NSW GOVERNMENT | Justice & Attorney General

Capacity Toolkit

What is ‘capacity’?

How do I decide whether a person has the capacity to make their own decisions?

Information for government and community workers, professionals, families and carers in Tasmania.

Aged Care and Rehabilitation Clinical Network
Department of Health and Human Services

Tasmania
Explore the possibilities

Justice &
Attorney General

This document is based in large part on the New South Wales Capacity Toolkit. The Department of Health and Human Services Tasmania acknowledges the initial work of the NSW Department of Justice and Attorney General in producing the original resource.

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Capacity Toolkit

Information for government and community workers, professionals, families and carers in Tasmania.

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Foreword

As Clinical Leader of the Aged Care Rehabilitation Clinical Network I am excited to have been involved in the production of this excellent resource for the Tasmanian community. As a Specialist in health of older people, issues of capacity and capacity assessment appear regularly in my clinical practice, and this resource and the associated factsheets will be invaluable in promoting understanding and improving quality of outcomes for people whose decision making capacity is compromised. As well as older people, there are many others in our community with physical and intellectual disabilities who will benefit from the knowledge in this toolkit.

The Tasmanian Capacity Toolkit is a one-stop-shop resource for government and community workers, professionals, families and carers. The toolkit aims to:

- provide information about the definition of capacity;
- provide primary principles on which the concept of capacity is assessed;
- outline when a capacity assessment may be needed;
- present guidelines for assessment of capacity to assist in conducting timely assessments and to maintain consistency in the way that capacity is assessed across different decision types;
- provide information about facilitating assisted decision making; and
- give information on what to do if there is a dispute about capacity.

The development of Tasmanian Capacity Toolkit is one of the first projects by the Aged Care and Rehabilitation Clinical Network which is a new model of cooperation that encourages members to work together across the boundaries of the sectors, to deliver best practise through more integrated consistent services to people in Tasmania. The toolkit is a great example of the Network in operation to encourage best practice in service provision in order to improve outcomes for people in Tasmania.

The Tasmanian Capacity Toolkit is adapted from the original document prepared by the NSW Attorney General's Department. I and the Working Group would like to thank Director General Laurie Glanfield for permission to adapt the Toolkit to suit the Tasmanian context, and its author, Jenna Macnab, from the Diversity Services Unit, NSW for her support and help throughout this project. The Capacity Toolkit is the result of feedback received from hundreds of people, many of whom had been involved with someone whose decision making ability had been in question, and is a comprehensive document that promotes and protects the rights of all people. This is a vital tool for all Tasmanians whenever we are vulnerable and need to make decisions about our lives. Please use it.

Yours sincerely

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CAPACITY AT A GLANCE

In this Toolkit 'capacity' is a legal word. We use the term to refer to an adult's ability to make a decision for themself.

Under the law, you must presume that every adult has capacity.

Sometimes you may be the person who decides whether another person has capacity.

Generally, when a person has capacity to make a particular decision they can:

- understand the facts and the choices involved
- weigh up the consequences, and
- communicate the decision.

However, for some decisions there is a specific legal test for capacity. When you are assessing a person's capacity to make any of these decisions you must consider the particular matters outlined in the legal test. The test you use depends on the legal area to which the decision relates. There is more about this in Section 5 of this Toolkit.

Who is the Toolkit for?

This Toolkit is for you if you have concerns about the ability of an adult to make decisions for themself. The person may be someone you:

- work for or with
- provide services to
- care for
- support.

You may need to assess, or seek an assessment of, a person's capacity in your personal or professional life. You may be a:

- family member, friend or work colleague
- advocate[3]
- government or non government employee or volunteer, including:
  - someone who provides home help
  - a housing provider
  - someone who works for an organisation which provides services to people with a disability, older people or people with a mental illness
  - a social worker or case manager

[3] An advocate is someone who supports a person to say what they want, or speaks on behalf of a person, representing their interests in a way that promotes and protects their rights.

- person who works in the law, including a solicitor, barrister, paralegal or court staff
- worker in a financial organisation
- health care worker, including a doctor, dentist, nurse, therapist or ambulance staff.

In general, a person's capacity to make day-to-day decisions is not subject to the type of assessment discussed in this Toolkit. Decisions about when to get up, what to wear or what to eat, for instance, 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 Capacity 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.

How do I use the Toolkit?

The Capacity Toolkit is not an assessment tool. However, it does provide information about capacity, capacity assessment and the various legal tests of capacity in Tasmania, all of which will help you when you need to assess a person's capacity.[4]

This is a guide only. There is no legal responsibility for you to use the Toolkit.

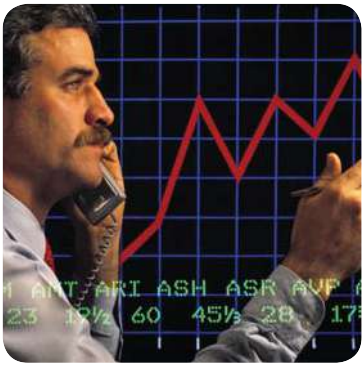
Section 1, the section you are reading now, tells you who will find the Toolkit useful and gives advice on which sections might be of most help to you.

Section 2 is about the general concept of decision-making capacity. It outlines some of the main ideas that are linked to capacity.

Section 3 sets out capacity assessment principles. These are the basic building blocks for any assessment of a person's decision-making capacity. This section also explains when capacity might be assessed and by whom.

Section 4 offers some practical tips on conducting an assessment of capacity.

[4] Once you have read the Toolkit it may be helpful to refer to an assessment tool such as those included in *Who can decide: The six step capacity assessment process* [See References at page 173].



Section 5 will be helpful for people who need to know what the test for decision-making capacity is in a certain area of life. It is divided into three parts, relating to decisions about a person's:

1. personal life and personal decisions
2. health
3. money and property (financial decisions).

Section 6 will be useful when you need to know how to support a person to make a decision for themself. This section is about enhancing a person's capacity to make decisions. It also provides information on how to resolve disagreements if they arise.

Section 7 contains a list of places where you can find further information or advice.

Navigating the Toolkit

The Toolkit is not necessarily meant to be read from cover to cover. If you do, you will find some places where the information is repetitive. Where you are looking for particular information you will be able to find it quickly by using the contents, the index and the Toolkit's colour-coded pages.

CASE STUDY

The case studies, highlighted in boxes, provide examples of issues raised when a person's decision-making capacity is in question.

Pressed for time?

If you are:

- **supporting a person to make a decision themself**, (not assessing capacity) see:
  - Section 2 – What is capacity?
  - Section 3 – Capacity assessment principles
  - Section 6 – Assisted decision-making and How can I support a person to make their own decision?
- **unsure about whether you are someone who should assess a person's capacity,** then read:
  - Section 1 – Who is the Toolkit for?
  - Section 3 – Who might assess capacity?
- **not sure whether a person should have their capacity assessed,** start at:
  - Section 2 – What is capacity?
  - Section 3 – When should capacity be assessed?
- **assessing the capacity of a person** and looking for information on how to proceed, turn to:
  - Section 2 – What is capacity?
  - Section 3 – Capacity assessment principles
  - Section 4 – Tips on assessing capacity
- someone with a lot of knowledge about capacity but **needing guidance on assessment in a specific area,** go to:
  - Section 4 – Tips on assessing capacity
  - Section 5 – Assessing capacity in each area of life.

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What is capacity?

In this Toolkit capacity is a legal word. A person who has capacity is 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
- matters that have legal consequences, including:
  - making a will
  - getting married
  - entering into a contract
  - having medical treatment.

People who have capacity are able to live their lives independently. They can decide what is best for themself 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.**

If a person doesn't have the capacity to make a certain decision, someone called a 'substitute decision-maker' might need to make the decision for them. There is more information about this in Section 3 'Capacity assessment principles' on page 27. (See principle 6.)

Capacity is decision-specific

If you care for, or provide services to, a person whose decision-making is in question you may need to decide frequently (each time a decision is made) whether the person has capacity to make each and every decision.

It is very rare for a person not to have capacity for any decisions. However, this can happen when a person is unconscious or has a severe cognitive disability, for instance.

More often, people lack capacity only in making one sort of decision.

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 more complex decision about money). They can make a decision about accepting treatment (a health decision) when they are well, but not when they are unwell (for example, suffering from severe depression).

CASE STUDY

Decision-specific capacity

'I have a grandfather with dementia. Sometimes he seems to know that I'm his grandson and other times he thinks I'm his son. He has good days and bad days.

At one stage he needed an operation on both eyes because he had cataracts. When the doctor did the first operation, my grandfather didn't know what was going on. He was having one of those bad days and seemed to be stressed out about the hospital. He thought he was at the hospital campsite in the war. He couldn't understand the cataract surgery and the doctor ended up asking my dad to sign the forms to say he could have the operation.

It's funny, really, because when he went back to have the other eye operated on he seemed much better, and when the doctor talked with him he knew what was going on. I think the doctor realised this because he got my grandfather to sign his own forms that time. I don't know why my grandfather understood the second time. Maybe it was because he had done it before, or maybe he was just having one of his better days.'

Lachlan, grandson

What can affect a person's capacity?

Capacity varies from person to person and from situation to situation. Capacity is not something solid that you can hold and measure. Neither is it something that is the same all the time. It is affected by a person's abilities and by what's happening around them.

Everyone's abilities vary and everybody reacts in their own way to their environment. For example, some people enjoy being in a crowded, noisy place but others find it stressful and difficult.

Also, each person's capacity can fluctuate, depending on things such as their mental and physical health, personal strengths, the quality of services they are receiving, and the type and amount of any other support. This creates a challenge for you when undertaking a capacity assessment.[5]

So, the level of capacity a person has at a particular time can depend on the following factors:

- **the type of decision** being made: Is it a financial decision, a health decision, or some other kind of decision?
- **the timing of the decision**: Is the person tired? Is the person more able to make decisions in the morning, for instance?
- **is the decision simple or complicated?**
- **how much information** has the person been given, and what is their level of understanding about the information?
- **communication between the assessor and the person:** Is there effective communication in place at the assessment so each person understands the other? For example, neutral interpreters[6] or advocates may be required, or a particular Communication strategy.[7]

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[5] See Section 4 'Tips on assessing capacity – Flexible assessments', on page 64.

[6] Multicultural Tasmania (Department of Premier and Cabinet) has information about interpreters on their website: www.dpac.tas.gov.au/divisions/cdd/multitas Or call 131450

[7] See Section 6 'How can I support a person to make their own decision? – Communicate in an appropriate way' on page 150.

- **the physical environment** in which the decision is being made: Is the environment noisy or is the situation stressful?
- **the person's experience**: How much knowledge of, or familiarity with, the topic does the person have?
- **health**: Does the person have an illness or condition that worsens from time to time and affects their capacity, such as a mental illness or the effects of drugs, alcohol or anesthetic?
- **personal stress**: Is the person dealing with any social issues which may cause them stress at the time of decision-making?

CASE STUDY

Timing, physical environment and capacity

'My aunt has an intellectual disability. I was appointed as her administrator a while ago. Often I need to reassess which financial decisions she has the ability to make because I don't want to control all her finances when she can do it herself.

I spend time with her a couple of days a week, and after asking questions, I can see whether she is okay to look after her shopping and bills until I see her next. It usually depends on if she is particularly tired or stressed out about something happening around her.

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 even pushing

us to get past. My aunt couldn't concentrate and was anxious. She couldn't make a decision about the phone plans that the sales person was explaining to her. So I made that 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!'

Amrita, niece

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 themself.

A further 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.

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.

CASE STUDY

Regaining capacity

'My daughter has a mental illness which, at times, means that she does not have the capacity to make health decisions for herself. Generally there are many signs and symptoms that alert me to the fact that the illness is beginning to become more severe and affect her capacity. When this happens, I start to become aware of her decision-making ability, particularly around health issues.

Sometimes she decides not to seek medical advice or rejects medical advice given to her. This is one sign that her capacity is affected because when she is well she doesn't make those same types of decisions. Anyhow, in these acute periods of illness I make her health decisions, and any other decision she is not able to make.

The periods of illness vary in length, but my daughter always regains the capacity to make all decisions herself. Of course she then starts to make her own decisions without my interference.'

Helen, mother

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Capacity assessment principles

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**

The following pages in this section look at each of these principles in turn.

1. Always presume a person has capacity

The most basic principle is to presume a person has the capacity to make all decisions for themself.

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 this 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 in some 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.

Sometimes the decision-making process is collective and involves the whole community in meetings and discussions about the decision, such as in some Indigenous communities.[8]

Also, some religious beliefs may impact on the decision made, 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.

[8] See Section 4 'Tips on assessing capacity – Cultural and linguistic diversity and capacity' on page 64.

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.[9]

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, and
- giving an explanation as to the reasons why you made your decision.

[9] See capacity assessment principle 4 'Assess the person's decision-making ability – not the decision they make' on page 36.

You may only need to satisfy yourself of the facts. For example, you may be an attorney (under a power of attorney) or an enduring guardian making a decision about whether to use your powers.

Or, 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. For example, you may be a solicitor refusing to draw up a power of attorney for a person whom you have assessed as lacking the capacity to make the power of attorney.

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 Health Complaints Commissioner.
- A lawyer may be required to show that their capacity assessment of a client was correct if the validity of their client's will is being disputed in court.
- 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 return of 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 being mediated by an organisation, such as the Banking and Financial Services Ombudsman.

- An assessment of capacity may be put before the Guardianship and Administration Board for consideration if there is an issue of capacity being determined by them.

CASE STUDY

Assuming capacity

'I don't like arguing with my sister Eugina, but she thinks that because my brother has been told that he has Alzheimer's, it means he can't make any decisions for himself. I tried to explain to Eugina that you have to have reasons, evidence if you like, to show that someone can't make a decision about something for themselves.

I know that she is just being protective, but she doesn't have to worry. When Eugina actually sees him I think she will understand. (She doesn't live near us).

He might have been told that he has Alzheimer's, but the idea is not to strip him of his right to live his life like he wants. Eugina and I should monitor the things he can and can't do before taking over any decisions.'

Nicias, brother

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 about 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.[10]

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 may be delayed to a later time when the person may be able to make the decision for themself. Delaying the decision will give them the greatest control over their own life.

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[10] However, remember to take into account cultural diversity and religious factors as discussed in capacity assessment principle 1 'Always presume a person has capacity' on page 28.

