

How guardians can protect, respect and promote human rights

What is guardianship?

In New South Wales, guardians are formally appointed under the *Guardianship Act 1987* (NSW) when a person lacks or loses capacity to make decisions. As a guardian, you are the substitute decision-maker – this means you can make legally binding decisions about some things on behalf of the person under guardianship.

Appointing a guardian is considered a last resort. The law assumes as a starting point that everyone has capacity and can and should make decisions for themselves.

You might have been appointed by the Guardianship Tribunal or by a person making a legal document to appoint you as an enduring guardian. If you were appointed as an enduring guardian, this means the person planned ahead and chose to appoint you before they lost capacity. It is a good idea for everyone to plan ahead, so they can have a say in who makes decisions on their behalf in the future.

What decisions can guardians make?

Guardians can be appointed to make decisions about accommodation, health care, consent to medical or dental treatment, or in relation to the use of services. The guardianship order or form of appointment for enduring guardians will set out the types of decisions you can make and how long the order lasts. The need for a guardian may be temporary or permanent. It is uncommon for a guardian to have decision-making capacity about all aspects of a person's life.



You cannot make financial decisions for the person, unless you have been appointed as the financial manager or authorised under an enduring power of attorney.

What are human rights?

The basic idea of human rights is that everyone should be treated fairly, with dignity and respect. Human rights apply to all people everywhere – regardless of factors like a person's capacity, age, ethnicity, sex, disability or religion.

It is important to remember that human rights are inalienable. This means that a person cannot lose their human rights or have them taken away, even when a person gets older or if a person becomes sick.

Where do human rights come from?

Modern ideas about human rights come from international agreements known as treaties and declarations, including the Universal Declaration of Human Rights.

The Guardianship Act says that all guardians have a duty to:

- ▶ give paramount consideration to the welfare and interests of the person
- ▶ take into consideration the person's views
- ▶ restrict as little as possible the person's freedom of decision-making and action
- ▶ encourage the person, as far as possible, to live in the community
- ▶ encourage self-reliance in personal, domestic and financial affairs
- ▶ preserve family relationships
- ▶ recognise the cultural and linguistic environments of the person, and
- ▶ protect the person from neglect, abuse and exploitation.

These are legal requirements and, as you will see, reflect human rights.

Australia has agreed to follow the obligations contained in the Declaration, along with International Covenants on Civil, Political, Economic, Social and Cultural Rights; and Conventions on Racial Discrimination, Discrimination against Women, the Rights of the Child, and the Rights of Persons with Disabilities.

Not all United Nations (UN) human rights obligations have been made into Australian laws, but this does not reduce the importance of respecting a person's basic human rights. Human rights are perhaps best regarded as a moral choice about how we treat others, and how we expect to be treated in return.

What are the human rights of a person under guardianship?

Even when a person needs a guardian to make decisions, they still have human rights and must be treated with fairness, dignity and respect.

One of the main things to remember is that the person under guardianship must be involved, to the extent possible, in every decision you make about them.

You will see how many of the things you have a duty to do under the Guardianship Act such as encouraging, as far as possible, a person to live in the community, use the same words or ideas that are in the various UN treaties and declarations.

While a person who lacks or loses capacity still has human rights, it might be the case that their human rights are more likely to be overlooked, ignored or even abused. This is why you should be a human rights advocate.

Key human rights that you need to remember when you make decisions are the rights to:

- ▶ self-determination – that means, to make one's own decisions
- ▶ access to justice in the legal system
- ▶ freedom from torture or cruel, inhuman or degrading treatment
- ▶ freedom from exploitation, violence and abuse
- ▶ respect for physical and mental integrity
- ▶ to live and participate in the community
- ▶ freedom of expression and opinion, and access to information
- ▶ respect for privacy
- ▶ respect for relationships and family
- ▶ education and employment, and
- ▶ participate in cultural life, recreation, leisure and sport.

MIKE is forty-three-years-old and requires a guardian to make decisions about what services provide him with support and assistance. The Guardianship Tribunal appointed Mike's sister, Megan, after he was refusing all help. Recently, Mike's carer has changed and he is upset. Mike again starts refusing any support. Without speaking with her brother, Megan talks with Mike's case manager and changes the carer. Despite the change, Mike's behaviour persists and increases. Megan finally decides to talk with Mike after reading about her obligations and his human rights, although she is reluctant to do so. Megan discovers that the new carers spoke to Mike as if he were a child and laughed at him. Mike misses his old carer. Megan speaks with the case manager and they arrange for Mike to "meet" any potential carers, so Mike can find a worker he trusts and who respects him.



BEN has been appointed by the Guardianship Tribunal to make decisions about health care and accommodation for his mother, Mrs. Wilson, who at eighty-years-old has lost capacity due to dementia. Mrs. Wilson's community nurse recommends that she move into full-time residential care. Prior to making a decision, Ben considers his obligations under the law and human rights. He tries to stand in his mother's shoes and recalls how she never wanted to enter "one of those homes". Yet Ben wants her to be safe. He seeks help from other health care professionals, who advise that his mother can remain at home for now, with extra daily support. Ben makes the decision for his mother to stay living at home, and advocates for her human rights to the community nurse.



