



## Chapter 7

# Capacity and incapacity

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### INTRODUCTION

- 7.1 The concept of capacity is used throughout the law as a shorthand term to refer to a level of cognitive ability that is required before a person can lawfully do various things. Because lack of capacity can prevent people from participating in many of the activities that form part of daily life, alternative decision-making arrangements are necessary.
- 7.2 Guardianship laws are used when a person who lacks capacity needs the assistance of another person to make legally binding decisions on their behalf in order to engage in activities that require individual authorisation. For legal purposes, the decision of the substitute decision maker becomes the decision of the represented person.<sup>1</sup>
- 7.3 Current Victorian guardianship law draws a sharp distinction between those people who have capacity and those who do not. It does not cater for different levels of cognitive functioning. At present, guardianship law has only one response to the needs of people with impaired decision-making ability: the appointment of a substitute decision maker to make decisions on that person's behalf.<sup>2</sup>
- 7.4 The Commission believes that new guardianship laws must be sufficiently flexible to accommodate different levels of cognitive ability and decision-making needs. We discuss the Commission's recommendations for a broader range of decision-making arrangements in Chapters 8 and 9. Those recommendations aim to respond to 'capacity disqualifications' by allowing people to participate to the greatest extent possible in decisions that affect them.
- 7.5 The Commission also believes that we should reform the way guardianship law describes and assesses capacity. This is necessary to:
- better reflect the reality of the way impaired decision-making ability is experienced by different people
  - provide users of the system (people with disabilities, their supporters, carers and professionals) with greater clarity about indicators of incapacity and more guidance concerning when appointments under guardianship law might be appropriate
  - safeguard the rights of people who might be experiencing impaired decision-making ability.
- 7.6 While the Commission believes that the way in which guardianship law describes and assesses incapacity should be clarified, it also believes that there must be an individualised approach to assessment. The law must be flexible enough to respond to individual circumstances and experiences of impaired decision-making ability.
- 7.7 Throughout this report we use the term 'capacity' to refer to 'legal capacity'—the standard which allows a person to engage in legal relationships. When referring to someone's cognitive ability to make decisions, we generally use the term decision-making 'ability'.

### BACKGROUND

- 7.8 Three issues associated with capacity are among the most complex and challenging aspects of guardianship law. They are:
- the meaning of capacity

<sup>1</sup> *Guardianship and Administration Act 1986* (Vic) ss 24(4), 25(3), 40, 48(3).

<sup>2</sup> Other substitute decision-making regimes, such as those found in the *Disability Act 2006* (Vic) and the *Mental Health Act 1986* (Vic), are discussed in Chapters 23 and 24.

- the relevant capacity standard in particular circumstances—the level of cognitive functioning that a person must have before they can be said to have capacity to participate in an activity
- the means of testing or assessing whether a person meets the required capacity standard.

7.9 The term ‘competence’ is sometimes used instead of capacity, especially in North America, to describe this fundamental concept. Although some people suggest that competence is a legal concept and capacity a medical one,<sup>3</sup> we prefer the view that the terms have the same meaning and can be used interchangeably.<sup>4</sup> It appears that the terms are usually treated as synonyms in Australian law, with capacity being the more common expression.

7.10 As Canadian expert Robert Gordon has observed:

[O]f all the issues and problems in the field of adult guardianship law the meaning of ‘incompetency’ and ‘competency’ and determining the difference between them attracts the greatest level of concern and dialogue.<sup>5</sup>

## THE MEANING AND SIGNIFICANCE OF CAPACITY

7.11 Capacity is a legal concept that describes the level of intellectual functioning a person requires to make and accept responsibility for important decisions that often have legal consequences. Capacity is linked to the significant value of respect for autonomy, which is ‘the authority to make decisions of practical importance to one’s life, for one’s own reasons, whatever those reasons might be’.<sup>6</sup>

7.12 Autonomous people are presumed to have the necessary level of intellectual functioning, as well as the right, to make their own decisions. Medical ethicists Tom Beauchamp and James Childress suggest that while:

*autonomy* and *competence* differ in meaning (*autonomy* meaning self governance; *competence* meaning the ability to perform a task or range of tasks) the criteria of the autonomous person and of the competent person are strikingly similar.<sup>7</sup>

7.13 Peteris Darzins and his fellow authors suggest that:

Capacity ... is a useful social construct, which underpins people’s rights to make autonomous decisions about their own affairs, while establishing a mechanism through which the need for substitute decision making processes could be determined in the case of decision making capacity having been lost.<sup>8</sup>

7.14 The New South Wales Government’s *Capacity Toolkit* also emphasised the connection between capacity and autonomy:

People who have capacity are able to live their lives independently. They can decide what is best for themselves and can either take or leave the advice of others.<sup>9</sup>

7.15 Terry Carney suggests that the meaning of the term often depends upon the professional context in which it is used. The medical perspective is concerned with ‘cognitive ability to comprehend, remember and reason rationally’; the legal

3 See the discussion in Ben White, Lindy Willmott and Shih-Ning Then, ‘Adults Who Lack Capacity: Substitute Decision Making’ in Ben White, Fiona McDonald and Lindy Willmott, *Health Law in Australia* (2010) 151.

4 Tom L Beauchamp and James F Childress, *Principles of Biomedical Ethics* (Oxford University Press, 6th ed, 2009) 111.

5 Robert M Gordon and Simon N Verdun-Jones, *Adult Guardianship Law in Canada* (Carswell, 1992) 6–34. See also Jonathan Herring, ‘Entering the Fog: On the Borderlines of Mental Capacity’ (2008) 83 *Indiana Law Journal* 1619, 1624 where Herring states, ‘The search for a single test for legal competency has been said to be like the search for the Holy Grail’.

6 Catriona Mackenzie, ‘Relational Autonomy, Normative Authority and Perfectionism’ (2008) 39(4) *Journal of Social Philosophy* 512, 512.

7 Beauchamp and Childress, above n 4, 113.

8 Peteris Darzins, D William Molloy and David Strang, *Who Can Decide? The Six Step Capacity Assessment Process* (Memory Australia Press, 2000) 1.

9 New South Wales Government, Attorney General’s Department, *Capacity Toolkit* (2008), 18 <[http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL\\_DiversitySrvces.nsf/wwFiles/CAPACITY\\_TOOLKIT0609.pdf/\\$file/CAPACITY\\_TOOLKIT0609.pdf](http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/wwFiles/CAPACITY_TOOLKIT0609.pdf/$file/CAPACITY_TOOLKIT0609.pdf)>.



perspective involves the ability ‘to understand information and appreciate the issues and consequences entailed in particular decisions’; and the social perspective concerns the more general issue of maintaining ‘adequate levels of social functioning’.<sup>10</sup>

- 7.16 Capacity is an extremely important attribute. Its absence disqualifies a person from being able to:
- enter into a binding contract<sup>11</sup>
  - dispose of property by will or by gift<sup>12</sup>
  - vote<sup>13</sup>
  - become a member of parliament<sup>14</sup>
  - hold various public offices<sup>15</sup>
  - have sexual relations with another person<sup>16</sup>
  - marry<sup>17</sup>
  - authorise many forms of medical treatment<sup>18</sup>
  - engage in various occupations<sup>19</sup>
  - undertake numerous other activities that are regulated by law.
- 7.17 Legal policy concerning people who lack capacity also serves to strengthen a central notion of our law that we should ordinarily respect the autonomy of people to make their own decisions, regardless of the quality of those decisions. As a community we qualify this principle, however, by distinguishing some people with impaired decision-making ability from those who are free to exercise autonomy, because we consider it is necessary to protect vulnerable people from those who might seek to exploit them, or from themselves.
- 7.18 The common law has long supported the autonomy principle by developing rules presuming that all adults have capacity and placing the burden of disproving capacity upon any person who seeks to challenge that presumption.<sup>20</sup> In some jurisdictions, such as Queensland,<sup>21</sup> Western Australia<sup>22</sup> and England and Wales,<sup>23</sup> modern guardianship legislation reinforces the common law rules by declaring that all adults are presumed to have capacity and by placing an evidentiary burden upon any person who asserts otherwise.

### THE STANDARD FOR LEGAL CAPACITY

- 7.19 The law has not devised a uniform standard for the level of cognitive ability a person requires in order to have capacity to legally participate in many of the activities of

10 Terry Carney, ‘Guardianship, Citizenship, & Theorizing Substitute Decisionmaking Law’ in I Doron and A Soden, *Beyond Elder Law: New Directions in Law and Ageing* (Springer, forthcoming 2012).

11 *Blomley v Ryan* (1954) 99 CLR 362.

12 *Banks v Goodfellow* (1870) LR 5 QB 549.

13 *Commonwealth Electoral Act 1918* (Cth) s 93(8); *Constitution Act 1975* (Vic) s 48(2)(d).

14 A requirement to become a member of Parliament in Victoria is that the person is enrolled to vote, and a person who lacks capacity is not entitled to be enrolled: see *Constitution Act 1975* (Vic) ss 44(1), 48(2)(d).

15 For example, the Australian Constitution and the Victorian Constitution allow for the removal of judges on the grounds of incapacity: see *Australian Constitution* s 72(ii); *Constitution Act 1975* (Vic) s 87AAB(1).

16 *Crimes Act 1958* (Vic) s 36(e).

17 *Marriage Act 1961* (Cth) s 23B(1)(d).

18 If a doctor provides medical treatment to a patient who is unable to consent without the consent of someone authorised to provide consent or other lawful justification, that doctor may be found guilty of trespass or false imprisonment.

19 For example, a lack of capacity would lead to a finding that the person was not a ‘fit and proper person’ to practise law. See *Legal Profession Act 2004* (Vic) ss 1.2.6(1)(m), 2.3.3, 2.4.7.

20 *Re T (An adult: Consent to Medical Treatment)* [1992] 4 All ER 649.

21 *Guardianship and Administration Act 2000* (Qld) sch 1 cl 1.

