



**New South Wales  
Law Reform Commission**

# **Review of the Guardianship Act 1987**

## **Question Paper 1**

### **Preconditions for alternative decision- making arrangements**

August 2016  
[www.lawreform.justice.nsw.gov.au](http://www.lawreform.justice.nsw.gov.au)

## QP 1 Preconditions for alternative decision-making arrangements

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## Make a submission

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We seek your responses to this question paper. To tell us your views you can send your submission by:

**Email:** [nsw\\_lrc@justice.nsw.gov.au](mailto:nsw_lrc@justice.nsw.gov.au)

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## Terms of reference

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Pursuant to section 10 of the Law Reform Commission Act 1967, the NSW Law Reform Commission is asked to review and report on the desirability of changes to the *Guardianship Act 1987* (NSW) having regard to:

1. The relationship between the *Guardianship Act 1987* (NSW) and
  - The *NSW Trustee and Guardian Act 2009* (NSW)
  - The *Powers of Attorney Act 2003* (NSW)
  - The *Mental Health Act 2007* (NSW)
  - other relevant legislation.
2. Recent relevant developments in law, policy and practice by the Commonwealth, in other States and Territories of Australia and overseas.
3. The report of the 2014 ALRC Equality, Capacity and Disability in Commonwealth Laws.
4. The UN Convention on the Rights of Persons with Disabilities.
5. The demographics of NSW and in particular the increase in the ageing population.

In particular, the Commission is to consider:

1. The model or models of decision making that should be employed for persons who cannot make decisions for themselves.
2. The basis and parameters for decisions made pursuant to a substitute decision making model, if such a model is retained.
3. The basis and parameters for decisions made under a supported decision making model, if adopted, and the relationship and boundaries between this and a substituted decision making model including the costs of implementation.
4. The appropriate relationship between guardianship law in NSW and legal and policy developments at the federal level, especially the *National Disability Insurance Scheme Act 2013*, the *Aged Care Act 1997* and related legislation.
5. Whether the language of 'disability' is the appropriate conceptual language for the guardianship and financial management regime and to what extent 'decision making capacity' is more appropriate.
6. Whether guardianship law in NSW should explicitly address the circumstances in which the use of restrictive practices will be lawful in relation to people with a decision making incapacity.
7. In the light of the requirement of the UNCRPD that there be regular reviews of any instrument that has the effect of removing or restricting autonomy, should the *Guardianship Act 1987* provide for the regular review of financial management orders.

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8. The provisions of Division 4A of Part 5 of the *Guardianship Act 1987* relating to clinical trials.
9. Any other matters the NSW Law Reform Commission considers relevant to the Terms of Reference.

[Reference received 22 December 2015]

## Recent Australian reviews of guardianship laws

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In this Question Paper we refer extensively to a number of recent Australian reviews:

- NSW Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010)
- Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010)
- Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) – reflected in part in the Guardianship and Administration Bill 2014 (Vic) which the Victorian Parliament did not pass.
- Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014).

### 3. The concept of “capacity”

#### **Question 3.1: Elaboration of decision-making capacity**

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

#### **Question 3.2: Disability and decision-making capacity**

How, if at all, should a person’s disability be linked to the question of his or her decision-making capacity?

#### **Question 3.3: Defining disability**

If a link between disability and incapacity were to be retained, what terminology should be used when describing any disability and how should it be defined?

#### **Question 3.4: Acknowledging variations in capacity**

- (1) Should the law acknowledge that decision-making capacity can vary over time and depend on the subject matter of the decision?
- (2) How should such acknowledgements be made?
- (3) If the definition of decision-making capacity were to include such an acknowledgement, how should it be expressed?
- (3) If capacity assessment principles were to include such an acknowledgment, how should it be expressed?

#### **Question 3.5: Should the definitions of decision-making capacity be consistent?**

- (1) Should the definitions of decision-making capacity within NSW law be aligned for the different alternative decision-making arrangements?
- (2) If the definitions of decision-making capacity were to be aligned, how could this be achieved?

#### **Question 3.6: Statutory presumption of capacity**

Should there be a statutory presumption of capacity?

#### **Question 3.7: What should not lead to a finding that a person lacks capacity**

- (1) Should capacity assessment principles state what should not lead to a conclusion that a person lacks capacity?
- (2) If capacity assessment principles were to include such statements, how should they be expressed?

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### **Question 3.8: The relevance of support and assistance to assessing capacity**

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

### **Question 3.9: Professional assistance in assessing capacity**

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

### **Question 3.10: Any other issues?**

Are there any other issues you want to raise about decision-making capacity?

## 4. Other preconditions that must be satisfied

### **Question 4.1: The need for an order**

- (1) Should there be a precondition before an order is made that the Tribunal be satisfied that the person is "in need" of an order?
- (2) If such a precondition were required, how should it be expressed?

### **Question 4.2: A best interests precondition**

- (1) Should there be a precondition before an order is made that the Tribunal be satisfied that the order is in the person's "best interests"?
- (2) If such a precondition were required, how should it be expressed?
- (3) What other precondition could be adopted in place of the "best interests" standard?

### **Question 4.3: Should the preconditions be more closely aligned?**

- (1) Should the preconditions for different alternative decision-making orders or appointments in NSW be more closely aligned?
- (2) If so, in relation to what orders or appointments and in what way?

### **Question 4.4: Any other issues?**

Are there any other issues you want to raise about the preconditions for alternative decision-making arrangements?

## 5. Other factors that should be taken into account

### **Question 5.1: What factors should be taken into account?**

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

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# 1. Introduction

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## In brief

This Question Paper considers the circumstances that must exist before a decision-maker can be appointed under the system of guardianship in NSW to make personal, financial and medical decisions for somebody else. We seek your views about these preconditions.

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- 1.1 In NSW a number of different laws allow a person to be appointed to make decisions on behalf of somebody else. We are reviewing one such law – the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”).
- 1.2 The *Guardianship Act* allows a formal decision-maker to be identified or appointed to make personal, financial and medical decisions for someone who cannot make those decisions themselves. We refer to these appointments as “alternative decision-making” arrangements or orders in this Question Paper.
- 1.3 The *Guardianship Act* also sets out the circumstances (or “preconditions”) that must exist before such an appointment can be made. In this Question Paper, we focus on these circumstances and invite you to comment on them.

## Why we are reviewing the *Guardianship Act*

- 1.4 When the *Guardianship Act* became law almost thirty years ago, it reflected new ideas about the different needs of people with disability. There was also a growing awareness of the rights of people with disability to live in the community rather than in an institution.<sup>1</sup>
- 1.5 Since then, the way people think about disability has shifted again. This is partly because of developments in human rights law, in particular the development of the United Nations *Convention on the Rights of Persons with Disabilities* (“UN *Convention*”).<sup>2</sup> The principles of the UN *Convention* include the right of people with disability to dignity, autonomy, full and active participation in society and equal recognition before the law.
- 1.6 Like many of the guardianship laws in Australia and overseas, the *Guardianship Act* could better reflect these new ideas. Many places have recently reviewed their guardianship laws as a result, just as we are doing now.
- 1.7 Another reason we are reviewing the *Guardianship Act* is that the profile of people exposed to the guardianship system has changed a lot since the Act was

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1. N O'Neill and C Peisiah, *Capacity and the Law* (Sydney University Press, 2011) [5.4.1].

2. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008).

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introduced. Initially the largest group was people with intellectual disability. Now cases involving people with dementia are most common and the number of cases involving people with a mental illness or brain injury is significant.<sup>3</sup> This raises the question whether our current guardianship framework, primarily designed for people with intellectual disability, is suitable.

### Our approach

- 1.8 This paper is first in a series of question papers that we will release to promote discussion and seek your ideas about guardianship law in NSW. It complements the Background Paper, available on our website. The Background Paper outlines our approach to this review, describes what the *Guardianship Act* does, introduces some key concepts and provides an overview of the landscape in which our laws operate.
- 1.9 Each question paper will deal with different elements of guardianship:
  - **Question Paper 1:** Preconditions for alternative decision-making arrangements.
  - **Question Paper 2:** Decision-making models.
  - **Question Paper 3:** Supporters and decision-makers: appointment, powers, responsibilities and accountability (including, under current arrangements, enduring guardians, guardianship orders, persons responsible, financial managers and informal decision-making arrangements).
  - **Question Paper 4:** NCAT and key agencies (including the operation of the Guardianship Division of the NSW Civil and Administrative Tribunal, the NSW Public Guardian, the NSW Trustee and Guardian, and the case for a Public Advocate).
  - **Question Paper 5:** Medical and dental treatment and restrictive practices.
  - **Question Paper 6:** Other issues, including:
    - interaction with other laws (for example, NSW power of attorney, trustee and guardian, mental health and criminal laws, Commonwealth aged care legislation and the National Disability Insurance Scheme, and the recognition of interstate and overseas equivalent orders)
    - language of the *Guardianship Act*, and
    - the age at which people can come under the *Guardianship Act*.
- 1.10 Following these question papers and other forms of consultation, we will write a final report that contains our findings and recommendations for reform.
- 1.11 We will also publish easy read versions of all of our publications for this review on our website.

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3. NSW Civil and Administrative Tribunal, *NCAT Annual Report 2014–2015* (2015) 41.

## This Question Paper

- 1.12 In this Question Paper, we review the current preconditions for alternative decision-making arrangements in NSW and give an overview of the equivalent provisions in other places. Drawing upon ideas in the preliminary submissions we have received, we outline various perspectives and seek your ideas about the law.
- 1.13 In preparing this paper, we are aware that many people may not support the guardianship framework that we have in place now. A key feature of our current law is that it adopts a “substitute” decision-making model, which involves a person making decisions on behalf of someone else.
- 1.14 The UN *Convention* reflects a growing international preference for a different model – namely, a “supported” decision-making model. This model emphasises that all people have the right to make decisions for themselves. However, the model recognises that some people may need or want support to help them to reach their decision. The level or nature of that support will vary from person to person. The support that one person needs or wants may also change over time. It may even depend upon the type of decision in question.
- 1.15 While leaving open the question of what decision-making model NSW should adopt, we have chosen to focus on the current system in NSW as a starting point for discussion.
- 1.16 In the following chapters we consider:
- **Chapter 2:** The current law — when alternative decision-making arrangements can be made in NSW and what must happen before they take effect.
  - **Chapter 3:** The concept of “capacity”, which in current NSW law is central to the question of whether an alternative decision-making arrangement can be made.
  - **Chapter 4:** Other preconditions that must be satisfied before an order can be made or arrangements entered into force.
  - **Chapter 5:** Factors that a court or tribunal should take into account when deciding whether to make a particular order. These are expressed variously as considerations, principles or guidelines.

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## 2. Current law and practice

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### In brief

There are different types of alternative decision-making arrangements in the guardianship system in NSW. These include enduring guardianship and enduring powers of attorney, Tribunal-imposed guardianship orders and financial management orders, and consent to medical and dental treatment. The preconditions that must be satisfied before they can take effect differ for each arrangement. However, some assessment of a person's capacity is required in each case.