How you can be a human rights advocate

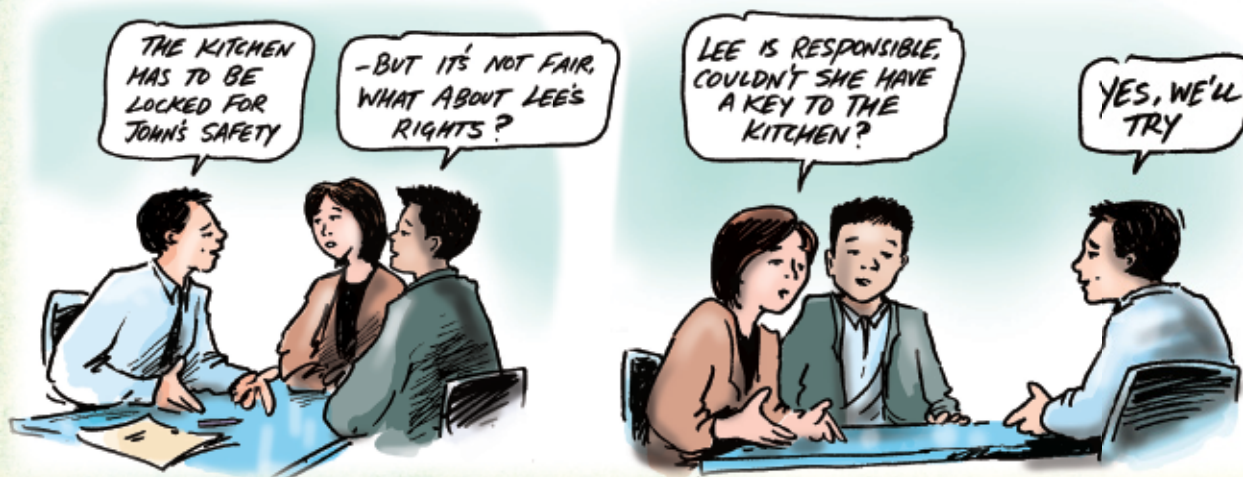
It is important for you to know about human rights along with your duties under the Guardianship Act. You can consider them as part of your job as a guardian. After all, you are in a good position to be

a human rights advocate for the person. You can advocate that the person lives a life free of abuse, neglect and discrimination.

You can promote the person's human rights to family, friends and service providers, including doctors, nurses and people who

work in residential facilities. Some may not know about or respect the human rights of the person under guardianship.

Human rights can also act as a 'checklist' when you're making decisions.



LEE has an intellectual disability and moved to a group home after her mother went to live in an aged care facility. She shares the house with 3 other people. Lee's sister, Jing, and brother, Chen, had been appointed as her guardians to make decisions about her accommodation and services. Lee had settled well into her new home, but recently had been aggressive toward a new resident, John. Jing discovered that there was a new rule that the kitchen was to be locked at all times, because John has serious food allergies. Lee had always loved to cook in the kitchen. Now she could not do this and she was distressed. Her brother and sister felt it was not necessary or fair to place restrictions on Lee in her own home and that this was causing her aggression. They arranged to meet with the house manager, Paul, who agreed to try their idea that Lee could have a key to the kitchen, so that she could use it without risking the safety of John.

MARIA and Joseph have been married for thirty years. Before Joseph became unwell with cancer he legally appointed Maria as his enduring guardian to make decisions about his health care. Now that Joseph can no longer make these decisions, Maria is overwhelmed and thinks this means she has to make decisions about everything, including whether Joseph's friends visit. The couple's granddaughter, Angela, sees the upset this is creating, and explains to Maria her obligations under the appointment, and talks about Joseph's human rights. Angela explains that Joseph can still make decisions about his social activities, and that he should be encouraged to participate in community life. Angela also helps Maria organise regular check-ups and get a treatment plan for Joseph.



HUMAN RIGHTS CHECKLIST FOR GUARDIANS

In every decision you make as a guardian, you need to comply with the law as well as respect and protect the human rights of the person under guardianship.

- You will need to use as a starting point, the person's right to self-determination. If possible, find out their views and preferences using appropriate communication. Give the person information about the decision to be made and the options available. You can support the person to reach a decision themselves, which you can then make as the guardian.
- If you are unable to obtain the person's views and preferences, make the decision that you believe the person would have made. You can consider what the person has said or indicated in the past. Try to 'stand in their shoes'.
- Consider the views of family and friends. It might be a good idea for some decisions to talk with service providers, health care professionals and carers.
- You might need to remind service providers, health care professionals, community workers, family and friends about the person's human rights.
- If you are faced with several options, remember to choose, whenever possible, the option that least restricts the person's freedom of action.
- The main consideration must be the welfare and interests of the person – this can sometimes mean acting in a way that family or carers disagree with.
- If you find the duties are in conflict, you will need to balance and prioritise them. Sometimes this can be quite a hard thing to do and you might want to talk with the Private Guardian Support Unit on (02) 8688 6060.
- When you've made a decision, explain to the person the decision, the reasons why it was made and the effect it will have on their life. Let the person know what they can do if they disagree with your decision.
- Remember to exercise only the decision-making functions given to you by the Guardianship Tribunal order or the form of appointment. You must respect the person's right to make decisions about other areas of their life.

Please note: This fact sheet contains general information only. It does not constitute legal advice. If you are seeking legal help, contact your local community legal centre. Go to www.clcnsw.org.au or ring (02) 9212 7333. For specialist support, you may contact:

THE AGED-CARE RIGHTS SERVICE
(02) 9281 3600
Freecall 1800 424 079
www.tars.com.au

INTELLECTUAL DISABILITY RIGHTS SERVICE
(02) 9318 0144
Freecall 1800 666 611
www.idrs.org.au

PUBLIC GUARDIAN
Private Guardian Support Unit
(02) 8688 6060
Freecall 1800 451 510
www.publicguardian.lawlink.nsw.gov.au

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