22 *Guardianship and Administration Act 1990* (WA) s 4(3).

23 *Mental Capacity Act 2005* (UK) s 1(2).

everyday life. Some years ago, leading United States' commentators described the search for a uniform standard of competency (or capacity) as 'the search for a holy grail'.<sup>24</sup> That observation is still relevant in Australia today.

- 7.20 Many different statutory and common law standards are used when disqualifying a person from participating in particular activities because of incapacity. Some of these standards are discussed below.
- 7.21 A major difference between these various branches of the law of general application and guardianship law is the perspective from which a person's capacity is viewed. The various branches of the general law, such as the law of contract, are interested in whether a person has the capacity to be regarded as an autonomous person who is bound by their own decisions. In contrast, when a tribunal determines whether someone requires the assistance of a guardian or an administrator, the central issue is the person's incapacity to make particular decisions.

### ASSESSING CAPACITY

- 7.22 There are no definitive, scientific tests for use when assessing whether a person meets a particular capacity standard. Capacity has been described as an 'artificial construct' with 'no incontrovertible proof of its existence'.<sup>25</sup> Although clinicians can and do employ various assessment tools when testing for capacity, 'because normative judgments underlie each test ... the assessment of decisional competence remains heavily a matter of clinical judgment'.<sup>26</sup>
- 7.23 Courts have often emphasised that capacity assessments are ultimately questions of fact for judicial officers and tribunal members when the issue of a person's capacity arises in the course of legal proceedings. For example, when VCAT is dealing with a guardianship or administration application, it cannot delegate the task of assessing capacity to a health professional by relying upon that person's opinion alone.<sup>27</sup>

### CURRENT LAW

- 7.24 In this part, we consider the numerous legal rules about capacity that exist in the general law and examine the various capacity standards that are used in different contexts in Victoria's guardianship laws.

### THE GENERAL LAW

- 7.25 The numerous legal rules concerning capacity have developed over time and without coordination. While there is no uniform test for legal capacity, the level of cognitive ability required to satisfy a court that a person has capacity is generally quite low. Each area of law has developed its own standard for deciding whether a person is unable to participate in an activity on the same terms as other people because they lack capacity. In most instances, capacity standards exist to protect vulnerable people and ensure fair transactions.
- 7.26 Understanding of capacity appears to have evolved over time, from being seen as something that either exists or is absent, to a more recent acceptance that capacity is a state that can vary from one time and from one decision to another. Understood in this way, modern capacity standards generally focus on the particular decisions a person is asked to make.<sup>28</sup>

24 Loren H Roth, 'Tests of Competency to Consent to Treatment (1977) 134 *American Journal of Psychiatry* 279, 283 referred to in Michael Perlin, Pamela Champine, Henry Dlugacz and Mary Connell, *Competence in the Law: From Legal Theory to Clinical Application* (John Wiley & Sons, 2008) 1.

25 Darzins, Molloy and Strang, above n 8, 111.

26 Beauchamp and Childress, above n 4, 115.

27 *XYZ v State Trustees Ltd* [2006] VSC 444.

28 See Peteris Darzins, D William Molloy and David Strang, 'What is Capacity?' in Darzins, Molloy and Strang, above n 8, 4-5.



7.27 Different capacity standards apply in relation to the following activities:

- entering into a valid contract
- making a will
- voting in elections
- consenting to sexual relations
- getting married
- responsibility for criminal conduct.

7.28 In some areas of law it has been implicitly accepted that people have varying levels of capacity that require different responses depending on the degree of incapacity experienced by a person in particular circumstances. These developments are most evident in contract law and criminal law.

### Contracts

7.29 Capacity of the parties is an essential requirement of a valid contract. The common law of contracts has effectively recognised two capacity standards, described below.

#### *Non est factum*

7.30 When dealing with written contracts, the common law distinguishes between a person unable to understand the general nature or purport of a document due to mental incapacity and a person whose mind has no concept at all of the deed apparently executed.<sup>29</sup>

7.31 In the latter case, when a person's degree of incapacity is profound, the contract is void and held to never have existed at law because of the underlying policy that a person should not be held to a bargain when they have no idea of the document they signed.<sup>30</sup> This defence is called *non est factum*, or literally, 'it is not his deed'.

7.32 The relevant capacity standard was recently described by the New South Wales Court of Appeal:

The principle is that the signer must know what he or she is signing. The cases reveal ... the difficulty of expression in identifying the line marking the boundary of *non est factum*. It is sufficient to state for present purposes that a signer who has no understanding at all about what he or she is signing, because of incapacity, does not know what he or she is signing such that the mind does not go with the pen.<sup>31</sup>

#### Soundness of mind

7.33 The second capacity standard is relevant when dealing either with contracts that are not written or, if the contract is written, when the defence of *non est factum* is not available. In these circumstances, there is no fixed standard because the requisite level of capacity must be determined according to the particular transaction. The common law rule is that 'each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation'.<sup>32</sup>

7.34 Failure to achieve the second capacity standard means that a contract is voidable—it can be set aside if the party who seeks to avoid contractual obligations is able to prove the incapacity of any party.<sup>33</sup>

29 Elsie Bant, 'Incapacity, Non Est Factum and Unjust Enrichment' (2009) 33 Melbourne University Law Review 368, 371. See also *Gibbons v Wright* (1954) 91 CLR 423.

30 So that when total incapacity is proved, there is no contract on which to proceed: see *Drew v Nunn* (1879) 4 QBD 661,669 where Lord Bramwell states: 'If a man becomes so far insane as to have no mind, perhaps he ought to be deemed dead for the purpose of contracting.'

31 *Ford v Perpetual Trustees Victoria Ltd* (2009) 75 NSWLR 42 at 62.

32 *Gibbons v Wright* (1954) 91 CLR 423 at 437.

33 *Gibbons v Wright* (1954) 91 CLR 423.

## Making a will

- 7.35 A will is valid if at the time of execution the testator (person who made the will) possessed the requisite capacity and intention, and if the will meets certain formal requirements.<sup>34</sup>
- 7.36 A person with ‘testamentary capacity’ is commonly described as being of ‘sound mind, memory and understanding’.<sup>35</sup> They must be able to understand the nature and effect of what they are doing in executing the will, and realise the extent and character of the property they are dealing with.<sup>36</sup> A testator must also be able to recognise the nature of the moral claims on their estate to which they ought to give effect.<sup>37</sup>
- 7.37 The lawyer assisting a client to make or change a will should assess their client’s capacity. This involves assessing whether the will is the product of a free and capable testator<sup>38</sup> and was made with their knowledge and approval.<sup>39</sup> A medical opinion is not always conclusive.<sup>40</sup>
- 7.38 Whether a person had sufficient capacity to make a will is a question of fact; the doubt must be such that the court considers it sufficient to prevent a finding of testamentary capacity.
- 7.39 The legal test for testamentary capacity is not the same as for the appointment of an administrator under the *Guardianship and Administration Act 1986* (Vic) (G&A Act), and it is possible for a represented person with an administrator to be capable of making a will.<sup>41</sup>
- 7.40 In 2009 in *Nicholson v Knaggs*, Justice Vickery said that the United Nations’ *Convention on the Rights of Persons with Disabilities*—and its emphasis on equal enjoyment of legal capacity—will have a role in the development of the law of testamentary capacity in Victoria.<sup>42</sup>

## Voting in elections

- 7.41 The Commonwealth and each of the state jurisdictions have compulsory voting for all people over the age of 18. Each jurisdiction also provides that some people are disqualified from voting, including disqualification relating broadly to unsoundness of mind or mental illness.
- 7.42 The *Commonwealth Electoral Act 1918* (Cth) provides that once it is proved that a person ‘by reason of being of unsound mind is incapable of understanding the nature and significance of enrolment and voting’,<sup>43</sup> they are no longer ‘entitled to have [their] name placed or retained on any Roll or to vote at any Senate election or House of Representatives election’.<sup>44</sup>
- 7.43 The equivalent provision in Victoria is found in the *Constitution Act 1975* (Vic):

34 I J Hardingham et al, *Wills and Intestacy in Australia and New Zealand* (Law Book Company Limited, 2nd ed, 1989) 50. See also *Wills Act 1997* (Vic) s 7.

35 *Banks v Goodfellow* (1870) LR 5 QB 549, 565.

36 *In Will of Wilson* (1897) 23 VLR 197, 199 (Hood J). See also *Timbury v Coffee* (1941) 66 CLR 277.

37 *Banks v Goodfellow* (1870) 5 QB 549; *Timbury v Coffee* (1941) 66 CLR 277.

38 *Bagot’s Executor & Trustee Co Ltd v Bathern* (1982) 62 FLR 177; *Le Cras v Perpetual Trustee Co Ltd* [1967] 2 NSW 706.

39 *Timbury v Coffee* (1941) 66 CLR 277.

40 Danuta Mendelson ‘Assessment of Competency: a Primer’ (2006) 14(2) *Journal of Law and Medicine* 156, 157.

41 *Edwards v Edwards* [2009] VSC 190, [55]–[58].

42 *Nicholson v Knaggs* [2009] VSC 64, [58]–[75].

43 *Commonwealth Electoral Act 1918* (Cth) s 93(8)(a).

44 *Ibid* s 93(8).

