The Law Handbook

YOUR PRACTICAL GUIDE TO THE LAW IN NEW SOUTH WALES

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Lindsay Ash – Legal Aid NSW

Tim Chate – Intellectual Disability Rights Service

Kenn Clift – Intellectual Disability Rights Service

Janene Cootes – Intellectual Disability Rights Service

Alexandra Craig – Intellectual Disability Rights Service

Benjamin Garcia-Lee – Intellectual Disability Rights Service

Margot Morris – Intellectual Disability Rights Service

Geoffrey Tremelling – Legal Aid NSW

DISABILITY

[16.10] Disability and the law

"Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others" (*United Nations Convention on the Rights of Persons with Disabilities*, Art 1).

People with disability are subject to the same laws that apply to all citizens of NSW. However, some laws apply specifically to people with disability, for example, guardianship legislation. Some laws contain specific provisions relating to people with disability such as the *Mental Health (Forensic Provisions) Act 1990* (NSW) and discrimination legislation. These special provisions often recognise particular vulnerabilities affecting some people with disability in their interactions with the community and the law.

In practice, people with disability can encounter additional barriers in successfully accessing legal remedies and exercising their rights.

This chapter addresses particular areas of law which relate to legal issues frequently raised by people with disability as well as legal and rights provisions which specifically affect people with disability.

[16.20] United Nations Convention on the Rights of Persons with Disabilities

In July 2008, the Australian government ratified the *United Nations Convention on the Rights of Persons with Disabilities* (the *Convention*). This international human rights instrument was drafted by and for people with disability. It identifies the rights of people with disability, and the obligations on States, who are parties to the Convention, to promote, protect and ensure the enjoyment of those rights by all people with disabilities.

The Convention reaffirms that people with disability enjoy the same human rights as people without disability. The Convention recognises specific rights, including:

- equality before the law without discrimination;
- freedom from torture, exploitation, violence and abuse;
- an adequate standard of living and social protection;
- education, work and health.

The Convention outlines the obligations that States Parties have in relation to the rights of people with disability. These obligations include:

- adopting legislation and administrative measures to promote the human rights of people with disability;
- adopting legislative and other measures to abolish discrimination;
- protecting and promoting the rights of people with disability in all policies and programs;
- stopping any practice that breaches the rights of people with disability;
- ensuring that the public sector, private sector and individuals respect the rights of people with disability.

States that are parties to the Convention periodically report to the *United Nations Committee on the Rights of Persons with Disabilities* (the *Committee*). The initial report outlines the actions that the State has taken to implement the Convention. Subsequent reports respond to issues and concerns, and indicate progress being made by the State to realise the rights of people with disability.

The Optional Protocol to the Convention gives the Committee power to investigate complaints from groups or individuals that a State which is a party to the Optional Protocol has breached the Convention. In 2009, the Optional Protocol entered into force in Australia.

More information is at www.un.org/development/desa/disabilities.

Rights of people with disability

[16.30] People with disabilities have the same rights as everyone else. Some of their rights which are mentioned in this chapter include rights to:

- personal safety and protection;
- freedom from abuse and neglect;
- equal treatment under the law;
- fairness in dealing with complaints;
- adjustments because of their disabilities;
- clean and safe housing;
- access to health services;
- marriage;
- have children;
- privacy;
- ownership of property;
- make a will;
- appoint people to act on their behalf;
- education;
- access public places;
- use public transport;
- sue for wrongful injury or loss;
- protection as a consumer;
- vote.

[16.35] Freedom from abuse, neglect and exploitation

People with disability are subject to high levels of abuse, neglect and exploitation.

The November 2015 report of the Senate Community Affairs References Committee Inquiry into Violence, Abuse and Neglect against people with disability in institutional and residential settings states that "violence, abuse and neglect of people with disability is both widespread and takes many forms. The evidence presented showed that a root cause of violence, abuse and neglect of people with disability begins with the devaluing of people with disability".

A Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability was established in April 2019 by the Australian government.

In July 2019, the NSW government established the NSW Ageing and Disability Commissioner. The Commissioner is independent of government and has the power to investigate allegations of abuse, neglect and exploitation of adults with disability and older people in home and community settings. The Ageing and Disability Commissioner has strong powers including power to initiate investigations on their own motion, apply for and execute a search warrant, seize evidence and gather and share information. The Ageing and Disability Commissioner will also report to the NSW government on systemic issues related to abuse, neglect and exploitation of people with disability and older people (see [16.770] for the NSW Ageing and Disability Commissioner's Abuse Hotline and the National Disability Abuse and Neglect Hotline).

The National Disability Insurance Scheme Quality and Safeguards Commission can investigate complaints of abuse in disability services.

The right to make decisions

A child is a person under 18, and an adult is a person 18 or above. The law authorises (with some exceptions) parents to make decisions for their children. A parent's authority ends when the child becomes an adult at age 18. People over 18 are entitled to make their own decisions.

Like everyone, adults with disability have the right to make their own decisions. Many will choose to do this alone and unaided. Others may choose to accept help from other people to make their decisions. This help may include explanation, education, information gathering, general assistance, advice, and help identifying and weighing up options. When help from others is given, this is called supported decision-making. Where a person is not able to make their own decision independently, they should have the opportunity to make a decision with appropriate support or to participate in decision-making to the greatest extent possible.

What is needed for decision-making?

Making decisions involves:

- understanding the facts;
- understanding the main choices;
- weighing up the likely results of those choices;
- understanding how those results will affect the decision-maker; and
- communicating the decision in some way.

If a person with a disability can do all these things, then they are legally able to make that decision.

If a person with a disability cannot make a decision, even with supports, then consideration should be given as to whether there are existing arrangements or alternative arrangements that can be used which are satisfactory to the person with a disability.

Substitute decision-making

If they wish, a person with a disability may appoint their own substitute decision-maker through an enduring guardianship document for personal, medical and lifestyle decisions or a power of attorney for financial decisions. A person must have an understanding of the nature and effect of the enduring guardianship or power of attorney at the time they complete the documents and must be giving the authority of their own free will.

These options can be very useful for someone whose disability means that they periodically become incapable of making their own decisions due to mental health or medical conditions. They may avoid the need for guardianship or financial management orders and maintain the person's choice of decision-maker. It is important to have a lawyer involved in drawing up these documents and to explain clearly to the lawyer how the principal wants the appointment to work, for example, time limits etc.

[16.40] What is a power of attorney?

A person who makes a power of attorney (called the principal) gives another person (called the attorney) legal authority to act on her/his behalf in financial decisions.

The person making a power of attorney needs to understand at least that:

- (s)he does not have to make a power of attorney; and
- (s)he is giving the attorney legal authority to make decisions and/or act for her/him (subject to any conditions or limitations specified in the document creating the power); and
- subject to the terms of the document creating the power, the attorney may be able to do things with the principal's property, such as taking money from or adding money to the principal's bank account, buying goods and services with the principal's money, selling the principal's house or their car or their dog, signing a tenancy agreement for them, borrowing money for them which they will have to pay back, mortgaging their house and/or using their property as security for a loan; and
- the attorney does not have to seek the principal's permission in advance; and
- the attorney should be trustworthy and sufficiently responsible and wise to deal prudently with the principal's property; and
- the attorney should carry out the principal's directions and account to her/him for the decisions made and actions taken as their attorney; and
- the principal will be legally responsible for the attorney's decisions and/or actions until the power of attorney is revoked or otherwise ended; and
- the principal can revoke the power of attorney at any time, unless it is an irrevocable power of attorney; and
- the power of attorney is not valid from the time the principal becomes of unsound mind, unless it is an "enduring power of attorney"; and
- an enduring power of attorney cannot be revoked if the principal becomes of unsound mind.

Importantly, it is possible to provide in a power of attorney document for conditions or limitations on the attorney.

If a person does not have the mental capacity to make a power of attorney at the time it is granted, then the power of attorney is void (ie, of no effect).

A power of attorney *cannot* be used for lifestyle or health decisions.

A power of attorney may be "general". This type of power can be useful for a short-term appointment, for example, if the principal plans to travel overseas or is going to hospital. It can be limited to specific matters, in time, or in place. It stops operating if the principal loses the ability to make his/her own decisions.

A power of attorney can be made to continue even if the principal later becomes of unsound mind. This is called an "enduring power of attorney".

The attorney should not make financial decisions against the wishes of the principal unless (s)he has become of unsound mind and the power of attorney is an enduring one. Decisions should still be in the best interests of the principal, except as specifically authorized in the power of attorney document.

It is recommended that a power of attorney be prepared by a lawyer. The lawyer must be satisfied that the principal has the mental capacity to make a power of attorney. The lawyer may need to get an opinion from a doctor or specialist medical professional if the lawyer is uncertain about the person's mental capacity to make a power of attorney.

If the principal has become of unsound mind, the attorney can only continue to act if there is an enduring power of attorney. A power of attorney can be revoked or changed by the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT), or the Supreme Court. A power of attorney is suspended if the Guardianship Division makes a financial management order.

[16.50] What is enduring guardianship?

An enduring guardian is a person appointed to make lifestyle and health decisions on behalf of the appointor if (s)he loses mental capacity at some time in the future. The appointment of enduring guardian document can say exactly what areas of decision-making are to be included.

A person 18 years of age or over may appoint an enduring guardian. This can be done by an adult if (s)he is able to understand the nature and effect of the enduring guardianship at the time it is made. An appointment of an enduring guardian must be signed by the appointor, and by the appointed guardian, and witnessed by a lawyer.

The appointment has effect only during the time that the person is in need of a guardian. An enduring guardian must take into account the wishes of the adult with disability and restrict their freedom of decision-making and freedom of action as little as possible. An enduring guardian may have authority to override the objections of the adult who has lost her/his capacity to make a decision, however, an enduring guardian does not have authority to override the person's objections to medical or dental treatment.

What if a person is incapable of appointing an enduring guardian or an attorney?

If a person does not have sufficient understanding to be able to appoint an enduring guardian for lifestyle, health and medical decisions, or an attorney for financial decisions, and a decision-maker is needed, an application can be made to the Guardianship Division of the NSW Civil and Administrative Tribunal to appoint a guardian or financial manager. This is covered in detail at [16.420].

Useful documents to have available

It is useful to safely keep originals and copies of documents such as a birth certificate, doctors' letters and medical reports about a person's disability, photographs, school reports, documents recording the person's name and address, a passport, a driver's licence, an identity card from Roads and Maritime Services, an appointment of an enduring guardian (if available), a power of attorney (if available), and any guardianship or financial management orders.

[16.60] When rights are infringed

Non-legal remedies

As for all people in the community, when a person with a disability has been treated unlawfully or their rights have been infringed, the first step often is to consider non-legal remedies and ways to informally resolve what has happened. This can result in quicker and less stressful outcomes than going to court. Going to court can be costly and there is always the risk that a person will not succeed in their case. Informal ways of resolving problems also allow the person bringing the complaint to be involved and to have their say. People with a disability can talk with an advocate or lawyer about informal ways to solve a problem. Some informal ways to solve a problem include:

- complaints to the local member of parliament or to the relevant government minister;
- negotiation by letter or through meetings;
- mediation or conciliation – Community Justice Centres provide free mediation services.

Free legal assistance

Many people with disabilities cannot afford to pay for a lawyer to assist them to negotiate a good outcome for their problem or to run a legal case for them. There are places where free legal advice and assistance is available.

Community Legal Centres

There are community legal centres throughout NSW that help the people in the local area with legal problems. These are "generalist" community legal centres. Information about the community legal centre near you can be found at www.clcnsw.org.au.

In addition to these generalist centres, in NSW there are two "specialist" community legal centres that focus on protecting and promoting the rights and autonomy of people with disability:

- the community legal centre operated by the Intellectual Disability Rights Service for people with intellectual disability and other cognitive impairments;
- the Australian Centre for Disability Law (previously the Disability Discrimination Legal Centre).

LawAccess NSW

If a person with disability needs some free legal information or legal advice over the telephone, they can call LawAccess NSW on 1300 888 529.

Legal Aid NSW

Legal Aid NSW can provide free legal advice and, in some cases, legal representation in a number of areas of law. Most Legal Aid NSW offices give free legal advice by appointment. If you have a disability and feel you may need extra time, tell Legal Aid NSW when making the appointment so they can set aside some extra time. You might also want to bring a support person. You should let Legal Aid NSW know this as well. It can be difficult to get an appointment at Legal Aid NSW so don't leave it until the last minute.

For Legal Aid NSW to take on your case and represent you in court, you must meet the Legal Aid NSW "means test" and your case must meet Legal Aid NSW's "merits test". A person whose only income is the Disability Support Pension will usually be eligible for Legal Aid.

A person who has substantial difficulty in dealing with the legal system by reason of a substantial:

- psychiatric condition;
- developmental disability;
- intellectual disability; or
- physical disability

is considered by Legal Aid NSW to have "exceptional circumstances" because they are at "special disadvantage". This means that in some sorts of cases, where Legal Aid NSW would not normally represent a person, they may represent a person who has a disability. For example, if someone has to go to court because another person has applied to have an Apprehended Domestic Violence Order or Apprehended Personal Violence Order taken out against them, Legal Aid NSW would not normally represent the person. However, Legal Aid would usually represent a person with disability who is at "special disadvantage" in this situation. For more information about how Legal Aid NSW works and its services, see Chapter 4, Assistance With Legal Problems.

Private lawyers

Private lawyers can apply to Legal Aid NSW for a "grant of legal aid" which means that Legal Aid NSW will pay the lawyer a fee to provide legal assistance. The rules about being eligible for this help from Legal Aid NSW are the same as outlined above.

Sometimes lawyers in private law firms do work for people for no charge. This is called pro bono work. At other times, they might think a case is strong and agree to work for the person on the basis that they will only charge them a fee if the person wins their case. Normally, however, private lawyers will charge a fee for all clients. It is important that private lawyers know how to work with people with a disability. They should be flexible in how they work with their client. For example, they may need to give more time to a client with disability or they may need to adjust their communication methods.

Disability advocacy

Disability advocates assist people with disability to assert their rights and resolve problems. Advocates are not the same as lawyers. There are advocacy organisations specifically for people with disability across NSW. Disability advocacy assistance is free. A person with disability does not need to have an NDIS funding package to use advocacy services. For the contact details of the disability advocacy organisations in NSW, see [16.770].

Assisting, advising and acting for people with disabilities – tips for solicitors

Solicitors working with a client who has a disability should ask the client whether there are any ways that the client would like the solicitor

to adjust their usual practices to take account of the client's needs, for example, particular fonts or print size in documents and what communication methods will work best for the client.

If a person has cognitive impairment such as intellectual disability, brain injury, or a mental health condition, it does not automatically mean the person is unable to instruct a lawyer or to understand the law. However, some adjustments may need to be made to help the person exercise their legal rights.

The following adjustments may help clients with intellectual disability, brain injury, or mental health conditions, as well as some clients with other disabilities.

If the client has difficulty reading, then letters should be in large print and in simple words. If the client cannot read adequately, do not rely on written letters alone to get information across. Explain the information, and read any letter to the client on the phone or at the next appointment. A simple letter using dot points to remind the client of the most important information may be useful. Check whether there is someone else that the client would like you to send letters to. The solicitor may use pictures to explain court orders, legal restrictions, behaviour requirements, agreements, obligations, etc.

Allow extra time for appointments. Use simple words. Use short sentences. Communicate one idea or question at a time. Check understanding. Beware of the client who says "yes" to each question. It is often a sign that the client does not understand but is pretending that they do. Be sure the client knows that you want them to tell you if something is confusing. Otherwise, they may assume it is better to cover up their confusion. Also, some clients pretend to read documents. It is sometimes better to read the document to the client. Allow the client to have a rest if the appointment is a long one and you think the client may have a short attention span.

Where appropriate, encourage the client to bring a support person who can help them to understand and remember the advice. The support person can help by taking notes, making sure the solicitor talks to the client simply, getting the client to ask questions of the solicitor, and reminding the client about the solicitor's advice afterwards. In this regard, of course, a support person is only a helper, who does not take away the duty of the solicitor to take clear instructions, and to carry them out. So talk to the client, and not to the support person.

Clients with cognitive impairment can be particularly susceptible to undue influence by others. A client may simply agree with the demands of their carer, or support person. Be alert to any signs that this is occurring.

In all cases, especially criminal cases, the solicitor must make sure that the client is not confused between the roles played by the solicitor and the support person. For example, the client should not talk to the support person about confidential legal matters without the solicitor present. Ensure that any support person knows that legal advice is confidential and not to be shared with third parties without the consent of the client.

Assessing capacity

People with disabilities are all individuals, so do not make assumptions or judgments without checking with the person. In some cases, a person's cognitive disability may be so significant that even with support and communication adjustments, the person does not have the capacity in the eyes of the law to instruct a lawyer. A decision about lack of capacity to instruct should not be made prematurely. It may be necessary to begin by asking a number of simple questions and keeping notes of the responses, such as: What is your name? Where do you live? What is your date of birth? What is your mother's name? How many brothers and sisters do you have? What date is Christmas? What is today's date? What does a solicitor do? What is a judge? What does a policeman do? etc. It is a good idea to first tell the client that it is your job to ask some questions to work out how well they understand things. Explain that this means that you may ask some questions they think are very simple. You may also need to try different supports and communication adjustments. If you have doubts about the client's capacity to instruct, you may have to consult a range of people in the person's life – for example, family, doctors, carers and service providers.

Does the client have mental capacity?

The Law Society of NSW has developed guidelines for solicitors "When a client's mental capacity is in doubt" (2016) which is available to solicitors on the Society's website.

The Capacity Toolkit is also a very practical resource for solicitors. It is available at www.publicguardian.

justice.nsw.gov.au/Documents/capacity_toolkit0609.pdf.

Remember that a person's capacity can vary over time and it should not be assumed a person always lacks capacity. Also, a person without support may lack capacity, but where that person has support (like a family member to explain things more clearly), they may no longer lack capacity.

Can another person step in for a person who lacks mental capacity?

If it is determined that a person lacks the relevant mental capacity, but they have a strong legal case or need their rights protected, it is possible to arrange that someone, such as a relative or friend, can bring the case and instruct the lawyer on that person's behalf. Such a person is sometimes called a *tutor*, a *next friend* or a *guardian ad litem*. This is discussed in the Law Society's guidelines on mental capacity.

[16.70] Privacy and access to personal information

There is no law that gives people in NSW a general legally enforceable right to privacy. Also, there is no law saying that everyone is legally entitled to all personal information about them held by an organisation. There are some protections provided in specific situations. The *Privacy Act 1988* (Cth) and the *Privacy and Personal Information Protection Act 1998* (NSW) create rights and responsibilities about collecting, retaining, using and providing access to personal information. These Acts place restrictions and responsibilities on the way personal information is used and disclosed by government agencies, private sector organisations and health service providers. The Acts also create some rights for people to access and amend personal information held about them. In some cases, information may be provided to a person acting on behalf of a person with a disability if the person is unable to make their own application.

The *Health Records and Information Privacy Act 2002* (NSW) sets out privacy protections to be adhered to by NSW government agencies and some private sector organisations that provide health services and hold health information about people. In most instances, information about a person's disability would be considered health information.

Freedom of information

The *Government Information (Public Access) Act 2009* (NSW) (*GIPA Act*) came into force on 1 July 2010. It replaces the *Freedom of Information Act 1989* (NSW). The object of the *GIPA Act* is to open government information to the public.

Under the *GIPA Act*, a person can request access to and copies of personal information held about them by government agencies and departments. For more information on this area of law, see Chapter 25, Freedom of Information.

Complaints

Complaints about privacy issues and access to government-held information in NSW can be referred to the Information and Privacy Commission New South Wales (IPC). Complaints about privacy issues involving the Commonwealth can be referred to the Office of the Australian Information Commissioner (OAIC).

Services provided or funded by the government

[16.80] Historically a number of government agencies and departments have been responsible for providing supports to people with disabilities and also for providing funding to disability organisations that provide disability support in NSW. This was mainly done through the Department of Aging, Disability and Home Care (ADHC). However, since 1 July 2018, the National Disability Insurance Scheme (NDIS), established under the *National Disability Insurance Scheme Act 2013* (Cth), became fully operational in NSW (see the sections on the NDIS later in this chapter starting at [16.600]). The National Disability Insurance Agency (NDIA) is an independent statutory agency whose role is to implement the NDIS. Effectively the NDIA is now the fund provider for the disability services that are included in participant's NDIS plans. Participants

will also continue to need some other services, called mainstream services, that should be provided by the NSW government, for example, health services, hospital services, some housing services, education, transport services, crisis accommodation, etc as well as other services that should be funded by the Australian government, for example employment services. There are also other services, for example legal services and advocacy services, which are available through community legal centres, Legal Aid, and advocacy organisations which are funded by both the NSW and Australian governments. Also some disability services may be provided by Local Councils. (For information about disability services, contact a disability advocacy organisation, Local Area Co-ordinators, your Co-ordinator of Supports if you have one, the NDIA, DCJ, or Local Councils.)

Prior to the NDIS people with disabilities received block funding for services and supports which were delivered in a more integrated manner, and which also included case management for people with higher needs. Under the NDIS, however, there is now individual funding and participants can choose, with some exceptions, the services they want to achieve their goals in their NDIS plans, and they must negotiate directly with the service providers to get these services. The NDIA funds Local Area Co-ordinators (LAC) to provide information about service providers (and the LAC may also do yearly plan reviews with participants); and the NDIA also funds Co-ordinators of Supports (C o S) for participants with higher needs to manage the engagement of service providers for them (however, the NDIA does not fund case management).

The NDIA will review a participant's plan if the participant makes a review application. There are time limits.

The Commonwealth Ombudsman is able to review complaints about the NDIA or the NDIS Quality and Safeguards Commission. Appeals about decisions of the NDIA can be made to the Commonwealth Administrative Appeals Tribunal.

Complaints about services

The National Disability Insurance Scheme Quality and Safeguards Commission started on the 1st July 2018. Its roles include regulating the registered service providers. Complaints about services can be made to this commission. It offers a mediation service for participants in relation to complaints (however, this does not involve adjudication). The NDIS Quality and Safeguards Commission also receives and monitors reports of reportable incidents, such as abuse and neglect and provides the system for regulation of the use of "restrictive practices" in disability services.

The DSS funds and administers employment support services and some advocacy services for people with disability. Complaints about Disability Employment Services, Australian Disability Enterprises, and disability advocacy services can be made to the Complaints, Resolution and Referral Service-Job Access.

In NSW, the Official Community Visitor Scheme is now located with the NSW Ageing and Disability Commissioner. Under this scheme, Official Community Visitors make regular site visits to disability residential services and are able to examine documents and speak with residents with the aim of identifying any issues of concern.

Disability Service Standards

All NDIS service providers must be accredited against the National Standards for Disability Services. Services must meet standards in relation to service user rights, participation and inclusion, individual outcomes, feedback and complaints, service access and service management. Disability service standards are similar under Commonwealth and NSW disability legislation (see the *Disability Services Act 1986* (Cth) and for NSW they can be found in the *Disability Inclusion Regulation 2014* (NSW)). They have also been adopted by the NDIS. The disability service standards do not create legally enforceable rights. Service organisations are expected to have policies and procedures in place to demonstrate that they meet the six standards.

Going to court – getting disability assistance

[16.90] People with disability who are required to attend courts for any purpose can seek assistance from the Court Registry. It is a good idea to contact the court registry at least two weeks prior to your court appointment so that necessary assistance can be arranged. Contacts for Court Registries can

be found on the Lawlink website (onlineregistry.lawlink.nsw.gov.au/content).

You can get a form to request disability assistance through the Court Registry and on line from the Lawlink website. If you experience any difficulties in arranging support, contact Diversity Services in the Attorney General's section of the Department of Police and Justice to raise disability needs (see [16.770]).

Assistance might include hearing loop/infrared equipment for amplification; wheelchair access; Auslan interpreter; particular document formats, for example, Braille, large print, audio, electronic; other support. It is wise to provide as much notice as possible.

Accidents, injuries and other harm

[16.100] Some aspects of accidents and compensation are covered in detail in Chapter 3, Accidents and Compensation. Victims Support, for victims of crimes, is covered in Chapter 39.

If a person with a disability suffers any harm, loss or injury because of the negligence or intentional interference of another person or organisation, they may be able to pursue legal action and sue for damages.

Anyone wishing to bring such a case should consult a solicitor who is experienced in personal injury law, because these matters are complex and there is a risk of having to pay a very high costs bill if the case is unsuccessful. If the injury is work-related, the solicitor should also be experienced in workers' compensation matters. For workers' compensation, see Chapter 3.

There are time limits for commencing legal action for personal injury.

Intrusive or restrictive practices

Physically intrusive and restrictive practices can only be used on a person where a person's health, life or safety is at risk. Such practices should never be used as a "behaviour management strategy" merely to control a person's challenging behaviour.

If intrusive or restrictive practices are proposed to be used on a person on a regular basis, then the proposal should be taken before the Guardianship Division of the NSW Civil and Administrative Tribunal for the Tribunal to consider whether a guardian should be appointed with authority to consent to the particular restrictive practice proposed. The Tribunal will seek the opinions of a range of people in the person's life, including family, doctors, psychologists, carers and service providers before making its decision and orders.

