

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.

This system appears to be working reasonably well. Service providers caring for a person need to understand the nature of enduring guardianship and acknowledge its directions when providing care.

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?

The Tribunal needs adequate resources, including time, skills, and knowledge, to consider the need and the best person/organisation to be the guardian. Tribunal staff need to be well resourced to answer enquiries in a timely appropriate, interested manner.

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?

If a person requires a guardian to assist with decision making as assessed by the Tribunal and there are no family, friends or other people to do this then some type of public guardian will be required.

The public guardians need the skills and resources to be able to listen to the person's needs and assertively act accordingly.

Guardians need to know how to work with service providers such as social workers and they need to have a good understanding of the services available and referral processes. Too often public guardians will say they 'are not case managers' however there is a level of case managing involved if the person they are making decisions for requires this.

People with conditions such as acquired brain injuries, intellectual disabilities, and dementia differ in their abilities to make decisions and in their understanding of rules, regulations, and compliance with laws. If a guardian is appointed to assist people with decision making this must include the ability to know when a person is making requests which are clearly not feasible and the guardian needs to understand why the request may be made.

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?

Previous comments about the skills required apply if volunteers are to be appointed as guardians. Adequate resources and monitoring are required as for public guardians or family members/friends.

The motivation for people to volunteer as guardians needs to be considered.

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?

Previous comments about the skills required to be a guardian also apply to financial management. People understandably can be upset about the high fees they are charged by the NSW Trustee for financial management. If the financial management is done well then perhaps the fees would be justified.

Financial managers need the skills to be able to listen to the person's needs and assertively act according to their means. Many people who have their finances managed are unable to forecast their future financial situation (which is the reason they require their finances to be managed) and make demands for spending which may not be in their best interests. Flexibility from the financial manager is required and they need to assist the person if quotes are required and in researching options for spending such as for private health insurance. Punitive, unkind, and unhelpful attitudes from some financial managers at the NSW Trustee exacerbate already difficult situations. In addition to being 'accountants' they need to have skills in understanding disability and how to engage and assist people.

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?

If someone needs to be appointed, then, as previous comments, they need the skills and resources to do this and if there is no one else available with these necessary requirements then the NSW Trustee appears to be the only option. I do not think the law should specifically state this as it may lead to inappropriate appointments.

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?

It is difficult to accurately predict how, for profit, private, and public organisations, will effectively manage a person's finances. The Tribunal needs more time to consider who is the most appropriate person to do this. Private companies would need the same level of support and monitoring that the NSW Trustee and private financial managers need at present.

Regardless of which type of organisation manages finances, a very clear process for feedback and complaints needs to be established and people need to be taken seriously when they have issues.

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?

I am surprised to learn that suggestions from family and friends are not included in the information that the Tribunal considers in appointing guardians or financial managers. The Tribunal needs the resources to consider all the relevant details from all interested people and the NSW law should allow it.

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?

Limited orders should remain and if guardians or other interested people identify that there are other decisions to be made which do not fit with the orders, they should be able to apply to the Tribunal.

A list (not conclusive) of all the types of decisions a guardian can make would be useful for the Tribunal to choose from.

It would be cumbersome to have a list for the things guardians cannot do as where would it end? Better to say what they can do and provide the opportunity to add to this, as described above, if necessary.

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?

Financial managers should not all have the same powers and only the Tribunal should determine which powers they do have. This includes the powers the NSW Trustee has in managing a person's finance.

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?

A person's freedom to make their own decisions and encouraging them to manage their own decisions needs to be balanced with their best interests. People are appointed guardians and financial managers due to some inability to do this themselves. The authority to make decisions for people also includes the responsibility to carefully consider the options. This is what the person is often unable to be responsible for doing in some aspects of their lives. What a person wants may not necessarily be the wisest choice.

Encouraging a person to manage their own choices does not always mean getting them to do the work of exploring options and getting quotes. Financial Managers must be able to assess the abilities of the person to carry out such functions and if necessary they must do this research in the interest of the person whose finances

they are managing. An example of this is where a person with an acquired brain injury wanted to join a private health fund and the NSW Trustee asked him to get quotes - surely this is the type of information the Trustee would have or would be useful for them to gather.

It is absolutely necessary and appropriate to listen to what the person wants, however this must be balanced with the abilities they have to make decisions. Financial managers need to know when to intervene and when not to - discussion with the person, family, service providers and other interested people is an important part of the process.

People would not have the need for a decision maker if they did not have a level of cognitive impairment. and were able to do the research on options for themselves. It is this impairment that guardians and financial managers need to be aware of and to gauge their interaction accordingly.

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

Thank you for providing the opportunity to contribute to this review of the Guardianship Act.

The views expressed have been formed from several years working as a social worker/health professional, making many applications to the Guardianship Tribunal, and working extensively with guardians and financial managers, private and public. I am available to expand further on my comments if required.

* The original concept of Guardianship and Financial Management may have become lost over the years as new staff and Tribunal members are involved. Understanding the original purpose is important and whilst flexibility within guidelines is required, if important changes are made this needs to be with intention not by accident.

* It is important that all involved ask the reason why a person may need someone else to make decisions for them, and if Governments and the community consider it their responsibility to address the issue then they must take steps to ensure best practice and evidence based activities steer the process.

* Adequate resources, funding for the service, training, staff support, and monitoring of the activities of the Tribunal and guardians/financial managers are required.

* The functions of managers for financial decisions need to remain separate from decisions for other matters, however these two, either private, public, or for profit need to work together in the interests of the person requiring their assistance.

What's next?

Thank you for taking the time to answer our questions.

We will ask more questions in the future.

We will think about all the answers that you and other people give us.

We will do this when we write down our ideas for making changes to the law.

If you'd like more information, please contact us. Our contact details are on page 20.

How to tell us what you think

You can send your answers to us by email or post.

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We need to receive your answers by 31 January 2017.

We may publish your answers on our website, or include them in things that we write.

If we do this, people will be able to read your answers.

Please tell us if you don't want us to publish some, or all, of your answers.

Word list

Enduring guardian

Someone you choose to make decisions for you.

Guardianship

Guardianship is when another person makes decisions for you.

This is usually because you can't make decisions on your own.

Tribunal

The Guardianship Division of the NSW Civil and Administrative Tribunal.

A group of people appointed by the Government to make decisions about guardianship.

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