Representing clients in the Guardianship Division of NCAT

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Representing clients in the Guardianship Division of the NSW Civil and Administrative Tribunal (**NCAT**) can be challenging, especially for legal practitioners unfamiliar with practising in a protective jurisdiction which employs an inquisitorial model of decision-making. The Guardianship Division is required to give paramount consideration to the welfare and interests of people with disabilities and to exercise its powers in a manner that encourages informality, flexibility and despatch. I will provide an overview of the practices and procedures of the Division designed to achieve those requirements. In addition, I aim to provide practical guidance to legal practitioners about how to assist the Guardianship Division to achieve its statutory obligations.

NCAT's Guardianship Division: an overview

One of four divisions of NCAT, the Guardianship Division exercises a "protective jurisdiction". Among other things, the Tribunal appoints substitute decision-maker(s) for people with a decision-making disability in circumstances where there is a need for a decision or a particular class of decisions to be made for that person. Except in relation to decisions about medical and dental treatment where a person is "incapable of giving consent to the carrying out" of that treatment,[1] the Guardianship Division does not make decisions on behalf of people with decision-making disabilities. Nor does the Division review decisions made by substitute decision-makers. Where, either by order of the Division or the NSW Supreme Court, the Public Guardian is appointed as guardian for a person, decisions made by the Public Guardian in exercise of

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[1] *Guardianship Act 1987* (NSW), Pt 5, Div 4. See also, *Children and Young Persons (Care and Protection) Act 1998* (NSW), s 175.

that authority are reviewable by NCAT's Administrative and Equal Opportunity Division (**AEOD**).[2] Similarly, where, by order of the Guardianship Division or the Supreme Court, the estate of a person is committed to the management of the NSW Trustee and Guardian, decisions made by the NSW Trustee and Guardian in exercise of that authority are reviewable by the AEOD.[3] Decisions made by a private guardian or financial manager appointed by the Guardianship Division or the Supreme Court are not reviewable by the AEOD.

The powers, duties and functions of the Guardianship Division are governed by the *Civil and Administrative Tribunal Act 2013* (NSW) (**NCAT Act**) and its enabling legislation, the *Guardianship Act 1987* (NSW), the *Powers of Attorney Act 2003* (NSW), the *Children and Young Persons (Care and Protection) Act 1998* (NSW) and the *NSW Trustee and Guardian Act 2009* (NSW).

The Guardianship Division and the Supreme Court exercise concurrent jurisdiction under the *Guardianship Act*[4] and Pt 5, Div 4 of the *Powers of Attorney Act*[5]. The Supreme Court's "inherent jurisdiction" or "parens patriae" (parent of the nation)[6] is not displaced by the NCAT Act or the Guardianship Division's enabling legislation.[7]

With the concurrence of the Supreme Court, NCAT may refer proceedings relating to "a person's capability to manage their [financial] affairs" to the Court.[8] In addition, NCAT may refer an application made to it under the *Powers of Attorney Act* in respect of an enduring power of attorney or the revocation of an enduring power of attorney to the Supreme Court, and vice versa.[9] In deciding

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[2] *Guardianship Act*, s 80A; *Civil and Administrative Tribunal Act 2013* (NSW), Sch 3, cl 3(1)(b) ('*NCAT Act*').
[3] *NSW Trustee and Guardian Act 2009* (NSW), s 70; *NCAT Act*, Sch 3, cl 3(1)(b).
[4] *Guardianship Act*, s 8.
[5] *Powers of Attorney Act 2003* (NSW), s 27 ('*Powers of Attorney Act*').
[6] *Secretary, Department of Health and Community Services v JWB & SMB* [1992] HCA 15; (1992) 175 CLR 218 (Marion's Case) at 258-259.
[7] *Guardianship Act*, ss 8, 31G; Justice Geoff Lindsay, 'Roles in Protective Management of Person and Property' (Seminar Paper, NCAT Guardianship Division Training Seminar, 8 December 2017) at [29].
[8] *Guardianship Act*, s 25L. See, for example, *Secretary, NSW Department of Communities and Justice and Anor v ZYM and Anor* [2022] NSWSC 935 (Lindsay J); *Sobalirov v Bullen* [2020] NSWSC 1532 (Sackar J).
[9] *Powers of Attorney Act*, s 34(1).

whether or not to make such referral, the Supreme Court and NCAT may have regard to whether:

