



Marriage Celebrants Program

For delivery in 2021

Ongoing professional development for marriage celebrants – Real consent (revised version of the 2016 compulsory topic)

Introduction

This activity is listed in the Marriage (Celebrant Professional Development) Statement 2021.

The activity is designed to complement the needs of both experienced and inexperienced celebrants. The information provided in this activity is available in the Guidelines on the *Marriage Act 1961 for authorised celebrants* on the Attorney-General's Department's website page, [Resources for marriage celebrants](#).

Grounds on which a marriage may be invalid (part 8.2 of the guidelines)

Section 23B of the Marriage Act states that the only grounds on which a marriage is void are:

- (a) either of the parties is, at the time of the marriage, lawfully married to some other person
- (b) the parties are within a prohibited relationship
- (c) by reason of section 48 the marriage is not a valid marriage
- (d) the consent of either of the parties is not a real consent because:
 - (i) it was obtained by duress or fraud
 - (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
 - (iii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony,
or
- (e) either of the parties is not of marriageable age.

This activity considers real consent in more detail.

Real consent (parts 8.5 and 8.6 of the guidelines)

In respect of marriage law, there are two important types of consent, the consent required from a relevant person for the marriage of a minor and the requirement for the real consent of adult parties to voluntarily enter into a marriage. It is the latter that we will be focussing on in this activity.

- Consent is an important and potentially difficult area for authorised celebrants. Issues of real consent may arise infrequently, but can be difficult to assess when they do.

- Changes in the community have led to the issue of real consent arising in an increasing range of circumstances, for instance through increased awareness of the rights of people with disability, an ageing population and a growing awareness of the occurrence of forced marriages.

As noted above, paragraph 23B(1)(d) provides that a marriage is void if the consent of either of the parties is not a real consent.

Consent is not real consent under s 23B of the Marriage Act, if:

- (i) it was obtained by duress or fraud;
- (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
- (iii) that party did not understand the nature and effect of the marriage ceremony.

The family courts are responsible for determining whether or not any of these grounds are satisfied and render a marriage void.

Other consent issues that arise on the day of the marriage ceremony can include, for example, duress or a party to the marriage who is intoxicated, under the influence of drugs, or otherwise appears to be in an altered mental state to an extent that this could impair their ability to consent to the marriage.

General consequences if the marriage is void due to lack of consent

- The authorised celebrant may have committed an offence. Under section 100 of the Marriage Act it is an offence for a person to solemnise a marriage or purport to solemnise a marriage if the person has reason to believe there is a legal impediment to the marriage or if the person has reason to believe it would be void. The penalty for this offence is imprisonment for up to six months or 5 penalty units.
- The couple may have to apply to a court for a declaration as to the validity of their marriage. They may also have to go through a second marriage ceremony under section 113 of the Marriage Act. Each of these processes can be stressful, expensive and difficult for the couple. In addition, the authorised celebrant may be called to give evidence in court as to the consent of the parties.
- A valid marriage usually invalidates any existing will. The position of each member of the couple and members of their families may be considerably affected if a marriage is void.
- The Registrar of Marriage Celebrants may also take disciplinary measures against a Commonwealth-registered marriage celebrant (section 39I of the Marriage Act).

Forced marriage (duress)

Authorised celebrants should be aware that issues of consent can arise at any time prior to the conclusion of the marriage ceremony. Authorised celebrants must be satisfied that both parties genuinely consent to the marriage. If at any point a celebrant is unsure of the genuine consent of either party he or she should not proceed with solemnising the marriage.

Forced Marriage

A forced marriage is when a person gets married without freely and fully consenting, because they have been coerced, threatened or deceived.

Some types of coercion are obvious and easy to identify, including the use of physical or sexual violence, or refusing to let somebody leave a particular place or location until they accept the marriage. Other types of coercion are less obvious because they involve psychological and emotional pressure. These types of coercion can include making a person feel responsible for, or ashamed of, the consequences of not marrying, such as bringing shame on their family.

