

Queensland Capacity Assessment Guidelines 2020

Are you concerned about another adult's
capacity to make decisions?

Are you thinking about seeking a capacity assessment?

Are you having your own capacity assessed?

A guide to understanding capacity,
capacity assessment and the legal tests of capacity
under Queensland's guardianship legislation.

The *Queensland Capacity Assessment Guidelines* have been prepared by the Attorney-General and Minister for Justice as required under section 250 of the *Guardianship and Administration Act 2000* to assist people required to make assessments about the capacity of adults to make decisions about matters under Queensland’s guardianship legislation.

These guidelines have been developed in consultation with representatives with relevant expertise from key government, advocacy, health, legal and community organisations.

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SECTION 1: Introduction

In these guidelines, ‘capacity’ is a legal term.

Capacity refers to the ability to exercise the decision-making process. An adult with capacity has the right to make legally recognised decisions about their life, such as healthcare choices, support services they may need, where they live and how they manage their finances.

If an adult has impaired capacity for making a particular decision then someone else (a ‘substitute decision-maker’¹) might be needed to make the decision for them.

These guidelines

These guidelines provide general information about capacity, capacity assessment and the legal tests of capacity in Queensland. They are relevant for Queensland’s guardianship legislation (the *Guardianship and Administration Act 2000* and *Powers of Attorney Act 1998*).

These guidelines only apply when assessing the capacity of adults (people 18 years and over).

Are these guidelines relevant to me?

There might be a time in your personal or professional life when you need to assess or seek an assessment of your own or someone else’s capacity to make a decision.

These guidelines can help you if you are:

- » genuinely concerned about an adult’s capacity to make decisions
- » thinking about seeking a capacity assessment from a health or legal professional
- » having your own capacity assessed by another person.

These guidelines apply to capacity assessments for decisions about:

- » personal matters
- » health matters
- » financial matters.

These guidelines also apply to making or revoking an enduring document (advance health directive or enduring power of attorney).

NOTE:

These guidelines only apply to capacity assessments carried out according to Queensland’s guardianship legislation.

These guidelines do not apply to other types of decisions, such as:

- » making a will (testamentary capacity)
- » giving instructions to a lawyer
- » fitness and capacity in criminal proceedings.

¹ See [Appendix C](#) for more information about different types of substitute decision-makers.

SECTION 2: Capacity

What is capacity?

Capacity is a legal term referring to the ability to exercise the decision-making process.

When an adult has capacity to make a certain decision, they are able to:

- » understand and retain (even for a short while) the information relating to the decision
- » understand the main choices available
- » understand and weigh up the consequences of the choices
- » communicate the decision
- » make a decision freely and voluntarily.

It is the adult's ability to exercise the decision-making process that is assessed when you carry out a capacity assessment.

It is important to remember that while an intellectual or cognitive impairment might impact on an adult's decision-making ability, it doesn't necessarily mean they lack capacity. The same can be said for mental illness, brain injury, dementia and age. Whether the adult makes a decision that others might think is wrong, risky or immoral is also irrelevant.

Why is capacity important?

An adult with capacity has the right to make legally recognised decisions about their life, such as healthcare choices, support services they may need, where they live and how they manage their finances.

If an adult has impaired capacity for making a particular decision then someone else (a 'substitute decision-maker') might be needed to make the decision for them.

About capacity

An adult's capacity can depend on:

- » the type of decision that must be made
- » the complexity of the decision
- » when the decision must be made
- » the support and information available.

The presumption of capacity

Under the law it is not up to the adult in question to prove they have capacity. **It is presumed that every adult has capacity to make all decisions until proven otherwise.** This presumption is not affected by any personal characteristics such as disability, mental illness or age (if the person is over 18 years of age). The responsibility is on the person seeking to challenge the adult's decision-making capacity to prove the adult has impaired capacity. This can be done through a capacity assessment.

Capacity is decision-specific and time-specific

Capacity is specific to the type of decision to be made and the time the decision is made. Someone might have capacity to make certain types of decisions (e.g. a personal decision about where to live) and not others (e.g. a financial decision about whether to sell their house).

Capacity can fluctuate

Capacity can change or fluctuate. An adult with a medical condition or illness may temporarily lose capacity, but then regain capacity at a later date. On the other hand, an adult with dementia or delirium, for example, might have capacity on some days (or during some parts of the day) and not others.

Capacity can change with support

An adult's capacity can improve depending on the support available to them. For this reason, an adult can't be found to lack capacity until all practical steps have been taken to provide the support and information needed to make the decision.

You can find out more about this in [Section 3](#) 'Capacity assessment principles'.

Who can carry out a capacity assessment?

There could be a situation where you would be required to carry out, or seek an assessment of, an adult's capacity to make a decision. You could be a:

- » family member, friend or colleague
- » health professional
- » social worker, support worker or advocate
- » person who works in the law, including a justice of the peace (JP)
- » worker in a financial institution
- » Aged Care Assessment Team (ACAT) worker.

While anyone can carry out a capacity assessment, an assessment is just an opinion and the results of the assessment can be reviewed or challenged. The Queensland Civil and Administrative Tribunal (QCAT) or Supreme Court can make a formal declaration or finding about an adult's capacity. You may want to seek legal advice if you are unsure about an adult's capacity, or for information on making an application, see [Appendix B](#).

 **NOTE: IMPORTANT!**

What to do if you think the adult is being abused or pressured

If you suspect that an adult is being physically, financially or emotionally abused or pressured to make a decision, the priority must be to ensure the adult's health, safety and well-being.

You should try to connect the adult with appropriate and relevant support services and prioritise their immediate safety. You should consider whether the assessment can be done at a later time with appropriate supports for the adult.

See **Appendix A** of these guidelines for information about support services, **including elder abuse support services**. If you think the adult is in immediate danger, call the police.

When might I need to carry out a capacity assessment?

There are many reasons why you might need to carry out (or seek) a capacity assessment. You might be:

- » deciding if an adult can consent to medical treatment
- » deciding if an adult needs more support with making decisions
- » providing evidence to QCAT or the Supreme Court about an adult's capacity
- » deciding whether to apply to QCAT for an appointment of a guardian or administrator
- » deciding if you should witness the signature of an adult on an enduring power of attorney or advance health directive form, refer to **Section 6**
- » deciding if an attorney's power under an enduring power of attorney has commenced.

 **NOTE:** These guidelines are not a cognitive assessment tool and should not replace cognitive tests or examination carried out by a qualified health practitioner (e.g. a psychologist).

Human rights and capacity

The importance of human rights

All human rights apply universally to all people — including persons with disabilities. The *Convention on the Rights of Persons with Disabilities* (CRPD) reaffirms that persons with disabilities have equal human rights.

Queensland's *Human Rights Act 2019* (Queensland Human Rights Act) works to respect, protect and promote human rights in Queensland. The Queensland Human Rights Act also reaffirms that all individuals have human rights.

All adults have the right to make legally recognised decisions about their lives, such as healthcare choices, support services they may need, where they live and how they manage their finances. These decisions must be respected when made by an adult with capacity, even if another person disagrees or believes the decision is wrong. This reflects the important human right of **equality before the law** and the principles of dignity, autonomy and self-determination.

Human rights and capacity assessments

Capacity assessments and the results of capacity assessments can significantly impact on an adult's human rights. A finding that a person does not have capacity for a matter could impact multiple rights protected under the Queensland Human Rights Act, including:

- » **recognition and equality before the law (section 15)** — a finding of impaired capacity impacts on an adult's right to make decisions under the law in relation to that matter and may result in the appointment of a substitute decision-maker to make decisions on their behalf
- » **protection from torture and cruel, inhuman or degrading treatment (section 17)** — a finding of impaired capacity may mean an adult is subject to medical treatment without their consent
- » **right to liberty and security of person (section 29)** — a finding of impaired capacity may mean an adult is subject to restrictive practices (such as restraint and seclusion)
- » **privacy and reputation (section 25)** — a finding of impaired capacity may mean that decisions impacting an adult's family and home, physical and mental integrity and even the exercise of their sexuality and individual identity (such as their clothing), are made by someone else.

Carrying out a capacity assessment

Capacity assessments should be carried out in a way that least restricts an adult's human rights. See **Section 3** 'Capacity assessment principles' for guidance on carrying out capacity assessments in a way that least restricts an adult's human rights.

SECTION 3: Capacity assessment principles

This section describes the **five principles** to be applied in making an assessment of an adult's capacity.



Practical tip

You can print this page to use as a guide



Principle 1

Always presume an adult has capacity



Principle 2

Capacity is decision-specific and time-specific



Principle 3

Provide the adult with the support and information they need to make and communicate decisions



Principle 4

Assess the adult's decision-making ability rather than the decision they make



Principle 5

Respect the adult's dignity and privacy



Principle 1

Always presume an adult has capacity

Always presume every adult has the capacity to make all of their decisions for themselves. It is wrong to assume a lack of capacity because of age, appearance, dress, beliefs, language skills, personal habit or any other characteristic.

Incorrect assumptions about an adult's capacity can be influenced by:

- » the way an adult presents themselves (e.g. tattoos, piercings, 'odd' clothing, personal hygiene)
- » the way an adult conducts themselves (e.g. loud and noisy behaviour, appearing quiet and withdrawn, whether they engage in illegal behaviour or if they appear to be under the influence of drugs or alcohol)
- » the way an adult looks (e.g. physical characteristics like skin colour or scars, features linked to Down syndrome or difficulty controlling muscle spasms associated with cerebral palsy)
- » an adult's beliefs (e.g. political standing, religious beliefs or values)
- » an adult's impairment (e.g. intellectual disability, acquired brain injury, visual or hearing impairments or physical impairments)
- » how an adult communicates (e.g. difficulty speaking or understanding English or a speech impediment)
- » an adult's age (e.g., elderly or frail, requiring assistance with their day-to-day personal care).

