SUBMISSIONS TO THE NSWLRC REFERENCE INTO GUARDIANSHIP

SAFEGUARDS AND PROCEDURES

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2. Enduring guardianship

Question 2.1: Witnessing an enduring guardianship appointment

What changes, if any, should be made to the *Guardianship Act 1987* (NSW) concerning:

(a) the eligibility requirements for witnesses

The witness should be qualified as an Australian Legal practitioner

(b) the number of witnesses required, and

if so qualified there need be only one witness

(c) the role of a witness?

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1. The main conflict issues arising from the making of an enduring guardianship appointment [EGA] seem to be between the adult children of the person making the instrument. There can be bitter contests of will over matters of accommodation, most notably in this writer's experience, including:

    - whether the elder is to live in an aged care facility [ACF] or whether the elder will remain in their family home and receive home care services, or perhaps remain living with one of the adult children as a carer.
    - There is also the problem of exclusion by the guardian of others in the family to access to the elder which may be because of longstanding issues of abuse or rivalry or similar reasons.
    - Treatment issues often arise as to whether palliation is to be followed, whether it is adequate, whether discharge from a hospital [arising for example from a fall] should be first for rehabilitation and then for home care services, or directly to an ACF.

When such issues arise there should be an inclusive mechanism for conciliation, mediation and finally, if necessary, for arbitration. Perons who have a genuine interest should be included in the process. Without an accessible process for alternate dispute resolution [ADR], bitterness, hostility and even violence can arise and divide the family. Such an arrangement can be seen as a preventive measure which may help to avoid a formal application for review of the EGA which is the only possible option in which there is some compulsion available to require the parties to attend and to discuss and perhaps to compromise.

Accordingly there needs to be some mechanism for access to ADR established at the outset of the signing of the EGA. This could take the form of a requirement to follow the necessary steps in the event of a member of the family [or other

person interested in the welfare of the person] incorporated in the EGA itself and subscribed to by the Appointor, the guardian and others in the family whom the appointor may wish to include. These are matters requiring some discussion with the appointor.

Aside from the instrument itself there should always remain the option available to any interested person, to bring the operation fo the EGA to the Tribunal for review.

2. The other main issue of contention about the making of the EGA is whether the appointor has or had the necessary capacity to understand the nature and effect of the instrument they signed. This will often arise – in my experience – with one of the interested parties such as an adult child not being consulted about a possible change [for example by revocation of a previous EGA and the making of a new one] in circumstances where the EGA may have been made by the appointor after being taken to professional advisors unknown to the rest of the family. This may give rise to the issue whether the appointor had sufficient capacity for understanding the nature and effect of the instrument/s to be made.

The Capacity Guidelines [2009] published by the Law Society of NSW refers to the general test for the ability to make legal instruments thus :

> Despite the many different legal tests for capacity, the fundamental issue is whether the client is able to:
> ■■ understand the facts involved in the decision-making and the main choices;
> ■■ weigh up the consequences of those choices and understand how the consequences affect them; and
> ■■ communicate their decision.

In my submission the need is clear for a professional person to witness and to examine the appointor in the event of making an EGA, having regard to the potential for serious issues arising subsequent to the execution of the instrument.

The format for the client examination should be elaborated and prescribed as a minimum and for guidance and published by the Law Society of NSW for the benefit of its members and their clients.

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Question 2.2: When enduring guardianship takes effect

Should the *Guardianship Act 1987* (NSW) contain a procedure that must be followed before an enduring guardianship appointment can come into effect? If so, what should this process be?

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1. There is no need for a change in the format of the certificate which is required to be made at the time of signing by the appointor but the procedure should change as submitted above.?

2. The question whether the guardian already appointed [if there is one] should be notified of a proposed change of guardian is one which deserves some attention. It is submitted this could be made a pre-condition to the EGA taking effect and desirably notice should be given before the new EGA is executed.

3. The outstanding cause of family dispute in this writer's experience is a lack of timely communication between family members and especially between the

appointor and their adult children. One of the issues on which there is often a lack of communication is the making of a new EGA. Sometimes there is also a failure to formally revoke the previous EGA thus compounding the effect of the hurt, resentment and breakdown in family relationships by the failure to communicate and by taking the previous guardian by surprise.

