



NCAT Guardianship Division Procedural Direction 2

REPRESENTATION

This Procedural Direction applies to:	Proceedings in the Guardianship Division
Effective Date:	14 November 2014
Replaces Procedural Direction:	2 January 2014
Notes:	You should ensure that you are using the current version of this Procedural Direction. A complete set of Procedural Directions and Guidelines is available on the Tribunal website at www.ncat.nsw.gov.au

Introduction

1. This Procedural Direction is a guide for persons wishing to represent a party in Guardianship Division proceedings in relation to:
 - (a) The nature of Guardianship Division proceedings
 - (b) Forms of representation which are possible in Guardianship Division proceedings
 - (c) Applications for leave to represent a party in Guardianship Division proceedings
 - (d) Who may apply for leave to be represented
 - (e) How to apply for leave to represent a party
 - (f) Determining applications for leave to represent a party
 - (g) Decisions to grant leave to a person to represent a party
 - (h) Representation for the subject person by a legal practitioner: special considerations
 - (i) The role of a legal practitioner such as a McKenzie Friend/legal support person
 - (j) The role of a legal practitioner

- (k) The role of a legal practitioner during a hearing
- (l) Revocation of orders granting leave for a person to represent a party
- (m) The appointment of separate representatives.

Definitions

2. References to sections in this Procedural Direction are, unless otherwise stated, references to section of the *Civil and Administrative Tribunal Act 2013*.
3. Words used in this Procedural Direction have the same meaning as defined in the Act.

Word	Definition
Act	<i>Civil and Administrative Tribunal Act 2013</i>
Party	<p>A party is a person who:</p> <ul style="list-style-type: none"> • falls within the definition of party in s 3F of the <i>Guardianship Act 1987</i>; or • falls within fits the definition of a party in s 35(2) of the <i>Powers of Attorney Act 2003</i>; or • has been joined as a party to the proceedings by the Tribunal under s 44 of the <i>Civil and Administrative Tribunal Act 2013</i>. <p>Please see the information sheet on parties to proceedings and the fact sheet 'Who is a party to Guardianship Division Proceedings' for more information.</p>
Subject person	The person who is the subject of the application/s to the Tribunal being considered in the Guardianship Division
Tribunal	NSW Civil and Administrative Tribunal

The nature of Guardianship Division proceedings

4. The Guardianship Division of the NSW Civil and Administrative Tribunal exercises a protective jurisdiction in relation to people with decision making disabilities. When exercising any of its functions under the *Civil and Administrative Tribunal Act 2013* or the *Guardianship Act 1987*, it must have regard to the principles set out in section 4 of the *Guardianship Act* including the requirement to give paramount consideration to the welfare and interests of persons who have disabilities.
5. The Tribunal must also seek to give effect to the following matters when it exercises any of the powers given to it by the Act:
 - The objects set out in s 3 of the Act;
 - The guiding principle set out in s 36(1) of the Act to facilitate the just, quick and cheap resolution of the real issues in the proceedings;

- The requirement that the practice and procedure of the Tribunal is implemented so as to facilitate the resolution of the issues between the parties in such a way that the cost of the parties and the Tribunal is proportionate to the importance and complexity of the subject matter of the proceedings (s 36(4)).
6. The Tribunal conducts its proceedings in an investigative/inquisitorial manner rather than in an adversarial manner. It is not bound by the rules of evidence and may inquire into and inform itself on any manner in such a manner as it thinks fit, subject to the rules of natural justice (s 38(2)). It is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal forms (s 38(4)).
 7. The Tribunal is to take such measures as are reasonably practicable to ensure that all parties to proceedings before it understand the nature of the proceedings. It is, if requested to do so, to explain to the parties any aspect of the procedure, or any decision or ruling, that relates to the proceedings, as well as ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings (s 38(5)).
 8. The Tribunal may, at its discretion, grant or refuse leave to a person to represent a party in proceedings and may revoke any leave that it has granted (s 45(3)).
 9. The Guardianship Division's procedures aim to make its legal process accessible for people with disabilities and their families. The role of a legal practitioner or a non-legal representative, such as a family member, friend or advocate, during a Guardianship Division hearing should be considered in this context.
 10. The Guardianship Division also seeks to ensure that other people who are not parties, including family members and witnesses, can understand and participate in hearings. Guardianship Division members will usually identify key issues and explore them with participants at the hearing, rather than always expecting parties to present and argue a case.

