Performing Capacity Assessments

Information For GPs

HAWKE'S BAY District Health Board Whakawāteatia

OURHEALTH HAWKE'S BAY Whakawāteatia

WHANGANUI DISTRICT HEALTH BOARD Te Poari Hauora o Whanganui

Wairarapa DHB Wairarapa District Health Board Te Poari Hauora a-rohe o Wairarapa

HUTT VALLEY DHB

MidCentral District Health Board Te Pae Hauora o Ruahine o Tararua

Capital & Coast District Health Board Ūpoko ki te Uru Hauora

Performing Capacity Assessments

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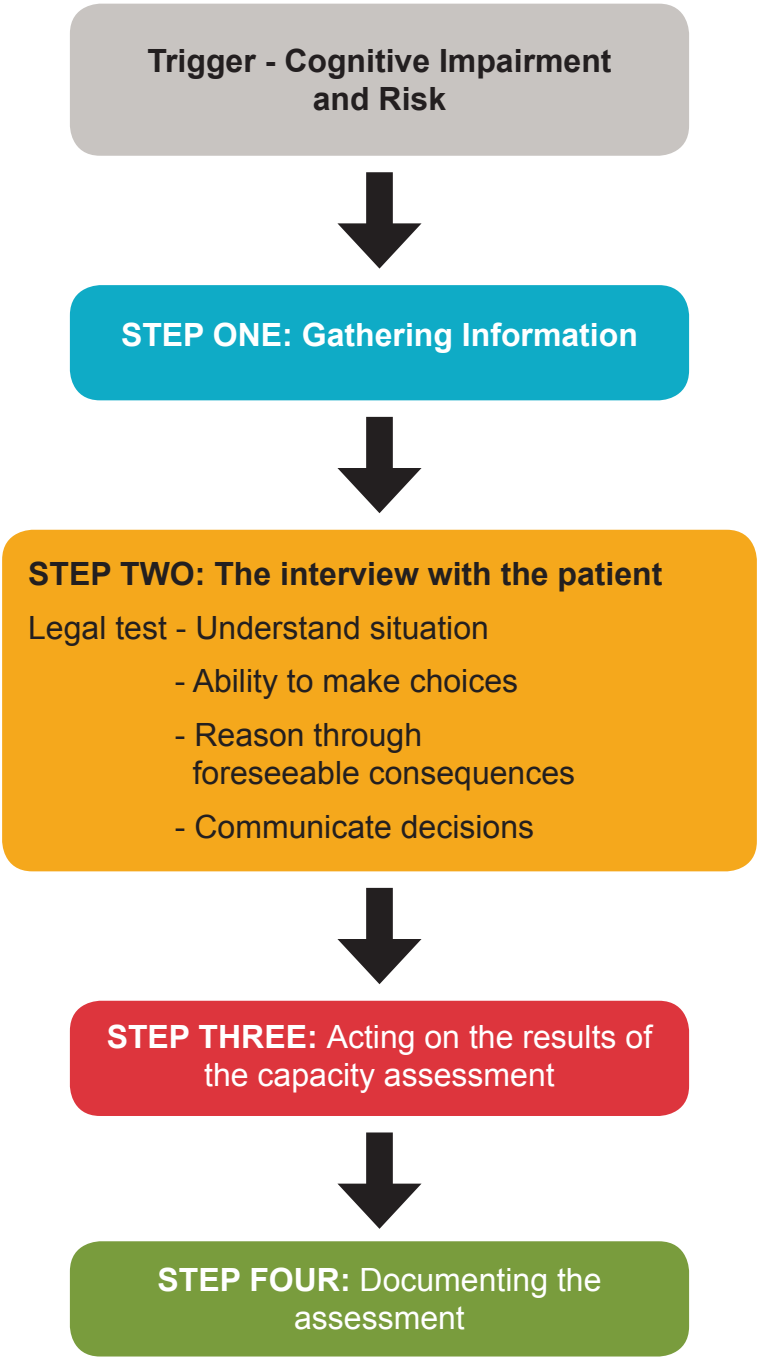

FOREWARD:

This booklet came about as the result of capacity assessment workshops we provided to GPs in the central region. We hope this will be used as a standalone reference guide to all GPs for when they complete capacity assessments.

It is designed to assist doctors who have had little or no experience of doing these assessments and may also serve as a good refresher to those who have more experience in completing these assessments more.

We acknowledge there is no national standard for completing these assessments.

