

# Memorandum of understanding between the Chief Psychiatrist and the Public Advocate

Responsibilities and roles when working with people with mental illness





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with people with mental illness**

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## Introduction

### Purpose

This document is a memorandum of understanding between the Public Advocate and the Chief Psychiatrist.

Guardians and mental health professionals sometimes make decisions on behalf of persons who are unable to consent to treatment because of mental illness or mental disability.

The purpose of this memorandum of understanding is to provide guidance to mental health professionals and guardians where respective roles and responsibilities are uncertain or overlap under both the *Guardianship and Administration Act 1986* (Vic) and the *Mental Health Act 1986* (Vic).

The philosophy underlying this memorandum of understanding is the principle that authority should be exercised in a manner that is least restrictive of a person's freedom and in a person's best interests. This is consistent with the philosophy in the Mental Health Act and the Guardianship and Administration Act.

This memorandum of understanding:

- outlines the coverage of the Mental Health Act and the Guardianship and Administration Act in relation to patients of mental health services
- explains the respective roles and responsibilities of guardians and mental health professionals under both the Guardianship and Administration Act and the Mental Health Act
- provides guidance to guardians and mental health professionals about respective roles in assessing a patient of mental health services and similarly at the point of discharge of the patient
- outlines the role of guardians and the role of mental health professionals concerning psychiatric treatment and non-psychiatric treatment of a patient under the Mental Health Act
- provides guidance to guardians and mental health professionals about patients who have dual disabilities and about aged patients with mental illness or mental disability
- outlines possible scenarios where conflict may arise between guardians and mental health professionals and provides mechanisms by which such conflict can be resolved
- explains how guardians and mental health professionals can exchange confidential information under certain provisions of the Mental Health Act and privacy legislation
- explains the role of the Public Advocate as an advocate for persons with mental illness or mental disability.

We hope this memorandum of understanding will prove a useful resource and enhance cooperative working relationships between guardians and mental health professionals. Importantly, we hope it will achieve the overall objective of promoting a high level of quality care for patients with a mental illness or a mental disability.



Amgad Tanaghow

**Chief Psychiatrist**  
19 June 2006



Julian Gardner

**Public Advocate**  
19 June 2006

## Definitions of terms used in this memorandum of understanding

<b>'authorised psychiatrist'</b>	means a person appointed as authorised psychiatrist under s. 96 of the Mental Health Act
<b>'community treatment order'</b>	under s. 3 of the Mental Health Act means an order made under s. 14 of the Mental Health Act
<b>'guardian'</b>	means the Public Advocate, named as a plenary guardian or limited guardian in a guardianship order made by the Victorian Civil and Administrative Tribunal
<b>'involuntary patient'</b>	under s. 3 of the Mental Health Act means: (a) a person who is subject to an involuntary treatment order (including a person who is subject to a community treatment order) or (b) a person who is subject to a hospital order (including a person who is subject to a restricted community treatment order) or (c) a person who is subject to an assessment order or a diagnosis, assessment and treatment order or (d) a person who is subject to a hospital transfer order or (e) a person whose detention and treatment is continued under s. 12A(4) or s. 12C or (f) a person to whom s. 93F, s. 93H or s. 93K(5) applies
<b>'patient'</b>	means a forensic patient, or an involuntary patient; or a security patient
<b>'public advocate'</b>	under s. 3 of the Guardianship and Administration Act means the person appointed under s. 14 Part 3 of the Guardianship and Administration Act

## Disclaimer

The information in this memorandum of understanding is intended as general information and not as legal advice. Staff should develop a working knowledge of relevant provisions of the Guardianship and Administration Act and the Mental Health Act. Provisions of the Guardianship and Administration Act and Mental Health Act can be accessed at [www.dms.dpc.vic.gov.au](http://www.dms.dpc.vic.gov.au).

Alternatively, general information can also be obtained by accessing the Office of the Public Advocate at [www.publicadvocate.vic.gov.au](http://www.publicadvocate.vic.gov.au) or the Office of the Chief Psychiatrist at [www.dhs.vic.gov.au/ahs/chief-psych.htm](http://www.dhs.vic.gov.au/ahs/chief-psych.htm).

