

# CAPACITY GUIDELINES

A PRACTICAL GUIDE FOR  
LEGAL PRACTITIONERS

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# TABLE OF CONTENTS

<b>Introduction</b>	<b>2</b>	<b>Further reading and resources</b>	<b>16</b>
<b>1 What is capacity?</b>	<b>3</b>	Where can I go for more help?	16
Don't confuse capacity with trauma, stress or undue influence	4	<b>Schedule 1</b>	<b>17</b>
The role of the legal practitioner	5	Testamentary Capacity	17
<b>2 Key principles of capacity</b>	<b>6</b>	Capacity to manage personal affairs	18
<b>3 Assessing capacity</b>	<b>7</b>	Capacity to make a power of attorney	19
Signs that a person's capacity is in doubt	7	Capacity to provide instructions and conduct and participate in proceedings	20
Maximising capacity and supported decision-making	8	Capacity to consent to medical treatment	23
Supported decision-making	9	<b>Schedule 2</b>	<b>24</b>
Working with Culturally and Linguistically Diverse Clients and Aboriginal and Torres Strait Islander clients	10	Pro forma letter of instruction	24
Referring your client for a formal assessment	11		
Making the final legal judgement	13		
<b>4 What to do if a client lacks capacity?</b>	<b>15</b>		

# INTRODUCTION

**These Capacity Guidelines are designed to assist legal professionals gain a better understanding of the needs of clients with disability.<sup>1</sup> They will help practitioners make reasonable adjustments when necessary to support clients give meaningful instructions, understand their legal rights and options, and participate in legal processes relating to them.**

While it is presumed that clients have capacity to make decisions for and about themselves, practitioners must nonetheless be alert to the signs of a lack of capacity. Throughout this guide, the term ‘capacity’ refers to the mental aspect of establishing capacity, rather than other aspects such as a minimum age requirement.<sup>2</sup>

Australia ratified the United Nations *Convention on the Rights of Persons with Disabilities* (CRPD)<sup>3</sup> in 2008. The CRPD makes clear how existing human rights apply to persons with disabilities and provides the framework for many of the principles outlined in this guide.<sup>4</sup>

This guide provides the ACT legal profession with a framework to assess whether a client has capacity to give instructions and outlines the steps that should be adopted when a client’s capacity is in doubt. It also sets out in greater detail the relevant legal tests for capacity (such as making a will or power of attorney, giving instructions to a solicitor, or managing one’s affairs generally). Finally, it includes several pro forma resources that practitioners can use and adapt.

Ultimately, this resource seeks to help legal practitioners facilitate the participation of clients with disability in important legal processes while ensuring decisions are not made by clients without capacity.<sup>5</sup>

Funding for the development of these guidelines was provided as part of the ACT Disability Justice Strategy First Action Plan.<sup>6</sup>

1 People with disability are those who have ‘long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others’: *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006 [2008] ATS 12, entered into force 3 May 2008, art 1 (CRPD).

2 See further, discussion of ‘legal capacity’ in Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Final Report 124, August 2014) 44–47.

3 CRPD (n 1).

4 Nick O’Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press, 4<sup>th</sup> ed, 2019) ch 1.2.

5 *Ibid* ch 1.1.

6 Available at: <[https://www.communityservices.act.gov.au/disability\\_act/disability-justice-strategy](https://www.communityservices.act.gov.au/disability_act/disability-justice-strategy)>.

# 1 WHAT IS CAPACITY?

**There is no single legal definition of capacity. The legal definition of capacity depends upon the type of decision being made.<sup>7</sup> There are a variety of legal tests of capacity that are always assessed by reference to the capacity to do something, such as enter into a contract, make a will, or provide instructions to a lawyer.**

Importantly, lack of capacity in one respect does not necessarily entail a lack of capacity in other respects. For example, a person can lack capacity to manage their financial affairs but still have capacity to make a will.<sup>8</sup> Additionally, we all require support to make decisions and different levels of support are required for different decisions. An individual may require support to understand legal information but be able to clearly express their values, will and preference pertinent to the decision. An individual may make use of memory aids to retain or reference information, but clearly express their intent in the preparation of a will.

As a result, there are a number of legal tests for capacity depending on the type of act or transaction in question. Schedule 1 to this guide sets out in greater detail the relevant legal tests for capacity.

Practitioners need to ascertain whether a client is able to understand the general nature of what they are doing.<sup>9</sup> This understanding will typically be comprised of the following elements:

- an understanding of the specific situation, relevant facts or basic information about choices;
- an evaluation of the reasonable implications or consequences of making choices;

- the ability to use reasoned processes to weigh the risks and benefits of the choices; and
- the ability to communicate relatively consistent or stable choices.<sup>10</sup>

Some questions practitioners can ask in doing this include:<sup>11</sup>

- Has the client demonstrated a basic understanding of the relevant facts and issues that is necessary for making decisions such as the one in question?
- Does the client have an awareness of options in regard to decisions, and of personal and legal obligations and restrictions?
- Does the client have an ability to compare likely consequences as a result of choosing one option over another?
- Does the client have insight into their abilities and limitations for decision making?
- Is the client aware of the existence or possibility of exploitation for personal gain?
- Are the conclusions the client reaches consistent with the information on which the conclusion is based?
- Is the client able to explain the reasoning process behind their decision?
- Are the client's desired outcomes stable or do they vary? Can the client recall previous decisions?

7 *Gibbons v Wright* (1954) 91 CLR 423.

8 *Re Estate of Margaret Bellew* (Supreme Court of New South Wales, Probate Division, McLelland J, 13 August 1992).

9 The general rule is that '[t]he law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation': *Gibbons v Wright* (1954) 91 CLR 423, 437 (Dixon CJ).

10 O'Neill and Peisah (n 4) ch 1.3.

11 Allens and Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity* (Report, 1 July 2014), 33–34 (Queensland Handbook).



## CASE STUDY

Arthur is in his eighties and signed an enduring power of attorney (EPOA) several years ago appointing his son, Edward as his attorney. The EPOA will commence if Arthur develops impaired decision-making capacity. He did not limit any of the matters that his attorney could deal with and he did not authorise his attorney to act in a conflict of interest situation. He has been unable to access money from his bank account. Arthur indicated a few months ago he was disoriented and got lost going for a walk. His son Edward took Arthur to the doctor, and the doctor suggested Arthur was showing early signs of dementia. Edward has since taken full control of Arthur's finances as his attorney and indicated that he will soon be putting Arthur's house on the market and moving him into an aged care facility. Arthur is concerned about his money as he knows Edward is in a lot of debt.

