

MODULE 4.2

Understanding Elder Abuse

LEGAL RESPONSES
TO CAPACITY ISSUES
AND ELDER ABUSE



Working with Older Tenants

A TOOL KIT FOR THE NSW COMMUNITY HOUSING INDUSTRY ASSOCIATION

Legal responses to capacity issues and elder abuse

Elder abuse is extremely prevalent in society – approximately 1 in 5 elders. This can be in various forms such as physical abuse, neglect, or financial exploitation. However, unlike other forms of abuse, it does not often receive the attention it needs.

Social Housing providers are often in a unique position to detect elder abuse before it becomes apparent to other people. Relatively innocuous things – from a tenant unexpectedly missing rent or bill payments to not keeping the property in good repair – can often appear relatively innocuous but may in fact be symptoms of far more serious things. However, knowing what you can do about it within a legal context is often far more difficult.

This section of the toolkit aims to provide useful information for social housing providers who suspect that one of their older tenants is experiencing issues in one of more these areas:

- Cognitive decline
- Financial management problems
- Financial Abuse
- Physical Abuse

THIS SECTION WILL PROVIDE INFORMATION ON HOW TO:

1. Identify common risk factors involved in elder abuse;
2. Be pro-active in identifying and understanding what those risk factors look like in practical situations;
3. Implement strategies to mitigate those risks;
4. Respond to common scenarios you might encounter in the course of the provision of services; and, most importantly,
5. Help keep older persons aging in their own homes for as long as possible.

Capacity

This is a section by itself, because assessing and understanding what is meant by capacity differs depending on each context in which the term is used.

On the one hand, a person may have ‘capacity’ in a day-to-day sense: they can look after themselves, wash their clothes and prepare meals. On the other, a person who can do all of those things may nevertheless have no sound understanding of their financial resources and liabilities.

To complicate matters even further, even if somebody can do all of those things, they may still nevertheless be incapable of understanding a legal document like a contract or a lease agreement.

Given this, it is not surprising that capacity is a term that, when used in legal sense, is bound to result in confusion – even amongst experienced lawyers.

NOT ALL TASKS ARE THE SAME

One important thing to remember is that not all tasks are equal. A person may still be suffering from some form of incapacity even though they are able to cope in some other area of life.

It is not uncommon to find an older person able to cope with paying rent and bills who nevertheless cannot make major financial decisions or is at risk of being taken advantage of financially. The same person may also fail to seek medical treatment when it is clearly necessary or engage in behaviours which jeopardise their tenancy and quality of life.

Presumptions

In law, there is usually a presumption that people have capacity. A legal presumption means that unless there is evidence to the contrary, then a certain state of affairs or facts can be assumed to be true.

In order to show that someone does not have capacity, it is therefore necessary to get evidence that this is not the case – to ‘rebut’ the presumption. For older people, usually this takes the form of an expert medical report from a Geriatrician or another doctor who is familiar with the person.

However, there are certain medical conditions which mean that this presumption does not exist, or that the opposite presumption applies. Examples are numerous, but people with advanced dementia, Alzheimer’s and other conditions which directly affect their ability to manage their day to day lives are generally presumed not to have capacity.

WHY IS LEGAL CAPACITY SO IMPORTANT?

A person’s ability to enter into contracts, commence legal proceedings and even seek legal advice by themselves by and large stops when they no longer have legal capacity. Without a competent, willing and above all trustworthy Guardian and Attorney available, this means that their ability to take control of their lives is severely limited.

