

## Assessment of Decision-Making Capacity

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### Introduction

This chapter examines the fundamental issues surrounding decision-making capacity. It also describes the historical background associated with mental capacity and provides a comprehensive review of the current situation.

### Scope of this chapter

#### Definition of capacity

The Australian legal system contains a complex amalgam of Commonwealth, State and Territory legislation, along with common law, with the latter based on a long history of matters examined by courts not just in Australia, but also widely in the Commonwealth of Nations, formerly known as the British Commonwealth. Accordingly, the concept of decision-making capacity is also defined by a mix of legislation and common law. Further, documents published by various government agencies to aid understanding of, and compliance with, legislation have also de facto defined (or at least influenced) understanding of the concept of decision-making capacity. In some instances, the latter explanatory, or practice-guiding, documents define decision-making capacity in ways that seem to be contrary to the underlying law. Despite the fact that there are potentially three sources of definitions of decision-making capacity, as listed above, there does not seem to be such extensive dysfunction in this area as to justify a drive to comprehensively supplant common law with legislated definitions of capacity.

The greatest difficulty with the definition of decision-making capacity is that, like the legal concept of innocence, it can really only be adequately defined in the negative. Innocence is not defined in a positive way. Rather, it is defined as the state where there is the absence of guilt. Similarly, decision-making capacity is defined by the absence of lack of decision-making capacity. This, apparently backward, approach to both of these concepts is actually practically most useful. Consider the state of innocence – the list of activities that people could engage in while in the state of innocence is potentially infinitely long. It would be impractical, indeed impossible, to list all the things that people are allowed to do while remaining innocent. Similarly, the decisions that people could capably make would also potentially be an infinitely long list, which would be impossible to enumerate. Hence, defining the behaviours, or the elements of actions, that are contrary to both the concept of innocence and to the

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