Whether someone has capacity to make decisions involves a clinical assessment; whether someone is competent to make decisions involves the application of a legal test. The legal test is to determine that a person understands the nature, and can foresee the consequences, of decisions in respect of matters relating to his or her personal care and welfare or property; and is able to communicate his or her decision and this forms the framework that we have based this booklet around.

We recommend you read through the booklet, go off and complete a few assessments and then discuss these with colleagues at peer review.

Our hope is that this booklet will generate discussion, leading onto a consensus from experts in this field thus enabling us to develop a recommended national standard.

Another good reference guide called **"Interactive toolkit for assessing Capacity"** has been developed by Alison Douglass and Dr Greg Young which uses a slightly different framework. This toolkit covers the medica-legal aspect in greater depth.

There will be cases that are more complex and even with this guide will prove difficult to determine capacity. We would recommend either discussing these with peers or referring to a specialist for assessment.

Finally, the more assessments you do, the more your confidence grows, the less you will need to refer to this booklet.

Capacity assessments should be performed when there is a concern that the patient (known as the donor on EPOA forms) may not be competent to make a particular decision and where there is some risk as a result of the impaired capacity ie: there must be a significant trigger. Capacity Assessments should be focused on the particular concern at the time.

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STEP ONE:
Gathering Information

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Find out exactly what the capacity assessment is for

Examples of personal welfare decisions include:

- Appointing an Enduring Power of Attorney (EPOA)
- Making personal decisions
- Medical or dental decisions
- Making advance care directives

Examples of financial decisions include:

- Entering into a contract
- Managing accommodation
- Paying bills
- Buying food, clothes and other necessities
- Banking
- Selling assets

A common misperception is that capacity is “all or nothing” when in fact it is specific to a decision. You are therefore identifying ONE specific decision that needs to be assessed.

For example: is my patient able to make the decision about where they should live? ***Or*** is my patient able to consent/decline a treatment or procedure? ***Or*** is my patient able to make an EPOA?

The specific decision will guide the questions that need to be asked in the assessment.

Establish the trigger

Discuss with the referrer what events led to concerns about capacity. Capacity assessments are invasive and should not be done unless there is a suspicion that the patient is (a) incapable and (b) at risk.

It is important that, as the assessor, you think through yourself:

- what is the situation you want the patient to understand
- what are the possible choices available for this particular person
- what are the foreseeable consequences of the different choices?

You should have this information before you assess the patient and the gathering of this information can be done by the practice nurse or ward social worker prior to the assessment appointment time.

- Obtain collateral information about the patient's cognition from the GP/hospital notes and next of kin.
- Find out what problems the patient's cognitive impairment has caused in their ability to manage activities of daily living/ finances etc. You will need collateral information ideally from several people who know the person well in order to get accurate & true information.
- Determine if the cognitive impairment is likely to be short term, long term or progressive.
- Decide on the best time to perform the assessment. If the decision does not need to be made immediately and if the patient's cognition is likely to improve, the assessment could be delayed until the patient is more likely to be competent. For example if the person has a delirium. Or see them in the morning if you know they become more impaired later in the day.
- Ensure the assessment is conducted in a suitable location where interruption and distraction are minimized and privacy is ensured.

It is important to know what the persons belief systems, values and goals are as this will inform the choices they make. A person's cultural background shapes their identity.

For example if a person is a vegetarian, they are unlikely to choose meals on wheels that only provides meat options and is not a valid option for the assessor to consider. If at all possible, choices should be consistent with the person's values, goals and beliefs.

Further information to be gathered and considered:

- If the patient requires an interpreter an impartial interpreter should be arranged as family members may not accurately interpret the patient's responses.
- Other aides to communication include written communication, presenting information at the appropriate reading level, nonverbal communication, cultural support people, or family/whanau support. If a patient uses hearing aids &/or glasses, make sure these are available.
- If the patient has an intellectual disability you will need to use appropriately simpler language.
- In the case of Māori, you will need to think about cultural processes, such as tikanga and whakawhanaungatanga, or "establishing the relationship".
- Patients should be asked if they wish a family member to be present for the assessment, as they may feel uncomfortable answering some questions with family present.
- At the start of the assessment, explain briefly to the patient what you are going to do and why. It is not necessary to get the patient's consent for the assessment but you will need to engage them in the interview to the extent that they answer your questions. How you introduce yourself can make a big difference.

