

Assessing capacity for decision-making in practice: contemporary expectations in legal practice

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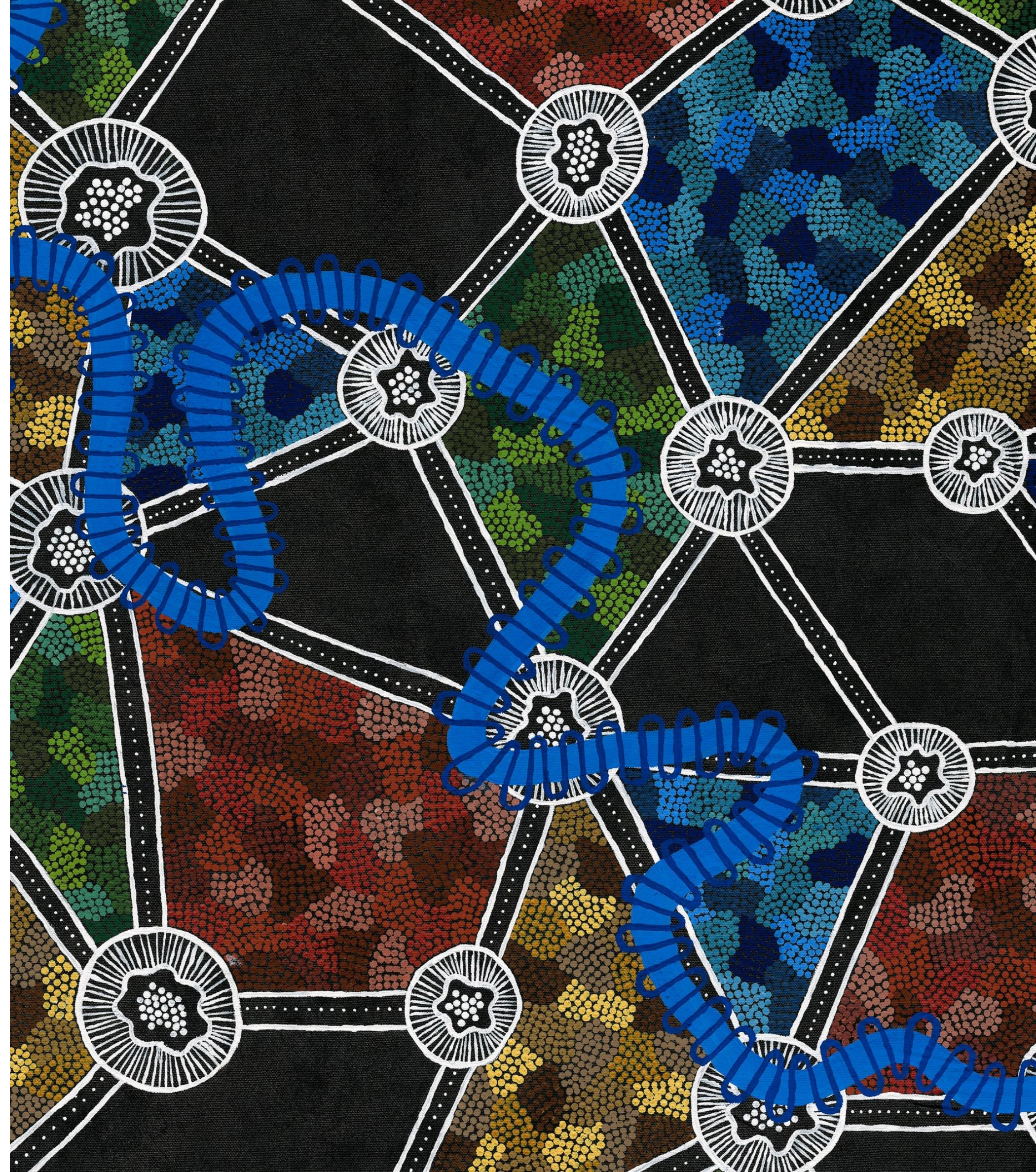
Caxton acknowledges the Jagera and Turrbul peoples, the Traditional Custodians of the land on which we work.

We recognise the ongoing connection to lands, waters and communities of Aboriginal and Torres Strait Islander peoples across Australia.