Justice NSW has a comprehensive toolkit available for government workers and agencies who are interacting with clients or tenants in situations where capacity may be an issue. It is accessible online at https://www.justice.nsw.gov.au/diversityservices/Documents/capacity_toolkit0609.pdf

BEHAVIOURS WHICH ARE ASSOCIATED WITH A PERSON WHO HAS CAPACITY (BY COMPETENCY)

PERSONAL	FINANCIAL	LEGAL
Maintains Personal Hygiene	Has no trouble paying rent or bills	Understanding Contracts
Cooks for themselves	Saves money for a rainy day and shows reasonable evidence of planning for a exigencies	Understands the nature of planning documents (Wills, Power of Attorney etc).
Keeps a clean home – free from dirty clothes, mould outbreaks, pet detritus etc.	Knowing which financial institutions they have accounts in	Can make sound decisions in relation to legal matters – is able to weigh the pros and cons of litigation.
No evidence of hoarding useless things	Knowledge of where and what their assets are	Knowing who their beneficiaries are in a Will
Able to maintain friends, able to leave house and socialise		

Common terms & definitions (with explanations)

The Aged Care Assessment Team ('ACAT')

All persons receiving aged care assistance must go through this process. The team will assess the individual needs of the applicant and determine what level of assistance they need and what they are eligible for. It is a crucial tool in helping older persons stay in their homes longer, as well as freeing up places in Aged Care Facilities for people who really need it.

NSW Civil and Administrative Tribunal

The Court-like body that oversees much of the framework of the Guardianship and Financial Management legislation in New South Wales. Generally abbreviated as 'NCAT.'

Community Legal Centres ('CLCs')

Law firms which provide free legal advice and assistance. Statewide, there are generalist CLCs which provide advice to specific geographic areas, while there are also a list of contact details available in the resources section of this toolkit.

Principal

The person who appoints other people to act or make decisions on their behalf. When making an appointment, a solicitor will assess whether the Principal has legal capacity. If satisfied, the documents are drafted and 'executed' by the Principal. They take effect when they appointment is accepted by the appointee. People may grant one or both of the following powers:

Power of Attorney

An Attorney is a person who manages financial affairs. The Attorney may be appointed to act immediately in the event of the Principal being overseas and needing someone local to manage, for example, an investment property, or may only take effect under certain circumstances – most commonly when the principal loses their financial capacity. An example of a Power of Attorney instrument can be found in the fact sheets section.

Enduring Guardian

Similar to an Attorney, but a Guardian is appointed either by the Principal or NCAT to make decisions about a person's life—where they'll live, what care they'll receive – if the Principal loses personal capacity to make those decisions or to look after themselves. A blank copy of an Appointment as Guardian can also be found through the NSW Trustee and Guardian's website: https://www.tag.nsw.gov.au/verve/_resources/Appointment_of_Enduring_Guardian_Form_March_2018.pdf

Financial Management Order

This operates similar to an appointment as an Attorney, but can only be made by NCAT. The terms of the financial management order can be very broad, but are often tailored to address specific concerns, like non-payment of rent.

Standing

Standing in a legal sense means a person who is able to bring a matter to the Court or tribunal. Usually the only people who are able to bring matters to Court are those acting on their own behalf—a person to whom money is owed, or a person who wishes to sue another for breach of contract are obvious examples.

In the context of the Guardianship division, section 9 and section 25I of the Act provides that the following persons may make an application about somebody in need of a guardian or financial manager:

- a. The person themselves;
- b. The public guardian and/or the NSW Trustee; and
- c. Any other person, who in the opinion of the tribunal, has a genuine concern for the welfare of the person.

Clearly, part C in particular is open to interpretation. For some practical guidance, see the case studies in Part V of this section.

Enduring Attorney or Guardian

Very much the same as an Attorney, except that the appointment often commences only when a person has lost capacity. Depending on the terms of the appointment, they may not have any power to handle the Principal's affairs until capacity is lost.

Reciprocal Agreement

All States and Territories of Australia now recognize a Power of Attorney/Enduring Guardian appointment made in another state, subject to the laws of the State.

Aged Care Facility

Aged care facilities come in 2 'levels' depending on the amount of support a person needs, with level '1' (formerly known as hostels) encouraging a high degree of self-care and independence, while level '2' involves a high degree of care and are designed for residents who are no longer generally capable of meeting the day to day tasks of life.

Practical Guidance

Q: The Tenancy is not proceeding smoothly. I think that there might be elder abuse occurring.