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Question 2.3: Reviewing an enduring guardian appointment

Are the powers of the NSW Civil and Administrative Tribunal to review an enduring guardian appointment sufficient? If not, what should change?

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1. The powers are insufficient and the practice is often disappointing in this writer's experience.
2. The Tribunal views its role as an instrument for appointing a decision maker and in this instance this is all the Act allows [revoke or confirm the appointment – see s 6K]. However, it is often the case that applications for review arise out of disputes among family members concerning the care and treatment or the accommodation options available to the elder/ aged family member.
3. The Guardianship Act allows a limited range of options to the Tribunal in assessing the operation pf an EGA. There are often substantial and extensive factual issues which are contained in statements filed for parties and others who are not parties.
4. The Guardianship Act [s. 6K] provides

Action on review

6K Action on review

(1) On reviewing the appointment of an enduring guardian, the Tribunal may:

(a) revoke the appointment or deal with the matter as provided by subsection (3) (or both), or

(b) confirm the appointment, with or without varying the functions of the enduring guardian under the appointment.

(2) The Tribunal must not revoke the appointment of an enduring guardian unless:

(a) the enduring guardian requested the revocation, or

(b) the Tribunal is satisfied that it is in the best interests of the appointor that the appointment be revoked.

(3) The Tribunal may, if it considers that it is in the best interests of the appointor to do so, deal with a review as if any of the following applications had been made in respect of the appointor:

(a) an application for a guardianship order under Part 3,

(b) an application for a financial management order under Part 3A,

(c) applications for both such orders.

5. In cases of this kind the parties and those supporting them are often seeking a clear cut decision on the issues in contention. Those issues may involve –
   - Which aged care facility is best for the elder?

- When discharged from hospital [for example after a fall] should the elder have rehabilitation or should s/he go directly to an Aged Care Facility [ACF] or return home?
- If there has been a shortfall in care in the [ACF and the EG refuses to act on it by complaining or by seeking medical / clinical/ nursing notes and records or taking other action to seek to remedy or to improve the situation;
- Refusal of access to a family member who may have been outspoken about shortfalls in care and treatment and where the staff of the ACF themselves complain to their management officer about harassment or similar

6. In such cases the Tribunal begins the review and, in accordance with the authority in the Guardianship Act [see s6K[3]], in due course announces that they will proceed to assessing the issues concerning the appointment by order of a guardian, rather than embarking upon an inquiry into the facts and make a determination about the real issues in dispute between the parties and their supporters.
7. In my view the avoidance of the causes of the conflict by the Tribunal, even though the avoidance is presently authorised by the Act, is an avoidance of the main issues and only leaves to another party [the guardian newly appointed by the Tribunal] to return to those issues and to traverse once again the [often hotly contested] facts and historical narrative to arrive at a decision. That decision itself will likely be open to legal review in the context of a seriously conflicted family.

8. It is submitted that the authority for the Tribunal to decide to commence an inquiry into appointing a guardian [in the course of a review] should be limited to cases where the facts indicate that
   - The process will be more efficient in determining the issues and reaching a decision,
   - will be likely to have achieve acceptance by the parties in conflict, and
   - is just and efficient to do so, and
   - it is in the best interests of the protected person to do so.

9. The present situation leaves the parties in conflict with the same issues dividing them and without access to an authoritative decision maker within in a reasonable time frame. A failure to mediate or adjudicate when the parties are present and are concentrating their minds upon the issues, is a failure of our current legal regime under the Guardianship Act to address the real issues in a timely manner.

10. Accordingly it is submitted that the issues which have been presented to the Tribunal arising from the operation of the EGA should be the subject of assessment, adjudication and orders by the Tribunal after hearing the evidence form the parties and their witnesses. In other words, dealing with the application on its merits and not proceeding to interrupt the application by substituting for it, an inquiry into orders for guardianship or financial management. That will be achieved by repealing s. 6[K]{3}.

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Question 2.4: Ending an enduring arrangement

What changes, if any, should be made to the *Guardianship Act 1987* (NSW) concerning:

(a) the resignation of an enduring guardian, and

(b) the revocation of an enduring guardianship arrangement?

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1. A requirement for a reasonable attempt at communication/ discussion/ attempt to resolve conflict or problem issues between the appointor and the guardian, before the resignation or revocation EGA commences [see above]

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Question 2.5: Other issues

Would you like to raise any other issues about enduring guardianship procedures?

