

# Legal Aid ACT

## Decision-making and **your rights**



As the law says, we must **presume that adults have 'capacity'** to make decisions for themselves unless proven otherwise.



## Legal Aid ACT

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Legal Aid ACT helps people in the ACT with their legal problems. We provide free initial advice and assistance on criminal, family, and civil matters, and ongoing assistance to people who cannot afford a private lawyer.

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**Phone:** [02] 6243 3436

**Email:** [legalaid@legalaidact.org.au](mailto:legalaid@legalaidact.org.au)

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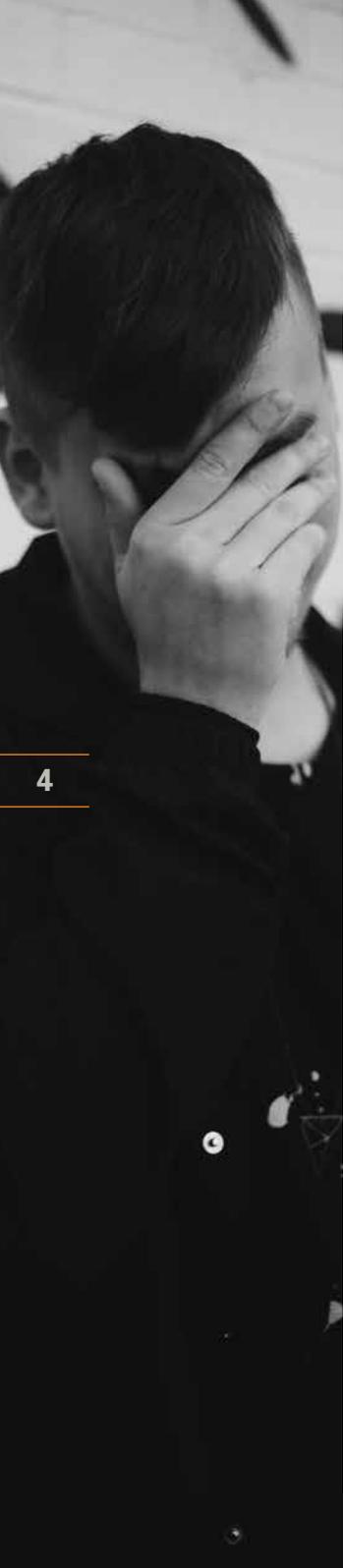
**As the law says, we must presume that adults have 'capacity' to make decisions for themselves unless proven otherwise.**

Everyone wants to make their own decisions about things that affect their lives, and not be controlled by others. As the law says, we must presume that adults have 'capacity' to make decisions for themselves unless proven otherwise. Generally, capacity means that when making a particular decision, the adult can:

- understand the facts and the choices involved;
- weigh up any consequences; and
- appropriately communicate the decision.

Capacity to make decisions may be affected by factors such as stress, illness, injury or age. Loss of capacity may be total or partial, permanent or temporary. The law recognises that you may have lost capacity to make some complex decisions, but not others. For example, you may not have capacity to understand complicated financial arrangements or make a Will, but you may still be able to decide your medical treatment and where you want to live. In other words, 'decision making capacity' applies to certain decisions and is not a general label.

People who have experienced a loss of decision making capacity are more vulnerable to abuse by others. This can include being taken advantage of by their own family members. This Help Sheet gives tips on what to do if your capacity to make your own decisions becomes impaired.



## Who will make decisions for me if I lose capacity?

This all depends on whether you plan ahead.

You can decide who you would like to make decisions for you if you can no longer do so, but you have to do this in advance.

Powers of Attorney are legal documents that let you choose a trusted person to make decisions for you. They are designed to give you choice and control over how your affairs are handled, often in circumstances after your decision-making capacity has become impaired, such as through illness or injury (this is known as an Enduring Power of Attorney).

In the ACT, Powers of Attorney are governed by the Powers of Attorney Act 2006. This Act contains information about how a Power of Attorney can be made and removed.

For more information about Powers of Attorney in the ACT, you can contact the Public Advocate of the ACT or the Public Trustee and Guardian Office (See resources page 12).

