# Understanding PBU and integrating capacity principles into your advocacy

In [PBU & NJE v Mental Health Tribunal [2018] VSC 564](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2018/564.html?context=1;query=PBU;mask_path=), Justice Bellfound that VCAT committed an error of law in its interpretation and application of the capacity test in s 68 of the *Mental Health Act 2014* (Vic). VCAT had determined that both PBU and NJE lacked the capacity to give informed consent and were therefore liable to receive compulsory ECT.

PBU agreed he had a mental illness but not that he had treatment-resistant schizophrenia, as maintained by his doctors. VCAT found that while PBU could understand the information he was given about ECT (the first limb of the capacity test), he lacked capacity to give informed consent **because he disagreed with the diagnosis of his treating team**.

NJE was also being treated for schizophrenia, although she did not believe that she had any form of mental illness. NJE felt that ECT would interfere with her psychic abilities and instead wished to be treated with alternate medications. VCAT determined that NJE could understand and remember relevant information and communicate a decision about ECT, but **could not use and weigh that information** because she had not carefully considered the advantages and disadvantages of ECT before making her decision.

## Key principles:

### Lack of acceptance, belief of insight into diagnosis may be relevant when assessing capacity to give informed consent, but it is not determinative

VCAT’s finding that PBU did not have capacity because he did not accept his diagnosis was discriminatory because it imposed on him a requirement for having capacity which is not imposed on people without mental illness. Bell J at **[279]**:

For various personal, social and medical reasons, it is not uncommon for persons having mental illness *and* persons not having mental illness to deny or diminish their illness and the need for treatment. In both cases, lack of acceptance, belief or insight may be relevant when determining whether a person has the capacity to give informed consent, but it is only one consideration. It would be discriminatory to treat this consideration as determinative in relation to people having mental illness when it is not determinative in relation to people not having mental illness.

### To have capacity to give informed consent, it is not necessary to carefully consider the advantages and disadvantages of treatment

VCAT’s finding that NJE couldn’t ‘use or weigh’ the relevant information because she hadn’t carefully considered the advantages and disadvantages was discriminatory because it imposed a more stringent standard than applies to people without mental illness. Bell J at **[280]**:

# To have the capacity to give informed consent, it is not required of persons having mental illness, nor of persons not having mental illness, that they give, or are able to give, careful consideration to the advantages and disadvantages of the treatment. It is not required that they make, or are able to make, a rational and balanced decision in relation to the decision. It is enough that the person, like most people, is able to make and communicate a decision in broad terms as to the general nature, purpose and effect of the treatment.

### Bar for capacity to give informed consent is a low one

VCAT applied a threshold of capacity which was too high by requiring NJE to carefully consider the advantages and disadvantages of the proposed ECT. Bell J at **[178]** and **[206]**:

A capacity test applying to people with mental disability is plain-bread discriminatory on that ground if the standard of functioning required of those persons is greater than the relatively low standard required of people generally. As we have seen, the general capacity standard of the common law requires only that the person, whether mentally disabled or not, is able to understand the general nature, purpose and effect of the medical treatment, transaction or proceeding in question.

The capacity test must be applied in a non-discriminatory manner so as to ensure that people with mental illness are not deprived of their equal right to exercise legal capacity upon the basis of contestable value-judgments relating to their illness, decisions or behaviour, rather than upon the basis of the neutral application of the statutory criteria (s 68(2)(c)). In short, the test is not to be applied so as to produce social conformity at the expense of personal autonomy.

# The threshold of capacity in s 68(1)(a)–(d) is relatively low and requires only that the person understands and is able to remember and use or weigh the relevant information and communicate a decision in terms of the general nature, purpose and effect of the treatment. The threshold is not that the person understands the information sufficiently to make a rational or well-considered decision, is able make such a decision or has actually done so. The person does not need to have an understanding and possess those abilities in terms of the actual details of the proposed treatment but only the salient features.

See also [XJY v Mental Health Tribunal (Human Rights) [2021] VCAT 83](https://jade.io/article/784030) where VCAT found that, because of her delusions, XJY was unable to understand some of the information she was given about the effects of the ECT and therefore did not meet the criteria in s 68(1)(a). Further, VCAT found XJY’s ‘disorder of the form of thought’ specifically interfered with her ability to weigh information about ECT, as required by s 68(1)(c).

### The test of capacity in s 68(1) is primarily a functional one

In NJE, VCAT misapplied the test in criterion 68(1)(c). The test was whether NJE had the **ability** to ‘use or weigh’ relevant information, not whether she had actually done so, ‘to a careful consideration standard or at all’. Bell J at **[206]**:

Reflecting the common law, the test of capacity in s 68(1) is primarily a functional one in which the question is whether the person has the ability to remember and use or weigh relevant information and communicate a decision, not whether the person has actually done so (paras (b), (c) and (d)). The purpose of the functional test (as distinct from a status or outcome-based test) is to ensure that, in relation to capacity to give informed consent, people with mental illness are afforded the same respect for their inherent dignity and autonomy-space as people not having that illness. In relation to s 68(1)(a), the question is whether the person understands the information.

