Decision Making Policy

**AIM:**

The aim of this policy is to provide a framework for appropriate decision making for financially managed persons under the [NSW Trustee and Guardian Act 2009](https://www.law.nsw.gov.au/nswlegislation/legislation/acts/2009/119/). The policy aims to reinforce the general principles under the Act. Decisions should be made considering the client's whole of life context rather than consideration of any single decision in isolation. The aim of this policy is that managed persons will be treated with respect and dignity and encouraged as much as possible towards self determination, with NSWTG providing a supportive and assistive role.

NSWTG has developed a Client Consultation Framework which is client centred and flexible and creates a framework for a consultative process that takes into account a person’s unique life experiences, circumstances and views. The needs and well being of the individual will be considered in the context of the many factors which affect them including family, culture, employment, support structures, health and medical, legal etc.

**POLICY:**

**Convention on the Rights of Persons with Disabilities and Supported Decision Making**

The [Convention on the Rights of Persons with Disabilities](https://www.un.org/development/desa/policy/water/factsheets/2018/Crpd_english.html) was adopted on 13 December 2006 and ratified by Australia in 2008. The purpose of the present Convention is to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity. The Convention is intended as a human rights instrument with an explicit, social development dimension. It adopts a broad categorisation of persons with disabilities and reaffirms that all persons with all types of disabilities must enjoy all human rights and fundamental freedoms. It clarifies and qualifies how all categories of rights apply to persons with disabilities and identifies areas where adaptations have to be made for persons with disabilities to effectively exercise their rights and areas where their rights have been violated, and where protection of rights must be reinforced.

Article 12 of the CRPD necessitates that guardianship and administration systems should be replaced by systems of alternatives, including, in particular, methods of supported decision-making. While in the financial administration system an adult’s legal capacity is restricted or denied, supported decision-making means that the person retains full legal capacity. In the current system an adult’s decision-making is substituted: it is the financial manager who makes decisions on behalf of the adult with disabilities and in his or her ‘best interests’. Supported decision-making means that the adult himself/herself makes the decision. Instead of making decisions in the name of the adult, supporters assist the person to reach and communicate his/her own decisions.

As the principle of full legal capacity is established by Art.12, States Parties are required to develop a comprehensive system of supported decision-making and safeguards for
all people with disabilities in law and in practice. These systems and the legislative changes required will take time to develop and the current systems of financial management and supported decision-making will therefore exist in parallel during the period of time until the transition is completed.

In the meantime, supported and substitute-decision-making should be seen as a continuum with the decision-making that best reflects usual decision-making processes in our society at one end and fully substituted decision-making at the other. Along the continuum, various models can be identified. With supported decision-making, the presumption is always in favour of the person with a disability who will be affected by the decision. The individual is the decision maker. Even when an individual with a disability requires total support, the support person should enable the individual to exercise his/her legal capacity to the greatest extent possible, according to the wishes of the individual.

This distinguishes supported decision-making from substituted financial decision-making, where NSWTG has the legal power to make decisions on behalf of the individual, with consultation with the individual and in the individual’s best interest, however the decision may not necessarily be according to his/her wishes.

**GENERAL PRINCIPLES**

People subject to a Financial Management Order have a cognitive impairment which impacts on their capacity to make decisions. There is a continuum of capacity for every client which can fluctuate over time. Capacity is ability and comes in degrees. A person may have the capacity to make decisions in some circumstances or about some matters but not others.

