

**ATTORNEY GENERAL'S DEPARTMENT OF NSW  
DISCUSSION PAPER**

*Are the rights of people whose capacity is in question  
being adequately protected?*

**A joint response by People with Disability Australia Inc  
and Blake Dawson Waldron**



**BLAKE DAWSON WALDRON**  
L A W Y E R S

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## 1. SUMMARY OF RECOMMENDATIONS

### 1.1 Issue One: Creating a Consistent Approach to the Assessment of Legal Capacity

In response to Questions 1 and 2 we recommend:

- that a single legal definition of capacity be adopted which can be used in all circumstances;
- that a 'decision specific' approach to capacity be adopted as the norm. However, a 'functional' approach should remain available if it would be against the person's best interests for capacity to be determined on a decision by decision basis;
- that the uniform definition be based on a 'decision specific' approach to capacity but be sufficiently flexible that it can be applied if a 'functional' approach is required by the circumstances;
- that capacity be defined as the ability to:
  - understand the information relevant to making the decision;
  - use and weigh that information as part of the decision-making process;
  - appreciate the reasonably foreseeable consequences of the decision and of not making a decision;
  - make the decision voluntarily; and
  - communicate the decision (whether through speech, writing, sign language or any other means).

'Decision' includes:

- a single decision; or
- all the decisions required by the transaction, matter or function for which it is proposed an alternative decision-maker be appointed;
- that guidelines be included with the definition to assist in applying the uniform definition across different disciplines.

In response to Question 3 we recommend:

- incorporating a presumption of capacity into legislation governing the appointment of substitute decision-makers (but not otherwise); and
- including guiding principles to maximise the autonomy of a person whose capacity is in question or who is found to be under legal incapacity in legislation governing the appointment of substitute decision-makers.

In response to question 4 we recommend that the *Guardianship Act 1983* and *Protected Estates Act 2003* be changed to include the proposed definition which can be applied to specific decisions (such medical treatment) or specific function (such as management of part or all of a person's financial estate).

In response to question 5 we consider that a single definition would result in more standardised capacity assessments in practice.

## 1.2 **Issue Two: Creating Resources For Capacity Assessors**

In response to Question 1 we recommend:

- that further consideration be given to the composition of the list of assessors. In particular we recommend that the police be considered as a distinct group of assessors of capacity with specific needs;
- consistency and cross-disciplinary cooperation in the development and conduct of training for capacity assessors; and
- the inclusion of people with disability in the development of training materials for capacity assessors.

In response to Question 2 we recommend resources for capacity assessors include the guiding principle of presumption of capacity and adequate safeguards for people with disability

In response to Question 3 we recommend two tiers of assessment, being laypersons and professionals.

## 1.3 **Issue Three: Promoting and Protecting Rights**

In response to Question 1 we recommend the development of a new framework to support people who lack capacity or whose capacity is in question encompassing the features set out in 6.6.

In response to Question 2 we submit that:

- if a person's capacity is questioned, only a Court or Tribunal can determine whether or not the person lacks capacity;
- the ability of the Court or Tribunal to determine whether or not the person lacks capacity is not dependent on a Court or Tribunal order being in existence;
- the appropriate role for the Court or Tribunal is to determine whether or not a person has capacity if it is challenged and to appoint a substitute decision-maker if the person lacks capacity;
- it is not the role of the person whose capacity is being questioned to challenge the questioning of their capacity through a second opinion. Any such suggestion reverses the existing onus on the person questioning another's capacity to prove that the person lacks capacity.

In response to Question 3 we submit that the current framework is inadequate for the reasons set out in 6.5.

## 2. **BACKGROUND TO JOINT SUBMISSIONS**

What follows is a joint response to the NSW Attorney-General's Department Discussion Paper titled "Are the rights of people whose capacity is in question being adequately promoted and protected?" (**the Discussion Paper**) by People with Disability Australia Inc and Blake Dawson Waldron.

People with Disability Australia Inc (**PWD**) is a leading national peak disability rights, advocacy and service organisation. PWD has been providing cross-disability services and information, individual and systemic advocacy and disability rights training for people with disability and their associates on a statewide, national and international basis for 25 years. PWD is an organisation owned and controlled by people with disability.

Blake Dawson Waldron (**BDW**) is a national (and international) law firm. BDW's National Pro Bono Program (established in 1999) has three focus areas, one of which is assisting people with mental illness and/or intellectual disability and their carers. Our response is based on our experience acting for people with an intellectual disability, mental illness or cognitive impairment affecting their legal capacity.

PWD and BDW have developed good working relationships and have a common approach on the issue of capacity. PWD and BDW decided that it would be useful to make a joint submission drawing on both the experience and expertise of PWD in working with and advocating for people whose capacity is in question and/or limited and the experience of BDW in acting for such people.

## 3. **PRELIMINARY MATTERS**

### 3.1 **Legal capacity**

In this paper 'capacity' means the ability to make legally binding decisions.

Under NSW law there is a presumption that a person over 18 has capacity. Further, unless an alternative decision-maker has been appointed (for example under an Enduring Power of Attorney or by the Guardianship Tribunal) the only person able to make legally binding decisions for a person is the person themselves.

The consequences of having legal capacity are that:

- (a) the person has the right to make legal decisions for themselves (regardless of the 'wisdom' of those decisions); and
- (b) the person is legally responsible for his or her decisions.

Given the consequences of a finding of legal capacity it is important in defining capacity to balance the right to autonomy in decision-making with the need to adequately protect people who lack capacity to make decisions, even with support.

### 3.2 **The wider issue of capacity**

The focus of the Discussion Paper is on people whose capacity is limited or in question because they have a cognitive impairment. Capacity, however, is a wider issue. A person's

capacity may be limited due to age, education, intellectual ability, relevant knowledge and experience, psychological factors, the nature and consequences of the decision and external factors such as time frame. A person's capacity may be permanently or temporarily limited. Incapacity may be imposed by law, for example, a child under the age of 14 does not have the capacity to consent to medical treatment.<sup>1</sup>

We submit that any discussion of capacity must take into account the range of circumstances in which a person's capacity is limited. We further submit that any uniform definition of capacity must apply to the variety of circumstances in which a person may lack capacity if it is to avoid being discriminatory on the grounds of disability.

### 3.3 Human rights considerations

In reviewing the law and procedures for people whose capacity is in question and/or is limited we must remain mindful of Australia's human rights obligations and of international human rights principles. Any change to the law of capacity must comply with those obligations and should be guided by the principles behind those obligations.

We note the following rights, obligations and principles in particular:

- (a) The right to be recognised as a person before the law<sup>2</sup>;
- (b) The right to freedom from discrimination on the grounds of disability. A "status" approach to capacity under which a person's capacity is determined on the basis of their mental illness, intellectual disability or cognitive impairment rather than their decision-making ability would violate this right;
- (c) The obligation to ensure that any restriction on a person's right to autonomy in decision-making is proportionate to and based upon a finding that the person lacks the requisite capacity<sup>3</sup>;
- (d) The obligation to define capacity so as to limit the operation of a finding of incapacity to the decision or function that the person is unable to manage at a particular time and in a particular circumstance<sup>4</sup>;
- (e) The right of a child who is capable of forming his or her own views to have those views be given due weight in accordance with the age and maturity of the child<sup>5</sup>;
- (f) The right of a person to freely pursue their economic, social and cultural development<sup>6</sup>. Implied in this right is a right of a person to enter into the contracts

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<sup>1</sup> Section 49 *Minors (Property and Contracts) Act* 1970 (NSW).