Once a Housing Provider has determined that elder abuse is, or is likely to be, present, appropriately responding to it can be very complex. On one hand, some things need to be taken care of immediately – but caution should be taken not to simply put a band-aid on a much larger problem. As a general rule there are a few questions which should be considered when determining what the best course of action is.

Here we will address some of the initial questions you might ask yourself when faced with a possible elder abuse or diminished capacity scenario.

1. IS THE PERSON IN DANGER?

It might seem obvious, but if anybody is concerned about the physical wellbeing of a person due to the violence of another, the best option is to call the police. Unfortunately, sometimes the police can be reluctant to intervene in matters involving elder abuse - primarily due to the potential complexity of the family dynamics involved, lack of specific training and the pervasive view that it is 'just a family matter.' It is often a good idea to ask to speak to the Domestic Violence Liaison Officer or the Vulnerable Persons Officer which are specialist police operating out of each local area command.

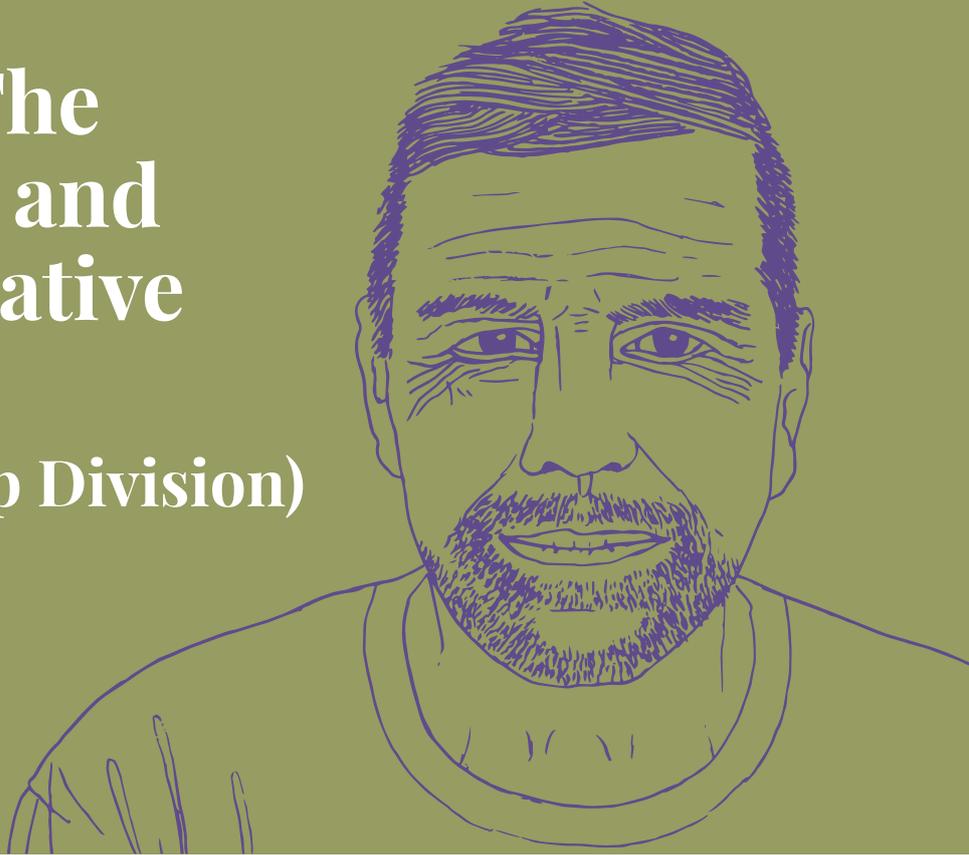
2. WHO IS THE ABUSER?

Elder abuse, like many forms of violence, is most often perpetrated by those persons closest to the victim. Elder abuse however often takes on a much more sinister role whereby the abuser will try to become the person's Power of Attorney and/or Enduring Guardian—thereby giving them incredible amounts of control over their victim.