Complaints about restrictive practices applied by service providers can be made to the National Disability Insurance Scheme Quality and Safeguards Commission. Complaints about restrictive practices applied by services funded by the NSW Government can be made to the NSW Ombudsman. Any unauthorised intrusive or restrictive practice is an assault and may be grounds for legal action (criminal and/or civil).

Consumer protection

[16.110] A consumer is a person who buys goods or services for personal, domestic, or household use. Goods include such items as food, clothes, furniture, electrical appliances and motor vehicles bought from a dealer, while services include such things as telephone services, car repairs, gym memberships, hairdressers, health services, and support services.

People with disability are sometimes less able to protect themselves as consumers than are people without disabilities. For example:

- vision or hearing impairment may cause a person to make mistakes when entering into agreements;
- painful physical conditions may cause a person to be impatient and to act unwisely;
- intellectual disability or a mental health condition may cause a person to sign a document without understanding it; or
- a third party such as a carer may cause a person with a disability to feel pressured into making certain decisions.

In exercising their rights as consumers, some people with disabilities may need support. In particular, a person with intellectual disability or any form of cognitive impairment may need help to understand the nature and effect of a specific contract at the time it is made. The more complex the transaction and the higher the value of any property involved, the greater the understanding (and possibly the help) required by the person with cognitive impairment. Help required may include:

- having a support person present;
- making the consumer feel comfortable and not vulnerable;
- having the contract read and explained in simple terms;
- asking the consumer to explain in their own words what the contract means and providing clarification where necessary;
- asking questions that test the consumer's memory of key points;
- checking the consumer's ability to understand their needs and how to meet them;
- asking questions to check the consumer understands when and how much to pay;
- checking the consumer's understanding by asking questions that require more than a "yes" or "no" answer;
- overcoming any speech problems of the consumer;
- avoiding "nodding" or "smiling" at the consumer to influence answers;
- checking that there has been no undue influence over the consumer;
- allowing time for the consumer to think, to change their mind, or to get independent advice.

Many people with a disability do not need this type of help. If a person is able to freely and voluntarily enter into a contract which they can understand, they are said to have "legal capacity" to enter into the contract, whether or not they have a disability.

People with disabilities are legally bound by the consumer contracts that they enter into unless they can prove that there is a legal reason why the contract is unenforceable or able to be set aside. See generally, Chapter 10 on Consumers, Chapter 11 on Contracts, Chapter 13 on Credit and Chapter 29 on Insurance.

Is the consumer contract unenforceable or able to be set aside?

Under contract law, there are principles that may allow a consumer to get out of a contract and these are explained in detail in Chapter 11. The principles most relevant to people with disability are:

Incapacity

If a person with a disability does not understand the general nature and effect of a contract, then they are said to "lack legal capacity" to enter into the contract.

A person's capacity can vary over time and it should not be assumed a person who lacks capacity on one occasion always lacks capacity. Also, a person may lack capacity when they are unsupported, but when they have support (such as a family member to explain things more clearly), they may have capacity.

Undue influence

Undue influence occurs when a person cannot make a free and independent decision because of the very strong way their thoughts and actions are influenced by another person. A person with a disability may experience undue influence at the hands of a relative or carer who stands to benefit from a contract.

Unconscionable dealings

This occurs where one person knew or ought to have known about the other person's "special disability" or "special disadvantage" and takes advantage of it. A person with a disability, particularly an intellectual disability, may be at a special disadvantage or under a special disability in many contract situations.

These principles may also make a contract "unfair" or "unjust" under the consumer laws about goods and services (see below).

The consumer laws about goods and services

The general effect of the consumer laws is that if the consumer contract can be shown to be *unfair* or *unjust* then the consumer may be able to get out of the contract, vary it, get money refunded, or get compensation. How this is done is covered in Chapter 10 on Consumers.

The presence of one of more of the following circumstances at the time of entry into a contract may cause it to be unfair or unjust:

- unequal bargaining power between the parties;
- undue pressure or coercion;
- unreasonable harassment;
- false advertising;
- concealment of defects;
- unreasonable conditions in the consumer contract;
- overly complicated language and form of the contract;
- limited educational background and literacy of a party to the contract;
- lack of help or advice where a party is in need of this in order to understand the contract;
- physical or mental disability of a party to the contract;
- poor economic circumstances of a party to the contract.

The NSW courts and the Federal Circuit Court of Australia are often inaccessible for people with cognitive disability because of legal incapacity, or lack of tutors to manage the court proceedings, and/or legal costs. If people with a disability have a consumer claim where the amount paid or payable for the goods and services is less than $40,000.00, then they can take legal action in the NSW Civil and Administrative Tribunal (NCAT), see s 79S of the *Fair Trading Act 1987* (NSW). Unfortunately, many service agreements under the National Disability Insurance Scheme (NDIS) involve services with costs that exceed $40,000.00: for example, accommodation services, supported independent living services, day care services, etc. Consumer claims about these agreements cannot be made in NCAT. (It is submitted that there is a need for NSW legislation to give NCAT jurisdiction in matters related to service agreements under the NDIS, where the amount payable for the services exceeds $40,000, as well as jurisdiction to make orders that include specific performance and injunctions.)

The Consumer Credit Laws

Consumer credit is covered in detail in Chapter 13.

A person with intellectual disability or another disability that affects cognition may be at particular risk of entering into a consumer credit or loan contract that is unaffordable or otherwise unsuitable. If the contract can be shown to be unsuitable or unjust, then remedies are available under the *National Consumer Credit Protection Act 2009* (Cth).

The matters that may cause a consumer credit contract to be unsuitable or unjust are similar to the matters that can cause a consumer contract for goods and services to be unfair or unjust. If you have a complaint about a consumer credit or loan contract, you should get help from a community legal centre, Legal Aid NSW, the Australian Financial Complaints Authority (AFCA) or a private lawyer.

Insurance

Insurance is covered in detail in Chapter 29, Insurance.

The person applying for insurance has a *duty to disclose* relevant information to the insurer before entering into a contract of insurance. For some types of insurance, such as life insurance, income protection insurance and travel insurance, information regarding a person's disability is likely to be considered relevant information.

Full disclosure of relevant information is extremely important, since failure to disclose may result in an insurer refusing to pay a claim.

The criminal justice system

[16.120] People with disability have the same rights as people without disabilities in the criminal justice system. The law makes some provision to compensate for the vulnerability of people with disability and other disadvantaged groups. Often people with disability face many barriers in the criminal justice system and are not able to exercise their rights. This is particularly the case for people with cognitive or mental health impairment.

Without the right intervention, legal assistance and support, some people with disability can find themselves trapped in the revolving doors of the criminal justice system. Often a person's disability is not recognised or properly assessed.

Opportunities to seek diversion from the criminal justice system into support services are not always pursued. People with disability can become institutionalised in prison and are vulnerable to violence, exploitation and abuse in prison.

A person with disability may become involved with the criminal justice system as a:

- victim of crime;
- person accused of a crime; or
- witness.

[16.130] Communication barriers to accessing justice

Adjusting communication

People with disability are confronted with difficulties and barriers throughout the criminal justice system, whether they are the victim, accused or convicted. Many of these difficulties can be overcome by those around the person with disability making some adjustments in the way that they interact. For people with cognitive impairment involved in the criminal justice system, particularly important adjustments might be in relation to communication. Below are some suggested adjustments to assist a person with cognitive impairment to tell their story:

- use short sentences and clear language – one idea at a time;
- encourage free recall – let the person tell their story;
- be prepared to wait for the person to answer – taking in information and answering may take longer than you're used to;
- allow more than the usual time for an interview – be patient;
- check whether the person understands what you're talking about – you can do this by asking the person to explain in their own words what you've told them;
- allow regular breaks – the person may have limited concentration;
- talk with the person in a quiet and private place, free from distractions;
- if necessary, allow the person with disability to have a support person present.

People with hearing impairments and those with communication disabilities are also particularly disadvantaged. The court can arrange Auslan interpreters and amplification assistance. Ask at the court registry as early as possible before the court date or contact Diversity Services (see [16.770]).

[16.140] As a victim of crime

Barriers to getting justice

People with disability are more likely to be victims of crime because they can be more vulnerable and less able to protect themselves.

A person with a disability who is a victim of a crime has the same rights to the protection and assistance of the law as anyone else, but in practice it often does not work out that way.

Some problems are:

- they may not understand that what happened to them is against the law;
- they may be reluctant to report a crime if the perpetrator is a staff member or resident of an accommodation service in which they live, or a family member or acquaintance;
- they may not be believed by others;
- police or prosecutors may decide not to take the case forward because they feel the person will not be a reliable witness.

These problems can often be overcome by people supporting and making adjustments in communication with the victim so as to encourage them to speak up against violence and abuse. It is particularly important that police and prosecutors do not assume a person with disability cannot give reliable evidence, as this might amount to unlawful disability discrimination. The Justice Advocacy Service (JAS) can provide trained support persons to attend police interviews to help people with cognitive impairment who have been victims of crime.

Getting legal assistance

It is important that victims with disability or those assisting them obtain legal advice about the person's civil remedies (like suing for damages or victim's compensation) in addition to reporting the matter to police. Legal Aid or a local community legal centre may also be able to provide legal assistance for people with disabilities. Intellectual Disability Rights Service (IDRS) can provide free legal advice and assistance to people with cognitive impairment.

Right to a support person

Sometimes people with disability may have additional rights to people without disabilities. Modification to and support in the interview process applies to a vulnerable person whether they be a suspect, accused or victim. A person with disability may be classified as a vulnerable person.

The police will arrange an interpreter for a person who is deaf, hearing impaired or speaking impaired.

The JAS can arrange for a trained support person to be present with a victim or witness of crime who has cognitive impairment when they are providing a statement to the police (see [16.770]).

Charter of Victims Rights

In NSW, victims of crime have a Charter of Victims Rights. The Charter seeks to protect and promote victims' rights. Some of the rights in the Charter include that:

- victims are to be treated with courtesy, compassion and respect;
- victims are to be informed about and given access to welfare, health and counselling services;
- victims' privacy is to be protected; and
- victims are to be kept informed in a timely manner about any prosecution of the perpetrator of the crime.

While the Charter does not give rise to legally enforceable rights, it is taken very seriously by NSW Police and other government agencies that attend to the welfare and support of victims of crime. If you feel that a government agency has not abided by the Charter, you should call the Victims Access Line (ph: 1800 633 063 or 8688 5511).

Victims of sexual offences

People with cognitive impairment are particularly vulnerable to sexual exploitation and sexual assault. The law in NSW recognises this by making it a crime to have sex with a person with a cognitive impairment in certain situations. A person who is responsible for the care of a person with a cognitive impairment and has, or attempts to have, sexual intercourse with that person is guilty of an offence. An exception to this is when the carer is married to, or in a de facto relationship with, the person with cognitive impairment. It is an offence for anyone to take advantage of, or attempt to take advantage of, a person's cognitive impairment to get them to engage in sex. Consent is not a defence to either of these offences.

In other circumstances where a sexual offence has occurred, the victim's cognitive impairment or serious physical disability may be an aggravating factor that increases the seriousness of the crime and potential penalty (see Chapter 35, Sexual Offences).

Where the crime is a sexual offence, a victim should be consulted by police if police are contemplating modifying or withdrawing charges laid against the accused (including any decision to accept a plea of guilty to a less serious charge) unless the victim has expressed a wish not to be contacted or cannot be located. Victims should also be aware of the NSW Rape and Domestic Violence Services formerly Rape Crisis Centre (ph: 1800 424 017). Sexual offences are discussed in more detail in Chapter 35, Sexual Offences.

Giving evidence in court

A person with a disability can give evidence in court as long as they generally understand that:

- they have promised to tell the truth (and what that means); and
- telling a lie in court is against the law.

If there is any doubt, the court or the prosecutor should arrange for the person with a disability to be independently assessed by a psychologist for an opinion as to whether they understand these concepts and have the capacity to give reliable evidence in court.

Problems in giving evidence

Sometimes people with disability experience barriers and problems when giving evidence in court. For example:

- the court process is structured around verbal skills and memory – people with cognitive impairment can find these things more difficult than other people;
- the magistrate, judge or jury may doubt the understanding of people with cognitive impairment and so not consider their evidence as important as other evidence.

These barriers and problems can be overcome by people offering appropriate supports and adjusting their communication.

Available adjustments in giving evidence for people with disability

In some circumstances, the *Evidence Act 1995* (NSW) and *Criminal Procedure Act 1986* (NSW)

permit adjustments to be made to the way a person with disability gives evidence in court and how they may be cross-examined. There are also rules of examination in court that prevent questioning that is confusing, repetitive or harassing for the person being questioned.

Amendments have been made to the *Criminal Procedure Act* to improve the way victims of sexual assault are treated in court.

Some of these changes relate to all victims of sexual assault:

- the victim no longer has to face the accused person in court. They can give evidence from a private room away from the courtroom, which is transmitted to the courtroom via a television. If the alleged victim wishes to give evidence in the courtroom but does not wish to see the accused, a request can be made that a screen or partition be used;
- the case may now be heard in a closed court so members of the public cannot hear the evidence;
- the alleged victim may now have a support person with them during the court proceedings. This person can be a member of the family, friend, counsellor or professional court support officer (provided they are not a witness in the case);
- the court strictly limits what can be published about cases on the internet and in the media. This means that the alleged victim's name or any information that may identify them must be kept confidential outside the court. This is called a "non-publication order";
- if the accused person is not legally represented they can no longer directly ask the alleged victim questions in court. Prior to this change in the law, an accused person who was representing him or herself in court could directly ask questions. Now the court may appoint an alternative person, if required;
- the alleged victim may not be asked improper questions, such as those which are humiliating, harassing, repetitive or insulting. In particular, improper questions should not be used by the lawyer representing the accused during a cross-examination;
- the alleged victim's evidence will be recorded so, if for any reason the trial needs to be re-heard, they may not need to give their evidence again.

Some additional procedures for the protection of vulnerable persons

Extra support is provided to "vulnerable people", including children less than 16 years of age and people with a cognitive impairment. A person is deemed to have a cognitive impairment if they require supervision or social habilitation in connection with daily life activities, as a result of one or more of the following:

1. intellectual disability;
2. a developmental disorder (including an autistic spectrum disorder);
3. a neurological disorder;
4. dementia;
5. a severe mental illness;
6. a brain injury.

If the alleged victim is a vulnerable person, they may receive extra support in court, as detailed below:

- alleged victims would normally only have to give evidence once;
- alleged victims no longer have to appear in the courtroom in person. A vulnerable person can have a pre-recorded statement played to the court as evidence. Further evidence, such as cross-examination, can be given in a private room away from the courtroom, and transmitted to the courtroom via a TV screen;
- the alleged victim is allowed to be with a support person during the trial;
- arrangements may be made through the court if the alleged victim needs help with communication.

The JAS can provide a support person to be at court with a victim or witness who has cognitive impairment.

Assistance from the Witness Assistance Service

If a person with disability is to give evidence in a case where a person has died or there has been a physical or sexual assault, the Witness Assistance Service (part of the Office of the Director of Public Prosecutions) should be contacted. The service can support the person through the court process.

Giving evidence successfully

Sarah (not her real name) was sexually assaulted by a bus driver on her way home from work. Even though Sarah made a detailed statement to the police, they thought she would be unable to withstand the

pressure in court because of her intellectual disability and told her to "go home and forget about it".

The Intellectual Disability Rights Service obtained a psychologist's report stating that Sarah would make a reliable witness. This was used to convince the Director of Public Prosecutions to take the matter to court.

Initially Sarah had problems coping with lengthy cross-examination by the defence. However, after a strong submission from the prosecution, the judge allowed her to be cross-examined in 15–20 minute sessions, giving her time to refresh her concentration. Her mother was allowed to sit behind her and bring to the attention of the court any questions she felt Sarah could not understand. Sarah's evidence improved, and the driver was convicted.

[16.150] Victims' support, counselling and recognition payments

Victims' Support is discussed in more detail in Chapter 39, Victims Support.

Where a person has been physically or mentally injured as a result of an act of violence that occurred in NSW, whether or not it is proven in court as a crime, they may be able to apply to Victims Services, a part of the NSW Department of Justice, for support, counselling, and financial assistance or for a recognition payment. This is called the Victims Support Scheme and is established in accordance with the *Victims Rights and Support Act 2013* (NSW). Acts of violence include physical, indecent and sexual assaults. When a person is subject to an act of violence, they should report this to police and be medically examined as soon as possible. Photographs of injuries, witness statements, counsellor's notes, diary entries and CCTV footage are the types of useful information to include in an application to receive support. A person who witnesses an act of violence carried out on another person may also be able to apply for support, as a secondary victim.

A claim for Victims Support must be lodged within two years of the violent incident. If an application is lodged outside the two-year time limit, it may not be accepted. There are exceptions to this time limit for some offences. For example, there is no time limit for making a claim for a recognition payment for childhood sexual assault. Applications for Victims Support are determined by an independent assessor through Victims Services and the victim is not required to go to court. The standard of proof for a Victims Support application is lower than for a criminal prosecution – the standard of proof is "on the balance of probabilities" rather than "beyond reasonable doubt". This means that the victim only has to show that it was more probable than not that they were the victim of an act of violence and they suffered an injury (or injuries) as a result.

Victims of violent crime can also apply for free counselling through Victims' Services Approved Counselling Scheme. Too often, counselling is not sought for people with disability who have been victims of crime. In seeking counselling through this scheme, it is important to ask for a counsellor who has experience working with people with disability.

People with disability sometimes require support when reporting acts of violence carried out against them. At other times, they will be reluctant to tell anyone at all. If the person's disability prevents them from communicating what has happened, there may be indicators such as sudden mood and behaviour changes by the person with disability. It is important that police and medical practitioners make adjustments and provide support to people with disability to encourage them to speak up against violence and abuse.

[16.160] Accused of a crime

Encountering the system

People with cognitive disabilities and mental health conditions are over-represented in the criminal justice system, including in prison. They have increased contact with the criminal justice system because they are more likely to experience psychological and socioeconomic disadvantage and sometimes do not receive adequate support and services. Often, justice personnel such as police, lawyers, magistrates and judges do not recognise or understand these disabilities and how they may affect a person. People with disability are not inherently more likely than people without disability to commit crimes.

A person with a cognitive disability is more likely to:

- be charged with an offence, and convicted;
- admit to an offence they did not commit (to please the police or other authority figures, or

to avoid admitting they did not understand questions);
- be refused bail;
- receive a prison sentence and to be refused parole (because of a lack of support options and services in the community).

At the police station

Police currently receive little training about identifying, adjusting to and communicating with people with disability.

Support is essential

People with impaired intellectual functioning and those with impaired physical functioning are "vulnerable persons" at law. This means that there are special provisions to assist them when they are at the police station, including the right to a support person. It is also crucial that a person with disability be offered legal advice before they give any evidence or think about participating in an interview. Failure to get a support person and make appropriate adjustments for a suspect with disability may mean any evidence the police gather will be deemed inadmissible in court.

General rules about police

- All police in uniform should wear a badge that shows their name and rank. Police officers who are in plain clothes should provide their name and station if they are asking a person to come to the police station or if they are arresting a person.
- A person does not need to go to the police station with police unless they are being arrested.
- If a person is being arrested, the police must read the person the formal caution about their rights, including their right to silence.
- A person who is under arrest must cooperate and go with police officers.
- Generally, a person should give their name and address when asked by police.
- Except for supplying the police with the person's name and address, a person generally has a *right to silence* – that is, the right to not answer any questions from police. There are some exceptions to the right to silence. The police should tell a person if one of these applies.
- If a person chooses not to answer questions or give an interview, the police *cannot* force the person to have this refusal recorded (on ERISP – Electronic Recording Information with Suspected Persons). Sometimes the police ask to do this, but they do not have the power to insist on this. It is best to avoid going to an interview room to be taped.

When police may give a warning instead of charging

Depending on police attitudes to the person and their awareness of the person's disability, they may exercise their discretion to give a warning or caution to a person rather than charge the person. This will usually only be an option where the alleged offence is a minor one.

Rules about police conduct with a person with disability

The law aims to protect the rights of people with disability. People with disability may be regarded as "vulnerable people" at law. The police are required to follow certain procedures when a person they have detained is a person who has a disability, so it is usually in the person's interests to tell the police they have a disability, or for someone else to do so on their behalf. The laws about how police must act when dealing with a person with disability are primarily contained in the *Criminal Procedure Act*, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and *Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW).

Vulnerable persons' right to a support person

People who have impaired intellectual functioning, or impaired physical function, are recognised as "vulnerable" persons (*Law Enforcement (Powers and Responsibilities) Regulation 2016* (NSW), reg 28). If police custody managers *suspect* that a person is a vulnerable person, they should take immediate steps to contact a support person and organise for the vulnerable person to have a support person present with them at the police station and during any police interview.

Support for people with cognitive impairment at the police station

The JAS, operated by the Intellectual Disability Rights Service, provides trained support persons for people with cognitive impairment who are in contact with

the criminal justice system as suspects, accused, witnesses or victims. A support person can attend police stations, court and legal appointments. One-on-one support is available throughout NSW 24 hours/7 days a week. The phone number for a person with cognitive impairment who is under arrest is 1300 665 908.

The support person can assist the person with disability, ensure that any interview is conducted properly and fairly, and should identify any communication problems that arise.

Police must also ensure that the detained person understands the warning the police give about the right to remain silent. This warning is sometimes referred to as the *caution*. This might require the Custody Manager to repeat the warning, explaining it simply or asking the support person to help explain it.

Where to get urgent legal help

A person who is in police custody has the right to contact a solicitor.

The following are options for obtaining urgent legal advice for a person with disability who has been detained by police for questioning:

- for adults and children with cognitive impairment, the Intellectual Disability Rights Service 1300 665 908, 24 hours 7 days a week;
- for adults and children, LawAccess 1300 888 529, business hours;
- for people under 18 years, Youth Hotline 1800 101 810 till midnight on weekdays and 24 hours at the weekend;
- for Aboriginal and Torres Strait Islanders, Aboriginal Legal Service 1800 765 767, 24 hours 7 days a week.

Excluding evidence in court

Where there is doubt about whether an accused with cognitive impairment understands the caution, or about the fairness of questioning or an interview or about whether a confession is genuinely voluntary, the accused's lawyer can ask the court to exclude the evidence.

Admissions by an accused with cognitive impairment to police may be unreliable or not genuinely voluntary for a number of reasons, including the accused person's:

- willingness to please authority figures;
- failure to understand questions;
- failure to understand the caution;
- desire to "get it over with" and leave the police station quickly.

If police have not followed the proper procedures in dealing with people who are charged with criminal offences, a court may decide to exclude evidence or admissions made by a person with cognitive impairment. This is because there are wider, public policy concerns to see that people with disability are dealt with fairly by police.

For more about arrest and interrogation, see Chapter 14, Criminal Law.

Forensic procedures and requests for samples

Under the *Crimes (Forensic Procedures) Act 2000* (NSW), police have wide powers to obtain forensic samples from suspects and prisoners. Samples include saliva from mouth swabs, fingerprints, hair strands and photographs of parts of a person's body. With advances in DNA technology, these samples can be useful for police to help with investigations into unsolved crimes. Obtaining forensic samples can be very invasive and traumatic for a person.

There are two main types of forensic procedures, non-intimate and intimate. Non-intimate forensic procedures are less invasive and include procedures such as taking buccal swabs, collecting hair samples (other than pubic hair), taking a sample from under a fingernail or taking a hand, finger or foot print. Intimate forensic procedures include procedures such as taking blood samples, collecting pubic hair or a dental impression. Different rules apply depending upon whether the forensic procedure is non-intimate or intimate.

Forensic procedures with the informed consent of the person

Forensic samples may be taken with the informed consent of the person or with an order of the court. "Informed consent" carries with it a requirement that police inform the person of their rights and, in particular, the fact that the forensic procedure may produce evidence against that person which could be used in court. However, the legislation says that a child or an "incapable" person cannot give consent.

If police want to take a forensic sample from a person who is incapable, perhaps due to disability,

the prudent course is to seek an order of the court to do so.

[16.170] Going to court

Legal Aid NSW

Legal Aid NSW can assist with advice and representation in most criminal matters for people with disability. Where possible, it is best to make contact with Legal Aid before appearing in court. If this is not possible, a person due to appear in a criminal matter in the Local Court should turn up to court by 9 am and ask to speak to the duty solicitor.

The JAS can provide a support person to attend court with a person with cognitive impairment (see [16.770]).

Was there an intention to commit a crime?

Most criminal offences require the prosecution to prove the accused had a particular mental state at the time of the offence, either:

- an intention to do the unlawful act; or
- recklessness as to whether or not it was done or as to its consequences.

In some circumstances, the impairment of a person with cognitive disability may be so substantial that the person is actually incapable of forming the required mental state to constitute a crime.

The Local Court and "section 32"

A s 32 order is a way for the Local Court to divert people with mental and cognitive impairments out of the criminal justice system. Part 3 of the *Mental Health (Forensic Provisions) Act 1990* contains all the provisions (including s 32) relevant to summary proceedings before a magistrate in the Local Court relating to persons with mental and cognitive disabilities.

