THE ROLE OF NCAT'S GUARDIANSHIP DIVISION[1]

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NCAT and the Guardianship Division

1 The NSW Civil and Administrative Tribunal (the Tribunal or 'NCAT') commenced operations on 1 January 2014, creating a 'one-stop shop' for specialist tribunal services in the state of New South Wales.

2 The Tribunal deals with a broad and diverse range of matters, from tenancy issues and building works, to professional discipline, to decisions on guardianship and administrative review of government decisions. Consolidating the work of 22 former tribunals into a single point of access, the Tribunal provides services that are prompt, accessible, economical and effective. One of the former tribunals which now falls under the NCAT umbrella is the former Guardianship Tribunal. That work is now performed by the Guardianship Division of NCAT.

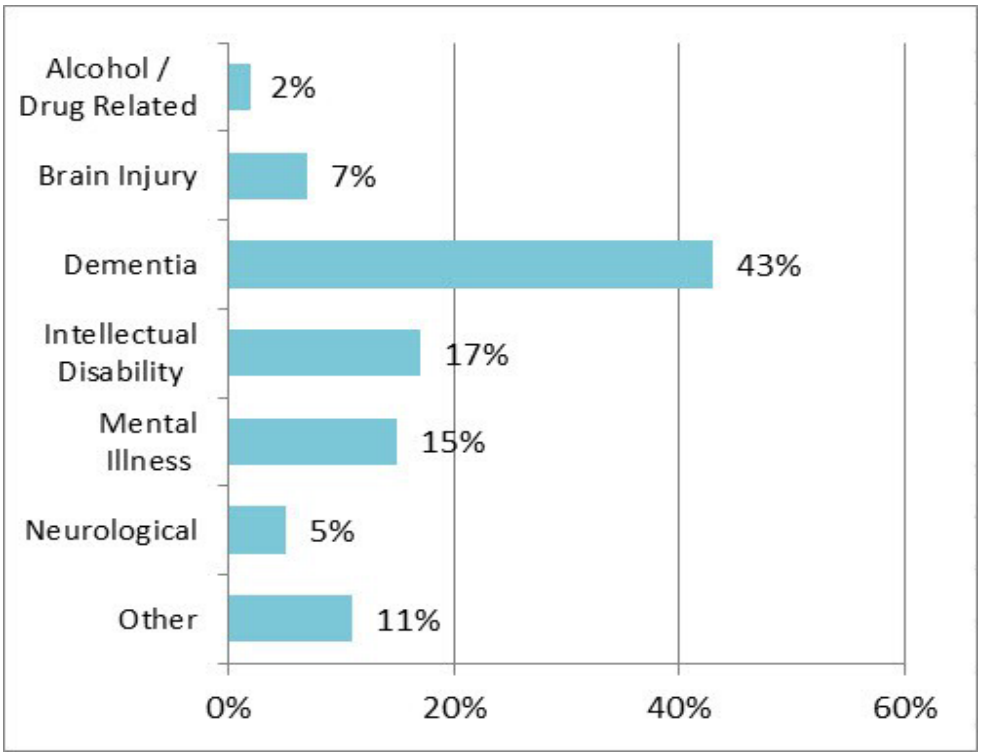
3 As is reflected in the table below, in the first two years of the then Guardianship Tribunal's operation, that is, from 1989-1991, 47.2% of its clients were people with an intellectual disability and 33.8% of its clients were people with dementia. Most of its clients were under 61 years of age (54.9%). The Tribunal received 4,988 applications and conducted 2,973 hearings.

4 In the financial year 2015/2016, 17% of the Tribunal's clients were people with an intellectual disability and 43% of its clients were people with dementia. A further 15% were people with a mental illness. Over 60% of the Tribunal's clients were over 65 years of age. The Tribunal attended to 10,384 applications or reviews of orders and conducted 7,792 hearings. The Tribunal experiences an average growth of 17% per year in the number of applications lodged with the Guardianship Division, something that is unlikely to abate given the broader aging population.

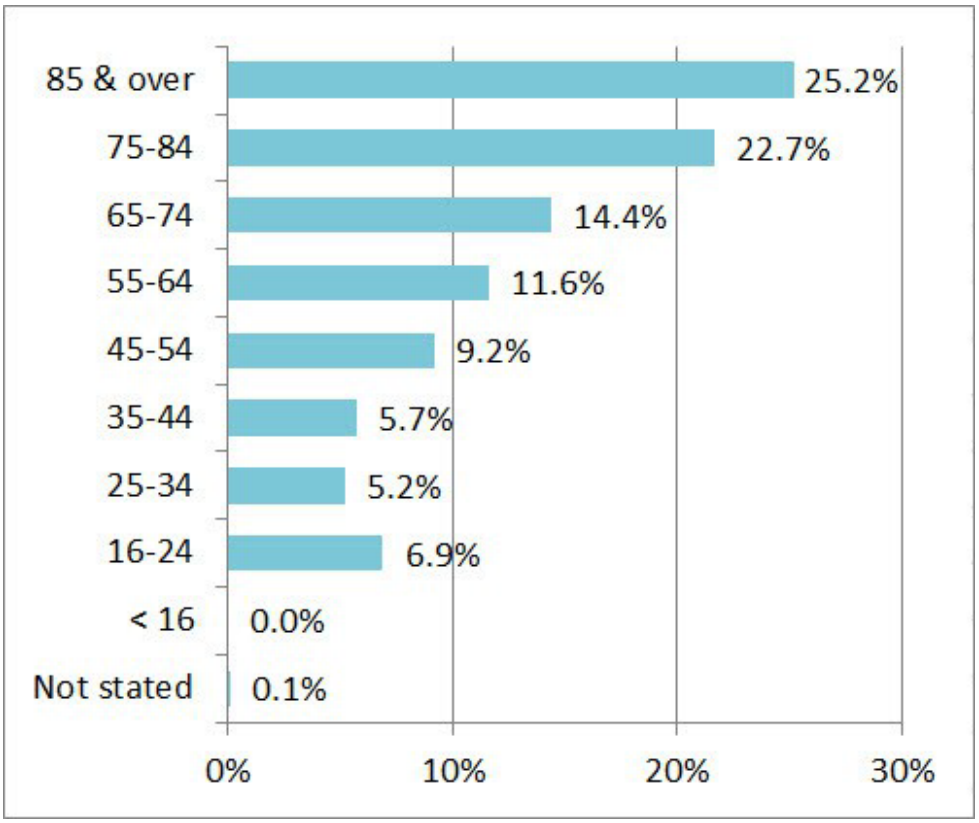
[1] Presented at UNSW Elder Law Seminar, 22 November 2016.

