THE GUARDIANSHIP DIVISION OF NCAT: CURRENT JURISDICTION, PRACTICE, PROCEDURE, AND PROPOSALS FOR REFORM[1]

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Introduction

1 I am grateful for the opportunity to present to you this evening at this STEP Event. I have been fortunate to play a leadership role within the guardianship jurisdiction in this state for nearly ten years now, both as President of the former Guardianship Tribunal of NSW and currently as a Deputy President of NCAT and the Head of the Guardianship Division. Over that period I have witnessed a significant increase in the public's awareness of the Guardianship jurisdiction with a resultant increase in workload together with growing impetus for reform and change.

2 Whilst the legislation underpinning the Division's jurisdiction has changed little since its establishment, the sector of the community that we inhabit has seen significant changes in philosophy and policy, which has all had an impact on the nature and volume of applications the Division receives. These philosophical and policy changes are obviously not always harmonious.

3 From one perspective, greater awareness and reliance of the UN Convention on the Rights of People with Disabilities ("the UN Convention"), [2] has led societal change to recognise the equal rights of people with disabilities and focus more on their right to autonomy in decision-making with support rather than protection through the appointment of substitute decision-makers.

4 From another perspective, greater awareness of the scourge of elder abuse has caused for there to be calls for reforms which provide greater protection for those of our elders who are vulnerable. These somewhat divergent pressures, in my view, illustrate the challenges confronting the members of the Division on a daily basis - evaluating the facts presented to determine what the outcome of an application should be through the fine balance of promoting both autonomy and protection.

[1] Presented at STEP NSW Seminar, 16 May 2018, The Banco Court, Supreme Court of NSW.
[2] *Convention on the Rights of Persons with Disabilities* opened for signature, 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

5 My intention this evening is to provide an overview of our jurisdiction and workload, our inter-relationship with the Supreme Court, a brief summary of our practice and procedure through the prism of an application to review an enduring power of attorney, and to then conclude with a summary of current proposals for reform of the jurisdiction.

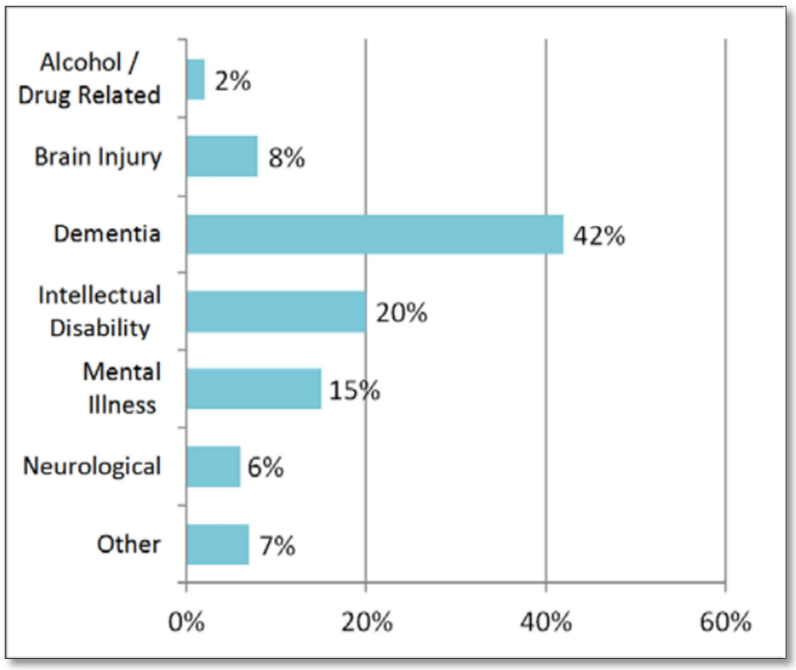
Overview of the jurisdiction and workload of the Division

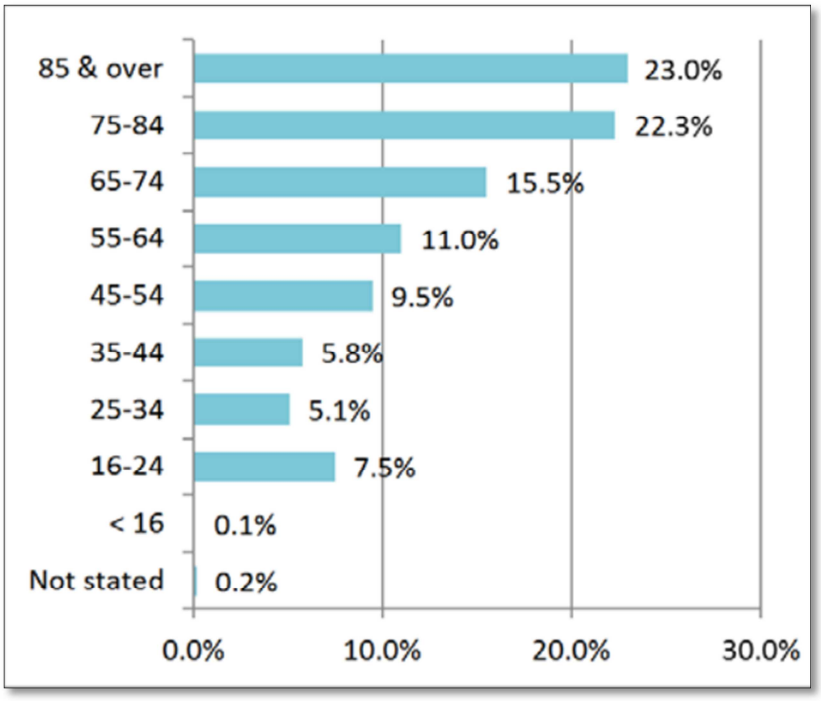
6 Perhaps the first thing to note is the changing nature of the workload of the Guardianship Division. In the first two years of the then Guardianship Tribunal's operation, that is, from 1989-1991, 47.2% of its clients were people with an intellectual disability and 33.8% of its clients were people with dementia. Most of its clients were under 61 years of age (54.9%). The Tribunal received 4,988 applications and conducted 2,973 hearings.

