



**Benchmark**

*best practice - best evidence with vulnerable people*

# Guideline Summary: Responsive Practice with Older Persons

## **1. How are we defining an older person?**

- For purposes of this guideline, we define “older person” as someone 65 years or older. However, many of the best practice tips are universal. Also, many of the strategies that are detailed in other guidelines would aid communications with older people, depending on their conditions.
- We are mindful that there is great diversity amongst older people and do not presume that older people are in decline or have impairments. Given that diversity, and the spectrum of legal matters they may encounter, we offer the following guidance to assist older people to participate in the legal system as fully as possible.

## **2. What can you do?**

- Appropriate spacing of meetings and pacing of conversations is beneficial.
- Separate topics should be addressed separately. To adjust, older people should be alerted when there is a change in topic.
- Interviews should occur at a time and place where there are minimal distractions. While there are benefits to interviewing within the person’s residence, that location may present its own distractions.
- When a person has not attended a meeting, returned calls or replied to correspondence, follow-up is advisable. Leaving a phone message can be a barrier to someone who does not have credit or technological knowledge to access it.
- Photos, videos, audio recordings, documents or objects may aid recall.

## **3. Creating a hospitable setting**

- Ask before the meeting about physical accessibility requirements.
- Clear the route from the parking lot through to the office.
- Toilets should have arm rails and an alarm.
- Remove barriers e.g. raised thresholds; curbs or steps; provide elevators; and offer alternative entrances.

## **4. Building trust**

- Expect that there may be multiple meetings to build trust.
- Be sure to talk to the client, rather than focus on people who may accompany them.
- Dignify the person by respecting his or her feelings and values.

## 5. Accommodating sensory impairments

### Hearing

- Minimise background noise. Offer auditory amplifiers if required. Have spare hearing aid batteries available. Speak face to face, rather than side by side. Slow and very distinct speaking is better than increased volume. A lower pitch may assist.

### Vision

- Increase lighting and decrease glare from windows. Use large font and double line-spacing. Send documents in simple language in advance. People with a narrow field of vision may be startled unless they can hear others approach.

## 6. Capacity

- Legal professionals begin from the position that older people retain the cognitive ability to function and make a range of decisions. The following tips may enhance people's ability to demonstrate capacity.

### Best practice tips

- Speak slowly, ask simple questions and repeat information.
- Ask people to explain their understanding of what was discussed.

### Definition of capacity

- Decision-making capacity (or simply "capacity") refers to a person's ability to make decisions. Capacity is referred to in New Zealand legislation and case law. It is defined for purposes of the Substance Addiction (Compulsory Assessment and Treatment) Act 2017, s 9. However, it is not defined, for example, in the Mental Health (Compulsory Assessment and Treatment) Act 1992. For purposes of adult guardianship and protection, see the relevance of capacity in the Protections of Personal and Property Rights Act 1988.
- The Code of Health and Disability Services Consumers' Rights refers to, but does not define, competence or capacity.

### Code of Health and Disability Services Consumers' Rights 1996

- The presumption of capacity in the health context is fundamental to the Health and Disability Commissioner (Code of Health and Disability Services Consumers' Rights) Regulations 1996 (the Code). Older people are entitled to the rights contained within the Code when they are consumers of health or disability services.

- According to Right 7 (2) every consumer must be presumed competent to make an informed choice and give informed consent, unless there are reasonable grounds for believing that the consumer is not competent. This Right also includes the process for proceeding under the Code when a person has diminished, or lacks, capacity.

### **When does a person have capacity?**

A person is deemed to have capacity if she or he has the following:

- *Understanding*: The person understands the nature of his or her situation and the decision to be made.
- *Reasoning*: The person is able to describe the options, and reason through the risks and benefits of each, before coming to a decision (or electing not to make a decision).
- *Appreciation*: The person appreciates the significance or relevance of the decision, both for himself or herself, and perhaps for the others that might be impacted. AND
- *Communication*: The person can communicate all of the above, and the decision made, in verbal, written or other forms.