	First two years of the Tribunal's operation (1989 - 1991)	In the last financial year (2015/2016)
No. of application received	4,988	10,384
No. of hearings conducted	2,973	7,792
% of clients aged over 65	Less than 45%	More than 60%
% if clients with Dementia	33.80%	43%
% of clients with an intellectual disability	47.20%	17%

5 The following graph depicts the distribution of applications received by the Division in the last financial year, by disability:



Graph 1 - Disability identified in the applications received in 2015-2016



Graph 2 – Age demographic of people the subject of applications 2015-2016

6 The changing demographics of the Australian population, and in particular the increase in numbers of people experiencing dementia, makes consideration of these matters all the more pressing. According to a study by Deloitte Access Economics, NSW had 91,308 people with dementia in 2011, projected to increase to 303,673 people by 2050[2].

Functions and Guiding Principles of the *Guardianship Act 1987* (NSW)

7 The Guardianship Division of NCAT appoints substitute decision makers for adults with a decision-making incapacity. The following types of applications are received:

- Guardianship (Part 3 *Guardianship Act*)
- Financial Management (Part 3A *Guardianship Act*)
- Medical and Dental Consent (Part 5 *Guardianship Act*)

[2] Deloitte Access Economics, "Dementia Across Australia: 2011-2050", 9 September 2011, p16, available at https://fightdementia.org.au/sites/default/files/20111014_Nat_Access_DemAcrossAust.pdf [accessed 4 September 2015]

- Reviews of Enduring Powers Of Attorney instruments (Part 5, Div 4, *POA Act*)
- Reviews of Enduring Guardianship instruments (Part 2 *Guardianship Act*)
- Approval of Clinical Trials (Part 5, Div 4A *Guardianship Act*)

8 It appoints guardians for personal, health and lifestyle decisions, financial managers for financial and/or legal decisions, it reviews guardianship and financial management orders, it also reviews enduring guardianship appointments and enduring powers of attorneys and provides consent to medical treatment and special medical treatment (a special category of treatment defined in the law that affect a person's fertility e.g. sterilisation) and it approves clinical trials.

9 The Guardianship Division of the Tribunal must observe the principles in section 4 of the *Guardianship Act 1987* (NSW) (Guardianship Act). These principles state that everyone exercising functions under the Act with respect to people with a disability has a duty to:

(a) give the person's welfare and interests paramount consideration;
(b) restrict the person's freedom of decision and freedom of action as little as possible;
(c) encourage the person, as far as possible, to live a normal life in the community;
(d) take the person's views into consideration;
(e) recognise the importance of preserving family relationships and cultural and linguistic environments;
(f) encourage the person, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs;
(g) protect the person from neglect, abuse and exploitation; and
(h) encourage the community to apply and promote these principles.

10 The s 4 principles are a "statutory expression of the purposive character of the Supreme Court's inherent (*parens patriae*) protective jurisdiction" (*C v W* [2015] NSWSC 1774 at [90]).

11 Further, as explained by Justice Lindsay in *P v NSW Trustee and Guardian* [2015] NSWSC 579 (at [52]), the protective jurisdiction exercised under the *Guardianship Act* is:

> governed by a central informing idea; that the jurisdiction exists for the care of those who are not able to take care of themselves…and that an exercise of

> the jurisdiction affecting a person in need of protection must be for the benefit, and in the best interests, of that person as an individual, not for the benefit of the state, or others, or for the convenience of carers…Implicit in the focus on a person in need of protection "as an individual" is respect for his or her autonomy".

12 Where there is a suitable person available and willing to be appointed as the substitute decision-maker for the person who is the subject of the application, the Tribunal must consider that person for appointment. Where there is no such person available or, in the case of guardianship, the person does not satisfy the requirements of s 17(1) of the Guardianship Act, then the Tribunal may appoint the Public Guardian for guardianship matters and the NSW Trustee and Guardian for financial matters, both statutory office holders.

13 As at 30 June 2015, there were 10,999 people whose finances were being managed by the NSW Trustee & Guardian and a further 3,771 people whose finances were being managed by a private financial manager.[3] There were 2096 people under responsibility of the Public Guardian.[4]

14 The Tribunal exercises functions under the following legislation:

- *Civil and Administrative Tribunal Act 2013* (CAT Act)
- *Civil and Administrative Tribunal Rules 2014* (CAT Rules)
- *Civil and Administrative Tribunal Regulation* 2013 (CAT Regulation)
- *Guardianship Act 1987*
- *Guardianship Regulation 2016*
- *Children and Young Persons (Care and Protection) Act 1998*
- *NSW Trustee and Guardian Act 2009*
- *Powers of Attorney Act 2003* (POA Act)

15 The Supreme Court of NSW also has concurrent jurisdiction with the Tribunal in relation to certain matters as well as its inherent protective jurisdiction.

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[3] NSW Trustee & Guardian, "NSW Trustee & Guardian Annual Report 2014 – 2015", 30 June 2015, p13, available at http://www.tag.nsw.gov.au/verve/_resources/NSWTG_Annual_Report_2014-2015.pdf [accessed 16 November 16, p 13]

[4] NSW Trustee & Guardian, "NSW Trustee & Guardian Annual Report 2014 – 2015", 30 June 2015, p45, available at http://www.tag.nsw.gov.au/verve/_resources/NSWTG_Annual_Report_2014-2015.pdf [accessed 16 November 16, p 13]

16 When exercising functions, the Guardianship Division of the Tribunal must also seek to give effect to the objects of the CAT Act as set out in s 3, the guiding principles set out in s 36(1) of facilitating the "just, quick and cheap" resolution of "the real issues in dispute" and the implementation of these principles in a way that it proportionate to the importance and complexity of the subject matter of the proceedings (s 36(4)).

Tribunal Processes

Access to justice in a protective jurisdiction

17 Anyone with a genuine concern with the welfare of a person who is incapable of making his or her own decisions may apply to the Guardianship Division of the Tribunal.[5] To facilitate access to its protective jurisdiction, no fees are required for lodging an application in the Guardianship Division. The protective framework within which the Tribunal operates underpins the work of both the Tribunal's members and staff.

Preparing applications for hearing

18 The focus on the interests of the person with a disability is reflected in the work that the Division's staff undertake before an application or review of an order is heard by the Tribunal.

19 In every case before the Guardianship Division, Tribunal officers strive to involve the person with a disability in the pre-hearing case preparation process as much as possible. Tribunal staff use their experience and expertise in a range of disability fields to communicate with the person with a disability to explain the Tribunal's role, seek the person's view about the case before the Tribunal and assist with any questions or concerns the person may have.

20 Tribunal officers also contact the applicant and the parties to provide them with information about the Tribunal hearing and clarify what evidence is required.

Hearings in the Guardianship Division of the Tribunal[6]

21 The Tribunal will schedule hearings to allow sufficient time for appropriate exploration of the person's circumstances and his or her need for orders to be made. However,

[5] Guardianship Act, ss 9(1), 25I(1).
[6] Guardianship Tribunal, "24 years – empowering and protecting" Annual Report 2012/2013, p 21

the Tribunal can convene an urgent hearing within hours of receipt of an application. These hearings are often conducted by telephone. The Tribunal operates an after-hours service where urgent applications are made and need to be heard outside normal business hours. The hearing rooms at the Tribunal's premises are less formal than a court room and are designed to assist the person with a disability to feel at ease, if such a thing is possible in the context of a hearing. Hearings may also be conducted by video conferencing and parties may participate by telephone.

