



# Outline

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## Outline (cont.)

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# What is capacity?

- A person's capacity is their mental ability to make a decision for themselves
- Generally speaking, a person has capacity to make a decision if they can:
  - Understand the facts and main choices involved, and
  - Weigh up the consequences of the choices, and
  - Understand how the consequences affect them, and
  - Communicate their decision

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## What is capacity (cont.)?

- A person who has capacity can make decisions about things that affect their lives. This includes lifestyle decisions such as where to live, what to eat and what to buy
- A person who has capacity can also make decisions about things that have legal consequences. This includes making a will, getting married or signing a contract
- **It also includes providing, or refusing to provide, consent to treatment for a mental illness**

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# Why is capacity important?

- Capacity is important for ethical, clinical and legal reasons
- The requirement for capacity to be presumed and for a person with capacity to be allowed to make a decision for themselves reflects our society's strong ethical preference for maintaining a person's decisional autonomy
- Capacity is clinically important because it involves evaluating a person's mental functioning. This requires obtaining a psychiatric history and conducting a mental status examination focusing specifically on functions relevant to decision making including attention, mood, thinking (form and structure), memory and cognitive function

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## Why is capacity important? (cont.)

- Lastly, capacity is legally important
- A person with legal capacity has the right to make decisions for themselves and to have their decisions respected. A person with legal capacity also has the power to stop others from making decisions on his or her behalf
- Failure to respect a person's legal capacity can also have legal consequences. Consent to treatment may be invalid if it has been given by a person who lacks decision making capacity, and provision of treatment to a person without consent or other lawful authority may give rise to civil and/or criminal sanctions
- **Under the *Mental Health Act 2013* a person can only be placed on a Treatment Order if the person lacks decision making capacity**

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## Key features of capacity

- Capacity is not something solid that you can hold and measure. Nor is it something that is the same all the time
- Rather, capacity is affected by a person's abilities and by what's happening around them. It varies from person to person and from situation to situation. It can also vary depending on the person's mental or physical health
- In different areas of life there are different tests that can be used to determine whether or not a person has, or lacks, capacity
- **For some types of decisions there is a specific legal test. This includes decisions about things that are important, or that have legal consequences, such as whether to have medical treatment**

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## An adult's capacity must be presumed

- At law, **adults must be presumed to have decision making capacity**. This includes adults with mental illness or with any other disability
- A person's lack of capacity to make a decision must be positively established, and there must be good reasons for making a determination that a person lacks decision making capacity
- A person's age, appearance, disability, behaviour, language skills or other conditions or characteristics should not lead to an assumption that the person lacks decision making capacity

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Incorrect assumptions can often be made about a person's decision making capacity on factors such as:

- Whether the person has tattoos or piercings
- The way that the person communicates (for example the person's lack of English skills or dysarthria or dysphagia)
- The presence of physical disabilities, learning difficulties and disabilities such as ADHD, Multiple Sclerosis or Parkinson's Disease
- Temporary conditions such as being intoxicated
- Behaviour such as avoiding eye contact or talking to oneself, hypomania, withdrawal or hallucination
- Being an extrovert or introvert

## Capacity is decision-specific

- **A person can have capacity for some decisions but not others**
- Capacity is specific to the decision being made
- A person's capacity may depend on the type of decision being made, whether the decision is simple or complicated and the person's familiarity with the subject matter
- For example a person may have capacity to decide to take over the counter medication but lack capacity to decide about having ECT
- This means that a person's capacity should be reassessed every time a key decision needs to be made

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Assessing a person's decision making abilities on an issue-specific basis takes fluctuations in a person's decision making capacity into account. This approach prevents an assessment that a person has decision making capacity simply because they acquiesce to a medical practitioner's recommendation. It also discourages the conclusion that a person lacks decision making capacity simply because they disagree with clinical advice.

Assessing a person's decision making capacity on an issue-specific basis also prevents too much attention being given to a person's previous decisions and pattern of decision making, and the likely outcome of the particular decision that the person is being asked to make, as a way of determining whether the person has – or lacks – decision making capacity.

Within the context of the *Mental Health Act 2013*, it means that a person may have capacity to decide about assessment for mental illness, but not capacity to decide about treatment. It also means that a person may also be able to decide about some types of treatments, but not about others.

