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Guardianship and administration laws across Australia



Written by Ben Fogarty, Principal Solicitor of the Intellectual Disability Rights Service

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Introduction and the specific laws on guardianship and administration



The purpose of this publication is to provide legal practitioners, people with decision-making disability, their family, friends and support network, with a basic understanding of what guardianship and financial management (also known as administration) is, the alternatives to formal orders and what laws in States and Territories govern these areas.

Quite a number of the Intellectual Disability Rights Service's (IDRS's) clients are subject to financial management orders and guardianship orders. In some cases, these measures and supervision work well. A balance between protection and autonomy is reached¹, with the client living a safe, dignified and fulfilling life. In other cases, the arrangements are a disaster – the client feels disempowered, frustrated and angry with a guardian or financial manager who seems unwilling to listen and to give the time and resources that are essential for such an important role.

With an ageing population and increasing numbers of people with dementia and other neurological conditions, and the prevalence of mental illness in society, an understanding of guardianship and financial management law and the alternatives thereto will become increasingly important in the Australian legal landscape.

This paper explores guardianship and financial management (or, as it is sometimes called, administration²) laws across Australia and seeks to provide a basic understanding of what guardianship and financial management are, what the recurrent problems are and what the alternatives are. Permeated by a philosophy of least restrictive and pro-autonomy decision-making, the paper covers crucial concepts like legal capacity and general guiding principles, and proceeds to review and critique the 'tests' employed by tribunals, panels, boards and courts in the making of guardianship and financial management orders.

The following statutes³ were reviewed for this paper:

- *NSW Trustee and Guardianship Act 2009* (NSW)
- *Guardianship Act 1987* (NSW) (**NSW Act**)
- *Adult Guardianship Act* (NT) (**NT Act**)

¹ See s6 ('Purpose to achieve balance') of the *Guardianship and Administration Act 2000* (Old) for a legislative acknowledgement of the need to strike this balance.

² New South Wales uses the term "financial management", although it is noted that most Australian jurisdictions use the term "administration". The former will be employed in this paper given the author's New South Wales practice.

³ The paper confined itself to these statutes and did not review other statutes relating to decision-making, like power of attorney and mental health legislation.

- *Aged and Infirm Persons Property Act* (NT)
- *Guardianship and Administration Act 1986* (Vic) (**Vic Act**)
- *Guardianship and Administration Act 1993* (SA) (**SA Act**)
- *Guardianship and Administration Act 2000* (Qld) (**Qld Act**)
- *Guardianship and Management of Property Act 1991* (ACT) (**ACT Act**)
- *Guardianship and Administration Act 1990* (WA) (**WA Act**)
- *Guardianship and Administration Act 1995* (Tas) (**Tas Act**)

A pro-autonomy philosophy on guardianship, financial management and decision-making

People with decision-making disability⁴ are autonomous and independent human beings with wishes, hopes, likes and dislikes. Just because a person has a decision-making disability does not mean they can't make decisions for themselves.

There is no presumption that a person with decision-making disability does not have legal capacity to make decisions about their lives or to look after their own affairs. *Sometimes some* people with decision-making disability need help and support, on an informal or formal basis, to make *some* decisions in their lives – for example, about where they will live or about investing money for the future.

Decision-making needs to be regarded as a spectrum, with complete autonomy on one end (the default) and, at the other, substitute decision-making. In between is a scale of informal supported decision-making that varies from time to time and from decision to decision.

Supported and substitute decision-making arrangements do not require a formal guardian appointed by order of a tribunal or court. They can operate informally. It is certainly my view that it is preferable if a person can have in place informal supported decision-making arrangements with trusted, supportive and diligent family and/or friends, than resorting to formal arrangements.

Where there is a proven and current need for a person's decision-making to be supported (or, as an absolute last resort, to be substituted) and it is in their best interests the following principles should guide and instruct the decision-making process:

- the wishes, opinions and choices of the person must always be sought and considered first;
- the privacy, cultural diversity and integrity of the person must always be respected;
- the least restrictive and intrusive intervention into the person's life;
- the ability to make decisions ('legal capacity') is a fluid concept that may vary from time to time and from decision to decision – it should not be regarded as a static, unchanging and one-time only classification;
- diminished decision-making ability should not be confused with difficulties or impairment in communication – people should be provided adjustments and alternative modes of communication to express themselves;
- substitute decision-making as an absolute last resort;
- records⁵ must always be kept about supported and substitute decision-making arrangements (informal and formal) and decisions made to ensure processes are transparent, subject to independent review and (if necessary) to appellate review by courts;
- informal arrangements and support from family members, carers or friends who have close and continuing relationships with the person are preferable to formal orders of guardianship and financial management, and
- support provided to the person to make decisions must always be in the best interests and welfare of the person.

⁴ The paper will use the term "decision-making disability" to be as comprehensive as possible. Statutes across Australia use slightly different definitions and terminology in reference to who might be classified a "protected" or "represented" person for the purposes of guardianship and financial management.

⁵ Section 49 of the Qld Act contains an explicit duty to keep records (breach of which can attract a fine of up to 100 penalty units).

The United Nations' Convention on the Rights of Persons with Disabilities (CRPD)

The CRPD and its Optional Protocol were adopted at the United Nations Headquarters in New York on 13 December 2006, and entered into force internationally on 3 May 2008. Federal, State and Territory governments should acknowledge the practical and symbolic import of this international convention by ensuring all their laws, social policy, budget allocations and future planning meet the principles, intent and spirit of the CRPD.

Australia ratified the CRPD on 17 July 2008, making it one of the first countries to do so. On 30 July 2009 Australia acceded to the Optional Protocol on the CRPD providing a mechanism for Australians to make complaints to the United Nations Disabilities Committee for breaches of the CRPD (where domestic remedies have been exhausted). By ratifying the CRPD and adopting the Optional Protocol, Australia has signalled its intent to join other countries around the world in a global effort to promote the equal and active participation of all people with disability in society.

The purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms for all people with disability, and to promote respect for their inherent dignity. It seeks to redress the physical and social barriers, discrimination and disadvantage confronting people with disability throughout the world and to promote their full participation and recognition in civil, political, economic, social and cultural life.

Some of the CRPD's Articles that bear on the fundamental principles of autonomy, personal decision-making and self-determination include:

- Non-discrimination (Art 4)
- Equal protection before the law (Art 5)
- The right to equal recognition before the law (Art 12)
- Access to justice on an equal basis with others (Art 13)
- Freedom from exploitation, violence and abuse (Art 16)
- Protecting the integrity of the person (Art 17)
- Freedom of expression and opinion, and access to information (Art 21)

In the interpretation part of the CRPD Australia recognizes that people with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the CRPD allows for supported decision-making arrangements and substitute decision-making on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards (including review before a court or tribunal).

Australia also recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others and declares its understanding that the CRPD allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, only where such treatment is necessary to protect the health and welfare of a person or persons, as a last resort and subject to safeguards (including review before a court or tribunal).

Australia recognizes the rights of persons with disability to liberty of movement and to freedom to choose their residence, on an equal basis with others.

It is incumbent upon all State and Territory governments (along with the Federal government) to uphold and implement the principles, intent and spirit of the CRPD in their social policy, allocation of resources and laws. This is especially so in regards to any legislation that restricts a person's liberty, freedom of choice and expression, as do guardianship and financial management laws.

General principles

Each statute⁶ contains general principles that guide and apply to tribunals, panels, boards and courts whose role it is to consider and determine guardianship and financial management applications and reviews, to government bodies that exercise financial management and guardianships functions (like public trustees, protective commissioners, offices of the adult guardian, public advocates, etc) and to private financial managers and guardians. Some are quite extensive, others are much less so⁷. The principles that are shared by each of the Acts are:

⁶ s4 NSW Act; s6 Tas Act; Sch 1, Pt 1 Qld Act; s4 NT Act; s4(2) Vic Act; s5 SA Act; s4 WA Act; ss5 and 5A ACT Act.

⁷ The Qld Act is the most comprehensive, the NT and Vic Acts much less so.

- 1 the way in which decisions are made on behalf of a person should be least restrictive of the person's freedom of decision and action;
- 2 the best interests of the person should be promoted⁸, and
- 3 the wishes and views of the person should be given effect to (to the extent they can be ascertained).

Based on a review of all the statutes, the CRPD and the experiences of people subject to guardianship and financial management orders, this paper submits the following⁹ as a best-practice set of general principles:

1	Presumption of capacity
	Each person is presumed to have capacity to make decisions.
2	Same human rights
	<ol style="list-style-type: none"> 1 The right of all people to the same basic human rights regardless of a particular person's capacity must be recognised and taken into account. 2 The importance of empowering a person to exercise the person's basic human rights must also be recognised and taken into account.
3	Welfare and interests of the person
	The welfare and interests of persons must be given paramount consideration.
4	Freedom from abuse, neglect and exploitation
	A person must be protected from neglect, abuse and exploitation.

⁸ The 'best interests' principle is not expressly articulated in s5 of the SA Act.

⁹ This is based substantially on the principles found in Schedule 1, Part 1 of the Qld Act.

5	Individual value
	A person's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.
6	Valued role as member of society
	<ol style="list-style-type: none"> 1 A person's right to be a valued member of society must be recognised and taken into account 2 Accordingly, the importance of encouraging and supporting a person to perform social roles valued in society must be taken into account.
7	Participation in community life
	The importance of encouraging and supporting a person to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.
8	Encouragement of self-reliance
	The importance of encouraging and supporting a person to achieve the person's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.
9	Maximum participation, minimal limitations and substitute judgment
	<ol style="list-style-type: none"> 1 A person's right to participate, to the greatest extent practicable, in decisions affecting the person's life, including the development of policies, programs and services for people with decision-making disability for a matter, must be recognised and taken into account. 2 Also, the importance of preserving, to the greatest extent practicable, a person's right to make his or her own decisions must be taken into account. 3 So, for example – <ol style="list-style-type: none"> a) the person must be given any necessary support, and access to information, to enable the person to participate in decisions affecting the person's life; and b) to the greatest extent practicable, for exercising power for a matter for the person, the person's views and wishes are to be sought and taken into account; and c) a person or other entity in performing a function or exercising a power on that person's behalf must do so in the way least restrictive of the person's rights. 4 Also, the principle of substitute judgment must be used so that if, from the person's previous actions, it is reasonably practicable to work out what the person's views and wishes would be, a person or other entity in performing a function or exercising a power on that person's behalf must take into account what the person or other entity considers would be the person's views and wishes. 5 However, a person or other entity in performing a function or exercising a power on behalf of the person must do so in a way consistent with the person's proper care and protection. 6 Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.
11	Maintenance of existing supportive relationships
	The importance of maintaining a person's existing supportive relationships must be taken into account.

11	Maintenance of environment and values
	<ol style="list-style-type: none"> 1 The importance of maintaining a person's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account. 2 For a person who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the person's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including Aboriginal tradition or Island custom), must be taken into account.
13	Appropriateness to circumstances
	Power for a matter should be exercised by a guardian or financial manager for a person in a way that is appropriate to the person's characteristics and needs.
14	Confidentiality
	A person's right to confidentiality of information about them must be recognised, taken into account and respected.
15	Community education
	The community should be educated about these principles and encouraged to apply and promote them.

