

## Director of Child Protection Litigation Practice Note

### Guidance on responding to a concern about a parent's decision-making capacity for legal matters in child protection proceedings

1. This Practice Note provides guidance to Director of Child Protection Litigation (DCPL) Lawyers on when there is a concern about a parent's decision-making capacity for legal matters in relation to a child protection proceeding (proceeding).

#### Summary

2. An adult is presumed to have capacity for a matter,<sup>1</sup> that is, to have the "capacity to make all decisions unless there is evidence to the contrary that can rebut the presumption. The presumption of capacity has long been recognised at common law".<sup>2</sup>
3. Concerns about a parent's decision-making capacity in legal matters in the context of a child protection matter can be raised before or during a proceeding within the documents and evidence relied on, or, alternatively by the legal representative of the parent or by another participant in the proceeding.
4. The DCPL as a representative of the State<sup>3</sup> and as an officer of the Supreme Court,<sup>4</sup> has an obligation to assist the Childrens Court of Queensland<sup>5</sup> to make a fully informed decision in accordance with the provisions of the *Child Protection Act 1999* (the CP Act) in respect to applying for child protection orders and conducting proceedings under the DCPL Act.<sup>6</sup> This includes raising where required, a concern about a parent's decision-making capacity in legal matters with the court.
5. The Queensland Civil and Administrative Tribunal (QCAT), has the exclusive jurisdiction for the appointment of guardians for adults with impaired capacity for matters.<sup>7</sup>
6. The parent concerned or another *interested person* can make an application to QCAT under the GA Act for a declaration or order in relation to the parent's decision-making capacity for legal matters,

<sup>1</sup> Sections 7(a) and 11, and 11B (1<sup>st</sup> General principle) of the *Guardianship and Administration Act 2000* (GA Act).

<sup>2</sup> Page 19 of the Queensland Handbook for Practitioners on Legal Capacity, which can be accessed through the Queensland Law Society at:  
[www.qls.com.au/Knowledge\\_centre/Ethics/Resources/Client\\_instructions\\_and\\_capacity/Queensland\\_Handbook\\_for\\_Practitioners\\_on\\_Legal\\_Capacity](http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity/Queensland_Handbook_for_Practitioners_on_Legal_Capacity)

<sup>3</sup> Section 8 of the *Director of Child Protection Litigation Act 2016* (DCPL Act).

<sup>4</sup> Section 38 of the *Legal Profession Act 2007*, and noting that the powers and functions of the DCPL have been delegated under section 14 of the DCPL Act to ODCPL Lawyers in an Instrument of Delegation dated 1 July 2016.

<sup>5</sup> Rule 3 of the Australian Solicitors Conduct Rules 2011 – 'Paramount duty to the court and the administration of justice'.

<sup>6</sup> Section 10 of the DCPL Act.

<sup>7</sup> With exception of appointments made under s 245 of the GA Act.



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and where required, appoint a guardian and/or administrator in respect of an adult with impaired decision-making capacity.

7. If neither the parent nor an *interested person* makes an application to QCAT under the GA Act, there will need to be consideration by the court as to whether it should invite QCAT to consider of its own initiative for a determination to be made about the parent's decision-making capacity for legal matters in the context of the proceeding. It is important to note that this is not a transfer of the proceeding, rather, it is the court managing the issue of the concern about the parent's decision-making capacity for legal matters by inviting QCAT to consider the issue on its own initiative.<sup>8</sup>
8. If the DCPL notes the issue and determines that it should be dealt with by way of QCAT being invited to consider the matter, a written application in the proceeding should be made by the DCPL, which should be supported by evidence exhibited to an affidavit outlining the basis of the concern. This will include identifying what specific evidence should be provided to QCAT in support of QCAT being invited to consider the issue, and what work may need to be undertaken to ensure just the evidence that is relevant to the issue is provided.
9. If the court decides to invite QCAT to consider the issue, the DCPL should provide the court with a draft order as per this practice note, and in respect of this issue, it is noted that the average number of weeks that most applications were finalised within is 37 weeks,<sup>9</sup> and so an initial adjournment of 12 weeks should be sought to establish whether QCAT will consider the matter and to obtain an update on the expected timeframe.