If staff are uncertain about their obligations under the Mental Health Act or the Guardianship and Administration Act in individual cases, or if staff have queries, they are advised to seek independent legal advice.

**Note: This memorandum of understanding does not impose any legally binding or enforceable obligations on either party to the memorandum of understanding.**

## Legislation

For persons with a mental illness or a mental disorder, both the Mental Health Act and the Guardianship and Administration Act allow for substitute decision making and the enforcement of those decisions. This is through the provisions of the Mental Health Act where a person is made an involuntary patient or through the Guardianship and Administration Act with the appointment of a guardian by the Victorian Civil and Administrative Tribunal.

Both Acts are human rights focused and require that authority be exercised in the way that is least restrictive of the person's freedom<sup>1</sup>. However, both Acts also allow for significant intrusion and restriction of the life of a person with a mental illness. Such intrusion must be on therapeutic or best interests grounds.

## Safeguards on liberty

The Mental Health Act provides a number of safeguards for involuntary patients, including the requirement that the patient be seen by the authorised psychiatrist within 24 hours, the right of a patient to a second opinion, the right to appeal at any time (without a restriction on the number of appeals), and the requirement that the Mental Health Review Board must review the continued detention of a patient within eight weeks of their admission. An involuntary patient has the right to appeal against a decision of the Mental Health Review Board.

Once the Victorian Civil and Administrative Tribunal appoints a guardian, it cannot review or oversee the decisions made by the guardian which are made on behalf of a person under the Guardianship and Administration Act. There is provision for an appeal against the guardianship order itself (as distinct from the decision of a guardian) by means of the re-hearing or re-assessment process, but this is at the discretion of the Victorian Civil and Administrative Tribunal. In this sense, there is less overview of a person's situation as compared with the Mental Health Act, which requires the Mental Health Review Board to hear appeals brought by patients and to review orders concerning a patient's treatment plan.

Guardianship provides for the appointment of a decision maker who is independent of the clinical professionals.

*1 The Mental Health Act requires that all functions, powers and duties be performed in the least possible restrictive environment and least possible intrusive manner consistent with the effective giving of that care and treatment. The Guardianship and Administration Act requires that all functions, duties, powers and functions to be performed by means that are least restrictive of a person's freedom of decision and action as is possible in the circumstances.*

## Coverage of the Mental Health Act and the Guardianship and Administration Act

The Mental Health Act covers people who have a mental illness. Section 8 of the Mental Health Act defines a mental illness as being a medical condition that is characterised by a significant disturbance of thought, mood, perception or memory.

The Guardianship and Administration Act covers persons who have a disability (intellectual impairment, mental disorder, brain injury, physical disability or dementia) and who are unable because of that disability to make reasonable decisions for themselves.

Persons with these conditions may be admitted to a mental health service as an involuntary patient under the Mental Health Act, but only after a clinical assessment indicates that the s. 8 criteria of the Mental Health Act have been met.

A guardian's authority concerning health care does not extend to the ability to consent to psychiatric treatment.

It should also be noted that a guardian cannot consent on behalf of a patient to special procedures. 'Special procedure', defined in s. 3 of the Guardianship and Administration Act, includes any procedure likely to cause infertility, a procedure resulting in termination of pregnancy, a procedure resulting in the removal of tissue for transplantation, or any dental or other medical treatment prescribed by the regulations.

Consent to a special procedure may be given by the Victorian Civil and Administrative Tribunal.

## The authority of the authorised psychiatrist and references to the role of guardian in the Mental Health Act

The authority of the authorised psychiatrist is set out in the Mental Health Act and is the same in respect of all involuntary patients.

A guardian has a limited role concerning a represented person who is a patient in a psychiatric facility. The guardian must be informed of the patient's admission to the psychiatric facility and must be consulted about electro-convulsive therapy.

A guardian may consent to:

- non-psychiatric health care.