Another common misperception is that performing a cognitive assessment will determine the person's capacity to make a medical decision. It is helpful, to complete a MOCA or other cognitive screen as it will give you information about what deficits the person has. However it does NOT tell you whether the patient is able to make the specific informed decision at hand. I would recommend the screening tool is done on a separate occasion.

As with any assessment it is better if the patient explains himself in his own words. Start the assessment by asking open ended and nonleading questions.

STEP TWO:
The interview with the patient

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Part A: Assessing the ability to understand the situation

Discuss the relevant issue with the patient. For example:

When assessing capacity for personal welfare decisions

- Ask the patient about their living arrangements; what supports do they need such as home help, meals on wheels; what help do they receive from family and friends and who visits them?
- Assess if they can dress appropriately for the weather; attend to personal hygiene.
- Do they eat well? How do they do the shopping and meal preparation?
- Can they understand their medications and do they take them as prescribed?
- Assess the potential risks to the patient, for example: from fires, poor hygiene, malnutrition, injuries, and medication errors.
- How would the patient get medical help?
- Are they at risk of abuse from others?

If a patient wants to live at home independently when there are concerns about their safety ask them what will happen if:

- They don't have help or don't move into to a rest home
- Ask why they think a move has been proposed

If the patient is refusing treatment ask the patient to:

- Describe what is wrong with them
- If they need treatment
- What they think the treatment will do for them
- What they think will happen if they don't have treatment
- Why they think the treatment has been proposed

When assessing financial capacity ask the patient about these 5 things:

- Assets
- Income
- Outgoings
- Debts
- Obligations

For example:

- What bank they bank with; how many accounts they have; how much money in each account. What assets do they have and what is the value of them.
- What income do they have coming in

- What debts and obligations if any they have, (an obligation might be a father paying a monthly sum for his adult son who has Down syndrome and lives in care).
- What are their outgoings; how do they pay their bills: how much would they expect the bills to be for
- How do they protect themselves from being taken advantage of financially

If they don't know the answer to any of these questions ask them how they would find out.

It is helpful to have a family lawyer involved who writes to you requesting the assessment and can give you the information about the person's finances.

A GP may assess capacity to manage finances in a straightforward situation, for example, where the person owns their house but little to no other assets; receives superannuation and is forgetting to pay bills and/or is vulnerable to exploitation; the family has concerns and want the EPOA invoked so the substitute decision maker can step in and start paying the bills etc.

If the situation is complex for example: with family conflict or large sums of money or investments involved, I would recommend an assessment by a specialist privately.

When assessing testamentary capacity check that the patient:

- Understands the nature and effect of making a will;
- The extent of their estate;
- The claims of those who might expect to benefit under the will.
- Ask about and review previous wills and question any changes

Likewise when assessing capacity to appoint an EPOA.

Ensure the patient understands what an EPOA is, when it will take effect, are able to discuss who they are appointing and why.

Discussing the specific issue with the patient may reveal that they lack the knowledge needed to make the decision. In which case they will need to be educated about the situation, their choices and consequences so that they fully understand the issues.

Treat this situation as you would when ensuring your patient is able to give informed consent when consenting to a medical procedure. Remembering that you have to educate them first including running through all the risks and benefits of the procedure.

After educating the patient check their understanding and ability to retain the information, by asking them to explain it back to you in their own words.

Does the patient understand the nature of the concerns raised and acknowledge why people may have these concerns?

Part B: Assessing the ability to discuss what choices (options) are available to them

Ask the patient about what choices are available, and what the benefits/risks of each choice are.

What may happen if no intervention were made?

Ask the patient to tell you in their own words.

For example if the decision is about where they should live what are the choices available for this particular patient? Staying at home, going into residential care are likely choices but living with a relative may/may not be realistic.

Then, can they tell you what further options are available leading on from a certain choice i.e. if they stayed at home further options could be - meals on wheels, carer support, day care etc.

Part C: Assessing the ability to reason through the foreseeable consequences of their choices

Ask the patient to discuss which choice they prefer and how they reached that decision. What is important to them when making decisions, and how did they weigh up the options?

The process of choosing is more important than the choice itself as competent patients have the right to make choices that are not recommended by the health care professional.

Parts B and C test the patients' ability to manipulate information. When given new information by the doctor which may contradict or differ from their belief, whether they have the mental flexibility to take this new information on board and see the situation differently.

Part D: Can the patient communicate their decision to others

A patient may have had a stroke, and be aphasic or have severe dysarthria and be unable to write. Therefore they are not able to make themselves understood.

