

10 December 2025

Our ref: BC:SS:MC

Ms Sarah Cruickshank
Director-General
Strategic Policy and Legal Services
Department of Justice

By email: [REDACTED]

Dear Ms Cruickshank

Review of Queensland Capacity Assessment Guidelines 2020

Thank you for your letter dated 13 November 2025 and the opportunity to provide comments as part of the statutory review of the *Queensland Capacity Assessment Guidelines 2020 (Guidelines)*.

The Guidelines have been referred to the Queensland Law Society's (QLS) Health and Disability, Succession, Human Rights and Public Law and Elder Law committees for feedback. However, given the time of year and the length of the document, we have received limited feedback from our committee volunteers on this occasion. In this submission, we have provided our committee members' general feedback in addition to specific comments on the Guidelines.

General comments

Capacity assessment principles and DRC Report

The review of the Guidelines sits within a broader foundational context defined by international obligations and an existing in principle government commitment to implement key recommendations from the Disability Royal Commission (DRC) in relation to client autonomy and access¹. Although the Guidelines predate the DRC's final report (DRC Report), several core principles articulated within the Guidelines reflect the critical themes of legal capacity reform arising in the context of the DRC. To ensure the Guidelines effectively reflect modern decision-making paradigms, we strongly encourage the adoption of DRC recommendations relating to enabling autonomy and access where appropriate².

¹ Queensland Government response to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, tabled on 31 July 2024, <https://www.health.gov.au/sites/default/files/2025-11/original-queensland-government-response-to-the-disability-royal-commission.pdf>

² Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2023), *Final Report – Volume 6: Enabling Autonomy and Access*.

It is important the Guidelines are updated to align with recommendations on guardianship and supported decision-making from the DRC Report (see in particular Recommendations 6.4 to 6.13, which the Queensland government has accepted in principle). Although most of these recommendations are directed to legislation change, the Guidelines should reflect the principles and intentions of these recommendations to ensure they are up to date and reflective of recent reviews related to capacity.

Strengthening human rights considerations

QLS supports recognition of adults' human rights when carrying out capacity assessments under the Guidelines. However, our committee members suggest the Guidelines could be comprehensively strengthened to ensure capacity assessments are carried out in a way that least restricts an adult's human rights by emphasising the paramount principle of autonomy and least intrusive action within a supported decision-making framework.

Carrying out assessments within a supported decision-making framework would inherently enhance recognition of an adult's right to adequate and appropriate support to maximise their capacity. Further, emphasising a supported decision-making framework is consistent with the foundational principles established in the *Guardianship and Administration Act 2000* (Qld) (**GAA**) and consistent with the principles set out in the Guidelines.

We recommend embedding the premise that all adults are entitled to the same human rights and fundamental freedoms throughout the Guidelines. Additionally, we recommend providing practical guidance throughout the Guidelines on how to incorporate human rights principles into a capacity assessment.

Awareness and target audience

QLS committee members note the Guidelines are generally a very helpful resource. For legal practitioners experienced in this area, the Guidelines are useful as a refresher on assessing capacity or to assist when explaining capacity.

However, our committee members note a lack of awareness about the Guidelines, including among legal practitioners. It appears the Guidelines are underutilised by people who assess capacity.

It is also not clear whether the Guidelines are intended for use by legal practitioners, health professionals or the public. Attempting to make the Guidelines a 'one size fits all' document for different audiences can diminish the Guidelines' effectiveness and result in unintended consequences.

Specifically, QLS is concerned the Guidelines present as a 'how to' document for members of the public to 'assess' capacity rather than an opportunity to help adults recognise when they may need professional advice or assistance in relation to capacity issues³. We are also concerned future attorneys may be encouraged to use the Guidelines to 'assess' the capacity of their principal without any training or experience in assessing capacity. This could lead to negative outcomes for the principal, particularly if the attorney has a conflict of interest.

³ The Public Advocate and Queensland Law Society (2022) *Elder Abuse Joint Issues Paper*, p 63.

Therefore, we recommend the Department evaluates how often the Guidelines are being used, who is using the Guidelines, and how those persons are applying the Guidelines.

After the Department clarifies the intended audience and identifies usage of the Guidelines, we suggest the Department consider a more targeted approach that differentiates between audiences. For example, the Department could consider making an easy-read version available for the public to understand but retain the detailed version for application by professionals who assess capacity.

We also recommend the Department conduct regular awareness raising campaigns about the Guidelines among professionals who may be required to assess capacity, advocates and social service providers, and the public, including those who wish to advocate for themselves.

Processes and training

While our committee members agree the Guidelines are a good tool, there are no deliberate processes to embed the Guidelines into regular use. In our view, clear processes need to be implemented to encourage and assist with use of the Guidelines, such as providing training on how to assess capacity using the Guidelines and developing tools to assist with applying the Guidelines, e.g., interviewing tools and questionnaires. Obtaining user feedback and evaluating the effectiveness of the Guidelines with key stakeholder input are also an essential part of developing and embedding these processes.

A lack of specific training in capacity assessment can result in legal practitioners refusing instructions from clients or referring cases to other practitioners due to fears that a client lacks capacity, which is often exacerbated by a mistaken belief that capacity assessment is solely the domain of health professionals. This negatively impacts timely and cost-effective access to justice for some of our most vulnerable members of society, particularly those who reside outside major metropolitan areas.

This fear often also manifests with rushed or expeditious capacity assessments. Crucially, failures to undertake a thorough process to maximise capacity leaves vulnerable adults, particularly, older people, in undesirable circumstances.

Consequently, there is a clear need for enhanced professional training and awareness to provide assessors with a sound conceptual foundation and consistent procedures required for making these critical capacity assessments.

