

Review of the Guardianship Act

Question Paper 2: Decision Making Models

Easy Read version

Should we have supported decision making in NSW?

At the moment in NSW, if someone can't make or communicate their own decisions, the court, or a group of people called a Tribunal, can choose someone to make decisions for them.

This means that they can no longer make their own decisions.

Some people think that people need support to make decisions, rather than having someone make decisions for them.

What do you think?

Here are some questions to think about.

Question 1: Should NSW law allow a supporter to be chosen to help people make their own decisions?

Some good things about supported decision making are:

- If someone finds making decisions difficult, having a supporter means they don't have to give up their right to make their own decision.
- There would be clear rules about how the supporter has to work with the person to help them make a decision.

Some possible bad things about supported decision making are:

- There might be too many rules and this might put people off supporting others.
- Supporters might go ahead and make a decision for someone, even though they are only supposed to be helping them make the decision.

What do you think?

You can use the space below to share your thoughts.

People over 18 are seen to have the capacity to make decisions for themselves unless they have an illness, accident or develop dementia where they are assessed to have lost capacity. There are however people who fall between these two situations and these people need some help and assistance to make the more difficult decisions. This person could be their nominated 'person responsible' or their substitute decision maker.

Question 2: Should the person be allowed to choose their supporter?

In some places, supported decision making is already part of the law.

In these places, people can choose the person who will support them.

This means they get to decide who their supporter is.

And they can also choose what kind of decisions they want support with.

What do you think?

Yes they should be able to choose the person or persons. This should happen for any decisions but particularly where they do not fully understand the possible outcomes and risk.

Question 3: Should a court or tribunal be able to choose the supporter?

There may be a time when someone is no longer able to make a decision about who their supporter should be.

But they might still be able to make other decisions with the help of the right supporter.

If this happens, it may be good for a court or tribunal to have the power to choose the supporter.

What do you think?

We have a system in NSW called the 'person responsible'. This person could be able to do this task unless there is evidence they are not suitable or there is a family dispute. When this occurs then the Guardianship Tribunal needs to become involved.

Question 4: Who can become a supporter?

In other parts of Australia, there are rules about who can become a supporter.

For example, in many places, the person should:

- be at least 18 years old
- know how to think about interests and views of the person they are supporting
- not have been convicted of a crime.

What rules do you think are important?

What do you think?

These rules are important and we would support all three.

It is particularly important that the supporter will act in the way the person would have wanted and in their best interests. It is really important that they do not make a decision based on their own ideas or needs.

Question 5: How many supporters do you think people should be able to choose?

Should people be able to choose as many supporters as they like, or should there be a limit?

What do you think?

There could be a number of supporters eg a person has six children and wants each involved. This would be fine so long as one person is the appointed or elected spokesperson.

Question 6: Should the Public Guardian or NSW Trustee be allowed to be supporters?

Sometimes, government agencies could act as supporters.

This includes the Public Guardian or the NSW Trustee.

Some people think that these agencies should not be supporters.

This might be because they might not understand what people want.

Other people say that agencies should be able to be a supporter where no one else is available to be a supporter.

What do you think?

The Public Guardian or the NSW Trustee should only be appointed if a person does not have a 'person responsible', or that person has lost capacity and /or there is a family dispute and cannot be resolved

Question 7: Should paid workers and volunteers be allowed to be supporters?

In some places, paid workers and **volunteers** can be supporters as well as family and friends.

Volunteers don't get paid. They work for free because they want to help people.

This means there are more people to take on the job if family or friends are not available to support people to make decisions.

However, some people think that working with paid workers or volunteers might get complicated.

There might be times of conflict between what the person needs and what the worker or volunteer wants.

And some people think that paid workers or volunteers might not know a person well enough to help them make the decisions that are right for them.

What do you think?

There is already a system where Public Guardians can be appointed. These people are trained to do this job and are paid. However we need this system for when there is no other person to do this job. We think at times they do not know what the person may have wanted and have to do their best. We need to be very careful who does this task as these people are very vulnerable to neglect and exploitation. So these people need to be trained and paid

Question 8: What types of decisions should a supporter be able to help with?

In some places where they already have supported decision making, support people can help with personal decisions.

This might include decisions about where to live and what medical treatment to have.

In other places support people can also help with financial decisions, for example, where to invest money.

Some people think that financial decisions are too complicated for a supporter to help with.

They say that a supporter may make decisions for their own financial benefit.

Others say that extra protections should be put in place to make sure the right financial decisions are made.

What do you think?

We think people need a specific person to manage their finances. These are very different decisions to medical care and where they might live and other services. If people do not have an enduring power of attorney then someone with financial management skills needs to be appointed. This may be their public guardian if they have received that training but usually it is the Public Trustee.

Should we have co-decision making in NSW?

If someone has trouble making their own decisions, some places allow for a **co-decision maker** to be used.

A co-decision maker makes decisions with the person they are supporting.