3. HOW URGENT IS IT?

Is the person at immediate risk of eviction or facing homelessness? Government health systems are considerably stretched, resulting in wait times for services which might exacerbate issues a tenant is experiencing. In severe cases, there may be a complete loss of the older person's legal or financial options, if action is not taken promptly. If this is the case, such as where eviction proceedings are being considered, the older tenant will need immediate legal advice.

Going to The NSW Civil and Administrative Tribunal (Guardianship Division)



Overview of the Tribunal

Whether or not there is abuse of an older person present, it may still be necessary to assist the tenant if there are significant doubts about a person's ability to manage their own affairs.

An 'interested person' can apply to the NSW Civil and Administrative Tribunal for orders appointing a Guardian and Financial Manager to make decisions about their life and finances where it becomes apparent that somebody is in need of financial management and guardianship.

No doubt as a housing provider you are familiar with NCAT to some extent. However, you might not know who can apply for orders to assist an older person where they cannot manage their own affairs. Under Sections 9 and 25B of the Guardianship Act 1987, any person who has a genuine concern for the welfare of a person may make an application for the appointment of a Guardian or for a review of an existing appointment or existing orders.

Crucially, the applicant for orders to appoint a guardian and financial manager is not necessarily the same person who is appointed to manage the person's affairs. It is virtually impossible that NCAT would appoint a housing provider as financial manager, as to do so would involve a direct conflict of interest. Accordingly, Housing Providers need not worry that they will be required to manage the financial affairs of a tenant.

Where there is no one 'suitable'¹ available to assist the tenant by becoming their financial manager or Guardian (usually a spouse, family member, friend etc), the Tribunal will appoint the public trustee or public guardian respectively.

It is likely to be rare in practice that a Housing Service Provider will be an applicant for guardianship or financial management orders – however, this may well change in future. Where a Housing Provider has been an applicant in the past, the results were indeed some of the most promising as the issues regarding the tenant were detected comparatively early, with swift and decisive action following from there (see Re IKT in the case studies).

¹ See s25M Guardianship Act. Suitable means, essentially, 'ready, willing and able.'

THE TRIBUNAL AS A JURISDICTION

The NSW Civil and Administrative Tribunal is designed to be as accessible as possible to people without a formal legal education. Unlike the Courts system, the usual rules of evidence do not apply as strictly – however, the person making the application still needs to show that there are sufficient grounds for getting the orders they are seeking.

TYPES OF APPLICATIONS

The Tribunal has broad powers to make orders affecting people's lives. As a housing provider, the most relevant orders for you will be:

1. Guardianship Orders
2. Financial Management Orders
3. Review of existing appointment of Powers of Attorney or Enduring Guardianship Orders

GUARDIANSHIP ORDERS

The power to make a guardianship order can only be exercised in circumstances where the tribunal is satisfied that 'the person is in need of a guardian'² because that person is, due to a disability, totally or partially incapable of managing his or her person.³

A disability is broadly defined under section 3 of the Act as a person³:

- a. Who is intellectually, physically, psychologically or sensorially disabled,
- b. Who is of advanced age,
- c. Who is a mentally ill person within the meaning of the Mental Health Act 2007, or
- d. Who is otherwise disabled.

Unlike the broad appointment of an Enduring Guardian made by a Principal while they still have capacity, it is common for the Guardianship division to restrict its orders to deal only with the issues specific to the matter. For example, a Tribunal may order that, on the appointment of the Public Trustee or another person, they are invested with the powers to determine where the person will live and what services (like Home Care Services) they receive but not what medical treatment they get.

The tribunal may also review, vary or revoke an appointment as Enduring Guardian made by another order or by the Principal when they had capacity. If revoking an appointment, it must appoint someone else to act as Guardian or the Public Trustee.

FINANCIAL MANAGEMENT ORDERS

Under Section 25G, the Tribunal may make a financial management order in respect of a person only if the Tribunal has considered the person's capability to manage his or her own affairs and is satisfied that:

- (a) the person is not capable of managing those affairs, and
- (b) there is a need for another person to manage those affairs on the person's behalf, and
- (c) it is in the person's best interests that the order be made.