Arthur seeks legal advice about his options.

The solicitor concludes that Arthur has capacity to provide instructions, noting that Arthur:

- is presumed to have capacity to manage his personal and financial affairs (the fact that he may have signs of dementia does not rebut the presumption, although it could be a 'red flag' of impaired capacity)
- understands the purpose and nature of an EPOA, including that Edward should not be acting as his attorney while he has capacity
- gave the solicitor logical and coherent instructions:
  - He indicated he had an infection when he got lost a few months ago and this was why he became confused — he has since recovered with antibiotics.
  - He feels that his son does not take into account his wishes, is limiting his autonomy, and is not considering other options Arthur has presented to him, e.g. Arthur is willing to get home services assistance and set up Centrepay and direct debits for some of his bills.
  - He believes his son may have moved his savings out of his account and he would like assistance recovering these funds.
  - He feels that he is socially isolated and Edward is taking advantage of his isolation.
  - He no longer likes the idea that Edward can control his money or have the power to decide where he should live because he doesn't trust him anymore after what has happened.

## Don't confuse capacity with trauma, stress or undue influence

While lawyers should turn their minds to issues of undue influence and duress in appropriate circumstances, the issue of whether someone is being unduly influenced or experiencing duress is distinct from the issue of whether they have the capacity to make a particular decision, or enter into a particular transaction.

Similarly, sometimes the effects of trauma or stress may result in a client being unable to coherently explain what they have experienced, or communicate fixed details such as dates and times. This does not necessarily mean that the client lacks capacity. For example, when working with family violence-affected

clients, a client may be unable to recall specific incidents related to the violence but may be able to formulate coherent responses to questions about their finances, housing arrangements, or work.

Practitioners can assist clients by building sufficient rapport with them. This can be done through multiple meetings and using appropriate breaks, acknowledging the client's experiences, using supported decision-making practices and making warm referrals — with the client's consent — to specialist services such as the Domestic Violence Crisis Service (DVCS) or Victim Support ACT.



## CASE STUDY

Tina is highly distressed and goes to her solicitor for family law and family violence advice. At the interview, she is unable to stop crying, her eyes remain shut for a lot of the time, her speech is slurred, she keeps rocking and swaying and she appears confused. When speaking about the family violence specifically, Tina struggles to recall specific dates or incidents, and is fixated on some relatively minor incident. Tina states that the perpetrator told people she was 'crazy' and 'delusional'. She believes him. However, when talking about other day-to-day matters such as her children and work, Tina is more calm and coherent.

The solicitor, with Tina's consent, makes a warm referral to DVCS and Victim Support ACT. After addressing the immediate safety concerns, acknowledging Tina's story, receiving collateral history from the client's supportive family member who was able to assist with dates and more specific details, Tina was able to leave the home with her children and instruct of her own accord to apply for a family violence order.

## The role of the legal practitioner

Rule 8 of the Legal Profession (Solicitors) Conduct Rules 2015 (ACT) provides that 'a solicitor must follow a client's lawful, proper and competent instructions.' Associated commentary notes that '... solicitors must be reasonably satisfied that their client has the mental capacity to give instructions, and if not so satisfied, must not act for or represent the client'.<sup>12</sup>

While it is the role of the court to make the final decision about whether a person has capacity, legal practitioners have a role to play in assessing whether a client lacks capacity by:

- making an assessment of capacity by reference to 'red flags' and the nature of their clients' interactions with them, and supporting the client in order to maximise the client's capacity to give instructions
- seeking a consultation or formal evaluation with an expert of the client's capacity where it may be in doubt
- making a judgment about capacity for each particular decision or transaction.

While 'a failure to be alert to issues of incapacity has the potential to generate liability in negligence',<sup>13</sup> if practitioners know how to respond to situations where a client's capacity is in doubt, they should be less inclined to refuse to act out of fear of disciplinary action. In doing so, some of the most disadvantaged in our community will be better able to access critical legal assistance.

Ultimately, '[w]hether or not a court reaches a contrary conclusion about the client's capacity in subsequent proceedings is irrelevant. It is **the process, not the ultimate conclusion**, that is important'.<sup>14</sup>

<sup>12</sup> See Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Commentary* (Discussion Paper, August 2015) 7.

<sup>13</sup> See also *Anastasia Pates v Diane Craig and the Public Trustee: Estate of the Late Joyce Jean Cole No 106306/94 Wills-Solicitors* [1995] NSWSC 87; *Winefield v Clarke* [2008] NSWSC 882; *White v Wills* [2014] NSWSC 1160.

<sup>14</sup> Queensland Handbook (n11), 18.

## 2 KEY PRINCIPLES OF CAPACITY

The following core principles relating to capacity should inform any assessment conducted by legal practitioners:<sup>15</sup>

- 1 Presume that a person has capacity.** At common law, it is presumed that a person has the capacity to make decisions for themselves, unless there is evidence to rebut the presumption.
- 2 Capacity is decision-specific.** Capacity must be assessed for each decision or transaction. If a client can make some but not all decisions, then they have a right to make as many decisions as possible.
- 3 Capacity is fluid.** A person's capacity can fluctuate over time or in different situations, so their capacity must be assessed for each decision whenever there is doubt. Even where a client lacked the ability to make a specific decision in the past, they might be able to make that decision later on. Clients might also regain, or increase, their capacity, for example by learning new skills
- or taking medication. Other factors such as stress, grief, depression, reversible medical conditions, or hearing or visual impairments may also affect a person's decision-making capacity.
- 4 Don't assume that a person lacks capacity because of age, appearance, education level, behaviour or disability.** The mere fact that disability or old age exists does not warrant the conclusion that the person lacks capacity to make particular decisions.
- 5 Assess a person's decision-making ability and not the decision itself.** A person does not lack capacity merely because they make a decision you would not have made or one you think is wrong or unwise.
- 6 Substitute decision-making is a last resort.** Ensure that everything possible has been done to support the client to make a decision. Seek appointment of a substitute decision-maker *only after all other options have been exhausted*.



### CASE STUDY

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.

<sup>15</sup> See New South Wales Attorney General's Department, *Capacity Toolkit: Information for government and community workers, professionals, families and carers in New South Wales*, (Sydney, 2008) 27–47.

# 3 ASSESSING CAPACITY

Once the decision in question and legal test for it has been identified, the following framework may be used to guide practitioners in assessing a client's decision-making capacity.

## Signs that a person's capacity is in doubt

Assessing a client's capacity is often a difficult task. It is also one that should be treated with care and seriousness. At times, it will be obvious that a person lacks capacity, such as where a person is clearly unable to comprehend what is being said to them, or to communicate in a rational way.

