

ACT CAPACITY TOOLKIT

A GUIDE FOR
ASSESSING CAPACITY

AUGUST 2020



ACT
Government

This initiative has been funded through the *Disability Justice Strategy 2019–2029*
www.communityservices.act.gov.au/disability_act/disability-justice-strategy

Acknowledgements

We gratefully acknowledge Queensland Advocacy Incorporated and their publication *Queensland Handbook for Practitioners on Legal Capacity* for assistance with the development of this Toolkit.

We also thank the NSW Department of Communities and Justice for allowing us to use their *Capacity Toolkit 2008* in the development of this Toolkit.

This Toolkit has been prepared by Legal Aid ACT with the contribution of:

- ACT Human Rights Commission – Public Advocate
- ADACAS
- Advocacy for Inclusion
- Canberra Community Law
- Public Trustee and Guardian.

Disclaimer

This document has been prepared by Legal Aid ACT for general information purposes. While every care has been taken in the production of this publication, no legal liability is accepted, warranted or implied by Legal Aid ACT. Further, recipients should obtain their own independent advice before making any decisions that rely on this information.

TABLE OF CONTENTS

SECTION 1		SECTION 5	
Who is this toolkit for?	2	Substitute decision-making	16
SECTION 2		Important principles	16
What is capacity?	3	SECTION 6	
Capacity is decision specific	3	Other areas	17
Capacity is time specific	4	Guardianship and financial management	17
Capacity and external factors	4	Enduring Power of Attorney	17
Capacity must be distinguished from the decision	4	Health attorney	17
Capacity can be regained	5	Nominated person	17
SECTION 3		Related agencies	18
Assessing capacity	6	Further reading	19
Capacity assessment principles	6	Notes	20
SECTION 4			
Supported decision-making	12		
How can I support a person to make their own decision?	13		
Communicate in an appropriate way	14		
Help the person feel at ease	14		

Section 1

Who is this toolkit for?

This Toolkit is for you if you have concerns about the ability of an adult to make decisions for themselves. You may need to assess, or seek an assessment of, a person's capacity in your personal or professional life.

In general, a person's capacity to make day-to-day decisions is not subject to the type of assessment discussed in this Toolkit. Minor decisions such as when to get up, what to wear, or what to eat, are usually supported or made when required by family, friends or other carers, with the person closely involved.

However, you may need to assess, or seek an assessment of, a person's capacity when the decision in question is about something significant, or has legal consequences.

This Toolkit applies only to the civil (non-criminal) areas of law. It does not relate to an assessment of a person's capacity under criminal law.

Section 2

What is capacity?

Capacity, in the broadest sense, is the ability of a person to make decisions for themselves and deal with their affairs.

Generally, the requirements of capacity for an adult include understanding the nature and effect of decisions about specific matters that relate to them, freely and voluntarily making decisions about the matter, and communicating the decisions in some way.

An adult is presumed to have capacity for a matter unless it can be shown otherwise.

A person who has capacity is usually able to make decisions about things that affect their daily life, such as:

- where to live
- what to buy
- what support or services they need
- when to go to the doctor.

A person who has capacity is usually also able to make decisions about things that have legal consequences, including:

- making a will
- getting married
- entering into a contract
- having medical treatment.

People who have capacity can decide what is best for themselves and can either take or leave the advice of others.

Broadly speaking, when a person has capacity to make a particular decision, they are able to do all of the following:

- *understand the facts involved*
- *understand the main choices*
- *weigh up the consequences of the choices*
- *understand how the consequences affect them*
- *communicate their decision.*

Capacity is decision specific

Capacity is decision specific, and the fact that a person has impaired capacity to make a specific decision, does not preclude them from being able to make other decisions. For example, a person might be able to decide where they want to live (personal decision), but not be able to decide whether to sell their house (financial decision). They can do their grocery shopping (make a simple decision about money), but not be able to buy and sell shares (make a complex decision about money).



