



## Guardianship Division Guideline August 2017

# Representation

### What does this Guideline explain?

1. This Guideline explains:
  - a) the general principles the Guardianship Division applies when a party asks for leave to be legally represented
  - b) the kinds of representation which are possible in the Guardianship Division
  - c) who may apply for leave to be represented
  - d) how does a party apply for leave to be represented
  - e) how does the Guardianship Division deal with requests for leave for representation
  - f) decisions to grant leave to a person to represent a party
  - g) what happens if the subject person is unable to give instructions to a legal practitioner
  - h) the role of a legal practitioner such as a McKenzie Friend/legal support person
  - i) the role of a legal practitioner before a hearing
  - j) when leave for legal representation may be revoked
  - k) what is the role of a separate representative.

### Definitions

2. Definitions that explain words or concepts used in this Guideline are at the back of the Guideline.

### What are the general principles for when a party asks for leave to be legally represented?

3. A party to proceedings in the Tribunal has the carriage of the party's own case and is not entitled to representation (section 45(1)(a) of the Act).
4. A party may only be represented by another person if the Tribunal grants leave for the person to represent the party (section 45(1)(b)(i) of the Act) or in the case of representation by an Australian legal practitioner – for a particular or any legal Australian legal practitioner to represent the party (section 45(1)(b)(ii) of the Act).
5. When cases are heard in the Guardianship Division, the Tribunal exercises a protective jurisdiction in relation to people with decision making disabilities. When exercising any of its functions under the Act or the *Guardianship Act*, it must have regard to the principles set out in section 4 of the *Guardianship Act* including the requirement to give paramount consideration to the welfare and interests of persons who have disabilities.

6. Applications for leave to represent a party are not frequently made and in the majority of proceedings before the Guardianship Division the parties are not represented.
7. The aim of the Guardianship Division's procedures is to make its legal processes accessible for people with disabilities and their families. The role of a legal practitioner or a non-legal representative, such as a family member, friend or advocate, during a Guardianship Division hearing should be considered in this context.
8. The Guardianship Division also seeks to ensure that other people who are not parties, including family members and witnesses, can understand and participate in hearings. Guardianship Division members will usually identify key issues and explore them with participants at the hearing, rather than expecting parties to present and argue a case..

## What kinds of representation are possible in Guardianship Division proceedings?

### Legal Practitioners

9. Legal practitioners may represent or assist a party in Guardianship Division proceedings in several ways:
  - General legal advisor – A legal practitioner may provide advice and assistance to a party without appearing at a hearing. They may, for example, assist a party in pre-hearing discussions with other parties, or assist a party in preparing documents and gathering evidence
  - McKenzie Friend<sup>1</sup> – A legal practitioner may attend the hearing as a party's McKenzie Friend by providing support but not representation. Practitioners do not need to seek the leave of the Tribunal to attend as a McKenzie Friend
  - Legal Representative – An Australian legal practitioner may attend the hearing as a party's legal representative and act on their instructions. The leave of the Tribunal is required for a party to be represented by an Australian legal practitioner (section 45(1)(b)(ii) of the Act)
  - Separate Representative – A legal practitioner may act as the separate representative of a party. If the Tribunal orders that the subject person is to be separately represented, then the separate representative appears at the hearing to make submissions about the "best interests" of the subject person (see section 4 of the *Guardianship Act*). Only the Tribunal may order that a party is separately represented (section 45(4)(c) of the Act)
10. Legal practitioners may also be involved in proceedings as a:
  - Party – A legal practitioner may be a party to proceedings either because they are an applicant or another from of party, for example, if they are an attorney pursuant to a power of attorney, or
  - Witness – A legal practitioner may be called as a witness to give evidence. For example, evidence may be required about the circumstances surrounding the making

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<sup>1</sup> The role of a McKenzie Friend was established in *McKenzie v McKenzie* [1971] P 33.

of an enduring power of attorney where the legal practitioner has prepared and witnessed the document and the validity of the document is in question.

### **Non legal representatives**

11. A party may be represented by someone who is not an Australian legal practitioner in the following ways:
  - Guardian ad litem (section 45(4)(a) of the Act)
  - A person who is not a legal representative, for example a family member, a friend or an advocate. The leave of the Tribunal is required for a non-legal representative to represent a party (sections 45(1)(b)(i) and (4)(b) of the Act).

### **Who may apply for leave to be represented?**

12. Either the party seeking representation or the person who wishes to represent a party may apply for leave to represent the party (rule 31(1) of the Rules).

### **How does a party apply for leave to represent a party or to be represented?**

13. An application by a party for leave to represent a party to proceedings or to be legally represented by any Australian legal practitioner may be made orally or in writing at any stage of the proceedings (rule 31(1) of the Rules).
14. However, to reduce the likelihood of delay of the proceedings and in order to be fair to all parties, it is preferable for applications for leave to be made by way of a letter to the Divisional Registrar of the Guardianship Division that includes the following:
  - The name of the person who is the subject of the proceedings and his or her client number
  - The name of the party the proposed representative is seeking leave to represent
  - Whether the party is seeking leave to be represented by any Australian legal practitioner in the proceedings before the Tribunal
  - The grounds for the application for leave to represent the party
15. It is also preferable that the proposed representative or the party seeking leave to be represented lodge their application together with any supporting documents at the Guardianship Division as early as possible before the hearing date and no later than five working days before the hearing date, unless special circumstances apply.

