

# Submission to the Attorney General

on the need for a review of the law and practice in  
relation to Legal Capacity

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**The primary draft of the submission was prepared by Edwina  
Brietzke, Researcher**

**Contact:**

Julian Gardner  
Public Advocate  
5<sup>th</sup> floor, 436 Lonsdale Street  
Melbourne 3000 Victoria  
Tel: (03) 9603 9505  
Fax: (03) 9603 9501

## **Executive Summary**

The definition of capacity and the practice of assessing capacity can affect, positively or negatively, the rights of an individual and the degree to which those who are vulnerable are protected.

There is a lack of clarity in the legal definitions of capacity. Many Victorian Acts deal with capacity. This is highlighted by the fact that three Victorian Acts that govern substitute decision-making contain six different definitions of legal capacity.

A review of Victorian legislation should consider:

- Consolidating all of the three existing enduring powers of attorney within a single Act.
- Whether the concept of disability should be retained in the context of capacity.
- Whether a single definition of capacity could be applied.

The assessment of capacity is currently undertaken by many people ranging from ordinary members of the public to specialist professionals. It is not always clear whether the assessors understand what capacity means or what they are assessing.

A review of the practice of assessing capacity should consider:

- what resources are needed by the various professionals who assess capacity
- the principles and practice guidelines that should guide assessments and
- whether it is useful to distinguish between informal and formal assessment.

The goal of the recommended review of capacity should be to strengthen the protection and promotion of individual rights and in so doing reinforce the principles of the Victorian Charter of Human Rights and Responsibilities.

## **Contents**

### **Part 1**

- 1.1 Issues with the definition and application of the concept of legal capacity**
- 1.2 Lack of clarity in legal definitions of capacity**
- 1.3 Definitions of legal capacity in substitute decision-making legislation**
- 1.4 Issues with assessment of capacity**
- 1.5 Enhancing rights and protections of people whose capacity is lacking or in question**

### **Part 2**

- 2.1 Background – a general overview of the concept and its application**
- 2.2 Key aspects of legal capacity**
- 2.3 Where is capacity defined in the law?**
- 2.4 When should capacity be assessed?**
- 2.5 Who assesses legal capacity?**

## Legal capacity

This paper is in two parts. The first section describes the issues with the way the concept is defined and applied. The second section describes the concept and how it has been applied. This section is aimed at a general audience that may have little knowledge of the concept.

### Part 1

#### 1.1 Issues with the definition and application of the concept of legal capacity

The literature describes a range of concerns with the way legal capacity is defined and applied. The experience of the Office of the Public Advocate in Victoria raises similar issues.

#### 1.2 Lack of clarity in legal definitions of capacity

Some critics believe that the variation in the way legal capacity is defined in the law creates confusion about the concept and how it can best be applied. Definitions of capacity vary in different areas of the law and also between Australian states and territories.

Critics have suggested the variation in definitions of legal capacity in different Australian state and territory legislation is a disadvantage because it:

- diminishes the assistance that can be derived from decided cases
- makes it more complex to determine the law on a particular point
- means that assessment processes need to be tailored to each jurisdiction<sup>1</sup>.

Another problem is that different state and territory laws make it difficult for individuals who move between states and territories. For example, most states and territories recognise enduring powers made in other states and territories, but not in all cases.

The 2006 NSW paper on legal capacity questions whether there would be benefit in adopting 'a single definition of legal capacity that could be used for decision-making in all circumstances'<sup>2</sup>. Commentators disagree on whether it is possible or desirable to create a single definition of capacity to cover all areas of the law. Some critics hold that it would be difficult to create a single definition that was suitable for all areas of the law because the concept of capacity is applied in so many different areas. Other authors, including legal

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<sup>1</sup> Jim Cockerill, Bernard Collier, & Kay Maxwell, 'Legal requirements and current practices', *Mental capacity: Powers of attorney and advance health directives*, eds. Collier B., Coyne C., & Sullivan K., Federation Press, Sydney, p35.

