

# 14

## Legal issues

<u>Guardianship</u>	318
<u>Alcohol, drugs and driving</u>	322
<u>Programs to reduce re-offending or avoid prison</u>	325

## **Guardianship: when a person can no longer look after their own affairs**

### **WHAT IS GUARDIANSHIP?**

If an adult is unable to look after their own affairs, there are laws that can sometimes give someone else the power to help them. This most often happens when a client is unable to make decisions for themselves because of a disability (e.g. brain damage from alcohol or from drug overdose). Sometimes a relative or other adult can be made the client's guardian. This guardian is given the right to look after the person's affairs, including their health and welfare. In other cases a 'public guardian' or 'public advocate' is appointed. This is someone outside the family, who might do this as part of their job. Rules about guardianship will vary in each state and territory. This section gives an overview of some common features.

### **WHEN MIGHT A GUARDIAN BE NEEDED?**

Use of alcohol or other drugs can damage a person's brain, which may result in them acting in ways that place them at risk. This can happen when they are intoxicated, but the harms from alcohol or drug use can continue long after becoming sober.

Guardianship may be needed when a person has:

- Brain damage, from alcohol, drugs or other causes
- A severe psychiatric disorder, that leaves them unable to care for themselves
- A developmental delay that has been present from birth (e.g. Down's Syndrome). This may have led them to use alcohol or drugs, and they may now be at major risk (e.g. of physical or sexual abuse).
- A severe alcohol and/or drug problem that regularly exposes them to major risks (e.g. they are in hospital a lot, or they regularly put their life at risk through suicide attempts)
- Been neglected, exploited and or abused by someone because of their drinking or drug use. The person's family or friends are also unable to prevent this harm.

## ARE ALL GUARDIANSHIP ORDERS THE SAME?

All guardianship orders give someone else control over a person's affairs. But there are different types of orders. Sometimes a guardianship order:

- Is lifelong ('continuing')
- Gives control over just part of a person's affairs (e.g. their money, or one aspect of their treatment). This is called a 'limited order'
- Is for a set period of time (a 'temporary order').

## WHO CAN BE A GUARDIAN?

A guardian must be 18 years or older. Often the guardian is a family member, but other responsible adults can be the guardian. The guardian cannot be arguing or fighting with the person who needs a guardianship order. The guardian must be able and willing to complete the tasks set out in the order (e.g. manage the money, decide on housing). If a person has no family or friends who are able to act as their guardian, a public guardian can be appointed.

## WHAT DOES A GUARDIAN DO?

The guardian may have the power to decide over aspects of a person's day-to-day life; for example:

- *Accommodation*: the person can be told to live in a certain place (e.g. in a supported hostel).
- *Health care*: the person can be made to attend certain treatment (e.g. see a doctor, have surgery for a badly broken arm, attend drug and alcohol treatment (note: some rehabs may not take clients who have not chosen to be there – 'coerced clients').
  - *Note*: the guardian may need to consent to any health care (e.g. you may need to get a guardian's consent to have a tooth extracted, or to transfer a client to a rehabilitation unit).
  - *Note*: in an emergency, treatment may need to go ahead, even while you wait for consent.
- *Finances*: the person's money can be looked after, and bills paid for them. The person may be given some spending money for other expenses.
- *What education and training they should do*
- *What work they should do* (e.g. someone with brain damage can be supported to work in a sheltered workshop).

## HOW TO ORGANISE A GUARDIANSHIP ORDER?

When you request a guardianship order the government will want to know why, and they will need to have the facts well documented. You will need to be able to satisfy the panel (or tribunal or court) that the person you are concerned about has major problems with making decisions and cannot manage their life.

Finding someone who understands the system and has successfully organised a guardianship order before can be a big help. Usually you will need to have your client's level of disability clearly documented (e.g. with a report from a doctor or psychologist on their level of brain damage). Sometimes specialist doctors (e.g. brain doctor or 'neurologist') or psychologists are required for assessment and reports.

It can be challenging and time consuming to obtain a guardianship order. But in the long run it can save a lot of time and, most importantly, sometimes it is the only way to keep the person safe.

Sometimes you can suggest to the person's family that they consider a guardianship order, and you can support them in starting the process. If the individual has no family involved, you can try to start the process of organising a public guardian yourself.

## WHERE TO FIND OUT ABOUT GUARDIANSHIP IN YOUR STATE OR TERRITORY

A useful place to find out more information about guardianship is the Public Guardianship Board in your state or territory.