Forms of representation which are possible in Guardianship Division proceedings

Australian legal practitioners

11. Legal practitioners may represent or assist a party in Guardianship Division proceedings in several ways:
 - General legal advisor – A legal practitioner may provide advice and assistance to a party without appearing at a hearing. They may, for example, assist a party in pre hearing discussions with other parties, or

assist a party in pre hearing discussions with other parties, or assist a party in preparing documents and gathering evidence.

- McKenzie Friend¹ – A legal practitioner may attend the hearing as a party's McKenzie Friend by providing support but not representation. Practitioners do not need to seek the leave of the Tribunal to attend as a McKenzie Friend.
- Legal Representative – A legal practitioner may attend the hearing as a party's legal representative and act on their instructions. The leave of the Tribunal is required for a legal practitioner to have this role (s 45(4)(b)).
- Separate Representative – A legal practitioner may act as the separate representative of a party. If the Tribunal orders that the subject person is to be separately represented, then the separate representative appears at the hearing to make submissions about the best interests of the subject person. Only the Tribunal may order that a party is separately represented (s 45(4)(c)).

12. Legal practitioners may also be involved in proceedings as a:

- Party – A legal practitioner may be a party to proceedings either because they are an applicant or a party, for example, in some matters, if they are an attorney pursuant to a power of attorney; or
- Witness – A legal practitioner may appear at a hearing as a witness to give evidence. For example, evidence may be required about the circumstances surrounding the making of an enduring power of attorney where the legal practitioner has prepared and witnessed the document and the validity of the document is in question.

Non-legal representatives

13. A party may be represented by someone who is not an Australian legal practitioner in the following ways:

- Guardian ad litem (s 45(4)(a)).
- Another person appointed by the Tribunal. This could be a family member, a friend or an advocate. The leave of the Tribunal is required for a non-legal representative to represent a party (s 45(4)(b)).

¹ The role of a McKenzie Friend was established in *McKenzie v McKenzie* [1971] P33 and is discussed in more detail later in this Procedural Direction.

Applications for leave to represent a party in Guardianship Division proceedings

14. A party to proceedings in the Tribunal has the carriage of the party's own case and is not entitled to representation (s 45(1)(a)).
15. A party may only be represented by another person if the Tribunal grants leave for the person to represent the party (s 45(1)(b)).
16. Applications for leave to represent a party are not frequently made and in the majority of proceedings before the Guardianship Division of the Tribunal the parties are not represented.

Who may apply for leave to be represented?

17. Only the person who wishes to represent a party may apply for leave to represent the party (rule 31(1) of the *Civil and Administrative Tribunal Rules 2014* ('NCAT Rules')).

How to apply for leave to represent a party

18. An application by a person for leave to represent a party to proceedings may be made orally or in writing at any stage of the proceedings (rule 31(1) of the NCAT Rules).
19. However, to reduce the likelihood of delay of the proceedings and in order to be fair to all parties, it is preferable for applications for leave to be made by way of a letter to the Divisional Registrar of the Guardianship Division that includes the following:
 - The name of the person who is the subject of the proceedings and his or her client number;
 - The name of the party the proposed representative is seeking leave to represent;
 - The grounds for the application for leave to represent the party.
20. It is also preferable that the proposed representative lodge their written application together with any supporting documents at the Guardianship Division as early as possible before the hearing date and no later than five working days before the hearing date, unless special circumstances apply.

Determining applications for leave to represent a party

21. Hearings to determine interlocutory applications, including applications for leave to represent a party, are normally listed before a single member of the Guardianship Division of the Tribunal. The majority of applications for leave to represent a party are conducted by telephone conference.