## A person's capacity may fluctuate

- **A person's capacity may change over time and be affected by environmental and other factors**
- A person who couldn't make a *particular* decision in the past may be able to make the same *particular* decision now, or into the future
- A person who couldn't make a *type* of decision in the past may be able to make *other types* of decisions now, or into the future
- Whether a person has decision-making capacity may also depend on environmental factors such as the physical environment, the time of day, location, noise levels and who is present with the person
- Capacity may be affected by personal stress or anxiety levels, medication, infection, drugs or alcohol, and by mental and physical health
- The amount and type of information that has been given to the person and how well they understand the information may also be relevant

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## A person with capacity has the right to make “bad” decisions

- **A person’s decision doesn’t always have to be a good one, and not everyone will agree with the decisions that a person makes**
- There are however times when the decision that a person makes may prompt the need to assess the person’s capacity to make the decision. This includes where the decision puts the person at significant risk of harm or mistreatment. It also includes times when the person’s decision is different from the decisions that they would usually make
- Deciding whether to assess capacity in these circumstances involves carefully balancing the person’s right to make a decision and the extent to which their health or safety, or the safety of others, might be in danger if they make that decision

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Respect for autonomy involves respecting the right of a competent individual to have opinions, to make choices, and to take actions based on personal goals and values.

For this reason it is important to take care that it is the person’s ability to make the decision that is being assessed, rather than the decision that they have made.

## Substitute decision making is a last resort

- Everything possible should be done to support a person to make a decision, before the person is assessed as lacking decision making capacity
- This includes:
  - Communicating in a way that is appropriate for the person (using Plain English, non-verbal communication, an Alternative and Augmentative Communication system or an interpreter if needed)
  - Giving the person sufficient information about the decision and its consequences
  - Choosing a time and place that puts the person at ease
  - Helping the person to get treatment for any medical condition that may be affecting their capacity
  - Helping the person to find someone to support them (such as a family member, friend or advocate)

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It is generally important to maximise a person's decision making capacity and under the *Mental Health Act 2013* this is actively required.

A person who can make some – but not all – decisions should be helped to make as many decisions as they can. For people in this situation consideration should be given to delaying decisions until a later point in time, when the person may be more able to make decisions for themselves, where this is clinically appropriate.

## Capacity can be regained

- A person may regain and/or increase their capacity
- A person with mental illness may have capacity to make decisions when they are well but not during periods of mental ill health
- A person can learn new skills that will enable them to make decisions for themselves
- This means that a person's decision making capacity should be reassessed regularly and every time that a key decision need to be made

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## When should capacity be assessed?

- The presence of mental illness, or refusal to consent to treatment, are not generally enough - on their own - to trigger a capacity assessment
- Capacity should however be assessed if mental illness is present and the person's decision is very different from their usual decisions, conflicts with the person's usual preferences, is at odds with the person's best interests, or is different to the decision that most people would make in the circumstances
- Capacity should particularly be assessed if the person's decision puts themselves, or others, at risk of harm or mistreatment – that is, if the decision is “high stakes” and has potentially severe consequences
- Capacity should also be reassessed if the person appears to have regained decision making capacity
- **Capacity should also be assessed when this is required by the *Mental Health Act 2013***

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Factors which may – alone or when considered together with other factors - indicate the need to assess a person's decision making capacity include:

- If the person has been assessed as lacking decision making capacity in the past
- If the person has a history of decision making which puts the person at significant risk
- If the person is confused about matters which they easily understood in the past
- If the person's decision is out of character
- If the person has experienced an abrupt change in mental state, a sudden personality change or is expressing inappropriate emotion
- If the person is experiencing noticeable memory problems, has experienced a dramatic loss of language skills, social skills, reading or writing skills
- If the person is disoriented as to time, place or person
- If the person is not attending to financial matters, is spending in an unusual way or is noticeably being taken advantage of by others

## Capacity and the *Mental Health Act 2013*

- The *Mental Health Act 2013* sets out the circumstances in which a person who does not have decision-making capacity may be involuntarily assessed or treated with respect to a mental illness
- The Act recognises the right for a person with decision making capacity to make their own decisions about assessment or treatment for a mental illness
- An assessment of decision making capacity is required before an Assessment Order is affirmed; and a person may only be placed on a Treatment Order if he or she is found to lack decision making capacity

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The prohibition on enabling a person with capacity to be treated against their will, and the inclusion of involuntary treatment criteria which focus on decision making capacity rather than solely on concepts of dangerousness or risk, is consistent with the United Nations *Convention on the Rights of Persons with Disabilities* and enables earlier intervention for a person experiencing a mental health crisis than a focus on risk would achieve.