7 Fast forward to the financial year 2016/2017 and only 20% of the Tribunal's clients were people with an intellectual disability and over 42% 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 10,569 applications or reviews of orders and conducted 8,330 hearings.

	First two years of the Tribunal's operation (1989 - 1991)	In the last financial year (2016/2017)
No. of applications received	4,988	10,569
No. of hearings conducted	2,973	8,330
% of clients aged over 65	Less than 45%	61%
% of clients with Dementia	34%	42%
% of clients with an intellectual disability	47%	20%

8 The following graphs depicts the distribution of applications received by the Division in the 2016/2017 financial year, by disability and by age group:





9 At the time the Tribunal's jurisdiction was first established one of the primary motivations was to bring into existence an accessible and flexible means of putting in place formal decision-making regimes for people with an intellectual disability. Now, due to our nations' ageing demographic, the focus has changed to be more upon

those with dementia or other cognitive impairments generally associated with the aging process. The changing demographic of the Australian population, and in particular the increase in numbers of people experiencing dementia, suggests that the workload of the Guardianship Division is likely to continue to increase. 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.[3]

10 The primary role of the Guardianship Division is to determine applications seeking the appointment of substitute decision-makers for adults with a decision-making incapacity. The following types of applications are received:

- Guardianship (Part 3, *Guardianship Act 1987* (NSW))
- Financial Management (Part 3A, *Guardianship Act*)
- Medical and Dental Consent (Part 5, *Guardianship Act*)
- Reviews of Enduring Powers Of Attorney instruments (Part 5, Div 4, *Powers of Attorney Act 2003* (NSW) (**POA Act**)
- Reviews of Enduring Guardianship instruments (Part 2, *Guardianship Act*)
- Approval of Clinical Trials (Part 5, Div 4A, *Guardianship Act*)

11 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; provides consent to medical treatment and special medical treatment (a special category of treatment defined in the legislation that affect a person's fertility e.g. sterilisation) and it approves clinical trials where it is intended that patients will be recruited into a trial where they cannot provide their own consent.

12 The table below provides a snapshot of the breakup of applications received in the Division. Whilst it only records data for the month of March 2018, the breakup of applications is generally consistent with this representative sample. Applications for the appointment of guardians and financial managers makes up the majority of the workload in the Division, accounting for over 77% of all applications:

[3] Deloitte Access Economics, *Dementia Across Australia: 2011-2050* (9 September 2011) 16 <https://fightdementia.org.au/sites/default/files/20111014_Nat_Access_DemAcrossAust.pdf>..

	Applications Received	% of Total Applications
Guardianship	253	42.7%
Requested Review Guardianship	23	3.9%
Financial Management	207	35.0%
Requested Review of Financial Management	30	5.1%
Enduring Power of Attorney	20	3.4%
Enduring Guardianship	8	1.4%
Review/Revocation of an EPA	4	0.7%
Medical/Dental Consent	36	6.1%
Recognition of Interstate Appointment	9	1.5%
Clinical Trial	2	0.3%
Directions to Guardian	0	0.0%
Set Aside/Vary Decisions	0	0.0%
Total	**592**	**100%**

Statutory Reviews

	Scheduled for Review	% of Total Reviews
Review of Guardianship Order	201	82.7%
Review of Financial Management Order	42	17.3%
Review of Interstate Recognition	0	0.0%
Total	**243**	**100%**

13 Where there is a suitable person available and willing to be appointed as the guardian or financial manager 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.

14 There are two key differences between guardianship and financial management appointments in NSW. First is the issue of supervision. Whilst the Public Guardian of NSW has a private guardian support unit which can assist private guardians, there is no oversight of the role performed by private guardians. Private financial managers however are always subject to the supervision of, and must regularly report to, the NSW Trustee and Guardian,[4] and there is a fee payable to the NSW Trustee and

[4] Sections 66, 116 of the *NSW Trustee and Guardian Act 2009* (NSW).

Guardian for performing this role[5] (a role which parties are very often unaware of at the time of lodging an application). The second difference is the duration of orders. The Division cannot make indefinite guardianship orders. They must always be reviewed by a further hearing before the Tribunal generally within one year for initial orders and three years for renewed orders.[6] This is not the case for financial management orders which are generally indefinite and only revoked upon application.

15 Rather than outline the legislative tests for the main types of applications the Division receives, I thought it more illustrative to just briefly give an overview of some matters which have come before us. The reasons for each of these matters have been published and are available on either Caselaw or Austlii:

- *NBX* [2017] NSWCATGD 35 – the Tribunal made a guardianship order for a 27 woman with a diagnosis of schizophrenia. Ms NBZ had suffered significant trauma as a young woman in her country of birth, Sierra Leone. The Tribunal concluded that her disability prevented her from making major life decisions and that there were significant decisions to be made for her health and wellbeing as she was pregnant with twins as a result of an alleged sexual assault.