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It would be useful for the settlement of internal family disputes over issues of guardianship if the Tribunal were empowered specifically to adjudicate, upon application in discrete proceedings, in relation to any decision taken by an enduring guardian, similarly as for a review for a guardian appointed by order.

As mentioned above, there are continuing disputes between siblings over the decisions made by an enduring guardian and for good social policy reasons of dispute resolution, there needs to be a ready means of settling those disputes, short of the appointment by the Tribunal of a Guardian to replace an appointed guardian.

Such an application, confined to a specific issue such as an accommodation decision to be made, or one which has been made but is not working from the viewpoint of an eligible applicant such as an adult child, might be a more preferable application and one which more efficiently dispenses a mandated yet focussed solution.

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3. Guardianship orders and financial management orders

Question 3.1: Applying for a guardianship or financial management order

What are your views on the process for applying for a guardianship or a financial management order?

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1. The format for applications and the notes which are published on the NCAT website refer to the need for two medical practitioner opinions. For the reasons submitted below [as regards possible misdirection by the Tribunal], this is not what is authorised by the Guardianship Act or the judicial decisions which guide the Tribunal in the case of financial management applications and orders.
2. The issues of capacity to which the NCAT notes refer are matters better and more properly dealt with by a directions or interlocutory hearing conducted by an officer of the Tribunal such as the Registrar, if it becomes apparent that capacity will be an issue at the hearing of the application. Granted that by far the biggest proportion of

applications involve someone with impaired capacity, yet convenience to the Tribunal should, in this case, defer to avoiding an apparent prior assumption that capacity will be an issue in the hearing. If that course is adopted it is submitted that will be a contributor to undermining the integrity of the proceeding itself.

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Question 3.5: Reviewing a guardianship order

(1) What factors should the NSW Civil and Administrative Tribunal consider when reviewing a guardianship order?

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1. the policy of treating its function as appointing or confirming the decision maker results in the non-involvement of or disinclination of the Tribunal to become involved in assessing and deciding upon important issues affecting the person and family- such as [in review of an EPOA] issues of neglect- breach of fiduciary duty and [in a review of an EGA] other forms of exploitation and elder abuse - thus removing the forum from the family or others having an interest in the proceedings and their real need to resolve the root causes of conflict. Accordingly the Tribunal hearing model should allow for a ventilation of elder abuse issues and provide remedies and support for victims and families. -

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(2) Should these factors be set out in the *Guardianship Act 1987* (NSW)?

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Yes – the Tribunal should be required to address the particular problems and issues which have led to the application for review in order to decide –

[a] whether those issues may be resolved by a decision or order of the Tribunal in the interests of the protected person;

[b] if the answer to that question is 'no', only then should the Tribunal decide to proceed to considering whether another person is appointed.

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Question 3.6: Grounds for revoking a financial management order

(1) Should the *Guardianship Act 1987* (NSW) expressly allow the NSW Civil and Administrative Tribunal to revoke a financial management order if the person no longer needs someone to manage their affairs?

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Yes – this would be consistent with the regard for self determination of the person.

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Question 5.5: Reporting requirements of private guardians

Should private guardians be required to submit regular reports on their activities? If so, to whom should they be required to report?

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One of the main reason for challenging existing Guardianship orders and in seeking review of existing EGAs in my experience, is a lack of consultation and more particularly a lack of information about the protected person's health status and decisions taken for treatment, shared with other members of the family of the protected person. Resentment and suspicion build quickly in these circumstances. Communication of information about the exercise of the delegated functions of a guardian will, in my view, help to reduce tensions and hostility between siblings, in particular.

Accordingly at the time of appointment of a guardian, the form of appointment should require an inquiry of the parties which members of the family and others have a legitimate interest in the welfare of the protected person and in knowing about their health and welfare. The nominated person/s should be informed by reports prepared at a time when decisions are made by the guardian, and in a timely manner.

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Question 5.6: Directions to guardians

Who should be able to apply to the NSW Civil and Administrative Tribunal for directions on the exercise of a guardian's functions?

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Any person with a genuine interest in the welfare of the person.

Question 5.9: Criminal offences

Should NSW introduce new criminal offences to deal specifically with abuse, exploitation or neglect committed by a guardian or financial manager?