A person who, by reason of being of unsound mind, is incapable of understanding the nature and significance of enrolment and voting is not entitled to be enrolled as an elector for the Council or Assembly.<sup>45</sup>

- 7.44 In order to remove an elector from the rolls due to incapacity, the Australian Electoral Commission and Victorian Electoral Commission both require a registered medical practitioner to 'certify in writing that the person is incapable of understanding the nature and significance of enrolment and voting'.<sup>46</sup>

### Consenting to sexual relations

- 7.45 The law generally assumes that people over the age of consent<sup>47</sup> have the capacity to consent to sexual acts. However, a person may be found to lack the capacity to consent to these acts. A person who engages in sexual acts with a person who lacks capacity to consent to such acts may be guilty of a criminal offence.<sup>48</sup>
- 7.46 Consent is defined in the *Crimes Act 1958* (Vic) as 'free agreement'.<sup>49</sup> The Act contains a non-exhaustive list of circumstances in which a person cannot freely agree to an act. One of them is when the person is incapable of understanding the sexual nature of the act.<sup>50</sup>
- 7.47 Determining consent in cases of rape against people with a cognitive impairment has been described as 'problematic'.<sup>51</sup> Proof of cognitive impairment is not enough to establish that a person does not have the capacity to consent to sexual acts,<sup>52</sup> as most people with a cognitive impairment are capable of both understanding the nature of sexual acts and consenting to sexual activity.<sup>53</sup>
- 7.48 The Victorian Full Court decision *R v Morgan*<sup>54</sup> (Morgan) is the leading authority in relation to the capacity to understand or comprehend sexual acts. The case sets out a two-staged approach to establishing a complainant's understanding of sexual acts:
- that what is proposed to be done is a physical fact of penetration of the body by the male organ
- or, if that is not proved,
- that the act of penetration proposed is one of sexual connexion as distinct from an act of a totally different character.<sup>55</sup>
- 7.49 The second limb of the Morgan test is a broad approach, requiring only general understanding of the nature and significance of sexual intercourse.

45 *Constitution Act 1975* (Vic) s 48(2)(d).

46 See Victorian Electoral Commission, *Removal of Elector's Name Form* <<http://www.vec.vic.gov.au/files/NoLongerCapable.pdf>>; Australian Electoral Commission, *Claim that an elector should not be on the electoral role*, available from Australian Electoral Commission upon request. See <<http://www.aec.gov.au/>>.

47 The age of consent in Victoria is 16. However, it is an offence for a person to take part in an act of sexual penetration with a 16 or 17 year old child to whom he or she is not married and who is under his or her care, supervision or authority: see *Crimes Act 1958* (Vic) s 48(1).

48 *Crimes Act 1958* (Vic) s 36(d),(e), pt 1 div 8A, 8E.

49 A definition of 'consent' was inserted to the *Crimes Act 1958* (Vic) following recommendations by the former Law Reform Commission of Victoria in 1991: see Law Reform Commission of Victoria, *Rape: Reform of Law and Procedure*, Report No 43 (1991).

50 *Crimes Act 1958* (Vic) s 36(e).

51 Bernadette McSherry, 'Sexual Assault Against Individuals with Mental Impairment: Are Criminal Laws Adequate?' (1998) 5(1) *Psychiatry, Psychology and Law* 107, 112.

52 *R v Lynch* (1930) 30 SR (NSW) 420, 421 (Ferguson J). See also *The Queen v Beattie* (1981) 26 SASR 481.

53 Victorian Law Reform Commission, *Sexual Offences*, Interim Report (2003) 365.

54 *R v Morgan* [1970] VR 337.

55 *Ibid* 341.



7.50 The law does not indicate how this understanding should be assessed. In presenting evidence of a complainant's capacity to comprehend the sexual nature of such acts, 'it is highly likely that expert evidence from psychiatrists and psychologists will be led to aid the jury' in the assessment of the state of the complainant's knowledge or understanding of the act at the material time.<sup>56</sup>

### Getting married

7.51 The law provides that marriage may be entered into by two adults—a man and a woman—who have given their individual consent to the marriage.<sup>57</sup>

7.52 Section 23B of the *Marriage Act 1961* (Cth) provides that a marriage is void<sup>58</sup> when a person's consent was 'not a real consent'. One of those circumstances is when a party 'was mentally incapable of understanding the nature and effect of the marriage ceremony'.<sup>59</sup> Courts have generally been reluctant to find that a marriage is void for this reason.<sup>60</sup>

### Responsibility for criminal conduct

7.53 Where a person has engaged in conduct that might constitute a criminal offence, a defence of not guilty by reason of mental impairment may be available to them.

7.54 A person must be found not guilty because of mental impairment if, at the time they engaged in the conduct constituting the offence, the person had a mental impairment that had the effect that:

- (a) he or she did not know the nature and quality of the conduct; or
- (b) he or she did not know that the conduct was wrong (that is, he or she could not reason with a moderate degree of sense and composure about whether the conduct, as perceived by reasonable people, was wrong).<sup>61</sup>

7.55 A finding of not guilty because of mental impairment does not necessarily mean the person will be released into the community as they may be placed under a supervision order.<sup>62</sup> We discuss supervision orders in more detail in Chapter 25 where we consider the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic).

7.56 In some jurisdictions, but not Victoria, there is a partial defence of 'diminished responsibility' for homicide.<sup>63</sup> This defence deals with circumstances where a person experiences an 'abnormality of mind' at the time an offence is committed that substantially impairs their mental responsibility for the killing. It is a lesser standard than a finding that a person is not guilty because of mental impairment.

### CAPACITY STANDARDS IN VICTORIAN GUARDIANSHIP LAWS

7.57 As discussed earlier, guardianship laws permit the appointment of a substitute decision maker to make decisions for a person who is legally unable to make their own decisions.

<sup>56</sup> McSherry, above n 51, 109.

<sup>57</sup> *Marriage Act 1961* (Cth) ss 5, 23B.

<sup>58</sup> If a marriage is held to be void, a decree of nullity may be granted: *Family Law Act 1975* (Cth) s 51.

<sup>59</sup> *Marriage Act 1961* (Cth) s 23B(1)(d).

<sup>60</sup> John Blackwood, 'Sexuality and the Disabled: Legal Issues' (1992) 11 *University of Tasmania Law Review* 182, 183.

<sup>61</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) s 20.

<sup>62</sup> *Ibid* s 23.

<sup>63</sup> *Homicide Act 1957*, 5 & 6 Eliz 2, c 2 (UK) s 2; *Crimes Act 1900* (ACT) s 14; *Criminal Code Act 1899* (Qld) s 304A. In New South Wales it is known as 'substantial impairment by abnormality of mind': *Crimes Act 1900* (NSW) s 23A.



7.58 The need for a capacity standard arises in four main contexts under current guardianship laws. Different language—and perhaps a different standard—is used in each instance. The table below outlines the four contexts in which capacity standards arise and what standards are applied in each context.

Context	Capacity standard
VCAT is asked to appoint a guardian or an administrator.	The person 'is unable ... to make reasonable judgments' about matters relating to their person or their estate <sup>64</sup>
A person responsible is asked to consent to medical or dental treatment or to authorise participation in medical research for another person who is incapable of giving consent.	The person is incapable of understanding 'the general nature and effect' or is incapable of 'indicating whether or not they consent or do not consent' to the proposed procedure or treatment. <sup>65</sup>
A person seeks to appoint an enduring guardian, an attorney with enduring powers, or a medical agent, and the witnesses to the appointment are required to record their opinion about that person's capacity.	The standard for each of the appointments is different. For the appointment of an attorney, the standard is that the person appeared to have the capacity necessary to make the appointment, which is defined as 'the ability to understand the nature and effect' of the document. <sup>66</sup> Similarly, for an enduring guardian, a witness must certify that the person appeared to understand the nature and effect of the document. <sup>67</sup> For an agent it is a belief that the person is of sound mind and understands the importance of the document. <sup>68</sup>
A person who holds an appointment as an enduring guardian, enduring attorney or medical agent seeks to activate the appointment because the principal is no longer able to make decisions.	For the activation of an enduring power of attorney (medical) the standard is that the person is 'incompetent'. <sup>69</sup> For the activation of an enduring power of guardianship, the standard is the person is unable to make reasonable judgments in respect of the relevant matter. <sup>70</sup> There is no set legislative standard for activation of an enduring power of attorney (financial), as the donor can elect when or in what circumstance the power comes into effect. <sup>71</sup>

7.59 The legislative history of these various statutory provisions does not indicate whether the drafters of the legislation sought to create different capacity standards or whether they chose different language to describe the same, or a similar, standard. There is little case law to provide guidance about whether different standards should be applied in the various circumstances set out in the above table.

<sup>64</sup> *Guardianship and Administration Act 1986* (Vic) ss 22(1)(b), 46(1)(a)(ii).

<sup>65</sup> *Ibid* s 36(2).

<sup>66</sup> *Instruments Act 1958* (Vic) ss 118, 125A(1)(b).

<sup>67</sup> *Guardianship and Administration Act 1986* (Vic) s 35A(2), sch 4, Form 1

<sup>68</sup> *Medical Treatment Act 1988* (Vic) s 5A(2), sch 2.

<sup>69</sup> *Ibid* s 5A(2)(b).

<sup>70</sup> *Guardianship and Administration Act 1986* (Vic) s 35B(1).

<sup>71</sup> The donor of an enduring power of attorney (financial) may specify a time, circumstance, or occasion upon which the attorney may exercise their powers. A donor might decide to specify that the power becomes exercisable when they have lost the capacity to make the decision themselves. If the donor does not specify a particular time, circumstance or occasion the default position is that the attorney may exercise their powers immediately: see *Instruments Act 1958* (Vic) s 117.