### **How does the Guardianship Division deal with requests for leave for legal representation?**

16. Hearings to determine interlocutory applications, including applications for leave to represent a party or to be legally represented, are normally listed before a single member of the Guardianship Division. The majority of such applications are conducted by telephone conference.
17. Late applications – if the application is received less than five working days before the scheduled hearing date, then it will most likely be dealt with by the Tribunal at the beginning of the hearing.

18. The Tribunal has broad discretion to decide whether to grant an application for a person to represent a party or for legal representation generally. The Guardianship Division takes into account the principles in section 4 of the Guardianship Act when making a decision about such an application.
19. Some considerations that may be relevant to the Guardianship Division's determination to grant leave are:
  - Whether representation will promote the principles in section 4 of the *Guardianship Act*, in particular the paramount consideration: the interests of the subject person
  - The guiding principle set out in section 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 unfair if one party is represented but another 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
20. The above list is not exhaustive and the Guardianship Division may take into account any other factors which are relevant in the particular circumstances of the subject person.

### **Determining applications for leave by a non-legal representative**

21. The matters set out in paragraphs 16 to 20 above apply to an application made by a non-legal representative to represent a party.
22. In addition, when dealing with an application for leave to represent a party from a person who is not an Australian legal practitioner, the Tribunal is required to have regard to such of the following circumstances as it considers are relevant to the proceedings:
  - Whether the proposed representative has sufficient knowledge of the issues in dispute to enable him or her to represent the party effectively
  - Whether the proposed representative has the ability to deal fairly and honestly with the Tribunal and other people involved in the proceedings
  - Whether the proposed representative is vested with sufficient authority to bind the party, and
  - Any other circumstances that the Tribunal considers relevant (rule 32(1) of the Rules.

## Decisions to grant leave to a person to represent a party

23. In making an order granting leave to a person to represent a party to proceedings, the Tribunal may impose such conditions in relation to representation as the Tribunal thinks fit (rule 31(2) of the Rules).
24. The Tribunal may, as a condition of an order granting leave to a person (including an Australian legal practitioner) to represent a party to proceedings, require the person to disclose the estimated cost of representation by the person (rule 33 of the Rules).
25. A party, or a party's representative, who intends to seek a costs order should refer to *Guardianship Division Guideline Costs in the Guardianship Division* for more information before making an application.
26. An Australian legal practitioner or other person who is representing a party in proceedings is under a duty to co-operate with the Tribunal to give effect to the guiding principle to facilitate the just, quick and cheap resolution of the real issues in the proceedings and, for that purpose, is under a duty to participate in the processes of the Tribunal and comply with directions and orders of the Tribunal (sections 36(1) and (3) of the Act).
27. The Tribunal may refuse to grant leave to a particular legal practitioner to be the representative in circumstances where the legal practitioner is a possible witness in the proceedings or seeks to represent more than one party to the proceedings.
28. A legal practitioner cannot represent a party in proceedings in which the legal practitioner will also be a material witness. This may arise, for example, where a legal practitioner has witnessed the execution of an enduring power of attorney and the issue in dispute is whether the principal had the requisite capacity to execute that document. Legal practitioners are prohibited from acting where they are or may be a witness in proceedings.
29. In the Guardianship Division, parties to proceedings often have a close family or personal relationship to the subject person. They may perceive that they share a common interest with the subject person and believe there is no difficulty in instructing a legal practitioner to represent both themselves and the subject person in Tribunal proceedings. However, it is generally not appropriate for a legal practitioner to represent both the subject person and other parties in such proceedings due to the potential conflict of interest in either the current Tribunal proceedings or related matters.

### **What if the subject person is unable to give instructions to a legal practitioner?**

30. If the subject person is unable to give instructions to a legal practitioner the Tribunal may appoint a separate representative instead of granting leave for a particular legal practitioner or for any legal practitioner to represent the subject person (section 45(4)(c) of the Act).
31. Practitioners are referred to the Law Society of New South Wales publication, 'When a client's capacity is in doubt' (March 2009).

### **What is the role of a legal practitioner as a McKenzie Friend/legal support person?**

32. A legal practitioner may attend the hearing with their client and act as their McKenzie Friend. In this role, a legal practitioner can support their client during the hearing by making notes, helping their client to organise their papers or giving advice or prompts during the hearing.

However, the legal practitioner does not have a right to participate in the proceedings as an advocate.