<sup>2</sup> Attorney General's Department of NSW, (2006), *Are the rights of people whose capacity is in question being adequately promoted and protected? A discussion paper*, Attorney General's Department of NSW, Sydney, p10.

professionals, have suggested that ‘a single definition of capacity be adopted which can be used in all circumstances’.<sup>3</sup>

Other jurisdictions, including Queensland, United Kingdom and Ontario, have demonstrated that it is possible to provide greater clarity in definitions of legal capacity that apply to particular areas of the law, such as substitute decision-making.

### **1.3 Definitions of legal capacity in substitute decision-making legislation**

Several jurisdictions have added clarity by providing a single definition of legal capacity that covers enduring powers, guardianship and administration, rather than separate definitions for each of these areas as in the case in Victoria.

The *Queensland Guardianship and Administration Act 2000* provides one definition of capacity that covers enduring powers, guardianship and administration:

‘Capacity for a person, for a matter, means the person is capable of -  
a) understanding the nature and effects of decisions about the matter; and  
b) freely and voluntarily making decisions about the matter; and  
c) communicating the decisions in some way.’<sup>4</sup>

The United Kingdom *Mental Capacity Act*, which provides for substitute decision-makers to be appointed, and establishes the role and powers of a public advocate and mental capacity advocates, contains a single definition of legal capacity which states that:

‘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>5</sup>

The Ontario *Substitute Decisions Act 1992* also provides for administration, guardianship and enduring powers in a single piece of legislation. It contains two similar definitions of legal capacity; one for the purpose of property matters and one for personal care matters:

‘A person is incapable of managing property if the person is not able to understand information that is relevant to making a decision in the management of his or her property, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.’<sup>6</sup>

‘A person is incapable of personal care if the person is not able to understand information that is relevant to making a decision concerning his or her own

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<sup>3</sup> People With Disability Australia Inc & Blake, Dawson, Waldron Lawyers, (2006), *Attorney General’s Department of NSW Discussion Paper, Are the rights of people whose capacity is in questions being adequately protected? A joint response by People with Disability Australia Inc and Blake Dawson Waldron*, p10.

<sup>4</sup> Queensland, *Guardianship and Administration Act 2000*, Schedule 4: Definitions.

<sup>5</sup> *Mental Capacity Act, 2005*, S2(1), UK.

<sup>6</sup> Ontario, *Substitute Decisions Act, 1992*, S6

health care, nutrition, shelter, clothing, hygiene or safety, or is not able to appreciate the reasonably foreseeable consequences of a decision or lack of decision.<sup>7</sup>

In contrast, Victoria has three Acts that govern substitute decision-making; the *Guardianship and Administration Act 1986*, the *Instruments Act 1958* and *Medical Treatment Act 1988*. These Acts include six different definitions of legal capacity. The *Guardianship and Administration Act 1986* alone contains four different definitions of capacity.

The *Guardianship and Administration Act* provides for the appointment of guardians and administrators. It establishes a Public Advocate, allows the creation of enduring powers of guardianship and defines who has capacity to consent to medical treatment. It states that a guardianship order can only be made when the person who is the subject of a request:

- '(a) is a person with a disability; and
- (b) is unable by reason of the disability to make reasonable judgments in respect of all or any of the matters relating to her or his person or circumstances; and
- (c) is in need of a guardian<sup>8</sup>.

The Act states that an administration order can only be made when the person who is the subject of the request:

- '(i) is a person with a disability; and
- (ii) is unable to make reasonable judgments in respect of the matters relating to all or any part of her or his estate by reason of the disability; and
- (iii) is in need of an administrator of her or his estate.<sup>9</sup>

With respect to medical and dental treatment the Act states that a person does not have the legal capacity to consent if they are 'incapable of understanding the general nature and effect of the proposed procedure or treatment' or 'incapable of indicating whether or not he or she consents or does not consent to the carrying out of the proposed procedure or treatment'<sup>10</sup>.

Finally, the Act allows for an enduring power of guardianship to be created. An enduring power allows one person to appoint another who will act for them if they become incapacitated. An enduring power of guardianship allows the guardian to make lifestyle decisions such as where the incapacitated person will live and work and who can visit them. It states that a person has the capacity to create an enduring power of guardianship if two witnesses are able to attest:

- '(a) that the appointor, the proposed guardian and the proposed alternative guardian (if any) have signed this instrument freely and voluntarily in our presence; and

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<sup>7</sup> Ibid, S45

<sup>8</sup> *Guardianship and Administration Act 1986*, S22,1.