CASE STUDY: Decision specific

Alice has recently been diagnosed with dementia. She is finding it difficult to manage her retirement portfolio so Alice's daughter and enduring attorney assist her with that.

On the other hand, Alice is very good at managing her fortnightly income and deciding how she spends this money.

Section 2

What is capacity?

Capacity is time specific

Capacity is fluid and is something that can change with time. A person may have impaired capacity for a temporary period, or it may last for a long period of time. People with dementia, for example, may have times when they are more lucid and have capacity, and at other times have less capacity. Some people with mental illness have a fluctuating level of capacity to make decisions.

Capacity and external factors

Capacity can also be affected by external factors. For example, a crowded environment or a high-pressure situation may cause a person greater stress and result in lowered capacity compared to when they are well rested and sitting in a quiet area.



CASE STUDY: External factors

My aunt has an intellectual disability. I was appointed as her financial manager. In order to fulfil the requirements of this role, I needed to identify which financial decisions she has the ability to make, so I don't control areas of her finances that she can do herself. Last week my aunt decided that she wanted to get a mobile phone. She knew exactly how much she wanted to spend and what she wanted it for. But when we got to the shopping centre it was very crowded and extra noisy. At the counter people were pushing us to get past. My aunt couldn't concentrate and was anxious. She couldn't make a decision about the phone plans the sales person was explaining to her. So I made the decision, based on what she had told me at home, and signed the contract on her behalf. We got out of there as fast as we could!

Beth, niece

Capacity must be distinguished from the decision

While there is a relationship between a person's capacity and the decisions that person makes, whether a person has capacity should not be determined purely by examining the effect of their decisions. Just because a person makes decisions that seem 'bad', 'unwise', 'reckless' or 'wrong' does not mean the person lacks capacity to make those decisions. Capacity does not require a person to always make decisions that are 'objectively' correct or in their own 'best interests' or in the 'best interests' of certain others.



CASE STUDY: Capacity distinguished from the decision

Matthew comes to see you at your office. When he arrives, you see his hair is long and unkempt, he is wearing track pants and a ripped t-shirt and it looks like he hasn't shaved in days. He also appears hyper-vigilant and is constantly looking around and behind him. Once you start your meeting with him you learn that he is a veteran who is living on a Centrelink pension. He came to you for some help working out whether he can challenge a lending decision from a credit provider. When you ask him what the matter involves, he says he already has multiple loans and wants additional funds to buy another two cartons of beer to get him through the next two days, and he's got a feeling that he's going to win big on the pokies but has no money to play. You must presume Matthew has capacity. Matthew's appearance and demeanour are not enough to displace that presumption and the fact that he wants to spend the money on alcohol and gambling does not mean that he lacks capacity.

Capacity can be regained

A person can regain capacity or increase their capacity. For example, they can regain consciousness or learn new skills that will enable them to make certain decisions for themselves.

An example relates to people with a mental illness. They can have capacity to make decisions at certain times but not be able to make some or all decisions at other times depending on the current symptoms of their mental illness, which can change over time with treatment and care.

It is essential to remember that capacity is decision specific. This means that, where there is doubt, a person's capacity must be reassessed every time a decision needs to be made.

Section 3

Assessing capacity

There are six principles to be applied when assessing a person's capacity. They aim to support and protect people, and help them to make the most of their decision-making ability.

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

1 Always presume a person has capacity

The most basic principle is to presume a person has the capacity to make all decisions for themselves. It is important to understand how a person is exercising their capacity in relation to a decision, before first questioning whether the person has capacity to make the decision.

Every adult is free to make their own decisions if they have the capacity. As a family member, friend, carer, or other individual involved with a person, you should always make the presumption, unless it is established that they don't have the capacity to make a particular decision.

Culture, language, ethnicity and religious impacts

When applying this principle, consider how a person's culture, language, ethnicity or religion impacts on their freedom to make decisions. For example, in some communities and families a person may regularly allow, or prefer, the head of a household, a parent, or an elder of the community to make all the important decisions.