It's important to understand and recognise some of these common incorrect assumptions so that you can be more likely to avoid them. The responsibility is on the person seeking to challenge the adult's decision-making capacity to prove the adult has impaired capacity. This can be done through a capacity assessment.



Case example

My sister Rosie has cerebral palsy. When she was admitted to hospital for elective surgery I noticed that the medical staff spoke directly to me about the procedure and how to take care of her after the surgery. I think this happens because Rosie has difficulty communicating and the staff at the hospital found it difficult to understand what she was saying. I had to remind them that my sister was the one making decisions and that if you take the time, you can understand what she is saying.

Rebecca, sister



Principle 2

Capacity is decision-specific and time-specific

Capacity is specific to the decision to be made. Just because an adult lacks capacity for one decision does not mean they lack capacity to make other types of decisions.

For example:

- » an adult may be capable of making simple personal decisions (e.g. what to eat and what to wear) but not complex personal decisions (e.g. whether to have a significant medical procedure)
- » an adult may be capable of making simple financial decisions (e.g. paying rent and utilities bills) but not complex financial decisions (e.g. buying a house).

Capacity is also specific to the time the decision needs to be made. An adult's capacity might change. For example, an adult with dementia or delirium could have capacity for making decisions at certain times of the day, or on some days and not others.



Case example

Samara is a young woman with fluctuating capacity and requires medications to manage her symptoms. Unfortunately, Samara's medications have a sedative side effect that keep her groggy in the morning. In the afternoon she is better able to make decisions because she is alert and engaged. Everyone who supports Samara understands that she requires afternoon appointments for important discussions and complex decisions.



Case example

Charles has a history of alcohol use, and from time to time his capacity is impacted. When he spends some time without drinking his capacity improves and he is able to make his own decisions.



Principle 3

Provide the adult with the support and information they need to make and communicate decisions

An adult's capacity to make a decision can depend on the support and information available to them at that time.

An adult can't be treated as unable to make a decision unless all practicable steps have been taken to provide the information and support necessary to make that decision.

An adult should also be given the support necessary to express their views, wishes and preferences in any way, including, for example, by conduct. The purpose of this principle is to make sure that all people can exercise their human rights on an equal basis with others.

Case example

I am a support worker who works with Kamal who has an intellectual disability. He cannot read or write. He does use verbal communication but he finds it really hard.

I support Kamal to make his own decisions about most day-to-day things. I find that the more we work together and get to know each other, the more decisions Kamal can make. I always make sure I put aside enough time to go through the information. I then check in with him to make sure he understands. I find if I watch his body language and facial expressions and listen carefully to his words it really helps. Sometimes we use pictures.

At the hospital the doctor asked me to come in with Kamal to support him to understand a minor procedure Kamal had to have done. We worked together the same way we always do to understand the information and make a decision.

Arya, support worker



Principle 4

Assess the adult's decision-making ability rather than the decision they make

Capacity assessment is not focused on whether or not the final decision is a 'good' or 'bad' decision, but the ability of the adult to exercise the decision-making process itself. A capacity assessment should be focused on the decision the adult is making at the time.

The right to make a decision also involves the right to take risks, to make 'bad' decisions and to learn from these decisions. This principle recognises self-determination is important for the dignity of all people.

If you are assessing an adult, take care to not impose your own values and beliefs.



Case example

My father is getting older. He has saved all his life and now owns his own home. He has some savings but otherwise relies on the aged pension. He has recently decided he wants to 'see the world' before he dies. He's booked a number of cruises in Europe. I looked at the brochures. He'll definitely be quite comfortable, but they seem quite expensive. I asked him about it and he said that he would be using pretty much all his savings. He knows this, but travelling has always been his goal. If it was me I'd be saving for when I got older so that I could afford good care when I was too old to look after myself. But my father can make his own decisions.

Paz, son



Principle 5 Respect the adult's dignity and privacy

When you are assessing an adult's capacity, you need to do it in a way that is respectful of the adult's dignity and privacy.

Plan the capacity assessment in advance. Consider details like choosing a suitable setting that limits distractions and preserves the adult's dignity and privacy.

You should be upfront and let the adult know that you are assessing their decision-making capacity to make a specific decision, and why you are assessing them. If an adult is found to lack capacity, this might have serious consequences for them. For example, another person may be appointed to make decisions for them. You should explain the possible consequences of a finding that they do not have capacity. They may have impaired capacity for some or all decisions depending on the decision that needs to be made at the time.

When you are assessing an adult's capacity, always remember you are dealing with personal information. Everyone has the right to have their personal information protected.



Practical tips

Respect the adult's privacy

✓ DO	× DON'T
✓ Ask the adult for the information you need from them or seek the adult's permission to get it from someone else.	× Get the adult's personal information from third parties without seeking their consent.
✓ Only ask for information relevant to the decision.	× Seek as much information as you can regardless of its relevance to the assessment.
✓ Only use the information gathered for the purpose of the assessment.	× Use the information for other purposes without asking the adult first.
✓ Get the adult's permission before you share their personal information with others.	× Disclose the adult's personal information to others not related to the assessment process.



Case example

I have Parkinson's disease. Recently I have been admitted to hospital more often. The doctors have told me that they think my condition is getting worse. The last time I was admitted, the occupational therapist came to do an assessment of my capacity. She said the doctors told her to do it, but she didn't really explain why it was happening. It was really embarrassing. I was in a ward with lots of other people. I had to talk about a lot of personal information. There was a lot of noise which meant we both had to speak loudly which made it worse. Because I felt so embarrassed I stopped answering her questions and told her that I didn't know the answers.

Thomas

SECTION 4: The general test of capacity

The legal tests of capacity

Under Queensland’s guardianship legislation there are two legal tests of capacity. Choosing which test to use depends on the type of decision:

- » **the general test of capacity** — is applied when assessing capacity for decisions about personal, health or financial matters
- » **the test for making an enduring document** — is applied when assessing capacity for making an advance health directive or enduring power of attorney. See **Section 6** for more information on the test of capacity for making an enduring document.

This section goes through the general test of capacity in more detail.

The general test of capacity

Use the general test of capacity for any decision relating to personal, health or financial matters.



Personal matters

Decisions about personal matters relate to: the adult’s care or welfare, for example:

- » where the adult lives and who they live with
- » services and supports provided to the adult
- » whether the adult works and, if so, their role and the location of their work and employer
- » who the adult has contact with
- » whether the adult applies for a licence or permit
- » day-to-day issues (e.g. diet and dress, daily activities)
- » legal matters (e.g. seeking legal advice) other than financial and property matters.

Health care is a type of personal matter (see below).



Health matters

Decisions about health matters relate to: the adult’s health care including medical treatments, procedures and services to treat both physical and mental conditions. Most commonly, decisions about health matters are about consenting to or refusing health care. For example, health decisions might include deciding whether or not to go to hospital, to have surgery, or to take a medication. When an adult is nearing the end of their life, health care also includes stopping treatments that are aimed at keeping the adult alive or delaying their death (life-sustaining treatments).



Financial matters

Decisions about financial matters relate to: finances and property, for example:

- » paying everyday expenses, such as rent and bills for electricity, gas and water
- » arranging deposits or withdrawals from the adult's bank account
- » paying rates, taxes, insurance premiums or other outgoings for the adult's property
- » making or seeking advice about investment decisions
- » seeking legal advice in relation to the adult's financial or property matters
- » carrying on a business or trade
- » signing contracts on behalf of the adult and performing contracts entered into by the adult (e.g. signing agreements relating to aged care homes)
- » selling, mortgaging or purchasing the adult's property.

The legal test to apply ▶

Under the general test for capacity under Queensland's guardianship legislation, the adult must be capable of:

- (a) understanding the nature and effect of decisions about the matter**
- (b) freely and voluntarily making decisions about the matter**
- (c) communicating the decision in some way.**

There are three parts that make up this test. The criteria in all three needs to be met for an adult to have capacity to make the decision.

(a) Understanding the nature and effect of decisions about the matter

The adult must be able to understand the information relevant to the decision, main options and consequences for them and their situation.

What level of understanding is needed?

The adult you are assessing should understand the information relevant to the decision to be made.

They also need to be able to retain the relevant information, even for a relatively short period of time. As long as they hold on to that information long enough for the decision to be made, they pass this part of the test. This is an important consideration for people with conditions such as dementia.

The adult doesn't need to have a complex understanding of all the facts, but they do need a basic understanding of the key features of the information relevant to the decision to be made. The more complex the decision, the more understanding is needed to meet this criteria.

 **NOTE:** Section 3 discusses the capacity assessment principles. Principle 3 is that an adult must be provided with the support and information necessary to make and communicate decisions.

You, as the assessor, need to make sure that all of the information is readily available and accessible to the adult. Consider the best format for them. Would visual aids or assistive technologies make it easier to understand?

Understand and weigh the consequences of different options

The adult you are assessing needs to be able to broadly identify the advantages and disadvantages of the main options in relation to the decision. They need to show a general understanding of the consequences of these options (or choices) and how these will affect them and their situation.