<sup>9</sup> Ibid, S46(1)(a)

<sup>10</sup> *Guardianship and Administration Act 1986*, S36,2(a)(b)

(b) that the appointor, the proposed guardian and the proposed alternative guardian (if any) appeared to understand the effect of this instrument.’<sup>11</sup>

The *Instruments Act 1958* has many functions. One of these allows an individual to create an enduring power of attorney for financial matters. A financial power of attorney gives the attorney power to make decisions about specified financial and legal matters.

The *Instruments Act 1958* specifies that a person has the legal capacity to create an enduring power if they understand the ‘nature and effect of the enduring power’<sup>12</sup>. The Act elaborates on this by specifying six things a person must understand in order to demonstrate that they understand the nature and effect of the enduring power:

‘(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>13</sup>

Among other things the *Medical Treatment Act 1988* allows a person to create an enduring power of attorney for medical decisions. The Act provides the following criteria for legal capacity: two witnesses must attest that the person giving the enduring power ‘is of sound mind and understands the import of this document’<sup>14</sup>.

As can be seen in the definitions provided above a number of jurisdictions have removed the concept of disability from definitions of legal capacity. The inclusion of the notion of disability has been criticised as discriminatory given that most people with a disability do not lack capacity. Review of the Victorian legislation would offer the opportunity to consider this option.

The Queensland definition of capacity in relation to substitute decision-making also offers the option of protecting people who lack capacity by virtue of being coerced or unduly influenced. Under current Victorian legislation people who are subject to coercion would not be found to lack capacity. In a recent case heard by the Queensland Guardianship and Administration Tribunal a man

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<sup>11</sup> Ibid, Schedule 4

<sup>12</sup> *Instruments Act 1958*, S118(1)

<sup>13</sup> Ibid, S118(2)

<sup>14</sup> *Medical Treatment Act 1988*, 5A(2)

with no disability was found to lack capacity because he was being financially coerced by two women. An administrator was appointed to manage his assets.<sup>15</sup> This definition of capacity would allow for protection of vulnerable people who are being coerced but who do not have disability. This is a particular area of concern in relation to elderly people.

For some time OPA has supported the notion that all enduring powers should be covered by a single Act. This would allow clarification of inconsistencies in existing criteria for legal capacity in relation to enduring powers. It would enable greater consistency in the way each power operates. Consideration of a single Act would also provide a timely opportunity to consider whether guardianship and administration functions should be covered, along with enduring powers, in a single act, as is the case in the United Kingdom and Ontario.

Furthermore, it is appropriate to consider whether the concept of disability should be retained. Currently, in Victoria, the notion of disability is used only in definitions of legal capacity for the purpose of guardianship and administration, but not in any other area of substitute decision-making. Arguably, Queensland and Ontario have demonstrated that the notion of disability is not necessary.

Finally, there is a great need for general information on legal capacity that describes what the concept means and how it is applied. Any revision of the law in this area must be accompanied by accessible information that makes this important area of law easy to understand for the general public and professionals.

#### **1.4 Issues with assessment of capacity**

Information about capacity assessment is lacking for both the general public and the range of professionals who assess capacity whether informally or formally. The lack of knowledge in the general population is a particular concern given the ever increasing numbers of people who develop dementia. In addition, many members of the general public act as witnesses for people creating powers of attorney. In this role it is essential that they understand what capacity means and what to do if they suspect capacity is lacking.

The lack of information and resources for professionals has been well documented. A major difficulty in this area is that there are no universally agreed processes for assessing capacity and no agreed criteria for determining whether capacity is lacking. Assessment of capacity continues to be the focus of ongoing research and academic work. Despite the lack of agreement on capacity assessment many jurisdictions have attempted to provide better information and resources.

Ontario has developed an Office of Capacity Assessment to register and train formal capacity assessors<sup>16</sup>. The assessors are all health professionals such

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<sup>15</sup> Telephone conversation between OPA and Joelle Waters, Legal Officer, Queensland Guardianship and Administration Tribunal, 12 Oct 2006.

