



Rights for Older South Australians Choice, Independence and Safety

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Outline

- Overview of the Office of the Public Advocate
- Positive and negative rights
- Guardianship & Advanced Directives
- Detention in nursing homes
- The Right to Safety
- Supported Decision Making
- Practice considerations



Role of Public Advocate

- (a) to keep under review, within both the public and the private sector, all programmes designed to meet the needs of mentally incapacitated persons;
- (b) to identify any areas of unmet needs, or inappropriately met needs, of mentally incapacitated persons and to recommend to the Minister the development of programmes for meeting those needs or the improvement of existing programmes;
- (c) to speak for and promote the rights and interests of any class of mentally incapacitated persons or of mentally incapacitated persons generally;
- (d) to speak on behalf of any mentally incapacitated person in the resolution of problems faced by that person arising out of his or her mental incapacity



Other functions

- (e) to give support to and promote the interests of carers of mentally incapacitated persons;
- (f) to give advice on the powers that may be exercised under this Act in relation to mentally incapacitated persons, on the operation of this Act generally and on appropriate alternatives to taking action under this Act;
- (g) To monitor the administration of this Act and, if he or she thinks fit, make recommendations to the Minister for legislative change

Other functions

Guardian of last resort

Investigations

Advocacy Board Matters

Education



Freedom

- **Positive freedom**
 - Opportunity
 - Fulfill ones own goals and potential
 - Can rely on provision of support services, transport, suitable accommodation, health care
 - Prevention of abuse, neglect, exploitation
- **Negative freedom**
 - Freedom from unnecessary direction, control, detention, restraint, seclusion
 - Spectrum of intervention



G&A Act 1993 Principles

- Paramount consideration given to the wishes of the person if he or she were not mentally incapacitated (only as far as can be ascertained)
- Present wishes
- Not to disturb adequate informal arrangements
- Least restrictive while consistent with proper care and protection.



Capacity

- Always presume a person has capacity
- Capacity is decision specific
- Don't assume a person lacks capacity based on appearances
- Assess the person's decision making ability-not the decisions they make
- Respect a person's privacy
- Substitute decision making is a last resort



Assessing Capacity

- Understand the facts involved in the decision
- Know the main choices that exist
- Weigh up the consequences of the choices
- Understand how the consequences affect them
- Communicate their decision



Capacity is decision specific

Dixon, Kitto and Taylor JJ in *Gibbons v Wright*[1954] HCA 17; (1954) 91 CLR 423 at [7] said

- *The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation.*



Is this a definition of mental incapacity?

mental incapacity means the inability of a person to look after his or her own health,

safety or welfare or to manage his or her own affairs, as a result of—

(a) any damage to, or any illness, disorder, imperfect or delayed development,

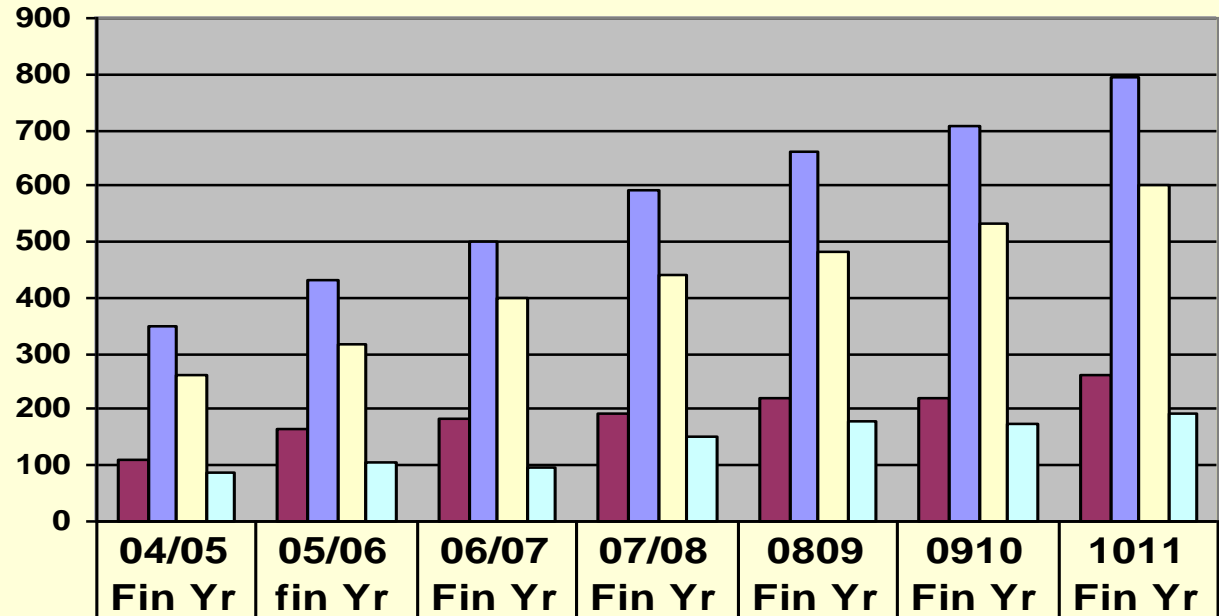
impairment or deterioration, of the brain or mind; or

