SUBSTITUTE DECISION-MAKING, THE NDIS, AND THE NDIS QUALITY AND SAFEGUARDS COMMISSION[1]

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INTRODUCTION

1 The intention of this presentation is to provide an overview of substitute decision-making and the guardianship jurisdictions across Australia, to outline functions of substitute decision-making insofar as they interact with the NDIS, and then to conclude with some brief commentary on how the advent of the regulation of the use of restrictive practices by the NDIS Quality and Safeguards Commission has impacted upon the guardianship jurisdiction in NSW.

SUBSTITUTE DECISION-MAKING

The rise of substitute decision-making

2 Like many developed nations, Australia has an ageing population. We enjoy the seventh highest life expectancy in the world. [2] That demographic trend means that increasing numbers of people in our community are diagnosed with dementia and other aged-related conditions which impact upon their cognitive functioning. For example, according to a report commissioned by Dementia Australia, it is estimated there are currently 459,000 Australians living with dementia. Without a medical breakthrough, the number of people with dementia in Australia is expected to increase to 590,000 by 2028 and 1,076,000 by 2058.

3 One of the many ramifications of our ageing population is that more Australians need a lawfully appointed substitute decision-maker than ever before and this is only likely to increase in the years ahead. Using data available from the Guardianship Division of NCAT for illustration purposes, the workload of that Division has increased by 23% over just the last two years, with 59% of all applications being for people 65 years of age and over. Further, the primary diagnosed cause of cognitive incapacity in 41% of all matters before the Division last financial year was dementia.

4 There is a growing importance for all legal practitioners to have a working knowledge of the assessment of capacity applicable to the

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[2] "Human Development Report 2019" (PDF). United Nations Development Programme. 10 December 2019. Retrieved 12 December 2019.

tasks they are being asked to perform and the substitute decision-making regimes that exist in their respective jurisdictions.

5 The following commentary provides a general overview of substitute decision-making in Australia, including automatic substitute decision-making regimes, substitute decision-makers appointed by instrument, and appointments by orders of a court or, most likely, a tribunal or board vested with what is colloquially referred to as "Guardianship jurisdiction".

Automatic Substitute Decision-Making Schemes

6 The vast majority of the Australian population have an available, automatically appointed substitute decision-maker. They did not have to do anything to appoint this person and may even be surprised to learn who may exercise that authority. I am referring to the legislative schemes in place in all Australian jurisdictions, except the Northern Territory (NT), which provides for a substitute decision-maker to turn to for consent to medical treatment if a person is unable to provide their own consent.

7 It is likely that a spotlight will be shone on these various automatic schemes in the weeks and months ahead given the rollout of COVID-19 vaccinations for the Australian population and the need to understand the substitute consent arrangements in place in each jurisdiction if an adult is unable to provide their own consent to vaccination.

8 These automatic schemes are a good example of how all Australian jurisdictions are very similar in the way they provide for substitute decision-making when a person lacks capacity, but how they also use different terminology and sufficiently nuanced differences to be troublesome.

9 Legislation exists in all states[3] and the Australian Capital Territory (ACT)[4] which provides, without the execution of any documentation by a person, a pathway for healthcare professionals to follow to identify who can provide substitute consent to treatment for that person.

10 Despite the fact that the term "next of kin" continues to appear on medical admission documentation around the country, that term is of no legal relevance in any jurisdiction when it comes to identifying a

[3] New South Wales – Part 5 of the *Guardianship Act 1987* (NSW); Tasmania – Part 6 of the *Guardianship and Administration Act 1995* (Tas); Victoria – Part 4 of the *Medical Treatment Planning and Decisions Act 2016* (Vic); South Australia – Part 2A of the *Consent to Medical Treatment and Palliative Care Act 1995* (SA); Western Australia – Part 9D of the *Guardianship and Administration Act 1990* (WA); Queensland – Chapter 4 of the *Powers of Attorney Act 1998* (Qld).
[4] Part 2A of the *Guardianship and Management of Property Act 1991* (ACT).

person's substitute decision-maker for medical treatment. It may also surprise many that for some people, a close friend may be their substitute decision-maker rather than any relative, in circumstances where they do not have a close relationship with a relative.

11 The correct terminology in New South Wales (NSW), Tasmania, South Australia (SA) and Western Australia (WA) is "person responsible". Queensland and the ACT use the term "health attorney" and the Victorians have a "medical treatment decision maker".

12 Each legislative scheme provides a list of people, in priority order, as to who can provide substitute consent to medical treatment.[5] The top of the hierarchy (after an appointed guardian, or equivalent) in all jurisdictions, as you would expect, is a person's spouse, de facto or domestic partner so long as they are in a close and continuing relationship with that person.

13 The order of remaining categories in the hierarchy differs between jurisdictions. In NSW, Tasmania, Queensland and the ACT, the next person on the list is a carer, usually someone who provides domestic care to the individual who lacks capacity to consent, and does not receive remuneration for that care[6]. This is followed by a close relative or a close friend. In Victoria, SA and WA, a close relative takes precedence over a carer. Some jurisdictions go a step further and provide a priority list within a category. For example, in Victoria, if a person does not have an identifiable spouse or carer, then their eldest adult child can provide substitute consent, and if there is no child, their eldest parent, and if no parent, their eldest sibling[7].