<sup>16</sup> Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca>, Retrieved 21 June 2006

as nurses, doctors, social workers and psychologists. This formal system offers clarity and uniformity as all assessors work according to standard processes.

The United Kingdom has partly addressed this issue through the *Mental Capacity Act 2005* by mandating the preparation of one or more codes of practice 'to give guidance about the legislation'<sup>17</sup> to a range of groups including those responsible for 'assessing whether a person has capacity in relation to any matter'<sup>18</sup>. The Act provides that any person acting in relation to a person lacking capacity must give regard to the relevant code<sup>19</sup>. The codes must be approved by both Houses of Parliament<sup>20</sup>.

In Victoria, the Office of the Public Advocate has been working with neuropsychologists to develop better guidelines for neuropsychologists who are conducting capacity assessments that will be used by the Guardianship List of the Victorian Civil and Administrative Tribunal in making decisions.

The discussion paper released by the Attorney General's Department of NSW 'Are the rights of people whose capacity is in question being adequately promoted and protected?' raised questions about what resources are needed by the various professional who assess capacity, what principles and practice guidelines should guide assessments and whether it is useful to distinguish between formal and informal assessment. As in NSW all of these issues are concerns in Victoria.

### **1.5 Enhancing rights and protections of people whose capacity is lacking or in question**

Any review of legal capacity should consider ways to enhance individual rights and protections. A number of issues have been identified.

Some critics have suggested that capacity assessments and applications for substitute decision-makers often proceed without proper exploration of a person's ability to make decisions with appropriate information and support. For this reason several jurisdictions have added guiding principles to substitute decision-making legislation that mandate provision or adequate information and attempts at supported decision-making prior to any steps being taken to assess capacity and appoint a substitute decision-maker. For example, one of the principles of the United Kingdom Mental Capacity Act 2005 states that 'A person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success.'<sup>21</sup>

Concerns have been raised about the lack of advocacy support for people whose capacity is in question, or who have been found to lack capacity. A number of Australian jurisdictions provide advocacy for people in these situations, however it is often best interest advocacy rather than advocacy that

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<sup>17</sup> *Explanatory Notes to Mental Capacity Act, 2005*

<sup>18</sup> *Mental Capacity Act, 2005, S42, 1, a, UK*

<sup>19</sup> *Mental Capacity Act, 2005, S42, 4, UK*

<sup>20</sup> *Mental Capacity Act, 2005, S43, 2, a, b, UK*

<sup>21</sup> *Mental Capacity Act, 2005, 1(3), UK*

is solely focussed on the wishes, feelings and beliefs of the individual. The United Kingdom Mental Capacity Act 2005 has addressed these concerns by creating Independent Mental Capacity Advocates (IMCA)<sup>22</sup>. The IMCA makes representations about the individual's values, beliefs, feelings and wishes and can challenge a substitute-decision maker on behalf of the person lacking capacity.

The NSW discussion paper on capacity raised questions about how people can seek a second opinion if they do not agree with an assessment of capacity or a decision by a Court or Tribunal regarding the appointment of a substitute decision-maker. The paper also questions whether the existing framework for advocacy is sufficient to protect the rights of people whose capacity is in question.

It would be useful for Victoria to review all of these issues as part of any review of the law in relation to legal capacity.

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<sup>22</sup> *Mental Capacity Act, 2005, UK*

## **Part 2**

### **2.1 Background – a general overview of the concept and its application**

#### **What does legal capacity mean?**

In everyday use the term capacity refers to a person's ability to do a particular thing. When the concept of capacity is used in law it refers to something more specific. Legal capacity generally refers to a person's capacity to understand a particular situation to the extent required by the relevant law. It often includes the ability to make a decision about the situation. The term competence is often used to mean the same thing as capacity.

#### **Who lacks capacity?**

There are many reasons why a person may lack or lose capacity. Children and teenagers do not have legal capacity in many areas. People with dementia, acquired brain injury, mental illness and intellectual disability may lack capacity if their disability affects their ability to think, but most people with disabilities do not lack capacity. People in a coma, and some people with other severe medical conditions, cannot make any decisions.