22 The Tribunal does not follow an adversarial approach in the conduct of its hearings and in its decision making. It uses more inquisitorial methods and the Tribunal may inform itself on any matter in such manner as it sees fit.[7] The Tribunal is not bound by the rules of evidence however it must act in accordance with the rules of natural justice.[8] During a hearing the Tribunal focuses on the issues concerning the person with a disability and will try, where possible, to facilitate the person's participation and to seek his or her views.

23 The Tribunal is able to make arrangements for parties with particular needs. Where appropriate, the Tribunal arranges the attendance of accredited interpreters to assist parties participating in hearings. Interpreters were used on 767 occasions during the 2015/2016 financial year and provides services across 50 different languages.

24 Although the Tribunal premises and staff are located in Sydney CBD, the Tribunal conducts hearings in a number of metropolitan, regional and rural locations across New South Wales. This facilitates access to the Tribunal and participation in proceedings by people with disabilities for whom applications are made, their family, friends and professionals and service providers.

25 In 2014/2015 the Tribunal conducted approximately 37% of its hearings outside the Sydney CBD at locations including Albury, Armidale, Ballina, Blue Mountains, Bowral, Central Coast, Coffs Harbour, Dubbo, Goulburn, Lismore, Mittagong, Moruya, Newcastle, Nowra, Orange, Port Macquarie, Queanbeyan, Shoal Bay, Stockton, Tamworth, Taree, Tweed Heads, Wagga Wagga, Wollongong and other locations in the Sydney metropolitan area.

[7] CAT Act, s 38(2).
[8] CAT Act, s 38(2).

Medical evidence relied upon in guardianship matters

26 One of the key aspects of the preparation of matters for hearing by Registry staff is the effort made to ensure at least two reports have been provided by medical or allied health professionals concerning the application before the Tribunal. As applications to the Tribunal can be made by any person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person, it is possible that the applicant may not have access to relevant medical information that may assist the Tribunal. Accordingly these reports are sought from health professionals by the Tribunal as a matter of course in guardianship and financial management matters and provided by a range of health professionals without the provision of a fee. The Tribunal relies heavily on the good will of health professionals in assisting the Tribunal to carry out its role in a protective jurisdiction to protect and promote the welfare and best interests of people with disabilities. Very often, general practitioners working in country towns or regional areas where there may be little access to specialist services will be called upon to provide their professional opinion as to whether a 'person's disability affect their capacity to make informed decisions' about their 'accommodation, care and services, health and medical care and their financial affairs and any other area'.

27 There are two issues to note in relation to medical assessments of capacity in guardianship proceedings. The first is that there are different definitions of and levels of capacity relative to the nature of the decision-making in question. The second is that a definitive diagnosis of the nature of a person's disability, although helpful and persuasive, may not be necessary where there is powerful evidence of the extent of a person's capacity in one or more areas.

Capacity – Overview

28 The definition and test (in a legal sense) for 'capacity' varies depending on the nature of the task for which one's capacity is being assessed. Legal practitioners are asked to ensure that their clients are competent to give instructions in legal matters. This becomes particularly relevant where a person goes to a solicitor to make or amend a will and to draw up substitute decision making documents, known in NSW as enduring guardianship and enduring powers of attorney instruments. The validity of these instruments can be challenged in the Tribunal, both on the basis that they were not validly made and also on the basis that they are not operating in the best

interests of the principal, that is, the appointer. There is no specific case law which gives us a neat answer as to the validity of the making of such instruments. Instead, we rely on the general test at law for a person's capacity to make a legal instrument.[9]

29 The High Court in the case of *Gibbons v Wright*[10] stated:

> "[T]he mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument and may be described as the capacity to understand the nature of that transaction when it is explained."

30 Another way that this has been explained is:

> Despite the many different legal tests for capacity, the fundamental issue is whether the client is able to:
>
> - understand the facts involved in the decision-making and the main choices;
> - weigh up the consequences of those choices and understand how the consequences affect them; and
> - communicate their decision."[11]

31 A discussion of the differing nature of the test for capacity, depending on the nature of the transaction in question, is provided in the decision of *Guthrie v Spence* [2009] NSWCA 369, [174]-[175] (Campbell JA (with whom Basten JA and Handley A-JA agreed)):

> Under the general law there is no single test for capacity to perform legally valid acts – rather, capacity is decided, in relation to each particular piece of business transacted, by reference to whether the person has sufficient mental ability *'to be capable of understanding the general nature of what he is doing by his participation'*, and concerning any legal instrument *'is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained* ': *Gibbons v Wright* (1954) 91 CLR 423 at 437–8 per Dixon CJ, Kitto and Taylor JJ. Thus, capacity of both children and adults to give evidence is dependent, in broad terms, on being able to understand the nature and significance of the task that is involved in giving evidence: Heydon, *Cross on Evidence*, 7th Australian edition, (2004), para [13050]- [13065], pp 376-83. Capacity to consent to medical treatment depends on the ability of the person in question to understand fully what is proposed:

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[9] See also Ward J, Legal capacity then and now: The potential repercussions of neuroscientific studies; STEP Conference, 29 May 2014.
[10] *Gibbons v Wright* (1954) 91 CLR 423 at 438
[11] Jenna MacNab, "Capacity: A practical guide for lawyers" (2008),46 No.5 *LSJ* 68 at 71. Available at http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/023880.pdf [accessed 4 September 2015]

Secretary, Department of Health and Community services v JWB (Marion's Case) (1992) 175 CLR 218 at 237-8. The familiar test of testamentary capacity laid down in *Banks v Goodfellow* (1870) LR 5 QB 549 and *Re Estate of Hodges; Shorter v Hodges* (1988) 14 NSWLR 698 is dependent on being able to carry out the particular tasks involved in understanding and evaluating the matters that need to be taken into account in deciding what one's testamentary dispositions will be. Capacity to marry is dependent on being able to understand the nature of the relationship of marriage: *In the Estate of Park; Park v Park* [1954] P 89; *Sheffield City Council v E* [2004] EWHC 2808 (Fam); [2005] Fam 326.

The task-specific nature of these tests of capacity has the effect that the one person could have capacity to perform one task, but lack capacity to perform a different task – thus in *Park v Park* the person in question had capacity to marry but lacked capacity to make a will. In *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889; [2003] 1 WLR 1511; [2003] 3 All ER 162 at [27], Kennedy LJ recognised that a personal injuries plaintiff might have capacity to make decisions concerning the litigation including whether or not to settle, but lack capacity to decide (even with advice) how to administer a large award.

Capacity and applications to NCAT

Guardianship

32 The Tribunal may make a guardianship order for a person under s 14(1) of the Guardianship Act if it is satisfied that the person is a "person in need of a guardian". Section 3(1) defines a "person in need of a guardian" as a "person who, because of a disability, is totally or partially incapable of managing his or her person."