### **Presumption of capacity**

10. An adult is presumed to have capacity for a matter,<sup>10</sup> that is, to have the "capacity to make all decisions unless there is evidence to the contrary that can rebut the presumption. The presumption of capacity has long been recognised at common law".<sup>11</sup>

<sup>8</sup> Section 241 of the GA Act, which provides for the transfer of a proceeding between the court and QCAT, relates to a proceeding under the GA Act being transferred between the Supreme Court and QCAT, recognising as per s 240 of the GA Act that the Supreme Court's inherent jurisdiction is not effected by the GA Act, which includes its *parens patriae* jurisdiction.

<sup>9</sup> QCAT guidance as at 30 November 2024, provides that the number of weeks that most applications were finalised for 'Decision-making for Adults with impaired capacity' matters was 37 weeks:  
<https://www.qcat.qld.gov.au/applications/timeframes>

<sup>10</sup> Sections 7(a) and 11, and 11B (1<sup>st</sup> General principle) of the GA Act.

<sup>11</sup> Page 19 of the Queensland Handbook for Practitioners on Legal Capacity, which can be accessed through the Queensland Law Society at:  
[www.qls.com.au/Knowledge\\_centre/Ethics/Resources/Client\\_instructions\\_and\\_capacity/Queensland\\_Handbook\\_for\\_Practitioners\\_on\\_Legal\\_Capacity](http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity/Queensland_Handbook_for_Practitioners_on_Legal_Capacity)

## A legal matter

11. The GA Act provides that a legal matter for an adult includes a matter relating to the 'use of legal services to bring or defend a proceeding before court', and 'bringing or defending a proceeding, including settling a claim, whether before or after the start of a proceeding'.<sup>12</sup>

## Concerns about a parent's decision-making capacity in legal matters

12. Concerns about a parent's decision-making capacity in legal matters in the context of a proceeding could be raised within the documents and evidence that the DCPL receives from Child Safety as part of the brief of evidence<sup>13</sup> or at any point during a proceeding in the court under the CP Act. The basis of the concerns may be any one or more of the following:
  - a. an expert report or opinion obtained by either Child Safety or another party such as the separate representative (will usually be in evidence before the court) that provides an opinion that the parent has impaired decision-making capacity; or
  - b. an expert report or opinion obtained by the parent's lawyer (would not necessarily be in evidence), which would have occurred after the lawyer had made an assessment of their client's decision-making capacity that led to the lawyer arranging for their client to undergo a formal capacity assessment from an appropriate expert that substantiated the concern; or
  - c. a lawyer has made an assessment of their client's decision-making capacity, which led to the lawyer referring their client for a formal capacity assessment from an appropriate expert and the client refused to participate in the assessment.<sup>14</sup>
13. It is important to note that an expert report may be focused on decision-making capacity in relation to a parent's other decision-making domains, and depending on the expert's qualifications and the terms of reference of their engagement, the report may not necessarily be informative in relation to a parent's decision-making capacity in legal matters for the purposes of the proceeding.

## Rights and principles to take into account when considering concerns about a parent's decision-making capacity in legal matters in a proceeding

14. When considering concerns raised about a parent's decision-making capacity in legal matters in a proceeding, the DCPL should have regard to the following acknowledgement of rights provision set out in the GA Act:

<sup>12</sup> A legal matter is defined within s 10 of the GA Act (see s 18 'Legal matter' in Part 3 of Schedule 2 'Types of matters').

<sup>13</sup> Child Safety are required to provide the DCPL a brief of evidence under s 16 of the DCPL Act.

<sup>14</sup> Note the Queensland Government has issued Queensland Capacity Assessment Guidelines 2020 – A guide to understanding capacity, capacity assessments and the legal tests of capacity under Queensland's guardianship legislation, which can be accessed at: <https://www.publications.qld.gov.au/dataset/capacity-assessment-guidelines>.