(1) the application relates to the effect of an enduring power of attorney or revocation of an enduring power of attorney on third parties

(2) the application is likely to raise for consideration complex or novel legal issues that the Supreme Court is better suited to determine, and

(3) other matters the Supreme Court or NCAT considers relevant.10

Applications to the Guardianship Division

Applications to the Division are made by a wide variety of people, including the person who is the subject of the application for proposed orders (referred to as the **Subject Person**), friends and family of the Subject Person, the NSW Ageing and Disability Commission, the NSW Police, the Public Guardian, the NSW Trustee and Guardian, hospitals, mental health facilities, residential care providers, service providers and medical practitioners.

Applications to the Division can be made by "any … person who, in the opinion of the Tribunal, has a genuine concern for the welfare of the person"[11] and, in most cases, the Subject Person. In addition, applications can be made by:

(1) the Public Guardian, in respect of an application for a guardianship order,[12] and review of a guardianship order[13]

(2) the NSW Trustee, in respect of an application for a financial management order,[14] and review of a financial management order[15]

[10] *Powers of Attorney Act*, s 34(2).
[11] *Guardianship Act*, ss 6J, 9(1)(d), 25I, 25R.
[12] *Guardianship Act*, s 9(1)(c).
[13] *Guardianship Act*, s 25B(c).
[14] *Guardianship Act*, s 25I(1)(a).
[15] *Guardianship Act*, s 25R(b).

(3) the guardian, enduring guardian, or attorney of the principal of an enduring power of attorney in respect of an application for review of a reviewable power of attorney,[16] and

(4) "any person" in relation to an application for consent to the carrying out of medical or dental treatment.[17]

Since NCAT's establishment in 2014 the number of applications[18] made to the Guardianship Division has steadily increased year-on-year. In 2021/2022, the Division received 14,876 applications and determined 14,308 applications.[19] This represents a 15.8% increase in the number of applications made to the Division in 2019/2020.[20]

The primary driver for this increase is Australia's ageing population and the consequent increase in the number of Australians living with dementia and other age-related decision-making disabilities. Other contributing factors are:

(1) increased community awareness of abuse and exploitation of people with disability as a result of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability and the Royal Commission into Aged Care Quality and Safety

(2) ongoing structural changes within the disability sector due to the implementation of the NDIS, and

[16] *Powers of Attorney Act*, s 35(1).
[17] *Guardianship Act*, s 42(1). Note, the Tribunal is not required to consider an application if it is not satisfied that the applicant has a sufficient interest in the health and well-being of the patient: *Guardianship Act*, s 44(3).
[18] In this paper I use the term "application" to refer to both initial applications to NCAT and end of term and requested reviews of guardianship and financial management orders.
[19] NSW Civil and Administrative Tribunal, *NCAT Annual Report 2021-2022*, p 41.
[20] NSW Civil and Administrative Tribunal, *NCAT Annual Report 2021-2022*, p 42.

(3) the implementation of regulatory safeguards to reduce the use of restrictive practices in residential aged care facilities in response to the Royal Commission into Aged Care Quality and Safety.[21]

In 2021/2022, age-related disabilities, including dementia, accounted for 42% of all applications made to the Guardianship Division, followed in turn by intellectual disability (18% of applications); mental illness (14% of applications); neurological conditions (7% of applications); brain injury (6% of applications); and drug and alcohol related conditions (3% of applications).[22]

An inquisitorial model of decision-making

The question of whether Australian tribunals can properly be characterised as employing an "adversarial" or "inquisitorial" model of decision-making has been the subject of academic interest over the past few decades.[23] The question also arises in the context of appeals from tribunal decisions. Where it is asserted that the tribunal was required to employ inquisitorial-type procedures, decisions are challenged on the ground that the tribunal was obliged but failed to inquire into a particular matter.[24] On the other hand, where it is asserted that the tribunal was required to employ adversarial-type procedures, decisions are challenged on the ground that, in its conduct of the proceedings, the tribunal had "descended into the fray" or "become as if a party".[25]

An inquisitorial style of decision-making is said to be based on aspects of the systems used in some European civil law jurisdictions where responsibility for defining the issues and gathering the evidence largely rests with the decision-maker. In contrast, an adversarial style of decision-making is said to be one where those tasks are largely left to the parties. Care must be taken in applying