A guardian may not consent to:

- psychiatric treatment
- admission into or detention in a psychiatric facility, including a gazetted psychiatric aged care facility
- a community treatment order
- psychosurgery
- electro-convulsive therapy
- the provision of informed consent where this is required under the Mental Health Act
- the transfer of a mentally ill prisoner
- the psychiatric treatment of a forensic patient.

## The authority of a guardian and references to the role of mental health services in the Guardianship and Administration Act

A guardian's role is to make certain decisions on behalf of the represented person. The authority of a guardian will be set down in the guardianship order. A *plenary* order confers on the plenary guardian the powers and duties regarding a represented person which a parent would have regarding a child.

Generally orders are *limited* and the area of guardianship will be specified (for example, health care, accommodation, access to persons, or access to services).

In performing their role as a guardian, it may be necessary for the guardian to act as the advocate for the represented person to secure what the guardian considers to be in the best interests of the represented person.

A guardian cannot require that a mental health service provide particular services. A guardian may act as an advocate<sup>2</sup> to explore with a mental health service the options considered to be in the best interests of the represented person.

There are no specific references to mental health services provided under the Mental Health Act in the Guardianship and Administration Act. There are references to service providers generally, the most prominent being:

- A person providing paid care, treatment or accommodation to a person may not be appointed as their guardian.
- The tribunal may make an order under s. 26 of the Guardianship and Administration Act which authorises service providers to take action necessary to enforce the decision of a guardian. This does not require the service provider to follow the directions of the guardian, but protects them legally if they take action under this section.

## Role of the guardian and role of the mental health professional

There are many ways in which guardians and mental health professionals may work together for the benefit of the patient. A guardian may be appointed prior to the involvement of the mental health professional, or the mental health professional may consider applying for the appointment of a guardian.

The Guardianship and Administration Act requires the Victorian Civil and Administrative Tribunal to be satisfied that there is a need for a guardian to make a decision before it can appoint one. Therefore, a mental health professional, in considering whether a guardianship application is necessary to meet the patient's needs, will consider whether those needs can be met using provisions of the Mental Health Act.

When a guardian is appointed, it is important that each party understands and respects the legal context, role, and organisational and professional independence of the other.

### Assessment of a client

A guardian may facilitate the assessment of a client with a view to obtaining appropriate treatment and services.

When a person first makes contact with or is referred to a mental health service, a mental health professional will assess the person to determine the most appropriate service response. This assessment will include decisions about eligibility and priority for specialist mental health services and involves clinical judgments exercised by mental health professionals.

<sup>2</sup> For more on the role of guardian as advocate, see Section 9 of this memorandum of understanding.

Where a guardian is involved in facilitating the assessment of a client, it is appropriate for the mental health service to work collaboratively with the guardian.

Guardians may seek the help of mental health professionals to assess a patient who:

- the guardian considers appears to be mentally ill and requires treatment
- or
- has dual or multiple disabilities and complex needs
- or
- is exhibiting unusual behaviours of an unknown cause and requires investigation.

Subject to s. 120A of the Mental Health Act and privacy legislation preventing such disclosure, the mental health professional will advise the guardian of the outcome of such assessments and discuss options that may be available to the guardian in the light of such assessments.

The Mental Health Act s. 120 confidentiality provisions do not operate to prevent a mental health service from providing information to a guardian. Disclosure of information to a guardian is conditional on two matters: (1) that the guardian is requesting information that is 'reasonably required' for the ongoing care of the person (this requirement is broad and is likely to be satisfied in most situations), and (2) that the guardian will be involved in providing that care. This does not necessarily mean that the guardian will be involved in *actually* providing that care or providing accommodation. The fact that the guardian's role is to access such services is enough to satisfy the requirement 'involved in providing that care' under the Mental Health Act.

A guardian cannot require a mental health service to provide services to a client.

## Discharge planning from a mental health service

There are two common circumstances where discharge planning from a mental health service involves guardianship:

- where a guardian is already appointed
- where an application for guardianship is considered appropriate.

### Where a guardian is already appointed

The mental health service is responsible for the development of a discharge plan for the patient that meets the needs of the patient. A guardian has relevant authority to provide consent to the discharge plan on behalf of the patient. Accordingly, the mental health service should endeavour to involve the guardian in discussions around discharge.