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- (a) an adult's right to make decisions is fundamental to the adult's inherent dignity;
- (b) the right to make decisions includes the right to make decisions with which others may not agree;
- (c) the capacity of an adult to make decisions may differ according to—
  - i. the type of decision to be made, including, for example, the complexity of the decision to be made; and
  - ii. the support available from members of the adult's existing support network;
- (d) the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent;
- (e) an adult with impaired capacity has a right to adequate and appropriate support for decision-making.<sup>15</sup>

15. Further, the DCPL should also have regard to the general principles of the GA Act, in particular, the following general principles:

**2 Same human rights and fundamental freedoms**

- (1) An adult's inherent dignity and worth, and equal and inalienable rights, must be recognised and taken into account.
- (2) The rights of all adults to the same human rights and fundamental freedoms, regardless of a particular adult's capacity, must be recognised and taken into account.
- (3) The principles on which an adult's human rights and fundamental freedoms are based, and that should inform the way those rights and freedoms are taken into account, include—
  - (a) respect for inherent dignity and worth, individual autonomy (including the freedom to make one's own choices) and independence of persons; and
  - (b) non-discrimination; and
  - (c) full and effective participation and inclusion in society, including performing roles valued by society; and
  - (d) respect for difference and acceptance of persons with impaired capacity as part of human diversity and humanity; and
  - (e) equality of opportunity; and
  - (f) accessibility; and
  - (g) equality between all persons regardless of gender.

**3 Empowering adult to exercise human rights and fundamental freedoms**

The importance of the following matters must be taken into account—

- (a) empowering an adult to exercise the adult's human rights and fundamental freedoms;
- (b) encouraging and supporting an adult—
  - i. to perform social roles valued in society; and
  - ii. to live a life in the general community and to take part in activities enjoyed by the community; and

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<sup>15</sup> Section 5 of the GA Act.





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- iii. to achieve maximum physical, social, emotional and intellectual potential and to become as self-reliant as practicable;
- (c) an adult's right to participate to the greatest extent practicable in the development of policies, programs and services for people with impaired capacity for a matter.

**6 Respect for privacy**

- (1) An adult's privacy must be taken into account and respected.
- (2) An adult's personal information, including health information, must be protected on the same basis as other people's personal information is protected.

**8 Maximising an adult's participation in decision-making**

- (1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life must be recognised and taken into account.
- (2) An adult must be given the support and access to information necessary to enable the adult to make or participate in decisions affecting the adult's life.
- (3) An adult must be given the support necessary to enable the adult to communicate the adult's decisions.
- (4) To the greatest extent practicable, a person or other entity, in exercising power for a matter for an adult, must seek the adult's views, wishes and preferences.
- (5) An adult's views, wishes and preferences may be expressed orally, in writing or in another way, including, for example, by conduct.
- (6) An adult is not to be treated as unable to make a decision about a matter unless all practicable steps have been taken to provide the adult with the support and access to information necessary to make and communicate a decision.<sup>16</sup>

16. In practical terms, just because a parent appears to have impaired decision-making capacity for a legal matter, this may not mean the appointment of a guardian is necessary. The capacity of a parent to make a decision in respect of a legal matter in the proceeding, may, as outlined in the GA Act, differ according to:

- a. the nature and extent of the parent's impaired capacity; and
- b. the type of decision to be made, including, for example, the complexity of the decision to be made; and
- c. the support available from members of the adult's existing support network.

17. The DCPL needs to consider if there is a legal matter in the proceeding for which a decision needs to be made, including considering the support that may need to be made available to the parent along

<sup>16</sup> Section 11B (2<sup>nd</sup>, 3<sup>rd</sup>, 6<sup>th</sup> and 8<sup>th</sup> General principles) of the GA Act.

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with the time that might be required for this to occur. As the result may be that it is then not necessary to seek a declaration about the parent's decision-making capacity for legal matters, and consequently, a potential lengthy delay in the proceeding will be avoided.

18. When considering concerns raised about a parent's decision-making capacity in legal matters in a proceeding, the DCPL, consistent with their obligations as a representative of the State,<sup>17</sup> must ensure when considering and taking action, that the parent has been made aware of the concerns relating to their decision-making capacity for legal matters, and been given fair and proper notice of any application that is to be made in the proceeding, including the reasons for it, particularly where they are unrepresented. This includes where required, assisting the parent by encouraging them to obtain legal advice and representation, and/or to obtain other support, and ensuring that they have the time to do so.
19. In addition to having regard to the acknowledgement of rights provision set out in the GA Act, the DCPL must also give proper consideration to human rights before making a decision, and act and make decisions that are compatible with human rights.<sup>18</sup>
20. If a DCPL Lawyer on review of the circumstances of a matter is uncertain as to whether concerns about a parent's decision-making capacity in legal matters should be raised in a proceeding, the DCPL Lawyer should consult with their Assistant Director of Child Protection Litigation to determine how the issue should be managed.