## **VCAT appointments—unable to make reasonable judgments**

- 7.60 Before appointing a guardian or an administrator, VCAT must be satisfied that a person has a disability—defined as ‘intellectual impairment, mental disorder, brain injury, physical disability or dementia’—and that by reason of that disability the person is ‘unable to make reasonable judgments’ in respect of their person or their estate.<sup>72</sup>
- 7.61 The determination of whether a person is ‘unable to make reasonable judgments’ is a question of fact which requires VCAT to consider all the relevant lay and expert evidence.<sup>73</sup>
- 7.62 In Victoria, the test is subjective in the sense that VCAT must measure the person’s capacity in relation to their actual property and affairs, rather than against the objective standard used elsewhere, such as ‘the ordinary routine affairs of man’.<sup>74</sup>
- 7.63 The G&A Act does not define ‘reasonable judgments’. This term could be interpreted as inviting VCAT to evaluate the worth or quality of the decisions a person makes. In practice, the term seems to have been given the same meaning as ‘capacity’ or ‘competence’.<sup>75</sup> However, it has also been suggested that the standard of ‘unable to make reasonable judgments’ is potentially a different standard than that of legal incompetence,<sup>76</sup> and may allow for the appointment of a guardian or administrator in circumstances where capacity is not lacking or severely impaired.<sup>77</sup>
- 7.64 The Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons (Cocks Committee) report, which recommended that the term ‘reasonable judgments’ be used in legislation as a standard for capacity, explained their approach in the following terms:

In order to determine whether a particular individual falls within the category of persons incapable of making reasonable judgments for themselves, one would be required to make a factual judgment. In the context of surgical intervention and ability of a patient to consent to it, one would observe the patient’s response to and comprehension of facts, including likely risks and possible benefits, when explained to him by his medical adviser. A determination that a person is incapable of managing his financial affairs would be influenced by observation of his financial dealings over, say, the previous 12 months. This does not mean, of course, that the bad investor or unsuccessful entrepreneur should lose control of his estate, nor should the person who simply lacks an interest in money matters be the subject of an estate administration order. It is the person whose capacity is lacking or is severely impaired who may be in need of this type of protection.<sup>78</sup>

## **Personal appointments—able to understand the nature and effect of the document**

- 7.65 The common law test for legal capacity to execute a document or enter a transaction depends upon the particular transaction. The person must have ‘the capacity to understand the nature of the transaction when it is explained’.<sup>79</sup>
- 7.66 The statutes that permit one person to appoint another to make decisions for them when they are unable to do so require the person to demonstrate capacity at the time

72 *Guardianship and Administration Act 1986 (Vic)* ss 22(1)(a)–(b), 46(1)(a)(i)–(ii).

73 *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [55]–[58].

74 *XYZ (Guardianship)* [2007] VCAT 1196 (29 June 2007) [53]–[55]; *Guardianship and Administration Act 1986 (Vic)* s 46(1)(a)(ii).

75 See John Chesterman, ‘Capacity in Victorian Guardianship Law: Options for Reform’, *Monash University Law Review* (forthcoming).

76 *A v Guardianship and Management of Property Tribunal* [1999] ACTSC 77 (16 July 1999) [49]–[61]; *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [35]–[36], [71]–[73].

77 *XYZ (Guardianship)* [2007] VCAT 1196 (29 June 2007) [64].

78 Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons, Parliament of Victoria, *Report of the Minister’s Committee on Rights and Protective Legislation for Intellectually Handicapped Persons* (1982) 95.

79 *Gibbons v Wright* (1954) 91 CLR 423, 437–8 (Dixon CJ, Kitto and Taylor JJ).

of making the appointment. While the wording of the capacity standards differ, they appear to have been designed to replicate the common law standard.

- 7.67 As described in the table above, legislation requires that a person must understand the nature and effect of an enduring power of attorney when making an appointment.
- 7.68 The *Instruments Act 1958* (Vic) describes what it means to ‘understand the nature and effect’ of an enduring power of attorney:
- (2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters—
    - (a) that the donor may, in the power of attorney, specify conditions or limitations on, or instructions about, the exercise of the power to be given to the attorney;
    - (b) when the power is exercisable;
    - (c) that once the power is exercisable, the attorney has the same powers as the donor had (when not under a legal incapacity) to do anything for which the power is given subject to any limitations or restrictions on exercising the power included in the enduring power of attorney;
    - (d) that the donor may revoke the enduring power of attorney at any time the donor is capable of making an enduring power of attorney;
    - (e) that the power the attorney is given continues even if the donor subsequently ceases to have legal capacity;
    - (f) that at any time that the donor is not capable of revoking the enduring power of attorney, the donor is unable to effectively oversee the use of the power.<sup>80</sup>
- 7.69 The G&A Act and the *Medical Treatment Act 1988* (Vic) do not provide equivalent descriptions of the matters a person must understand when making an enduring power of guardianship and an enduring power of attorney (medical).

### Automatic appointments for medical treatment

- 7.70 The *Guardianship and Administration Act 1986* (Vic) provides that a person is incapable of giving consent to medical and dental treatment, medical research or a special procedure if they are:
- incapable of understanding the general nature and effect of the proposed procedure or treatment, or
  - incapable of indicating whether or not they consent to the proposed procedure or treatment.<sup>81</sup>
- 7.71 While this appears to be a different standard to that of ‘unable to make reasonable judgments’ which applies when VCAT is appointing guardians and administrators,<sup>82</sup> there are no reported cases in which the two standards have been compared.

## APPROACHES TO ASSESSING CAPACITY

### VCAT

- 7.72 Whether a person is unable to make reasonable judgments about a matter is a question of fact,<sup>83</sup> which VCAT must determine on the balance of probabilities when deciding whether to appoint a guardian or an administrator.

<sup>80</sup> *Instruments Act 1958* (Vic) s 118.

<sup>81</sup> *Guardianship and Administration Act 1986* (Vic) s 36(2).

<sup>82</sup> *Ibid* ss 22(1)(b), 46(1)(a)(ii).

<sup>83</sup> *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006).

- 7.73 VCAT usually requires some medical evidence of a person's cognitive functioning. In many cases, this will involve a standard 'Medical Practitioner's Opinion', which can be completed by either a general practitioner or specialist.<sup>84</sup> In more complex cases additional material such as a report from a neuropsychologist may be provided.
- 7.74 VCAT must make its own finding of fact in relation to capacity, and cannot simply defer to medical opinion.<sup>85</sup> In addition to medical opinion, VCAT considers relevant lay evidence, such as evidence as to how the person is actually managing their affairs.

### Creation and activation of enduring powers

- 7.75 While witnesses to enduring powers are required to indicate their belief that the person has the capacity to make the appointment, there is no formal process to assess the person's capacity at this time.<sup>86</sup> Similarly, there is no formal capacity assessment process for use when an enduring power is activated. Where there is doubt about the person's capacity, the representative may seek medical opinion or advice from VCAT.

## OTHER JURISDICTIONS

### UNITED NATIONS' CONVENTION

- 7.76 The *Convention on the Rights of Persons with Disabilities* does not contain a capacity standard. It requires signatories to ensure that 'persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.<sup>87</sup>
- 7.77 The meaning of this requirement has been a source of significant debate.<sup>88</sup> Australia and other nations have stated that this requirement does not prohibit the use of substitute decision making.<sup>89</sup> At a minimum, however, the Convention is viewed as marking a paradigm shift towards promoting greater autonomy for people with disabilities in decisions that affect their lives, and in obliging states to provide decision-making support that is proportionate and tailored to their individual circumstances.<sup>90</sup>
- 7.78 We consider new options for supporting people in the exercise of legal capacity in Chapters 8 and 9.

### OTHER AUSTRALIAN JURISDICTIONS

- 7.79 The approach in other Australian jurisdictions to describing a capacity standard in guardianship laws and assessing whether a person meets that standard appears to be similar to the position in Victoria. In Queensland, however, it is unnecessary for the purposes of both making a tribunal appointment and activating a personal appointment to establish any causal link between a person's lack of capacity and any disability.<sup>91</sup>

84 The form has been recently updated and is available at: <[http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/guardianship/\\$file/medical\\_report\\_guardianship\\_list.pdf](http://www.vcat.vic.gov.au/CA256902000FE154/Lookup/guardianship/$file/medical_report_guardianship_list.pdf)>.

85 *XYZ v State Trustees Ltd* [2006] VSC 444 (22 November 2006) [54]–[59].

86 However s 118 of the *Instruments Act 1958* (Vic) does note that it is advisable for a witness to record the basis upon which they determined that the person understood the nature and effect of the enduring power of attorney.

87 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12(2) ('*Convention on the Rights of Persons with Disabilities*').

88 See, eg, Tina Minkowitz, 'Abolishing Mental Health Laws to Comply with CRPD' in Bernadette McSherry and Penelope Weller (eds), *Rethinking Rights-Based Mental Health Laws* (Hart Publishing, 2010) 151, 156–9.

89 See United Nations Treaty Collection, *Chapter IV: Human Rights, 15*; *Convention on the Rights of Persons with Disabilities* (6 December 2010), 2 <<http://treaties.un.org/doc/Publication/MTDSG/Volume%20IV/Chapter%20IV/IV-15.en.pdf>>.

90 United Nations Department of Economic and Social Affairs, Office of the United Nations High Commissioner for Human Rights and the Inter-Parliamentary Union, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities* (2007) 89–91.

91 *Guardianship and Administration Act 2000* (Qld) sch 4 (Dictionary): definition of 'capacity', *Powers of Attorney Act 1998* (Qld) sch 3 (Dictionary): definition of 'capacity'.

**Statutory capacity standards**

- 7.80 Like Victoria, guardianship laws in Tasmania, Western Australia and the Northern Territory may be invoked when a person is 'unable to make reasonable judgments' about their affairs because of a disability.<sup>92</sup>
- 7.81 In New South Wales, guardianship orders may apply where a person is 'totally or partially incapable of managing his or her person',<sup>93</sup> while a financial management order may be made where the person is 'not capable' of managing their affairs.<sup>94</sup>
- 7.82 In the Australian Capital Territory, guardianship laws are applicable where a person 'has impaired decision making ability' in relation to the matter.<sup>95</sup>
- 7.83 In South Australia, 'mental incapacity' is defined as the 'inability of a person to look after his or her own health, safety or welfare or to manage his or her own affairs'.<sup>96</sup>
- 7.84 Queensland guardianship laws contain a more detailed 'capacity' standard:  
*capacity*, for a person for a matter, means the person is capable of—  
 (a) understanding the nature and effect of decisions about the matter; and  
 (b) freely and voluntarily making decisions about the matter; and  
 (c) communicating the decisions in some way.<sup>97</sup>

**Requirement of 'disability' or other diagnosis**

- 7.85 Guardianship laws in all Australian states and territories except Queensland stipulate that a person's lack of capacity must be due to a disability.<sup>98</sup>

**Inability to communicate a decision**

- 7.86 In Victoria, the inability to communicate a decision is only specifically referred to as indicating incapacity in relation to medical and other treatment decisions.<sup>99</sup>
- 7.87 Queensland and the Australian Capital Territory are the only two Australian jurisdictions to specify that an inability to communicate a decision is part of the test for capacity more generally.<sup>100</sup>

**Presumption of capacity**

- 7.88 Although the common law presumes that adults have the capacity to make decisions that affect their own lives unless there is evidence to the contrary,<sup>101</sup> this presumption has not been given statutory force in the G&A Act.
- 7.89 Queensland and Western Australian guardianship laws have explicitly included a presumption of capacity in their guardianship laws.<sup>102</sup>

92 *Guardianship and Administration Act 1995* (Tas) ss 20 (1)(b), 51(1)(b); *Guardianship and Administration Act 1990* (WA) ss 43(1)(b)(ii), 64(1)(a); *Adult Guardianship Act* (NT) s 3(1) (as part of the definition of 'intellectual disability' for the purposes of this Act).