#### **Why do we need the concept of legal capacity?**

The concept of legal capacity allows society to identify, assist and protect people who may be vulnerable because of their incapacity. It also determines which people can exercise certain rights. For example a person who lacks capacity:

- cannot marry or make a will
- may need an administrator to protect them from financial losses if they are no longer capable of managing money
- cannot be held responsible for a crime if they did not understand what they were doing
- may need a guardian to decide where they will live if their needs are not being met in their current place of residence.

The concept of legal capacity also allows the community to protect itself from people who lack capacity. For example:

- if a person lacking capacity entered into a financial contract without being able to fulfil the contract this could lead to serious disadvantage and losses for any other parties to the contract

- a doctor who treats a person who cannot give consent could be found guilty of assault
- it would be unjust if a person lacking capacity were able to give evidence in court.

The concept of legal capacity allows society to protect vulnerable people, and to protect itself from incapable people. It distinguishes between people who can freely exercise their rights and be held responsible for their actions and those who cannot.

### **Where does the concept of legal capacity come from?**

It is a general expectation that societies will protect citizens who lack understanding from harm or from taking, or being held responsible for, certain actions. To do this each society must be able to identify people who lack understanding.

From as early as the 13<sup>th</sup> Century, English law used the notion of capacity, and terms such as minor (child) and lunatic, to identify people who needed protection or who could exercise certain rights. Most modern democracies inherited the concept of legal capacity from English law. The notion of understanding has always been central to definitions of capacity although it has been expressed in many different ways.

### **How has the concept of legal capacity been applied over time?**

From early times the concept of capacity was used to identify people who were vulnerable and needed protection. In 13<sup>th</sup> Century, English law formally acknowledged the king as the protector of vulnerable citizens, including people who lacked capacity. The concept of 'parens patriae' was used to describe the king's protective role. Parens patriae is a Latin term meaning 'father of the people'.

The 'fatherly' protection offered under the principle of parens patriae was very paternalistic. Decisions were made in the supposed best interests of the person who lacked capacity or who was assumed to lack capacity. The rights, wishes, dignity and personal responsibility of the person lacking capacity were not considered.

People who lacked capacity in one area were assumed to lack capacity in all areas. People with a disability were automatically assumed to lack capacity even though most people with disabilities do not lack capacity. Many people with disabilities were institutionalised, had no say over decisions affecting them and suffered many abuses.

Over the past 30 years the application of the concept of legal capacity has been fundamentally influenced by major philosophical, social and technological changes. International human rights conventions affirmed the right to self-determination and dignity for all people. Medical developments, deinstitutionalisation and the disability rights movement increased the number, visibility and voice of people with disabilities. People with and without disabilities questioned the definition and use of the concept of legal capacity.

Today legal capacity is applied in a way that reflects modern philosophies of autonomy and human rights. For example, all people are assumed capable unless proven to lack capacity. The state has assumed the protective role once held by the king and if it appoints a substitute decision-maker the wishes of the person lacking capacity must always be considered.

The continuing challenge is to balance respect for individual rights with protection of the individual and society.

## **2.2 Key aspects of legal capacity**

### **Capacity is a social construct**

The concept of capacity is constructed by each individual society to meet its own needs. Typically the most powerful groups in a society are in the strongest position to influence social constructs. Unsurprisingly, social constructs tend to reflect the views and values of dominant social groups.

The construct of capacity has often been used to serve the needs of dominant groups, frequently at the expense of minority or marginalised groups. For example, women were once thought incapable of voting. People with disabilities were once thought to be incapable of making decisions. Until the 1970s homosexuality was classified a mental illness and homosexuals continue to be denied fundamental rights. For these reasons Justice Michael Kirby has warned that in judging what society calls 'mental illness or incapacity, we must ... retain a healthy scepticism'<sup>23</sup>.

Debate continues over the way the construct of legal capacity is defined. For example, some disability groups argue that the emphasis on cognitive abilities in definitions of legal capacity discriminates against some people with mental illness who use emotions and intuition as the main basis for making decisions.

Despite this ongoing debate modern Western democracies tend to define and apply legal capacity according to similar principles.