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- 2.1 The *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) sets out the circumstances in which:
- someone who has been appointed as an “enduring guardian” may make decisions on behalf of the person who appointed them
  - the Guardianship Division of the NSW Civil and Administrative Tribunal (“the Tribunal”) may appoint a guardian and/or financial manager to make decisions for another person, and
  - a person may consent to medical and dental treatment on behalf of someone else.
- 2.2 In this Chapter, we outline what the *Guardianship Act* says about when these decision-making arrangements can be made and what must happen before they can take effect. We also introduce another important aspect of the NSW guardianship system – the NSW Capacity Toolkit.<sup>1</sup>

### General principles

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- 2.3 Everyone exercising functions under the *Guardianship Act* with respect to people with disability must observe certain general principles. These principles are important because they set out, in a positive way, the approach that people should take to making decisions about the affairs of others. Of particular relevance to the

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1. NSW, Attorney General's Department, *Capacity Toolkit* (2009).

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matters raised in this Question Paper, the Tribunal must apply these general principles when deciding whether to make a guardianship order or a financial management order. The general principles are set out in s 4 of the *Guardianship Act*, as follows:

- (a) the welfare and interests of such persons should be given paramount consideration,
- (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation,
- (h) the community should be encouraged to apply and promote these principles.<sup>2</sup>

## Enduring appointments

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- 2.4 In NSW a person may appoint someone to make personal decisions for them if, in the future, they lose the ability to make their own decisions. If they want someone to make decisions about their lifestyle and health, they can appoint an enduring guardian. If they want someone to make decisions about their legal and financial affairs, they can appoint an enduring power of attorney.

### Making an enduring appointment

- 2.5 To appoint an enduring guardian or an enduring power of attorney, the person making the appointment must have decision-making capacity. According to the common law test, this means that he or she must be capable “of understanding the nature of the acts or transactions which the particular [document] purports to authorize”.<sup>3</sup>
- 2.6 A person who wants to make an enduring appointment must complete and sign a formal document. In the case of the appointment of an enduring guardian, this document must be signed by witnesses who can certify that the person, in their presence, signed the document voluntarily and that the person appeared to understand the effect of the appointment.<sup>4</sup>

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2. *Guardianship Act 1987* (NSW) s 4.

3. *Gibbons v Wright* (1954) 91 CLR 423, 445.

4. *Guardianship Act 1987* (NSW) s 6C(1)(e).

- 2.7 In the case of enduring powers of attorney, the document must express the person's intention that the appointment will continue to be effective even if the person later lacks "capacity through the loss of mental capacity".<sup>5</sup> The document must also be signed by an approved witness. Among other things, the witness must confirm that the person "appeared to understand the effect of the power of attorney".<sup>6</sup>

### When an enduring appointment takes effect

- 2.8 A person's prior appointment of an enduring guardian takes effect when he or she becomes "a person in need of a guardian".<sup>7</sup> That is, they are a "person who, because of a disability, is totally or partially incapable of managing his or her person".<sup>8</sup> This is effectively an automatic process, although if the operation of the appointment is challenged in court, a medical practitioner's certificate may be used as evidence that the person was incapable of managing his or her person because of disability.<sup>9</sup>
- 2.9 An enduring power of attorney will continue to be effective even if the person lacks "capacity through the loss of mental capacity".<sup>10</sup>

### Guardianship orders

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- 2.10 Guardianship orders differ from enduring appointments. The Tribunal makes a guardianship order only after a person has lost decision-making capacity.
- 2.11 In making a guardianship order, the Tribunal appoints a guardian for a person. The guardian makes decisions about how that person lives, including matters such as lifestyle and health care.
- 2.12 The Tribunal can only make a guardianship order if it is satisfied that the person is "in need of a guardian".<sup>11</sup> As noted above, such a person is a "person who, because of a disability, is totally or partially incapable of managing his or her person".<sup>12</sup>
- 2.13 The *Guardianship Act* defines a person who has a disability as 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 the Mental Health Act 2007, or
  - (d) who is otherwise disabled,

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5. *Powers of Attorney Act 2003* (NSW) s 19(1)(a).

6. *Powers of Attorney Act 2003* (NSW) s 19(1)(c)(ii).

7. *Guardianship Act 1987* (NSW) s 6A.

8. *Guardianship Act 1987* (NSW) s 3(1).

9. *Guardianship Act 1987* (NSW) s 6N.

10. *Powers of Attorney Act 2003* (NSW) s 19(1)(a).

11. *Guardianship Act 1987* (NSW) s 14.

12. *Guardianship Act 1987* (NSW) s 3(1).

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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.<sup>13</sup>

- 2.14 In making a guardianship order, the Tribunal must also take the general principles in s 4 into account and must also have regard to the following list of matters:
- (a) the views (if any) of:
    - (i) the person, and
    - (ii) the person's spouse, if any, if the relationship between the person and the spouse is close and continuing, and
    - (iii) the person, if any, who has care of the person,
  - (b) the importance of preserving the person's existing family relationships,
  - (c) the importance of preserving the person's particular cultural and linguistic environments, and
  - (d) the practicability of services being provided to the person without the need for the making of such an order.<sup>14</sup>
- 2.15 The Tribunal's Appeal Panel has held that the Tribunal must take into account each of these matters once it has determined that a person is a "person in need of a guardian". In each case before it, the Tribunal must decide how much weight or importance to give to any of these matters.<sup>15</sup> The Tribunal might, under such arrangements, find that a person fits the definition of a "person in need of a guardian" but also conclude that services can be provided to the person without the need for a guardianship order. In such a case, the Tribunal might decide not to make an order.
- 2.16 When balancing these considerations, the Tribunal must observe the general principles set out in s 4.<sup>16</sup> There is a clear degree of overlap (and perhaps some conflict) between the general principles and these considerations.

## Financial management orders

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- 2.17 In making a financial management order, the Tribunal appoints someone to manage a person's financial affairs. The Tribunal may make a financial management order only if it is satisfied that:
- the person is not capable of managing his or her own affairs
  - there is a need for another person to manage those affairs on the person's behalf, and
  - it is in the person's best interests that the order be made.<sup>17</sup>

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13. *Guardianship Act 1987* (NSW) s 3(2).

14. *Guardianship Act 1987* (NSW) s 14(2).

15. *IF v IG* [2004] NSWADTAP 3 [26]. See also *EB v Guardianship Tribunal* [2011] NSWSC 767 [113]–[115]; *A v Public Guardian* [2006] NSWADTAP 55 [10].

16. *IF v IG* [2004] NSWADTAP 3 [28].

17. *Guardianship Act 1987* (NSW) s 25G.

- 2.18 The Tribunal's focus is on whether the person can deal with his or her own affairs "in a reasonable, rational and orderly way, with due regard to his or her present and prospective wants and needs, and those of family and friends, without undue risk of neglect, abuse or exploitation".<sup>18</sup>
- 2.19 The Supreme Court has recently observed that whether a person is "capable of managing his or her own affairs ... ultimately requires a judgement-call grounded upon guidance available within the framework of the governing legislation and a close examination of the facts of the particular case".<sup>19</sup>
- 2.20 There may be situations in which a person's inability to manage their affairs is not enough to justify a financial management order. This might include where there is no practical reason to burden the person or his or her estate with the administrative arrangements that come with an order. It might also occur when the Tribunal decides to allow the person "an opportunity to enjoy freedom of decision, freedom of action and the possibility of normal life living in community with an empathetic family".<sup>20</sup>
- 2.21 Unlike with guardianship orders, the Tribunal is not required to find that a person has a disability before it can make a financial management order. The omission of the disability requirement was intended to overcome a practice that required a finding of mental illness or mental infirmity before a manager could be appointed.<sup>21</sup> However, the Tribunal must nevertheless turn its attention to the general principles set out in s 4 when the person in question has a disability (as defined in the Act). This is because s 4 states that the general principles must be taken into account whenever decisions are made under the Act "in respect of persons with disabilities".

## Consent for medical and dental treatment

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- 2.22 The *Guardianship Act* establishes alternative decision-making arrangements that apply when a person is incapable of consenting to medical or dental treatment. When the relevant preconditions are met, a "person responsible" may make those decisions instead of the person having the treatment.<sup>22</sup> The Act sets out a hierarchy of people who may be the "person responsible". This includes a guardian (but only if the order or instrument appointing the guardian specifically allows the guardian to consent to medical or dental treatment), the person's spouse, a close friend or relative, or someone who has the care of the person.<sup>23</sup>
- 2.23 These arrangements have effect if the person:
- (a) is incapable of understanding the general nature and effect of the proposed treatment, or

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18. *P v NSW Trustee and Guardian* [2015] NSWSC 579 [308]. See also *CJ v AKJ* [2015] NSWSC 498 [38].

19. *P v NSW Trustee and Guardian* [2015] NSWSC 579 [312], [314].

20. *P v NSW Trustee and Guardian* [2015] NSWSC 579 [319]; *CJ v AKJ* [2015] NSWSC 498 [51], [54]–[58].

21. *P v NSW Trustee and Guardian* [2015] NSWSC 579 [290].

22. *Guardianship Act 1987* (NSW) pt 5.

23. *Guardianship Act 1987* (NSW) s 33A(4).

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- (b) is incapable of indicating whether or not he or she consents or does not consent to the treatment being carried out.<sup>24</sup>
- 2.24 A patient's objection is to be disregarded if:
- (a) the patient has minimal or no understanding of what the treatment entails, and
  - (b) the treatment will cause the patient no distress or, if it will cause the patient some distress, the distress is likely to be reasonably tolerable and only transitory.<sup>25</sup>
- 2.25 We will consider these arrangements in further detail in Question Paper 5.

### The NSW Capacity Toolkit

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- 2.26 The Capacity Toolkit is another important part of the NSW guardianship framework. The NSW Attorney General's Department developed the Toolkit in 2008. It was designed to guide government and community workers, professionals, families and carers in relation to capacity. The guidance it offers extends to informal scenarios as well as those that arise under the *Guardianship Act*. However, it has no legislative status.
- 2.27 The Toolkit explains what capacity is, sets out assessment principles and provides advice on assessing capacity. Much of the advice and information supplements the existing statutory provisions in NSW and does so in a way that some consider to be consistent with the UN *Convention*.<sup>26</sup>
- 2.28 The Toolkit advises that a person has decision-making capacity if he or she can:
- understand the facts involved
  - understand the main choices
  - weigh up the consequences of the choices
  - understand how the consequences affect them
  - communicate their decision.<sup>27</sup>
- 2.29 The Toolkit explains a number of important points, including for example that capacity:
- is decision-specific, except in some rare cases, for example, where a person is unconscious or has a severe cognitive disability
  - is not the same all the time for a variety of reasons, and
  - can be regained or increased.<sup>28</sup>

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24. *Guardianship Act 1987* (NSW) s 33(2).