**Obligation to raise a concern about a parent's decision-making capacity in legal matters with the court**

21. The DCPL as a representative of the State<sup>19</sup> and as an officer of the Supreme Court,<sup>20</sup> has an obligation to assist the court to make a fully informed decision in accordance with the provisions of the CP Act in respect to applying for child protection orders and conducting proceedings under the DCPL Act. This includes raising where required, a concern about a parent's decision-making capacity in legal matters with the court.
22. The Victorian Supreme Court case of *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 (Goddard) provides a summary of the legal principles in relation to the presumption of legal personality and capacity, and sets out the considerations when there is a potential issue with a party's/client's capacity.<sup>21</sup>

<sup>17</sup> See the model litigant principles outlined in Part 4 (guidelines 5 to 9) of the DCPL's Guidelines issued under s 39 of the DCPL Act

<sup>18</sup> Section 58 of the *Human Rights Act 2019* (HR Act).

<sup>19</sup> Section 8 of the *Director of Child Protection Litigation Act 2016* (DCPL Act)

<sup>20</sup> Section 38 of the *Legal Profession Act 2007*, and noting that the powers and functions of the DCPL have been delegated under section 14 of the DCPL Act to ODCPL Lawyers in an Instrument of Delegation dated 1 July 2016.

<sup>21</sup> *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87, paragraphs [545] to [569], pages 155 to 167 of judgment of Bell J, accessed at: [the Law Library of Victoria judgments index](#).



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23. Whilst acknowledging that a lawyer representing a parent must follow their lawful, proper and competent instructions,<sup>22</sup> it is however noted that a lawyer representing a parent, also has an obligation as an officer of the Supreme Court to bring to the attention of the court any doubts or concerns they hold regarding their client's capacity to commence or participate in a proceeding (competence to instruct). This is based on the decision of Goddard, which refers to a Queensland Supreme Court decision of McMeekin J in the matter of *Till v Nominal Defendant* [2010] QSC 121 (Till), where the solicitors were said to have acted in an appropriate manner.<sup>23</sup>

**Role of the court when concerns raised about a parent's decision-making capacity in legal matters**

24. Once a concern about a parent's decision-making capacity in legal matters is raised in a proceeding, then the issue will need to be managed by the court, and resolved before the court determines the child protection application. It is noted that the *Childrens Court Act 1992* (CC Act) nor the underlying *Childrens Court Rules 2016* (CC Rules) provide the court with the ability to appoint a litigation guardian for a person under a legal incapacity in a proceeding.

**Obtaining a declaration or order about a parent's decision-making capacity in legal matters**

25. QCAT has the exclusive jurisdiction<sup>24</sup> for the appointment of guardians for adults with impaired capacity for matters,<sup>25</sup> which includes the function to ensure it has all relevant information and material<sup>26</sup> and where necessary make a declaration about an adult's decision-making capacity, and where required, appoint a guardian in respect of an adult with impaired decision-making capacity.<sup>27</sup>
26. QCAT may, by order, appoint a guardian for a personal matter (including a legal matter for the purposes of a proceeding) for a parent if satisfied:
- the parent has impaired capacity for the matter; and
  - there is a need for a decision in relation to the matter or the parent is likely to do something in relation to the matter that involves, or is likely to involve, unreasonable risk to the parent's health, welfare or property; and
  - without an appointment, the parent's needs will not be adequately met, or their interests will not be adequately protected.<sup>28</sup>

<sup>22</sup> Rule 8 of the Australian Solicitors Conduct Rules 2012.

<sup>23</sup> *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87, paragraphs [568] and [569], pages 166 and 167.

<sup>24</sup> With exception of appointments made under s 245 of the GA Act.

<sup>25</sup> Section 82 of GA Act.

<sup>26</sup> Section 130 of the GA Act.

<sup>27</sup> Section 12 of the GA Act and s 10 of the *Queensland Civil and Administrative Tribunal Act 2009*.