33 Under s 3(2) of the Guardianship Act, a reference to a person who has a disability is a reference to a person:

(a) who is intellectually, physically, psychologically or sensorily disabled;

(b) who is of advanced age;

(c) who is a mentally ill person within the meaning of the *Mental Health Act 2007* (NSW)*;* or

(d) who is otherwise disabled;

and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation.

34 The power to make a guardianship order is discretionary but in considering whether or not an order should be made, the Tribunal must have regard to the matters set out in s 14(2) which provides as follows:

> (2) In considering whether or not to make a guardianship order in respect of a person, the Tribunal shall have regard to:
> (a) the views (if any) of:
> (i) the person, and
> (ii) the person's spouse, if any, if the relationship between the person and the spouse is close and continuing, and
> (iii) the person, if any, who has care of the person,
> (b) the importance of preserving the person's existing family relationships,
> (c) the importance of preserving the person's particular cultural and linguistic environments, and
> (d) the practicability of services being provided to the person without the need for the making of such an order.

35 It is not enough for the Tribunal to be satisfied that the person has a disability. The law also requires that, by virtue of that disability, the person is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation (*IF v IG & Ors* [2004] NSWADTAP 3, [24]).

36 The Tribunal must find that the person meets the statutory definition of *person in need of a guardian* as a pre-condition to engaging in the second step of the process (that is, consideration of the factors in section 14(2)) (*IF v IG & Ors* [2004] NSWADTAP 3 (13 February 2004), [25]).

37 Justice Lindsay in *P v NSW Trustee and Guardian* [2015] NSWSC 579 made the following comments about the factors set out in s 3(2) of the Guardianship Act (at [293]-[303]):

> The word "disability" found in section 3(2) is not specifically, separately defined. Its meaning must be inferred from legislative purpose, history and context.
>
> Although the words "with respect to" in section 4 justify a construction of section 4 that requires observance of the stated "general principles" upon consideration whether a person *is* "a person who has a disability", not merely *after* a finding of material "disability" is made, the operation of section 4 does ultimately depend, in terms, on the existence of "a person who has a disability" as defined by section 3(2); *cf, Re D* [2012] NSWSC 1006 at [65]; *CJ v AKJ* [2015] NSWSC 498 at [44]-[48].

The reference in section 3(2)(b) to a person "who is of advanced age" is important. "Age" is not, of itself, a disability. The concept of "advanced age" appears, deliberately, not to be tied to a particular, numerical age but to have a broader scope, depending upon the facts of the case. The frailty of old age, which descends on different people at different ages, appears to be implicitly at the core of any common meaning to be attributed to the expression "advanced age". Such a construction is consistent with the protective purpose of the legislation.

In section 3(2) the words "otherwise disabled" in section 3(2)(d) take colour from the preceding paragraphs, but not exclusively. *Semble*, a person under the legal incapacity of infancy (because aged less than 18 years) falls within the expression "otherwise disabled" although in peak condition.

In section 3(2) the concept of "disability" is measured against the possibility of a consequential "restriction" on the particular person "in one or more major life activities to such an extent that he or she requires supervision or social habilitation".

The concluding words of the subsection, which qualify subparagraphs (a)-(d) jointly and severally, provide a clue to the meaning of the subparagraphs. They refer to a state of being, status or condition potentially capable of giving rise to a "restriction" in "major life activities" to such an extent that a person "requires" supervision or social habilitation.

This is consistent with the embrace of Lord Eldon's identification of the purposive character of the protective jurisdiction, confirmed by *Marion's Case*.

A finding of mental illness is a sufficient, but not a necessary, requirement to satisfy section 3(2) (a)-(d), but even such a finding, of itself, is insufficient to satisfy section 3(2) read as a whole. The subsection, read as a whole and in context, focuses on a person who, by reason of a state of being, status or condition, is in need of "supervision" or "social habilitation".

In the context of sections 25E, 25G and 25M, that need is holistically related to an incapacity for management of the person's estate. The focus of the legislation is not upon a person's state of being, status or condition as such, or upon particular reasons for an incapacity for self-management, but upon functionality; in the present context, the functionality of a person's management capacity.

The word "habilitation" found in section 3(2) is not a word commonly used, unlike its derivative "rehabilitation". Both have Latin roots. The prefix "re" in the word "rehabilitation" means "again, anew". The noun *habilitas* means "aptitude, ability". The verb *habilitare* means "to make fit". The adjective *habilis* means "easily handled, manageable, handy, suitable, fit, proper, apt, nimble, swift".

The expression "social habilitation" (in the context of references to "disability", "restricted", "major life activities" and the word "requires") may be taken to refer to a need for services to help a person to be, or become, able to function normally in community with others.

38 Under s 16 of the Guardianship Act, amongst other things, a guardianship order shall specify whether the order is plenary or limited (s 16(1)(c)). As a matter of practice, the Tribunal does not make plenary guardianship orders.

39 In the case of a limited guardianship order, s 16(2) requires that the order specify:

> (a) the extent (if any) to which the guardian shall have custody of the person under guardianship, and
> (b) which of the functions of a guardian the guardian shall have in respect of the person under guardianship.

40 The functions that may be included in an order (depending on the available evidence) include:

- Accommodation – decisions about where a person will reside.
- Services – decisions about access to services, for example, meals on wheels.
- Medical and Dental Consent – giving or withholding consent to specific treatment.
- Health care – for example, putting in place a health care plan, deciding to seek a second opinion from a specialist
- Access – decisions about who may/may not visit the person.
- Restrictive Practices – decisions about behaviour support and intervention.
- Advocacy – advocating generally for the person

41 All guardianship orders are time limited. Initial orders are usually made for no longer than one year[12] but in certain specified circumstances can be made for a period up to three years.[13] On review, guardianship orders may be made up to three years[14] and, in certain specified circumstances, up to five years.[15] Temporary (30 day) guardianship orders may be made appointing the Public Guardian.[16] These orders are reviewed before the end of the 30 days.

[12] Guardianship Act, s 18(1)(a).
[13] Guardianship Act, s18(1A)(a).
[14] Guardianship Act, s 18(1)(b).
[15] Guardianship Act, s 18(1A)(b).
[16] Guardianship Act, s 16(1)(b).

42 Guardianship orders can appoint more than one guardian with separate or shared functions.[17] Orders are reviewed at the end of the term, however a review may be requested at any time.[18]

Financial management

43 The basis upon which the Tribunal may make a financial management order is set out in s 25G of the Guardianship Act:

> **25G Grounds for making financial management order**
> The Tribunal may make a financial management order in respect of a person only if the Tribunal has considered the person's capability to manage his or her own affairs and is satisfied that:
>
> (a) the person is not capable of managing those affairs, and
>
> (b) there is a need for another person to manage those affairs on the person's behalf, and
>
> (c) it is in the person's best interests that the order be made.

44 Over time, there have been different interpretations by the Supreme Court in the approach to be taken in assessing a person's capacity to manage their own financial affairs. However, in the case of *P v NSW Trustee and Guardian* [2015] NSWSC 579, there was a reconsideration of how to interpret s 25G of the Guardianship Act.