CASE STUDY

Decision specific capacity

'I am my husband, Stephan's, carer. When Stephan can't make decisions for himself about his daily activities and life, I make them for him. Every day is different really. Sometimes Stephan has clarity and can understand things. That's when he makes his own decisions. At other times, he doesn't comprehend things enough to make his own mind up, and then I make decisions for him. I never really know what to expect. I always start by thinking, "Stephan has the right to make any decision he can." I assume that he is able to make his mind up unless it's obvious to me (after I discuss things with him) that he doesn't understand.

If things are urgent and important and I think that Stephan is having an 'unclear' day, I will jump in and make the decisions for him then and there. Otherwise I will wait until he can make the decision himself.'

Ada, wife and carer

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**: physical characteristics such as scars, skin colour, features linked to Down's Syndrome or muscle spasms caused by Cerebral Palsy, or other characteristics linked to cultural or religious practice
- **the way a person presents**: attention to hygiene, tattoos, body piercings, a dishevelled appearance, or irregular clothing
- **the way a person communicates**: difficulty expressing themself, lack of English language skills, slurring of speech, using an Alternative and Augmentative Communication (AAC) system[11]
- **a person's impairment**: physical disabilities, learning difficulties and disabilities such as Aspergers or Attention Deficit Hyperactive Disorder (ADHD), illnesses related to age or neurological function such as Multiple Sclerosis, Parkinson's Disease or Motor Neurone Disease, and temporary conditions such as being drunk or unconscious
- **the way a person acts or behaves**: being an extrovert (shouting or gesticulating), behaving in a withdrawn way (talking to oneself or avoiding eye contact), and actions that are connected to a particular cultural or religious belief (such as allowing or preferring another person, or the community group, to make a decision on your behalf).

[11] see Section 6 'How can I support a person to make their own decision? – Communicate in an appropriate way' on page 150.

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 with which others disagree. 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 at significant risk of harm or mistreatment
- 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
- 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.'

Jan, daughter

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. It is often subject to particular, generally tighter, rules. Below is a brief summary of some rules around collecting, using and disclosing information.

There are state and federal privacy laws and these can apply differently depending on who is doing the collecting, using and disclosing. For example, private general practitioners are generally covered by the federal law while health care professionals working for the Department of Health and Human Services may have different responsibilities under Tasmanian legislation. For more detailed guidance you should refer to your organisation's privacy policies and procedures.

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 you are assessing. 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 guardian', 'your doctor, Dr Gordon', 'the woman 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 to the assessment.

It is also a good idea to tell the person you are assessing that they can see the information you are collecting about them if they want to.

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 threat to a person's health or safety. This exception generally only applies when the danger is something that is about to happen. It doesn't generally 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 threat to a person's health or safety. You may also be able to give certain information to a carer or family member of a person who is incapable of giving their own consent to the information being disclosed, or if the person cannot communicate their consent to the disclosure, in certain circumstances.

CASE STUDY

Privacy

'A client came in asking me to draft a will for him. After I went through the usual legal questions I had doubts as to whether the person had the capacity to make a will. It was really hard to decide, so I thought I needed to ask their GP for some information.

I explained this to the client, telling him that it was not unusual to want further information in these circumstances, and I went through the benefits for him to have things done properly. I asked the client to sign a form giving me permission to seek personal health information from his GP.

I drafted up a letter to the GP asking for some specific opinions, and wrote a paragraph confirming that the client had given me permission to ask the GP about his personal information. I attached a copy of the client's permission form.

Although it is sometimes hard to tell a client that I need another opinion about their capacity, most clients can see the logic after I outline the advantages. Asking the client to sign a privacy form giving me permission to access the GP's information also means the GP's disclosure is ethical.'

Nyla, lawyer

More information

The following government agencies can give you information about your privacy obligations:

Office of the Privacy Commissioner (Federal)
Ph: 1300 363 992
TTY: 1800 620 241
www.privacy.gov.au

Health Complaints Commissioner Tasmania
Ph: 1800 001 170 (Free call)
www.healthcomplaints.tas.gov.au

If you belong to a professional association, contact them about the privacy standards that apply within your profession. For example:

Australian Medical Association (Tasmania Branch)
Ph: (03) 6223 2047
www.ama.com.au

Australian Healthcare and Hospitals Association
Ph: (02) 61620780
www.austhealthcare.com.au

Banking and Financial Services Ombudsman
Ph: 1300 780 808
www.abio.org.au

Law Society of Tasmania
Ph: (03) 6234 4133
www.taslawsociety.asn.au

Real Estate Institute of Tasmania
Ph: (03) 6233 4769
www.reit.com.au

If you are a staff member of a government department or an organisation, refer to your agency's privacy policy or procedure.

6. Substitute decision-making is a last resort

Consider assisted decision-making

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 assisted decision-making.

They might not have the capacity to make the same decision at another time without that support.

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 assistance you provide, or get, for a person to support them to make a decision for themself 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 pathologist or other professional[12]
- provide **information in a more accessible form**, such as a neutral interpreter or advocate[13]

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[12] See Section 6 'How can I support a person to make their own decision? – Communicate in an appropriate way' on page 150.

[13] Multicultural Tasmania (Department of Premier and Cabinet) has information about interpreters on their website: www.dpac.tas.gov.au/divisions/cdd/multitas Or call 131450

- 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 behavioural 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 in Section 6 on page 149.

Remember, if you are supporting a person to make a decision for themself you must not act in a way that might influence their decision. It is not your role to persuade a person to make what you think is the 'correct' decision, or to pressure them into making the decision that you would make. It is best not to talk about your own opinion. Simply assist the person to work through the decision-making process by providing information and support in a way they feel comfortable.

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 ambos. 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

Substitute decision-making

If all efforts fail to support a person through the decision-making process, you can then determine that the person doesn't have capacity to make the decision. At that stage, someone called a 'substitute decision-maker' might need to make the decision for them. **This is a last resort.**

Substitute decision-making can happen informally, where the person has a 'person responsible' – an appointed guardian, a family member, friend or carer - who can make decisions for them. It can also happen where there is a more formal legal arrangement in place for someone to make substitute decisions by using an advance care directive or an enduring power of attorney. The Guardianship and Administration Board can also act as a substitute decision maker in certain circumstances.

The Guardianship and Administration Board can appoint someone as a substitute decision-maker, such as an administrator or a guardian. They will however only appoint a guardian or administrator if:

- a person has a disability; and
- because of that disability, they cannot make reasonable personal and lifestyle decisions (guardianship) or decisions about their financial affairs (administrator); and
- decisions need to be made and there is no less restrictive way of making the decision without the appointment of a guardian or administrator respectively.

The Board will not appoint a guardian or administrator for decisions that may arise in the future.

If the Guardianship and Administration Board finds that a person does not have the capacity to make particular decisions and appoints a substitute decision-maker for some decisions, this does not automatically mean that the person does not have the capacity to make other types of decisions.

Generally, the Board will only appoint a guardian or administrator when there is no less restrictive option available.

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

CASE STUDY

Formal substitute decision-maker

'My old boyfriend has a severe head injury from a motorcycle accident. He had been really clever, and still retained a lot of his ability to think and communicate. However, he now has little insight into some decisions, especially those about money.

Fortunately, for years after the accident I supported him to make most decisions about his finances on his own, and he was happy for the support. It was just an informal arrangement. All I really did was go through his expenses with him each month and talk him through the advantages and disadvantages of spending his money on certain things. I also encouraged him to get professional advice about long-term investments or spending.

Then we split up. He started to try to look after his own money, but seemed unable to do it now that my support wasn't there.

I think his friend decided to apply to the Guardianship and Administration Board for an administration order because he was worried that the insurance money (which he was supposed to live off) was being spent quickly on unnecessary large items. The Board made an order for a substitute decision-maker, called an administrator, to make his financial decisions.'

Tania, ex-girlfriend

More information

The Guardianship and Administration Board can provide more information about the appointment of a substitute decision-maker or a 'person responsible'.[14] For information about whether you need to apply for the appointment of a substitute decision-maker go to the website or phone the Board.

Guardianship and Administration Board Tasmania
Ph: 1300 799 625
www.guardianship.tas.gov.au

The Office of the Public Guardian (OPG) can provide answers to common questions over the phone, or go to the OPG website.

Office of the Public Guardian
Ph: (03) 6233 7608 (information and support)
www.publicguardian.tas.gov.au

The Public Trustee can be appointed as attorney (under a power of attorney) or as an administrator.

Public Trustee
Ph: 1800 068 784
www.publictrustee.tas.gov.au

[14] Medical and dental practitioners have a legal and professional responsibility to get consent before treating a person. The person usually gives this consent. If the practitioner assesses them as not capable of consenting to their own treatment, the practitioner should seek consent from their 'person responsible'. A 'person responsible' can be:

- the person's guardian (if appointed to make medical and dental decisions). If there is no guardian, then (in order)
- the spouse of the person (this includes de facto spouses and same sex spouses);
- a person who has the unpaid care of the person;
- a close friend or relative of the person who has a close personal relationship with that person through frequent personal contact.

Solicitors can also give you information and advice about substitute decision-makers. The Law Society of Tasmania has a list of solicitors on its website.

Law Society of Tasmania
Ph: (03) 6234 4133
www.taslawsociety.asn.au

The Legal Aid Advice line provides free non means tested advice from a solicitor on Monday to Fridays. This service also runs open clinics in all regions and referrals to community services and provides a searchable website.

Legal Aid Commission of Tasmania
Ph: 1300 366 611
www.legalaid.tas.gov.au

When should capacity be assessed?

Triggers

It is not always obvious when a person can't make a specific decision. However, particular circumstances, events or behaviours might lead you to question a person's capacity at a point in time. These are called **triggers**.

Once you have judged that a trigger exists, a capacity assessment is the next step if all other attempts to solve the problem have failed and the conduct of the person is causing, or is likely to cause, significant harm to the person or someone else. Or if there are important legal consequences of the decision.

Triggers that involve the person's conduct might include any of the following:[15]

- repeatedly making decisions that put the person at significant risk of harm or mistreatment
- making a decision that is obviously out of character and that may cause harm or mistreatment
- often being confused about things that were easily understood in the past
- often being confused about times or places
- having noticeable problems with memory, especially recent events, which have an effect on the person's ability to carry out everyday tasks
- dramatically losing language and social skills. For example, having difficulty finding a word, not making sense when speaking, not understanding others when

[15] Some of these triggers are adapted from information provided on the Alzheimer's Australia website: www.alzheimers.org.au

they speak, having wandering thought patterns, interrupting or ignoring a person when they are speaking, or failing to respond to communication

- having difficulty expressing emotions appropriately, such as inappropriate anger, sexual expression, humour or tears without actual sadness
- displaying sudden changes in personality. For example, excessive irritability, anxiety, mood swings, aggression, overreaction, impulsiveness, depression, paranoia or the onset of repetitive behaviours
- declining reading and writing skills
- having difficulty judging distance or direction, for example when driving a car.

Triggers that involve the person's circumstances might include:

- not looking after themself or their home the way they usually do and this being bad for their health or putting them at significant risk. For example, neglecting significant personal concerns such as health, hygiene, personal appearance, housing needs or nutritional needs
- not paying bills or attending to other financial matters, such as running their business, repaying loans or other debts
- making unnecessary and excessive purchases or giving their money away, and this being out of character

- noticeably being taken advantage of by others, such as being persuaded into giving away large assets that they still require such as a house, car or savings, or signing contracts that disadvantage them
- having been diagnosed with a condition that may affect their capacity

- having lacked capacity to make decisions in the past.

These types of triggers may be noticed by you, or by someone else who is seeking a capacity assessment for the person, or even by the person themself.

Increased capacity

Another important trigger for assessment is when a person's capacity improves. The person may simply have regained capacity lost through ill health or other circumstances. They may have learnt skills or accessed support services to increase their capacity. A person who could not make their own decisions in the past may now be able to do so if another assessment is conducted.

Mental illness and fluctuation of capacity

If you are dealing with a person whose capacity fluctuates because of a mental illness, it is crucial to make an assessment when there is an indication of increased ability to make decisions. This will enable the person to have control over as many of their decisions as possible.

CASE STUDY

Triggers

'I have an elderly client, Aja, whom I visit regularly. Lately I have noticed that her car is taking quite a few knocks, different scrapes, dents and marks. This by itself doesn't worry me, but I have found that she is also repeating herself often and forgetting where she can find common items, like cups and towels, in her home.

As her caseworker I organised a meeting with Aja, her doctor, and her family (after getting her permission, of course!) and we all discussed whether Aja should undertake a test which would help the doctor advise her (and the Department of Energy Infrastructure and Resources) about whether she should continue driving.

Aja's family said that they had noticed the forgetfulness too, especially that she was not turning up to planned events and was using words from her native language (Hindi) right in the middle of an English sentence.

On her doctor's advice after a capacity assessment (at which there was also a neutral interpreter), Aja decided that she should no longer drive.'

Shaun, caseworker

Who might assess capacity?

Assessors

Different people will be involved in assessing a person's capacity. Exactly who, depends on the kind of decision and the time at which it is made. It is usually the individual who is directly concerned with the decision-maker when the decision needs to be made, either in their role as a provider of services or as an involved or concerned family member, carer or friend.

These issues affect people such as:

- solicitors, who have an obligation to consider a person's capacity before acting on instructions about a variety of decisions such as property transactions, civil litigation and future planning
- professionals from the financial sector, who must consider a person's capacity to give directions regarding their finances and assets
- medical or dental practitioners seeking consent for treatment from a patient
- community workers or other professionals, such as a disability or social and allied health workers, who may assess a person's capacity to make a decision about services

- members of the community appointed as an enduring guardians, or with enduring power of attorney which can only commence once a person has lost capacity
- advocates seeking consent to support a person to express their views
- family members, friends or carers making informal decisions for a person with a decision-making disability.

The following examples show how you might be involved in assessing a person's capacity in different circumstances:

- legal practitioners might assess whether a person has capacity to understand the nature of what they are doing and whether they have the capacity to give the legal practitioner the necessary information to carry out the work
- bank staff may need to assess whether a person is capable of dealing with their finances
- doctors or healthcare professionals may need to assess a person's capacity to decide whether to go ahead with a treatment before they rely on the person's consent
- community nurses might assess whether a person can consent to getting an injection or having a bandage changed, or agree to the release of personal information to others
- Aged Care Assessment Team (ACAT) workers, social workers, family members or carers may need to decide whether a person has the capacity to make the personal decisions necessary to live in their own home.