Regrettably, in New South Wales, at least, based on the experiences of some of IDRS's clients subject to financial management or guardianship, it is apparent that the public financial manager (formerly the Office of the Protective Commissioner and now the NSW Public Trustee and Guardian) is funded so poorly that it actually *cannot* comply with the general principles under the NSW Act. State and Territory governments must improve funding and resources to public financial managers, public trustees and public guardians so that each can properly fulfil their statutory mandate.

Informal arrangements versus formal orders

As a general rule, it is preferable for a person with decision-making disability to have in place informal supported decision-making arrangements with trusted, supportive and diligent family and/or friends, rather than resorting to formal orders and arrangements. The reasons for this view are:

- once a person is under formal orders, it is difficult for the person to have those orders varied or revoked – the evidentiary onus lies with *them* to prove they have re-gained capacity to manage their affairs or there is no longer a need for an order or that it is not in their best interests to have one;
- in some jurisdictions orders are not automatically reviewed and so a person (whose decision-making skills or other circumstances may have improved) can be left languishing for years unnecessarily bound and limited in their lifestyle and financial choices;
- formal orders may appoint government bodies as the financial manager and/or the guardian and these bodies are often difficult to contact and engage with, creating poor relations and distrust, and
- a formally-appointed financial manager can draw annual fees from the estate of the person (regardless of how well or diligently they attend to their duties).

IDRS consistently receives complaints from people who are subject to formal orders where a government body is their financial manager and/or their guardian. Common complaints include:

- use of 'client service teams' leading to no particular person being responsible or accountable for any particular client;
- inconsistent service delivery and information to clients which understandably leads to incredible levels of stress and frustration for those clients;
- slow (to no) responses to requests from clients;
- bills not being paid;

- slow decision-making;
- an unwillingness to spend the time needed to understand the needs, changing circumstances and idiosyncrasies of clients;
- a lack of individualised service to the needs and wishes of each client;
- clients being left for extensive periods of time 'on hold' when they telephone the offices and being forced to leave voicemail messages that do not get returned or answered, and
- concerning cynical and pejorative attitudes displayed by some of the staff in these offices to their clients and to disability generally.

It should be noted that all but one¹⁰ of the statutes¹¹ contain a provision that the public guardian and public financial manager must only be appointed as the guardian and financial manager where there is no other appropriate private person or entity available to be appointed – that is, of last resort.

Mechanisms to assist informal arrangements

There are legally-recognised mechanisms and instruments that can assist in creating and structuring informal arrangements for a person with decision-making disability and avoid the need for formal orders. Most of these mechanisms and instruments require the person to have had legal capacity at the time they employ those mechanisms and create those instruments. That is because they purport to express the personal wishes and views of the person for a future time. Powers of attorney and enduring powers of attorney are examples. They are legal documents made by people (with legal capacity) for a time in the future when they may no longer have full decision-making capacity – for example, if they are comatose or they sustain a significant brain injury from an accident, they acquire dementia or they have intense and debilitating episodes of mental illness.

Meeting with social security, banking, health insurance and other institutions

Regularly IDRS is contacted by parents of children with decision-making disability when their children have just turned 18 years old and they are in the process of organising or assisting them with their social security entitlements, housing, health insurance and banking arrangements. If the adult child does not have legal capacity to execute a power of attorney, then his or her parents can be confronted by some institutions that refuse to provide personal information to them or refuse them to continue to look after their adult child's affairs without the authority of the child or a formal financial management order. In fairness, the institutions have privacy law obligations and also need to ensure clients aren't being defrauded or exploited. However, such situations can cause real headaches for families. In such circumstances, formal orders do not need to be resorted to. There are several informal ways to try to resolve these problems, including:

- some institutions have 'nominated person' or 'nominee' forms that a parent can fill in;
- the family can meet with the institution taking with them relevant medical and school reports about the child, points of identification and explain the need for alternative informal arrangements, and
- a solicitor could write a letter to the institution (attaching relevant medical and school reports and information about the child) explaining the need for alternative informal arrangements.

In most cases, once the institution understands the need for the alternative informal arrangements, the problem resolves swiftly and things progress relatively smoothly. It is worth noting that if an institution unreasonably refuses to adjust its provision of services to a person with (decision-making) disability, say, by permitting informal arrangements, the institution may be in breach of state and federal disability discrimination laws¹².

Powers of attorney

All jurisdictions have legislation providing for powers of attorney and enduring powers of attorney¹³. A power of attorney is a document that appoints a person (called 'the attorney') to act on behalf of the person who gives the power (called 'the donor' or 'principal'). The attorney can make decisions about the principal's property or financial affairs. This means that they can operate the principal's bank accounts, pay the principal's bills, and sell or buy property or shares on behalf of the principal. An attorney cannot be used to make medical or lifestyle

¹⁰ There does not appear to be such a provision in the Tas Act.

¹¹ s14(2) Qld Act; s14(4) NT Act; s23(4) Vic Act; s29(4) SA Act; s9(4) and s9(5) ACT Act; s44(5) WA Act; s17(3) NSW Act

¹² In short, the argument is that the institution provides services and must make reasonable adjustments in the provision of those services to clients with disability to the extent those adjustments do not cause it unjustifiable hardship.

¹³ ss102-110 WA Act; ss61-65 ACT Act and Powers of Attorney Act 2006 (ACT); Powers of Attorney Act 1998 (Qld); Powers of Attorney Act 2003 (NSW); Powers of Attorney Act (NT); Powers of Attorney Act 2000 (Tas); Instruments (Enduring Powers of Attorney) Act 2003 (Vic); Medical Treatment Act 1988 (Vic), and Powers of Attorney and Agency Act 1984 (SA).

decisions for a principal. However, an 'enduring guardian' or a medical or health attorney (as are available in some jurisdictions¹⁴) can make such decisions.

There are two main types of powers of attorney – a general power of attorney and an enduring power of attorney. A general power of attorney ceases to have effect after the principal loses their capacity to make financial decisions. An enduring power of attorney will continue to have effect even after the principal loses capacity.

To make a power of attorney, an individual must be capable of understanding the nature and effect of the power of attorney. Capability means that the person has an understanding of the range of decisions which the attorney is authorised to make under the power of attorney and the effect of those decisions. People with decision-making disability may still have capacity to make a power of attorney.

If there is any doubt about whether a person has the legal capacity to make a power of attorney, then an appropriate professional (such as a general practitioner, psychologist, neuropsychologist or psychiatrist) should make an assessment of the person's understanding of the nature and effect of the power of attorney. The assessment should be completed before the power of attorney is made and a report of the assessment attached to the power of attorney (for future reference).

Enduring guardians

All jurisdictions have provisions for the appointment of enduring guardians¹⁵. People who are 18 years or older can appoint a person as their enduring guardian. That is, they can decide who they want as their guardian should they not have legal capacity to make decisions about themselves, their health care and their lifestyle in the future. The proposed enduring guardian must be 18 years or older and must not be associated with the person in a medical or treatment capacity. The instrument appointing the enduring guardian must be in writing and can contain directions and instructions about functions and powers to be exercised by the enduring guardian. As with powers of attorney, a person making an enduring guardianship must have capacity at the time of making the instrument. There are strict procedural requirements, declarations and forms that need to be complied with and filled out in jurisdictions where enduring guardianships are available.

Future or advance directives¹⁶

Future or advance directives¹⁷ are decisions made by people about what financial, lifestyle or medical treatment¹⁸ they would like in the future, in case at some point, they cannot make decisions for themselves. They can be made orally or in writing; although reducing it to writing (with an independent witness) is prudent and may save delay and disputes in the future. In practice, most directives tend to cover health care and medical treatment only. Some jurisdictions¹⁹ have statutory provisions allowing people to make future or advance directives; otherwise the right to make a future or advance directive is left for consideration at common law²⁰. Advance directives are similar in effect to powers of attorney.

For example, in Queensland's *Powers of Attorney Act 1998* there is provision for a person to make an advance health directive.

To make directives:

- the person must have legal capacity at the time;
- the directive must be in writing (and usually in a prescribed form), and
- the directive must be sufficiently specific.

In New South Wales advance health care directives²¹ are informal mechanisms not directly supported by legislation. However, there are ways in which they can be used to assist administrative decision-makers, government organisations, boards, panels, tribunals and courts to make decisions. For example, they can be inserted in enduring guardian arrangements to assist in instructing and limiting the guardian on how

14 Medical agents can be appointed via provisions in the *Consent to Medical Treatment and Palliative Care Act 1995* (SA). Health attorneys can be appointed under ss32A-32N of the ACT Act.

15 s25 SA Act; ss5-60 NSW Act; ss25-27 SA Act; ss32-35 Tas Act; ss35A-35E Vic Act and *Instruments (Enduring Powers of Attorney) Act 2003* (Vic).

16 The author attended a talk by Associate Professor Cameron Stewart, University of Sydney, at the 2009 Legal Aid Commission of NSW's Civil Law Conference, entitled "Medical decisions, end-of-life issues and capacity – recent decisions, current legal frameworks and future directions". Associate Professor Stewart has a wealth of knowledge and resources on this topic and is involved in some interesting research projects on the topic.

17 Also sometimes referred to as 'living wills'.

18 Including withdrawal of life-sustaining interventions.

19 *Medical Treatment (Health Directions) Act 2006* (ACT); *Natural Death Act 1988* (NT); *Powers of Attorney Act 1998* (Qld); *Consent to Medical Treatment and Palliative Care Act 1995* (SA); *Guardianship and Administration Act 1990* (WA) and *Medical Treatment Act 1988* (Vic).

20 For example, in NSW, see: *Hunter and New England Area Health Service v A* [2009] NSWSC 761 where an advance directive refusing dialysis was binding on the health service and not affected by the NSW Act.

21 For a useful discussion of advance health care directives in NSW, see: Ellison, S., Schetzer, L., Mullins, J., Perry, J. and Wong, K., "The legal needs of older people in NSW", Law and Justice Foundation of NSW, Sydney, 2004. SA has four different 'types' of advance directive: enduring powers of attorney, enduring guardianships, medical powers of attorney and anticipatory directions.

to exercise their functions. NSW Department of Health's guidelines in relation to the management of dying patients states that the contents of an advance directive, where made, should also be taken into account. If directives are contrary to statutory requirements or duties under the common law for medical practitioners, they will give way to the latter. Some advance directives seek to cover 'end of life' decisions and have caused considerable controversy²², given the statutory and ethical duties of medical practitioners and the lack of clear formal legal recognition of directives.

Recording wishes and requests in wills

Where parents are the carers, informal guardians and financial managers for their child with decision-making disability, it is prudent for them to plan for the future and consider making wills that reflect their wishes as to who they would like to be their child's guardian and financial manager, what accommodation and lifestyle choices they would like for their child and what financial arrangements will be in place to care for their child when they pass away.

Parents can indicate in their wills who they wish to act as the guardian of their children. If the parents die before their children are 18 years old, the guardian (indicated in the will) will have guardianship and financial management powers in respect of the parents' children until the children turn 18 years old. This is irrespective of whether or not the children have decision-making disabilities.

Where children with decision-making disability are adults and are still under the informal care, guardianship and financial management of their parents, the law is not so definitive. A parent may wish to include a phrase in their will expressing their wishes for the future care and support of their child, such as:

"I request X to be the guardian to assist, support and care for my son for the remainder of his life."

Such expressions of wishes and requests are not legally binding, but they are an indication of the parents' wishes and they can be very important if an estate is contested in court or a guardianship or financial management application comes before a tribunal, panel, board or court. If the parents have cared for or been guardians for their child for all or a significant part of their life, a tribunal, panel, board or court is likely to apportion considerable weight to their wishes in determining who should be appointed guardian and financial manager. Expressions of wishes and requests in wills should be an essential part of planning for the future care of a family member with decision-making disability.