Other times, however, a lack of capacity will not be clear. A person can appear oriented in time and space and be able to hold a rational conversation but still show signs of lacking capacity (because, for example, they cannot make reasoned judgments or properly reason through consequences).

There are certain indicators of a lack of capacity which should cause 'warning bells to go off' if a solicitor becomes aware of them.

## 'Red flags' to be aware of

Some of the following 'red flags' might warrant further investigation (noting that these signs could also be a response to a stressful situation):

- a client demonstrates difficulty with recall or memory
- a client has ongoing difficulty with addressing questions put to them about their matter
- a client has problems with simple calculations which they did not have previously
- a client is disoriented
- there is a sense that 'something about the client has changed', such as deterioration in personal presentation, mood or social withdrawal
- a client has changed solicitors several times over a short period, particularly if there has been a change from a solicitor who has advised the client for many years
- a client is accompanied by many other friends, family or carers to interviews with the solicitor but is not given the chance to speak for themselves
- a client shows a limited ability to interact with the solicitor
- a client shows a limited ability to repeat advice to the solicitor and ask questions about the issues.<sup>16</sup>

Note that these are by no means exhaustive and should not be used as grounds for a formal diagnosis.

<sup>16</sup> American Bar Association Commission on Law and Aging and the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) 13–16 (*Assessment of Older Adults with Diminished Capacity*).

## Maximising capacity and supported decision-making

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If 'red flags' have been identified, steps should be taken to ensure there is access to supports to maximise a client's ability to participate in the decision. This might include checking if there are memory aids they use routinely, or ensuring that written material or explanations are accessible. This also involves, among other things, **explaining to the client the legal test that is required to be met.**

The *Queensland Handbook for Practitioners on Legal Capacity* provides some useful tips on how to maximise a client's capacity, such as:<sup>17</sup>

- meet with client in person and alone (noting the client's possible subsequent need for support)
  - adapt your communication style (deal with simple issues first, take breaks, allow the client time to think, provide memory cues and explain matters exhaustively)
  - explain the area of law and the legal test that needs to be met
  - use open ended questions — a client's understanding of what a particular decision or transaction involves is best tested by using open ended questions, and asking the client to explain in their own words the import of the decision or transaction
- it may be useful to ask the client to consider a similar situation they may have experienced in the past
  - ensure any interpreters, non-verbal communication tools, visual and auditory aids (such as hearing amplifiers) are available for the client to use
  - ensure the meeting environment is appropriate — this may be quiet, well-lit, comfortable and familiar to the client
  - consider the timing of decision-making (e.g. a morning appointment may better suit the client) and whether gradual decision-making (over a series of meetings) or delayed decision-making (to a time when the client is most lucid) would increase capacity
  - seek the assistance of third parties such as friends, family or community supports but only with the prior consent of the client. Where possible, the client should answer your questions. If your client has a support person or an advocate accompanying them, be sure that it is the client answering the questions rather than the support person on the client's behalf (unless the client has difficulties communicating). Verify any vested interest by support persons.

<sup>17</sup> *Queensland Handbook* (n 11) 8–10.

## Supported decision-making

Support is decision-specific and time-specific. Support looks different for each person, and everything should be done to support a client to maximise their participation in decisions about their own life.

Not all decisions call for a supported decision-making process and not all supported decision-making processes call for the involvement of a legal practitioner. Like the test for capacity, the need for supported decision-making is context specific and depends on the circumstances of the person and the nature of the decision to be made.

Similarly, supported decision-making can take a variety of forms — it can be ‘translating’ unfamiliar words or technical terms into easy language, identifying options in plain language or helping the person work through the pros and cons of a particular decision.

The process of supported decision-making can be captured by the acronym **ASK ME**:<sup>18</sup>

A	S	K	M	E
<b>Assess</b> the person’s strengths and weaknesses in decision-making, memory, planning and understanding of consequences.	<b>Simplify</b> the task at hand. That is, limit decisions to those about which the person can express desires and understand consequences.	<b>Know</b> the person. Find out the person’s long-held values and whether they still hold these values. Respect the person’s right to change their mind.	<b>Maximise</b> the ability to participate in the decision. Remove barriers to communication (use visual aids, interpreters, etc) or schedule appointments at a time that works best for the client.	<b>Enable</b> participation in decision-making. Assist and facilitate communication

<sup>18</sup> O’Neill and Peisah (n 4) ch 1.4.

## Working with Culturally and Linguistically Diverse Clients (CALD) and Aboriginal and Torres Strait Islander clients

Where a client requires an interpreter it is always preferable that family members or friends do not act as interpreters as it may be hard for these individuals to interpret accurately and impartially or to maintain confidentiality. Accredited interpreters are bound by standards of conduct and have been assessed as having the required competence in the relevant language. Using an accredited interpreter will ensure that there are no misunderstandings or miscommunications between you and your client.<sup>19</sup>

Further, sometimes people lose verbal skills 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 may require an interpreter. It is always best to check with the client before the meeting whether an interpreter is required, and to choose the preferred mode of interpreting.

It is also good to develop an understanding of the role of cultural decisions in a client's life and decision-making processes. Legal Aid ACT's Community Liaison Unit can be contacted for information and referral services relating to supporting clients with disability from CALD and Aboriginal and Torres Strait Islander backgrounds.



### CASE STUDY: Maximising a client's capacity in the family law context

Xuelin is in the middle of a family law dispute relating to parenting and property matters. She has struggled with mental health issues in the past, and has indicated she is struggling now with schizo affective disorder. During consultation with you, she is unable to provide a coherent account of the separation or give clear instructions on how to proceed.

Being mindful of time limitations, you try and get more information from Xuelin about when she separated. Xuelin also agrees to you calling an interpreter using the Telephone Interpreter Service (TIS) as English is not her preferred language. While with you, she also agrees to call her brother, who is also her support person, to confirm when she separated. While on the phone, Xuelin also lets you have a chat to her brother to get a bit of background about her matter and personal circumstances. You have the phone on speaker so that Xuelin can participate in the discussion relating to her. Having determined that there were no imminent deadlines, Xuelin's brother agrees to support her to get in contact with her doctor for treatment. With Xuelin's permission, and while her brother is still on the phone, you explain the family law process, the steps involved and time limits, and some of the options available to Xuelin. You also agree to provide an information sheet by Xuelin's preferred method of communication and invite them to get in touch if they have any questions. They agree to follow up in a couple of weeks to progress the matter.

