding or retaining or using or communicating their decision.

Decision-making Capacity (2)

- A person will not be taken to be incapable of understanding information merely because the person is not able to understand matters of a **technical** or **trivial** nature; and
- A person will not be taken to be incapable of retaining information merely because the person can only retain the information for a limited time; and
- A person may fluctuate between having impaired decision-making capacity and full decision-making capacity; and
- A person's decision-making capacity will not be taken to be impaired merely because a decision made by the person results, or may result, in an adverse outcome for the person.

Decision-making Capacity (3)

- The legal age for someone with capacity to give their own consent for Health decisions, is 16 years old.
- However, if a 16 year old does not have capacity, it is assumed that there is a suitable parent/guardian in place to give Health consent for them.
- In cases where the decision-making of the parent/guardian is questionable, this is a Child Protection issue, and SACAT will only hear a Health matter or make a Guardianship Order for someone who is over 18 years of age.
- (Note: SACAT is able to make an Administration Order (for finances) for a 16 year old who lacks capacity).

Person Responsible (Health)

- **Health Care and Medical Treatment Decisions** under the Consent to Medical Treatment and Palliative Care Act, 1995 – S14(1).
- **‘Person Responsible’** can make decisions for a person who is not able to make them for themselves. This is sometimes referred to as “informal arrangements”.
 - a) Guardian (already appointed by SACAT to make health decisions)
 - b) Prescribed Relative (with a close & continuing relationship)
 - c) Adult Friend (close & continuing relationship)
 - d) Adult charged with overseeing ongoing day-to-day supervision, care and well-being of the patient, and *willing* ...

NOTE: change of terminology from “Next of Kin” to Person Responsible

Prescribed Relative

- A Prescribed Relative could be:
 - Person who is legally married to the patient
 - Adult domestic partner of the patient (as per Family Relationships Act, 1975)
 - Adult related to the person by blood or marriage
 - Adult related to the person by adoption
 - Aboriginal or Torres Strait Islander – kinship rules apply
- The Prescribed Relative **must have** a close and continuing relationship with the person.

Informal Arrangements

- For accommodation and lifestyle decisions
 - Health decisions/consent covered by the Consent Act & Person Responsible
- A family member, carer, or close friend may be able to assist with decision-making
 - If they are willing and able
 - If there is no conflict around decisions or decision-makers
 - If the person is not objecting to any decisions that are being made for them

Formal (Legal) Arrangements

- Prior to July 2014, the following documents allowed for a person to leave instructions regarding Health, Accommodation and Lifestyle decisions:
 - **Enduring Power of Guardianship** (under Guardianship and Administration Act, 1993): record wishes about accommodation, health and lifestyle decisions, and/or appoint one or more people to act as Substitute Decision-Makers if they could not make their own decisions.
 - **Medical Power of Attorney** (under Consent to Medical Treatment and Palliative Care Act, 1995): record wishes about health, including end-of-life directions, and appoint one or more Medical Agents who could make health decisions if the person could not make them for themselves due to incapacity.
 - **Anticipatory Direction** (under Consent to Medical Treatment and Palliative Care Act, 1995): record wishes for end-of-life care and treatment – no one appointed.

Legislative Change & Advance Care Directives

- The new ACD form replaced Enduring Power of Guardianship, Medical Power of Attorney and Anticipatory Direction Documents.
- These documents, if made prior to July 1st 2014, remain valid but must be treated as if they are made under the new legislation. They are now referred to as Advance Care Directives, and the appointees are referred to as Substitute Decision-Makers (not Enduring Guardians).
- Decisions made by Substitute Decision-Makers must be made in accordance with the Principles set out in Section 10 of the Advance Care Directives Act, and according to any directions written in the document.

Advance Care Directives

- Legal document.
- Record instructions, wishes and preferences for future **health care, accommodation, and personal (lifestyle) matters**.
- Appoint one or more Substitute Decision-Makers – chosen by the person to make decisions on his/her behalf in any period of impaired decision-making capacity, or as determined by the person.
- Single form for health, accommodation and personal (lifestyle) matters
 - The official form is the only one that can be used.

Advance Care Directives (2)

- Preserve the rights of individuals to direct, in advance, what quality of life means to them, how they wish to live and how they want decisions to be made for them, if they are not able to make them for themselves.
- Overarching principles support the right for people to make their own decisions for as long as possible and, if necessary, to be **supported** to make decisions if they have difficulty doing so.
- If a person is not able to make decisions, even with support, the substitute decision-maker (if one has been appointed) must “stand in the shoes” of the person and make decisions as the person would have done, and must follow any instructions written in the ACD.

When is an ACD “Active”?