Sovereignty was never ceded. It always was, and always will be, Aboriginal land.

We pay our respect to Elders. We celebrate the cultural distinctions of First Nations people. We value their rich and positive contribution to society.

We acknowledge the pain and injustices caused by colonisation and commit to promoting and protecting the human rights of First Nations people through our work and by walking in solidarity for justice, equity and healing.



Starting with a case to help contextualise practice.....

Human rights

Eddie, 80 years of age, born in mainland China, migrated to Australia and a citizen for 20 years.

Daughter rings your office to make appointment for Eddie to complete an EPOA as he has been diagnosed with early dementia. Hospital recommended that it “was a good thing to have”. She states that Eddie wants to appoint her as sole attorney for all decisions.

How best to support Eddie to make his own decisions?

Eddie relies upon a 4WW to walk and so his daughter will drive him to the office.

Possibility of elder abuse

Who is the client? If Eddie, what are his views and preferences?

Capacity to provide instructions

What is Elder Abuse

A single or repeated act or failure to act, including threats, that results in harm or distress to an older person. These occur where there is an expectation of trust and/or where there is a power imbalance between the party responsible and the older person.

(Source: Australian Institute of Family Studies (2021) *National Elder Abuse Prevalence Study: Final Report*)



Brief statistics and facts of potential relevance to this case...keep in mind

1 in 6 older people experience elder abuse in Australia

Most common form of identified elder abuse is psychological and financial abuse. Often one form of abuse is found with more e.g. social/neglect

Adult children and partners are most likely abusers

Significant adverse health and social impacts for older people including likely relocation to an RACF.

Having an EPOA/substitute decision-maker is often required now by RACFs before admission.

Carer stress is not an excuse for elder abuse

A disability or medical diagnosis is a risk factor for elder abuse but not evidence of abuse

Elder abuse defined in aged range of over 60 for non-First Nations but over 50 for First Nations elders

Given that financial abuse commonly occurs with elder abuse, some guidance about what you might wish to explore with the client when taking instructions is provided via the DJAG QLD Capacity Assessment Guidelines, 2020 – see excerpt below

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.

Potential Elder abuse red flags to keep in mind with Eddie.....are any of these observed?