<sup>2</sup> Article 6 of the UDHR and Article 16 ICCPR

<sup>3</sup> Report of the Secretary General, see Note 11, Chapter 3, para 17; WHO Resource Book at Note 1 Chapter 2, 7.2

<sup>4</sup> Report of the Secretary General, see Note 11, Chapter 3, para 17; WHO Resource Book at Note 1 Chapter 2, 7.2

<sup>5</sup> Article 12 of the International Convention on the Rights of the Child.

necessary to enable pursuit of the person's economic, social and cultural development;

- (g) The right of disabled persons to measures designed to assist them to become as self-reliant as possible<sup>7</sup>;
- (h) The right of disabled, mentally retarded and mentally ill persons to services which will enable them to develop their capabilities and skills to the maximum<sup>8</sup>;
- (i) The right of disabled, mentally retarded and mentally ill persons to protection against exploitation<sup>9</sup>;
- (j) The right of a person with a mentally illness whose legal capacity is in question to a fair hearing by an independent and impartial tribunal<sup>10</sup>;
- (k) The right of a person with a mental illness to confidentiality<sup>11</sup>;
- (l) The principle that the treatment of a person with a mental illness be directed towards preserving and enhancing that person's autonomy<sup>12</sup>; and
- (m) The right to liberty of movement and freedom of a person to choose his or her residence<sup>13</sup>.

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<sup>6</sup> Article 1 of the International Covenant on Economic, Social and Cultural Rights.

<sup>7</sup> Article 5 of the UN Declaration on the Rights of Disabled Persons U.N. Doc. A/10034 (1975)

<sup>8</sup> Article 6 of the UN Declaration on the Rights of Disabled Persons U.N. Doc. A/10034 (1975) and Declaration on the Rights of Mentally Retarded Persons UN Doc. A/8429 (1971) Article 2

<sup>9</sup> Article 10 of the UN Declaration on the Rights of Disabled Persons U.N. Doc. A/10034 (1975) and Declaration on the Rights of Mentally Retarded Persons UN Doc. A/8429 (1971) Article 6

<sup>10</sup> Article 6 of the Declaration of the rights of Mentally Retarded Persons G.A. res. 2856 (XXVI), 26 U.N. GAOR Supp. (No. 29) at 93, U.N. Doc. A/8429 (1971).

<sup>11</sup> Article 6 of the Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, G.A. res. 46/119, 46 U.N. GAOR Supp. (No. 49) at 189, U.N. Doc. A/46/49 (1991).

<sup>12</sup> Article 9 of the Principles for the Protection of Persons with Mental Illnesses and the Improvement of Mental Health Care, G.A. res. 46/119, 46 U.N. GAOR Supp. (No. 49) at 189, U.N. Doc. A/46/49 (1991).

<sup>13</sup> Article 12 of the International Covenant on Civil and Political Rights.

#### 4. **ISSUE ONE: CREATING A CONSISTENT APPROACH TO THE ASSESSMENT OF LEGAL CAPACITY**

##### 4.1 **Executive Summary**

In response to Questions 1 and 2 we recommend:

- that a single legal definition of capacity be adopted which can be used in all circumstances;
- that a 'decision specific' approach to capacity be adopted as the norm. However, a 'functional' approach should remain available if it would be against the person's best interests for capacity to be determined on a decision by decision basis;
- that the uniform definition be based on a 'decision specific' approach to capacity but be sufficiently flexible that it can be applied if a 'functional' approach is required by the circumstances;
- that capacity be defined as the ability to:
  - understand the information relevant to making the decision;
  - use and weigh that information as part of the decision-making process;
  - appreciate the reasonably foreseeable consequences of the decision and of not making a decision;
  - make the decision voluntarily; and
  - communicate the decision (whether through speech, writing, sign language or any other means).

'Decision' includes:

- a single decision; or
  - all the decisions required by the transaction, matter or function for which it is proposed an alternative decision-maker be appointed.
- that guidelines be included with the definition to assist in applying the uniform definition across different disciplines.

In response to Question 3 we recommend:

- incorporating a presumption of capacity into legislation governing the appointment of substitute decision-makers (but not otherwise); and
- including guiding principles to maximise the autonomy of a person whose capacity is in question or who is found to be under legal incapacity in legislation governing the appointment of substitute decision-makers.

In response to question 4 we recommend that the *Guardianship Act 1983* and *Protected Estates Act 2003* be changed to include the proposed definition which can be applied to specific decisions (such medical treatment) or specific function (such as management of part or all of a person's financial estate).

In response to question 5 we consider that a single definition would result in more standardised capacity assessments in practice.

#### 4.2 Current definitions of capacity and competence in NSW

There is no single definition of capacity in NSW. "Capacity" is defined differently in NSW legislation and in case law.

The Discussion Paper sets out the definitions of capacity in the *Guardianship Act 1987* (NSW)<sup>14</sup> and the *Protected Estates Act 1983* NSW.<sup>15</sup> These two Acts define capacity not in terms of individual decisions but rather take an "outcomes" approach. The *Guardianship Act 1987* (NSW) defines "a person in need of a guardian" as:

*"...a person who, because of disability, is totally or partially incapable of managing his or her person."*<sup>16</sup>

Section 4 of the *Protected Estates Act* defines an "incapable person" as:

*"...a person who, under the law of another country, state or territory, being the country, state or territory in which the person resides, has been found to be incapable of managing his or her affairs."*

The meaning of the phrase "incapable of managing his or her affairs" was considered by Powell J in *PY v RJS* (in the context of determining whether or not a person was mentally ill under the *Mental Health Act 1958* (NSW)).<sup>17</sup> His Honour held a person is not incapable of managing his or her own affairs unless, at the least, it appears:

- (a) that he or she is incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man; and
- (b) that, by reason of that lack of competence there is shown to be a real risk that either:
  - (i) he or she may be disadvantaged in the conduct of such affairs; or
  - (ii) that such moneys or property which he or she may possess may be dissipated or lost.

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<sup>14</sup> The meaning of "a person in need of a guardian" and "a person with a disability" is set out in s3 of this Act. There is also a link with the definition of "enduring guardianship" in Section 6N of the Act.

<sup>15</sup> The definition of "incapable person" is at s4 of that Act.

<sup>16</sup> *Guardianship Act 1987* (NSW) s 3(1).

<sup>17</sup> (1982) 2 NSWLR 700.

Justice Powell further held that a person is not incapable of managing his or her own affairs merely because he or she lacks the high level of ability needed to deal with complex transactions or does not deal with simple or routine transactions in the most efficient manner.<sup>18</sup>

These definitions focus on the outcomes of a person's decisions rather than their ability to make a particular decision or decisions.

The definition of capacity in relation to entering into a contract is decision-specific. To have the capacity to enter into a binding contract a person must have the ability to give free and full consent to the terms of the contract and the ability to form an intention to enter into legal relations.<sup>19</sup> In *Gibbons v Wright* the High Court (at 437 per Dixon CJ, Kitto and Taylor JJ) defined a decision-specific test for capacity to enter into a contract:

*“The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he [or she] is doing by his [or her] participation.”*<sup>20</sup>

Generally, the capacity to consent to medical treatment is also decision-specific and requires the ability to understand the nature and effect of the treatment proposed.<sup>21</sup>

The following table provides a non-exhaustive list of the statutory definitions of capacity in New South Wales.

Act	Type of decision	Definition
<i>Guardianship Act 1987</i>	That a person is in need of a guardian due to lack of capacity.	'Person in need of a guardian' means a person who, because of a disability, is totally or partially incapable of managing his or her person (s3(1)).  A person with a disability is a person: (a) who is intellectually, physically, psychologically or sensorily disabled, (b) who is of advanced age, (c) who is a mentally ill person within the meaning of Chapter 3 of the <i>Mental Health Act 1990</i> , or (d) who is otherwise disabled,

<sup>18</sup> *PY v RJS* (1982) 2 NSWLR 700 at 702.