The inability to communicate is enough on its own for a person to lack capacity.

STEP THREE: Acting on the results of the capacity assessment

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Capacity may not be complete however a decision will need to be made on whether the patient's decision-making is sufficient for this particular situation, taking into account the importance and complexity of the decision at hand.

The legal starting point is that everyone is presumed competent until proven otherwise.

The primary objective of a court when applications are made under the PPPR act, is to make the least restrictive intervention possible in the life of the patient and to encourage them to exercise and develop such capacity as they have to the greatest extent possible.

The legal test of competence differs depending on which part of capacity is being examined:

- **For a personal order or property order** (section 6 & 10 PPPR Act) the court must be satisfied that the patient partially lacks competence in relation to that decision (e.g. placement in a rest home).
- **For appointment of a welfare guardian** (section 6 & 12 PPPR Act) the court must be satisfied the patient wholly lacks capacity to make or communicate decisions.
- **For an order appointing a property manager** the court must be satisfied the person lacks, wholly or partly, the competence to manage their affairs in relation to their property (section 25(2)(b)).
- **For enacting an EPOA in relation to property** the patient should not be wholly competent to manage their own property affairs. (section 94 (1))
- **For enacting an EPOA in relation to personal care and welfare** the patient lacks the capacity to make a decision about a matter ***and/or*** to understand the nature of the decisions ***and/or*** foresee the consequences of the decisions ***or*** lacks the capacity to communicate decisions about matters relating to personal care and welfare (section 94(2)).
- **If the patient is competent** the health care professional may be able to give advice to help resolve the issue or to arrange appropriate supports for the patient. Advice may also include appointing an EPOA.
- **If the patient is incompetent** to make the decision at hand a substitute decision maker needs to be appointed, who should:
    - act in consultation with the patient, following their wishes where possible, and if not possible:
    - they should make decisions based on the patient's best interests.

In summary:

- If the patient has already appointed an EPOA, this person can now take over this role.
- If there is no EPOA, the patient's capacity to appoint one should be assessed. If they are capable of appointing an EPOA, one should be appointed and start acting in this role immediately.
- But if the patient is not capable of appointing an EPOA a welfare guardian or property manager may need to be appointed through the family courts or the court may issue a personal order under the Protection of Personal and Property Rights Act 1988.

Alternatively, if the patient is not competent to give informed consent and there is no one entitled to consent on their behalf, you may determine that Right 7(4) of the Code of Health and Disability Consumer's Rights provides sufficient grounds for you to act in the patient's best interests without resorting to the courts under the PPPR Act.

This is possible provided you take into account and act according to any views the patient has previously expressed or, if their views are not known, to take into account the views of those who have an interest in the welfare of the patient. Situations where this may be appropriate include the need for life saving surgery or urgent blood transfusion in an incompetent patient.

So, just to clarify:

✔ If a person lacks capacity to make a decision the assessor would discuss with the substitute decision maker where to from here.

For example if the person lacked capacity to make the decision of where they live this does not mean the person has to go into aged residential care. It may be decided to trial a return home, with carers going in daily and meals on wheels provided. This may be successful for a period of time. However if the person refuses the carers entry and doesn't eat the meals, the self-neglect continues. If it is deemed there is sufficient risk at that point the attorney decides the person goes into residential care but would involve the person in the choice of where they live if possible.

STEP FOUR: Documenting the Assessment

STEP FOUR: Documenting the Assessment

Different health professionals write up capacity assessments in different ways. However, certain information must be included in any assessment for it to be legally sound. A checklist may be useful and should contain the following:

1. The date of the assessment
2. The relationship between the assessing clinician and the patient
3. The decision that the patient was required to make
4. The reason or trigger for the assessment
5. Information that was considered vital to the decision, and where that information was obtained
6. What efforts have been made to support the patient to make a decision
7. The relevant medical history with a particular emphasis on the development and severity of any cognitive problems, and what treatment could be given to optimise the patient's cognition
8. Where appropriate, a description of the patient's living circumstances, the supports that are in place, and what is recommended
9. A more detailed description of how the patient answered the four questions
10. An explanation of why the answers the patient gave showed that he lacked capacity to make the decision.
11. A conclusion or recommendation based on the findings of the assessment.