[21] NSW Civil and Administrative Tribunal, *NCAT Annual Report 2021-2022*, p 42.
[22] NSW Civil and Administrative Tribunal, *NCAT Annual Report 2021-2022*, p 42.
[23] N Bedford and R Creyke, *Inquisitorial Processes in Australian Tribunals* (Australian Institute of Judicial Administration, 2006).
[24] See, for example, *Minister of Immigration and Citizenship v SZIAI* [2009] HCA 39; (2009) 259 ALR 429; *ZND v ZNE* [2020] NSWCATAP 34 at [20]-[36]. See also, Wilson J, 'Tribunal Proceedings and Natural Justice: a Duty to Inquire' (2013) 32(1) *University of Queensland Law Journal* 23.
[25] See, M Aronson, M Groves and G Weeks, *Judicial Review of Administrative Action and Government Liability* (7th ed, 2017, Lawbook Co) at [9.70].

these labels because, as explained by Basten JA, "the commonly opposed epithets of 'adversarial' and 'inquisitorial' do not usefully provide a comprehensive description of the field of decision-making".[26]

This is not the occasion to explore whether labelling tribunals as 'adversarial' or 'inquisitorial' is "misconceived and misleading"[27] but I make two observations.

First, attempts to pigeonhole a particular tribunal as either "adversarial" or "inquisitorial" fail to recognise that neither are "pure" constructs. Over thirty years ago, Sir Anthony Mason observed that "there is a degree of commonality and convergence between the two systems" and neither system is static.[28] In Australia, long gone are the days where judges sit "inscrutable like the sphinx" until judgment is pronounced[29] and permit the parties to define the issues to be determined, the evidence to be considered and the time allocated to hear a matter. In NSW, the convergence to which Sir Anthony referred has accelerated since the introduction of the *Civil Procedure Act 2005* (NSW), its emphasis on "proportionate justice", and the introduction by NSW Courts of case management practices and features traditionally seen in inquisitorial systems.

Second, whether the style of decision-making employed by NCAT and other "super tribunals"[30] can be characterised as "adversarial" or "inquisitorial" cannot be answered solely by reference to the nature of the inquiry powers available to the tribunal. For example, all Divisions of NCAT may "inquire into and inform itself on any matter in such manner as [the Tribunal] thinks fit, subject to the rules of natural justice".[31] In addition to those permissive powers, all Divisions of NCAT have a positive obligation to "ensure that all relevant material is

[26] *Swift v SAS Trustee Corporation* [2010] NSWCA 182 at [40].
[27] *South Western Sydney Area Health Service v Edmonds* [2007] NSWCA 16 per McColl JA at [96].
[28] Sir Anthony Mason, 'The Future of Adversarial Justice' (Speech given at the 17th Annual Australian Institute of Judicial Administration Conference, Adelaide, 7 August 1999), published in [1999] NSWBarAssocNews 4. http://www.austlii.edu.au/au/journals/NSWBarAssocNews/1999/4.pdf.
[29] *Johnson v Johnson* (2000) 201 CLR 488 at 493; [2000] HCA 48.
[30] Over the past two decades each Australian state and territory has created a single civil and administrative tribunal commonly referred to as a "CAT" following the amalgamation of multiple smaller tribunals. This process has resulted in the stand-alone guardianship tribunals that existed in all states and territories being amalgamated into a CAT.
[31] *NCAT Act*, s 38(2).

disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings".[32]

Whether the model of decision-making employed by NCAT can properly be characterised as inquisitorial or adversarial, or where it falls within that spectrum depends on several factors, including the nature of the function being exercised, historical and cultural factors and, significantly, the funding available to enable the tribunal to undertake its own inquiries. For example, the function of adjudicating *inter partes* disputes about a diverse range of matters, such as allegedly defective building works or the termination of a residential or commercial tenancy, allocated to the NCAT's Consumer and Commercial Division, probably places the model of decision-making used by that Division towards the adversarial end of the spectrum. In contrast, the function allocated to the Guardianship Division of making protective orders in respect of people with decision-making disabilities places the model of decision-making used by that Division towards the inquisitorial end of the spectrum.

As I outline below, in practice, the Guardianship Division makes extensive use of its inquiry powers.

