

Practice Direction – Processing of Emergency Applications

This practice direction is issued pursuant to Clause 6, Part 2, Schedule 2 of the *Guardianship and Administration Act 1995* (the Act).

Anita Smith, President
22 July 2013

SUMMARY:

Applications for the emergency appointment of a guardian or administrator must be received by the Board by 3.00pm on a working day.

Apart from exceptional circumstances, applications received after this time will not be determined by the Board until 3.00pm the following working day.

After working hours (only) it is recommended that you discuss a potential emergency guardianship application with the Office of the Public Guardian on **(03) 6165 3444**.

Scope:

Section 65 of the *Guardianship and Administration Act 1995* allows for the Board to make an emergency appointment of the Public Guardian as guardian or the Public Trustee as administrator for up to 28 days without a hearing. This Practice Direction relates to the processing of such applications.

Relevant provisions:

- Section 65(2) Empowers the Board to appoint a guardian or administrator for a person who is not a 'represented person' (i.e. not already subject to a guardianship or administration order) or to make any direction considered appropriate in the circumstances
- Section 65(1) Empowers the Board to appoint a guardian or administrator for a person who is a 'represented person' (i.e. is already subject to a guardianship or administration order) or to make any direction considered appropriate in the circumstances
- Section 40 Enables a medical practitioner to carry out medical treatment without consent where the treatment is necessary, as a matter of urgency to save the person's life, to prevent serious damage to the person's health, or to prevent the person from suffering or continuing to suffer significant pain or distress (except for special treatment).

Practice Direction:

(i) *Content of applications*

This Practice Direction relates to the processing of emergency applications. Please refer to the Board's policy "*What is an emergency?*" for information about the factual content of an emergency application.

http://www.guardianship.tas.gov.au/data/assets/pdf_file/0008/176786/What_is_an_emergency.pdf

(ii) *Submitting an application*

It is recommended that an applicant discuss the application by calling:

(03) 6165 7500 or 1300 799 625 **in working hours**

(03) 6165 3444 **after working hours**

The Board provides an application form for emergency applications. Please refer to Form 3 in the following table:

<http://www.guardianship.tas.gov.au/forms2>

In working hours (only) an application for an emergency order can be:

faxed to: (03) 6173 0211

emailed to: guardianship@justice.tas.gov.au

After working hours (only) it is recommended that you discuss the potential application with the Office of the Public Guardian on **(03) 6165 3444**

(iii) *Requirements of the Board*

In considering an emergency application, the Board:

- (a) may act on a request made, or information received, by telephone or any other means that the Board considers appropriate in the circumstances; and
- (b) is not required to give notice to any person, and
- (c) is not required to hold a hearing before making an order

But the Board must make such inquiries or investigations as the Board may think appropriate.

The Board must be furnished with an application with sufficient time to make necessary inquiries or investigations before making an order.

(i) Out-of-hours responses to applications

The Board is not funded to provide an out-of-hours service. Although a Board member may respond to emergency applications out-of-hours, this is unfunded and *ad hoc*. Services and facilities should not rely upon being able to contact a Board member out-of-hours.

Out-of-hours applications are *futile* where the application relates to **administration (financial matters)** because the Public Trustee and financial institutions are not available to take any action resulting from an emergency order out-of-hours.

After working hours (only) it is recommended that you discuss the potential application with the Office of the Public Guardian on **(03) 6165 3444**. The Office of the Public Guardian will field calls about potential emergency orders relating to guardianship (personal decision making) matters.

Out-of-hours applications for appointment of a **guardian** *may be unnecessary* because:

- In the case of applications for **emergency medical treatment** the emergency treatment provisions in section 40 of the Act may apply to the proposed treatment (see Annexure below).
- In the case of **accommodation or hospitalisation**, the facility wishing to keep a person in safe premises may be able to rely upon their duty of care to avert a crisis or emergency rather than seek the appointment of a guardian. It is recommended that facilities seek legal advice about the circumstances under which a duty of care can be relied upon.
- In the case of **removing persons who pose a threat** to the health and wellbeing of a person with a disability, the facility wishing to exclude the persons who pose a threat may be able to rely upon their duty of care to avert a crisis or emergency rather than seek the appointment of a guardian. It is recommended that facilities seek legal advice about the circumstances under which a duty of care can be relied upon.

(ii) Responses to applications within working hours

Where an application is made for appointment of a guardian or administrator in working hours, there needs to be sufficient time for the Board to make its inquiries and investigations and to consider whether an application should be granted.