If the assessment is for the family courts the documentation may need to be in a legal format or written on the form from the family courts which can be obtained from the family court website:

Pitfalls in the assessment of Decision Making Capacity:

1. Practitioner assumes that if the patient lacks capacity for one type of medical decision, the patient lacks capacity for all medical decisions
2. Practitioner does not understand that capacity (or incapacity) is not “all or nothing” but specific to a decision.
3. Practitioner confuses legal competence, as decided by a formal judicial proceeding, with clinical determination of decision making capacity.
4. Practitioner fails to ensure that the patient has been given relevant and consistent information about the proposed treatment before making a decision.
5. As long as a patient agrees with the practitioners health care recommendations, the practitioner fails to consider that the patient may lack capacity to make decisions.
6. When evaluating a patient’s ability to return to independent living, the practitioner assesses only what the patient says & fails to have the patient’s functional abilities & living situation evaluated.
7. In assessing capacity to make medical decisions, the practitioner gives greater weight to the patient’s final decision than to the process the patient uses in coming to that decision.
8. Practitioner assumes that if a patient has a diagnosis of Alzheimer’s disease or another dementia, even if mild, the patient lacks capacity for making all medical decisions.
9. Practitioner does not understand that the criteria for determining capacity to make decisions vary with the risks & benefits inherent in the decision.
10. Practitioner believes that if a patient has a mental illness such as schizophrenia, the patient lacks capacity to make any medical decisions.
11. Practitioner lacks knowledge of emergency procedures for treating medically ill patients who lack decision making capacity.
12. Practitioner does not understand his/her obligation to maximize a patient’s capacity to make decisions. (even if this requires extra effort)
13. Practitioner believes that evaluation of cognition, for example by using the MMSE, is the appropriate method for determining capacity to make medical decision.
14. Practitioner believes that a mental health professional is necessary to determine a patient’s capacity to make decisions.

From: Linda Ganzani et al Psychosomatics 44:3, may June 2003

Summary

We would like to conclude by making the following points about assessing capacity:

- Capacity is decision and time specific and is not absolute.
- The aim of assessment is to protect the patient's autonomy
- The clinician needs to support the patient to make the decision if possible
- Every clinician needs to know how to assess capacity
- The clinician who knows the patient best should ideally do the capacity assessment

Filling in the EPOA templates

There are two separate forms: one to certify mental incapacity for property for example: managing finances, and one to certify mental incapacity for personal care and welfare ie for decisions about personal care, where the person resides or about treatment and procedures etc.

You should ask for a certified copy of the EPOA. This confirms who the donor is, who the attorney(s) is/are for that part and the date it was made. You need this information to fill in the form correctly. It is possible for the donor to put a clause in the property order that states the attorney is to start acting on their behalf now while they are mentally capable and to continue when they become mentally incapable. Thus meaning it has already been invoked and a certificate of mental incapacity is not required.

There are useful guidelines that accompany the forms to help you fill them in.

Sometimes the donor will state in the EPOA that the assessment of their capacity has to be done by a health practitioner with a specified scope of practice Eg with a vocational scope of practice. This then effects which statement you select in point 2 on the form, i.e. you would choose statement B. If the donor specifies the assessor has to have vocational scope of practice and you do not hold this, then you cannot complete the form.

The two templates for invoking the enduring power of attorney are as below. They can be added to or parts deleted as appropriate.

You will notice that the form for personal care and welfare asks you in point 4 of the form to choose one or more of four statements:

- if the person lacks the capacity to **make a decision about** *and/or*
- lacks capacity to **understand the nature of decisions** *and/or*
- to foresee the **consequences of decisions** *and/or*
- to **communicate** decisions about

Remember these are the key elements of an informed decision which you teased out in your assessment.

You may select several statements if they apply. Often you will include statements A, B and C together. Or you may choose statement D on its own as lacking capacity to communicate is a standalone reason to be mentally incapable.

In the guideline in point 4 it states that: **The assessment and certificate relates to a particular significant matter.** If and when another significant matter arises, a further assessment and certificate ***may*** be required

In conflict point 6 states:

However if the health practitioner certifies that the donor is mentally incapable because of a health condition that is likely to continue for a period of time stated in the certificate, no further certificates will be required during the stated period unless the donor suspends the attorneys power to act.

And

The PPP&R Act 1988 legislation (see hyperlink last page) in section 98(3b) (a) if the donor is certified as mentally incapable because of a health condition that is likely to continue indefinately, no further certificates are required under subsection (3)(a) in relation to any further personal care and welfare matters.

If the health practitioner certifies that the donor is mentally incapable because of a health condition that is likely to continue indefinitely, no further certificates as to the donors incapacity are required unless the donor suspends the attorney's power to act.