A s 32 application can be made at any time through the course of the proceedings, including at the conclusion of a contested hearing. Section 32 applications may be made without having to enter a plea. This means that a s 32 application can be made where a person is unfit to enter a plea. The application is most commonly raised by the defendant's lawyer, but it can be raised by any party to proceedings. Sometimes a magistrate, of their own motion, may apply the provisions of s 32. The effect of the order is to dismiss the charges either unconditionally or subject to conditions. Conditions usually relate to complying with a support or treatment plan, which is an outline of various steps to be taken for the accused to engage with services and supports to meet their needs and address any issues associated with their alleged offending conduct.

For a magistrate to make an order under s 32, she or he must be satisfied broadly of two things:

- first, that the defendant is cognitively impaired, or suffering from mental illness, or suffering from a mental condition for which treatment is available in a mental health facility;
- second, that it would be more appropriate to deal with the defendant through a s 32 order and diversion into support, than through the normal criminal law process of pleas, hearings, sentencing and the like. In deciding whether it is more appropriate, the magistrate must consider an outline of the facts of the alleged offence but then apply his/her discretion in deciding whether or not to apply the section.

Cognitive impairment includes (without limitation) the following:

1. intellectual disability;
2. borderline intellectual functioning;
3. dementia;
4. acquired brain injury;
5. drug or alcohol related brain damage (including foetal alcohol spectrum disorder);
6. autism spectrum disorder.

Section 32 orders normally last six months, but their effect may be lengthened considerably by the use of adjournments. If a person breaches any one of the conditions within those six months, and it is reported to the court, then they can be brought back before the court.

What about charges heard in the NSW Children's Court?

Section 32 orders are available for charges for summary offences that are heard in the NSW Children's Court.

What about Commonwealth criminal offences?

Section 20BQ of the *Crimes Act 1914* (Cth) is similar to s 32 and applies to persons "suffering from an intellectual disability" or "suffering from a mental illness within the meaning of the civil law of the State or Territory" who are before a court of summary jurisdiction (like the Local Court) in respect of a Commonwealth offence.

The main difference under s 20BQ(1)(c) is that if the charges are dismissed conditionally, the period of the order can be up to three years (compared to the six-month maximum period under s 32).

For further information on s 32

The IDRS provides more information about s 32 applications online (see www.s32.idrs.org.au). Queries about specific s 32 applications for people with cognitive impairment may be directed to section32@idrs.org.au.

Cases in the District and Supreme Courts

Matters in the District and Supreme Courts generally have very serious potential consequences. Only suitably qualified and experienced lawyers should be instructed to appear in such matters, especially in matters for people with cognitive impairment. Questions of fitness and the defence of mental illness are highly specialised areas of criminal law.

Fitness to stand trial

Section 32 is not available in the District and Supreme Courts. In these courts, an application may be made that an accused is not fit to stand trial because of a cognitive impairment, like intellectual disability. However, a person will not be regarded as unfit to stand trial just because they have cognitive impairment. What must be determined is the degree to which the disability impairs their ability to properly participate in the trial process.

To determine this, the court needs to consider, among other things, whether the person:

- can understand the charge and the nature of the proceedings;
- can understand the main effects of the evidence;
- is able to follow the course of the proceedings, at least in a general sense, and can make a defence to the charge.

If "fitness" is raised as an issue, the court should order that the person be assessed by a psychologist or other appropriate professional for an independent opinion about whether the person is or is not fit to stand trial. Ultimately, it is a question to be decided by the judge hearing the matter by applying the standards outlined in the case of *R v Presser* [1958] VR 45.

If the person is found unfit to stand trial

If the person is found unfit to stand trial, the court makes an order referring them to the Mental Health Review Tribunal (MHRT) for a determination as to whether they are likely to become fit within the next 12 months. The person at this point is classified as a "forensic patient". If the MHRT determines that they are not likely to become fit within the next 12 months, the court will hold a special hearing to determine, on the limited evidence available to it, whether the person committed the alleged offence. This is called a "special hearing" and it is conducted as close as is possible to a regular criminal trial. If the accused chooses to give evidence, little to no weight can be attributed to their evidence. Also, given the finding that they are unfit, they cannot give instructions to their lawyer and effectively they have no control over the process.

If the offence is found to be proven at the conclusion of a special hearing, then a qualified finding of guilt is entered. A qualified finding of guilt does not constitute a basis in law for a criminal conviction, but the outcomes are often similar.

If the court would have sentenced the accused to a prison term had he or she been fit and had a regular criminal trial taken place, the person can still be sentenced to a prison term. The MHRT will determine where the person will serve that term of imprisonment. It could be in a psychiatric hospital or in a prison hospital. The court sets a maximum term for which the person can be imprisoned or detained known as the "limiting term", which is the equivalent of the head sentence the court would have imposed had it been a regular criminal trial. The limiting term encompasses the non-parole and parole periods, so these patients can end up serving the entire period without the opportunity for release during the parole period.

While serving the limiting term, the person must be reviewed by the MHRT at least once every six months. The MHRT can order that the person be released before the expiry of the limiting term.

In 2013, the *Mental Health (Forensic Provisions) Amendment Act 2013* (NSW) introduced provisions into the *Mental Health (Forensic Provisions) Act 1990* that allow for extension orders to be made in respect of a limited number of forensic patients, to facilitate the continued supervision and review of those patients by the MHRT. This now includes people with cognitive impairments.

Too often people with disability, particularly people with cognitive impairment, remain in detention because no appropriate alternative is

provided to manage or eliminate problematic behaviour. The circumstance of detention itself often exacerbates the person's behaviour problems, making their release less and less likely. It is important to remember that the risk a person with cognitive impairment may pose to others is not simply a feature of the individual but is also determined by the specific environment within which the person functions.

The defence of mental illness

Mental illness and cognitive impairment such as intellectual disability are two entirely different things. However, the defence of mental illness can be used by people with cognitive impairment. The legal requirement for the defence of *mental illness* is that a person, at the time of the offence, had a "disease of the mind" such that they were not aware of the nature and quality of the offending act, or, if they did know the nature and quality of the offending act, they did not know what they were doing was wrong.

The defence of mental illness can be raised as a defence to indictable charges being dealt with in the District Court or appellate courts. If the defence is made out, the court must return a special verdict of "not guilty by reason of mental illness" (*Mental Health (Forensic Provisions) Act 1990*, s 38). However, this verdict does not mean that the person is released. The person is detained as a forensic patient.

If a person is found not guilty by reason of mental illness

If a person is found not guilty by reason of mental illness, then the court can order that the person go to prison or a psychiatric hospital for treatment and for the protection of the community, or be released into the community usually with a plan of management and supervision. Such a person is referred to as a "forensic patient".

As soon as practicable following a forensic patient having been detained in strict custody, the MHRT must review the person's case and make a decision about the person's detention, care, treatment or conditional/unconditional release. Conditional release may include supervision by a psychiatrist or case manager, medication and supported accommodation.

Review of forensic patients

A forensic patient is a person who has:

- been found unfit to be tried for an offence and ordered to be detained in a correctional centre, mental health facility or other place; or
- been found not guilty by reason of mental illness and ordered to be detained in a correctional centre, mental health facility or other place or released into the community subject to conditions.

The main provisions relating to the review of forensic patients are found in the *Mental Health (Forensic Provisions) Act 1990*. Forensic patients are under the review of the MHRT. There is no set period of time for which the person is to remain in detention, and release depends on the orders of the MHRT.

The MHRT must review the case of any forensic patient at least once every six months. The MHRT can make orders about the person's continued detention, care and treatment, or release with or without conditions. These orders may say where the patient is to be detained, under what kind of security, and whether the person can have leave. If the patient is on conditional release, the MHRT can determine the conditions that apply to the patient's continuing presence in the community.

Prior to amendments to the *Mental Health (Forensic Provisions) Act 1990* and the *Mental Health Act 2007* (NSW), the MHRT could only make recommendations to the Minister for Health with regard to release of a forensic patient. Such decisions are now made by the MHRT.

Alternatives to imprisonment

Even when a person with disability has been convicted of a serious offence, there may be alternatives to imprisonment that are appropriate and best serve the objects of sentencing. Lawyers working with people with disability should be familiar with diversionary options and alternatives and actively assist their clients to access them where appropriate.

All too often, people with disability are held in prison on remand or given prison sentences because:

- they are considered less able to meet bail conditions and not given the support to meet those conditions;
- there is no accommodation available for them; or
- the place in which they have been living no longer accepts them.

Restitution orders under the Victims Rights and Support Act 2013

A person who is convicted of an offence which involved an act of violence may face a Provisional Order for Restitution issued by Victims Services under the *Victims Rights and Support Act 2013* (NSW). This will occur where the victim has applied for and been granted a recognition payment for an injury sustained as a result of the act of violence. The order may require the convicted person to pay part or all of the recognition payment. It may take years before the victim's claim is finalised and the person receives the Provisional Order. The Provisional Order can be opposed and contested by notifying Victims Services.

Legal Aid is not available in such matters.

The IDRS has expertise in opposing Provisional Orders for Restitution for people with intellectual disability. People with intellectual disability usually have very limited financial resources and are most often dependent on the Disability Support Pension. It is important that they are assisted to contest the order to seek a reduction or waiver due to their limited means and sometimes special circumstances.

Discrimination

[16.180] See Chapter 17 for detailed information about discrimination law.

Discrimination on the basis of disability is prohibited in certain circumstances by laws including the *Anti-Discrimination Act 1977* (NSW), the *Disability Discrimination Act 1992* (Cth) and the *Fair Work Act 2009* (Cth). These laws do not give a person with disability special rights. Rather, they aim to ensure that a person with a disability has *equal* access to things like accommodation, education and employment, and is not treated less favourably or harassed because of their disability.

Employment and industrial issues

[16.190] (Refer to Chapter 22, Employment for general information about employment laws, and refer to Chapter 3 at [3.340], for information on workers' compensation for injuries at work.)

Laws that are relevant to the employment of people with a disability are:

- the *Disability Services Act 1986* (Cth);
- the *Fair Work Act 2009* (Cth) and other laws referred to in Chapter 22, Employment;
- the common law;
- the anti-discrimination laws (see [16.180]).

[16.200] Awards, industry instruments and agreements, and minimum employment standards

Most employees who have a disability will work in open employment under an award, industrial instrument, or agreement. In most cases, these employees will be covered by the same awards that apply to other employees. Some of these people with disability employed in open employment may have their wages determined under the Supported Wage System. Other people with disability will work in supported employment. These people are employed in Australian Disability Enterprises (supported employment), and they may be employed under the Supported Employment Services Award 2010 (see [16.220] for details).

From January 2010, most employers and employees in Australia are covered by the national workplace relations system and one set of workplace relations laws, including most employers and employees who were previously covered by state workplace laws. (The national system does not cover public sector employees in state and local government in NSW. These employees are covered by NSW laws about employment conditions, awards, wages, and termination. These matters and employment disputes are dealt with by the NSW Industrial Relations Commission.)

For employees not covered by any awards, industry instruments or agreements, there are the

National Employment Standards (NES) and the National Minimum Wage Order 2018.

Information about awards, industrial instruments or agreements, and minimum employment standards can be obtained from the Fair Work Commission and from the Fair Work Ombudsman. Both bodies also deal with employment complaints.

[16.210] Open employment

Open employment exists where an employee with a disability works in the open workforce under award wages and conditions.

Open employment can be arranged directly with an employer, or by using a Disability Employment Service (DES) Provider. Disability Employment Service providers are specialist employment service providers funded by the Department of Social Services to assist job seekers with disability with employment preparation, job search, post placement, and ongoing support. Information about Disability Employment Services can be found on the Department of Employment website (www.employment.gov.au).

The wage assessment tool used in open employment is the supported wage system (SWS). The Department of Social Services has Supported Wage Management Units (SWMU) which deal with applications under the Supported Wage System, and manage the Supported Wages System in offices in state and territory capital cities (phone 1800 065 123).

To be eligible, under the Supported Wage System, a person must be aged at least 15 years and meet the impairment criteria for receipt of the Disability Support Pension (DSP), which are advised by Centrelink (now part of the Department of Human Services, see www.humanservices.gov.au or phone 132 468 for recorded information). The job must be for a minimum of eight hours per week.

The prospective employee is given a trial period (if necessary) of up to 12 weeks or in some cases extended to a maximum 16 weeks. A negotiated wage is paid during the trial period. The assessment of productivity is made. Assessments are generally undertaken by Department of Social Services approved SWS assessors, although depending on the industrial instrument, the productivity assessment may also be conducted by the employer and worker representative in consultation with the worker. The pro-rata wage is calculated. The award wage used for the SWS wage assessment cannot be less that the national minimum wage. The employee and the employer then sign the wage assessment agreement, which is sent to the Fair Work Commission. If there is no objection from the union, then the wage agreement is effective. The employer can legally pay the pro-rata award wage and superannuation from the date the agreement is signed. The wage agreement is reviewed in 12 months unless an earlier review date is agreed. The cost of a review assessment is paid by the Australian Government. The employer must provide workers' compensation insurance for potential SWS recipients who are working during the trial period and those employed after the SWS productivity assessment.

Part-time jobs can be assessed under the SWS using the same procedure and calculations as for full-time jobs. This can be achieved by using the part-time hourly figures in the wage calculations.

Disputes about the SWS productivity assessment can be referred to the SWMU for review. Disputes on other matters once the worker has been engaged on SWS provisions are dealt with by the same dispute resolution mechanisms that are available to other workers in the workplace. If unsuccessful, further complaints may be made to Job Access' Complaints Resolution and Referral Service (CRRS), or to the Fair Work Commission, or to the Fair Work Ombudsman.

[16.220] Supported employment

Supported employment exists where an employee works in an Australian Disability Enterprise (ADE).

ADEs are businesses (generally not-for-profit organisations) that provide employment for people with disabilities who require support to remain in paid employment. ADEs were previously known as "business services" and before that as "sheltered workshops".

Most ADEs have been funded by the Department of Social Services (DSS). Funding for ADEs is gradually transitioning to the NDIS. People with disability may be referred to an ADE by Centrelink, or a community group. Some ADEs advertise for employees. The employee must be eligible to receive the Disability Support Pension. The job must be at least eight hours per week to get government funding.

Each ADE has its own certified agreement which must comply with the Disability Service

Standards. These have been revised for transition to the National Disability Insurance Scheme (NDIS). They are called the National Standards for Disability Services. There are six service standards. There is now greater emphasis on human rights, choice, control and being person-centred (refer to the website of the Department of Social Services). ADEs funded by the DSS are audited to check that their certified agreements meet the National Standards for Disability Services.

The certified agreement must specify the wage assessment tool that is used. ADEs can currently choose one out of the 29 wage assessment tools used. The award governing employees of ADEs is the Supported Employment Services Award 2010. That Award requires payment of wages assessed under one of the 29 approved wage assessment tools including the SWS, the Greenacre wage assessment tool, the Skillmaster tool and others.

The wage assessment is done by an assessor. The assessor may be independent, although some organisations have their own assessors. The assessment can also be arranged by the Commonwealth Department of Social Services.

A wage assessment tool compares the work performance of a person with a disability to the work performance of a person without a disability doing the same work. The result of that comparison is recorded as a percentage. The wage that is paid to the person with disability is calculated using that percentage and multiplying it by the award wage.

For example, the minimum rate of pay for a grade one full-time employee under the Supported Employment Services Award 2010 is $18.93 per hour or $719.20 per week. Then, if that person's work performance, using a wage assessment tool, was assessed at 50%, they would be paid $9.47 per hour or $359.60 per week.

Complaints about employment services can be made to JobAccess' Complaints Resolution and Referral Service (CRRS). This is a complaints resolution service for people using Australian Government-funded disability employment and advocacy services. It deals with:

- open and supported employment;
- complaints about service providers;
- breaches of the National Standards for Disability Services;
- occupational health and safety matters;
- wages paid relating to DESs and ADEs.

Some ADEs are not funded by the DSS and have their own wage assessment tools. In such cases, the CRRS may not be able to deal with the complaint; however, the ADE is required by the National Standards for Disability Services to have a complaint mechanism. This should be followed and if the result is unsatisfactory, a complaint may be made to the Fair Work Commission or the Fair Work Ombudsman.

The Fair Work Commission has information about awards and deals with complaints and industrial disputes relating to open employment and supported employment.

Discrimination in Wage Assessment Tools

The BSWAT was previously used to determine the wages of supported employees in Australian Disability Enterprises. In *Nojin v Commonwealth of Australia* [2012] FCAFC 192 (21 December 2012), the BSWAT was found to be discriminatory. This case may have implications for finding discrimination in other wage assessment tools.

[16.230] Employment information

JobAccess is a free information and advice service about the employment of people with disability. JobAccess helps people with disability, employers, service providers and the community to access information about services, financial assistance and workplace solutions. You can find useful information about reasonable adjustments, disclosure of disability, disability employment case studies, tools and checklists. Refer to the website at www.jobaccess.gov.au or phone 1800 464 800 (see [16.770] for details).

Housing

[16.240] This section focuses on housing issues for people with disability. For general information about housing and related issues, see Chapter 27, Housing.

People with disability may live independently on their own or with their families or with other people. Some may require supported accommodation. There is a continuum of supported accommodation services. Where little support is needed, some people may live independently with drop in support or personal care being provided for only a few hours per week. Other people may need more than a few hours of support each week, and some high needs people may need to live in a group living setting with 24 hour staff support, seven days per week. (Group homes are called specialist disability accommodation under the National Disability Insurance Scheme (NDIS).) Unfortunately, there are cases where no group home accommodation is available and some people with disability are living in aged care and nursing home accommodation.

[16.250] Renting public or private accommodation

For information about applying for public housing, contact Housing NSW.

Where people with a disability rent (or have a lease), problems can arise if landlords try to impose large rent increases or attempt to evict them without reasonable grounds. People with disabilities have the same rights as other people who rent premises. For detailed information about rights and responsibilities involved in renting, see Chapter 27, Housing. People with disabilities who rent independently may still receive support services from a service provider funded by the National Disability Insurance Agency (NDIA).

[16.260] Group homes

For information about applying for supported group home accommodation, contact the NDIA, a Local Area Coordinator (LAC) or a disability advocate.

Under the NDIS, group homes are operated by a service provider of accommodation and a service provider of supported independent living services (SIL). The resident enters into agreements with each service provider. Although these agreements refer to the fees paid by the resident, for example 25% of the Disability Support Pension for accommodation and 50% of the Disability Support Pension for SIL services, they are unlikely to refer to the fees negotiated between the NDIA and the service provider which are likely to exceed $100,000.00 per year. These unknown fees are referred to in the resident's NDIS plans as "stated supports".

Group homes are staffed by disability workers, and they support people with disability who are unable to live more independently. The staffing level should be based on the assessed need of the group of people living in the home. Group homes provide up to 24 hours of support, seven days per week.

The supported independent living services may include attention to the resident's general health and safety needs, development of a person-centred lifestyle plan, help with social relationships, development of household routines, help to maintain personal care, planning to help to access recreational programs, leisure activities, holidays, development of skills for independent living, assistance with access to health services etc.

Residents should be able to make a complaint to the service provider, and they can also complain to the NDIS Quality and Safeguards Commission. The *National Disability Insurance Scheme Act* (the Act) at Ch 6A sets out the functions of the Commission. One of its functions is to help with the mediation of complaints, however, the Commission does not adjudicate complaints. The Commission may close a complaint because it involves legal issues. Some examples of the problems residents may have include:

- not being treated with dignity and respect;
- not having their own bedroom;
- not sharing common areas;
- not having community participation;
- not having personal possessions secured;
- not being safe;
- not being given behaviour support;
- not being given information;
- not being allowed privacy.

It is unlikely that residents can take legal action about accommodation agreements or supported independent living agreements. Firstly, this is because the courts are usually inaccessible to people with cognitive disability because of legal incapacity, or not having a tutor, or legal cost issues. Secondly, the amount payable for the services in these agreements usually exceeds $40,000 and therefore NCAT does not have jurisdiction. Thirdly, neither the *Residential Tenancies Act 2010* (NSW) nor the *Boarding Houses Act 2012* (NSW)

apply to group homes. (It is submitted that there is a need for NSW legislation to give statutory rights to residents of group homes that can be enforced by NCAT, and also to give NCAT jurisdiction in matters related to service agreements that exceed $40,000, and jurisdiction to make orders that include specific performance and injunctions.)

The NDIS Quality and Safeguards Commission does not have official community visitors to inspect group homes. As at the 1st of July 2019, the Aging and Disability Commission commenced in NSW, and it took over the Official Community Visitor scheme.

Section 207 of the *Act* provides for NSW laws to operate concurrently where they do not conflict with the *National Disability Insurance Scheme Act 2013*. Therefore, orders made by courts and tribunals about financial management and guardianship may affect decision-making under the NDIS.

[16.270] Boarding houses

For boarding houses covered by the *Boarding Houses Act*, the boarder has the right to a written occupancy agreement. This agreement must comply with the "occupancy principles" set out in s 30 and Sch 1 of the *Act*. In the event of a dispute, there is a dispute resolution process under occupancy principle 11. If that does not work, or if it is a serious or urgent problem, the boarder can apply to the NSW Civil and Administrative Tribunal (NCAT), to resolve the dispute. If the dispute is not about occupancy, but about the services the boarding house agreed to supply, for example meals, the boarder may have a consumer claim which can be taken to the NCAT. Also, there are standards for places of shared accommodation, set out in Pt 1 of Sch 2 of the *Local Government (General) Regulation 2005* (NSW), which apply to boarding houses covered by the Act.

For general information on rights and responsibilities under the *Boarding Houses Act*, see Chapter 27, Housing.

[16.280] Assisted boarding houses

People with a disability may also occupy an assisted boarding house under the *Boarding Houses Act*. This includes boarding premises that provide beds, for fee or reward, for use by two or more residents who are persons with additional needs. "Additional needs" means residents who have age-related frailty, mental illness or disability which is permanent or likely to be permanent, and which results in the need for care or support services involving assistance with, or supervision of, daily tasks and personal care (such as showering or bathing, the preparation of meals and the management of medication). Assisted boarding houses used to be known as "licensed boarding houses" or "licensed residential centres". These are private, usually for-profit shared accommodation services, where two or more people with disability elect to reside.

Assisted boarding houses, as defined under the *Boarding Houses Act*, do not include premises used for occupation that is provided by a registered provider of specialist disability accommodation for the purposes of the *National Disability Insurance Scheme Act 2013* – see s 37(2)(o1). The *Boarding Houses Act*, and the Regulations, apply to general boarding houses and assisted boarding houses, but there are additional requirements for assisted boarding houses. For example, the proprietors of assisted boarding houses must apply to the Department of Communities and Justice (DCJ) for authorisation to operate. Assisted boarding houses are required to comply with additional conditions relating to accommodation, staff and service standards as set out in the *Boarding Houses Regulation 2013* (NSW), especially Sch 1. These additional rules for assisted boarding houses do not create additional legally enforceable personal rights – see s 34(4).

Complaints about assisted boarding houses not meeting the additional rules and conditions applying to them should be referred to the proprietors initially, and if they are not fixed, a further complaint can be made to DCJ. Complaints can also be made to the Official Community Visitor.

[16.290] Lodgers

If an occupant does not have an agreement covered by the *Residential Tenancies Act 2010* (NSW), nor by the *Boarding Houses Act*, nor any other type of agreement or contract that gives them occupancy rights, then they may be a lodger.

In most circumstances, they would have only the minimal rights and obligations of a lodger under the common law.

[16.300] Complaints and legal action about housing and related services

People with disabilities who rent or board may be able to have their problems dealt with by making a claim in the NSW Civil and Administrative Tribunal (NCAT), however, it is advisable to get legal advice from a solicitor before doing this.

Residents in group homes can make complaints to the NDIS (Quality and Safeguards) Commission, however, it is unlikely that they can take legal action in relation to their accommodation, or service agreements (SIL), because of the reasons noted above in [16.260] Group Homes.

People with disabilities who have complaints about accommodation and services funded by the NSW government, or monitored by NSW government can complain to the NSW Ombudsman. The Ombudsman can make recommendations and report, however it has no power to compel compliance.

After 1st July 2019, complaints about abuse and neglect in any type of accommodation may be made to the Aging and Disability Commissioner.

A person making a complaint can use an advocate to help them. Advocacy organisations can usually help with housing problems.

Personal relationships

[16.310] People with disability have the same rights as people without disability to have friendships and sexual relationships, to live with someone, and to marry and have children.

[16.320] Sexual relationships

In NSW, the law affords privacy and choice to all people over 16, including people with disability, regarding their sexual relationships. A parent cannot normally legally prevent a person with disability, who is at or over the age of consent, from having a sexual relationship.

All people have the right to enjoy sexual relationships without being abused or exploited. The law will only interfere in sexual relationships where there is abuse, potential for exploitation or lack of consent (see section on sexual assault at [16.140]).

Unfortunately, people with disability are more likely to be victims of sexual assault and can be vulnerable to sexual exploitation. Specific offences exist to protect people with cognitive impairment from sexual exploitation. For more detail, see [16.140].