## Capacity and the *Mental Health Act 2013* (cont.)

- Under the *Mental Health Act 2013* the need to assess a person's decision making capacity arises at two key points:
  - A person under an Assessment Order must be independently assessed by an approved medical practitioner within 24 hours of the Order being made and the Order may only be affirmed and/or extended if the approved medical practitioner is satisfied that the assessment criteria are met. This requires a determination that the person does not have decision making capacity
  - An approved medical practitioner may only apply for a Treatment Order if satisfied that the treatment criteria are met. This requires a determination that the person does not have decision making capacity

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### 25. Assessment criteria

The assessment criteria are –

- (a) the person has, or appears to have, a mental illness that requires or is likely to require treatment for –
  - (i) the person's health or safety; or
  - (ii) the safety of other persons; and
- (b) the person cannot be properly assessed with regard to the mental illness or the making of a treatment order except under the authority of the assessment order; and
- (c) the person does not have decision-making capacity.

### 40. Treatment criteria

The treatment criteria in relation to a person are –

- (a) the person has a mental illness; and
- (b) without treatment, the mental illness will, or is likely to, seriously harm –
  - (i) the person's health or safety; or
  - (ii) the safety of other persons; and

**(c)** the treatment will be appropriate and effective in terms of the outcomes referred to in [section 6\(1\)](#); and

**(d)** the treatment cannot be adequately given except under a treatment order; and

**(e)** the person does not have decision-making capacity.

## Capacity and the *Mental Health Act 2013* (cont.)

- A patient's decision making capacity should also be re-assessed:
  - Whenever application is made for variation to, or renewal of, a Treatment Order, and
  - Prior to a scheduled Tribunal hearing, and
  - At any other time if requested by the Mental Health Tribunal

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# Decision making capacity test - adults

- **Adults with mental illness must be presumed to have decision making capacity**
- **This presumption may be rebutted using the test set out in section 7(1) of the *Mental Health Act 2013***
- Section 7(1) states that an adult is taken to have the capacity to make a decision about his or her own assessment or treatment **UNLESS** a person (medical practitioner) or body (Mental Health Tribunal) considering that capacity under the legislation is satisfied that:
  - The person is unable to make the decision because of an impairment of, or disturbance in, the functioning of the mind or brain AND
  - The person is unable to:
    - Understand information relevant to the decision OR
    - Retain information relevant to the decision OR
    - Use or weigh information relevant to the decision OR
    - Communicate the decision

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## 7. Capacity of adults and children to make decisions about their own assessment and treatment

**(1)** For the purposes of this Act, an adult is taken to have the capacity to make a decision about his or her own assessment or treatment (***decision-making capacity***) unless a person or body considering that capacity under this Act is satisfied that –

**(a)** he or she is unable to make the decision because of an impairment of, or disturbance in, the functioning of the mind or brain; and

**(b)** he or she is unable to –

**(i)** understand information relevant to the decision; or

**(ii)** retain information relevant to the decision; or

**(iii)** use or weigh information relevant to the decision; or

**(iv)** communicate the decision (whether by speech, gesture or other means).

## Decision making capacity test - children

- **Children with mental illness must be presumed to lack decision making capacity**
- **This presumption may be rebutted using the test set out in section 7(2) of the *Mental Health Act 2013***
- Section 7(2) states that a child (person under 18 years of age) is taken to have the capacity to make a decision about his or her own assessment or treatment **ONLY IF** a person (medical practitioner) or body (Mental Health Tribunal) considering that capacity under the legislation is satisfied that:
  - The child is sufficiently mature to make the decision AND
  - Notwithstanding any impairment of, or disturbance in, the functioning of the child's mind or brain, the child is able to:
    - Understand information relevant to the decision AND
    - Retain information relevant to the decision AND
    - Use or weigh information relevant to the decision AND
    - Communicate the decision
- A child is defined in the legislation as a person who is under 18 years of age