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Yes - and the offences should not only be confined to abuse by guardians and financial managers but by any person who offends against the "proposed criminal offences" and by their actions or omissions, effect harm injusy or financial loss upon the protected person.

The Commission is referred to the submission made by this author to the Australian Law Reform Commission on the need for a new law which criminalises elder abuse. A copy of the submission is attached to this paper. The New South Wales Parliament has the power to legislate in and across this area unlike the Commonwealth Parliament.

It is submitted that any such new law could and should fall within the jurisdiction of the Local Courts of NSW.

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Question 5.10: Civil penalties

Should NSW introduce new civil penalties for abuse, exploitation or neglect committed by a guardian or financial manager?

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Please see the attached paper on the proposal for the introduction of a new law criminalising elder abuse. What is most important in cases of elder abuse is that there is a pathway for the victims which can bring relief by ordering repayment or compensation to the victim/ complainant. Under the regime which is contemplated by this writer [see the Elder Justice proposal attached] It is possible there could be a concurrent jurisdiction with the

Local Courts – nominated in the Elder Justice Proposal as the venue for criminal proceedings, for a new Elder Justice law in NSW where that jurisdiction could be exercised by the NCAT but dealing only with civil penalties and recovery of moneys.

Question 5.11: Offences, civil penalties and compensation orders

Should NSW legislation empower the NSW Civil and Administrative Tribunal to issue compensation orders against guardians and financial managers?

See above [5.10]

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Question 8.1: Composition of the Guardianship Division and Appeal Panels

(1) Are the current rules on the composition of Guardianship Division and Appeal Panels appropriate?

No

(2) If not, what would you change?

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1. The Guardianship Division assembles three member Tribunals for each case on an ad hoc basis. Although there may be good reasons for this, it seems to me this raises an understandable and natural reluctance or resistance to avoid wasting time and expense to re-convene on another day, when dealing with interlocutory issues like adjournments and similar applications, such as the need for additional evidence or documents in the hands of third parties.
2. It is not unusual for the papers to be sent to parties by Tribunal officers only a few days before the case is listed, so I suspect the need to balance economy, efficiency [cheap and quick] and the rights and interests of the parties are probably tested more often than should be the case. In such instances, my point is that the bias against adjournment may weigh against the parties seeking adjournment unduly, because of the management model of the Tribunal.
3. In my experience there is usually only one joint elaboration of the Reasons for Decision. If that is indeed a universal rule of practice, it seems to this author that there is no accountability for the judgment of each of the individuals.
4. Why should there not be an expression of view required from each member? How else can the contribution of the additional members of the Tribunal other than the member writing the Reasons, be assessed? If the application of experience and logic from members other than the Chair is not required, it is difficult to see what value there is in retaining input from them. There is no additional protection for the person who is the subject of the proceedings since the legal process of compliance with law and natural justice should always be protection enough.

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Question 8.5: When a person can be represented

When should a person be allowed to be represented by a lawyer or a non-lawyer?

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1. it seems to me from past experience, that there is at least a kind of unstated unwillingness to admit lawyers to the processes of the Tribunal, unless there are no other alternatives available. For example, in a recent case this author was refused leave because the decision maker claimed the Tribunal was used to dealing with issues of the kind arising in the particular case and would not be assisted by a lawyer. That kind of reasoning is rather like expressing otherwise unstated policy then assessing applications on their merits.
2. The Tribunal will often appoint a Separate Representative for the person whose capacity is in issue, but the duties of that person are themselves conflicted because they are not obliged to act upon instructions and moreover, although I did not know this for a fact, I assume that communications are not necessarily privileged with the client and thus can be conveyed without consent to the Tribunal.
3. In my view the right to legal representation for the person whose status is under review, should be clearly stated in the Guardianship Act 1997 and not be a matter of an application for leave, where leave is sought to represent the person whose capacity is in issue. After all, the basic personal right to self-determination is at stake in proceedings before the Tribunal. Few legal issues are more important.
4. The right of other parties to be represented should also be the subject of a presumption in favour of leave, unless it appears:

   [a] that other parties may be disadvantaged by the grant of leave – for example if others are not represented – but this exception should also allow that the Tribunal will in any event conduct the proceedings fairly and will ensure other parties not represented are given the opportunity to respond the submissions or applications made by the legal representative of a party.

   [b] that there are no matters of conflict or contention of any significance as between the parties or with the protected person.