If an order is made, it also needs to be communicated to the Public Guardian or the Public Trustee so that the appointed agency can make decisions on behalf of the represented person.

To facilitate the inquiries, investigations, consideration of the application and the communication with the Public Guardian and the Public Trustee:

- Applications for the emergency appointment of a guardian or administrator must be received by the Board by 3.00pm on a working day.
- Apart from exceptional circumstances, applications received after this time will not be determined by the Board until 3.00pm the following working day.

(iii) Establishing exceptional circumstances for determination outside of nominated hours:

If an applicant requires that an application be determined outside of the 3.00pm deadline the applicant will need to establish why the application falls outside of the emergency medical treatment and duty of care provisions established above.

As a guide:

The following will not generally be considered 'exceptional circumstances':

- A plan to move a person with a disability to a secure facility in the next 24 hours
- Seeking consent to treatment that can be provided within the terms of section 40 or 41 of the Act
- A plan to administer ECT within the next 24 hours
- A request to stop bank accounts or prevent a financial transaction

The following will generally be considered 'exceptional circumstances':

- A need for Police or Forensic Medical Services to obtain consent to taking forensic samples from a person with a disability who may have been a victim of crime.

Anita Smith
PRESIDENT

22 July 2013

ANNEXURE

RELEVANT LEGISLATIVE PROVISIONS

40. Urgent medical or dental treatment

Medical or dental treatment may be carried out on a person to whom this Part applies without consent given in accordance with this Division if the medical practitioner or dentist carrying out or supervising the treatment considers the treatment is necessary, as a matter of urgency –

- (a) to save the person's life; or
- (b) to prevent serious damage to the person's health; or
- (c) except in the case of special treatment, to prevent the person from suffering or continuing to suffer significant pain or distress.

41. Medical or dental treatment without consent

(1) Where –

- (a) it is proposed to carry out any medical or dental treatment which is not special treatment on a person to whom this Part applies; and
- (b) there is no person responsible for that person; and
- (c) the treatment is necessary and is the form of treatment that will most successfully promote that person's health and well-being; and
- (d) that person does not object to the carrying out of the treatment –

it is lawful, subject to subsection (2), for the medical or dental treatment to be carried out on that person without consent under this Division.

(2) The regulations may provide that in such cases as are specified in the regulations medical or dental treatment may not be carried out on a person to whom this Part applies without consent under this Division.

(3) A medical practitioner or dentist who carries out or supervises any medical or dental treatment under subsection (1) without the consent of the relevant person must certify in the clinical records relating to the treatment that –

- (a) the treatment is necessary and is the form of treatment that will most successfully promote that person's health and wellbeing; and
- (b) the person does not object to the carrying out of the treatment.

65. Emergency orders

(1) Where the Board considers it proper to do so by reason of urgency, the Board may in respect of a represented person make any order or give any direction considered appropriate in the circumstances.

(2) Where the Board considers it proper to do so, by reason of urgency, the Board may, in respect of a person who is not a represented person but in respect of whom the Board considers that there may be grounds for making a guardianship order or an administration order make an order appointing –

(a) the Public Guardian as his or her guardian; or

(b) The Public Trustee as administrator of his or her estate –

and in either case the Board may make any order or give any direction considered appropriate in the circumstances.

(3) The Board may make an order under this section of its own motion or on request by any person whom the Board considers to have a proper interest in the matter.

(4) In the exercise of its powers under this section –

(a) the Board is not required to give notice to any person or to hold a hearing before making an order but the Board must make such inquiries or investigations as the Board may think appropriate; and

(b) the Board may act on a request made, or information received, by telephone or any other means that the Board considers appropriate in the circumstances; and

(c) the Board may make an administration order in respect of the estate of a person who is the donor of an enduring power of attorney in force under Part 4 of the *Powers of Attorney Act 2000*, if he or she is of or over the age of 18 years.

(4A) The powers and functions of the Board under this section may be exercised and performed by one or 3 members of the Board as may be determined in each case by the President.

(5) An order under this section –

(a) remains in effect for such period as the Board determines but not exceeding 28 days; and

(b) may be renewed but only once for a further period not exceeding 28 days.

(6) A power or function under this section that has been exercised or performed, or purportedly exercised or performed, by any member or members of the Board before the commencement of the *Guardianship and Administration Amendment Act 2006* is taken to have been validly exercised or performed by the Board.