25. *Guardianship Act 1987* (NSW) s 46(4).

26. See, eg, Council on the Ageing NSW, *Preliminary submission PGA10*, 4.

27. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 18. Compare *Mental Capacity Act 2005* (UK) s 3(1).

- 2.30 It also sets out the following capacity assessment principles:
1. Always presume a person has capacity
  2. Capacity is decision specific
  3. Don't assume a person lacks capacity based on appearances
  4. Assess the person's decision-making ability – not the decision they make
  5. Respect a person's privacy
  6. Substitute decision-making is a last resort.<sup>29</sup>
- 2.31 In addition, the Toolkit contains advice on assessing capacity.<sup>30</sup> It provides detailed advice about assessing capacity in each area of life, including personal life, health, and money and property. The Toolkit sets out the legal tests for enduring guardianship, advance care directives, medical and dental treatment, powers of attorney, entering a contract and making a will.<sup>31</sup> Finally, it provides advice on how to assist or support someone to make a decision.<sup>32</sup>
- 2.32 One preliminary submission to our review notes that the Toolkit provides a good framework, even though it was written to operate within the current structures.<sup>33</sup> Law reform bodies in other jurisdictions – for example, Victoria and Queensland — have expressed support for the Toolkit and recommended that their States adopt a similar tool.<sup>34</sup>

## The importance of decision-making capacity

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- 2.33 In this Chapter, we have considered the different types of alternative decision-making arrangements under the *Guardianship Act* and the situations in which these arrangements may be made. Although the tests differ depending upon the arrangement in question, some kind of assessment of decision-making capacity is always required before any of these arrangements can take effect. As “capacity” is important to each of these arrangements, we will consider this concept in more detail in Chapter 3.

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28. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 19–23.

29. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 27–49.

30. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 61–70.

31. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 72–144.

32. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 147–163.

33. Council of the Ageing NSW, *Preliminary submission PGA10*, 4.

34. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [7.161]–[7.162], Rec 28; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [7.262]–[7.278] Rec 7–11, 7–12. See also South Australia, Advance Directives Review Committee, *Planning ahead: your health, your money, your life — Proposals for implementation and communication strategies*, Report 2, Stage 2 (2008) 42–43, Rec 21.

## QP 1 Preconditions for alternative decision-making arrangements

### 3. The concept of “capacity”

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#### In brief

The concept of decision-making “capacity” plays an important role in the NSW guardianship system. This Chapter deals with the major question of what decision-making capacity is and the interrelated question of how to assess it.

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- 3.1 The concept of “capacity” is a key element of guardianship law in NSW. As set out in Chapter 2, a person must lack decision-making capacity before an enduring appointment can take effect, and before the Guardianship Division of the NSW Civil and Administrative Tribunal (“the Tribunal”) can appoint guardians or financial managers. The *Guardianship Act 1987* (NSW) (“*Guardianship Act*”) also provides that a person must have capacity to make an enduring guardianship appointment. Conversely, a person who lacks capacity cannot appoint or revoke an enduring guardian.<sup>1</sup>
- 3.2 Guardianship law in every other Australian State and Territory also provides that the relevant court, tribunal or board cannot order an alternative decision-making arrangement unless it is satisfied of a number of matters, including most relevantly for this Chapter, that a person has a specified level or form of incapacity.<sup>2</sup>
- 3.3 Under these laws, a finding that a person lacks decision-making capacity can have serious consequences. That is, the person may lose the ability to make decisions that the law will recognise and give effect to. In other words, a person’s lack of decision-making capacity can lead to a loss of “legal capacity”. However, in recent years there has been an increasing recognition that “legal capacity” is different from decision-making capacity (sometimes referred to as “mental capacity”).

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1. Para [2.4]–[2.21] above.

2. *Guardianship and Management of Property Act 1991* (ACT) s 7(1); *Guardianship and Administration Act 2000* (Qld) s 12(1)(b); *Guardianship of Adults Act* (NT) s 11(1); *Guardianship and Administration Act 1993* (SA) s 29(1), 35(1); *Guardianship and Administration Act 1995* (Tas) s 20(1), s 51(1); *Guardianship and Administration Act 1986* (Vic) s 22(1); *Guardianship and Administration Act 1990* (WA) s 43(1), s 64(1).

## QP 1 Preconditions for alternative decision-making arrangements

- 3.4 Article 12 of the United Nations *Convention on the Rights of Persons with Disabilities*<sup>3</sup> (“UN Convention”) requires governments to recognise that people with disability “enjoy legal capacity on an equal basis with others in all aspects of life”. The Committee on the Rights of Persons with Disabilities has commented that under article 12 of the UN *Convention*, “perceived or actual deficits in mental capacity must not be used as justification for denying legal capacity”.<sup>4</sup>
- 3.5 The Committee’s position may require some fundamental changes to the way that guardianship law operates in NSW. In particular, it may require a move from the current substitute decision-making model to a decision-making model where people are supported in exercising their legal capacity. We will consider proposals for supported decision-making models in Question Paper 2. Adopting a fully supported decision-making model may have significant consequences for the question of decision-making capacity and how it interacts with such a model. However, in our view, these issues are best examined in the context of the alternative models in Question Paper 2.
- 3.6 The purpose of this Chapter is to seek your views on the way decision-making capacity is dealt with in the *Guardianship Act*. We also consider the recent reviews and new laws in other places that have retained, at least in part, comparable models.
- 3.7 This Chapter deals with the major question of what decision-making capacity is and the interrelated question of how to assess it.
- 3.8 The *Guardianship Act* provides few details on these questions. As reviewed in Chapter 2, in NSW the level of incapacity required for a guardianship order or a financial management order is that the person is incapable of managing his or her own person or his or her own affairs.<sup>5</sup> For a guardianship order, the incapacity may be total or partial.<sup>6</sup> However, unlike the laws elsewhere, the *Guardianship Act* does not explain the concept of capacity any further than this.
- 3.9 The *Guardianship Act* also does not explain how to assess a person’s decision-making capacity. Some guidance can, however, be derived from the general principles contained in s 4. In order to help people apply the law, the NSW Capacity Toolkit contains some capacity assessment principles, which we set out in Chapter 2.<sup>7</sup>
- 3.10 The remainder of this Chapter reviews the major issues relating to the concept of capacity and its assessment. We consider:
- what capacity is
  - the link between disability and incapacity
  - acknowledging variations in capacity
  - the diversity of definitions of capacity in NSW

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3. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008).

4. United Nations, Committee on the Rights of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities*, General Comment No 1, CRPD/C/GC/1 (2014) [13].

5. *Guardianship Act 1987* (NSW) s 3(1), s 25G(a).

6. *Guardianship Act 1987* (NSW) s 3(1).

7. Para [2.30] above.

- the statutory presumption of capacity
- what should not lead to a finding of lack of capacity
- the relevance of support and assistance, and
- the use of professional assistance in assessing capacity.

## What is decision-making capacity?

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- 3.11 Outside of NSW, some laws detail what is involved in having, or lacking, decision-making capacity. In England and Wales, for example, under the *Mental Capacity Act 2005* (UK), a person is regarded as being unable to make their own decision if they cannot:
- understand the relevant information (including the consequences of making or failing to make the decision)
  - retain the information
  - use the information or weigh it as part of the decision-making process, or
  - communicate the decision.<sup>8</sup>
- 3.12 The Northern Territory and Ireland have used versions of these four points.<sup>9</sup> The Guardianship and Administration Bill 2014 (Vic) also adopted this approach,<sup>10</sup> however the Bill was not enacted. While in NSW the *Guardianship Act* does not include this information, a similar list appears in the Capacity Toolkit’s advice on assessing capacity.<sup>11</sup> Alberta imposes fewer express requirements, stating only that capacity for a decision means “the ability to understand the information that is relevant to the decision and to appreciate the reasonably foreseeable consequences of ... a decision, and ... a failure to make a decision”.<sup>12</sup>
- 3.13 The laws mentioned above require that all of the elements be present for a person to have capacity or that only one element needs to be absent for a person to lack capacity. In 2010, the NSW Legislative Council Standing Committee on Social Issues (“Standing Committee on Social Issues”) adopted a similar list of criteria to define capacity in its report on substitute decision-making for people lacking capacity. However, this Committee recommended that capacity be defined “with reference to, but without being limited to” those criteria.<sup>13</sup>
- 3.14 Queensland law states that “impaired capacity, for a person for a matter, means the person does not have capacity for the matter” and then defines “capacity” as follows:

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8. *Mental Capacity Act 2005* (UK) s 3.

9. *Guardianship of Adults Act* (NT) s 5(1); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 3(2).

10. Guardianship and Administration Bill 2014 (Vic) cl 4(1). See also Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) Rec 24, 25.

11. NSW, Attorney General’s Department, *Capacity Toolkit* (2009) 18. See para [2.28] above.

12. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 1(d).

13. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) Rec 1.

## QP 1 Preconditions for alternative decision-making arrangements

Capacity, for a person for a matter, means the person is capable of—

- (a) understanding the nature and effect of decisions about the matter; and
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.<sup>14</sup>

3.15 In 2010, the Queensland Law Reform Commission (“QLRC”) recommended retaining this definition.<sup>15</sup> The QLRC observed that “the current definition of capacity achieves an appropriate balance between maximising an adult’s decision-making autonomy and safeguarding the adult from neglect, abuse and exploitation”.<sup>16</sup> In particular, it noted that the second limb in the definition was an important legislative safeguard.<sup>17</sup> The QLRC also recommended adopting a version of the English and Welsh elements (outlined in paragraph 3.11) as part of guidelines on how to apply the first element of its definition rather than making those elements part of the statutory definition of capacity.<sup>18</sup>

3.16 The laws elsewhere have introduced the idea of an ability to make “reasonable judgements” or “reasoned and informed decisions” in respect of the relevant matters.<sup>19</sup> South Australia has specified that the personal matters are the person’s own “health, safety or welfare”.<sup>20</sup> Western Australia combines these concepts in requiring that the relevant tribunal must be satisfied of one of the following criteria, namely that the person is:

- (i) incapable of looking after his own health and safety;
- (ii) unable to make reasonable judgments in respect of matters relating to his person; or
- (iii) in need of oversight, care or control in the interests of his own health and safety or for the protection of others.<sup>21</sup>

### Question 3.1: Elaboration of decision-making capacity

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

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14. *Guardianship and Administration Act 2000* (Qld) sch 4; *Powers of Attorney Act 1998* (Qld) sch 3.

15. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) Rec 7-8, 7-9. See also Rec 8-1–8-7.

16. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [7.132].

17. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [7.210].

18. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) Rec 7-16.

19. *Guardianship and Administration Act 1986* (Vic) s 22(1); *Guardianship and Administration Act 1995* (Tas) s 20(1)(b); *Guardianship of Adults Act* (NT) s 5(1)(b).

