

Guardianship Review: Video 2 Transcript

Erin Gough: Hello, today we are talking about our current review of the guardianship law and, specifically, about the first questions we are looking at as part of this review. But first of all, Alan could you remind us of what we mean by guardianship.

Alan Cameron: Guardianship is the legal process which allows someone, usually a family member, to make decisions for someone who can't make decisions for themselves. For example, you may know someone who has appointed an enduring guardian to look after their affairs or indeed you might yourself have been through the process of appointing someone to make those decisions. So our review is looking at the process by which that happens.

EG: And how does the law decide when someone can't make a decision for themselves?

AC: That is a very good question Erin, but a very difficult and important one too. It is often a tribunal or a court that decides if somebody is able to make a decision. But the law doesn't set out the grounds of the way in which that decision should be made. Fortunately, in NSW, the Department of Justice has issued a toolkit, which provides some explanation about that. One of the things that we will be looking at is whether the contents of that toolkit, perhaps in the same or an amended form, ought to be included in the law itself.

EG: And what must the court or tribunal currently be satisfied of before it appoints an alternative decision maker?

AC: The answer to that will be different depending upon what sort of alternative decision is being appointed. If we are talking about a guardianship order, then the question is whether the person is incapable of making that decision by reason of a disability of some kind. But if we are talking about a financial management order, the only question is, whether the person is capable of making that decision or not. In capacity, which is the present expression in the law is the question that has to be solved.

EG: Capacity seems to be a central concept here. Does the law give us an idea of what that means?

AC: No, as I mentioned a moment ago, the law does not really do that and therefore the question that we have to decide or recommend to the Government about is whether the law should be changed to spell out much more clearly exactly what capacity means. And that will be one of the major subjects upon which we will be giving advice and therefore upon which we will be looking to the public to give us some feedback.

EG: What are the problems with how capacity is currently understood?

AC: The law seems to assume at the moment that you are either capable of making all decisions or not capable of making any. And the law also assumes that if you are incapable of making a decision at one time then you are incapable at all times. So what we need to look at is whether that is the right approach or whether a much more general understanding of capacity would work more fairly.

EG: And how can members of the public help us to decide what changes should be made to the law?

AC: We are looking to hear what people's experience with all of this has been. There are a lot of people out there who have had experience with making these decisions and seeing how people fluctuate in their capacity if you like. We are looking for feedback, we are looking for submissions through our website, or just by writing to us on what their experience has been.

EG: Thanks so much Alan, we look forward to hearing from you about your experiences with NSW guardianship law.