<sup>19</sup> See Legal Aid New South Wales, *Guidelines on Interpreting and Translation* (2014) <[www.legalaid.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0018/5832/Guidelines-on-interpreting-and-translation.pdf](http://www.legalaid.nsw.gov.au/__data/assets/pdf_file/0018/5832/Guidelines-on-interpreting-and-translation.pdf)>.

## Referring your client for a formal assessment

Once the client's capacity has been maximised, again conduct an assessment of the client's capacity having regard to the relevant legal test to be applied (see Schedule 1).

If it is concluded that the client has (or does not have) capacity, make a record of this by taking detailed and contemporaneous file notes (including questions and answers recorded verbatim),<sup>20</sup> a record of the assessment process, the client's reasoning and ultimate conclusions. A solicitor's notes may also be of assistance to any professional clinician who may be engaged to undertake an assessment of the client's capacity.

If you still have doubts about a client's capacity, you may need to engage a medical professional with experience in assessing capacity to make a formal assessment, but only with your client's consent.

If the matter is being litigated, a medical report addressing capacity will almost certainly be required.<sup>21</sup>

There are a number of different medical professionals who can undertake such an assessment. In selecting the appropriate expert, practitioners should take into account their client's particular circumstances, the nature of the possible incapacity (e.g. mental illness, intellectual disability, acquired brain injury or dementia) and the experience and qualifications of the proposed expert.

The following medical professionals might be in a position to undertake a capacity assessment depending upon the needs and circumstances of the client.

### Medical experts<sup>22</sup>

Medical professional	Expertise
<b>Psychiatrist</b>	A medical doctor who specialises in the study, treatment and prevention of mental disorders.
<b>Psychologist</b>	A person engaged in the scientific study of the mind, mental processes and behaviour. They are not medical doctors.
<b>Neuropsychologist</b>	A psychologist who conducts assessments that ascertain the presence and nature of brain dysfunction. The assessment is conducted through interviews, observation and psychological testing and generally involves the administration of tests of memory, concentration, other thinking skills and language ability.
<b>Psychogeriatricians</b>	A psychiatrist who specialises in the diagnosis, treatment and prevention of mental disorders occurring in the aged.
<b>Geriatrician</b>	A medical doctor specialising in the diagnosis, treatment and prevention of disorders that occur in old age, and with the care of the aged.
<b>Gerontologist</b>	A scientist who studies the changes in the mind and body that accompany ageing and the problems associated with them.
<b>Neurologist</b>	A scientist who specialises in the diagnosis, treatment and prevention of diseases of the nervous system.

<sup>20</sup> One option, with the client's consent, may be to use 'dictate' in a software package to record the client interview.

<sup>21</sup> See *Fehily v Atkinson* [2016] 3069 EWHC Ch 84, quoting *Masterman-Lister v Brutton & Co* [2002] 1889 EWCA Civ 29.

<sup>22</sup> Law Society of New South Wales, *When a Client's Mental Capacity is in Doubt: A Practical Guide for Solicitors* (Guide, 2016) 9.

Referrals for medical capacity assessments can be made through the client's GP to a private geriatrician or the ACT government aged care outpatient service.

It will often be a sensitive, if not unpleasant, task to suggest to a client that there are concerns they do not have the capacity to make their own decisions. Loss of capacity is frightening and stigmatising to most people, and many clients will be offended, angry and defensive when this issue is raised.

This task may be made easier if it can be explained to the client by reference to the legal need to ensure that the client's capacity is adequate for the task at hand. The formal assessment could be suggested as a kind of 'insurance' to protect against possible future legal challenges to the validity of the legal transaction involved. The consequences of not being able to act for a client should also be canvassed.

## Writing the referral letter

A good medical report always starts with an appropriately detailed referral letter. If it is not clear to the medical professional what they are being asked to do and if they lack pertinent information, the provided opinion may be vague and unhelpful to the central issue of the client's capacity to make a particular legal decision.

Thus, a good referral letter should set out:

- the client's background
- the reason the client contacted the solicitor
- the purpose of the referral — what is the legal task or decision being considered
- relevant legal standard of capacity to perform the task at hand — here practitioners should outline the legal test and also seek a response from the author of the report which demonstrates the client's understanding (or lack thereof)
- copies of the documents in question (wills, powers of attorney, etc)
- any known medical information about the client
- information about the client's social or living circumstances
- the client's values and preferences if known
- supports the client may use in communicating with the assessor.

A pro forma letter is included at Schedule 2.

In the context of legal proceedings, a good report is essential. Reports that provide non-specific conclusions or do not set out the basis for conclusions have been criticised and are of limited or no value for the purposes of assessing capacity.<sup>23</sup>

<sup>23</sup> See, e.g. *Re Clara (Guardianship)* [2019] ACAT 46 in relation to capacity to understand the nature and effect of making an enduring power of attorney generally.

### What if my client refuses to consent to a medical assessment or doesn't believe there is any issue with their capacity?

If your client does not consent to a medical assessment where you believe there are genuine doubts as to capacity, you will be placed in an awkward position. Ultimately, legal practitioners cannot force a client to undergo a formal assessment (see section 'What to do if a client lacks capacity?' for more information as to how to proceed).

The *Queensland Handbook for Practitioners on Legal Capacity* recommends that if a practitioner finds themselves in such a situation, the issue of a medical assessment should be revisited where:

- after a period of time, initial concerns about capacity still remain
- all other possible options have been explored and either rejected or are not feasible
- the consequences of no longer acting for the client have been fully canvassed.<sup>24</sup>

<sup>24</sup> *Queensland Handbook* (n 11) 44.

### Making the final legal assessment

A capacity assessment report sent to a solicitor may conclude that the client is or is not capable of the particular legal task in issue, for example, that they do have testamentary capacity. However it is important to remember that these findings are clinical opinions which are distinct from a legal determination about capacity. They are simply one source of evidence about the issue which the solicitor must consider before finally advising the client.<sup>25</sup>

The solicitor must take time to thoroughly read and understand the report and to clarify any technical terms or language with the report's writer if necessary.<sup>26</sup>

The clinical report could also be used to discuss clinical intervention or treatment options with the client or their family.<sup>27</sup> It may be possible that these interventions could improve the client's functioning and/or their capacity. For example, the client could be given antipsychotic medication to address psychiatric symptoms impairing understanding.<sup>28</sup>

Ultimately, whatever decision is reached should be supported by detailed and contemporaneous file notes (including questions and answers recorded verbatim), a record of the assessment process, the reasoning and ultimate conclusions.<sup>29</sup>

Concerns about a client's capacity may not be raised until some years after a solicitor has taken instructions, as is often the case when wills are disputed many years after they have been made. Having detailed notes is crucial.