Lastly, it is acknowledged that, in some circumstances, there will be no option but to resort to formal orders – for example, where the person has no close and trusted family, friends or carers, or where the person has been subjected to abuse, neglect or exploitation under informal arrangements.

²² For example, see "Doctors feared saving suicidal young woman", Rebecca Smith, Aislinn Laing and Kate Devlin, Telegraph, London, 2 October 2009 (<http://www.smh.com.au/world/doctors-feared-saving-suicidal-young-woman-20091001-geeq.html>)

What is a 'person responsible'? Medical, dental and health treatment

Medical, dental and other health practitioners require a person's consent before treating them.

A person responsible is someone who has authority to consent to medical, health and dental treatment for an adult who is unable to give a valid consent to that treatment²³. Sometimes, a patient is incapable of understanding the general nature and effect of proposed treatment or is incapable of indicating whether or not they consent to the treatment being carried out. In these cases, the person responsible can give substitute consent to the medical or dental practitioner on behalf of the patient. In jurisdictions that have 'persons responsible'²⁴, there is a 'hierarchy' of who can be the person responsible. In New South Wales, it is as follows:

- 1 The person's formally appointed guardian
- 2 The person's most recent spouse or de facto with whom the person has a close and continuing relationship
3 An unpaid carer of the person
- 4 A relative or friend who has a close personal relationship

There are some forms of medical treatment that a person responsible cannot consent to. These forms are variously described as 'special medical or dental treatment' or 'prescribed medical or dental treatment' and include²⁵:

- sterilisation;
- treatment to which the person objects;
- termination of pregnancy;
- clinical trials;
- use of psychotropic drugs;
- use of a drug of addiction for a defined period of time;
- experimental medical procedures or trials;
- psychosurgery, and
- electro-convulsive therapy.

If proposed treatment is special or prescribed medical or dental treatment, then the medical practitioner must gain consent from a tribunal, panel, board or court before the treatment can be carried out. In general terms, in deciding whether to give consent tribunals, panels, boards and courts need to:

- conduct a hearing;
- have regard to the views of the patient, the person proposing the treatment and any person responsible;
- have regard to the grounds on which it is alleged the patient requires substitute consent, the particular condition of the patient that requires treatment, the alternative courses of treatment that are available, the general nature and effect of those courses, the nature and degree of the significant risks (if any) associated with each of those courses and the reasons for which it is proposed that any particular course should be carried out, and
- be satisfied that the treatment is necessary to save the patient's life or to prevent serious damage to the patient's health²⁶.

If a practitioner considers treatment is urgent and necessary, they may treat a person without the consent of the person (or person responsible, tribunal, panel, board or court).

23 Persons responsible can provide consent for minor (eg. treatments involving general anaesthetic for fractures or endoscopes, and medications affecting the central nervous system) and major (eg. any treatment involving serious risk) treatments only. They cannot consent to special treatments.

24 s33A NSW Act; s37 Vic Act; ss4 and 43 Tas Act; s59 SA Act, and s119(3) WA Act. The ACT Act, NT Act and Qld Act do not provide for 'persons responsible'. For minor, uncontroversial health care, if consent cannot be given by the person, the determination is left to the health provider (s64 Qld Act).

25 This list covers treatments referred to across all jurisdictions. However, not all these treatments are covered in every jurisdiction. It is important to check the specific statutory provisions of your jurisdiction to see what is covered.

26 Some jurisdictions also employ a lower standard of satisfaction – namely, that the treatment is the only or most appropriate way of treating the patient and is manifestly in their best interests, and health care standards and guidelines will be complied with in the carrying out of the treatment (eg. s45(3)(c) and (d) NSW Act).

What is capacity and how is it assessed?²⁷

Capacity (or legal capacity, as it is sometimes called) is the term given to the ability of a person to rationally and reasonably make decisions for themselves – or, put another way, the capability of a person to manage their own affairs. The main areas where capacity is relevant are decisions that need to be made about a person's lifestyle, health, accommodation, work and financial affairs.

The law presumes that every person 16 years and over has capacity. Those seeking to oppose this presumption for a particular person bear the onus of proving its rebuttal.

There is no single definition or test to determine whether a person has capacity to make decisions for themselves. It will depend very much on the type of decision being made and the circumstances and context in which that decision is being made. Fundamentally, however, to have capacity a person must be able to:

- 1 understand the nature and effect of the decision to be made about a matter and the choices available;
- 2 freely and voluntarily weigh up the consequences and understand how the consequences will affect them or others, and
- 3 communicate their decision in some way.

Whether a person has capacity is best assessed by people who know the person – for example, family, friends, advocates and doctors. The longer and more intimately a person has known another person, the more weight can be attached to their opinion as to whether the other person has or lacks capacity. Capacity though is not determined solely on a medical assessment or report. Medical assessments and reports from general practitioners and specialists will play a part and should be sought, but they should not be considered the sole determinant of whether a person has capacity or not.

Whether a person has capacity is the threshold question in almost all²⁸ guardianship and financial management applications²⁹. The Acts assess capacity to manage both the whole of one's affairs and individual parts of one's affairs. In other words, a person may be regarded under the Acts as not having capacity in one part of their affairs (for example, arranging their own accommodation or managing the proceeds of an inheritance) and that will be sufficient to render them eligible to be subject to guardianship or financial management orders. In other words, tribunals, panels, boards and courts do not need to be satisfied that the person has no capacity in regards to managing all of their affairs. For this reason, equity dictates that tribunals, panels, boards and courts should carefully consider and tailor the orders they make to ensure that people retain control of areas of their affairs and lives about which they remain capable to do so.

Capacity should be viewed as a fluid concept – that is, decision-specific. So it may vary over time, especially where a person has a disability which only affects their decision-making episodically. It should not be regarded as a static, unchanging and one-time only classification. Unfortunately, the statutory regimes do not reflect this view, in all respects, with some orders not being properly tailored to the individual, others being inflexible and still others being left in place longer than is necessary.

Capacity is an assessment of a person's ability to make a decision, not the decision they make. Just because a person does not agree with the decisions another person is making on moral, religious, political or opinion-based grounds, this should not in any way bear upon an inquiry into the latter's capacity. If a person wants to spend their money on sex services on a weekly basis or they want to have a certain boyfriend or girlfriend, they should be entitled to do so. IDRS has been contacted by parents of adult children with intellectual disability, saying they want to gain guardianship to stop their children associating with a person or spending their money on sex services. These are not, in and of themselves, proof that the child lacks legal capacity.

²⁷ For an excellent guide to assessing capacity, see: *Capacity Toolkit – Information for government and community workers, professionals, families and carers in New South Wales*, NSW Attorney General's Department, 2008.

²⁸ The WA Act appears to allow a guardianship order to be made without an assessment as to a person's ability to look after or to make reasonable judgments about their health, welfare and safety. Subsection 43(1)(b)(iii) entitles an order to be made on a 'needs' basis – that is, where the person is "in need of oversight, care or control in the interests of his <sic> health and safety or for the protection of others".

²⁹ ss 4, 14(1) and 25G(a) NSW Act; ss3 and 15(a) NT Act and s12(2)(b)(ii) of the *Aged and Infirm Persons' Property Act* (NT); ss22(1)(b) and 46(1)(a)(ii) Vic Act; ss3, 29(1)(a) and s35(1)(a) SA Act; s12(1)(a) and Schedule 4 Qld Act; ss5, 6A, 7(1)(a) and Dictionary ACT Act and Dictionary of the *Powers of Attorney Act 2006* (ACT), ss43(1)(b)(i), 43(1)(b)(ii) and 64(1)(a) WA Act; s20 Tas Act.

Lastly, it is worth noting that just because a person is under a guardianship or financial management order, this does not automatically mean they don't have testamentary capacity to make a will. Case law³⁰ makes it clear that the fact a person is under a financial management order does not lead to the conclusion that the person is conclusively to be presumed to lack testamentary capacity. A person, though under a financial management order, may retain sufficient capacity to understand the nature of the document (the will) to be executed, the extent of the property to be disposed of, and the claims of those the person proposes to benefit or exclude.

Practical steps for solicitors

While it is not a solicitor's role to be the sole arbiter of the legal capacity of a client, they need to be confident their client can give valid and legal instructions. So, a solicitor should make some inquiries and a basic assessment as to a client's legal capacity if there are signs that a client may have a decision-making disability that impairs their capacity to give instructions. Some practical steps are:

- 1 Check for warning signs that a client may not be following what you are saying. They may seem distracted. They may say things that don't follow from what you've been saying or discussing.
- 2 Ask them if they understand what you have said. Ask them to repeat back to you what you have said or what they understand are the options available to them or the different consequences of the alternatives you have put to them.
- 3 Ask family, friends or carers whether there are adjustments you can make that might then allow you and the client to communicate and satisfy you of their capacity.
- 4 If doubts remain, you should arrange for the client to be formally assessed by a clinician (usually a psychologist or psychiatrist) who has expertise in assessing cognitive capacity.
- 5 Based on all of the evidence in steps 1-4 above, you need to make a final judgement about your client's capacity for the particular matter about which you are advising them.

Never jump to conclusions about a client's capacity and always make adjustments in communication for a client. Some people may have disabilities that affect the way they communicate – this does not mean they don't have legal capacity. So be as patient and flexible as you can when it comes to communicating with a client.

³⁰ *Perpetual Trustee Company Ltd v Fairlie-Cunninghame & Anor (The Estate of Samuel Douglas Machattie Service)* (1048860 of 1993) NSW SC (Probate Division); *Re Estate of Margaret Bellew* (114882 of 1991) NSW SC (Probate Division), and *Banks v Goodfellow* (1870) 5 QB 549.



Guardianship

What is guardianship?

Guardianship is the term given to the regime of control, management and substitute decision-making exercised by one, two or more persons (exercising functions jointly or separately), the public guardian, adult guardian or Public Advocate over the welfare³¹ and health of a person with decision-making disability who does not have capacity and is in need of such a regime. Guardianship does not cover decisions about financial affairs – these are matters for a financial manager (or as it is sometimes called, an administrator). Strictly, guardianship can be informal, as well as formal, though for the remainder of this section of the paper the focus is on formal guardianship.

The types of decision-making disabilities for which (formal) guardianship orders are sought and made can include:

- intellectual disability;³²
- psychiatric disabilities (like schizophrenia and depression);
- neurological disabilities (like dementia and Alzheimer's);
- developmental disabilities (like autism and Asperger's);
- brain injury, and
- physical disabilities (that render a person unable to communicate their intentions or wishes in any manner whatsoever)³³.

Of course, this is not an exhaustive list. Moreover, it should be noted that the wording of some of the Acts is such that there is no requirement that a person about whom a guardianship application is being made must have an identifiable (or diagnosed) decision-making disability. Examples of this include:

- the Qld Act is silent as to the need to prove the aetiology of a person's "impaired capacity", and
- section 43 (Making of a guardianship order) of the WA Act does not refer at all to any disability.

Guardianship orders can be limited temporally and functionally. They do not need to be for every aspect of a person's life, welfare and health needs. The types of order that are made are variously described³⁴ as:

Limited³⁵ – specifies the extent to which a guardian has custody of the person and which of the functions of a guardian he or she will have.

Plenary³⁶ – the guardian has full custody of the person and exercises the full range of functions of a guardian.