<sup>19</sup> *Halsbury's Laws of Australia*

<sup>20</sup> (1954) 91 CLR 423.

<sup>21</sup> *Guardianship Act* s33(2).

Act	Type of decision	Definition
		and who, by virtue of that fact, is restricted in one or more major life activities to such an extent that he or she requires supervision or social habilitation (s3(2)).
<i>Guardianship Act 1987</i>	That a person is in need of a guardian due to lack of capacity under Appointment of Enduring Guardian.	The appointor was, on the day or during the period, totally or partially incapable of managing his or her person because of a disability (s6N).
<i>Guardianship Act 1987</i>	That a person lacks capacity to consent to medical or dental treatment.	A person is incapable of giving consent to the carrying out of medical or dental treatment if the person:  (a) is incapable of understanding the general nature and effect of the proposed treatment, or  (b) is incapable of indicating whether or not he or she consents or does not consent to the treatment being carried out (S33(2)).
<i>Protected Estates Act 1983</i>	That a person lacks capacity resulting in an order that a person's estate be subject to management.	Where the Court is satisfied that a person is incapable of managing his or her affairs, it may make a declaration to that effect and order that the estate of the person be subject to management under this Act (s13(1)).  S4 Defines "incapable" in terms of inability to self-manage  Cases: <i>PY v RJS</i> (1982) 2 NSWLR 700; <i>P v R</i> [2003] NSWSC 819
<i>Civil Procedure Act 2005</i>	That a person involved in court proceedings lacks capacity resulting in the need for court approval of any settlement.	'Person under legal incapacity' means any person who is under a legal incapacity in relation to the conduct of legal proceedings (other than an incapacity arising under section 4 of the <i>Felons (Civil Proceedings) Act 1981</i> ) and, in particular, includes:  (a) a child under the age of 18 years, and (b) a temporary patient, continued treatment patient or forensic patient within the meaning of the <i>Mental Health Act 1990</i> , and (c) a person under guardianship within the meaning of the <i>Guardianship Act 1987</i> , and (d) a protected person within the meaning of the <i>Protected Estates Act 1983</i> , and (e) an incommunicate person, being a person who has such a physical or mental disability that he or she is unable to receive communications, or express his or her will, with respect to his or her property or affairs (s3).
<i>Uniform Civil Procedure Rules 2005</i>	That a person lacks capacity and requires a tutor to conduct court proceedings on their behalf	'Person under legal incapacity' includes a person who is incapable of managing his or her affairs (r7.13).

### 4.3 Advantages of a uniform definition

The benefits of a uniform definition of capacity include:

- (a) The opportunity, in the creation of the uniform definition, to overcome problems in current definitions of capacity including:
  - (i) The lack of consistency in the definitions which creates confusion about how capacity is defined and contributes to the lack of consistency in assessment of capacity;
  - (ii) Problems with the definition of incapacity as the inability of a person to manage their affairs (set out in 3.2) including:
    - (A) That the definition does not allow for the maximisation of autonomy of a person with the ability to make some but not all decisions;
    - (B) That the definition requires a subjective interpretation of the person's lifestyle rather than an objective assessment of the person's decision-making ability. The court or tribunal is required to decide what is a "reasonably competent fashion" in which to deal with a person's day to day affairs;
    - (C) That the definition is discriminatory in that it denies the person, by reason of their disability, the right to rationally make capricious decisions; and
    - (D) That the definition, as it applies in the *Guardianship and Protected Estates Acts*, does not allow for the provision of a substitute decision-maker for complex transactions for a person who can deal with ordinary routine matters but cannot deal with more complex matters;
  - (iii) Problems with the definition of capacity as the ability to understand the nature and effect of the thing proposed (for example the type of medical treatment or contract) including:
    - (A) That the definition does not require an ability to weigh information nor appreciate the consequences of a decision, only to understand the nature and effect of the decision; and
    - (B) That the definition is silent on the need for an ability to communicate the decision;
- (b) Greater legal and popular certainty of the meaning of capacity; and
- (c) It will enable more standardised and accurate testing of capacity.

#### 4.4 **Should the test for capacity be decision-specific?**

We do not support a 'status' approach to capacity under which a person is said to lack capacity because of the form or severity of their cognitive impairment<sup>22</sup>. The status approach is not compatible with enabling and encouraging people to take for themselves any decision they have the capacity to take. Further, a status approach is also, by its nature, discriminatory.

We do not support an 'outcomes' approach to capacity. A finding of capacity must depend on the ability of a person to make decisions, not on the decisions they make.

A decision-specific test for capacity is most likely to maximise the decision-making autonomy of a person whose capacity is in question. This approach implicitly acknowledges that the existence of a disability or illness does not lead automatically to the conclusion that the individual lacks capacity. It avoids unnecessary intrusion into the life of a person. For these reasons, a decision-specific approach should be the norm.

There are circumstances, however, in which a decision-specific approach to capacity may disadvantage a person who lacks the capacity to make all their own decisions, for example:

- (a) When a person lacks capacity to make all major decisions in court or tribunal proceedings. Given the interrelated nature of the decisions and given that a tutor bears any adverse costs order, it would be impracticable and potentially against the person's interests for a strict decision-specific approach to be taken to the question of capacity;
- (b) When a person requires a course of medical treatment involving a series of interrelated decisions and the person lacks the ability to make all the major decisions; and
- (c) When a person does not and will never have the capacity to make decisions in relation to a function or functions for example where a person is profoundly intellectually disabled.

In such circumstances we support the use of a functional approach to capacity. By 'functional approach' we mean that in some circumstances (such as those outlined above) a person's capacity should be considered in relation to the function as a whole rather than in relation to each individual decision required to exercise the function. A functional approach should be available where it would be in the person's best interests notwithstanding the desirability of maximising the person's autonomy in decision-making.

#### 4.5 **Form of legislation**

We submit that a definition of capacity should not be considered in isolation. Capacity legislation should provide a comprehensive framework aimed at maximising the autonomy of the decision maker. It should contain:

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<sup>22</sup> WHO Resource Book on Mental Health and Human Rights and Legislation *WHO Publication 2005*, Chapter 2, para 7.2 page 40 <[www.who.int/mental\\_health/policy/legislation/policy/en](http://www.who.int/mental_health/policy/legislation/policy/en)>

- (a) A definition of capacity;
- (b) Provision for assistance to be provided to a person to enable them to make their own decisions where possible;
- (c) Provision for substitute decision-making;
- (d) Principles to be adhered to in determining capacity and in assisted and substitute decision-making; and
- (e) Provide for regulation and supervision of alternative decision-makers.

We submit that the onus of proving that a person lacks capacity should be on the party calling the person's capacity into question.

The question of whether a person has capacity to make their own decisions is a question of law. Whilst medical evidence may assist in determining whether someone has or had capacity to make a decision, the determination of capacity cannot be based solely on medical opinion.

#### 4.6 The elements of a definition of capacity

We submit that a definition of capacity should include the following elements (and only those elements):

- (a) The ability to understand information relevant to the decision or function

To have capacity a person must be able to understand the information relevant to the decision to be made. This element is found in most functional and decision-specific tests for capacity. The *Guardianship and Administration Act 2000* (Qld) test for capacity for example requires “understanding of the nature and effects of decisions about the matter” (Schedule 4).<sup>23</sup>

Depending on the type of decision to be made, a general understanding may not suffice. Where the person whose capacity is in question wishes to participate in complex legal proceedings, as in *Dalle-Molle (By His Next Friend Public Trustee) v Manos*,<sup>24</sup> an understanding of the nature and purpose of the litigation and its possible outcomes (including in relation to costs) would be necessary.