Financial abuse

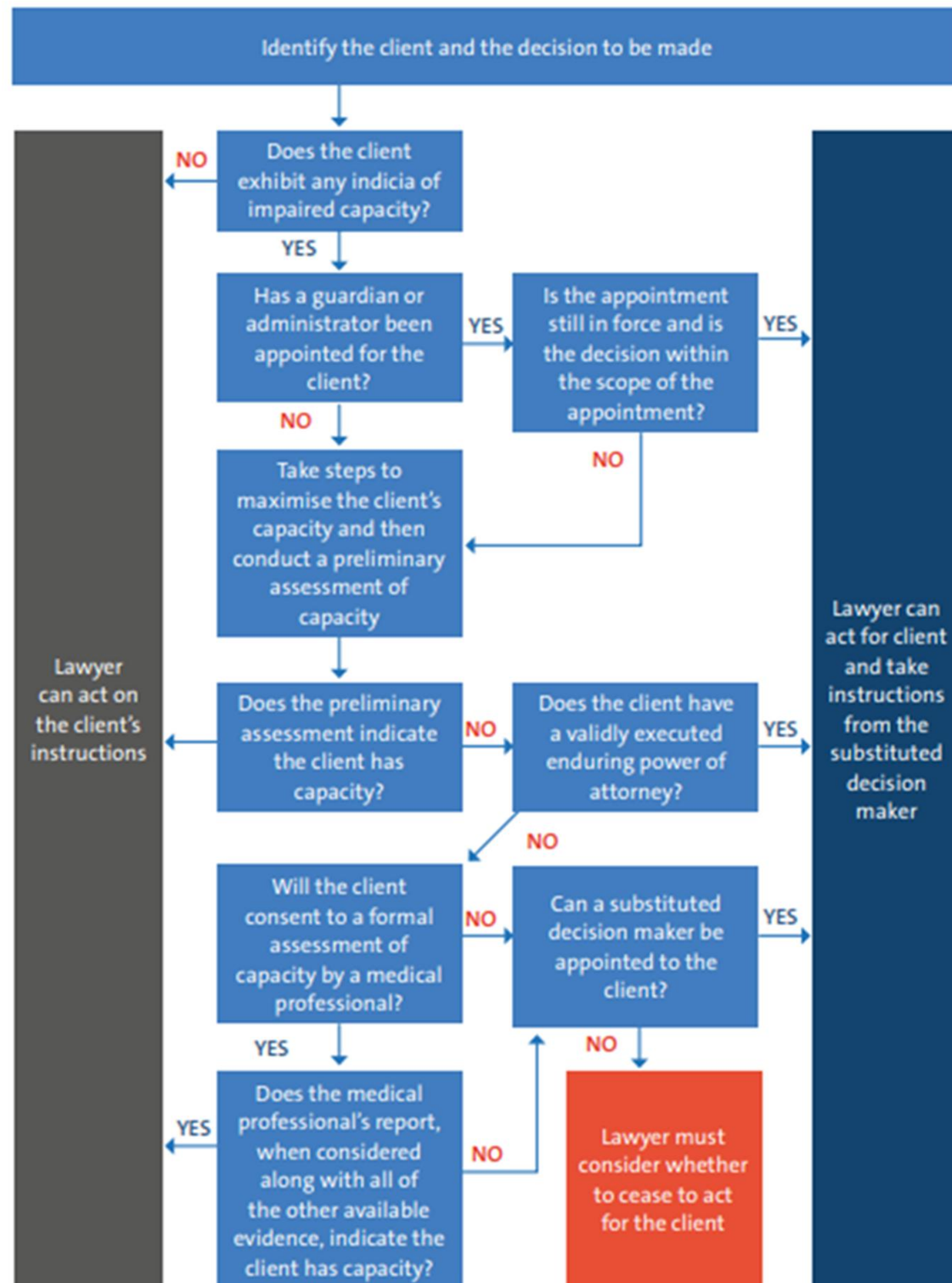
- Attends to sign Enduring Power of Attorney (EPOA) /other legal document but does not understand it
- Does not know why he is attending
- Fearful or anxious when asked about the document
- Expresses fear of something unless he allows daughter to have access via EPOA e.g. loss of access to grandchildren/threat of RACF

Psychological abuse

- Not allowed to speak for himself
- Deferring to his daughter rather than answering the questions you pose
- Daughter denigrates him verbally

Neglect

- Eddie seemed malnourished or unkempt



Practical process for assessing a client's capacity

1. Who is my client and what is the decision to be made?
2. Is there a **reason** to question my client's capacity? Are there any red flags?
3. What can I do to maximise my client's capacity?
4. How do I assess my client's capacity?
5. What records of capacity assessment should I keep?

Who is my client?

Is it the daughter or Eddie?

A lawyer may determine that the person with questionable capacity is the client; or they may determine that a family member, friend, carer or other person who supports the person is the client.

In cases of the former, while others may accompany a client to provide support and assistance to the client and background information to the lawyer, the lawyer must only take instructions from the client and not from the support persons. (from the Qld Law Society, QAI and Allens Linklaters, 2014, QLD Handbook for Practitioners on legal capacity)