This means individuals with capacity to make their own decisions may freely allow others to make important decisions on their behalf. When decisions are made by others, consideration should be given to those people sharing the responsibility of the outcome of the decision, particularly if there are risks that need to be managed.

Sometimes the decision-making process is collective and involves the whole community in meetings and discussions about the decision, such as in some Aboriginal and Torres Strait Islander communities.

Also, some religious beliefs may impact on the decision, or how it is made. For example, some Jehovah's Witnesses and Christian Scientists hold particular beliefs that might affect their decisions about various medical treatments.

Presumption versus protection

Even with a presumption of capacity, it is still important to think about the balance between a person's right to make a decision, and the extent to which that person's health or safety might be in danger if they can't make a decision. This can be a very difficult balancing exercise.

If you are faced with this situation be mindful not to act in an overly protective way when assessing whether a person has capacity. Protecting a person from making what you think is an unwise decision may seem helpful, but it is often best not to intervene.

It is important to understand that if a person isn't allowed to confront a difficult decision or its consequences, their right to be in control of their life is denied. Each individual has the right to take their own chances, and make their own mistakes.

Remember that making an unwise decision, or one that you don't agree with, does not mean that a person lacks capacity.

Challenging the presumption

If you are claiming that a person doesn't have capacity, you need to give good reasons. Use facts to show that it is more likely than not that the person lacked the ability to make the decision at the time.

Providing facts and demonstrating a person's inability to make a decision can be as simple as doing the following:

- documenting the assessment process
- providing a summary of the questions you asked the person and their answers
- giving an explanation as to the reasons why you made your decision.

For example, if you are a professional providing a service to a person, you may need to provide reasons to others, such as family members or friends.

Providing reasons for your decision about a person's capacity may be done in a more formal way if the person, or someone else, challenges your decision. Keeping detailed notes of an assessment and writing down why you made the decision is therefore essential.

Here are some examples of when good notes will be useful:

- A doctor may decide that their patient has the capacity to consent to a risky operation. If the patient suffers harmful side effects as a result of the operation, the doctor may need to explain the capacity assessment decision to the family, or even the ACT Health Services Commissioner.
- A bank teller may need to provide details about deciding that a customer had the capacity to transfer a large sum of money from their account to the account of another. This is particularly the case when the customer normally only makes regular small transactions. A family member of the customer may try to argue that the bank is responsible for returning the funds because the person shouldn't have been assessed as having the capacity to make such an important financial decision. The matter might be before a court, or the Australian Financial Complaints Authority.
- An assessment of capacity may be put before the Supreme Court or the ACT Civil and Administrative Tribunal if there is an issue of capacity being determined by them.

Section 3

Assessing capacity

2 Capacity is decision-specific

You need to assess, or seek an assessment of, the person's capacity for each decision whenever there is doubt about capacity. This is because a person's capacity can vary in different circumstances, at different times and in relation to different types of decisions.

If a person can make some, but not all decisions, then they have a right to make as many decisions as they can.

Remember, even if a person couldn't make a certain decision in the past, they might be able to make:

- *the same type of decision now or in the future*
- *other types of decisions now or in the future.*

So every time a decision needs to be made, you should ask the question:

'Does the person have the capacity to make this decision now?'

If the person is unable to make a decision about something now, think about whether the decision can be delayed to a later time when the person may be able to make the decision for themselves. Delaying the decision will give them the greatest control over their own life.

3 Don't assume a person lacks capacity based on appearances

It is wrong to assume a person lacks capacity because of their age, appearance, disability, behaviour, language skills or any other condition or characteristic.

In fact, it may be discrimination under the law if you make unsupported assumptions about a person's capacity because of the way they look or behave.

Incorrect assumptions can often be made about a person's lack of capacity based on any of the following:

- the way a person looks
- the way a person presents
- the way a person communicates
- a person's impairment
- the way a person acts or behaves.



CASE STUDY: Capacity and appearance

I am a person with Cerebral Palsy. I find it difficult to communicate. I have problems moving my lips, tongue, jaw and face muscles. When I speak it is hard to understand me, but if you listen carefully you can tell what I'm saying.

