

Role of the Guardianship Division

This fact sheet outlines the role of the Guardianship Division of the NSW Civil and Administrative Tribunal (NCAT) and its jurisdiction under the *Guardianship Act 1987*.

Who we are

NCAT's Guardianship Division exercises a protective jurisdiction under the *Guardianship Act 1987*. Its purpose is to protect and promote the rights and welfare of adults with impaired decision making capacity.

What we do

Adults with disabilities are usually assisted by family members, friends and service providers. If these arrangements are not working, or if there is a legal problem, NCAT can make orders and put formal arrangements in place if needed.

NCAT determines applications for the appointment of guardians and/or financial managers for people with disabilities. NCAT can also review the guardianship and financial management orders it makes.

NCAT also has a number of other functions. It can consent to medical or dental treatment, review enduring guardianship appointments and enduring powers of attorney, approve clinical trials, recognise interstate appointments, and consent to special medical treatment.

Guiding principles

NCAT must observe the principles of the *Guardianship Act 1987*. These principles state that everyone who works with people with disabilities under the Act has a duty to:

- Give the person's welfare and interests paramount consideration
- Restrict the person's freedom of action and decision-making as little as possible
- Encourage the person to live a normal life in the community
- Take the person's views into consideration
- Recognise the importance of preserving family relationships and culture and linguistic environments

- Encourage the person to be self-reliant in matters relating to their personal, domestic and financial affairs.
- Protect the person from neglect, abuse and exploitation
- Encourage the community to apply and promote these principles.

NCAT's Guardianship Division has a duty to protect and promote the rights and welfare of people with a decision making disability

Guardianship

Appoint a Guardian

NCAT can appoint a guardian to make personal or lifestyle decisions on behalf of a person with decision making disabilities.

When NCAT appoints a guardian it limits their authority to specific functions such as:

- where the person should live
- what support services the person should use what healthcare and medical treatment the person should receive
- if restrictive practices are appropriate in the management of the person's behaviour.

To make a guardianship order NCAT must be satisfied that:

- the person is 16 years of age or more and is resident in New South Wales
- the person has a disability that affects their decision making
- there is a current need for someone to be given legal authority to make personal decisions for them



NCAT can appoint a family member or friend as a private guardian or, if it is not possible or appropriate to appoint a private guardian, it can appoint the Public Guardian.

For more information about the Public Guardian, visit the Public Guardian website

<https://www.tag.nsw.gov.au/public-guardian>

NCAT can appoint a single guardian, joint guardians and substitute guardians.

Guardianship orders are time limited. Initial orders can be made for a period of up to one year although, in certain limited circumstances, a three year order may be possible.

For further information please refer to the fact sheets *Guardianship Hearings* and *Guardianship Orders – what happens after the hearing?*

Review a guardianship order

NCAT has a statutory obligation to review a guardianship order when the term of the order expires. The only exception is when NCAT decides that it is in the person's best interests for the order not to be reviewed. If this is the case NCAT will state in the order that it will not be reviewed. This usually occurs when the order is required for specific decisions that, once made, will end the need for guardianship.

When NCAT reviews a guardianship order it can renew the order in the same terms, renew and vary the terms of the order or end guardianship by letting the order lapse.

Request a review of a guardianship order

Anyone with a genuine concern for the welfare of a person under guardianship can request that a guardianship order be reviewed by NCAT.

NCAT can review a guardianship order on request if the order is not working in the interests of the person or it is thought that there is no longer a need for guardianship.

For further information please refer to the fact sheet *Review of guardianship orders*.

Review an enduring guardian appointment

Under Part 2 of the *Guardianship Act 1987* an adult who has decision making capacity can appoint another adult as their enduring guardian to make

lifestyle decisions for them should they lose their capacity in the future.

Part 2 also gives NCAT jurisdiction to review enduring guardianship appointments. Anyone with a genuine concern for the welfare of a person who has appointed an enduring guardian can apply to NCAT for a review of the appointment.

NCAT can revoke or confirm the appointment or change the functions given to the enduring guardian. It can also make a guardianship order, which operates to suspend the enduring guardian appointment.

For more information about appointing an enduring guardian visit the Legal Aid NSW website <https://www.legalaid.nsw.gov.au/my-problem-is-about/planning-ahead>.

