

Decision-Making:

A Rights Based Approach





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PART ONE

What You Need to Know

Questions around a person's capacity to make decisions following a sexual assault may arise in relation to:

- the decision to contact sexual assault services and report the abuse to police,
- consent to treatment, including consent to a forensic medical examination, and
- other decisions that may need to be made as a result of the abuse/assault, such as decisions regarding the person's accommodation or services, or the need to assist the person to move from a dangerous environment.

The information below is taken from the Tasmanian Capacity Toolkit, the New South Wales Capacity Tool Kit, and TASCAT Guardianship Stream Factsheets. Laurel House acknowledges the work done by the Department of Health Tasmania, TASCAT and the NSW Department of Communities and Justice.

What is Decision-Making Capacity?

Broadly speaking, when a person has capacity to make a particular decision, they are able to do all of the following:

- understand the facts involved
- understand the main choices
- weigh up the consequences of the choices
- understand how the consequences affect them
- communicate their decision. ¹

Capacity is Decision Specific

It is very rare for a person to not have capacity for any decisions. More often, people only lack capacity in making specific types of decisions. For example, a person might be able to decide where they want to live (personal decision), but not be able to decide whether to sell their house (financial decision). They can do their grocery shopping (a simple decision about money), but not be able to buy and sell shares (a more complex decision about money).

The level of capacity a person has in respect of a specific decision can vary across time and context. This is, in fact, the case for people whether they have a disability or not. Capacity can depend on many factors including the type of decision being made, the complexity of the decision, how much information the person has been given, their level of understanding, the communication strategy employed, and the amount of stress the person is under. ²

Assume the Person has Capacity

The most fundamental principle is to presume a person has the capacity to make all decisions for themselves. Every adult is free to make their own decisions if they have the capacity. You should always make this presumption unless it is established that the person does not have the capacity to make a particular decision. ³

It is very important not to assume that because a person has a disability that they lack capacity to make their own decisions. Even where a person may have impairments that affect their ability to understand or communicate, it is your obligation to consider what reasonably available supports the person may require in order to exercise their rights in decision-making.

Presumption vs Protection

Even with a presumption of capacity, it is still important to think about the balance between a person's right to make a decision and the extent to which that person's health or safety might be in danger if they make a certain sort of decision.

This can be a very difficult balancing exercise. If you are faced with this situation, be mindful not to act in an overly protective way when assessing whether a person has capacity. Remember that making an unwise decision, or one that you don't agree with, does not mean that a person lacks capacity.

Protecting a person from making what you think is an unwise decision may seem helpful, but it is very important that any steps you take to intervene are appropriate. If a person isn't allowed to confront a difficult decision or its consequences, their right to be in control of their life is denied. Each individual has the right to take their own chances and make their own mistakes.

Testing Capacity

A capacity assessment will be required where:

- attempts at supported decision-making have failed, and
- there is a decision that needs to be made for the person that requires a formally appointed substitute decision-maker, and
- there is no current substitute decision-maker appointed.

For information on assessing capacity see sections 3, 4 and 5 of the Tasmanian Capacity Toolkit: <https://www.health.tas.gov.au/publications/capacity-toolkit>

Supported Decision-Making

No-one makes all decisions independently; in attempting to make good lifestyle decisions, we often consult the important people in our lives and, sometimes, professionals to assist us.

Assisting, or supporting, someone to make a decision means giving them the tools they need to make the decision for themselves. It is about supporting them to make their own decision, and in doing so, safeguarding their autonomy. It does not mean making the decision for them. A person's right to make decisions is fundamental to their independence and dignity.

Support a Person to Make their Own Decision

As noted above, a person's capacity to make a decision can vary across time and context. To begin with, try and create the best possible environment for the person who is making the decision. You can start doing this by:

- Finding the most effective way to communicate with the person. Do they use an Augmentative and Alternative Communication (AAC) system, e.g. a communication device?
- Do they require a support person, advocate or interpreter?
- Find out how they are usually supported to make important decisions and discuss this option with the person.