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### 7. Capacity of adults and children to make decisions about their own assessment and treatment

(2) For the purposes of this Act, a child is taken to have the capacity to make a decision about his or her own assessment or treatment (***decision-making capacity***) only if a person or body considering that capacity under this Act is satisfied that –

(a) the child is sufficiently mature to make the decision; and

(b) notwithstanding any impairment of, or disturbance in, the functioning of the child's mind or brain, the child is able to –

(i) understand information relevant to the decision; and

(ii) retain information relevant to the decision; and

(iii) use or weigh information relevant to the decision; and

(iv) communicate the decision (whether by speech, gesture or other means).

### 3. Interpretation

(1) In this Act, unless the contrary intention appears –

***child*** means a person who has not attained the age of 18 years;

## Matters common to both tests

- An adult or child may be taken to understand information relevant to a decision if it reasonably appears that he or she is able to understand an explanation of the nature and consequences of the decision given in a way that is appropriate to his or her circumstances (whether by words, signs or other means)
- An adult or child may be taken to be able to retain information relevant to a decision even if he or she may only be able to retain the information briefly
- Information relevant to a decision includes information on the consequences of:
  - making the decision one way or the other, and
  - deferring the making of the decision, and
  - failing to make the decision

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### 7. Capacity of adults and children to make decisions about their own assessment and treatment

**(3)** For the purposes of this section –

**(a)** an adult or child may be taken to understand information relevant to a decision if it reasonably appears that he or she is able to understand an explanation of the nature and consequences of the decision given in a way that is appropriate to his or her circumstances (whether by words, signs or other means); and

**(b)** an adult or child may be taken to be able to retain information relevant to a decision even if he or she may only be able to retain the information briefly.

**(4)** In this section –

**information** relevant to a decision includes information on the consequences of –

**(a)** making the decision one way or the other; and

**(b)** deferring the making of the decision; and

**(c)** failing to make the decision.

**“Impairment of, or disturbance in, the functioning of the mind or brain”**

- This element of the tests prevents a person from being found to lack decision making capacity for reasons that are “external” to the person’s mental capacities, such as being under duress or being unduly influenced by others

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## “Unable to understand information relevant to the decision”

- The information that the person must be able to understand includes information on the consequences of making the decision one way or the other; information on deferring the making of the decision; and information on failing to make the decision
- Care must be taken to ensure that the person has been given information in a way that is appropriate to his or her circumstances. This includes ensuring that the information is in a language and a form that the person can understand, is in plain English, is free of jargon and delivered in a way that is appropriate to the person’s age

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You can test this element by asking the patient to paraphrase back information that is given; a person’s ability to meet this element of the test may be doubted if he or she gives an incongruent response.



## “Unable to retain information relevant to a decision”

- The Act states that a person (adult or child) may be taken to be able to retain information relevant to a decision even if he or she may only be able to retain the information briefly
- The information that the person must be able to retain includes information on the consequences of making the decision one way or the other; information on deferring the making of the decision; and information on failing to make the decision
- The Act does not define “briefly”. Whether information has been retained for a sufficient (or insufficient) period of time will be a matter of fact in individual cases

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## “Unable to use or weigh information relevant to a decision”

- A person’s ability to use or weigh information can be assessed with reference to how the person has come to make their decision
- A person’s ability to use or weigh information in coming to a decision can be tested by considering whether the person has used or weighed the information in a way that is consistent with our “folk understanding” of decision making:
  - Has the person made the decision in a way that makes sense to us?
  - Is the way that the person has made the decision the way that we would expect people generally to make decisions of this kind?

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Care must be taken to ensure that an assessment of how the person has come to make their decision does not involve an assessment or evaluation of the nature of the decision that the person has made.

