

|  | <b>ACT:</b><br><b>Mental Health Act 2015</b> ss7-8  | <b>NSW:</b><br><b>Mental Health Act 2007</b>   | <b>NT:</b><br><b>Mental Health and Related Services Act 1998</b>                       | <b>QLD:</b><br><b>Mental Health Act 2016</b> ss14, 18   | <b>SA:</b><br><b>Mental Health Act 2009</b> s5A  | <b>TAS:</b><br><b>Mental Health Act 2013</b> s7  | <b>VIC:</b><br><b>Mental Health Act 2014</b> ss68, 70                         | <b>WA:</b><br><b>Mental Health Act 2014</b> ss13, 15, 18  | <b>NZ:</b><br><b>Mental Health Act (Compulsory Assessment and Treatment) Act 1992,</b> ss2, 59, 67, 130; <i>Health and Disability Services Consumers' Rights Regulation 1996</i> Right 7; <i>Guidelines to the MH Act 2012</i> 10.2.1, 11.4  |
|--|---|--|--|---|--|--|---|---|--|
| <b>Does a presumption of capacity exist?</b> | Yes; the presumption is rebutted if one of the following elements is lacking:   | Yes; the presumption is rebutted if one of the following elements is lacking:          | Yes; the presumption is rebutted if one of the following elements is lacking:          | Yes; the presumption is rebutted if one of the following elements is lacking:   | Yes; the presumption is rebutted if one of the following elements is lacking:          | Yes; the presumption is rebutted if he or she is unable to make the decision because of an impairment of, or disturbance in, the functioning of the mind or brain, and one of the following elements is lacking: | Yes; the presumption is rebutted if one of the following elements is lacking: | Yes; the presumption is rebutted if one of the following elements is lacking:   | Yes; the presumption is rebutted if one of the following elements is lacking:  |
| <b>Understanding</b>                         | ability to understand when a decision about treatment, care or support for the person needs to be made; the facts that relate to the decision; the main choices available to the person in relation to the decision; and how the consequences affect the person | ability to understand the information material to the decision                         | ability to understand the information material to the decision                         | ability to understand, in general terms – that they have an illness, or symptoms of an illness, that affects their mental health and wellbeing; and the nature and purpose of the treatment; and the benefits and risks of the treatment, and alternatives; and the consequences of not receiving the treatment | ability to understand the information material to the decision                         | ability to understand information relevant to the decision   | ability to understand information given that is relevant to the decision      | ability to understand any information or advice about the decision that is required under this Act to be provided; and understand the matters involved in the decision; and the effect. The information includes a clear explanation containing sufficient information to enable the person to make a balanced judgment; identifying and explaining any alternative treatment about which there is insufficient knowledge to justify it being recommended or to enable its effect to be predicted reliably; and warning about any risks | ability to understand the information relevant to the decision, including an explanation of the expected effects of any treatment including the expected benefits and the likely side effects. This should include: details of any drug, dose and method of administration proposed; the likely course of the treatment; intended effects of the treatment on the mental state of the patient, possible side effects; and any other relevant information |
| <b>Retaining</b>                             | N/A   | ability to retain the information material to the decision                             | ability to retain the information material to the decision                             | N/A   | ability to retain the information material to the decision                             | ability to retain information relevant to the decision   | ability to remember the information that is relevant to the decision          | N/A   | ability to retain that information   |
| <b>Using and Weighing</b>                    | ability to weigh up the consequences of the main choices  | ability to use and weigh the information as part of the process of making the decision | ability to use and weigh the information as part of the process of making the decision | N/A   | ability to use and weigh the information as part of the process of making the decision | ability to weigh information relevant to the decision  | ability to weigh information that is relevant to the decision                 | ability to weigh the above factors for the purpose of making the decision   | ability to use and weigh the information as part of the process of making the decision   |
| <b>Communicating</b>                         | ability to communicate the decision in whatever way the person can  | ability to communicate the decision.   | ability to communicate the decision.   | ability to communicate the decision in some way   | ability to communicate the decision in any manner.                                     | ability to communicate the decision (whether by speech, gesture or other means).   | ability to communicate the decision by speech, gestures or any other means.   | ability to communicate the decision in some way.  | ability to communicate that decision by any means.   |
| <b>Additional criteria</b>                   | on the basis of what is understood and the consequences that are weighed, make the decision.  | N/A  | N/A  | ability to make a decision about the treatment.   | N/A  | N/A  | N/A   | N/A   | N/A  |

Disclaimer: These tables have been developed by the RANZCP as at 30 June 2017 in order to allow key provisions in the mental health Acts to be compared. They are intended for reference purposes only and are not intended to be a substitute for legal or clinical advice.

Comment: The NSW, NT and SA Acts contain no capacity test, so the common law test in *Hunter and New England Area Health Service v A* [2009] NSWSC 761 applies. The four-part test set out in that case (understanding/retaining/using and weighing/communicating) is generally applied across the Acts. The Queensland Acts and Tasmanian Acts are the main exceptions. The Queensland Act focuses less on using and weighing information, and more on other aspects of decision-making. The Tasmanian Act adds the qualifier that the decision-making capacity is impaired by 'an impairment of, or disturbance in, the functioning of the mind or brain'.