I remember going into the bank one day wanting to withdraw money from my account. I don't know whether it was the communication difficulty or the way I looked (sometimes my muscles make jerky movements), but the bank teller obviously thought I couldn't understand anything. He was speaking to me as though I were a two-year-old, and shouting as though I couldn't hear him. He didn't process my transaction, telling me 'I had better get some help with it'.

Well, I reckon he needed the help! I can't believe he didn't sit down with me and make the time to try to understand me. He just took one look, and because of my disability he thought I didn't understand what I was doing. I ended up getting a friend to come with me and explain it to him. How humiliating! For him, me, and the bank. People shouldn't make assumptions based on looks.

Melissa, customer

4 Assess the person's decision-making ability—not the decision they make

You can't decide that a person lacks capacity just because they make a decision you think is unwise, reckless, or wrong.

Everyone has their own values, morals, beliefs, attitudes, likes and dislikes. You might think a decision is bad yet someone else will think it is good.

The majority of people take chances or make 'bad' decisions once in a while. The right to make a decision includes the right to take risks and to make decisions others disagree with. This is known as dignity of risk.

However, you may question a person's capacity to make a decision if they make a decision that either:

- puts them (or someone else) at significant risk of harm or mistreatment; and/or
- is very different from their usual decisions.

When questioning a person's capacity, you may also consider:

- the person's past decisions and choices
- whether they are easily influenced or pressured by others
- the risk to themselves or others
- whether they have developed a medical condition which might affect their decision-making
- providing more information to assist them to understand what's involved in the decision, and its consequences.



CASE STUDY: Assess decision-making ability

My mum has Bipolar Disorder. Sometimes when she has episodes of mania she does things I think are reckless, like going out and paying lots of money for a puppy that she won't want or be able to look after later. She's done this a lot. I try to get her to see the history and what will happen but she doesn't listen at that point. It annoys me but it's not life threatening or harmful to anyone else, so I go along with it. I usually find a home for the dog later. On the other hand, sometimes mum gets so depressed that she refuses to eat or leave her bed. She refuses to see a doctor. I don't think her decision-making is good then, and I make decisions on her behalf to get help.

5 Respect a person's privacy

Respect a person's right to privacy when you are assessing their capacity. When you are assessing a person's capacity you are dealing with a person's personal information.

'Personal information' generally means any information or any opinion about a person that can identify that person.

Various privacy laws and principles aim to protect the privacy of a person being assessed. These principles also balance a person's privacy interests against their personal interests such as health or safety.

The most common privacy principles are about:

- **collecting** information about a person
- **using** information about a person
- **disclosing** (providing) a person's information to someone else.

It is important to remember that 'health information' is a type of personal information.

Section 3

Assessing capacity

Collecting information

Always ask the person being assessed for the information you need for a capacity assessment. Explain why you need the information and what you will be doing with it.

If you need to get information about the person from others for the purpose of assessment, explain this to the person. Ask the person if it is okay to speak to the others to get this information. Don't generalise about whom you will talk to. Name, or at least clearly identify, the other people — for example, 'your sister Hannah', 'your doctor, Dr Gordon', 'the woman from Home Care who comes to help you get dressed on Tuesdays'.

Whether you are talking to the person or someone else, ask only for information that is relevant.

Using information

When you have collected personal information to help you assess a person's capacity, you can only use it for that purpose. If you need to use it for another purpose, you need to ask the person.

There are some exceptions to this rule. For example, you can use the information collected to deal with a serious danger to a person's health or safety. This exception only applies when the danger is something that is about to happen. It doesn't apply if the possible danger is in the distant future.

Disclosing information

If you are going to give the personal information you have collected to anyone, you have to get permission. When asking for permission, tell the person exactly to whom you are going to give their information, and why.

Again, there are exceptions. For example, you can give the personal information to others without permission if they need it to deal with a serious and immediate danger to a person's health or safety. It doesn't apply if the possible danger is in the distant future.