 **Remember:** Do not equate what could be considered a ‘bad’ decision with impaired capacity.

The important thing is that the adult is capable of weighing the advantages and disadvantages, not that they make a decision that others would agree with.

They should then be able to weigh up the different consequences of various options and come to a decision.

(b) Freely and voluntarily making decisions about the matter

It must be clear that the adult is making the decision and is not being pressured or coerced into making the decision.

Sometimes a family member, friend or carer may behave in a way that is domineering or overbearing, seeking to pressure the adult to make a decision in a certain way. This type of behaviour can impact on the voluntariness of the adult’s decision-making. Family conflict can also sometimes be so extreme that it impacts on an adult’s ability to make a decision freely and voluntarily.



Practical tips

Red flags to look out for

It can be difficult to know if the adult you are assessing is being pressured or not. Look out for risk factors such as:

- » family conflict, especially if one family member has isolated the adult from other family members or their usual support networks
- » the history or presence of threats or perceived threats and abuse
- » threats to withdraw care and support
- » sudden decisions to make significant changes to their arrangements (like large gifts of money or property) that are out of character and would disadvantage the adult.

NOTE: Be careful not to apply this test too broadly. Many people might seek advice from others before they come to a decision.

This doesn't mean the decision wasn't made freely and voluntarily, the focus is on whether the adult can make a decision free of intimidation, pressure or influence.

(c) Communicating the decision in some way

Many people with physical, intellectual or cognitive impairments could have different ways of communicating their decisions to others. As the assessor, you need to make sure that all support is provided to facilitate the communication of the decision. Some examples of support you could provide are:

- » the use of interpreters (or sign language)
- » symbol boards for people with limited use of verbal language
- » allowing others to be there during the assessment (such as a support worker or speech therapist)
- » employing an accredited language interpreter (for an adult who does not speak English or if English is not their first language)
- » assistance with physical behaviour language options using a support worker or speech therapist.

Most adults with capacity to understand the nature and effect of a decision will also be able to communicate that decision in some way. It's usually only in very rare cases that an adult has the cognitive ability to understand the nature and effect of a decision (and make the decision freely and voluntarily), but is unable to communicate the decision in any way.

NOTE: Figures from the Australian Bureau of Statistics (ABS) reveal that 1.2 million Australians have some level of communication disability (ABS, Disability Ageing and Carers Australia, Summary of Findings, 2015).

 Practical tips

Communicating with an adult with an intellectual disability or cognitive impairment

If you are assessing an adult with an intellectual disability or cognitive impairment, here are some tips to help:

- » find a place to communicate where the adult feels comfortable
- » always use plain language
- » find out how they prefer to communicate and use that approach
- » if they use a communication device, learn how to use it with them
- » take time to provide information
- » take regular breaks if needed
- » take time to understand their response
- » take notice of their facial gestures and expressions
- » use your own facial gestures and expressions to communicate
- » use pictures or even your own drawings
- » check in regularly with the adult and make sure they understand what you are saying
- » use open-ended questions – don't ask questions that suggest an answer or a one-word answer (i.e. 'yes' or 'no').

 Case example

My son Ali has an intellectual disability and has limited verbal communication. He lives in a home with other young people. With his support worker and speech pathologist, we have established ways of communicating with him. We use a combination of words, pictures, facial expressions and gestures. This means he can tell us what he wants about most things. He can tell us when he wants to spend time with the others in the house, when he wants to go out to the shops or the park and what he wants to eat. He makes it really clear when he doesn't want to do something!

A new support worker started visiting his home the other day and I sat down with her and the occupational therapist and we discussed how Ali communicates. It will take a little bit of time, but she will get to know him.

Nijah, mother

Summary – The general test of capacity

Apply this test for making decisions about personal, health or financial matters.

 **Practical tip**

You can print this page to use as a guide 

Adult's name:

Assessor's name:

Date and time of assessment:

The decision to be made:

a. Understanding the nature and effect of decisions about the matter

Thinking about the adult's ability to make that particular decision, can they:

- understand the information relevant to the decision?
- retain the information (even for a short time)?
- understand the main choices?
- understand the consequences of each choice and how these consequences will affect them and their situation?
- weigh up the consequences of the choices?
- make a decision?

✓ If the answer is 'yes' to all of these matters, then the adult passes this part of the capacity test.

b. Freely and voluntarily making decisions about the matter

Thinking about the adult's ability to make that particular decision, can they:

- make the decision freely and voluntarily?
- ✓ If the answer is 'yes', then the adult passes this part of the capacity test.

c. Communicating the decision in some way

Thinking about the adult's ability to make that particular decision, can they (when provided with appropriate support):

- communicate the decision in any way?
- ✓ If the answer is 'yes', then the adult passes this part of the capacity test.

SECTION 5: The capacity assessment checklist

Summary – The capacity assessment checklist

Use this checklist to assess an adult’s capacity.



Practical tip

You can print this page to use as a guide



Adult’s name:

Assessor’s name:

Date and time of assessment:

The decision to be made:

1. Identify the decision to be made

Identify the decision to be made and whether it is related to a personal, health or financial matter

2. Identify a genuine need to assess capacity

Presume the adult has capacity
Identify concerns about the adult’s capacity
Identify a genuine need for the decision to be made at this time
Consider if concerns about the adult’s capacity can be addressed by linking the adult to appropriate supports

3. Apply the general test of capacity

Apply the **general test of capacity** (for personal, health and financial decisions)

4. Prepare for the assessment

Gather information relevant to the decision
Make a plan to:
» involve and support the adult
» provide the adult with information in the right way.

5. Conduct the assessment

Explain the assessment process to the adult
Give the adult the opportunity to ask questions about the assessment process
Ask relevant questions

6. Document your conclusion and your reasons

Document your conclusion and your reasons



Remember: It is important that the **capacity assessment principles** are applied throughout the process.

NOTE: This section explains the process for assessing an adult's capacity for making decisions about personal (including health) matters and financial matters using the **capacity assessment checklist**. Practical tips and case examples are provided throughout this section to assist you in understanding the process. See **Section 6** for information about capacity assessment for making an enduring document.

✓ 1. Identify the decision to be made

This section explains the process for assessing an adult's capacity for making decisions about personal (including health) matters and financial matters. It is important that at the time you conduct the assessment you identify the decision(s) to be made by the adult. This is because capacity is specific to the decision to be made. The test of capacity may also be different depending on the decision to be made.

✓ Identify the decision to be made and whether it is related to a personal, health or financial matter



Decisions about personal matters relate to: the adult's care or welfare, for example:

- » where the adult lives and who they live with
- » services and supports provided to the adult
- » whether the adult works and, if so, their role and the location of their work and employer
- » who the adult has contact with
- » whether the adult applies for a licence or permit
- » day-to-day issues (e.g. diet and dress, daily activities)
- » legal matters (e.g. seeking legal advice) other than financial and property matters.



Decisions about health matters relate to: the adult's health care including medical treatments, procedures and services to treat both physical and mental conditions. Most commonly, decisions about health matters are about consenting to or refusing health care. For example, health decisions might include deciding whether or not to go to hospital, to have surgery, or to take a medication. When an adult is nearing the end of their life, health care also includes stopping treatments that are aimed at keeping the adult alive or delaying their death (life-sustaining treatments).



Decisions about financial matters relate to: finances and property, for example:

- » paying everyday expenses, such as rent and bills for electricity, gas and water
- » arranging deposits or withdrawals from the adult's bank account
- » paying rates, taxes, insurance premiums or other outgoings for the adult's property
- » making or seeking advice about investment decisions
- » seeking legal advice in relation to the adult's financial or property matters
- » carrying on a business or trade
- » signing contracts on behalf of the adult and performing contracts entered into by the adult (e.g. signing agreements relating to aged care homes)
- » selling, mortgaging or purchasing the adult's property.

✓ 2. Identify a genuine need to assess capacity

Capacity assessments can be invasive, involving detailed questioning and the gathering of personal information. For this reason, they should only be conducted where there is a genuine concern for the adult's capacity and a need to make a decision at the specific time.

✓ Presume the adult has capacity

You must start with the presumption that the adult has capacity to make a decision about a matter.

Case example

My wife Luisa has recently been diagnosed with early-onset Alzheimer's disease. When Luisa's extended family first found out about her diagnosis, they started pressuring me to make personal decisions for her, 'just in case she forgets an important detail or makes a silly decision.' I stood my ground though, and told them that unless evidence proved otherwise, I would assume Luisa could make her own personal decisions.

Vincent, husband

✓ Identify concerns about the adult's capacity

Circumstances or events may lead to concerns about an adult's capacity. This might include sudden changes in personality, confusion or loss of short-term memory. Sometimes concerns may be raised by family and friends who have noticed a change in the adult.

Generally, you are looking for a change in behaviours or circumstances (e.g. something that is unusual or out of character for the adult). If the adult has always exhibited a certain behaviour or lived in a certain way, this is probably not a cause for concern.

Circumstances that may be cause for concern

In general

- » sudden changes in personality, such as depression, aggression, mood swings, paranoia
- » inability to remember certain words
- » a change in speech patterns or communication, reading or writing skills
- » confusion about where they are or where they have put things (disorientation)
- » making choices or decisions that are out of character
- » a noticeable inability to remember information, particularly in the short term
- » wandering attention or inability to concentrate
- » often losing things or getting lost
- » being taken advantage of by others.

Personal matters

- » a drastic change in their personal habits or self-care
- » dressing differently than they normally would
- » sudden homelessness
- » fear of certain acquaintances
- » having friends and family members around that they would not normally socialise with
- » accidents with cooking (such as leaving the stove on)
- » sudden changes in personality
- » confusion about things that they understood in the past.