20. *Guardianship and Administration Act 1993* (SA) s 29(1)(a).

21. *Guardianship and Administration Act 1990* (WA) s 43(1)(b).

## The link between disability and incapacity

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- 3.17 In NSW, the preconditions that must be satisfied before the Tribunal can appoint a guardian include that that the person is a “person in need of a guardian”.<sup>22</sup> A person is in need of a guardian if he or she is a “person who, because of a disability, is totally or partially incapable of managing his or her person”.<sup>23</sup> This, in effect, requires that there be a causal link between a person’s disability and their incapacity. A similar causal link is not required when the Tribunal decides whether to appoint a financial manager.<sup>24</sup>
- 3.18 Some other Australian States and Territories also directly state that a person’s incapacity must be the result of a specified disability before a guardianship or financial order may be made.<sup>25</sup> However, others do not. For example, Queensland does not require the incapacity to be the result of a disability in any case,<sup>26</sup> and Western Australia does not require it when the Tribunal is considering appointing a guardian.<sup>27</sup> The Northern Territory law expressly states that the cause of the decision-making impairment is “immaterial”.<sup>28</sup>
- 3.19 The following paragraphs consider whether there should be a link between disability and capacity and, if there is to be a link, how disability should be defined.

### Should there be a link between disability and incapacity?

- 3.20 There are different perspectives on whether a link between disability and incapacity should be retained in the *Guardianship Act*. Submissions to the Standing Committee on Social Issues criticised the way that parts of the *Guardianship Act* apply specifically (and irrelevantly) to people with disability. In their view, this violates the prohibition on discrimination and the right to equal recognition before the law found within the *UN Convention*.<sup>29</sup>
- 3.21 The Standing Committee on Social Issues recommended removing “because of a disability” from the definition of “person in need of a guardian” in the *Guardianship Act*. It did so on the basis that “laws applying arbitrarily to persons with disability and requiring a threshold determination of liability are in violation of the [UN *Convention*]”.<sup>30</sup> It also recommended that legislation should ensure that “a person is not considered incapable of making a particular decision simply on the basis of their having a disability”.<sup>31</sup>

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22. *Guardianship Act 1987* (NSW) s 14.

23. *Guardianship Act 1987* (NSW) s 3(1).

24. Para [2.21] above.

25. *Guardianship and Administration Act 1986* (Vic) s 22(1)(b); *Guardianship and Administration Act 1995* (Tas) s 20(1)(b); *Guardianship and Administration Act 1993* (SA) s 3(1) definition of “mental incapacity”; *Guardianship and Management of Property Act 1991* (ACT) s 5; *Mental Capacity Act 2005* (UK) s 2(1). See also *Guardianship and Administration Bill 2014* (Vic) cl 20(1).

26. *Guardianship and Administration Act 2000* (Qld) s 12(1).

27. *Guardianship and Administration Act 1990* (WA) s 43(1).

28. *Guardianship of Adults Act* (NT) s 5(5).

29. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [5.129]–[5.132].

30. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [5.138]–[5.139], Rec 6.

31. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [4.52]–[4.57], Rec 1.

## QP 1 Preconditions for alternative decision-making arrangements

- 3.22 The NSW Government's response acknowledged that "there is not necessarily a nexus between disability and incapacity and that incapacity should not be inferred from disability alone". However, it rejected the Standing Committee's recommendation. The Government was concerned that removing the link to disability might "unintentionally broaden" the scope of application of the Act to:

any person who is incapable of managing their personal life for whatever reason, including, for instance, children, people who have lifestyle issues such as alcoholism, drug use, gambling problems, some personality issues or people who chose to live in a way that may be regarded as eccentric or unconventional.<sup>32</sup>

In the Government's view, this could allow the Tribunal to make orders for people who did not have a disability. The Government also noted the "significant policy issues and major resource implications" arising from the recommendation.<sup>33</sup>

- 3.23 The Victorian Law Reform Commission ("VLRC") decided to retain the disability requirement in Victorian law.<sup>34</sup> The VLRC considered linking incapacity to a disability was necessary to provide an "objective safeguard":

It provides extra assurance that the person's decision-making ability is actually impaired because the person's disability can be assessed using various widely accepted tests.<sup>35</sup>

- 3.24 The VLRC argued that:

without a causal link to disability, there is potential for incapacity assessments to become overly subjective. There is a risk that without any required connection with a disability, incapacity could be determined in some cases by making value judgments about the merits of the decisions a person makes.<sup>36</sup>

- 3.25 One way to address these concerns might be to include within the *Guardianship Act* a list of characteristics or behaviours that should not, by themselves, lead to a finding of lack of capacity. We consider this further below.<sup>37</sup>

- 3.26 Some preliminary submissions to our review prefer to avoid the language of disability altogether, suggesting that a focus on decision-making capacity is more appropriate.<sup>38</sup> A related issue raised in a number of submissions is that a person's disability status should not of itself determine their decision-making capacity.<sup>39</sup>

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32. NSW Government, *Legislative Council Standing Committee on Social Issues Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) Rec 6.

33. NSW Government, *Legislative Council Standing Committee on Social Issues Substitute Decision-Making for People Lacking Capacity: Government Response* (2011) Rec 6.

34. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) Rec 22.

35. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [12.104].

36. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [12.103].

37. Para [3.57]–[3.67] below.

38. NSW Disability Network Forum, *Preliminary submission PGA5*, 6; NSW Council for Intellectual Disability, *Preliminary submission PGA18*, 6; *Confidential preliminary submission PGA33*, 2; Intellectual Disability Rights Service, *Preliminary submission PGA44*, 5; NSW Trustee and Guardian, *Preliminary submission PGA50*, 10; Australian Lawyers Alliance, *Preliminary submission PGA52*, 6; BEING, *Preliminary submission PGA22*, 4; Alzheimer's Australia NSW, *Preliminary submission PGA14*, 5; Institute of Legal Executives, *Preliminary submission PGA35*, 4.

39. NSW Disability Network Forum, *Preliminary submission PGA5*, 6; Council on the Ageing NSW, *submission PGA10*, 3; Alzheimer's Australia NSW, *Preliminary submission PGA14*, 5; BEING,

- 3.27 One submission, for example, suggests that it is “fundamentally important that assessments of decision-making ability are not based on a person’s disability but on a proper inquiry into a person’s ability to make specific decisions”.<sup>40</sup> Another submission observes that the focus should not be on disability but should be on “decision-making capacity’, any support a person needs to maximise that capacity, and any absence of that capacity”.<sup>41</sup> Some submissions emphasise that disability status is not relevant to assessing decision-making capacity (when the assessment takes into account appropriate support).<sup>42</sup> One submission suggests that any consideration of whether a person lacks capacity to make or implement relevant decisions should include a finding that the maximum available support with decision-making is not adequate to address the situation.<sup>43</sup>
- 3.28 Another submission criticises the use of the concept of disability as being open to misuse and abuse, but also does not think that a focus on decision-making capacity is a more appropriate replacement.<sup>44</sup>

### Question 3.2: Disability and decision-making capacity

How, if at all, should a person’s disability be linked to the question of his or her decision-making capacity?

### How should disability be defined?

- 3.29 If a link between disability and incapacity is retained, a further issue is how ‘disability’ should be defined. The *Guardianship Act* currently defines a person who has a disability as 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 the Mental Health Act 2007, or
  - (d) who is otherwise disabled,
- 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.<sup>45</sup>
- 3.30 In other places that require a disability to cause the incapacity, the disability is variously defined as involving a range of broadly described mental and physical disabilities or conditions:

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*Preliminary submission PGA22*, 4; Institute of Legal Executives, *Preliminary submission PGA35*, 4.

40. Disability Council NSW, *Preliminary submission PGA26*, 9.

41. Intellectual Disability Rights Service, *Preliminary submission PGA44*, 5.

42. Council of the Ageing NSW, *Preliminary submission PGA10*, 4, 6; NSW Trustee and Guardian, *Preliminary submission PGA50*, 10.

43. NSW Council for Intellectual Disability, *Preliminary submission PGA18*, 5, 7.

44. B Pace, *Preliminary submission PGA9*, 11.

45. *Guardianship Act 1987* (NSW) s 3(2).

## QP 1 Preconditions for alternative decision-making arrangements

- **Victoria** defines the required disability as “intellectual impairment, mental disorder, brain injury, physical disability or dementia”,<sup>46</sup> to which the VLRC has proposed adding autism spectrum disorder to avoid doubt.<sup>47</sup>
  - In **Tasmania** disability means “any restriction or lack (resulting from any absence, loss or abnormality of mental, psychological, physiological or anatomical structure or function) of ability to perform an activity in a normal manner”.<sup>48</sup>
  - In **South Australia**, the required disability is “any damage to, or any illness, disorder, imperfect or delayed development, impairment or deterioration, of the brain or mind; or ... any physical illness or condition that renders the person unable to communicate his or her intentions or wishes in any manner whatsoever”.<sup>49</sup>
  - In **Western Australia**, for an administration order, the required mental disability includes “an intellectual disability, a psychiatric condition, an acquired brain injury and dementia”.<sup>50</sup>
  - In the **Australian Capital Territory** the required disability is a “physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness”.<sup>51</sup>
  - In **England and Wales**, the required disability is an “impairment of, or a disturbance in the functioning of, the mind or brain”.<sup>52</sup>
- 3.31 The VLRC recommended the continued inclusion of “physical disability” in Victoria’s definition of disability “because a physical disability can bear upon a person’s capacity to execute a decision by impairing their ability to communicate their wishes”.<sup>53</sup> However, physical impairments are increasingly being overcome by assistive technology and the availability of a range of ongoing supports.

### Question 3.3: Defining disability

If a link between disability and incapacity were to be retained, what terminology should be used when describing any disability and how should it be defined?

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46. *Guardianship and Administration Act 1986* (Vic) s 3(1) definition of “disability”.
  47. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [7.130]–[7.131].
  48. *Guardianship and Administration Act 1995* (Tas) s 3(1) definition of “disability”.
  49. *Guardianship and Administration Act 1993* (SA) s 3(1) definition of “mental incapacity”.
  50. *Guardianship and Administration Act 1990* (WA) s 3(1) definition of “mental disability”.
  51. *Guardianship and Management of Property Act 1991*(ACT) s 5.
  52. *Mental Capacity Act 2005* (UK) s 2(1).
  53. *Guardianship and Administration Act 1986* (Vic) s 3(1); Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [7.129].

