

Understanding capacity

The Office of the Public Guardian has a very important role when it comes to protecting the rights and interests of vulnerable Queenslanders. This includes acting as a guardian of last resort, and investigating reports of abuse, neglect or exploitation.

However we can only perform these functions for adults who have impaired decision making capacity. This is a term that can cause a great deal of confusion, as capacity can fluctuate, and varies from adult to adult and situation to situation. Capacity can also change depending on the decision that needs to be made.

This factsheet is designed to provide a guide as to what capacity means, and to help you understand whether an adult may have impaired decision making capacity.

NOTE: A person is always considered to have capacity until it has been proven otherwise

What is the formal definition of capacity?

The *Guardianship and Administration Act 2000* defines capacity as the ability to:

- understand the nature and effect of decisions about a matter
- freely and voluntarily make decisions about the matter, and
- communicate the decisions in some way

All three of these criteria must be met for an adult to have the capacity to make the decision. So let's have a closer look at what this means in practice.

Understanding the nature and effect of a decision about a matter

This means that a person is able to understand everything that needs to be considered when making a decision, what the possible choices are, and what the potential consequences and outcomes of those choices could be.

Freely and voluntarily make decisions about the matter

This means that a person is able to make a decision free from any interference or pressure by others. The most common example of an adult not being able to

make a decision freely and voluntarily is where an adult is being unduly influenced or pressured by another person to make a decision that may run against their wishes or best interests. This may be evident where the adult seems to be making decisions that you would not expect them to make if they were making that decision independently, especially where that decision might not be in their best interest. An example of this could be selling their house for less than market value to a friend or relative, or refusing help from support services through fear of being punished by someone in their life.

Communicate the decision in some way

This means that a person has to be able to communicate their decision in some way – communication isn't limited to just verbal communication – i.e just because someone isn't able to speak doesn't mean they don't have capacity. For example they may communicate through writing, storyboards, or through signals to indicate yes, no or letters of the alphabet. Capacity is only lacking if the adult isn't able to communicate the decision in any way.

What causes a lack of capacity?

A loss of capacity can be caused by a number of factors and conditions such as an intellectual or psychiatric disability, an acquired brain injury, or a cognitive impairment such as dementia. If an adult becomes unconscious due to an illness or accident they would also be considered to have lost capacity. Of course if they regain consciousness again, they may well also regain the capacity to make decisions.

Is a lack of capacity permanent?

Not necessarily – capacity can fluctuate over time. People's conditions can change, depending on the cause of the loss of capacity, so past ability shouldn't lead to any assumptions of current capacity.

This is why guardianship orders are often made for limited periods of time, and at the end of that period the need for a guardian will be reassessed.

Is 'bad' decision making a sign of loss of capacity?

This is a simple trap to fall into, but the fact is that just because you don't like a decision a person has made, or think it is risky or reckless, it doesn't mean they lacked the capacity to make it. A person has the right to make a decision that you or other people don't agree with. This is sometimes called 'dignity of risk'.

For example you might not agree with a parent's decision to gift a sibling a large sum of money, but if they have understood the consequences of that act and decided to do it without any undue influence from the sibling or anyone else, they have the capacity to make the decision.

Another example may be an adult refusing to enter an aged care facility, even though their family fears for their safety. If the adult fully understands the risks and potential consequences of remaining at home, but choose to accept those risks, they have the capacity to make that decision.

Similarly, you shouldn't assume someone has lost capacity simply because of their appearance, age, or any physical or intellectual impairment they may have.

Can someone have capacity for one thing and not another?

In a word, yes. Capacity isn't a blanket term and what's really important is that decision making relates to specific situations and decisions, and isn't a general state of being. So for example someone might be able to make decisions about day-to-day tasks such as what they need to buy from the shop for dinner, but not make more complex decisions such as what mobile phone plan to choose, or whether to have a surgery.

In fact it's unusual for an adult to lack the capacity to make all decisions, and would generally only be the case where an adult is in a persistent state of unconsciousness, or has a severe cognitive disability such as advanced dementia.

So when a determination is made around capacity, it is often in the context of specific decisions. This is very much the case when the Queensland Civil and Administrative Tribunal (QCAT) is making a decision to appoint a guardian. A guardianship appointment should only be made where there are decisions that need making, and an adult doesn't have the capacity for those specific decisions.

Similarly when it comes to our investigative function, an adult doesn't have to have lost capacity in all areas, they just need to have lost capacity for decision making in an area that impacts on the nature of the investigation (for example certain types of financial decisions).

Who determines whether someone has capacity?

If you are unsure as to whether an adult has capacity, a doctor or health professional such as a GP, psychologist, psychiatrist or geriatrician can perform a variety of cognitive assessments and medical examinations.

If there is any question or dispute about capacity (which can happen in family conflict situations), QCAT can make a final decision. This will be done at a hearing where evidence will be heard, and will include a report from a health professional.

Note that the Office of the Public Guardian isn't able to determine if an adult has capacity.

Where can I find more information about capacity?

The [Queensland Capacity Assessment Guidelines 2020](#) provide a guide to understanding capacity, capacity assessment and the legal tests of capacity under Queensland's guardianship legislation.

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