A mental health service may only include a residential condition in a community treatment order where this is necessary for the treatment of the patient.

The mental health service may consult the guardian about either the treatment plan or the discharge plan.

Where the mental health service and the guardian are unable to agree on a discharge plan, either may refer the matter to the dispute resolution mechanism set out in Section 7 of this memorandum of understanding. Dispute resolution in this regard is subject to the provisions of the Mental Health Act.

### Where it is considered appropriate to apply for the appointment of a guardian

A mental health service may consider it appropriate to seek the appointment of a guardian to make decisions about the discharge plan for the patient.

If an application for guardianship by a mental health professional is considered appropriate for the patient's needs, an application may be made:

- after discussion with the treating team, which includes the authorised psychiatrist or his or her delegate.

The following points may need to be considered when deciding whether or not to make an application for guardianship concerning accommodation:

- A mental health service may only consider a residence condition, as part of a community treatment order, if this is necessary for the treatment of a person's mental illness. It is not necessary to appoint a guardian to provide consent on behalf of a patient in relation to accommodation if a mental health service has already made a decision about accommodation in this respect.
- Where a patient is unable to make a decision regarding where to live, and their place of residence is not necessary for treatment issues, it may be relevant to seek the appointment of a guardian.
- If the patient consents to a decision regarding where to live, it is not necessary to appoint a guardian.
- Given that both Acts are restrictive of freedom, an order should not be made under both Acts at the same time unless it is absolutely necessary to meet an individual's needs.

A decision that a person must reside in a particular place is restrictive of the person's freedom. This is so whether it is a decision of a guardian or a decision expressed as a condition of a community treatment order.

Where a guardian has been recently appointed, the mental health service needs to allow reasonable time for a newly appointed guardian to meet with the represented person and to provide the guardian with options for consideration.

Cooperative working relationships must be fostered between guardians and mental health professionals so that the best interests of the patient remain paramount.

The mental health professional and the guardian should work together cooperatively in discharging their respective duties of care in situations where safe and suitable accommodation has not yet been identified for the patient at the point of discharge of the patient from treatment and care.

If the mental health professional and guardian cannot agree in this situation, they may refer the dispute to be resolved according to the processes set out under Section 7 of this memorandum of understanding.

### Case management

A guardian is appointed to make decisions for the patient but is not an alternative to a case manager and will not fulfil the role of a case manager.

A guardian will work cooperatively with social workers and mental health case managers in the interests of the represented patient.

## Health care

### Psychiatric health care

A guardian has no authority to consent or withhold consent to the provision of psychiatric treatment.

### Non-psychiatric health care

Division 4 of Part 5 of the Mental Health Act governs the provision of non-psychiatric medical treatment.

Non-psychiatric treatment is defined as:

- a) any surgical operation or procedure or series of related surgical operations or procedures or
- b) the administration of an anaesthetic for the purpose of medical investigation or
- (c) the administration of any course of treatment or course of medication requiring a prescription or medical supervision – the primary purpose of which is not the treatment of any mental disorder or the effects of mental disorder but does not include a special procedure within the meaning of the Guardianship and Administration Act.

The Mental Health Act makes a distinction between ‘major non-psychiatric treatment’ and ‘not major non-psychiatric treatment’ and sets out the criteria for providing informed consent to be met by a patient. The criteria are less strict where the proposed treatment is ‘not major non-psychiatric treatment’.

In the event that an involuntary patient is unable to provide consent, s. 85 of the Mental Health Act authorises the giving of consent by (in order of priority subject to whether a person listed is available, willing and able to make a decision):

1. an agent appointed by the patient under the *Medical Treatment Act 1988* (Vic)
2. a person appointed by the Victorian Civil and Administrative Tribunal to make decisions about the proposed treatment

3. a guardian appointed under the Guardianship and Administration Act with relevant health care powers
4. an enduring guardian appointed under the Guardianship and Administration Act by the patient with relevant health care powers
5. the authorised psychiatrist.