Flexibility, informality and despatch

The *Civil and Administrative Tribunal Act 2013* (NSW) (**NCAT Act**) requires the Tribunal "to resolve the real issues in proceedings justly, quickly, cheaply and with as little formality as possible".[33]

As the Hon Keith Mason AC QC has observed, the NCAT Act does not merely authorise flexibility, informality and despatch but "mandates these qualities". Commenting on the procedural provisions in the NCAT Act, Mr Mason observed:

[32] *NCAT Act*, s 38(6). The scope of the duty imposed by s 38(6) has been considered by several NCAT Appeal Panels, see, for example, *Raissis v Anaz* [2019] NSWCATAP 25 at [20]-[27]; *ZND v ZNE* [2020] NSWCATAP 34 at [32]-[33]; *Tom v Commissioner for Fair Trading* [2022] NSWCATAP 303 at [122]-[128].
[33] *NCAT Act*, ss 3(d), 36(2). See also, *NCAT Act*, s 38(4).

> "[These provisions] encourage innovation and discourage heavy-handed judicial review. Tribunals are not courts. What is more, they are not intended to act as if they were courts. If tribunals slide into the legalistic, adversarial, judicial model they will be thanked by neither courts nor government."[34]

The procedural flexibility conferred by the NCAT Act[35] permits the Tribunal to tailor its proceedings to suit the particular function being exercised. The Tribunal:

(1) is not bound by the rules of evidence and may inquire into and inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice[36]

(2) is to act with as little formality as the circumstances of the case permit and according to equity, good conscience and the substantial merits of the case without regard to technicalities or legal form[37]

(3) is to take such measures as are reasonably practicable:

  (a) to ensure that the parties to the proceedings before it understand the nature of the proceedings

  (b) if requested to do so—to explain to the parties any aspect of the procedure of the Tribunal, or any decision or ruling made by the Tribunal, that relates to the proceedings

  (c) to ensure that the parties have a reasonable opportunity to be heard or otherwise have their submissions considered in the proceedings [38]

[34] The Honourable Keith Mason AC QC, 'Flexibility, Informality and Despatch. Striking the Balance in Tribunal Decision-making' (Conference Paper, Council of Australasian Tribunals Conference, 8 June 2017) at p 4.
[35] *NCAT Act*, s 38(1).
[36] *NCAT Act*, s 38(2).
[37] *NCAT Act*, s 38(4).
[38] *NCAT Act*, s 38(5).

(4) is to ensure that all relevant material is disclosed to the Tribunal so as to enable it to determine all of the relevant facts in issue in any proceedings[39]

(5) may require the presentation of the respective cases of the parties before it to be limited to the periods of time that it determines are reasonably necessary for the fair and adequate presentation of the case[40]

(6) may call any witness of its own motion[41]

(7) may examine any witness on oath or affirmation or require evidence to be verified by a statutory declaration[42]

(8) may examine or cross-examine any witness to such extent as the Tribunal thinks proper in order to elicit information relevant to the exercise of the functions of the Tribunal in any proceedings[43]

(9) may compel any witness to answer questions which the Tribunal considers to be relevant in any proceedings[44]

(10) may issue a summons (or direct a registrar to issue a summons) to compel the attendance of the person before it[45]

(11) may dismiss at any stage proceedings considered frivolous or vexatious or otherwise misconceived or lacking in substance.[46]

[39] *NCAT Act*, s 38(6)(a).
[40] *NCAT Act*, s 38(6)(c).
[41] *NCAT Act*, s 46(1)(a).
[42] *NCAT Act*, s 46(1)(b).
[43] *NCAT Act*, s 46(1)(c).
[44] *NCAT Act*, s 46(1)(d).
[45] *NCAT Act*, s 46(2)(b).
[46] *NCAT Act*, s 55(1)(b).

Institutional features unique to the Guardianship Division

There are several institutional features unique to the Guardianship Division. They include:

(1) **Multi-disciplinary decision-making**. Most substantive decisions made by the Division are determined by a Tribunal constituted by three members: a lawyer (the **Legal Member**), a person with expertise in treating and/or assessing people with disability (the **Professional Member**), and a person with lived and/or professional experience with people with a decision-making disability (the **Community Member**). The advantages of this multi-disciplinary model of decision-making include the following:

(a) it enables the Tribunal to make effective use of its inquiry powers

(b) in circumstances where the Subject Person often lacks capacity to respond to claims about them made by the applicant or other parties, it enables the Tribunal to test claims, such as:

(i) that the Subject Person has a decision-making disability

(ii) that the Subject Person is unable to manage their personal and/or financial affairs

(iii) that the Subject Person lacks capacity to consent to proposed medical treatment

(iv) that the Subject Person lacks capacity to appoint an enduring attorney or an enduring guardian.