<sup>25</sup> See *XYZ (Guardianship)* [2007] VCAT 1196 [68]–[70].

<sup>26</sup> *Assessment of Older Adults with Diminished Capacity* (n 16) 39–40.

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*

<sup>29</sup> *Queensland Handbook* (n 11) 10.



### **CASE STUDY: Capacity assessment in practice**

Beatrice is an 83-year-old woman who comes to see you about making a new power of attorney. As you're talking with her, you learn that she has executed four powers of attorney over the last five years. Each previous power of attorney appointed someone different as the attorney, though they have all been close family members or friends. When you ask her why she revoked and remade these powers of attorney, Beatrice replies that she thought the people she appointed 'made bad choices' and were 'not friendly'. When asked to provide an example, Beatrice tells you that her daughter 'took some of my money'; when asked further about this, you learn that her daughter set aside some money to pay for repairing some termite damage to Beatrice's home. You also learn that the current attorney had begun the process of admitting Beatrice into a nursing home and has a place for her.

#### **Does Beatrice have capacity to make a new power of attorney?**

Identify the legal test for capacity to make a new enduring power of attorney (EPOA) (see Schedule 1). Also consider whether there is any reason to question whether Beatrice has capacity. The fact that Beatrice has made four powers of attorney over five years could raise red flags. The frequency with which Beatrice revoked and remade the powers of attorney might mean that she has trouble thinking through the pros and cons of a decision and sticking with a decision unless there is a logical reason to change her mind. Further, it may be useful to explore why Beatrice thought that her daughter was making a bad decision when she set aside money to pay for termite damage rectification.

Explain to Beatrice in easy English what an EPOA is and when someone can and cannot make an EPOA. Explain to her the legal test for making an EPOA — you may wish to use diagrams and present her with a factsheet to take home and read. You should tell her the risks, benefits and possible consequences of making a new EPOA and the possibility of tailoring the document to meet her needs.

You could suggest that Beatrice take some time to consider making an EPOA in light of your discussion and that she come back in a week or so. You could find out from Beatrice what time of day she functions best and whether there are any aids required.

Then seek to assess whether Beatrice understands the nature and effect of creating another EPOA. To do this, use open-ended questions such as 'what do you understand an EPOA to be?'; 'under an EPOA, what can your attorney do with your property?'; 'what powers do you want to give your attorney?'.

You may also wish to have another lawyer in your practice present during the assessment process. If you think that there may be an issue with Beatrice understanding the legal nature and effect of entering into an EPOA, you should ask for consent to obtain a medical report (refer to Schedule 2 for pro forma).

Remember that a medical report is not determinative, particularly when it fails to address the legal test or provide non-specific conclusions. Ultimately, whatever decision is reached needs to be supported by detailed and contemporaneous file notes (including questions and answers recorded verbatim), a record of the assessment process, the reasoning and ultimate conclusions.

## 4 WHAT TO DO IF A CLIENT LACKS CAPACITY?

If a client lacks capacity to make the decision or enter into the transaction in question, a substitute decision-maker may have to be appointed. A client may already have an EPOA in place; if so, the attorney named in the EPOA may be able to make the decision or enter into the transaction subject to the terms of the EPOA.

If there is no EPOA or other substitute decision-making arrangement already in place, then a guardian, litigation guardian and/or a financial manager may have to be appointed.<sup>30</sup> It is also important to note that some decisions cannot be made by substitute decision-makers.<sup>31</sup>

As a general rule, applications to appoint a guardian or financial manager should not be brought by the client's legal practitioner where there is a relative, friend or other person who could bring the application instead.<sup>32</sup>

A solicitor may bring an application where there is no reasonable alternative; however, solicitors must remain mindful of confidentiality obligations in doing so. Further, '[t]he bringing of such actions is extremely undesirable because it involves the solicitor in a conflict between the duty to do what the solicitor considers best for the client and the duty to act in accordance with the client's instructions; and also because of a possible conflict between the solicitor's duty to the client and the solicitor's interest in continuing to act in the proceedings in question and to receive fees for this'.<sup>33</sup>

Legal practitioners should only consider ceasing to act if a substitute decision-maker cannot be appointed. A solicitor can cease acting for a client for just cause and on reasonable notice.<sup>34</sup> If the lawyer ceases to act, they should give the client reasonable notice and provide the client with a letter setting out their reasons for ceasing to act, the possible consequences for the client and the options and support available to the client.<sup>35</sup> If the retainer is to be terminated, then the client should be given as much notice as possible in writing.

In cases of doubt, solicitors can obtain guidance from the ethics team at the ACT Law Society.

<sup>30</sup> See Schedule 1 for the relevant tests.

<sup>31</sup> In the guardianship context, these include voting, making a will, consenting to the adoption of a child, consenting to a marriage or civil union and consenting to a prescribed medical procedure: *Guardianship and Management of Property Act 1991* (ACT) s 7B.

<sup>32</sup> *R v P* (2001) NSWLR 664, 683 [63] (Hodgson JA).

<sup>33</sup> *Ibid* 683 [64] (Hodgson JA).

<sup>34</sup> *Legal Profession (Solicitors) Conduct Rules 2015* (ACT) r 13.1.3.

<sup>35</sup> *Queensland Handbook* (n 11) 11.

## FURTHER READING AND RESOURCES

Allens and Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity* (Report, 1 July 2014) <[www.qls.com.au/Knowledge\\_centre/Ethics/Resources/Client\\_instructions\\_and\\_capacity/Queensland\\_Handbook\\_for\\_Practitioners\\_on\\_Legal\\_Capacity](http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity/Queensland_Handbook_for_Practitioners_on_Legal_Capacity)>.

American Bar Association Commission on Law and Aging and the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005) <[www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf](http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf)>.

Law Society of New South Wales, *When a Client's Mental Capacity is in Doubt: A Practical Guide for Solicitors* (Guide, 2016) <[www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf](http://www.lawsociety.com.au/sites/default/files/2018-03/Clients%20mental%20capacity.pdf)>.

New South Wales Attorney General's Department, *Capacity Toolkit: Information for government and community workers, professionals, families and carers in New South Wales*, (Sydney, 2008).

Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press, 4th ed, 2019) <<http://austlii.community/wiki/Books/CapacityAndTheLaw/#FootNote2note>>.