You can do this by discussing these issues with the person and/or by enlisting the support of a trusted family member, service provider or advocate. It is important that you do not seek information from a support person who is the alleged perpetrator of abuse. Get assistance from a neutral interpreter, speech pathologist, behavioural support practitioner or other professional, where required. But make sure to discuss this with the person first.

Once communication and other supports are in place:

- ensure the person has all the information they need, available in a format that they understand, to make an informed decision. Try not to give more detail than the person needs. In some cases, a very simple, broad explanation will be enough.
- describe the risks, benefits and any possible consequences of them making, or not making, the decision.
- be patient, give the person plenty of time to express themselves and to make the decision.

For further information on how to support a person with decision-making see page 149 of the Tasmanian Capacity Toolkit.

Where There is Already an Appointed Enduring Guardian or Guardian

The exception to supported decision-making is where a formal legal substitute decision-maker has already been:

- called upon by a medical professional as a 'person responsible (see below)
- activated by a power of attorney or enduring guardianship (see below)
- appointed by a tribunal or court (see below).

AND that other decision-maker has the power to make decisions of the relevant kind (e.g. consent to medical treatment, services or accommodation decisions).

NOTE: It is extremely rare that a substitute decision-maker has lawful authority to make ALL decisions on behalf of a person. Before relying on a substitute decision-maker to make a specific decision for a person you MUST be certain they have the authority to do so.

If the substitute decision-maker has the lawful authority to make a decision of the relevant kind, you cannot support the person to make their own decision because it has already been determined that the person lacks the capacity to make the decision for themselves.

However, even in these situations the substitute decision-maker should consult with the person about the decision to be made, and you can support the person in making their views on the decision known.

Substitute Decision-Making is a Last Resort

Only once all steps taken to support person to make decision/s informally are exhausted and the person is unable to make the decision that substitute decision-making should be considered.

Substitute decision-making can happen informally where the person has family, friends or carers who can make decisions for them when the decisions are not major.

It can also happen formally where there is a formal legal arrangement in place for someone to make substitute decisions such as an enduring guardianship or guardianship appointment.

TASCAT (Tasmanian Civil and Administrative Tribunal) can consider appointing someone as a substitute decision-maker, such as a financial manager or a guardian, when:

- there is no one available to make substitute decisions informally
- the person hasn't put legal arrangements in place to appoint someone to make decisions for them when they lack capacity
- there is a disagreement or problem preventing decisions from being made.

***You should also consider whether the decision itself requires a formally appointed substitute decision-maker. Where you are unsure, you can contact TASCAT Protective Division Guardianship Stream to discuss whether there is a need to lodge an application.**

Person Responsible

If a person has a disability and is incapable of understanding the nature and effect of medical treatment, a 'Person Responsible' can give consent on that person's behalf. ⁴

A Person Responsible for a child (under 18 years) will be the child's parent or, if they are married, their spouse.

A Person Responsible for an adult (18 years or over) will be one of the following, in order of priority:

- a guardian (this includes an enduring guardian),
- their spouse (this includes de facto spouses and same sex spouses)
- an unpaid carer who is now providing support to the person or provided this support before the person entered residential care
- a close relative or friend of the person, who has a close personal relationship with the other person through frequent personal contact and who has a personal interest in the other person's welfare.

For further information on the role of 'Person Responsible' (PR), including responsibilities and what a PR can consent to, see the TASCAT Consent to Medical or Dental Treatment by a Person Responsible fact sheet:

https://www.tascat.tas.gov.au/_data/assets/pdf_file/0006/636999/Consent-to-Medical-or-Dental-Treatment-by-a-Person-Responsible.pdf

Enduring Guardian

(Appointed by the person themselves when they have/had capacity)

An enduring guardian is appointed by a person to make decisions about their personal circumstances should they lose the capacity to make decisions due to the onset of a disability. The Enduring Guardianship Appointment instrument will identify the scope of decision-making authority that the enduring guardian has.

If a person has lost capacity but has not appointed an enduring guardian, decisions about medical treatment may be made on their behalf by a 'person responsible' who their doctor believes has a sufficient personal connection with the person to consent or refuse treatment on their behalf.