[16.330] Marriage

Anyone including same sex couples is free to marry provided they are old enough, and they generally understand the nature and effect of the marriage ceremony.

A marriage will be void where a party is mentally incapable of understanding the nature and effect of the marriage ceremony (*Marriage Act 1961* (Cth), s 23B(1)(iii)).

This has been interpreted to mean that a person entering a marriage must have either a general understanding of marriage and its consequences, or an understanding of the specific consequences of the marriage for them (see *Babich v Sokur* [2007] FamCA 236).

Under the Family Law Act

The *Family Law Act 1975* (Cth) covers marriage relationships, breakdown of marriage and the welfare of the children of a marriage or de facto relationship (see Chapter 24, Family Law). Where a marriage breakdown involves children, the law treats parents with disability no differently from parents without disability. In matters about with whom a child is to live, a parent with a disability will have a much better chance of success if they can show an awareness of the needs of the child and how they can support the child either by themselves or with the assistance of friends, family or government agencies.

[16.340] De facto relationships

De facto couples (including same-sex couples) have many of the same rights and responsibilities as married people. All couples, including couples

where one or both people have a disability, have these rights and responsibilities.

[16.350] Family planning

Many people with disability want to be parents, but can face opposition from others including their parents, friends and authorities. This may make it difficult for the person to plan pregnancy and parenthood and access services. With the right support, many parents with disability raise happy and healthy families.

Contraception

All men and women, including those with disability, have the right to make their own decision about whether to use contraception and which method to use.

Making these choices requires access to accurate and accessible information about reproduction and contraceptive options.

If a person does not have the capacity to decide

A person's cognitive impairment may prevent them from being able to understand and make a decision about contraception, even with appropriate supports in place. A "person responsible" (defined in [16.570]) can consent to contraception treatments on behalf of a person who is incapable of understanding sufficiently to consent themselves. If the person objects to contraception, the consent of a person responsible is not valid. In these circumstances or if there is dispute about whether contraception is in the interests of the person with disability, an application should be made to the NSW Civil and Administrative Tribunal (Guardianship Division) under the *Guardianship Act 1987* (NSW) to determine whether the person is able to make the decision or, if not, who can make decisions around contraception for the person.

Abortions are legally available in many situations in NSW. Under the law, no one can make a woman with a disability have an abortion if she is capable of making an informed decision that she does not want one.

Likewise, no one can stop a woman from having an abortion just because she has a disability, if her decision to have an abortion is informed.

If a person does not have the capacity to decide

A person's cognitive impairment may prevent them from being able to understand and make a decision about termination of a pregnancy even with appropriate supports in place. In these circumstances, only the NSW Civil and Administrative Tribunal or the Supreme Court can decide whether to terminate or not.

Sterilisation

Both women and men can undergo surgery for sterilisation, although the operation is more complicated for women than for men.

People with disability have the right to make fully informed decisions about the matter. Sterilisation is a very serious matter and its effect is permanent. It should only be considered in extreme situations of emergency, where a person's life is at risk or to prevent serious damage to health.

If a person does not have the capacity to decide

Where sterilisation is sought for an adult who is incapable of understanding and making the decision, even with appropriate supports in place, or for a child, an application must be made to the NSW Civil and Administrative Tribunal (Guardianship Division) under the *Guardianship Act*.

The Tribunal can consent to a sterilisation only if it is satisfied that it is necessary to save the person's life, or prevent serious damage to their health, and that it is the most appropriate treatment in all the circumstances.

Sterilisation ordered by the Family Court

The Family Court also has power to order sterilisation operations for children. The Family Court's power exists in addition to that of the NSW Civil and Administrative Tribunal.

Parents with disability

[16.360] Parents with disability can face discrimination when parenting, and it is not uncommon for their ability to parent to be challenged by members of the community and

authorities. Parents with cognitive impairment and mental health conditions frequently experience challenges to their parenting ability and are involved in a disproportionate number of child removal cases in the NSW Children's Court.

Under the UN Convention on the Rights of Persons with Disabilities, to which Australia is a signatory, the State has an obligation to eliminate discrimination against parents with disability and assist them in their child rearing responsibilities.

All children, including those born to parents with disability, have a right to grow up in their birth family, unless there are reasons why this is not in the child's best interests.

Parents with cognitive impairment

Historically, people with cognitive impairment were institutionalised and sterilised, which denied them the opportunity to become parents. Today, these practices are far less common, and becoming a parent is a more realistic goal for people with cognitive impairment. Research shows that cognitive impairment, in the mild range, does not preclude a person from being a loving and responsible parent.

The environment in which some people with cognitive impairment parent, can make parenting more difficult. Parents with cognitive impairment are more likely to experience social isolation, poverty and domestic violence. Addressing these issues can enhance parenting capacity.

Like all parents, it is essential that parents with cognitive impairment have access to appropriate guidance and support in relation to parenting.

[16.370] When DCJ becomes involved with a family

If Community Services is concerned about the safety, welfare or wellbeing of a child, they can become involved in a family's life. They are given this power through the *Children and Young Persons (Care and Protection) Act 1998* (NSW). A child is defined as someone under 16 and a young person is someone aged 16 to under 18, see s 3 of the *Act*.

The law gives Community Services the power to investigate its concerns and, if it thinks it is necessary, take the action it believes will promote the safety, welfare and wellbeing of the child. The most extreme action Community Services can take is to remove a child from their parent. Before a child is removed Community Services is required to try alternative action, such as assisting the family to access support services, unless there is an urgent safety risk to the child.

Community Services may call a parent into its office for a meeting or go and visit the parent at home. At these meetings, parents may be asked to sign documents or agree to do (or not do) certain things. It is important that a parent with cognitive impairment knows what they are agreeing to or signing, as breaking an agreement may eventually result in a child being removed. If a parent is asked to sign something without a support person present, the parent should ask to take the papers away, so that they can get independent advice before signing the document.

Even if they are not going to be asked to sign anything, parents with cognitive impairment should always attend meetings with Community Services with a support person. Everything that is said at a meeting with Community Services is documented and forms part of the case file. Community Services' policy states that birth parents may have a support person with them at meetings or conferences. The support person can be informal, for example, a friend, relative, or formal, for example, a disability advocate or family support worker.

The advantage of having a disability advocate as a support person in any meetings with Community Services is that the advocate will be able to assist the parent to explain their abilities and encourage Community Services to treat the person fairly.

If a matter goes to court

If, after investigating the matter, Community Services' caseworkers form the opinion that a child is in need of care and protection, it may make a care application in the Children's Court, where the case will be decided by a Children's Magistrate. The focus of the Children's Court is the "best interests of the child" (see Chapter 7, Children and Young People for further information on care and protection proceedings).

The law says that the Children's Court cannot make a decision that a parent cannot meet their child's needs just because the parent has a disability (*Children and Young Persons (Care and Protection) Act 1998*, s 71(2)(a)).

Community Services will have to show how the quality of the parent's care is causing the child to be harmed, abused or neglected, or why it is

placing the child at risk of being harmed, abused or neglected. Community Services will also have to prove that whatever the problem is, it cannot be addressed.

During a care and protection matter, the court considers who should care for the child going forward. In making this decision, the court will consider whether there is a realistic possibility of restoring the child to their parent. Amendments to the law mean that from February 2019 the court can consider if there is realistic possibility of restoration to the parent within a reasonable time, being not more than two years from the date of Final Orders.

If there is no realistic possibility of restoration, the court will look at alternative care arrangements for the child. The legislation contains permanent placement principles. Care arrangements must be made in accordance with these principles. Under the placement principles, placement with birth parents is the preferred placement, followed by placement with relatives or kin, followed by adoption (unless the child is Aboriginal or Torres Strait Islander), and finally placement under the care of the Minister.

A decision around realistic possibility of restoration must be made within six months of the care application if a child is less than one and within a year if the child is over one. There is discretion to extend these timeframes.

For parents with cognitive impairment, a challenge will be finding appropriate services, courses and supports to put in place to allow the parent to either prove or improve their parenting capacity within the specified timeframe. Not many parenting supports, services or courses are tailored to parents with cognitive impairment. It is important that tailored services are used or they are unlikely to be effective. To be effective, services need to be hands on, practical and delivered in the parent's home if possible.

Legal representation

The child, or children, who are the subject of the care application will automatically be given a lawyer to represent them in their care matter.

It is advisable that parents get lawyers for the case. Each parent will need a separate lawyer. If the parent has not arranged a lawyer before the matter goes to court, a duty solicitor will speak on behalf of the parent/s the first time the matter is in court. If a parent is eligible for Legal Aid, they can either keep the lawyer who represented them on the first day, or find another lawyer through the Legal Aid Care and Protection Panel lawyers. Parents who are not eligible for Legal Aid will have to arrange a private lawyer – Legal Aid NSW can provide a list of Care and Protection lawyers. If a parent is Aboriginal, they may be able to get a lawyer through Aboriginal Legal Services.

It is important that the parent understands what is going on in their court case, and it is the duty of the lawyer to assist the parent to understand what is happening. The parent should ask their lawyer to explain what is going on, and tell their lawyer if they do not understand any of the court proceedings or documents. A parent may also want to take a support person to all meetings with their lawyer.

If a parent is unhappy with the legal representation they are receiving, they can change lawyers. Where the parent is represented through a Legal Aid grant, they should contact Legal Aid and let them know they want to change lawyers. The grant of Legal Aid is allocated to the parent, not the lawyer, so it moves with parent when they change lawyers.

Support person during the case

Care proceedings can be traumatic and confusing for parents. Parents may find it useful to have a support person with them when they attend court and meetings about their case.

The law allows a person involved in a care and protection matter to have a support person with them in court. Permission from the court is required and must be granted unless the support person is a witness in the proceedings; or it is against the wishes of the child, who is the subject of the proceedings, that this person be a support person; or there is any other good reason why the court should refuse to allow this person to be the support person in court (*Children and Young Persons (Care and Protection) Act 1998*, s 102).

A support person can be informal (friend or family) or formal (disability case worker, disability advocate, family support worker). A disability advocate may be a useful support person if the parent's disability is an issue in the case.

Many matters are referred to mediation to see if the parties can come to an agreement about what is best for the child. The usual mediations at this stage are Dispute Resolution Conferences. If the matter goes to a Dispute Resolution Conference (DRC), the parent may want the support person

to attend the DRC with them. A support person can assist the parent to understand what is happening during the DRC and ask for breaks if necessary. The Children's Court makes extensive use of alternative dispute resolution (ADR). For example, most contact issues are now resolved through ADR. It is advisable that a parent with cognitive impairment has a lawyer and support person present during any ADR process.

Guardian ad Litem

A Guardian ad Litem (GAL) is a guardian, appointed by the court, to represent the interests of a person seen as incapable of giving proper instructions to their lawyer. A Guardian ad Litem is appointed for the duration of the legal case only.

The Court can appoint a Guardian ad Litem for a parent in a care and protection matter if it thinks that the parent is incapable of properly instructing their lawyer (s 101).

The Guardian ad Litem instructs the lawyer on behalf of the parent. In performing this role, the Guardian ad Litem is to protect and promote the parent's interests.

The law identifies a parent having intellectual disability as a situation when a Guardian ad Litem may be appointed in care proceedings (s 101).

Once a Guardian ad Litem is appointed, the parent loses their direct voice in the case so it is important to be sure that the parent actually needs a Guardian ad Litem before one is appointed. Other options that will allow the parent to continue to participate in the proceedings should first be explored. In many cases, a support person or advocate may be able to assist the parent to understand sufficiently to instruct their solicitor.

Intellectual Disability Rights Service has developed a website to assist lawyers and disability workers who are representing or assisting parents with disability trying to navigate the Care and Protection system. This can be found at www.idrs.org.au/.

[16.380] Adoption

Adoption matters are decided in the Supreme Court. The consent of the parents or guardians is normally required before the court can make an adoption order. Parental consent can be dispensed with if the court considers that is in the best interests of the child.

Where there is no proper consent

The court will refuse to make an order where there is no proper consent. For example, where the consent is obtained by fraud, duress or improper means, or the person giving consent did not fully understand what they were doing (*Adoption Act 2000* (NSW), s 58), the court will not make an adoption order.

Where the person cannot consent

The court may dispense with the need for consent if the parent is incapable of properly considering the question and giving consent because of a physical or mental condition (*Adoption Act 2000*, s 67(1)(b)).

The court will require extensive information on the circumstances of the child and the parent before making an order in this situation.

As discussed above, adoption is included in the permanent placement principles. It is expected that the number of adoptions, as alternative care arrangements, will increase. Parents with cognitive impairment should make sure they understand the implications of adoption and the terms of any adoption plan they are asked to sign and always seek independent advice. A support worker or advocate may assist them through this process.

See Chapter 7, Children and Young People, for a detailed discussion of adoption.

Wills

[16.390] For more information on Wills, Estates, and Funerals, see Chapter 40.

Wills, trusts and estate planning can be complicated. Some basic information about them has been provided below. You should always get legal advice about your own particular circumstances with a solicitor who has expertise in wills, trusts and estates matters.

[16.400] Wills where a beneficiary is a person with a disability

Everyone should make a will – particularly if they have a son or daughter with a disability who may be unable to look after their inherited property independently.

A will can be made flexible enough to allow for changes in the beneficiary's living arrangements and support needs.

Where there is no will

Where there is no will, the deceased's property is distributed according to the *Succession Act 2006* (NSW), and a person with a disability is entitled to inherit in the usual way (see Chapter 40, Wills, Estates and Funerals).

Considerations in making the will

Making provision for changed circumstances

Parents should be wary of making only a small provision for children with a disability.

Parents sometimes do this if the child is permanently placed in an institution or other residential facility, and has modest needs as a result, or if the person receives a pension.

It is of course impossible to predict the vicissitudes of life and the needs of a person with a disability 10 or 30 years after parents die. For example, the residential facility may have closed down, or raised its fees to an amount well above the pension. So parents need to be sure they make enough provision for changing circumstances.

Also parents may have decided to make less provision for a child with a disability because they think their other children will care for them; however the other children may die first, or they may not carry out their parents' wishes. If it is not desirable to leave property outright to a person with a disability, then it may be suitable to give them personal items and provide for their share of the financial and real estate assets to be held in trust for them (see Setting up a trust under the will at [16.400]).

Applications under the Succession Act

Where parents make a much greater provision for one family member or dependent than for another family member or dependent, or fail to provide adequately for a family member or dependent with disability, an application can be made under the *Succession Act 2006* (NSW) to the Supreme Court for adequate and proper provision to be made to the family member or dependents disadvantaged from the estate of the deceased parent (see Chapter 40, Wills, Estates and Funerals).

Where the person receives property

Where a person with a disability is absolutely entitled to inherited property it should be given to them, unless they do not have legal capacity in which case it should be held in trust or held by an appointed financial manager (see *Trustee Act 1925* (NSW), s 47).

Setting up a trust under the will

An alternative to leaving property outright to a person with a disability is for a parent to set up a trust under the will so that the property can be used for the benefit of that person in the way the parent chooses. For example, if there is only one child, and that child has a disability, the parents could leave all their property to be held in trust and applied by the trustees for the child's benefit. The will should also state what is to happen to the trust property when the child dies.

For example …

Suppose there are three children and one of them has intellectual disability. The parents could leave a third of their property directly to each child without a disability and leave the remaining third in trust to be used for the benefit of the child with intellectual disability.

The will could also say that anything remaining in the trust, if the child with intellectual disability dies without issue, will go to the other children or their families, or to charity, if that is the wish of the will maker.

Tax on money held in trust

Income from a trust under a will is taxable – so it may be better to use the money to buy something for the person with a disability (such as a car or somewhere to live) rather than investing it for income.

What the will allows the trustees to decide

The will can be very specific about how much the trustees have to spend on the person with a disability, or it can give the trustees a wide discretion.

The *advantages* of giving the trustee a wide discretion include:

- maximum flexibility for the trustees to react to changing needs and circumstances;
- it allows the trustees to remove or at least minimise the effect of the will on the person's social security benefits.

A *disadvantage* of giving wide discretion is that it limits what can be done if the person with a disability feels that the trustees are not acting fairly.

This highlights the importance of choosing suitable trustees.

Who should be trustees

The trustees can be the same people as the executors named in the will.

Qualities to look for in trustees include:

- being relatively young but over 18 years – they may have to act for decades;
- business sense – knowledge of investments, income tax and social security;
- independence from the family situation – they may need to make "unpopular" decisions about how property is to be divided among the will-maker's children;
- continued interest in the person with a disability – a willingness to engage with the person and to keep up an awareness of their needs and wishes and what services and resources are available for them.

It may be better to have more than one trustee. People and entities to consider as trustees include:

- a sibling (but be wary of conflicts of interest – see below);
- an accountant, solicitor, trustee company, or NSW Trustee and Guardian;
- an advocate for the person with disability;
- a friend who takes an interest in the person with a disability and in whom the person has confidence.

The NSW Trustee and Guardian and private trustee companies

If parents cannot find suitable trustees, the NSW Trustee and Guardian or a private trustee company can be appointed.

The advantages of using these organisations are that:

- they offer permanent life-time services;
- they are normally cautious and sensible about investing money.

The disadvantage is the lack of a personal touch. People with a disability often feel organisations and trustees that look after their money do not listen to their requests and unreasonably refuse them. Frustration can increase because they are dealing with an organisation – not a single real person.

Siblings as trustees

If siblings without a disability are appointed as the only trustees, they may be in a situation of conflict of interest.

Wills may provide that when the person with a disability dies, the share of the estate held in trust for them goes to the children without a disability or their families. In this case, the children who are trustees know that whatever they do not spend on the person with a disability will come to them, and so they may be tempted not to spend the trust money on the person with a disability while they are alive.

Special disability trusts

A special disability trust can be set up and operate during the lifetime of a person or commence via their will when they die. There are some specific rules about special disability trusts including:

- the beneficiary must have a "severe disability";
- there can only be one beneficiary; and
- the primary purpose of the trust must be to provide only for the "care and accommodation" of the beneficiary.

The initial step should be to verify with Centrelink or the Department of Veterans Affairs that the person for whom the trust is being established is "severely disabled" as required by the special disability trust rules.

The trust funds can be used for:

- the cost of accommodation of the person with severe disability;
- extra care costs arising from the disability;
- the beneficiary's dental and medical expenses, including membership costs for private health funds;
- up to $12,000.00 in a financial year on discretionary items not related to the care and accommodation needs of the beneficiary. These items must relate to a beneficiary's health, wellbeing, recreation, independence and social inclusion. The expenditure should remain compliant within the legislative requirements of a special disability trust; and

- costs associated with operating the trust.

Some of the benefits of special disability trusts are that:

- the value of the primary residence of the beneficiary that is held within the special disability trust and funds up to a prescribed amount held within that trust will be exempt from the assets test for the disability support pension;
- income from the special disability trust that is used to pay for the care and accommodation expenses of the beneficiary is exempt from the income test for the beneficiary;
- immediate family members can gift up to $500,000 (combined) into the trust and be eligible for gifting concessions when applying for social security payments.

Limitations on and possible problems with special disability trusts include:

- once money is in the trust it cannot be withdrawn or used for anything other than the purpose of the trust; and
- depending upon a person's particular assets and income and their lifestyle needs, a special disability trust may not put the beneficiary and their family in a better financial or lifestyle position than other future planning arrangements (such as outright gifts, or a grant of a life estate, or a right of occupancy, or providing an annuity, or some other form of trust arrangement, etc).

You should *always* discuss future planning, wills and estates matters with a lawyer who has expertise in those areas or with the NSW Trustee and Guardian.

Testamentary guardians

Testamentary guardians are people appointed in a will to take over the parents' role as guardians of their children. Such an appointment is not legally binding, however, it may be useful as evidence of the parent's wishes if formal guardianship orders are needed.

Property not governed by the will

The will maker should take care to ensure that the will disposes of all their property, however, the will maker also needs to consider any legal arrangements that relate to property that is not covered by the will. For example, life insurance benefits and superannuation benefits often go to the person named in the relevant policies as beneficiaries, or if no one is nominated then the rules of these funds often provide for payment to be made to the deceased's dependents. Another example is that property owned as joint tenants is transferred by law upon the death to the surviving joint tenant.

[16.410] Can people with intellectual disability, brain injury, mental health conditions, or other conditions of mental impairment make a will?

They can make a will if they have testamentary capacity. That requires them to:

- know that a will deals with their property after they die;
- know, in general terms, the amount of their estate;
- know the people who may have a moral claim on them for support;
- be able to weigh up those moral claims.

At law, a will is presumed valid unless and until someone challenges it. Evidence of capacity should be obtained at the time it is made if it is likely to be challenged. Any written notes, statutory declarations, or medical reports relating to the testamentary capacity should be kept with the will. It is submitted that a solicitor is better placed to be independent, give advice, draw the will, obtain evidence of testamentary capacity, and keep records.

GUARDIANSHIP AND PROPERTY MANAGEMENT FOR ADULTS

[16.420] This section deals with guardianship and property management for people 16 and over who are unable to make decisions for themselves. The Guardianship Division of NCAT may appoint

a guardian for a person who has a disability and is unable to make personal or lifestyle decisions. It may appoint a financial manager for a person who is not able to manage their financial affairs.

Someone cannot be assessed as lacking mental capacity merely because they make a decision others regard as unwise, reckless or wrong. Individuals have their own values, beliefs, likes and dislikes and the majority of people take chances or make "bad" decisions occasionally. People may take informed risks reflecting their life preferences. This is known as dignity of risk.

Someone may be able to make a particular decision at a certain time because they have support during the decision-making process. Where possible people should be supported in decision-making. A supported decision-making process includes knowing the person, providing opportunities for decision-making, providing information, weighing up the options with the person including any risks, remaining neutral, assisting the person to make and implement the decision and reflecting with the person on the process.

A person's capacity to make a decision comes into question if their decision-making results in them making decisions which expose them to neglect, abuse or exploitation.

The tribunal must conduct examinations of a person's capacity to make a decision being mindful of the principles provided in s 4 of the *Guardianship Act*. The Tribunal is required to protect a person from neglect, abuse or exploitation (s 4(g)) and has a duty to: restrict as little as possible a person's freedom of action and freedom or decision (s 4(b)); take account of the person's views (s 4(d)); and to encourage, as far as possible, the person to be self-reliant in matters relating to their personal, domestic and financial affairs (s 4(f)) (*Re NIQ* [2014] NSWCATGD 28).

The relevant Acts are the *Guardianship Act*, the *NSW Trustee and Guardian Act 2009* (NSW) and the *Civil and Administrative Tribunal Act 2013* (NSW).

The Guardianship Act

[16.430] The *Civil and Administrative Tribunal Act* establishes the Guardianship Division of the Tribunal, which can:

- appoint guardians and financial managers for people 16 and over who cannot make decisions for themselves because of a cognitive disability;
- consent to certain medical and dental procedures for people who are incapable of consenting for themselves;
- review enduring guardianship appointments and enduring powers of attorney (*Powers of Attorney Act 2003* (NSW)), and make a range of orders about those arrangements.

[16.440] Principles of the Guardianship Act

The main principles in s 4 of the *Guardianship Act* are, in summary, that:

- the welfare and interests of people with disabilities should be paramount, and their freedom of decision and freedom of action should be restricted as little as possible;
- people with disabilities should be encouraged, as far as possible, to live a normal life in the community and be protected from neglect, abuse and exploitation;
- the views of the person with a disability should be taken into account.

Guardianship jurisdiction of the Supreme Court

The Supreme Court has an inherent guardianship jurisdiction which is not affected by the legislative scheme (*Guardianship Act*, ss 8, 31), but it rarely makes guardianship orders for adults. The Supreme Court can also make estate management orders under the *NSW Trustee and Guardian Act 2009* which place a person's financial affairs under the management of the NSW Trustee (s 41).

THE GUARDIANSHIP DIVISION OF THE NEW SOUTH WALES CIVIL AND ADMINISTRATIVE TRIBUNAL

[16.450] The Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) is a statutory body and its decisions are legally binding.

The Guardianship Division of the tribunal, and anyone exercising functions under the *Guardianship Act*, are under a duty to observe the principles set out in s 4 of the *Act*. People bound by this duty include not only tribunal members and staff, but also guardians and estate managers.

[16.460] What the Guardianship Division of NCAT does

The Guardianship Division conducts hearings where it considers applications for:

- guardianship orders;
- financial management orders;
- consent to medical and dental treatment;
- approval of clinical trials as being suitable for people who are unable to give their consent to participation in the trial;
- review of an enduring guardianship appointment;
- review of an enduring power of attorney.

The Guardianship Division also provides information to the public about guardianship and property management issues.

Tribunal members

The Guardianship Division has part-time members, a principal member and a full-time deputy president who is the Division Head. When hearing guardianship or financial management applications, the tribunal consists of a panel of three members which includes:

- a legal member, who must be a lawyer of at least seven years standing; and
- a professional member, such as a medical practitioner, psychologist or social worker, who has experience in assessing or treating people with disabilities; and
- a community member who has experience with people with disabilities.

Certain matters, such as reviews of guardianship or financial management orders, can be dealt with by one or two members of the tribunal. The registrar can deal with procedural applications.

