

SKILLS MODULES

2 OF 7

MODULE 2
Working with
Capacity Issues

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BEFORE WE BEGIN

REFLECTION

Before we begin this module take a moment to think about this statement from [de Bhailis \(2017\)](#):

As a holder of rights a person is entitled to full protection of her rights by the legal system. As an actor in law a person has the power to create, modify or end legal relationships and make decisions which must be legally recognised (Committee on the Rights of Persons with Disabilities 2014). Some commentators characterise this in terms of passive capacity and active capacity (Hoffman & Könczei 2011) . In contrast, mental capacity is used to refer to a combination of cognitive ability, impairment and a person's extent of understanding of the consequences of their actions. Mental capacity is used in many States as a means to assess and deny legal capacity. A common example of this would be legislation which establishes a test of mental capacity as the threshold for carrying out certain legally binding decisions, such as decisions about consent to medical treatment, decisions involving the sale or purchase of assets, and decisions about where and with whom to live.

How does our work or professional environment approach the issue of legal capacity? Does it conflate functional or mental capacity with the right to legal capacity?

OVERVIEW

WORKING WITH CAPACITY ISSUES

Working effectively with older persons often involves the impact of impaired decision making capacity.

Developing an appropriate approach to assessing capacity is fundamental to ensuring that appropriate action is taken. Many resources exist around assessing capacity including screens, assessments and tools. Individual advisers must ultimately make decisions about whether an older person has legal capacity to give instructions and take advice, and in the context of financial abuse, whether cognitive impairment may or has already lead to financial abuse. Excellent resources already exist to assist advisers to understand and assess capacity. For many advisers, professional ethics require that an older person be able to provide competent instructions.

LEARNING OUTCOMES

include gaining skills in recognising how legal capacity is defined, assessed and impacts on the adviser/client relationship, but also how it presents as a major risk factor for financial abuse.

CAPACITY IN BRIEF

Many of the barriers faced by older persons with disabilities in exercising autonomy and capacity relate to the absence of appropriate support services and assistive technologies. They have limited access to support services and rely on informal networks, primarily their families and carers. When services do exist, they often do not respect their autonomy, nor do they promote their full and effective participation and inclusion in society. ([UN](#))

Legal capacity is an outward exercise of autonomy. Older persons are at heightened risk of denial or restriction of their legal capacity. Experts have noted the existence of legal barriers as well as informal barriers preventing the exercise of legal capacity, which are based on stereotypes associated with older persons with disabilities. ([UN](#))

In Queensland, capacity is assessed differently for different types of decisions. For example, the capacity to make a gift or enter a contract differs from decisions about medical treatment or the appointment of an attorney under an enduring document.

OUR STARTING POINT IS PRESUMED CAPACITY

GUARDIANSHIP AND ADMINISTRATION ACT 2000 (GAA)

An adviser's starting point is that an older person is presumed to have capacity. (GAA, sec 7) This means older persons have the right to make legally effective decisions and act on those decisions. An older person's right to make decisions is fundamental to their inherent dignity and the right to make decisions includes the right to make decisions with which others may not agree. (GAA, sec 5) The Act also acknowledges that capacity may differ depending on:

- the nature and extent of the impairment
- the type of decision to be made, including, for example, the complexity of the decision to be made and
- the support available from members of the adult's existing support network (GAA, sec 5)

Further the Act acknowledges the right of an older persons with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent and that an older person with impaired capacity has a right to adequate and appropriate support for decision-making.

INDUSTRY EXAMPLE

INFORMED CONSENT

Most industry codes of ethics recognise the presumption of capacity sits alongside the reality of assessing client competence.

Financial counsellors' code of ethics reinforce client's rights to autonomy with the need for them to provide informed consent:

2.3.1 Service agreement

Financial counsellors provide adequate information to their clients so that clients understand the nature and scope of the financial counselling service and the role of the financial counsellor as an independent professional. This allows the client to provide informed consent to proceed with the financial counselling process.

