

Professional Applicants

Applications under the *Guardianship & Administration Act*; *Advance Care Directives Act*

The rules of natural justice

Applications for guardianship and administration are governed by administrative law principles including the rules of natural justice. These rules include:

- providing a fair hearing by an impartial decision maker;
- giving a person who may be affected by the decision sufficient notice of the hearing and what the hearing is about;
- telling them their rights;
- giving them sufficient information to prepare and submit their case;
- and giving them the opportunity to attend the hearing, hear the evidence, produce their own evidence and be heard.

Before the hearing

Sufficient/reasonable notice of hearing

SACAT usually allows a minimum of seven to ten days' notice of the hearing *from the time the person receives the notice*. It is therefore important that email addresses for the subject person and all 'interested' persons are all correct.

- ***Urgent interim Hearings (pre-hearing):*** Under s 66 of the *Guardianship and Administration Act 1993* (G&A Act) SACAT can conduct interim applications without any or sufficient notice in urgent circumstances. The urgency needs to relate to the medical, physical safety and/or financial welfare circumstances of the person or of people who may be affected by the person's conduct. In those circumstances urgent orders only last for 21 days because the person has not been afforded procedural fairness. Following the urgent hearing, if needed, there will be a full hearing.

You should advise SACAT whether a full hearing will be required as soon as possible so that it can be listed after documents are filed and notice has been provided.

Provision of documentary evidence

The person who is the subject of proceedings (the subject person) is entitled to participate in the hearing and be provided with the application, medical reports and other documents filed in support of an application prior to the hearing. If documents are provided late, or during the hearing, then the Tribunal Member would appropriately consider an application for an adjournment.

If you are concerned that releasing the medical report or other information (including applicant's names) to the subject person may result in a 'serious harm to the person or another person' you should contact the registry. In certain specific circumstances a *non-disclosure order* can be made under s 60 of the *SACAT Act 2013* and Rule 45 of the *SACAT Rules 2014*.

Other persons whose rights are affected by the proceedings (such as an appointed guardian/substitute decision maker (SDM) or attorney under a legal instrument or close family members) are also entitled to the information that affects them (e.g. allegations in reports about the conduct of a family member or SDM). SACAT respects the rights to confidentiality of the subject person and will not release medical or financial information about the subject person to anyone else (including family) before the hearing, unless directed by a Tribunal Member.

Attendance at the hearing

Subject person to be involved in the hearing

The person the subject of the proceedings has a right to be at the hearing to hear the evidence and to participate in the hearing.

This is because the outcome of the hearing may involve an order which takes away the person's rights to make decisions about their own life. The Tribunal also has a responsibility to ascertain the wishes of the person under section 5 of the G&A Act.

Proceeding in the absence of the person

If the person cannot comprehend or communicate their views and wishes then the Tribunal will consider proceeding in the absence of the person under section 43 of the SACAT Act. SACAT will need clear medical and/or nursing evidence to substantiate this before proceeding in this way.

Visit to Person (VTP)

If the person can comprehend and communicate their views but is unable to attend due to a physical illness, frailty or significant issues (such as significant security concerns) then the Tribunal will consider sending a member out to take evidence from the person prior to the hearing. This is called a "VTP request". SACAT needs medical evidence or other evidence to support such an application before we will send a member to visit the person. The Tribunal will not authorise a VTP request just to suit the applicant, or if it is inconvenient to bring the person to the hearing. It is a fundamental right for the person to appear at a hearing that involves issues that concern their human rights. SACAT needs at least a week to organise a VTP. Late requests may result in an adjournment.

'Persons with an interest in the proceedings'

People with an interest should be advised of the proceedings. The applicant has the responsibility to obtain this information and advise the Tribunal before the hearing.

Such persons (usually referred to as 'interested persons') would include all relevant living family members and the persons appointed under instruments, such as the attorneys, guardians/SDM's, partner, children, siblings and parents (as relevant to the circumstances of the

person). It is imperative that in all applications the applicant provide the names and contact details of the relevant interested persons who should be notified of the hearing.

Representation

The person who is the subject of the proceedings is entitled to legal representation or an advocate. You should explain this to the person. If a lawyer is appointed late and requests an adjournment, such a request would usually be allowed, depending on the circumstances.

Adjournments

Adjournments can occur if:

- relevant interested persons have not been notified/hear about the proceedings late;
- the medical evidence is insufficient/disputed;
- the subject person is not brought to the hearing or a late VTP request is made;
- the subject person has not been given the application and documents in support, advised of their rights, or wishes to have legal representation (the applicant will need to give evidence about what steps they have taken to explain the application, the person's rights and the evidence);
- an Enduring Power of Attorney or Advance Care Directive is provided late or at the hearing.