6 Substitute decision-making is a last resort

A person may be able to make a particular decision at a certain time because they have support during the decision-making process. This is called supported decision-making.

Before deciding that a person does not have the capacity to make a decision, you should ensure that everything possible has been done to support them to make their decision

The type of support you provide or get for a person to support them to make a decision for themselves, depends on matters such as personal circumstances, the type of decision, and the time available to make the decision.

When seeking support for a person to make a decision, you can try the following:

- use the most appropriate form of communication for the individual, such as non-verbal communication, visual aids (photographs, symbols, drawings), or other alternative formats. You may need to take advice on an Alternative and Augmentative Communication (AAC) system, or obtain a communication assessment from a speech therapist or other professional
- provide information in a more accessible form, such as a neutral interpreter or advocate
- find a particular location or better time of the day so the person might feel more at ease to make decisions
- suggest to, or assist, the person to get treatment for a medical condition that may be affecting their capacity

- support the person to resolve, or to get help in resolving, underlying personal or social issues which are causing them stress
- help the person find someone to support them to make choices or express a view, such as an advocate or support practitioner
- help the person find, or get access to, a structured program to improve their capacity to make particular decisions, such as learning a new skill or improving their communication
- give the person relevant information about the decision and its consequences.

There is more information about supporting a person to make their own decisions on **page 12**.

If all efforts fail to support a person through the decision-making process, a 'substitute decision-maker' might need to make the decision for them. **This is a last resort.**



CASE STUDY: Supporting someone to make their own decision

I was working in the emergency department of the hospital one night when a man, Mark, was brought in by the paramedics. Mark had been in a car accident and was conscious, but in shock. He didn't seem to be able to speak and seemed really distressed. He was making noises and wild gestures.

I thought Mark lacked the capacity to make decisions about the treatment of his injuries because he wasn't talking or listening to what I was trying to explain to him. To me, he didn't seem to comprehend. I put this behaviour down to the severe shock he was suffering, and decided to give him urgent treatment without consent.

Luckily before I started any treatment, a nurse said that she thought Mark was using sign language. She tried signing to him and he immediately relaxed and signed back. It turns out he did have complete capacity! What I thought was non-communication and wild gesturing due to shock, was actually Mark's desperate attempt to show me he was deaf. I just wasn't giving him information in the right way. In fact, he could answer my written questions, and I was able to get Mark to make all his own medical decisions.

Minh, registrar

Section 4

Supported decision-making

Before you assess someone as not being capable of making a certain decision themselves, you need to do everything you can to support them through the decision-making process.

The support you will be able to give varies, depending on the following:

- what decision is being made? For example, a significant one-off decision will require different support from day-to-day decisions
- what are the circumstances of the person making the decision? For example:
 - a person who has learning difficulties may need a different approach from a person who has dementia
 - if the person has an intellectual disability then you may need to seek a neutral support person or specialist such as, in behaviour support
 - if the person has difficulty communicating, they may need a neutral interpreter, a person with skills in Alternative and Augmentative Communication (AAC) systems, or an advocate present when an assessment is taking place
 - where the person has a mental illness that fluctuates, making the decision may be able to be delayed.
- how much time does the person have to make the decision?

The exception to supported decision-making is where a formal legal substitute decision-maker has already been appointed:

- *under an enduring power of attorney or by statute; or*
- *by a tribunal (such as a 'guardian' or 'financial manager').*

You can't support the person to make their own decision in these situations because it has already been determined that the person lacks the capacity to make the decision for themselves.

However, even in these situations the substitute decision-maker should use supported decision-making to try to give effect to their will and preferences.

How can I support a person to make their own decision?

This Toolkit has provided guidelines to help you to assess whether a person has capacity to make certain decisions. If you have decided that they have capacity, but need help in making a decision, you should start by asking the person what things they feel would be most helpful to support them.

Provide relevant information

Does the person have all the information they need to make an informed decision? If not, provide and explain any information required to help the person make the decision.