(c) it ensures that at least two members of the Tribunal have training and experience in communicating with people with decision-making disabilities

(d) in circumstances where the quality of expert evidence is variable and often uncontradicted, it enables the Tribunal to scrutinise, test, and evaluate that evidence. This is especially valuable where the application is urgent and where the decision the Tribunal is being asked to make has serious and irreversible consequences for the Subject Person, such as to give or withhold consent to the termination of a pregnancy or the amputation of a limb.

Justice Payne of the NSW Court of Appeal, in an address to the 2022 NCAT Members' Conference, commented on the merits of multi-disciplinary panels in the Guardianship Division and commended NCAT for:

> "…retaining multi-member and multi-disciplinary panels in the Guardianship Division. Whilst every day that Division makes some of the most difficult decisions that confront our legal system, its decisions are virtually never seen in the Court of Appeal. Those decisions that I have come across have been of outstanding quality, perhaps due to the quality of decision-making by experienced members of multi-disciplinary panels."[47]

(2) **Focus on the Subject Person**. The Guardianship Division employs a range of strategies to ensure that the Subject Person occupies centre-stage throughout the proceedings. These include pre-hearing and hearing processes designed to maximise the involvement of the Subject Person, recruiting members with skill and experience in communicating with people with decision-making disabilities and providing intensive training for staff and members about decision-making disabilities.

(3) **Pre-hearing outreach**. Before each hearing a Guardianship Division staff member endeavours to contact the Subject Person and to elicit their views about the application. In addition, the staff member seeks to:

[47] Justice Tony Payne, 'Making good decisions' (Conference Paper, NCAT Member Conference, 4 November 2022) https://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/2022%20Speeches/Payne_20221104.pdf.

(a) liaise with the applicant to remind them of their obligation to inform the Subject Person that an application has been made to NCAT and to use their best endeavours to assist the Subject Person to understand the issues raised in that application

(b) ensure that the applicant and/or other parties have made suitable arrangements to facilitate the Subject Person's attendance at the hearing

(c) after liaising with the Subject Person and people involved with their care (if any), to identify any assistance the Subject Person may require to maximise their participation in the hearing such as: the services of an interpreter, the use of a hearing loop or a communication device, the appointment of a separate representative.

(4) **Triaging applications**. Applications to the Guardianship Division are generally assessed within 24-48 hours of receipt by an experienced staff member of the Division and allocated to one of four risk categories, assessed by reference to the apprehended risk to the Subject Person and/or their estate. The Division routinely lists urgent applications for hearing within days, sometimes hours of receipt. In addition, the Division operates a 24/7 service to deal with urgent applications made outside business hours.

(5) **Oral hearings for all substantive applications**. In contrast to other Divisions of NCAT which may dispense with oral hearings providing certain requirements are met,[48] when determining any substantive application, the Guardianship Division must conduct an oral hearing.[49]

(6) **Single event hearings**. Most applications to the Division are not listed for directions and are determined at a single hearing, usually between

[48] *NCAT Act*, s 50(2).
[49] *NCAT Act*, Sch 6, cl 6. The Tribunal may dispense with a hearing when making an ancillary or interlocutory decision: *NCAT Act,* Sch 6, cl 6(2).

60 and 120 minutes in length. A small proportion of applications are channelled into the Division's "complex case pathway". Applications assessed as being appropriate for that pathway because, for example, there are related proceedings in other jurisdictions, are listed for one or more directions before the substantive hearing. Issues commonly determined at directions hearings include:

(a) the issues to be determined and any witnesses or material that might assist the Tribunal to determine those issues

(b) whether to appoint a separate representative for the Subject Person

(c) whether any particular form of assistance is required to facilitate the Subject Person's participation in the hearing

(d) the determination of any interlocutory application, such as a request for leave to issue a summons or to make a confidentiality order in respect of any material that has been filed or is proposed to be filed.

The Division operates a modified docket system and endeavours to list the Legal Member who conducts the directions hearing in the substantive hearing.