[5] *Guardianship Act 1987* (NSW), s 33A; *Guardianship and Administration Act 1995* (Tas) s 4; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14(1); *Medical Treatment Planning and Decisions Act 2016* (Vic) s 55; *Guardianship and Administration Act 1990* (WA) ss 110ZD, 110ZJ; *Powers of Attorney Act 1998* (Qld) s 63(1); *Guardianship and Management of Property Act 1991* (ACT) s 32B.

[6] For example, in NSW, s 3D of the *Guardianship Act 1987* (NSW) provides that a person "has the care of another person" if they, otherwise than for remuneration, provide domestic services and support to the other person, or arrange for the other person to be provided with domestic services and support.

[7] *Medical Treatment Planning and Decisions Act 2016* (Vic) s 55(3).

	NSW	TAS	VIC	SA	WA	QLD	ACT
Title	***Person responsible***	***Person responsible***	***Medical treatment decision maker***	***Person responsible***	***Person responsible***	***Health attorney***	***Health attorney***
Hierarchy	1. Guardian 2. Spouse 3. Carer 4. Close friend or relative	1. Guardian 2. Spouse 3. Carer 4. Close friend or relative	1. Appointed medical treatment decision maker 2. Guardian 3. Spouse 4. Primary carer 5. Oldest of any of the following, in priority order: adult child, parent, adult sibling	1. Guardian 2. Prescribed relative (spouse, de facto, other relatives) 3. Adult friend 4. Carer	1. Enduring guardian 2. Guardian 3. Spouse 4. Nearest relative, in the following order: spouse, child, parent, sibling 5. Primary (unpaid) carer 6. Any other person with a close and personal relationship with the person	1. Spouse 2. Primary (unpaid) carer 3. Close friend or relative (not a paid carer) 4. Public guardian	1. Domestic Partner 2. Carer 3. Close friend or relative

14 There are exclusions to these automatic substitute decision-making schemes. Treatment, invariably described as "special" or "prescribed" treatment[8], which includes for example any treatment which would render the person permanently infertile, cannot be consented to by a person responsible/health attorney/medical treatment decision-maker. Only the person themselves, or in their place, a relevant court or tribunal can consent to such treatment.

15 Similarly, in some jurisdictions, the substitute decision-maker cannot provide substitute consent if the person is objecting to the treatment proposed. [9] In these circumstances, or where there is a dispute between different potential substitute consent givers within a hierarchy, or where there is no one on the hierarchy identified or contactable, is when applications are then usually made to the relevant tribunal or board to determine whether consent should be given for the proposed treatment. In Western Australia, when confusion arises as to when the person responsible regime might be engaged in a given case, and / or the identity of the person responsible in question, s 110ZG of the *Guardianship and Administration Act 1990* (WA) ("the WA Act") provides an application process where the Tribunal can declare that a

[8] For example: *Guardianship Act 1987* (NSW), s 36; *Guardianship and Management of Property Act 1991* (ACT) ss 32A, 70; *Consent to Medical Treatment and Palliative Care Act 1995* (SA) s 14A(3).
[9] For example: s 46(2)(a) of the *Guardianship Act 1987* (NSW).

patient is unable to make treatment decisions, and if not, identify who the person responsible is in the particular case.

16 Armed with the knowledge of the existence of these legislative schemes, we can all evaluate for ourselves who is on our personal hierarchy to provide substitute consent to treatment if we are hit by the proverbial bus. If that list is not quite what you had in mind, there is hope, as anyone with the requisite capacity can appoint by instrument a substitute decision-maker who will then trump the automatic scheme.

Substitute Decision-Makers appointed by instrument

17 A proactive way in which substitute decision-makers can be appointed by an individual on their own behalf is through enduring instruments – namely enduring powers of attorney and/or enduring guardian appointments. In addition, formal advance care directives are a relatively new instrument through which medical and health care decisions can also be made in advance, including decisions about the withholding and the withdrawal of treatment.

18 These various instruments can be a source of great confusion across state and territory borders and it is vital that their respective roles and powers in each jurisdiction are properly understood. For example, an enduring power of attorney in Queensland can authorise a substitute decision-maker to make decisions in relation to health care and consent to medical and dental treatment. This is not the case in New South Wales, where this kind of authority requires the appointment of an enduring guardian.

Substitute Decision-Makers appointed by an order

19 The superior courts of all jurisdictions retain their *parens patriae*, or protective, jurisdictions. Specialised tribunals or boards have been established in all jurisdictions which also effectively exercise the protective jurisdiction which is a codified version of the *parens patriae* jurisdiction. The first to be established was the Guardianship and Administration Board of Victoria which commenced in 1987.

20 These tribunals and boards were established to provide a more accessible and specialised mechanism to appoint substitute decision-makers for people with decision-making incapacity at a time when society was rapidly changing its views on the rights of people with disability. Many large institutions that housed scores if not hundreds of people with disability, often from birth, were closed and a greater focus developed on assisting people with disability to live within the community, such as in group homes as we know them to exist today.

21 The change in societal attitudes also shone a light on how many significant decisions were being made for people unable to make their own decisions, (such as where to live, what medical treatment to have, etc.) by others who had no lawful authority to do so and without any oversight or principled governance. From that background sprung what is often referred to as the Guardianship jurisdiction which we have in Australia today.