When making decisions, consideration is to be given to the following principles under s.39 of the *NSW Trustee and Guardian Act 2009*:

- The welfare and interests of such persons should be given paramount consideration,
- The freedom of decision and freedom of action of such persons should be restricted as little as possible,
- Such persons should be encouraged, as far as possible, to live a normal life in the community,
- The views of such persons in relation to the exercise of those functions should be taken into consideration,
- The importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- Such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- Such persons should be protected from neglect, abuse and exploitation

In addition to these principles the following issues are also to be considered:

- The terms of the Order appointing NSWTG
- The client’s own views
Decision Making Policy

The client's immediate and long term needs
The financial resources available
Requests, plans and objectives of any Guardian appointed for the client
The client's current, previous and “hoped-for” lifestyle
The client's commitments or obligations to their family
Arrangements put in place by the client when they had the capacity to manage their own affairs
Views of the client’s family and the rights and views of probable beneficiaries after the client’s death
Any other factors deemed relevant

NATIONAL STANDARDS

The Australian Guardianship and Administration Council (AGAC) has an agreed set of standards nationally in relation to financial management. There are twelve (12) standards that apply. These include:

Providing financially managed persons with information
Advocating as necessary for financially managed persons
Seeking views and involvement from financially managed persons
Protecting the assets of financially managed persons
Making financial decisions with financially managed persons
Investing money appropriately for financially managed persons
Making appropriate payments to and on behalf of financially managed persons
Keeping appropriate records
Respecting privacy and confidentiality for and of financially managed persons
Protecting and respecting the legal rights of financially managed persons
Acting professionally towards financially managed persons
Acting within the boundaries of FMO’s and review situations of financially managed persons

CLIENT CONSULTATION FRAMEWORK

The NSWTG will be adopting a Client Consultation Framework (CCF) as the basis for investigation and decision making on behalf of financially managed persons. This tool reflects the philosophy of the UNCRPD and the need to move over time on the decision making continuum to supported decision making. It recognises and puts into practice the philosophy that every represented person is an individual and decisions must be contextual and relevant to the whole person and reflect their life choices and wishes.
The CCF provides a framework for building an individual client profile for each client to inform proactive decision making and assist with appropriate relationship management.

**Client / Stakeholder Involvement**

Wherever possible, Client Service Officers are to work with the client, their family, friends and service providers to bring the client to an understanding of the decision that is to be made and assist them in making the decision. NSWTG’s role in these situations is to ensure the facilitation of the decision making and, where necessary, formally approve the decision and its implementation. This requires solid work with the client and their support people and services, the provision of information in a format which meets the needs of the client to facilitate their understanding and within a timeframe which is responsive to the issues at hand.

**Client Self Management (s.71)**

NSWTG may authorise clients to deal with all or part of their estate themselves.. Clients can be given authority to manage as much of their estate as it is deemed they will be able to cope with, with the support and assistance of NSWTG and any support services in place.

See [Facts Sheet 18 – What is a Section 71?](#)

**Confidentiality and Privacy**

Staff are to respect the need for privacy and confidentiality when discussing a client’s financial affairs with other people in their lives. Seeking the client’s consent where possible in regard to parties being consulted is critical. It is also important that staff understand the vulnerability of many clients. Revealing specific financial information to some people in a client’s life may place the client at increased risk of exploitation.

See [Fact Sheet 15 – Privacy](#).

**SUBSTITUTE DECISION MAKING**

Where it is not possible to obtain input from a client and they have no identified support persons to assist them, decisions should be made using a substituted judgement model or, if not possible, the best interest model. The principle of substituted judgement looks to the person’s prior expressed wishes, past behaviours and actions that are relevant to the decision being made. Substituted judgement allows for the individual preferences of clients, even to the extent that some may be regarded as idiosyncratic, eccentric or ‘risky’. Substituted judgement is closely linked with the least restrictive alternative principle, in that staff will support clients in their decisions as far as possible and not superimpose their own ideas or values on any decision.

See [Fact Sheet 2 – What are Substitute Decisions?](#)

**Best Interests**

The best interests’ model of substitute decision making is based upon an incapacity to involve the client in decision making and a lack of access to information about how a person had previously made similar types of decisions. It involves taking into account
those matters which a reasonable person would consider in making such a decision. The best interests’ model should be recognised an inherently divergent to the philosophy of the UNCRPD and should not be used as a justification to unreasonably interfere with the freedom of action for financially managed persons.