45 Previously the Court tended towards an objective assessment of a person's ability to deal competently with "the ordinary routine affairs of man."[19] However, the extent of the financial management required was considered to be relevant to the determination of the issue:

> "Whilst one does not have to be a person who is capable of managing complex financial affairs, one has to go beyond just managing household bills." (*H v H*, unreported, NSW Supreme Court, Young J, 20 March 2000).

46 In *P*, a consideration of the subjective circumstances of the individual was considered to be preferable. Justice Lindsay still considered the question of capacity within the context of a protective jurisdiction and cautioned that a holistic approach should be taken with regard to the governing legislation in light of the protective jurisdiction that

[17] Guardianship Act, s 16(3).
[18] Guardianship Act, Part 3, Division 4.
[19] *PY v RJS & Ors* [1982] 2 NSWLR 700 per Powell J at 702

has been set up by the legislation.[20] Justice Lindsay states that the purpose of the protective jurisdiction is:

> "To protect a person incapable of managing his or her own affairs in a proper and provident manner, because he or she is liable to be robbed by anyone, giving rise to a necessity of taking care of him or her."[21]

47 Of central significance is the functionality of the management capacity of the person (*PB v BB* [2013] NSWSC 1223, Lindsay J). Other cases suggest that capacity needs to be assessed "in the light of objective physical facts concerning the relevant person's property, money and other assets and the way the person is able to look after them (*P v R* [2003] NSWSC 819, Barrett J; *Re D* [2012] NSWSC 1006, White J).

48 In *P*, the Court went onto note (at [307]-[308]) that:

> "[A] focus for attention is whether the person is able to deal with (making and implementing decisions about) his or her own affairs (person and property, capital and income) in a reasonable, rational and orderly way, with due regard to his or her present and prospective wants and needs, and those of family and friends, without undue risk of neglect, abuse or exploitation".

49 In considering whether the person is "able" in this sense, attention may be given to their past and present experience as a predictor of the future course of events, as well as the extent to which the person, placed as he or she is, can be relied upon to make sound judgments about his or her welfare and interests ([at 309]).

50 The support systems available to the person need to also be considered.

51 Financial management orders will only be made if there is a need for an order. In considering that possibility the Tribunal will assess whether there are any informal arrangements in place. Some parties may also have arrangements with Centrelink that are not working. There may also be certain transactions that require a substitute decision maker, for example, to sell a house, or the complexity of the estate means that a financial manager is required.

52 When hearing an application for a financial management order, the Tribunal will also consider what are the person's best interests and this may be linked to the person's

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[20] *P v NSW Trustee and Guardian* [2015] NSWSC 579 at paras 304-314.
[21] *P v NSW Trustee and Guardian* [2015] NSWSC 579, Lindsay J [241].

general welfare, and not just financial interests. Whether an order is in a person's best interests may also require consideration of whether the person needs protection from abuse or exploitation, improve their quality of life or allow greater access to family or cultural activities. However, in some cases, orders may not be in the person's best interests.

53 The complexity of estates and an individual's requirements is considered when making financial orders and as such orders may include exclusion clauses,[22] for example, to exclude Centrelink benefits and savings accounts. See, however, views expressed by Justice Lindsay in relation to the limitations of exclusions orders (*Re Application for Partial Management Orders* [2014] NSWSC 1468; *Re W and L Parameters of Protected Estate Management Orders)* [2014] NSWSC 1106).

54 Financial management orders are generally not time limited unless the Tribunal specifies the order should be "reviewable".[23] Orders can be reviewed, varied and revoked upon request at any time.[24]

55 Interim financial management orders may be made pending further consideration of the person's capability to manage their own affairs – for up to six months.[25]

Medical and dental treatment

56 Part 5 of the *Guardianship Act* provides the legislative framework for substitute decision making in relation to medical and dental treatment in NSW, either by the Tribunal, a 'person responsible', or without consent if the treatment is necessary, as a matter of urgency, to save life, prevent serious damage to health or to prevent suffering or the continuation of significant pain or distress.[26]

57 Part 5 only applies, however, to a patient who is above the age of 16 years and "who is incapable of giving consent to the carrying out of medical or dental treatment".[27]

58 Section 33(2) of the Guardianship Act gives meaning to incapability, namely:

[22] Guardianship Act, s 25E(2).
[23] Guardianship Act, s 25N(1).
[24] Guardianship Act, Part 3A, Division 2.
[25] Guardianship Act, s 25H.
[26] Guardianship Act, s 37(1).
[27] Guardianship Act, s 34(1).

- That the person is incapable of understanding the general nature and effect of the proposed treatment, or

- Is incapable of indicating whether or not he or she consents or does not consent to the treatment being carried out

59 The fundamental presumption of capacity is the starting point from which the provisions of Part 5 is considered. The common law presumes that adults have the capacity to make decisions that affect their own lives unless that presumption is rebutted (*Hunter and New England Area Health Service v A* [2009] NSWSC 761 ("*Hunter and New England Area Health Service*") at [23]). Whilst this presumption has not been given explicit statutory force in Part 5 of the *Guardianship Act*, it is nevertheless regarded as starting from this basis given that Part 5 of the *Guardianship Act* only has application if a person is incapable of giving consent to the carrying out of medical or dental treatment pursuant to s 34(1).

60 The provisions of the Guardianship Act dealing with incapability are consistent with the principles surrounding the common law understanding of capacity.[28] The Tribunal's decision in *UMG* [2015] NSWCATGD 54 notes the following principles set out in the case law.

61 In *Hunter and New England Area Health Service* (at [24]), the Court noted that:

> it is necessary to bear in mind that there is no sharp dichotomy between capacity on the one hand and want of capacity on the other. There is a scale, running from capacity at one end through reduced capacity to lack of capacity at the other. In assessing whether a person has capacity to make a decision, the sufficiency of the capacity must take into account the importance of the decision (as Lord Donaldson pointed out in Re T at 113). The capacity required to make a contract to buy a cup of coffee may be present where the capacity to decide to give away one's fortune is not.

62 The decision in *Hunter and New England Area Health Service* was applied in *Re JS* [2014] NSWSC 302 where Justice Darke stated (at [18]):

> In deciding whether a person has capacity to make a particular decision, the ultimate question is whether the person suffers from some impairment or disturbance of mental functioning so as to render him or her incapable of making the decision. That will occur if the person is unable to comprehend

[28] *UMG* [2015] NSWCATGD 54, [147].

> and retain the information which is material to the decision, in particular as to the consequences of the decision, or is unable to use and weigh the information as part of the process of making the decision (see Hunter at [25]).

63 These authorities adopt formulations of the common law test outlined in a number of UK decisions including *Re MB* [1997] 2 FCR 514 (see, in particular, 553-554) and *In re T (Adult: Refusal of Treatment)* [1993] Fam 95.

