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Our practice support tools are developed using current reference material. The source of this material is available upon request.

## Overview

This tool has been developed to:

- Provide nurses with information to assist them with understanding the legislation related to capacity assessment
- Assist nurses to understand their accountabilities related to capacity assessment

Like all regulatory tools, use this document in conjunction with employer policy, applicable legislation and the standards of practice and code of ethics for nurses.

## What is Capacity?

[Capacity](#) refers to the [client](#)'s ability to understand information that is relevant to the making of a personal-care decision and the ability to appreciate the reasonably foreseeable consequences of a decision or lack of a decision.

Capacity is an essential element of [informed consent](#). A client can provide informed consent if they understand the information relevant to the service being offered and understand the consequences of a decision or lack of a decision related to the service. Clients are presumed to have capacity to make decisions unless there is information to suggest otherwise.

In Nova Scotia, legislation specifies:

- Under what circumstances a formal capacity assessment is to be performed
- Who is authorized to perform a formal [capacity assessment](#)
- How a formal capacity assessment is performed and reported
- Who is authorized to make decisions for an individual when it is determined that they lack capacity

An individual's capacity may vary with time or with the nature of the decision to be made.

Federal legislation specifies who can complete a capacity assessment, specifically related to client decision-making for [MAiD](#).

## Provincial Legislation

In Nova Scotia, the Personal Directive Act, the Hospitals Act and the Adult Capacity and Decision-Making Act address capacity assessments.

### PERSONAL DIRECTIVES ACT AND REGULATIONS

The [Personal Directives Act \(PDA\)](#) allows an individual to make a personal directive outlining instructions about future personal care decisions to be made on their behalf in the event that they lose capacity. The PDA also authorizes the individual to appoint a delegate to make personal care decisions for them should they no longer have capacity to do this for themselves.

According to the PDA:

- Personal care is considered to include, but is not limited to, "health care, nutrition, hydration, shelter, residence, clothing, hygiene, safety, comfort, recreation, social activities, support services and any other personal matter that is prescribed by the regulations" (s.21).

- If an individual has not made a personal directive and has been determined to lack capacity, a statutory decision-maker can be appointed. This statutory decision-maker is usually the nearest relative who has capacity and is willing to make decisions. When no such relative exists, the Public Trustee acts as the statutory decision-maker.

Health care is further defined in the PDA [Regulations](#) as “any examination, procedure, service or treatment that is done for a therapeutic, preventative, palliative, diagnostic or other health-related purposes, and includes a course of health care or a care plan” (s. 2(2)).

Personal directives only take effect when an individual lacks the capacity to make a personal care decision.

## CAPACITY ASSESSMENTS UNDER THE PDA

A basic capacity assessment for personal care, as part of obtaining an individual’s consent for a service being offered falls within the scope of practice of many health care providers. All nurses can perform this type of basic capacity assessment.

According to the PDA, a nurse can request a formal capacity assessment when they are unable to determine if the client has capacity or if there has been a significant change in a client’s day-to-day capacity. The PDA only authorizes physicians to complete this type of formal capacity assessment.

A formal capacity assessment is required when:

- Requested by the delegate, statutory decision-maker, nearest relative, health care provider, person in charge of a home care services provider or person in charge of a continuing care home in which the individual resides.
- Individuals request a reassessment of their capacity if they feel that their status has changed (PDA, s.10(2));
- There are concerns that the individual who has made a personal directive lacks capacity to make the decision to leave the province (PDA, s.11); or,
- A delegate’s capacity needs to be assessed (PDA, s. 13(a)).

Physicians are the only health care professionals authorized to complete Form 1: Assessment of Capacity to make Decisions about a Personal Care Matter under the PDA legislation.

## HOSPITALS ACT

The [Hospitals Act](#) presumes that every adult client in a hospital or a psychiatric facility has capacity to make all treatment decisions with respect to their health care.

According to the Hospitals Act, an individual admitted to a hospital or a psychiatric facility must consent to receive treatment.

If a client is suspected to lack capacity to make a decision regarding treatment, the Hospitals Act only authorizes a physician to conduct a capacity assessment to determine if a client can consent to treatment while in the hospital.

If a client is determined to lack capacity, the act authorizes who can provide consent to treatment for the client.

Physicians are the only health care professionals authorized to complete Form A: Declaration of Capacity to Consent to Treatment under the [Hospital Act Regulations](#).