(7) **Questioning by the Tribunal**. Consistent with the power to inform itself "on any matter in such manner as it thinks fit" and the obligation to ensure that "all relevant material is disclosed to the Tribunal", the practice within the Guardianship Division is for the Tribunal to lead the questioning of parties and witnesses. This practice is employed irrespective of whether one or more party is legally represented.

(8) **Limited use of alternative dispute resolution**. Reflecting the fact that the Guardianship Division is not a consent jurisdiction,[50] and the possibility that the Subject Person may lack capacity to consent to any proposed order, "resolution processes" such as alternative dispute resolution[51] are not used in the Guardianship Division to determine substantive applications. However, the Division commonly uses such processes to assist parties to reach agreement about procedural issues, subject to the Tribunal's overriding duty to give paramount consideration to the interests and welfare of the Subject Person.[52]

Legal representation in the Guardianship Division

Legal representation of parties is the exception rather than the rule in the Guardianship Division. In 2021/2022, one or more parties were legally represented in about five per cent of proceedings in the Division. In that year, the Division granted 215 requests for legal representation and appointed 562 separate representatives.[53]

A party seeking to be represented by either a legal practitioner or a person who is not a legal practitioner requires leave of the Tribunal.[54] A party is permitted to make an application to be legally represented at any stage of the proceedings, and to make that application orally or in writing.[55] However, the Guardianship Division's strong preference is for applications for leave to be represented to be made in writing at least five working days before the hearing date.[56]

In making an order granting leave to a person (including a legal practitioner) to represent a party, the Tribunal may impose such conditions as it thinks fit,

[50] *M v M* [2013] NSWSC 1495 at [50].
[51] *NCAT Act*, s 37.
[52] *Guardianship Act*, s 4(a); cl 5(1) of Sch 6 to the *NCAT Act*.
[53] NSW Civil and Administrative Tribunal, *NCAT Annual Report 2021-2022*, p 43.
[54] *NCAT Act*, s 45(1). Civil and Administrative Tribunal Rules 2014 (NSW) ('NCAT Rules'), r 31(2). See also Guardianship Division Guideline, 'Representation', August 2017.
[55] NCAT Rules, r 31(1).
[56] Guardianship Division Guideline, 'Representation', August 2017, [43].

including that the proposed representative disclose the estimated cost of representation.[57]

The Tribunal may revoke leave given to a person (including a legal practitioner) to represent a party.[58] In addition, the Tribunal may revoke the appointment of a separate representative.[59]

The Guardianship Division may order that a party be separately represented.[60] The Guardianship Division Guideline, *Representation*[61]*,* lists the following examples where the discretion to order that a party be separately represented may be exercised:

(1) where there is a serious doubt about the Subject Person's capacity to give legal instructions but there is a clear need for the person's interests to be independently represented at the Tribunal hearing or they wish to be represented

(2) where there is an intense level of conflict between the parties about what is in the best interests of the Subject Person

(3) where the Subject Person is vulnerable to or has been subject to duress or intimidation by others involved in the proceedings

(4) where there are serious allegations about exploitation, neglect or abuse of the Subject Person

(5) where other parties to the proceeding have been granted leave to be legally represented

(6) where the proceedings involve serious and/or complex issues likely to have a profound impact on the interests and welfare of the Subject

[57] *Civil and Administrative Tribunal Rules 2014* (NSW) r 31(2), r 33.
[58] *NCAT Act*, s 45(3).
[59] *NCAT Act*, s 45(4A).
[60] *NCAT Act*, s 45(4).
[61] Guardianship Division Guideline, 'Representation', August 2017, at [13]-[15].

Person, such as end of life decision-making or proposed sterilisation treatment.

Where the Tribunal orders that the Subject Person be separately represented, the Tribunal requests Legal Aid NSW to appoint a Separate Representative for that person. An order that a person be separately represented does not guarantee a grant of legal aid.[62]

A Separate Representative is not bound to act on instructions and must act in the best interests of the Subject Person.

Separate Representatives play an invaluable role in proceedings in the Guardianship Division. In most cases the Separate Representative conducts a pre-hearing interview with the Subject Person. The report of that interview is often the only independent and reliable information available to the Tribunal about the circumstances and views of the Subject Person. In arranging to meet with the Subject Person, Separate Representatives not infrequently confront gatekeepers who have an interest in withholding information about the Subject Person or who hold the view that the Subject Person is unlikely to hold a view about the application or to be able to meaningfully participate in the proceedings. Securing an interview with the Subject Person commonly requires the Separate Representative to employ diplomacy, perseverance and ingenuity.