Capacity assessors should be advised that whether a person has the requisite degree of understanding will depend on the particular decision or function in question and be given some understanding of the information to be understood.

- (b) Using and weighing information relevant to the decision-making process

To have capacity a person should be able to use and weigh relevant information in reaching decisions. This “weighing of information” element is present in limb (c) of

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<sup>23</sup> For examples, see *Guardianship Act 1987* (NSW) s 3(1).

<sup>24</sup> [2004] SASC 102.

the *Mental Capacity Act 2005* (UK) in its reference to the ability to “to use or weigh... information as part of the process of making the decision”. The inability to weigh information was also part of the three-limb test used in the English decision of *Re C (Adult: Refusal of Treatment)*,<sup>25</sup> where the court considered whether the person could weigh up various factors in deciding whether to accept medical treatment.

As discussed in Stewart Biegler’s article “A Primer on the Law of Competence to Refuse Medical Treatment”<sup>26</sup>, an inability to attach weight to relevant factors may be evidenced by a lack of rationality or reasoning in the process by which a person reaches a decision, not the outcome. Where the factors a person considers and steps he or she takes to reach a decision seem inconsistent with that decision, the person may lack the requisite ability to weigh and evaluate the information relevant to the decision.

Failure to make prudent decisions should not of itself result in a finding that a person lacks capacity. We submit that it is inappropriate to inquire into the rationality of the outcome (or decision) following the weighing-up process since it may capture eccentric or unusual preferences of individuals who would otherwise be considered capable (and hence withdraw autonomy from a wider range of people). We submit the right of a person to rationally make an unwise decision should be as available to a person whose capacity is in question as it is to anyone else. Such a consideration is included in *Mental Capacity Act 2005* (UK), Section 1(4)

*"A person is not to be treated as unable to make a decision merely because he makes an unwise decision."*

The Ontario Guidelines contain a similar provision:

*"... [O]ne cannot conclude incapacity solely on the basis of financial mismanagement or self-care deficits, as the person may be voluntarily incurring the known risks. The issue for the assessor is not whether the person's actions or choices appear reasonable or will put them at increased risk, but whether the individual is able to understand critical information and appreciate the reasonably foreseeable consequences of his or her decisions or lack of them."*

The Irish Law Reform Commission in their Consultation Paper on Vulnerable Adults and the Law: Capacity<sup>27</sup> also recommended that their capacity legislation contain a statement to ensure the protection of those who choose to make unwise decisions:

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<sup>25</sup> [1994] 1 WLR 290 (*Re C*).

<sup>26</sup> (2004) 78 *Australian Law Journal* 325.

<sup>27</sup> LRC CP 37-2005

*"The Commission recommends that an adult should not be regarded as unable to make a decisions merely because they make a decision which would ordinarily be regarded as imprudent."*<sup>28</sup>

We agree with the commentary<sup>29</sup> that in determining whether a person is capable of "weighing up" relevant information, it may help to direct the following types of questions to the person whose capacity is in question:

Q: How did you reach your decision?

Q: What things were important to you in reaching the decision?

Q: How did you balance those things of importance when making your decision?

In the decision *P v R*<sup>30</sup> Barrett J considered the defendant's inability to identify relevant issues in making decisions in relation to personal injury proceedings. His Honour observed that the defendant fixed on a version of events and view of the legal representatives involved in the proceedings that had no relation to reality, influencing her ability to "manage her affairs" in the proceeding.<sup>31</sup> This inability to attach weight to relevant issues was a factor underpinning the Court's finding that the defendant was incapable of making decisions in her best interests.

We do not recommend a specific requirement that the person be able to remember the information to be weighed. We consider that an ability to remember information is implied in the requirement that the person be able to use and weigh information in coming to a decision. The ability to remember information as such may result in a finding of incapacity based on a 'memory test' rather than a consideration of the person's actual decision-making ability. For example, BDW represents a client with a brain injury. The client does not remember all the advice and information she is given nor gives from meeting to meeting. Within the meeting, however, the client is able to remember the relevant information, understand and weigh that information and makes consistent, thoughtful, reasonable decisions. The client is able to give instructions but were a requirement to retain information form part of the test for capacity the client would be found to lack capacity.

- (c) Understanding the effects or consequences of the decision (and of not making a decision)

A test for incapacity should include the ability to recognise and consider the effects or consequences of decisions. This "consequences" element is present in limb (a) of

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<sup>28</sup> Irish Law Reform Commission in their Consultation Paper on Vulnerable Adults and the Law: Capacity, p.75

<sup>29</sup> We refer to the article of Stewart Biegler entitled "A Primer on the Law of Competence to Refuse Medical Treatment" (2004) 78 *Australian Law Journal* 325.

<sup>30</sup> [2003] NSWSC 819.

<sup>31</sup> [2003] NSWSC 819 at [82].

the capacity definition in the *Guardianship and Administration Act 2000* (Qld) (in its reference to “effects of decisions about the matter”) and limb (b) of the Ontario *Substitute Decisions Act 1992* (in its reference to the ability to “appreciate the consequences of a decision”).

We support the approach taken in the Ontario legislation and the view expressed in the English decision of *Masterman-Lister v Brutton & Co*<sup>32</sup> that a person should only be assessed as incapable on the basis of this element if they cannot identify the *reasonably* foreseeable consequences (or effects) of the decision.

Such an approach is consistent with existing law. For example, in *Gibbons v Wright* the Court focussed on whether each of two sisters could foresee how execution of a real property mortgage and transfer of title would affect her interest in the property and the manner in which title would pass upon her death.<sup>33</sup> In *Dalle-Molle (By His Next Friend Public Trustee) v Manos*,<sup>34</sup> the plaintiff's inability to understand the implications of major financial transactions was one of several bases upon which the court found the plaintiff incapable of giving adequate instructions in proceedings relating to those transactions.

Including a "consequences" element in the definition for incapacity is consistent with the approach of the World Health Organisation, which recommends a consideration of a person's ability to appreciate the consequences of giving or withholding consent in determining his or her capacity to make a "treatment decision".<sup>35</sup>

(d) Decisions should be made freely and voluntarily

An element of capacity is that the person can make decisions independently and without coercion. For a person whose capacity is in question, a variety of individuals may be in a position to influence the person's decision-making. These include family, friends, legal advisers, health professionals and financial advisers. If properly advised, the ability of a person to make decisions independently and outside the sphere of influence of others would be a useful indicator of the person's capacity to exercise decision-making power in their own best interests.

The importance of voluntary participation in the decision-making process is related to the goal of maximising personal autonomy (as espoused by the Queensland guardianship legislation and overseas jurisdictions). The Law Society of New South Wales quotes a contributor of the Law Society of England and Wales in stating:

*"The concept of capacity gives legal expression to individual autonomy in the sense of the right to respect for, and recognition of, the legal effects of*

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<sup>32</sup> [2003] 3 All ER 162.

<sup>33</sup> (1954) 91 CLR 423 at 438-439.

<sup>34</sup> [2004] SASC 102.

<sup>35</sup> World Health Organisation (2005) "WHO Resource Book on Mental Health, Human Rights and Legislation" 40.

*one's own decisions. The boundary between capacity and incapacity is used to differentiate between those whose decisions will be accorded respect and legal recognition and those for whom decisions must be made by others.*"<sup>36</sup>

In *Dalle-Molle (By His Next Friend Public Trustee) v Manos*<sup>37</sup> the court considered the plaintiff's vulnerability to the influence of family among other factors in concluding that the plaintiff was incapable of autonomous decision-making.