## ADULT CAPACITY AND DECISION-MAKING ACT (ACDMA) AND REGULATIONS

The [Adult Capacity and Decision-Making Act](#) and [Regulations](#) apply to adults, who may not be able to make some or all decisions for themselves due to temporary or permanent learning disabilities, mental health conditions, brain injuries or other health issues.

According to the ACDMA and Regulations, an individual can apply to the court to be appointed as a representative for an adult who has been assessed to lack capacity to make decisions for themselves in one or more areas.

A capacity assessment under this legislation is completed by a designated assessor to determine the need to appoint a representative (formally known as a guardian) to make certain decisions for the individual across the different capacity domains. These domains include, but are not limited to, personal care, finances, living arrangements, health and leisure activities.

Capacity assessments under the ACDMA are for a different purpose than capacity assessments performed under the PDA or the Hospitals Act.

The ACDMA Regulations authorize the following health care professionals to conduct a capacity assessment for the specific reason to determine the need to appoint a representative:

- Physicians
- Psychologists
- Other designated health care professionals, including RNs and NPs, who have completed additional training through the Public Trustee's office.

RNs and NPs who have completed the additional required training and are designated assessors are authorized to perform a capacity assessment under the ACDMA and Regulations for the specific circumstances outlined in the legislation.

## Federal Legislation

### CRIMINAL CODE OF CANADA AND MEDICAL ASSISTANCE IN DYING (MAiD)

The Criminal Code of Canada requires that all clients requesting MAiD have an assessment to determine if they have capacity to provide informed consent to request and receive this intervention.

Under this federal legislation, only NPs and physicians are authorized to complete the capacity assessments required to confirm a client's eligibility for MAiD.

Table 1: Summary of Provider Roles in Assessing Capacity

Provider	Assessing Capacity to make Personal Care Decisions (PDA)	Assessing Capacity related to Decisions under Personal Directives Regulations (s.4)	Assessing Capacity to make decisions for treatment in Hospital (Hospitals Act)	Assessing Capacity to Determine Need for a Representative (ACDMA)	Capacity related to Requests for MAiD
LPN	X				
RN	X			X*	
NP	X			X*	X
Physician	X	X	X	X	X

\*RNs and NPs who have completed additional mandatory education by the Public Trustee's Office and are designated assessors

# Nurses Accountabilities Related to Capacity Assessment

Nurses are accountable to be familiar with the specific legislation that is applicable to their practice setting, the type of capacity assessment required, who is authorized to complete capacity assessments and to follow employer policies when initiating an assessment of capacity.

Table 2: Nurses Accountabilities Related to Capacity Assessment

PDA and Regulations	Hospitals Act	ACDMA and Regulations	MAiD
<ul style="list-style-type: none"> <li>If you believe the client has capacity, obtain consent from the client and provide the nursing service.</li> <li>Consult a physician to perform capacity assessments in the following circumstances:               <ul style="list-style-type: none"> <li>If you suspect the client lacks capacity to make personal care decisions</li> <li>There is a disagreement about the client's capacity</li> <li>A delegate, SDM or others as outlined in the PDA request a capacity assessment.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>If you believe the client has capacity, obtain consent from the client and provide the nursing service.</li> <li>Consult a physician to perform a capacity assessment:               <ul style="list-style-type: none"> <li>If you suspect the client lacks capacity to make decisions related to treatment while in hospital.</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>RNs and NPs who are designated assessors may perform capacity assessments following the requirement specified in the Act.</li> </ul>	<ul style="list-style-type: none"> <li>When a client requests MAiD, NPs are accountable to confirm client's eligibility for MAiD.</li> </ul>

## Key Points

- Individuals are presumed to have capacity to make decisions unless there is information to suggest otherwise.
- Physicians are the only health care professionals authorized to conduct formal capacity assessments under the PDA and the Hospital Act.
- Physicians and Psychologists are authorized to conduct formal capacity assessments under the ACDMA.
- RNs and NPs who have completed the appropriate education and are designated as capacity assessors are authorized under the ACDMA to perform capacity assessments to determine the need to appoint a representative for an individual.
- NPs are authorized to complete capacity assessments under MAiD legislation to confirm a client's eligibility for MAiD.
- Nurses should be aware of specific legislation that is applicable to their practice setting, the type of capacity assessment required, who are authorized to complete capacity assessments and follow any specific employer policies related to capacity assessment.

## Suggested Reading

- [Medical Assistance in Dying Practice Guideline for Nurses](#)

For further information on anything contained within this practice guideline, please contact an NSCN Practice Consultant at [practice@nscn.ca](mailto:practice@nscn.ca).