See also [XCH (Guardianship) [2020] VCAT 901](https://jade.io/article/763274) where VCAT found that the doctor had taken an outcome rather than a functional approach to XCH’s capacity assessment. VCAT noted the lack of evidence that XCH was ‘cognitively compromised’ – the medical hypothesis presented was that XCH lacked capacity because he had a disability and spent his money on illicit substances that were harmful to him.

### A person doesn’t lack capacity because they make unwise or unreasonable decisions

VCAT’s discussion of NJE’s circumstances were ‘heavily influenced by best-interest considerations’. For example, VCAT expressed concern that she spent several nights a week without sleep because she was working on her psychic healing powers. Capacity should be determined based on cognitive function, not decisions and behaviour. Bell J at **[206]** and **[280]**:

The capacity test must be applied in a non-discriminatory manner so as to ensure that people with mental illness are not deprived of their equal right to exercise legal capacity upon the basis of contestable value-judgments relating to their illness, decisions or behaviour, rather than upon the basis of the neutral application of the statutory criteria (s 68(2)(c)). In short, the test is not to be applied so as to produce social conformity at the expense of personal autonomy.

A person with mental illness is not to be found lacking the capacity to give informed consent simply by reason of making a decision that could be considered unwise (s 68(2)(d)), which recognises that self-determination is important for both dignity and health and that people with mental illness should have the same dignity of risk in relation to personal healthcare decision-making as other people. This reflects the two-way relationship between self-determination, freedom from non-consensual medical treatment and personal inviolability on the one hand and personal health and wellbeing on the other.

A person does not lack the capacity to give informed consent simply by making a decision that others consider to be unwise according to their individual values and situation. To impose upon persons having mental illness a higher threshold of capacity, and to afford them less respect for personal autonomy and individual dignity, than people not having that illness, would be discriminatory.

In [YLY v Mental Health Tribunal (Human Rights) [2019] VCAT 1383](https://jade.io/article/667030), the psychiatrist gave evidence that the possible consequences of YLY not having ECT were extended periods of inpatient treatment and the possibility of death due to poorly managed diabetes. VCAT found that the fact that YLY had made a choice that others considered to be unwise, did not mean he lacked capacity or was unable to use or weigh the information. Nor did it matter whether he accepted as true or accurate the information he was given about ECT – this did not mean he was unable to understand the information.

### Capacity is issue-specific, fluctuating and context dependent

A principle guiding a capacity assessment is that ‘a person’s capacity to give informed consent is specific to the decision that the person is to make’ (s 68(2)(a)). See also Bell J at **[152]** where he states that ‘the principles recognise the issue-specific, fluctuating and context-dependent nature of exercising the capacity to give informed consent’.

In [IFZ (Guardianship) [2020] VCAT 582](http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VCAT/2020/582.html?context=1;query=IFZ;mask_path=), VCAT noted that the test and guiding principles for capacity to give informed consent under s 68 of the Mental Health Act aligned with those used to evaluate decision-making capacity in s 5 of the *Guardianship and Administration Act 2019* (Vic). In considering whether IFZ had decision-making capacity in relation to her financial matters, VCAT noted that her estate was ‘substantial’ and required decisions about financial matters that were ‘complex’. The complexity of IFZ’s estate provided the context within which her capacity to make decisions about financial matters needed to be evaluated. Further, in [XCH (Guardianship) [2020] VCAT 901](https://jade.io/article/763274) VCAT found that XCH’s financial estate was ‘both modest and simple’ and therefore the degree of functional ability required to manage his estate was low.

### The information that a person must understand and be able to remember and use or weigh is only the ‘nature, purpose and effect’ of the treatment

VCAT found that NJE did not have capacity because she was not able to (or more accurately had not) consider the advantages and disadvantages of the treatment. Justice Bell found this to be an error. His Honour held that the ‘relevant information’ that a person must understand and be able to remember and use or weigh is only the ‘nature, purpose and effect’ of the treatment. Bell J at **[213]**:

…to satisfy the requirements of s 68(1)(a), (b) and (c), the person needs to understand the information relevant to the decision and be able to use or weigh the information only in terms of the general nature, purpose and effect of the treatment. This is a low threshold. It is not necessary for the person to have a detailed understanding of the treatment or be able to make a well-considered decision.

Therefore, in ECT matters, the relevant question for VCAT is whether a consumer understands and is able to remember and use or weigh, in simple terms, the:

* **nature** **of ECT**: That it is electricity applied to the brain is arguably sufficient, although some decision-makers consider the extra details that the consumer is placed under a general anaesthetic and/or that the electric current induces a seizure, to be relevant.
* **purpose** **of ECT**: That it is being given to treat the person for mental illness (or symptoms of mental illness) is sufficient. Note, that as per PBU, the consumer does not need to believe or agree with this, they just need to understand it, and be able to use or weigh it.
* **likely effects of ECT**: This includes both the intended effect (lessening of symptoms) and side effects (such as memory loss). Again, the consumer does not need to agree that these will be the effects (as strictly speaking the effects are unknown), but they need to understand and be able to use and weigh the fact that their doctor considers that these will be the effects.

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