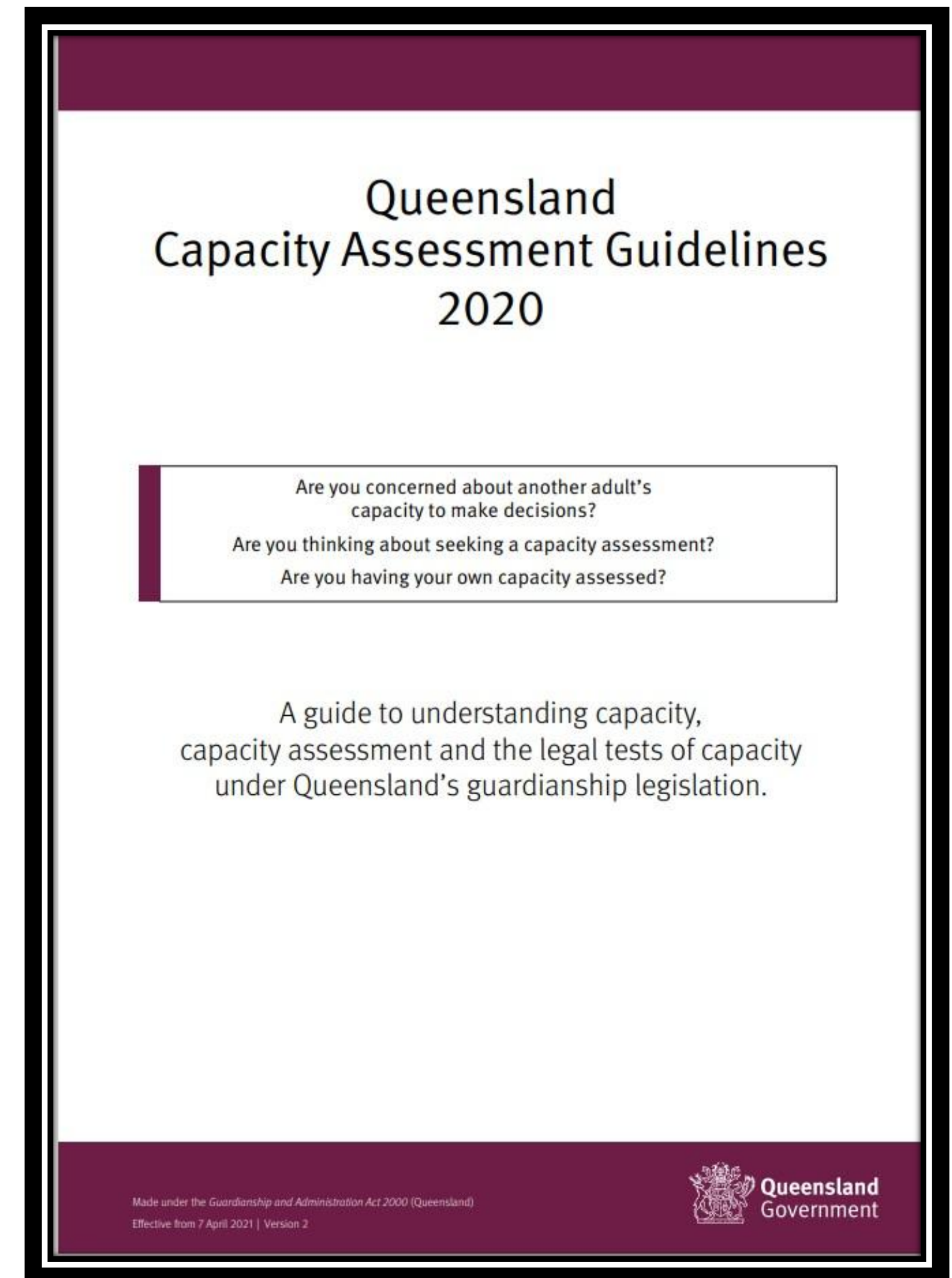
See the Adult alone first

Confidentiality and right to privacy

Right to feel heard and empowered

What is Capacity for decision-making ?

- It is a legal concept so legal interpretations apply
- It is not a medical concept but is commonly misunderstood to fit here
- Medical diagnosis can inform but is not definitive alone as....
 - Capacity is more than a diagnosis or a disease
 - It is about the person as a whole, their support systems and the adult's wishes
- Capacity for decision-making is not “black and white” - NOT blanket ‘lacks capacity’



A bit more about capacity.....



Domains of Capacity

- Health
- Personal
- Financial

Capacity can change
over time – fluctuating.

Always ensure you are relying upon recent
medical or other reports if these are required

Capacity may change
depends on the decision
domain or part of domain

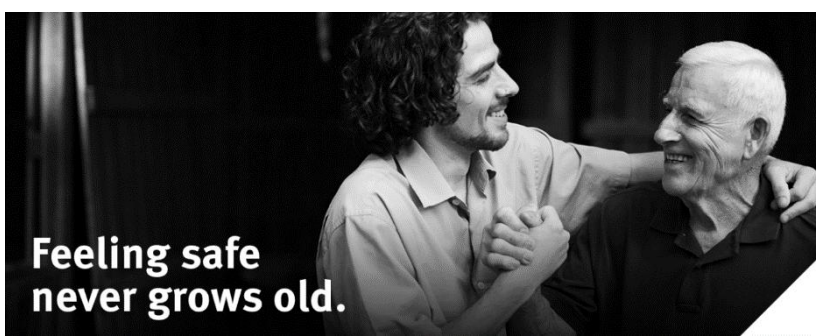
A person's appearance, age,
behaviour or disability does
not determine whether they
have capacity or not.