What if there are still doubts about capacity?

If there are still doubts about a person's capacity after an assessment, you (or another individual) may want to get a second opinion about the person's capacity from a general practitioner, a psychiatrist, a psychologist, a geriatrician or a neuro-psychologist, for example.

These second opinions could be used, for instance, by a:

- legal practitioner to decide whether a person has the capacity to make a will or enter into a contract
- general practitioner to determine whether the patient can understand the nature and effect of a proposed treatment, or if a substitute decision-maker may be required
- healthcare worker to help decide whether a person has the capacity to make a decision about their accommodation arrangements
- family member to decide whether to use an enduring power of attorney or guardianship, or to seek the appointment of an administrator or guardian from the Guardianship and Administration Board.

Should I seek a second opinion?

In some situations, a second opinion may be the only way to ensure a fair assessment of a person's capacity. Factors that may indicate that a second opinion might be necessary are:

- a dispute by the person concerned, who believes they still have capacity
- a disagreement between family members, carers, community workers or other professionals about the person's capacity.

Additionally, as the seriousness of a decision and its consequences increases, the possible need for a second opinion also increases when there is still a question of the person's capacity to make that decision.

Remember, although getting a second opinion will help, the final decision about capacity is ultimately to be made by whomever it is that needs to know whether the person is capable of making the specific decision. That might be the individual who will be making the decision on behalf of the person (substitute decision-maker), or a community worker or other professional providing a service to the individual. More specific examples are a:

- family member needing to use a power of attorney
- lawyer writing an advance care directive
- bank manager approving a loan
- doctor assessing capacity to consent to medical treatment.

When there is involvement by the Guardianship and Administration Board, they will be able to make a determination about a person's capacity.

Where a second opinion is unable to be obtained for reasons such as a dispute, urgency, location or lack of finances, the individual disputing the original capacity assessment may need to go to the Guardianship and Administration Board for a decision about a substitute decision-maker.

Section 4

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Tips on assessing capacity – what do I need to know before I start? 61

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Tips on assessing capacity – what do I need to know before I start?

You need to assess, or seek an assessment of, a person's capacity when:

- there is a demonstrated trigger[16]
- all other reasonably available attempts to solve the problem have failed, and
- there are important legal or personal consequences or the conduct of the person is causing, or is likely to cause, significant harm to the person or someone else.

It is important to assess a person who may not have the capacity to make certain decisions. Failing to assess them means that they will continue to make their own decisions, which may cause them physical or legal harm.

It is equally important to ensure that you carry out the assessment correctly so that the result is accurate. An incorrect result may deny a person their right to make a specific decision, or force them to make a decision that they are incapable of making or that may cause them harm.

The following are tips on capacity assessment that will help to ensure that the assessment is carried out correctly.

Apply the principles

Begin by applying the six capacity assessment principles.

1. Always presume a person has capacity

The most basic principle is to presume that a person has the capacity to make all decisions for themself.

[16] See Section 3 – When should capacity be assessed?' on page 50.

2. Capacity is decision specific
Apply the presumption of capacity for **every** decision the person makes. This is because a person may be able to make some, but not all, decisions for themself.

3. Don't assume a person lacks capacity based on appearances
Do not assume a person lacks capacity because of their age, appearance, disability, behaviour, state of mental health or any other condition or characteristic.

4. Assess a person's decision-making ability – not the decision they make
A person cannot be assessed as lacking capacity simply because they make a decision you think is unwise, reckless or wrong.

5. Respect a person's privacy
Respect a person's right to privacy when you are assessing their capacity.

6. Substitute decision-making is a last resort
If all efforts made to support a person through the decision-making process fail, then you can decide that the person doesn't have capacity to make that decision. It is only then that you would consider seeking out a substitute decision-maker to make the decision for the person.

A more complete overview of these principles can be found in Section 3 – Capacity assessment principles on page 27.

Tell the person about the process

Before beginning an assessment, it is important to effectively communicate to the person what you are doing and why. Your aim should be to get the person to participate willingly in the process. You might tell them the following:

- there is concern about their capacity to make a particular decision or decisions. You might briefly outline the decision and the concern
- there is the possibility of risk or harm to themself or others if they make a decision or decisions without capacity
- what is involved in the assessment process
- why it is beneficial for them to participate in the process – if they assist by providing information then you will better be able to safeguard their interests. For example, assessing capacity can provide a safeguard later if there is a dispute in the future over the person's will
- the result of the assessment will be either of the following:
  - they have capacity to decide the particular decision for themself
  - they lack capacity to decide the particular decision and require someone to make this decision on their behalf.

In most cases people are willing to cooperate. When a person remains unwilling to participate and there are serious consequences, you may have to take further steps. For example, if you think you may need to use a substitute decision maker you will need to identify who this might be, and contact them.[17]

[17] See Section 6 'Resolving disagreements'. See page 156.

Be flexible about assessments

It is important to understand that people are individuals, come from diverse cultural and linguistic backgrounds, and have different skill levels. When conducting an assessment, be flexible and adaptable to the individual's needs and preferences. Each person should be given the same opportunity to be correctly assessed. You can do this by making a reasonable adjustment (change)[18] to the assessment process.

When making a reasonable adjustment, remember the following:

- never assume what the person may need or how best to support them. Always ask them or get specialist advice on what they may require
- consider that treating everyone the same does not ensure equal outcomes
- conduct the assessment in a way that best suits the situation and the individual. In most situations you can undertake the assessment in a variety of flexible ways.

Consider cultural and linguistic diversity and capacity

Culture, language, ethnicity and religion are integral factors in how people make decisions, as well as the decisions they make. They shape how people think, behave and communicate.

For example, in some communities and in some families, individuals with capacity to make their own decisions freely allow others to make important decisions on their behalf. Sometimes a person may allow or prefer the head of a household to make all the important decisions. Or there

[18] Many of the ideas outlined in 'How can I support a person to make their own decision?', on page 149, can be used as a reasonable adjustment to the assessment process.

may be an established pattern where a parent within a family, or an elder of a community, makes certain decisions.

Sometimes the decision-making process is a collective one involving the whole community in meetings and discussions about the decision, such as in some Indigenous communities.

Religious beliefs may impact on the decision made, 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.

So, when you are determining capacity, make sure you take into account the person's language, ethnicity, cultural values and religious beliefs.

You may need to do the following:

- organise an interpreter if you can't understand the person or have difficulty communicating with the person in English[19]
- seek information about the cultural and ethnic background of the person as well as the religious beliefs of the person and consider it when you are assessing the person
- take into account the effect of a proposed decision on the person's relationships within their cultural or religious community.

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[19] Multicultural Tasmania (Department of Premier and Cabinet) has information about interpreters on their website: www.dpac.tas.gov.au/divisions/cdd/multitas Or call 131450

CASE STUDY

Culture and capacity

'Recently I visited with an Aboriginal man to talk about what kind of care or services he might need to help him to remain in his home. Although I had no previous experience with Aboriginal clients, and do not come from an Aboriginal background, I took on this particular client due to staff shortages.

The client and I spent some time discussing his needs and which services he may benefit from, but he still seemed unable or unwilling to make a decision about whether to give me permission to go ahead with the referrals.

At first I thought that he might not have the capacity to make a decision about his service options. I decided to come back at another time and discuss the issues with him again.

The second time I visited, his extended family was around too. I was a bit shocked, and suggested that we put the meeting off until another time. He told me that he had asked them around to his place so that they could listen too. It was noticeable that he felt much more comfortable than he was on my first visit. So, I agreed that his family could join us.

It was a learning experience for me. I had misjudged the importance of involving the man's family in the decision-making process. I now understand that it is important to familiarise myself with a person's culture before an assessment, and to take it into account during the assessment.'

Sarah, aged care assessment team

Don’t make value judgments

Assessing a person’s capacity means considering complex issues and making difficult decisions. To ensure an accurate assessment it is essential to be objective and impartial about the person’s beliefs, values, preferences, feelings and emotions.

Determine what you are you looking for

In general, when you assess the capacity of a person to make a particular decision, you are considering whether the person can do the following:

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

For example, some people can tell you the facts about their financial circumstances, but can’t solve a problem using those facts. They may know the name of their bank and the value of their assets but not be able to discuss or weigh up options about investing those assets.

There are also situations where a person may not have any experience in making certain types of decisions. You might have to assess whether the person can learn to start making those decisions - see case study on page 125.

In rare instances, such as a person with 'locked-in syndrome', a person may be able to make a decision but is unable to effectively communicate it. The assessment result is that the person lacks capacity.

Apply the right test to the decision in question

For different areas of a person's life, different types of decisions need to be made. For some areas there is a specific legal test that applies. When you are assessing a person's capacity to make a decision you must consider the particular matters outlined in the test. The test you use depends on the legal area to which the decision relates.

For further information on each test and how to apply it to an assessment of capacity see Section 5 'Assessing capacity in each area of life' on page 72.

Ask questions carefully

Ask **open-ended questions** rather than questions which require only a 'yes' or 'no' answer.

Don't ask leading questions. Leading questions suggest or guide the person to a particular answer.

The aim of questioning is to draw the person into a discussion about the decision, the options and the consequences. That will give you an opportunity to assess the person's ability to understand and weigh up information, choices and consequences.

If the person has someone with them for support, remember to direct all your questions to the person you are assessing, not to the support person. Sometimes, it is a good idea to start the assessment with the support person present. When the person being assessed feels at ease, they may be comfortable having the support person wait outside.

It is important that the person being assessed answers the questions. In some circumstances the person being assessed may need support during the assessment from a neutral person, such as an interpreter[20] or advocate.

You may want to ask the person the following questions:

- how did you reach your decision?
- what things were important to you when you were making your decision?
- how did you balance those things when you were making your decision?

'How can I support a person to make their own decision?' on page 149 will give you further tips about environment and communication.

[20] Multicultural Tasmania (Department of Premier and Cabinet) has information about interpreters on their website: www.dpac.tas.gov.au/divisions/cdd/multitas Or call 131450

Avoid undue influence

Decisions must be made freely and voluntarily. The person making the decision must not feel pressured or deceived into making a decision they would not otherwise make.

People who have difficulty making decisions, or who are dependent on others financially, physically or emotionally, are more at risk of being unduly influenced.

To find out whether the person's decision is what they wanted, start by asking them who else was involved in the decision-making process. Seek to determine whether the involvement amounted to supporting the person through the decision-making process, or whether the involvement has been overbearing and has distorted the person's real wishes.

This is difficult where there may be an established or assumed power difference or where there is an on-going pattern of interaction between two people.

If you suspect undue influence, try communicating with the person making the decision, without the other person present. Ask questions that will separate the views of the person from the views of others.

You may also need to suggest that the person obtain some independent advice from a lawyer, accountant or financial advisor depending on the nature of the decision.

Section 5

Assessing capacity in each area of life 72

- Personal life 74
- Health 93
- Money and property 110

Assessing capacity in each area of life

There is no 'one size fits all' legal test for whether a person has capacity in any given situation. This is because people differ, decisions differ and laws differ.

Decisions can be divided into the three following areas.

- **Personal life:**
  - making and using an **enduring guardianship**
  - **personal** decisions including accommodation and support services.

- **Health:**
  - **medical and dental** treatment
  - instructing your health care providers about your **future medical choices**
  - **other health** decisions including non-intrusive examinations, over the counter medication and alternative therapies.

- **Money and property:**
  - entering into a **contract**
  - making a **power of attorney** and making and using an **enduring power of attorney**
  - **financial** decisions
  - making a **will**.

Select the section that relates to the area of decision-making relevant to the situation. The individual sections on the following pages will provide you with:

- the legal test, and
- a checklist which will assist you to apply it.

The questions you ask the person during an assessment of capacity should reflect the legal test of capacity for that type of decision.

These questions aim to assist you in gathering information from the person that will help you to decide if the person has capacity to make the decision in that particular area of life.

Section 5.1

Personal life

Enduring guardianship 75

Personal decisions 84

Enduring guardianship

When a person appoints an enduring guardian they are choosing someone to make medical and lifestyle decisions on their behalf if they become unable to make those decisions at some time in the future because of a disability.[21] Such decisions include:

- how and where the person lives
- decisions about support services
- who the person might want to see and when
- medical and dental treatment decisions.

There are two occasions when a person's capacity might be assessed in relation to an enduring guardianship document.

1. When the document is being made

The document appointing an enduring guardian must be witnessed by two people, each of whom must be satisfied that the person making the appointment has signed the instrument freely and voluntarily, and that the person appears to understand the effect of the document. This effectively requires a determination that the person making the appointment has the capacity to do so, at the time they are signing it.

Where there is uncertainty it may be necessary to assess the person's capacity to make the enduring guardianship before the document can be witnessed.

[21] An enduring guardianship is not the same as an enduring power of attorney, which is about financial decisions. To obtain detailed information about what an enduring guardianship document is and does, see 'More information' on page 82.

2. When the document needs to be used

The appointment of an enduring guardian only takes effect if the person making the appointment becomes unable to make their own medical or personal decisions. Only then can the enduring guardian communicate the person's wishes on their behalf.

It may be necessary to assess a person's capacity to make their own medical or dental decisions in order to determine whether or not the enduring guardian can or should make the decision for the person.

It will generally be the individual named as enduring guardian who undertakes, or seeks, an assessment of whether the person has lost the capacity to make the personal or health decision.

The remainder of this section is concerned only with the first point: the test for capacity to **make** an enduring guardianship document. In relation to tests for the second point, you will find information about assessing a person's capacity to make:

- personal decisions, on page 84
- medical and dental treatment decisions, on page 102.

Legal test

This is what you are looking for when you are assessing whether a person has the capacity to appoint an enduring guardian:

CAPACITY = UNDERSTANDING THE NATURE + EFFECT OF THE DOCUMENT
AT THE TIME IT IS MADE

Checklist

- [ ] Does the person understand the nature and effect of appointing an enduring guardian at the time that they make the appointment, not hours or days before or after it is made?
- [ ] Does the person understand the 'nature' of what they are doing by appointing an enduring guardian? Are they familiar with the general idea of enduring guardianship? More specifically:
  - Do they understand they are appointing someone to make personal decisions on their behalf if they lose the capacity to do this for themself?
  - Do they understand they can appoint different people to make decisions in different areas of their personal life, such as:
    - accommodation
    - services they might want
    - access to people they might want to see and when
    - health?
- [ ] Does the person understand the 'effect' of the appointment? Can they identify the general result of an enduring guardianship appointment? Do they understand the following:
  - The enduring guardian's powers will come into effect when the person lacks capacity in a particular area?
  - The enduring guardian's powers will continue while the person is unable to make decisions in a particular area?