(e) Communication of decision

We submit that the final element in determining whether a person has the capacity to make a decision ought to be whether that person is able to communicate the decision, whether by talking, using sign language, or any other means. This element is present in Schedule 4 of the *Guardianship and Administration Act 2000* (Qld) and s3 of the *Mental Health Act 2005* (UK).

We submit that determining whether a person is capable of communicating a decision encompasses more than the person conveying their decision. The person must also be able to communicate their ability to understand the information relevant to the decision, to weigh that information and to understand the consequences of the decision.

A person should not be assessed as incapable on the basis of this element until a reasonable effort has been made by the capacity assessor to facilitate the communication of an informed decision. Hence communication should be a two-way process to maximise the chance that the person whose capacity is in question successfully communicates his or her decision.

#### 4.7 Presumption of Capacity

(a) Current position at law

A presumption of capacity already exists under the law. Although not stated in all relevant pieces of legislation, the operation of both legislation and the common law creates a presumption of capacity.

At common law, an adult is presumed to have the capacity to make his or her own decisions unless incapacity to make that particular decision is established<sup>38</sup>. Capacity is assumed upon reaching the age of 18 with regard to getting married, entering into contracts, making gifts, or writing a valid will<sup>39</sup>.

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<sup>36</sup> Phil Fennell (1993) "Incapacitated Clients" *Law Society of England and Wales Gazette* 27 in *Law Society Journal* (2003) "Client Capacity Guidelines" 41(8) LSJ 50 at 51.

<sup>37</sup> [2004] SASC 102.

<sup>38</sup> *Dalle-Molle (By His Next Friend Public Trustee) v Manos* [2004] SASC 102; *Borthwick v Carruthers* 91787) 1 TR 648; *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162

<sup>39</sup> This common law presumption is codified in s 9 of the *Minors (Property and Contracts) Act 1970* (NSW). Part 2 of that Act specifies the activities for which capacity is presumed after reaching majority.

In *Dalle-Molle (By His Next Friend Public Trustee) v Manos*<sup>40</sup> DeBelle J stated that the presumption of capacity continues to apply where it is alleged that a person lacks the required mental capacity to properly participate in a certain function or decision, so that those who assert incapacity bear the onus of proof .

In the law concerning the appointment of substitute decision-makers, a person must be proven to be incapable of managing his or her affairs before a substitute decision-maker is appointed. A presumption of capacity is implicit then in the operation of those laws.

- (b) Recommendation that certain legislation includes a presumption of capacity

Despite the presumption of capacity under the law, we submit that legislation enabling the appointment of substitute decision-makers (including guardians, financial managers, and, in the case of health decisions, tribunals) should state the presumption of capacity. The statement of a presumption of capacity reinforces the right to autonomy in decision-making and that the onus is on those questioning a person's capacity to prove the person lacks capacity.

In Queensland, the *Powers of Attorney Act 1998* (Qld) and *Guardianship and Administration Act 2000* (Qld) explicitly state that an adult is presumed to have capacity under the general principles<sup>41</sup>. This principle is required to be applied by an entity exercising a power or function for a person with impaired capacity under section 11 of the Act. It is not specified though that this principle is to be applied by a Court or Tribunal that is making a determination of capacity or making any ruling that relates to a person whose capacity is in issue. Under the *Mental Capacity Act 2005* (UK), which comes into force in 2007, a person is assumed to have capacity unless the contrary is established.

- (c) Recommendation that a statement of principles be included

We submit that guiding principles similar to those enshrined in Schedule 1 Part 1 of both the *Powers of Attorney Act 1998* (Qld) and *Guardianship and Administration Act 2000* (Qld) be included with the presumption of capacity in legislation providing for the appointment of alternative decision-makers. Those provisions state in identical terms that the "importance of empowering an adult to exercise the adult's basic human rights must be recognised and taken into account". Paragraph 7(2) of the guiding principles states that the "importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account" by, for example:

- (i) Ensuring the person receives such support and access to information as are necessary to enable the adult to participate in decision affecting the adult's life;

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<sup>40</sup> [2004] SASC 102

<sup>41</sup> Section 1, Schedule 1 *Powers of Attorney Act 1998* (Qld); Section 1, Schedule 1 *Guardianship and Administration Act 2000* (Qld)

- (ii) ensuring the adult's views and wishes are sought and taken into account to the greatest extent possible; and
- (iii) providing that the person performing a function or exercising a power under the Act must do so in a manner which is least restrictive of the adult's rights.

The principles should also state that, unless it is not possible due to the person's lack of capacity or the circumstance, an alternative decision-maker should not be appointed unless steps have first been taken to assist the person to make the decision or exercise the function.

- (d) Recommendation against a general statement of presumption of capacity under the law

While we recommend that a presumption of capacity be included in legislation under which an alternative decision-maker is appointed, we recommend against a general legislative statement of presumption of capacity under the law.

When considering capacity, particularly capacity to contract, there is a need to strike a balance between facilitating a person with limits on their decision-making ability to live their lives as independently as possible and the need to protect people who are vulnerable from commercial exploitation and protect good faith suppliers who do not suspect a person does not appreciate the implications of the transaction. At common law, the law's desire to uphold bargain wherever possible means a person is generally bound by a contract unless they can show both that they did not understand what they were doing and that the other party was aware of their lack of capacity. This common law position leaves people with limited capacity vulnerable to exploitation.

The *Contracts Review Act* 1980 (NSW) allows for the review of contracts which are found to be unjust. The fact that a party had limited capacity to enter into the contract is not grounds in and of itself for the contract to be found to be unjust. However, lack of capacity rendering a party to the contract unable to reasonably protect his or her interests, or the interests of any party whom he or she represented is a factor in determining whether or not the contract is unjust.<sup>42</sup>

We submit that any general statement of capacity enshrined in legislation may lessen the effectiveness of the limited protections for people with limited capacity from unscrupulous dealers.

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<sup>42</sup> Section 9(2)(e) of the *Contracts Review Act* 1980 (NSW).

## 5. ISSUE TWO: CREATING RESOURCES FOR CAPACITY ASSESSORS

### 5.1 Executive Summary

In response to Question 1 we recommend:

- that further consideration be given to the composition of the list of assessors<sup>43</sup>. In particular we recommend that the police be considered as a distinct group of assessors of capacity with specific needs;
- consistency and cross-disciplinary cooperation in the development and conduct of training for capacity assessors; and
- the inclusion of people with disability in the development of training materials for capacity assessors.

In response to Question 2 we recommend that resources for capacity assessors include the guiding principle of presumption of capacity and adequate safeguards for people with disability

In response to Question 3 we recommend two tiers of assessment, being laypersons and professionals.

### 5.2 Assessors of capacity in NSW

We recommend including members of the police force in the list of capacity assessors.

We acknowledge that issues for people whose capacity is in question who are charged with a criminal offence (including the issue of fitness to be tried) is not within the scope of the Discussion Paper<sup>44</sup>. However, we strongly recommend that this issue be discussed in greater detail at an appropriate time and forum.

There are many similarities between the needs of police officers and those of other assessors mentioned in the Discussion Paper. Police have numerous interactions with people with disability including when questioning and cautioning people, charging people, taking witness statements and assisting victims of crime.

There is ample anecdotal evidence that people with cognitive disabilities experience difficulties in communication with police officers. We submit that the police have an obligation to assess the capacity of those with whom they interact to determine whether or not the person has the capacity to make their own decisions on questions such as whether or not to be questioned, to accept a caution and whether they want police to charge the perpetrator of an offence against them.