“A person with capacity can
make an unwise decision or
an error of judgment, or even
a series of such decisions”
RGB [2023] QCAT 501

Test for capacity for enduring documents?

Your role is to assess whether Eddie has capacity to complete the Enduring Power of Attorney

1. Understand the nature and effect of the document and provisions chosen
2. Is he able to make the decision to complete one freely and voluntarily ?
3. S41 *Powers of Attorney Act 1998* – unpacks how to determine whether the person understand the nature and effect of making an EPOA further.....



Feeling safe
never grows old.

Form 2

Powers of Attorney Act 1998 (section 44(1))
Version 4: approved for use from 30 November 2020.

For patient record purposes, health services can affix identification label here

Enduring power of attorney –short form (Queensland)

This form allows you to appoint someone you trust (an 'attorney') to make decisions for you during your lifetime. Use this form to appoint:

- » attorney(s) for personal (including health) matters only
- » attorney(s) for financial matters only
- » the same attorney(s) for both personal (including health) matters and financial matters.

Before you complete this form, read [Form 9 – Enduring power of attorney explanatory guide](#), consider who you want to appoint and talk to them.

This is a **legal document** that can significantly affect your legal rights. It is recommended that you seek independent legal advice before completing this form.

Forms and explanatory guides are available at www.qld.gov.au/guardianship-planahead

Do you need a medical assessment to determine capacity to complete the EPOA?

1. Your role is to assess capacity for making the document.
2. **Presume capacity** to complete a document
3. A medical assessment focuses on capacity to consent to medical or health aspects
4. Ageist if sought just because the person is older than 60 years
5. If seek a medical report, refer them to the bespoke questions that will need to be addressed
6. Having a medical diagnosis such as early dementia does NOT automatically indicate impaired capacity



Practice tips for assessing capacity for EPOA completion

Set up the interview so that you see Eddie separately first to discuss.

Advise the daughter that it is appropriate practice to discuss matters with Eddie alone.