2.3.2 Client's right to determine choices

Financial counsellors work with the client to gather accurate and current information on relevant aspects of the client's financial, social and legal situation. This information is used to assist the client to make informed decisions about their financial circumstances and options.

EXERCISING LEGAL CAPACITY

Advisers need to understand that not every interaction calls for assessment or questioning of an older person's legal capacity.

It is important to clarify that every time a person is supported to make a decision this will not amount to support to exercise legal capacity, just as every action does not amount to an exercise of legal capacity (Arstein-Kerslake & Flynn 2017).

For example, if a person is supported to decide what to wear this is not support to exercise legal capacity as generally this decision does not have legal consequences.

This reflects the need to consider the type, nature and extent of the decision to be made before any limitations to legal capacity are considered.

CAPACITY ASSESSMENT

Advisers need to have an understanding of how the law defines ‘capacity’ so when it arises, they recognise the relevance to legal process and importance to individual autonomy.

The approach to defining ‘capacity’ depends on the decision to be made, however a general approach can be found in the [Guardianship and Administration Act 2000](#) which defines ‘capacity’ and ‘impaired capacity’ as:

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

(a) understanding the nature and effect of decisions about the matter;

and

(b) freely and voluntarily making decisions about the matter; and

(c) communicating the decisions in some way.

And:

impaired capacity, for a person for a matter, means the person does not have capacity for the matter.

ASSESSING CAPACITY

If decision making capacity is in doubt an adviser must take steps to assess and maximise capacity.

Practically, the steps (adapted from the [QLD Handbook for Practitioners on Legal Capacity](#)) to be taken to assess capacity include:

1

IDENTIFY the client

2

IDENTIFY the particular decision the client is seeking to make and the relevant legal test for capacity

3

CONSIDER whether there is any reason to question whether the client has capacity.

4

DETERMINE whether a substituted decision maker has been formally appointed for the client

5

IF 'red flags' or indicia of impaired capacity are present and no substituted decision maker has been appointed, take steps to maximise the client's capacity.

INDUSTRY EXAMPLE

WORKING WITH CAPACITY ISSUES

The CPA Australia suggests members be aware of the signs that a person may have impaired decision making capacity:

SIGNS OF POSSIBLE LACK OF CAPACITY

The following factors, if present, may indicate a lack of capacity on behalf of the older person:

- poor concentration – limited ability to interact with practitioner or to repeat advice and ask key questions
- appears overwhelmed
- difficulty with recall or memory loss
- ongoing difficulty with communications – difficult to understand
- lack of mental flexibility – not open to even hearing about options or risks
- poor insight or judgment
- problems with simple calculations which they did not have previously
- sense that “something about the client has changed”.

The CPA provides specific details about assessing capacity at [Client Capacity](#)

ASSESSING CAPACITY



IDENTIFY the client

In most cases, the client will be the older person seeking advice or assistance.

Where a decision maker (such as an attorney or guardian/administrator or supporter) or supporter has been appointed to or by the older person, it may be the decision maker and not the older person who has the exclusive ability to provide the adviser with instructions. Whether the adviser acts on those instructions is a critical issue where financial abuse is suspected or known.

In some cases, the decision maker may be the adviser's client. In almost all cases, the adviser cannot and should not accept instructions from third parties or persons of influence such as family, friends and carers.

ASSESSING CAPACITY

2

IDENTIFY the particular decision the client is seeking to make and the relevant legal test for capacity

This involves taking instructions from the older person so you can assess the type of decision they seek to make.

Some decisions have specific legal tests for capacity such as entering contracts, making gifts, making financial decisions, making health and medical treatment decisions, executing legal documents such as wills, health directives, powers of attorney and conducting litigation.

Example

Section 41 of the [Powers of Attorney Act 1998](#) requires that the principal understand the nature and effect of the enduring power of attorney including six specific matters.

ASSESSING CAPACITY



CONSIDER whether there is any reason to question whether the client has impaired decision making capacity.