[16.470] Procedures of the tribunal

Making an application

Applications to the tribunal should be made using its application form, which can be obtained from the tribunal and are available to be downloaded from its website (www.ncat.nsw.gov.au/Pages/guardianship/gd_forms.aspx). Applications can be submitted online or faxed, posted or lodged in person at the tribunal.

Information and advice about completing the forms can be obtained from the tribunal's toll free telephone enquiry service on 1300 006 228 or 9556 7600. If a person is unable to make a written application, they should contact the tribunal for assistance.

There is no fee for making the application.

Applications by solicitors

It is preferable that solicitors do not make applications for guardianship or financial management for their clients because of the inherent conflict of interest (see *McD v McD* [1983] 3 NSWLR 81).

However, a solicitor can arrange for another interested person such as a family member or social worker to make the application, and can assist them in doing this. If this is not practicable, the solicitor should contact the tribunal for further advice.

When the application has been received

Much of the work of preparing applications for a hearing is done by the tribunal's staff.

Once an application has been received, it is allocated to an officer of the tribunal's Coordination and Investigation Unit, who is responsible for preparing the application for hearing. This officer:

- contacts the parties to the application and anyone else who may provide evidence and information to the tribunal;
- ensures that the applicant obtains any necessary written reports before the hearing;
- coordinates the collection of relevant information;
- obtains, where possible, the views of the person the application is about and assist in identifying how the person can best participate in the proceedings;
- writes a report for the hearing, detailing the issues and evidence available, which is made available to all the parties before the hearing (the report does not make recommendations).

After the process of obtaining evidence and information has begun, a date is set for hearing the application before the tribunal.

Applications for legal representation

Parties before the tribunal may appear in person or, with the tribunal's permission, be represented by a lawyer or other person (*Civil and Administrative Tribunal Act*, s 45).

A lawyer who wishes to represent a person at a tribunal hearing should contact the Coordination and Investigation Unit officer handling the case at least five working days before the hearing to discuss making an application for leave for legal representation. These applications are considered at procedural hearings, which are usually conducted by telephone at least a week before the final hearing.

Procedural hearings are usually conducted by a single member who does not have to be a legal member, who will consider whether leave should be given for a person who is a party to the matter to be legally represented at the tribunal hearing.

The tribunal can also, when appropriate, order separate legal representation for the person who is the subject of the application.

When representation may be allowed

Some considerations that may be relevant to the Guardianship Division's determination to grant leave are:

- whether representation will promote the principles in s 4 of the *Guardianship Act*, particularly, the interests of the subject person;
- the guiding principle set out in s 36(1) of the *Act* to facilitate the just, quick and cheap resolution of the real issues in the proceedings;
- any disability or other factor that impedes the party's capacity to fully participate in the hearing;
- the nature and seriousness of the interests of the party that are affected by the proceedings;
- whether the party's interests and point of view conflict with those of other parties;
- whether the proceedings involve complex legal or factual issues;
- fairness between the parties. It may be fair if one party is represented and the other is not, particularly if the subject person is unrepresented or the parties are in conflict;
- whether representation may assist a party to focus on the relevant issues and may promote a conciliatory approach in the proceedings;
- the tribunal may take into account any other factors which are relevant in the particular circumstances of the subjected person (*NSW Civil and Administrative Tribunal Guardianship Division Guideline, August 2017*).

Other assistance from lawyers

A lawyer may in any case:

- give advice;
- prepare applications and gather evidence for their clients;
- give other help outside the hearing room.

Lawyers may also attend the hearing to advise and assist their client without representing them.

Speaking for yourself

It is important for people appearing before the tribunal to speak for themselves rather than through a lawyer. Sometimes it may be appropriate for the tribunal to obtain the views and evidence of the person who is the subject of the application in the absence of other parties.

In all cases, it is critical that the tribunal is given information about the capacities of the person who is the subject of the application, and makes its own assessment of the person proposed as guardian or financial manager.

Notice requirements

The applicant must serve a copy of the application, notice of the hearing and all documents on the person who is the subject of the application and each party including the Public Guardian.

The tribunal's staff send a copy of the hearing report with a list of all evidence received to all the parties before the hearing.

Conciliation

When it considers it appropriate, the tribunal may require parties to use resolution processes (*Civil and Administrative Tribunal Act*, s 37).

Hearings

The tribunal conducts its hearings informally, but it must follow the rules of natural justice. It is not bound by the rules of evidence (*Civil and Administrative Tribunal Act*, s 38).

The tribunal must generally conduct its hearings in public, though it can decide to hold particular cases in private (*Civil and Administrative Tribunal Act*, s 49).

Hearings are conducted at the tribunal's premises at Balmain and in regional and country locations.

Evidence

The tribunal relies on written and oral evidence when making its decisions. Witnesses may either attend the hearing in person or participate by phone or audiovisual link.

Witnesses

Any interested person can give relevant evidence to the tribunal and the tribunal may call and examine any witness.

The tribunal can compel witnesses to appear or produce documents. A witness does not have to answer a question if the witness has a reasonable excuse for refusing to answer the question (s 46).

If the person who is the subject of the application cannot attend the hearing, the tribunal must ensure that every effort has been made to obtain their views before making an order (s 14).

The tribunal must also try to obtain the views of the person's spouse or partner, if any, and their carer.

The tribunal's decision

Usually, the tribunal will make its decision on the day of the hearing and will announce it to the parties at the conclusion of the hearing.

After the hearing, written reasons are generally to be provided. The tribunal sends the parties written orders and reasons for its decision (*Civil and Administrative Tribunal Act*, Sch 6, cl 11).

Are there restrictions on publication?

It is an offence to publish or broadcast, without the tribunal's consent, any identifying material about:

- a person under guardianship;
- a person whose affairs are under financial management;
- a person who is the subject of any application to the tribunal;
- a child (s 65).

This provision does not prevent the tribunal from providing written reasons for its decision to the parties involved (s 65(3)).

There are also penalties imposed for the disclosure of information obtained in the course of administering or executing duties under the *Guardianship Act* (s 101).

Reviews of enduring powers of attorney

Under the *Powers of Attorney Act*, the tribunal can review an enduring power of attorney and make a range of orders including:

- varying a term or power of an enduring power of attorney;
- removing a person from office as attorney;
- replacing an attorney with another person;
- reinstating an enduring power of attorney which has lapsed;
- directing attorneys to provide accounts and other information to the tribunal;
- revoking all or part of an enduring power of attorney;
- declaring that a person did not have mental capacity to make an enduring power of attorney (*Powers of Attorney Act*, s 36).

Recognition of interstate enduring powers of attorney

An enduring power of attorney which has been made in another state or territory is recognised as having effect in NSW (*Powers of Attorney Act*, s 25(1)).

These instruments are recognised only to the extent that the powers that they give could have been validly given under the NSW Act.

Guardianship

[16.480] Guardianship is substitute decision-making in personal or life matters.

An appointed guardian can make some or all personal decisions for the person who is the subject of a guardianship order. This usually means being given the authority to make decisions appropriate to the needs of the person under guardianship.

The Guardianship Division of NCAT can appoint either the Public Guardian or a private guardian.

[16.490] Applying for guardianship orders

When to apply

It is appropriate to apply or at least seek the advice of the tribunal's staff where a person with a decision-making disability cannot make decisions for themselves and there is a need for a guardian to be appointed to make decisions on their behalf because:

- the person's health is at serious risk and will continue to be at risk if no substitute decision-maker is appointed;
- informal arrangements to support a person with a disability have collapsed or become insufficient for their increasing needs, and the person is at risk and lacks the insight to make decisions to reduce or prevent the risks;
- a person with a disability is unable to make decisions and is in need of protection from abuse or exploitation;
- there is a dispute between a person whose disabilities impair their decision-making capacities and their family or service providers about where the person should live or what support services they should receive; or
- although the person does not resist decisions being made for them, there is dispute between care-givers and family members or among care-givers about what decisions should be made.

Further information about whether it is appropriate or necessary to make a guardianship application can be obtained from the tribunal's enquiry service.

Who may apply

Applications for a guardianship order may be made by:

- the person with a disability;
- the Public Guardian (in practice this rarely happens);
- anyone the tribunal considers to have a genuine concern for the welfare of the person the application is about (*Guardianship Act*, s 9(1)).

Those with a genuine concern for the welfare of the person with a disability may include family members, friends and carers as well as involved health professionals or service providers.

Parties to the application

Under s 3F of the *Guardianship Act*, the following are parties to a guardianship application:

- the person the application is about;
- the applicant;
- their spouse (or de facto or same-sex partner);
- the person, who has care of the person to whom the application relates;
- the Public Guardian.

The tribunal can join anyone as a party to the proceedings if it considers that person should be joined (*Civil and Administrative Tribunal Act*, Sch 6, cl 7; s 44).

What must be established before a guardian can be appointed

Before the Guardianship Division of NCAT can appoint a guardian, it must be satisfied that:

- the person who is the subject of the application has a disability; and
- because of the disability, the person is totally or partially incapable of managing themselves; and
- there is a need for a guardian to be appointed (*Guardianship Act*, ss 3, 14).

It is helpful if evidence of disability, incapacity and need are provided with the application.

What does "disability" mean?

Under the *Guardianship Act*, a person has a disability if they are restricted in one or more major life activities to the extent that they need supervision or "social habilitation" because of:

- intellectual, physical, psychological or sensory impairment;
- advanced age;
- mental illness within the meaning of the *Mental Health Act 2007*; or
- other disabilities (s 3(2)).

Evidence of disability and incapacity

Wherever possible, the tribunal requires evidence of the person's disability from professionals with expertise in disability and capacity assessment.

The tribunal may also rely on evidence from others about their own observations of the person's disabilities.

The evidence of social workers, community nurses, family members, friends and others who have had regular contact with the person is also considered in deciding whether the person is incapable of managing themselves and whether there is a need to appoint a guardian.

What the tribunal considers

In deciding whether a person needs a guardian, the tribunal must take into account the views of the person and those of their spouse or partner, if any, and any person who provides them with care.

It must also consider the importance of preserving the person's family relationships and their cultural and linguistic environment.

The tribunal should also explore whether it is practical for services to be provided to the person without the need for an order being made (*Guardianship Act*, s 14).

[16.500] Guardianship orders

The Guardianship Division of NCAT can make three types of guardianship orders:

- temporary limited or plenary orders;
- continuing limited orders;
- continuing plenary orders.

Where possible, the tribunal must make a continuing limited order (s 15).

Decisions that can be made under a limited guardianship order

Under a limited guardianship order, a guardian can be given the function of making decisions in different areas of a person's life, such as where they should live or what medical and dental care they should receive. Another common function is to decide what services the person should receive, such as therapy or home care support. A guardian may also be responsible for approving behaviour management programs or restrictive practices.

When there is a need, a guardian may be authorised to make the decision about whether a person should move to an aged care facility or other accommodation. A guardian may be given the power to authorise others, such as the ambulance service or police, to take a person to that accommodation and return them if they leave. This power is occasionally given to guardians of people who have dementia and require a higher level of care than they can receive at home.

Temporary orders

Temporary orders appoint the Public Guardian, and are made when a short-term solution to a problem is required, or an urgent order is needed (s 17). They can be limited or plenary orders.

They are for a maximum of 30 days and may be renewed only once for up to 30 days (s 18).

A temporary order may not be made where it is practicable to make a continuing order (s 15).

Continuing limited orders

The vast majority of guardianship orders made by the tribunal are *continuing limited guardianship orders*, under which the tribunal gives the guardian specific functions.

Orders may be made for a maximum of only one year initially and can be renewed for up to three years (ss 16, 18(1)).

Continuing plenary orders

Under a continuing plenary order, the guardian has custody of the person under guardianship to the exclusion of all others and has all the functions of a guardian at law and equity (s 21).

Such orders are rarely made, and only if a continuing limited order is not adequate.

Orders may be made initially for one year, and renewed for up to three years after review (s 18).

Longer orders

The tribunal can make longer guardianship orders if it is satisfied that:

- the person who is the subject of an application has permanent disabilities;
- the person is unlikely to regain the capacity to manage themselves; and

- there is a need for a longer order.

Where appropriate, the tribunal can make an initial order for up to three years and a renewed order for up to five years (ss 18(1A), (1B)).

Who can be appointed

When a continuing order is made, the tribunal appoints a private person wherever possible (s 15). The Public Guardian must be appointed as guardian if the tribunal decides to make a temporary guardianship order (s 17).

Private guardians

Private guardians are usually relatives, close friends or someone who has a positive relationship with the person under guardianship.

They must be 18 or older (s 16).

The Guardianship Division of NCAT must be satisfied that:

- the proposed guardian's personality is generally compatible with that of the person under guardianship;
- there is no undue conflict between the interests, particularly the financial interests, of the proposed guardian and the person under guardianship; and
- the proposed guardian is willing and able to exercise the functions conferred by the guardianship order (s 17).

Alternative guardians

Where the tribunal makes a continuing guardianship order and appoints a private person, it may also appoint an alternative guardian to act for the guardian during the guardian's absence or incapacity (s 20).

Joint guardians

When making a limited guardianship order the tribunal can appoint two or more private guardians, either as joint guardians with the same functions, or with separate functions (s 16).

The Public Guardian cannot be appointed as a joint guardian.

If a guardian dies

If a jointly appointed guardian dies, the surviving joint guardians continue to act jointly (s 22A).

If a guardian dies and there is no surviving joint guardian, the alternative guardian, if any, acts until the order is reviewed.

The Public Guardian becomes the guardian of anyone under guardianship who does not have a surviving guardian or alternative guardian.

When the Public Guardian may be appointed

The Public Guardian is often appointed where:

- the person under guardianship has no family or friends who would be appropriate guardians;
- proposed guardians do not meet the criteria set down in s 17 of the *Act* (see Who can be appointed at [16.500]);
- the circumstances of the case mean it is not in the interests of the person to appoint otherwise appropriate people (eg, conflict between family members means they would not act objectively if appointed as guardians).

Assessment of orders

When making a guardianship order, the tribunal may specify that an assessment of the person and the operation of the order be carried out by the tribunal during the currency of the order (s 24).

Review of orders

Who may request a review?

The tribunal may be asked to review a guardianship order by:

- the person under guardianship;
- the guardian;
- the Public Guardian;
- anyone who, in the tribunal's opinion, has a genuine concern for the person's welfare (s 25B).

The tribunal may also initiate such a review itself (s 25(1)). After the review, the tribunal may vary, suspend, revoke, or confirm the order (s 25C).

Automatic review

The tribunal must review each guardianship order before it expires (s 25(2)(b)) unless it has been made as a non-reviewable order (s 16).

The tribunal may renew the order, with or without variation, or decide the order should lapse at the set time.

If the review process has begun and the order expires, the order is deemed to remain effective until the review is completed (s 25(6)).

Non-reviewable orders

A guardianship order may contain a statement that it is not to be reviewed at the end of its term. This can only be done if the tribunal is satisfied it is in the best interests of the person who is the subject of the order. However, a review of a non-reviewable order can be requested if circumstances change and this would be in the best interests of the person.

Seeking directions from the tribunal

Guardians unsure about what to do in certain circumstances may apply to the tribunal for directions (*Guardianship Act*, s 26). Before making a direction, the tribunal must consider any views of both the person under guardianship and the guardian. The tribunal must also consider the importance of preserving the person's cultural environment and existing family relationships.

Guardians rarely request directions.

Removal orders

Where an application for a guardianship order has been made, the tribunal may order that the person who is the subject of the application be removed from their current dwelling and placed under the care of the Secretary of the Department of Communities and Justice (ss 11, 13).

Under a removal order, various officers of the department have the delegated power to enter and search premises and to remove the person, using reasonable force if necessary.

The police may also be authorised by the tribunal to carry out a removal order (s 11).

When removal orders may be made

Removal orders intrude on the rights of individuals. In our legal tradition, such powers are exercised rarely, and only for very good reasons. Orders may be made when a person has a disability and:

- is being unlawfully detained against their will;
- is likely to suffer serious damage to their physical, emotional or mental health or well-being unless immediate action is taken.

The power may also apply where a person, because of dementia, brain damage or other disability, does not realise they are living in a situation in which they are in danger or need medical treatment urgently to protect them from a life-threatening illness or decline in health.

The tribunal will grant removal orders only in urgent situations. It will expect to hear evidence of informal attempts by discussion or persuasion to remove the person from the premises, or an explanation of why such techniques are not appropriate in the circumstances.

Must the person be removed?

An authorised officer of the department does not have to remove the person if the officer thinks there is no immediate need to remove them. For example, the officer may organise appropriate services or move the person later.

Admissions to mental health facilities

Application by a guardian

A guardian may make a request to a mental health service for a person under their guardianship to be admitted as a voluntary patient under s 7 of the *Mental Health Act 2007*.

The right to leave hospital

The guardian's request cannot override s 8 of the *Mental Health Act 2007*, which provides that voluntary patients may, at any time, discharge themselves or leave the hospital. These matters were discussed in *White v Local Health Authority* [2015] NSWSC 417, however the operation of this section was not clarified.

This provision, intended to safeguard the rights of people who admit themselves to psychiatric hospitals as voluntary patients, applies equally to patients admitted by guardians. It can create difficulties for guardians and those in psychiatric hospitals responsible for the care, safety and wellbeing of patients.

If the guardian objects to an admission

Section 7(2) of the *Mental Health Act 2007* provides that a person under guardianship cannot be voluntarily admitted to a psychiatric hospital if their guardian objects. A person under guardianship who is admitted to a psychiatric hospital as a voluntary patient must also be discharged on their guardian's request.

If the person is discharged

If a person under guardianship is discharged from voluntary admission, their guardian must be advised by an authorised medical officer (s 8). The guardian should also be given information about follow-up care (see ss 71, 79).

If the person cannot consent to treatment

If a person under guardianship is admitted to a psychiatric hospital as a voluntary patient, and is unable to give an informed consent to treatment, their "person responsible" must consent to such treatment (see The person responsible at [16.570]).

[16.510] Enduring guardianship

Appointing an enduring guardian

A person over 18 who is legally competent can appoint their own enduring guardian. The appointment must be in writing in an approved form.

Witnessing requirements

Both the person and their appointed enduring guardian (including any alternative enduring guardians) must sign the appointment in front of:

- an Australian solicitor or barrister with a current practising certificate; or
- a registrar of a NSW Local Court (*Guardianship Act*, ss 5, 6, 6C).

The witness must not be the person who is being appointed as the enduring guardian.

The witness must certify on the form that the appointor signed the form voluntarily and appeared to understand the effect of appointing an enduring guardian.

The signatures of the appointor and of the enduring guardian can be witnessed at different times, different places and by different witnesses (s 6C(4)).

If the appointor cannot sign

If the appointor is unable to sign the appointment, another person (the *eligible signer*) can sign on their behalf (s 6C(b)(ii)).

The witness must certify that the person who could not sign directed the eligible signer to sign for them and that this happened in the presence of the witness.

The eligible signer must be over 18, and cannot be either:

- a witness to the appointment; or
- the appointed enduring guardian (s 5).

If the appointor cannot sign their name, they can make their mark on the document instead (s 6C(2)).

Who cannot be appointed

A person is not eligible to be appointed as an enduring guardian if they are:

- under 18;
- directly or indirectly involved in, or responsible for, providing certain services (see below) for a fee to the appointor (s 6B);
- a relative or spouse of someone providing such services (s 6B(2)(b)).

Services covered in s 6B(2)(a)

The services covered in s 6B(2)(a) include:

- medical services (whether in a hospital, at home or elsewhere);
- accommodation services; or
- any other services which support the appointor in activities of daily living.

What the appointment should specify

The appointment should specify the functions the enduring guardian is to exercise, and any directions or limitations required.

In the instrument of appointment, the appointor may:

- exclude, limit or add areas of decision-making authority for an enduring guardian;
- include lawful directions to the guardian.

The enduring guardian must exercise their authority in accordance with those directions, unless otherwise directed by the tribunal (s 6E(3)).

When the appointment takes effect

An enduring guardianship appointment takes effect only when the appointor is no longer capable and has become "a person in need of a guardian" (s 6A).

What decisions the guardian can make

An enduring guardian is authorised to make lifestyle decisions about the appointor when that person is no longer capable. An enduring guardian cannot make decisions about financial matters.

The enduring guardian may be authorised to make decisions about the appointor in the following areas:

- where the person should live;
- the health care the person should receive;
- the personal services the person should receive;

- consent to medical and dental treatment under Pt 5 of the *Act* (s 6E).

An enduring guardian does not have authority to override the appointor's objections to medical or dental treatment.

The guardian's right of access to information

The enduring guardian has the right to access information about the appointor (sometimes including health information or medical records), as long as:

- such access is to assist them to carry out their duties as enduring guardian; and
- the appointor would have been able to access that information (s 6E(2A)).

If two or more guardians are appointed

If two or more enduring guardians are appointed, they can be appointed to act *severally*, *jointly* or *jointly and severally* (s 6D(1)).

Guardians appointed severally

If the guardians are appointed *severally*, they can make decisions separately and independently.

If each of the enduring guardians is to exercise different functions, they must be appointed severally, with each enduring guardian having a specific function.

Guardians appointed jointly and severally

If the guardians are appointed *jointly and severally*, they can either act separately and independently to make decisions, or they can act together.

Guardians appointed jointly

If the guardians are appointed *jointly*, they must act together to make decisions.

If one guardian cannot continue

If one enduring guardian dies, resigns or becomes incapacitated:

- where the guardians were appointed *severally* or *jointly and severally*, the remaining guardians can continue to make decisions;
- where the guardians were appointed *jointly*, the appointment of other guardians is terminated unless the appointment document makes other specific provisions.

Alternative enduring guardians

An appointor may appoint an alternative enduring guardian (s 6DA), who can act only if the original enduring guardian dies, resigns or becomes incapable.

An original enduring guardian who becomes able to perform their duties again resumes those duties from the alternative guardian.

Resigning as an enduring guardian

If the appointor is not in need of guardianship

An enduring guardian may resign their appointment by giving written notice to the appointor, but only if the appointor is not in need of a guardian (s 6HB).

If the appointor is in need of guardianship

If the person is in need of a guardian, the enduring guardian can only resign with the approval of the Guardianship Division of the tribunal.

Signing and witnessing requirements for resignation

The requirements for signing a resignation and witnessing signatures are similar to those for appointing an enduring guardian (see Appointing an enduring guardian at [16.510]).

Revoking an appointment

An enduring guardianship appointment can be revoked in writing by an appointor who still has capacity to understand their decision (s 6H).

Signing and witnessing requirements

The revocation must be in an approved form, and witnessed by someone who meets the requirements for witnessing the appointment of an enduring guardian (see Appointing an enduring guardian at [16.510]). The witness must certify on the form that the person revoking the appointment signed the revocation form voluntarily and appeared to understand the effect of revoking the appointment of the enduring guardian.

If the person cannot sign

The considerations that apply when a person cannot sign the instrument of appointment apply when they are unable to sign a revocation (see Appointing an enduring guardian at [16.510]).

When does the revocation take effect?

The revocation takes effect when written notice of the revocation is given to the person appointed as enduring guardian.

Automatic revocation by marriage

If a person marries, or remarries, after appointing an enduring guardian, the marriage automatically revokes the appointment. This means that the person must make a new enduring guardianship appointment after the marriage (s 6HA).

This does not apply if the person has married the enduring guardian. In that case, the enduring guardianship appointment continues.

Reviewing an appointment

An enduring guardianship appointment can be reviewed by either:

- the Guardianship Division of NCAT (s 6J); or
- the Supreme Court (s 6L).

When the tribunal can review an appointment

The tribunal can review an appointment on its own initiative or on the application of anyone who, in the opinion of the tribunal, has a genuine concern for the welfare of the appointor (s 6J).

What the tribunal may do

The tribunal can confirm, revoke or vary the appointment.

It may also:

- confirm the appointment even if the instrument of appointment was not executed properly or in certain other cases (s 6K(4)), if satisfied that this reflects the person's intentions;
- appoint a person to replace an enduring guardian who has resigned, died or become incapacitated (s 6MA), if satisfied that the appointor is in need of a guardian and that the person replacing the guardian is suitable;
- make an order declaring that the appointment of an enduring guardian has effect (s 6M), if satisfied that there is a need and the person has been appointed as the enduring guardian;
- make orders as if an application had been made for guardianship and/or financial management but only if it has revoked the enduring guardianship appointment (ss 6K(1), 6K(3)).

If a guardianship order is made, the enduring guardianship appointment is suspended for the period of the order (s 6I).

Where an appointment has already been revoked and the Tribunal is satisfied about the validity of the revocation, there is no order that can be made on the application for review. A new application for Guardianship under s 14 of the *Act* must be made (see *Re WBN* [2015] NSWCATGD 9).

Recognition of interstate appointments

Certain interstate instruments that appoint the equivalent of enduring guardians in other states and territories are recognised as having effect in NSW (s 6O). These instruments are listed in cl 8 of the *Guardianship Regulation 2010*.

These instruments are recognised only to the extent that the functions conferred could have been validly conferred on an enduring guardian in NSW.

Property management

[16.520] Property management is called "financial management" in the *Guardianship Act*. The *NSW Trustee and Guardian Act 2009* uses the term "estate management".