### **Adults are presumed to be capable**

A key principle of capacity is that all adults are presumed capable. The right of every individual to make choices is protected by principles of autonomy and dignity enshrined in international human rights conventions. These rights are a characteristic of human existence. They do not have to be earned. Adults do not have to prove they are capable of exercising their right to self-determination.

The presumption of capacity has been compared to the presumption of innocence. Just as a person is presumed innocent until proven guilty, they are also presumed capable until proven to be lacking in capacity.

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<sup>23</sup> P Darzins, D W Molloy & D Strang (2000) *Who can decide: The six step capacity assessment process*, Memory Australia Press, Adelaide, p vi.

## **An individual does not have to prove they are capable**

When there is an appropriate trigger the state has the power to act in its protective role and investigate a person's capacity. An individual does not have to prove their own capacity. The state is responsible for proving that a person lacks capacity. In complex cases this often requires careful and detailed assessment.

## **Capacity is not determined by the outcome of a decision**

Capacity is not determined by the outcome of a decision. It is determined by a person's ability to understand a situation and make a choice. People who have legal capacity are free to make good, bad, unusual or eccentric choices. The principle of autonomy means that anyone who can make a choice should be free to do so regardless of the outcome of that choice.

## **Levels of capacity vary and can fluctuate**

Capacity used to be thought of as an attribute that was either fully intact or completely absent. This often led to actions that permanently removed all decisions from people lacking capacity even if they were capable of some decisions. More recent approaches to capacity recognise that capacity can vary in relation to different situations and can fluctuate or decline over time.

A person may lack capacity for complex medical decisions but retain capacity for simple decisions. A person with a mental illness may be incapable only during brief periods when they are unwell. A person with dementia will typically lose their ability to manage financial matters before they lose their capacity to make general life decisions.

## **Disability does not imply incapacity**

Most people with disabilities do not lack capacity. Any person may experience loss of capacity at some point in their life regardless of whether they have an existing disability. However people with particular disabilities may be more likely to lose capacity. For example, people with dementia typically lose capacity as their disease progresses.

## **Adequate information**

It is impossible to understand a situation and make an informed choice without sufficient information. Assessment of a person's capacity may be incorrect if the person was not provided with adequate information. Information must be provided in a way that each person can understand. For example, a person with an intellectual disability may need information in plain language and they may need to hear the information a number of times.

## **Adequate support**

Some people cannot make a legally binding decision independently, but are able to make a decision with support. For example, a person with an acquired brain injury may be able to understand information, but unable to remember several pieces of information for long enough to weigh up choices and make a decision. People with intellectual disabilities have often been denied opportunities to make decisions for themselves and may not have developed the skills for making decisions. In cases like these the assistance of a support person could make it possible for the individual in question to make a decision that is legally binding. Even people who do not lack capacity often consult others about their decisions.

The necessity of support has been recognised in the United Kingdom *Mental Capacity Act 2005*. Principle number three of the Act's six guiding principles states 'a person is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success'<sup>24</sup>.

## **Changing notions of capacity assessment**

Initially the aim of capacity assessment was to determine whether a person did or did not have capacity. This type of assessment was based on the notion that capacity was an attribute that was either present or absent. Recognition that a person could lack capacity in one area and retain it in another led to assessment of specific domains.

Domain specific assessment examines whether a person has capacity to make decisions in one particular area. This approach assumes that a person either has or lacks capacity to make all decisions in a particular area, for example all financial decisions or all health care decisions.

More recently the concept of decision specific assessment has evolved. This focuses on whether a person has the capacity to make a particular decision or a set of decisions about a specific matter. For example, a person may be capable of making a particular health care decision that is relatively straightforward but incapable of a more complex health care decision.

### **2.3 Where is capacity defined in the law?**

The concept of capacity is fundamental to many areas of the law. For example a person must have legal capacity to marry<sup>25</sup>, make a will, give evidence<sup>26</sup>, stand trial<sup>27</sup>, sue or be sued, or enter a financial or legal contract. In addition, a substitute decision-maker, such as a guardian or administrator, can only be appointed when a person lacks capacity. Therefore many different definitions of capacity can be found in common law and legislation.

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<sup>24</sup> UK *Mental Capacity Act*, 2005, S1(3).