Sinclair, C et al, *Supporting decision-making: A guide for people living with dementia, family members and carers* (2018) <[http://sydney.edu.au/medicine/cdpc/documents/resources/SDM\\_Handbook\\_Online\\_Consumers-ReducedSize.pdf](http://sydney.edu.au/medicine/cdpc/documents/resources/SDM_Handbook_Online_Consumers-ReducedSize.pdf)>.

### Where can I go for more help?

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#### ACT Human Rights Commission

☎ 02 6205 2222  
✉ [human.rights@act.gov.au](mailto:human.rights@act.gov.au)  
🌐 [www.hrc.act.gov.au](http://www.hrc.act.gov.au)

#### ACT Law Society

☎ 02 6247 0300  
✉ [mail@actlawsociety.asn.au](mailto:mail@actlawsociety.asn.au)  
🌐 [www.actlawsociety.asn.au](http://www.actlawsociety.asn.au)

#### ADACAS

☎ 02 6242 5060  
✉ [adacas@adacas.org.au](mailto:adacas@adacas.org.au)  
🌐 [www.adacas.org.au](http://www.adacas.org.au)

#### Advocacy for Inclusion

☎ 02 6257 4005  
✉ [info@advocacyforinclusion.org](mailto:info@advocacyforinclusion.org)  
🌐 [www.advocacyforinclusion.org](http://www.advocacyforinclusion.org)

#### Canberra Community Law

☎ 02 6218 7900  
✉ [info@canberracommunitylaw.org.au](mailto:info@canberracommunitylaw.org.au)  
🌐 [www.canberracommunitylaw.org.au](http://www.canberracommunitylaw.org.au)

#### Legal Aid ACT

☎ 1300 654 314  
✉ [legalaid@legalaidact.org.au](mailto:legalaid@legalaidact.org.au)  
🌐 [www.legalaidact.org.au](http://www.legalaidact.org.au)

#### Public Trustee and Guardian

☎ 02 6207 9800  
🌐 [www.ptg.act.gov.au](http://www.ptg.act.gov.au)

# SCHEDULE 1

## Testamentary capacity

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The fundamental statement of the test for testamentary capacity was articulated by Cockburn CJ in *Banks v Goodfellow* (1870) LR 5 QB 549, 565:

*It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties — that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made.*

Unsoundness of mind that does not have a direct bearing on the provisions of the will is not sufficient to invalidate a will.<sup>36</sup>

The current test of testamentary capacity can be distilled to four components. The maker of a will **must**:

- 1 understand the nature and effect of a will
- 2 know the nature and extent of their property
- 3 comprehend and appreciate the claims to which they ought to give effect
- 4 not be affected by delusions that influence the disposal of their assets at the time they make their will.<sup>37</sup>

Practitioners must ensure that they satisfy themselves of a client's capacity to make a will. Failure to do so can quickly become an issue of professional responsibility and, as Kunc J noted in *Ryan v Dalton* [2017] NSWSC 1007 at [106], 'the effort involved in paying attention to questions of capacity at the time instructions for a will are taken and the will is executed (including, where necessary, obtaining an assessment of the client where it is thought one is called for) pales into insignificance with the expense, delay and anxiety caused by litigation after the testator's death'.

<sup>36</sup> *Banks v Goodfellow* (1870) LR 5 QB 549, 570–1; *Bull v Fulton* (1942) 66 CLR 295.

<sup>37</sup> See *Briton v Kipritidis* [2015] NSWSC 1499 [39]–[42] (Ball J).

## Capacity to manage personal affairs

There is no single legal test for capacity to manage one's personal affairs. To the extent that managing personal affairs involves entering into contracts, making a will or power of attorney, getting married or any other act or transaction that has a specific legal test, then that specific test will apply.

In the context of making a guardianship order, which permits a person to make a range of personal and health decisions on behalf of a person who has 'impaired decision-making ability', s 5 of the *Guardianship and Management of Property Act 1991* (ACT) provides that:

*a person has impaired decision-making ability if the person's decision-making ability is impaired because of a physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness.*

In order to make a guardianship order, ACAT must be satisfied that:

- the person has impaired decision-making ability in relation to a matter relating to their health or welfare
- while the person has the impaired decision-making ability there is, or is likely to be, a need for a decision in relation to the matter; or the person is likely to do something in relation to that matter that involves, or is likely to involve, unreasonable risk to the person's health, welfare or property
- if a guardian is not appointed the person's needs will not be met; or the person's interests will be significantly adversely affected.<sup>38</sup>

A person's 'interests' include:

- protection of the person from physical or mental harm
- prevention of the physical or mental deterioration of the person

- the ability of the person to:
  - look after themselves
  - live in the general community
  - take part in community activities
  - maintain their preferred lifestyle (other than any part of the person's preferred lifestyle that is harmful to the person)
- promotion of the person's financial security
- prevention of the wasting of the person's financial resources or the person becoming destitute.<sup>39</sup>

In *Re Jane* [2019] ACAT 18, the Tribunal reinforced that 'impaired decision-making is not an "all or nothing" concept. It must be assessed "in relation to the matter" in question'.<sup>40</sup> In addition, the Tribunal, in deciding that the appointment of a guardian was appropriate in the circumstances, stated that '[w]hether a person has impaired decision-making ability is not a question to be deferred to the medical profession. Sections 7 and 8 state that it is a circumstance about which the Tribunal must be "satisfied". The Tribunal must be satisfied, or not, on the whole of the evidence before it'.<sup>41</sup> The Tribunal further highlighted that:

- the question to ask is whether the proposed protected person has impaired decision-making ability in relation to issues such as accommodation, medical treatment and finances<sup>42</sup>
- 'the right [of a proposed protected person] to be heard also explains why every effort should be made to overcome any impediment that is preventing a person's attendance [at a hearing]. Jane's attendance at the hearing well illustrated the importance and value of hearing from the protected person whenever possible'.<sup>43</sup>

<sup>38</sup> *Guardianship and Management of Property Act 1991* (ACT) s 7(1).

<sup>39</sup> *Ibid* s 5A.

<sup>40</sup> *Re Jane* [2019] ACAT 18, 13 [40].

<sup>41</sup> *Ibid* 15 [45].

<sup>42</sup> *Ibid* 17 [48].

<sup>43</sup> *Ibid* 29 [99].