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<sup>43</sup> Discussion Paper page 12

<sup>44</sup> Discussion Paper page 1

Appropriate training and support for police officers who are required, by the nature of their work, to assess capacity would assist in:

- improving procedural fairness for the person whose capacity is in question;
- increasing the autonomy in decision-making for people whose capacity is in question;
- enabling the provision of appropriate support for people who lack capacity; and
- increasing the likelihood that evidence obtained from a person with limited capacity is admissible.

We submit that police officers need access to assessors with the training and expertise to determine the needs of people whose capacity is in question. We further submit that police officers need access to people able to support people whose capacity is in question to make their own decisions as far as possible.

Given the often urgent nature of police matters police also need training and support to make accurate capacity assessments themselves as the need arises. People with disability are disproportionately represented in criminal matters, therefore, a tool which allows police to undertake capacity assessments, similar to the tools described in the Discussion Paper, is vital.

### **5.3 Development and delivery of training**

We submit that there should be consistency and cross-disciplinary cooperation in the development and delivery of training for capacity assessors. An ad hoc, disjointed approach to training is not in the best interests of either the person whose capacity is being questioned nor the person making the assessment of capacity.

We submit that for the training to properly equip assessors to address the needs of people whose capacity is in question and to respond appropriately and understand the people they are assessing, people with disability should be included in the team which develops the training resources and provides the training.

### **5.4 Resource options for capacity assessment**

All resources for capacity assessors should start with a strong statement that a person has capacity until it is proven otherwise. The resources should emphasise the right of the person being assessed to autonomy in decision-making to the greatest extent possible. The content of the resources should at all times be compatible with these principles.

The resources for capacity assessment should contain safeguards which protect a person whose capacity is in question. Although the support networks of an adult with severe disability, for example, should be empowered as much as possible to act in the interests of the person without requiring a formal guardianship arrangements, it is unrealistic and

dangerous to assume that persons with disability will always be protected by those closest to them<sup>45</sup>.

We recommend that, at a minimum, the following resource options be developed and implemented:

- Training for professionals involved in capacity assessment. The training should be offered at both tertiary level and as part of ongoing professional development. People with disability themselves should be included in the development of the curriculum and in the delivery of the training. This would ensure that the training is informed by the experiences of those people who have had their capacity to make decisions questioned;
- An assessment tool which is flexible and incorporates guiding principles such as those contained in the *Guidelines for Conducting Assessment of Capacity (Capacity Assessment Office, Ontario, May 2005)*. In particular, we highlight the principle of “guardianship as a last resort”. We submit that it is imperative that any reform in NSW includes this principle;
- Alternatives to capacity assessment & substitute decision-making which provide support to people with cognitive disability to enable them to make decisions for themselves; and
- Diversion of people whose capacity is in question, where appropriate, to formal advocacy for assistance to resolve the underlying problem giving rise to the capacity issue. Such an option will enable people with disability to have recourse to services such as PWD which provides an independent advocacy service based on disability rights principles. It would further enable the person with disability to have access other services with which the advocacy service has a relationship or of which the advocacy service has knowledge (such as community legal services and self-advocacy services).

## 5.5 Distinctions between lay and professional assessments

We recommend that a distinction be drawn between informal and formal capacity assessment. This could be achieved by having two forms of assessment tools – one for laypeople and one for qualified professionals. Both assessment tools should make clear the legal position of a person whose capacity is in question (that is, that the person is presumed to have capacity and only the person, or a substitute decision-maker with legal authority, can make decisions on the person's behalf even if the assessor finds the person lacks capacity).

At PWD our staff regularly make layperson's assessments of the capacity of our clients' capacity in order to assist them in a broad range of matters, such as finding housing, Centrelink applications and opening a bank account.

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<sup>45</sup> PWD and NACLAC intervention, United Nations, January 2006:  
<http://www.un.org/esa/socdev/enable/rights/ahc7docs/ahc7pwnaclc.doc>

In relation to professional assessment, we note the long waiting lists for professional visits and expensive medical bills, which are often out of the reach of many people with disability.

The need to determine capacity sometimes occurs when the individual is in crisis. In an emergency it may not be possible to undertake a formal assessment of capacity and an assessment of the person's capacity may not have been done before (for example where a person who is homeless has an urgent need for accommodation and his or her accounts need to be accessed to pay for the accommodation and/or an agreement needs to be entered into with an accommodation provider to secure a scarce bed). We recommend the development of interim options for the assessment of capacity which enable a person to obtain appropriate support and protection pending a more complete capacity assessment.

## 6. **ISSUE THREE: PROMOTING AND PROTECTING RIGHTS**

### 6.1 **Executive Summary**

In response to Question 1 we recommend the development of a new framework to support people who lack capacity or whose capacity is in question encompassing the features set out in 6.6.

In response to Question 2 we submit that:

- if a person's capacity is questioned, only a Court or Tribunal can determine whether or not the person lacks capacity;
- the ability of the Court or Tribunal to determine whether or not the person lacks capacity is not dependent on a Court or Tribunal order being in existence;
- the appropriate role for the Court or Tribunal is to determine whether or not a person has capacity if it is challenged and to appoint a substitute decision-maker if the person lacks capacity; and
- it is not the role of the person whose capacity is being questioned to challenge the questioning of their capacity through a second opinion. Any such suggestion reverses the existing onus on the person questioning another's capacity to prove that the person lacks capacity.

In response to Question 3 we submit that the current framework is inadequate for the reasons set out in 6.5.

### 6.2 **Introduction**

The starting point of any consideration of what should occur if a person's capacity is questioned must be that, at law, a person is presumed to have capacity. As discussed in 3.1, flowing from that presumption is the fact that, unless and until a Court or Tribunal decides otherwise, once a person is over 18 the only one who can make a decision binding on that person is the person him or herself. The best way to ensure that a person's autonomy in decision-making is maximised is to maintain that presumption.

We submit any changes to law or practice aimed at supporting a person whose capacity is in question (including by facilitating access to a second opinion) must not:

- dilute or reverse the presumption of capacity;
- create uncertainty about the legal status of the person whose capacity is in question but has not yet been determined by a court or tribunal; nor
- have the effect of requiring the person whose capacity is in question to fulfil certain criteria (such as obtaining second opinions) before their presumption of capacity is acknowledged or restored.

In considering how to best support a person whose capacity is being questioned, it is useful to consider the circumstances in which capacity is likely to be questioned. We submit that,

other than when a person's capacity is being determined by a court or tribunal, the circumstances where a second opinion is likely to be useful is limited.

(a) When is capacity likely to be questioned?

The circumstances in which a person's capacity may come into question are many and varied, including when decisions need to be made on financial matters, legal matters, health care, accommodation, services and consumer contracts.

The triggers for questioning a person's capacity are likely to be similar, however, and may include:

- (i) behavioural changes in the person;
- (ii) a perception that the person's behaviour is odd or unusual;
- (iii) a perception that the person's decision or decisions are unwise or unreasonable;
- (iv) a reduction in the person's ability to remember;
- (v) a reduction in the person's ability to communicate; and
- (vi) a change in the relationship between the person whose capacity is in question and the person questioning their capacity (such as the development of a lack of trust, a disagreement or an increased dependence by the person whose capacity is being questioned).

(b) Who is likely to question a person's capacity?