Temporary³⁷ – where a tribunal, panel, board or court is not satisfied it can make a final determination and continuing order, it will make a temporary order (lasting only 21-30 days) to allow the person,

31 The NT Act refers to "decisions relevant to daily living".

32 The NT Act uses the collective term "intellectual disability" to mean any "disability in an adult resulting from an illness, injury, congenital disorder or organic deterioration or of unknown origin and by reason of which the person appears to be unable to make reasonable judgments or informed decisions relevant to daily living". This use is a perversion of the meaning of "intellectual disability" that is accepted in medical contexts and in legal jurisdictions outside of the Northern Territory.

33 This category is not found expressly in all of the Acts; however, it is found in s3 of the SA Act, the Tas Act and the Vic Act.

34 New South Wales and Victoria use the following four categories.

35 See, for example, s25 Vic Act and S16(1)(c) NSW Act.

36 See, for example, s24 Vic Act and s16(1)(c) NSW Act.

the temporary guardian (most often the public guardian) and parties to the application a period in which to try to resolve outstanding matters in dispute and return before the tribunal, panel, board or court for a final determination and continuing order.

Continuing³⁸ – where a tribunal, panel, board or court makes an order that is to operate for a substantive period of time (one, three, five or more years).

Formal guardianship orders can only be made for a person who is 18 years of age³⁹.

When might a guardian be needed?

The sorts of situations where formal guardianship orders might be needed are where:

- a person does not have any family or friends willing and able to support the person and to maintain informal decision-making arrangements;
- there is conflict about what is in the best interests of a person;
- informal decision-making arrangements are proving detrimental to the best interests of the person;
- a person is being subjected to neglect, harm, abuse or exploitation;
- a person's own decisions are not working in their own best interests and are in fact placing them at risk, or
- a child's parents pass away.

³⁷ See ss32-33 Vic Act and ss18(2) and 18(3) NSW Act.

³⁸ See ss18(1) and 18(1A) NSW Act.

³⁹ In some jurisdictions, like, New South Wales, Queensland and Western Australia, advance appointments (for guardianship and financial management) can be made for people under 18. In Queensland advanced appointments can be made for persons 17 ½ years of age to take effect when they turn 18 and ending when they turn 19, unless extended (s13 Qld Act). s15(1)(a) of the NSW Act says an order cannot be made for a person under 16.

What must be satisfied for guardianship orders to be made?

Generally, in order to make a guardianship order, a tribunal, panel, board or court must be satisfied that:

- person has an impaired decision-making capacity⁴⁰ (because of a disability or, in some jurisdictions⁴¹, because of other reasons);
- that impaired capacity renders the person totally or partially incapable of managing his or her person, and
- the person is in need of a guardian.

This reflects the position in New South Wales and Queensland⁴², but the statutes for other States and Territories employ variations on these requirements – some lowering the threshold for a formal order to be made, others raising the threshold. For example, in Western Australia, the State Administrative Tribunal only needs to be satisfied the person is 18 years of age and is:

- incapable of looking after his <sic> own health and safety; or
- unable to make reasonable judgements in respect of matters relating to his <sic> person; or
- in need of oversight, care or control in the interests of his <sic> own health and safety or for the protection of others, and
- in need of a guardian⁴³.

It is concerning the WA Act uses a 'reasonableness of judgement' standard⁴⁴ and expressly considers the interests of others in deciding whether or not to make an order for a person.

Sub-section 15(1) of the NT Act requires the NT Supreme Court to be satisfied that:

- a) a person is "under an intellectual disability", and
- b) "is in need of an adult guardian".

"Intellectual disability" is defined in s3 of the NT Act to mean "a disability in an adult resulting from an illness, injury, congenital disorder or organic deterioration or of unknown origin and by reason of which the person appears to be unable to make reasonable judgments or informed decisions relevant to daily living". On its face, a threshold comprising of the appearance that a person is "unable to make reasonable judgments or informed decisions relevant to daily living" seems somewhat low.

Sub-section 29(1) of the SA Act requires that:

- the person has a "mental incapacity";⁴⁵
- the person does not have an enduring guardian, and
- "an order should be made in respect of the person".

The last requirement leaves the South Australian Guardianship Board with an extraordinarily wide discretion.

40 s91(1) of the *Powers of Attorney Act 2006* (ACT) lists things that alone do not indicate impaired decision-making capacity – that "the person (a) is eccentric; (b) makes unwise decisions; (c) does or does not express a particular political or religious opinion; (d) has a particular sexual orientation or expresses a particular sexual preference; (e) engages in or engaged in illegal or immoral conduct; or, (f) takes or has taken drugs, including alcohol." s6A of the ACT Act ('Limits on finding impaired decision-making ability') has a similar list, although curiously, there is no (b) and (f) is qualified by stating that "any effects of a drug may be taken into account".

41 Namely, Queensland and Western Australia.

42 See s14 NSW Act and s12(1) Qld Act.

43 s43(1) WA Act.

44 The Tas Act also uses a 'reasonableness of judgement' standard – s20(1)(b).

45 Defined as "the inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs, as a result of: (a) any damage to, or illness, disorder, imperfect or delayed development, impairment or deterioration, of the brain or mind; or (b) any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever."

Who can be a guardian?

The basic requirements common to almost all⁴⁶ of the Acts⁴⁷ that are used to determine whether a person is suitable as a guardian are:

- the proposed guardian must be 18 years of age or older;
- the proposed guardian's personality must be generally compatible with the person (and, in some jurisdictions, with any financial manager);⁴⁸
- there must be no undue conflict between the interests (particularly, the financial interests) of the proposed guardian and the person, and
- the proposed guardian must be both willing and able to exercise the functions conferred under the guardianship.

Some jurisdictions build on these basic requirements by assessing the suitability or appropriateness of proposed guardians by:

- ensuring the proposed guardian consents to act as guardian;⁴⁹
- considering the wishes of the person;⁵⁰
- acknowledging the desirability of preserving existing family relationships;⁵¹
- assessing the compatibility of the proposed guardian with the person (and any financial manager),⁵² and
- assessing whether the proposed guardian will be available and accessible to the person.⁵³

In most jurisdictions a person who cares for or works with a person on a professional basis cannot be a guardian.

What functions can a guardian exercise?

Common and relatively straightforward functions

Guardianship orders specify what functions⁵⁴ (or powers) the guardian can exercise. Some of the more common include:

- **accommodation** – where the person lives currently and will live in the future and with whom they live and will live;
- **services**⁵⁵ – what services the person will access and engage in (for example, day programs);
- **education and training** – what education and training the person can receive,⁵⁶ and
- **work** – whether a person can work, the nature of the work and with whom they can work⁵⁷.

These functions do not usually court much controversy. Others, listed below, tend to be controversial and contentious.

46 The NT Act is different in that it specifies that "the Public Guardian, a near relative of, or a person who has provided or is providing substantial care and attention for a person under a disability" may apply [s8(1)] or any person whom a court directs [s8(2)]. The latter option of directing a person to be a guardian seems to run counter to the principle that a proposed guardian needs to be suitable, willing and able to be a guardian. Curiously, the NT Act also has further provisions to determine whether a person is eligible as a guardian (s14).

47 s17(1) NSW Act; s21(1) Tas Act; s23(2) Vic Act; s50 SA Act; s44 WA Act; and, s10 ACT Act; s15 Qld Act. The Qld Act also considers a proposed appointee's criminal history (if any) and whether they've been removed as an attorney, guardian or administrator in the past. Unlike the other Acts, the Qld Act empowers the tribunal to make inquiries about the appropriateness and competence of the proposed appointee (s17 Qld Act).

48 s14(2)(c) NT Act; s21(2)(c) Tas Act; s23(2)(c) Vic Act; s44(2)(b) WA Act; s10(4)(c) ACT Act; and, ss15(1)(d) and (e) Qld Act.

49 s14(1) NT Act

50 s14(2) NT Act; s44(2)(c) WA Act; s21(2)(a) Tas Act; s23(2)(a) Vic Act; and, s10(4)(a) ACT Act. Interestingly, the SA Act does not expressly have regard to the wishes of the person subject to the application for guardianship, although there is a catch-all "such other matters as the Board considers relevant" (s50(1)(f)). The Qld Act also does not expressly seek the wishes of the person in addressing the appropriateness of an appointee, although it does require the general principles and whether the appointee is likely to apply them to be considered (s15(1)(a)).

51 s14(2) NT Act; s44(2)(a) WA Act; s21(2)(b) Tas Act; s23(2)(b) Vic Act; s50(1)(b) SA Act; and, s10(4)(b) ACT Act. The Qld Act also does not expressly consider the desirability of preserving existing family relationships in addressing the appropriateness of an appointee, although it does require the general principles and whether the appointee is likely to apply them to be considered (s15(1)(a)).

52 s14(2) NT Act; s44(2)(b) WA Act; s21(2)(c) Tas Act; s23(2)(c) Vic Act; s50(1)(a) SA Act; s10(4)(c) ACT Act; and, ss15(1)(d) and (e) Qld Act.

53 s14(2) NT Act; s44(2)(d) WA Act; s21(2)(d) Tas Act; s23(2)(d) Vic Act; s10(4)(e) ACT Act; s10(1)(f) Qld Act; and, s50(1)(d) SA Act. The Qld and SA Acts also require regard to be had to whether the potential appointee would be competent to carry out their functions (s15(1)(g) Qld Act and s50(1)(c) SA Act).

54 The wording in the NT Act regarding the authority of a guardian under a full order is archaic, regrettable and in urgent need of amendment - "all the powers and duties which the guardian would have if he or she were a parent and the represented person his or her infant child" [s17(1)].

55 In some jurisdictions it is unclear whether a guardian and/or financial manager can make decisions about legal services (and proceedings) for the person. Section 7(3) of the ACT Act clarifies this by stating that a guardian can "bring or continue legal proceedings for or in the name of the person".

56 Found, for example, in s45(2)(e) WA Act and s7(3) ACT Act.

57 Found, for example, in s7(3) ACT Act; s17(2) NT Act; s7(3) ACT Act; s25(2)(c) Tas Act and s45(2)(c) WA Act.

Restrictive practices⁵⁸

Some guardianship orders include functions permitting the guardian to authorise a service provider to contain or seclude an adult. Others have functions permitting retrieval of a person (usually by police) in order to return them to their place of accommodation. These functions strike at some of the most fundamental of human rights – freedom of movement and association, and bodily protection and integrity⁵⁹. Accordingly, it is essential that tribunals, panels, boards and courts give careful consideration before granting such functions, that there are transparent protocols, criteria and guidelines on whether and, if so, when to use such functions, and that they are regularly reviewed by the tribunals, panels, boards and courts.

Access

Another restrictive function that can be given to a guardian is 'access'. This function allows a guardian to decide who a person can and/or cannot contact and associate with and to instruct service providers to prevent contact and access by the person to those former associates. Such functions may be included in an order where the person:

- is at risk of exploitation or abuse by a former associate – for example, a person may be disinhibited sexually and be vulnerable to unprotected and unsafe sexual encounters;
- has been involved in the criminal justice system in the past when in the company of a former associate or under that former associate's influence;
- has behavioural problems and (according to clinical opinions) contact with a former associate (including a family member) outside of what's permitted by the person's behavioural management plan is deemed to have an adverse effect on the person and to be detrimental to the person's emotional, physical or psychological well-being.