- *NAD* [2018] NSWCATGD 1 – the Tribunal was satisfied that it should appoint the NSW Trustee and Guardian to manage the financial affairs of Mrs NAB, an 84 year old woman of Turkish heritage who lived in regional NSW. The evidence led the Tribunal to conclude that Mrs NAD was prevented from having contact with her extended family by the son with whom she resides and that an examination of property transactions that the son had engaged in on his mother's behalf which benefitted him personally was required.

- *NKQ* [2008] NSWGT 21 – an example of the Tribunal exercising the authority to provide consent to medical treatment. Mr NKQ, a 19 year old man with Down Syndrome and associated intellectual disability, required chemotherapy and blood transfusions to treat an aggressive and rare leukaemia. Mr NKQ's parents had consented to the chemotherapy but not to the use of blood or blood products due to their religious beliefs. The Tribunal concluded that Mr

[5] Clauses 6, 27 of the NSW Trustee and Guardian Regulation 2017 (NSW).
[6] Section 18(1) of the *Guardianship Act 1987* (NSW).

NKQ could not provide the consent himself and that the proposed treatment should proceed.

16 As at 30 June 2017, there were 11,332 people whose finances were being managed by the NSW Trustee and Guardian and a further 4,256 people whose finances were being managed by a private financial manager.[7] There were 2,251 people under responsibility of the Public Guardian.[8]

17 The Tribunal exercises functions under the following legislation:

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

18 The Tribunal has a statutory duty to seek out and recognise the views of the person the subject of an application wherever possible.[9] This focus on the interests and views of the person with the disability is reflected in both the work that the Tribunal's Registry undertakes before an application or review of an order is heard by the Tribunal[10] and during hearings before the Tribunal. Tribunal Officers strive to involve the person with a disability in the pre-hearing case preparation process as much as possible. Tribunal Officers use their experience and expertise in a range of disability fields to engage with the person with a disability to explain the Tribunal's role, seek the person's view about the case before the Tribunal, and strongly encourage them to attend and participate in the hearing process. Over the last year in 65% of

[7] NSW Trustee & Guardian, *NSW Trustee & Guardian Annual Report 2016 – 2017* (30 June 2017) 12 <http://www.tag.nsw.gov.au/verve/_resources/NSW_Trustee__Guardian_Annual_Report.pdf>.
[8] Ibid 51.
[9] Sections 4, 14, 40 of the *Guardianship Act.*
[10] Guardianship Tribunal, *24 years – empowering and protecting* Annual Report 2012/2013, 21.

hearings, the person the subject of an application has participated in the hearing either in person, by videoconference or by telephone.

19 For an initial guardianship or financial management order to be made, the Tribunal must be constituted by three members, one being a barrister or solicitor who presides at the hearing, one being a health care professional (e.g. a psychologist or a geriatrician), and one being a community member,[11] usually a person who identifies as a person with a disability, or is a carer or advocate for a person with a disability. The Division currently has 123 members assigned to the Division who come from diverse backgrounds.

20 Whilst other Australian jurisdictions may sit from time to time as multi-member panels, it is my understanding that NSW is the only state where the 3 member panel constitution is mandatory. This structure brings a wealth of knowledge and expertise to the Tribunal process and is designed to assist in the involvement of the person in the hearing. In my experience, the mandatory use of three member panels allows the Tribunal to draw on diverse expertise which contributes significantly to the quality of decision-making, makes for a more effective and fairer hearing in highly conflicted or contentious matters, and reduces the likelihood that an aggrieved party will perceive that the Tribunal has been biased or has determined an application other than on the merits.

21 Whilst the Tribunal is not bound by the rules of evidence in matters before the Guardianship Division, the principles of procedural fairness do apply.[12] The Division does not follow an adversarial approach and uses more inquisitorial methods than would be the case in other forums. Other aspects of hearings before the Division that may be of interest include:

- Hearing duration – unless a matter is identified as having particular complexity, most hearings are allocated between one to two hours;

- Hearing location – hearings are held in the Tribunal's own hearing rooms in Sydney and other venues throughout NSW. Where possible and appropriate, the Tribunal will conduct hearings at hospitals, aged care facilities, and other

[11] Clause 4, Sch 6 of the *Civil and Administrative Act 2013* (NSW).
[12] Section 38(2) of the *Civil and Administrative Tribunal Act 2013* (NSW).

venues to promote the involvement of the person the subject of the application;

- Accessibility – there are no fees to file an application in the Guardianship Division, there are no requirements as to the form in which evidence may be provided, that is, evidence need not be in affidavit form, and whilst evidence as to capacity from relevant health professionals is highly desirable, it is not mandatory before an order can be made;

- Legal representation – most parties represent themselves with legal representatives appearing in less than 5% of all hearings in the Division (that figure includes where a separate representative appointment has been made);

- Orders and reasons – in most matters the panel of the Division will announce its orders at the conclusion of the hearing and is required to then provide written reasons for decision which in most cases are issued within 28 days of the hearing;

- Interpreters – in 2016/2017, the Division appointed 758 interpreters to assist in hearings in 57 different languages.