22. Late applications – if the application is received less than five working days before the scheduled hearing date, then it will most likely be dealt with by the Tribunal at the beginning of the hearing.
23. The Tribunal has broad discretion to decide whether to grant an application for a person to represent a party. The Guardianship Division takes into account the principles in section 4 of the *Guardianship Act 1987* when making a decision about such an application.
24. Some considerations that may be relevant to the Guardianship Division's determination to grant leave are:
 - Whether representation will promote the principles in section 4 of the *Guardianship Act 1987*, in particular the paramount concern being the interests of the subject person;
 - The guiding principle set out in section 36(1) of the Act to facilitate the just, quick and cheap resolution of the real issues in the proceedings;
 - Any disability or other factor that impedes the party's capacity to fully participate in the hearing;
 - The nature and seriousness of the interests of the party that are affected by the proceedings;
 - Whether the party's interests and point of view conflict with those of other parties;
 - Whether the proceedings involve complex legal or factual issues;
 - Fairness between the parties. It may be unfair if one party is represented but another is not, particularly if the subject person is unrepresented or the parties are in conflict;
 - Whether representation may assist a party to focus on the relevant issues and may promote a conciliatory approach in the proceedings.
25. The above list is not exhaustive and the Guardianship Division may take into account any other factors which are relevant in the particular circumstances of the subject person.

Determining applications for leave by a non-legal representative

26. The matters set out in paragraphs 21 to 25 above apply to an application made by a non-legal representative to represent a party.
27. In addition, when dealing with an application for leave to represent a party from a person who is not an Australian legal practitioner, the Tribunal is required to have regard to such of the following circumstances as it considers are relevant to the proceedings:
 - Whether the proposed representative has sufficient knowledge of the issues in dispute to enable him or her to represent the party effectively;

- Whether the proposed representative has the ability to deal fairly and honestly with the Tribunal and other person involved in the proceedings;
- Whether the proposed representative is vested with sufficient authority to bind the party; and
- Any other circumstances that the Tribunal considers relevant (rule 32(1) of the NCAT Rules).

Decisions to grant leave to a person to represent a party

28. In making an order granting leave to a person to represent a party to proceedings, the Tribunal may impose such conditions in relation to representation as the Tribunal thinks fit (rule 31(2) of the NCAT Rules).
29. The Tribunal may, as a condition of an order granting leave to a person (including an Australian legal practitioner) to represent a party to proceedings, require the person to disclose the estimated cost of representation by the person (rule 33 of the NCAT Rules).
30. A party, or a party's representative, who intends to seek a costs order should refer to *Guardianship Division Procedural Direction 2: Costs* for more information before making an application.
31. An Australian legal practitioner or other person who is representing a party in proceedings is under a duty to co-operate with the Tribunal to give effect to the guiding principle to facilitate the just, quick and cheap resolution of the real issues in the proceedings and, for that purpose, is under a duty to participate in the processes of the Tribunal and comply with directions and orders of the Tribunal (s 36(1) and (3)).

Representation for the subject person by a legal practitioner: special considerations

What if the subject person is unable to give instructions to a legal practitioner?

32. If the subject person is unable to give instructions to a legal practitioner the Tribunal may appoint a separate representative instead of granting leave to a legal practitioner to represent the subject person (s 45(4)(c)).
33. Practitioners are referred to the Law Society of New South Wales publication '*When a client's capacity is in doubt*' (March 2009).

Other considerations

34. The Tribunal may refuse to grant leave to the legal practitioner to be the representative in the following circumstances:
 - The legal practitioner is a possible witness

35. A legal practitioner cannot represent a party in proceedings in which the legal practitioner will also be a material witness. This may arise, for example, where a legal practitioner has witnessed the execution of an enduring power of attorney and the issue in dispute is whether the principal had the requisite capacity to execute that document. Both the *Solicitors' Rules* and the *Barristers' Rules* prohibit a legal practitioner from acting where they are or may be a witness in proceedings.²
- The legal practitioner has a conflict of interest
36. In the guardianship jurisdiction, parties to proceedings often have a close family or personal relationship to the subject person. They may perceive that they share a common interest with the subject person and believe there is no difficulty in instructing a legal practitioner to represent both themselves and the subject person in Tribunal proceedings. However, it is not appropriate for a legal practitioner to represent both the subject person and other parties in such proceedings due to the potential conflict of interest in either the current Tribunal proceedings or related matters.

Role of a legal practitioner as a McKenzie Friend/legal support person

37. A legal practitioner may attend the hearing with their client and act as their McKenzie Friend.³ In this role, a legal practitioner can support their client during the hearing by making notes or suggestions for their client, helping them to organise their papers or giving advice or prompts during the hearing. However, the legal practitioner does not have a right to participate in the proceedings as an advocate.