These orders may be quite specific where a person is only experiencing issues in a few areas and is otherwise managing relatively well. However, where the person has little to no capacity they will tend to be broad, effectively limiting or removing the person's ability to access their own money. This is often very distressing for older persons in particular and these broad management orders are not made unless absolutely necessary.

Importantly, the orders made under this part of the Act may also provide for the sequestration of the person's Estate – and thus can be a critical tool in combatting financial abuse by essentially depriving the abuser of their ability to gain control over the older person's assets.

² Section 14 Guardianship Act 1987 (NSW)

³ Section 3(2) Guardianship Act 1982 (NSW)

FACTSHEETS

The Role of the Tribunal's Guardianship Division

https://www.ncat.nsw.gov.au/Documents/gd_factsheet_role_of_the_guardianship_division.pdf

Information for Applicants: Appointment of Financial Manager and/or Guardian

https://www.ncat.nsw.gov.au/Documents/gd_information_appointment_financial_manager_and_or_guardian.pdf

Applying for a Review of an Appointment of a Guardian

https://www.ncat.nsw.gov.au/Documents/gd_factsheet_review_enduring_guardianship.pdf

Applying for a Review of an Appointment of an Enduring Power of Attorney

https://www.ncat.nsw.gov.au/Documents/gd_factsheet_review_enduring_power_of_attorney.pdf

Capacity Factsheet

https://www.justice.nsw.gov.au/diversityservices/Documents/factsheet_english.pdf

NSW Justice Department's Capacity Toolkit

https://www.justice.nsw.gov.au/diversityservices/Documents/capacity_toolkit0609.pdf

APPLICATION FORMS

Application for Guardianship Orders

https://www.ncat.nsw.gov.au/Documents/gd_form_guardianship_application.pdf

Request to Review a Guardianship Order

https://www.ncat.nsw.gov.au/Documents/gd_form_request_review_guardianship_order.pdf

Review of an Enduring Power of Attorney

https://www.ncat.nsw.gov.au/Documents/gd_form_review_enduring_power_of_attorney.pdf

Financial Management Application

https://www.ncat.nsw.gov.au/Documents/gd_form_financial_management_application.pdf

Review of Financial Management Orders

https://www.ncat.nsw.gov.au/Documents/gd_form_review_revoke_financial_management_order.pdf

COMMUNITY LEGAL CENTRES

Community Legal Centres NSW is the peak representative body for almost 40 community legal centres in NSW. Community legal centres are independent non-government organisations that provide free legal services to people and communities at times when that help is needed most, and particularly to people facing economic hardship and discrimination.

You can find the directory of Community Legal Centres here www.clcnsw.org.au/directory

Responding to risks in practice

Some early warning signs and appropriate responses

SYMPTOM:

Tenant is Isolated or Withdrawn

It is not uncommon for older people to live quite solitary lives compared to others in the general community for a variety of reasons, and this alone is not necessarily a good indicator of elder abuse. It is however best to be on guard if a previously very social tenant—someone who had frequent visitors, engaged in social activities etc.—becomes withdrawn.

Whether or not abuse is occurring, isolation can easily make it more persistent or allow it to escalate. A frequent strategy employed by abusers—in particular, financial abusers—is to try to isolate the older person from friends, family and support networks as best as they can to avoid detection or scrutiny of their behaviour. In return, the older person often feels completely dependent on their abuser, leading to a situation which, without outside intervention, it can be extremely difficult to escape from.

RESPONSE

Does the older person have a next of kin listed in their personal details? It is usually a very good idea to get them involved from an early stage unless their next of kin is the abuser.

Risk management strategies include:

- Having the tenant regularly update their next of kin
- Providing the tenant with information about local recreational services and facilities

Legal and social support services like the Senior's Rights Service get a lot of calls from other older people who are concerned for their friend's wellbeing, which illustrates how important social networks are at detecting and combating elder abuse.