Remember

An untidy house or lack of food in the fridge does not necessarily mean the adult does not have capacity. Many people live with untidy houses and only buy food as needed. There could be another explanation such as:

- » the adult needs support with shopping and cleaning
- » the adult is recovering from a recent illness
- » the adult has always lived that way and that's how they like it.

Health matters

- » missing medical appointments
- » being unable to answer basic questions about their medical history
- » consenting to treatment which does not align with the adult's views and values (e.g. religious beliefs)
- » appearing confused about basic medical information
- » unusual behaviour towards health professionals.

Remember

Behaving unusually towards health professionals does not necessarily mean the adult does not have capacity. There could be other explanations such as:

- » they are not happy with the care they have been receiving.

Signs of confusion and disorientation could be a temporary result of a medical or other condition, such as:

- » fever and pain associated with an illness e.g. a urinary tract infection
- » grief, stress or anxiety related to recent events
- » normal changes in capacity throughout the day due to fatigue
- » side-effects from medication
- » inadequate nutrition or hydration.

Financial matters

- » significant financial changes in spending habits
- » forgetting to pay bills
- » giving away a lot of money
- » frequently losing or forgetting their wallet
- » being confused or overwhelmed about single financial interactions
- » forgetting to pay for items at the shops
- » having trouble with everyday calculations.

Remember

Not having sufficient money to pay bills, or forgetting to pay for things, does not necessarily mean the adult does not have capacity. There could be other explanations which, if appropriately addressed, might increase the adult's capacity to make the decision, such as:

- » has the adult had a significant unplanned expense?
- » is the adult on medication that makes them forgetful?
- » could the adult be subject to financial abuse?

 **NOTE:** There may be circumstances that cause you to question the adult's capacity to make decisions about personal, health or financial matters. Where the concerns are serious, or multiple concerns exist, it may be necessary to undertake a capacity assessment.



Practical tips

What to do if you think the adult is being abused or pressured

If you suspect that an adult is being physically, financially or emotionally abused or pressured to make a decision, the priority must be to ensure the adult's health, safety and well-being.

You should try to connect the adult with appropriate and relevant support services and prioritise their immediate safety. You should consider whether the assessment can be done at a later time with appropriate supports for the adult.

See **Appendix A** of these guidelines for information about support services, **including elder abuse support services**. If you think the adult is in immediate danger, call the police.

NOTE:

- » Be aware that financial abuse is a common form of elder abuse.
- » Conflicts often arise when an older adult's family has an interest in their estate and do not like the adult spending their savings or selling their assets before they die.
- » You should investigate the presence of risk factors such as:
 - » family conflict, particularly where one family member has isolated the adult from other family members or their usual support networks
 - » the presence or history of threats or perceived threats
 - » threats to withdraw care and support
 - » sudden decisions to make significant changes to their arrangements that are out of character and would disadvantage the adult or another person.
- » Consider whether the adult's family is pressuring them to make a certain decision. Is the family pushing for a result that does not align with the adult's previously expressed wishes?

See **Appendix A** of these guidelines for information about support services, including elder abuse support services. If you think the adult is in immediate danger, call the police.



Case example

I was recently asked to conduct a capacity assessment for a client of the bank I work for. The client's name was Mary. Mary's son had come in with her and was claiming that she had lost capacity. He wanted to start exercising his power of attorney for financial matters. At the bank counter, Mary had explained that she was struggling to manage her finances. When I spoke to Mary alone in my office however, she seemed very nervous. She said that her son was insisting that she spends too much money on everyday expenses, and that he needed access to her accounts so that he could keep an eye on things. I asked her some more questions about her son's attitude to her money, and it sounded to me like Mary was being financially abused. I didn't think it was appropriate to assess Mary's capacity before these concerns had been addressed. Instead, I connected Mary with support services for victims of abuse and recorded my concerns in her client profile.

Samira, bank manager

✓ **Identify a genuine need for the decision or decisions to be made at this time**

It should only be necessary to begin a capacity assessment if there is a need for a particular decision or decisions to be made at the time. That is, without a decision being made the adult will be at serious risk to their health, welfare or property. For example, if an adult has a temporary loss of capacity due to a medical condition, and the decision can be delayed, then a capacity assessment may not need to be carried out.

✓ **Consider if concerns can be addressed by linking the adult to supports**

Isolation and a lack of connection to community and social supports can impact negatively on any person, but may particularly impact on an older person or a person with disabilities. Simply linking the adult to medical, community and social supports they need may address any concerns about capacity to make decisions about personal, health or financial matters. This may remove the need to conduct a capacity assessment.

 **Practical tips**

 **Personal matters**

If the adult is struggling with living independently they might benefit from:

- » support with accessing the shops to do their shopping
- » a meal delivery service — like Meals on Wheels
- » in-home support with housework and cleaning.

 **Health matters**

- » the adult might benefit from a medical review, or a visit from an allied health professional or social worker in order to identify options for available supports
- » concerns about the adult's capacity might be addressed once adequate services are arranged, such as domiciliary (home) care or transition care.

 **Financial matters**

If the adult is struggling with everyday purchases and paying bills, they may simply require extra support, such as:

- » Centrepay — a free service to pay bills and expenses as deductions from Centrelink payments
- » direct debits set up
- » financial counselling
- » help with making a budget
- » shopping assistance
- » postal or phone reminders for bills.

Case example

My father, Reg, is 85 years old and has just been admitted to hospital. He has Parkinson's disease. He was admitted by his GP who, when he saw him after a long break between visits, noticed he was malnourished and weak and that his symptoms had deteriorated significantly. I live interstate, so while I had talked to him on the phone, I hadn't really noticed how unwell he was either until I saw him. The hospital thinks it's time for him to be admitted to an aged care facility. They want to do a capacity assessment and get me appointed as his decision-maker (a guardian) so I can make the decision. But I spoke to another social worker at the hospital and we agreed that he was already showing signs of improvement with rest, proper food and care. We decided that we would first try sending him home with transition care, followed by in-home support and care and Meals on Wheels. I am working with the social worker to make all the arrangements. I think we should give this a go first and if it doesn't work we will reassess.

Michael, son

Case example

I have a patient, Maria, who I am treating for a range of medical conditions. She has to take a lot of medication. Her family usually bring her into my surgery and wait in the waiting room while I see her. This time Maria's daughter, Rosa asked to see me after the appointment. She told me that she had noticed that Maria was forgetting to take her medication. She said she'd brought this up with Maria and said maybe it was time to go into a 'home' where Rosa could be sure that she was being looked after. Maria had refused, which is why Rosa was now seeking my assistance to assess Maria's capacity.

I suggested that we first start looking at some supports such as using a Webster Pack that organised Maria's medication on a daily basis, making it easier to remember which medication to take and whether she had taken it. We could also look into getting a home care nurse to drop in from time to time.

David, doctor

Case example

My son Robert lives with me, and I help to look after his finances because he has trouble with numbers due to an intellectual disability. The other day, Robert came home with an expensive new smartphone that he had signed up to at a phone shop in the local shopping mall. I looked at the contract that Robert had signed, and quickly realised that Robert can't afford to keep paying the high repayments that his new phone and phone plan requires. This made me wonder whether I needed to start an application to be appointed as Robert's financial administrator, which would require a doctor to assess Robert's capacity.

I found a local disability advocacy organisation online that provides advice in these situations. They supported Robert to negotiate a different phone and plan with the phone shop, one that he can afford. I was really grateful, because I want Robert to maintain his financial independence as much as possible.

Sylvia, mother

✓ 3. Apply the general test of capacity

Under Queensland’s guardianship legislation, the **general test of capacity** applies to decisions about personal (including health) matters and financial matters.

The legal test to apply ▶

Under the general test for capacity under Queensland’s guardianship legislation, the adult must be capable of:

- (a) understanding the nature and effect of decisions about the matter**
- (b) freely and voluntarily making decisions about the matter**
- (c) communicating the decision in some way.**

See **Section 4** ‘The general test of capacity’ for more information.

 **NOTE:** Under Queensland’s guardianship legislation there is a different legal test which applies to making or revoking/cancelling an enduring power of attorney or an advance health directive. See **Section 6** ‘Assessing capacity to make an enduring document’.

✓ 4. Prepare for the assessment

✓ Gather information relevant to the decision

You should gather the relevant facts about the personal, health or financial decision to be made, including the main options available to the adult. The information required will depend on the type of decision that needs to be made. It should also be relevant to the adult’s individual circumstances.



Practical tips

Practical tips for gathering information relevant to the decision



Personal matters

If the decision is about in-home support for an older person who is finding it difficult to manage, you would provide information about the available options such as:

- » engaging a cleaner/housekeeper
- » applying for in-home support services from the government
- » transition care on discharge from hospital
- » for each option
 - » the cost
 - » what they cover
 - » the pros and cons.



Health matters

If the decision is about a proposed treatment, gather information about:

- » the medical condition proposed to be treated
- » what the proposed treatment involves
- » the benefits of the treatment
- » the risks of the treatment
- » the immediate effects of the treatment and any recovery time
- » the consequences of not having the treatment
- » alternative treatments available and their risks and benefits.



Financial matters

If the decision is about choosing an insurance provider, gather information about:

- » the adult's current financial situation (if available)
- » some of the leading insurance providers
- » any providers that the adult has an interest in
- » the risk of not insuring the asset
- » for each option
 - » the cost
 - » what they cover
 - » the pros and cons.