Role of a legal practitioner before a hearing

38. A legal practitioner involved with Tribunal proceedings should establish contact with the Tribunal officer handling the case in which they are involved. Practitioners are expected to act in a professional, courteous and non-adversarial manner when dealing with Tribunal staff.
39. Legal representatives may be required to ensure the distribution to other parties of documents submitted to the Tribunal.
40. If the legal practitioner's view is that the matter should be heard as a matter of urgency or if the legal practitioner has other information relevant to the listing of the matter, this should be discussed with the Tribunal officer.

² *NSW Solicitors Rules*, Rule 27; *NSW Barristers' Rules*, Rule 95(d)

³ *McKenzie v McKenzie* [1971] P. 33

Role of a legal practitioner during a hearing

41. Legal representatives appearing at a hearing should conduct themselves at the hearing in a way which is appropriate and sensitive to the special requirements of the protective jurisdiction of the Tribunal. A traditional adversarial process is not appropriate in proceedings which focus on people with disabilities.
42. During a hearing, a legal representative should:
 - Address the Tribunal members as “Tribunal Member” or “Ms/Mrs/Mr Smith” or “Dr Smith”;
 - Be conscious of the needs and level of understanding of a person with a disability who may be present at the hearing;
 - Assist in conciliation between the parties if appropriate;
 - Conduct themselves in a respectful manner.
43. The Tribunal has a statutory obligation under the *Guardianship Act 1987* to seek and consider the views of the subject person and may often wish to speak directly with them rather than have those views summarised by the person’s legal representative. In some circumstances, the Tribunal may speak with the subject person in the absence of other parties and witnesses.

Revocation of orders granting leave for a person to represent a party

44. The Tribunal may only revoke leave granted to a legal practitioner or a non-legal representative if the Tribunal is satisfied that:
 - The party no longer consents to the person representing the party;
 - The person applied for leave to represent the party without the consent of the party;
 - The person does not have sufficient knowledge of the issues in dispute to enable him/her to represent the party effectively or is unable to deal fairly and honestly with the Tribunal and other persons involved in the proceedings;
 - The party is, or has become, incapable of instructing the representative; or
 - Any other grounds are present that the Tribunal considers sufficient to justify the revocation (rule 32(2) of the NCAT Rules).

Separate representatives

Appointment of a separate representative for a party

45. The Tribunal may order that a party be separately represented (s 45(4)(c)). The subject person is a party to all proceedings in the Guardianship Division.

Appointment of a separate representative for the subject person

46. The Tribunal has a broad discretion to decide whether a subject person should be separately represented. The section 4 principles of the *Guardianship Act 1987* guide the Tribunal's decision to order that a party be separately represented.
47. The Tribunal may decide to appoint a separate representative for the subject person if:
- There is a serious doubt about the subject person's capacity to give legal instructions but there is a clear need for the person's interests to be independently represented at the Tribunal hearing or they wish to be represented;
 - There is an intense level of conflict between the parties about what is in the best interests of the subject person;
 - The subject person is vulnerable to or has been subject to duress or intimidation by others involved in the proceedings;
 - There are serious allegations about exploitation, neglect or abuse of the subject person;
 - Other parties to the proceeding have been granted leave to be legally represented;
 - The proceedings involve serious issues likely to have a profound impact on the interests and welfare of the person with a disability, such as end of life decision-making or proposed sterilisation treatment.
48. The Tribunal's order for separate representation does not guarantee eligibility for legal aid (s 45(5)). The provision of a separate representative will be determined by Legal Aid NSW in accordance with their policies.

Role of a separate representative

49. The role of a separate representative is different from that of a solicitor acting on instructions. A separate representative's role when representing the subject person is to make submissions to the Tribunal about the best interests of that person as they arise in the matter before the Tribunal.
50. A separate representative should seek out the views and opinions of the person with a disability wherever possible and present these to the Tribunal but they are not limited to conveying only those views. The role of a separate representative is not only to seek and inform the Tribunal of the wishes of the subject person but ultimately to represent the best interests of the person rather than act on instructions.

51. A separate representative may also canvass the views of all others involved in the proceedings and make a submission to the Tribunal, based on all the available information, about what is the best outcome for the person with a disability.

Wright J

President

14 November 2014