

Submission to the Attorney General's Department of NSW

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

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Introduction

The Public Interest Advocacy Centre (PIAC), an independent, non-profit law and policy organisation, seeks to promote a just and democratic society through identifying and making strategic interventions on public interest issues and working co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly-based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately forty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

The invitation to comment

PIAC welcomes the opportunity to comment on the Discussion Paper released by the NSW Attorney General's Department, *Are the rights of people whose capacity is in question being adequately protected?*

PIAC believes that a closer examination of the legal definition of capacity in civil matters is well timed, as the justice system in NSW grapples with important issues pertaining to questions of capacity every day, in an increasingly complex environment.

In general, PIAC believes that the rights of people whose capacity is in question are not being adequately protected under current arrangements in the civil jurisdiction. There is a great deal of definitional uncertainty and resultant inconsistency when it comes to protecting the rights of people whose capacity is in question.

PIAC's comments contained in this submission are based on the experience of PIAC lawyers who undertake legal work and advocacy for a wide range of individuals. In particular, PIAC currently undertakes work in legal areas in which the issue of legal capacity arises from time to time, these areas include:

- Children in Detention Advocacy Project (CID^{DA}AP);
- Homeless Persons' Legal Service (HPLS);
- discrimination advocacy and litigation; and

- advocacy and litigation around health rights with a particular focus on people who experience mental illness.

PIAC's experience through these particular projects has highlighted the problems lawyers face when they suspect a client may not have legal capacity. PIAC's comments in relation to the discussion paper are confined to this area, as PIAC is not in itself a specialist legal service on issues such as capacity.

Obligations on lawyers in determining capacity

It is a professional obligation on lawyers to ensure that their client has capacity to instruct in relation to their legal issue. The concept of capacity includes the ability of the client to understand the advice of the lawyer and to make an autonomous decision to instruct and direct the actions of the lawyer.

The law presumes that all adults are competent to provide instructions to a lawyer. The Law Society's Client Capacity Guidelines provide one of the few sources of professional guidance for lawyers in instances where there may be a concern over the capacity of a client.

Step one of those guidelines affirms the presumption of capacity and asks whether there is any reason to doubt capacity. From this simple 'yes/ n'o flow diagram the process of determining capacity is outlined. This process includes:

- whether instructions can be obtained if there is further education or explanation;
- whether the lawyer can act in the matter without full formal instructions;
- whether a relative or friend can assist with instructions clearly in the clients best interests;
- whether a formal assessment of capacity by a professional should occur;
- whether the client can be compelled to undertake an assessment; and
- whether the lawyer should continue to act.

The limitations of the guidelines are outlined in further detail in this paper.

Challenges for NSW lawyers in determining capacity

A clear difficulty for lawyers in determining capacity is the lack of clarity. The presumption of capacity, the lack of clear guidance for legal practitioners on the relevant test for determining capacity, as well as the sometimes-limited specialist skills of lawyers, can place them in a difficult ethical position. Lawyers often must attempt to resolve this dilemma with little guidance from Courts, the Law Society or their colleagues. Whilst the intention of the presumption is to affirm the fundamental right of all adults to instruct and determine the enforcement and protection of their legal rights and interests, this presumption coupled with under-developed guidelines in relation to what should occur when capacity is doubted, can lead to lawyers presuming capacity when it may need to be tested.

The area of capacity is also often considered an area of expertise only for practitioners who are specialists in areas particularly affecting people with a disability. The result of this is that many lawyers not working within specialist disability legal services often have limited knowledge on how issues surrounding the capacity of clients should be resolved, as well as how best to approach ethically fraught areas such as obtaining instructions from a third party.

PIAC also notes that the issue of capacity is not solely an issue for people experiencing a decision-making disability and that the issue of capacity can affect a wide range of clients including people

of a different cultural background, and children. PIAC favours the development of an understanding of capacity that identifies the wide-ranging factors that might impact on an individual's competence to give instructions. Just as a decision-making disability may impact upon a person's competence to provide instructions, it should be recognised that cultural, linguistic or other barriers may impact upon competence. PIAC recognises that, with appropriate care taken by legal practitioners, many of these barriers can be effectively overcome. A definition of capacity that is narrowly framed in terms of disability can lead to practitioners not adequately considering other factors that might impinge on capacity.

PIAC notes that it can be the case that a person who has never been diagnosed, assessed or identified as having a decision-making disability may still not have capacity to instruct a lawyer. It should also be acknowledged that capacity is not a fixed concept, and may fluctuate over periods of time, such as during a long-running case. This presents particular challenges of lawyers acting over a period of time for a client when concern over the client's capacity may be episodic. It can be extremely difficult for lawyers in this context to know the best course of action especially with concerns about maintaining client trust and the right of the client to pursue their legal issue.

An understanding of capacity as a broad concept not solely confined to decision-making disabilities, also places emphasis on other factors such as the role of the lawyer in the process of obtaining instructions. A one-size-fits-all approach by lawyers to clients, based on a traditional model of legal interviewing can lead to communication difficulties that could manifest as a client capacity issue.