Restrictions on access and contact with others are extreme. They prevent a person enjoying the company of another human being, usually against their wishes. They involve subjective assessments by people other than the person about 'what is best' for the person.

Health care, medical and dental treatment

One of the most common functions of a guardian is providing substitute consent for a person to health care, medical and dental treatment. Each jurisdiction has its own specific regime governing substitute consent for health care, medical and dental treatment, although generally each uses the following categories:

- **Urgent/emergency:** eg a person is involved in a car accident and is comatose and requires immediate surgery to save their life;
- **Special:** eg termination of pregnancy (discussed in more detail below);
- **Major:** eg dental surgery requiring the removal of teeth, and
- **Minor:** eg stitches for a cut requiring local anaesthetic.

If there is no person responsible or the person responsible cannot be located or cannot or will not respond, and the treatment is minor treatment, then the practitioner may treat without consent. However, if the treatment is major treatment, the practitioner must have consent from the tribunal, panel, board or court.

A practitioner may use some force in providing treatment. The Acts permit a practitioner to use the minimum force necessary and reasonable to carry out authorised treatments and health care.⁶⁰

Controversy has courted the question whether a guardian's health care function authorises him or her to make an informed consent to the withdrawal or with-holding of life-sustaining treatments. There is no single consistent position among the jurisdictions.⁶¹ The legislative hurdle that exists, certainly in New South Wales, is to ensure that any medical or dental treatment is "carried out for the purpose of promoting and maintaining [the protected person's] health and wellbeing"⁶².

58 Chapter 5B of the Qld Act contains a very thorough regime governing restrictive practices. Curiously, restrictive practices can only apply to a person with intellectual disability or cognitive disability who is receiving disability services from a funded service provider as understood by Disability Services Act 2006 (Qld). The types of restrictive practice permitted under the Qld Act include: containment and seclusion, chemical, physical and mechanical restraint, and restricting access. s80V(2) requires that for containment and seclusion the tribunal must be satisfied that the adult's behaviour in the past has resulted in harm to that adult or others, and there must be a positive behaviour support plan in place. Only Disability Services Queensland (DSQ) or a non-government organisation funded by DSQ can apply for an order for containment and seclusion.

59 The importance of the right to freedom of liberty, movement and association is reflected in New South Wales' statutory and Common Law (the writ of habeas corpus) and also in a number of international instruments to which Australia is a signatory, including the Convention on the Rights of Persons With Disabilities (see Articles 3.a., 3.c. and 13), the International Covenant on Civil and Political Rights (see Article 9) and Universal Declaration of Human Rights (see Article 3).

60 For example, s75 Qld Act.

61 Subsection 66A(2) of the Qld Act requires the person's health provider to reasonably consider that the commencement or continuation of the measure for the person would be inconsistent with good medical practice before a guardian's consent will operate.

62 s32(b) NSW Act.

In New South Wales, the single member judgment of the NSW Administrative Decisions Tribunal (**NSW ADT**) in *WK v Public Guardian (No 2)* [2006] NSWADT 121 held that “the ordinary meaning of the words in s 33 [of the NSW Act] defining “medical treatment”, are not sufficiently broad to encompass the withdrawal of life sustaining treatment” (at 11), and that a “decision to withdraw life sustaining medical treatment, is not a decision carried out for the purpose of promoting and maintaining the health and well being of a person” (at 12). However, two years later a de facto review of this judgment occurred in the case of *FI v Public Guardian* [2008] NSWADT 263. That case was heard by President O’Connor DCJ and in his judgment he held that a guardian does have power to make an advance care plan that includes provisions for the withdrawal of treatment, so long as the general principles of the NSW Act govern its making. The judgment stated that the “object of guardianship is to enable the making of decisions that the subject would have been able to make had he or she had legal capacity to do so” (at 44) and that it is well established that “a person has the right to refuse consent to any medical treatment, even if the treatment is objectively in the person’s best interests, including if the treatment may be necessary to save or sustain that person’s life”⁶³ (at 45).

Special treatments

The sorts of treatments regarded as special (and requiring approval from a tribunal, panel, board or court) in most jurisdictions are:

- termination of pregnancy
- sterilisation
- experimental treatments or medical research
- drugs of addiction (used for more than a specified period of time)
- removal of tissue from an adult while alive for donation to someone else
- electroconvulsive therapy or psychotherapy

Special treatments can only be consented to by order of the tribunal, panel, board or court. The tribunal, panel, board or court needs to consider the risks to the person of having the treatment and not having the treatment, the alternatives available, the therapeutic value to the person, the person’s quality of life with and without the treatment.

Matters about which a guardian never has power

There are some decisions that guardians (formal⁶⁴ or informal) can never make for a person. They are:

- making or revoking a will;
- making or revoking a power of attorney, enduring power of attorney or advance health directive;
- exercising the right to vote in an election or referendum;
- consenting to special treatment (see above);
- consenting to the adoption of a child, and
- consenting to marriage.

What are the responsibilities of a guardian?

Some of the guardianship statutes across Australia spell out the duties and responsibilities of guardians, and, in some cases, provide for penalties⁶⁵ and compensation⁶⁶ for breaching those duties and responsibilities. The duties made explicit in some statutes are:

- a duty to act in the best interests of the person;⁶⁷
- a duty of confidentiality;⁶⁸
- a duty to act honestly and with reasonable diligence;⁶⁹
- a duty to act as directed by the terms of a tribunal, panel, board or court’s order,⁷⁰ and

63 *Airedale National Health Service Trust v Bland* [1992] UKHL 5; [1993] AC 789.

64 See, for example, s110 WA Act, s7B ACT Act and Sch 2, s3 Qld Act.

65 For example, ss35 and 36 Qld Act.

66 For example, s59 Qld Act.

67 For example, s20(1) NT Act.

68 For example, s80 SA Act and s113 WA Act.

69 For example, s35 Qld Act.

- a duty to avoid situations or transactions that would give rise to a conflict of interest⁷¹. A guardian can be removed for breaching these duties, failing to act or other misconduct.

Commonsense tips on the responsibilities and the role of a guardian

Based on the experiences of clients of IDRS, below are some practical suggestions on how a guardian (formal or informal) can best fulfil their role:

- be available and contactable by the person and their support⁷² and service networks
- consult with the person first and find out what they want
- listen to what the person and their support network are saying in respect of a decision to be made
- respect the person's privacy and what they want (even if it is counter to your personal beliefs)
- make decisions as promptly as possible
- if it is a formal arrangement, know what the order covers (and doesn't cover) and only make decisions covered by the order
- remember you can seek guidance, if you need it, from the person's support network, professionals, support teams within tribunals, boards and the public advocate
- exercise common sense and discretion
- keep up open, regular and transparent dialogue with the person, their support and service networks so that you know who the person is, their idiosyncrasies, what they like, what they don't like – if someone was making decisions about you, you'd like to think they know who you are
- keep written records of the decisions you make, the views expressed by the person and their service and support networks
- confront any dispute that arises and be prompt to try and resolve it
- don't exclude the views and input of parents

⁷⁰ For example, s36 Qld Act.

⁷¹ For example, s37 Qld Act.

⁷² This includes family, friends and carers.

The process for guardianship

In each jurisdiction the process for formal guardianship is as follows:

- application
- investigation
- hearing
- review.

Most jurisdictions also have alternative means by which a person may be subject to a guardianship order – for example, in New South Wales, people who are classified by a court as involuntary patients (per the *Mental Health Act 2007* (NSW)). These alternative means are beyond the scope of this paper.

Application

There are some differences across the States and Territories as to who has standing to bring a guardianship application, though generally it is:

- the tribunal, board, panel or court⁷³ on its own initiative;
- the person him or herself;
- the public guardian, adult guardian or Public Advocate;
- a relative,⁷⁴ and
- an interested party⁷⁵.

It is worth noting that a person can make an application for another person and not seek to be the guardian themselves. They may not feel they are suitable or equipped to take on the role, but still feel the person needs a formal order and it is in their best interests.

Investigation

The bulk of the 'investigations' carried out by tribunals, panels, boards and courts is conducted during the hearing (discussed below). Most do not have the funding or resources to undertake substantive inquiries or investigations. There are some exceptions. Section 28 of the SA Act empowers the Guardianship Board to order the Public Advocate to investigate the affairs of a person and to furnish a report at its conclusion.

Hearing

Those entitled to receive notice of an upcoming hearing and to be parties to the proceedings are:

- the applicant;
- the person to whom the application relates;
- relatives⁷⁶ of that person;
- a person (if any) who has care of that person;
- the public guardian, adult guardian or Public Advocate, and
- any other person who has a proper interest in the proceedings⁷⁷.

73 Under s8(2) of the NT Act the NT Supreme Court "may direct any person to make an application under this section in respect of a person under a disability".

74 s8(1) of the NT Act uses the defined term "near relative".

75 "Interested party" is the term used in s12(3) of the Qld Act and is defined to mean "a person who has a sufficient and continuing interest in the other person". s33(1)(e) of the SA Act says that an application may be made by any person "who satisfies the Board that he or she has a proper interest in the welfare of the person". The NT Act also specifies that a person who has or is providing "substantial care and attention for a person under disability" can apply.

76 s3F(c) of the NSW Act specifies the spouse (if any) of the person as long as their relationship is "close and continuing".

77 s57A of the NSW Act says that the tribunal may join any person who, in its opinion, "should be a party to the proceedings (whether because of the person's concern for the welfare of the person the subject of the proceedings or for any other reason)".

Hearings (certainly those conducted before a board, panel or tribunal) are as informal as possible. Hearing rooms are not structured like courts – there is no witness stand and no bench. People participating sit around a table and don't need to stand or bow as in a court. Members hearing the application do not wear wigs, gowns or uniforms. There usually needs to be a good reason why and cause shown for a legal representative to be allowed to participate in a hearing. The members try not to focus on legal sections and arguments. The members apply, but usually are not bound to apply, the rules of evidence.

The process is very flexible. There can be 'time-outs'; the person can ask to have a private discussion with the members, with everyone else moving outside; where a person is very unwell, the members can come and hold a hearing at the person's home or hospital. People are addressed by their first name, if they prefer. Everyone is permitted to give their opinion at some stage. The hearing is not meant to be a fight or an adversarial contest – rather it is an inquisitorial exercise for the members.

At the end of the hearing, depending upon the complexity of the matter before them, the members can deliver their decision and order there and then or they can reserve their decision (to be delivered in person or in writing at a later point). Sometimes the members will need more time to deliberate. Once the decision is made, all parties will receive written copies of the order and the reasons for the order.

Review

All guardianship orders (whether temporary, continuing, limited or plenary) are subject to automatic periodic review. Review periods may be specified in the order as relatively short terms, say 28 days, where the order is temporary. For continuing orders, automatic review periods vary from jurisdiction to jurisdiction – the most frequent being annually, the least frequent being every five years.

Reviews (and usually, following from these, revocations) are mandatory⁷⁸ where the guardian:

- dies;
- wishes to be discharged, or
- appears incapable of carrying out their duties by reason of mental or physical incapacity.

In addition to automatic and mandatory reviews, each statute has provision for reviews to be conducted where an eligible person makes an application (so long as the application is not frivolous, vexatious or lacking in substance).⁷⁹

Generally those eligible to apply for a review are:

- the tribunal, panel, board or court on its own initiative;
- the person under guardianship;⁸⁰
- the public guardian, adult guardian or Public Advocate, and
- a person with "a genuine concern for the welfare of the person under guardianship".