In discussion with several psychogeriatrician colleagues the consensus is that the guideline is deliberately woolly to cover different circumstances. A person may still retain ability to make a lot of decisions but lacks capacity to make one significant decision which because of risk needs to be acted on. The form would be filled in for that one significant matter, for example: **where they should live.**

Another person may be extensively cognitively impaired and found unable to make multiple decisions e.g. about what treatment they should have, what assistance they need for personal cares and be unable to make the decision about where they should live. It may be that there is risk living at home and the recommendation is they live in a dementia care unit. In that case in filling out statement A in point 4 of the form you might write: In my opinion, the donor is mentally incapable as he/she lacks the capacity to make a decision about **where they should live, what treatment they have or what their personal care needs are.**

In point 5 of the form you have to choose one of three statements about how long you think the condition causing the mental incapacity will last for:

Statement A is useful if a person has a health condition that you know that they may improve or recover from. For example people who have alcohol dependency syndrome and are abstinent from alcohol may improve a lot cognitively; usually over a three month period so you could make the certificate valid for 3 months. It is important that you go back to review them just before it expires, reassess them and decide if they are now mentally capable /incapable. If they are still mentally incapable you may decide they will not improve so would now therefore choose statement B that *is likely to continue indefinitely*. Statement B would also be appropriate if a person has a progressive neurological condition that affects their cognition such as dementia.

The usefulness of statement C is unclear so would not recommend you using this option.

Point 6 requires you to write the reasons for your opinion and the guidelines state you need to record your reasons in case it is challenged. Providing examples of their answers demonstrates how they lack capacity. Remember if you are stating they lack capacity on several matters such as where they should live, what help they may need, what medication they should be taking etc. ensure you provide examples for each matter as you need to explain why they lack capacity in *each* matter. It is also helpful to point out any medical disorders that may be contributing to their mental incapacity.

Form 4

Health practitioner's certificate of mental incapacity for enduring power of attorney in relation to personal order

Sections 97(5) and 99D, Protection of Personal and Property Rights Act 1988

I, *[Full name, address, registration number of health practitioner]*, a health practitioner, certify that—

1. I am a health practitioner registered, or deemed to be registered, with The Medical Council of New Zealand under the Health Practitioners Competence Assurance Act 2003 as a practitioner of *[Describe type of practice]*

2. *For this paragraph—*
   - *select Statement A if the donor has not specified in the enduring power of attorney that his or her mental capacity be assessed by a health practitioner with a specified scope of practice; or*
   - *select Statement B if the donor has specified in the enduring power of attorney that his or her mental capacity be assessed by a health practitioner with a specified scope of practice.*

   Statement A

   My scope of practice includes the assessment of a person's mental capacity.

   Statement B

   My scope of practice—
   - includes the assessment of a person's mental capacity; and
   - is the same as that specified in the enduring power of attorney.

3. On *[date]* I examined/assessed* *[Full Name of donor]*, the donor of the enduring power of attorney in relation to property dated *[date enduring power of attorney was signed]* to ascertain his/her* mental capacity.
   *Select one.

4. *For this paragraph select the statement(s) that apply.*

   Statement A

   In my opinion, the donor is mentally incapable as he/she* lacks the capacity to make a decision about *[specify matter relating to donor's personal care and welfare in respect of which a decision is being made, or is proposed to be made]*.
   *Select one.

Statement B

In my opinion, the donor is mentally incapable as he/she* lacks the capacity to understand the nature of decisions about *[specify matter relating to donor's personal care and welfare in respect of which a decision is being made, or is proposed to be made].*

*Select one.

Statement C

In my opinion, the donor is mentally incapable as he/she* lacks the capacity to foresee the consequences of decisions about *[specify matter relating to donor's personal care and welfare in respect of which a decision is being made, or is proposed to be made]*, or to foresee the consequences of any failure to make such decisions.

*Select one.

Statement D

In my opinion, the donor is mentally incapable as he/she* lacks the capacity to communicate decisions about *[specify matter relating to donor's personal care and welfare in respect of which a decision is being made, or is proposed to be made].*

*Select one.

5. For this paragraph select the statement that applies.

Statement A

The donor's mental incapacity is due to a health condition that is likely to continue for a period of *[number]* of months/years*.

*Select one.

Statement B

The donor's mental incapacity is due to a health condition that is likely to continue indefinitely.

Statement C

The donor's mental incapacity is due to a health condition the duration of which I am unable to determine.

