

# **Review of the Guardianship Act**

## **Question Paper 3: The role of guardians and financial managers**

**Easy Read version**

## What we are trying to do

At the moment, we are reviewing the law about **guardianship**.

Guardianship is when another person makes decisions for you. This is usually because you can't make decisions on your own.

The law we are reviewing is called the *Guardianship Act 1987*.

We want to make sure that the law is fair.

We also want to make sure it is right for the community today.

Our community has changed a lot since the law was written in 1987.

We'd like to know what you think about our ideas for new laws.

This document has some questions for you to think about.

## Who could be a guardian?

A guardian is somebody who is chosen to make personal decisions for someone else.

We are interested in your ideas about who could be a guardian.

What do you think?

Here are some questions to think about.

## **Question 1: Who should be able to be a guardian**

Currently, in NSW, the law says that a person can choose someone to make decisions for them.

This person is called an '**enduring guardian**'.

There are some rules about who can be an enduring guardian.

The person:

- must be at least 18 years old
- cannot be someone who is paid to provide the person with medical, accommodation or any other services
- cannot be the spouse, parents, child, brother or sister of someone paid to provide the person with a service.

The person can choose 1 or more enduring guardians.

The person can also choose someone to step in if the original guardian can no longer do the job.

What do you think about these rules?

Should there be any other rules?

**You can use the space below to share your thoughts.**

We agree with the exclusions above. We think the process of appointing an Enduring Guardian(EG) is working reasonably well. We would like there to be a process that does not involve lawyers. The cost of this is prohibitive for some people.

Your EG can be given your advance care plan and then you have outlined in principle what you will want in the future should you lose capacity

## **Question 2: Who can the tribunal choose to be a guardian?**

In some situations, a **tribunal** can choose a guardian for another person.

A tribunal is a group of people who work together to make legal decisions.

There are rules about the people the tribunal can choose to be a guardian:

- they must be at least 18 years old
- they must get along well with the person they are deciding for
- they must not put their own interests ahead of the interests of the person they are deciding for
- they must be willing and able to exercise the role of guardian.

What do you think about these rules?

Should there be any other rules?

**What do you think?**

Yes we agree with these rules

### **Question 3: Should the tribunal choose the Public Guardian?**

There is a government person called the Public Guardian.

The Public Guardian makes decisions for other people.

The tribunal can only choose the Public Guardian to be a guardian if no one else is available.

For example, the tribunal might choose the Public Guardian if the person doesn't have any family or friends who are willing or able to perform this job.

What do you think?

Are there any other things the tribunal should think about?

**What do you think?**

**We agree with this**

#### **Question 4: Should volunteers from the community be appointed to act as guardians?**

It can sometimes be difficult to find someone to act as a guardian.

People may not have friends or relatives who are willing or able to do this job.

In some parts of Australia, trained volunteers from the community can act as guardians.

Do you think this is a good idea?

**What do you think?**

No

When the Tribunal is making decisions there is already a community member as one of the three persons involved.

## Who could be a financial manager?

A financial manager is somebody who can make financial decisions for someone else.

We are interested in your ideas about who should be a financial manager.

Here are some questions to think about.

### **Question 5: Who should the tribunal choose as a financial manager?**

At the moment, the tribunal can choose someone to be a financial manager.

The person must be a 'suitable person'.

The current law does not explain what this means.

Some people think that the law should explain who can be a financial manager.

Here are some ideas about what the tribunal should think about:

- The relationship between the person and the financial manager.
- Whether the financial manager might put their own interests ahead of the person's interests.
- Whether there is any family conflict or disagreement between the person and the financial manager.
- The financial manager's honesty and character.
- Whether the financial manager is willing and able to do the job.
- Whether the financial manager will make decisions to keep the person safe and well.

What do you think about these ideas?

Are there any other things that the tribunal should think about?

**What do you think?**

We think all these considerations need to be met. There is a huge risk to the person if someone misuses their finances



## **Question 6: When should the tribunal choose the NSW Trustee as the financial manager?**

There is a government agency called the NSW Trustee.

In some cases, the tribunal can choose the NSW Trustee as the financial manager.

The law allows the tribunal to do this even if there are other options.

Do you think that the NSW Trustee should only be chosen if no one else can do it?

If so, should the law say this?

### **What do you think?**

We would tend to stay with the Public Trustee being appointed as currently occurs. There could be a family or friend appointed where this person has financial capacity, is known to be trustworthy and where all of the family agree.

## **Question 7: Should the tribunal choose a company to be the financial manager?**

In some other parts of Australia, a company can be chosen to make financial decisions for someone else.