Financial management

Appoint a financial manager

NCAT can appoint a financial manager to make financial decisions on behalf of a person who is not capable of managing their affairs.

A financial manager can make decisions about any aspect of a person's financial affairs unless NCAT specifies that a part of a person's estate is excluded from management.

To make a financial management order NCAT must be satisfied that:

- the person has assets in New South Wales
- the person is not capable of managing his or her own affairs
- there is a need for another person to manage those affairs
- it is in the person's best interests for an order to be made.

NCAT can appoint a family member or friend as a private financial manager. If it is not possible or appropriate to appoint a private financial manager, it can appoint the NSW Trustee and Guardian.

Private financial managers are subject to the directions and authority of the NSW Trustee and Guardian. For further information visit the NSW Trustee and Guardian website

www.tag.nsw.gov.au.



Review a financial management order

Unlike guardianship orders, most financial management orders made by NCAT operate indefinitely. In some circumstances the Tribunal may decide to review a financial management order after a specified period of time. If this is the case, the review period will be stated in the order and a further hearing will be conducted to determine whether the financial management order should continue.

Interim financial management order

If NCAT makes no findings about a person's capability to manage their affairs, it may make an interim financial management order pending further consideration of the person's capability.

Interim financial management orders can only be made for a period of up to six months.

For more information refer to the fact sheets *Financial management hearings* and *Financial management – What happens after the hearing?*

Request a review or revocation of a financial management order

Anyone with a genuine concern for the welfare of a person who is the subject of a financial management order can apply for a review or revocation of the order.

A review can be sought to replace the manager or to include or exclude a part of the person's estate from management.

NCAT can only revoke a financial management order only if it is satisfied that:

- the person has regained the capacity to manage their own affairs
- it is in the person's best interests for the order to be revoked.

For more information refer to the fact sheet *Review or revoke financial management orders*.

Medical and dental consent

Medical and dental practitioners have a legal and professional responsibility to obtain consent before they treat a patient. The patient usually provides this consent themselves. If they are not capable of understanding the proposed treatment, depending

on the nature of the treatment, the practitioner may need to seek consent from a substitute decision maker depending on the nature of the treatment.

In most cases, a person responsible will be able to consent on behalf of a person with a disability. The *Guardianship Act 1987* provides a hierarchy of people from whom a doctor should identify a person responsible. If there is no person responsible or they cannot be located or decline to act, the treating practitioner can seek consent from the Tribunal.

The Guardianship Division's fact sheet *Person Responsible* explains the person responsible hierarchy as well as the categories of treatment set out in the *Guardianship Act 1987* and the consent requirements for each of them.

Review of enduring powers of attorney

Under the *Powers of Attorney Act 2003*, NCAT can review an enduring power of attorney. NCAT can review the making of or the operation and effect of an enduring power of attorney. NCAT can also review a revocation of an enduring power of attorney.

NCAT cannot review a non-enduring power of attorney.

For further information please refer to the fact sheet *Review of an enduring power of attorney*.

Clinical trials

If a clinical trial is to include people who lack the capacity to provide consent to treatment, it must be approved by NCAT. This ensures that people with disabilities are not denied access to treatment that is only available through a clinical trial. It also ensures that people with disabilities only receive medical and dental treatment which will promote their health and well-being.

In clinical trial matters, NCAT also determines who should have consent authority for the individuals taking part. NCAT can confer this authority on the person responsible or exercise this function itself.

For more information please refer to the *Clinical trials* fact sheet.



Interstate recognition

NCAT can recognise appointments made under corresponding law by tribunals or courts in other Australian States and Territories and in New Zealand.

The person appointed in a substitute decision making role under corresponding law can apply to have their authority recognised in New South Wales. The recognition only has effect for the period of time specified in the recognition order.

NCAT may review its recognition when the recognition order expires.

Contact NCAT

1300 006 228 | www.ncat.nsw.gov.au

Interpreter Service (TIS) 13 14 50

National Relay Service for TTY users 13 36 77

NCAT Guardianship Division fact sheets and application forms can be accessed on the NCAT website.

For more information and assistance visit the NCAT website or contact NCAT's Guardianship Division on (02) 9556 7600 or 1300 006 228.