22 Apart from in Tasmania, the Guardianship jurisdiction in all states and territories is exercised by Civil and Administrative Tribunals, or as they are often referred to, the Super Tribunals[10]. Tasmania is the only remaining jurisdiction to have a standalone tribunal, the Guardianship and Administration Board of Tasmania (for simplicity, and with apologies to Tasmania, the collective group will be referred to as "Tribunals"). Having said that, the Board is slated for amalgamation come 1 July 2021 into TCAT, due to be established on that date.

23 It is not within the scope of this paper to attempt to outline the practice and procedure of the various tribunals. However, one matter of significance for legal practitioners not acquainted with these tribunals is that, depending on the jurisdiction, there may not be an automatic right of appearance, and leave may need to be sought depending on the party to be represented. All parties require the leave of the respective tribunal to be legally represented in NSW [11] and Victoria[12]. In Queensland, all parties except the person the subject of the application require leave[13] and in Tasmania leave is not required to be represented if you are the applicant, the subject of the application or the Public Guardian[14]. Any party to guardianship proceedings in the remaining jurisdictions may be legally represented without the need to seek the leave of the tribunal.[15]

24 Each of these tribunals has very similar functions but, of course, often use differing terminology to describe them. They determine applications: seeking the appointment of an administrator, [16] or a financial manager [17] (or guardian with financial powers in the NT[18]), to manage a person's financial and legal affairs; seeking the appointment

[10] The New South Wales Civil and Administrative Tribunal (NCAT); the Victorian Civil and Administrative Tribunal (VCAT); the South Australian Civil and Administrative Tribunal (SACAT); the State Administrative Tribunal of Western Australia (WASAT); Queensland Civil and Administrative Tribunal (QCAT); Northern Territory Civil and Administrative Tribunal (NTCAT); ACT Civil and Administrative Tribunal (ACAT).
[11] *Civil and Administrative Tribunal Act 2013* (NSW) s 45(1).
[12] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 62(1).
[13] *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 43(2)(b)(i).
[14] *Guardianship and Administration Act 1995* (Tas) s 73.
[15] *ACT Civil and Administrative Tribunal Act 2008* (ACT) s 30; *State Administrative Tribunal Act 2004* (WA) s 39(1); *Northern Territory Civil and Administrative Tribunal Act 2014* (NT) s 130; *South Australian Civil and Administrative Tribunal Act 2013* (SA) s 56(1)(b).
[16] QCAT, ACAT, WASAT, SACAT, Tas, VCAT.
[17] NCAT.
[18] NTCAT.

of a guardian to make personal, health, and lifestyle decisions for the person; requesting consent to medical treatment; and requesting a review of an enduring power of attorney or an enduring guardianship instrument.[19]

25 The majority of matters dealt with by the guardianship section of each tribunal are applications for the appointment of an administrator/financial manager or a guardian, and the subsequent reviews of such appointments. For example in the last financial year, NCAT's Guardianship Division dealt with 9,535 first instance matters and, of those, 89% related to either financial management or guardianship.

Guardianship Division Lodgements

Substantive Applications	**Subtotal**	**2019/20**	**%**
Guardianship		4,014	42
Requested Review of Guardianship		502	5
Subtotal	4,516		
Financial Management		3,335	35
Requested Review of Financial Management		700	7
Subtotal	4,035		
Enduring Power of Attorney		239	3
Enduring Guardianship		174	2
Review/revocation of an EPA		26	<1%
Medical/Dental Consent		461	5
Recognition of Interstate Appointment		66	<1%
Clinical Trial		20	<1%
Set Aside/Vary Decision		3	<1%
Subtotal of substantive applications	9,535		
Statutory Reviews (Guardianship and Financial Management)		**3,310**	
Total		**12,850**	

26 The following overview of the guardianship jurisdiction is limited to those most popular applications – guardianship and financial management/administration.

[19] The meaning and operation of an "enduring guardian" and "enduring power of attorney" differ from state to state: for example, in NSW, they are two distinct mechanisms – a power of attorney dealing with financial and estate matters and an enduring guardian dealing with lifestyle and health care matters; in Qld, a power of attorney document can deal with financial matters and authorise the appointee to make lifestyle and health decisions for the appointor – functions which are not authorised by a power of attorney in NSW.

Administration / Financial Management

27 The starting point for any tribunal dealing with an application seeking the appointment of a substitute decision-maker is the presumption of capacity. The person who is the subject of the application is presumed to be capable of managing their own affairs unless it is proven that the contrary is the case.[20]

28 Variations between jurisdictions mean any applicant, or their legal advisers, should be aware of the legislative test applicable to their application.[21] This will include ensuring that they have the requisite standing to make the application.[22] However, it is reasonable to summarise the questions all tribunals must determine on such applications as follows:

(a) Is the person incapable of managing their own personal or financial affairs, whether through disability or otherwise as set out in the relevant jurisdiction's legislation?; and

(b) Is there a proper basis / need for an order to be made and is an order in the person's best interests?