The Supreme Court and the Guardianship Division

22 The Tribunal shares jurisdiction with the Supreme Court. Section 8 of the *Guardianship Act* provides that nothing in that Act limits the inherent jurisdiction of the Supreme Court with respect to the guardianship of persons. The Supreme Court may make financial management orders pursuant to s 41 of the *NSW Trustee and Guardian Act*. The Supreme Court may also review an appointment of an enduring guardian and it has an inherent jurisdiction in relation to consent for treatment.[13]

23 Similarly, jurisdiction to review enduring powers of attorney and revocations of enduring powers of attorney under the POA Act is shared with the Supreme Court.[14]

[13] Section 6L of the *Guardianship Act 1987* (NSW).
[14] Section 26 of the *Powers of Attorney Act 2003* (NSW).

24 The Tribunal also has various powers to refer applications for financial management[15] and applications relating to enduring powers of attorney[16] to the Supreme Court. The Tribunal may also refer questions of law to the Supreme Court.[17]

25 The primary relationship between the Tribunal and the Supreme Court is as described by Slattery J in *P v D1* [2011] NSWSC 257:

> The legislature has committed the primary working machinery of the Guardianship Act to the Tribunal and its decisions are to be given great weight; but it is probably inaccurate to describe the Tribunal as a "specialist" Tribunal: *K v K* [2000] NSWSC 1052, [14]. On appeal under s 67 the Court's approach is to deal with a matter broadly and fairly and not to interfere if the Tribunal members have directed themselves properly and fairly on the facts and have not erred in law…*Re R* [2000] NSWSC 886 and *K v K* [2000] NSWSC 1052, [14]. But one of the functions of the Court is to ensure that the Tribunal has guidance upon the proper interpretation of this legislation so that the Tribunal is integrated into the machinery of justice applicable in this field of jurisprudence.

26 As to the issue whether an application should be made in the Court or the Tribunal, Lindsay J provides the following useful commentary[18]:

> 34 NCAT has institutional features not routinely shared by the Supreme Court. They include: first, administrative arrangements designed to facilitate procedural informality in the conduct of hearings, and routine reviews of guardianship decisions; secondly, shared decision-making procedures involving lawyers, medical experts and community representation; and, thirdly, procedures which enable access to justice which is, on the whole, likely to be cheaper for members of the community than more formal procedures pursued in the Court.
>
> 35 On the other hand, there are particular types of case which must be dealt with by the Court, or which might be better dealt with by the Court than by the Tribunal. Such cases include:
>
> (a) a protracted dispute involving competing claims to control of a large or complex estate, a need for discovery or substantial questions of law.
>
> (b) a case in which a person (or an estate) in need of protection is located outside New South Wales or is proposed to be removed from the jurisdiction: eg, *IR v AR* [2015] NSWSC 1187.
>
> (c) a case in which there is a proposal that a private manager for reward (not being a licensed trustee company) be appointed as a financial

[15] Section 25L of the *Guardianship Act 1987* (NSW).
[16] Section 34 of the *Powers of Attorney Act 2003* (NSW).
[17] Section 54 of the *Civil and Administrative Tribunal Act 2013* (NSW).
[18] Lindsay J, *Roles in Protective Management of Person and Property*, NSW Civil and Administrative Tribunal Guardianship Division Training Seminar, 8 December 2017, [34]-[35].

manager: see, generally, *Ability One Financial Management Pty Ltd and Anor v JB by his tutor AB* [2014] NSWSC 245.

(d) a case in which consideration may need to be given to:

(i) a claim for an ex gratia allowance out of a protected estate: eg, *JPT v DST* [2014] NSWSC 1735.

(ii) a prospective application for a "statutory will" (that is, a will made, for a person lacking testamentary capacity, by an order of the Court) under the *Succession Act 2006* NSW. See sections 18, 19, 21 and 23; *GAU v GAV* [2014] QCA 308; [2016] Qd R 1; *Secretary, Department of Family and Community Services v K* [2014] NSWSC 1065; *W v H* [2014] NSWSC 1696.

(iii) whether any (and, if so, what) relief should be granted to an enduring attorney or guardian who is, or may be, held liable to account for a breach of fiduciary obligations: eg, *C v W (No. 2)* [2016] NSWSC 945 at [22]-[47]; *SLJ v RTJ* [2017] NSWSC 137 at [32].

27 Parties to proceedings in the Guardianship Division may appeal to either the Supreme Court or the Internal Appeal Panel of NCAT.[19] Parties to proceedings in the Guardianship Division may appeal any decision made under the enabling legislation as of right on a question of law or with leave on any other question and with leave for an interlocutory decision.[20]

28 Appeals to the Supreme Court may be made as of right on a question or law or with leave on any other question and with leave for an interlocutory decision.[21] A review of the Tribunal's decisions may also be commenced by way of a summons seeking judicial review or seeking orders in its inherent jurisdiction. However, the Court has commented that, if the Supreme Court receives an application for judicial review or for the Court to make orders in its inherent jurisdiction superseding the Tribunal's orders, the Court will proceed as if it has received an appeal on a question of law or an application for leave to appeal on the merits of the decision.[22] Section 34 of the CAT Act recognises this common law principle in relation to judicial review.