- ☐ Is the person freely and voluntarily appointing the enduring guardian?
- ☐ Can the person communicate the above, with assistance if necessary?

If the person wants to change or revoke an existing enduring guardianship document, capacity needs to be assessed at that time. As well as the above, you need to find out:

- ☐ Does the person know how and why the new document is different from the old?
- ☐ Does the person know the nature and effect of changing or revoking the existing enduring guardianship document?

Tips on Questioning

Remember, when assessing whether a person has the capacity to appoint an enduring guardian, it is important that you:

- ✔ ask open-ended questions
- ✔ do not ask leading questions
- ✔ frame your questions to quickly identify any areas of concern for which a person may need support or help, or require a substitute decision-maker
- ✔ ensure it is the person being assessed who answers the questions. In some circumstances the person may need support from a neutral person such as an advocate or an interpreter.[22]

[22] Multicultural Tasmania (Department of Premier and Cabinet) has information about interpreters on their website: www.dpac.tas.gov.au/divisions/cdd/multitas Or call 131450

Questions

Here are some specific questions you may ask as part of the assessment process to determine if the person has capacity to appoint an enduring guardian.

- ✔ Explain to me what appointing an enduring guardian is about.
- ✔ Why do you want to appoint somebody as an enduring guardian?
- ✔ If you do appoint an enduring guardian, when will your enduring guardian be able to make decisions for you?

- ✔ What sorts of decisions will your enduring guardian be able to make for you?
- ✔ Tell me about your family and friends. Who would you want to appoint to be able to make decisions for you?
- ✔ Why would you choose that person or those people?
- ✔ Would you want your enduring guardian to make decisions for you in the same way that you would make them?
- ✔ How can you help them understand how you would want decisions to be made? Remember, you may not have the capacity to tell them later.
- ✔ Sometimes people appoint more than one person so they can make decisions together for you. Do you think you might want to do this? Why or why not?

- ✔ Sometimes people appoint several different people as their enduring guardians and each guardian has a particular area of decision-making, such as accommodation, health, services, and access to whom you might see and when. Is this something you would want to do? Why or why not?
- ✔ What do your friends and family think about you appointing an enduring guardian, and what do they think about the person or people you have chosen?
- ✔ What happens if you decide that you want to change or cancel your appointment of an enduring guardian?
- ✔ When would you be able to do this?

Similar questions to those above should be asked if the person wants to change or cancel an enduring guardian appointment. Also ask:

- ✔ Do you understand what your current enduring guardianship arrangements are, and how do you want to change them? Why?
- ✔ Is anyone prompting you to change the current arrangements and, if so, why?

CASE STUDY

Enduring guardianship

'Anne sent her client, Isabella, to me for an opinion about her capacity to make an enduring guardianship document. She was worried that Isabella was being pushed into appointing her son, Chris, as an enduring guardian. Anne suspected that Chris wanted the ability to decide for Isabella where she would live and who she could see for a selfish reason – she thought Chris had a plan to move Isabella into a small unit and then live in her waterfront house himself.

I began talking with Isabella about appointing an enduring guardian. Although she appeared to understand the concept that someone else might make decisions for her, she didn't know what sort of decisions, when they might make them or who she might like to appoint.

I reported to Anne that, at this time, I didn't think that Isabella understood well enough what she would be doing by appointing an enduring guardian and what the consequences for her might be. I suggested to Anne that she speak to the Guardianship and Administration Board about the situation.'

Trevor, psychologist

More information

An information sheet on the appointment of an enduring guardian is available by phoning the Office of the Public Guardian (OPG) or the Guardianship and Administration Board or from the website www.guardianship.tas.gov.au

Office of the Public Guardian
Ph: (03) 6233 7608
www.publicguardian.tas.gov.au

Guardianship and Administration Board
Ph: (03) 6233 3085
www.guardianship.tas.gov.au

Solicitors can also give you information and advice about appointing an enduring guardian. The Law Society of Tasmania has a list of solicitors on its website.

Law Society of Tasmania
Ph: (03) 6234 4133
www.taslawsociety.asn.au

The Legal Aid Advice line provides free non means tested advice from a solicitor on Monday to Fridays. This service also runs open clinics in all regions and referrals to community services and provides a searchable website.

Legal Aid Commission of Tasmania
Ph: 1300 366 611
www.legalaid.tas.gov.au

Personal decisions

Each day a person makes many personal decisions, such as when to get out of bed, what to wear, what to eat, and what to do. Major personal decisions people make throughout life include where to live, what type of support services to apply for or accept, and which people to associate with.

There are several reasons why a person may need an assessment of whether they can continue making certain personal decisions for themself.

Here are some examples.

- An assessment may be carried out by a concerned family member, friend or carer who wants to know whether they, or others, should begin making decisions in all or some of these personal areas on an informal basis.
- An enduring guardian may assess, or seek an assessment of, capacity when they think they should start making decisions in areas where the person seems unable to do so.[23]
- An assessment might be the first step on the path to making an application to the Guardianship and Administration Board for a guardian to be appointed.

[23] There is information on how to assess if a person has capacity to **make** an enduring guardian document in 'Enduring guardianship' on page 75.

There is no specific legal test for personal decision-making capacity that covers all of the above situations.

However, if you are assessing a person's capacity as part of the process of determining whether an application needs to be made to the Guardianship and Administration Board, or in relation to an existing application, keep in mind that the Board applies a particular legal test to decide whether a person is someone for whom a guardian could be appointed. The Tribunal will look at whether the person has a disability, and whether that disability makes them unable to fully or partially:

- make reasonable judgements in respect of all or any matters relating to his or her person or circumstances
- whether or not there are any less restrictive alternatives
- and whether or not there is a need for a guardianship order to be made.

But, in general, when you are assessing a person's capacity to manage their everyday personal decisions, you are considering whether, in relation to the specific area that is of concern, the person is able to:

- **understand the facts** involved in the decision
- **understand the main choices** that exist
- **weigh up the consequences** of the choices
- **understand how the consequences affect them** and their situation
- **communicate their decision.**

Most often you would carry out an assessment in relation to specific areas of concern, such as accommodation decisions or decisions about support services. Questions relating to other areas of personal decision-making may be relevant. This depends on how broad the area of concern is, and on whether you need a complete picture of the ability of the person to manage all personal decisions.

Checklist

Particular areas relevant to 'making reasonable judgements in respect of all or any matters relating to his or her person or circumstances' that you may wish to consider are listed below.

- ☐ How much does the person know about their living arrangements and how to meet their needs?
- ☐ Can the person dress appropriately for the weather and take care of their personal hygiene?
- ☐ Can the person shop for groceries and safely prepare meals, and are they eating properly?
- ☐ Does the person understand their medication routine and follow it?
- ☐ What informal or formal support services such as family care, home care, nursing, Meals on Wheels, domestic cleaning or transport services, does the person get or need?
- ☐ What friends or family does the person see?

Also consider whether there is significant harm, or risk of harm, to the person or others as a result of the person not being able to manage personal decisions. For example:

- ☐ Can the person manage in their present accommodation without posing any threat to themself or others? For instance, is there a fireplace that may cause a fire hazard because of improper use? Is the state of cleanliness a hygiene risk?
- ☐ Is the person at risk due to malnutrition or dehydration, or in danger when cooking such as by cutting themself or leaving things on the stove, or in danger through dressing inappropriately or due to lack of personal hygiene?

- ☐ Are they not taking, or taking too much, medication, and could this be a cause of harm?
- ☐ Are they accepting and accessing relevant services which can assist to prevent risk of harm?

- ☐ Does the person recognise when to seek medical help, know how, and are they able to get medical help when it is needed?
- ☐ Is the person being mistreated, threatened or abused by the people who care for or visit them?

A person doesn't have to be able to manage these aspects of their life perfectly, but they do need to be able to manage without causing themself or others significant harm or risk of harm.

Tips on Questioning

Remember, when assessing whether a person has the capacity to make everyday personal decisions, It is important that you:

- ✔ ask open-ended questions
- ✔ do not ask leading questions
- ✔ frame your questions to quickly identify any areas of concern for which a person may need support or help, or require a substitute decision-maker
- ✔ ensure it is the person being assessed who answers the questions. In some circumstances the person may need support from a neutral person such as an advocate or an interpreter.[24]

[24] Multicultural Tasmania (Department of Premier and Cabinet) has information about interpreters on their website: www.dpac.tas.gov.au/divisions/cdd/multitas Or call 131450

Questions

Here are some specific questions you may ask as part of the assessment process to determine if the person has capacity to make everyday personal decisions.

- ✔ How are you coping with XYZ (the area of concern)?
- ✔ Do you think you are having any difficulties?

If they don't believe they have any problems, then discuss the concerns that have been raised by the people close to them (or whoever it was that recognised the trigger). You are looking for understanding of the situation and insight into what the problem might be. Use the following questions as a basis for discussion:

- ✔ Describe your situation. Why do you think it could be a matter for concern?
- ✔ What do you think could be done to help to address the concern?
- ✔ Tell me what other options there are, and what option you might want to take.
- ✔ What are the pluses and minuses of each option as you see it?

If the person can't tell you these things, share with them the options and the benefits or disadvantages of each, then ask them the questions again.

You are looking for indications that the person can understand the information and weigh up consequences.

CASE STUDY

Personal decisions

'One day I surprised my dad by arriving at his place unannounced. I hadn't seen him for nearly a week. I found him standing in the yard dressed in tracksuit pants, woollen socks, a fleecy jumper and a beanie. The problem was that it was 32 degrees that day! Even with the bulky gear on I could see that he had lost a lot of weight.

'Then I went inside and the place was like a sauna. The heater was on. When I asked dad about it he kept saying that turning it on was just what you did when you got up in the morning. He repeated this over and over.

When I opened the fridge there was only yoghurt and a couple of bits of mouldy fruit in there. I asked him about what he was eating and whether he was cooking for himself, but he became very aggressive with me, which had never happened before.

I thought that, as his enduring guardian, I might need to apply for Meals on Wheels to provide a service to him. We talked about the choices he had, and whether he thought he would like Meals on Wheels, but he still didn't understand the need for nutrition. He kept saying that he'd eaten enough through his life to keep him going now! I decided to apply for Meals on Wheels for him and to try to work out if he was still okay to manage the other things in his life. I decided to take the heater away for the summer because I wasn't confident that he understood that he didn't need to heat the place up.'

Ben, son and enduring guardian

More information

The Office of the Public Guardian (OPG) can provide answers to common questions over the phone, or go to the OPG website. There is a fact sheet about Guardianship which can be accessed by going to www.publicguardian.tas.gov.au then Clicking on 'About Us' then Clicking on 'Enduring Guardianship', then under this is a link titled 'Enduring Guardianship Fact Sheet.'

If you are considering making an application, to the Guardianship and Administration Board please contact the Board on 03 6233 3085 and discuss your concerns with an Investigation and Liaison Officer. Advice is free and confidential. If necessary they will send you an application form.

Solicitors can also give you information and advice about guardianship. The Law Society of Tasmania has a list of solicitors on its website.

Law Society of Tasmania
Ph: (03) 6234 4133
www.taslawsociety.asn.au

The Legal Aid Advice line provides free non means tested advice from a solicitor on Monday to Fridays. This service also runs open clinics in all regions and referrals to community services and provides a searchable website.

Legal Aid Commission of Tasmania
Ph: 1300 366 611
www.legalaid.tas.gov.au

Section 5.2

Health

Future health decisions (advance care directive) 94

Medical and dental decisions 102

Other health decisions 107

Future health decisions (advance care directives)

A person's capacity to make health care decisions is often reduced by serious illness. However, this is the time when important health care decisions need to be made, including end-of life care decisions. Planning ahead by making an 'advance care directive' will help a person who needs decisions made for them when they lack the capacity to make them for themself. An advance care directive can be in addition to, or instead of, appointing an enduring guardian.

In Tasmania, there is no standard method to make an advance care directive. However, an advance care directive usually contains:

- details of a person's health care preferences
- any values and beliefs that may guide future treatment
- instructions regarding the future use or restriction of particular medical treatments
- details of who a person wants to make these decisions for them when they aren't able to do so.[25]

There are two points at which a person's capacity might be assessed when dealing with an advance care directive.

[25] This information comes from the NSW Health policy *Using advance care directives* published in 2005. There are not currently any specific guidelines addressing advance care directives in Tasmania. However they are in development. If you want more information contact the Department of Health and Human Services Palliative Care Clinical Network, on (03) 62220472 http://www.dhhs.tas.gov.au/palliative_care/patients/advanced_care_planning

1. When the advance care directive is being made

For the advance care directive to be legal, the person making the directive must have capacity when signing the document.

It is often a legal or health professional who will undertake, or seek, an assessment of a person's capacity at the time of the making of the advance care directive.

2. When the advance care directive needs to be used

This assessment is triggered by concern about whether the person who made the advance care directive still has the capacity to make their own medical or dental decisions. If they are found to lack capacity to make a certain decision, the advance care directive can be used.

It may be the individual named in the directive to make decisions for the person that will undertake, or seek, an assessment of whether the other person has lost the capacity to make medical and dental decisions. Or it may be a medical or dental practitioner.

The remainder of this section is concerned only with the first point: to test whether the person has capacity to make an advance care directive. Advice about the test for the second point is in Section 5 'Medical and dental treatment'.

Legal test

This is what you are looking for when you are assessing whether a person has the capacity to make an advance care directive:

CAPACITY = UNDERSTANDING THE NATURE + EFFECT OF THE DOCUMENT AT THE TIME IT IS MADE

Checklist

- ☐ Does the person understand the nature and effect of the advance care directive **at the time it is being made**, not hours or days before or after it is made?
- ☐ Do they understand the 'nature' of what they are doing by making an advance care directive? Are they familiar with the general idea of advance care directives? More specifically, do they understand the following:
  - They are providing instructions about their health care preferences that will be followed if they lack the capacity to make these decisions?
  - They can provide information about their values, and general and specific information about what they want in particular health care circumstances?
  - The directive can't be used to allow or request assisted suicide, which is illegal in Tasmania.