Please note that if a Tribunal Member adjourns and is part-heard this limits the available dates when the matter can be relisted and will impact on the length of time it takes to finalise the matter.

Interim Protection Order on Adjournment

After a person has been given notice of the hearing and for the period of any adjournment SACAT can make interim protection orders, if required, appointing an interim guardian or administrator.

We need evidence to substantiate the grounds for making an interim order on an adjournment, namely, that the circumstances of the person require an order to be made to protect their interests (social or financial) before the matter is finalised.

What SACAT needs to receive with the application

Medical/Psychological/Social Work/Allied Health Practitioner evidence

This type of evidence provided in support of the application must satisfy the definition of *'mental incapacity'* under the G&A Act, or *'impaired decision making capacity'* under the ACD Act. If this evidence is insufficient the matter may be dismissed or adjourned.

These are legal definitions not medical definitions.

SACAT needs evidence about the diagnosis **AND** how this impacts on the person's ability to make decisions and look after his or her own health, safety or welfare or to manage his or her own affairs. The **medical and psychological report form** is the bare minimum of evidence we require in this respect. An **ACAT/Social Work/OT report** would assist regarding the impact of the person's illness on the person's ability to look after their finances and/or activities of daily living.

The Tribunal would be assisted by additional evidence from the hospital notes in most cases: geriatrician's entries, neurological or neuropsychological reports or entries, social work reports or entries, OT reports, speech pathology reports etc.

Please note: any medical reports/excerpts from hospital notes provided with the application will be provided to the subject person.

Social Work Reports

Social work reports are very helpful. A short social work report should detail the reason for the application, the steps taken to resolve any disputes between family members or substitute decision-makers, the outcome of family meetings, the social issues which may be impacting on the necessary decisions regarding health, access or accommodation e.g. discharge planning to an aged care facility, whether the person has supports at home, or the capacity to pay for supports in the home, or is on the waiting list for a 'my aged care' package.

Please note any social work reports that make allegations of physical or emotional abuse of the subject person or the misuse of funds by a family member/neighbour/SDM will be provided to the subject person and to persons who are the subject of those allegations. In certain specific circumstances a *non-disclosure order* can be made under s 60 of the *SACAT Act 2013* (and/or Rule 45 of the *SACAT Rules 2014*) – you should contact the registry first before filing the document.

Legal Instruments (EPA/EPG/ACD)

It is imperative that the Tribunal be advised in the application whether there is an advance care directive (including an enduring power of guardianship/medical power of attorney) or an enduring power of attorney in existence. If at all possible, a copy of the document should be provided before the hearing.

Complex Matters/Directions Hearings

Complex matters usually involve conflict between substitute decision-makers under an ACD, or between family members, allegations of misappropriation of funds by attorneys or family members, allegations of elder abuse, arguments about the validity of instruments or the diagnosis/decision making capacity of the person.

Complex matters are triaged before they are listed for full hearing and are generally referred for a directions hearing before a member prior to a full hearing. At the directions hearing the Tribunal Member will make directions for various people to file additional evidence and submissions, for summonses to be issued to witnesses or for the production of documents, and for persons to be added as “interested persons”.

This means that complex matters may not be dealt with as quickly as straightforward matters. The hearings generally take longer and may involve adjournments before being finalised.

Advance Care Directives (ACD)

Revoke an ACD

If there is already an ACD in place appointing one or more substitute decision-makers (SDMs) then the Tribunal cannot entertain an application for a guardianship order unless there is also an application to revoke the appointment of the SDMs.

Eligible person

Only an eligible person can apply to revoke an ACD or the appointment of substitute decision-makers. ‘Eligible person’ includes the subject person, SDM, a health practitioner providing care, or any person that the Tribunal or the Public Advocate considers to have a ‘proper interest’. The Tribunal and OPA would generally consider social workers and Directors of Nursing employed at hospitals or ACFs to be ‘eligible persons’.

OPA and dispute resolution service (DRS)

If there are concerns about the conduct of the SDMs then the applicant hospital should contact the Office of the Public Advocate (OPA) to seek advice about how to proceed. If the parties consent, there needs to be an attempt at dispute resolution between the appointed SDMs by OPA.

SACAT will usually not entertain an application about the revocation of an ACD if the matter should have first been referred to the DRS, or is currently at the DRS.

If the dispute resolution is unsuccessful, the matter will likely be referred to the Tribunal either by the Public Advocate or by the hospital/ACF. Social workers should seek the views of substitute decision makers about their attitude to attempted dispute resolution before referring the matter to OPA or SACAT.

