

Review of the Guardianship Act 1987 – Question Paper 1

JH&FMHN feedback to Ministry of Health Legal Branch

October 2016



Health
Justice Health &
Forensic Mental Health Network

Item	Page Ref.	Section	Issue/comment	Proposed Alternative
3.3	13	The Concept of Capacity	The use of the word 'disability' may be interpreted as narrow and specific to those with a physical or cognitive disability.	We would recommend considering the use of "impairment" or "condition" in place of "disability".
3.4	14	Acknowledging variations in capacity	We recognise that capacity can vary over time. Medical practitioners can review capacity in such cases. However, there needs to be a timeframe that ensures a review of capacity. Capacity can vary between different situations; someone's condition might affect decision making capacity in one situation but not another.	A timeframe for capacity to be reviewed to be included
3.6	14	Statutory presumption of capacity	We agree that there should be a statutory presumption of capacity in line with common law	Nil
3.7	14	What should not lead to a finding that a person lacks capacity	The core definition of capacity should be clear enough that a careful assessment would suffice for a finding of a lack of capacity.	Nil
3.8	14	The relevance of support and assistance to assessing capacity	From a clinical perspective, the offer of support for mentally ill individuals would be encouraged. The support offered may in some instances assist capacity. The distinction between support and proxy decision making must be clear.	Nil
5.1	38	What factors should be taken into account	The factors that relate to incapacity for financial management may differ to factors that influence a guardianship order.	We would recommend that the Act takes into account these differences where possible.