A review considers whether the guardianship order needs to be amended, varied, continued or replaced subject to any conditions or restrictions, or revoked altogether. Matters that will need to be addressed will be:

- the effectiveness of the guardianship order in providing care and protection for the person;
- the need for the continuation of the order, and
- any changes in the circumstances of the person or of the person's guardian.

78 Some statutes (like the SA Act) also make reviews mandatory where the guardian has been found guilty of such neglect or misconduct or of such default as, in the opinion of the tribunal, renders him or her unfit to continue. The Qld Act also specifies that revocations will be mandatory if the guardian becomes a paid carer of the person, the guardian becomes a residential service provider of the person, or, where the guardian and person were married, if the marriage dissolves.

79 s25A of the NSW Act also allows the tribunal to refuse a review if in its opinion "the request does not disclose grounds that warrant a review" or "the tribunal has previously reviewed the order". The breadth of these grounds is alarmingly ambiguous.

80 Wording used in s25B(d) of the NSW Act.

Financial management



What is financial management?

Financial management (or administration) is the term given to the regime of control, management and substitute decision-making exercised by a person, an entity, two or more persons or entities (exercising functions jointly or separately), the government financial manager or public trustee over the financial affairs (or sometimes referred to as the estate) of a person with decision-making disability who does not have capacity to manage those affairs and is in need of such control and supervision.

Like guardianship, a person with decision-making disability can have their financial affairs managed informally, without the need for formal orders. It is the author's view that transparent informal arrangements of financial management that respect the person's dignity and integrity and seek to maximise the person's decision-making capacity and autonomy are to be preferred to formal financial management orders.

The types of decision-making disabilities for which financial management orders can be made are the same as those for which guardianship orders can be made (see above).

Most financial management orders are permanent. Experience in New South Wales indicates that once a financial management order is made, it is very difficult for the person to ever have it varied and virtually impossible to have it revoked.

Financial management orders do not need to be made for all the financial affairs of a person. They can apply to particular parts only.⁸¹ For example, the order could be confined to management of a large inheritance a person has received, leaving the person to continue to manage the income he receives from his job. Notwithstanding this available flexibility, most financial management orders cover all the financial affairs of a person.

Financial managers are entitled under the Acts to be remunerated for managing the affairs of the (protected) person. This can be controversial where the manager's performance has been substandard and where the person feels frustrated and ignored by the manager.

Just because a person is under a guardianship order, it does not necessarily follow that they must also be under a financial management order, and vice versa.

When might a financial management order be needed?

Some people with decision-making disabilities receive some help and support, on an informal basis, to manage their money. A family member, friend, disability advocate, financial counsellor, disability worker or combination of these people may assist a person with decision-making disability to manage their finances. This should be done with the express agreement of the person with decision-making disability and records, accounts and receipts should be kept for all transactions and payments made. For example, a family member might become a joint signatory on the person's bank account or receive the person's Disability Support

⁸¹ Referred to as a "limited administration order" in the SA Act [s35(1)(c)].

Pension on their behalf if the person cannot manage and requests that assistance. Centrelink refers to the family member in this example as a 'nominee' for the person with decision-making disability.

Where informal arrangements break down or a person's cognitive impairment and money-managing skills decline to the point that he or she can no longer be supported in their financial decision-making or where the person's decisions about their finances are placing them at risk of exploitation, it may be necessary for formal orders to be sought.

Other situations where formal financial management orders might be needed include where:

- a person does not have any family, friends or other trusted people in their life willing and able to assist them with their financial affairs and to maintain informal supported financial decision-making;
- there is conflict about what financially is in the best interests of a person;
- informal supported financial decision-making is proving detrimental to the best interests of the person;
- a person's financial needs are being neglected or they are being financially abused or exploited;
- a person's own financial decisions are not working in their own best interests and are in fact placing them at risk, or
- a child's parents pass away.

What must be satisfied for financial management orders to be made?

In order to make a financial management order a tribunal, panel, board or court needs to satisfy itself of matters that are very similar to those required for a guardianship order – namely, that the person has impaired decision-making capacity, is in need of an order and an order is in their best interests.

Section 25G of the NSW Act stipulates that the tribunal may make a financial management order "only if" it has considered a person's capability to manage their own affairs and "is satisfied that:

- a) the person is not capable of managing those affairs, and
- b) there is a need for another person to manage those affairs on the person's behalf, and
- c) it is in the person's best interests that the order be made."

The other States and Territories employ similar criteria.

Western Australia's criteria are not so stringent. There the tribunal need only be satisfied that the person "is unable, by reason of a mental disability, to make *reasonable judgments* in respect of matters relating to all or any part of his <sic> estate" (my emphasis) and "is in need of an administrator".⁸² These criteria are virtually identical to those used in Victoria.⁸³ It is submitted that the 'reasonable judgment' threshold (in lieu of the 'not capable of managing' threshold) is too low a threshold for making such an intrusive and disempowering order upon a person as a financial management order.

South Australia has a very broad discretion. Sub-section 35(1) of the SA Act simply requires the Guardianship Board to be satisfied that the person has a "mental incapacity" and that it "should" make an order. Of course, it is bound by the general principles⁸⁴ in exercising that discretion.

Capable of managing his or her own affairs

In New South Wales, the Supreme Court has provided guidance on determining whether a person is capable of managing his or her own affairs. The often-cited authority for determining this is the NSW Supreme Court judgment of Justice Powell in *PY v RJS* [1982] 2 NSWLR 700:

82 s64(1) WA Act.

83 s46(1) Vic Act.

84 s5 SA Act.

"It is my view that a person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears:

- a) that he or she appears incapable of dealing, in a **reasonably competent** fashion, with the ordinary routine affairs of man; and
- b) that, by reason of that lack of competence there is shown to be a **real risk** that either:
 - (i) he or she may be disadvantaged in the conduct of such affairs; or
 - (ii) that such moneys or property which he or she may possess may be dissipated or lost ... **"it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner"**

[my emphasis]

Justice Powell, in another case, *Re C (TH) and the Protected Estates Act* [1999] NSWSC 456, helpfully provides further guidance:

"... it is not a question of whether the Protective Commissioner or somebody else could manage the affairs of the applicant better, or that if the applicant was left on her own the likelihood would be that her funds would soon be dissipated. One cannot be too paternalistic. People have the right to manage their affairs, unless they fall below the level that is prescribed by the Act."

[my emphasis]

Need for an order

There is a risk that tribunals, panels, boards or courts may find that a person is in need of an order merely because they are not capable of managing their affairs.⁸⁵ This should not be the methodology. They are two distinct inquiries.

The Vic Act⁸⁶ provides guidance on determining whether or not a person is in need of a financial manager, by requiring consideration of:

- whether the needs of the person could be met by other means less restrictive of the person's freedom of decision and action, and
- the wishes of the person.

In the Northern Territory, financial management is governed by the *Aged and Infirm Persons' Property Act*.

Pursuant to subsection 12(1) of that Act, the NT Supreme Court cannot make a protection order "unless it is satisfied that the person is, by reason of age, disease, illness or mental or physical infirmity in a position which renders it necessary in his <sic> interests of that person or the interests of those dependent on him that his estate be protected." Further, subsection 12(2) says that to determine whether a person is "in a position which renders it necessary in his <sic> interest or the interests of those dependent on him that his estate be protected", the NT Supreme Court must take into account:

- the contents of any report;⁸⁷
- whether the person is "unable, wholly or partly, to manage his affairs," or
- whether the person is "subject to or liable to be subject to undue influence in respect of his <sic> estate or the disposition thereof."

There is concern that often informal supports, adjustments and measures could be put in place to adequately address any real concerns or risks a person faces with respect to their financial decision-making, but, for whatever reason, they are not put in place or even trialled. There is a risk that applications for formal financial management orders are therefore too readily resorted to. This also flies in the face of recent amendments to the *Disability Discrimination Act 1992* (Cth) that extend the grounds of unlawful disability discrimination to cover situations where there is a failure to make reasonable adjustments [see sections 5 and 6 of the *Disability Discrimination Act 1992* (Cth)].

Another concern is that at times applications are made for financial management orders by persons who simply disagree with or do not approve of another person's financial decisions (usually based on moral, religious or personal beliefs). Just because a person with decision-making disability wants to spend their money on sex services, entertainment or gambling, this does not automatically mean they need a financial manager. When considering the 'need' limb the tribunal, panel, board or court should ask itself:

- is the application motivated by moral, religious, political, personal or other irrelevant beliefs?
- what supports, adjustments and measures have been taken to limit any real and identified risks associated with the person's incapacity to manage their financial affairs?
- are they sufficient to allay the risks?

Best interests of the person

Many of the people contacting IDRS about financial management orders find the restrictions very distressing, frustrating and detrimental to their lives. They are often limited in many aspects of their lives – for example, some clients have not been able to access funds for food, transport and other necessities. For many others, negotiating for money to enjoy some special event or occasion, outside their usual routine (for example, a gift for a friend's birthday or to attend a special event, like a concert or dinner) proves to be impossible. There should be an express obligation in legislation that the effect of the financial management order on the person and the relationship between the person and their financial manager be taken into account by the tribunal, panel, board or court when considering the 'best interests of the person'.

⁸⁵ In *Re R* [2000] NSWSC 886 Young J (at paragraph 31) was inclined to see need as flowing automatically from a finding that the person was not capable of managing their affairs.

⁸⁶ Subsection 46(2).

⁸⁷ s10 of the NT Act empowers the Supreme Court to order government services to investigate and report on the welfare of a person the proposed subject of a protection order.

Who can be a financial manager?

A person over 18 years of age or a trustee company may be a financial manager. There may be more than one financial manager for a person – that is, joint financial managers. In some jurisdictions, like South Australia, Western Australia and the Australian Capital Territory, the Public Advocate may be appointed a financial manager (usually as a last resort).

The tribunal, panel, board or court must be satisfied the financial manager(s) will act in the best interests of the person and otherwise be suitable to act as the manager of the estate of the person. The criteria⁸⁸ for determining the suitability of proposed financial managers include:

- the compatibility of the proposed appointee with the person and with any guardian of the person;
- the wishes of the person;
- whether or not there are existing informal arrangements for management of the person's financial affairs;
- whether or not this is the least restrictive alternative, and
- whether the proposed appointee will be able to perform the functions proposed to be vested in the financial manager.

What are the functions of a financial manager?

Each Act lists the powers and functions of financial managers.⁸⁹ An order need not be for the entire estate of a person; an order can be restricted to certain aspects of a person's estate. Financial management orders commonly cover:

- paying a person's essential living expenses – paying bills, rent, food and related living expenses;
- deciding how a person spends their money – for entertainment, holidays, leisure and pass-times;
- deciding how a person invests their money;
- selling or purchasing property and investments for a person;
- paying for repairs to property of a person;
- demanding, recovering and receiving moneys owed to a person;
- looking after a person's Centrelink payments and any other income;
- insuring or leasing the person's property
- looking after any money or property a person receives as a beneficiary of a will or trust, and
- paying a person's debts.

The WA Act requires a financial manager to act in the best interests of the represented person. The WA Act indicates⁹⁰ that a financial manager acts in the person's best interests if he or she acts as far as possible:

- as an advocate for the person in relation to the estate;
- to encourage the person to live in the general community and participate as much as possible in the life of the community;
- to encourage the person to become capable of caring for herself or himself and of making reasonable judgments for herself or himself;
- to protect the person from financial neglect, abuse and exploitation;
- in consultation with the person, taking into account, as far as possible, the wishes of that person as expressed, in whatever manner, or as gathered from that person's previous actions;
- in the manner that is least restrictive of the rights, while consistent with the proper protection, of the person;
- in such a way as to maintain any supportive relationships the person has, and
- in such a way as to maintain the person's familiar cultural, linguistic and religious environment.