<sup>25</sup> *Marriage Act 1961*, s23(1)(d)(iii) provides that a party's consent is void because 'that party was mentally incapable of understanding the nature and effect of the marriage ceremony'.

<sup>26</sup> *Evidence Act 1958*, s23 (1)(a)(b)

<sup>27</sup> *Victorian Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, s6(1)(2)

Common law, or case law, is the rules of law made by judges as they make judgements about particular cases. Common law involves forming a precedent for decision-making in similar cases. Definitions of capacity are continually refined in common law, but they are also defined in new legislation. Legislation is made by parliaments. Modern liberal democracies continually make new laws, and refine existing ones, to keep up with social changes.

In many cases the law in relation to legal capacity in a particular situation is covered only by common law. In some cases common law from other countries will be relevant, particularly British common law. In other cases both common law and legislation will be relevant. In addition, some matters will be dealt with by state law whereas others will be covered by Commonwealth law.

For example, common law provides the criteria for determining who has capacity to make a will which is referred to as testamentary capacity. The test for testamentary capacity is found in common law. It initially came from an English case called *Banks v Goodfellow* that was heard in 1870 and has been restated by courts since then.

A solicitor assessing capacity must be satisfied that the client understands the nature and effect of the will, the extent and character of their estate and the claims of potential heirs. The solicitor must also be sure that the client is not affected by delusional thinking.

One example of the many legislative definitions of legal capacity is provided in the Victorian *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*. The Act states:

‘(1) A person is unfit to stand trial for an offence if, because the person's mental processes are disordered or impaired, the person is or, at some time during the trial, will be-

- (a) unable to understand the nature of the charge; or
- (b) unable to enter a plea to the charge and to exercise the right to challenge jurors or the jury; or
- (c) unable to understand the nature of the trial (namely that it is an inquiry as to whether the person committed the offence); or
- (d) unable to follow the course of the trial; or
- (e) unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
- (f) unable to give instructions to his or her legal practitioner.

(2) A person is not unfit to stand trial only because he or she is suffering from memory loss.<sup>28</sup>

It can often be difficult to find out what the law says about capacity in relation to a particular issue, especially if it is necessary to find relevant common law. However, most people do not need legal research skills. Citizens get legal

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<sup>28</sup> *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997*, S6.

information from a range of sources including publications and brochures, the internet, the media, government and non-government agencies, advisory bodies and legal professionals. Professionals get information about relevant laws during their training and from their professional organisations.

Critics believe legal capacity can be hard to understand because there are so many different definitions in the law. Jurisdictions around the world continue to review their definitions of legal capacity. Many are changing laws and creating guidelines or other information to make the concept easier to understand and apply.

## 2.4 When should capacity be assessed?

Capacity assessment must be conducted as required by the relevant law. For example, doctors must get consent before proceeding with treatment. If the capacity of the person needing treatment is unclear the doctor must clarify whether the person has capacity to consent. To treat without consent is to commit an assault. Solicitors making wills must check the testamentary capacity of their clients.

More detailed assessment is only warranted when less involved measures cannot provide a clear picture of a person's capacity. Detailed capacity assessment should only be 'performed as a last resort when a reasonable range of other potential solutions have been considered, tried and failed'<sup>29</sup>.

Valid triggers for formal capacity assessment include:

- people have demonstrated behaviour which has put them, or others, at risk of significant harm
- there is a decision which needs to be made
- people are known or suspected to have impaired decision-making
- people have made choices that others believe are not consistent with their values previously held when they were apparently capable
- all previous attempts to solve the problem have failed and capacity assessments which may confirm a lack of decision-making ability are the last resort
- appointment of substitute decision-makers, if indicated, will solve the problems<sup>30</sup>.

When an individual lacks or loses capacity family members or carers will often make decisions on their behalf without any formal legal authority. This is seen as a preferable option because it avoids the time, cost and potential distress of formal assessment and substitute decision-making processes. However, there are cases where informal decision-making is not appropriate. If there is conflict between any of the people involved or a particular type of legal decision needs

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<sup>29</sup> P Darzins, D W Molloy & D Strang (2000) *Who can decide: The six step capacity assessment process*, Memory Australia Press, Adelaide, p 13.