☐ Does the person understand the 'effect' of the directive? Can they tell you the general result of the advance care directive? That is, do they understand the following:

- The directive will come into effect when they lack the capacity to make medical and dental decisions?
- The person named in the directive (if any) will make medical and dental decisions on their behalf?
- The directive will continue to be in effect as long as they lack the capacity to make medical and dental decisions?
- They can't revoke or change the directive while they lack capacity?

☐ Is the person freely and voluntarily making the advance care directive?

☐ Can they communicate the above, with assistance if necessary?

If the person wants to change or revoke an existing advance care directive, capacity needs to be assessed at that time. As well as the above, the person must know the following:

☐ How and why the new document differs from the old.

☐ The nature and effect of changing or revoking the existing advance care directive.

Tips on Questioning

Remember, when assessing whether a person has the capacity to make an advance care directive, it is important that you:

✔ ask open-ended questions

✔ do not ask leading questions

- ✔ frame your questions to quickly identify any areas of concern for which a person may need support or help, or require a substitute decision-maker
- ✔ ensure it is the person being assessed who answers the questions. In some circumstances the person may need support from a neutral person such as an advocate or an interpreter.[26]

Questions

Here are some specific questions you may ask as part of the assessment process to determine if the person has capacity to make an advance care directive.

- ✔ Explain to me what an advance care directive is.
- ✔ Why do you want to make an advance care directive?
- ✔ When will the advance care directive be used?
- ✔ What sorts of decisions do you think it will cover?
- ✔ How will it help someone make those decisions in the same way as you would make them?
- ✔ Tell me about your family and friends.
- ✔ Who would you want to be able to make medical and dental decisions for you?
- ✔ Why would you choose that person?
- ✔ What happens if you decide that you want to change or cancel your advance care directive?

[26] Multicultural Tasmania (Department of Premier and Cabinet) has information about interpreters on their website: www.dpac.tas.gov.au/divisions/cdd/multitas Or call 131450

- ✔ When would you be able to do this?

Similar questions to those above should be asked if the person wants to change or cancel an advance care directive. Also ask:

- ✔ What are your current advance care directive arrangements? How do you want to change them and why?
- ✔ Is anyone prompting you to change the current arrangements and, if so, why?

CASE STUDY

Advance care directives

'I have a client who asked me to assist him in writing an advance care directive. He has Multiple Sclerosis (MS) and is fearful that one day he will have trouble communicating decisions. I told him that there really is only a tiny chance of this, but he said that you can never be too prepared. That's true, and it's generally a good idea to make plans for the future anyway.

We went through the form that he had, and I helped him understand the types of medical scenarios that may come up and the decisions which may need to be made. It was clear to me that he understood what the document was all about, how it related to him, when it would be used, and for what purpose. He signed the advance care directive after we had discussed it thoroughly and I then witnessed it to show that I believed that he had capacity to make it.'

Margaret, community nurse

More information

The Department of Health and Human Services Palliative Care Website has fact sheets that give information on Advance Care Planning. These can be accessed at this website:

http://www.dhhs.tas.gov.au/palliative_care/patients/fact_sheets by clicking on the link that says ‘Advance Care Planning’.

Other information is also available on the website by clicking on

http://www.dhhs.tas.gov.au/palliative_care and Clicking on Patients Carers and Families, and then following the link to ‘Advance Care Planning’

If you would like to ask for a copy of this fact sheet, please call:

Palliative Care South
Ph: 03 6224 2515 or palliativecare.south@dhhs.tas.gov.au
Palliative Care North
Ph: 03 6336 5544 or palliativecare.north@dhhs.tas.gov.au
Palliative Care North West
Ph: 03 6440 7111 or palliativecareservicenw@dhhs.tas.gov.au

There is information on how to make an advance care plan on the Respecting Patient Choices website www.respectingpatientchoices.org.au
To locate the information that is specific to Tasmania, click on ‘Make an advance care plan’ then select TAS from the drop down menu, titled ‘Select a state’.

The Advance Care Directives Association Inc. publishes a book called *My health, my future, my choice*, which is available at a cost on their website at: www.advancecaredirectives.org.au by clicking on the 'Publications' tab or by calling and asking for an order form.

Advance Care Directives Association Inc.
Ph: 0423 157 003
www.advancecaredirectives.org.au

The Office of the Public Guardian (OPG) can provide answers to common questions over the phone, or go to the OPG website. There is a fact sheet about Guardianship which can be accessed by going to www.publicguardian.tas.gov.au then Clicking on 'About Us' then Clicking on 'Enduring Guardianship', then under this is a link titled 'Enduring Guardianship Fact Sheet.'

Solicitors can also give you information and advice about advance care directives. The Law Society of Tasmania has a list of solicitors on its website.

Law Society of Tasmania
Ph: (03) 6234 4133
www.taslawsociety.asn.au

The Legal Aid Advice line provides free non means tested advice from a solicitor on Monday to Fridays. This service also runs open clinics in all regions and referrals to community services and provides a searchable website.

Legal Aid Commission of Tasmania
Ph: 1300 366 611
www.legalaid.tas.gov.au

Medical and dental treatment

It is important that people make their own decisions about medical or dental treatment, when they can, based on their beliefs and values. If there is a question about a person's medical or dental decision-making capacity it is usually a medical or dental practitioner, or other health professional, who conducts or seeks a capacity assessment.

Practitioners have a legal and professional responsibility to get consent before treating any person. Generally, the person gives this consent themself. Before assessing whether a person has capacity to make decisions about specific treatment, the practitioner must provide the person with all relevant information about treatment options.

If the practitioner assesses a person as lacking the capacity to make a decision, and the treatment is not urgent, they must seek consent from either:

- a 'person responsible'[27]
- a guardian, appointed under an enduring guardianship or by the Guardianship and Administration Board
- a person named in an advance care directive
- the Guardianship and Administration Board.

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[27] A 'person responsible' for an adult may be:
- An appointed guardian (this includes an Enduring Guardian) who has the power to make decisions about heath care; or if there is no guardian
- The person's spouse (this includes de facto spouses and same sex spouses); or if there is no spouse
- an unpaid carer who is now providing support to the person or provided this support before the person entered residential care; or if there is no carer
- a close relative or friend of the person, who has a close personal relationship with the other person through frequent personal contact and who has a personal interest in the other person's welfare.

Legal test

This is what you are looking for when you are assessing whether a person has the capacity to make medical or dental decisions:

CAPACITY = UNDERSTANDING THE NATURE + EFFECT OF THE ACTUAL TREATMENT BEING PROPOSED AT THE TIME THE CONSENT IS REQUIRED

Checklist

- [ ] Does the person understand the nature and effect **at the time that the medical or dental decision is required**, not hours or days before or after it is made?
- [ ] Does the person know the 'nature' of the treatment? That means, do they understand broadly and in simple language:
  - what the medical or dental treatment is?
  - what the procedure involves?
  - why it is proposed?
  - that there are other options? If choosing between options, the person must understand what each option is, what it involves, the effect of each option, and the risks and benefits
  - what it means if they don't have the treatment?
- [ ] Does the person understand the 'effect' of the treatment? Are they aware, in simple terms, of the main benefits and risks of the treatment?

- ☐ Does the person have the ability to indicate whether they want the treatment? Can they communicate any decision made, with assistance if necessary?
- ☐ Has the person made the decision freely and voluntarily?

Also consider that a person has a right to refuse treatment. What most people would decide to do in the situation is irrelevant. Consider the following:

- ☐ Is refusal of treatment consistent with the person's views and values?
- ☐ Is this behaviour usual for the person?
- ☐ Has all the relevant information been given to the person in a way they can understand?

Tips on Questioning

Remember, when assessing whether a person has the capacity to make medical or dental decisions, it is important you:

- ✔ ask open-ended question
- ✔ do not ask leading questions
- ✔ frame your questions to quickly identify any areas of concern for which a person may need support or help, or require a substitute decision-maker
- ✔ ensure it is the person being assessed who answers the questions. In some circumstances the person may need support from a neutral person such as an advocate or an interpreter.[28]

[28] Multicultural Tasmania (Department of Premier and Cabinet) has information about interpreters on their website: www.dpac.tas.gov.au/divisions/cdd/multitas Or call 131450

Questions

Here are some specific questions you may ask as part of the assessment process to determine if the person has capacity to make medical and dental decisions.

- ✔ Tell me about your health or teeth and why you need some medical or dental treatment.
- ✔ What is the medical or dental treatment that you might be having? Can you explain it to me?
- ✔ Where will you be having the treatment?
- ✔ How long will it take?
- ✔ How will the treatment help you? What are the good things about the treatment?
- ✔ Will there be any bad things about the treatment? What are they?
- ✔ How do you think you will be able to deal with these?
- ✔ What are the risks of having the treatment?
- ✔ Is there any other treatment you might be able to have? Can you tell me about it?
- ✔ How would this other treatment help you?
- ✔ What are the risks of having this other treatment?
- ✔ Which do you think is the best treatment? Why?
- ✔ What would happen if you didn't have any treatment at all?
- ✔ What do your family and friends think of the treatment?
- ✔ What do they want you to do? Why?

CASE STUDY

Medical decisions

'Jovesa and I were visiting the doctor because he had developed tremors and a very fast heartbeat. The doctor explained that the problem was actually because of a part of his body in his neck called his thyroid. He needed medication and regular blood tests to monitor whether his new medication was working.

The blood tests showed that things were not settling down. The doctor then talked about what he could do next to stop the thyroid from causing these things to happen. He gave Jovesa a pamphlet to explain:

- why the thyroid was playing up and why the medication wasn't working
- the different things that he could do to stop the thyroid causing problems
- the treatment he recommended for Jovesa and why
- the risks of having or not having the treatment
- that Jovesa has a right to decide whether or not to have the treatment.

The pamphlet used really simple language and photos to explain everything. When I took Jovesa home we went through the pamphlet together on a few occasions. I asked him various questions to work out whether he understood the information or not. Then we went back to the doctor. Jovesa told the doctor that he had decided to have the treatment, even though he was scared about it.

The doctor asked Jovesa some questions about how the treatment worked and why he had decided to have it, and came to the conclusion that he had the capacity to make the decision about the treatment himself.'

Felise, carer

Other health decisions

There may be a need to assess the capacity of a person to make other health decisions, such as whether to:

- have a non-intrusive examination by a doctor or dentist, for example, having the mouth, teeth, throat, nose, ears or eyes looked at
- take over-the-counter chemist medication
- have alternative therapies such as physiotherapy, acupuncture, reflexology, chiropractic or naturopathic treatment.

The person needs to understand the nature and effect of the type of examination, medication or therapy that they are deciding upon.

You can use the capacity test (checklist and questions) from the medical and dental treatment section, on page 102, as a guide to capacity assessment for other health decisions.

More information

The Office of the Public Guardian (OPG) can provide answers to common questions over the phone 1300 799 625 or email guardianship@justice.tas.gov.au or go to the OPG website.

There are fact sheets about medical and dental treatment on the Guardianship and Administration Board website http://www.guardianship.tas.gov.au/publications/factsheets There is a fact sheet for consumers, and one for practitioners. The page also contains a fact sheet for

Persons Responsible called ‘Are you a Person Responsible?’

When the person is a patient in a mental health facility, the Mental Health Tribunal (MHRT) may approve certain medical or dental treatment or procedures.

Mental Health Tribunal
Ph: (03) 6233 3033
www.mentalhealthtribunal.tas.gov.au/home

There is information on how to make an advance care plan on the Respecting Patient Choices website www.respectingpatientchoices.org.au
To locate the information that is specific to Tasmania, click on ‘Make an advance care plan’ then select TAS from the drop down menu, titled ‘Select a state’.

Solicitors can also give you information and advice about medical and dental treatment decisions. The Law Society of Tasmania has a list of solicitors on its website.

Law Society of Tasmania
Ph: (03) 6234 4133
www.taslawsociety.asn.au

The Legal Aid Advice line provides free non means tested advice from a solicitor on Monday to Fridays. This service also runs open clinics in all regions and referrals to community services and provides a searchable website.

Legal Aid Commission of Tasmania
Ph: 1300 366 611
www.legalaid.tas.gov.au

Section 5.3

Money and property

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Wills 137

Contracts

Contracts are a part of daily life. A simple contract is made when a person buys a paper, coffee or groceries. All purchases are simple contracts, even though a written agreement is not signed.

More complex contracts are usually written when a person buys or rents more expensive items, such as a car or house. For example, if a person signs a lease to rent a property or enters into a social housing tenancy agreement, this is making a contract. Written contracts may also be used in connection with the electricity, gas, water or phone.

A person may have a contract to borrow money with a financial institution such as a credit union, building society or bank.

Contracts also exist at the workplace. It is not unusual to enter into an employment contract with your employer.

If there is any doubt about a person's capacity, it is important that you undertake, or seek, an assessment when they are entering into a contract. In some circumstances, the law may state that a person is still bound by a contract even if they did not have capacity when they signed the contract.

You might carry out, or seek, an assessment if you are a legal practitioner, family member, friend or carer, community worker, staff member of a financial organisation, government employee or anyone else concerned about the person's capacity to enter into a contract.

Legal test

This is what you are looking for when you are assessing whether a person has the capacity to make a contract:

CAPACITY = NATURE + EFFECT
OF THE SPECIFIC CONTRACT
AT THE TIME IT IS MADE

Checklist

- ☐ Does the person understand **the particular contract** they are deciding about, rather than any other contract or contracts in general?
- ☐ Does the person understand the contract **when they are signing it**, not hours or days before or after the contract is made?
- ☐ Do they know the 'nature' of the contract? Do they understand the general idea of the whole contract, not just details about parts of it?
- ☐ Do they understand the 'effect' of the contract? Do they know what the general result and effects of carrying out the contract will be?
- ☐ Do they have the level of understanding required for the degree of difficulty of the contract (greater for a complex contract than for a simple one)?
- ☐ Do they enter into the contract freely and voluntarily?
- ☐ Can they communicate the above, with assistance if necessary?