### State and Territory Public Guardianship Boards

#### *Australian Capital Territory*

Office of the Community Advocate  
Phone (02) 6207 0707  
[www.publicadvocate.act.gov.au](http://www.publicadvocate.act.gov.au)

#### *New South Wales*

The NSW Public Guardian  
Phone (02) 9265 3184 (Sydney)  
(02) 9671 9800 (Blacktown)  
(02) 4320 4888 (Gosford)  
[www.lawlink.nsw.gov.au/opg](http://www.lawlink.nsw.gov.au/opg)

#### *Northern Territory*

Office of Adult Guardianship  
Phone (08) 8922 7116 (Darwin)  
(08) 8951 6739 (Alice Springs)  
[www.health.nt.gov.au/Aged\\_and\\_Disability/Adult\\_Guardianship/index.aspx](http://www.health.nt.gov.au/Aged_and_Disability/Adult_Guardianship/index.aspx)

#### *Queensland*

The Adult Guardian  
Phone (07) 3234 0870  
[www.justice.qld.gov.au/91.htm](http://www.justice.qld.gov.au/91.htm)

#### *South Australia*

Office of the public advocate  
Phone (08) 8269 7575  
[www.opa.sa.gov.au](http://www.opa.sa.gov.au)

#### *Tasmania*

Office of the Public Guardian  
Phone (03) 6233 7608  
[www.publicguardian.tas.gov.au](http://www.publicguardian.tas.gov.au)

#### *Victoria*

Office of the Public Advocate  
Phone (03) 9603 9500  
[www.publicadvocate.vic.gov.au](http://www.publicadvocate.vic.gov.au)

#### *Western Australia*

The Public Advocate  
Phone (08) 9278 7300  
[www.publicadvocate.wa.gov.au](http://www.publicadvocate.wa.gov.au)

## FURTHER READING

Fogerty B (2009). *Guardianship and administration laws across Australia*. Sydney: Intellectual Disability Rights Service. See: [www.idrs.org.au/\\_pdf/Guardianship\\_and\\_administration\\_laws\\_across\\_Australia\\_by\\_Ben\\_Fogarty.pdf](http://www.idrs.org.au/_pdf/Guardianship_and_administration_laws_across_Australia_by_Ben_Fogarty.pdf).

## Alcohol, drugs and driving

### OVERVIEW

Alcohol and drugs affect people's driving skills, making it harder to drive safely. Driving under the influence of alcohol or drugs increases the chances of having accidents and of getting into trouble with the law. To avoid problems with drink or drug driving, people should avoid using or stay under the limit when they plan to drive, or make other plans such as public transport, have a designated driver, or stay with a friend or family member when intending to use.

#### How many people drink or drug drive in Australia?

Among people who have had any alcohol in the past 12 months, around 1 in 6 men and 1 in 11 women report drink driving. Among people who have used illegal drugs, around 1 in 5 men and 1 in 8 women report drug driving, mostly after using cannabis. Young people are almost twice as likely as older adults to drive after using drugs.

In Australia, alcohol is involved in a quarter of the car crashes where someone dies. However, among Aboriginal people, alcohol is involved in up to 8 in every 10 crashes where someone dies. In these cases, usually a lot of alcohol is found in the driver's blood (often up to four times the legal limit).

### WHAT ARE THE LAWS AROUND DRINK AND DRUG DRIVING?

#### Alcohol

All Australian drivers have to follow the same rules about how much alcohol can be in their blood when driving:

- 'Full' licence drivers can have up to 0.05% (g/100ml) of alcohol in their blood.
- 'Provisional' (P Plate) or 'learner' drivers can have no alcohol in their blood while driving.
- People who drive for a living (e.g. bus, taxi and truck drivers; police) can have no alcohol in their blood when driving work vehicles.

The general rule to help stay below the blood alcohol limit of 0.05% is:

- For women, no more than one standard (small) drink each hour
- For men, no more than two standard (small) drinks in the first hour, then no more than one standard (small) drink each hour after that.

How alcohol is broken down in the body varies from person to person. So, for one person, drinking no more than one standard (small) drink each hour may be too much, while for someone else it keeps them under the 0.05% limit.

Remember, this is the legal limit, not the health limit (see Alcohol, p. 70).

## Drugs

It is an offence to drive under the influence of drugs in Australia. There are some differences across Australia, so check with the police in your state or territory.

## Roadside testing

Roadside alcohol and drug testing is conducted by police around Australia and includes breath and saliva tests and sometimes blood tests. Anyone who is driving or attempting to drive can be tested. If a person gets caught drink driving, they may have to go to court, pay a fine, or lose their licence or demerit points (see your state or territory road authority for more information on penalties).

## WHAT HAPPENS TO DRIVING SKILLS WHEN YOU DRINK OR DRUG DRIVE?

Driving requires lots of skills like: being able to focus, making judgements and decisions, and doing things with hands and feet while keeping your eyes on the road. These skills get worse when people use alcohol, illegal drugs, or prescribed medicines.