29 In determining all applications, tribunals are bound to observe certain principles[23], which, again for summary purposes, generally require them to ensure the person's welfare and interests are protected, whilst also taking account of the person's views and wishes where possible, and taking the least restrictive course of action. That is, not to make orders removing the person's autonomy unless the evidence satisfies the tribunal that there is no viable alternative to doing so. I emphasise this last point on proceeding in the least restrictive manner because this is often a relevant issue when an order is being sought from a tribunal primarily to allow for the commencement, management, or

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[20] For example: s 4(3) of the *Guardianship and Administration Act 1990* (WA). This is also enshrined in the tenor of the statutory threshold criteria to the making of a financial management/administration order – being that unless incapacity/incapability is proven, an order cannot be made. See for example: *Guardianship Act 1987* (NSW) s 25G(a); *Guardianship and Administration Act 2019* (Vic) s 30(2)(a); *Guardianship and Administration Act 1990* (WA) s 64(1).

[21] *Guardianship Act 1987* (NSW) s 25G; *Guardianship and Administration Act 2019* (Vic) s 30; *Guardianship and Administration Act 1993* (SA) s 35; *Guardianship and Administration Act 1990* (WA) s 64; *Guardianship and Administration Act 2000* (Qld) s 12; *Guardianship and Management of Property Act 1991* (ACT) s 8; *Guardianship and Administration Act 1995* (Tas) ss 51(1)-(4).

[22] The requisite status of the person making an application varies from state to state: for instance, in Victoria, "a person" can bring an application for a financial administration order in respect of another person (*Guardianship and Administration Act 2019* (Vic) s 23(1)); in South Australia, the applicant must, at least, have a "a proper interest in the welfare of the person" (*Guardianship and Administration Act 1993* (SA) s 37); in NSW, the applicant (other than in the case of an application made by the NSW Trustee, or the subject person themselves) must have a "genuine concern" for the welfare of the subject person (*Guardianship Act 1987* (NSW) s 25I(1)).

[23] See for example: *Guardianship Act 1987* (NSW) s 4; *Guardianship and Administration Act 2019* (Vic) s 8; *Guardianship and Administration Act 1993* (SA) s 5; *Guardianship and Administration Act 1990* (WA) s 4.

settlement of legal proceedings. The new Victorian Act also establishes the role of a supportive administrator, whose role it is to support the subject person to make a decision themselves, but holds no substitute decision-making authority.[24]

30 Tribunals are generally legislatively bound not to make an order if there is an alternative which is less restrictive upon the person's self-determination.

31 If satisfied that an order should be made, the tribunal must then decide who to appoint. A natural person can be appointed if assessed to be suitable to perform the role and if they have consented to appointment (often referred to as a private administrator/financial manager). If there is no person available found to be suitable to perform the role, the tribunal may appoint the substitute decision-maker of "last resort", the Public Trustee or the equivalent body in each jurisdiction ("the Trustee")[25]. There is also the authority to appoint a trustee corporation for financial decisions in certain circumstances.

32 In most jurisdictions there is no requirement upon the tribunal to obtain the consent of the Trustee before proceeding to appoint them. However, in the ACT and the NT[26] the Trustee's consent is required prior to appointment.

33 Putting aside variations in language, each of the regimes (apart from ACT) provide an administrator/financial manager with explicit authority to take all steps and execute all documentation as required to take possession and control of the person's estate and then proceed to manage the estate in the person's interests.

34 Administrators/financial managers are, to varying degrees, subject to supervision by an independent body. For example, in NSW, the Supreme Court maintains an overarching supervisory role over the NSW Trustee and Guardian and private managers – though the latter to a lesser extent in practice, as private managers are supervised more directly by the NSW Trustee and Guardian.[27]

35 In all jurisdictions, private managers are supervised (through auditing and reporting requirements) by a combination of Trustees, Public Advocates, and/or tribunals.[28] In Queensland, an appointed guardian

[24] *Guardianship and Administration Act 2019* (Vic) s 90. A similar role is established in guardianship.
[25] NSW – the NSW Trustee & Guardian; Vic – State Trustees; Tas – the Public Trustee; WA – the Public Trustee; SA – the Public Trustee; Qld – the Public Trustee of Queensland; NT – the Public Trustee; ACT – the Public Trustee & Guardian.
[26] ACT – *Guardianship and Management of Property Act 1991* (ACT) s 10(1); NT – *Guardianship of Adults Act 2016* (NT) s 13(3)(c).
[27] *NSW Trustee and Guardian Act 2009* (NSW) s 64-66;
[28] Tas - *Guardianship and Administration Act 1995* (Tas) ss 63, 66; SA – *Guardianship and Administration Act 1993* (SA) s 44-45; WA – *Guardianship and Administration Act 1990* (WA) s 80;

can also require an administrator (of the same person) to produce summaries of accounts.[29]

36 Administration/financial Management orders, in all jurisdictions except for NSW, are subject to mandatory periodic review. Victoria requires an order to be "reassessed" within 12 months of an initial order, unless otherwise ordered, and in any event no later than three years (unless otherwise ordered).[30] Some jurisdictions, such as SA, Tasmania, the ACT and the NT, require reviews every three years;[31] others, such as WA and Queensland allow an order to operate for a maximum of five years before it must be brought back for review.[32]

37 An administration/financial management order has significant consequences for a person's autonomy, in that it largely removes a person's legal right to deal with their own estate and manage their affairs. The effect spreads wider than the person's current decision-making, in that it also suspends the operation of any prior appointment of a substitute decision-maker by instrument.

Guardianship

38 Apart from in the NT, guardianship under each legislative scheme refers to personal domains of decision-making not involving financial matters, such as where a person lives, who they live with, and what health care and treatment they should receive.