93 *Guardianship Act 1987* (NSW) ss 3, 14(1).

94 *Ibid* s 25G(a).

95 *Guardianship and Management of Property Act 1991* (ACT) ss 5, 7(1)(a), 8(1)(a).

96 *Guardianship and Administration Act 1993* (SA) s 3 (definition of mental incapacity).

97 *Guardianship and Administration Act 2000* (Qld) sch 4 (Dictionary), *Powers of Attorney Act 1998* (Qld) sch 3 (Dictionary).

98 *Guardianship and Administration Act 1986* (Vic) ss 3 (definition of 'disability'), 22(1)(a)–(b), 46(1)(a)(i)–(ii); *Guardianship and Management of Property Act 1991* (ACT) s 5; *Guardianship Act 1987* (NSW) s 3 (definition of 'person in need of a guardian'. However a diagnostic test is not specifically required in relation to the appointment of a financial manager: at s 25G; *Guardianship and Administration Act 1993* (SA) s 3 (definition of 'mental incapacity'); *Guardianship and Administration Act 1990* (WA) ss 3 (definition of 'mental disability'), 64(1)(a); *Guardianship and Administration Act 1995* (Tas) ss 3 (definition of 'disability'), 20(1)(b), 51(1)(b); *Adult Guardianship Act* (NT) s 3(1) (definition of 'intellectual disability' for the purposes of this Act).

99 *Guardianship and Administration Act 1986* (Vic) s 36(2).

100 *Guardianship and Administration Act 2000* (Qld) sch 4 (Dictionary): definition of 'capacity'; *Powers of Attorney Act 1998* (Qld) sch 3 (Dictionary): definition of 'capacity'; *Guardianship and Administration Act 1993* (SA) s 3 (definition of mental incapacity).

101 See *Borthwick v Carruthers* (1787) 99 ER 1300 and *Re Cumming* (1852) 42 ER 660 at 668.

102 *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 1; *Guardianship and Administration Act 1990* (WA) s 4(3). The presumption of capacity in Queensland was considered in the Queensland Supreme Court case of *Bucknall v Guardianship and Administration Tribunal* (No 1) [2009] 2 Qd R 402. In this case it was found that the Queensland Guardianship Tribunal was obliged to start from the presumption of capacity in determining an initial application for guardianship and in reviewing a guardianship order, but that an administrator was entitled to rely on the Tribunal's finding of incapacity in exercising its powers: at [21–6], [43].

## Other additions to capacity standards

7.90 Queensland guardianship laws contain an additional provision which amplifies the capacity standard in the Act and which should be considered whenever anyone is making a capacity assessment:

the capacity of an adult with impaired capacity to make decisions may differ according to—

- (i) the nature and extent of the impairment; and
- (ii) the type of decision to be made, including, for example, the complexity of the decision to be made; and
- (iii) the support available from members of the adult's existing support network.<sup>103</sup>

7.91 Guardianship laws in the Australian Capital Territory specify that a person cannot be found to have impaired decision-making capacity only because the person:

- (a) is eccentric; or
- (b) does or does not express a particular political or religious opinion; or
- (c) is of a particular sexual orientation or expresses a particular sexual preference; or
- (d) engages or has engaged in illegal or immoral conduct; or
- (e) takes or has taken drugs, including alcohol (but any effects of a drug may be taken into account).<sup>104</sup>

## ENGLAND AND WALES

7.92 The *Mental Capacity Act 2005* (UK), which operates in England and Wales, includes a detailed incapacity standard as well as principles for use when assessing whether a person meets that standard. A person must be assumed to have capacity unless it is shown that they lack capacity.<sup>105</sup>

7.93 As with Victorian guardianship laws, the Mental Capacity Act requires a causal link between a finding of incapacity and a disability or impairment:

a person lacks capacity in relation to a matter if at the material time he is unable to make a decision for himself in relation to the matter because of an impairment of, or a disturbance in the functioning of, the mind or brain.<sup>106</sup>

7.94 The Mental Capacity Act describes what it means for a person to be unable to make a decision:

- (1) ... a person is unable to make a decision for himself if he is unable—
  - (a) to understand the information relevant to the decision,
  - (b) to retain that information,
  - (c) to use or weigh that information as part of the process of making the decision, or
  - (d) to communicate his decision (whether by talking, using sign language or any other means).
- (2) A person is not to be regarded as unable to understand the information relevant to a decision if he is able to understand an explanation of it given to him in a way that is appropriate to his circumstances (using simple language, visual aids or any other means).

<sup>103</sup> *Guardianship and Administration Act 2000* (Qld) s 5(c).

<sup>104</sup> *Guardianship and Management of Property Act 1991* (ACT) s 6A.

<sup>105</sup> *Mental Capacity Act 2005* (UK) s 1(2).

<sup>106</sup> *Ibid* s 2(1). The Act also specifies that it does not matter whether the impairment or disturbance is permanent or temporary: at s 2(2).



- (3) The fact that a person is able to retain the information relevant to a decision for a short period only does not prevent him from being regarded as able to make the decision.
- (4) The information relevant to a decision includes information about the reasonably foreseeable consequences of—
  - (a) deciding one way or another, or
  - (b) failing to make the decision.

7.95 The principles for use when assessing incapacity are that:

- A person is not to be treated as unable to make a decision unless all practicable steps to help him or her to do so have been taken without success.<sup>107</sup>
- A person is not to be treated as unable to make a decision merely because he or she makes an unwise decision.<sup>108</sup>
- A lack of capacity cannot be established merely by reference to—
  - (a) a person's age or appearance, or
  - (b) a condition or an aspect of his or her behaviour which might lead others to make unjustified assumptions about his capacity.<sup>109</sup>

## CANADA

### Alberta and Ontario

7.96 The Canadian provinces of Alberta and Ontario provide for the use of capacity assessors, who may come from medical and non-medical backgrounds.

#### Capacity assessment in Alberta

- 7.97 In Alberta, the court must be satisfied that a person 'does not have the capacity to make decisions' about the relevant matters before a guardian or trustee can be appointed.<sup>110</sup> Capacity is defined as the ability to understand the information relevant to the decision, and to appreciate the reasonably foreseeable consequences of a decision or failure to make a decision.<sup>111</sup>
- 7.98 Guardianship, trusteeship and co-decision-making applications ordinarily require a 'capacity assessment report'.<sup>112</sup> The process for capacity assessment is set out in detail in regulations.<sup>113</sup> Capacity assessments are conducted by 'designated capacity assessors'. Medical practitioners and psychologists are automatically designated capacity assessors, but social workers, registered nurses, psychiatric nurses and occupational therapists may also become designated capacity assessors provided that they undergo specific capacity assessment training.<sup>114</sup>
- 7.99 The Public Guardian of Alberta described Alberta's system of designated capacity assessors as a 'fabulous success', arguing that it provides a more thorough and inclusive process. The use of social workers, nurses and occupation therapists allows capacity assessments to occur more often in environments such as the person's home, which allow the person to perform at their best. The process of capacity assessment

<sup>107</sup> *Mental Capacity Act 2005* (UK) s 1(3).

<sup>108</sup> *Ibid* s 1(4).

<sup>109</sup> *Ibid* s 2(3).

<sup>110</sup> *Adult Guardianship and Trusteeship Act SA 2008*, c A-4.2, ss 26(6)(a), 46(5)(a).

<sup>111</sup> *Ibid* s 1(d).

<sup>112</sup> *Ibid* ss 13(2)(a), 26(3)(a), 46(2)(a). If the person refuses or is unable to participate in this process the Court may consider other evidence: at s 105.

<sup>113</sup> *Adult Guardianship and Trusteeship Regulation*, Alta Reg 219/2009, regs 3–10.