The type of person or organisation questioning a person's capacity may also be wide and varied including:

- (i) the person's family, friends or carer;
- (ii) an accommodation or welfare service provider (for example when a person is resisting the provision of a service);
- (iii) a person or company seeking to contract with the person (for example a real estate agent acting on the sale of the person's house);
- (iv) a lawyer (for example when a person wishes to make a will, sell their house or commence or carry on litigation);
- (v) a doctor (generally when the doctor has concerns about the person's capacity to consent to treatment); and
- (vi) a company providing services day to day such as a bank (for example when a person wishes to make a large withdrawal or transfer of money from their bank account).

(c) Why is a person's capacity likely to be questioned?

The motives for questioning a person's capacity may include that:

- (i) the questioner is concerned the person is being or may be exploited (for example where the person is giving away property or large sums of money or handing control of their finances to someone the questioner considers unsuitable or to someone the person barely knows);
- (ii) the questioner does not want to lose their legal rights against the person (for example where they are entering into a contract with the person and wish to be able to enforce the contract);
- (iii) the questioner does not want to be legally liable because they act on the decision of a person who lacks capacity to consent (for example when providing medical treatment);
- (iv) the questioner is concerned about the person's welfare generally (for example where a person has ceased paying their utility bills and is without electricity or no longer appears to have the ability to adequately care for their health or wellbeing); and/or
- (v) the questioner is unhappy with the decision or decisions the person has made (for example the child of an elderly person who has decided to dispose of their wealth outside the family or who forms a relationship with someone the questioner disapproves of).

(d) What happens if a person's capacity is questioned?

If a person questions another's capacity, the questioner may:

- (i) seek an opinion as to the person's capacity and act on the basis of that opinion;
- (ii) act on the person's decision regardless of their doubts about the person's capacity;
- (iii) refuse to act on the person's decision;
- (iv) rely on an Enduring Power of Attorney or Appointment of Enduring Guardian to substitute their decision for that of the person;
- (v) informally substitute their decision for that of the person;
- (vi) look to an alternative decision-maker to make a decision. The alternative-decision maker may have legal power to make the decision such as a person responsible if consent is required to medical treatment or an Attorney or Enduring Guardian or the questioner may look to an informal decision-maker such as a family member and act on that person's decision; and/or
- (vii) seek the appointment of an alternative decision-maker.

### 6.3 Limited utility of a second opinion

If a person or organisation questions another's capacity and does not formally seek the appointment of a substitute decision-maker, a second opinion will rarely be of benefit. The compromise of a person's autonomy in decision-making occurs most commonly outside the supervision of courts, tribunal or advocates. As Justice Kirby said:

*"there are thousands of decisions made everyday, which one never scrutinised by a lawyer, let alone a court ... Decisions made by individuals with great power and responsibility affect in practice the rights of many"<sup>46</sup>.*

In many cases, when a person questions another's capacity the questioner will make the decision on behalf of the person without any formal opinion as to capacity and regardless of whether or not they have the lawful authority to do so. Unless the person whose capacity is in question becomes aware of the decision, objects and is able to bring that objection to the attention of an advocate, court or tribunal, a second opinion will not assist.

If, outside court or tribunal proceedings, the questioner obtains an opinion stating the person lacks capacity, it would be rare, we submit, that obtaining a second opinion will resolve the issue. If the second opinion confirms a lack of capacity and a decision must be made, the only option is to seek the appointment of a substitute decision-maker through a court or tribunal. If the second opinion conflicts with the first, stating the person has capacity, it would be unsafe legally for questioner to rely on the person's decision as legally binding. There are few circumstances in which BDW, as lawyers, would advise a client to act on the decision of a person whose capacity is in question where there are conflicting opinions about the person's capacity. The questioner would be safer to seek the appointment of an alternative decision-maker.

It is generally only, then, when an order is sought for a substitute decision-maker and evidence is brought of the person's lack of capacity that the need for a second opinion arises.

In light of the background above, we have considered the three questions posed by the Discussion Paper in Issue Three out of order. First we consider the role of courts and tribunals and the need for that role to be expanded, then we consider deficiencies in the advocacy framework in NSW and finally how a person can be supported to obtain a second opinion.

### 6.4 Role of Courts and Tribunals

#### (a) Current jurisdiction

Currently when a person's capacity is in question the role of the courts and tribunals is to determine whether or not to appoint a substitute decision-maker. In exercising that jurisdiction, the court or tribunal considers whether or not a person lacks capacity, but does not have the power to declare that a person has capacity in whole or in part (though this may be implied from time to time in the decision that is made).

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<sup>46</sup> Discussion Paper page 19

Where a person's capacity is in question, the Guardianship Tribunal and/or the Supreme Court have the power to appoint an alternative decision-maker to:

- (i) manage the person's estate<sup>47</sup>;
- (ii) make lifestyle decisions on the person's behalf<sup>48</sup>; or
- (iii) make medical or dental treatment decisions on the person's behalf<sup>49</sup>.

The Guardianship Tribunal also has the power itself to make medical treatment decisions on a person's behalf<sup>50</sup>.

The procedure for making an application to the Guardianship Tribunal relevantly includes the provision of at least two written reports on the person's ability to manage their affairs. The preferred report writers are doctors or health professionals. If the questioner establishes that the person lacks capacity or the person's capacity is limited, the person may require a second opinion. Until that point, the onus of proving a lack of capacity is on the questioner.

After a hearing, courts and tribunals can make a finding that a person whose capacity is in question requires an alternative decision-maker. Implicit in that decision is a finding that the person lacks capacity in relation to the decision or function for which the alternative decision-maker is sought.

A court or tribunal does not, however, have power to:

- (i) declare a person has capacity; nor
- (ii) assist a person to obtain a second opinion as to their capacity.

A magistrate and/or the Mental Health Tribunal may make the decision to consent to health treatment (and ancillary decisions, for example, in the case of an involuntary patient, the decision on accommodation) on behalf of a person who lacks capacity including in relation to:

- (i) involuntary admission<sup>51</sup>;
- (ii) treatment as set out in a community treatment or counselling order (requiring the person to accept medication, therapy and rehabilitation as set out in their treatment plan)<sup>52</sup>;

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<sup>47</sup> s25E *Guardianship Act* and s13 of the *Protected Estates Act*

<sup>48</sup> s14 *Guardianship Act*

<sup>49</sup> s42 *Guardianship Act*

<sup>50</sup> s42 *Guardianship Act*

<sup>51</sup> s51(3) of the *Mental Health Act 1990* (NSW)

<sup>52</sup> s118(1) and s131 *Mental Health Act*

- (iii) electro-convulsive therapy<sup>53</sup>; and
- (iv) the Psychosurgery Review Board can consent to psychosurgery<sup>54</sup>

Again, at the point at which the questioner establishes a lack of capacity, a second opinion may be required. Until that point the onus is on the person or organisation bringing the application to prove the person lacks capacity, not on the person to prove they have capacity.

(b) Proposed extension of the power of courts and tribunals

We submit that where a person's capacity is in question there is a role for the Guardianship Tribunal to declare that at law the person *has* legal capacity in relation to the decision or function before the Court.

Currently a finding that a person does not require a substitute decision-maker does not, at law, mean the person has capacity to make decisions generally or in relation to a specific function. As discussed at 4.2 the test to determine whether or not a guardian or financial manager can be appointed is whether the person can manage their affairs. The fact that a court or tribunal is not convinced that the person lacks capacity to manage their day to day affairs does not provide a legal basis for assuming the person has capacity to make the particular decision or exercise the function. This leaves the person or organisation seeking to rely on the decision of the person whose capacity is in question vulnerable to consequences including:

- (i) an inability to enforce their agreement with the person;
- (ii) a charge of professional misconduct in the case of professionals such as doctors or lawyers;
- (iii) a negligence action; and/or
- (iv) criminal charges (for example, for assault where the person lacked the ability to consent to medical treatment).