## Acknowledging variations in capacity

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- 3.32 The NSW arrangements have been criticised as being, among other things, inflexible, limited, and not recognising that a person’s capacity to make decisions can vary over time and may depend upon the type of decision required.<sup>54</sup>
- 3.33 It is now widely recognised that a person’s decision-making capacity can fluctuate and can differ depending on the subject matter. For example, the UN Committee on the Rights of Persons with Disabilities has observed:
- Mental capacity refers to the decision-making skills of a person, which naturally vary from one person to another and may be different for a given person depending on many factors, including environmental and social factors.<sup>55</sup>
- 3.34 O’Neill and Peisah have also observed that:
- capacity cannot be extrapolated from one capacity task to another. For example, a person’s capacity to write a will cannot be inferred from their capacity to consent to medical treatment. The concept of global capacity, whereby a person is deemed capable or incapable of making all decisions, has been rejected. Consequently, it is inappropriate to state that a person “lacks capacity”, without further reference to the type of capacity. ... Freedom is maximized when a person is allowed to make the decisions they are capable of making.<sup>56</sup>
- 3.35 A number of preliminary submissions also emphasise that capacity is a fluid concept and that levels of capacity can fluctuate.<sup>57</sup> One submission, for example, criticises the “bright line” approach to capacity that does not reflect “the lived experience of people experiencing cognitive decline associated with dementia”.<sup>58</sup> Another rejects the approach that suggests that people either have decision-making capacity or they do not.<sup>59</sup> Another submission gives the following examples of the range of states of capacity:
- [A] young person may have capacity that is limited by a developmental stage; or, in the case of an adult, is episodically limited by mental illness. Alternatively, a person may have reduced capacity due to a condition that is likely to be permanent or deteriorate.<sup>60</sup>
- 3.36 Some submissions also note that capacity can differ in the context of specific decisions, depending on such factors as their nature and complexity.<sup>61</sup>

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54. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [4.15]–[4.17].

55. United Nations, Committee on the Rights of Persons with Disabilities, *Convention on the Rights of Persons with Disabilities*, General Comment No 1, CRPD/C/GC/1 (2014) [13].

56. N O’Neill and C Peisah, *Capacity and the Law* (Sydney University Press, 2011) [1.2].

57. Senior Rights Service, *Preliminary submission PGA7*, 9; B Pace, *Preliminary submission PGA9*, 11; Council of the Ageing NSW, *Preliminary submission PGA10*, 4; BEING, *Preliminary submission PGA22*, 5; Disability Council NSW, *Preliminary submission PGA26*, 9; B Ripperger and L Joseph, *Preliminary submission PGA31*, 7–8.

58. L Barry, *Preliminary submission PGA2*, 2.

59. B Pace, *Preliminary submission PGA9*, 5.

60. NSW, Family and Community Services, *Preliminary submission PGA54*, 3.

61. Senior Rights Service, *Preliminary submission PGA7*, 22; B Ripperger and L Joseph, *Preliminary submission PGA31*, 8.

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- 3.37 One submission notes that decision-making capacity lies on a “spectrum” varying from domain to domain and from time to time. At any point in time, capacity may be impaired for a set of circumstances but not others.<sup>62</sup> Another submission, therefore, prefers using “diminished capacity” instead of “no capacity” to recognise people can make decisions in some circumstances.<sup>63</sup>
- 3.38 Recent reviews of guardianship laws have all acknowledged that a person’s decision-making capacity can vary depending on the circumstances.
- 3.39 One approach to this would be to ensure that any definition of decision-making capacity accommodates the reality. For example, the Standing Committee on Social Issues recommended that its proposed definition of capacity “acknowledge the fact that a person’s decision-making capacity varies from domain to domain and from time to time”.<sup>64</sup>
- 3.40 The VLRC has also noted the “need to accommodate different levels of cognitive ability and decision-making needs” and considered that that the “law must be flexible enough to respond to individual circumstances and experiences of impaired decision-making ability” and that there must be an “individualised approach to assessment”.<sup>65</sup> The VLRC recommended that Victoria should adopt the following assessment principles to recognise that a person’s capacity can vary over time and subject matter:
- (a) A person’s capacity is specific to the decision to be made.
  - (b) Impaired decision-making capacity may be temporary or permanent and can fluctuate over time. ...
  - (f) When assessing a person’s capacity, every attempt should be made to ensure that the assessment occurs at a time and in an environment in which their capacity can most accurately be assessed.<sup>66</sup>
- 3.41 Other reviews have also proposed assessment guidelines or principles to recognise that a person’s decision-making capacity can vary. For example, the Australian Law Reform Commission (“ALRC”) recommended that the following principles must be considered when assessing the decision-making support that a person may need:
- (e) A person’s decision-making ability will depend on the kind of decisions to be made.
  - (f) A person’s decision-making ability may evolve or fluctuate over time.<sup>67</sup>
- 3.42 The QLRC also acknowledged that any consideration of capacity should take into account that impaired capacity may be partial, temporary or fluctuating.<sup>68</sup>

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62. NSW Trustee and Guardian, *Preliminary submission PGA50*, 4.

63. B Ripperger and L Joseph, *Preliminary submission PGA31*, 11.

64. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) Rec 1.

65. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [7.4], [7.6].

66. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) Rec 27.

67. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) Rec 3-2(2).

68. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [7.60].

Accommodating fluctuating capacity could, for example, simply involve delaying a decision until the person regained capacity for the decision at hand.<sup>69</sup>

3.43 The law in Ireland provides for the following general approach to assessing capacity:

a person’s capacity shall be assessed on the basis of his or her ability to understand, at the time that a decision is to be made, the nature and consequences of the decision to be made by him or her in the context of the available choices at that time.<sup>70</sup>

3.44 In addition, the law in Ireland states that a person may have the capacity to make a decision about a particular matter at a particular time even if:

- the person can retain the relevant information for a short period only
- the person lacks capacity in respect of a decision on the matter at another time, or
- the person lacks capacity in respect of a decision on another matter.<sup>71</sup>

3.45 Irish law also provides that, before intervening in the affairs of a person who lacks capacity, a relevant person (including the court) must have regard to:

- (a) the likelihood of the recovery of the relevant person’s capacity in respect of the matter concerned, and
- (b) the urgency of making the intervention prior to such recovery.<sup>72</sup>

#### Question 3.4: Acknowledging variations in capacity

- (1) Should the law acknowledge that decision-making capacity can vary over time and depend on the subject matter of the decision?
- (2) How should such acknowledgements be made?
- (3) If the definition of decision-making capacity were to include such an acknowledgement, how should it be expressed?
- (4) If capacity assessment principles were to include such an acknowledgment, how should it be expressed?

### Diversity of definitions within NSW law

3.46 As set out in Chapter 2, the way the *Guardianship Act* describes decision-making capacity differs for each decision-making arrangement. One significant distinction is that in the case of guardianship orders, the Tribunal must be satisfied that a person has a disability that results in incapacity before finding that they lack capacity to

69. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [15.99] [15.106].

70. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 3(1).

71. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 3(4)–(6).

72. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 8(9).

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make a decision. This is not required, for example, for financial management orders.

- 3.47 A number of preliminary submissions raise issues with the consistency of the various definitions of decision-making capacity in NSW.<sup>73</sup> The many different definitions of capacity, both legislative and common law, in the various contexts of financial management, guardianship, powers of attorney, and medical treatment, present a puzzle of inconsistent terminology. These may be confusing to people who encounter these different contexts either at the same time or individually.
- 3.48 The VLRC has recommended that a set of consistent definitions for both capacity and incapacity should apply in the different circumstances covered by the law in Victoria:

A capacity standard would be used when determining whether a person has the cognitive ability to appoint an enduring personal guardian or financial administrator. An incapacity standard would be used when determining whether a person is unable to make decisions for themselves and a personal appointment becomes operative, a tribunal appointment might be necessary, or a health decision maker assumes responsibility for making medical treatment decisions.<sup>74</sup>

- 3.49 In England and Wales, the *Mental Capacity Act 2005* (UK) has one definition of a person who lacks capacity that applies to lasting powers of attorney, the appointment of deputies, and advance decisions to refuse treatment.<sup>75</sup>
- 3.50 It seems likely that the different definitions of capacity that currently apply in NSW and in other jurisdictions are the result of separate development of the various areas in which capacity or lack of capacity must be determined. They may not be the result of deliberate analysis of the need for different definitions. However, it may be the case that some of the differences are tailored to particular environments. Some care would therefore need to be taken if NSW were to consider formulating a provision that covers all circumstances.

### **Question 3.5: Should the definitions of decision-making capacity be consistent?**

- (1) Should the definitions of decision-making capacity within NSW law be aligned for the different alternative decision-making arrangements?
- (2) If the definitions of decision-making capacity were to be aligned, how could this be achieved?

## Statutory presumption of capacity

- 3.51 A starting point for the assessment of decision-making capacity is the presumption of capacity. Some laws elsewhere expressly provide that a person is presumed to have decision-making capacity unless proved otherwise.<sup>76</sup>

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73. Senior Rights Service, *Preliminary submission PGA7*, 19; B Ripperger and L Joseph, *Preliminary submission PGA31*, 4, 8; Institute of Legal Executives, *Preliminary submission, PGA35*, 2; Australian Centre for Health Law Research, *Preliminary submission PGA47*, 3; NSW Trustee and Guardian, *Preliminary submission PGA50*, 6.

74. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [7.136].

75. *Mental Capacity Act 2005* (UK) s 2.

- 3.52 There is no statutory presumption in NSW. The presumption, however, exists at common law.<sup>77</sup> In addition, one of the capacity assessment principles in the NSW Capacity Toolkit is “always presume a person has capacity”.<sup>78</sup>
- 3.53 The Standing Committee on Social Issues recommended that this presumption should be added to the *Guardianship Act*. The Committee considered that, together with its proposed new definition of capacity, a statutory presumption would:
- “facilitate domain-specific decision-making arrangements”, and
  - be “consistent with the social model of disability which seeks to remove barriers to persons with disabilities participating in society and living independently in the community”.<sup>79</sup>
- 3.54 The VLRC also proposed a legislative restatement of the common law on the presumption of capacity in Victoria.<sup>80</sup> Several preliminary submissions to our review also support an express statement of the presumption of capacity unless proved otherwise.<sup>81</sup>
- 3.55 On the other hand, in framing its proposed National Decision-Making Principles, the ALRC preferred to emphasise the equal right of people to make decisions rather than to refer to a presumption of capacity. The ALRC considered that the presumption involved an unhelpful binary distinction between those who have legal capacity and those who do not.<sup>82</sup>
- 3.56 The QLRC recommended that the presumption of capacity should inform the development and application of guidelines for making capacity assessments.<sup>83</sup>

### Question 3.6: Statutory presumption of capacity

Should there be a statutory presumption of capacity?

## What should not lead to a finding of lack of capacity

- 3.57 The *Guardianship Act* is silent on the issue of what should not lead to a finding of lack of capacity. However, the Capacity Toolkit includes among its capacity assessment principles the following:

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76. *Guardianship and Administration Act 1990* (WA) s 4(3); *Guardianship and Administration Act 2000* (Qld) sch 1 cl 1; *Mental Capacity Act 2005* (UK) s 1(2); *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 2(a); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 8(2).
77. *Borthwick v Carruthers* (1787) 1 Term Reports 648; 99 ER 1300; *Re Cumming* (1852) 1 De GM&G 537, 557; 42 ER 660, 668; *Erdogan v Ekici* [2012] VSC 256 [49].
78. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 27-31.
79. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [5.32], Rec 2.
80. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) Rec 26. See also *Guardianship and Administration Bill 2014* (Vic) cl 4(2).
81. Council of the Ageing NSW, *Preliminary submission PGA10*, 4; NSW Young Lawyers, *Preliminary submission PGA32*, 5.
82. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [3.14].
83. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) Rec 7-14(a).