NOTE:

- » You may need to support the adult to access information.
- » Don't provide too much information that would be overwhelming.
- » Describe the options and the risks and benefits of each option.

✓ **Make a plan to involve and support the adult**

The adult will need to be given as much support as much as possible to participate in the process.

Establish a supportive environment

An appropriate setting should be chosen without distractions, where the adult's privacy and dignity are respected. An assessment of capacity can be confronting. Plan a time and place for the assessment when the adult is likely to be most comfortable, safe and most likely to have capacity.



Case example

The medical oncologist at our hospital recently requested that I assess Hillary's capacity to consent to chemotherapy. Hillary has dementia and has recently been diagnosed with bowel cancer. I made some initial inquiries with Hillary and her family and found out that she is most lucid in the morning. I also found out that she finds it hard to concentrate for long periods. Because of this, I've pencilled in a couple of morning visits with Hillary. If I spread out the assessment over a few, short morning conversations, I should be able to assess her when she's in the best possible frame of mind.

Dr Lim, neuropsychologist

Find out the best way to communicate with the adult

It is important to be flexible and provide information to the adult using their usual methods of communication. For adults who use non-verbal means of communication, you will need advice and support. This may be sought from their usual support worker or an allied health professional. It may be necessary to organise a professional interpreter for a person who has difficulty communicating in English or is deaf, for example.

Consider whether a support person should attend

Some adults may feel more comfortable having their extended family or supporters present during the assessment. It may also be appropriate to involve a support worker or advocate who has experience in communicating with the adult.

It must be clear that the adult is making the decision and is not being pressured or coerced into making the decision.

Case example

Last week I was asked to conduct a capacity assessment for Warren. When planning for the assessment, I called Warren and his wife Lucy to find out how I could support Warren in the assessment. I found out that Warren has hearing loss but does not use sign language. I arranged to conduct the assessment in a quiet location and planned to have all supporting information printed to give to Warren, in case he has trouble hearing my explanations. I also told Warren that he should bring his hearing aid and that he can bring Lucy as a support person if he wants.

Reva, occupational therapist

✓ Make a plan to provide the adult with information in the right way

Information must be provided in a format that is accessible to the adult. This may include using an interpreter, simple language, assistive technologies, brochures, pictures or diagrams. The adult should be provided with sufficient time to consider the information.

Practical tips

Practical tips for providing information:

- » take time to provide the right information
- » don't provide information at a time of day when the adult is likely to be tired, disorientated, or otherwise not at their best. It may also be useful to have more than one or two meetings with the adult or have breaks during the meeting
- » where the situation is potentially distressing (e.g. diagnosis of a serious or life-threatening illness), several meetings may be needed to take in all the information
- » use pictures, brochures or diagrams if they might assist the adult to understand the issues
- » don't provide details that are not needed to make the decision, it may be overwhelming
- » use simple language
- » break down the information into smaller points and wait until each point has been understood before moving on
- » describe the main options, risks and benefits of each option
- » follow up the information you provide the adult in your verbal conversations with simple written information (if they can read and write)
- » repeat the information or the key points to summarise
- » to check their understanding, ask the adult to repeat the main points back to you.

 NOTE: Remind the adult to bring any items that would assist them to receive information and communicate. For example, the adult might need to bring their glasses, hearing aid, dentures or assistive technology.

✓ 5. Conduct the assessment

✓ Explain the assessment process to the adult

At the beginning of the capacity assessment, you should explain the process to the adult. It is important to be upfront about the fact that you are conducting a capacity assessment and the possible consequences of the assessment. Give the adult the opportunity to ask questions about the capacity assessment process.

The adult has the right to refuse to undergo a capacity assessment. If you have continuing doubts about the adult's capacity and the adult does not want to participate in the assessment process, an alternative approach may be required, such as an application to QCAT to determine the adult's capacity (see **Appendix B** for more information).

Inform the adult in your own words that:

- » there are concerns about their capacity
- » a decision needs to be made about a certain matter and their capacity to make this decision has been called into question
- » you will be having a discussion with them, including asking some questions to ensure that they have the capacity (are able) to make the decision – this is called a capacity assessment process
- » they are encouraged to participate in the process
- » notes will be taken about the assessment process
- » a conclusion will be made about the adult's capacity to make the decision at the end of the assessment process
- » if, as a result of the assessment process, you (the assessor) conclude that they do have capacity, then they can go ahead and make the decision
- » if, as a result of the assessment process, you (the assessor) conclude that they do not have capacity, then they may need additional support to make the decision or another decision-maker may need to be appointed to make the decision.

Your conclusion about their capacity is your opinion only. If they disagree about your conclusion that they do not have capacity they can get a second opinion or seek a finding by QCAT or the Supreme Court that they do have capacity to make the decision (a declaration of capacity).

✓ Ask relevant questions

The purpose of asking the adult questions during the capacity assessment is to engage the adult in a discussion about the decision, the various options available and the consequences of each option. This is done in order to assess the adult's capacity to make the decision.



Remember: You are focusing on whether the adult can exercise the decision-making process, not whether they make a decision that you would consider 'wise'.

Start with open-ended questions

After making the adult feel comfortable and explaining the assessment process, start by asking the adult familiar questions, like how their day is going.

The person conducting the assessment should then ask open-ended questions designed to encourage a full, meaningful answer using the adult's own knowledge or feelings. It is the opposite of a closed-ended question, which encourages a short or single-word answer, such as 'yes' or 'no'. Open-ended questions give the adult the opportunity to tell you their views, wishes and preferences in their own words, without you directing the conversation.

You should resist interrupting the adult and use active listening techniques, for example by acknowledging the adult through gestures (head nods) and words ('ok', 'uh-huh'). This gives the adult confidence to answer and encourages the flow of the conversation.

Examples of open-ended questions



Personal matters

Decision: where to live — when an adult wants to move away from family and live independently

- » Tell me about your family
- » Tell me about your current living situation

Decision: getting support services to stay in their own home — when an adult is having difficulty with self-care

- » Tell me about your home
- » Tell me about your morning routine



Health matters

Decision: about treatment — adult has stopped taking a prescription medication

- » Tell me about your health conditions
- » Why were you prescribed this medication?

Decision: about treatment — adult is not consenting to chemotherapy

- » Tell me about your diagnosis
- » What does this diagnosis mean for your future health?



Financial matters

Decision: whether to sell the family home to fund aged care accommodation

- » Tell me about your financial position
- » Tell me about your house
- » How do you feel about selling your home?

Decision: whether to invest in a friend's business venture

- » Tell me about your friend
- » How do you normally invest your money?

Then ask more specific questions

The answers the adult provides to open-ended questions should provide some prompts to ask other more targeted questions.

These targeted questions can be more specific to the adult's situation and the decision that has to be made. Through these targeted questions the assessor can begin to determine whether the adult understands the issue generally, and in particular whether they understand the consequences of a potential decision. This is the point where concerns highlighted in open-ended questions can be verified, or not.

Examples of more specific questions



Personal matters

Decision: where to live – when an adult wants to move away from family and live independently

- » Why do you want to move out?
- » What are some of the supports that you currently receive from your family?
- » Why do you think that your family is worried that you would not cope on your own?

Decision: getting support services to stay in their own home – when an adult is having difficulty with self-care

- » How do you think you are going with looking after yourself?
- » Do you think it would be easier to have some help at home?



Health matters

Decision: about treatment – adult has stopped taking a prescription medication

- » Can you tell me about how you felt before you started taking the medication?
- » Can you tell me the things you don't like about this medication?

Decision: about treatment – adult is not consenting to chemotherapy

- » What do your friends and family think about the treatment?
- » What are some of your concerns about chemotherapy?



Financial matters

Decision: whether to sell the family home to fund aged care accommodation

- » Do you think you would be happy with the money you receive from selling your home?
- » What are some of the things that would influence your decision to sell or not?

Decision: whether to invest in a friend's business venture

- » Have you invested in businesses before with your friend?
- » What do you like about your friend's business?

Ask about options and consequences

Finally the adult should be asked questions about the possible options and the consequences (including advantages/disadvantages) of the different options. If the adult is having difficulties identifying the options, it is okay to share the information gathered about the options. Then ask the adult to explain the options again.



Examples of questions about options and consequences



Personal matters

Decision: where to live — when an adult wants to move away from family and live independently

- » What type of support would you need to live on your own?
- » How would you feel about other people, support workers, coming into your home and helping you out?

Decision: getting support services to stay in their own home — when an adult is having difficulty with self-care

- » What are some of the supports available? What kind of things could they help with?
- » What do you think about Meals on Wheels?



Health matters

Decision: about treatment — adult has stopped taking a prescription medication

- » What would happen if you stopped taking this medication?
- » Is there another medication you could take instead? Can you tell me about it?
- » Would the other medication be as effective in treating your condition?

Decision: about treatment — adult is not consenting to chemotherapy

- » What are the benefits of chemotherapy? How would it help you?
- » Are there bad things about chemotherapy? What are they?
- » Is there any other treatment you might be able to have? Can you tell me about it?
- » What will happen if you stop having chemotherapy?



Financial matters

Decision: whether to sell the family home to fund aged care accommodation

- » What are the financial benefits of selling?
- » What are the risks?
- » If you don't sell the house, what are your other options for financing your accommodation?

Decision: whether to invest in a friend's business venture

- » If you do invest, how much money will you have left over for other things such as paying your regular bills?
- » If you decide not to invest, what are some other ways that you could support your friend's business?