64 In the case of *In Re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290, Thorpe J considered that in order for a finding of incapacity to be made, "the question to be decided is whether it has been established that [the patient's] capacity is so reduced…that he does not sufficiently understand the nature, purpose and effects of the proffered [treatment]" (at 295). He applied the following analysis to the decision making process (at 295):

- Comprehending and retaining treatment information
- Believing it
- Weighing it in the balance to arrive at a choice

65 In NSW, a 'person responsible' can consent to major and minor medical treatment.[29] If the patient (over 16 years of age) does not have capacity, then the person responsible hierarchy applies. In order of responsibility the following persons can consent: guardian (includes enduring guardians) with a medical and dental consent function; spouse (close and continuing relation and includes same sex and de facto); carer (not a professional paid carer); a close relative or friend.[30]

66 When giving consent a person responsible must have regard to the views of the patient.[31] The hierarchy is meant to be automatic and flexible to the circumstances.

67 There are circumstances where only the Tribunal can give consent. For example, the only the Tribunal may consider a request to consent to what is referred to as special medical treatment which is treatment that, for example, would have the effect of rendering a person infertile or terminating a pregnancy.[32]

[29] Guardianship Act, 36(1).
[30] Guardianship Act, s 33A(4).
[31] Guardianship Act, s40(3)(a).
[32] Guardianship Act, s 36(1)(b).

68 The Tribunal can also consent even in circumstances where a person is objecting to the proposed treatment. A guardian appointed by the Tribunal may also override a person's objections to treatment but only if the guardian has been given a special authority to do so.[33]

Review of the making, operation and effect of enduring powers of attorney

69 The Tribunal, on application of an interested person, can review the making, operation and effect and revocation of enduring powers of attorney under s 36 (1) and 36 (2), of the POA Act. The Tribunal may then make orders under 36 (3) and (3A) of the POA Act respectively, declaring that the principal did or did not have capacity to make a valid power of attorney or capacity to revoke a power of attorney.

70 When reviewing the **making** of an enduring power of attorney under s 36(1) of the POA Act, the Tribunal may make:

> (a) an order declaring that the principal did or did not have mental capacity to make a valid power of attorney,
>
> (b) an order declaring that the power of attorney is invalid (either in whole or in part) if the tribunal is satisfied:
>
> > (i) the principal did not have the capacity necessary to make it, or
> >
> > (ii) the power of attorney did not comply with the other requirements of this Act applicable to it, or
> >
> > (iii) the power of attorney is invalid for any other reason, for example, the principal was induced to make it by dishonesty or undue influence

71 As there is no statutory test for the capacity to make an enduring power of attorney in the POA Act, the Tribunal must have regard to the common law when determining capacity in applications to review the making of an enduring power of attorney.

72 The authoritative statement of the test for capacity from *Gibbons v Wright* has already been set out.

73 In *Ranclaud v Cabban* (1988) NSW ConvR 57 (55-385) Young J furthers this discussion about capacity in the context of making a power of attorney:

[33] Guardianship Act, s 46A.

> Such a power permits the donee to exercise any function which the donor may lawfully authorise an attorney to do. When considering whether a person is capable of giving that sort of power one would have to be sure not only that she understood that she was authorising someone to look after her affairs but also what sort of things the attorney could do without further reference to her.

74 Thus, a person has capacity to make an enduring power of attorney if he or she understands both the nature and effect of the document when it is explained to the person. The person must be able to demonstrate his or her understanding by communicating this back to the person who did the explaining.

75 In *Szozda v Szozda* [2010] NSWSC 804 Barrett J dealt with an application and cross-claims in relation to several enduring powers of attorney that had been executed by Mrs Szozda in favour of various family members.

76 Barrett J assessed the case law in relation to capacity, beginning with *Gibbons v Wright* and the principle that a principal must be capable of understanding the nature of the transaction when it is explained [27]. His Honour accepted the proposition that the degree of understanding required to make a power of attorney will differ according to the relative complexity of the principal's estate, quoting Young J in *Ranclaud v Cabban* (above) [29]. Forrest J applied the *Ranclaud* test in *Ghosn v Principle Focus Pty Ltd & Ors* (No 2) [2008] VSC 574, stating that the Court needed to be satisfied that the donor had:

> A more intricate understanding of the consequences of the powers of attorney, and in particular the actions that could be taken by [the attorney] in relation to the companies and the trust properties... Each instrument and its execution is to be examined in accordance with the accompanying circumstances.

77 Barrett J then turned to the proposition that the relevant test for capacity to make a general or enduring power of attorney is analogous to the test for testamentary capacity, finding that the analogy is questionable [31 – 32]. However, he ultimately goes on to say that whilst the decision to create a power of attorney differs from the one to create a will, it "must be regarded as of a similar degree of complexity or even greater complexity" [35].

78 His Honour ultimately finds:

> The only matter that can sensibly become the subject of assessment is the creation of the power of attorney itself, for use as and when the need may arise in the future. It is the nature of that act (by which I mean to include its ramifications and consequences) that the donor must sufficiently understand [32].
>
> The central concept is thus one of complete and lasting delegation to a particular person, albeit with the ability to put an end to the delegation while capacity to do so remains. That concept of empowering another person to act generally in relation to one's affairs raises two basic questions. First, is it to my benefit and in my interests to allow another person to have control over the whole of my affairs so that they can act in those affairs in any way in which I could myself act – but with no duty to seek my permission in advance or to tell me after the event, so that they can, if they so decide, do things in my affairs that I would myself wish to do (such as pay my bills and make sure that cheques arriving in the post are put safely into the bank) and also things that I would not choose to do and would not wish to see done – sell my treasured stamp collection; stop the monthly allowance I pay to my grandson; exercise my power as appointor under the family trust and thereby change the children and grandchildren who are to be income beneficiaries; instruct my financial adviser to sell all my blue chip shares and to buy instead collateralised debt obligations in New York; have my dog put down; sell my house; buy a place for me in a nursing home? Second, is it to my benefit and in my interests that all these things – indeed, everything that I can myself lawfully do – can be done by the particular person who is to be my attorney? Is that person someone who is trustworthy and sufficiently responsible and wise to deal prudently with my affairs and to judge when to seek assistance and advice? The decision is one in which considerations of surrender of personal independence and considerations of trust and confidence play an overwhelmingly predominant role: am I satisfied that I want someone else to be in a position to dictate what happens at all levels of my affairs and in relation to each and every item of my property and that the particular person concerned will act justly and wisely in making decisions? [34].

79 In *Scott v Scott [2012] NSWSC 1541* Lindsay J held that each case must be considered on its own facts:

> Attention must be focussed on all the circumstances of the case, including the identities of the donor and donee of a disputed power of attorney; their relationship; the terms of the instrument; the nature of the business that might be conducted pursuant to the power; the extent to which the donor might be affected in his or her person or property by an exercise of the power; the circumstances in which the instrument came to be prepared for execution, including any particular purpose for which it may ostensibly have been prepared; and the circumstances in which it was executed [199].
>
> An exploration of all the circumstances of the case will, not uncommonly, call for consideration of events leading up to, and beyond, the time of execution of the disputed power of attorney, as well as on the focal point of the time of execution itself. A longitudinal assessment of mental capacity, along a time line extending either side of the focal point, may be necessary, or at least permissible, in order to examine the subject's mental capacity in context [200].