29 Unless consent to withdraw is granted by the Court or Tribunal as applicable, an internal appeal lodged with the Tribunal precludes an appeal to the Supreme Court

[19] Clause 12, Sch 6 of the *Civil and Administrative Tribunal Act 2013* (NSW).
[20] Section 80(2) of the *Civil and Administrative Tribunal Act 2013* (NSW).
[21] Clause 14, Sch 6 of the *Civil and Administrative Tribunal Act 2013* (NSW).
[22] *Re F* [2013] NSWSC 54, [5-6] (White J).

against the same decision just as an appeal to the Supreme Court precludes an internal appeal to the Tribunal.[23]

30 In terms of appeal statistics, so far this financial year of the 7571 applications dealt with, there have been only 24 appeals to the internal appeal panel of NCAT. I do not have accurate data on the number of appeals of applications for review filed with the Supreme Court but understand that it is rarely anymore that 15 -20 in any given year.

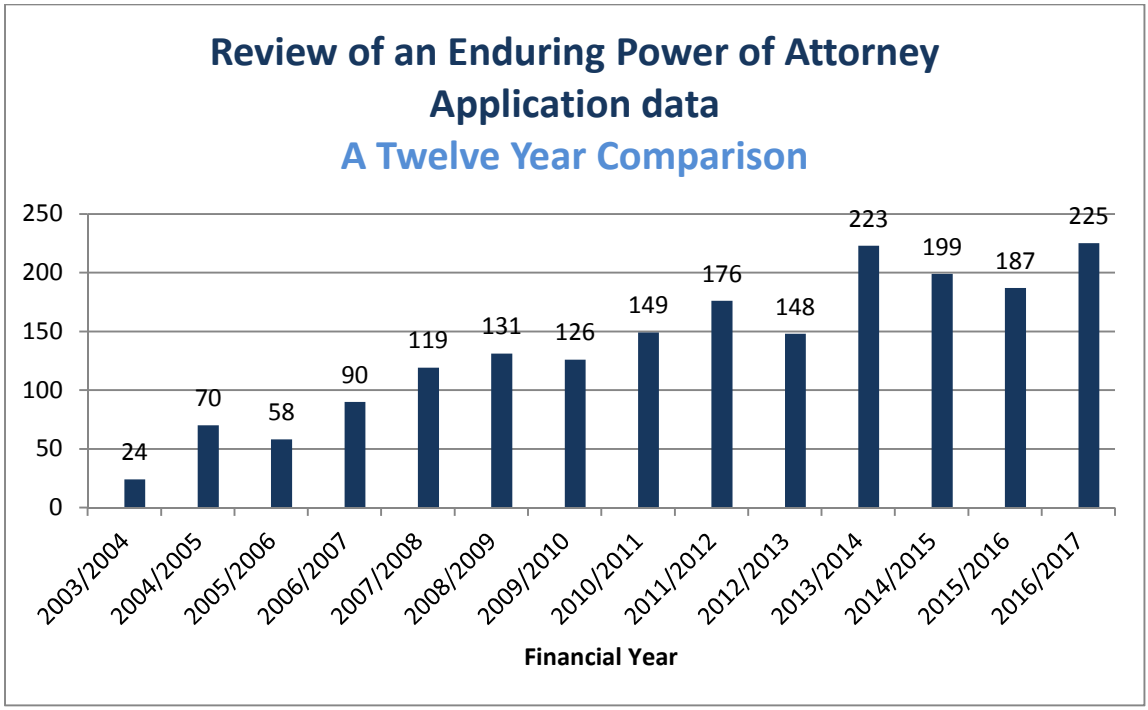
Practice and Procedure: Application to Review an Enduring Power of Attorney

31 In preparing for this presentation it was suggested to me from amongst your members that the Division's jurisdiction and applicable practice and procedure in dealing with applications to review an enduring power of attorney might be of particular interest.

32 There is no doubt that one of the more complex and time-consuming jurisdictions that the Division exercises is that of reviewing enduring powers of attorney. Complexity arises in terms of the nature of the estate managed by the instrument, the range of powers that are available to the Tribunal in relation to the instrument, and more often than not, the level of conflict amongst the parties.

33 In recent times, enduring powers of attorney have become a focus in relation to the topic of elder abuse with calls for reform and greater powers to be provided to Tribunals.[24] This focus or awareness may go some way to explaining the significant increase in applications for review that the Division (and the predecessor Tribunal) has experienced since the jurisdiction was first conferred in 2004 (including about a 100% increase in application rate over 10 years) as shown in the following graph:

[23] Clause 12(3), (4), Sch 6 of the *Civil and Administrative Tribunal Act 2013* (NSW).
[24] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws,* Report 124 (2014) <https://www.alrc.gov.au/publications/equality-capacity-disability-report-124>; Parliament of NSW, *Elder Abuse in New South Wales,* Report 44 (2016), <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2387#tab-reports>; Australian Law Reform Commission, *Elder Abuse – A National Legal Response,* Report 131 (2017) <https://www.alrc.gov.au/publications/elder-abuse-report>.



34 In this financial year so far, applications to review an enduring power of attorney represent only 3.4% of the total applications received by the Division. However, whilst I cannot provide you with empirical data, I can assure you that the complexity and/or conflict attached to these matters means that they consume far more than 3.4% of our time and resources.

35 As with all applications received at the Division, these review applications are reviewed on the day of receipt for the purpose of triage. They are allocated to a Tribunal Officer who then prepares the matter for hearing within a time frame based upon the assessed risk to the person or their estate. If the matter is assessed as a high-risk matter, it can be heard by the Tribunal within a matter of days of receiving the application. If the assessed risk is moderate to low, it may be six to eight weeks before the matter has an allocated hearing date.