Under s. 85 of the Mental Health Act, decisions about non-psychiatric treatment may be made by the authorised psychiatrist or a guardian.

The authorised psychiatrist may provide substitute consent if there is no agent or guardian reasonably available, willing and able to make a decision about non-psychiatric treatment. In this situation, a decision about non-psychiatric treatment will only be made after the authorised psychiatrist is assured that the patient lacks the capacity to consent to non-psychiatric treatment.

Consent to non-psychiatric treatment is not required in situations of urgency, such as when it is necessary to save the patient’s life, or to prevent serious damage to a patient’s health, or to prevent suffering or significant pain and distress. However, a medical practitioner must not carry out any non-psychiatric treatment, including any emergency treatment, if a ‘refusal of treatment certificate’ has been completed and is in force under the Medical Treatment Act.

Where a guardian has been appointed, a guardian can consent to non-psychiatric treatment. However, a guardian does not have automatic access to services to monitor the represented person’s taking of their medication. At the point of discharge, it is important that both patients and guardians are fully informed about how to re-access mental health services.

The guardian’s capacity to enforce their decision will be limited unless there is an order from the Victorian Civil and Administrative Tribunal under s. 26 of the Guardianship and Administration Act in place.

Mental health professionals may supervise patients who are living in the community and may encourage patients to comply with non-psychiatric treatment.

### **Dual disability**

Where a patient has dual or multiple disabilities, guardians and mental health workers will work cooperatively with disability workers and case managers to ensure the patient receives appropriate assessment, support and treatment.

It is noted that a guardian is not authorised to make a referral to a dual disability statewide service.

Accordingly, it is expected that mental health professionals will facilitate the involvement of dual disability assessments and services where appropriate.

### **Aged persons psychiatry and guardianship**

The same provisions for admission and treatment apply in an aged psychiatry acute facility as in an adult acute facility.

When a patient is discharged to an aged care residential facility, it will not normally be necessary for a guardian to be appointed to consent to that placement unless the patient actively disputes the placement or attempts to leave once living there.

An application for guardianship may be considered when other persons attempt to remove the patient from their accommodation.

It is noted that the Office of the Public Advocate has a protocol with the Aged Care Assessment Service which governs assessment and placement of people within the aged care system where the person is unable to consent for themselves and where there is little or no dispute as to that patient's placement.

### **Conflict with third parties**

There are occasions where there is a dispute between the mental health service and the family or friends of the patient regarding treatment or placement of the person.

The hospital may also make any necessary arrangement to restrict visits to an inpatient if such visits are detrimental to the patient or affect the smooth running of the hospital.

The existence of conflict between the family of a patient and mental health professionals is not necessarily a reason to seek the appointment of a guardian. Where family members or other third parties oppose the treatment provided to the patient, the Mental Health Act empowers the authorised psychiatrist to provide psychiatric treatment for mental illness.

Under the Mental Health Act, an authorised psychiatrist may determine that a residency condition in a community treatment order is necessary for the treatment of the patient. The authorised psychiatrist may take into account the wishes of any guardian, family member or carer who is involved in the ongoing care of the patient.

Where family members or other third parties dispute the discharge plan in relation to residence that does not relate to a community treatment order, it may be necessary to seek the appointment of a guardian to make decisions about accommodation (refer to Section 6.2.2 of this memorandum of understanding).

A guardian may be required for a patient who has been discharged into the community where decisions need to be made to restrict or organise access to the patient by others.

The Guardianship and Administration Act encourages family involvement in the life of the person who has a disability. Specifically, the Guardianship and Administration Act requires the Public Advocate to 'promote, facilitate and encourage' facilities such as health facilities 'to encourage the involvement of relatives' in the 'provision of those services and facilities' (s. 15(a)(iv)). In the decision to appoint a guardian, the Victorian Civil and Administrative Tribunal is required to have regard to the desirability of preserving family relationships (s. 23(2)(b)). Accordingly, decisions made to exclude family members from access to a represented person must be firmly grounded in the best interests of the represented person.