If a person cannot manage their financial affairs, including their property, a manager can be appointed. This can be either:

- a private manager who is subject to the authorisation and direction of the NSW Trustee and Guardian; or
- the NSW Trustee and Guardian.

Jurisdiction of the Supreme Court and the Mental Health Review Tribunal

The Supreme Court can appoint a manager for a person's estate under the *NSW Trustee and Guardian Act 2009*. Applications should be made to the Supreme Court Equity Division – Protective.

The Supreme Court's powers are found primarily in s 41 of the *Act*. Orders under the Act can also be made by The Mental Health Review Tribunal.

[16.530] Appointment of a manager by the Guardianship Division of NCAT

The power of the tribunal to make financial management orders is set out in the *Guardianship Act*, but management under the order is still given effect under the *NSW Trustee and Guardian Act 2009*.

When a financial manager may be required

The need for a financial manager may arise when:

- the incapable person needs to engage in a legal transaction (eg, to sell their house), and there is a need for a legally authorised person to sign or execute documents; or
- informal arrangements are no longer satisfactory because the person who used to carry them out is no longer able to do so; or
- there are disputes in the family about the management of the person's finances and property; or
- there is dispute between the family and caregivers, or between various caregivers, about the management of the person's finances and property; or
- there is a risk of financial exploitation.

Further information about making a financial management application can be obtained from the tribunal's enquiry service.

Who may apply?

Applications for financial management can be made by:

- the NSW Trustee;
- anyone who, in the tribunal's opinion, has a genuine concern for the welfare of the person who is the subject of the application (s 25I).

When may the tribunal make an order?

Before the tribunal may make a financial management order, it must be satisfied that:

- a person is not capable of managing his or her own affairs;
- there is a need for someone else to manage the person's affairs; and
- it is in the best interests of the person that the order be made (s 25G).

What does "not capable of managing his or her own affairs" mean?

Recent Supreme Court decisions have moved away from hypothetical notions such as the ordinary routine affairs of a person but rather on the capability of the particular person to deal with his or her actual assets.

The question is whether the person under consideration is reasonably able to manage his or her own affairs in a reasonably competent fashion, without the intervention of a manager who is charged with the duty to protect his or her welfare and interests.

The focus should be on whether the person is able to deal with (make and implement decisions about) his or her own affairs (person and property, capital and income) in a reasonable, rational and orderly way, with due regard to his or her present and prospective wants and needs, and those of family and friends, without undue risk of neglect, abuse or exploitation (*CJ v AKJ* [2015] NSWSC 498; *P v NSW Trustee and Guardian* [2015] NSWSC 579).

Considering whether a person is "able" in this sense, the Court or Tribunal may give attention to past and present experience as a predictor of the future course of events, support systems available to the person; and the extent to which the person, placed as he or she is, can be relied upon to make sound judgments about his or her welfare and interests.

Disability in the guardianship sense is not an element of the test for incapability for the purposes of considering a financial management application (*GW v Protective Commissioner* [2003] NSWADTAP 61).

Consideration of the capability or otherwise of a person to manage their own affairs involves a protective element. The welfare and interests of the subject person should be given paramount consideration. A proper consideration of the protective nature of the jurisdiction requires the Court (or Tribunal) to take into account, if not actively consult, the views of the subject person and those close to him or her (see *H v H* [2015] NSWSC 837).

Proof of incapability and need

Professional evidence from doctors or psychologists is required to establish the person's inability to manage their affairs. Evidence from family members, care-givers and others is also relevant. The relevant time for considering whether a person is incapable of managing their own affairs is not merely the day of hearing but the reasonably foreseeable future (*McD v McD* [1983] 3 NSWLR 81).

Protected persons

Someone whose estate is subject to a current financial management order is referred to as a "protected person" (s 25D).

[16.540] Financial management orders

If the Guardianship Division of the tribunal is satisfied that a financial management order is needed, it may make an order that the person's estate be managed under the *NSW Trustee and Guardian Act 2009*, and then appoint a manager (*Guardianship Act*, ss 25E, 25M).

NSW Trustee & Guardian Fees

The fees NSW Trustee & Guardian charge for managing a person's estate and for their involvement with a private financial manager are set by government in the *NSW Trustee and Guardian Act 2009*.

The Private Management Fees from 1 July 2016 are:

Establishment

$500 establishment fee is payable by new private management clients from 1 July 2016.

Fee reductions apply for clients with total assets $75,000 or less.

Clients with assets:

$25,000 or less will be exempt.

$25,001–$75,000 will pay $250.

$75,001 or greater will pay $500.

Administration

$120 yearly fee:

Fee reductions apply for clients with total assets $75,000 or less.

Clients with assets:

$25,000 or less will be exempt.

$25,001–$75,000 will pay $60.

$75,001 or greater will pay $120.

Account checking

Yearly fee, based on complexity:

$100 (low);

$200 (medium);

$300 (high).

Investment

0.1% per year on the of value of assets invested in NSW Trustee & Guardian investment funds.

For further information about the fees charged, contact the NSW Trustee and Guardian or refer to its website.

What orders can be made

Financial management orders may be for the person's whole estate and the rest of their life.

Many orders like this are made, but the *Guardianship Act* also allows for greater flexibility in the scope and duration of orders.

The tribunal can exclude part of a person's estate (such as their pension) from a financial management order (s 25E).

The manager can also authorise the protected person to deal with a specified part of their estate. The authorisation must be in writing and approved by the NSW Trustee (*NSW Trustee and Guardian Act 2009*, s 71).

Interim financial management orders

The Guardianship Division of the tribunal can make short-term (interim) financial management orders – up to six months – while the person's capability to manage their affairs is being considered (*Guardianship Act*, s 25H). These orders protect the person's financial resources when it is unclear whether they lack the capability to manage their affairs.

Duration of orders

Orders remain in force until:

- the protected person's death;
- revocation by the Supreme Court;
- set aside by the internal appeal jurisdiction of the tribunal;
- revocation by the Guardianship Division of NCAT;
- revocation by the Mental Health Review Tribunal;
- termination of management by the NSW Trustee and Guardian;
- expiration of an interim financial management order without a further order.

What happens to a power of attorney?

Any power of attorney the protected person made before the financial management order is suspended for the duration of the financial management order (*Powers of Attorney Act*, s 50).

Review of financial management orders

Review periods

Financial management orders are permanent orders. However, the Guardianship Division of the tribunal can set a review period for orders that it makes (*Guardianship Act*, s 25N).

Orders that cannot be reviewed or revoked

The Guardianship Division of the tribunal cannot review or revoke financial management orders made by the Supreme Court or the Mental Health Review Tribunal (see Mental health in Chapter 26, Health Law).

Applying for revocation or review of an order

The protected person who is the subject of the order, the NSW Trustee, the private manager or anyone else who, in the opinion of the tribunal, has a genuine concern for the welfare of the protected person, can apply to the tribunal for the revocation or variation of a financial management order made by the Guardianship Division of the tribunal (ss 25N, 25R).

An application can also be made to review the appointment of the financial manager under the order (*Guardianship Act*, s 25S).

When the tribunal may refuse to review an order

The tribunal can refuse to review a financial management order, or the appointment of a financial manager, if:

- it has previously reviewed the order; or
- the request does not show grounds that warrant a review (ss 25O, 25T).

When the tribunal may revoke an order

The tribunal can revoke a financial management order if:

- the person is capable of managing their affairs; or
- the tribunal considers that it is in their best interests, even though they may not be capable of managing their affairs (s 25P(2)).

Replacing a financial manager

The tribunal can also consider applications to review the appointment of a financial manager such as the NSW Trustee or a private person (s 25S).

After conducting such a review, the tribunal can either revoke or confirm the appointment of the manager. If the tribunal revokes the appointment, it can appoint another person as manager (*Guardianship Act*, s 25U(3)).

If a manager dies, is unable or unwilling to act, or is acting in an unsuitable manner, the tribunal can appoint a new manager (*Guardianship Act*, s 25U; see *Holt v Protective Commissioner* (1993) 31 NSWLR 227).

Recognition of interstate orders

The Guardianship Division of NCAT can recognise the appointment of guardians and financial managers appointed under a corresponding interstate law (*Guardianship Act*, s 48B).

Any guardian or manager who was appointed under such a law may apply to the tribunal to have their appointment recognised in NSW. When the appointment has been recognised, the guardian or financial manager is taken to have been appointed as the person's guardian or manager under the *Guardianship Act*.

Guardians and managers appointed under the recognition provisions can only exercise functions granted under their original appointment if they are also functions under the *Guardianship Act*.

Corresponding laws are defined in cl 16 of the *Guardianship Regulation 2016* (NSW), and include guardianship and financial administration legislation of all the Australian states and territories, and New Zealand.

Consent to medical and dental treatment

[16.550] Medical and dental treatment may not be carried out on an adult unless:

- the person consents to the treatment;
- the treating doctor is empowered by law to treat them without their consent; or
- another person authorised by law consents to the treatment.

[16.560] When the Guardianship Act applies

Part 5 of the *Guardianship Act* covers medical and dental treatment for people unable to consent to treatment. It provides mechanisms for:

- identifying substitute decision-makers (such as "persons responsible");
- Guardianship Division of the tribunal consent to certain treatments (such as "special medical treatments") in certain circumstances;
- treatment without the person's consent, in limited circumstances.

What is medical and dental treatment?

Medical treatment is defined in the *Guardianship Act* to include procedures normally carried out, or supervised, by a medical practitioner (s 33).

Dental treatment is defined to include procedures normally carried out, or supervised, by a dentist (s 33).

What is not included

Non-intrusive (eg, visual) examinations for the purpose of diagnosis, first-aid medical or dental treatment, and giving non-prescription drugs are not included, and the substitute consent provisions of the Act do not apply to them.

When is a person unable to consent?

In some cases, a person is unable to consent to their own treatment because of a pre-existing disability such as dementia, developmental disability or brain damage.

In other cases, they may be unable to consent because of unconsciousness, disorientation or confusion due to some illness.

A person may be able to consent to simple medical treatment (like straightforward dental treatment) but not to more complicated procedures or medication (like surgical operations or anti-psychotic medication).

To whom the Act applies

The Act applies to a person 16 or older, who is:

- incapable of understanding the general nature and effect of the proposed treatment; or
- incapable of indicating whether or not they consent to it (s 34).

If there is an emergency

A medical practitioner or dentist may carry out treatment on a person if they believe the treatment is necessary as a matter of urgency to:

- save the person's life;
- prevent serious damage to the person's health;
- prevent the patient suffering, or continuing to suffer, significant pain or distress, except in the case of special treatment (see What are special medical treatments? at [16.570]) (*Guardianship Act*, s 37).

[16.570] Who may give consent

Authority to consent depends on the type of treatment proposed. The *Guardianship Act* divides treatment into special, major and minor treatment.

These are defined in the Act and the *Guardianship Regulation 2010*.

Consent for special treatment

Only the Guardianship Division of the tribunal can give consent for special treatment under the *Guardianship Act*. However, it can confer on a patient's guardian the authority to consent to the continuation of the treatment, and the carrying out of similar special treatment (s 45A).

Only the Guardianship Division of NCAT can consent to certain special medical treatments for people under 16 under the *Children and Young Persons (Care and Protection) Act 1998* (s 175) (see Special medical treatment for children at [16.570]).

Consent for major and minor treatment

Both the Guardianship Division of the tribunal and the *person responsible* (see below) can give consent for minor and major treatments to promote or maintain the person's health and wellbeing.

The person responsible

Under the *Guardianship Act*, the "person responsible" is, in order of precedence:

- a legally appointed guardian or enduring guardian authorised to give consent to medical and dental treatment on behalf of the person under guardianship;
- the most recent spouse or de facto spouse (including a same-sex partner) with whom the person has a close, continuing relationship;
- an unpaid carer (or recipient of carer pension) or someone who arranges care and support services on a regular basis, or who provided this support before the patient entered residential care;
- a close friend or relative who is interested in the patient's welfare (s 33A).

If a "person responsible" declines in writing to exercise the relevant functions, or a doctor or other qualified person certifies that they are not capable of exercising them, the next person in the hierarchy becomes the "person responsible".

If the patient objects

In some circumstances, if a patient objects to treatment only the Guardianship Division of the tribunal or an authorised guardian with a specific authority to override, the person's objections can give consent on their behalf (see Objections to treatment at [16.570]).

When the tribunal can consent

Before it can consent to a treatment, the tribunal must be satisfied it is the most appropriate treatment to promote and maintain the person's health and wellbeing (*Guardianship Act*, s 45).

Special treatment

Where a proposed treatment is special treatment (see What are special medical treatments? at [16.570]), the Guardianship Division of the tribunal can consent only if additional requirements are met (s 45).

Before the tribunal can consent to special treatment such as sterilisation, termination of pregnancy, it must be satisfied that the treatment is necessary:

- to save the person's life; or
- to prevent serious damage to the person's health.

If the special treatment is a new treatment which has not gained widespread support in the particular medical specialty or it is a special treatment set out in cl 9 of the *Guardianship Regulation 2010* (experimental treatment or androgen-reducing medication for behavioural control), the tribunal can only consent if the treatment:

- is the only or most appropriate treatment and is manifestly in the person's best interests; and
- complies with any relevant guidelines of the National Health and Medical Research Council (s 45(3)).

What are special medical treatments?

"Special medical treatments" listed in the *Guardianship Act* and the *Guardianship Regulation 2010* include:

- treatment intended (or likely) to render the person infertile (s 33);
- termination of pregnancy (cl 9);
- vasectomy or tubal occlusion (cl 9);
- an aversive stimulus – mechanical, chemical, physical or otherwise (cl 9);
- new treatment that has not yet gained the support of a substantial number of medical practitioners or dentists specialising in the relevant area (s 33);
- androgen-reducing medication for the purpose of behavioural control (cl 14);
- administration of one or more prescription medications affecting the central nervous system if dosage levels, combinations or number of medications, or duration of treatment, are outside the accepted treatment for such a patient (cl 14).

Major treatment

A person's primary substitute decision-maker in relation to major treatment is their "person responsible" (see The person responsible at [16.570]).

The Act provides for alternative consents to medical treatment for persons above 16 years of age who are incapable of giving consent themselves (s 34).

Consent may be given to minor or major medical treatment by the person responsible or by the tribunal (s 36).

The tribunal should be approached where there is no person responsible or the person responsible cannot be located.

What are major medical treatments?

For the purposes of Pt 5 of the *Guardianship Act*, cl 11 of the *Regulation* identifies major medical treatment as:

- the administration of a drug of addiction (see *Poisons List*, s 8 issued under the *Poisons and Therapeutic Goods Act 1966*);
- the administration of long-acting injectable hormonal substances for contraception or menstrual regulation;
- the administration of a general anaesthetic or other sedation, but not a treatment involving sedation to facilitate the management of fractured or dislocated limbs or most endoscopy treatments;
- treatment to eliminate menstruation;
- the administration of a prescription only medication for the purpose of affecting the central nervous system (*Guardianship Regulation 2010*, cl 10), other than for certain therapeutic purposes;
- any treatment involving testing for the human immunodeficiency virus (HIV);
- treatment with a substantial risk (ie, more than a mere possibility) of:
  - death;
  - brain damage;
  - paralysis;
  - permanent loss of function of any organ or limb;
  - permanent and disfiguring scarring;
  - exacerbation of the condition being treated;
  - an unusually prolonged period of recovery;
  - a detrimental change of personality;
  - a high level of pain or stress.

For full details, check the *Guardianship Regulation 2010*.

Major dental treatment

Major dental treatment is listed in cl 12 as any treatment:

- involving the administration of a general anaesthetic or simple sedation;
- intended to, or likely to result in, the removal of all teeth;
- likely to result in significant impairment of the patient's ability to chew food for an indefinite or prolonged period.

Minor treatment

What are minor medical treatments?

Any treatment not identified as either special or major treatment is considered minor medical or minor dental treatment. Minor medical or dental treatments may be consented to by the person responsible or the Guardianship Division of the tribunal.

Minor medical or dental treatments

If there is no person responsible or the person responsible cannot be contacted or is unable or unwilling to make a decision concerning a request for their consent, the minor treatment may be given, providing the patient does not object.

The medical practitioner or dentist must certify in writing in the patient's clinical record that:

- the treatment is necessary and is the most appropriate treatment to promote their health and wellbeing; and
- the patient does not object (s 37).

If either the patient objects to the treatment or there is concern that a refusal by the person responsible is not in the patient's best interest, an application can be made to the tribunal.

Objections to treatment

If the patient objects

The person responsible cannot consent if the person who is to receive the treatment objects (s 46).

The person is taken to have objected to the treatment, even though they are unable to consent to it, if:

- they indicate (by whatever means) that they do not want it carried out; or
- they have indicated before in similar circumstances that they do not want it carried out, and have not subsequently indicated otherwise (s 33).

In these circumstances, only the Guardianship Division of the tribunal can give consent to the proposed treatment.

When a guardian can override objections

A guardian may be authorised to override a person's objections if the tribunal is satisfied that person objects because of a lack of understanding of the nature of or reason for the treatment (s 46A).

When objections can be disregarded

A patient's objection may be disregarded and the consent of the substitute decision-maker takes effect if:

- the patient has minimal or no understanding of what the treatment entails; and
- the treatment will cause them no distress or, if it will cause some distress, it is likely to be reasonably tolerable and brief (s 46(4)).

Information for the substitute decision-maker

The person responsible (including a guardian or enduring guardian with a consent role) must, when asked to consent to treatment on behalf of a patient, be given information about a number of matters (s 40). These are:

- why the doctor or dentist believes the person cannot give their own consent;
- the condition that requires treatment;
- other courses of treatment available for that condition;
- the general nature and effect of those courses of treatment;
- the nature and degree of significant risks (if any) associated with each course of treatment; and
- the reasons for proposing a particular course of treatment.

The person responsible should consider the views of the person who is to receive the treatment, if that person is capable of communicating their views, and must also consider whether the treatment will promote and maintain the person's health and wellbeing.

If the Guardianship Division of the tribunal is the substitute decision-maker, the views of the person responsible should also be considered.

New treatments available in clinical trials

The Guardianship Division of the tribunal can approve clinical trials as being suitable for the participation of patients who cannot give their own consent (s 45AA). This gives such people access to new treatments that are only available through clinical trials. Consent can be given by the tribunal even though the person may receive a placebo in the trial.

A person who cannot consent cannot be included in a clinical trial unless the tribunal approves the trial.

Special medical treatment for children

The Guardianship Division of the tribunal has power under the *Children and Young Persons (Care and Protection) Act 1998* to consent to certain special medical treatments proposed for a child (under 16) who may or may not have a disability. They are:

- treatment intended or reasonably likely to make the person infertile (not including treatment to treat a life-threatening condition where infertility is an unwanted consequence);
- treatment for the purpose of contraception or menstrual regulation (if listed in the *Children and Young Persons (Care and Protection) Regulations* – however, none is listed as yet);
- vasectomy or tubal occlusion.

The tribunal must be satisfied that the treatment is necessary to save the child's life or prevent serious damage to the child's psychological or physical health. The child is entitled to be legally represented at the tribunal's hearing of the application.

If the treatment is needed urgently to save the child's life or prevent serious damage to their psychological or physical health, it may be given without consent.

When the tribunal may approve the trial

The tribunal must be satisfied that:

- the trial meets the required ethical and safety standards;
- the trial has been approved by all relevant ethics committees and complies with relevant guidelines of the National Health and Medical Research Council;
- only people with the condition the trial seeks to treat are recruited into the trial; and
- participation poses no known substantial risk, or no greater risk than other available treatments (s 45AA).

Above all, it must be satisfied that the opportunity to participate in the trial is in the person's best interests.

If the tribunal approves the trial as suitable, it can delegate consent for individual patients to their person responsible (s 45AB).

Appeals

[16.580] To the Supreme Court

A party to proceedings before the Guardianship Division of the tribunal can appeal to the Supreme Court against a decision of the tribunal (Sch 6, cl 12). If a financial management order is made under the *NSW Trustee and Guardian Act 2009* by the Mental Health Review Tribunal when the person was in a mental health facility, only the person who is the subject of the order can appeal the decision.

Appeals can be made as of right on questions of law. If the appeal is not about a question of law, the Supreme Court's permission is needed.

An appeal should be made within 28 days after receipt of the tribunal's written reasons, although the Supreme Court may extend the time.

An appeal operates as a stay of the order of the tribunal, unless the court makes an order bringing the order back into force (Sch 6, cl 14).

[16.590] Appeal Panel – NSW Civil and Administrative Tribunal

A party to proceedings before the Guardianship Division of the tribunal may also appeal against certain decisions of the tribunal to the Internal Appeal Panel of NCAT (*Civil and Administrative Tribunal Act*, s 5 lists the decisions that can be appealed).

If the appeal is not about a question of law, NCAT's permission is needed (*Civil and Administrative Tribunal Act*, s 80).

An appeal should be made within 28 days from the day of receipt of the Guardianship Division's written reasons or 28 days from the day of notification of the decision (*Civil and Administrative Tribunal Rules 2014* (NSW), r 25).The tribunal may extend the time (*Civil and Administrative Tribunal Act*, s 41).

Unlike an appeal to the Supreme Court, an appeal to the Appeal Panel does not operate as a stay of the Guardianship Division of NCAT's decision unless the tribunal orders otherwise (*Civil and Administrative Tribunal Act*, s 43).

Can a person lodge two appeals?

The Supreme Court may refuse to conduct a review of a decision of the Tribunal if an internal appeal has been lodged against the decision (*Civil and Administrative Tribunal Act*, s 34).

THE NATIONAL DISABILITY INSURANCE SCHEME

[16.600] This section deals with the National Disability Insurance Scheme (NDIS). The relevant Act is the *National Disability Insurance Scheme Act*. There are also a number of Rules instruments

made under the Act (see [16.660]) and a set of Operational Guidelines that are used by the National Disability Insurance Agency (NDIA) to guide decision-making.

[16.610] The National Disability Insurance Scheme

The National Disability Insurance Scheme (NDIS) is a way of providing services and support for people with disabilities. The NDIS applies nationally and was introduced in stages from July 2013.

The NDIS is made up of:

- services including coordination and referral services;
- funding for organisations to enable them to assist people with disabilities to participate in economic and social life; and
- "reasonable and necessary" supports which are provided to participants in the NDIS in the form of individualised funding.

A participant in the NDIS will receive a plan, which contains a "statement of participant supports" – a record of the supports that will be provided to them. Reasonable and necessary supports are provided in the form of funding amounts which the participant can use to get services, equipment and other disability-related needs.

Participants in the NDIS can choose who will deliver disability services to them and, with some exceptions, how their funding will be managed. The NDIS is not means tested.

[16.620] The National Disability Insurance Agency

The National Disability Insurance Agency (NDIA) is the Commonwealth Government Agency responsible for delivering the NDIS. Its other roles include developing and enhancing the disability sector, building community awareness of disability, collecting and analysing data about people with disability and supports for people with disability, and undertaking research in relation to disability.

[16.630] The NDIS Quality and Safeguards Commission

The NDIS Quality and Safeguards Commission commenced operation in New South Wales and South Australia on 1 July 2018. It begins operation in Victoria, Queensland, Tasmania, the ACT and the Northern Territory on 1 July 2019 and in Western Australia on 1 July 2020. It is headed by the NDIS Quality and Safeguards Commissioner.

The Commission handles complaints in relation to providers providing services under the NDIS and has a broad regulatory function to address issues of quality and safety in the provision of disability services.

The Commission has powers to investigate and respond to incidents and complaints. It also oversees compliance with the NDIS Code of Conduct and Practice Standards (https://www.ndiscommission.gov.au/document/791).

[16.640] New South Wales

In NSW, the scheme commenced from 1 July 2013 for people living in the local government area (LGA) of Newcastle, then Lake Macquarie LGA and Maitland LGA.

As of July 2018, the NDIS is rolled out across New South Wales (https://www.ndis.gov.au/understanding/ndis-rollout).

The NDIS Act and Rules

[16.650] The NDIS Act

The *National Disability Insurance Scheme Act* commenced on 1 July 2013.

The Act creates the framework for the National Disability Insurance Scheme. It sets out the objects and principles by which the NDIS will operate. It sets out the process for a person becoming a participant in the NDIS, how participants develop an individual, goal-based plan with the National Disability Insurance Agency, and how reasonable and necessary supports will be funded for participants.

In addition, the legislation provides options for how a participant's funded supports can be managed, in what circumstances a nominee will be appointed, and who can be appointed as a child's representative.

The legislation also provides for a system of internal and external review for decisions made under the Act where an affected person disagrees with the decision.

[16.660] The Rules

The Act provides for the making of rules which guide the detailed operation of the NDIS and accompany the legislation. In some cases, they import additional considerations for decision-makers under the Scheme, for example, the *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* (Cth) and the *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth).

The NDIS Rules cover issues such as:

- becoming a participant (the eligibility criteria);
- supports for participants – (ie, criteria for determining whether a support is "reasonable and necessary" and therefore will be funded under the Act);
- children – who can be a child's representative and when a child can represent themselves;
- nominees – when it is appropriate to appoint a nominee, who can be a nominee, and duties of a nominee;
- facilitating the preparation of participants' plans;
- registered providers;
- restrictive practices – the regulation of practices that restrict the rights or movement of a person with the aim of protecting that person from harm;
- Specialist Disability Accommodation (SDA); and
- plan management – who will manage the funded supports in a participant's plan.