- Advance Care Directives are not “activated” (unlike Powers of Attorney).
- An ACD comes into effect as soon as the document is signed and appropriately witnessed.
- The document is only used if a person does not have the capacity to make a particular – **specific** – decision.
- A person’s capacity to make decisions may fluctuate – they may be able to make a particular decision, need support to make their own decision, or need a substitute decision to be made for them.

When are the instructions binding?

- Provision of an ACD comprising a **refusal of a particular health care or medical treatment** (whether express or implied) is a **BINDING** provision.
- This means that if a person has refused certain health care or medical treatment in the ACD, the refusal is binding and they cannot be given that particular treatment.
- **All other provisions are NON-BINDING**, but should be adhered to if possible (e.g. Accommodation in Aged Care Facility).

Guardianship Orders

- What if the person no longer has capacity to make decisions about accommodation, health and lifestyle (or one of those areas)? And,
 - has not appointed a substitute decision-maker under an Advance Care Directive,
 - there is no one able to assist informally, and
 - there are accommodation and/or health and/or lifestyle decisions to be made?
- An application can be made to SACAT for a **Guardian** to be appointed.

Guardianship Orders (2)

- SACAT can only appoint a Guardian if it is satisfied that:
 - The person has impaired decision-making capacity,
 - There are accommodation, health or lifestyle decisions to be made,
 - The person is not able to make these decisions themselves, and
 - Informal arrangements are not adequate.
- Application to SACAT must include:
 - Medical or Psychological Report, completed by a GP/Geriatrician, and
 - Evidence of the need for a Guardian to be appointed.
- The appointment of a Guardian is a last resort – only when absolutely necessary.

Guardian appointed by SACAT

- SACAT can appoint a:
 - **Full Guardian:** Authority to make accommodation, health and lifestyle decisions, or
 - **Limited Guardian:** Authority limited to one or more of the above (e.g. Limited to only making health decisions).

Public Advocate as Guardian

- The Public Advocate is appointed as Guardian of last resort by SACAT.
- The Public Advocate is appointed a guardian for a person who has impaired decision-making capacity.
- The Public Advocate delegates the day to day responsibility for decision making to the advocate/guardian staff of the OPA.
- Different guardianship teams – Guardianship Team Response (GTR), Guardianship Individual Response (GIR) and Guardianship Duty Response (GDR), Aged Care Team.
- Section 5 principles.

OPA Dispute Resolution Service



In 2013, the Advance Care Directives Act 2013 (ACD Act) came into effect. This gave the Dispute Resolution service the authority to:

- Give information to help people understand their rights and responsibilities under ACDs.
- Give information to help people understand and apply the *Consent to Medical Treatment and Palliative Care Act 1995* (Consent Act).
- Help decision-makers to uphold the wishes stated in Advance Care Directives.
- Help people identify issues that are in dispute.
- Assist with exploring all the options to resolve the dispute.
- Help people to communicate openly about decision-making and disagreements.
- Facilitate mediations and family meetings.
- Help people to avoid SACAT process.

OPA Dispute Resolution Service (2)

An application for dispute resolution can be made if:

- A person has made an Advance Care Directive
- There is a dispute about consent to medical treatment.
- There is a disagreement about decisions or decision-makers.

Our dispute resolution process is:

- Voluntary.
- Confidential.
- Future-focused.

Our aim is to ensure that everyone involved – especially the person who the dispute is about – has the opportunity to be heard.

Information

- The Information Service at OPA provides information to the general public, service providers, and professionals in relevant fields.
- The Information Service operates mainly over the phone, providing information and education about:
 - The functions of the OPA
 - Advance Care Directives (ACD)
 - Enduring Powers of Attorney (EPA)
 - Guardianship Orders
 - Administration Orders
 - The South Australian Civil and Administrative Tribunal (SACAT) and their processes
 - Consent to Medical Treatment
 - Informal Arrangements

Information (2)

The OPA Information Officer:

- Is available from Monday to Friday, between 9am and 5pm.
- Generally, attends to enquiries within 24 hours.
- Can give information about other relevant services.
- Can not provide legal advice.
- Keeps all information confidential (and caller details anonymous, if required).

Recent conceptual shifts in decision-making

FROM (old decision-making concepts)	TO (new decision-making concepts)
"Best Interests" or Interest-based	Rights-based (person's wishes & freedoms paramount)
Substitute Decision-Making	Supported Decision-Making (where possible)
Incapacity	Presumed capacity
Global capacity	Decision-specific capacity

Contacting OPA

You can contact OPA by:

- Calling 1800 066 969 and leaving your details for the Information Officer to return your call.
- Emailing your enquiry to opa@sa.gov.au

You can also access a range of Fact Sheets (including Easy Read versions) on our website: www.opa.sa.gov.au

Thank you!

Thank you for your invitation to speak,
and for your valuable time and attention today.

Any questions?



**Government of
South Australia**