Evidence to revoke an ACD/SDM

In order to revoke an ACD or the appointment of an SDM under an ACD the Tribunal needs evidence of the matters set out in section 51 (1) or (2) of the ACD Act (see attached). You should seek legal advice about this if required. There are relevant fact sheets and information sheets on our website or you can seek advice from the Public Advocate’s Office, the legal officers within the Department of Health & Wellbeing, the Crown Solicitor’s Office or a private lawyer (if you are employed in a private Aged Care Facility).

Invalidity of Instruments – Declaration

If the advice provided to the hospital/ACF is that the ACD is not, or may not be, a valid document then an application can be made to the Tribunal for a declaration as to the validity of the advance care directive (under the ACD Act). If the advice provided to the hospital/ACF is that the EPA is not, or may not be, a valid document then an application for an administration order can be made. Invalidity of instruments may relate to the competence of the person to make the document, or to issues regarding appropriate witnessing.

Section 51 (1) and (2) ACD Act

51—Orders of Tribunal in relation to substitute decision-makers

- (1) If, of its own motion or on the application of an eligible person in respect of an advance care directive, the Tribunal is satisfied that a person appointed as a substitute decision-maker under the advance care directive—
 - (a) is a person who cannot be a substitute decision-maker pursuant to section 21(2); or
 - (b) is no longer willing to act as a substitute decision-maker under the advance care directive; or

(c) has been negligent in the exercise of his or her powers under the advance care directive; or

(ca) is in such default in the exercise of the person's powers under the advance care directive that, in the opinion of the Tribunal, the person is not fit to continue as a substitute decision-maker,

the Tribunal may—

(d) revoke the appointment of the substitute decision-maker; or

(e) if the person who gave the advance care directive is competent—with the consent of the person, make any variation to the advance care directive the Tribunal thinks appropriate (including by appointing another substitute decision-maker); or

(f) if the person who gave the advance care directive is not competent, and if no other substitute decision-maker was appointed under the advance care directive—revoke the advance care directive.

(2) If, on the application of the Public Advocate, the Tribunal is satisfied that, because of a change in the personal circumstances of—

(a) the person who gave the advance care directive; or

(b) a substitute decision-maker under the advance care directive,

it is no longer appropriate that a particular person be a substitute decision-maker under the advance care directive, the Tribunal may make any of the orders contemplated by subsection (1)(d), (e) or (f).

(5) However, the Tribunal should not revoke an advance care directive under this section if there are provisions in the advance care directive that can continue to have effect despite the fact that there is no substitute decision-maker appointed under the advance care directive.

Note—

Such provisions include, for example, an expression of the wishes of the person who gave the advance care directive in respect of specified health care, or accommodation or personal matters.

In the circumstances contemplated by subsection (1)(f) of this section, the Tribunal may also make an order placing the person who gave the advance care directive under limited or full guardianship—see Part 4 Division 2 of the *Guardianship and Administration Act 1993*. If such an order is made, section 31A of that Act requires the guardian to seek to give effect to the instructions and wishes of the person as set out in the revoked advance care directive.

Checklist for professional applicants

| Have you provided? | |
|--|---|
| <input type="checkbox"/> | Application for Guardianship/Administration Order |
| <input type="checkbox"/> | The names and contact details of all relevant living family members such as the partner, children, siblings and parents (preferably an email address, but if this cannot be provided then a postal address) |
| <input type="checkbox"/> | A SACAT medical or psychological report |
| <input type="checkbox"/> | Any additional medical reports available that relate to cognitive capacity and ability to make decisions/look after finances, health, safety and welfare (e.g. geriatrician's entries, neurological or neuropsychological entries, social work entries, OT, speech pathology etc) |
| <input type="checkbox"/> | An ACAT report (if available) |
| <input type="checkbox"/> | A social work report to explain the background, relevant issues and need for orders |
| <input type="checkbox"/> | The details (and copies) of all relevant instruments that exist (ACD, EPG or EPA). The names and contact details/email addresses of attorneys/SDMs/guardians. |
| For applications to revoke an ACD or SDM appointed under an ACD: | |
| <input type="checkbox"/> | An application to revoke appointment of a substitute decision maker(s); and/or an application to revoke an ACD |
| <input type="checkbox"/> | Evidence of the matters set out in section 51(1) of the ACD Act |

- Additional application for Guardianship Order if guardians needed

For applications questioning the validity of an ACD:

- An application to seek a declaration or direction with reasons and any evidence regarding concerns about witnessing/competence to make document

For applications questioning the validity of an EPA

- An application to seek an administration order with reasons and any evidence regarding concerns about conduct of attorneys.

Contact the Tribunal

For further information and assistance in making applications under the *Guardianship and Administration Act* or *Advance Care Directives Act*, you may contact SACAT on 1800 723 767 (select option 4 and then option 2).

This information sheet does not constitute legal advice and does not relate to the circumstances of any individual matter. If you wish to have legal advice you should seek that independently.