<sup>28</sup> Section 12(1) of the GA Act



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27. Capacity for a person for a matter is defined to mean the person is capable of:

- a. understanding the nature and effect of decision about the matter; and
- b. freely and voluntarily making decision about the matter; and
- c. communicating the decision in some way.<sup>29</sup>

**Who can make an application to QCAT for a declaration or order about a parent's decision-making capacity for legal matters?**

28. The parent concerned or another *interested person* can make an application to QCAT under the GA Act for a declaration or order in relation to the parent.<sup>30</sup> An *interested person* is someone who has a sufficient and continuing interest in the parent.<sup>31</sup> In practical terms, this could be a member of the parent's family, a close friend, a professional or someone who has a genuine and continuing interest in the welfare of the parent. The Queensland Handbook for Practitioners on Legal Capacity, prepared by Allens and Queensland Advocacy Incorporated is of assistance with this issue.<sup>32</sup>

29. It is also noted that QCAT may make a declaration about the capacity of a parent on its own initiative.<sup>33</sup>

**Approach in the absence of an application for a declaration or order about a parent's decision-making capacity for legal matters**

30. When a concern is raised about a parent's decision-making capacity in legal matters and neither the parent nor an *interested person* makes an application to QCAT under the GA Act, there will need to be consideration by the court as to whether the court should invite QCAT to consider of its own initiative for a determination to be made about the parent's capacity.

31. It is important to note that this is not a transfer of the proceeding, rather, it is the court managing the issue of the concern about the parent's decision-making capacity for legal matters by inviting QCAT to consider the matter on its own initiative.<sup>34</sup>

32. Under s 8(5) of the CC Act and rules 62 to 67 of the CC Rules, in particular r 67(2)(c), the court is empowered to make a direction about things to be done to help decide whether a party to a

<sup>29</sup> Section 3 (dictionary in schedule 4) of the GA Act.

<sup>30</sup> Section 115 of the GA Act

<sup>31</sup> Sections 3 (dictionary in schedule 4) and 126 of the GA Act.

<sup>32</sup> Queensland Handbook for Practitioners on Legal Capacity, in particular Chapter 7 (pages 46 through 52) can be accessed through the Queensland Law Society at: [Queensland Handbook for Practitioners on Legal Capacity](#)

<sup>33</sup> Section 146(2) of the GA Act

<sup>34</sup> Section 241 of the GA Act, which provides for the transfer of a proceeding between the court and QCAT, relates to a proceeding under the GA Act being transferred between the Supreme Court and QCAT, recognising as per s 240 of the GA Act that the Supreme Court's inherent jurisdiction is not effected by the GA Act, which includes its *parens patriae* jurisdiction.





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proceeding understands the nature, purpose and legal implications of the proceeding, or ensure the party understands the proceeding. This it is noted, may not mean the appointment of a guardian is necessary. For example, as outlined in s 106 of the CP Act, if a parent has a disability that prevents them from understanding or taking part in the proceeding, the parent may need a person to facilitate their taking part in the proceeding rather than through the formal appointment of a guardian. This is linked back to the DCPL needing to consider if there is a legal matter for which a decision needs to be made, including considering the support that may need to be made available to the parent along with the time that might be required for this to occur, rather than the seeking of a declaration about the parent's decision-making capacity for a legal matter or an order appointing a guardian.

33. It is important to note that a proceeding under the GA Act in QCAT in respect of considering whether a declaration should be made about the parent's decision-making capacity and for a guardian to be appointed for the purposes of their participation in a proceeding, that the QCAT proceedings are open and information about the child protection proceedings can be published unless otherwise ordered.
34. The QCAT decision of *RNE*,<sup>35</sup> which concerned a matter where the court had referred to QCAT the questions of whether RNE had capacity to understand the child protection proceedings, and whether a guardian should be appointed to make decisions for him in legal matters, involved QCAT initiated applications in respect of a declaration about RNE's capacity and for the appointment of a guardian. The matter also included QCAT initiated applications for a confidentiality order and a non-publication order that were heard at the same time. This decision provides an overview of the legislative framework for confidentiality orders and non-publication orders in guardianship proceedings before QCAT, and how they may apply to documents provided by the court to QCAT in support of an invitation to QCAT to consider of its own initiative for a determination to be made about the parent's capacity.<sup>36</sup> The orders made by QCAT in *RNE* were that the names of REN's children were not to be disclosed to any person entitled to access the documents on QCAT's file, and unless ordered by QCAT, the documents that had been provided to QCAT from the court were not to be disclosed to any person entitled to access documents on QCAT's file.
35. The QCAT decision of *QJI*,<sup>37</sup> is another matter that concerned the court inviting QCAT to consider the question of whether the mother in child protection proceedings, QJI, had capacity to understand the conduct of proceedings, and whether a guardian should be appointed to make decisions for her in legal matters. QCAT initiated applications in respect of a declaration about QJI's capacity, for the appointment of a guardian, a confidentiality order and a non-publication order. In determining these applications, whilst acknowledging that the decisions required to conduct litigation in a child litigation proceeding are complex and involve a consideration of highly sensitive material relevant to the subject child, and a party to the proceeding, QCAT found that there was

<sup>35</sup> *RNE* [2022] QCAT 343.