However, some people think that companies will not always have the person's best interests in mind.

Sometimes, they might keep their own profits in mind.

For this reason, people think that strict rules should apply if this is allowed in NSW.

### **What do you think?**

With the recent loss of money that has happened for some people using bank financial planners and other financial planners who have defrauded them, we would not want to see companies given this role

**Question 8: Should family and friends be able to suggest who the tribunal should appoint when they can no longer care for the person?**

Some people have suggested that family and friends who can no longer care for a person could suggest to the tribunal who should be a guardian or financial manager.

At the moment, the law does not allow this in NSW.

**What do you think?**

Yes it could be helpful but they would need to be assessed carefully. See Question 6.

# What powers should guardians and financial managers have?

## Question 9: What powers should a guardian have?

At the moment the tribunal can make an order that sets out exactly what a guardian can and can't make decisions about.

These are called 'limited' orders.

The tribunal could also give the guardian very broad powers that are not explained in detail.

This is called a 'plenary' order.

Some people think that there should be a list of all the types of decisions a guardian can make for the tribunal to choose from.

For example, decisions relating to:

- where a person lives and who they live with
- their job
- their health care.

There is also a suggestion that the law should list the things that guardians can't do.

For example:

- voting on behalf of the person
- deciding whether the person can marry or divorce
- making the person's will.

Do you think the law should set out a list of the decisions a guardian can and can't make?

What should be on the list?

Should the tribunal be able to say which of these decisions a guardian can make?

- **What do you think?**
- **Yes\_they can decide**
- where a person lives and who they live with
- their health care.
- Other personal decisions

**They should not be able to**

- voting on behalf of the person
- deciding whether the person can marry or divorce
- making the person's will.
- Making an advance care directive

## **Question 10: What powers should a financial manager have?**

In NSW, the law currently says that the NSW Trustee or the courts get to decide what powers a financial manager has.

Examples of powers include:

- To receive money, rent, income or profit from someone's property.
- To buy property for someone else.
- To rent out or sell someone's property.
- To manage someone's business.
- To pay rates, taxes and other debts for someone.

The tribunal or NSW Trustee could decide which powers a financial manager should have.

Or all financial managers could have the same powers (and the tribunal could only remove powers when it's really important).

- **What do you think?**

It is not clear what you mean by 'someone else'. Is this the person whose finances are being managed or as often happens someone else in the family

- To receive money, rent, income or profit from someone's property.
- To pay rates, taxes and other debts for someone

In some cases to manage a business.

We think that the Tribunal should decide what powers the financial manager should have on a case by case basis.

# What should guardians and financial managers do?

## Question 11: What duties and responsibilities should guardians and financial managers have?

The law says that, when making decisions for someone else, guardians and financial managers have to think about the following things:

- The person's welfare – meaning their options for staying well and safe.
- The person's interests – the things that are important in their life.
- The person's views and opinions.
- The person's freedom to make their own decisions.
- The person's relationship with their family.
- The person's culture.
- Encouraging the person to manage their own choices and day-to-day life.
- Protecting the person from harm.

Most importantly, the law currently says that guardians and financial managers must think about the person's welfare and interests first.

An important document called the *UN Convention on the Rights of Persons with Disability* says that we must look at this a different way.

Instead of thinking about people's welfare and interests first, we must think about what people actually want.

However, it's sometimes not easy to work out what some people want and not everyone will agree about what a person actually wants.

Some people find it hard to communicate. Some people may not understand at all.

Even though this is difficult, it may be possible to design a law that addresses these problems.

Some laws in other parts of Australia already do this.

They often include:

- A rule that the decision-maker must listen to what the person wants and help to make this happen.
- Instructions about how the decision-maker can decide what the person wants.
- Instructions on what to do if the decision-maker can't work out what the person wants.
- An understanding that the decision-maker may override what the person wants in some rare cases. For example, if the person doesn't want to eat anything but also doesn't want to die.

Do you think guardians and financial managers should try to work out what the person actually wants?

When should they be allowed to override what a person wants?

**What do you think?** They should certainly be working from a premise of what the person would want as far as this is known.

The example of how the decision-maker can override the person is not a good example. You cannot without undue force make a person eat who does not want to eat. I do not think guardians or financial planners should have the right to override the person's wishes



**Question 12: Are there any other issues or ideas that you would like to share with us?**

Some of these issues are very difficult situations which may need to be resolved for individual people but about which you cannot legislate. This is why you need trained people as are employed by the Guardianship tribunal to make decisions on behalf of the person.