Question 8.7: Representation of a client with impaired capacity

Should the *Guardianship Act 1987* (NSW) or the *Civil and Administrative Tribunal Act 2013* (NSW) allow a person to be represented by a lawyer in Guardianship Division cases when the person's capacity is in question?

1. Seeking to represent somebody whose capacity is in issue contains within that notion a potential contradiction. It is open for the Tribunal to question the capacity of the client to give instructions in the first place.
2. As a minimum, I submit that the person whose self determination is in question should always be granted representation on the following basis:
   a. If an application is made by or on behalf of the person affected;
   b. That there is always the possibility that the Tribunal may be diverted from a strict application of the law when arriving at the decision – crucial to the individual concerned – to deprive them of their right to self determination – see my comments below on mis-direction;
   c. At the very least the lawyer, when there are reasonable grounds for concern that the affected person may indeed be unable to understand the nature and potential effect of the proceedings should be permitted nevertheless to make submissions, objections and take other steps including appeal, on the issue of the application of the law by the Tribunal, providing the lawyer is also instructed by the attorney of the protected person acting under the authority of an

enduring power of attorney and further providing the Tribunal can be satisfied there is no conflict of interest if the attorney is providing instructions.

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Question 8.10: Privacy and confidentiality

What, if anything, should be changed in the law to protect the privacy of people involved in Guardianship Division cases?

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1. I have noted an aged care provider using medical records of a person within its care without consent as material supporting an application for Financial Management filed by the Provider. It seems to me this is a breach of privacy legislation both Commonwealth and State. There is no way of knowing whether this is routine practice in cases like the one which came to my attention, where a dispute exists in relation to the accommodation bond and where the resident and his family are contesting the claim which runs into many thousands of dollars.
2. Secondly, the forms which are published by NCAT as application forms, appear to require “two reports from medical practitioners”. How this is done in practice is not clear in circumstances where the person is and well may be, unable to make decisions or give consent either to the release of their medical records, or to an examination by a medical practitioner for report to be used [potentially adverse to the person’s interests] in guardianship proceedings. Reports should only be produced to the Tribunal in response to a Summons or other order of the Tribunal.
3. Thirdly it appears to me from observation that it is possible for the case officer of the NCAT in preparing for the case, to invite the person’s medical practitioner, treating hospital or nursing home to send to the Tribunal the medical records or at least a report of the person as regards assessment of capacity, for the purpose of the hearing.
4. In the latter case this kind of practice, if indeed it is used from time to time by officers of the Tribunal, seems a possible breach of the Health Records and Information Privacy Act [NSW] since there is no order or application involved to the Tribunal and no exercise of a judicial function.

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Question 8.12: Other issues

Would you like to raise any other issues about the procedures of the Guardianship Division of the NSW Civil and Administrative Tribunal?

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POTENTIAL FOR MISDIRECTION – ESTABLISHING THE FACTUAL MATRIX FOR ORDERS FOR GUARDIANSHIP

1. The definition of a “person in need of a guardian” (s.3) and of "disability" (s.3(2)) are central to the decision-making process of the Tribunal. To find that a person has a disability requires a finding that the person is "restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation". However, I have been able to find only very few cases decided by the Tribunal in which the requirement has been observed in relation

to the definition, by a series of findings of fact. In other words, I believe the Tribunal has ignored the importance of demonstrating that the disability is of the kind required by the Act to be shown to exist.

2. For example, there is a requirement for supervision or social habilitation to be satisfied, before the definition of disability is established. I have been unable to find a single Tribunal decision in which the requirement for habilitation is discussed, let alone found as a fact. The same situation applies to "supervision". In each case there should be a positive finding of the need for one or the other, or both. That finding should be based on evidence before the Tribunal.
3. It seems to me that the Tribunal most often allows itself to be satisfied as to, for example, a matter of the mental capacity for understanding which satisfies the test which is commonly applied by the Tribunal, that is, making 'major life decisions'.
4. Taking the last point further, there are many cases which make it clear that the Tribunal is applying a principal test for disability which is not authorised by the Guardianship Act. The test which many decisions show is the one applied, is to answer the question: is the [subject] person unable to make important life decisions? A short summary of selected decisions of the Tribunal and its predecessor is set out below to illustrate the point:

SHORT ANALYSIS OF DECISIONS BY GSHIP TRBNL – RATIONALE-DISABILITY- TEST: ABILITY TO MAKE 'IMPORTANT LIFE DECISIONS'		
25 AUGUST 2016	KAX [2016] NSWCATGD 44	What did the Tribunal have to decide? The Tribunal had to decide: Does Mr KAX have a disability which **prevents him from being able to make some important life decisions?**
31 MARCH 2015	EID [2015] NSWCATGD 7	Is Mr EID someone for whom the Tribunal could make a further order? The Tribunal must first consider whether Mr EID is someone for whom the Tribunal could make a further order, because he continues to have a disability which **prevents him from being able to make important life decisions.**
2 JULY 2014	EAD [2014] NSWCATGD 13	The questions which had to be decided by the Tribunal were: Is Mr EAD someone for whom the Tribunal could make an order because he has a disability which prevents him from being **able to make important life decisions?**
(16 March 2012)	FGE (2) [2012] NSWGT 3	The Tribunal is satisfied that a combination of disabilities, both physical and cognitive, render her, in the language of the Act, at least "partially incapable of managing her person" including being **unable to make important life decisions** e.g. where she should reside and the level of care an assistance she requires. She is a person for whom the Tribunal could make a guardianship order in terms of the Act, as set out above
(6 October 2011)	DRP [2011] NSWGT 12	23. The Tribunal was satisfied that Ms DRP has an intellectual disability which **prevents her from making important life decisions**. She is a person for whom the Tribunal could make a guardianship order.
(28 July 2011)	CVP [2011] NSWGT 19	The Tribunal is satisfied that Mr CVP has a disability which affects his ability to manage his person in terms of the Act and **prevents him from making important life decisions**. He is a person for whom the Tribunal could make a guardianship order.

13 January 2011	PXC [2011] NSWGT 1	The Tribunal was satisfied that Mr PXC **has a disability which prevents him from making important life decisions** and that he is a person for whom the Tribunal could make a guardianship order
(25 August 2010)	IAT [2010] NSWGT 27	At the last hearing, Dr Z, General Practitioner, submitted two reports advising that Mrs IAT had a diagnosis of dementia that rendered her incapable of making decisions for herself. When the previous order was made, the Tribunal found that Mrs IAT had a disability being dementia and was unable to make important life decisions. There is no new evidence before the Tribunal in relation to this issue and her incapacity is not disputed. The Tribunal is satisfied that Mrs IAT **continues to have a disability which prevents her making important life decisions.** She is a person for whom the Tribunal could make a further guardianship order in terms of the Guardianship Act set out above.

5. In a case of *SFGB v Minister for Immigration & Multicultural Affairs* (15 Nov 2002) [2002] FCA 1389, Tamberlin J said:

> In cases where the language of a statute is clear and unambiguous, the authorities consistently caution against the danger of adding judicial gloss to statutory language and against construing judicial pronouncements as if they were themselves legislative instruments to be interpreted as such.

6. For authority, His Honour referenced *Geelong Harbour Trust Commissioners v Gibbs, Bright & Co* (1970) 122 CLR 504 at 513. In that case Barwick, CJ had this to say about the interpretation of statutes, in instances where the meaning of the statute was clear:

> The principal question in this appeal is whether a section of a statute means what its words seem plainly to say or whether those words are subject to limitations or exceptions unexpressed by the legislature but to be declared by the Court in order to implement a policy of the legislature divined by the Court from the words of the statute and their impact, if applied without qualification, upon the previously existing general law.(p506)
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> 2. There is a subsidiary question, namely, whether if it is thought that the legislature meant what the words of the statute seem plainly to say, the reasoning of an earlier decision of this Court not resulting in such a construction ought none the less, merely because of the lapse of time, to be accepted and followed. (at p506)
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> …
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> 19. To qualify the unambiguous language of s. 110 so as to effect some supposed policy of the legislature would, in my opinion, not be construing the words of the legislature but on the contrary be an attempt to legislate.

3. Would Barwick CJ be provoked into declaring that this was another example of 'an attempt to legislate' if he was to review the manner in which the Tribunal sets for itself a test for satisfying Section 3[2] of the Guardianship Act which by its terms [it is submitted] is unambiguous? That is my proposition and if correct, would cast into

doubtful validity the very many decisions which appear to have relied upon the test, mentioned above. That's is because that test does not conform with the test required by the Guardianship Act .