39 Once an application by someone with standing is made, the starting point for each tribunal as to whether a guardianship order should be made largely depends on how "modern" the jurisdiction's legislation is. In ageing legislation, such as NSW, SA and Tasmania, the tribunal needs to make a positive finding that the person has a disability[33] or mental incapacity.[34] Other jurisdictions have moved away from disability being the trigger for a potential order and focus more on the person's decision-making ability. [35] In Victoria, the new *Guardianship and Administration Act* in-force as of 1 March 2020 defines decision-

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ACT – *Guardianship and Management of Property Act 1991* (ACT) ss 26-27; Vic – *Guardianship and Administration Act 2019* (Vic) ss 16, 61; *Guardianship and Administration Act 2000* (Qld) s 153; NT – *Guardianship of Adults Act 2016* (NT) ss 28, 32.

[29] *Guardianship and Administration Act 2000* (Qld) s 182.

[30] *Guardianship and Administration Act 2019* (Vic) s 159.

[31] SA - *Guardianship and Administration Act 1993* (SA) s 57(1); ACT - *Guardianship and Management of Property Act 1991* (ACT) s 19(2); NT - *Guardianship of Adults Act 2016* (NT) s 101(3).

[32] WA - *Guardianship and Administration Act 1990* (WA) s 84; Qld - *Guardianship and Administration Act 2000* (Qld) s 28.

[33] *Guardianship Act 1987* (NSW) ss 3(1), 14(1); *Guardianship and Administration Act 1995* (Tas) s 22(1).

[34] *Guardianship and Administration Act 1993* (SA) s 29.

[35] *Guardianship and Administration Act 2000* (Qld) s 12; *Guardianship and Management of Property Act 1991* (ACT) s 7; *Guardianship of Adults Act 2016* (NT) s 11.

making capacity to include the ability to make a decision with practicable and appropriate support.[36]

40 All jurisdictions, however, must then determine whether the person is unable to make reasonable judgments about personal matters and, if so, whether there is a proper basis/need to proceed to make an order. The same comments on the requirement upon tribunals to assess the need to make an administration/financial order through the prism of the what is least restrictive to the person's autonomy (see [30] above) applies to the appointment of guardians.

41 In making limited guardianship orders, tribunals are required to spell out in the order which decision-making functions of guardianship are being granted to the appointed guardian. As previously noted, given tribunals are required to proceed in a manner which least restricts a person's autonomy, a function of guardianship will only be granted when the tribunal is satisfied there is a need for a substitute decision- maker for the relevant domain of the person's life. For example, if a person is found to be unable to appropriately make decisions as to their health care due to paranoid beliefs based in a mental illness, it may be that they have a guardian appointed solely with the health care function and to consent to medical treatment, leaving all other personal domains of decision-making with the person.

42 Most jurisdictions have codified the functions of guardianship to some degree.[37] For example, the Tasmanian and Victorian legislation provide functions of guardianship such as determining where the person may live, who they should have access to, and to make healthcare decisions for the person. NSW and SA do not have codified functions but over time their respective tribunals have described functions carved out from the plenary power, such as an accommodation function, a provision of services function, and so on.

43 If satisfied that an order should be made, the tribunal can appoint a natural person if assessed to be suitable to perform the role and if they have consented to appointment (often referred to as a private guardian). If there is no person available or suitable to perform the role, then just like with financial matters, the tribunal may appoint the guardianship substitute decision-maker of "last resort" - the Public Guardian in some jurisdictions, and the Public Advocate in others. [38] Unlike administration/financial management, there are no fees charged

[36] *Guardianship and Administration Act 2019* (Vic) s 5(e).
[37] *Guardianship and Administration Act 1995* (Tas) ss 25(2), 26(1); *Guardianship and Administration Act 1990* (WA) s 45(2); *Guardianship and Administration Act 2019* (Vic) s 3 definition of "personal matter"; *Guardianship and Administration Act 2000* (Qld) sch 2; *Guardianship and Management of Property Act 1991* (ACT) s 7(3); *Guardianship of Adults Act 2016* (NT) s 24.
[38] NSW – the Public Guardian; Vic – the Office of the Public Advocate; Tas – the Public Guardian; WA – the Office of the Public Advocate; SA – the Office of the Public Advocate; Qld – the Office of the Public Guardian; NT – the Office of the Public Guardian; ACT – the Public Trustee & Guardian.

by Public Advocates/Public Guardians for their services and private guardians are not the subject of oversight or supervision other than through regular review by the appointing tribunal.

THE NDIS: APPLICATION AND PLAN MANAGEMENT – IS THERE A ROLE FOR A FORMALLY APPOINTED DECISION MAKER?

44 The National Disability Insurance Scheme (NDIS) has been developed on the basis of recognising the full legal capacity of people with disabilities (in accordance with article 12 of the UN Convention on the Rights of Persons with Disabilities). People with disability are assumed under the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act), so far as is reasonable in the circumstances, to have capacity to determine their own best interests and make decisions that affect their own lives (s 17A(1)). However, there is recognition within legislation that underpins the NDIS that there will be a cohort of people who may need someone to act on their behalf to *access* the scheme and undertake the development and management of their plan. The nominee scheme created by the NDIS Act recognises this and is a form of substitute decision-making in itself.