<sup>30</sup> *Ibid*, p 13.

to be made a formal substitute decision-maker may be required. A substitute decision-maker cannot be appointed unless a person lacks capacity. This necessitates a formal capacity assessment.

## **How is legal capacity assessed?**

Assessment of legal capacity should always be an investigation of a person's capacity in relation to the legal definitions and criteria relevant to the matter in hand. Assessment of legal capacity is different to other capacity assessments. Other capacity assessments may be conducted for a range of reasons. For example, an elderly person may be assessed to determine the supports they need to continue living independently at home. This type of assessment would not need to address legal criteria.

In most situations a person's capacity will be obvious. Simple questioning will usually be enough to confirm that a person understands to the extent required by the relevant law. In some cases questioning will be guided by the legal criteria such as the common law test for making a will. Some professional organisations provide advice on different aspects of capacity assessment. For example, the British Medical Association has created a simple *Consent tool kit* for doctors that is available online<sup>31</sup>.

Capacity assessors often use simple tests as a first step to help them decide if further assessment is needed. These are typically psychological tests that have been developed and trialled on large groups such as the Mini Mental Status Examination (MMSE). The MMSE is one of the most widely used tests for assessing general cognitive ability. It is a 30 item test that assesses orientation, attention, immediate and short-term recall, language, and the ability to follow simple oral and written commands. Simple tests can indicate whether further assessment is needed, but they cannot provide enough information to confirm a person's level of capacity.

Whenever there is doubt about a person's level of capacity only detailed assessment can provide a clear picture. Detailed assessment means an assessment by a trained professional who would usually use a range of psychological tests. This type of assessment results in a written report which explains the outcomes of the assessment, usually with a reason for the opinions provided.

There is a great deal of research and writing on capacity assessment but there are no universally agreed capacity assessment processes. In many cases assessors struggle to find the information and support they need. Better education and support for all people who assess capacity is required. Around the world jurisdictions are trying to create better assessment processes and better guidelines for assessors.

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<sup>31</sup> *Consent tool kit*, 2003, [www.bma.org.uk](http://www.bma.org.uk), Retrieved 21 June 2006.

## Is a capacity assessment a legal finding?

A capacity assessment is not a legal finding. Only a tribunal or a court can make a legal determination about capacity. Tribunals and courts rely on assessments to provide evidence on which they can base their decisions. However, an assessment is a professional opinion and a tribunal or court is not obliged to agree with it. In more complex cases assessments may provide conflicting opinions and the tribunal or court will be responsible for making a legal determination about capacity.

## 2.5 Who assesses legal capacity?

Because legal capacity is relevant to various decisions many different people assess capacity. For example, doctors assess capacity to consent to treatment. Solicitors assess capacity to sign a contract or make a will. Judges assess capacity to give evidence or stand trial. Celebrants assess capacity to marry. Witnesses, who may be ordinary citizens or specified professionals, assess capacity to sign an enduring power of attorney. Enduring powers allow one person, called the donor, to give another person the power to make decisions on their behalf if the donor becomes incapacitated.

Victorian law does not say who should conduct detailed capacity assessments. In practice detailed capacity assessments are usually conducted by geriatricians, psychiatrists, neuropsychologists and psychologists. A geriatrician is a doctor who specialises in the care of elderly people. A psychiatrist is a doctor who specialises in care of people with mental illness. A neuropsychologist is a psychologist who specialises in the assessment, diagnosis and management of people with brain impairments. A psychologist is an academically trained and registered professional who specialises in the study or treatment of mental problems. Psychologists are not medical doctors.

Some jurisdictions have legislated to create formal capacity assessors. In Ontario, the Capacity Assessment Office trains and registers 'eligible health professionals to be capacity assessors in accordance with the *Substitute Decisions Act*<sup>32</sup>. Eligible professionals are doctors, nurses, psychologists, registered social workers and occupational therapists. The assessors only assess capacity in relation to certain types of decisions as defined in the *Substitute Decisions Act*. In some cases the assessor has the power to make a legal determination about a person's capacity. This saves time and resources by avoiding the need for a court or tribunal to hear the matter.

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<sup>32</sup> Ministry of the Attorney General <http://www.attorneygeneral.jus.gov.on.ca>, Retrieved 21 June 2006.