SYMPTOM:

Poor Financial Management Skills

People miss rent payments all the time. However, where a tenant has previously been meticulously prompt with rental payments and all of a sudden begins to miss those payments, it is very possible that there is something else happening.

Tenants who have had a significant and potentially sudden change in their cognitive abilities may simply find themselves unable to understand their financial obligations and manage their affairs, while those who are experiencing elder abuse may not be able to, whether because they can no longer afford it, somebody is controlling their money or they don't have the financial capacity to deal with it any longer.

RESPONSE

Responses differ depending on a variety of factors, but one of the first enquiries that should be made is whether or not the person has capacity.

- If they have lost capacity, it may be necessary to consider an application to the NSW Civil and Administrative Tribunal for the appointment or review of a financial manager.
- If you are sure that the tenant still has capacity and you suspect they are experiencing financial abuse, then they can be referred to a CLC.

SYMPTOM:**Physical violence**

Physical violence is not always easy to detect.

RESPONSES

- Call the police any time there is a reasonable apprehension of a risk to the tenant's safety. It is better to have the police attend and find nothing, than to fail to report domestic violence.

If the abuser is a family member, member of the household or a person in a close personal relationship with the older person, it is likely to be a domestic violence issue. You can refer to CHIA's Strengthening Practice in Responding to Family Violence Toolkit available at:

<http://nswfha.wpengine.com/information/resources/strengthening-practice-in-responding-to-domestic-and-family-violence>

- If the police cannot assist for whatever reason, a Community Legal Centre may be able to assist them to take out an Apprehended Personal or Domestic Violence Order. Make sure the tenant knows about those services available.

SYMPTOM:**Living in Squalor**

This is often a sign that a person is simply not coping with the pressures of independent living, or has possibly lost the capacity to care for themselves. Cognitive decline in particular can lead to all kinds of behaviours which without proper consideration, could simply be written off as laziness or being a bad tenant.

Signs of squalor can include:

- Compulsive collection of useless items
- Collection of animals/pets
- Unwashed dishes or clothes
- Broken appliances

More rarely however, these sorts of behaviours can also be a severe response to a particularly stressful episode in an older person's life such as the death of a loved one, being forced to relocate or suffering elder abuse.

RESPONSES

The appointment of a Guardian does not necessarily mean the tenant will have to move out.

- You could refer the tenant to ACAT for an assessment of their needs and their eligibility to receive home care services by following the link: <https://www.myagedcare.gov.au/referral-form>
- In some cases, it might be necessary to consider making an application to the tribunal for Guardianship orders. If there is nobody reasonably available to be appointed as Guardian, then the NSW Trustee and Guardian will be appointed. The Tribunal or a Guardian will issue directions throughout the matter to ensure the case progresses smoothly
- Refer the tenant to a support service

Some best practice tips

AT THE START OF A TENANCY

1. If you are not doing so already, let the tenant know about local clubs and facilities. Studies show a positive correlation between active engagement in social activities and increased cognitive ability as a person ages.
2. Ask the tenant if they have an Enduring Guardian or Enduring Power of Attorney in place and record who this is. This is a great time to ask the tenant for permission to contact these people if something begins to go wrong during the tenancy. Unfortunately, many tenants will not have these appointments in place.
3. You could even include Legal Aid's very helpful publications on Planning Ahead as part of the materials provided to a tenant at the start of a tenancy, which can be ordered through their website:

<http://lacextra.legalaid.nsw.gov.au/PublicationsResourcesService/PublicationImprints/Files/195.pdf>

4. If a new tenant has come to your service, or an existing tenant has relocated, because they were forced to leave a bad situation, new housing alone is no guarantee that the abuse has stopped. If you know, or have reason to believe, that the tenant has previously been a victim of abuse or violence, you can assist them best by empowering them to be their own advocate. Legal Aid's Violence and Abuse pamphlet is an easily readable resource available for free.