<sup>114</sup> *Ibid* reg 7.



takes up to two hours, and the findings of assessments are generally accepted by courts in Alberta.<sup>115</sup>

- 7.100 This system is quite costly. An assessor may charge up to CAD \$500 for a capacity report in relation to personal or financial matters, and CAD \$700 for both.<sup>116</sup>

### Capacity Assessment in Ontario

- 7.101 Similar to Alberta, Ontario has a system of prescribed capacity ‘assessors’.
- 7.102 The capacity standard in Ontario is that a person is incapable of managing their property or personal care if the person is not able to understand information that is relevant to making a decision, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.<sup>117</sup>
- 7.103 Capacity assessors in Ontario are trained and supported by the ‘Capacity Assessment Office’, which also produces guidelines for capacity assessment.<sup>118</sup> As with Alberta, the professionals eligible to become capacity assessors are doctors, psychologists, nurses, social workers and occupational therapists.<sup>119</sup> To be an assessor, all of these professional groups are required to complete a course, participate in continuing education, and conduct at least five assessments every two years.<sup>120</sup>

## SIX-STEP CAPACITY ASSESSMENT PROCESS

- 7.104 One approach to capacity assessment that received significant support in consultations and submissions was the six-step capacity assessment process, devised by Professor Peteris Darzins and colleagues.<sup>121</sup>
- 7.105 The process is as follows:
- Step 1: Ensure there is a valid trigger present to justify a capacity assessment, such as a person demonstrating behaviour that puts themselves or others at risk, or making choices that seem inconsistent with their previously held values.
  - Step 2: Engage the person in the assessment process by seeking agreement and informing the person about the process as far as possible.
  - Step 3: Gather information about the triggers for the assessment, and information about the person that can help inform an assessment of their decision making.
  - Step 4: Educate the person about the relevant decisions to the extent necessary to ensure that ‘ignorance’ is not mistaken for ‘incapacity’.
  - Step 5: Assess the person’s capacity by diligently and thoroughly determining whether a person understands and appreciates the decisions they face.
  - Step 6: Take appropriate action based on the person’s capacity results, including arranging for a substitute decision maker if necessary.<sup>122</sup>
- 7.106 The six-step capacity assessment process strongly emphasises the need to work from a presumption of capacity. The process of capacity assessment should primarily seek evidence of incapacity, and if this evidence cannot be found, the presumption of capacity should prevail.<sup>123</sup>

115 Teleconference with Brenda Lee Doyle–Provincial Director, Office of the Public Guardian, Alberta Canada (19 May 2011).

116 *Adult Guardianship and Trusteeship Regulation*, Alta Reg 219/2009, regs 9–10.

117 *Substitute Decisions Act*, 1992 SO 1992, c 30, ss 6, 45.

118 Capacity Assessment Office, Ontario Ministry for the Attorney General, *Guidelines for the Assessment of Capacity* (May 2005) <<http://www.attorneygeneral.jus.gov.on.ca/english/family/pgt/capacity/2005-05/guide-0505.pdf>>.

119 *Substitute Decisions Act*, 1992, O Reg 460/05 reg 2(2).

120 *Substitute Decisions Act*, 1992, O Reg 460/05 reg 2(1), 4–6.

121 Darzins, Molloy and Strang, above n 8, 1.

122 *Ibid* 12–18.

123 *Ibid* 3.

**COMMUNITY RESPONSES**

- 7.107 In the consultation paper, we asked for views about what criteria should guide the appointment of substitute decision makers, how to improve understanding of the concept of capacity, and how the law could better reflect people's different experiences of impaired decision-making ability. The Commission proposed a range of possible reform options for community comment.
- 7.108 A majority of submissions favoured retaining the presence of 'disability' as part of the capacity standard used by VCAT when deciding whether to appoint a guardian or administrator. There was general support for providing a clearer definition of capacity in guardianship laws, but some disagreement about what that definition should be. There was strong support for a statutory presumption of capacity and legislative capacity assessment principles.

**THE CAPACITY STANDARD**

- 7.109 The Commission posed two questions in the consultation paper:
- Should 'disability' continue to be relevant to the assessment of capacity and the criteria for appointment?
  - What should be the legislative standard for capacity under new guardianship laws?<sup>124</sup>

**Disability as a precondition to lacking capacity**

- 7.110 The issue of whether 'disability' is an appropriate concept for continued use in guardianship law formed part of our terms of reference. In response to our information paper, a number of groups expressed concern that focusing on people with a 'disability' was discriminatory and suggested that the real issue was 'incapacity'.<sup>125</sup>
- 7.111 It was widely accepted that the presence of disability alone does not justify the appointment of a guardian or administrator.<sup>126</sup>
- 7.112 However, there was also general support for the Commission's proposal that the presence of a disability should remain part of the test for finding that a person lacks capacity.<sup>127</sup> A smaller number of submissions argued that the presence of a disability should not be a precondition to a finding that a person lacks capacity—primarily on the basis that the requirement is discriminatory.<sup>128</sup> The Victorian Equal Opportunity and Human Rights Commission, for example, argued that the requirement of a diagnosis of disability is a 'discriminatory step' and that concerns about widening the category of people to whom an order could apply had been overstated.<sup>129</sup>

124 Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 10 (2011) 199–200.

125 For eg, Submissions IP 5 (Southwest Advocacy Association), IP 9 (Royal District Nursing Service), IP 11 (Tony and Heather Tregale), IP 19 (Scope Vic), IP 20 (Dying with Dignity Victoria), IP 22 (Epworth Foundation), IP 29 (Australian Association of Social Workers), IP 37 (Victorian Equal Opportunity and Human Rights Commission), IP 42 (Health Services Commissioner), IP 46 (Troy Huggins), IP 47 (Law Institute of Victoria), IP 50 (Action for Community Living) and IP 52 (Spectrum Migrant Resource Centre).

126 Consultation with College of Clinical Neuropsychologists (23 March 2011); Submissions CP 14 (BENETAS), CP 17 (Inclusion Melbourne), CP 45 (Scope Vic), CP 54 (JacksonRyan Partners), CP 57 (Aged Care Assessment Service in Victoria), CP 58 (The Australian Psychological Society), CP 66 (Victorian Equal Opportunity and Human Rights Commission), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 74 (PILCH Homeless Persons' Legal Clinic) and CP 75 (Federation of Community Legal Centres (Victoria)). However, the Catholic Archdiocese of Melbourne argued that 'disability' alone could be sufficient justification if there is a need for representation: Submission CP 27 (Catholic Archdiocese of Melbourne).

127 Consultation with College of Clinical Neuropsychologists (23 March 2011); Submissions CP 14 (BENETAS), CP 19 (Office of the Public Advocate), CP 22 (Alzheimer's Australia Vic), CP 23 (Dr Kristen Pearson), CP 29 (STAR Victoria), CP 33 (Eastern Health), CP 47 (Dr Michael Murray), CP 48 (Centre for the Advancement of Law and Mental Health—Monash University), CP 54 (JacksonRyan Partners), CP 56 (Disability Discrimination Legal Service), CP 57 (Aged Care Assessment Service in Victoria), CP 58 (The Australian Psychological Society), CP 59 (Carers Victoria), CP 70 (State Trustees Limited), CP 71 (Seniors Rights Victoria), CP 73 (Victoria Legal Aid), CP 74 (PILCH Homeless Persons' Legal Clinic) and CP 75 (Federation of Community Legal Centres (Victoria)).

128 Submission CP 37 (Mildura Base Hospital), CP 45 (Scope Vic), CP 63 (Shih-Ning Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)) and CP 66 (Victorian Equal Opportunity and Human Rights Commission).

129 Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

## Describing the capacity standard

- 7.113 The Commission asked whether new legislation should define ‘capacity’. The Commission suggested that the definition in the United Kingdom’s Mental Capacity Act could be adopted in Victoria because it is the product of detailed consideration of this issue in a similar jurisdiction.<sup>130</sup>
- 7.114 The inclusion of a clearer legislative definition of capacity or incapacity was supported in submissions,<sup>131</sup> but there was concern among some groups that a definition could prove overly prescriptive.<sup>132</sup>
- 7.115 The Public Advocate, State Trustees, the Law Institute of Victoria and several other groups supported the Mental Capacity Act approach,<sup>133</sup> while others had concerns with particular aspects of the definition.
- 7.116 The Mental Capacity Act definition is that a person lacks the ability to make a decision if they are unable to:
- understand the information relevant to the decision, or
  - retain that information, or
  - use or weigh that information as part of the process of making the decision, or
  - communicate their decision in some way.<sup>134</sup>
- 7.117 The Act provides further guidance about what this means,<sup>135</sup> and a Code of Practice provides additional assistance.<sup>136</sup>
- 7.118 The requirement to be able to communicate decisions was seen by a number of groups as having the potential to lead to inappropriate incapacity findings for people with significant communication impairments.<sup>137</sup> It was argued that the law should explicitly require the provision of appropriate assistance in communication.<sup>138</sup> Communication Rights Australia was particularly concerned, arguing that ‘without full support it is inevitable that an unacceptable number of people will have their autonomy eroded on the basis of inaccurate assessments of their capacity’.<sup>139</sup>
- 7.119 The requirement to ‘retain’ information was also criticised as potentially including people who have memory difficulties, but are nonetheless able to make decisions about their own affairs.<sup>140</sup> Seniors Rights Victoria argued that the law should only require the ability to retain information for as long as is necessary to make the decision.<sup>141</sup>
- 7.120 The Australian Psychological Society (APA) supported a statutory framework for the assessment of capacity, but suggested modifications to the Mental Capacity Act approach. The APA argued that retention of information is needed for both the decision and its implementation, and that the framework should identify people who

130 The *Mental Capacity Act 2005* (UK) was the result of an extensive review process conducted by the Law Commission of England and Wales. The Commission’s report considered the capacity standard which should be used, which was ultimately adopted in England and Wales. See Law Commission (United Kingdom), *Mental Incapacity*, Report No 231 (1995) 32–41.

131 Submissions CP 19 (Office of the Public Advocate), CP 57 (Aged Care Assessment Service in Victoria), CP 58 (The Australian Psychological Society), CP 59 (Carers Victoria), CP 74 (PILCH Homeless Persons’ Legal Clinic) and CP 77 (Law Institute of Victoria).

132 Submissions CP 66 (Victorian Equal Opportunity and Human Rights Commission) and CP 67 (Trustee Corporations Association of Australia).

133 Submissions CP 19 (Office of the Public Advocate), CP 57 (Aged Care Assessment Service in Victoria), CP 59 (Carers Victoria), CP 70 (State Trustees Limited), CP 74 (PILCH Homeless Persons’ Legal Clinic), CP 77 (Law Institute of Victoria) and CP 78 (Mental Health Legal Centre).

134 *Mental Capacity Act 2005* (UK) s 3(1).

135 *Ibid* s 3(2)–(4).

136 Department for Constitutional Affairs (United Kingdom), *Mental Capacity Act 2005 Code of Practice* (The Stationery Office, 2007) 40–62.

137 Consultation with carers, service providers and advocates in Bendigo (30 March 2011); Submission CP 75 (Federation of Community Legal Centres (Victoria)).