36 Interestingly, one of the main tasks undertaken by our Officers is to obtain a copy of the enduring power of attorney itself. As there is no requirement in NSW that an enduring power of attorney be registered to be operational, there is no registry that can be searched with certainty to obtain a copy of a current and operational enduring power of attorney. Many applications are lodged where the applicant makes allegations against a person accusing them of engaging in poor management or wrongdoing in managing a person's estate under the belief that they are operating

under an enduring power of attorney. However, they are unable to provide a copy of the instrument. An essential starting point for our Tribunal Officers is to confirm that there is in fact an enduring power of attorney in place and that there is a copy of the instrument before the Tribunal.

37 Many of the applications received to review enduring powers of attorney are directed into a "complex case pathway". This means one or more directions hearings will be conducted by a single Legal Member of the Tribunal to examine the application, make directions as to document exchange, submissions, or witnesses, determine whether a separate representative should be appointed for the person the subject of the application, and otherwise take steps to endeavour to narrow or clarify the matters that need to be resolved before it is listed and heard by a three member panel of the Tribunal.

38 The Tribunal's jurisdiction to review enduring powers of attorney arises under Part 5 of the POA Act which came into effect on 16 February 2004. This review jurisdiction extends to enduring powers of attorney made before, as well as after, that Act came into effect.[25]

39 There are two types of reviews of enduring powers of attorney we can conduct:

- a review of the **making** of an enduring power of attorney, and
- a review of the **operation and effect** of an enduring power of attorney.[26]

40 The Tribunal does not have jurisdiction to review ordinary or general powers of attorney or irrevocable powers of attorney.

41 The first step the Tribunal needs to take in a hearing relating to an application to review an enduring power of attorney is to determine whether the applicant has standing to make the application. Pursuant to s 35(1) of the POA Act, the Tribunal may conduct a review on the application of an **interested person**,[27] defined as:

[25] Section 6(5) of the *Powers of Attorney Act 2003* (NSW).
[26] Section 36(1) of the *Powers of Attorney Act 2003* (NSW).
[27] For a case example of where the applicant was found not to have standing, see *KTC* [2011] NSWGT 23 (18 October 2011).

- the attorney (including an attorney whose appointment has been purportedly revoked);
- the principal;
- a guardian of the principal;
- an enduring guardian of the principal; or
- any other person who, in the opinion of the Tribunal, has a proper interest in the proceedings or a genuine concern for the principal's welfare.

42 The Tribunal has the discretion to decide whether or not to carry out the review.[28] This first step must be considered before proceeding to carry out the review.

43 The POA Act provides no guidance about what factors the Tribunal should consider when determining this question. If the Tribunal decides not to carry out the review, it should dismiss the application for review.

44 Slattery J in *Susan Elizabeth Parker v Margaret Catherine Harris & Ors* [2012] NSWSC 1516 noted that there is a "two-step discretion under the *Powers of Attorney Act*, s 36(1) and (2)" at [42]. In the circumstances of the case before him, Justice Slattery noted as follows:

> In my view the Court does not have to conduct a full review of all documents associated with the operation of the subject power of attorney to do this. Something short of a full review must be able to justify the exercise of the s 36(1) discretion as to whether or not the Court should conduct a full s 36 review. In the circumstances of this case the Court can glean sufficient information to exercise the s 36(1) discretion by undertaking a general survey of what [the Applicant] has produced [80].

45 If the Tribunal has determined that it should proceed to conduct a review of the enduring power of attorney, the next question is whether or not the actual making of the document is challenged or is otherwise in question. The Tribunal may make either or both of the following orders if the point in issue is the making of the instrument:

[28] Section 36(1) of the *Powers of Attorney Act 2003* (NSW).

- an order declaring that the principal did or did not have mental capacity to make a valid power of attorney, and/or

- an order declaring that the power of attorney is invalid either in whole or in part.[29]

46 Before making an order declaring that the power of attorney is invalid either in whole or in part, the Tribunal must be satisfied that:

- the principal did not have the capacity necessary to make it, or

- the enduring power of attorney did not comply with the applicable requirements of the POA Act, or

- the power of attorney is invalid for any other reason (for example, the principal was induced to make it by dishonesty or undue influence).

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

48 The authoritative statement of the test for capacity is found in the joint judgment of Dixon CJ and Kitto and Taylor JJ in *Gibbons v Wright* (1954) 91 CLR 423 at [438]:

> [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.

49 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:

> 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.

[29] Section 36(3) of the *Powers of Attorney Act 2003* (NSW).

50 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 provided the explanation.

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

> 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].

52 There is much that could be said on the issue of requisite capacity at the time of formation of an enduring power of attorney. I am sure you would all be aware of the appropriate case law given your fields, and in any event, I note that her Honour Justice Ward provided a very comprehensive paper on the topic from a previous STEP event which I note is available on the Supreme Court website.[30]

53 The Tribunal does regularly receive applications to review an enduring power of attorney which relates to the making of the instrument itself.[31] However, the majority of review applications relate to the manner in which the instrument is being operated, or not operated, as the case may be.