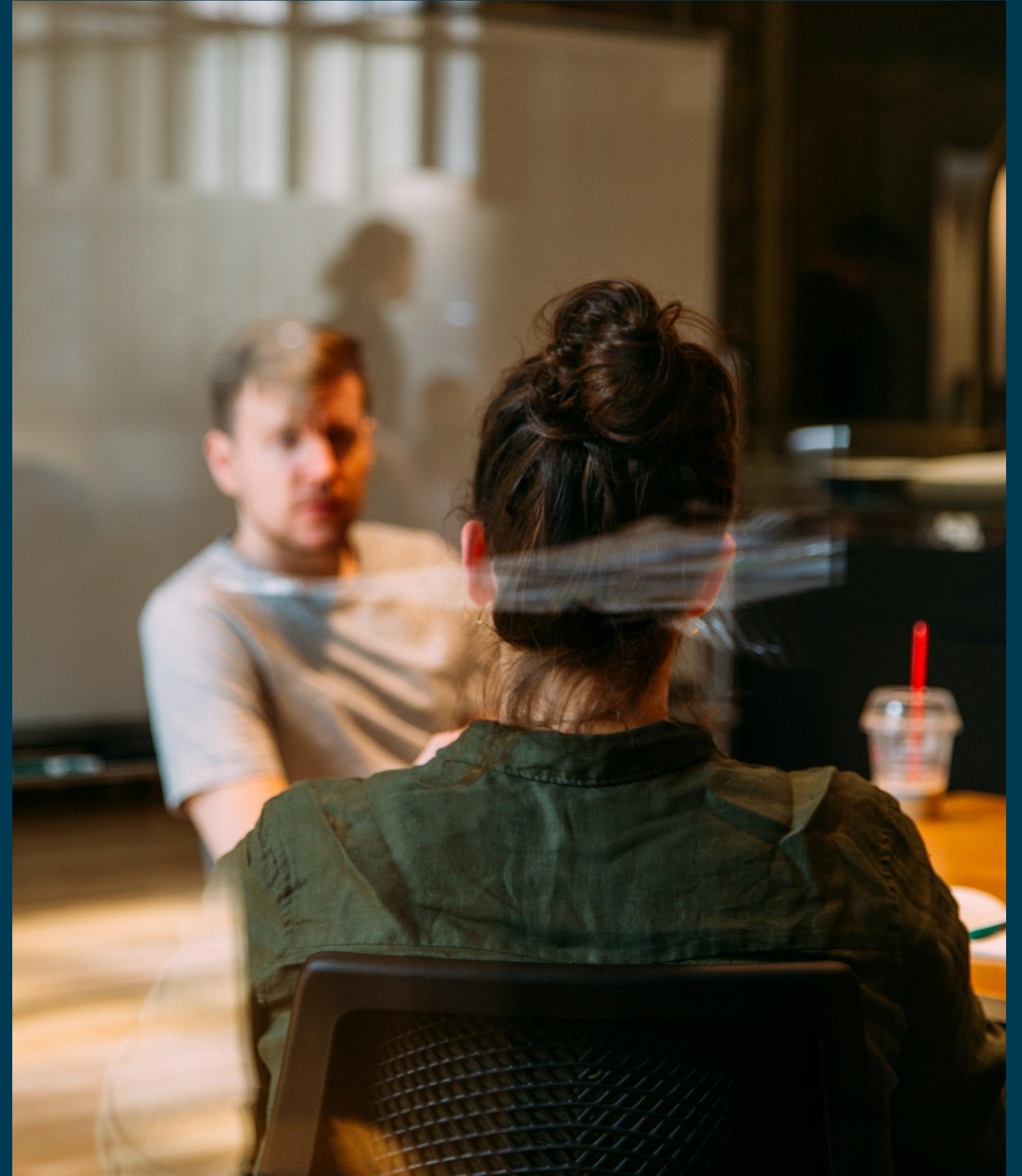
Then at the meeting:

- What was the reason that Eddie asked to meet with you today?
- Who initiated the meeting?
- Why does he want an EPOA?
- What does he know about the purpose of the EPOA?



Questioning tips

1. Use open questions when testing his understanding of the document. – Who, what, why, when
2. Be aware of any potential elder abuse red flags
3. As you take instructions about the document, you will discuss the sections and possible conditions of the document with Eddie. E.g.
 1. What are his wishes and preferences that he would like his attorney to consider?
 2. If he wishes to nominate an immediate financial power to his daughter, what does he understand about access to his finances?
4. Consider the questions identified in Section 41 of the Powers of Attorney Act 1998 Qld



Consider cultural impacts

Eddie is from mainland China.
What cultural expectations does he maintain?

- Older son as decision-maker?
- Will it lead to conflict if his daughter is appointed attorney?

If he has early dementia, do you need to have an independent interpreter? (Issues with family as interpreters)