Further, it leaves the person whose capacity is in question vulnerable to being unable to exercise their right to make decisions, enter contracts and so on due to lingering questions about their capacity.

We note that the new definition of capacity as suggested at 4.6, if included in the *Guardianship Act* and the *Protected Estates Act*, would enable a declaration of capacity in the course of hearing the application to appoint a substitute decision-maker without requiring further change to the law. Under the proposed definition, capacity is defined as the ability to make a decision or exercise a function (rather than the ability to manage one's day to day affairs). If a person meets the criteria he

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<sup>53</sup> s194 of the *Mental Health Act*

<sup>54</sup> s153 of the *Mental Health Act*

or she has capacity and if he or she does not, he or she lacks capacity (and therefore requires a substitute decision-maker).

We reiterate, however, that the best safeguard for ensuring maximum autonomy for a person whose capacity is in question is the presumption of capacity. In any extension of the Tribunal's power to enable a declaration that the person has capacity we need to be careful to ensure that the wider legal presumption of capacity is not compromised as a matter either of law or practice.

## 6.5 Deficiencies in the current advocacy framework

Problems with the current advocacy framework include:

- (a) Where a care-giver or person providing a service to a person whose capacity is in question goes beyond assisting the person with decision-making, and begins making substitute decisions it is unlikely to come to the attention of the law or an advocate. The person's autonomy in decision-making is therefore removed without scrutiny;
- (b) There is insufficient scrutiny of 'informal' decisions taken on behalf of people whose capacity is limited. The informal processes by which carers manage the estates of people who lack capacity include reliance on authorities purportedly or actually given by the person lacking capacity (such as signatures on bank accounts) and arrangements between the carer and agencies providing services to the person lacking capacity (such as Centrelink and/or the Department of Housing). There are no or insufficient safeguards to ensure that authorities to make decisions on another's behalf are given without duress and that decisions are being made in accordance with the person's wishes and/or for the benefit of the person;
- (c) If a person does make decisions on another's behalf without the person's consent and/or lawful authority, the remedies available are limited and frequently ineffective. They depend on:
  - (i) The matter coming to the attention of a person who can and will bring the matter to the Court; and
  - (ii) Being able to prove the person acted without consent or authority.

Even if the matter is successful, often the person is unable to recover against the other and monetary compensation may be inadequate when the decision taken has affected the quality of the person's life.

- (d) Where a person lacking capacity is reluctant to have an alternative decision-maker appointed and has no family or support person willing or able to commence proceedings there is no organisation charged with taking proceedings.

This has caused difficulties for BDW on a number of occasions. For example, BDW acted for a 51 year old man with a chronic mental illness in relation to a claim on his mother's estate. A beneficial and generous settlement offer was made, however our client would or could not decide whether or not to accept the offer, vacillating daily and making a series of significantly different counter offers. The offer made by the executor was more beneficial than the court had the power to

order. As proceedings had not been commenced, a tutor could not be appointed to instruct BDW on behalf of the client and enter into settlement on his behalf. The client did not have a financial manager, and did not require a financial manager to manage his pension. There was no one in the client's life who could make an application for a financial manager and the appointment of a manager was against the client's wishes. As solicitors BDW could apply to the Tribunal for the appointment of a financial manager as a last resort, however, this would have destroyed the relationship between BDW and the client and would require us to act directly contrary to the client's wishes. There was no service prepared or able to firstly assist the client to make a decision, or, if that was not possible, to apply for an alternative decision-maker to be appointed.

- (e) There is little information and education about the rights of people whose capacity is in question. BDW regularly does talks to carers and parents of people with intellectual disability or mental illness about estate planning and substitute decision-making. The majority of people in our audiences are unaware (and surprised to hear) that in relation to their children who are over 18, lack capacity and for whom they have not been formally appointed as a substitute decision-maker:
  - (i) that they do not have the lawful authority to make decisions on behalf of their children after they turn 18;
  - (ii) that where they manage their child's finances they are required to give the child their money on the child's demand; and
  - (iii) that they cannot mix the child's money with the household money (for example to contribute to the cost of a new car for the family).
- (f) There is little support available to enhance the capacity of people whose capacity is limited;
- (g) Due to current funding restraints, many advocacy services are unable to provide full and comprehensive advocacy services to support people in their decision-making. Often, there are extensive waiting lists for such services. Even when people are successful in obtaining such services, the organisations themselves are restricted in the assistance they can provide;
- (h) Within the advocacy framework primacy is given to medical opinion on what is essentially a legal determination. While medical evidence is certainly important, insufficient weight is accorded the evidence of the person's family, friends, carers and other support workers who can attest to the person's capacity in the decisions they make daily;
- (i) There is no provision in the legislation for support and assistance to be provided to a person whose capacity is in question;
- (j) The Guardianship Tribunal will only hear applications for appointment of an alternative decision-maker where there is a genuine dispute. While this is a well-intended aim which seeks to avoid enmeshing people unnecessarily in legal proceedings and to maintain the autonomy of people to make their own decisions as

long a possible, in practice this policy leaves both care-givers and people whose capacity is in question vulnerable.

Caregivers remain vulnerable as if a person does not have capacity to make decisions they equally do not have capacity to authorise a caregiver to make decisions for them. Every time a caregiver withdraws money from the person's account or purchases something on the other person's behalf or enters into a contract for housing or agrees to services on the other person's behalf they are acting unlawfully.

The person whose capacity is in question is also left vulnerable by this policy as:

- (i) Unless a guardian or financial manager is appointed there is no external scrutiny of decisions made on the person's behalf; and
- (ii) It increases the likelihood of such decisions being made without scrutiny.

## 6.6 Supporting a person to obtain a second opinion

We submit that the *Guardianship Act* should enable the provision of a trained, independent advocate for every person whose capacity is in question in proceedings before the Guardianship Tribunal. The role of the advocate would be to help a person to understand their options and to convey their views. It would not be the role of an advocate to make decisions for the person but to provide support and facilitate the person's decision-making to the greatest extent possible.

We submit that the *Guardianship Act* should be amended to:

- (a) Enable the provision of an advocate to support a person whose capacity is in question including support:
  - (i) To enhance the person's capacity to avoid the appointment of a substitute decision-maker if possible;
  - (ii) To challenge the suggestion that the person lacks capacity if the person whose capacity is in question wishes to so challenge;
  - (iii) During the Tribunal hearing; and
  - (iv) If a substitute decision-maker is appointed, to ensure the person's views are taken into account in all decisions affecting them so far as possible.
- (b) Create and ensure funding for a panel of authorised report writers prepared to provide reports on behalf of people whose capacity is in question when the person cannot afford to pay for a report;
- (c) Require the Guardianship Tribunal to advocate and provide education in relation to the objectives of the legislation and its principles and guidelines both in relation to assisted and substitute decision-making.

The provision of advocates under the *Guardianship Act* should have the following features:

- (i) Advocates should have a mandate to make representations about the person's wishes, feelings, beliefs and values and bring to the attention of the decision-maker all factors that are relevant to the decision;
- (ii) Advocates should have a mandate to challenge a substitute decision-maker on behalf of the person lacking capacity if necessary;
- (iii) Local and specialist agencies should be funded by the government to provide appropriately trained and supervised advocates;
- (iv) The advocates should assist the person to liaise with appropriate professionals and interested persons, including the substitute decision-maker, if appointed;
- (v) The advocates should assist with obtaining and evaluating information on behalf of the person and obtaining further opinions if required; and
- (vi) The Tribunal should have the duty to ensure that advocacy is of a satisfactory standard.