Tips on Questioning

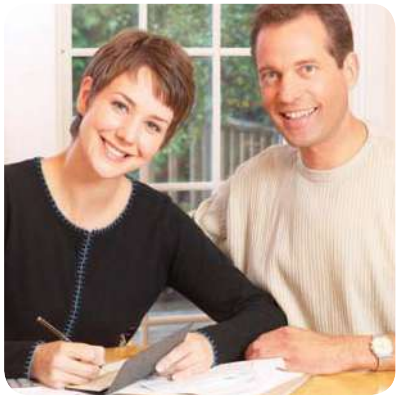
Remember, when assessing whether a person has the capacity to make a contract, it is important that you:

- ✔ ask open-ended questions
- ✔ do not ask leading questions
- ✔ frame your questions to quickly identify any areas of concern for which a person may need support or help, or require a substitute decision-maker
- ✔ ensure it is the person being assessed who answers the questions. In some circumstances the person may need support from a neutral person such as an advocate or an interpreter.[29]

Questions

Here are some specific questions you may ask as part of the assessment process to determine if the person has capacity to make a contract.

- ✔ What is the contract about?
- ✔ Who are you are making this contract with?
- ✔ If you sign this contract, what happens next?



[29] Multicultural Tasmania (Department of Premier and Cabinet) has information about interpreters on their website: www.dpac.tas.gov.au/divisions/cdd/multitas Or call 131450

- ✔ Do you have to pay anything to, or do anything for, the other person?
- ✔ How will it affect you?
- ✔ What does the other person have to do after the contract is signed?
- ✔ Do they have to pay you anything, or do anything for you?
- ✔ How will it affect the other person?
- ✔ Will anyone else be affected by the contract or benefit from the contract? Who?
- ✔ Tell me about some of the important parts of the contract.
- ✔ Do you need, or did you get, legal advice about the contract?
- ✔ How long is the contract for?
- ✔ If you do sign the contract, can you end it later if you want to?
- ✔ How do you go about ending the contract?
- ✔ What happens if you don't do what you are supposed to do under the contract?
- ✔ Did you talk to any friends or family about the contract? What did they think about it?

CASE STUDY

Contracts

'I feel pretty cranky about what happened to my uncle at a local electrical store. He recently had a brain injury from a stroke. It means he has difficulty paying attention and is very slow to take in information and think things through. Also, he doesn't comprehend complex ideas.

I dropped by his place the other day and was surprised to see that he has a whole lot of new whitegoods and entertainment equipment – a fancy new fridge/freezer, a washing machine, a new huge screen TV, DVD player and stereo system. He said that he had gone to buy a DVD player and ended up 'renting' the other stuff too. He thought he might try it out because he could always take it back if he didn't need it. This sounded a bit odd, so I asked him if he had any documents to say how much rent he had to pay. It turns out the stuff is actually purchased on an 'interest free' finance deal.

I read the documents, which were long and technical, and I knew there was no way he had understood what they were about when he signed them. When I asked him about it he thought he could take the stuff back at any time and not pay a cent more! The contract actually said that if he didn't pay off the goods in time, the store would arrange a loan for my uncle through a particular finance company (so he could pay off the goods), and then he would have to pay the loan back at a huge interest rate!

I freaked out and called the store. I have made an appointment with the manager, so I will see what I can do. If that doesn't work I may have to take my uncle to a lawyer for advice.'

George, nephew

More information

The Tasmanian Office of Consumer Affairs has fact sheets for consumers of various types of products on its website. They can be accessed from their website http://www.consumer.tas.gov.au and clicking on the link titled ‘Publications’.

Solicitors can also give you information and advice about contracts. The Law Society of Tasmania has a list of solicitors on its website.

Law Society of Tasmania
Ph: (03) 6234 4133
www.taslawsociety.asn.au

The Legal Aid Advice line provides free non means tested advice from a solicitor on Monday to Fridays. This service also runs open clinics in all regions and referrals to community services and provides a searchable website.

Legal Aid Commission of Tasmania
Ph: 1300 366 611
www.legalaid.tas.gov.au

Financial decisions (money and property)

A person must manage their money and property, for themself and others who depend on them. This is an essential part of life. Financial management includes:

- managing accommodation, for example, maintaining a house, renting or boarding
- paying bills for services such as water, electricity, gas and phone
- buying food and clothes
- general banking, balancing income and debt
- deciding what other things to buy and sell, including important items such as cars and investments.

These are the ordinary, regular dealings that continue throughout life.

You may question a person's capacity to manage their own money and property when their decisions are causing them or others harm, or when their assets are being lost, or wasted.

People often plan ahead and appoint a person who will have power of attorney to manage their finances for them when they lose capacity. If they don't do this, the Guardianship and Administration Board can appoint a financial manager called an "administrator" when a person lacks the capacity to manage their finances.

There are several situations in which a person may need an assessment of whether they can continue making their own financial management decisions.

Here are some examples.

- An assessment may be carried out by a concerned family member, friend or carer who wants to know whether they, or others, should begin making minor or routine decisions about some of the person's financial affairs, on an informal basis.
- A person with enduring power of attorney may assess a person's capacity to manage their financial affairs when they think they may need to start using or continue using the document.
- An assessment might be the first step on the path to making an application to the Guardianship and Administration Board for an administrator to be appointed for all or some of the person's financial affairs.

The remainder of this section is concerned only with the test for capacity to manage financial affairs, such as in the types of situations outlined above.[30]

[30] The 'Powers of Attorney' section on page 128 deals with assessing a person's capacity to **make** a power of attorney.

Legal test

This is what you are looking for when you are assessing whether a person has the capacity to make their own financial decisions:

CAPACITY = THE PERSON CAN MANAGE THEIR OWN AFFAIRS

Checklist

You will need to consider two quesions.

1. Is the person capable of managing their own property and affairs?

The meaning of 'affairs' is broad. A person who can manage their own affairs will be able to manage their property and money and provide for the welfare of themself and anyone dependent on them. A person doesn't have to be able to manage their affairs in the best possible way; they just have to be able to manage them.

- [ ] Does the person have the skills to deal in a fairly capable way with the ordinary, regular dealings in life (such as those described in the first paragraph of this section)?

- ☐ Does the person have money management skills? For example, ask them the name of their bank, how they budget, and how they can work out the market value of their property?
- ☐ Do they understand their assets, ongoing expenses and financial obligations?
- ☐ Can they manage their money to provide for food, clothing, medicine and other necessities for themself and any dependents?
- ☐ Do they have a history of looking after their affairs in the past? Some people may not have ever been involved in routine financial decisions. You may need to consider how the person can get assistance or become familiar with banking and other finances.[31]
- ☐ Does the person know when to get appropriate professional advice? When considering this you need to take into account the extent of their assets and the complexity of their financial affairs. If the person's affairs are complex, determine if the person:
  - knows when they can't deal with their affairs
  - knows that they can get professional advice, and from whom
  - can understand and weigh up professional advice.
- ☐ Can they protect their own interests? Can the person identify and deal appropriately with someone who is unfairly trying to gain benefit from their assets?
- ☐ Can they communicate the above, with assistance if necessary?

[31] See Section 6 'Assisted decision-making' and 'How can I support a person to make their own decision?' on page 147.

2. If the person can't manage their affairs, is there a risk that they may be disadvantaged or harmed, or their money or property wasted or lost?

Question the person to assess the following:

- ☐ Is there risk of significant disadvantage or harm caused by their inability to manage their money or property?
- ☐ Is the person freely and voluntarily making decisions about the management of their affairs?

Remember, people have the right to manage their own affairs. Each individual has the right to take their own chances and make their own mistakes. Also, making an unwise decision or one that you don't agree with does not necessarily mean that a person lacks capacity.[32]

If the person can't manage all of their affairs, decide whether there are parts that they can manage.

[32] See capacity assessment principle 4 'Assess the person's decision-making ability – not the decision they make' on page 36.

Tips on Questioning

Remember, when assessing whether a person has the capacity to make property and financial decisions, it is important that you:

- ✔ ask open-ended questions
- ✔ do not ask leading questions
- ✔ frame your questions to quickly identify any areas of concern for which a person may need support or help, or require a substitute decision-maker
- ✔ ensure it is the person being assessed who answers the questions. In some circumstances the person may need support from a neutral person such as an advocate or an interpreter.[33]

Questions

Here are some specific questions you may ask as part of the assessment process to determine if the person you are assessing has capacity to make property and financial decisions. Assure the person that the answers are confidential.

- ✔ What bank accounts do you have?
- ✔ How much money do you have in the bank at the moment?
- ✔ Do you keep any money anywhere else, such as at home? Where?
- ✔ Do you own any property? How much do you think the property is worth now? Are you the only owner or does someone else own it with you?

[33] Multicultural Tasmania (Department of Premier and Cabinet) has information about interpreters on their website: www.dpac.tas.gov.au/divisions/cdd/multitas Or call 131450

- ✔ Where do you get your money from? Do you have a job or a pension? Do you have a business or any other source of income?
- ✔ How much are your bills each month? What sort of bills do you have to pay?
- ✔ Do you have any credit cards, and how much do you owe on them? What are your other debts?
- ✔ Do you have a mortgage or do you pay rent?
- ✔ Can you tell me who depends on you? Does this person or people have any income of their own?
- ✔ What investments do you have? Is there an accountant or financial advisor that you go to? If so, what is their name and how often do you see them?
- ✔ Do your family or friends help you with your finances and, if so, how do they help?
- ✔ Have you ever given money to, or bought things for, your family or friends? What types of things? Have they ever asked you for money or influenced you to spend your money in a certain way?
- ✔ What sort of major purchases have you made over the last year?
- ✔ What are the next major purchases you want to make?
- ✔ What would happen if you didn't pay your bills?
- ✔ What would happen if you didn't follow a budget and instead spent your money on unnecessary or expensive things?

After you have asked your assessment questions, it is worthwhile to then ask the person whether they believe they can manage their financial affairs. You might ask:

- ✔ Do you have any financial concerns or problems? If so, what they are? How will you manage them?
- ✔ If not, are you aware of any concerns about your ability to manage your financial affairs that have been raised by a person or people close to you (or whoever it was that recognised the trigger)?

If they are not aware of the concerns, provide them with more information about the situation. Then ask them the questions again. You are looking for understanding of the situation and whether they have insight into what the potential or existing problems might be. For example unpaid bills, overspending on unwanted goods, giving away large amounts of money or property, accumulating large debts, mishandling of money, or allowing others to influence decisions about money or property.

Ask the person open-ended questions which help them to describe the situation and why they think it could be a matter for concern such as:

- ✔ What other options do you have, or might you want to take?
- ✔ What are the pluses and minuses of each option?

If the person can't tell you these things, discuss with them the benefits and disadvantages of each option and ask them what they think of these choices.

You are looking for indications that the person can understand and weigh up information, options and consequences.

CASE STUDY

Financial management

'Last week I went to my client Joan's house. There was a huge pile of unopened mail in the kitchen. When I asked her about it during our interview, she said that she didn't feel like opening her mail. We talked about what she thought was in the mail, and she told me that it would just be junk. I showed her one envelope which was dated months ago and had the name of an electricity company and REMINDER written on it. I suggested that it might be an electricity bill. We then discussed what might happen if she didn't pay the bill, and Joan seemed to understand that the company would cut the electricity to her house.

I started to ask Joan questions about her property and her banking arrangements. Her answers made me realise that just before her husband had died Joan had stashed a whole lot of cash in the house and had been using it to live. Her husband was the one who dealt with all the accounts and Joan didn't know the banking details. She was starting to run out of the cash and was too embarrassed to tell anyone about the situation! That's why she tried to make light of the mail situation.

After I had worked it out, I told Joan that she wasn't alone, that lots of people let someone close to them deal with the household money. But now, she either had to learn new skills so that she could take care of the finances or appoint a power of attorney to do it for her. I agreed to assist her to get some information on money matters, and to take her to the bank so that she could find out more about her financial arrangements.'

Rebecca, social worker

More information

The Public Trustee has information available about financial administration on their website www.publictrusee.tas.gov.au Click on 'Financial Administration' A fact sheet is available from this site.

The Public Trustee can also answer questions over the phone – the number is FREECALL from anywhere within Tasmania 1800 068 784.

You can also make an appointment to go and speak to someone about appointing a financial administrator by emailing tpt@publictrustee.tas.gov.au

The Office of the Public Guardian (OPG) can provide answers to common questions over the phone 1300 799 625 or email guardianship@justice.tas.gov.au or go to the OPG website.

Solicitors can also give you information and advice about financial administration. The Law Society of Tasmania has a list of solicitors on its website.

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www.taslawsociety.asn.au

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Legal Aid Commission of Tasmania
Ph: 1300 366 611
www.legalaid.tas.gov.au

Powers of attorney

Many people plan ahead and appoint a person with power of attorney to manage their financial decisions, such as buying or selling property or operating bank accounts.

There are two types of power of attorney: a general power of attorney and an enduring power of attorney.

A **general power of attorney** is made so that someone can make financial decisions on behalf of a person when they are absent, or if they simply prefer another person to make those decisions for them. For example, if a person is overseas and needs someone else to sell their house or pay their bills. It could also apply if a person couldn't physically get to the bank to operate their own account.

An enduring power of attorney is a person who begins, or continues, to make decisions for a person when they no longer have the capacity to make their own decisions about their financial affairs. A general power of attorney will not continue when a person loses capacity unless this is stated in the document, and the document is properly made as an enduring power of attorney.[34]

There are two points at which a person's capacity might be assessed when dealing with a power of attorney.

[34] To obtain detailed information about what a power of attorney document is and does, or the differences between an enduring and general power of attorney see 'More information' on page 135.

1. **When the document is being made**
   For the appointment of a power of attorney to be legal, the person making the appointment must have capacity at the time that they are signing the power of attorney document.

2. **When an enduring power of attorney needs to be used**
   This assessment is triggered by concern about whether the person who made an enduring power of attorney still has the capacity to make their own financial decisions. If they are found to lack capacity to make a certain decision, the individual appointed as having enduring power of attorney can make this decision for the person.

   It will usually be the person appointed as enduring power of attorney that will undertake, or seek, an assessment of whether the person has lost the capacity to make the financial decision.

The remainder of this section is concerned only with the first point: the test for capacity to appoint a general or enduring power of attorney. Advice about the test for the second point, capacity to make 'financial decisions', is in Section 5 'Financial decisions (money and property)', on page 117.

Legal test

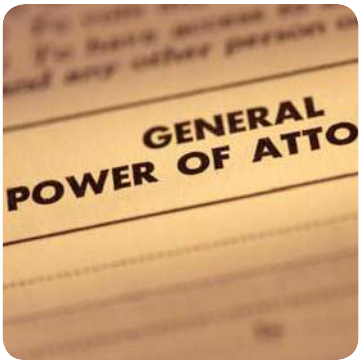
This is what you are looking for when you are assessing whether a person has the capacity to appoint a power of attorney.

