



Review of the Guardianship Act 1987

Question Paper 1

Preconditions for alternative decision making arrangements

Seniors Rights Service

Question 3

The Concept of Capacity

Question 3.1

- (1) Should the Guardianship Act provide further detail to explain what is involved in having, or not having, decision making capacity?

Yes

- (2) If the Guardianship Act were to provide further detail to explain what is involved in having or not having decision making capacity, how should this be done.

The Guardianship Act should have a definition of capacity similar to that set out in the Attorney General NSW Tool Kit. The tool kit states a person had capacity when he or she can (i) understand the facts involved (ii) understand the main choices (iii) weigh up the consequences of the choices (iv) understand how the consequences affect them (v) communicate their decision.

It should also set out capacity assessment principles as set out in the Attorney General NSW Tool Kit

Question 3.2

- (1) How if at all should a person's disability be linked to the question of his or her decision making capacity?

A person's capacity should not be linked to a disability but assessed based on their decision making capabilities.

If however, capacity was to be linked to disability, the categories of disability should be broadly defined as set out in the current definition of a person with a "disability" under the Guardianship Act 1987.

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Question 3.3

- (1) If a link between disability and incapacity were to be retained, what terminology should be used when describing any disability and how should it be defined.

We refer to our response to Question 3.2 above.

Question 3.4

- (1) Should the law acknowledge that decision-making capacity can vary over time and depend on the subject matter of the decision?

Yes

- (2) How should such acknowledgments be made?

We support the recommendation of the Victorian Law Reform Commission that capacity assessment principles include the following:

- (i) A person's capacity is specific to the decision being made;
- (ii) Impaired decision making capacity can be temporary or permanent and can fluctuate over time;
- (iii) When assessing a person's capacity every attempt should be made to ensure that the assessment occurs at a time and in an environment in which their capacity can most accurately be assessed.

- (3) If the definition of decision-making capacity were to include such an acknowledgement, how should it be expressed?

We refer to response in (1) and (2) above.

- (4) If capacity assessment principles were to include such an acknowledgement, how should it be expressed.

We refer to response in (1) and (2) above.

Question 3.5

- (1) Should the definitions of decision-making capacity within NSW Law be aligned for the different alternative decision making arrangements?

No. The capacity to make decisions is decision specific and therefore different tests for capacity are required for different decisions. This ensures autonomy to the greatest extent possible is granted to the older person.

- (2) If the definitions of decision making capacity were to be aligned, how could this be achieved.

We refer to response (1) above.

Question 3.6

- (1) Should there be a statutory presumption of capacity?

Yes there should be a statutory presumption of capacity in the capacity assessment principles similar to the Attorney General Tool Kit NSW. Capacity is assumed until proven otherwise through a thorough capacity assessment.

Question 3.7

- (1) Should capacity assessment principles state what should not lead to a conclusion that a person lacks capacity?

Yes

- (2) If capacity assessment principles were to include such statements, how should they be expressed?

We support the inclusion of the Victorian Law Reform Commission recommended capacity assessment principles that an “adults incapacity to make a decision should not be assumed based on age, appearance, condition, or an aspect of their behaviour”.

The person should not be assumed to have incapacity based on the fact that they make an unwise or imprudent decision.

A person should not be deemed to lack capacity to make a decision if it is possible for them to make that decision with appropriate support.

Question 3.8

- (1) Should the availability of appropriate support and assistance be relevant to assessing capacity?

Yes

- (2) If the availability of such support and assistance were to be relevant, how should this be reflected in law?

We support the inclusion of the Victorian Law Reform Commission recommended capacity assessment principles that “a person should not be deemed to lack capacity to make a decision if it is possible for them to make that decision with appropriate support”

Question 3.9

- (1) Should special provision be made in NSW law for professional assistance to be available for those who must assess a person’s decision making capacity?

Yes

- (2) How should such provision be framed

The Law Society Capacity Assessment Guidelines provide for obtaining medical expert reports where there is uncertainty about a person's capacity to make a decision according to the legal test for capacity for that decision.

Expert reports are useful in assisting with capacity assessment but can be expensive.

If provision is to be made in the law for obtaining expert assistance thought has to be put into the bearer of the cost of expert medical evidence

Training on capacity assessments is recommended

Preconditions to be Satisfied for Financial Management and Guardianship Orders

Question 4.

Question 4.1

- (1) Should there be a pre-condition before an order is made that the Tribunal is satisfied that the person is in "need" of an order?

Yes

- (2) If such a precondition were required how should it be expressed.

The person should be in "need" of an order to protect their welfare.

In NSW were a person can show that informal arrangements are currently working to protect their welfare, and there is no need for an order, a guardianship order is not made.

Question 4.2

- (1) Should there be a precondition before an order is made that the Tribunal be satisfied that the order is in the person's best interests?

Yes

- (2) If such a pre-condition were required how should it be expressed?

A pre-condition could be expressed "to promote the person's personal and social well being". Ultimately the order is there to protect the person's best interests.

It is noted that any appointed guardian under a guardianship order must comply with the principles in section 4 of the Guardianship Act 1987 and consider the wishes of the older person in making any decision along with other considerations in section 4.

- (3) What other pre-condition could be adopted in place of the "best interests" standard?

Refer response in (2) above.

Question 4.3

- (1) Should the preconditions for different alternative decision-making orders or appointments in NSW be more closely aligned?

No

- (2) If so, in relation to what orders or appointments and in what way?

The pre-conditions for alternative decision making arrangements will be different as capacity tests differ based on the areas of decision making to be covered by the order.

Question 5

Other Factors that Should be Taken Into Account

- (1) What considerations should the Tribunal take into account when making a decision in relation to:
 - (a) A guardianship order;
 - (b) A financial management order
- (2) Should they be the same for all orders
- (3) Are there any issues you want to raise about the factors to be taken into account when making an order.

When making appointments the Tribunal is to have regard to the Principles in section 4 of the Guardianship Act 1987.

We recommend that the section 4 Principles include the rights conferred on people with Disabilities under the UN Convention of the Rights of Persons with Disabilities. These human rights include rights such as freedom of expression, right to privacy, and the right to independent living. These rights should also include a form of acknowledgement of an older person's wishes to be respected as to who can have access to them as they age.