



# Review of Supported Decision-Making in South Australia

## Fact Sheet 4 – Guardianship, Administration and the Public Trustee

### What is a Guardianship Order?

Under s 29 of the *Guardian and Administration Act 1993* (SA) (‘the **GA Act**’), the South Australian Civil and Administrative Tribunal (‘**SACAT**’) can place a person (referred to as the ‘protected person’) under guardianship (limited or full) if SACAT is satisfied that the person has a mental incapacity and that a guardianship order should be made. If a person has an Advance Care Directive (‘**ACD**’), this can be revoked and a guardianship order made. In this case, the person appointed by SACAT, known as the ‘guardian’, must still consider and follow the revoked ACD as far as reasonably practicable.<sup>1</sup>

When a person is subject to a guardianship order, SACAT appoints a guardian to make health and lifestyle decisions on their behalf. The guardian appointed by SACAT must be a natural person<sup>2</sup> and cannot be the protected person’s professional carer.<sup>3</sup> If SACAT determines there is no appropriate person available to appoint as guardian (or to appoint as sole guardian), they can appoint the Public Advocate, either jointly or solely.<sup>4</sup>

Under s 32 of the *GA Act*, a person can seek an order to place and detain a protected person. For example, such an order may be sought when a person believes a protected person should be in an aged care facility but the protected person does not wish to go, possibly because they do not have insight into the severity of their condition. This order can be made in conjunction with a guardianship order.

### What is an Administration Order and what is the role of the Public Trustee?

Under s 35 of the *GA Act*, SACAT can also place a person (the ‘protected person’) under an administration order (limited or full) if SACAT is satisfied the person has a mental incapacity and that an administration order should be made. The person appointed by SACAT, known as the ‘administrator’, can be given a broad range of powers in relation to the protected person’s living estate, including selling and buying real property (including the protected person’s home), and instigating and taking part in legal proceedings in relation to the protected person and their living estate.<sup>5</sup> An administration order is often made at the same time as a guardianship order.

SACAT can appoint the Public Trustee, a trustee company or a suitable natural person as an administrator.<sup>6</sup> Unlike the Public Advocate, who can be appointed as a joint guardian,<sup>7</sup> the Public Trustee can only be appointed as a sole administrator.<sup>8</sup>

Even when not appointed as the administrator, the Public Trustee still plays a role in every administration order. When a private administrator is appointed, they have reporting obligations to the Public Trustee, who in turn must report to SACAT.<sup>9</sup> When the Public Trustee is the administrator, they must report directly to SACAT at intervals determined by SACAT.<sup>10</sup> The Public Trustee

<sup>1</sup> *Guardianship and Administration Act 1993* (SA) s 31A.

<sup>2</sup> *Ibid* s 29(3).

<sup>3</sup> *Ibid* s 29(5).

<sup>4</sup> *Ibid* s 29(4).

<sup>5</sup> *Ibid* s 39(2).

<sup>6</sup> *Ibid* s 35(2).

<sup>7</sup> *Ibid* s 29(4).

<sup>8</sup> *Ibid* s 35(3).

<sup>9</sup> *Ibid* s 44.

<sup>10</sup> *Ibid* s 45.



also charges fees and commission in relation to any estate they administer,<sup>11</sup> including when appointed as administrator by SACAT.

## Current Issues

Guardianship and/or administration orders are common forms of substitute decision-making. Such orders may be necessary for persons who have no decision-making capacity, however, there are concerns such orders can be viewed as paternalistic and may be made too often, and, may be a 'first resort', rather than being a 'last resort'. Guardianship and administration orders can also hinder the promotion and implementation of SDM principles, leaving individuals with decision-making support needs with limited opportunities to exercise their agency and make decisions in accordance with their own values and preferences.

It appears that applications under s 32 of the *GA Act* are being brought to SACAT, when any order under the *GA Act* would otherwise not be required. Such orders may be unnecessarily removing people's autonomy.

Both guardianship and administration orders also give great powers to a person to whom the protected person may not have even considered giving this decision-making power. In the case of the Public Trustee and Public Advocate being appointed, this power is given to a state agency who likely has had no personal relationship with the protected person and therefore has no or minimal knowledge about their lifestyle or preferences. There have been concerns raised interstate as to the function of the Public Trustee in carrying out their role.

## Consultation Questions

1. How effective are SACAT guardianship and administration orders in ensuring that the decisions made on behalf of people with decision-making support needs align with their preferences and values?
2. Can you share any instances where SACAT guardianship and administration orders have played a significant role in protecting the autonomy of people with decision-making support needs? What challenges, if any, have been encountered?
3. How effective is the Public Trustee in ensuring that the decisions made on behalf of people with decision-making support needs align with their preferences and values?
4. Can you share any instances where the Public Trustee has played a significant role in protecting the autonomy of people with decision-making support needs? What challenges, if any, have been encountered?
5. Do you believe these existing legal arrangements align with the principles of empowerment, autonomy, and inclusivity in supporting decision-making for people with decision-making support needs? Is your view informed from the perspective of:
  - a. a carer; or
  - b. an individual with decision-making support needs?

SALRI's consultation process will open in July 2024 and close on 30 September 2024.

*Please note:* SALRI does not, and cannot, provide legal advice to individuals. If you are in need of legal advice, we encourage you to speak to a lawyer and/or contact a community legal service.



<sup>11</sup> *Public Trustee Act 1995* (SA) s 45. See also 'Fees and charges', *Public Trustee* (Web Page) <[www.publictrustee.sa.gov.au/about-us/fees-and-charges](http://www.publictrustee.sa.gov.au/about-us/fees-and-charges)>.