> Where an Enduring Power of Attorney confers on an attorney power to dispose of the principal's property to or for the benefit of the attorney or third parties, the nature and degree of mental capacity required to grant such a power may approximate that required for the making of a valid will. In that event, the "standard" laid down by *Banks v Goodfellow* (1870) LR 5 QB 549 at 564-565 might apply or be approximated [202].
>
> That "standard" is explained in the following terms:
>
> > "It is essential to the exercise of [a power to make a will] that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made." [203].
>
> It is not, literally, a matter of imposing, or recognising, a different "standard" of mental capacity in the evaluation of the validity of different transactions. What is required, rather, is an appreciation that the concept of "mental capacity" must be assessed relative to the nature, terms, purpose and context of the particular transaction. Nothing more, or less, is required than a focus on whether the subject of inquiry had the capacity to do, or to refrain from doing, the particular thing under review [205].

80 His Honour discussed the utility of evidence given by the eligible witness to the section 19 certificate at paragraphs 208–209.

81 If capacity is absent when a power of attorney is granted, the general law position is that the power of attorney is void (*McLaughlin v Daily Telegraph Newspaper Co Ltd (No 2)* [1904] HCA 51).

Review of revocation of an enduring power of attorney

82 The Tribunal's jurisdiction to review a revocation of an enduring power of attorney commenced on 13 September 2013. This jurisdiction applies to revocations executed before the commencement of the amendments to the POA Act (clause 7, schedule 5). There is no prescribed form for a revocation of an enduring power of attorney. Accordingly, the Tribunal may be required to review purported revocations of any form, including oral revocations.

83 Pursuant to s 36(3A) of the POA Act, the Tribunal may make either or both of the following orders with respect to a revocation of an enduring power of attorney:

(a) an order declaring that the principal did or did not have mental capacity to revoke a power of attorney;

(b) an order declaring that the power of attorney remains valid (either in whole or in part) if the tribunal is satisfied:

(i) the principal did not have the capacity necessary to revoke it; or

(ii) the revocation is invalid for any other reason, for example, the principal was induced to make the revocation by dishonesty or undue influence.

84 The discretions in s 36(1) and (2) of the POA Act apply to applications to review a revocation of an enduring power of attorney. The Tribunal may determine not to make any orders under s 36(2) of the Act and instead treat the application to review the revocation of enduring power of attorney as an application for a financial management order pursuant to s 37(1) of the POA Act.

85 For a consideration of some of the issues raised by an application for review of a revocation of an enduring power of attorney, see *FFJ* [2014] NSWCATGD 22; *DSD* [2015] NSWCATGD 45.

Review of enduring guardianship appointments

86 The Tribunal can review the appointment (or purported appointment) of an enduring guardian on request, or on its own motion.[34]

87 Reviews are commonly requested because there are concerns about the way in which an enduring guardian is exercising his or her decision-making authority. Sometimes, allegations are made that the appointment of an enduring guardian was made in circumstances which suggest that it might not have been validly made. For example, there might be allegations of coercion of the appointor, or that the appointor lacked capacity to make the appointment.

88 When it reviews an enduring guardianship appointment under s 6K of the Guardianship Act, the Tribunal may:

- confirm the appointment with no variations to the enduring guardian's functions;

[34] Guardianship Act, s 6J(1).

- confirm the appointment and vary the functions of the enduring guardian;
- revoke the appointment; or
- revoke the appointment, and treat the application for review as if it were an application for guardianship or financial management order or both to be made for the appointor; or
- if it considers that it is in the best interests of the appointor to do so, deal with a review as if an application had been made for a guardianship order, a financial management order, or both.

89 The Tribunal must not revoke an appointment of an enduring guardian unless:

- the enduring guardian requested the revocation; or
- the Tribunal is satisfied that it is in the best interests of the appointor that the appointment be revoked (s 6K(2)).

90 As well as being able to request that the Tribunal revoke the appointment, an enduring guardian has the alternative option of requesting that the Tribunal approve his or her resignation (s 6HB).

91 The principles in section 4 of the Act apply when the Tribunal exercises its function of reviewing appointments of enduring guardians. In identifying the workability of the appointment relevant to the person's best interests, the Tribunal is guided by the objects of the Act (*IS v Public Guardian & Ors* [2009] NSWADTAP 24 at 64).

92 The Guardianship Act does not define the level of capacity a person must have to execute a valid appointment of enduring guardian. Additionally, the Tribunal does not have specific jurisdiction to make a finding about an appointor's capacity to appoint an enduring guardian nor the power to review an appointment on that basis. Nevertheless, evidence about this issue might be relevant in deciding whether it is in the appointor's best interests for the appointment to continue (see *KCE* [2010] NSWGT 1 (6 January 2010)).

93 The Tribunal may also make orders declaring that the appointment of an enduring guardian has effect (Guardianship Act, s 6M).

94 An appointment of an enduring guardian only has effect when the appointor is "a person in need of a guardian" (s 6A). As previously noted, the phrase "a person in need of a guardian" is defined in s 3 of the Act to mean *"*a person who, because of a disability, is totally or partially incapable of managing his or her person".

95 Often, this loss of capacity will be clear, and the authority of the enduring guardian to assume authority under the appointment will be unproblematic. However, sometimes there is a dispute about whether the enduring guardianship appointment is operative, and whether the enduring guardian is legally able to make substitute decisions for the appointor. In these circumstances, an order may be sought seeking a declaration that the appointment has effect.

96 The following examples illustrate some of the circumstances which give rise to applications for an order declaring that the appointment of an enduring guardian has effect:

- It is not clear that the person has lost capacity, because his or her capacity fluctuates or is difficult to assess;
- Other people in the appointor's life, such as family members or health professionals, are challenging the authority of an enduring guardian to make substitute decisions, because they do not accept that the appointor has lost capacity;
- The appointor disputes that he or she has lost decision-making capacity, and continues to act in a way which countermands the actions and decisions of the enduring guardian.

97 For a consideration of some of the issues raised by an application for review of an enduring guardianship appointment, see *QMT* [2015] NSWCATGD 44; *KWD* [2014] NSWCATGD 49; *WBN* [2015] NSWCATGD 9.

Representing clients at the Guardianship Division[35]

98 The issue of capacity may also arise in the context of applications made in the Tribunal seeking leave for a party to be legally represented.

[35] See in general NCAT Guardianship Division, Procedural Direction 2, Representation from which much of the discussion below is drawn.