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3. Don't assume a person lacks capacity based on appearances
  4. Assess the person's decision-making ability – not the decision they make.<sup>84</sup>
- 3.58 The law in some other places specifies that certain behaviours, conditions and outcomes will not, by themselves, lead to a conclusion that a person lacks capacity. These can be grouped broadly as follows:
- the person's appearance, behaviour and beliefs
  - the fact that people may think the person's decisions are unwise, and
  - the person's methods of communication.

### Appearance, behaviour and beliefs

- 3.59 Both the Northern Territory and the Australian Capital Territory specify behaviours, appearances and beliefs that will not, by themselves, lead to a conclusion that a person lacks capacity. The Australian Capital Territory law states that a person must not be taken to lack capacity "only because" the person:
- (a) is eccentric; or
  - (b) does or does not express a particular political or religious opinion; or
  - (c) is of a particular sexual orientation or expresses a particular sexual preference; or
  - (d) engages or has engaged in illegal or immoral conduct; or
  - (e) takes or has taken drugs, including alcohol (but any effects of a drug may be taken into account).<sup>85</sup>
- 3.60 The Northern Territory law states that a person's decision-making capacity is not considered to be impaired only because he or she:
- (a) has a disability, illness or other medical condition (whether physical or mental); or
  - (b) engages in unconventional behaviour or other forms of personal expression; or
  - (c) chooses a living environment or lifestyle with which other people do not agree; or
  - (d) makes decisions with which other people do not agree; or
  - (e) does not speak English to a particular standard or at all; or
  - (f) does not have a particular level of literacy or education; or
  - (g) engages in particular cultural or religious practices; or

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84. NSW, Attorney General's Department, *Capacity Toolkit* (2009) 27, 33–37.

85. *Guardianship and Management of Property Act 1991*(ACT) s 6A.

- (h) does or does not express a particular religious, political or moral opinion; or
- (i) is of a particular sexual orientation or gender identity or expresses particular sexual preferences; or
- (j) takes or has taken, or is or has been dependent on, alcohol or drugs (but the effect of alcohol or drugs may be taken into account); or
- (k) engages or has engaged in illegal or immoral conduct.<sup>86</sup>

3.61 Likewise, in England and Wales, the law provides that a lack of capacity cannot be established merely by reference to:

- (a) a person's age or appearance, or
- (b) a condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about his capacity.<sup>87</sup>

3.62 The VLRC has proposed a capacity assessment principle that “an adult’s incapacity to make a decision should not be assumed based on their age, appearance, condition, or an aspect of their behaviour”.<sup>88</sup>

### Unwise decisions

3.63 A number of jurisdictions provide that an order is not to be made, or a person is not to be treated as unable to make a decision, solely on the basis that the person makes unwise or imprudent decisions.<sup>89</sup> Both the VLRC and the Standing Committee on Social Issues have made recommendations to similar effect.<sup>90</sup>

### Methods of communication

3.64 In Alberta, in the case of a financial matter, the court cannot make a trusteeship order solely on the basis of evidence that the person has “difficulty communicating about the financial matter”.<sup>91</sup>

3.65 Ireland also provides that:

[a] person is not to be regarded as unable to understand the information relevant to a decision if he or she is able to understand an explanation of it given to him or her in a way that is appropriate to his or her circumstances (whether using clear language, visual aids or any other means).<sup>92</sup>

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86. *Guardianship of Adults Act* (NT) s 5(6).

87. *Mental Capacity Act 2005* (UK) s 2(3).

88. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) Rec 27(c).

89. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 46(6)(a); *Mental Capacity Act 2005* (UK) s 1(4); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 8(4).

90. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [5.52], Rec 3; Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) Rec 27(d). See also *Guardianship and Administration Bill 2014* (Vic) cl 4(4)(d).

91. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 46(6)(b).

92. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 3(3).

## QP 1 Preconditions for alternative decision-making arrangements

- 3.66 The VLRC has proposed a capacity assessment principle that “a person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support”.<sup>93</sup>
- 3.67 These principles raise a broader issue about the relevance of support and assistance to a person’s decision-making capacity, which we discuss in the following paragraphs.

### **Question 3.7: What should not lead to a finding that a person lacks capacity**

- (1) Should capacity assessment principles state what should not lead to a conclusion that a person lacks capacity?
- (2) If capacity assessment principles were to include such statements, how should they be expressed?

## The relevance of support and assistance

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- 3.68 An issue highly relevant to the assessment of capacity is how the Tribunal and others should take into account the support and assistance that a person could access to help them make a decision.
- 3.69 Physical impairments are increasingly being overcome by assistive technology and the availability of a range of ongoing supports. One submission to the ALRC’s 2014 review of equality, capacity and disability in Commonwealth laws stated that it was “imperative for the justice system to draw on disability expertise in decision support and adjustments” such as “assistive technology and techniques that address communication barriers”.<sup>94</sup>
- 3.70 Different places have approached the issue in different ways. For example, the NSW Capacity Toolkit currently provides some advice on assisting or supporting someone to make a decision. This includes communicating in a way that the person is best able to understand, in the person’s preferred communication mode and format including, where necessary, the use of a particular Alternative and Augmentative Communication system.<sup>95</sup> Also in NSW, the Tribunal could use its general power to inform itself<sup>96</sup> to call expert advice on assistive technology and the availability of a range of ongoing supports that may help a person to make their own decisions.
- 3.71 Alberta has a general principle that recognises the importance of support and assistance:

an adult is entitled to communicate by any means that enables the adult to be understood, and the means by which an adult communicates is not relevant to a determination of whether the adult has the capacity to make a decision.<sup>97</sup>

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93. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) Rec 27(e).

94. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) [7.12].

95. NSW, Attorney General’s Department, *Capacity Toolkit* (2009) 147–163.

96. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2).

97. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 2(b).

- 3.72 Similarly, the QLRC has recommended a set of principles to inform the development and application of guidelines for making capacity assessments. This includes recognising an “adult’s right to be given any necessary support and access to information to enable the adult to make or participate in decisions affecting the adult’s life”.<sup>98</sup>
- 3.73 One of the ALRC’s recommended assessment principles is that “a person’s decision-making ability must be considered in the context of available supports”.<sup>99</sup> In addition, one of the VLRC’s proposed capacity assessment principles states that someone “should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support”.<sup>100</sup> Some laws provide that a person is not to be considered as unable to make a decision unless “all practicable steps” have been taken to help him or her to make that decision, but without success.<sup>101</sup>
- 3.74 In Ireland, the *Assisted Decision-Making (Capacity) Act 2015* (Ireland) makes clear that alternative approaches should be adopted wherever possible by providing that a person will lack decision-making capacity if he or she cannot communicate his or her decision “whether by talking, writing, using sign language, assistive technology, or any other means”.<sup>102</sup>

### Question 3.8: The relevance of support and assistance to assessing capacity

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

## Professional assistance in assessing capacity

- 3.75 A person’s capacity to make a decision may need to be assessed by a variety of people in a wide variety of contexts. For example, medical professionals, lawyers, community workers, carers and family members. The NSW Capacity Toolkit suggests that there may be cases where such a person may want to get a second opinion from a professional such as a general practitioner, a psychiatrist, a psychologist, a geriatrician or a neuro-psychologist. However, the Toolkit emphasises that the person who needs to know whether a person has capacity to make a decision must ultimately determine whether they can make the required decision or not.<sup>103</sup>

98. Queensland Law Reform Commission, *A Review of Queensland’s Guardianship Laws*, Report 67 (2010) Rec 7-14(d).

99. Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Report 124 (2014) Rec 3-2(2)(c).

100. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) Rec 27.

101. *Mental Capacity Act 2005* (UK) s 1(3); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 8(3).

102. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 3(2)(d).

103. NSW, Attorney General’s Department, *Capacity Toolkit* (2009) 54–57.

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- 3.76 Currently, in NSW, the Tribunal has a general power to inform itself on any matter in such manner as it thinks fit, subject to the rules of natural justice.<sup>104</sup> This would include seeking evidence from professionals who could provide advice about a person's capacity to make the required decisions.
- 3.77 The VLRC has recommended that the Victorian Government should consider introducing a training and certification system for capacity assessment based on the designated capacity assessor systems developed in Ontario and Alberta.<sup>105</sup> In the VLRC's view, the "quality of capacity assessments would clearly be improved by relying on trained and certified capacity assessors". The VLRC, however, also noted the considerable expense associated with such a scheme.<sup>106</sup>
- 3.78 Some other places currently have ways of bringing in professional assistance that may help in assessing a person's capacity. These approaches are mostly in the context of court and tribunal hearings.<sup>107</sup> These will be considered in Question Paper 4 where we will consider Tribunal proceedings.

### Question 3.9: Professional assistance in assessing capacity

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

### Question 3.10: Any other issues?

Are there any other issues you want to raise about decision-making capacity?

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104. *Civil and Administrative Tribunal Act 2013* (NSW) s 38(2). See also *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s 98(1)(c).

105. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) Rec 29.

106. Victorian Law Reform Commission, *Guardianship*, Final Report 24 (2012) [7.164].

107. For example, *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 1(g), 13(5)(a), s 26(7)(a), s 46(7)(a); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 50.

## 4. Other preconditions that must be satisfied

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### In brief

This Chapter considers other requirements that must be satisfied before alternative decision-making arrangements can take effect. Two common preconditions are that there must be a “need” for an order and that the order is in the person’s “best interests”. The Chapter also considers whether the same preconditions should apply across all types of alternative decision-making orders.

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The order must be in the person’s “best interests” .....	32
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4.1 In Chapter 3, we considered the main precondition that must be satisfied before alternative decision-making arrangements can take effect under the *Guardianship Act 1987* (NSW) (“*Guardianship Act*”). That is, the person must lack the capacity to make a relevant decision. In this Chapter, we consider the other circumstances that must exist before the Guardianship Division of the NSW Civil and Administrative Tribunal (“the Tribunal”) may make the relevant orders. In particular, we consider the following preconditions:

- the person must be “in need” of an order, and
- the order must be in the person’s “best interests”.

Although we focus on these two requirements, we leave open the possibility that others may also be desirable.

4.2 These preconditions do not apply to all types of alternative decision-making orders. Accordingly, this Chapter also asks whether the same preconditions should apply across all types of orders.