Check to see if the adult is being pressured in any way

It is also important to check to see if the adult is being pressured by another person to make a particular decision. This is testing whether the adult can make the decision freely and voluntarily, which is also part of the capacity test under Queensland’s guardianship legislation.

Examples of questions to determine if the adult is being pressured

- » Tell me about your family and friends?
- » What do your family and friends think you should do? What do you think will happen if you don’t do that? Why?
- » Do you feel like anyone is pressuring or forcing you to make a particular decision?
- » Do you feel as if someone is not letting you do what you want to do? How do you usually make decisions? Who do you usually speak to about these decisions?



Personal matters

Decision: where to live — when an adult wants to move away from family and live independently

- » Is there anyone stopping you from doing what you want to do?
- » What do your family say about you moving out?
- » When you disagree with them, what do they do?

Decision: getting support services to stay in their own home — when an adult is having difficulty with self-care

- » Has someone else been telling you that you need extra support?
- » What kind of things do they say about you needing support?



Health matters

Decision: about treatment — adult has stopped taking a prescription medication

- » What has your family said about taking this medication?

Decision: about treatment — adult is not consenting to chemotherapy

- » What is your son’s view on whether you should have chemotherapy?
- » What about other members of your family?



Financial matters

Decision: whether to sell the family home to fund aged care accommodation

- » How do your children feel about selling the family home?

Decision: whether to invest in a friend’s business venture

- » Do you feel you have a choice about whether to invest?

Remember:

- » Document your process, conclusion, reasons and who was in attendance.
- » Apply the capacity assessment principles in **Section 3** ‘Capacity assessment principles’ of these guidelines.

What to do if you think the adult is being abused or pressured

If you suspect that an adult is being physically, financially or emotionally abused or pressured to make a decision, the priority must be to ensure the adult's health, safety and well-being.

 **Remember:** to have capacity an adult must be able to make a decision freely and voluntarily.

You should try to connect the adult with appropriate and relevant support services and prioritise their immediate safety. You should consider whether the assessment can be done at a later time with appropriate supports for the adult.

See **Appendix A** of these guidelines for information about support services. If you think the adult is in immediate danger, call the police.

✓ 6. Document your conclusion and your reasons

It is now time to come to a conclusion about the adult's capacity, if possible. It is important to remember that capacity can change and a lack of capacity at the time of assessment may only be temporary.

You should make notes about how you have conducted the assessment, including any support that was provided and who was in attendance. You should also record the conclusion you reached and the reasons for that conclusion (or your inability to reach a conclusion).

It is important that you fully and accurately record the process you undertook and the conclusions you reached. A well-documented decision allows others to understand how you came to the conclusion that you did.

As capacity can fluctuate or change, it is important to suggest a timeframe for a review of the assessment.

When the assessor's conclusion is challenged

In some cases, the assessor's conclusion about an adult's capacity might be challenged by the adult or others. **What is important is that the assessor has followed the process described in these guidelines and made a reasoned and justifiable decision about the adult's capacity based on the information obtained as part of the assessment.**

 **NOTE:** Your conclusion is your opinion only. It can be reviewed or challenged. QCAT or the Supreme Court can make a formal declaration or finding about the adult's capacity.

Next steps

What to do next if you think the adult has capacity

If you are satisfied the adult has capacity to make the decision (including with support) the adult can go ahead and make the decision, including deciding not to make a decision.

What to do next if you think the adult does not have capacity

If you think the adult may have impaired capacity, there are several options going forward:

Consider if the adult can continue to make the decision with support

Many adults with impaired capacity can be supported to make decisions for themselves. Queensland's guardianship legislation recognises that an adult's capacity to make decisions can differ according to the support available from members of their support network. An adult must be given the support and access to information they need to maximise their participation in decision-making.

Consider if a member of an adult's support network can make decisions on an informal basis

Queensland's guardianship legislation also recognises that a member of an adult's support network may make certain decisions for them on an informal basis. These are called informal decision-makers.

Consider if a substitute decision-maker might be needed

If, even with support, an adult cannot make the decision and the decision needs to be made, the adult may need someone to make certain decisions for them. This is known as a substitute decision-maker. A substitute decision-maker may include:

- » an **attorney** appointed under an enduring power of attorney or an advance health directive (if an adult has already made one when they had capacity)
- » a **guardian or administrator** appointed by QCAT to make decisions about the matter
- » a **statutory health attorney** (an adult's spouse, unpaid carer, or close friend or relative over the age of 18 years who has automatic authority under Queensland's guardianship legislation to make decisions about health care).

What to do next if you are not sure if the adult has capacity or not

If you are unsure about an adult's capacity, you should consider seeking a second opinion and/or a more formal assessment of capacity. An adult's general practitioner, a specialist such as a geriatrician, psychiatrist or a psychologist, or a lawyer will be able to carry out a formal capacity assessment. An application can also be made to QCAT or the Supreme Court for a formal declaration or finding about the adult's capacity.

For more information go to **Appendix B** of these guidelines.

SECTION 6: Assessing capacity to make an enduring document

This section provides guidance on assessing an adult's capacity to make an enduring document (an enduring power of attorney or an advance health directive) under Queensland's guardianship legislation.

The information in this section may also be useful for members of the adult's support network if the adult is considering making an enduring document and they have concerns about the adult's capacity.

What are enduring documents?

An '**enduring document**' is either an enduring power of attorney or advance health directive.

Enduring documents allow an adult to plan ahead, including for a time when they do not have capacity to make decisions themselves.

An **enduring power of attorney** allows an adult (the principal) to appoint a person(s) they trust as their 'attorney' to make decisions on their behalf during their lifetime. An attorney(s) can be appointed to make decisions about:

- » **personal** (including health) matters — personal matters relate to personal or lifestyle decisions. This includes decisions about support services, where and with whom you live, health care and legal matters that do not relate to your financial or property matters
- » **financial matters** — financial matters relate to your financial or property affairs including paying expenses, making investments, selling property or carrying on a business.

For personal (including health) matters, the appointed attorney(s) cannot exercise their powers until after the adult loses capacity to make decisions themselves. On the other hand, attorneys for financial matters can exercise their powers immediately upon the enduring power of attorney being made, unless it states otherwise.

An **advance health directive** allows an adult (the principal) to give directions about their future health care and special health care if they do not have capacity to make these decisions themselves. An advance health directive can also be used to appoint a trusted person(s) as an 'attorney' to make decisions about health matters if there is a time when the adult does not have capacity to make those decisions.

Who may need to assess an adult's capacity to make an enduring document?

An adult must have capacity to make an enduring document. An adult also must have capacity to revoke (cancel) an enduring document.

» An eligible witness

An enduring document must be signed by the person making the document (the principal) in the presence of an **eligible witness** who must be satisfied the person making the enduring document has capacity to make the document.

An eligible witness for an enduring document is a:

- » justice of the peace
- » commissioner for declarations
- » notary public
- » lawyer.

The following people **cannot witness** an enduring power of attorney or advance health directive: an attorney appointed under the document; a relation of the adult making the document or a relation of an attorney(s) appointed under the document; or the person signing the document on behalf of an adult who cannot physically sign it themselves. If the enduring power of attorney or advance health directive appoints an attorney(s) for a personal (including health) matter, an adult's paid carer or health provider cannot witness the document. Finally, a beneficiary under the adult's will cannot witness an advance health directive.

The **witness has an important role** in certifying that the adult appeared to have capacity to make the enduring document. The witness must only witness the adult's signature and sign the document if they conclude that the adult has capacity to make the enduring document.

» A doctor

A **doctor** must also complete and sign the doctor's certificate in an advance health directive. In signing the certificate, the doctor is certifying that the adult making the advance health directive appeared to have the capacity needed to make the advance health directive.

A doctor referred to in this document must be a medical practitioner registered under the Health Practitioner Regulation National Law to practise in the medical profession, other than as a student. For example, the adult's general practitioner (GP) or a doctor at a hospital will be able to complete and sign the doctor's certificate in the advance health directive.

NOTE: IMPORTANT!

It is strongly recommended that an attorney(s) whose powers begin on the loss of the adult's capacity under an enduring document seeks a capacity assessment from an independent person (e.g. a GP or other health practitioner) before exercising their powers to make decisions under the document.

The test of capacity for making an enduring document

The legal test to apply ▶

Under Queensland's guardianship legislation there is a specific legal test of capacity for making an enduring document. In general terms the adult must be capable of:

- (a) understanding the nature and effect of the document**
- (b) making the document freely and voluntarily.**

Both criteria (a) and (b) must be met for an adult to have capacity to make an enduring document.

To revoke (cancel) an enduring document, the adult must have capacity to make the enduring document that would give the same powers.

a. Understanding the nature and effect of the document

It is not enough for the adult to have a general understanding of the enduring document. The law requires them to actually understand the nature and effect of the document, the powers that it gives, when it operates and how and when they can revoke (cancel) it.

Capacity to make an enduring power of attorney

By making an enduring power of attorney, an adult (the principal) may appoint one or more people they trust to make decisions about either personal (including health) matters or financial matters for them. These people are called 'attorneys'. An attorney(s) may be given significant powers to make decisions about the adult's personal or financial affairs. Therefore, it is very important that the adult is capable of understanding the nature and effect of the document, including the powers it gives.