Precedent for formalised training exists internationally. The Public Guardian and Trustee of British Columbia (PGT) has developed a clear model for formalised training. This includes creating resources to support healthcare professionals involved in issuing 'certificates of incapability'⁴, such as specific training resources and a dedicated online course. In addition, the PGT has produced specific tools that demonstrate a practical application of rigorous interviewing processes that could inform the development of supplementary resources to boost use of the Guidelines.

By providing clear prescriptive processes, standardised assessment tools and recommending further training, the Department will empower assessors to conduct consistent and rigorous capacity assessments in accordance with the Guidelines.

⁴ <https://www.trustee.bc.ca/adults/certificate-incapability-process-healthcare-professionals>

Enduring documents and QCAT processes

QLS notes there are no formal requirements to consider the Guidelines when completing enduring documents or bringing guardianship matters before the Queensland Civil and Administrative Tribunal (QCAT). We recommend incorporating the Guidelines into these processes to further embed consistent use of the Guidelines.

We suggest including a checkbox in the Enduring Power of Attorney and Advance Health Directive forms for legal representatives or witnesses to declare whether they considered the Guidelines before preparing or witnessing the documents. This will direct the relevant person to consider the question of capacity with the assistance of the Guidelines before or at the time of signing and may assist if the adult's capacity is later questioned.

Similarly, we suggest adding a checkbox in QCAT's Health Professional Report for health professionals to declare whether they used the Guidelines when completing the report. Further, the checklists for assessing capacity on pages 20, 21, 44 and 45 of the Guidelines could be adopted straight into the Health Professional Report. Alternatively, we suggest QCAT accept capacity assessments conducted in this format.

To further embed use of the Guidelines for more consistent and reliable capacity assessments, we suggest QCAT consider the Guidelines during deliberations about capacity within a guardianship hearing.

Handbook consistency

This review coincides with the QLS's current review and update of the *Queensland Handbook for Practitioners on Legal Capacity (Handbook)*⁵, a resource widely used by legal practitioners to navigate complex issues of client capacity in everyday practice.

QLS considers alignment between the Guidelines and the Handbook is critical to ensuring clarity, consistency and accessibility of these important resources by legal practitioners. The Guidelines provide general information and principles about capacity and capacity assessment, while the Handbook translates those principles into practice tools for legal practitioners. By maintaining continuity between the two resources, legal practitioners will benefit from a coherent and integrated approach that reduces duplication, avoids confusion and strengthens confidence in the application of capacity assessment principles.

We would be pleased to make any necessary amendments to the Handbook to ensure consistency between the Guidelines and the Handbook after the review process has been completed.

Specific feedback on Guidelines

Section 1: Introduction

Under "these guidelines", we suggest including the note on page 7 that the Guidelines do not replace cognitive tests or examinations carried out by qualified health practitioners. In our view, this qualification should be prominently stated at the start of the Guidelines.

⁵ <https://www.qls.com.au/content-collections/handbooks/queensland-handbook-for-practitioners-on-legal-capacity>

Section 3: Capacity assessment principles

Principle 3

QLS recommends Principle 3 expressly state that maximising an adult's participation in decision-making, by providing them with support and information, is identified as one of the General Principles in the GAA⁶ and the *Powers of Attorney Act 1999* (Qld)⁷.

We also recommend Principle 3 set out what "all practicable steps" are to support an adult to make a decision. Information published by the Office of the Public Advocate about decision making support can be a helpful resource in this regard⁸.

This principle should also recognise the role of advocacy to aid adults who require decision-making support.

Principle 4

We suggest Principle 4 note that ageist, ableist and/or racist assumptions can influence prima facie assessments and are contrary to QCAT findings and the General Principles under the GAA.

In the example of Paz and his father on page 13 of the Guidelines, we suggest you reconsider highlighting the father's older age to avoid any implication that his capacity is in question due to his age. As noted in Section 2 of the Guidelines, age is not a determinant of incapacity.

Section 5: The capacity assessment checklist

It is important to recognise that, for culturally and linguistically diverse and First Nations communities, cultural factors can influence a client's decision making and should be accommodated with appropriate supports during the assessment process.

We recommend the Guidelines include explicit reference to culturally appropriate supports to maximise decision-making ability through the assessment and instructional process, both on page 27 and throughout the Guidelines.

Appendices

To reduce the length of the document, we suggest some of the appendices could be published as separate fact sheets.

Appendix A: If you need further assistance

Pages 51-52 list some organisations that can provide further assistance such as Aged and Disability Advocacy Australia. However, this list should include all independent disability advocacy organisations who are funded by the Queensland Government to provide advocacy assistance. We suggest the organisations listed on the Queensland government's website are included in the Guidelines and updated regularly⁹.

⁶ *Guardianship and Administration Act 2000* (Qld) s11B, general principle 8.

⁷ *Powers of Attorney Act 1999* (Qld) s6C.

⁸ <https://www.justice.qld.gov.au/public-advocate/our-advocacy/justice-and-human-rights/decision-making-support>

⁹ <https://www.qld.gov.au/disability/legal-and-rights/advocacy>

Further consultation

QLS would welcome the opportunity to provide further feedback if any amendments to the Guidelines are proposed. We also recommend the Department seek feedback from a wide range of stakeholders from a range of geographical areas, as some of the issues raised in this letter are likely to disproportionately affect access to justice for adults in rural, remote and regional areas.

We would also welcome the opportunity to discuss the publication of guidelines for assessing other forms of capacity, such as testamentary capacity.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on [REDACTED] [REDACTED]

Yours faithfully



Genevieve Dee
President