### The person must be “in need” of an order

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4.3 In NSW, the Tribunal must be satisfied that the person “is in need of a guardian” before it can make a guardianship order.<sup>1</sup> Before it can make a financial management order, the Tribunal must be satisfied that “there is a need for another person to manage those affairs on the person’s behalf”.<sup>2</sup>

4.4 Legislation in Queensland, the Northern Territory and the Australian Capital Territory similarly requires that the person must be in need of the relevant order.<sup>3</sup> In addition, Queensland and the Australian Capital Territory specify the nature of the

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1. *Guardianship Act 1987* (NSW) s 14(1).  
2. *Guardianship Act 1987* (NSW) s 25G(b).  
3. *Guardianship of Adults Act* (NT) s 11(1)(c); *Guardianship and Management of Property Act 1991* (ACT) s 7(1)(b), s 8(1)(b); *Guardianship and Administration Act 2000* (Qld) s 12(1).

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need. Before a tribunal can make a guardianship or financial management order in Queensland or the Australian Capital Territory, it must be satisfied that:

- there is, or is likely to be, a need for a relevant decision, or
- the person is likely to do something that involves or is likely to involve unreasonable risk to the person's health, welfare or property.

A tribunal must also be satisfied that, if nothing is done:

- the person's needs will not be met, and
- the person's interests will not be adequately protected (in Queensland) or will be significantly adversely affected (in the Australian Capital Territory).<sup>4</sup>

4.5 In 2010, the Queensland Law Reform Commission concluded that the grounds contained within the Queensland test are appropriate and should not be changed.<sup>5</sup>

4.6 However, a number of other Australian States and Territories do not expressly require satisfaction of a precondition that there is a need for an order. Instead, they require consideration of whether the person's needs could be met by other means that are less restrictive of the person's freedom of decision and action, or their rights and personal autonomy.<sup>6</sup>

### Question 4.1: The need for an order

- (1) Should there be a precondition before an order is made that the Tribunal be satisfied that the person is "in need" of an order?
- (2) If such a precondition were required, how should it be expressed?

## The order must be in the person's "best interests"

4.7 Another common requirement is that the alternative decision-making order must be in the "best interests" of the person concerned. In NSW, the Tribunal must be satisfied that a financial management order is the person's "best interests".<sup>7</sup> Before revoking an enduring guardianship order, the Tribunal must also consider whether it would be in the "best interests" of the person who made the original appointment to do so.<sup>8</sup>

4.8 The *Guardianship Act* does not expressly require the Tribunal to be satisfied that a guardianship order is in a person's "best interests". However, the Act's general principles state that anyone making a decision about a person with disabilities must

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4. *Guardianship and Management of Property Act 1991* (ACT) s 7(1)(b) and (c), s 8(1)(b) and (c); *Guardianship and Administration Act 2000* (Qld) s 12(1)(b) and (c).

5. Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) [14.58], Rec 14-1.

6. *Guardianship and Administration Act 1986* (Vic) s 4(2)(a), s 22(2)(a), s 46(2)(a); *Guardianship and Administration Act 1995* (Tas) s 6(a), s 20(2); *Guardianship and Administration Act 1990* (WA) s 4(4); *Guardianship and Administration Act 1993* (SA) s 5(d). See also *Mental Capacity Act 2005* (UK) s 1(6); *Guardianship and Administration Bill 2014* (Vic) cl 7(a)(i).

7. *Guardianship Act 1987* (NSW) s 25G(c).

8. *Guardianship Act 1987* (NSW) s 6K(2)(b).

give “paramount consideration” to that person’s “welfare and interests”.<sup>9</sup> This principle would extend to the Tribunal making a decision about a guardianship order. The use of a person’s “best interests” as a consideration to be taken into account when deciding whether to make a relevant order is dealt with in Chapter 5.

- 4.9 The “best interests” precondition also appears in the laws of other Australian States. Tasmania and Victoria each require the relevant tribunal or board to be satisfied that an order would be in the person’s best interests.<sup>10</sup> In contrast, it is not necessary in Western Australia and the Northern Territory for the relevant tribunal to be satisfied that an order is in the person’s best interests. Nevertheless, the laws of both Western Australia and the Northern Territory require the relevant tribunal to take the person’s best interests into account when making an order.<sup>11</sup> Other countries also use the “best interests” standard as a precondition. In Alberta, for example, the court must be satisfied that it is in the person’s best interests to appoint a guardian or trustee (among other things).<sup>12</sup>
- 4.10 The “best interests” standard also applies to alternative decision-making arrangements in another way. In many places, guardians and financial managers are required to act in a person’s “best interests” when making decisions for them.<sup>13</sup> We will consider this obligation in more detail in Question Paper 3.
- 4.11 Although the “best interests” standard is used in legislation around the world in various contexts, some people see it as a relic of an outdated approach to disability. The standard is now often criticised for being “too paternalistic and for taking away the fundamental human rights of a person to self-determination”.<sup>14</sup>
- 4.12 A number of preliminary submissions to this review note that article 12 of the UN *Convention on the Rights of Persons with Disabilities*<sup>15</sup> shifts the focus from decisions being made in the “best interests” of a person (as decided by a substitute decision-maker) to decisions being made in accordance with the person’s own “will and preference”.<sup>16</sup> The philosophy behind this approach is that everyone has a right to legal capacity, regardless of their level of decision-making ability. As a result, people with disabilities should be empowered to exercise their legal capacity by expressing their will and preference.
- 4.13 On one view, the “will and preferences” principle can come up against a practical difficulty where, for example, a person has a cognitive impairment so severe that the person is hard to understand (although with the advances of medical science, it is widely accepted that the number of people in this category is growing smaller).

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9. *Guardianship Act 1987* (NSW) s 4(a).

10. *Guardianship and Administration Act 1995* (Tas) s 20(3); *Guardianship and Administration Act 1986* (Vic) s 22(3).

11. *Guardianship and Administration Act 1990* (WA) s 4(2); *Guardianship of Adults Act* (NT) s 4(2).

12. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 26(6)(c), s 46(5)(c).

13. See, eg, *Mental Capacity Act 2005* (UK) s 4, s 9(4)a, s 20(6); *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 18(1)(a), s 35(1)(a); *Guardianship and Administration Act 1986* (Vic) s 4(2)(b), s 28(1); *Guardianship of Adults Act* (NT) s 4(2), (3).

14. M Schyvens, Presentation (2nd International Conference on Capacity, International Congress of Psycho-geriatricians, Berlin, 13 October 2015) 2.

15. *Convention on the Rights of Persons with Disabilities*, 2515 UNTS 3 (entered into force 3 May 2008).

16. NSW Disability Network Forum, *Preliminary submission PGA5*, 1; Senior Rights Service, *Preliminary submission PGA7*, 7; NSW Ombudsman, *Preliminary submission PGA41*, 4–5.

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Another view is that everyone is capable of expressing will and preferences in some way, even where that expression is not easy to understand.<sup>17</sup>

- 4.14 There is some evidence of hesitancy in embracing a new approach based on the will and preferences principle. For example, the Guardianship and Administration Bill 2014 (Vic) proposed removing the reference to “best interests” that is found in the current Victorian legislation.<sup>18</sup> However, the Bill still proposed that the Victorian Civil and Administrative Tribunal should only be able to make a guardianship or administration order if satisfied that the order would “promote the ... person’s personal and social wellbeing”.<sup>19</sup>

### Question 4.2: A best interests precondition

- (1) Should there be a precondition before an order is made that the Tribunal be satisfied that the order is in the person’s “best interests”?
- (2) If such a precondition were required, how should it be expressed?
- (3) What other precondition could be adopted in place of the “best interests” standard?

## Aligning the preconditions

- 4.15 As explained in Chapter 2, the *Guardianship Act* sets out the requirements that must be satisfied before the Tribunal can make a particular order. These requirements differ for guardianship and financial management orders. Similarly, the operation of enduring appointments in NSW depends on whether the appointment relates to guardianship or a power of attorney. A further issue is whether the various preconditions should be aligned.
- 4.16 On one hand, it is arguable that these requirements should be tailored to suit the particular types of orders and arrangements. After all, the nature of these orders and arrangements do differ in some respects. On the other hand, the similarities between certain types of orders and arrangements may provide a case for aligning their preconditions more closely.
- 4.17 At a functional level, particular decisions may involve both guardians and financial managers. For example, a decision about where a person lives may also require a decision to be made about the financial arrangements necessary to implement that decision. Indeed, many decisions about living arrangements will have financial implications.
- 4.18 Unlike NSW, laws in other States and Territories generally do not apply different preconditions to guardianship and financial management orders.<sup>20</sup>

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17. G Quinn, ‘Personhood and Legal Capacity: Perspectives on the Paradigm Shift of Article 12 CRPD’ (Paper presented at Conference on Disability and Legal Capacity under the CRPD, Harvard Law School, Boston, 20 February 2010) 19.

18. *Guardianship and Administration Act 1986* (Vic) s 4(2)(b), s 22(3), s 46(3). The Guardianship and Administration Bill 2014 (Vic) has lapsed.

19. Guardianship and Administration Bill 2014 (Vic) cl 28(4)(c).

20. *Guardianship and Administration Act 2000* (Qld) s 5, s 12; *Guardianship and Administration Act 1993* (SA) s 5, s 29(1), s 35(1), s 5; *Guardianship and Administration Act 1995* (Tas) s 6, s 20,

- 4.19 In 2010, the NSW Legislative Council Standing Committee on Social Issues considered that the requirements for making a guardianship order should be modelled on the requirements for making a financial management order. That is, it recommended that the Tribunal should only be able to make a guardianship order if it was satisfied that:
- the person is not capable of managing his or her person
  - there is a need for a guardian to be appointed, and
  - the guardianship order is in the person’s best interests.<sup>21</sup>
- 4.20 A related issue for further consideration is whether the Tribunal should be able to make a single order that covers personal matters as well as financial matters. In NSW, separate orders must be made even if the same person is appointed as both a guardian and a financial manager. In contrast, the legislation in England and Wales allows a court to appoint deputies to make specified decisions for a person’s personal welfare and/or their property and affairs.<sup>22</sup> Likewise, in Ireland, a court may appoint a decision-making representative to make one or more decisions on behalf of a person for his or her personal welfare or property and affairs, or both.<sup>23</sup> Aligning the preconditions for guardianship and financial orders in NSW law could potentially make it easier for similar “single orders” to be made. We will deal with the question of “single orders” in a later question paper.

**Question 4.3: Should the preconditions be more closely aligned?**

- (1) Should the preconditions for different alternative decision-making orders or appointments in NSW be more closely aligned?
- (2) If so, in relation to what orders or appointments and in what way?

**Question 4.4: Any other issues?**

Are there any other issues you want to raise about the preconditions for alternative decision-making arrangements?

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s 51; *Guardianship and Management of Property Act 1991* (ACT) s 4, s 7(1), s 8(1); *Guardianship of Adults Act* (NT) s 11.