They must both agree on the decision.

This is different to supported decision making.

Question 9: Should NSW law allow someone to be chosen to make decisions together with another person?

Some people say that co-decision making is good because the person still gets to take part in the decision making.

Others are worried that co-decision making could lead to people forcing others to make decisions they don't want to make.

What do you think?

We do not think there is any difference between calling the position a co-decision maker or a supporter based on the above information. The most important thing is how well the person assists and supports the person to make the decision which best suits them.

Question 10: Should people be able to choose their own co-decision maker or should a court or tribunal choose?

In some places, people can decide who to have as a co-decision maker.

In other places, a court or tribunal can choose a co-decision maker so long as the person agrees with the choice.

In other places, a court or tribunal can choose a co-decision maker without the person's agreement.

What do you think?

The person, if still capable of making the decision, should choose the person they want for the role. If they have lost the capacity to do so or do not have someone they wish to choose then a court or tribunal should make that decision.

Question 11: When should a court or tribunal be able to choose a co-decision maker?

The choice about using a co-decision maker affects a person's right to make a decision on their own.

This means that it is important that a co-decision maker is only chosen when needed.

Here are some ideas about when a co-decision maker could be chosen:

- When the person has a lot of trouble making decisions.
- When the person would be able to make decisions if a co-decision maker was used.
- When a decision can't be made by other methods.
- When it is in the person's **best interests**. This means that a decision must be made to keep the person safe and well.

What do you think?

All of the above

Question 12: Who can become a co-decision maker?

In other places in Australia, there are rules about who can become a co-decision maker. For example, the person should:

- be at least 18 years old
- be able to think about the other person's interests and views
- not have been convicted of a crime.

What rules do you think are important?

What do you think?

Yes we agree with these rules

Question 13: How many co-decision makers do you think people should be able to choose?

Should someone be able to have more than 1 co-decision maker?

Should there be a limit on how many co-decision makers a person has?

What do you think? See answer to question 5

Question 14: Should the Public Guardian or NSW Trustee be allowed to be a co-decision maker?

Some people think that government organisations like the Public Guardian or NSW Trustee are not suited to being co-decision makers.

This might be because they:

- don't understand people's interests or opinions well enough
- cannot spend time with a person to find out what they think.

Other people say that these organisations should be able to be a co-decision maker where no one else is available.

What do you think?

These organisations could perform this role if they have people trained to do it and who have sufficient time for the role.

Question 15: Should paid workers and community volunteers be allowed to be co-decision makers?

In some places, paid workers and community volunteers can be co-decision makers.

This means there are more people to take on the job if family or friends are not available.

However, some people think that working with paid workers or volunteers might get complicated.

There might be times of conflict between what people need and what the worker or volunteer wants.

And some people think that paid workers or volunteers might not know a person well enough to help them make the decisions that are right for them.

What do you think?

There is already a system where Guardians can be appointed and could be given this role. These people are trained to do this job and are paid. We need this system for when there is no other person to do this job. We think at times they do not know what the person may have wanted and have to do their best. We need to be very careful who does this task as these people are very vulnerable to neglect and exploitation.

Question 16: What can a co-decision maker make decisions about?

In some places, co-decision makers can only make personal decisions.

This might include decisions about:

- where someone lives
- the medical treatment they receive.

In other places, co-decision makers can make financial decisions as well.

What do you think?

We think people need a specific person to manage their finances. These are very different decisions to medical care and where they might live and other services. If people do not have an enduring power of attorney then someone with financial management skills needs to be appointed. This may be their public guardian if they have received that training. However this is usually the task of the Public Trustee.

Question 17: Should NSW still have substitute decision making?

Some people think that we should have all 3 types of decision making in NSW:

- supported decision making
- co-decision making
- substitute decision making.

They think we need substitute decision making in some cases.

For example, if someone is in a coma.

In these cases, it might be better if someone makes a decision for that person.

What do you think?

We think we must be careful not to make the system too complicated. We see that supported decision making and co-decision making are very similar and we only need one.

When the person has lost capacity then we need a substitute decision maker. There is no reason why one (or more) people could not play these roles depending on whether the person has some capacity to participate in the decision making or has lost capacity.

Question 18: When should we use substitute decision making?

If we decide that we should still have substitute decision making in NSW, we need to decide when it should be used.

Some people say that it should only be used if there are no other options, for example when a person:

- cannot understand the consequences of their decisions
- cannot explain what they want
- would prefer someone to make the decision for them, instead of getting help to make their own decision
- is at risk of harm if a decision is made any other way.

What do you think?

We agree that we should maintain the position of a substitute decision maker and these are the reasons to need to use them

Question 19: Are there any other issues you would like to raise?

When the changes were made to the Act in 1987 there was no education about the issues either for health professionals, lawyers or for the general public. These are very important issues and with an ageing population everyone needs to understand the process. If an extensive education process is not going to be done then the law should not be changed.