99 Legal representatives need to consider whether their client has the capacity to instruct. Useful resources include:

- The Law Society of New South Wales' "When a Client's Mental Capacity is in Doubt – A Practical Guide for Solicitors"[36]
- Attorney General's Department "Capacity Toolkit"[37]
- Brereton J "Acting for the incapable: a delicate balance"[38]

100 A party to proceedings in the Tribunal has the carriage of the party's own case and is not entitled to representation.[39]

101 A party may only be represented by an Australian legal practitioner if the Tribunal grants leave for the person to represent the party (CAT Act, s 45(1)(b)(ii)).[40] The Tribunal may grant leave for a particular or any Australian legal practitioner to represent the party.[41]

102 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.[42]

103 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.[43] In making an order granting leave to represent a party, the Tribunal may impose such conditions in relation to the representation as the Tribunal thinks fit.[44]

104 The Tribunal may, as a condition of an order granting leave to a person (including an Australian legal practitioner), require the person to disclose the estimated cost of representation by the person (rule 33 of the CAT Rules).

105 In assessing whether to grant leave in the Guardianship Division, the Tribunal will consider whether representation will promote the principles of s 4 of the

[36] https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1191977.pdf
[37] http://www.justice.nsw.gov.au/diversityservices/Documents/capacity_toolkit0609.pdf
[38] http://www.austlii.edu.au/au/journals/NSWJSchol/2011/16.pdf
[39] CAT Act, s 45(1)(a).
[40] A party may also be represented, if leave is granted by the Tribunal, by someone other than an Australian legal practitioner pursuant to s 45(1)(b)(i). However, the provisions relating to this are not relevant for current purposes.
[41] CAT Act, s 45(1)(b)(ii)).
[42] CAT Act, s 45(3).
[43] CAT Rules, rule 31(1).
[44] CAT Rules, rule 31(2).

Guardianship Act and s 36 of the CAT Act. It may also consider the legal and factual complexity of the matter, issues of fairness between the parties, the seriousness of the interests affected by the proceedings and any disability or other factor impeding a party's capacity to participate in the hearing.

106 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)).

107 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 (cat Act, s 45(4)(c)).

108 The Tribunal has a broad discretion to decide whether a subject person should be separately represented and the section 4 principles of the Guardianship Act also guide the Tribunal's decision to order that a party be separately represented.

109 The Tribunal may decide to appoint a separate representative for the subject person if:[45]

- 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;
- 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;

[45] NCAT Guardianship Division, Procedural Direction 2, Representation.

- 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.

110 The Tribunal's order for separate representation does not guarantee eligibility for legal aid.[46] The provision of a separate representative will be determined by Legal Aid NSW in accordance with their policies.

111 Other than an Australian legal practitioner, with leave, representing a party in proceedings or appearing as a separate representative, legal practitioners may also assist a party in Guardianship Division proceedings in other 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 preparing documents and gathering evidence.

- McKenzie Friend[47] – 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.

Potential conflicts of interest

112 Legal practitioners will need to turn their mind to the question of potential conflicts of interest. It is not uncommon for the potential for conflict to arise in two different contexts in the Guardianship Division:

- First is the situation where a legal practitioner seeks to represent both the subject person and another party (for example, an attorney). The Tribunal should weigh up whether a solicitor has a conflict between the duties owed to each client and consider whether the interests of the clients are identical in the proceedings. Under Rule 11.1 of the New South Wales *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (Legal Profession Conduct Rules):

[46] CAT Act, s 45(5).
[47] *McKenzie v McKenzie* [1971] P33.

> A solicitor and a law practice must avoid conflicts between the duties owed to two or more current clients, except where permitted by this Rule.[48]

The Tribunal will need to consider the issue of possible conflict for the legal practitioner in acting in the interests of the subject of the application and another party. However, it is difficult to reconcile the notion that there is no conflict or likely to be no conflict when the person who is the subject of the application may have cognitive impairment and therefore be unable to identify conflicts or the potential for conflict.

- The second situation is where it is known or becomes apparent that the legal practitioner will be required to give evidence material to the determination of the contested issues in the hearing. For example, where a solicitor has witnessed the purported execution of a power of attorney or appointment of enduring guardian they may have to provide evidence as to how they satisfied themselves that the subject person had the capacity to execute the instruments. A solicitor will not be permitted to appear as an advocate in a matter in which they are to appear as a witness.[49] Clause 27 of the Legal Profession Conduct Rules is as follows:

> 27.1 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court, the solicitor may not appear as advocate for the client in the hearing.
>
> 27.2 In a case in which it is known, or becomes apparent, that a solicitor will be required to give evidence material to the determination of contested issues before the court the solicitor, an associate of the solicitor or a law practice of which the solicitor is a member may act or continue to act for the client unless doing so would prejudice the administration of justice.

Conclusion

113 In this paper I have focussed on aspects of the current legal framework governing the issue of the appointment of substitute decision makers. I now wish to briefly draw attention to national and international developments to reform laws in this area.

[48] *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*
[49] *BPY v BZQ* [2015] NSWCATAP 33 (5 March 2015)

114 The existing substitute decision making model or "best interests" model in NSW, around the country and in many parts of the world has been criticised for being too paternalistic and for taking away the right to self-determination too easily.

115 International law and thinking on the rights of persons with disabilities now favours a model that puts the "will, preferences and rights" of the person concerned at the centre of the decision making process. A *supported* decision making model is preferred to the current *substitute* decision making model, in keeping with the UN Convention on the Rights of Person with Disabilities.[50]

116 In Australia, the debate for reform has largely centred on the need for the implementation of supported decision making over substitute decision making and the various methodologies that could be legislated to allow this.

117 Law reform processes have been underway in Australia as to how supported decision making models can/have/should be incorporated into our domestic laws: See, for example, the Victorian Law Reform Commission, *Guardianship*, Final Report 24, January 2012; Queensland Law Reform Commission, *A review of Queensland's Guardianship Laws*, 2010. Federally, in 2014 the Australian Law Reform Commission published its report entitled 'Equality, Capacity and Disability in Commonwealth Laws', ALRC Report 124.

118 The NSW Law Reform Commission is in the process of reviewing of the NSW Guardianship Act and associated legislation.

119 A real challenge, however, will be how supported decision making, whether introduced by way of legislation or practice, will be practically implemented "on the ground".

120 The National Disability Insurance Scheme has also been a significant reform in this area. The NDIS is a major policy change in Australia concerning the way support and services are provided for eligible people with permanent and significant disability, their families and carers. The scheme is a lifetime disability insurance scheme funded by a 0.5% levy on all tax payers which shifts the model of service delivery from being government funded by service provision to one of individualised support.

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[50] *Convention on the Rights of Person with Disabilities* opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

Individuals will be able to formulate their own support plans, to determine what form of support and services they receive and from whom. The interaction of the NDIS nominee scheme and state based substitute decision making regimes is a matter of current debate especially in relation to people with a high degree of cognitive impairment who do not have a private support network to advocate on their behalf to seek maximum benefit from the NDIS or to initiate a review of a decision of the NDIS.

121 I also note the attention being given to the issue of elder abuse and the question of how to enhance the autonomy of older members of our community with a supported decision making approach, against the call for greater protections for older people who are unable to protect themselves from abuse and exploitation including financial abuse. This topic has also been subject of recent inquiries: See Australian Law Reform Commission, *Protecting the Rights of Older Australians from Abuse*, (2016); Parliament of NSW, *Elder Abuse in New South Wales,* Report 44 (2016).