21. NSW, Legislative Council Standing Committee on Social Issues, *Substitute Decision-Making for People Lacking Capacity*, Report 43 (2010) [6.58]–[6.59], Rec 8.

22. *Mental Capacity Act 2005* (UK) s 15.

23. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 38(2)(b).

## QP 1 Preconditions for alternative decision-making arrangements

## 5. Other factors that should be taken into account

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### In brief

The Tribunal must also consider some other principles before it makes a guardianship or financial management order. This Chapter considers the principles that apply in NSW. It also reviews a selection of principles used elsewhere.

<b>Current NSW Law</b> .....	<b>37</b>
<b>General principles</b> .....	<b>37</b>
<b>Guardianship considerations</b> .....	<b>38</b>
<b>The law elsewhere</b> .....	<b>38</b>

- 5.1 As discussed in Chapters 3 and 4, in NSW the Tribunal must be satisfied of certain preconditions before it can appoint a guardian and/or a financial manager. Before it does so, it must have regard to the general principles set out in s 4 of the *Guardianship Act*.<sup>1</sup> In the case of a guardianship order, the Tribunal must also have regard to another list of considerations.<sup>2</sup>
- 5.2 Most of these principles are also contained in one form or other in the laws of at least one other place we have looked at. In this Chapter, we set out the current provisions in NSW and a selection of the principles used elsewhere. We aim to promote discussion on the suitability of the existing principles in NSW and whether any changes or additions should be made.

### Current NSW law

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#### General principles

- 5.3 The general principles are set out in s 4 of the *Guardianship Act*, as follows:
- (a) the welfare and interests of such persons should be given paramount consideration,
  - (b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
  - (c) such persons should be encouraged, as far as possible, to live a normal life in the community,
  - (d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
  - (e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,

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1. *Guardianship Act 1987* (NSW) s 4, set out at para [2.3] above.

2. *Guardianship Act 1987* (NSW) s 4, set out at para [2.14] above.

## QP 1 Preconditions for alternative decision-making arrangements

- (f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- (g) such persons should be protected from neglect, abuse and exploitation,
- (h) the community should be encouraged to apply and promote these principles.<sup>3</sup>

### Guardianship considerations

5.4 In the case of guardianship, in addition to the considerations set out in the general principles in s 4, the Tribunal must also have regard to the following list of matters:

- (a) the views (if any) of:
  - (i) the person, and
  - (ii) the person's spouse, if any, if the relationship between the person and the spouse is close and continuing, and
  - (iii) the person, if any, who has care of the person,
- (b) the importance of preserving the person's existing family relationships,
- (c) the importance of preserving the person's particular cultural and linguistic environments, and
- (d) the practicability of services being provided to the person without the need for the making of such an order.<sup>4</sup>

### The law elsewhere

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5.5 The laws in other places also set out various considerations that must be taken into account when deciding whether to make the relevant order.<sup>5</sup> As is the case in NSW, these considerations may be principles of general application or specifically relevant to the particular orders. Considerations used elsewhere that do not feature in NSW law include:

- the person's present and/or past views, wishes, and/or beliefs and values (where they are available and ascertainable)<sup>6</sup> - compare this with the NSW law

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3. *Guardianship Act 1987* (NSW) s 4.

4. *Guardianship Act 1987* (NSW) s 14(2).

5. *Guardianship and Administration Act 1986* (Vic) s 4(2), s 22(2); *Guardianship and Administration Act 1995* (Tas) s 6, s 20(2); *Guardianship and Administration Act 2000* (Qld) s 11(1), sch 1 pt 1; *Guardianship and Administration Act 1990* (WA) s 4; *Guardianship and Administration Act 1993* (SA) s 5; *Guardianship and Management of Property Act 1991* (ACT) s 4(2); *Guardianship of Adults Act* (NT) s 4; *Mental Capacity Act 2005* (UK) s 1(6); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 8. See also *Guardianship and Administration Bill 2014* (Vic) cl 7(a)(i), cl 29; Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report 67 (2010) Rec 7-14(b).

6. *Guardianship and Administration Act 1986* (Vic) s 4(2)(c), s 22(2)(ab); *Guardianship and Administration Act 1995* (Tas) s 6(c); *Guardianship and Administration Act 1993* (SA) s 5(b); *Guardianship and Administration Act 1990* (WA) s 4(7); *Guardianship of Adults Act* (NT) s 4(3)(a); *Guardianship and Management of Property Act 1991* (ACT) s 4(2)(a)–(c); *Mental Capacity Act 2005* (UK) s 4(6); *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 8(7)(b) and (c). See also *Guardianship and Administration Bill 2014* (Vic) cl 29(a).

which does not include a proviso that a person's views are available and ascertainable<sup>7</sup>

- the wishes of the person's family members<sup>8</sup> - compare this with the NSW law which only requires that the views of a spouse are to be taken into account<sup>9</sup>, and
  - the adequacy of existing informal arrangements (and the desirability of not disturbing them).<sup>10</sup>
- 5.6 The principles in the Queensland law include a number of human rights considerations that are not included in NSW law.<sup>11</sup> The principles state that the following rights should be recognised and taken into account:
- basic human rights and the importance of empowering people to exercise them<sup>12</sup>
  - the right to respect for human worth and dignity as an individual<sup>13</sup>
  - the right to be a valued member of society and the importance of encouraging and supporting people to perform valued social roles,<sup>14</sup> and
  - the right to confidentiality of information<sup>15</sup>
- 5.7 The Queensland principles also identify the importance of maintaining a person's cultural and linguistic environment and their set of values (including any religious beliefs). The Queensland principles specifically require consideration of Aboriginal or Torres Strait Islander culture, language and custom, where relevant.<sup>16</sup>
- 5.8 There are also some different considerations in overseas laws. In Alberta, for example, a court must consider whether a lack of capacity to make the decisions in question is likely to expose the person to harm and whether an appointment would "be likely to produce benefits" that would "outweigh any adverse consequences" for the person.<sup>17</sup> This forms part of the court's assessment of a person's best interests.
- 5.9 In Ireland, an intervention must "have due regard to the need to respect the right of the ... person to dignity, bodily integrity, privacy, autonomy and control over his or her financial affairs and property".<sup>18</sup>

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7. *Guardianship Act 1987* (NSW) s 4(d).

8. *Guardianship and Administration Act 1986* (Vic) s 22(2)(b). See also *Guardianship and Administration Bill 2014* (Vic) cl 29(b).

9. *Guardianship Act 1987* (NSW) s 14(2).

10. *Guardianship and Administration Act 1993* (SA) s 5(c). See also *Guardianship and Administration Bill 2014* (Vic) cl 29(d).

11. *Guardianship and Administration Act 2000* (Qld) s 11(1).

12. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 2.

13. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 3.

14. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 4.

15. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 11.

16. *Guardianship and Administration Act 2000* (Qld) sch 1 pt 1 cl 9(2).

17. *Adult Guardianship and Trusteeship Act 2008* (Alberta) s 26(7)(g), (i), s 46(7)(e).

18. *Assisted Decision-Making (Capacity) Act 2015* (Ireland) s 8(6)(b).

**Question 5.1: What factors should be taken into account?**

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

## Appendix A

### Preliminary submissions

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<b>PGA1</b>	Maxwell Watts and Mareea Watts (15 February 2016)
<b>PGA2</b>	Lise Barry (23 February 2016)
<b>PGA3</b>	Dr John Carter (9 March 2016)
<b>PGA4</b>	Lina Sultana (10 March 2016)
<b>PGA5</b>	NSW Disability Network Forum (18 March 2016)
<b>PGA6</b>	[Confidential] (18 March 2016)
<b>PGA7</b>	Senior Rights Service (18 March 2016)
<b>PGA8</b>	Mental Health Coordinating Council (18 March 2016)
<b>PGA9</b>	Bridgette Pace (19 March 2016)
<b>PGA10</b>	Council on the Ageing NSW (19 March 2016)
<b>PGA11</b>	Michael & Hilda Cochran (20 March 2016)
<b>PGA12</b>	Kellie Jefferson (20 March 2016)
<b>PGA13</b>	Legal Aid NSW (21 March 2016)
<b>PGA14</b>	Alzheimer's Australia NSW (21 March 2016)
<b>PGA15</b>	Supreme Court of NSW (21 March 2016)
<b>PGA16</b>	Medical Insurance Group Australia (MIGA) (21 March 2016)
<b>PGA17</b>	Carers NSW (21 March 2016)
<b>PGA18</b>	NSW Council for Intellectual Disability (21 March 2016)
<b>PGA19</b>	NSW Council for Civil Liberties (21 March 2016)
<b>PGA20</b>	Avant Mutual Group Limited (21 March 2016)
<b>PGA21</b>	Mental Health Review Tribunal (21 March 2016)
<b>PGA22</b>	BEING (21 March 2016)
<b>PGA23</b>	People With Disability Australia (21 March 2016)
<b>PGA24</b>	National Disability Services (21 March 2016)
<b>PGA25</b>	Peter Deane (21 March 2016)
<b>PGA26</b>	Disability Council NSW (21 March 2016)
<b>PGA27</b>	Jan Barham (21 March 2016)
<b>PGA28</b>	Department of Rehabilitation Medicine St Vincent's Hospital (21 March 2016)
<b>PGA29</b>	Vanessa Browne (21 March 2016)
<b>PGA30</b>	June Walker (21 March 2016)
<b>PGA31</b>	Bernhard Ripperger and Laura Joseph (28 March 2016)
<b>PGA32</b>	NSW Young Lawyers (29 March 2016)
<b>PGA33</b>	[Confidential] (29 March 2016)
<b>PGA34</b>	John Friedman (30 March 2016)
<b>PGA35</b>	Institute of Legal Executives (31 March 2016)
<b>PGA36</b>	[Confidential] (31 March 2016)
<b>PGA37</b>	Mary Lou Carter (1 April 2016)
<b>PGA38</b>	Our Voice Australia (1 April 2016)
<b>PGA39</b>	NSW Mental Health Commission (1 April 2016)

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- PGA40** The South Eastern Sydney Local Health District (SESLHD) Human Research Ethics Committee (HREC) (1 April 2016)
- PGA41** NSW Ombudsman Office (1 April 2016)
- PGA42** Nell Brown (3 April 2016)
- PGA43** Law Society of NSW (4 April 2016)
- PGA44** Intellectual Disability Rights Service (4 April 2016)
- PGA45** Craig Ward (1 April 2016)
- PGA46** [Confidential] (30 March 2016)
- PGA47** Australian Centre for Health Law Research (4 April 2016)
- PGA48** [Confidential] (4 April 2016)
- PGA49** NSW Health Commission (4 April 2016)
- PGA50** NSW Trustee & Guardian Submission (7 April 2016)
- PGA51** Michael Murray (6 April 2016)
- PGA52** Australian Lawyers Alliance (8 April 2016)
- PGA53** Mental Health Carers Arafmi NSW Inc (18 April 2016)
- PGA54** NSW Family and Community Services (27 April 2016)