## Capacity to make a power of attorney

In the absence of evidence to the contrary, a person is presumed to have capacity to make an enduring power of attorney.<sup>44</sup> Having decision-making capacity means the person can make decisions in relation to the person's affairs and understands the nature and effect of the decisions.<sup>45</sup>

Understanding the nature and effect of making an enduring power of attorney includes understanding:

- that, in the power of attorney, the principal may state or limit the powers to be given to an attorney
- that, in the power of attorney, the principal may instruct the attorney about the exercise of the powers given them
- when the powers given under the power of attorney can be exercised by the attorney
- that, if the powers under a power of attorney can be exercised by the attorney, then the attorney has the power to make decisions in relation to, and will have full control over, the matter covered by the power of attorney, subject to terms about exercising the powers that are included in the power of attorney
- that the principal may revoke the power of attorney at any time they have capacity to make the power of attorney
- that the power of attorney continues even if the principal becomes a person with impaired decision-making capacity
- that, at any time the principal is not capable of revoking the power of attorney, they cannot effectively oversee the use of the power.<sup>46</sup>

ACAT's decision in *Re Clara (Guardianship)* [2019] ACAT 46 is particularly instructive in relation to the question of capacity to make a power of attorney. Relevant principles drawn from that case include:

- once evidence rebutting the presumption of capacity is presented, an 'assessment of capacity should be determined by reference to the evidence as a whole'<sup>47</sup>
- determining capacity 'is not a matter of the Tribunal simply referring and/or deferring to medical (or other) opinion'<sup>48</sup>
- in the absence of evidence as to the basis for a solicitor's certification that a person appeared to understand the nature and effect of an Enduring Power of Attorney, little to no weight can be placed on the certification<sup>49</sup>
- medical report writers should:
  - be given a copy of the relevant power of attorney<sup>50</sup>
  - give reasons for their opinions and outline the evidence relied upon<sup>51</sup>
  - be clear and specific in their conclusions as to capacity.<sup>52</sup>

<sup>44</sup> Powers of Attorney Act 2006 (ACT) s 18

<sup>45</sup> Ibid s 9.

<sup>46</sup> Ibid s 17.

<sup>47</sup> *Re Clara (Guardianship)* [2019] ACAT 46, 40 [110].

<sup>48</sup> Ibid 42 [111].

<sup>49</sup> Ibid 51–4 [147]–[163].

<sup>50</sup> Ibid 48 [132].

<sup>51</sup> Ibid 50 [142].

<sup>52</sup> Ibid 49–50 [138]–[140].

## Capacity to provide instructions and conduct and participate in proceedings

### Providing instructions

Rule 8 of the *Legal Profession (Solicitors) Conduct Rules 2015* (ACT) provides that '[a] solicitor must follow a client's lawful, proper and competent instructions'. The corollary of this is that a solicitor should not follow instructions where they are not competently given. If a person is not competent to give instructions, there may also be a related issue of the client's capacity to enter into any costs agreement depending upon when the client's incapacity arose.

In *Goddard Elliot v Fritsch* [2012] VSC 87, Bell J stated that '...a lawyer has a duty of care not...to take and act on instructions from a client to settle a case when they know or should have known the client lacked the mental capacity to give the instructions or could not be reasonably satisfied the client had that capacity. Subject to advocates' immunity, this duty of care is actionable in negligence'<sup>53</sup> His Honour also stated that:

*the primary responsibility of a lawyer is to be satisfied the client has the mental capacity to instruct. Doubts about this issue in the mind of the lawyer can also have important consequences for the conduct of legal proceedings. If the issue cannot be resolved to the reasonable satisfaction of the lawyer...the lawyer must raise the issue with the court. It is the court which has the final responsibility to determine the issue.*<sup>54</sup>

In *Dalle-Molle v Manos* (2004) SASR 193, Debelle J set out the relevant principles with respect to considering capacity to provide instructions:

- '[t]he person must have the capacity not only to give sufficient instructions to prosecute or defend the action but the capacity also to give sufficient instructions to compromise the proceedings'<sup>55</sup>

- sufficient instructions means 'the person is able, once an appropriate explanation has been given, to understand the essential elements of the action and is able then to decide whether to proceed with the litigation or, if it is a question of agreeing a compromise of the proceedings, to decide whether or not to compromise'<sup>56</sup>
- '[t]he question of whether the person has the capacity to give sufficient instructions must be examined against the facts and subject matter of the particular litigation and the issues involved in that litigation'<sup>57</sup>
- '[t]he level of understanding of legal proceedings must, I think, be greater than the mental competence to understand in broad terms what is involved in the decision to prosecute, defend or compromise those proceedings. The person must be able to understand the nature of the litigation, its purpose, its possible outcomes, and the risks in costs which of course is but one of the possible outcomes'.<sup>58</sup>

Similarly, in *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889, Chadwick LJ stated:

*the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has the capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law — whether substantive or procedural — should require the interposition of a next friend or guardian ad litem.*<sup>59</sup>

<sup>53</sup> *Goddard Elliot v Fritsch* [2012] VSC 87, 142 [541].

<sup>54</sup> *Ibid* 153-4 [568].

<sup>55</sup> *Dalle-Molle v Manos* (2004) SASR 193, 198 [21].

<sup>56</sup> *Ibid* 199 [22].

<sup>57</sup> *Ibid* 199 [23].

<sup>58</sup> *Ibid* 199 [26].

<sup>59</sup> *Masterman-Lister v Brutton & Co* [2002] EWCA Civ 1889 [75].

## Starting or defending civil proceedings

A person who is not legally competent is not able to conduct civil proceedings on their own behalf; rather, a litigation guardian must be appointed to conduct the proceedings.

### *ACT Courts*

The *Court Procedures Rules 2006* (ACT) state that unless a territory law otherwise provides,<sup>60</sup> a person with a legal disability may start, defend or carry on a proceeding only by their litigation guardian.<sup>61</sup> 'Person with a legal disability' is defined as a child or a person who is not legally competent to be a party to an application in a proceeding.<sup>62</sup>

### *Federal Court and Federal Circuit Court*

A person under a legal incapacity can start or defend proceedings in the Federal Court only through a litigation representative.<sup>63</sup> A person is under a legal incapacity where they are a minor or a 'mentally disabled person'.<sup>64</sup> A mentally disabled person means 'a person who, because of a mental disability or illness, is not capable of managing the person's own affairs in a proceedings'.<sup>65</sup>

In the Federal Circuit Court, 'if the person does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding' then a litigation guardian must be appointed.<sup>66</sup>

## Defending criminal proceedings

In order for pleas to be entered to criminal charges, the accused person must be fit to plead:

*[I]n order to ensure that the process of determining guilt is as accurate as possible, that the accused can participate in the proceedings or assist counsel in his/her defence, that the dignity of the trial process is maintained, and that, if necessary, the determination of a fit sentence is made possible, the accused must have sufficient mental fitness to participate in the proceedings in a meaningful way.<sup>67</sup>*

It is presumed that a person is fit to plead; however, a person is unfit to plead where the person's mental processes are disordered or impaired to the extent that the person cannot:

- a** understand the nature of the charge
- b** enter a plea to the charge and exercise the right to challenge jurors or the jury
- c** understand that the proceeding is an inquiry about whether the person committed the offence
- d** follow the course of the proceeding
- e** understand the substantial effect of any evidence that may be given in support of the prosecution, or
- f** give instructions to the person's lawyer.<sup>68</sup>

A person is not unfit to plead only because the person is suffering from memory loss.<sup>69</sup>

60 See, e.g. a minor may start certain proceedings in the ACAT: *ACT Civil and Administrative Tribunal Procedures Rules 2020* (ACT) r 47(1).