CAPACITY = NATURE + EFFECT
OF THE DOCUMENT
AT THE TIME IT IS MADE

Checklist

- ☐ Does the person understand the nature and effect of the power of attorney document they are signing **at the time it is being made**, not hours or days before or after?
- ☐ Does the person understand the 'nature' of appointing a power of attorney? Are they familiar with the general idea of powers of attorney? More specifically, do they know:
  - that they are appointing someone to make financial decisions on their behalf?
  - what the attorney's functions will be and the sorts of decisions the attorney will be able to make?
  - when the power of attorney takes effect?
  - that they can give instructions on how their attorney will exercise the power?
  - that they can appoint more than one attorney?
  - that an appointed enduring power of attorney will begin making decisions, or continue to make decisions, when the person lacks capacity to make financial decisions?
- ☐ Does the person understand the nature and extent of his or her estate?
- ☐ Does the person know that the attorney's stewardship will not be monitored or audited in any fashion (unless specified in the document), and that therefore in choosing an attorney, the donor is placing a very high level of trust in the appointed person or organisation?

- [ ] Does the person understand the 'effect' of the document? That is, can they identify what the general result of the power of attorney appointment will be and the effect that it will have on them? More specifically, do they know:



  - the attorney can make decisions about the things detailed in the power of attorney document?
  - these are binding decisions made on their behalf?
  - they can cancel the power of attorney or change it in the future?
  - if the power is an enduring power of attorney, the attorney will continue to make decisions for them as long as they lack the capacity to do this for themself?
  - if it is an enduring power of attorney, they can't revoke or change the appointment while they lack capacity?

- [ ] Does the person appoint the attorney freely and voluntarily?
- [ ] Can they communicate the above, with assistance if necessary?

If the person wants to change or revoke a power of attorney, capacity needs to be assessed at that time. As well as the above checklist, also ensure the person is aware of the following:

- [ ] How and why the new power of attorney differs from the old.
- [ ] The nature and effect of changing or revoking the existing power of attorney.

Remember that a person can have the capacity to make a power of attorney even though they may not have the capacity to manage their financial affairs.

Tips on Questioning

Remember, when assessing whether a person has the capacity to appoint a power of attorney, it is important that you:

- ✔ ask open-ended questions
- ✔ do not ask leading questions
- ✔ frame your questions to quickly identify any areas of concern for which a person may need support or help, or require a substitute decision-maker
- ✔ ensure it is the person being assessed who answers the questions. In some circumstances the person may need support from a neutral person such as an advocate or an interpreter.[35]

Questions

Here are some specific questions you may ask as part of the assessment process to determine if the person has capacity to appoint a power of attorney.

- ✔ Explain to me what a power of attorney (or enduring power of attorney) is.
- ✔ Why do you want to appoint someone as your power of attorney?
- ✔ When does the power of attorney begin?

[35] Multicultural Tasmania (Department of Premier and Cabinet) has information about interpreters on their website: www.dpac.tas.gov.au/divisions/cdd/multitas Or call 131450

- ✔ What sort of decisions will your attorney be able to make for you?
- ✔ Tell me about your family and friends. Who would you want to appoint to be able to make these decisions for you?
- ✔ Why would you choose that person?
- ✔ Would you want your attorney to make decisions for you in the same way that you would make them?
- ✔ How can you help them understand how you would want decisions to be made? Remember, you may not have the capacity to tell them later.
- ✔ Are you aware that if you appoint a non professional attorney, their actions will not be monitored or audited in any fashion?
- ✔ Sometimes people appoint more than one person so that they can make decisions together for you. Why do you think people would want to do that?
- ✔ Do you think you might want to do this? Why or why not?
- ✔ What do your friends and family think about you appointing a power of attorney, and about whom you are choosing to be the attorney?
- ✔ What happens if you decide that you want to change or cancel your power of attorney? When would you be able to do this?

Similar questions to those above should be asked if the person wants to change or cancel a power of attorney. Also ask:

- ✔ What are your current power of attorney arrangements and how do you want to change them? Why?
- ✔ Is anyone prompting you to change the current arrangements and, if so, why?

CASE STUDY

Enduring power of attorney

'Noel came into my office asking for a signature on his enduring power of attorney. The law says that before I and a colleague both sign his power of attorney document, I have to be satisfied that Noel understands the document and its effect.

Anyhow, I asked him some questions to find out whether he knew what an enduring power of attorney was and how it was different from a general power of attorney. His answers made me realise that he wasn't sure of what he was really getting me to sign.

His friend had told him he'd better "see about doing an enduring power of attorney", and he had photocopied the form and filled out some of it.

We ended up spending some time together going through the document. I explained it to him bit by bit and asked him questions to check that he understood what I was saying. When he realised that it was about who would deal with his finances if he lost capacity to do it himself, he decided to talk to his family before he chose an attorney.

He came back the next week, and when we went through the questions I was satisfied that he understood the document and what it did. He also understood who he wanted to appoint as an attorney and why, what powers he wanted to give them, and when they could use those powers.'

Antonio, solicitor

More information

The Public Trustee has information available about powers of attorney on their website www.publictrusee.tas.gov.au Click on ‘Power of Attorney’. A fact sheet is available from this site.

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www.legalaid.tas.gov.au

Wills (testamentary capacity)

A will is only legal if the person who made it had 'testamentary' capacity when they made it. 'Testamentary' capacity is the legal test on page 138.

So, it is very important to make sure that a person has the capacity to make a will. If this is not done, any will made by them could be seen as being based on misunderstandings or false assumptions and therefore may be held not to be legal.

Equally, if a person is wrongly assessed as lacking capacity, they will lose the freedom to decide whom to leave their estate to when they die.

Some people make their will themselves or get assistance from friends or family. However, it is best to get professional advice to ensure that a proper capacity assessment is undertaken. This will provide a future safeguard if the will is challenged on the grounds of lack of capacity.

An assessment of a person's capacity to make a will is usually done by a legal practitioner, Public Trustee or Trustee Corporation employee when instructions are given to make the will and again when the will is signed.

Legal test

This is what you are looking for when you are assessing whether a person has the capacity to make a will, (testamentary capacity):

CAPACITY = NATURE + EFFECT
OF THE WILL
AT THE TIME IT IS BEING MADE

Checklist

- [ ] Does the person understand the nature and effect of the will **at the time the will is being made**, not hours or days before or after?
- [ ] Does the person understand the 'nature' of making a will? Do they know the general function of a will? More specifically, do they:
  - understand that their will comes into effect after they die?
  - understand what assets or property they own and can leave under their will, and in general terms, their value?
  - know that they can change or revoke the will at any time if they have capacity?

- [ ] Does the person understand the 'effect' of the will? More specifically, do they know:
  - that when they die their property will be given away to the people they have named?
  - who would normally be expected to benefit from a will?
  - which family members or friends may claim benefits from their estate?
- [ ] Is the person making the will freely and voluntarily?
- [ ] Can the person communicate the above, with assistance if necessary?

If the person wants to change or revoke their will, capacity needs to be assessed at that time. Ensure that you ask the same questions as above, and also the following questions:

- [ ] How and why does the new will differ from the old?
- [ ] What is the nature and effect of changing or revoking the existing will?

Remember, people can make decisions about their possessions which may be seen as unwise, unfair, unreasonable, or based on values that you do not accept. This doesn't mean that a person lacks the capacity to make a will.[36]

Importantly, a person may have testamentary capacity even though they may not have the capacity to manage their financial affairs.

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[36] See Section 3 'Capacity assessment principles' on page 27. (Principle 4 – 'Assess the person's decision-making ability – not the decision they make'.)

Tips on Questioning

Remember, when assessing whether a person has the capacity to make a will, it is important that you:

- ✔ ask open-ended questions
- ✔ do not ask leading questions
- ✔ frame your questions to quickly identify any areas of concern for which a person may need support or help, or require a substitute decision-maker
- ✔ ensure it is the person being assessed who answers the questions. In some circumstances the person may need support from a neutral person such as an advocate or an interpreter.[37]

Questions

Here are some specific questions you may ask as part of the assessment process to determine if the person has capacity to make a will.

- ✔ What is a will?
- ✔ Why do you want to have one?
- ✔ When does a will come into effect?
- ✔ Do you have any property, money or other belongings? What are they?

[37] Multicultural Tasmania (Department of Premier and Cabinet) has information about interpreters on their website: www.dpac.tas.gov.au/divisions/cdd/multitas Or call 131450

- ✔ How much do you think they would be worth?
- ✔ Tell me about your family and friends. Who would you want to give your things to after you die? Why would you choose those people?
- ✔ Is there anyone you don't want to give anything to? Why?
- ✔ What happens if you decide that you want to change or cancel your will?

Similar questions to those above should be asked if the person wants to change or cancel a will. Also ask:

- ✔ What are the current arrangements in your will?
- ✔ How do you want to change them and why?
- ✔ Find out if and why anyone is prompting them to change the current arrangements.

CASE STUDY

Wills

'I had an appointment with a new client, Betty, about changing her will. She came in with her cousin and insisted that he sit with her during the appointment. The cousin was overbearing and kept speaking on behalf of the client. In the end I asked the cousin to wait outside, saying that I had to discuss some matters with Betty alone. I stated that I would not be able to continue with the appointment if he did not do this.

Alone, Betty was able to answer a lot of my questions about what a will was, her property and who she thought should benefit from the will. However, she was not so clear on why she wanted to change her will. It became apparent that Betty had already changed her will twice in the last three months, following an argument with her family.

After the family argument the cousin had become closer to Betty and had moved into her home. I spoke at some length with Betty about many general matters, including her health. She confided in me that her psychologist said she had a depressive disorder and that, at times, it seemed to impair her ability to think clearly and make decisions without being influenced by others.

When I asked Betty about wanting to change her will this time she just said, "It would be best for my cousin."

I decided to ask Betty if I could contact her psychologist for an opinion about whether her depression would, at this time, affect her decision-making about her will. I explained this to her and told her that if I didn't find these things out, it could make the will invalid later. She consented to my talking with her psychologist.'

Michael, lawyer

More information

The Public Trustee has information available about making a will on their website www.publictrusee.tas.gov.au Click on 'Wills'. The Public Trustee can also answer questions over the phone – the number is FREECALL from anywhere within Tasmania 1800 068 784.

You can also make an appointment to go and speak to someone about making or changing your will by emailing tpt@publictrustee.tas.gov.au

Solicitors can also give you information and advice about making a will. The Law Society of Tasmania has a list of solicitors on its website.

Law Society of Tasmania
Ph: (03) 6234 4133
www.taslawsociety.asn.au

The Legal Aid Advice line provides free non means tested advice from a solicitor on Monday to Fridays. This service also runs open clinics in all regions and referrals to community services and provides a searchable website.

Legal Aid Commission of Tasmania
Ph: 1300 366 611
www.legalaid.tas.gov.au

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Assisted decision-making

Assisting, or supporting, someone to make a decision means giving them the tools they need to make the decision for themself. It is about supporting them to make their own decision, and in doing so, safeguarding their autonomy.

It does not mean making the decision for them. A person's right to make decisions is fundamental to their independence and dignity.

Capacity principle 6[38] provides that before you assess someone as not being capable of making a certain decision themself, 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 behavioural support

[38] 'Substitute decision-making is a last resort.' See page 42.

- if the person has difficulty communicating they may need a neutral interpreter,[39] a person with skills in Alternative and Augmentative Communication (AAC) systems, such as a speech pathologist 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 assisted decision-making is where a formal legal substitute decision-maker has already been:

- called upon as a 'person responsible' (see the definition on page 102)
- activated by a power of attorney or enduring guardianship
- appointed by a Board or court.

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 themself.

However, even in these situations the substitute decision-maker should consult with the person about the decision to be made.

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[39] Multicultural Tasmania (Department of Premier and Cabinet) has information about interpreters on their website: www.dpac.tas.gov.au/divisions/cdd/multitas Or call 131450

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, it is up to you to consider what kind of assistance is possible and appropriate. You may need to seek the advice of appropriate family, friends, carers, professionals or specialists.

Not all steps outlined in this section will apply in every situation and there may be other ways of supporting a person that have not been discussed here.

It is always important to find the most effective way of communicating with the person.

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.

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[40] or have an advocate present.
- ✔ For people with communication difficulties, 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.

[40] See previous footnote.

✔ Where a person with communication difficulty has no AAC system in place, it may be necessary to make a referral to a speech pathologist for a communication assessment. The following may also be useful:

- 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 behavioural 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. Remember individuals who have difficulty verbalising may use yes/no questions as a communication strategy. For these people you many need to use closed questions. You can check the person has understood by asking the same question a in different ways.
- 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.

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 checkups. 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 late 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 checkups.’

Frank, nurse

Enlist support in the decision-making 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 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 to 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,[41] advocate, speech pathologist, behavioural support practitioner 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.

[41] See footnote 39.

CASE STUDY

Supporting a person to make their own decision
'Jane has an intellectual disability. She expresses herself using some words, facial expressions and body language. She has lived in her current group home all her life, but now she needs to move to a new group home.

She finds it difficult to discuss abstract ideas or things she hasn't experienced. Staff concluded that Jane lacks the capacity to decide for herself which new group home she should move to. They then asked me, an advocate, to support Jane to express any views she may have so they could take these into account when making a decision for her.

I spent time with her in different environments and got specialist advice on the best way to communicate with Jane, used pictures, symbols and a structured language program familiar to Jane in order to find out the things that are important to Jane. I spoke to people who know her to find out what they think she likes. When some suitable places were found, I visited the homes with Jane. We took photos of the houses to help her to distinguish between them. I then used the photos to support Jane to work out which home she prefers.

During this process it became clear that, with the right communication, Jane was able to comprehend the idea of moving and tell me what she wanted and why. She did have the capacity to make decisions about her accommodation when she had the right support and communication system, and will be able to make the final decision about moving.'

Anthea, advocate

Resolving disagreements

At times people will disagree about a person's capacity to make a decision. The disagreement may be between someone who has assessed a person as having, or lacking, capacity to make a certain decision and/or:

- the person they have assessed
- a family member, friend, or carer (paid or unpaid) of the person
- a professional who has assessed the person's capacity differently.

Tips on resolving disagreements

Disagreements can be resolved in either informal or formal ways.