### **Related capacity matters**

- There is a presumption that people have capacity. A seemingly irrational decision does not necessarily mean that the person lacks capacity.
- Capacity may be viewed as a spectrum. If it appears that a person has moderate to no capacity, it is advisable to obtain a formal medical assessment by a qualified health professional who is experienced in undertaking such assessments.
- Also see the Code of Health and Disability Services Consumers' Rights, Right 7(3):

Where a consumer has diminished competence, that consumer retains the right to make an informed choice and give informed consent, to the extent appropriate to his or her level of competence.

### **Mental illness and capacity**

- Whether a person has, or had, a mental illness is not determinative of whether the person has capacity. The criteria for compulsory care under the Mental Health (Compulsory Assessment and Treatment Act) 1992 (MHA) is not dependent upon capacity. People do not lose all capacity to consent merely because they have a mental illness or meet the MHA's criteria for compulsory care.

## Undue influence

Courts have scrutinised the impact of this factor upon older people.

- Be mindful of the influence of others, whether they are present or absent.
- This includes family members, carers, advisors, and other professionals.

## When to be concerned: Red flags

- History of compromised capacity: e.g. alcohol or substance dependence, stroke, dementia, head injury, neurological conditions
- Recent illness, accident or hospitalisation
- Concerns voiced by family, whānau or carers
- Significant changes to, or seemingly illogical, decisions
- Difficulty in recalling information (historic information or matters discussed minutes before)
- You are bewildered by the interview with the client

## What is a medical capacity assessment by a clinician?

- The experienced clinician may inquire about the medical histories, medications and overall level of functioning.
- They may order investigations such as blood tests, a CT scan or administer a standardised cognitive test.

## 7. Assessment of capacity: the process

- The lawyer may investigate and document whether the person met the four criteria above. Probe the four components of capacity: understanding; reasoning; appreciation; and communication.
- Examine the person's instructions for inconsistencies, inaccuracies and radical departures from previous wishes.
- When the lawyer assesses for capacity, they may need to press for more information, greater accuracy, and better explanations. Clients may find this confronting but this allows the lawyer to document the person's reasoning.

## Before the assessment

- Gather information so that the person's statements can be checked e.g. the person's property and investments.
- Be clear about the legal tests required for the specific decision e.g. relevant sections of the PPPRA 1988 and Family Protection Act 1955.
- Inquire whether the person has communication difficulties

- Inquire whether the person requires an interpreter or support person

### **The capacity assessment itself**

- With consent, the interview may be audio recorded and transcribed.
- Start with verifiable facts, such as the composition of the family.
- Ask the person to repeat their understanding of key points.
- Provide written information.
- Probe whether the person has robustly appreciated the alternatives and risks.
- Several meetings may be required if: the person felt uncomfortable; the assessment was difficult or incomplete; and/or relevant information was not available. Subsequent meetings may identify consistencies.

### **Documentation**

- Document the process and results of the assessment. This will aid the court or tribunal.

### **Raising capacity assessment with the older person**

- Given this may be a delicate issue, carefully plan how this matter will be raised.
- See examples within the full guideline.
- Tell the person who will pay for the assessment and approximate costs.

### **Process of requesting a capacity assessment from a medical practitioner**

- Tell the clinician, orally and in writing, the purpose of the assessment.
- Detail the relevant legal test.
- The lawyer should communicate with the practitioner orally and in writing to clarify the purpose and specifics of the assessment.
- Request a clear, detailed report regarding whether the person has the requisite capacity for that decision, based on those specific criteria
- Ask the clinician to record the person's words verbatim
- Regarding testamentary capacity, request that the clinician ask the person about previous wills and why potential beneficiaries were included or excluded.
- If in doubt, request a second medical opinion.

## 8. Conclusions

- Best practice requires consideration of the person's sensory, physical and mental condition.
- Be continually attentive to the client's decision-making capacity.
- Great lawyers are flexible. They adjust their styles to accommodate their clients' needs and they support their clients to exercise their autonomy.

For more detailed information refer to the full guideline [[link](#)].