61 *Court Procedures Rules 2006* (ACT) r 275(1).

62 *Ibid* r Dictionary.

63 *Federal Court Rules 2011* (Cth) r 9.61.

64 *Ibid* sch 1.

65 *Ibid*.

66 *Federal Circuit Court Rules 2001* (Cth) r 11.08.

67 *R v Taylor* (1993) 77 CCC (3d) 551, 566–7, quoted with approval in *R v Bailiff* (2010) 244 FLR 362, 372 [46] (Penfold J).

68 *Crimes Act 1900* (ACT) s 311(1).

69 *Ibid* s 311(2).

Section 311 reflects the test set down by Smith J in *R v Presser* [1958] VR 45:

*[An accused] needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.<sup>70</sup>*

## Giving evidence

Section 13(1) of the *Evidence Act 2011* (ACT) provides that:

'A person is not competent to give evidence about a fact if, for any reason (including mental, intellectual or physical disability):

- a** the person does not have the capacity to understand a question about the fact, or
- b** the person does not have the capacity to give an answer that can be understood to a question about the fact and that capacity cannot be overcome.'

Where a person does not have the capacity to understand that, in giving evidence, they are under an obligation to give truthful evidence, the person is not able to give sworn evidence; however, they may give unsworn evidence subject to the criteria in s 13(5) of the *Evidence Act 2011* (ACT).

<sup>70</sup> *R v Presser* [1958] VR 45, 48.

## Capacity to consent to medical treatment

The *Guardianship and Management of Property Act 1991* (ACT) sets out the regime for substitute consent where an adult cannot consent to medical treatment (and where no attorney has been appointed with powers for health care matters and a Health Direction has not been made).

A 'protected person' is defined as an adult:

- who has impaired decision-making ability for the giving of consent to medical treatment
- who has not appointed an attorney with authority to give consent for medical treatment
- for whom ACAT has not appointed a guardian under the *Guardianship and Management of Property Act 1991* (ACT) with authority to give consent.<sup>71</sup>

'Impaired decision-making ability' means that the person's decision-making ability is impaired because of a physical, mental, psychological or intellectual condition or state, whether or not the condition or state is a diagnosable illness.<sup>72</sup>

A statutory health attorney may make health decisions for a protected person where a health professional believes on reasonable grounds that:

- a person is a protected person
- while the person is a protected person, the person:
  - needs, or is likely to need, medical treatment, or
  - would, or is likely to, benefit from participating in low-risk research
- the person does not have an advance consent direction under the *Mental Health Act 2015* (ACT) authorising the treatment.<sup>73</sup>

Under the *Mental Health Act 2015* (ACT), in relation to mental health treatment, care and support, a person

has decision-making capacity where a person is able to do all of the following things (with or without support):

- understand when a decision about their mental health treatment, care or support needs to be made
- understand the facts that relate to that decision
- understand the main choices available to the person in relation to the decision
- weigh up the consequences of the main choices
- understand how the consequences affect the person
- make the decision, based on the steps above
- communicate the decision in whatever way they can.<sup>74</sup>

A person may also have an Advance Agreement, which is a document created with the person and their treating team that sets out the person's preferences for their mental health treatment, care or support.<sup>75</sup> Another option is an advance consent direction, which allows a person to set out what treatments, medications or procedures the person does or does not consent to.<sup>76</sup>

Further, the Tribunal in *Re Michael* [2020] ACAT 8 made it clear that guardians (in this case, the Public Trustee) have a crucial role to play when it comes to making decisions about what treatments and medications a person subject to the *Mental Health Act 2015* (ACT) should be given. The Tribunal stated that 'a guardian has an important role, recognised under the [Mental Health Act 2015 (ACT)], to promote and protect the protected person's views and wishes unless those views and wishes will significantly adversely affect the person's interests.'<sup>77</sup>

<sup>71</sup> *Guardianship and Management of Property Act 1991* (ACT) s 32A.

<sup>72</sup> *Ibid* s 5.

<sup>73</sup> *Ibid* s 32D(1).

<sup>74</sup> *Mental Health Act 2015* (ACT) s 7.

<sup>75</sup> *Ibid* s 26.

<sup>76</sup> *Ibid* s 27.

<sup>77</sup> *Re Michael* [2020] ACAT 8 [64].

## SCHEDULE 2

### Pro forma letter of instruction

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[Address]

[Date]

Dear Dr [Addressee],

Thank you for agreeing to assess [client's name] and to provide a report in relation to his/her capacity to [make a will/make a power of attorney, etc].

Please contact [client] directly on [contact details] to arrange for them to attend your offices for an assessment.

Further, please find **enclosed** copies of the following documentation:

- [List of documents. Be sure to include a copy of any document at issue (a will, power of attorney, etc)]

### Background

[Provide a short introduction regarding the client's background. If you do not have documents that set out the client's medical information, outline this here so far as they are known. You should also set out the client's social or living circumstances and values/preferences if known.]

[Then provide a short summary of the circumstances that led to the need for an assessment of your client's capacity. Include any relevant observations you have made of your client, especially any 'red flags' you have noted.]

### Your instructions

On the basis of the information included in this letter and its attachments and your assessment of [client], please provide your opinion and the reasons for your opinion on the following matters:

- Whether [client] has the capacity to [make a will/power of attorney/etc].
- In this context 'having the capacity' means [state the relevant legal test].
- [Help by setting out questions the practitioner could ask to elicit whether the client understands the legal nature and effect of making a will/power of attorney, etc. For example:
  - What do you understand an enduring power of attorney to be?
  - What do you understand your attorney could do with your property? And so on...]
- [Other relevant questions in the circumstances]

I would be grateful to receive your completed report by [date]. If you have any questions or require clarification please contact [contact person].

Yours sincerely,



# Legal Aid ACT



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