Usually, informal ways are better for all involved as the matter is resolved more quickly, with less stress and at less cost than if a formal method was used.

Addressing disagreements early will often stop the dispute developing into something more serious.

Listening to, acknowledging and freely discussing a person's issues without criticism may be all the person is asking for. This could resolve the disagreement.

Don't be afraid to discuss the 'un-discussable'!

Where the issue is not urgent, giving a person time to process the information may help them to accept a different point of view.

Informal ways of resolving disagreements

Setting out the issues clearly in writing will sometimes help those involved focus on the most important issues. Putting the issues in writing may also make them clearer. However, make sure you don't use emotional language or make assumptions. Stick to presenting the facts only.

Holding a meeting to discuss the issues in detail may also work. It is sometimes a good idea to meet with the person you have a disagreement with. People should be encouraged to invite a support person to the meeting if they want to. A colleague, advocate, family member, friend or carer might be suitable.

It may be helpful to invite someone independent as well. This person could manage the meeting so that everyone gets an opportunity to state their views and concerns, while ensuring that the meeting does not become emotionally charged. You may want to engage a professional mediator.

It may be useful for the independent person to guide people through deciding what the rules are at the start of the meeting, as well as getting agreement on the matters for discussion. That person can then ensure that, during the meeting, everyone sticks to the rules and the issues.

When the meeting is over, you may wish to write to the other person and set out what you think the result of the meeting was and what the next steps are for those involved.

This method of resolving disputes may be inappropriate where there is an established pattern of behaviour, or a power imbalance, in relation to the people involved.

You may seek some advice or assistance with mediation or conflict management from your local Community Legal Centre. There is a directory of community legal centres on their website at www.naclc.org.au From this site click on

'CLC Directory' and follow the link to Tasmania. The major community legal centre contact details are below.

Hobart Community Legal Service
Free call: 1800 232 500
www.hobartlegal.org.au

Launceston Community Legal Centre
Free call: 1800 066 019

North West Community Legal Centre Inc.
(03) 6424 8720

Getting an advocate involved can be useful. An advocate may be able to help settle a disagreement in difficult situations simply by presenting a person's views to their family, friends, carers or professionals. Having an advocate can support a person to:

- say what they want
- protect their rights
- represent their interests
- get the services they need.

Most advocacy services are provided by non-government organisations and are arranged at a local community level. Advocacy Tasmania Inc can help if you need to arrange an advocate. They can be contacted on (free call) 1800 005 131. Or you can go to their website www.advocacytasmania.org.au.

Getting a second opinion of a person's capacity may resolve a dispute where the second opinion is the same as the original assessment result.[42]

[42] See Section 3 'Who might assess capacity – What if there are still doubts about capacity?' on page 56.

Formal ways of resolving disagreements

If a disagreement can't be resolved informally or is so serious that informal resolution is not suitable, it should initially be referred to the Guardianship and Administration Board. If you are unsure about whether a matter should go to the Board, contact them for guidance and advice.

Guardianship and Administration Board
Ph: (03) 6233 3085
www.guardianship.tas.gov.au/

The Board considers applications for:

- guardianship
- financial management
- review of guardianship or financial management orders
- consent to medical and dental treatment
- reviews relating to the making, operation and effect of enduring powers of attorney
- review of an enduring guardian appointment.
- review an enduring power of attorney.
- make a statutory will for a person who has never made a will

If you have made an application or are the subject of an application to the Guardianship and Administration Board and are unhappy with the decision the Board makes, you can ask the Supreme Court to look at the issue. This is called being able to 'appeal'.

If you are thinking of appealing a decision of the Guardianship and Administration Board you should get some advice from a solicitor. There are time limits on appealing, and other rules about who can appeal and what types of things you can get the Supreme Court to look at.

Supreme Court of Tasmania
Hobart : (03) 6233 6385
Launceston: (03) 6336 2386
Burnie: (03) 6434 6390
www.supremecourt.tas.gov.au

Solicitors can also give you information and advice about resolving a disagreement. The Law Society of Tasmania has a list of solicitors on its website.

Law Society of Tasmania
Ph: (03) 6234 4133
www.taslawsociety.asn.au

The Legal Aid Advice line provides free non means tested advice from a solicitor on Monday to Fridays. This service also runs open clinics in all regions and referrals to community services and provides a searchable website.

Legal Aid Commission of Tasmania
Ph: 1300 366 611
www.legalaid.tas.gov.au

You may seek some advice or assistance from your local Community Legal Centre. There is a directory of community legal centres on their website at www.naclc.org.au From this site click on 'CLC Directory' and follow the link to Tasmania. The major community legal centre contact details are below.

Hobart Community Legal Service
Free call: 1800 232 500
www.hobartlegal.org.au

Launceston Community Legal Centre
Free call: 1800 066 019

North West Community Legal Centre Inc.
(03) 6424 8720

Other avenues of complaint

Below is a quick guide to other places from which you can seek assistance in resolving disputes relating to capacity, or to which you can make a complaint about the way in which an assessment has been conducted.

Banking services

The Banking and Financial Services Ombudsman (BFSO) is a free and independent dispute resolution service. The BFSO will take complaints from individuals about member financial services operating in Australia if the amount you claim is less than $280,000.

Toll free: 1300 780 808
www.bfso.org.au

Mental Health Services

The Official Visitors are an independent body that visit in-patient facilities in approved hospitals once a month to examine the adequacy of care and treatment provided to patients; and to examine the standard of the facility environment and activities offered to patients.

Official Visitors also investigate complaints, and any suspected contraventions of the Mental Health Act and report them to the Mental Health Tribunal.

Official Visitors act independently and impartially. Patients, family, and staff are all welcome to contact them and information is treated confidentially.

Toll free: 1800 001 170

Email: official.visitors@mhous.ombudsman.tas.gov.au

Contracts for goods and services

The Office of Consumer Affairs can be contacted for advice where a person has bought goods or services capacity is an issue. Consumers of everyday goods and services can get information on their rights and responsibilities, and can get assistance with resolving disputes.

The Office of Consumer Affairs safeguards consumer rights and advises business and traders on fair and ethical practice.

The aim is to achieve fairness for all in the marketplace. Unfair practices are investigated and prevented.

General Enquiries: 1300 654 499.
http://www.consumer.tas.gov.au/fair_trading/advice_and_complaints

Residential tenancy disputes (Leases)

The Office of Consumer Affairs provides information regarding rental tenancy disputes. This information can be found at http://www.consumer.tas.gov.au/renting/disputes or by calling 1300 654 499.

If you want to dispute a rental bond, a dispute form is available from this office, which can then be lodged with the Office of the Residential Tenancy Commissioner.

For general advice on renting, contact the Private Rental Tenancy Support Service (PRTSS) on 1300 729 400 or the Tenants Union of Tasmania www.tutas.org.au on 1300 652 641.

Legal practitioners

The Legal Profession Board of Tasmania receives complaints about solicitors and barristers in Tasmania. It also oversees the investigation of complaints about the conduct of practitioners and plays a major role in resolving consumer disputes.

Ph: (03) 6226 3000
www.lpbt.com.au

Medical practitioners or other health professionals or organisations

The Health Complaints Commissioner Tasmania receives and deals with complaints involving individual health practitioners, such as doctors, optometrists and acupuncturists, and health service organisations, such as hospitals. The Health Complaints Commissioner also receives complaints against Home and Community Care (HACC) service providers and disability service providers.

Toll free: 1800 001 170
www.healthcomplaints.tas.gov.au

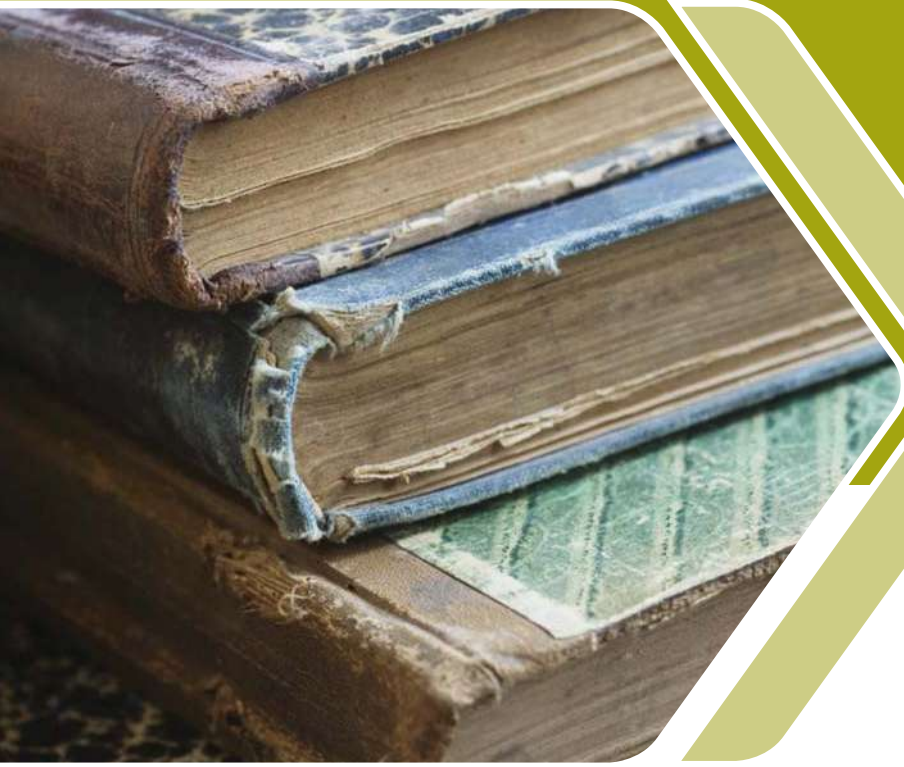
Government Departments

The Tasmanian Ombudsman investigates complaints about the administrative actions of government departments, councils and public authorities. The aim is to resolve individual complaints and to promote fairness, openness and good public administration in the state of Tasmania. This service is free, independent and impartial.

Toll free: 1800 001 170
www.ombudsman.tas.gov.au

Section 7

Other resources 166



Other resources

Advocacy Tasmania Inc
Ph: 1800 005 131
www.advocacytasmania.org.au

Alzheimer's Australia – Tasmania
National Dementia Hotline: 1800 100 500
http://www.alzheimers.org.au

Anglicare Tasmania Inc.
Ph: 1800 243 232
www.anglicare-tas.org.au

Association of Relatives and Friends of the Mentally Ill (ARAFMI) Tasmania
Ph: (03) 6331 4486 (North)
www.arafmitas.org.au

Aurora Disability Services
Ph: (03) 6273 0916

Australian Human Rights Commission
Ph: (02) 9284 9600
Complaints: 1300 656 419
www.hreoc.gov.au

Autism Tasmania
Ph: 1300 288 476
www.autismtas.org.au

Brain Injury Association of Tasmania
Ph: 1300 242 827
Ph: (03) 62787299
www.biat.org.au

Carers Australia (Tasmania Branch)
Ph: 1800 242 636
www.carersaustralia.com.au

Commonwealth Respite and Carelink Centre
Ph: 1800 052 222
http://www9.health.gov.au/ccsd

Council On The Ageing Tasmania Inc
Ph: (03) 6228 1897
www.cotatas.org

Disability Bureau Tasmania
Ph: 1800 009 501
TTY: 1800 654 524
SRS: 1800 555 727
www.dpac.tas.gov.au/divisions/cdd/disability/

Disability Services; Department of Health and Human Services Tasmania
Ph: 1300 799 530
www.dhhs.tas.gov.au/service_information/disability/disability_services

Financial Ombudsman Service
Ph: 1300 78 08 08
www.fos.org.au

Guardianship and Administration Board Tasmania
Ph: 1300 799 625
Ph: 6233 3085
www.guardianship.tas.gov.au

Hobart Benevolent Society
Ph: (03) 6234 1296

Law Society of Tasmania
Ph: (03) 6234 4133
www.taslawsociety.asn.au

Legal Aid Commission of Tasmania
Ph: 1300 366 611
www.legalaid.tas.gov.au

Migrant Resource Centre (South)
Ph: 62210999
www.mrchobart.org.au

Mental Health Council of Tasmania
Ph: (03) 6224 9222
www.mhct.org

Mental Health Services Helpline
Ph: 1800 332 388

Mental Health Review Tribunal Tasmania
Ph: 6233 3033
www.mentalhealthtribunal.tas.gov.au

Multi-cultural Council of Tasmania
Ph: (03) 62315067
www.mcot.org.au

Multiple Sclerosis (MS) Society of Tasmania
Ph: (03) 6220 1111
Freecall: 1800 676 721 (South)
Freecall: 1800 654 872 (North)
www.msaustralia.org.au/tas

National Association of Community Legal Centres
Ph: (02) 9264 9595
www.naclc.org.au

National Association of People Living with HIV/AIDS
Ph: 1800 259 666
www.napwa.org.au

National Relay Service
Helpdesk TTY: 1800 555 630
Voice: 1800 555 660
To make a call speak and read: 133 677
Type and read: 133 677
Speak and listen: 1300 555 727
www.relayservice.com.au

Office of Consumer Affairs and Fair Trading Tasmania
Ph: 1300 65 44 99
www.consumer.tas.gov.au

Office of the Anti-Discrimination Commissioner
Ph: 1300 305 062
TTY: 6233 3122
www.antidiscrimination.tas.gov.au

Office of the Public Guardian
Ph: (03) 6233 7608
www.publicguardian.tas.gov.au

Physical Disability Council of Australia
Ph: (02) 65671500
www.pda.org.au

Tasmanian Council of Social Services (TasCOSS)
Ph: (03) 6231 0755
www.tascoss.org.au

Tasmanian Council on Aids, Hepatitis and Related Diseases (TasCAHRD)
Ph: 1800 005 900
Ph: (03) 62341242 www.tascahrd.org.au

Public Trustee
Ph: 1800 068 784
www.publictrustee.tas.gov.au

Tasmanians with Disabilities Inc
Ph: (03) 6278 8023
www.twd.org.au

Tenants Union of Tasmania
Ph: 1300 652 641
www.tutas.org.au

Phoenix Centre - Tasmanian Transcultural Mental Health Network Migrant Resource Centre (South)
Ph: (03) 6234 9138
www.mrchobart.org.au/phoenix

Translating and Interpreting Service: Department of Immigration and Citizenship
Ph: 131 450
www.immi.gov.au/living-in-australia/help-with-english/help_with_translating

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