138 Submissions CP 29 (STAR Victoria), CP 75 (Federation of Community Legal Centres (Victoria)) and CP 82 (Communication Rights Australia).

139 Submission CP 82 (Communication Rights Australia).

140 Submissions CP 22 (Alzheimer’s Australia Vic), CP 71 (Seniors Rights Victoria) and CP 73 (Victoria Legal Aid).

141 Submission CP 71 (Seniors Rights Victoria).

lack insight into the potential consequences of the decisions—in particular people with damage to the frontal regions of the brain. The APA proposed the following amended definition:

A person is unable to make a decision for himself if he is unable—

- (a) to understand the information relevant to the decision
- (b) to retain that information for as long as is relevant to the decision and its implementation
- (c) to appreciate the potential consequences of the decision on themselves and their situation
- (d) to weigh the risks and benefits of the options as part of making the decision
- (e) to communicate the decision in some way (whether by talking, using sign language or any other means).<sup>142</sup>

### CAPACITY ASSESSMENT

7.121 In the consultation paper the Commission proposed:

- introducing legislative principles to guide the assessment of capacity
- including a presumption of capacity in new legislation
- recognising that capacity is decision and time specific; should not be assumed based on appearance; should not be based solely on evidence of ‘unwise’ decision making; and that incapacity should not be found if it is possible to support the person to make the decision.<sup>143</sup>

7.122 These proposals were based on concerns expressed to the Commission about the cursory manner in which capacity assessments are sometimes conducted,<sup>144</sup> and important developments in other jurisdictions.<sup>145</sup>

7.123 The proposals for a legislative presumption of capacity and the inclusion of statutory principles guiding capacity assessments were strongly supported in consultations and submissions.<sup>146</sup>

7.124 While generally supportive of the proposed principles, Scope argued that the principles should further emphasise the provision of support in decision-making and supported decision-making principles.<sup>147</sup>

7.125 The Victorian Equal Opportunity and Human Rights Commission noted the value in a consistent approach to capacity between guardianship and mental health laws, and a move away from an ‘all or nothing’ approach to assessing capacity.<sup>148</sup>

### THE COMMISSION’S VIEWS AND CONCLUSIONS

#### RETAINING THE CONNECTION BETWEEN ‘DISABILITY’ AND ‘INCAPACITY’

7.126 The Commission believes that new guardianship laws should require proof of a causal connection between a person’s lack of capacity and a disability. We discuss this issue again in Chapter 12 where we look at the criteria for VCAT to apply before it appoints a substitute decision maker.

<sup>142</sup> Submission CP 58 (The Australian Psychological Society).

<sup>143</sup> Victorian Law Reform Commission, *Guardianship*, Consultation Paper No 10 (2011) 201.

<sup>144</sup> *Ibid* 189–190.

<sup>145</sup> Primarily the *Mental Capacity Act 2005* (UK) ss 1–3.

<sup>146</sup> Roundtables with people with acquired brain injuries (16 March 2011) and Disability Advocacy Resource Unit (13 April 2011); Submissions CP 58 (The Australian Psychological Society), CP 69 (Australian Medical Association (Victoria)), CP 73 (Victoria Legal Aid) and CP 78 (Mental Health Legal Centre).

<sup>147</sup> Submission CP 45 (Scope Vic).

<sup>148</sup> Submission CP 66 (Victorian Equal Opportunity and Human Rights Commission).

- 7.127 As noted earlier, capacity is a legal construct ultimately determined by professional judgment rather than by objective testing. In order to ensure that findings of incapacity are not made because of subjective views about the quality of particular decisions, it is important that part of the assessment process rely upon objective, verifiable grounds. This would occur if a link between ‘disability’ and ‘incapacity’ is retained.
- 7.128 Retaining this link should also ensure that guardianship law does not become a means of controlling people with behavioural problems. Guardianship should continue to be seen as a mechanism for assisting people who have impaired decision-making ability because of disability to retain their individual status and participate in the life of the community to the fullest extent possible. Numerous other legal mechanisms can be invoked to assist people with behavioural problems and to protect the community from people who pose an unacceptable risk of harm.<sup>149</sup>

## RECOMMENDATION

### Retaining the connection between disability and incapacity

22. The law should state that a person lacks capacity in relation to a matter if at the relevant time they are unable to make a decision in relation to the matter because of a disability.

## Definition of disability

- 7.129 The current definition of ‘disability’ in the G&A Act—‘intellectual impairment, mental disorder, brain injury, physical disability or dementia’<sup>150</sup>—remains appropriate for new guardianship laws. Some concern was expressed about the continued inclusion of ‘physical disability’, given that the presence of a physical disability is a separate issue from a person’s cognitive ability to make a decision. However, because a physical disability can bear upon a person’s capacity to execute a decision by impairing their ability to communicate their wishes, the Commission believes its continued inclusion in the definition of ‘disability’ is appropriate.
- 7.130 The Commission accepts Autism Victoria’s submission that ‘autism spectrum disorder’ should be included in the definition of ‘disability’ for the purposes of the Act. This will clearly indicate that autism spectrum disorder is a condition that can impair a person’s decision-making ability.
- 7.131 While it is arguable that autism spectrum disorder is already included in the definition of ‘disability’ because it falls within the concept of ‘mental disorder’, the Commission believes that it is helpful to put this matter beyond doubt by specifically including autism spectrum disorder. While having an autism spectrum disorder does not necessarily mean that a person’s decision-making ability is impaired, guardianship legislation should be available to a person with autism spectrum disorder who satisfies all of the criteria for the appointment of a substitute decision maker.

## RECOMMENDATION

### The definition of disability

23. The definition of ‘disability’ should include intellectual impairment, autism spectrum disorder, mental disorder, brain injury, physical disability or dementia.

<sup>149</sup> See eg, *Severe Substances Dependence Treatment Act 2010* (Vic); *Disability Act 2006* (Vic) pt 8; *Mental Health Act 1986* (Vic) pt 3; *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Sex Offenders Registration Act 2004* (Vic); *Sentencing Act 1991* (Vic) pt 2A, s 18B.

<sup>150</sup> *Guardianship and Administration Act 1986* (Vic) s 3(1).

**Disability should not be a separate criterion**

- 7.132 As foreshadowed in the consultation paper, the Commission believes that ‘disability’ should not be a separate and distinct element of the statutory grounds for appointing a substitute decision maker. This recommendation represents an important change to the current law. Retaining ‘disability’ as a separate element would be out of step with a capacity-based approach to guardianship laws. The Commission considers that a person’s disability should be relevant only to the extent that it bears upon their ability to make or implement decisions.
- 7.133 Although this reform is unlikely to bring about any change in practice, it is symbolically important because it reinforces the notion that incapacity rather than disability justifies the appointment of a substitute decision maker.
- 7.134 This approach was largely supported in submissions,<sup>151</sup> although some submissions argued that the Commission should go further and recommend removal of all reference to disability as a precondition for a finding of incapacity.<sup>152</sup> Victoria Legal Aid expressed concerns, shared by the Commission, about removing reference to disability altogether:

The alternative proposal of removing the criterion of ‘disability’ altogether is problematic. It would mean that, regardless of the cause of a person’s inability to make reasonable judgments, if they lacked capacity an administrator or guardian could be appointed. The issue of how this capacity could be tested and objectively assessed would need to be determined. There is also the risk that removing this criterion would allow the law to be used to make orders in a far more liberal way than Parliament intended. If this approach were to be adopted then people with substance dependencies could easily be caught within the Act. The Act should not be used as a form of social control or to protect people who are vulnerable, even if they are making objectively bad decisions, where there is no issue of incapacity.<sup>153</sup>

- 7.135 The Commission acknowledges the concerns by some groups that continued reference to ‘disability’ could be seen as discriminatory. However, on balance, these concerns are outweighed by the need to ensure that there is some objective basis upon which to make a finding of incapacity.<sup>154</sup> In Chapter 12 the Commission makes a specific recommendation excluding the consideration of disability as a separate criteria for a VCAT appointment of a substitute decision maker.

**DEFINING INCAPACITY AND CAPACITY**

- 7.136 The Commission believes that new guardianship laws should define both capacity and incapacity. A capacity standard would be used when determining whether a person has the cognitive ability to appoint an enduring personal guardian or financial administrator. An incapacity standard would be used when determining whether a person is unable to make decisions for themselves and a personal appointment becomes operative, a tribunal appointment might by necessary, or a health decision maker assumes responsibility for making medical treatment decisions.
- 7.137 The Commission believes that the incapacity standard and the incapacity assessment framework in the United Kingdom’s Mental Capacity Act are useful precedents that

151 For eg, Submissions CP 19 (Office of the Public Advocate), CP 73 (Victoria Legal Aid) and CP 77 (Law Institute of Victoria). However, the Catholic Archdiocese argued against this approach, arguing that a disability should be enough to justify an application for guardianship if there is a need for representation and there should be no tests for incapacity: Submission CP 27 (Catholic Archdiocese of Melbourne).

152 For eg, Submissions CP 45 (Scope Vic), CP 63 (Shih-Ning Then, Prof Lindy Willmott & Assoc Prof Ben White (QUT)) and CP 66 (Victorian Equal Opportunity and Human Rights Commission).

153 Submission CP 73 (Victoria Legal Aid).

154 The Commission notes that this approach differs from that of the Queensland Law Reform Commission, which recently recommended retaining Queensland’s current approach of not requiring a finding of a disability as part of the test for incapacity. The Queensland Law Reform Commission argued that to do so would be discriminatory: Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report No 67 (2010) vol 1, 270.

can be adapted for use in Victoria. The Commission recommends a few changes of detail, based largely upon aspects of the Queensland legislation. The approach in the United Kingdom Act was mostly supported in submissions, and was endorsed in the Victorian Parliament Law Reform Committee's *Inquiry Into Powers of Attorney*.<sup>155</sup>

### The ability to retain information

- 7.138 The United Kingdom Act's stipulation that an inability to retain information is one of four indicators of incapacity was of particular concern to groups associated with age-related disabilities. The Mental Capacity Act also makes it clear that it is sufficient that a person may only be able to retain information for a short period.<sup>156</sup>
- 7.139 The Commission believes that it is preferable to deal with the issue of retention of information by saying that a person requires the ability to retain information only to the extent that is necessary to make the decision. This approach acknowledges that some decisions—such as those involving complex financial transactions—might require an ability to retain information on an ongoing basis, whereas other routine decisions might require a very limited ability to retain information.