## “Unable to communicate the decision”

- This element of the tests is of relevance for people with communication difficulties, catatonia, or people who are otherwise extremely agitated and who are unable to communicate their decision by speech, by gesture, or by any other means, because of their disability or condition

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## “Child is sufficiently mature”

- This element of the capacity test for children is reflective of the Common Law “mature minor” or *Gillick* test of competence
- Matters to be considered in determining whether or not a child is sufficiently mature to make a decision include:
  - Whether the child has sufficient understanding of the family, moral and medical matters involved
  - Whether the child understands the nature of the proposed treatment, the consequences of the treatment in terms of its intended and possible side effects and the anticipated consequences if the treatment is **not** provided
- The requirement to consider the child’s maturity is in addition to the other elements of the capacity test

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Specific factors which may also be taken into account in considering whether a child is sufficiently mature to make a decision include:

- The child’s age
- The nature of the procedure
- The degree to which the child is socially independent of his/her parents, and in particular, whether the child is living alone and is self-supporting
- The child’s insight into his or her condition
- The child’s apparent maturity, intelligence and attitude
- Whether it is the child, or the child’s parent or parents, who initiated contact with a medical practitioner
- Family dynamics
- Social history
- The child’s personality

## “Substitute” decision making

- Under the Act, a parent, a medical practitioner or the Mental Health Tribunal may make a decision about assessment or treatment for a person who lacks capacity to do this for themselves:
  - Informed consent for the assessment or treatment of a child who lacks decision making capacity may be given by a parent of the child
  - A medical practitioner may make an Assessment Order providing authority for an adult who lacks decision making capacity to be assessed, without informed consent, by an Approved Medical Practitioner
  - A medical practitioner may also make an Assessment Order providing authority for a child who lacks decision making capacity to be assessed, without informed consent, by an Approved Medical Practitioner but only if satisfied that the child cannot be properly assessed except under authority of an Assessment Order. This may be the case where it is not possible to obtain informed consent from a parent

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The Act effectively transfers responsibility for care decisions from the person, to a substitute decision maker, for a limited period of time. The substitute decision maker can then make decisions that the decision maker would, presumably, make for him or herself if he or she had decision making capacity at the relevant point in time.

A parent is defined in the Act to mean a person having, for a child, all of the responsibilities which, by law, a parent has in relation to his or her children. This includes a natural parent and a guardian.

### 3. Interpretation

**(1)** In this Act, unless the contrary intention appears –  
**parent**, of a child, means a person having, for the child, all of the responsibilities which, by law, a parent has in relation to his or her children;

## “Substitute” decision making (cont.)

- The Mental Health Tribunal may make a Treatment Order providing authority for an adult who lacks decision making capacity to be given particular treatment, without informed consent
- The Mental Health Tribunal may also make a Treatment Order providing authority for a child who lacks decision making capacity to be given particular treatment, without informed consent, but only if satisfied that the treatment cannot adequately be given except under a Treatment Order. This may be the case where it is not possible to obtain informed consent from a parent

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## Tips for assessing decision making capacity slide 1

- Tell the person about the process. Explain that there are some concerns about their ability to make a particular decision, explain why they should participate, and outline the likely outcome or outcomes
- If possible, be flexible about when, where and how the assessment is conducted. If the person's capacity is fluctuating and the decision can wait, consider delaying the capacity assessment process until the person is at their best
- Take the person's individual needs into account. In particular, consider the person's language, communication and other needs and provide the person with assistance (an interpreter, support person, advocate or family member) if needed
- Always keep the following in mind:
  - An adult's capacity must be presumed
  - Capacity is decision specific
  - A person's decision making capacity may fluctuate
  - Substitute decision making is a last resort
  - Capacity can be regained

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There are a range of reasons why a person should participate in a capacity assessment process. This includes allowing the person to have their say, and to be involved in making a decision. Participation in the capacity assessment process may also confirm that the person has decision making capacity. In this case the person will be free to make the decision themselves.

Remember that making a decision contrary to medical advice does not, in and of itself, indicate lack of decision-making capacity; conversely, a decision that is consistent with medical advice does not necessarily indicate capacity.