There are also Rules and Guidelines that relate to the functions of the NDIS Quality and Safeguards Commission and are made by Commissioner, including for worker screening and provider registration.

The NDIA has developed Operational Guidelines which contain the agency's operational information. See the NDIS website (https://www.ndis.gov.au/about-us/operational-guidelines).

[16.670] Objects and principles of the NDIS Act

The objects of the NDIS Act include:

- giving effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities;
- supporting the independence and social and economic participation of people with disability;
- providing reasonable and necessary supports for NDIS participants;
- enabling people with disability to exercise choice and control in the pursuit of their goals and the planning and delivery of their supports;
- raising community awareness of the issues that affect the social and economic participation of people with disability, and facilitating greater community inclusion of people with disability (s 3).

In giving effect to the objects of the Act, regard is to be had to the need to ensure the financial sustainability of the NDIS (s 3(3)).

General principles guiding actions under the Act include:

- people with disability have the same right as other members of Australian society to realise their potential for physical, social, emotional and intellectual development;
- people with disability should be supported to participate in and contribute to social and economic life;
- people with disability and their families and carers should have certainty as to care and support;
- people with disability should be supported to exercise choice;
- people with disability should be supported to receive reasonable and necessary supports, including early intervention supports;
- people with disability have the same right as other members of Australian society to determine their own best interests including the right to exercise choice and control;
- people with disability should be supported in all their dealings and communications with the NDIA so that their capacity to exercise choice and control is maximised;
- people with disability should have their privacy and dignity respected (s 4).

NDIS participants and their NDIS plans

[16.680] Making an access request to become a participant in the NDIS

To become a participant of the NDIS, a person must make an access request to the National Disability Insurance Agency (NDIA) (s 18).

Before making an access request, a potential participant can access the NDIS Access Checklist to help check their eligibility for the NDIS (https://www.ndis.gov.au/applying-access-ndis/am-i-eligible).

Prospective participants who need assistance to make an access request can seek the help of NDIA officers. The NDIA may provide support and assistance to prospective participants and participants of the NDIS, to do things in relation to the Act (s 6).

The Act requires that the contents of any form or notice must be explained by the NDIA officer to the maximum extent possible in the language and mode of communication which the person with disability is most likely to understand (s 7).

Once an access request is received, the NDIA must:

1. decide whether the access request is a valid request (s 19);
2. if it is a valid request make a decision whether the person meets the access criteria to become a participant or request further information – within 21 days of receiving the request (s 20).

To be a valid access request, the information and documents received by the NDIA must substantially comply with the requirements in the Act (s 19). Strict compliance is not necessary.

A third party, on behalf of the prospective participant, may submit an access request form.

The NDIA may request further information from the prospective participant or undergo an assessment or examination prior to determining the access request (s 26). The NDIA must give the prospective participant a minimum of 28 days to provide the information. Once the information has been received, the NDIA must make a decision within 14 days, or make a further request.

A decision that a person does not meet the access criteria is a reviewable decision under the Act (s 99). See [16.750] for how to seek review of a decision.

Once a person becomes a participant of the Scheme, the NDIA must facilitate the preparation of an individualised plan for the participant (s 32).

[16.690] Access to the NDIS

There are three requirements:

- the age requirements; and
- the residence requirements; and
- the disability requirements or the early intervention requirements (s 21).

Age

A person meets the age requirements if the person was aged under 65 when the access request was made (s 22).

Residence

A person meets the residence requirements if the person resides in Australia and is either:

- an Australian citizen;
- the holder of a permanent visa; or
- a special category visa holder who is a protected SCV holder (s 23(1)).

Whether a person resides in Australia involves consideration of a number of factors including their living arrangements, their family connections, financial ties and travel (s 23(2)).

Disability requirements

A person meets the disability requirements if the person has a disability that is attributable to an impairment that is, or is likely to be, permanent and that results in substantially reduced functional capacity.

Specifically, a person meets the disability requirements if:

- the person has a disability that is attributable to one or more intellectual, cognitive, neurological, sensory or physical impairments, or to one or more impairments attributable to a psychiatric condition; and
- the person's impairment or impairments are, or are likely to be, permanent; and
- the impairment or impairments result in substantially reduced functional capacity

to undertake, or psychosocial functioning in undertaking, one or more of the following activities: communication, social interaction, learning, mobility, self-care, self-management; and
- the impairment or impairments affect the person's capacity for social and economic participation; and
- the person is likely to require support under the NDIS for the person's lifetime (s 24).

Assessing whether the person meets the disability requirements

In determining whether a person meets the disability requirements, a delegate of the NDIA CEO will consider the information about the person's impairments against all five criteria above.

This involves examining all the information, including the information in the access request form, considering evidence and opinions from the prospective participant, their family members and health practitioners.

The Operational Guidelines contain a list of conditions that are likely to meet the disability requirements (https://www.ndis.gov.au/about-us/operational-guidelines/access-ndis-operational-guideline/list-conditions-which-are-likely-meet-disability-requirements-section-24-ndis-act).

A disability attributable to an impairment

There is no definition in the NDIS Act of either of the terms "disability" or "impairment".

Article 1 of the *Convention on the Rights of Persons with Disabilities* (CRPD) says that:

> Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.

One of the objects of the *National Disability Insurance Scheme Act* is to give effect to Australia's obligations under the CRPD (s 3(1)(a)).

An impairment is generally understood to involve a loss of, or damage to, a physical, sensory or mental function (*Mulligan v National Disability Insurance Agency* [2015] FCA 544 at [51]).

The cause of a person's disability whether it came about through birth, disease, injury or accident is not relevant (*Mulligan v National Disability Insurance Agency* [2015] FCA 544 at [16]).

Permanency

In order for a prospective participant to gain access to the Scheme, their impairment or impairments must be permanent or likely to be permanent.

The *National Disability Insurance Scheme (Becoming a Participant) Rules 2016* give further detail in relation to the requirements. For permanency, the Rules provide that an impairment will be permanent if there are no known, available and appropriate evidence based treatments that would be likely to remedy the impairment (r 5.4).

Impairments can be permanent even if they fluctuate in severity, or if there is a possibility that the severity of their impact may improve (r 5.5).

An impairment can be permanent even if a person continues to have medical review and treatment for it, as long as no further review or treatment is needed to demonstrate its permanency (r 5.6).

If a person has multiple impairments, the permanency of each impairment will be considered.

Conditions for which permanency will usually be accepted without a need for further evidence

The Operational Guidelines contain a list of conditions which will generally be considered permanent, but where an assessment of functional capacity will generally be required (https://www.ndis.gov.au/about-us/operational-guidelines/access-ndis-operational-guideline/list-b-permanent-conditions-which-functional-capacity-are-variable-and-further-assessment-functional-capacity-generally-required).

Substantially reduced functional capacity

To become a participant, the applicant must also establish that their impairment results in a substantially reduced functional capacity in one of the following areas:
- communication;
- self-management;
- self-care;
- mobility;
- learning; or
- social interaction.

An impairment will result in a substantially reduced functional capacity in one of these areas if:

1. the person is unable to participate effectively to completely in the activity without assistive technology, equipment (other than commonly used items) or home modifications; or
2. the person usually requires assistance (including physical assistance, guidance, supervision or prompting) from other people to participate in the activity; or
3. the person is unable to participate in the activity even with assistive technology, equipment, modifications or the assistance from another person (*National Disability Insurance Scheme (Becoming a Participant) Rules 2016*, r 5.8).

The areas or activities

There are six areas in which a prospective participant's functional capacity is to be assessed: communication, social interaction, learning, mobility, self-care and self-management. The Operational Guidelines provide examples of the activities that could be included in each of these areas.

Self-care, for example, could include personal care, hygiene, grooming and feeding oneself, and self-management planning and making decisions, problem solving and managing finances.

These examples are not exclusive and each area will be considered in relation to the circumstances and evidence of the prospective participant.

The effect on the person's capacity for social and economic participation

A prospective participant's impairment or impairments must affect their capacity for social and economic participation. There is no requirement that the participant's capacity for social and/or economic participation be substantially reduced or significantly reduced.

Early intervention

A person can alternatively access the NDIS through the early intervention requirements.

The early intervention requirements consider the likely trajectory and impact of a person's impairment over time and potential benefits of early intervention.

Specifically a person meets the early intervention requirements if:

- the person has one or more identified intellectual, cognitive, neurological, sensory or physical impairments or one or more impairments attributable to a psychiatric condition, that are permanent or are likely to be permanent; or the person is a child under six years with developmental delay; and
- the NDIA is satisfied that the provision of early intervention supports is likely to benefit the person by reducing the person's future needs for supports in relation to disability; and
- the NDIA is satisfied that the provision of early intervention supports is likely to benefit the person by:
  - mitigating or alleviating the impact of the impairment on the person's functional capacity; or
  - preventing the deterioration of their functional capacity; or
  - improving such their functional capacity; or
  - strengthening the sustainability of informal supports available to the person, including though building capacity of the person's carer; and
- the early intervention support is most appropriately funded or provided through the NDIS, and not through other service system (such as the health system) (s 25).

Comparing the early intervention and disability requirements

A prospective participant only needs to satisfy *either* the early intervention requirements or the disability requirements. Permanency or likely permanency features in both sets of requirements.

To satisfy the early intervention requirements, a prospective participant does not need to show a substantially reduced functional capacity in any activity or area, instead the requirements focus on the potential impact of support and whether support might improve or prevent the deterioration of the prospective participant's functional capacity.

The NDIA will consider a prospective participant's impairment against both the early intervention and disability criteria, regardless of the prospective participant's age or the length of time they have had their impairment/s.

A child under six with a developmental delay

A child under six with a developmental delay does not have to show their impairment is permanent to meet the early intervention criteria (s 25(1)(a)(iii)). Developmental delay is defined as a delay in the development of a child that is attributable to a mental or physical impairment (or a combination of the two), results in a substantial reduction in

functional capacity in one or more of the areas of self-care, receptive and expressive language, cognitive development and motor development and results in the need for care, treatment or other services that are individually planned and coordinated and of an extended duration (s 9).

If a prospective participant meets this definition, the NDIA will also be taken to be satisfied that the provision of early intervention supports will be of benefit to them, in that it is likely to reduce their future need for supports and mitigate/alleviate the impact of their impairments on their functional capacity, or improve or prevent deterioration of that capacity or strengthen their informal supports (ie, their family and/or carers) (s 25(2); *National Disability Insurance Scheme (Becoming a Participant) Rules 2016*, rr 6.8, 6.10, 6.11).

Whether the support will benefit the person

If the prospective participant is not a child under six, the NDIA will consider whether the support of the NDIS will benefit them in the ways set out above.

The NDIA can consider:

- the likely trajectory and impact of the person's impairment;
- potential benefits of early intervention; and
- evidence from the person, their family members or carers and expert opinion if necessary (*National Disability Insurance Scheme (Becoming a Participant) Rules 2016*, r 6.9).

The most appropriate source of funding

The final consideration for the early access requirements is whether the support the prospective participant seeks is more appropriately funded by other "general systems of service delivery or support services offered … as part of a universal service obligation or in accordance with reasonable adjustments required under a law dealing with discrimination on the basis of disability" (s 25(3)). There is a similar requirement when the NDIA is considering whether a support is reasonable and necessary – it requires consideration of whether other systems, including the health system, education system and justice system offer services to prospective participants, and whether therefore those systems are more appropriate to provide the early intervention support the prospective participant seeks.

Alternative access criteria – prescribed programs

As part of the implementation of the NDIS, many of the disability services previously provided by the States ceased.

Under s 21(2) of the *National Disability Insurance Scheme Act*, a person can meet the access criteria to access the NDIS, regardless of whether they meet the age, residence and disability or early intervention criteria, provided they were receiving support at relevant times under a program prescribed by the National Disability Insurance Scheme Rules.

The *National Disability Insurance Scheme (Prescribed Program – New South Wales) Rules 2016* (NSW) specify the prescribed programs that qualify. They include certain programs administered by the NSW Department of Communities and Justice and certain Commonwealth programs. A list is available in the Operational Guidelines (https://www.ndis.gov.au/about-us/operational-guidelines/access-ndis-operational-guideline/list-e-qualifying-programs).

Becoming a participant and ceasing to be a participant

Once the NDIA determines that a person meets the access criteria, they become a participant (s 28(1)).

A person ceases to be a participant when they die, enter a residential care service on a permanent basis or start being provided with home care on a permanent basis (and this first occurs after the person turns 65). Residential care service and home care are defined in the *Aged Care Act 1997* (Cth) (see s 43-5; Sch 1).

A person will cease to be a participant if they notify the NDIA that they no longer wish to be a participant, or if their status is revoked (s 29).

A person's status can be revoked if the NDIA is satisfied that the person does not meet the residence requirements, or at least one of the disability or early intervention requirements (s 30).

The decision to revoke a person's status as a participant takes effect from a date specified by the NDIA (s 30(2)). Once a person's status is revoked, they are no longer entitled to be paid NDIS amounts (s 29(2)).

The decision to revoke a participant's status is a reviewable decision (see [16.750]).

[16.700] NDIS plans – planning and assessment

The participant's statement of goals and aspirations

Once a person becomes a participant of the NDIS, the NDIA must facilitate the preparation of the participant's plan (s 32). A participant's plan has two parts. The first part is the participant's statement of goals and aspirations.

The statement is to be prepared by the participant (with or without support). The statement is to specify:

- the goals, objectives and aspirations of the participant to enable increased participation; and
- the participant's:
  - living arrangements; and
  - informal community supports and other community supports; and
  - social and economic participation (s 33(1)).

The participant's statement of goals and aspirations can be in any form the participant wishes. If the statement has not been supplied in writing, the NDIA officer will record the statement as part of the planning and assessment process (s 33(8)).

A participant can change their statement of goals and aspirations at any time (s 47). If a participant gives a new statement of goals and aspirations to the NDIA, the plan is taken to have been amended to include the new statement and the NDIA must provide a copy of the new plan to the participant within seven days (s 47(2)–47(3)).

The statement of participant supports

The second part of the plan is the statement of participant supports. The statement is prepared by the NDIA with input from the participant and using the available assessments. The statement of participant supports specifies the:

- general supports (if any) that will be provided to the participant;
- reasonable and necessary supports (if any) that will be funded under the NDIS;
- date by which the NDIA must review the plan;
- arrangements for management of the funding for supports under the plan; and
- management of other aspects of the plan (s 33(2)).

What is a support?

The term *supports* is defined in the Act to include general supports (s 9). General supports are services or activities engaged in by the NDIA in the nature of coordination, or a strategic or referral service (s 13(2)). General supports are those provided by the NDIA to the participant.

"Reasonable and necessary supports" are those funded, but not directly provided by the NDIA. Once a reasonable and necessary support is approved and a plan is made, an NDIS amount (an amount of funding paid under the NDIS in respect of reasonable and necessary supports (s 9)) is available to the participant in the plan.

The guiding principles of the Act specify that reasonable and necessary supports should:

- support people with disabilities to pursue their goals and maximise their independence;
- support people with disabilities to live independently and to be included in the community as fully participating citizens;
- develop and support the capacity of people with disabilities to undertake activities that enable them to participate in the community and in employment (s 4(11)).

Examples of supports include:

- assistance with personal care;
- aids and equipment;
- home modifications;
- assistance with planning and decision-making and household tasks;
- therapies;
- assistance to build the capacity to live independently, including financial management and tenancy management skills;
- assistance to engage in community activities such as recreation, education, training and employment.

The reasonable and necessary supports in the plan

Before specifying any reasonable and necessary support in a participant's plan, the NDIA must be satisfied of all of the following in relation to each support:

- the support will assist the participant to pursue their stated goals, objectives and aspirations; and
- the support will assist the participant to undertake activities to facilitate the participant's social and economic participation; and

- the support represents value for money in that the costs are reasonable, relative to the benefits achieved and the cost of alternative supports; and
- the support will be, or is likely to be, effective and beneficial for the participant, having regard to current good practice; and
- the funding or provision of the support takes account of what it is reasonable to expect families, carers, informal networks and the community to provide; and
- the support is most appropriately funded or provided through the NDIS, and is not more appropriately funded or provided through other general systems of service delivery or support services, that is, health system, education system; and
- the support is not prescribed by the NDIS Rules as a support that will not be funded or provided by the NDIS (s 34).

The NDIA must decide whether a support is a reasonable and necessary support by considering these criteria, as well as the additional considerations in the *National Disability Insurance Scheme (Supports for Participants) Rules*. If a support is a reasonable and necessary support, it must be fully funded (*McGarrigle v National Disability Insurance Agency* [2017] FCA 308 at [94]).

Reasonable and necessary supports: goals, objectives and aspirations

The first requirement for a support to be reasonable and necessary is that it must assist the participant to pursue their goals, objects and aspirations. The goals are written by the participant personally, which also makes consideration of this criterion personal and context specific.

Reasonable and necessary supports: value for money

To be funded under the NDIS, a support must be value for money, in that the costs are reasonable, relative to the benefits and the costs of alternative supports. The *National Disability Insurance Scheme (Supports for Participants) Rules* provide additional considerations that the NDIA is to consider where relevant:

- whether there are comparable supports which would achieve the same outcome at a substantially lower cost;
- whether there is evidence that the support will be of longterm benefit to, the participant;
- whether funding or provision of the support is likely to reduce the cost of the funding of supports for the participant in the long term;
- for equipment or modifications – the relative cost of purchasing or leasing the support, and whether there are any expected changes in technology or the participant's circumstances;
- whether the support will increase the participant's independence and reduce the participant's need for other kinds of supports (r 3.1).

Reasonable and necessary supports: effective and beneficial

In deciding whether a support is effective and beneficial or is likely to be effective and beneficial for a participant, the NDIA is to consider:

- published and refereed literature and any consensus of expert opinion;
- the lived experience of the participant or their carers; or
- anything the Agency has learnt through delivery of the NDIS (r 3.2).

The NDIA is to take into account expert opinion and may seek out expert opinion if necessary (r 3.3).

The lived experience of the participant will be given particular weight where it is supported by relevant independent evidence, but it will also be important where there is no relevant independent evidence (*McCutcheon and National Disability Insurance Agency* [2015] AATA 624).

Reasonable and necessary supports: taking into account what is reasonable to expect families, carers, informal networks and the community to provide

In considering this requirement, the Rules specify different considerations if the participant is a child or an adult.

For a child, the NDIA is to consider:

- that it is usual for parents to provide substantial care for a child;
- whether the child's support needs are substantially greater than those of children of a similar age;

- the extent of risks to the wellbeing of the participant's family members or carers;
- whether the funding would improve the child's capacity or reduce the risk to their wellbeing (r 3.4(a)).

For other participants, the considerations are:

- the extent of any risks to the wellbeing of the participant arising from the participant's reliance on the support of family members, carers, informal networks and the community;
- the suitability of family and carers to provide the support, including the age and capacity of the person's family members and carers, the intensity and type of support that is needed and the extent of any risks to the long term wellbeing of family members of carers (r 3.4(b)).

For all participants, the NDIA is to consider the desirability of supporting and developing the potential contributions of informal supports and networks within their communities (r 3.4(c)).

"Carer" is a defined term, meaning a person who provides personal care, support and assistance to a person with disability, but not including a person who provides care under a contract for service, through voluntary work, or as part of the requirements of a course of education or training (s 9).

Reasonable and necessary supports: support most appropriately funded by the NDIS

To be funded, the NDIA must also be satisfied that the support is most appropriately funded by the NDIS and not by another general system of support or service delivery. This requirement reflects an agreement reached by the Council of Australian Governments entitled *Principles to determine the responsibilities of the NDIS and other service systems* (https://www.coag.gov.au/sites/default/files/communique/NDIS-Principles-to-Determine-Responsibilities-NDIS-and-Other-Service.pdf).

The Principles, and the Support Rules, outline the responsibilities of the NDIS and other service systems. The Rules set out 10 areas – health, mental health, child protection and family support, early childhood development, school education, higher education, employment, housing and community infrastructure, transport and justice – under which the relative responsibilities of those service systems and the NDIS are set out (r 3.6; Sch 1).

One frequently considered intersection is that of the NDIS and Health. The Rules specify that the NDIS will be responsible for supports related to a person's ongoing functional impairment and that enable the person to undertake activities of daily living (including supports delivered by clinically trained professionals) where those supports are directly related to the person's functional impairment and integrally linked to the care and support a person needs to live in the community and participate in education and employment (r 7.4). The NDIS will not be responsible for the diagnosis or treatment of health conditions, activities that aim to improve the health status of Australians, including GP services, specialist services and services in hospitals, time limited, goal oriented services for treatment or post-acute care or palliative care (r 7.5).

On 28 June 2019, the Council of Australian Governments Disability Reform Council reached agreement in relation to a number of 'health related' supports that would be funded by the NDIS, including dysphagia supports, diabetic management supports, respiratory supports and others (https://www.dss.gov.au/disability-and-carers-programs-services-government-international-disability-reform-council/communique-28-june-2019).

The Disability Reform Council noted that the agreement would "provide certainty to NDIS participants and allow for clearer delineation of system responsibilities".

In each of the other areas, the Rules set out considerations relevant to whether a support will be most appropriately funded by the NDIS or another system. This does not convey any obligation on the other service system in question to fund the support (r 7.3).

General criteria for supports

Under the general criteria for supports, a support will not be provided or funded under the NDIS if it:

- is likely to cause harm to the participant or pose a risk to others; or
- is not related to the participant's disability; or
- duplicates other supports delivered under alternative funding through the NDIS; or
- relates to day-to-day living costs (eg, rent, groceries and utility fees) that are not attributable to a participant's disability support

needs (see *National Disability Insurance Scheme (Supports for Participants) Rules*, r 5.1).

Day-to-day living costs do not include additional living costs incurred solely as a result of the participant's disability support needs or costs that are ancillary to another support funded in the plan (r 5.2). Such costs can be funded if they otherwise meet the reasonable and necessary criteria. For example, transport costs, where the costs are incurred solely and directly as a result of a person's disability, could be funded.

Supports that consist of income replacement or would be contrary to a law of the Commonwealth or of the state in which they would be provided are not funded or provided by the NDIS.

Additional rules and considerations for particular supports

Some specific supports have additional rules or guidelines for the NDIA to consider in determining whether they are reasonable and necessary, for example the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016*, which concern Specialist Disability Accommodation (SDA) – accommodation for participants who need specialist housing solutions. SDA funding relates to the accommodation itself rather than support services that are delivered in the home. The SDA Rules cover eligibility for SDA, determining the appropriate SDA type and location and the registration of SDA providers.

The Operational Guidelines provide additional guidance on the inclusion of some other supports in plans, including assistive technology, home modifications and vehicle modifications (https://www.ndis.gov.au/about-us/operational-guidelines/including-specific-types-supports-plans-operational-guideline/including-specific-types-supports-plans-operational-guideline-overview#1).

How much funding will be provided?

When the decision is made that a support is reasonable and necessary, an NDIS amount will be included in a participant's plan. The NDIA each year publishes a price guide which provides guidance about NDIS prices for various supports (https://www.ndis.gov.au/providers/price-guides-and-information).

The guide designates different maximum price levels payable by participants for various supports, as well as outlining the process for providers to claim the funding for the services they have provided. There are different maximum price levels for personal care based on the complexity of the care, and higher price limits for services provided in regional, remote and very remote areas.

The price limits themselves are contained in the support catalogue, and there are separate guides for Assistive Technology and Consumables (items including continence products and equipment for eating and drinking), and Specialist Disability Accommodation (SDA).

The decision to approve a statement of participant's supports

The planning and assessment process outlined above leads to the decision under s 33(2) of the *National Disability Insurance Scheme Act* to approve the participant's statement of participant supports, whether or not the plan includes funded supports. There is no time limit for when a decision must be made whether or not to approve a statement of participant supports, however it must be done as soon as reasonably practicable (s 33(4)).

When preparing a statement of participant supports the NDIA may request that the participant provide further information, or undergo an assessment to inform the decision (s 36(1), 36(2)). The NDIA can produce the plan before it has received the information or report, and review the plan and replace it if necessary once the information is received (s 36(3); see [16.710]).

The NDIA must provide a copy of the participant's NDIS plan to the participant within seven days after the statement of participant supports is approved (s 38).

The decision to approve a statement of participant supports is a reviewable decision (see [16.750]).

[16.710] NDIS plans – reviewing plans

A participant's plan includes a review date. The Act provides that the NDIA must conduct review of the person's plan before the review date (s 48(5)). In conducting the review, the NDIA must prepare a new plan, including inviting the participant to update their statement of goals and aspirations, and approving a new statement of participant supports (s 49). A plan does not expire, it exists until either it is replaced following a review, or the

person ceases to be a participant. A plan cannot be varied once it comes into effect (s 37(2)).

A person may request that the NDIA conduct a review of their plan at any time (s 48(1)). Within 14 days of this request, the NDIA must decide whether or not it will conduct a plan review. If the NDIA refuses, the person can request review of that decision (s 99). If the NDIA does not make a decision about whether or not to conduct a review of the plan within 14 days, it is deemed to have refused to review the plan (s 48(2)), and the decision must proceed to automatic review (s 100(5)).