For further information see:

https://www.tascat.tas.gov.au/_data/assets/pdf_file/0019/637003/Enduring-Guardianship-Fact-sheet.pdf

Guardian

(Appointed by the TASCAT Protective Division, Guardianship Stream where the person lacks capacity)

A guardian is a person who has been appointed with legal authority to make personal (non-financial) decisions on behalf of an adult who lacks capacity to make such decisions because of a disability. Usually, the scope of a Guardian's authority to make decisions for a person is limited to specific types of decisions, such as accommodation, services, medical and dental consents etc. These authorities are identified in the order that appoints the guardian. It is important to inform yourself of the particular decision-making authority that the guardian has. If required, you can ask the guardian to show you a copy of the order.



When is a Guardian Needed?

Even where a person with a disability cannot make complex decisions unassisted, they often do not need a guardian to make other decisions such as those concerning accommodation, basic health care, engaging in employment or entertainment.

If informal support is working well for a person with a disability, it is unlikely that they are in need of a guardian.

If there is a competent 'person responsible' available for the person with a disability, that person has authority to make decisions about medical and dental treatment without the need for appointment of a guardian.

Generally, a guardian is only appointed where:

(a) There is conflict about the future health, accommodation or welfare of the person with a disability,

or

(b) Without an order, a service provider might be at risk of acting unlawfully with respect to a person with a disability because of a lack of authority (e.g. consenting to medical treatment or confinement to a certain accommodation facility).

For further information on guardianship see: https://www.tascat.tas.gov.au/_data/assets/pdf_file/0003/637005/Guardianship.pdf

Decision-Making:

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PART TWO

Decisions About Reporting Sexual Abuse and Consent to Treatment

What You Need to Know

Questions may arise in relation to:

- when to contact sexual assault services or Police
- consent to treatment
- role and powers of a Guardian

Contacting Sexual Assault Services and Reporting to Police

Making the decision to contact sexual assault services and to report to police should, wherever possible, be made by the person themselves.

Where you have concerns that the person lacks capacity, you or someone else can contact sexual assault services and report the assault to police. In this instance, you are not reporting on behalf of the person, you are not supporting them to report, you are making the decision to report yourself.

It is important that you consider this decision carefully. For a person who has capacity to make a decision on this matter with support, your decision to report yourself could be further disempowering to them during a period where they have experienced a loss of autonomy and control following a sexual assault.

Bear in mind that capacity varies in time/context (see advice on page 5). You should take into account the effect of the trauma of the assault AND disclosure on the person before making a decision about capacity. Adopt a trauma-informed approach.

If there is an appointed guardian or identified person responsible, you should discuss contacting them with the person.

Consent to Treatment

Following a sexual assault, a person may require:

- treatment of injuries
- treatment for sexually transmitted infections (STIs)
- medical advice and support regarding possible pregnancy, including options to prevent pregnancy
- a forensic medical examination.

If the person has decision-making capacity with regards to consenting to treatment, then consent should be obtained from them. You should organise any supports required by the person to assist them in the decision-making process (see *Supported Decision-Making above*).

Where the person lacks capacity to consent to treatment (including forensic medical examinations), substitute consent can be obtained from a 'person responsible' or guardian for the person. See above. Note, that even where substitute consent is required, the person themselves must be involved in the decision-making process; to the extent possible, their views must be obtained and any decision taken by a substitute decision-maker must be in the person's best interests.

- in the case of forensic medical examinations of an adult, if there is no identifiable person responsible or guardian, police or registered officers can, by notice to the Public Guardian, request that the Public Guardian become the Person Responsible.⁵

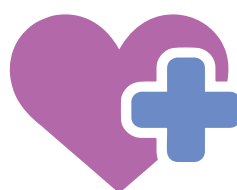
In the case of forensic examination of a child, consent can be obtained from the child's parent/guardian. Where there is no parent/guardian or the parent/guardian is the perpetrator, contact Child Safety Services by phoning 1800 000 123.

https://www.tascat.tas.gov.au/_data/assets/pdf_file/0006/636999/Consent-to-Medical-or-Dental-Treatment-by-a-Person-Responsible.pdf

Other Decisions

Guardianship encompasses decisions that may arise following a sexual assault, such as the person's accommodation, who has access to the person, and movement from a dangerous environment.