Factors such as limited time for client interviews, the use of legal jargon as well as culturally unfamiliar legal processes can impact on a person's understanding of the process in which they are participating. Access to interpreters, in particular in relation to specific dialects, can also impact upon whether a person is sufficiently advised in order to give effective instruction. This is particularly the case when the preciseness of the translation is important.

PIAC notes that all these factors may indicate that more time needs to be spent with a client, as well as a range of strategies employed by the lawyer to determine their capacity to instruct. The requirement of more time with the lawyer is likely to have costs implications for the client, who may already have limited means to engage the lawyer. Such costs can be an important issue affecting the access to legal assistance for people who may have their capacity questioned.

Determining whether a client has capacity is an important obligation on lawyers, and one which has serious impacts on the rights of individuals to access justice. It is also a complex and difficult process, which individual practitioners must often negotiate with little professional guidance. The lack of a uniform approach to the issue of capacity adds to this complexity, making the process of determining capacity more difficult.

The continuum of capacity and decision making

In considering the issue of capacity and the impact it has on the role of lawyers acting for clients it is useful to consider capacity and decision-making on a continuum with full capacity and independent decision-making at one end, and a complete absence of capacity and substitute decision-making at the other end. Somewhere towards the full capacity end of the continuum sits supported decision-making and further along the continuum towards absence of capacity sits a mix of supported and substitute decision-making.

It is important for lawyers to be aware of how this continuum might impact on their role. It is not sufficient to simply fall back on seeking input from a third party who is present in the client interview without some understanding of what influence that third party may have on the client's decision-making processes and without consciously considering what weight the lawyer is giving to the views of that third party in taking instructions.

In relying entirely on the third party for instructions, the lawyer is effectively implementing an informal substitute decision-making regime. This is extremely risky territory into which a lawyer should not be encouraged to wander unconsciously. Indeed, in the event that the lawyer feels unable to obtain instructions from the client, they should be provided with proper guidance on how to obtain formal authority for third party instructions, such as the appointment of a *guardian ad litem* or tutor.

The limitations of the current guidelines for lawyers

The main area of guidance for lawyers in NSW in civil law matters on the issue of capacity is the current Law Society's Client Capacity Guidelines (as outlined above). The flow chart set out in the guidelines provides lawyers with a series of questions they should address when they care concerned a client lacks capacity. A clear limitation of the guidelines is the limited guidance they provide to lawyers in making the determination in relation to each stage.

Determining capacity

One of the most important initial questions raised by the guidelines is whether there are reasons to doubt the client's competence. The guidelines do not provide assistance on what factors might be indicating a need to consciously assess competence.

PIAC believes that if the presumption of competence is to be effective it must be accompanied by some meaningful guidance that assists to identify behaviour that might lead a lawyer to doubt competence. While every individual is different, the lack of assistance for lawyers in making a initial decision to question competence may mean that competence is not questioned when it should be, or that irrelevant considerations are given undue weight when competence is considered. It cannot be assumed that this professional knowledge and expertise is within the capacity of most lawyers, or that it is freely available to lawyers either through the Law Society or through the assistance of colleague.

Third party instructions

The next stages in the guidelines also fail to provide the appropriate level of direction for lawyers.

In particular, guidance on what issues might allow a lawyer to act without full instructions and when it is appropriate to utilise a third party to assist in the process of obtaining instructions. It is imperative that greater guidance on these matters are provided to avoid a lawyer or a third party simply acting in the perceived best interests of the client. This is particularly the case when paternalistic notions may place limitations on the extent to which the client's wishes are considered.

A key right on the issue of capacity is the right to instruct a lawyer contrary to their advice. This may not be consistent with the views of a friend or third party as suggested by the guidelines. The wishes of the client to instruct the lawyer contrary to instructions should not in and of itself be grounds to question competence, but could result in this occurring due to the lack of clarity around when competence should be called into question.

There is likely to be a tendency that, under time constraints, a lawyer will turn to a third party whether or not they have formally considered the issue of capacity. In doing so, the lawyer is drifting into the area of ‘supported’ or ‘substitute’ decision-making.

Guidance on the formal appointment of third party representatives

As part of its CID²AP project, PIAC undertook research on the representation of juveniles. It became disturbingly clear that there is an absence of effective guidance on when a third party representative, such as a *guardian ad litem* or tutor, should be appointed and how to go about achieving such an appointment. This impacts not only on the legal rights of juveniles but also of adults with decision-making impairments.

Conclusion

PIAC believes the issue of determining capacity should be considered a mainstream legal issue that may arise from time-to-time for lawyers engaged in all types of legal work.

In recognition that all members of the community may at some point have their capacity affected or questioned, PIAC recommends the development of clear legal definitions as well as processes for determining capacity, and for implementing formal substitute or supported decision-making where capacity is absent or limited.

PIAC believes that the development of clear legal guidelines as well as compulsory mandatory legal education around the issue of identifying when a client may lack capacity is crucial.