<sup>36</sup> [5] to [14] on pages 2 to 4 *RNE* [2022] QCAT 343.

<sup>37</sup> *QJI* [2024] QCAT 509.

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insufficient evidence to rebut the presumption of capacity for QJI to make decisions about her legal matters relating to the proceedings, declaring that QJI had capacity to make decisions about her legal matters relating to the proceedings with appropriate support for decision-making.<sup>38</sup> Further QCAT dismissed the applications for a non-publication order and confidentiality order, referring to the protection afforded under the GA Act. In particular, section 114A(2) that provides a person must not without reasonable excuse, publish information about a guardianship proceeding to the public or a section of the public, if the publication is likely to lead to the identification for the relevant adult by a member of the public, or by a member of the section of the public to whom the information is published, and also referred to the protection afforded in relation to identification of a subject child under the CP Act.<sup>39</sup>

**Requirements for seeking the court to invite QCAT to consider an issue about a parent's decision-making capacity in legal matters**

36. When the DCPL determines that there is a concern about whether a parent has legal capacity in a proceeding that needs to be resolved by the court inviting QCAT to consider the matter, a written application in the proceeding should be made, which should be supported by evidence exhibited to an affidavit outlining the basis of the concern.
37. The application in the proceeding should identify what specific evidence is to be provided to QCAT in support of the invitation for it to consider the issue, and what work may need to be undertaken to ensure just the evidence that is relevant to the issue is provided.
38. If the basis of the concern is a standalone expert report or opinion obtained by either Child Safety or another party that is focused on the issue of the parent's decision-making capacity in legal matters, this is what should be provided to QCAT pursuant to a direction of the court.
39. If the basis of the concern is from a Child Safety case note/s or within evidence provided in the body of an affidavit, the DCPL Lawyer should consider and make a decision as to whether a standalone brief affidavit needs to be prepared by Child Safety and filed by the DCPL that solely focuses on the issue of the parent's decision-making capacity in respect of the legal matters, or whether it can be dealt with by way of redaction being undertaken of the evidence to ensure that just the evidence that provides the basis of concern is provided to QCAT pursuant to a direction of the court. This decision should be made in consultation between the DCPL and Child Safety.
40. In these matters, QCAT will generally consider 2 matters. Firstly, does the parent have capacity? If yes, no further action is taken, and the matter will generally be dismissed. If no, QCAT will then likely consider whether there is the need for the appointment of a guardian.

<sup>38</sup> Paragraphs [8] to [10] on pages 3 and 4, and paragraph [17] on page 5 of *QJI* [2024] QCAT 509.

<sup>39</sup> Paragraph [19] on page 5 *QJI* [2024] QCAT 509.



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41. To assist QCAT to hold enquires and make a declaration about the parent's decision-making capacity, and where required, appoint a guardian, the DCPL Lawyer should work with Child Safety to complete a contact list of interested persons that is to be provided to QCAT as part of the referral of the issue. Appendix A to this note is a template contact list that is to be used for this purpose.
42. Appendix B to this note is a copy of a proposed draft order inviting QCAT to consider the matter. Please note that if there is question of capacity for both parents, then QCAT require separate orders to be made.

**How long should a child protection proceeding be adjourned?**

43. If the court invites QCAT to consider of its own initiative for a determination to be made about the parent's decision making capacity in legal matters, when considering the length of an adjournment for this issue to be considered, it is noted that for 'Decision-making for Adults with impaired capacity', the average number of weeks that most applications were finalised within is 37 weeks,<sup>40</sup> and so an initial adjournment of 12 weeks should be sought to establish whether QCAT will consider the matter and to obtain an update on the expected timeframe.

