INTRODUCTION
23.1 This chapter considers the interaction between the Guardianship and Administration Act 1986 (Vic) (G&A Act) and the Disability Act 2006 (Vic), particularly in relation to arrangements for people with impaired decision-making ability who might pose a serious risk to the safety of others.

CURRENT LAW
23.2 The Disability Act establishes a framework for providing support and services to people with disabilities throughout Victoria. It interacts with the G&A Act in a number of areas as it provides for substituted consent for:

- general supports and services
- admission to residential institutions
- restrictive interventions, such as restraint and seclusion
- compulsory treatment.

23.3 The Disability Act’s provisions apply to people with a broad range of disabilities. However, they do not apply to people with a mental illness or disabilities related to ageing.1 The provisions regarding compulsory treatment apply only to people with an intellectual disability.2 These provisions are the focus of this chapter.

23.4 The other identified interactions between the Disability Act and the G&A Act are discussed in detail in the consultation paper.3 They include:

- consent to general supports and services
- consent to admission to residential institutions
- consent to restrictive interventions
- consent to compulsory treatment.

23.5 The Commission believes that there is no need to make any recommendations about these matters because the two statutes appear to operate together satisfactorily in these areas.

23.6 Prior to the introduction of the Disability Act, guardians were sometimes asked to consent to these matters for people with a disability who lacked capacity to make their own decisions.4

COMPULSORY TREATMENT
23.7 Compulsory treatment can be provided under the Disability Act in a number of ways, most of which are ordered by a court in relation to a person who:

- has been charged with an offence but is unfit to stand trial or is not guilty because of mental impairment5
- has been convicted of an offence,6 or
- is already in prison.7

Guardians are not usually involved in these matters.

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1 Disability Act 2006 (Vic) s 3 (definition of ‘disability’).
2 Ibid s 152(1)(a).
4 These decisions can continue to be made by guardians since the introduction of the Disability Act, with the exception of compulsory treatment for people with intellectual disabilities.
5 Disability Act 2006 (Vic) ss 180–2.
6 Ibid ss 151–65.
7 Ibid ss 166–79.
23.8 The Disability Act also permits the Victorian Civil and Administrative Tribunal (VCAT) to order compulsory treatment for a person with an intellectual disability who poses a significant risk of serious harm to others. This is done by making a supervised treatment order.8

23.9 Because the Disability Act limits the use of supervised treatment orders to people with an intellectual disability, guardianship remains the only means of providing compulsory treatment to people with other cognitive impairments.

COMMUNITY RESPONSES

23.10 In the consultation paper, the Commission suggested that the Disability Act’s compulsory treatment provisions could be extended to include people with an acquired brain injury in order to overcome the reliance upon guardianship orders in those instances where protection of the public is a primary reason for seeking compulsory treatment. The Public Advocate supported this suggestion.9

23.11 Victoria Legal Aid expressed reservations about the proposal, and raised concerns about the compulsory treatment provisions in the Disability Act as they currently apply to people with an intellectual disability, because of the lack of a reliable framework for predicting future risk.10

OTHER JURISDICTIONS

23.12 The Australian Capital Territory is the only Australian jurisdiction that has a compulsory care and treatment regime for people with a broad range of cognitive impairments who are at risk of harming others. These are found in the Mental Health (Treatment and Care) Act 1994 (ACT), which allows for, among other things, community care orders that involve compulsory care and treatment for someone with a mental dysfunction11 who is likely to do serious harm to themselves or someone else.12

THE COMMISSION’S VIEWS AND CONCLUSIONS

23.13 In an earlier reference, the Commission proposed a new legislative regime for compulsory care of and treatment for people with cognitive impairments who pose a serious risk to others.13

23.14 This recommendation was partially implemented by the provisions for supervised treatment orders for people with intellectual disabilities in part 8 of the Disability Act.

23.15 However, the Commission’s recommendation for broader application of these provisions was not adopted. When introducing the Bill, the Minister argued that, at that time, there was little evidence regarding appropriate treatments to reduce at-risk behaviour of people with an acquired brain injury.14

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8 Ibid ss 183–201.
9 Submission CP 19 (Office of the Public Advocate).
10 Submission CP 73 (Victoria Legal Aid).
11 Mental dysfunction is defined in s 3 of the Mental Health (Treatment and Care) Act 1994 (ACT) as ‘a disturbance or defect, to a substantially disabling degree, of perceptual interpretation, comprehension, reasoning, learning, judgment, memory, motivation or emotion’.
12 Mental Health (Treatment and Care) Act 1994 (ACT) ss 36–36A.
13 Victorian Law Reform Commission, People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care, Report No 4 (2003). The Commission suggested that ‘cognitive impairment’ should be defined as ‘a significant and long-term disability in comprehension, reasoning, learning or memory that is the result of any damage to, or any disorder, imperfect or delayed development, impairment or deterioration of the brain or mind’ at 115.
14 Victoria, Parliamentary Debates, Legislative Assembly, 1 March 2006, 418 (Sherryl Garbutt, Minister for Community Services).
23.16 This argument should not prevent the extension of the supervision treatment order provisions in the Disability Act to people with an acquired brain injury. The provisions relating to a supervised treatment order stipulate that the person can be detained under the order only if they receive treatment as part of a treatment plan that will both benefit the person and substantially reduce the risk of serious harm to another person. If VCAT is not satisfied that such a service can be provided, then a supervised treatment order cannot be made. With this safeguard in place in the legislation, there is no reason to exclude people with an acquired brain injury from the Act’s supervised treatment order provisions.

23.17 Without such provisions, there continues to be an expectation that guardians will consent to detention and treatment in these circumstances. While the Commission understands that the number of people for whom guardianship is used in this way is relatively small, this practice is not consistent with the long-accepted purpose of guardianship. Guardianship should be a mechanism for promoting the personal and social wellbeing of a person with a disability who is unable to make their own decisions rather than a device to protect the community from people who pose a risk to the safety of others.

23.18 While there will be some costs associated with this proposal, the Commission understands that they are likely to be modest.

RECOMMENDATION

Extending supervised treatment orders in the Disability Act

415. The Disability Act 2006 (Vic) should be amended to extend the application of the supervised treatment order provisions in part 8 to people with an acquired brain injury.

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15 Disability Act 2006 (Vic) s 191(b)(i).

16 In its most recent annual report, the Public Advocate reported that she currently acts as guardian for 200 people with an acquired brain injury: Office of the Public Advocate (Victoria), Annual Report 2010–2011 (2011) 7. The Commission understands that only a very small number of these people have those guardianship orders for the purposes of protecting others from serious harm.