The level of understanding which is required will also depend on the specific powers given under the enduring power of attorney and the complexity of the adult's financial and personal affairs. The adult doesn't need to know all the complexities of the types of transactions the attorney could undertake on their behalf. However, they should be able to generally understand:

- » their own personal and financial affairs that will be managed by the attorney(s)
- » the types of decisions which are likely to be made by the attorney(s)
- » the scope of the power given to the attorney(s)'.

Generally, the more complex the adult's personal and financial affairs are, the greater their understanding must be.

Capacity to make an advance health directive

By making an advance health directive an adult can give directions about their future health care and special health care. They can also appoint one or more people they trust to make decisions about health matters on their behalf if they do not have capacity to make the decision themselves. These people are called ‘attorneys’.

To appoint an attorney for health matters under an advance health directive, an adult must have the same capacity for making an enduring power of attorney giving the same type of power.

b. Making the document freely and voluntarily

The adult must also be capable of making an enduring document free of coercion or undue influence.

It must be clear that the adult is not being pressured into making the enduring document. Sometimes a family member, friend or carer might behave in a manner that is domineering or overbearing, seeking to pressure the adult to make a decision a certain way.

The legal test in Queensland’s guardianship legislation

The *Powers of Attorney Act 1998* sets out the test of capacity for making an enduring power of attorney (section 41) and an advance health directive (section 42). These tests are reflected in the summary checklists that follow.

Summary checklists

Summary – Assessing capacity to make an enduring power of attorney

a. Ask, in relation to the enduring power of attorney – can the adult understand the nature and effect of the document? This includes understanding the following matters:

The adult may specify or limit the power given to the attorney(s) and instruct the attorney(s) about the exercise of the power.

When the power given to the attorney(s) begins.

Once the power for a matter begins, the attorney(s) will have full control and power to make decisions about the matter, subject to terms or information included in the enduring power of attorney.

The adult may revoke the enduring power of attorney at any time the adult is capable of making an enduring power of attorney giving the same power.

The power the adult has given to their attorney(s) continues even if the adult does not have capacity to make decisions about the matter.

At any time the adult is not capable of revoking the enduring power of attorney, the adult is unable to effectively oversee the use of the power given to the attorney(s) by this document.

- ✓ **If the answer is ‘yes’ in relation to all of these matters then the adult passes this part of the capacity test.**

b. Ask, in relation to the enduring power of attorney – can the adult make the document freely and voluntarily?

- ✓ **If the answer is ‘yes’ in relation to this matter then the adult passes this part of the capacity test.**

 **NOTE:** For more information about making an enduring power of attorney see *Form 9 – Enduring power of attorney explanatory guide*.

Summary – Assessing capacity to make an advance health directive

a. Ask, in relation to the advance health directive – does the adult understand the nature and effect of the document, including:

The nature and likely effects of each direction in the advance health directive.

A direction operates only while the adult has impaired capacity for the matter covered by the direction.

The adult may revoke a direction at any time the adult has capacity to make a decision about the health matter covered by the direction.

At any time the adult is not capable of revoking a direction, the adult is unable to effectively oversee the implementation of the direction.

- ✓ **If the answer is ‘yes’ in relation to all of these matters then the adult passes this part of the capacity test.**

If the advance health directive also gives power to an attorney(s) to make healthcare decisions for the adult, then the adult must also understand the following matters:

The adult may specify or limit the power given to the attorney(s) and instruct the attorney(s) about the exercise of the power.

The power given to the attorney(s) begins when the adult loses capacity to make decisions for the health matter.

Once the power given to the attorney(s) for the health matter begins, the attorney(s) will have full control over and power to make decisions about the health matter, subject to terms or information included in the enduring power of attorney.

The adult may revoke the power given to the attorney(s) in the advance health directive at any time the adult is capable of making an advance health directive giving the same power.

The power the adult has given to their attorney(s) continues even if the adult does not have capacity to make decisions about health matter.

At any time the adult is not capable of revoking the power given to the attorney in the advance health directive, the adult is unable to effectively oversee the use of the power given to the attorney(s) by this document.

- ✓ **If the answer is ‘yes’ in relation to all of these matters then the adult passes this part of the capacity test.**

b. Ask, in relation to the advance health directive – can the adult make the document freely and voluntarily?

- ✓ **If the answer is ‘yes’ in relation to this matter then the adult passes this part of the capacity test.**

 **NOTE:** For more information about making an advance health directive see *Form 10—Advance health directive explanatory guide*.

Conducting the capacity assessment

Explain the assessment process to the adult

At the beginning of the capacity assessment process you should explain the process to the adult. It is important to be upfront with the fact that you are conducting a capacity assessment and the possible consequences of the assessment.

Inform the adult in your own words that:

- ✓ As a witness/doctor you must be satisfied that the adult has the capacity necessary to make the document. This means that you must be satisfied that the adult:
 - » understands the nature and effect of the document they are making
 - » is making the document freely and voluntarily
- ✓ You will have a discussion with them, including asking some questions to ensure that they have capacity to make the document
- ✓ They are encouraged to participate in the process
- ✓ Notes will be taken about the process
- ✓ A decision about the adult's capacity to make the document will be made at the end of the assessment process
- ✓ If, as a result of the assessment process, you conclude that they do have capacity to make the document, that you will sign the document
- ✓ If, as a result of the assessment process, you conclude that they do not have capacity to make the document, that you will not sign the document
- ✓ Your conclusion about their capacity is your opinion only. If they disagree with your conclusion that they do not have capacity they could seek a second opinion or an assessment from an expert (e.g. from a medical professional) or seek a finding by a tribunal (QCAT) that they do have capacity to make an enduring document.

 **NOTE:** A witness for an enduring document cannot rely solely on a medical report that an adult has capacity. They must be satisfied that the adult has capacity to make an enduring document, including that they are making the document freely and voluntarily.

Asking relevant questions

Ideally you should meet with the adult alone. This gives you an opportunity to develop a rapport with the adult and make sure that they are not being unduly influenced by another person to make the enduring document.

The purpose of asking the adult questions about the enduring document they are making is to engage them in a discussion about the document so that you can assess whether they understand the nature and effect of the document they are making and that they are making the document freely and voluntarily.

After making the adult feel comfortable and explaining the assessment process, start by asking the adult familiar questions, like how their day is going.

First, check that the adult has read the enduring document.

Then begin by asking **open-ended questions**, designed to encourage a full, meaningful answer using the adult's own knowledge or feelings. It is the opposite of a closed-ended question, which encourages a short or single-word answer, such as 'yes' or 'no'. You should resist interrupting the adult and use active listening techniques, for example by acknowledging the adult through gestures (head nods) and words ('ok', 'uh-huh').

Then ask more **specific questions**. These targeted questions can be more specific to the adult's situation and the document they are making. You can also ask more specific questions about the adult's particular circumstances. This helps you to begin to determine whether the adult understands the document and the powers it gives.

Finally, check to see if the adult is **being pressured in any way** to make the document. This is testing whether the adult can make the enduring document freely and voluntarily which is also part of the test of capacity to make an enduring document under Queensland's guardianship legislation.



Practical tips

- » If practical, ask anyone who is present in the room to leave before the adult signs the enduring document or revocation.
- » You should always attempt to meet with the adult alone before signing the document and record questions you ask and any responses the adult gives.
- » It is a good idea to ask the adult directly whether they feel they have been pressured into making the enduring document.

Examples of questions you may ask about making an enduring power of attorney

Start with open-ended questions

- » What is an enduring power of attorney?
- » Who have you discussed this enduring power of attorney with?
- » Why do you want to make an enduring power of attorney?
- » Has anyone helped you make this document?

Then ask more specific questions

- » Who are you appointing as your attorney(s)?
- » What sorts of decisions will they be able to make?
- » If you are appointing multiple attorneys, how will they make decisions together? Do they all need to agree? Or can one attorney make a decision without the others' agreement?
- » Do you know that once your attorney's power begins they will have full control and power to make decisions about the matter you have appointed them for?
- » Do you know that you can limit your attorney's powers or provide instructions about how they exercise their powers? Have you done this?
- » How long will your attorney(s) power last?
- » If the adult has appointed an attorney for financial matters:
 - » who will be able to make decisions about your financial matters?
 - » when will this power to make decisions start?
 - » what types of decisions will they be able to make?
- » If the adult has appointed an attorney for personal (including health) matters:
 - » who will be able to make decisions about your personal matters?
 - » when will this power to make decisions start?
 - » what types of decisions will they be able to make?
- » Can you cancel the attorney's power to make decisions?
- » Will you be able to cancel (revoke) the power given to your attorney if you do not have capacity?
- » Will you be able to supervise the exercise of power by your attorney(s) if you do not have capacity?

Check that the adult is not being pressured in any way

- » Has anyone pressured you to make this document?
- » If you decided not to make this document today, would it make anyone upset or disappointed? Discuss how they would deal with this and ensure they have considered safety planning.
- » If an attorney is being appointed — how long have you known the person(s) you are appointing as your attorney(s)?

Examples of questions you may ask about making an advance health directive

Start with open-ended questions

- » What is an advance health directive?
- » Who have you discussed this form with?
- » Why do you want to make an advance health directive?