### Effect of the decision

- 7.140 Another criticism of the Mental Capacity Act test—primarily from the Australian Psychological Association—is that it does not adequately recognise the importance of the ability to understand the possible consequences of the decision.<sup>157</sup> However, the Mental Capacity Act deals with this matter in the following way:
- The information relevant to a decision includes information about the reasonably foreseeable consequences of—
- (a) deciding one way or another, or
  - (b) failing to make the decision.<sup>158</sup>
- 7.141 The Commission prefers the simpler test used in many branches of the common law that a person 'understand the nature and effect' of a decision.<sup>159</sup> The Commission has incorporated the 'effect' limb of this test in its recommendation that the person must be capable of understanding 'the information relevant to a decision *and the effect of the decision*'.
- 7.142 This amendment to the Mental Capacity Act standard makes the ability to understand the likely consequences of a decision a clearer component of the test. This is important because an understanding of the effect of a decision is an essential component of being legally responsible for that decision.

### Ability to communicate the decision

- 7.143 Concerns about the requirement of being able to communicate a decision fell into two categories:
- Concern that people will be inappropriately found to lack capacity when they really lack assistance in communication.
  - A broader concern that an inability to communicate a decision does not mean a person lacks the cognitive ability to make a decision.

<sup>155</sup> Law Reform Committee, Parliament of Victoria, *Inquiry into Powers of Attorney* (2010) 110–113 ('*Inquiry into Powers of Attorney*').

<sup>156</sup> *Mental Capacity Act 2005* (UK) s 3(3).

<sup>157</sup> Submission CP 58 (The Australian Psychological Society).

<sup>158</sup> *Mental Capacity Act 2005* (UK) s 3(4).

<sup>159</sup> The leading case on capacity to enter into a contract in Australia—*Gibbons v Wright* (1954) 91 CLR 423—held that a person must have 'such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation': at 437 (Dixon CJ, Kitto and Taylor JJ). In addition to forming the standard for capacity for entry into enduring powers of attorney in Victoria, the test of 'nature and effect' forms part of the standard for guardianship laws in Queensland: see *Guardianship and Administration Act 2000* (Qld) sch 4.



- 7.144 A physiological inability to communicate a decision does not mean a person lacks the cognitive ability to make that decision. All reasonable efforts should be made to assist people in these circumstances to communicate their decisions to others. However, where all efforts to assist a person to communicate have been tried without success, it should be possible to find that a person lacks legal capacity, and therefore allow for the possibility of appointing a substitute decision maker. The appointment of a substitute decision maker may be justified in these circumstances on the basis that there is no other way to ensure the person's rights and interests are protected so that they can participate in the many activities where capacity is essential.
- 7.145 The Commission suggests that the law should include a very broad definition of what it means to be able to communicate a decision, and further principles to guide the process of capacity assessment.

### RECOMMENDATIONS

#### Defining incapacity

24. A person is unable to make a decision if they are unable to:
- (a) understand the information relevant to the decision and the effect of the decision
  - (b) retain that information to the extent necessary to make the decision
  - (c) use or weigh that information as part of the process of making the decision, or
  - (d) communicate the decision in some way.

#### Defining capacity

25. A person has the capacity to make a decision if they are able to:
- (a) understand the information relevant to the decision and the effect of the decision
  - (b) retain that information to the extent necessary to make the decision
  - (c) use or weigh that information as part of the process of making the decision, and
  - (d) communicate the decision in some way.

### ASSESSING CAPACITY

- 7.146 Assessing capacity is a very complex undertaking. There are no definitive, objective tests and relatively few professionals are specially trained to conduct capacity assessments. Professionals with decades of experience have suggested to the Commission that capacity assessment actually gets harder over time, as practitioners become more aware of the complex and individualised nature of cognitive ability and inability.<sup>160</sup>
- 7.147 The Commission believes that clear principles should inform the process of capacity assessment under guardianship laws. These principles should provide guidance when anyone—including clinicians, tribunal members, or persons appointed under enduring powers—is required to determine whether another person has capacity to engage in a particular activity.

<sup>160</sup> Consultation with Australian & New Zealand Society for Geriatric Medicine (7 April 2011).



7.148 The principles proposed by the Commission in the consultation paper were strongly supported in consultations and submissions and, with some additions, have formed the basis of the Commission’s recommendations. The Victorian Parliament Law Reform Committee’s *Inquiry into Powers of Attorney* also recommended similar principles.<sup>161</sup>

### **Presumption of capacity**

7.149 While it would effectively be a restatement of the common law, a statutory recognition of a presumption of capacity is symbolically significant.

7.150 The legal presumption of capacity is a particularly important starting point for VCAT when determining whether a substitute decision maker should be appointed. The presumption is also important when an assessment is made about whether a personal appointment should be activated due to loss of capacity.

## **RECOMMENDATION**

### **Presumption of capacity**

26. A person must be presumed to have capacity unless it is established that the person lacks capacity.

### **Capacity is decision-specific and time-specific**

7.151 It is unhelpful to view capacity as an attribute that a person either has or does not have. Impaired decision-making capacity may be temporary or permanent and can fluctuate over time or according to the decision to be made.

7.152 While some people may lose some or most capacity permanently—for example, a person in the late stages of dementia—others may only temporarily lose capacity.

7.153 Similarly, an inability to make decisions in one area—such as the management of money—does not necessarily mean that a person is unable to make other decisions about other aspects of their personal circumstances, such as decisions around health care or accommodation.

7.154 While these principles already appear to inform approaches to capacity assessment, the Commission believes there is benefit in including them in new guardianship laws.

### **Capacity is support-dependant**

7.155 This principle, drawn from the United Kingdom’s Mental Capacity Act, recognises that a person’s capacity to make a decision can be affected by the support available to them. Some people who struggle to make a decision alone might be capable of making their own decision with the support of a trusted person.

7.156 This principle would also oblige VCAT to consider options that are less restrictive of a person’s autonomy when deciding to appoint a substitute decision maker. This principle is consistent with Australia’s obligations under the Convention.<sup>162</sup>

### **Capacity should be properly assessed, and should not be based on assumptions**

7.157 These proposals, also drawn from the Mental Capacity Act, are consistent with a modern, functional approach to capacity assessment.

<sup>161</sup> *Inquiry into Powers of Attorney*, above n 155, 113–120.

<sup>162</sup> *Convention on the Rights of Persons with Disabilities* arts 12(3), (4).



- 7.158 An adult's lack of capacity to make a decision should not be assumed because of their age, appearance, condition, or an aspect of their behaviour. Additionally, a person should not be considered to lack the capacity to make a decision merely because they make a decision that others consider unwise.
- 7.159 While a person's condition or repeatedly poor decisions might give rise to concerns about their capacity, these matters should not be accepted as proof alone that a person lacks capacity.

### Capacity should be assessed in an appropriate environment

- 7.160 A person's capacity to make a decision may vary according to the circumstances in which an assessment occurs. 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. For example, a person may demonstrate greater decision-making ability when assessed in their home environment rather than in an unfamiliar setting such as a hospital or a tribunal hearing room. They may also perform better at certain times of the day than at others.

## RECOMMENDATIONS

### Capacity assessment principles

27. New guardianship legislation should contain the following capacity assessment principles:
- A person's capacity is specific to the decision to be made.
  - Impaired decision-making capacity may be temporary or permanent and can fluctuate over time.
  - An adult's incapacity to make a decision should not be assumed based on their age, appearance, condition, or an aspect of their behaviour.
  - A person should not be considered to lack the capacity to make a decision merely because they make a decision that others consider to be unwise.
  - A person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support.
  - 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.

## MEANS OF ASSESSING CAPACITY

### Victoria capacity assessment toolkit

- 7.161 Consistent with the recommendation of the Victorian Parliament Law Reform Committee,<sup>163</sup> the Commission believes that the development of a capacity assessment toolkit in Victoria would be beneficial, and contribute to capacity assessment standards.
- 7.162 The New South Wales capacity toolkit<sup>164</sup>—which has received broad support—should be adapted to the Victorian context, and in particular to reforms of Victorian guardianship laws.

<sup>163</sup> *Inquiry into Powers of Attorney*, above n 155, 113–130.

<sup>164</sup> NSW Government *Capacity Toolkit* (15 February 2001) Lawlink: Attorney General and Justice <[http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL\\_DiversitySrvces.nsf/pages/diversity\\_services\\_capacity\\_toolkit](http://www.lawlink.nsw.gov.au/lawlink/diversityservices/LL_DiversitySrvces.nsf/pages/diversity_services_capacity_toolkit)>.

## RECOMMENDATION

### Means of assessing capacity

28. The Victorian Government should develop a comprehensive resource about capacity and capacity assessment based on the New South Wales capacity toolkit.

### Qualified capacity assessors

- 7.163 The Commission believes the Victorian Government should consider introducing a training and certification system for capacity assessment based on the designated capacity assessor systems developed in Ontario and Alberta. This consideration should involve key organisations with an interest in guardianship laws, such as the Public Advocate, State Trustees and other professional administrators, and VCAT.
- 7.164 The quality of capacity assessments would clearly be improved by relying on trained and certified capacity assessors. As there is considerable cost associated with such a scheme, the Commission recommends that the Victorian Government further evaluate this proposal.

## RECOMMENDATION

### Qualified capacity assessors

29. The Victorian Government should consider the development of a system of designated capacity assessors, based on the Alberta model of designated capacity assessors.