6. The reasons for my opinion are: *[specify]*.

7. In my opinion _____ lacks capacity to _____.
   Their attorney should make that decision on their behalf.

Date:

Signature of health practitioner: _____

Guidelines for health practitioners

completing certificate of mental incapacity

(enduring power of attorney in relation to personal care and welfare)

Please note:

- this form must be used if the certificate of mental incapacity is issued in New Zealand:
- if the certificate of mental incapacity is issued outside New Zealand, the certificate must be in a form acceptable to the competent authority of the country concerned:
- these guidelines are intended to help health practitioners complete the certificate of mental incapacity for an enduring power of attorney in relation to personal care and welfare.

1. Purpose of assessment and certificate

The purpose of the health practitioner certificate is to record the opinion of an appropriate health practitioner about the mental capacity of a person (a "**donor**") who has set up an enduring power of attorney ("**EPA**") under the Protection of Personal and Property Rights Act 1988 (the "**Act"**).

An attorney appointed under an EPA in relation to personal care and welfare cannot act on a significant matter relating to the donor's personal care and welfare (see paragraph 4 below) unless a relevant health practitioner has certified that the donor is mentally incapable, or a Family Court determines that the donor is mentally incapable.

2. Who can complete the assessment and certificate?

The certificate of mental incapacity must be completed by a relevant health practitioner. **A relevant health practitioner** is a person:

- who is, or is deemed to be, registered with a registration authority appointed by or under the Health Practitioners Competence Assurance Act 2003 as a practitioner of a particular health profession; and
- whose scope of practice enables him or her to assess a person's mental capacity; and
- who is competent to undertake an assessment of that kind.

In the case of a certificate of mental incapacity issued outside New Zealand, a relevant health practitioner is a person registered as a medical practitioner by the competent authority of the country concerned and whose scope of practice includes the assessment of a person's mental capacity.

A donor may specify in an enduring power of attorney that an assessment of his or her mental capacity be undertaken by a health practitioner with a specified scope of practice (for example, a medical practitioner registered with a general scope of practice, or a nurse whose registered scope of practice is nurse practitioner). Provided that health practitioners who have that scope of practice are able to assess a person's mental capacity, then only a health practitioner with the scope

of practice specified by the donor and who is competent to do so may assess the donor's mental capacity and complete the certificate.

3. Definition of mentally incapable

The donor of an enduring power of attorney is **mentally incapable** in relation to personal care and welfare if the donor:

(a) lacks the capacity:

(i) to make a decision about a matter relating to his or her personal care and welfare; or

(ii) to understand the nature of decisions about matters relating to his or her personal care and welfare; or

(iii) to foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; or

(b) lacks the capacity to communicate decisions about matters relating to his or her personal care and welfare.

A donor's mental capacity is determined at the time a decision about a significant personal care and welfare matter is being, or is proposed to be, made, and is determined in relation to that matter.

Presumption of competence

In assessing a donor's mental capacity, a health practitioner must have regard to the presumption of competence in section 93B of the Act. This states that, for the purposes of Part 9 of the Act, every person is presumed, until the contrary, is shown to have the capacity:

(a) to understand the nature of decisions about matters relating to his or her personal care and welfare; and

(b) to foresee the consequences of decisions about matters relating to his or her personal care and welfare or of any failure to make such decisions; and

(c) to communicate decisions about such matters.

Imprudent behaviour

A person must not be presumed to lack mental capacity just because that person makes or intends to make a decision about his or her personal care and welfare that a person exercising ordinary prudence would not make in the same circumstances.

People subject to Mental Health (Compulsory Assessment and Treatment) Act 1992

A person must not be presumed to lack mental capacity just because that person is subject to compulsory treatment or has special patient status under the Mental Health (Compulsory Assessment and Treatment) Act 1992.

4. Definition of significant matter

The term a **significant matter related to the donor's personal care and welfare** means a matter that has, or is likely to have, a significant effect on the health, well-being, or enjoyment of life of the donor (for example, a permanent change in the donor's residence, entering residential care, or undergoing a major medical procedure). Note that the health practitioner completing the certificate is not certifying that the matter is a significant matter. The attorney is able to act in relation to personal care and welfare matters that are not significant ones if the attorney believes on reasonable grounds that the donor is mentally incapable. The attorney requires the certificate in order to act in relation to a significant matter. The health practitioner can therefore rely on the attorney's judgement that the matter is a significant one.