With the many calls on its budget, Legal Aid NSW is to be commended for its commitment to funding Separate Representatives to appear in the Guardianship Division. That commitment enables the Division to discharge its duty to take into account the interests and views of some of the most vulnerable people in our society.

[62] *NCAT Act*, s 45(5).

The duty to co-operate with the Tribunal to resolve the real issues in proceedings justly, quickly and cheaply

Being an advocate (I use the term advocate to refer to both solicitors and barristers) in the Guardianship Division can be challenging and commonly involves:

(1) dealing with complex questions of fact and conflicting expert evidence

(2) dealing with parties who may be unable to, or have difficulties communicating, with other people

(3) working with, or representing, parties who may bring unrealistic expectations, heightened emotions, and/or a series of unrelated grievances to the proceedings.

The attributes and qualities of an effective advocate in the Guardianship Division are largely the same as those required by an effective advocate in any jurisdiction: mastery of the principles of law relevant to the particular jurisdiction; a working knowledge of the practices and procedures used in that jurisdiction; an ability to identify the issues the decision-maker will be required to decide; careful case preparation; professional detachment; and interpersonal skills, including patience and adaptability.

Parties and their representatives have a statutory duty to cooperate with the Tribunal to facilitate the just, quick and cheap resolution of the real issues in the proceedings.[63] The Guardianship Division is fortunate to be assisted by many able advocates who scrupulously comply with that duty. However, some advocates are more able and willing to do so than others.

In my view, compliance with the duty to co-operate with the Tribunal requires an advocate to:

[63] *NCAT Act*, s 36(3).

(1) **Be familiar with the principles of law that govern the exercise of the Tribunal's powers**. Neither the procedural flexibility conferred on the Tribunal by the NCAT Act, nor the Tribunal's duty to give paramount consideration to the welfare and interests of the Subject Person, operate to enlarge the scope of the Tribunal's order-making powers. A creature of statute, the Tribunal can only make orders that it has been given power to make. It is not uncommon for the Tribunal to be asked to make orders it lacks power to make. For example, in the past four weeks members of the Tribunal have reported that they have been asked by advocates to make orders:

(a) to restrain a third party from visiting the Subject Person

(b) to direct a manager appointed under a financial management order to pay an outstanding account issued by the Subject Person's aged care provider; to reduce money spent on the care of the Subject Person

(c) to issue an injunction to prevent a manager appointed under a financial management order from dealing with the Subject Person's estate

(d) to freeze the assets of the principal of an enduring power of attorney.

(2) **Be familiar with the practices and procedures of the Division**. The NSW Bar Association offers sage advice to legal practitioners unfamiliar with practising in the Guardianship Division:

> "One of the rules of survival for any barrister is to be aware of the culture, systems, expectations and rules (written and unwritten) of the particular court or tribunal in which he or she appears. It is particularly important for a barrister who is intending to venture into a court or tribunal that is new to him or her to ascertain whether there are any

different approaches or systems in that court or tribunal, which might affect the conduct of the case."[64]

The Guardianship Division and its predecessor tribunals were established to deal with significant numbers of people who were not expected to obtain legal advice and representation. NCAT's website carries a wealth of information designed to assist self-represented parties to participate in Guardianship Division proceedings. That material is equally useful to advocates unfamiliar with the Guardianship Division's practices and procedures.

(3) **Assist the Tribunal to maximise the opportunity for the Subject Person to participate in the hearing by**:

(a) if representing the applicant or the carer of the Subject Person, encouraging their client to take steps to ensure that the Subject Person attends the hearing

(b) as far as practicable, making submissions in a manner that is likely to understood by the Subject Person

(c) impressing upon clients the need to avoid engaging in conduct likely to distress or confuse the Subject Person or derail the Tribunal's efforts to engage with the Subject Person.