45 The principles and objects of the NDIS are clearly directed at "enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports". But for those people who are unable to exercise choice and control, even with support, an understanding of the interaction between NDIS and state-based substitute decision-making schemes (and here I can only speak from the perspective of the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT)) is becoming clearer as NCAT hears more cases in relation to applications made for the appointment of guardians and financial managers under the *Guardianship Act 1987* (NSW) (Guardianship Act).

46 NCAT has taken a proactive approach to the way we are managing these applications – from recording applications that have been identified as being prompted by the NDIS, managing them within the Registry, listing and deciding on the constitution of the three-member panels hearing these cases and then closely monitoring the developing case law and publishing decisions online so that they are accessible and can explain some of the likely outcomes if applications for guardianship or financial management are made.

47 The Guardianship Division has kept record of these applications by amending its application forms prior to the roll out so that the applicant could tick a box to indicate that the application was being made because of the NDIS. In the 2019-20 financial year, 1,087 such applications were made. This does not however, capture the many cases that the Guardianship Division has heard that were not prompted

by the NDIS but which nevertheless dealt with issues concerning the person's entitlements under the NDIS.

Access to the Scheme

48 In NSW, applications for the appointment of a substitute decision- maker have been made which were prompted by the perceived need for such decision-makers to be appointed in order for a person to gain access to the NDIS. This perceived need quite legitimately arose from the provisions of the NDIS Act, NDIS Rules, and Operational Guidelines.

49 Section 18 of the NDIS Act provides that a person may make an 'access request' to the NDIA to become a participant in the NDIS launch.

50 Section 19(1) of the NDIS Act provides that an access request must be in the approved form, include the requisite information or attachments and be certified according to any requirements prescribed by the CEO of the NDIA.

51 There are no provisions in the NDIS Act relating to who may make an access request on behalf of a person who does not have the capacity to do so for themselves.

52 The NDIS (Becoming a Participant) Rules 2016 (Cth) (20 February 2017) state that 'A person, or someone who is able to act on their behalf, may make a request under the NDIS Act to become a participant in the NDIS (an access request)' (rule 2.1).

53 The Access to the NDIS Operational Guideline states as follows:

> 4.6 What constitutes a valid access request?
> A valid access request must:
> - have been received by the NDIA;
> - be in the form approved by the NDIA (if a specific form has been approved for use) and contain the information required by the form (section 19(1)(a));
> - include any additional information or documents required by the NDIA (section 19(1)(b)); and
> - be certified by the person, or their representative with legal authority, to include all the information and supporting documents which are in the possession or control of the person (section 19(1)(c)).
>
> After a person makes a valid access request, a person becomes a 'prospective participant' under the NDIS Act (section 9).

54 There is no further explanation or definition of someone with "legal authority" in relation to certifying the access request (in the absence of

the person themselves certifying it). However, this terminology was part of an amendment to the guidelines, whereas previously the guidelines said the appointment of a guardian or representative was necessary to certify an access request.

55 Further, evidence given by an NDIA representative in guardianship proceedings indicated a "common sense" test is usually applied if the request appeared to be provided by a person with the prospective participant's best interests in mind.[39]

56 On these bases, it is now established that a person does not need a guardian or financial manager to access the NDIS.

57 Nevertheless, applications occasionally continue to be made to NCAT seeking the appointment of a substitute decision-maker for a person because the applicant believes that such an appointment is necessary in order for the person to access the NDIS. As tribunals such as NCAT need to be satisfied on the evidence available that there is a need for a formal order appointing a substitute decision-maker, tribunals no doubt take an applicant to task if it is suggested that an order is needed to access the NDIS.

Plan Management – the Nominee Scheme

58 The NDIS Act requires that the CEO of the NDIA must facilitate the preparation of a plan in accordance with the NDIS Rules for each participant in the NDIS (NDIS Act, s 32). The plan must include a statement of the participant's goals and aspirations and a statement of participant supports (NDIS Act, s 33).

59 Section 31 contains principles relating to plans, which require the preparation, review, and replacement of plans, and the management of the funding of supports under a plan, to, so far as reasonably practicable (and among other things):

- be individualised and directed by the participant
- Where relevant, consider the role of family, carers, and other significant persons
- Be underpinned by the right of the participant to exercise choice and control

60 A participant's plan must also specify the reasonable and necessary supports (if any) that will be funded under the NDIS (NDIS Act, s 33(2)(b)) and the management for the funding for supports under the plan (NDIS Act, s 33(2)(d)).

[39] *LBL* [2016] NSWCATGD 22, [16]-[19].

61 Section 42(1) of the NDIS Act explains that "managing the funding for supports" means:

- Purchasing the supports identified in the plan
- Receiving and managing any funding provided by the NDIA, and
- Acquitting any funding provided by the NDIA

62 In specifying the management of the funding for supports mentioned in s 33(2)(d), the plan must (under s 42(2)) specify whether it will be managed, wholly or to a specific extent, by:

i. The participant
ii. A registered plan management provider
iii. The Agency
iv. A plan nominee

63 The role of "Plan Nominee" is undoubtedly where there is the most interplay between the NDIS and the various guardianship jurisdictions. I also hazard to say that there still remains a level of confusion as to when formal substitute decision-makers are required in this domain and there is a resultant number of unnecessary applications made to tribunals such as NCAT.