- The driver may: have a slower reaction time (e.g. is slower to put on the brakes), have poorer vision, be less focused, have trouble judging distance and speed, have trouble staying in their lane and take more risks while driving.
- Mixing alcohol with other drugs or taking different drugs together can also make driving skills even worse.
- Being intoxicated with alcohol or drugs increases the chance of being in an accident and of injuries caused to the driver and others.

**How long does it take for alcohol or drug levels in the body to go down?**

The only way to make the level of alcohol or drugs in the body go down is with time. For example, with alcohol, the liver takes about one hour to break down one standard drink. Nothing can make these levels go down faster. Drinking coffee, sucking on a lozenge, taking a shower and getting some fresh air all do not help the body break down alcohol or drugs faster.

**Is it okay to drive on methadone or buprenorphine treatment?**

If your client is on methadone or buprenorphine treatment, it is safe to drive if they are on a stable dose. If their dose is being increased or if they feel sleepy after their dose, then they should not drive. Of course if they are using alcohol or other drugs, then they also should not drive.

**TIPS FOR STAYING SAFE**

- Talk to your client about the risks of drink and drug driving (e.g. causing accidents, getting a fine, losing their licence).
- Encourage your client not to drink or use drugs if they are going to drive.
- If your client is going out in a group, encourage them to have one person be the designated driver who will have no alcohol or drugs, or to keep their alcohol use under the limit.
- Encourage your client to use public transport, taxis, courtesy buses, or to stay at a friend's or family member's house rather than drive home after using.
- If your client is taking prescribed medicines (e.g. anti-depressants, benzos) and is worried about driving safely, they should stop driving and talk to their doctor or pharmacist about the side effects of this medicine and whether they should change to a different medicine.

**FURTHER READING**

For more information on road safety in Aboriginal people: [www.healthinonet.edu.au/related-issues/road-safety](http://www.healthinonet.edu.au/related-issues/road-safety).

## Programs to reduce re-offending or avoid prison

### OVERVIEW

Sometimes going to prison can pull up an episode of using alcohol or drug problems. But drug use can also continue or even increase while a person is in custody, putting them at risk of problems from using including hep C or HIV. Because of the harms that may come from being in prison, each state and territory has a range of programs to try to keep people out of court and out of the prison system.

These approaches can include conditional bail, diversion, and court ordered programs to encourage the offender to address the underlying causes of their offending behaviour, such as alcohol or drug use. Sometimes the offender will be asked to complete a diversion program instead of going to court. There are also options that can happen before or after sentencing, and which are aimed at changing offending behaviour.

This section gives an overview of the range of options to help reduce re-offending and to offer alternatives to punishment such as prison. Note: programs to reduce offending or avoid prison are different in each state and territory. Therefore this section provides a broad overview of the types of options available, along with some examples.



#### **If a person has a mental illness and they commit an offence**

Each state and territory's Mental Health Act allows offenders with serious mental illness to get treatment rather than be automatically sent to prison. How this happens varies across Australia. For example: a person may be ordered to attend treatment instead of going to court; a psychiatrist report may be made to the court; and/or the magistrate might give a compulsory treatment order instead of punishment. Check with the mental health team, Department of Justice or Attorney-General's Office in your area for details.

## PROGRAMS THAT REPLACE COURT

### Cautions or ‘expiation notices’

In some states and territories, offences such as possession of cannabis can be dealt with by giving the person a caution or a fine, instead of having to go to court. This means the offence has been decriminalised, i.e. even though the possession of cannabis is still against the law (illegal) it is not classed as a criminal offence, so police can deal with the issue instead of the courts.

### Juvenile diversion

In some states or territories police can refer certain offenders to diversion programs instead of to court. An example of this is the Northern Territory Police’s Youth Diversion Scheme.

Juvenile diversion programs vary, but may involve:

- Education and treatment about drugs and alcohol
- Doing something to make up for the crime (restitution), e.g. doing volunteer work in the shop where the offence happened
- Community service
- The victim meeting the offender in a neutral safe environment (‘victim offender conference’) to try to give the offender a better understanding of the impact of their actions and to address the hurt they caused to the victim (and others).

Diversion often works best when there are suitable community-based programs available in the local area, such as alcohol and drug programs and youth services. However, informal programs or activities that also meet the offender’s (and perhaps victim’s) needs can also work well.

*Note:* there may be fewer options for formal diversion programs in smaller communities. If you work in a more isolated area, contact your local Department of Justice to ask about the possibility of increasing the diversion options available to your clients.

## ALTERNATIVE SENTENCING

Courts that use alternative sentencing have the full sentencing powers of a 'regular' court. To be eligible for alternative sentencing programs, the offender often needs to plead guilty (but not always; check the details in your state or territory). Most offences can be heard in these courts, with the exception in some instances of particularly serious crimes such as murder, family violence and sexual offences. Some types of alternative sentencing options include 'problem solving' and 'culturally appropriate' courts.