(b) any physical illness or condition that renders the person unable to

communicate his or her intentions or wishes in any manner whatsoever;



Increasing public guardianship



| | | | | | | | |
|---------------------|-----|-----|-----|-----|-----|-----|-----|
| ■ new guardianships | 109 | 166 | 184 | 192 | 220 | 222 | 261 |
| ■ total active | 349 | 430 | 499 | 593 | 661 | 705 | 793 |
| □ active 30 june | 264 | 315 | 401 | 441 | 483 | 532 | 602 |
| □ closures in yr | 85 | 106 | 98 | 152 | 178 | 173 | 191 |



Rights vs welfare based

| Welfare models | Rights based model |
|---|--|
| Capacity is defined in welfare terms | Capacity is decision specific |
| Purpose of appointment protection | Purpose of appointment substitute decision making |
| Appointment can be made even when there are no decisions to be made | Appointment made in the context of decisions |
| Lower threshold for making an order (benign paternalism) | Higher threshold for making an order (rights based legalism) |
| Less emphasis on the presumption of capacity | Emphasis on the presumption of capacity |
| Plenary orders are used more often | Plenary orders are discouraged |
| Orders are ongoing | Orders are time limited |
| | Person with disability has a voice in proceedings (may need to be longer and have access to advocacy) |



Additional principles

- (i) A presumption of capacity*
- (ii) mental capacity is decision specific.*
- (iii) Supported decision making –all practicable steps be offered to help a person make their own decision before making it for them.*



Where is the real incapacity?

| Incapacity | Response |
|--|--|
| Family incapacity | Mediation to avoid guardianship hearing |
| Service incapacity | Advocacy to provide professional assessments, care and accommodation |
| Community incapacity to protect vulnerable people | UK and US style adult protection policies or legislation |
| Incapacity of justice system to deter perpetrators of abuse on vulnerable people | Willpower and focus by police, prosecutors and the courts |



Powers of a Guardian

- Section 31: A guardian has all the powers a guardian has at law or in equity
- Section 32: Enforcement powers
 - Placement
 - Detention
 - Use of force



Secure Nursing Homes

Detention means a situation where a person is unable to physically leave the place where he or she receives services. The means of detention may include locked doors, windows or gates, and the constant supervision and escorting of a person to prevent the person from exercising freedom of movement.



Legal Rights of Secure Residents

- Allow status quo – no mechanism for appeal
- Expand use of guardianship
 - Applications for families and nursing homes
 - Reviews by Guardianship Board 6 monthly and 12 monthly
 - Mandatory Coronial Inquest
- A national mechanism
 - Community visitors, Accreditation



Advanced Directives

There are four different advance directives in South Australia.

- Financial decisions - Enduring Power of Attorney
- Lifestyle , Accommodation and Health decisions - Enduring Power of Guardianship
- Medical decisions only - Medical Power of Attorney & Anticipatory Direction



Differences in decision making

- *Guardianship and Administration Act 1993*
 - Substituted judgement
 - Previous and past views
 - The decision the person would have made
- *Consent to Medical Treatment and Palliative Care Act 1995*
 - Apply substituted judgement for instructions on the Medical Power of Attorney form
 - Absence of instructions act in the persons best interests
- *Power of Attorney and Agency Act 1984*
 - Protect the interests of the donor



Informal Advanced Care Documents

- Statement of Choices (Respecting Patient Choices)
 - Used in hospitals
 - Versions with or without competence
- Good Palliative Care Plan
 - Nursing Homes
- Variants in aged care facilities
- Ulysses Agreements



Problems

- Inadequate uptake of advance directives
- Difficulty tracking documents
 - Need for registration
- Advance directives as an instrument of abuse
- Use of non-statutory documents as an easy alternative to formal documents



SA Advanced Directive Review

A simplified system –one Act:

- Agent directive
- Personal Directive
- Ulysses Agreement



National Advanced Care Directives Framework

For personal not financial decision making

Sets standards for developing law, policies and problem solving:

- The appropriate standard is substituted judgement (not best interests)
- Recognise informal arrangements
- Only make a decision if the person is unable to make that particular decision.
- Least restrictive of proper care and protection



Conclusion

- Guardianship legislation – welfare or rights based
- Ensuring that alternatives to guardianship are available
- Greater use of advanced directives
- Adult protection policies in place
- Protection of rights of residents in secure nursing home