If there is already an appointed guardian with the authority to make those decisions, you need to consult them. If there is no such guardian, then you should use the supported decision-making model; but if that fails then you may need to lodge a guardianship application with TASCAT. See *decision-making flowchart in this Guide*.



When Should I Consider Contacting TASCAT?

You should contact TASCAT in situations where:

- there is concern that the appointed guardian or enduring guardian/person responsible (the person making decisions for the person with a disability) is the perpetrator and/or is otherwise not acting in the person's best interests and/or
- there is significant conflict over decision-making (e.g., among family members, or between family members and service providers, and that conflict can't be resolved informally).

Formal guardianship is only required where there is a need for a legally appointed decision-maker to make a specific decisions. To discuss lodging an application for guardianship/whether there is a need to lodge, contact TASCAT Protective Division Guardianship Stream on 1800 657 500

NOTE: you should also be aware that in lodging an application to TASCAT you are launching legal proceedings which may require a formal hearing, provision of evidence, the involvement of all parties, and consideration of legal representation. These issues should be discussed when contacting TASCAT.

What if the Person Has an Appointed Guardian But Does Not Want Them Informed?

If a person with disability who has been sexually assaulted does not want their guardian advised of the assault or involved in the reporting process you should discuss the reasons for this with them. Their reasons may include:

- the guardian is the alleged perpetrator
- feelings of shame
- concern that the guardian will make decisions affecting the person's lifestyle (such as where they live and who they see), which they fear will restrict their freedom.

Where the guardian is the alleged perpetrator or is otherwise not acting in the best interests of the person, you can contact TASCAT to discuss lodging an application to review the guardianship appointment. You should advise the person that this may result in legal proceedings. Discuss establishing support mechanisms, such as organising an advocate, who may also assist with seeking legal advice for the person.

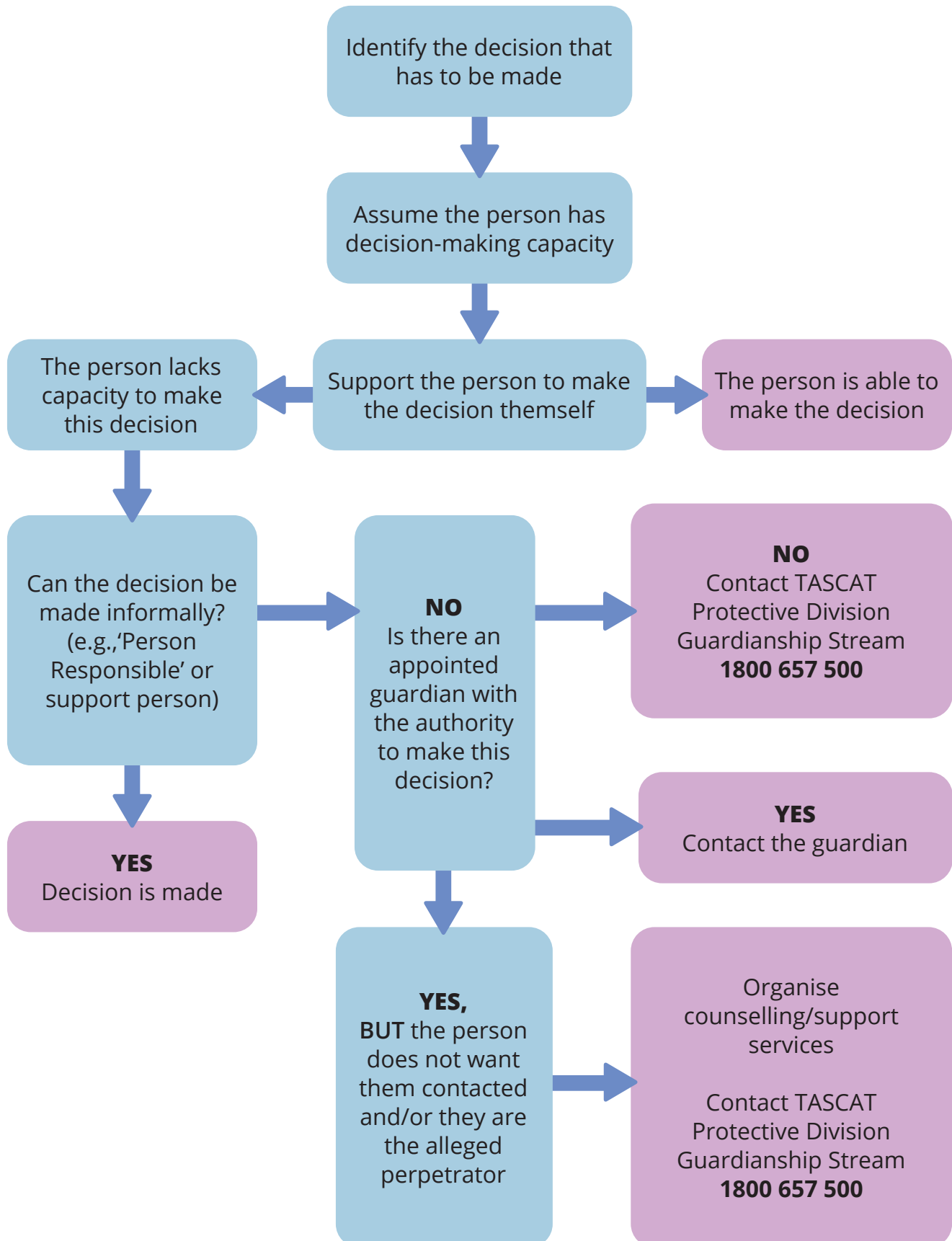
If the person does not want their guardian advised because of feelings of shame or concerns that the guardian may respond by limiting their freedom, it may be possible to assist the person to address their concerns with counselling, the involvement of an advocate or other support services.