⁸⁸ s68(2) WA Act.

⁸⁹ s17 *Aged and Infirm Persons' Property Act* (NT); s39 SA Act; ss48-58A Vic Act; ss33-55 Qld Act; ss69-83 WA Act and ss56-64 Tas Act. The NSW Act does not specify or enumerate the powers and functions of a financial manager. ss8(1) and (2) of the ACT Act merely states the powers a manager has are those the person would have if she or he were legally competent to exercise powers.

⁹⁰ s70(2) WA Act.

In most jurisdictions a financial manager can also institute or defend any legal action or other proceeding relating to the (protected) person's estate and suffer any judgment to go by default, or consent to any judgment or order in the action or proceeding upon such terms as the financial manager thinks fit.

A financial manager cannot make or revoke a will for a person. And, as noted above⁹¹, the fact a person is under a financial management order does not lead to the conclusion that the person is conclusively to be presumed to lack testamentary capacity. A person, though under a financial management order, may retain sufficient capacity to understand the nature of the document (the will) to be executed, the extent of the property to be disposed of, and the claims of those the person proposes to benefit or exclude.

What are the duties and responsibilities of a financial manager?

Financial managers must keep records and accounts and provide periodic reports to the tribunal, panel, board or public trustee for audit and review.

The Qld Act expressly imposes the following duties⁹² on financial managers:

- a duty to act honestly and with reasonable diligence;
- a duty to act as directed by the terms of the order, and
- a duty to avoid conflict transaction.

The Qld Act⁹³ also expressly requires financial managers to keep their property separate from those of the person and has limitations on the power of the financial manager to make investments, to make gifts and to maintain the person's dependants.

The process for making a financial management order

The process for making a formal financial management order mirrors that for formal guardianship orders. Most jurisdictions also have alternative means by which a person may be subject to a formal financial management order – for example, in New South Wales, the Supreme Court has an inherent *parens patriae* jurisdiction and can make an order that a person's estate (or part thereof) be managed by a financial manager. This is most commonly exercised where a person deemed not to have legal capacity is awarded a significant amount in compensation following legal proceedings.

As with guardianship, the process for making a formal financial management order is:

- application
- investigation
- hearing
- review.

91 Op.cit. 28

92 ss35-37 Qld Act.

93 ss49-55 Qld Act.

Application

There are some differences across the States and Territories as to who has standing to make a financial management application, though generally⁹⁴ it is:

- the tribunal, panel, board or court⁹⁵ on its own initiative;
- the person him or herself;
- a person already appointed as financial manager;
- a private guardian, the public guardian, adult guardian or Public Advocate;
- a relative,⁹⁶ and
- an interested party.⁹⁷

It is worth noting that a person can make an application for another person and not seek to be the financial manager themselves. They may not feel they are suitable or equipped to take on the role, but still feel the person needs a formal order and it is in their best interests.

Investigation

The bulk of the 'investigation' carried out by tribunals, panels, boards and courts is conducted during the hearing (discussed below). Most do not have the funding or resources to undertake substantive inquiries or investigations. There are some exceptions. Section 28 of the SA Act empowers the Guardianship Board to order the Public Advocate to investigate the affairs of a person and to furnish to it a report at the conclusion of the investigation.

Hearing

Those entitled to receive notice of an upcoming hearing and to be parties to the proceedings are:

- the applicant;
- the person to whom the application relates;
- a relative⁹⁸ of that person;
- a person (if any) who has care of that person;
- a private guardian, the public guardian, adult guardian or Public Advocate, and
- any other person who has a proper interest in the proceedings⁹⁹.

Hearings (certainly those conducted before a board, panel or tribunal) are as informal as possible. Hearing rooms are not structured like courts – there is no witness stand and no bench. People participating sit around a table and don't need to stand or bow as in a court. Members hearing the application do not wear wigs, gowns or uniforms. There usually needs to be a good reason why and cause shown for a legal representative to be allowed to participate in a hearing. The members try not to focus on legal sections and arguments. The members apply, but usually are not bound to apply, the rules of evidence.

The process is very flexible. There can be 'time-outs'; the person can ask to have a private discussion with the members, with everyone else moving outside; where a person is very unwell, the members can come and hold a hearing at the person's home or hospital. People are addressed by their first name, if they prefer. Everyone is permitted to give their opinion at some stage. The hearing is not meant to be a fight or an adversarial contest – rather it is an inquisitorial exercise for the members.

At the end of the hearing, depending upon the complexity of the matter before them, the members can deliver their decision and order there and then or they can reserve their decision (to be delivered in person or in writing at a later point). Sometimes the members will need more time to deliberate. Once the decision is made, all parties will receive written copies of the order and the reasons for the decision.

94 The NT Act only allows the person, spouse, de facto, near relative or the Public Trustee to make an application [s7(1)].

95 Under s8(2) of the NT Act the NT Supreme Court "may direct any person to make an application under this section in respect of a person under a disability".

96 s8(1) of the NT Act uses the defined term "near relative".

97 "Interested party" is the term used in s12(3) of the Qld Act and is defined to mean "a person who has a sufficient and continuing interest in the other person". s37 of the SA Act says that an application may be made by any person "who satisfies the Board that he or she has a proper interest in the welfare of the person". The NT Act also specifies that a person who has or is providing "substantial care and attention for a person under disability" can apply.

98 s3F(c) of the NSW Act specifies the spouse (if any) of the person as long as their relationship is "close and continuing".

99 s57A of the NSW Act says that the tribunal may join any person who, in its opinion, "should be a party to the proceedings (whether because of the person's concern for the welfare of the person the subject of the proceedings or for any other reason)".

Review

Most, but not all¹⁰⁰, Acts provide for automatic reviews (called 'reassessments' in Victoria) of financial management orders¹⁰¹. Automatic review periods vary from jurisdiction to jurisdiction – the most frequent being annually, the least frequent being every five years.

Reviews are mandatory where a financial manager:

- dies;
- becomes bankrupt or insolvent;
- wishes to be discharged, or
- appears incapable of carrying out their duties by reason of mental or physical incapacity.

Each Act has provision for reviews to be conducted where an eligible person makes an application (so long as the application is not frivolous, vexatious or lacking in substance¹⁰²). Generally those eligible to apply for a review are:

- the tribunal, panel, board or court on its own initiative;
- the person him or herself;
- a person already appointed as financial manager;
- a private guardian, the public guardian, adult guardian or Public Advocate;
- the public trustee (or equivalent);
- a relative, and
- an interested party.

A review considers whether the financial management order needs to be amended, varied, continued or replaced subject to any conditions or restrictions, or revoked altogether. The Acts do not provide much guidance on what must be satisfied in order for an order to be varied or revoked.

Revocation

In New South Wales a financial management order can be revoked by the Guardianship Tribunal if:

- a) it is satisfied that the protected person is capable of managing his or her affairs, or
- b) it considers that it is in the best interests of the protected person that the order be revoked (even though it is not satisfied that the protected person is capable of managing his or her affairs).

The onus of proof lies with the person making the application (usually the protected person) to lead evidence and establish either of the limbs. Leaving to one side the evidentiary difficulties for a person with decision-making disability to meet the onus of proof, there is an inherent unfairness in this 'test' for revocation in New South Wales. That is, there is no alternative limb in the test allowing the applicant to argue there is no longer a 'need' for their affairs to be managed by another person, even though there is a 'need' limb in the test to determine whether that person should have been under the financial management order in the first place. In other words, in New South Wales, it is easier to be put under a financial management order than it is to be removed from one. There should be a 'no longer needs' limb added, along the lines of the following:

- c) it [the Guardianship Tribunal] is satisfied that there is no longer a need for another person to manage the affairs (currently under management) on the person's behalf.

Given the complexity of properly preparing and making revocation applications,¹⁰³ there is a need for applicants to have legal representation.¹⁰⁴ Each Act should have a provision requiring the tribunal, panel, board or court to appoint a legal representative to assist a revocation applicant.

¹⁰⁰ The NSW Act only provides for reviews of financial management orders where an application is made.

¹⁰¹ ss26-32A Qld Act; s25P NSW Act; s36 SA Act; ss84-90 WA Act; s19 ACT Act; s67 Tas Act; s61 Vic Act, and s7 of the *Aged and Infirm Persons' Property Act* (NT).

¹⁰² s25A of the NSW Act also allows the tribunal to refuse a review if in its opinion "the request does not disclose grounds that warrant a review" or "the tribunal has previously reviewed the order". The breadth of these grounds is alarmingly ambiguous.

¹⁰³ Leading judgments in NSW like *Re Ghi (a protected person)* [2005] NSWSC 581, *PY v RJS* [1982] 2 NSWLR 700 and *Re C (TH) and the Protected Estates Act* (1999) NSWSC 456 show just how comprehensive and systematic the evidence needs to be for a revocation application to be successful.

¹⁰⁴ Section 13(2) of the NT Act requires the Adult Guardianship Executive Officer to ensure that in any guardianship application proceedings the person about whom the application is made is legally represented. Section 97(1)(d) of the WA Act requires the Public Advocate to seek assistance for any represented person or person in respect of whom an application has been made from any government department, institution, welfare organisation or the provider of any service, and, where appropriate, to arrange legal representation for the person.

Capable of managing one's affairs

There is nothing in the NSW Act that directs or mandates the Guardianship Tribunal about whether (and, if so, when) a financial management order should be varied. If revocation is sought on the ground of re-gained capacity, the person needs to prove 'the reverse of the incapable test'. That is, the person needs to provide evidence to satisfy the tribunal, panel, board or court that they are now capable of managing their financial affairs. For example, the person might get a report from a medical professional or caseworker that says their condition or situation has improved and they are now again capable of managing their financial affairs. This often applies to someone who has had a stroke, or has a brain injury or mental illness. Other important evidence may be that the person has had budgeting training and now has ongoing financial counselling support and so is better able to manage his or her finances or it could be that drug and alcohol problems were contributing to the person's difficulties and these are no longer a problem. It is very difficult to show re-gained capacity without professional support, particularly if the person hasn't been given a short-term trial to confirm they can manage their finances adequately.

There should be provisions in each Act allowing a person to apply for trials to give a person a chance to show they can better manage their finances. These trials should also be promoted and more readily accessible for people under financial management orders. This could be achieved by making it a process that must be considered and offered by the tribunal, panel, board or court at the (automatic periodic) reviews.

Controversies, criticisms and hot topics



Reviews of financial management orders should be automatic

At present, there are no automatic reviews of financial management orders in New South Wales¹⁰⁵ or the Northern Territory. In those jurisdictions they are only reviewed on application by a person or if the tribunal or court has specified in the original order that a review will occur after a specific period. Reviews, in these jurisdictions, are the exception, not the rule. It is submitted that financial management orders should be automatically reviewed. All the other Acts provide for automatic reviews of financial management orders (either every one, three or five years).

This will improve the accountability of private managers and government trustee companies and financial managers, and will improve the experience of people subject to financial management orders by allowing them an opportunity to contest an order and to show that their circumstances have changed sufficiently for the order to be varied or revoked. Of course, legislative amendment in this regard will not be enough – the New South Wales and Northern Territory governments will need to adequately fund and resource their tribunal and court for the additional work the change will create, so that reviews will be meaningful and procedurally fair.

