

6. The relationship between the *Guardianship Act* and mental health legislation

Question 6.1: Relationship between the *Guardianship Act* and the *Mental Health Act*

(1) Is there a clear relationship between the *Guardianship Act 1987* (NSW) and the *Mental Health Act 2007* (NSW)?

Answer: Generally, no. However, if a consumer were found to be mentally ill under the *Mental Health Act*, rendering them chronically unable to make informed decisions about their medical care, they would benefit from a guardian being appointed.

(2) What areas, if any, are unclear or inconsistent?

Answer: The area of voluntary admission is unclear. A person may be admitted to a mental health facility by their Guardian and the *Mental Health Act 2007* provides for a voluntary patient to discharge themselves at any time (s8(2)). However a problem arises when the Guardian claims to hold the person there despite the wishes of the person, where the Guardian has the power to determine the person's accommodation and medical treatment.

(3) How could any lack of clarity or inconsistency be resolved?

Answer: JH&FMHN agrees with the opinion of the Mental Health Review Tribunal that the *Guardianship Act* should prohibit a guardian from making decisions about a patient's discharge from a mental health facility and from readmitting them after their discharge.

Question 6.2: Relationship between the *Guardianship Act* and the *Forensic Provisions Act*

(1) Is there a clear relationship between the *Guardianship Act* and the *Forensic Provisions Act*?

Answer: No

(2) What areas, if any, are unclear or inconsistent?

Answer: In regards to the conditional release of a forensic patient there are situations whereby the interests of the patient would be benefited by the appointment of a guardian. However, it would appear that this is not a view shared by the NSW Civil & Administrative Tribunal. Whilst it is the case that a Guardianship order may assist the patient in carrying out the provisions of any release conditions, it is also the case that those conditions will not cover every aspect of the day to day living of such a patient. Where the patient would have received a guardianship order if that person was not a forensic patient, it seems unjust that the forensic patient status, which is not focused on area of guardianship, should be denied them. It is considered that conditional release with a guardianship order may assist the person in obtaining appropriate accommodation as the accommodation provider is often unacquainted with the safeguards of the *Forensic Provisions* legislation but acquainted with the concept of guardianship.

Also where a patient is slowly working towards his/her unconditional release, guardianship may become more important and the patient should be afforded the same benefits of guardianship that he/she would receive as a non-forensic patient in the community. In fact the denial of those safeguards may well lead to that person decompensating or being left vulnerable to exploitation.

(3) How could any lack of clarity or inconsistency be resolved?

Answer: Section 3C(1) of the Guardianship Act 1987, which states “(1) A guardianship order may be made in respect of a patient within the meaning of the Mental Health Act 2007” could be amended to also include a patient under the Mental Health (Forensic Provisions) Act 1990.

Question 6.3: Whether mental health laws should always prevail

(1) Is it appropriate that mental health laws prevail over guardianship laws in every situation?

Answer: Yes. The mental health laws can be more responsive to situation wherein a person’s mental state can fluctuate.