## Who should I choose to be my decision maker?

This is a very important decision. Abuse of Powers of Attorney is a common form of elder abuse. The person you appoint should be someone you trust to do the right by you, and must be willing and able to take on the responsibilities of being appointed an attorney.

You can appoint one or multiple attorneys and they do not have to be a lawyer.

The attorney is required by law to act according to your known wishes, and in your best interests. You should get independent legal advice before appointing a decision maker. Don't let anyone pressure you into signing a Power of Attorney form that appoints them as your attorney.

If you don't know anyone you feel would be suitable, you can appoint an independent trustee company or the Public Trustee & Guardian as your attorney, but fees will usually be charged for these services.

### Worried about your safety or independence?

You can call:

Legal Aid ACT on  
[02] 6243 3436 9am-4pm,  
Monday to Friday

or the Domestic  
Violence Crisis Service  
on (02) 6280 0900  
24hr/7 days a week

If your attorney is doing the wrong thing by you (such as taking your money or property without permission) or not acting in your best interests, you can remove the Power of Attorney as soon as you are aware of this, and you can appoint a new attorney.

However, if you have impaired decision making capacity, you will not be able to remove the Power of Attorney on your own and someone with an interest in your welfare will have to step in on your behalf.

This person can apply to the ACT Civil and Administrative Tribunal (ACAT) to have the attorney's actions reviewed and, if it is appropriate in the circumstances, overturned. There are a number of processes to go through and legal advice should be obtained before an application is filed with ACAT.



## Who decides if I have impaired decision making capacity?

The person you have appointed as your decision maker may be the person who decides when your decision making capacity is impaired. Otherwise, it may be a lawyer, doctor, or service provider who has contact with you and is confident that you have capacity to make specific decisions.

An assessment for decision making capacity can also be undertaken by a trained medical professional. The best place to start is with a doctor or an Aged Care Assessment Team. If you or another person disagrees with the assessment that is made about your capacity then an application can be made to ACAT to determine the matter. It is advisable to get an independent assessment of your decision making capacity when doing this.



A CASE STUDY



## Sebastian's story

Following a Legal Aid ACT presentation on the benefits of executing an enduring power of attorney, Sebastian began to consider what would happen to his finances if he were to lose his decision making capacity. However, he was worried about who would manage his affairs and the responsibility they would have. Sebastian knew that the only people he would be able to trust were his children but he was worried about the responsibility he would burden them with if he were to appoint one of them his attorney.

Sebastian contacted Legal Aid ACT to ask about the process of executing a power of attorney and talk about his concerns in appointing one of his children as his attorney. He was told that it is best to talk to his children and that if he wanted, he could appoint both his children as joint attorneys. He was also referred to the Public Trustee and Guardian to execute an enduring power of attorney.

Following his appointment, Sebastian talked to his children and made sure they understood the responsibility they would have. His children were happy to be appointed as joint attorneys so neither child was over-burdened. Sebastian executed the enduring power of attorney, helping to make sure his interests would be protected if he were to lose capacity.

## What happens if I don't plan ahead and my capacity becomes impaired?

Family members may be able to informally make some decisions for you but many decisions, particularly those involving legal or financial issues, can only be made by an attorney appointed through a Power of Attorney.

However, if you have not appointed an attorney, and there is a need for someone

to make decisions on your behalf and your capacity has become impaired, ACAT can appoint a guardian or financial manager to make decisions on your behalf.

To have a guardian or financial manager appointed, ACAT must hold a hearing to determine whether a guardian or financial manager should be appointed in the circumstances.



This includes making an assessment about whether you have impaired decision making capacity. This can be a time consuming and stressful process if you are not prepared.

ACAT must listen to your wishes, but can override them if it decides that it is appropriate to appoint a guardian or financial manager in the circumstances.

If a guardian or financial manager is required, and if there is a conflict between family

members, or there is no other appropriate person to be your Attorney, the Public Trustee and Guardian can be appointed.

Any orders made by ACAT in regards to the appointment of a guardian or financial manager are subject to regular review by ACAT.