Various 'red flag' circumstances that could (but do not necessarily) indicate that an older person has impaired decision making capacity. These can include a range of factors.

Advisers must be cautious that other issues don't cloud their judgement such as them to the older person acting under undue influence of another, their education and literacy , their financial circumstances such as their financial literacy, their health or treatment or medication, their dependency on others, their experience in financial decision making, the dominance of a person of influence, their language skills or cultural background.

Where health issues are in question it may be wise to obtain an expert capacity assessment from the older person's treating medical practitioner, including any experts who can address the issue of impaired decision making capacity.

ASSESSING CAPACITY



DETERMINE whether a decision maker has been formally appointed for the older person (such as a guardian or administrator, or litigation guardian).

Advisers should review the terms of the document effecting any such appointment to ensure the appointment is still in force and the decision to be made falls within its scope. If so, instructions may need to be taken from the decision maker depending on each adviser's ethical rules.

Example

Financial Counsellors' Code of Ethics note that a "representative" may be involved in the interviewing process but do not specify the nature of the representative's status – rather stating:

2.3.3 Client's representative

Clients have the right to nominate someone they trust to make decisions on their behalf if the client anticipates they may be unable to make informed decisions in the future

ASSESSING CAPACITY

5

IF 'red flags' or indicia of impaired capacity are present and no decision maker has been appointed, **take steps to maximise and support the older person's capacity.**

What steps are appropriate will invariably depend on the particular older person, but in general the following steps are recommended:

- Meet with older person in person and alone
- Focus on the older person as an individual and consciously put to one side biases and assumptions based on age, mental health, intellectual impairments, emotional distress or eccentricities
- Ensure that the setting is conducive to the older person's comfort, privacy and safety
- Take detailed notes of all interactions with the older person including their full instructions, and consultations with experts such as doctors.

INDICIA OF IMPAIRED DECISION MAKING CAPACITY

The following circumstances **could (but do not necessarily)** indicate that an older person has impaired decision making capacity:

- The older person has continuing difficulties communicating or a limited ability to interact with the adviser (including being unable to repeat advice or ask questions of the adviser)
- The older person has changed adviser recently or frequently or has radically changed their instructions recently
- third parties accompany the older person and do not give the older person an opportunity to speak for themselves
- the person facilitating contact between the older person and the adviser stands to benefit from any decision made by the older person
- the adviser has a sense that ‘something is different’ because there has been a change in the older person’s presentation, mood or sociability and
- the adviser is on notice of issues regarding the older person’s mental health or cognitive function (particularly where information is volunteered by a third party).

CLIENT HAS IMPAIRED DECISION MAKING CAPACITY

If you decide that the older person is not competent to give you instructions after trying to maximise and support their decision making capacity, you may not be able to take instructions from them to make a legal decision such as a financial transaction.

If you are in this situation you should take advice about the options open to you and the older person.

BEFORE WE LEAVE

REFLECTION

Consider this extract from [Barry \(2012\)](#):

As noted by Justice Bell 'there appears to be no reported case in which a court has held it be a breach of a lawyer's duty of care to take and act on instructions from a client who the lawyer knew or should have known lacked the mental capacity to give instructions.' Justice Bell found that lawyers do owe a duty to their clients to assess their capacity to give instructions, characterising this as 'an aspect of the general duty of care which a lawyer owes to their client, for it is always to be expected of a lawyer exercising ordinary skill and competence that they are reasonably satisfied of the client's mental capacity to instruct.'

Whilst Justice Bell found that this duty of care was actionable in negligence, he was a little more circumspect in relation to whether this duty is also of a fiduciary nature. Justice Bell opined:

[I]t might be thought the fiduciary obligations of a lawyer extend to not coercing a client to settle and to not knowingly or recklessly taking settlement instructions from a client lacking mental capacity. That view would dovetail with the obligations on the part of a lawyer to bring justified concerns about a client's mental capacity to the attention of the court and not to continue to act for a client lacking capacity without a next friend being appointed.