54 If the Tribunal is satisfied that the instrument subject to a review application is valid and in operation, upon conducting a review, it may make one or more of the orders in s 36(4) in relation to the operation and effect of the enduring power of attorney, but only if it is satisfied that it would be in the **best interests** of the principal to do so or that it would **better reflect the wishes** of the principal.[32] The orders are as follows:

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[30] Justice Ward, 'Legal Capacity then and now: The potential repercussions of neuroscientific studies' (Paper presented at STEP Conference, Sydney, 29 May 2014) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Ward/ward_20140529.pdf>.

[31] For some case examples, please see *VRH* [2013] NSWGT 5 (18 April 2013), *YLV* [2011] NSWGT 10 (31 August 2011), QBU [2008] NSWGT 18 (4 July 2008).

[32] Section 36(4) of the *Powers of Attorney Act 2003* (NSW).

(a) an order varying a term of, or a power conferred by, the power of attorney;

(b) an order removing a person from office as an attorney;

(c) an order appointing a substitute attorney to replace an attorney who has been removed from office by a review tribunal or who otherwise vacates the office;

(d) an order reinstating a power of attorney that has lapsed by reason of any vacancy in the office of an attorney and appointing a substitute attorney to replace the attorney who vacated office;

(e) an order directing or requiring any one or more of the following:

(i) that an attorney furnish accounts and other information to the tribunal or to a person nominated by the tribunal;

(ii) that an attorney lodge with the tribunal a copy of all records and accounts kept by the attorney of dealings and transactions made by the attorney under the power;

(iii) that those records and accounts be audited by an auditor appointed by the tribunal and that a copy of the report of the auditor be furnished to the tribunal;

(iv) that the attorney submit a plan of financial management to the tribunal for approval.

(f) an order revoking all or part of the power of attorney;

(g) such other orders as the review tribunal thinks fit.

55 In exercising its authority under s 36(4) of the POA Act, the Tribunal most commonly determines to make no order, or, it exercises its powers to revoke the instrument or remove and substitute an attorney.

56 The Tribunal is rarely requested to makes orders directing an attorney to provide accounts. In the event that it is asked to do so, consideration must be had of the practical aspects of such an order, in particular, issues about the costs of such audits and reports and clarification of who are suitable persons to be appointed to conduct them.

57 Where possible, the Tribunal seeks to obtain the views of the principal at the hearing. In order to ascertain the wishes of the principal before their cognitive capacity became impaired, the Tribunal might seek evidence from the attorney, any solicitors (or other witnesses) involved, and independent persons who do not have a vested interest in the outcome.

58 An order that is made on this basis should indeed go some way towards respecting the principal's wishes as to the way the enduring power of attorney operates and has effect.[33]

59 If, on a review of the making or operation and effect of an enduring power of attorney, the Tribunal decides not to make an order under s 36 of the POA Act, it may (if it considers it appropriate in all the circumstances) decide to treat the application to review the enduring power of attorney as an application for a financial management order.[34]

60 The Tribunal must first decide to review the enduring power of attorney under s 36(1) of the POA Act and must decide pursuant to s 36(2) of that Act not to make an order under s 36 of the POA Act, before it may decide to treat that review application as a financial management application.

61 If the Tribunal does not commence the review under s 36(1) of the POA Act, the Tribunal may not proceed to treat the application to review an enduring power of attorney as a financial management application. Similarly, the Tribunal cannot make an order under s 36 of the POA Act, such as an order revoking the power of attorney, and treat the application as a financial management application as well.

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[33] For some case examples, please see *CDI* [2013] NSWGT 9 (14 June 2013), *YNB* [2012] NSWGT 4 (28 March 2012), *YLV* [2011] NSWGT 10 (31 August 2011), *QQM* [2011] NSWGT 2 (21 February2011), *FNB* [2010] NSWGT 9 (29 January 2010), *TKX* [2009] NSWGT 6 (2 September 2009), *TKX (No 2)* [2010] NSWGT 10 (4 February 2010), *KGT* [2009] NSWGT 2 (20 April 2009), and *QBU* [2008] NSWGT 18 (4 July 2008).

[34] Section 37(1) of the *Powers of Attorney Act 2003* (NSW).

62 If the Tribunal decides to proceed under s 37(1) of the POA Act and make a financial management order for the principal, this operates to suspend the power of attorney being reviewed and any others which may exist.[35] The power of attorney would come back into effect if the Tribunal were later to revoke that financial management order.

Proposals for Reform

63 In recent years the debate across Australia for reform of jurisdictions such as that exercised by the Guardianship Division has largely centred on calls for the implementation of supported decision-making over substitute decision-making, effectively requiring a paradigm shift from a 'best interests' model towards what has been called 'will and preferences' and 'human rights' models of decision-making.

64 By some views, mechanisms for supported decision-making have been available in all Australian jurisdictions for many years – however, these mechanisms are generally only available to those assessed as having the requisite capacity to understand and otherwise execute the instruments of appointment.

65 The majority of Australians with a cognitive disability do not have a court or tribunal-appointed decision-maker. By default, most are supported informally by family, friends, or carers. Many would define this as supported decision-making. However, this form of support is unregulated, lacks any of the safeguards contemplated by Article 12.4 of the UN Convention , and leaves those who perform the support role without any guiding principles.

66 To date, the UN Convention has largely not been implemented into Australian domestic law as it pertains to Article 12. Having said this, it is clearly the driving force behind much policy reform. The most significant reform in this space is the implementation of the National Disability Insurance Scheme (NDIS) by the Federal Government. The NDIS is a major policy change concerning the way support and services are provided for eligible people with permanent and significant disability. Individuals can formulate their own support plans, to determine what form of support and services they receive and from whom.