64 Part 5 of Chapter 4 of the Act explains the role and appointment process regarding plan nominees. Any act that may be done by a participant under the Act that relates to the preparation, review or replacement of a plan, or the management of the funding for supports under a plan, may be done by a plan nominee. [40] It is the duty of every nominee to ascertain the wishes of the person for whom they are appointed and to act in a manner that promotes their personal and social well-being. [41] The nominee scheme is essentially a form of substitute decision-making built into the NDIS legislation – the existence of which means one should always question why a formal appointment from a court or tribunal is required for a person to attend to their NDIS requirements.

65 Plan nominees are appointed by the CEO of the NDIA, or his/her delegate, and a person can only be so appointed if they consent in writing[42] and if the CEO is satisfied they will comply with the duties required of them in s 80 of the Act. In practice, it is my understanding that the appointment process is a relatively straightforward process of the intended nominee making an application in person at an NDIA office.

[40] S 78(1) of the *National Disability Insurance Scheme Act 2013 (Cth)*
[41] S 80 (1) of *National Disability Insurance Scheme Act 2013 (Cth)*
[42] S 88(2) of the *National Disability Insurance Scheme Act 2013 (Cth)*

66 The following provision of the Act is of particular relevance to my presentation today:

> Section 88 - Provisions relating to appointments
> …
> (4) In appointing a nominee of a participant under section 86 or 87, the CEO must have regard to whether there is a person who, under a law of the Commonwealth, a State or a Territory:
>
> (a) has guardianship of the participant; or
> (b) is a person appointed by a court, tribunal, board or panel (however described) who has power to make decisions for the participant and whose responsibilities in relation to the participant are relevant to the duties of a nominee.

67 The National Disability Insurance Scheme (Nominees) Rules 2013 (Cth) provide more elaboration on the nominee scheme, and on the point of who may be appointed, provides at 4.8 (a):

> Matters to take into account when deciding who to appoint as nominee
> …
> 4.8 The CEO is also to have regard to the following:
> (a) the presumption that, if the participant has a court-appointed decision-maker or a participant-appointed decision-maker, and the powers and responsibilities of that person are comparable with those of a nominee, that person should be appointed as nominee…

68 I wish to focus on these provisions because I believe they are not infrequently misconstrued and as a result those supporting a person in the NDIS seek appointment as a substitute decision-maker from bodies such as NCAT so they might perform the role of nominee when they do not need to do so. The legislation is clear. Such an appointment is a factor, no doubt a very relevant and powerful factor, in the NDIA making a nominee appointment, but it is in no way a requirement for a person to be appointed as plan nominee. The vast majority of family members and friends wishing to become plan nominee can undoubtedly achieve this through liaising with the NDIA without going through a tribunal hearing to obtain an order, which in the circumstances I describe, will more often than not fail to produce the order sought, as tribunals are directed to be “least restrictive” when making appointments, and will be loath to do so when there is the availability of appointment via the nominee scheme built into the NDIS.

69 Whilst there are always exceptions, in the main, most successful applications for orders for the appointment of substitute decision-makers will be circumstances where there is dispute between multiple persons seeking to make decisions as to person’s NDIS arrangements, or, there is simply no one in the person’s life to assist, and there is the need to appoint the guardian of last resort, either the Public Guardian, or the Public Advocate, depending on the jurisdiction.

70 There does not appear to be any easily accessible public information about the numbers of nominees appointed under the NDIS. Anecdotally, it is understood that the use of nominees has generally increased since the initial few years of the NDIS rollout.

71 NDIA representatives in at least two NCAT cases[43] have indicated by way of submissions that the NDIA regularly seeks the input of a person's informal support network (family/close friends) to assist in the development of the person's supports plans.

72 When a person does not have family or close friends to assist in an informal manner, it may be in their interests for a guardian to be appointed, as was noted in *KCG* at [69]:

> [W]here the NDIA is making decisions on behalf of a participant and the participant has diminished or no capacity to express a view or be supported to participate in the process, in addition to having no private support network to advocate on their behalf or any person to initiate a review of a decision by the NDIA, then there may be a lack of appropriate safeguards in place. Accordingly, there may be limitations to Miss KCG's NDIS plan being managed by the NDIA without independent scrutiny.

73 See also *HKO* [2016] NSWCATGD 14, [20] and *TQX* [2016] NSWCATGD 56.

74 If a guardian is appointed in these circumstances, it is not clear that an appointment of a financial manager will be needed if all that requires management is the funding of the supports under the plan. This is because, as previously noted, it is likely that the NDIA will manage the funding for supports once decisions have been made about those supports following appropriate advocacy and substitute decision-making carried out by the appointed guardian. It is worth also noting that, as a matter of internal policy, the Public Guardian in NSW does not sign service agreements with NDIS service providers.

75 However, in any event, whether a guardian should be appointed in any given matter will inevitably depend on the fact situation, and if the facts of a case bring to light evidence of a need for a financial management order apart from funds provided under the NDIS, then careful consideration will of course need to be given as to whether such an order can and should be made.

[43] *KCG* [2014] NSWCATGD 7, [60]-[62]; *LBL,* [16]-[19].

NDIS QUALITY AND SAFEGUARDS COMMISSION AND RESTRICTIVE PRACTICES

76 In recent years, an emerging issue which has gained much attention at a policy level is the use of restrictive practices. Whilst this is an issue pertinent to people with disability and their service providers across Australia, different regulatory and consent regimes exist in different states, and so the discussion below will be limited to the NSW context.