<http://lacextra.legalaid.nsw.gov.au/PublicationsResourcesService/PublicationImprints/Files/186.pdf>

DURING THE TENANCY

5. Update the Next of Kin information with the tenant at regular intervals.
6. Use the checklists to ask relevant questions to see how the tenant is travelling.
7. Make case notes notes of any significant behavioural changes you see. These observations could be crucial later on in a variety of ways.



CASE STUDY ONE

RE EBI (2017) NSWCATGD 6

Coercive Power of a Guardian

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATGD/2017/6.html>

FACTS OF THE CASE

Mr EBI was 72 and a tenant in social housing. He suffered from vascular dementia, an undisclosed mental illness and lung cancer. He had been admitted to hospital multiple times and had additionally been discharged from hospital into his own community housing unit. Unfortunately, his condition thereafter quickly deteriorated and he was admitted into a residential aged care facility; however, unhappy there, he quickly left having refused to pay fees.

The previous guardianship orders provided only that the Public Guardian have the function of deciding accommodation, health care, medical and dental consents. Given Mr EBI's severely limited capacity Vincent's Hospital sought to amend these orders to include a coercive function, as well as financial management orders.

THE OUTCOME

The tribunal briefly considered whether or not the Hospital, as a corporation, had standing (see definitions) to bring the application, as the Act refers to a concerned person. The Tribunal concluded that St Vincent's Hospital did, as a corporation is also a person under the Interpretation Act.

The next question was whether or not the hospital had a genuine concern for Mr EBI's welfare. Again, the tribunal found in favour of the hospital. Given the hospital's constitution, organizational aims and the nature of its service, it was consistent with the Act to find that the hospital and, by extension its employees, have a genuine concern for the welfare of Mr EBI.

Ultimately, due to his severe cognitive impairment, inability to make reasonable decisions about his health, welfare and safety, it was necessary to appoint the public guardian with the coercive powers to ensure that Mr EBI stayed in an aged care facility as he was at that point beyond treatment at home. A financial manager was additionally appointed to ensure the necessary fees were paid to prevent him from being discharged.