4. It is accepted that being unable to make important life decisions is capable of qualifying for the test of whether that amounts to a 'major life activity'. However there seems to be [see the examples provided in the above table] no attempt to rationalise how the phrase 'life decisions' fits within the definition. There is equally no routine example of what life decisions are in question or any attempt to seek answers or any responses from the person to those 'important life decisions' during the hearing. Moreover 'life decisions' are not made in a vacuum of experience. It is the decisions required to be made in the instant case before the Tribunal which should attract the Tribunal's attention, not 'major life decisions ' in the abstract, or generally.

5. If the proposition that this alleged failure to find and recite the facts underlying the statutory definition is correct, the right to personal self-determination may have been severely and probably permanently affected for the very persons who were entitled to rely upon the protection of the Tribunal.

It is trite law that Tribunals are 'the creatures of statute'. They have no plenary powers or authority as does the Supreme Court. It must follow that strict adherence to the statute is always required in any decision of the Tribunal.

STANDARD OF PROOF – A HIGHER STANDARD SHOULD BE REQUIRED

10. Here is what Dixon J (as he then was) said in Briginshaw [1938] HCA 34; (1938) 60 CLR 336:

> The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences ... This does not mean that some standard of persuasion is fixed intermediate between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil issue may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained.

In the case of the Guardianship Tribunal the serious nature of the consequences could scarcely be higher– the very right to personal self-determination is at stake for a citizen. Why then is there no mention in any case decided by the Guardianship Tribunal that I can find, of *Briginshaw* and the standard of proof required in the application of s 14 (Guardianship orders) or s 25G (financial management orders) which in each section require the Tribunal to be 'satisfied' of certain matters.

Why should not the Tribunal be 'comfortably satisfied', for example, as in the case of the disciplinary Tribunal (Nurses & Midwives Tribunal) and described thus –

> Although the standard of proof required to establish a complaint in this jurisdiction is essentially the civil standard, because of the seriousness of the allegations and the gravity of their consequences, the Tribunal must be 'comfortably satisfied' that the particulars of the Complaint have been established. This qualifies the civil standard that is applied by the Tribunal. (HCCC v KOCSIS [2011] NSWNMT 19 (8 July 2011) at par 7).

If the use of a standard such as 'comfortable satisfaction' is thought to be undesirable to be prescribed in legislation then at least attention should be given as a matter of policy, to the other words of Dixon J which I have emphasised , so that the Guardianship Tribunal is required to assure itself of the matters to be shown to it by a claimant or witness and to guard itself against being persuaded by "inexact proofs, indefinite testimony, or indirect inferences". I fear that this could happen all too often in a Tribunal which (i) prefers to keep lawyers out of proceedings and (ii) contains within its numbers a majority of non-legal trained persons.

TRIBUNAL NOT BOUND BY RULES OF EVIDENCE

1. The Guardianship Tribunal, although not bound by the rules of evidence, is bound by the rules of natural justice as any other tribunal, but I think it would be helpful for persons who come before it as parties, especially as the person the subject of the proceedings, to be aware of their rights in this respect. In my view the Guardianship Act should be amended to restate the rules of natural justice for the assistance of persons who must deal with the Tribunal with a requirement that the statement be brought to the attention of parties in writing before a hearing of the proceedings.

FEE COLLECTION BY AGED CARE PROVIDERS

2. I have seen applications by aged care Providers for the appointment of Financial mangers on the basis of unpaid fees. Clearly, such claims for money [which is what they are in reality, should be pursued in the common law courts, not the Guardianship Tribunal. If a tutor is required an appointment can be made in the course of the matter. It is not possible without some research of the Tribunal's records, to say how many such applications are received. However, assuming the Tribunal is alive to the potential for abuse of its process, I think aged care providers should be cautioned by the Tribunal about these matters and the possibility of an adverse costs order. Providers should be directed to refer all such potential applications to the NSW Trustee & Guardian.

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Rodney Lewis practises as a solicitor in elder law and in issues related to elder abuse. He is partly responsible for introducing that part of legal practice to New South Wales through the University of Western Sydney course in Elder Law in 1999. He has published articles, presented seminars and speaks on the issues, in the media and to elder audiences. He is the author of the legal text **Elder Law in Australia**, Lexis 2ND edn, Lexis Nexis, Sydney 2012.