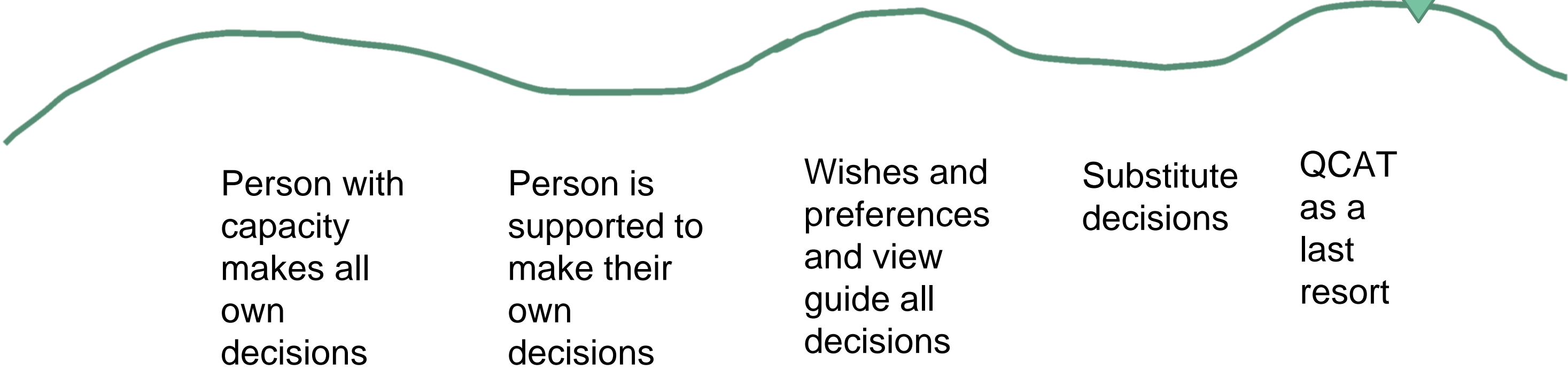


What can you do to maximise the person's capacity? And Why?

2019 Legislation – *Guardianship and Administration and Other Legislation Amendment Act 2019* – amended the *Guardianship and Administration Act 2000*, *Human Rights Act QLD 2019*
Recent recommendations from the Royal Commission on Persons with a Disability

Focus on autonomy, liberty, choice and emphasis upon people being supported to make their own decisions

A fluid continuum



Supporting and maximising participation : Practice tips – considerations....

Get to know the client, wishes and preferences – using Eddie as an example

- Reducing potential stress by timing the consultations
- Ask about support networks
- Consider timing and location of the interview
- Reduce distractions

What may impact upon their active participation and which mean you may need to mitigate or delay taking instructions?

- Acute Illness such as delirium
- Communication needs
- Medications such as pain medications

How good is your own communication?

- Reduce distractions e.g. use of computers, incoming calls, other people in room
- Non-verbals
- Ability to simplify legal concepts

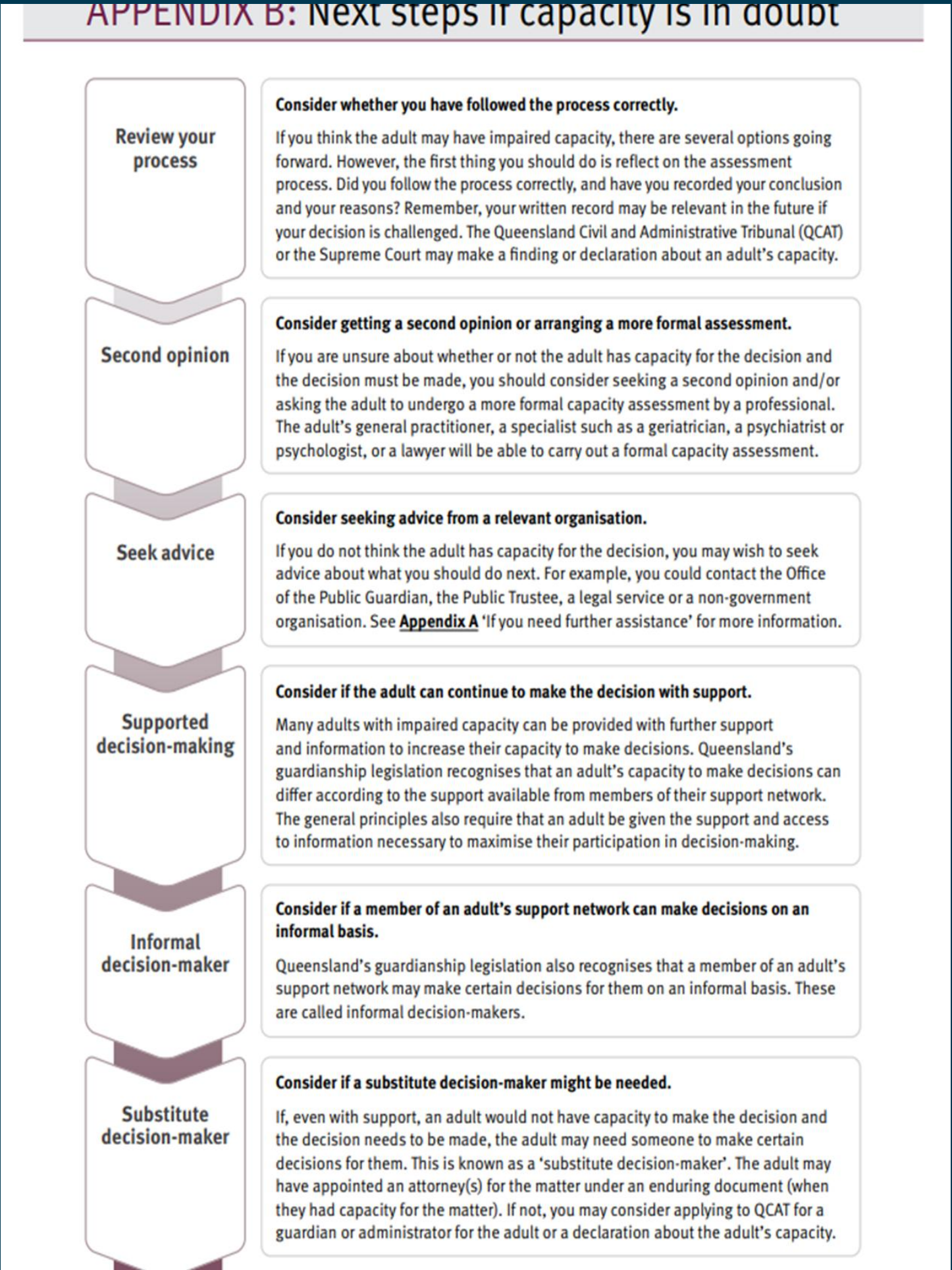
Remember the elder abuse or trauma red flags may confuse participation and mimic capacity concerns