77 NSW does not, to date, have a legislative definition of restrictive practices. In a decision on the use of restrictive practices in NSW, the Guardianship Division of NCAT adopted the definition of "restrictive practices" found in s 9 of the NDIS Act (*HZC* [2019] NSWCATGD 8, at [38]):

> Section 9 of the National Disability Insurance Scheme Act 2013 (Cth) defines restrictive practices as "any practice or intervention that has the effect of restricting the rights or freedom of movement of the person with disability". This is consistent with the common usage of the phrase by the Tribunal.

78 Prior to the NDIS, regulation of the use of restrictive practices was done only at a policy level, and consent was to be sought by either the subject person or a guardian appointed by the Tribunal with the function of consenting to the use of restrictive practices.

79 Since the advent of the NDIS, though, new Commonwealth legislation has been developed in the regulation of the support provided under the NDIS, particularly as it relates to the use of restrictive practices. The most significant change to the legislative arena brought about by the implementation of the NDIS is the commencement of the NDIS Quality and Safeguarding Framework which underpins the scheme.

80 Since 1 July 2018, registered NDIS providers in NSW are regulated by the NDIS Quality and Safeguards Commission (NDIS Commission) and are responsible to ensure that consent and authorisation is obtained for the use of all restrictive practices.

81 Registered NDIS providers and behavioural support practitioners must now comply with the requirements set by the NDIS Commission, including those outlined in the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) (the Rules), which commenced on 1 July 2018.

82 The Rules state that a restrictive practice is a regulated restrictive practice if it is or involves any of the following (r 6):

(a) seclusion, which is the sole confinement of a person with disability in a room or a physical space at any hour of the day or night where voluntary exit is prevented, or not facilitated, or it is implied that voluntary exit is not permitted;

(b) chemical restraint, which is the use of medication or chemical substance for the primary purpose of influencing a person's behaviour. It does not include the use of medication prescribed by a medical practitioner for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition;

(c) mechanical restraint, which is the use of a device to prevent, restrict, or subdue a person's movement for the primary purpose of influencing a person's behaviour but does not include the use of devices for therapeutic or non-behavioural purposes;

(d) physical restraint, which is the use or action of physical force to prevent, restrict or subdue movement of a person's body, or part of their body, for the primary purpose of influencing their behaviour. Physical restraint does not include the use of a hands-on technique in a reflexive way to guide or redirect a person away from potential harm/injury, consistent with what could reasonably be considered the exercise of care towards a person;

(e) environmental restraint, which restrict a person's free access to all parts of their environment, including items or activities.

83 The Tribunal in *HZC* adopted both the definition of "restrictive practices" given in s 9 of the NDIS Act, and the defined categories of restrictive practices given under the Rules. Whilst not a tribunal of precedent, decisions of the Guardianship Division since *HZC* have endeavoured to consistently uphold and apply these definitions, and acknowledge the operation of the Commonwealth regulatory framework in the NSW jurisdiction.

84 As noted above, whilst there remains no legislative definition of restrictive practices at a state level in NSW to date, a new draft bill purporting to do that and introduce a new regulatory framework for the use of restrictive practices (on NDIS participants) in NSW, recently completed its public consultation phase.[44]

85 The use and regulation of restrictive practices has also emerged as an issue in the context of aged care provided under the *Aged Care Act*

[44] The Persons with Disability (Regulation of Restrictive Practices) Bill 2021 is available to view online at https://www.facs.nsw.gov.au/inclusion/disability/restrictivepracticesbill.

1997 (Cth). The Quality of Care Principles 2014 (Cth) define and categorise the various kinds of restraint regulated under the Act – "physical restraint" and "chemical restraint" – and set out in Part 4A of those Principles the responsibilities of approved providers in residential care in relation to the use of restraint.

86 A recent string of Tribunal decisions discuss the effect of these relatively recent developments, as approved aged care providers become increasingly aware of their responsibilities under the Principles, and the characterisation of practices as "restraint" under the legislative definition:

(1) *VZM* [2020] NSWCATGD 25 – Wherein the Tribunal adopted the definitions of "physical restraint" and "chemical restraint" in the Aged Care Act (Quality of Care Principles) as consistent with the usage of those terms in the GD, and decided the use of bed rails to prevent the person accidentally falling out of bed and sustaining injury was not a physical restraint.

(2) *SZH* [2020] NSWCATGD 28 – The first of two decisions regarding the use of a coded keypad lock systems. The system was deemed to be possibly amounting to the tort of false imprisonment and a guardian was appointed with authority to consent to the use of "physical restraint".

(3) *JFL* [2020] NSWCATGD 32 – The second decision regarding the use of a keypad system, where the subject person was in dementia-specific ward. The Tribunal again decided it amounted to "physical restraint" and appointed a guardian with authority to consent to restrictive practices, placing novel conditions on the guardian's authority to consent.

CONCLUSION

87 The regulatory environment in which the Guardianship jurisdiction operates is constantly evolving. The broad overview above seeks to give a brief description of the Guardianship jurisdiction in its most common forms, how the jurisdiction can operate in the NDIS context, and how it is responding to the further evolution of regulation of the use of restrictive practices on people with disability. Despite near constant change in this environment, the primacy of the subject person remains central to all decision-making in the Guardianship jurisdiction.