You should seek legal advice if you have any proceedings in ACAT or wish to discuss any orders that have already been made.



## Information and Resources

Emergency '000'  
information in the person's  
own language  
([www.triplezero.gov.au](http://www.triplezero.gov.au))

### Legal Aid ACT

[02] 6243 3436

9am–4pm Monday to Friday

[www.legalaidact.org.au](http://www.legalaidact.org.au)

Free legal advice and  
support services

## ACT Civil and Administrative Tribunal

02 6207 1740

[www.acat.act.gov.au](http://www.acat.act.gov.au)

The ACT's independent dispute resolution service, deals with capacity disputes and substitute decision-making.

## Advance Care Planning Australia

1300 208 582

<http://advancecareplanning.org.au>

Explains the steps you can take to help you plan for your future health care.



## **Aged Care Assessment Team**

1800 200 422

[www.myagedcare.gov.au](http://www.myagedcare.gov.au)

Independent teams who assist older people and their carers to identify what kind of care will best meet their needs.

## **Capacity Australia**

0400 319 089

<http://capacityaustralia.org.au>

A not-for-profit charity that promotes autonomy of decision-making, with several resources.

## **Carers ACT**

1800 242 636

[www.carersact.org.au](http://www.carersact.org.au)

Free services and programs to help carers including information, counselling, workshops, referrals to other services and supports.

## **Conflict Resolution Service**

(02) 6190 7100

[www.crs.org.au](http://www.crs.org.au)

Provides mediation services in the ACT.

## **COTA (ACT)**

(02) 6282 3777

[www.cotaact.org.au](http://www.cotaact.org.au)

COTA ACT is the peak organisation for all issues relating to older Canberra citizens, seniors, those of mature age and their families.

## **Dementia Australia ACT**

1800 100 500

[www.dementia.org.au](http://www.dementia.org.au)

Dementia Australia ACT represents the interests of people living with dementia and those that care for them.

## **Domestic Violence Crisis Service**

(02) 6280 0900

24 hours/7 days

[www.dvcs.org.au](http://www.dvcs.org.au)

Domestic Violence Crisis

Service provides a variety of services from crisis intervention to community education.

## **Lifeline**

131 114 24 hours/7 days

[www.lifeline.org.au](http://www.lifeline.org.au)

Support in a crisis and suicide prevention.

## **Public Advocate of the ACT (Human Rights Commission)**

(02) 6205 2222

[www.hrc.act.gov.au/public-advocate](http://www.hrc.act.gov.au/public-advocate)

Includes support around administration of Enduring Powers of Attorney to protect the welfare of vulnerable people.

## **Public Trustee & Guardian**

(02) 6207 9800

[www.ptg.act.gov.au](http://www.ptg.act.gov.au)

Assistance and advice on Powers of Attorney, Wills, guardianship, estates and financial management.

## **Relationships Australia Elder Relationships Service**

(02) 6122 7100

[www.relationships.org.au](http://www.relationships.org.au)

The Relationships Australia Elder Relationship Service is a counselling and mediation service to support families who need help negotiating complex issues related to ageing.

## **The ACT Disability, Aged and Carer Advocacy Service (ADACAS)**

(02) 6242 5060

[www.adacas.org.au](http://www.adacas.org.au)

ADACAS provides help and support to people with disabilities, the elderly and their carers.

## **The Law Society of the ACT**

(02) 6274 0300

[www.actlawsociety.asn.au](http://www.actlawsociety.asn.au)

Can assist you to find a private lawyer who specialises in family agreements or any other legal matter.

## **1800 RESPECT**

1800 737 732

[www.1800respect.org.au](http://www.1800respect.org.au)

National sexual assault, domestic and family violence counselling service.





LEGAL AID FACT SHEET — 31 MAY 2018  
DECISION MAKING AND YOUR RIGHTS

IF YOU NEED HELP PLEASE CALL

**[02] 6243 3436**

**FREE LEGAL ADVICE AND  
SUPPORT SERVICES**

**Legal Aid ACT**