[16.720] Nominees

Under the Act, people with disability are assumed, so far as is reasonable in the circumstances, to have capacity to determine their own best interests and make decisions that affect their own lives.

Two types of nominees can be appointed under the Act, each with distinct areas of responsibility:

A Plan Nominee may do any act that may be done by a participant that relates to:

i. the preparation, review or replacement of the participant's plan, or
ii. the management of the funding for supports under the participant's plan.

A Correspondence Nominee has a narrower role. A correspondence nominee can make requests for information to the NDIA and receive correspondence from the NDIA on behalf of a participant. A correspondence nominee cannot do the acts a plan nominee is authorised to do (ss 78 and 79).

Nominees are appointed as a last resort

Appointments of nominees will be justified only when it is not possible for participants to be assisted to make decisions for themselves. Consequently, if the NDIA becomes aware that there may be a need for a nominee, the NDIA has a decision to make as to whether a nominee is necessary or whether the participant can be supported to make their own decisions for the purposes of the NDIS (*National Disability Insurance Scheme (Nominees) Rules 2013*, r 3.3).

It is only in rare and exceptional cases that the NDIA will find it necessary to appoint a nominee for a participant who has not requested that an appointment be made (*National Disability Insurance Scheme (Nominees) Rules 2013*, r 3.4).

Some people cannot be appointed as nominees and the person with parental responsibility for a child is the preferred choice of nominee. There are special rules for guardians and other people appointed as decision-makers for a child (ss 88(4), 74).

How appointments come about

Appointments of nominees usually come about as a result of a participant requesting that a nominee be appointed but can also come about on the initiative of the NDIA.

If the participant requests a particular person be a nominee, that person should ordinarily be appointed, unless there are conflicts of interest or there is evidence that the person has unduly influenced the participant to make that request (r 3.13).

If the NDIA is deciding to appoint a nominee, it should consult with the participant, consider whether there is a court appointed decision-maker and consider existing supporting relationships the participant has (r 3.14).

The NDIA can specify a term for the appointment and, for plan nominees, can impose limits on the functions for which the person will be a nominee (ss 86, 87(3)).

Removal of nominees

The appointment of a nominee can be suspended or cancelled in specific circumstances including, for example, where the nominee's ability to act as nominee becomes compromised or the NDIA has reasonable grounds to believe that the nominee has caused, or is likely to cause, physical, mental or financial harm to the participant. The decision to suspend or cancel the appointment of a nominee is a reviewable decision under the Act (s 99).

Duties of nominees

Under the *National Disability Insurance Scheme Act 2013* and *National Disability Insurance Scheme (Nominees) Rules 2013*, nominees have duties to both the participant and the NDIA. The duties of a nominee include:

1. Duty to ascertain wishes, and promote personal and social wellbeing, of participant.

See s 80 of the *Act* and r 5.3 of the *National Disability Insurance Scheme (Nominees) Rules 2013*.

2. Duty to consult with any court-appointed decision-maker or any participant-appointed decision-maker and any other person who assists the participant to manage their day-to-day activities and make decisions.

   See rr 5.8 and 5.9 of the *National Disability Insurance Scheme (Nominees) Rules 2013*.

3. Duty to apply their best endeavours to develop the capacity of the participant where possible to a point where a nominee is no longer necessary.

   See r 5.10 of the *National Disability Insurance Scheme (Nominees) Rules 2013*.

4. Duty not to do certain things unless participant is not capable or does not want to do the act himself or herself.

   See s 78(5) of the *National Disability Insurance Scheme Act* and rr 5.5 and 5.6 of the *National Disability Insurance Scheme (Nominees) Rules 2013*.

5. Duty to avoid or manage conflicts of interest and to inform the NDIA of any such conflict of interest as it arises.

   See rr 5.12, 5.13 and 7.4 of the *National Disability Insurance Scheme (Nominees) Rules 2013*.

6. Duty for corporate nominee to inform CEO if person closely involved in performance of the nominee functions changes.

   See r 5.14 of the *National Disability Insurance Scheme (Nominees) Rules 2013*.

7. Nominee to inform the NDIA of matters affecting ability to act as nominee (*Act*, s 83).

[16.730] Managing funding for supports

Managing the funding for supports includes purchasing and paying for any supports in the participant's NDIS plan, receiving and managing funding, and acquitting any funding (s 42(1)). A participant's statement of participant supports must specify how the funded supports will be managed.

Deciding who will manage a participant's funding for supports

Under the Act, a participant can request who will manage their NDIS funded supports (s 43). A person's options include:

- self-managing, some or all of the funding;
- nominating a registered plan management provider to manage some or all of the funding;
- a person chosen by the NDIA to manage some or all of the funding.

If a plan nominee has been appointed, management of the funded supports must be in accordance with the terms of the plan nominee's appointment. If a person does not make a request, then the funding will be managed by a registered plan management provider chosen by the NDIA or by the NDIA itself (s 43).

If a person's funding is managed by the NDIA, the supports must be provided by service providers registered with the NDIA (s 33(6)). If the funding is self-managed or managed by a plan management provider, there is no requirement that the provider or providers be registered.

Circumstances when a participant must not manage their funded supports

The Act specifies circumstances when a participant must not manage the funding in their plan, including when it would pose an unreasonable risk to the participant (s 44(2)(a)). In considering whether there is an unreasonable risk to the participant, the NDIA must consider many factors including whether the participant is vulnerable to physical, mental or financial harm, or exploitation, or undue influence (see *National Disability Insurance Scheme (Plan Management) Rules 2013*, rr 3.7–3.9 for the factors that must be considered).

Where the participant is a child, the NDIA must also consider whether the child's representative or plan nominee has an interest that could lead a reasonable person to consider that NDIS amounts in their control might be spent in a way other than in accordance with the plan and whether there are any strategies or safeguards the NDIA could employ through the plan to mitigate risks (r 3.7).

Compensation and the NDIS

[16.740] Compensation

The NDIS is designed to complement, not replace, existing compensation arrangements for personal injury. A person's reasonable and necessary supports will be reduced to take into account compensation payments received or given up by the person.

Requirement to seek compensation

The NDIA may issue a notice requiring a participant to seek compensation for a personal injury if the person has not tried to make a claim and if it is reasonable to take action. In considering whether it is reasonable, the NDIA must have regard to a number of factors including the disability and financial circumstances of the participant, any impediments the person may face in recovering compensation, and the impact of the requirement to take compensation action on the participant and their family s 104 of the Act and *Operational Guideline – Compensation – Recovery of NDIS Amounts – Action has not Been Commenced to Recover Compensation*.

NDIA may take compensation action

If the participant does not take action within the time required, then NDIA can take action to claim compensation or take over an existing claim and take steps to bring the claim to a conclusion (s 105A).

Any amount obtained as a result of a claim made or taken over by NDIA must be paid to the agency. The NDIA must deduct from the amount of those damages:

1. an amount equal to the total of all NDIS amounts paid to, or for the benefit of, the participant before the amount is paid to the NDIA; and
2. the amount of any costs incidental to the claim paid by the NDIA.

The NDIA must pay the balance to the participant or prospective participant (s 105B).

NDIA can recover compensation from participants

The NDIA can recover from compensation awarded for personal injury the amount that has been paid by the NDIS for supports in relation to the participant's impairment if the judgment specified that the compensation was for supports of the type funded by the NDIS (ss 106(1), 106(2)).

Where a person has received compensation for personal injury following a consent judgement or settlement, the NDIS can recover any amounts paid to the participant for supports when they receive compensation for those same supports. For details on how to calculate the recoverable amount, see *Operational Guideline – Compensation – Recovery of NDIS Amounts – Compensation Received by a Participant from a Judgement or Settlement*.

Special circumstances

The Act provides a discretion to treat all or part of the compensation payments as not having been made if appropriate to do in the special circumstances of the person (s 116). If this is refused, the person can seek review of that decision (s 99).

Reviews

[16.750] Requests for review of decisions

If an affected person is unhappy with a decision made by the NDIA, then they may request a review of that decision (s 100(2)). The request must be made within three months of the decision.

There are 33 types of reviewable decisions which are set out in s 99 of the *Act*. These include:

- a decision that the person does not meet the access criteria;
- a decision revoking a person's status as a participant;
- a decision approving the statement of participant supports in a participant's plan;
- a decision to appoint a plan nominee;
- a decision to appoint a correspondence nominee;

- a decision to give a notice to require a person to take reasonable action to claim or obtain compensation;
- a decision not to treat the whole or part of a compensation payment as not having been fixed by a judgment or settlement.

They also include decisions of the NDIS Quality and Safeguards Commissioner, including to refuse to register a provider, to impose conditions on registration or to make a banning order.

A person directly affected

A person directly affected by a reviewable decision may include, among others, people from the following categories:

- prospective participants;
- participants (including children);
- nominees;
- people who seek to have parental responsibility or to become a nominee;
- a child's guardian;
- persons or organisations applying to become registered service providers;
- registered providers of supports; and
- a person who owes a debt to the NDIA.

Internal merits review

When a reviewable decision has been made, the NDIA must give written notice to each person directly affected by the decision outlining that the decision has been made and the avenues available for review of the decision.

If the person is given written notice of the decision, the request for a review must be made within three months of receiving the notice (s 100(2)).

If the NDIA has been deemed to have refused access to the NDIS to a prospective participant (ss 21(3), 20) or has been deemed to have made a decision not to review a plan under s 48(2), the decision will be automatically reviewed without the need for a request (s 100(5)(b)).

A request for a review may be made in writing, in person or by telephone.

The first or internal review is conducted by another delegate of the NDIA (s 100(6)).

The review delegate must decide whether to:

- confirm;
- vary; or
- set aside the original decision.

The reviewer must conduct the review "as soon as reasonably practicable" (s 100(6)).

The review should be carried out at arm's length from the original decision-maker. The NDIA can vary a decision at any time during the review process.

In any internal review, the review delegate should discuss the matter with the applicant by telephone or an equivalent means. The internal review should be informal, easy to understand and allow the person directly affected to have their say.

The outcome of the internal review should be explained to the maximum extent possible, in the language, mode of communication and terms that are most appropriate to the person directly affected. Wherever practical, the internal review decision should be provided orally as well as in writing (s 7).

Review by the Administrative Appeals Tribunal

A person directly affected by an internal review decision who remains dissatisfied with the outcome of the internal review can apply to the Administrative Appeals Tribunal (AAT) for further review. An application to the AAT must be made within 28 days from the date of receiving the reviewable decision (see *Administrative Appeals Tribunal Act 1975* (Cth), s 29(2)). The AAT might allow a longer period if it is satisfied that it is reasonable in all the circumstances.

The AAT must decide whether to confirm, vary or set aside the decision.

The AAT Review of National Disability Insurance Scheme Decisions Practice Direction

The AAT has published a Practice Direction which explains what the AAT does when it reviews a decision made by the NDIA. It also explains what an applicant and the NDIA must do. The procedures apply to all kinds of decisions that the AAT reviews under the NDIS Act. The Practice Direction is available at www.aat.gov.au/resources/practice-directions-guides-and-guidelines.

Complaints

[16.760] Making a complaint

A complaint about the actions of the NDIA, including an individual NDIA officer, can be made to any NDIA offices in-person, by telephone, email or in writing. A complaint can be lodged on-line via its website.

Forms are available at https://www.ndis.gov.au/contact/feedback-and-complaints.

NDIA action on a complaint

The NDIA will contact the complainant and may ask for more information to help them understand the nature of the complaint.

They will contact the person complained about, provide them with details and ask for their comments and relevant information. They will let the complainant know what they say in response to the complaint.

If the complainant is dissatisfied with the outcome of their complaint, then a supervisor or manager can be requested to review the complaint and how it was handled.

If the complainant is not satisfied about the way the complaint was managed, assistance may be sought from the Commonwealth Ombudsman. Their contact details are:

- call: 1300 362 072;
- visit the website (www.ombudsman.gov.au/pages/making-a-complaint).

If the complaint is about a decision by the NDIA

If the complaint is about a decision made by the NDIA, the person affected can lodge an application for review of that decision. A form requesting a review is also available from www.ndis.gov.au/document/394 (see [16.750]).

If the complaint is about a provider

The person affected can lodge a complaint with the NDIS Quality and Safeguards Commission (in all states, other than WA – from 1 July 2020 only).

A complaint can be made by phoning 1800 035 544 or TTY 133 677 or completing a complaint contact form (https://forms.business.gov.au/smartforms/servlet/SmartForm.html?formCode=PRD00-OCF).

More information

- Visit: www.ndis.gov.au.
- Email: enquiries@ndis.gov.au.
- Call 1800 800 110 Monday to Friday, 9 am to 5 pm EST.

For people with hearing or speech loss:

- TTY: 1800 555 677.
- Speak and Listen: 1800 555 727.
- For people who need help with English TIS: 131 450.

See also B Madden et al, *The National Disability Insurance Scheme Handbook* (LexisNexis Australia, 2013).

Contact points

[16.770] If you have a hearing or speech impairment and/or you use a TTY, you can ring any number through the National Relay Service by phoning **133 677** (TTY users, chargeable calls) or **1800 555 677** (TTY users, to call an 1800 number) or **1300 555 727** (Speak and Listen, chargeable calls) or **1800 555 727** (Speak and Listen, to call an 1800 number). For more information, see www.communications.gov.au.

Non-English speakers can contact the Translating and Interpreting Service (TIS National) on **131 450** to use an interpreter over the telephone to ring any number. For more information or to book an interpreter online, see www.tisnational.gov.au.

Changes are expected to the websites for many NSW government departments that were not available at the time of printing. See www.service.nsw.gov.au for further details.

Australasian Legal Information Institute (AustLII)
www.austlii.edu.au

Government bodies

Anti-Discrimination Board
www.antidiscrimination.justice.nsw.gov.au
Free call (NSW only)
ph: 1800 670 812
Parramatta
ph: 9268 5555
Newcastle
ph: 4903 5300
Wollongong
ph: 4267 6200

Australian Competition and Consumer Commission (ACCC)
www.accc.gov.au
ph: 1300 302 502

Australian Financial Complaints Authority (AFCA)
www.afca.org.au
ph: 1800 931 678

Australian Human Rights Commission
www.humanrights.gov.au
ph: 9284 9600 or 1300 369 711

Australian Information Commissioner, Office of the
www.oaic.gov.au
ph: 1300 363 992

Australian Securities and Investments Commission (ASIC)
www.asic.gov.au
ph: 1300 300 630

Centrelink
www.humanservices.gov.au/individuals/centrelink
Inquiries about the Disability Support Pension
ph: 132 717
Financial Information Service
ph: 132 300

Community Justice Centres
www.cjc.justice.nsw.gov.au/
ph: 1800 990 777

Director of Public Prosecutions, Office of the
www.odpp.nsw.gov.au
ph: 9285 8606
TTY: (02) 9285 8646
Witness Assistance Service
ph: 1800 814 534

Disability Council of NSW
www.facs.nsw.gov.au/disability-council
ph: (02) 8879 9175 or TTY: 1800 555 630

Disability Discrimination Commissioner
Australian Human Rights Commission
www.humanrights.gov.au
ph: 9284 9600 or TTY: 1800 620 241
complaints infoline: 1300 656 419

Diversity Services, Department of Justice
www.justice.nsw.gov.au/diversityservices
ph: 02 8688 7507

Equity Division, Supreme Court of NSW
www.supremecourt.justice.nsw.gov.au
ph: 1300 679 272

Fair Trading, Department of
www.fairtrading.nsw.gov.au
ph: 133 220

Fair Work Commission
www.fwc.gov.au
ph: 1300 799 675

Fair Work Ombudsman
www.fairwork.gov.au
ph: 13 13 94

Communities and Justice, Department of – previously Department of Family and Community Services (FACS)
www.dcj.nsw.gov.au
ph: 9377 6000
Child Protection Helpline
ph: 132 111 or TTY: 1800 212 936 (to report child abuse and neglect, 24 hrs)
Please see website for a list of regional and metropolitan offices.
Housing and Homelessness

www.facs.nsw.gov.au/housing
ph: 1800 422 322

Guardianship Division
See NSW Civil and Administrative Tribunal (below)

Health Care Complaints Commission (HCCC)
www.hccc.nsw.gov.au
ph: 1800 043 159 or 9219 7444
TTY: 9219 7555

icare (Insurance & Care NSW)
ph: 13 44 22
www.icare.nsw.gov.au

Industrial Relations, NSW
www.industrialrelations.nsw.gov.au
ph: 131 628

Information and Privacy Commission NSW
www.ipc.nsw.gov.au
ph: 1800 472 679

Job Access
www.jobaccess.gov.au
ph: 1800 464 800

Jobs and Small Business, Department of
www.jobs.gov.au
ph: 1300 488 064

LawAccess NSW
www.lawaccess.nsw.gov.au
ph: 1300 888 529

Law Society of NSW
www.lawsociety.com.au
ph: 9926 0333
Law Society Solicitors Referral Service
ph: 9926 0300
Law Society Pro Bono Scheme
ph: 9926 0364

Medicare
www.humanservices.gov.au/individuals/medicare
ph: 132 011

Mental Health Advocacy Service
www.legalaid.nsw.gov.au
ph: 9745 4277

Mental Health Review Tribunal
www.mhrt.nsw.gov.au
ph: 1800 815 511 or 9816 5955

National Disability Insurance Scheme (NDIS)
www.ndis.gov.au
ph: 1800 800 110

NDIS Quality and Safeguards Commission
www.ndiscommission.gov.au
ph: 1800 035 544

NSW Ageing and Disability Commissioner
www.ageingdisabilitycommission.nsw.gov.au
ph: 1800 628 221

NSW Civil and Administrative Tribunal
www.ncat.nsw.gov.au
ph: 1300 006 228

Guardianship Division
www.ncat.nsw.gov.au/Pages/guardianship/guardianship.aspx
ph: 9556 7600 or 1300 006 228

NSW Trustee and Guardian
www.tag.nsw.gov.au
Trustee Services: 1300 364 103
Managed Clients: 1300 320 320
NSW Trustee and Guardian has a network of 19 branches throughout metropolitan and regional areas across NSW. See website for details.

Ombudsman, Commonwealth
www.ombudsman.gov.au
ph: 1300 362 072

Ombudsman, NSW
(including Community Services Division and Official Community Visitors)
www.ombo.nsw.gov.au
ph: 1800 451 524 or 9286 1000

Public Guardian, Office of the
www.publicguardian.justice.nsw.gov.au
General Information
ph: 8688 6070 or 1800 451 510
Contact a guardian
ph: 8688 2650 or 1800 451 510
Private Guardian Support Unit
ph: 8688 6060 or 1800 451 510

SafeWork NSW
www.safework.nsw.gov.au
ph: 13 10 50

Social Services, Department of
www.dss.gov.au
ph: 1300 653 227
National Disability Abuse and Neglect Hotline
www.jobaccess.gov.au/complaints/hotline
ph: 1800 880 052

State Insurance Regulatory Authority (SIRA)
www.sira.nsw.gov.au
ph: 13 10 50

Statewide Disability Services (NSW Corrective Services)
www.correctiveservices.justice.nsw.gov.au/Pages/CorrectiveServices/programs/statewide-disability-services/statewide-disability-services.aspx
ph: 9289 2136

Witness Assistance Service
www.odpp.nsw.gov.au/witness-assistance-service
ph: 9285 8606

Support and advocacy organisations

Ability Advocacy
abilityadvocacy.org.au/
ph: 6628 8188 or 1800 657 961

ACTION for People with Disabilities (North Sydney)
www.actionadvocacy.org.au
ph: 9449 5355

Aftercare Association of NSW
www.aftercare.com.au
ph: 1300 001 907

Australian Centre for Disability Law
www.disabilitylaw.org.au
ph: 1800 800 708

Australian Communication Exchange (ACE)
www.aceinfo.net.au
ph: (07) 3815 7600
TTY: (07) 3815 7602

Autism Spectrum Australia (ASPECT)
www.autismspectrum.org.au
ph: 1800 277 328

Carers NSW
www.carersnsw.org.au
ph: 9280 4744
Carer Line
ph: 1800 242 636

Connectability Australia
www.connectability.org.au/
ph: 02 4962 1000

Community Legal Centres NSW
www.clcnsw.org.au
ph: 9212 7333

Complaints Resolution and Referral Service (CRRS)
www.jobaccess.gov.au/complaints/crrs
ph: 1800 880 052
Freecall: 1800 464 800

Council for Intellectual Disability, NSW
www.nswcid.org.au
ph: 1800 424 065 or 9211 1611

Justice Advocacy Service
(part of Intellectual Disability Rights Service)
www.idrs.org.au
ph: 1300 665 908 includes after hours for support at police station 1300 665 908

Deaf Society of NSW
www.deafsocietynsw.org.au
ph: 1800 893 855
SMS: 0427 741 420

Dementia Australia
www.dementia.org.au/
ph: 1800 100 50

Disability Advocacy NSW
www.da.org.au
ph: 1300 365 085
Hunter Region
Newcastle office
ph: 4927 0111
New England Region
Tamworth office
ph: 6766 4588
Armidale office
ph: 6776 6201
Mid North Coast Region
Coffs Harbour office
ph: 6651 1159
Forster/Taree office
ph: 1300 365 085
Port Macquarie office
ph: 1300 365 085

Disability Council of NSW
See Government bodies.
ph: (02) 8879 9175 or TTY: 1800 555 630

Family Advocacy
www.family-advocacy.com
ph: 1800 620 588 or 9869 0866

Financial Rights Legal Centre
www.financialrights.org.au
ph: 1800 007 007

First Peoples Disability Network Australia
www.fpdn.org.au/
ph: 02 9267 4195

Flourish Australia
www.flourishaustralia.org.au/
ph: 1300 779 270 or 9393 9000

Information on Disability and Education Awareness Services (IDEAS)
www.ideas.org.au
ph: 1800 029 904 or SMS: 0458296602
Database of services throughout NSW

Illawarra Advocacy
www.illawarraadvocacy.org.au
ph: 4229 4999

Institute of Psychiatry NSW
ph: 9840 3833

Intellectual Disability Rights Service
www.idrs.org.au
ph: 1300 665 908 or 9265 6300

Legal Advice
ph: 9265 6350

Legal Aid NSW
www.legalaid.nsw.gov.au
(02) 9219 5000
Legal Aid Youth Hotline
ph: 1800 101 810
For a list of metropolitan, regional and specialist legal aid offices, please see the website.

Mental Health Carers NSW
www.mentalhealthcarersnsw.org/
ph: 1800 655 198 or 9332 0700

Mental Health Coordinating Council
www.mhcc.org.au
ph: 9555 8388

Mental Health Commission NSW
nswmentalhealthcommission.com.au
ph: 02 9859 5200 or 1300 884 563

Multicultural Disability Advocacy Association of NSW
www.mdaa.org.au
ph: 9891 6400 or 1800 629 072

National Disability Abuse and Neglect Hotline
www.jobaccess.gov.au/complaints/hotline
ph: 1800 880 052

National Disability Insurance Scheme (NDIS)
www.ndis.gov.au
ph: 1800 800 110

National Disability Services NSW
www.nds.org.au
ph: 9256 3111

Newell Advocacy
ph: 6752 1215

Official Community Visitors
See Ombudsman (NSW) under Government bodies.

One Door Mental Health
www.onedoor.org.au
ph: 1800 843 539 or 9879 2600

People with Disability Australia
(including Individual and Group Advocacy Service)
www.pwd.org.au
ph: 1800 422 015 or 9370 3100

Physical Disability Council of NSW (PDCN)
www.pdcnsw.org.au
ph: 9552 1606 or 1800 688 831

Physical Disability Australia
www.pda.org.au
ph: 1800 732 674

Public Interest Advocacy Centre
www.piac.asn.au
ph: 8898 6500

Rape Crisis Centre NSW
www.nswrapecrisis.com.au
ph: 1800 424 017
Online counselling available through website.

Regional Disability Advocacy Service
www.rdas.org.au

Wodonga: (02) 6056 2420

Wagga Wagga: (02) 6921 9225

Wangaratta: ph: (03) 5718 0171

Griffith: ph: (02) 6909 1787
Freecall: 1800 250 292

Royal Commission into Abuse, Neglect and Exploitation
www.disabilityroyalcommission.gov.au
ph: 1800 517 199 or 07 3734 1900

Self-Advocacy Sydney
www.sasinc.com.au
ph: 9622 3005

Shopfront Youth Legal Centre
www.theshopfront.org
ph: 9322 4808

Side By Side Advocacy
sidebyside.org.au
ph: 9808 5500

Spinal Life Australia
www.spinal.com.au
ph: 1300 774 625

Synapse – formerly Brain Injury Association of NSW
www.synapse.org.au
ph: 1800 673 074

Transcultural Mental Health Centre
www.dhi.health.nsw.gov.au/transcultural-mental-health-centre
ph: 9912 3851 or 1800 011 511

Unions NSW
www.unionsnsw.org.au
ph: 9881 5999

WayAhead – Mental Health Association NSW
www.wayahead.org.au
ph: 9339 6000
Mental Health Information Service
ph: 1300 794 991