## Resolving disputes

In the majority of cases disagreements between mental health professionals and guardians can be initially resolved through discussion and open communication.

If this is unsuccessful, mental health professionals and guardians should attempt to resolve the dispute internally with the involvement of the program manager and the clinical director of the service involved.

Where resolution of the dispute is still not possible, the Public Advocate and the Chief Psychiatrist may undertake to review the situation together and seek a resolution in the best interests of the patient.

## Exchange of information

Guardians and mental health workers may exchange information about patients receiving treatment under the Mental Health Act, within the framework of s. 120A of the Mental Health Act<sup>3</sup> and privacy legislation.<sup>4</sup>

Reports written by guardians for the Victorian Civil and Administrative Tribunal and by mental health professionals for the Mental Health Review Board will not generally be available prior to the respective hearings but may be made available later with the agreement of the relevant tribunal.

## Advocacy

The Office of the Public Advocate is empowered by the Guardianship and Administration Act to provide advocacy for a person with a disability apart from its role as guardian. Advocacy is work that is intended to support people in asserting their rights and interests.

When acting as a patient's advocate, the Public Advocate must act in their best interests, while taking into account the wishes of the patient.<sup>5</sup>

In order to ensure the rights of a patient with a mental illness are protected, it may be more appropriate to seek the assistance of an advocate rather than a substitute decision maker (guardian). Advocacy may provide an independent view on behalf of the patient and may be a more effective way of supporting people with disabilities.

*3 Section 120A of the Mental Health Act prevents disclosure of confidential information from a relevant psychiatric service unless the disclosure is to carry out functions under the Mental Health Act or any other Act. Among other exceptions, is subsection (3)(ca), which specifically permits disclosure to a guardian where (i) the information is reasonably required for the ongoing care of the person to whom it relates, and (ii) the guardian will be involved in providing that care.*

*4 The Office of the Public Advocate is bound by the provisions of the Information Privacy Act 2000 (Vic) and the Health Records Act 2001 (Vic). Information Privacy Principle 2 governs disclosures and permits disclosure of sensitive information where this information is directly related to the primary purpose for which it is collected. Information Privacy Principle 2.1(d) permits disclosure where there is: (i) a serious and imminent threat to an individual's life, health, safety or welfare, or (ii) a serious threat to public health, public safety, or public welfare. Health Privacy Principle 2.2(d) specifically permits disclosure where all of the following apply:*

*(i) The organisation is a health service provider providing a health service to the individual.*

*(ii) The use or disclosure for the secondary purpose is reasonably necessary for the provision of the health service.*

*(iii) The individual is incapable of giving consent within the meaning of s. 85(3) and:*

*(a) it is not reasonably practicable to obtain the consent of an authorised representative of the individual within the meaning of s. 85,*

*or*

*(b) the individual does not have such an authorised representative.*

*5 Advocacy in a person's best interests differs from legal advocacy where the legal advocate acts on instructions from their client. The Office of the Public Advocate is required to advocate what is in the patient's best interests having regard to all the information available.*

In addition, the Community Visitors Program, under the umbrella of the Office of the Public Advocate, is also empowered under the Mental Health Act to provide a limited advocacy role. The Office of the Public Advocate undertakes to provide advocacy within its identified priorities and resources for people who are suffering or are at risk of abuse, neglect or exploitation. The Office of the Public Advocate will also give priority to clients who are affected by cross-sectoral service system issues.

**Exchange of confidential information where the Public Advocate is acting as advocate and is not appointed a guardian**

Section 120A of the Mental Health Act contains confidentiality provisions that regulate the disclosure of patient information held by a relevant psychiatric service.

Generally, a relevant psychiatric service must not release information that identifies a patient who has received psychiatric services. Section 120A contains a number of exceptions that may permit an advocate to access information about such a patient in appropriate circumstances.

Unless the provision of confidential information falls within circumstances listed under ss. 120A(1)–(4) of the Mental Health Act, the information cannot be released to an advocate.

An advocate may release information to a mental health service where the disclosure complies with the *Health Records Act 2001* (Vic) or the *Information Privacy Act 2000* (Vic).