CASE STUDY TWO

RE IKT (2015) NSWCATGD 27

Financial Management

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/nsw/NSWCATGD/2015/27.html>

FACTS OF THE CASE

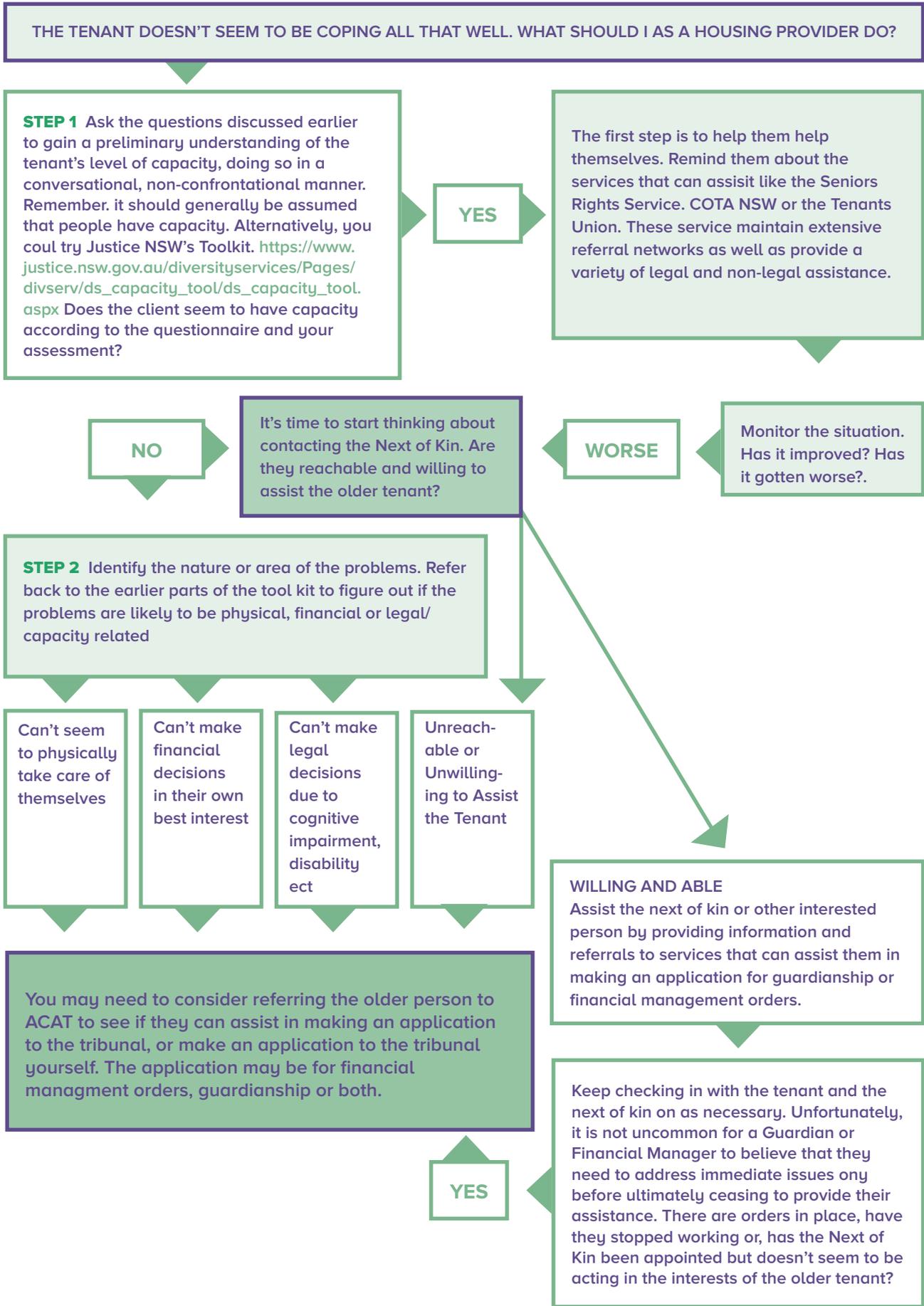
Ms IKT was a 50 year-old social housing tenant. While she managed to pay all of her electricity and internet bills, she was frequently behind on rent and her arrears were increasing week by week. After conducting a brief investigation, it became immediately apparent that the reason Ms IKT was falling behind on rent was that a substantial part of her income was being spent on illicit drugs and discretionary items. Ms HPT, a senior client services officer with Housing NSW, brought the application marking one of the few examples of a Housing provider being an applicant.

THE OUTCOME

The Tribunal did not find that Ms IKT was suffering from any form of legal or personal incapacity, but that she was unable to manage important aspects of her finances. Again, questions of standing were raised but it was found that the housing officer was a person with a genuine concern. Most importantly, the orders sought in this case were restricted to address only the issues which were evident – Ms HPT sought only the appointment of the NSW Trustee and Guardian as financial manager and a direction that the only changes to the usual course were to be the sequestration of part of Ms IKT's income so that her rent would be paid and she would not be evicted.

The tribunal declared that it was in Ms IKT's interests to appoint a financial manager indefinitely until such a time as she could satisfy it that she could adequately manage her own affairs. It therefore made orders that part of her income would be sequestered so that she could not waste it on drugs. The financial manager simply directed part of her income each fortnight to ensure rent was paid before the balance was returned to Ms IKT, effectively bringing to a close a lengthy saga of tribunal applications, abortive eviction proceedings and unnecessary stress for all parties.

FLOWCHART 1 (ASSUMES NO EPOA/ENDURING GUARDIAN EXITS)



FLOWCHART 2 (GOING TO THE TRIBUNAL)

GOING TO THE TRIBUNAL
 This assumes you have exhausted all the referrals available for substitute application (like a social worker) and it has become necessary to become the applicant yourself