The assessment and certificate relates to a particular significant matter. If and when another significant matter arises, a further assessment and certificate may be required (see paragraph 6 below).

5. Reasons for opinion

Although there is no prescribed method of assessing incapacity for the purpose of this certificate, it is important that the practitioner records the reasons for his or her opinion in case it is challenged.

6. Further certificates

Further certificates will be required whenever a decision needs to be made about a significant matter relating to the donor's personal care and welfare.

However, if the health practitioner certifies that the donor is mentally incapable because of a health condition that is likely to continue for a period stated in the certificate, no further certificates will be required during the stated period unless the donor suspends the attorney's power to act.

If the health practitioner certifies that the donor is mentally incapable because of a health condition that is likely to continue indefinitely, no further certificates as to the donor's incapacity are required unless the donor suspends the attorney's power to act.

Where a donor has given written notice to an attorney that the attorney's power is suspended, the attorney cannot act under the enduring power of attorney unless a further certificate is obtained from a relevant health practitioner, or the Court determines that the donor is mentally incapable.

7. Request for certificate, payment, etc

An assessment for the purpose of issuing a certificate can be requested by:

- the attorney (or the successor attorney) for the donor's personal care and welfare; or
- by any other person who is seeking the assessment and certificate for the purpose of authorising the attorney to act and who intends to pass the certificate on to the attorney.

The health practitioner should provide the completed certificate to the person who requests the assessment and certificate.

It is the responsibility of the person who requests the assessment and certificate to arrange payment for the assessment and certificate. This payment is recoverable by the person who requests the assessment and certificate as a debt from the donor's property.

8. More information about enduring powers of attorney

You can find more information about enduring powers of attorney on the New Zealand Law Society website (www.lawsociety.org.nz) and on the Ministry of Justice website (www.justice.govt.nz).

The law on enduring powers of attorney is set out in Part 9 of the Protection of Personal and Property Rights Act 1988. A copy of this Act can be found on the New Zealand legislation website at www.legislation.govt.nz.

Form 5

Health practitioner's certificate of mental incapacity for enduring power of attorney in relation to property

Sections 97(5) and 99D, Protection of Personal and Property Rights Act 1988

I, *[Full name, address, registration number of health practitioner]*, a health practitioner, certify that—

3. I am a health practitioner registered, or deemed to be registered, with The Medical Council of New Zealand under the Health Practitioners Competence Assurance Act 2003 as a practitioner of *[Describe type of practice]*

4. *For this paragraph—*
   - *select Statement A if the donor has not specified in the enduring power of attorney that his or her mental capacity be assessed by a health practitioner with a specified scope of practice; or*
   - *select Statement B if the donor has specified in the enduring power of attorney that his or her mental capacity be assessed by a health practitioner with a specified scope of practice.*

   Statement A
   My scope of practice includes the assessment of a person's mental capacity.

   Statement B
   My scope of practice—
   - includes the assessment of a person's mental capacity; and
   - is the same as that specified in the enduring power of attorney.

8. On *[date]* I examined/assessed* *[Full Name of donor]*, the donor of the enduring power of attorney in relation to property dated *[date enduring power of attorney was signed]* to ascertain his/her* mental capacity.
   *Select one.

9. In my opinion, the donor is mentally incapable because he/she* is not wholly competent to manage his/her* own affairs in relation to his/her* property.
   *Select one.

10. The reasons for my opinion are: *[specify]*.

11. Their attorney should manage their finances on their behalf .

Date:

Signature of health practitioner: _____

Some of you may prefer to learn using audiovisual material.

If so there is a hyperlink to a Vimeo made by myself, Dr Lucy Fergus Geriatrician and Dr Greg Young Psychiatrist. I would recommend everyone watch the two scenarios where Dr Fergus interviews a patient to see if you can identify the four key elements central to whether a person has capacity for the decision in hand.
Click here

We have also hyperlinked in other useful material:

A toolkit for assessing capacity by A Douglass, G Young & J McMillan
Click here

Forms for activating EPOA
Click here

Medical report for Welfare Guardian Application
Click here

Information, choice of treatment and informed consent.
Click here

Protection of Personal and Property Rights Act 1988
Click here

Enduring powers of Attorney
Click here

Performing Capacity Assessments information for GPs (electronic booket)
Click here

Thanks to Counties Manakau DHB who allowed us to use their guideline on capacity assessment drawn up by ARHOP (ATR). This was an invaluable starting point for drawing up the material for the workshops.

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For further information
please contact 06 878 8109

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