- However, try not to give more detail than the person needs. In some cases a very simple, broad explanation will be enough.
- Describe the risks, benefits and any possible consequences of making, or not making, the decision.
- You might need to support the person to access specialist advice, such as advice from a medical practitioner, a financial or legal advisor, or to get advice from trusted friends or relatives.
- If the person has choices, provide them with the facts they need on all the options in a balanced way. Discuss the risks, benefits, and any possible consequences, of each choice.
- Explain the effects that each choice may have on the person and those around them, including the people involved in their care.



CASE STUDY: Helping the person feel at ease

There is a young man, Van, who has been in hospital for a few months. He has an acquired brain injury and his behaviour is, at times, quite difficult. This is usually when he isn't able to understand what you're explaining to him.

I remember trying to get him to agree that when he was released from hospital he would go to the outpatient clinic for regular check-ups. I was in the middle of explaining it to him when he got really angry, started swiping at the book I was holding and yelling at me.

I spoke to Van's behavioural practitioner and got some advice. I learnt that Van got more agitated and aggressive in the evening. He wasn't able to concentrate as well at that time of day, as often all he could think about was when dinner was coming!

The practitioner also advised that it was hard for Van to concentrate in a noisy environment, and the ward was very noisy. This made him increasingly frustrated.

So I decided to talk to Van the next morning, after breakfast. He was much more alert and could concentrate for longer. He was also calm. I took him into one of the empty consultation rooms where it was quiet. As advised, I was very brief with my explanations and didn't rush him at all. Van understood and seemed happy to agree to go to the clinic for check-ups.'

Frank, nurse

Section 4

Supported decision-making

Communicate in an appropriate way

- Communicate in the way that the person is best able to understand.
- Provide information in the person's preferred communication mode and format.
- It may be necessary to get some support to assist in communication. For example, you might engage a neutral interpreter or have an advocate present.
- For people with communication needs, there may be a necessity to use a particular Alternative and Augmentative Communication (AAC) system. This may be as simple as obtaining a specific piece of equipment to aid in communication, such as a hearing loop, letter, word or picture board, voice synthesiser or a computer. However, it may mean that someone with particular skills in using and interpreting the AAC is needed to support the person during the assessment.
- Where a person with communication needs has no AAC system in place, it may be necessary to make a referral to a speech pathologist for a communication assessment. If this is not practical, then do the following:
 - if using visual aids to help explain things, such as pictures or objects, make sure the person understands them the way you want them to. For example, a red bus may represent a form of transport to one person and a day trip to another
 - for people who use non-verbal methods of communication, behaviour (in particular, changes in behaviour) can tell you how they are feeling. You may need to get some advice from a support practitioner
 - when you are speaking, use simple language and sentence structure
 - speak at an appropriate volume and speed
 - ask open questions to check that the person has understood what you have said or shown
 - separate difficult information into smaller parts to make it easier to understand.

Help the person feel at ease

Location

- Find out if there are particular locations where the person might feel more at ease. If there are, use them.
- It is possible that the person may be able to make their decision more easily at a location associated with the decision. For example, it might help the person decide about medical treatment if you take them to a hospital to see what is involved.
- Choose a quiet location where the discussion can't be easily interrupted.
- Try to eliminate any background noise or distractions, such as television, radio, or people talking.
- Choose a location where the person's privacy and dignity can be respected.

Timing

- Find out if there is a particular time of day when it is best to communicate with the person. Some people are more alert in the morning; others are better in the early afternoon or evening.
- If the person's capacity is likely to improve in the near future and the decision is not urgent, then delay the decision until communication is easier for the person. For example, you may want to delay a decision until after an episode of depression or psychosis or until a cycle of medication that affects the person's capacity is complete.
- If capacity for several decisions is being assessed then you may need to assess each decision at a different time. This will minimise the chances of confusion or tiredness.
- Do not rush the assessment. Give the person time to think and ask questions where necessary.