## What is the role of a legal practitioner before a hearing?

33. Before a hearing, a legal practitioner should:
  - a) Establish contact with the Tribunal officer handling the case in which they are involved.
  - b) Practitioners are expected to act in a professional, courteous and non-adversarial manner when dealing with Tribunal staff.
34. Legal representatives may be required to ensure the distribution to other parties of documents submitted to the Tribunal.
35. If the legal practitioner's view is that the matter should be heard as a matter of urgency or if the legal practitioner has other information relevant to the listing of the matter, this should be discussed with the Tribunal officer.
36. Legal representatives should conduct themselves at the hearing in a way which is appropriate and sensitive to the special requirements of the protective jurisdiction of the Tribunal. An adversarial approach is generally not appropriate in proceedings which focus on people with disabilities.
37. During a hearing, a legal representative should:
  - Address the Tribunal members as “Tribunal Member” or “Ms/Mrs/Mr Smith” or “Dr Smith”
  - Be conscious of the needs and level of understanding of a person with a disability who may be present at the hearing
  - Assist in resolving the issues in dispute between the parties if appropriate, and
  - Conduct themselves in a respectful manner.
38. The Tribunal has a statutory obligation under the *Guardianship Act* to seek and consider the views of the subject person and may often wish to speak directly with them rather than have those views summarised by the person’s legal representative. In some circumstances, the Tribunal may speak with the subject person in the absence of other parties and witnesses.

## Revocation of orders granting leave for a person to represent a party

39. The Tribunal may at its discretion revoke any leave that it has granted (section 45(3)(b) of the Act).
40. The Tribunal may only revoke leave granted to a person to represent a party if the Tribunal is satisfied that:
  - the party no longer consents to the person representing the party
  - the person applied for leave to represent the party without the consent of the party
  - the person does not have sufficient knowledge of the issues in dispute to enable him/her to represent the party effectively or is unable to deal fairly and honestly with the Tribunal and other persons involved in the proceedings

- the party is, or has become, incapable of instructing the representative, or
- any other grounds are present that the Tribunal considers sufficient to justify the revocation (rule 32(2) of the Rules).

## Separate representation

### Appointment of a separate representative for a party

41. The Tribunal may order that a party be separately represented (section 45(4)(c) of the Act).

### Appointment of a separate representative for the subject person

42. The Tribunal has a broad discretion to decide whether a subject person should be separately represented. The section 4 principles of the *Guardianship Act* guide the Tribunal's decision to order that a party be separately represented.

43. The Tribunal may decide to appoint a separate representative for the subject person if:

- There is a serious doubt about the subject person's capacity to give legal instructions but there is a clear need for the person's interests to be independently represented at the Tribunal hearing or they wish to be represented
- There is an intense level of conflict between the parties about what is in the best interests of the subject person
- The subject person is vulnerable to or has been subject to duress or intimidation by others involved in the proceedings
- There are serious allegations about exploitation, neglect or abuse of the subject person
- Other parties to the proceeding have been granted leave to be legally represented
- The proceedings involve serious and /or complex issues likely to have a profound impact on the interests and welfare of the person with a disability, such as end of life decision-making or proposed sterilisation treatment.

44. The Tribunal's order for separate representation does not guarantee eligibility for legal aid (section 45(5) of the Act). The provision of a separate representative will be determined by Legal Aid NSW in accordance with their policies.

### Role of a separate representative

45. The role of a separate representative is different from that of a solicitor acting on instructions. A separate representative is independent and does not act on the instruction of the person they represent.

46. A separate representative should seek out the views and opinions of the person with a disability wherever possible and present these to the Tribunal.

47. A separate representative may also canvass the views of others involved in the proceedings.

48. The role of a separate representative is to make submissions, based on all available information, as to the outcome that the separate representative believes would give paramount consideration to the welfare and interests of the subject person whilst also taking into account the other principles set out in section 4 of the *Guardianship Act*.

## What do some of the words in this Guideline mean?

- **Act:** *Civil and Administrative Tribunal Act 2013 (NSW)*
- **Guardianship Act:** *Guardianship Act 1987(NSW)*
- **Party or parties:** A person is a party to proceedings in the Guardianship Division if they are:
  - Identified as a party in section 3F of the *Guardianship Act*
  - Identified as a party in section 35(2) of the *Powers of Attorney Act 2003 (NSW)*
  - Identified as a party in rule 27 of the Rules
  - Joined by the Tribunal as a party under section 44 of the Act

For more information refer to the fact sheet - [Who is a party to proceedings in the Guardianship Division \[PDF, 88kB\]](#)

- **Registrar:** The Principal Registrar or any other person employed as a Registrar of the Tribunal
- **Rules:** Civil and Administrative Tribunal Rules 2014.

## This Guideline applies to:

Proceedings in the Guardianship Division of the Tribunal.

## Effective Date

1 August 2017

## Notes

You must use the latest version of this Guideline. The latest version of this Guideline is on the [NCAT website](#).

The law about the information in this Guideline is mainly in:

- Sections 45 of the *Civil and Administrative Tribunal Act 2013*
- Section 4 of the *Guardianship Act*, Rules 31, 32 and 33 of the Rules.

There is a copy of this Act on the [NSW Legislation website](#).

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