Inconsistencies and difficulties in revoking financial management orders

As mentioned above, the 'test' a person needs to satisfy for revocation under section 25P of the NSW Act (and the evidence they need to present) is too onerous, particularly when compared to the 'test' needed to be satisfied to put the person under the financial management order in the first place. This should not be the case.

Sub-section 25P(2) of the NSW Act says that the Guardianship Tribunal may revoke a financial management order only if:

- a) it is satisfied that the protected person is capable of managing his or her affairs, or
- b) it considers that it is in the best interests of the protected person that the order be revoked (even though it is not satisfied that the protected person is capable of managing his or her affairs)

It is starkly unfair that there is no alternative limb in this test allowing the applicant to argue there is no longer a 'need' for their affairs to be managed by another person, even though there is a 'need' limb in the test to determine whether that person should have been under the financial management order in the first place. In other words, in New South Wales, it is easier to be put under a financial management order

¹⁰⁵ A number of submissions to the NSW Parliament Standing Committee on Social Issues' inquiry into the provisions of substitute decision-making for people lacking capacity in New South Wales (discussed below) have called for automatic reviews.
See: www.parliament.nsw.gov.au/Prod/Parliament/Committee.nsf/0/EEDCC12FC63D6EC7CA2575EC00003769

than it is to be removed from one. It is submitted that section 25P(2) should include a 'no longer needs' alternative limb, with wording like:

- c) it is satisfied that there is no longer a need for another person to manage the affairs (currently under management) on the person's behalf.

These lopsided entry and exit 'tests' may also arise in other jurisdictions.

Given the complexity of properly preparing and making revocation applications, there is a need for applicants to be offered the assistance of legal support and, where necessary, legal representation. All the Acts should include a provision for their tribunal, board, panel or court to appoint a legal representative to assist a person applying for revocation of a financial management order.

Best interests

In most jurisdictions an alternative limb for revoking or varying a financial management order is the 'best interests' limb. People with intellectual disability tend to be more successful with revocation applications on the ground of best interests. These applications involve showing that there is no longer a need for the order because there are no longer risks to the person's finances. For example, a person who was exploiting them is no longer in their lives or there are now ways to manage the risk to their finances and, as a result, it is now in the person's best interests that the order be removed.

Many of the people contacting IDRS about financial management orders find the restrictions very distressing, frustrating and detrimental to their lives. They are often limited in the social activities they can enjoy. Moreover, most are frustrated and angry with their financial managers (especially where the financial manager is a government agency). Each Act should require the tribunal, panel, board or court to consider the effect of the financial management order on the person and their quality of life under it, and the relationship between the person and their financial manager when assessing the 'best interests' limb in a review, revocation or variation application.

Need for a Public Advocate in all States and Territories

Not all jurisdictions have a Public Advocate. A Public Advocate exists in South Australia, Western Australia, the Australian Capital Territory, Victoria and Queensland.¹⁰⁶ It has a legislated mandate to advocate for individuals without the need for a guardianship or financial management appointment. It should not be necessary to take away a person's right to make their own decisions in order for them to have advocacy services. Such an independent body is a powerful voice for vulnerable people, including those subject to guardianship and financial management.

Generally, the role and powers of the Public Advocate are:

- to make guardianship and financial management applications and to attend hearings;
- to act as a guardian or administrator either solely or jointly;
- at hearings, to seek to advance the best interests of the person, present information in his/her possession that is relevant to the hearing and investigate and report on any matter or matter referred to it;
- to investigate any complaint or allegation that a person is in need of a guardian or financial manager or is under an inappropriate guardianship or financial management order
- to seek assistance for any person under financial management and/or guardianship or for a person in respect of whom an application for such has been made by any government department, institution, welfare organisation or the provider of any service, and where appropriate, arrange legal representation for them;
- to provide information and advice on guardianship and financial management;
- to accompany police to go into accommodation where it is believed a person with disability is being unlawfully detained against their will or is likely to suffer serious damage to their physical, emotional or mental health or well-being unless immediate action is taken;¹⁰⁷
- to raise important matters and concerns with the Minister;
- to promote public awareness and understanding of guardianship and financial management and the protection of the rights of persons under financial management and/or guardianship and the protection of them from abuse and exploitation, and

¹⁰⁶ s91 WA Act; ss18-24 SA Act; ss14-18A Vic Act, and ss208-221 Qld Act.

¹⁰⁷ See, for example, s27 Vic Act.

- to promote family and community responsibility for guardianship and financial management and to support and coordinate community education projects.

The Public Advocate has the capacity to effect systemic improvements for people with decision-making disability. It is a 'pro disability', activist, human-rights focussed and independent body, able to scrutinise and take action against other government agencies to promote and protect the rights of persons subject to financial management and guardianship orders.

Queensland has both a Public Advocate and an Adult Guardian.¹⁰⁸ The functions and powers of both tend to overlap to a degree (for instance, protecting the rights of persons with impaired capacity and educating the community). However, the demarcation seems to be that the Public Advocate's functions relate more to systemic advocacy (like, promoting the protection of adults with impaired capacity from neglect, exploitation or abuse, and monitoring and reviewing the delivery of services and facilities to adults with impaired capacity), whereas the Adult Guardian's functions encompass individual complaints about guardians and financial managers, consenting to forensic examinations and scrutinising restrictive practice applications.

People with intellectual disability are some of the most vulnerable and voiceless people in our society. The need for a robust, well-resourced and fiercely independent public advocate in New South Wales and the Northern Territory has never been so paramount.

Problems with government bodies that exercise guardianship or financial management functions

Where a person does not have a family member, friend or other person with a genuine concern for their welfare who is willing and able to take on the role of guardian or financial manager, the tribunal, panel, board or court will appoint the relevant government body that exercises guardianship or financial management (like the public trustee).

IDRS consistently receives complaints from people who have the Office of the NSW Trustee and Guardian or the Office of the Public Guardian (OPG) as their financial manager or guardian respectively. Complaints include:

- use of 'client service teams' leading to no particular person being responsible or accountable for any particular client;
- inconsistent service delivery and information to clients with disability which understandably leads to incredible levels of stress and frustration for those people;
- slow (to no) responses to requests from clients;
- bills not being paid;
- slow decision-making;
- an unwillingness to spend the time needed to understand the needs, changing circumstances and idiosyncrasies of clients;
- a lack of individualised service to the needs and wishes of each client;
- being left for extensive periods of time 'on hold' when clients telephone and being forced to leave voicemail messages that do not get returned or answered, and
- concerning cynical and pejorative attitudes of some of the staff to their clients and to disability.

Few, if any, clients under the financial management of the NSW Trustee and Guardian have individualised financial plans and budgets specifically tailored to their lifestyle needs and aspirations. Few clients have regular direct personal contact with staff, and for those reasons it is not possible for the NSW Trustee and Guardian to really know if the person's assets are being used for their benefit or in their best interests.

¹⁰⁸ ss173-207 Qld Act.

Many of the service delivery problems can be ameliorated by better resourcing, funding and training government bodies that exercise guardianship or financial management.

The United Nations Convention on the Rights of Persons with Disabilities

The United Nations Convention on the Rights of Persons with Disabilities (**CRPD**) and its Optional Protocol were adopted at the United Nations Headquarters in New York on 13 December 2006, and entered into force internationally on 3 May 2008. In addition to the Federal government, all State and Territory governments should acknowledge the practical and symbolic import of this international convention by ensuring all laws regarding guardianship and financial management meet the principles, intent and spirit of the CRPD.

Australia ratified the CRPD on 17 July 2008, making it one of the first Western countries to do so. On 30 July 2009 Australia acceded to the Optional Protocol providing a mechanism for Australians to make complaints to the United Nations Disabilities Committee for breaches of the CRPD (where domestic remedies have been exhausted). By ratifying the CRPD and adopting the Optional Protocol, Australia has signalled its intent to join other countries around the world in a global effort to promote the equal and active participation of all people with disability in society.

The purpose of the CRPD is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms for all people with disability, and to promote respect for their inherent dignity. It seeks to redress the physical and social barriers, discrimination and disadvantage confronting people with disability throughout the world and to promote their full participation and recognition in civil, political, economic, social and cultural life.

Some of the CRPD's Articles that bear on the fundamental principles of autonomy, personal decision-making and self-determination include:

- Non-discrimination (Art 4)
- Equal protection before the law (Art 5)
- The right to equal recognition before the law (Art 12)
- Access to justice on an equal basis with others (Art 13)
- Freedom from exploitation, violence and abuse (Art 16)
- Protecting the integrity of the person (Art 17)
- Freedom of expression and opinion, and access to information (Art 21)

In the interpretation part of the CRPD Australia recognizes that people with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the CRPD allows for supported decision-making arrangements and substitute decision-making on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards (including review before a court or tribunal).

Australia also recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others and declares its understanding that the CRPD allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, only where such treatment is necessary to protect the health and welfare of a person/people, as a last resort and subject to safeguards (including review before a court or tribunal).

Australia recognizes the rights of persons with disability to liberty of movement and to freedom to choose their residence, on an equal basis with others.

It is incumbent upon the Federal government and all State and Territory governments to uphold and implement the principles, intent and spirit of the CRPD in their social policy, allocation of resources and legislation. This is especially so in regards to any legislation that restricts a person's liberty, freedom of choice and expression.

Current government reviews of guardianship and financial management laws

In mid-2009 the New South Wales and Victorian governments announced reviews of legislation relating to guardianship and financial management.

On 30 June 2009 the NSW Parliament Standing Committee on Social Issues established an inquiry into the provisions of substitute decision-making for people lacking capacity in New South Wales,¹⁰⁹ and, in particular, whether any New South Wales legislation requires amendment to make better provision for the management of estates of people incapable of managing their affairs; and the guardianship of people who have disabilities. The committee received written submissions and held public hearings that concluded on 5 November 2009. At this stage it is unclear when the committee will publish its report and make recommendations.

In June 2009 the Brumby Labor government referred the *Guardianship and Administration Act 1986* (Vic) for review by the Victorian Law Reform Commission.¹¹⁰ The Commission has been asked to review and report on the potential changes needed to meet the human rights of people with impaired decision-making capacity (particularly in light of the CRPD and the Victorian Charter of Human Rights and Responsibilities), developments in policy and practice in the area, and changes in Victoria's demographics that indicate more people will require support with decision-making in the future.¹¹¹

¹⁰⁹ www.parliament.nsw.gov.au/Prod/parliament/committee.nsf/0/EEDCC12FC63D6EC7CA2575EC00003769

¹¹⁰ www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/Home/Current+Projects/Guardianship/

¹¹¹ Ergun Cakal's short piece entitled "Dignity, autonomy, privacy – The Victorian Guardianship and Administration Act needs to be amended to better reflect the rights of people with disabilities", *Libertynews*, Issue 4, July-August 2009, Liberty Victoria, Victorian Council for Civil Liberties Inc, sees the review as well overdue.



Concluding remark

It is hoped that this paper has provided you with a basic understanding of what guardianship and financial management is, the alternatives to formal orders and what laws in your State or Territory govern these areas. It is also hoped that the paper has exposed some of the problems experienced by people subject to guardianship and financial management and aspects ripe for review and reform. Making lifestyle, financial and health decisions for another human being should always be exercised with the utmost understanding, diligence and empathy.