Then ask more specific questions

- » Has your doctor explained the medical terms in the form?
- » Are there any terms that you are unclear about?
- » What directions about health care have you given in the form?
- » Do you know when these directions will apply?
- » Will you be able to cancel (revoke) this advance health directive if you do not have capacity?
- » Will you be able to supervise the implementation of your directions if you do not have capacity?
- » Have you appointed an attorney to make healthcare decisions in this advance health directive? If so:
 - » who are you appointing as your attorney(s)?
 - » what sorts of decisions will they be able to make?
 - » when will they be able to start making decisions?
 - » if you are appointing multiple attorneys, how will they make decisions together? Do they all need to agree or can one attorney make a decision without the others' agreement?
 - » do you know that once the power given to your attorney(s) begins, they will have full control and power to make decisions about the matter you have appointed them for?
 - » do you know that you can limit the power given to your attorney(s) or provide instructions about how they exercise their powers? Have you done this?
 - » will you be able to cancel (revoke) the power given to your attorney(s) if you do not have capacity?
 - » will you be able to supervise the exercise of power by your attorney(s) if you do not have capacity?

Check that the adult is not being pressured in any way

- » Has anyone pressured you to make this document?
- » If you decided not to make this document today, would it make anyone upset or disappointed? Discuss how they would deal with this and ensure they have considered safety planning.
- » If an attorney is being appointed — how long have you known the person(s) you are appointing as your attorney(s)?

NOTE:

If the adult does not know the answer to these questions, you can spend some time explaining the nature of the document they are signing and the powers that it gives. Then you can ask similar questions again. Be careful that the adult is answering the questions in their own words, so that you can be sure that they understand.

What to do if you think the adult is being abused or pressured to make the enduring document

If you suspect that an adult is being physically, financially or emotionally abused or pressured to make a decision, the priority must be to ensure the adult's health, safety and well-being.

You should not sign the document.

Rather, you should try to connect the adult with appropriate and relevant support services and prioritise their immediate safety. You should consider whether the assessment can be done at a later time with appropriate supports for the adult.

See **Appendix A** of these guidelines for information about support services, **including elder abuse support services**. If you think the adult is in immediate danger, call the police.

Document your conclusion and your reasons

You should make notes about how you have conducted the assessment. Document the conclusion that you have reached and the reasons for that decision.

In some cases the assessor's conclusion about an adult's capacity may be challenged by the adult or others. What is important is that you have followed the process described in these guidelines and made a reasoned and justifiable decision about the adult's capacity based on the information obtained as part of the assessment.

 **NOTE:** your conclusion is your opinion only. It can be reviewed or challenged. QCAT or the Supreme Court can make a formal declaration or finding about an adult's capacity to make an enduring document.

What to do next if you have doubts about the adult's capacity

If you do not think that the adult has capacity to make the enduring document or if you are unsure about their capacity, you should not sign/witness the document. Explain to the adult the conclusion that you have reached and that:

- » they can seek a capacity assessment from an independent expert (e.g. a medical professional)
- » they can seek the advice of a lawyer about their options going forward
- » they can seek a declaration from QCAT about their capacity to make an enduring document.

See **Appendix A** for a range of organisations that can offer assistance and support.

APPENDIX A: If you need further assistance

13 HEALTH

13 HEALTH is a confidential phone service that provides health advice to Queenslanders.

The service can direct you to a local GP who can provide advice and assistance to complete an enduring power of attorney or advance health directive form.

You can talk to a registered nurse 24 hours a day, 7 days a week for the cost of a local call.

Tel: **13 43 25 84**

Elder Abuse Helpline

Call the Elder Abuse Helpline for free and confidential advice for anyone experiencing elder abuse or who suspects someone they know may be experiencing elder abuse.

Tel: **1300 651 192**

Monday to Friday, 9am to 5pm.

1800RESPECT

1800RESPECT is the national, confidential online and telephone counselling, information and referral service available 24 hours a day, 7 days a week. 1800RESPECT is funded by the Federal Government and delivered by Medibank Health Solutions.

Tel: **1800 737 732**

Office of the Public Guardian (OPG)

Learn more about the guardianship system and how OPG can help protect adults with impaired decision-making capacity.

www.publicguardian.qld.gov.au

Tel: **1300 653 187**

Public Trustee

The Public Trustee can provide independent personal financial administration services.

www.pt.qld.gov.au

Tel: **1300 360 044**

Monday to Friday, 8:30am to 5pm.

Queensland Law Society

For information about finding a solicitor for legal advice: www.qls.com.au

Tel: **1300 367 757**

Monday to Friday, 8:30am to 5pm.

Community legal centres

Call or visit your nearest community legal centre, Seniors Legal and Support Service or specialist legal centre for people with disability or mental illness. Community legal centres can provide free legal advice for your situation. You can find local legal help at:

www.communitylegalqld.org.au

Tel: **07 3392 0092**

Queensland Civil and Administrative Tribunal (QCAT)

Applications for guardianship and administration, as well as applications regarding capacity and attorneys can be made at QCAT.

Information about making an application to QCAT is available at:

www.qcat.qld.gov.au

Tel: **1300 753 228**

Monday to Friday, 8:30am to 3pm.

Aged and Disability Advocacy Australia (ADA Australia)

ADA Australia provides free and confidential advocacy services to older people and people with disability across Queensland.

www.adaaustralia.com.au

Tel: **1800 818 338**

Monday to Friday, 9am to 4pm.

Queensland Human Rights Commission

The Queensland Human Rights Commission is an independent government agency where you can make complaints of discrimination, sexual harassment, vilification, victimisation and breaches of human rights.

www.qhrc.qld.gov.au

Tel: **1300 130 670**

My Aged Care

My Aged Care is the Australian Government's starting point to find and access government-funded aged-care services, including services you can receive at home.

www.myagedcare.gov.au

Tel: **1800 200 422**

Monday to Friday, 8am to 8pm.

If you need an interpreter



If you have difficulty understanding this publication and need language assistance, please call **13QGOV (137468)**, ask for an interpreter and ask them to telephone any of the agencies in Appendix A.

If you are deaf or have a hearing or speech impairment



Use the National Relay Service to phone any of the agencies in this section.

For more information visit:

www.communications.gov.au/accesshub

APPENDIX B: Next steps if capacity is in doubt

Review your process

Consider whether you have followed the process correctly.

If you think the adult may have impaired capacity, there are several options going forward. However, the first thing you should do is reflect on the assessment process. Did you follow the process correctly, and have you recorded your conclusion and your reasons? Remember, your written record may be relevant in the future if your decision is challenged. The Queensland Civil and Administrative Tribunal (QCAT) or the Supreme Court may make a finding or declaration about an adult's capacity.

Second opinion

Consider getting a second opinion or arranging a more formal assessment.

If you are unsure about whether or not the adult has capacity for the decision and the decision must be made, you should consider seeking a second opinion and/or asking the adult to undergo a more formal capacity assessment by a professional. The adult's general practitioner, a specialist such as a geriatrician, a psychiatrist or psychologist, or a lawyer will be able to carry out a formal capacity assessment.

Seek advice

Consider seeking advice from a relevant organisation.

If you do not think the adult has capacity for the decision, you may wish to seek advice about what you should do next. For example, you could contact the Office of the Public Guardian, the Public Trustee, a legal service or a non-government organisation. See [Appendix A](#) 'If you need further assistance' for more information.

Supported decision-making

Consider if the adult can continue to make the decision with support.

Many adults with impaired capacity can be provided with further support and information to increase their capacity to make decisions. Queensland's guardianship legislation recognises that an adult's capacity to make decisions can differ according to the support available from members of their support network. The general principles also require that an adult be given the support and access to information necessary to maximise their participation in decision-making.

Informal decision-maker

Consider if a member of an adult's support network can make decisions on an informal basis.

Queensland's guardianship legislation also recognises that a member of an adult's support network may make certain decisions for them on an informal basis. These are called informal decision-makers.

Substitute decision-maker

Consider if a substitute decision-maker might be needed.

If, even with support, an adult would not have capacity to make the decision and the decision needs to be made, the adult may need someone to make certain decisions for them. This is known as a 'substitute decision-maker'. The adult may have appointed an attorney(s) for the matter under an enduring document (when they had capacity for the matter). If not, you may consider applying to QCAT for a guardian or administrator for the adult or a declaration about the adult's capacity.

APPENDIX C: Types of substitute decision-making arrangements

Queensland’s guardianship legislation recognises a number of substitute decision-makers, and authorises the exercise of power for a matter for an adult with impaired capacity for a matter.

Depending on the type of matter, a substitute decision-maker may be:

An informal decision-maker	A member of the adult’s support network acting on an informal basis. Queensland’s guardianship legislation recognises that a member of an adult’s support network may make decisions for them on an informal basis. An informal decision-maker cannot make an enduring document on behalf of an adult.
An attorney for personal (including health) matters	An attorney for personal matters appointed by the adult under an enduring power of attorney or advance health directive. The enduring document must have been made by the adult at a time when they had capacity to make the document.
An attorney for financial matters	An attorney for financial matters appointed by the adult under an enduring power of attorney. The enduring power of attorney must have been made by the adult at a time when they had capacity to make the document.
A statutory health attorney	A statutory health attorney (listed in an order of priority in Queensland’s guardianship legislation) is an adult’s spouse, unpaid carer, or close friend or relative over the age of 18 years who has automatic authority under Queensland’s guardianship legislation to make decisions about health care. If none of the above people are available or culturally appropriate, the Public Guardian is an adult’s statutory health attorney.
A guardian for personal (including health) matters	A guardian may be appointed by the Queensland Civil and Administrative Tribunal (QCAT) or the Supreme Court to make decisions about the adult’s personal (including health) matters.
An administrator for financial matters	An administrator may be appointed by QCAT or the Supreme Court to make decisions about the adult’s financial matters.
QCAT or the Supreme Court	There are certain matters for which QCAT and the Supreme Court can make an original decision.

Acknowledgements

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