- Coercive control may impact upon presentation and seems link a lack of capacity – how trauma-informed are you?
- Consider differential perspective e.g. recent loss and grief, history of institutional abuse

AND IF YOU ARE STILL CONCERNED....

Help is at hand.....

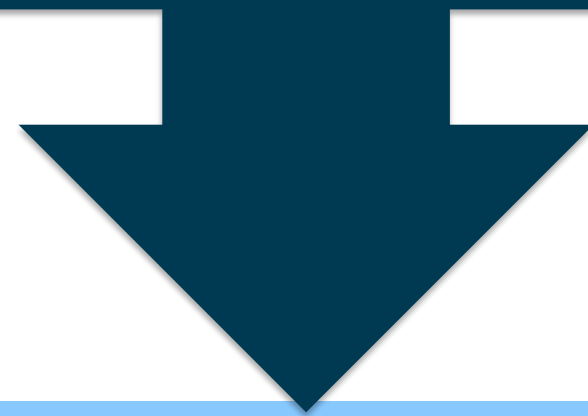
Department of Justice and Attorney General.
Queensland Capacity Assessment Guidelines
2020, pg.53



And if you have elder abuse concerns: Refer to

Senior Legal and Support Service (SLASS)	<ul style="list-style-type: none">• Focus on elder abuse by family or friends• Lawyer and social work model• https://www.legalaid.qld.gov.au/Listings/Organisations-directory/Seniors-Legal-Support-Service-SLASS• Will determine if the older person has capacity
ADA	<ul style="list-style-type: none">• https://adaaustralia.com.au/aged-care-advocacy/ - issues with aged care• https://adalaw.com.au/elder-abuse-advocacy/ - issues with elder abuse• Advocacy model
Relationships Australia	<ul style="list-style-type: none">• Mediation – not legal service
EAPU (Elder abuse prevention Unit Helpline)	<ul style="list-style-type: none">• For information about elder abuse and services
QPS	<ul style="list-style-type: none">• Urgent, assault or other reportable harm
Older person does not have capacity	<ul style="list-style-type: none">• Office of the Public Guardian• Appointment application via QCAT for either Administration and/or Guardianship

Contact details



Contact for further information about
today's session:

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Further reading/references

1. DJAG, 2020, QLD Capacity Assessment Guidelines
2. Office of the Public Guardian, Capacity guidelines for Witnessing of Enduring Powers of Attorney
3. Qld Law Society, QAI and Allens Linklaters, 2014, QLD Handbook for Practitioners on legal capacity

Be aware that the third document is dated 2014 and may not reflect all aspects of current expectations.



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