Enlist support in the process from other people or services

- Sometimes a person will be much more comfortable making decisions when someone else is there to support them. Having a relative, friend or advocate present can make the person feel more at ease.
- Others may not like another person present. This may increase their anxiety or affect their ability to make a free choice.
- Support the person to access, or to find help accessing, other services if appropriate. For example, there may be services that will help the person build new skills to improve their capacity to make particular decisions, or services to assist the person to sort out underlying personal or social issues that are affecting capacity. A person may require access to medical advice if there is a medical issue that could affect capacity.
- Get assistance from a neutral interpreter, advocate, speech and language therapist, support person or other professional if required.
- If you can't get specialist advice on communication (AAC systems) then ask those who know the person well about the most appropriate form of communication or whether there is someone who can communicate easily with the person. Family members, friends, advocates, carers (paid or unpaid), or health care workers may be able to assist with this knowledge.
- Be aware that sometimes people lose verbal skills, for example, due to dementia. While the person may have communicated in a second language in the past they may now prefer to use their first language, and you may need an interpreter.

Section 5

Substitute decision-making

If all efforts fail to support a person through the decision-making process, someone called a 'substitute decision-maker' might need to make the decision for them.

Substitute decision-making happens when a formal legal arrangement has been put in place, such as when:

- an enduring attorney under an Enduring Power of Attorney ('EPOA') makes a decision when the principal no longer has capacity to do so
- the ACT Civil and Administrative Tribunal ('ACAT') appoints a guardian or financial manager under the *Guardianship and Management of Property Act 1991*
- a health attorney is appointed by the treating doctor at the time the substitute medical consent is required.

Substitute decision-makers can only make decisions within the scope of the powers given to them. For example, a person can appoint one or more attorneys under an EPOA to make decisions in property (including financial), personal care, health care or medical research matters. An enduring attorney given powers to make decisions under an EPOA in relation to only personal care matters, cannot make decisions about the principal's financial affairs, nor can the attorney act outside any directions, limitations or conditions imposed on them. Similarly, a guardian or financial manager appointed by ACAT can only make decisions in relation to the powers given to them as set out in the ACAT orders.

Important principles

An enduring attorney must comply, to the maximum extent possible, with the general principles set out in Schedule 1 of the *Powers of Attorney Act 2006*. Even if a person has impaired decision-making capacity, an enduring attorney must allow them to take part in decisions affecting their life, including property and finance matters, to the greatest extent possible. If a person is unable to express their wishes or needs, an enduring attorney is obliged to consider what their wishes might be based on the person's past actions'. (Public Trustee and Guardian, ACT Government, *The Power to Choose*, 10–11).

Similarly, a guardian and/or financial manager appointed by ACAT must follow the principles set out at section 4 of the *Guardianship and Management of Property Act 1991*. These decision-making principles include (among other things) giving effect to the protected person's wishes, as far as they can be worked out, unless making the decision in accordance with the wishes is likely to significantly adversely affect the protected person's interests.

Remember, substitute decision-making should be a last resort and used only when all efforts to assist a person to make a decision for themselves have been unsuccessful.

Section 6 Other areas

Guardianship and financial management

A guardian is appointed to make a range of personal and health decisions for a person who is found by ACAT to have impaired decision-making ability. A financial manager is appointed by ACAT to make decisions in relation to financial and property matters. In the ACT, a person under guardianship or financial management is referred to as a protected person.

ACAT may appoint a financial manager or a guardian when:

- the person hasn't put legal arrangements in place to appoint someone to make decisions for them when they lack capacity
- the person has impaired decision-making ability in relation to a personal care, health care or financial matter
- there is a need for a decision or risk to the person's health, welfare or property
- if a financial manager or guardian is not appointed then the person's needs will not be met or their interests will be adversely affected.

A guardian and/or financial manager may be an individual or the Public Trustee and Guardian. The Public Trustee and Guardian may only be appointed as guardian and/or financial manager as a last resort where an individual is unavailable, unsuitable or unwilling to be appointed.