## Tips for assessing decision making capacity slide 2

- Consider the person's cultural and linguistic diversity and how this may influence or impact on their decision making and bear this in mind when assessing the person's capacity
- Avoid value judgements and be objective and impartial about the person's beliefs, values, preferences, feelings and emotions
- Avoid undue influence. Ask who else has been involved in the decision making process and if you suspect undue influence, try communicating with the person making the decision, without others present. Also try to ask questions that will separate the views of the person, from the views of others. This can be achieved by directing your questions to the person, rather than to others, and by ensuring that it is the person who answers your questions

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## Tips for assessing decision making capacity slide 3

- Determine ahead of time what you are looking for. Consider the elements of the tests set out in sections 71(1) (for adults) and 7(2) (for children) of the *Mental Health Act 2013* and make sure that you apply the right test
- Communicate clearly and avoid using jargon or complicated medical terminology. Instead, use plain English
- Ask lots of open ended questions (rather than questions which have a “yes” or “no” answer)
- Try to generate a discussion. Avoid leading questions or questions which suggest or guide the person to a particular answer
- Ask the person to repeat back to you, in their own words, their understanding of what has been discussed

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## Tips for assessing decision making capacity slide 4

- Generally useful questions to ask include:
  - Tell me about your health now and what you think is wrong with your health
  - Tell me about the treatment that you are currently having – do you think that the treatment is helping you?
  - Are there any bad things about the treatment that you are having now or that we've discussed?
  - Tell me about the treatment that we've discussed – do you think that the treatment will help you? How do you think that it will help you?
  - Can you tell me what you've decided about the treatment options that we've discussed?
  - Are there any other treatments that you might be able to have? How do you think that those other treatments would help you?
  - In your own words, which do you think is the best treatment? Why?

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## Tips for assessing decision making capacity slide 5

- Useful questions to ask to determine whether the patient can **understand relevant information**:
  - What did your doctor tell you about your condition?
  - What did your doctor tell you about the treatment and its risks and benefits? What do you think will happen if you have the treatment?
  - What did your doctor tell you about other treatments?
  - Did your doctor tell you what may happen if you have no treatment? What do you think will happen if you have no treatment?
- Useful questions to ask to determine whether the patient can **use or weigh information relevant to the decision**:
  - Why have you decided to have (or not to have) the treatment?
  - What things were important to you in making the decision?
  - How did you balance those factors?

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## What to do if you aren't sure

- You should seek a second opinion if you have any doubts, after having conducted a capacity assessment, about whether or not a person has decision making capacity
- It may also be useful to seek a second opinion when the person does not agree with the outcome of your assessment or if there is disagreement between family members, carers and other professionals about whether or not the person has decision making capacity. This is particularly the case where the consequences of the person's decision are significant
- In relation to Treatment Orders the Mental Health Tribunal will ultimately decide whether or not the person lacks decision making capacity about treatment decisions

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Tasmanian Health Service staff should contact the Head of Department for Mental Health Services in their region in the first instance.

Staff may also contact the Office of the Chief Psychiatrist to discuss the particular matter and obtain advice if needed.

## Documenting capacity

- The outcome of a capacity assessment should always be documented. It is also critical for clinicians to document how they came to a conclusion that a person has, or lacks, decision-making capacity
- Under the *Mental Health Act 2013*, a determination that a person does not have decision-making capacity should be documented using forms approved specifically for this purpose (see *next slide*)
- Other matters relevant to the person's capacity and capacity assessment process should be documented in the patient's clinical notes
- Care should be taken to ensure that documentation outlining the process and outcome of a capacity assessment is provided to the Mental Health Tribunal along with any application for Treatment Order or renewal of a Treatment Order, and at other times on request. This is critical for ensuring that the Tribunal is aware of the rationale for the finding that the person lacks decision making capacity

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## Useful resources

- The *Mental Health Act 2013* can be accessed at [Tasmanian Legislation Online](#)
- A range of useful information about the Act is available to read, download and print from [the Mental Health Act website](#) including:
  - Approved Forms (see in particular Chief Civil Psychiatrist Approved Form 2A Decision Making Capacity – Adults and Form 2B Decision Making Capacity - Children)
  - Flowcharts
  - Standing Orders and Clinical Guidelines (see in particular Chief Civil and Chief Forensic Psychiatrist Clinical Guideline 2 – Capacity)
  - Online Training Packages and other Education Resources
  - A Clinician's Guide to the *Mental Health Act 2013*
  - Fact Sheets and other Information for Consumers
  - Statements of Rights
- [Tasmanian Capacity Toolkit](#) (The Toolkit was developed prior to the *Mental Health Act 2013* and while it contains some information which is out of date its general content remains useful and is listed here for that reason)
- [Capacity Australia website](#)

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## Questions

# Any questions?

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