(4) **Assist the Tribunal to determine the application within the time allocated to the hearing by**:

(a) identifying the factual and legal issues the Tribunal will be required to decide and focusing on those issues

(b) tailoring evidence and submissions to fit the time allocated to the hearing. Where there are multiple factual issues to be

[64] NSW Bar Association, 'Guidelines for Barristers on Dealing with Self-Represented Litigants', second edition, November 2011 at [16].

determined, consider whether this could be best achieved by preparing written statements and brief written submissions

(c) not asking the Tribunal to rule on line-by-line objections to a witness statement on the ground that it contains irrelevant, scandalous or otherwise inadmissible material. That practice has the potential to absorb an enormous amount of hearing time. If considered necessary and appropriate, record an objection to material said to be inadmissible and move on

(d) only file documents that are relevant to the real issues in the proceedings. Less is more. An all-too common practice in the Guardianship Division is for parties, including represented parties, to file reams of documents produced under summons which have little or no relevance to the issues in the proceedings. That practice wastes the time of the Tribunal and all parties to the proceedings

(e) if considered necessary to file large amounts of material, index and paginate that material. If at the end of the hearing that material is no longer considered to be relevant to the real issues in the proceedings, inform the Tribunal.

(5) **Comply with any directions made by the Tribunal and meet any deadlines imposed by the Tribunal**. Non-compliance by a party with a procedural direction is a drain on the Guardianship Division's limited staff and member time. Granting an indulgence to one party invariably has a domino effect resulting in other parties requesting the Division to vary timetables and directions. In addition, it commonly results in parties concluding that they have been disadvantaged and for this to become a source of grievance and a distraction in the proceedings.

(6) **Avoid unnecessary adjournments**. Justice demands that proceedings be finalised with minimum delay and expense. In *Aon Risk Services*

Australia Limited v Australian National University,[65] the High Court pointed out that “delay has deleterious effects, not only upon the party to the proceedings in question, but to other litigants”. The Guardianship Division’s ability to dispose of its ever-increasing workload within a reasonable time requires parties and their representatives to meet the timetable imposed and not to cause unnecessary adjournments. Every adjourned hearing results in the disposition of another matter being delayed.

(7) **Communicate using simple, direct and non-legal language**. Fairness demands that proceedings be conducted in plain English. Avoid archaic words such as, “pursuant to”, “in lieu of”, “deemed”; legal jargon in general; and figurative expressions such as: “seen better days”, “as clear as mud”, “Dutch courage”. Where possible, explain in simple language any technical term relevant to the determination of the application, such as "refundable accommodation deposit (RAD)" or “restrictive practices (chemical restraint)”. There are many excellent resources available about the use of plain English in legal proceedings.[66]

(8) **Be able to work effectively with interpreters**. At a minimum, this requires using plain English, speaking slowly and clearly, and with appropriate pauses. The Judicial Council on Diversity and Inclusion provides several useful resources about working effectively with interpreters in legal proceedings.[67]

(9) **Exercise restraint where baseless, scandalous and/or inflammatory allegations are made about their client**. It can be very challenging for advocates representing a client who is subjected to such allegations by

[65](2009) 239 CLR 175; [2009] HCA 27.

[66] For example, Judicial Commission of NSW, *Equality before the Law Benchbook*, 30 June 2023, at 2.3.3.4, 3.3.5.3, 5.4.3.3; The Judicial Council on Diversity and Inclusion FACTSHEET 5, *Using Plain English*.

[67] Judicial Council on Diversity and Inclusion, *Recommended National Standards for Working with Interpreters in Courts and Tribuna*ls, March 2022, second edition, https://jcdi.org.au/wp-content/uploads/2022/05/JCDD-Recommended-National-Standards-for-Working-with-Interpreters-in-Courts-and-Tribunals-second-edition.pdf; Judicial Council on Diversity and Inclusion, Working with Interpreters for legal practitioners https://www.myauslearning.org.au/legal-practitioners-interpreters/.

other parties in proceedings and demands that their representative "set the record straight" or respond in kind. Effective advocates exercise restraint and put on the record that their client denies the allegations but will not respond to them item by item.

Conclusion

Sir Owen Dixon wrote that "I have never wavered in the view that the honourable practice of the profession of advocacy affords the greatest opportunity of contributing to administering of justice according to law".[68] Advocates who work in the Guardianship Division not only play a critical role in the decision-making process of the Tribunal, they contribute to ensuring that some of the most vulnerable people in our community are recognised, respected and protected.

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[68] Sir Owen Dixon OM, 'Address on First presiding as Chief Justice at Melbourne', 7 May 1952 in Owen Dixon, *Jesting Pilate and other papers and addresses* (eds Susan Crennan and William Gummow) (3rd ed, Federation Press, 2019), 292.