67 This move towards individual funding packages means eligible participants have more choice and therefore more decisions to make. For those who may have a

[35] Section 50(3) of the *Powers of Attorney Act 2003* (NSW).

cognitive impairment, the NDIS promotes supported decision-making over substitute decision-making whenever possible. There is, however, much ambiguity as to what this support entails, who provides and funds it, and safeguards are yet to be implemented.[36] In those circumstances, there is likely to be, at least in the short-term, an increase in applications for the appointment of formal substitute decision-makers. The Division is currently receiving 10-15 applications per month in which the applicant has identified that the primary reason for the application is the implementation of the NDIS.

68 Turning to specific reform proposals here in NSW, in November 2015, the then Attorney General of NSW requested that the Law Reform Commission of NSW ('the Commission') conduct a review into the *Guardianship Act.*[37] The Commission has been asked to have regard to a number of matters in conducting the review, including the UN Convention, the desirability of introducing a supported decision-making scheme, and whether the language of "disability" remains appropriate to the guardianship jurisdiction.

69 The Commission released six discussion papers for the purposes of community consultation prior to issuing a final consultation paper in November 2017 outlining draft proposals. I understand that the completion of the Commission's final report is imminent.

70 If the Commission's final report adopts the draft proposals that were released in their paper in 2017, some of the more significant proposals that will be before the government for consideration include:

- The *Guardianship Act* would be replaced by an *Assisted Decision-Making Act* and the Guardianship Division of NCAT would be renamed the Assisted Decision-Making Division of NCAT;

[36] For example, see decision of NCAT in *KCG* [2014] NSWCATGD 7 at [64] to [73]. For further information see: Fougere C 'Guardianship, financial management and the NDIS: NCAT's experience', (Paper presented at Australian Guardianship and Administration Council Heads of Council meeting, Hobart, 23 March 2017) <http://www.ncat.nsw.gov.au/Documents/speeches_and_presentations/20170323_paper_fougere_agac_hobart.pdf>.

[37] For more information: http://www.lawreform.justice.nsw.gov.au/.

- General principles based largely upon the UN Convention Rights of Persons with Disabilities would replace the current principles in s 4 of the *Guardianship Act*;

- The test for "capacity" would be replaced by a test of "decision-making ability";

- New supported decision-making regimes would be established whereby a person could enter into a personal support agreement and the Tribunal could appoint formal supporters;

- Enduring Powers of Attorney would be no more - The current arrangements for the separate appointment of enduring powers of attorney and enduring guardians would be combined and replaced with a single scheme of the appointment of enduring representatives through representative agreements

- The separate concept of distinct guardianship and financial management orders replaced with representation orders;

- The NSW Trustee and Guardian would not automatically supervise all representatives with financial authority as is currently the case, only those ordered to be subject to supervision by the Court or Tribunal;

- The Tribunal could appoint a representative with financial functions who carries on the business of managing estates and determine that they receive remuneration for that management;

- Those exercising functions of the new Act would be required to give effect to the person's will and preferences wherever possible rather than the person's best interests;

- All representation orders (and existing financial management and guardianship orders) would need to be subject to regular review by the Tribunal;

- The new Act would introduce new advocacy investigation functions to be performed by a public advocate, (which may or may not be separate to the

Office of the Public Guardian), the NSW Trustee and Guardian would be renamed the NSW Trustee and the Public Guardian would be renamed the Public Representative.

Conclusion

71 I have endeavoured in the time I have had this evening to present an overview of the work of the Guardianship Division of NCAT. With or without significant reform I feel the workload and the complexity of our workload will only increase in the years ahead due to an ageing society and significant systemic changes involving people with cognitive disabilities as I have outlined.

72 As to the future, I believe getting the right balance through any reforms will be very challenging, and something I would not envy being responsible for, which pleasingly I am not. That in no way should be interpreted as suggesting there is no need for reform.

73 However, in introducing any major reforms care must be taken to not overlook perhaps the most vulnerable in our society, those who have a cognitive impairment to the extent that they simply cannot make major decisions for themselves and cannot be genuinely supported to do so. There will need to be a proper assessment of any risks associated with a generalised move away from formalised substitute decision-making to ensure that what it is replaced with is a supported decision-making model that genuinely enables those people who can to make their own decisions, with support, rather than a *de facto* substitute decision-maker making decisions whilst standing in the shoes of a support person, without any oversight.

74 Like many things, if and when new models of supported decision-making are implemented, the "devil will be in the detail". As can often be the way with this jurisdiction, I will conclude with a series of questions rather than answers for any future reforms - questions which will need to be addressed daily by relatives, friends and carers of people with decision-making disabilities:

(1) if a person's decision-making capacity to make a particular decision is called into question, what is the test for assessing capacity to ensure that a person can be supported to make that decision?

(2) who makes this assessment and then determines what level of support is required?

(3) how do models of supported decision-making work for people with fluctuating cognitive capacity?

(4) what safeguards are required to ensure that:

(a) supports provided are suitably independent and free from conflict of interest?

(b) if a person's capacity diminishes, that substitute decision-making does not take place under the nomenclature of supported decision-making, that is how and when are steps taken to appoint a substitute decision-maker for someone who can no longer be supported to make their own decisions?