Enduring Power of Attorney

An EPOA is a legal document appointing an attorney to act on behalf of the principal and:

- continues to be valid if the principal has impaired decision-making capacity
- can nominate someone to make decisions on behalf of the principal in relation to financial/property, personal care, health care or medical research matters
- may be activated for financial decisions immediately if elected.

Health attorney

A health attorney is a person authorised to consent to medical treatment on behalf of a person with impaired decision-making ability. A health attorney is appointed by the treating doctor at the time the substitute medical consent is needed. A health attorney can be a domestic partner, unpaid carer, close relative or close friend and can only provide substitute medical consent.

Nominated person

The *Mental Health Act 2015* (ACT) provides for the appointment of a nominated person by someone with a mental disorder or mental illness. The person must have decision-making capacity in order to nominate someone. This nominated person has many of the same functions of a support person, however:

'the main function of a nominated person for a person with a mental disorder or mental illness is to help the person by ensuring that the interests, views and wishes of the person are respected if the person requires treatment, care or support for a mental disorder or mental illness.' (Mental Health Act 2015 (ACT) s20)

The nominated person is there as an additional oversight mechanism specifically to protect the wishes of the person in question.

Related agencies

ACT Civil and Administrative Tribunal

☎ 02 6207 1740
✉ tribunal@act.gov.au
🌐 www.acat.act.gov.au

ACT Disability Aged and Carer Advocacy Service

☎ 02 6242 5060
✉ adacas@adacas.org.au
🌐 www.adacas.org.au

ACT Human Rights Commission

☎ 02 6205 2222
✉ human.rights@act.gov.au
🌐 www.hrc.act.gov.au

ACT Law Society

☎ 02 6274 0300
✉ mail@actlawsociety.asn.au
🌐 www.actlawsociety.asn.au

ACT Public Advocate

☎ 02 6205 2222
✉ PublicAdvocateReferrals@act.gov.au
🌐 hrc.act.gov.au

Advance Care Planning Australia

☎ 1300 208 582
✉ acpa@austin.org.au
🌐 www.advancecareplanning.org.au

Advocacy for Inclusion

☎ 02 6257 4005
✉ info@advocacyforinclusion.org
🌐 www.advocacyforinclusion.org

Be My Voice

☎ 02 6287 8099
✉ reception@chnact.org.au
🌐 www.bemyvoice.com.au

Canberra Community Law

☎ 02 6218 7900
✉ info@canberracommunitylaw.org.au
🌐 www.canberracommunitylaw.org.au

Carers ACT

☎ 1800 052 222
(Carer Support Services) or
1800 242 636
(Carer Advice and Information)
✉ carers@carersact.org.au
🌐 www.carersact.org.au

Legal Aid ACT

☎ 1300 654 314 (Helpline) or
02 6243 3436 (Older Persons
ACT Legal Service)
✉ legalaid@legalaidact.org.au
🌐 www.legalaidact.org.au

Public Trustee and Guardian

☎ 02 6207 9800
✉ PTG@act.gov.au
🌐 www.ptg.act.gov.au

Further reading

Allens and Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity* (Queensland Law Society, 2014).

American Bar Association and American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (American Bar Association and American Psychological Association, 2005).

Bernadette McSherry, 'Mental Health Laws: Where To From Here?' (2014) 40(1) *Monash University Law Review* 175.

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

NSW, The State of, *Capacity Toolkit*, (Attorney-General's Department, 2008).

O'Neill, Nick and Carmelle Peisah, *Capacity and the Law* (Sydney University Press Law Books, 2011).

Public Trustee and Guardian, ACT Government *The Power to Choose* (Publication).

Sabatino, Charles, 'Representing a Client with Diminished Capacity: How Do You Know It and What Do You Do About It?' (2000) 16 *Journal of the American Academy of Matrimonial Lawyers* 481.

Legal Aid ACT



2 Allsop Street, Canberra City ACT 2601

t 1300 654 314 | **e** legalaid@legalaidact.org.au | **w** www.legalaidact.org.au