However, in the process of responding to the disclosure, any decisions that come under the authority of the appointed guardian cannot be made without their involvement. Make sure you are aware of the specific decision-making authority that the guardian has. You can contact TASCAT to confirm whether a guardianship order has been made, who is appointed and what decision-making authority they have.

CONTACT INFORMATION

Advocacy Tasmania Inc	advocacytasmania.org.au	Phone: 1800 005 131
Speakout Advocacy	168 Collins St, Hobart, TAS 7000	Phone: 03 6231 2344
TASCAT Protective Division Guardianship Stream	38 Barrack St, Hobart TAS 7000 guardianship@tascat.tas.gov.au	Phone: 1800 657 500

Decision-Making Flowchart



Further Resources for Supported Decision-Making

Capacity Toolkit Tasmania

https://www.dhhs.tas.gov.au/_data/assets/pdf_file/0008/98513/Web_Capacity_Toolkit_Tasmania.pdf

NSW Law Reform Commission Report 145 Review of Guardianship Act 1987

https://www.lawreform.justice.nsw.gov.au/Pages/lrc/lrc_current_projects/Guardianship/Report-145.aspx

NDIS Supported Decision-Making e-module: supporting you to make your own decisions, June 2021

<https://www.nds.org.au/events-and-training/all-events-and-training/supported-decision-making-e-learning-module-3039>

Australian Law Reform Commission, Equity, Capacity and Disability in Commonwealth Laws, Report 124, 2014

https://www.alrc.gov.au/wp-content/uploads/2019/08/alrc_124_whole_pdf_file.pdf

The La Trobe Support for Decision-Making Practice Framework (evidenced based) Learning Resource

<https://www.supportforddecisionmakingresource.com.au/>

References

¹ This information has been taken from The Tasmanian Capacity Toolkit:

https://www.dhhs.tas.gov.au/_data/assets/pdf_file/0008/98513/Web_Capacity_Toolkit_Tasmania.pdf
(Accessed 18 November 2021)

² The Capacity Toolkit provides information on how to assess a person's capacity.

³ Ibid

⁴ The information provided here is taken from TASCAT Protective Division Guardianship Stream Facts and information sheets: https://www.tascat.tas.gov.au/guardianship/publications_
(Accessed 18 November 2021)

⁵ Guardianship and Administration Act 1995 (Tasmania) section 4.

<https://www.legislation.tas.gov.au/view/html/inforce/current/act-1995-044> (Accessed 18 November 2021)

Also see https://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx (Accessed 18 November 2021)

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