**Abbreviations and definitions of terms used in the practice note**

44. The abbreviations and definitions of terms used within the practice note are as follows:
  - a. *Child protection application* as per r4 of the Rules (dictionary in schedule 1) means an application under the CP Act for the making, extension, amendment or revocation of a court assessment order or child protection order
  - b. *Child protection order* as per s3 of the CP Act (dictionary in schedule 3) means a child protection order under Chapter 2, part 4, including:
    - i. an order extending, varying, or revoking a child protection order; and
    - ii. an interim order under s67 of the CP Act in relation to a proceeding for a child protection order.
  - c. *Child protection proceeding* as per s3 of the CP Act (dictionary in schedule 3) means a proceeding under the CP Act for the making, extension, amendment, or revocation of a child protection order
  - d. CP Act: *Child Protection Act 1999*

<sup>40</sup> QCAT guidance as at 30 November 2024, provides that the number of weeks that most applications were finalised for 'Decision-making for Adults with impaired capacity' matters was 37 weeks:  
<https://www.qcat.qld.gov.au/applications/timeframes>



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- e. DCPL Act: *Director of Child Protection Litigation Act 2016*
- f. *Proceeding* – see *child protection proceeding*
- g. Rules: *Childrens Court Rules 2016*

Date effective	Application	Approved by
28/03/2025	All employees of the Office of Director of Child Protection Litigation	Nigel A. Miller

Version	Notes	Author	Date of change
1.0	Initial version	Nigel A. Miller	



## Appendix A

### Referral to QCAT for consideration of a declaration or order about a parent's decision-making capacity for legal matters for the purposes of the child protection proceeding

#### Contact List of Interested Persons

This form is to be completed by a Director of Child Protection Litigation (DCPL) lawyer when the Childrens Court directs that a concern raised about a parent's legal decision-making capacity for legal matters is to be referred to QCAT to consider on its own initiative for a determination to be made about the parent's capacity.

#### Adult:

Adult:	
DOB:	
Contact Number:	
Address:	

#### Interested Parties:

Name	Relationship to adult	Contact details
		Ph: Address:

Name	Relationship to adult	Contact details
		Ph: Address:

Name	Relationship to adult	Contact details
		Ph: Address:

Name	Relationship to adult	Contact details
		Ph: Address:

Name	Relationship to adult	Contact details
		Ph: Address:

Appendix B

**Form 16**

*Childrens Court Act 1992*  
*Child Protection Act 1999*  
Sections 63, 64, 65, 66, 67, 68, 69

**ADJOURNMENT OF PROCEEDING FOR A CHILD PROTECTION ORDER**

**CHILD:** Jack Brown  
Date of Birth: 31 March 2014  
Sex: Male  
Indigenous ID: Neither Aboriginal nor Torres Strait Islander

Upon application for a Child Protection Order, made by the Director of Child Protection Litigation, in the Childrens Court at [location] on [ date] for the above-named child.

I adjourn the proceeding to [date] at [time] for further mention of the application.

I MAKE an interim order in relation to the child –

- (1) Granting temporary custody of the child to the Chief Executive, Department of Communities, Child Safety and Disability Services pursuant to section 67(1) of the *Child Protection Act 1999*.

In respect of the question of [name], the [respondent mother's/respondent father's], capacity to understand the conduct of the child protection proceedings, the Childrens Court invites the Queensland Civil and Administrative Tribunal ("QCAT") to consider the issue, of its own initiative, and where necessary make a declaration about the [mother's/father's] decision-making capacity, and where required, appoint a guardian.

I DIRECT –

- (1) That the chief executive (child safety) is to provide the Director of Child Protection Litigation within 3 business days a list of all interested persons, including details about their relationship with [name] and their contact details.
- (2) That the Registrar of the Childrens Court at [jurisdiction] provide the following material to QCAT for consideration:
  - A copy of this order
  - A copy of the application in a proceeding
  - A copy of exhibit [the report or assessment], or
  - A copy of the Affidavit of..., or
  - A copy of paragraph/s [...] of the Affidavit of..., and
  - Contact List of Interested Persons prepared by the Director of Child Protection Litigation.
- (3) That consideration be given by QCAT as to the need for a confidentiality order in relation to information regarding the child that is the subject of confidential child protection proceedings.



**DCPL guidance on responding to a concern about a parent's decision-making capacity for legal matters in child protection proceedings**

The orders have effect for the period of the adjournment.

**Magistrate**

**Place:**

**Date:**