**Potential for Bias**

Staff cannot make substitute decisions that favour any activity that is illegal or threatens the well being of the client. Decisions that have some “moral” aspect will mean that staff need to be aware of their own prejudices and biases.

**Specialists**

Many decisions being made by NSWTG require specialist input. This can be provided by internal specialist qualified staff or by externally engaged specialists. Where specialist input has been obtained this will be included in the reasons for the decision being made.

**RECORD KEEPING**

Staff will create a record detailing any communication with a client/stakeholder and all information and decisions about a client. This information provides assistance in appropriate decision making. It also assists in building up a picture of client needs, expectations and lifestyle to afford better financial management.

**REASONS FOR DECISION**

Reasons for significant decisions will be communicated in writing. Significant decisions include:

- Real property – sales, purchases and leasing decisions
- Change in status of an asset – selling shares, collecting bank accounts
- Matters involving a degree of conflict or dispute or which are known to be of high concern to a client or support person
- Matters involving expenditure exceeding $10,000 and / or more than 20% of the client’s trust account (where the trust account has more than $10,000)
- Matters requiring approval from someone with higher authority than the allocated officer

The reasons for the decision will include reference to all parties that provided input and advice, both internal and external to the NSWTG, an overview of the decision to be made, the client’s current financial situation and a broad outline for the alternative chosen.

**RIGHTS OF REVIEW**

Most decisions made on behalf of financially managed persons are reviewable under the provisions of the *Administrative Decisions Tribunal Act 1997*. Written communication informing Clients/Stakeholders of significant decisions will also inform them of their options to have a decision reviewed.

See [Fact Sheet 5 Review of Decisions](#).
Internal Reviews of Decision

Where a request is made for an Internal Review of Decision, the decision is reviewed by a different staff member to the original decision-maker.

See Internal Review of Decision Policy.

Administrative Decisions Tribunal

After the Internal Review of Decision, any client / stakeholder still not satisfied with a decision, can make an application to have the decision reviewed by the Administrative Decisions Tribunal.

Please refer to Internal Review of Decision Policy.

APPLIES TO:

This policy applies to all employees of NSWTG involved in information gathering and decision making on behalf of directly managed persons.

This policy does not apply to Private Managers. However the principles contained in this policy are also applicable to Private Managers and those expectations are defined through the Directions and Authorities process of the Private Management Branch.

CONTEXT:

Financial substitute decision making on behalf of managed persons is the core responsibility of NSW Trustee and Guardian. It is important that such decision making is based on sound financial management practice, is transparent and occurs within the legislative framework and agreed service standards. It is also critical that clients and significant others (where possible with the consent of the client) are informed of, and involved in the decision making process and their review rights.

RISKS/BENEFITS:

The risks associated with non compliance with this policy include:

- The health and / or welfare of managed persons are compromised
- Financial loss for clients due to mismanagement
- Lack of dignity and respect for clients
- Statements of claim made against NSWTG
- Adverse findings by a court or tribunal about decisions made
- Damage to the credibility of NSWTG
- Adverse publicity

The benefits associated with compliance with this policy include:

- Client needs are identified and addressed
• Clients are supported and encouraged toward self determination as much as possible
• Clients are treated with dignity and respect
• Client estates are secured, protected and appropriately managed
• Effective working relationships are maintained with clients and stakeholders

For Public Release

Definitions

Client means a person subject to a Financial Management Order under direct financial management of NSWTG
DAS means the Disability Advisory Service of NSWTG
FMO means a Financial Management Order
NSWTG means NSW Trustee and Guardian

References

Refer to:

Internal Review of Decision Policy
NSW Trustee and Guardian Act 2009
Administrative Decisions Tribunal Act 1997
Convention on the Rights of Persons with Disabilities

Document Information

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