### Problem solving courts

These are special courts that offenders can be referred to depending on the type of crime and how severe it is. Examples include the Drug Court (NSW), Victorian problem solving courts, Family Violence Court (Vic) and the (NT) Substance Misuse Assessment and Referral for Treatment (SMART) court.

For example, the Drug Court (NSW) is a specialist court for offenders who are dependent on drugs. In this 12-month program, the magistrate can order treatment and urine drug screens three times a week. In this court and others like it, the magistrate plays an active role in regularly reviewing what progress the offender is making. A point demerit system is used to 'punish' the offender if they run into trouble while on their program. The number of points that are deducted depends on how severe the trouble is. For example, if drugs are detected in the offender's urine, a point may be taken away for every illegal (illicit) drug found. Drug Court users start with 28 points, and when they reach 0 they are sent back to prison.

### Culturally appropriate courts

These courts try to provide a more culturally appropriate way of sentencing in a less 'formal' court setting. People who care for the offender (e.g. family, elders, mentors) are actively involved in the court process. Respected community members such as elders who understand the issues assist in agreeing on a sentence and can set bail conditions more suited to the offender's rehabilitation options and their community. They can also help explain the process and consequences to the offender and their family. These courts may also help strengthen the authority of elders and other responsible family members.

The family of the offender or of the victim, and the victim themselves, may also be invited to take part in the court proceedings. This can provide opportunities for the offender to be more aware of the harms they have caused to the victim, their family, their community and themselves. It is hoped that involving family and others in this way will help reduce re-offending. Examples include: Koori Courts (Vic), Murri Courts (Qld), Circle Sentencing (NSW) and Community Court (NT). Most programs are similar in that they want the offender to take responsibility for their criminal behaviour and to play an active role in their recovery.

### **PROGRAMS THAT HAPPEN BEFORE SENTENCING**

Programs are available to offenders of minor offences before they go to court (pre-sentence programs). Taking part in a program can help a person to get treatment or education sooner, and to encourage them to change their behaviour. It may also help them get a better outcome when they go to court, e.g. a reduced sentence. Most programs aim to tackle the underlying problem that has caused the offending behaviour.

A number of states and territories have programs that bring the offender together with victim(s) of the crime and other people affected. Examples include Forum Sentencing (NSW) or Family and Victim Offender Conferencing (NT). This provides the victim and other people affected by the crime an opportunity to meet face-to-face and to tell the offender about the harm that the crime has had on their lives. It also provides the offender with an opportunity to learn about the harm their behaviour had on the victim and other people.

Across Australia there are also various problem-solving courts that look at releasing an offender on bail to undertake treatment and other programs prior to final sentencing (described above in 'problem-solving courts'). Some of these require the offender to admit they have broken the law and to agree to address their issues. In NSW, offenders can be referred by the court, before they enter a plea, to the MERIT program (Magistrate's Early Referral into Treatment). This provides intensive counselling support and case management for three months.

## PROGRAMS THAT HAPPEN AFTER SENTENCING

The magistrate or judge has many options to order treatment or another option instead of sending the offender to prison, or as well as prison. Again, such programs aim to tackle the underlying issues that contribute to the offence, such as alcohol, drug or mental health issues. One example is treatment orders where the magistrate may order the offender to enter a rehab or other alcohol and drug treatment instead of going to prison. If the offender does not follow this order and take part in the program, then they can be sent to prison. The offender's lawyer (solicitor) can ask the court for a treatment order (like going to rehab) instead of the client having to go to prison.

### Some challenges with treatment orders

- Magistrates may not always be aware of the full range of options, including the range of treatment approaches or which treatment is better than another. As professionals we need to try to keep magistrates up to date.
- Sometimes the magistrate may order the offender to attend rehab, but the offender is unable to get a place in a rehab. With the client's permission, it is important to talk to the offender's legal representative about this to explore other options.



For information on how your client can access programs after they have committed an offence, contact your local Department of Justice or Attorney-General's Department, Legal Aid office or your client's lawyer (solicitor).

## **HOW CAN A CLIENT ACCESS PROGRAMS TO REDUCE RE-OFFENDING OR AVOID PRISON?**

The availability of these programs and the rules varies around Australia.

- Many programs are only available for less serious offences.
- Referrals are sometimes made by the police, or by the prosecution or the court magistrate.
- Sometimes the offender's lawyer can request access to these programs.
- To be eligible, defendants usually (but not always) need to plead guilty.
- Contact the office of your local legal service (or your Department of Justice or Attorney-General) to check what options are available in your area and which offences are eligible.

## **FURTHER READING**

Go to the Indigenous HealthInfoNet website and type *diversion programs or alternative sentencing* in the search box: [www.healthinfonet.ecu.edu.au](http://www.healthinfonet.ecu.edu.au).