Forced marriage is a slavery-like practice, a form of gender-based violence and an abuse of human rights. Forced marriage is not limited to any particular cultural group, religion or ethnicity, and there are reports of forced marriage from all over the world. While men and boys can be victims of forced marriage, most reported victims are young women and girls.

The Commonwealth *Criminal Code Act 1995* (the Criminal Code) contains offences regarding forced marriage. It is illegal to cause a person to enter a forced marriage, and to be a party to a forced marriage, unless you are a victim of the forced marriage yourself. The offences can apply to any person with a role in bringing about the forced marriage—including families, friends, wedding planners or authorised celebrants.

The forced marriage offences do not criminalise arranged marriages. In a forced marriage, the victim does not consent to the marriage. An arranged marriage is a marriage where the spouses have the right to accept or refuse the marriage arrangement that has been made. *The Marriage Act does not prevent a person from consenting to marry another person that they have not met prior to the marriage ceremony.*

Signs of a forced marriage

If someone is in, or at risk of a forced marriage, they may find it hard to tell someone about their situation.

A combination of the following signs may indicate that a person is in a forced marriage, or at risk of being made to enter into a forced marriage. Some of these signs may not be immediately obvious to an authorised celebrant but could provide a guide about the kinds of questions to ask the couple (or the person).

- Is one party silent or looking down all the time?
- Has the couple been accompanied by extended family or friends who do some or much of the talking in response to the authorised celebrant's questions?
- Do the family members of one or both parties seem to have a lot of control over their lives that doesn't seem normal or necessary (for example, not being allowed out or always having to be accompanied)?
- Does one party answer all of the questions for the other party as well as for himself or herself?
- Has there been a sudden announcement that the couple is engaged?
- Did one party's older brothers or sisters stop going to school suddenly, or marry early?
- Does one party display signs of depression, self-harming, social isolation and substance abuse?
- Does one party seem to spend a long time away, or suddenly withdraw, from school, university or work?
- Does one party seem to not have control over their income?
- Does there appear to be evidence of family disputes or conflict, domestic violence, abuse or running away from home?

If an authorised celebrant forms a view that one of the parties may be under duress or otherwise not freely and fully consenting, they should attempt to discuss the matter with the party concerned in the absence of the other party or any family members to ensure that the consent is a real consent. It can be difficult to identify the signs of forced marriage and you should seek help and advice, from any of the services listed on the My Blue Sky [website](#) as soon as possible.

How can I help a person in, or at risk of, a forced marriage to stay safe?

It is important that you always act in the best interests of a person at risk of a forced marriage, by being mindful of their safety as well as your own. When seeking assistance, you can help protect a person at risk of a forced marriage, and yourself, by:

- Ensuring you do not attempt to set up a meeting with the person and their family or community members to discuss the situation, or contact family or community members, if you do not have the express permission of the person.
- Remembering that other people may read your emails, text messages or other written communications.
- Providing the party with information about forced marriage and services that can help them.
- With the person's consent, contacting the AFP or a specialist community organisation such as Anti-Slavery Australia for help and advice, including to make sure the person is not taken overseas.
- Meeting in a safe and private place.

The Department of Home Affairs' [website](#) has a number of resources, in a range of languages, available for the community in relation to forced marriage, including information about who to contact for help or advice.

Marriage celebrants may wish to download fact sheets or the small fold-away booklets so that they can be provided to a person they suspect may be in, or at risk of, forced marriage. It is important to refer the person to the right place where they can get appropriate advice and assistance. In addition, Anti-slavery Australia has launched the website www.mybluesky.org.au.

My Blue Sky is a referral mechanism for people in, or at risk of, forced marriage, as well as a source of information for service providers and the general public. The website partners with [Anti-Slavery Australia](#) who provides nationwide free, individualised legal advice.

Surprise marriages (part 11.1 of the guidelines)

Surprise weddings involve one of the parties to the marriage being 'surprised', either at or shortly before the ceremony. The most popular scenario involves one member of a couple wishing to 'surprise' the other party by organising the marriage without their knowledge and then presenting them with the complete ceremony as a romantic gesture.

Authorised celebrants must not participate in such ceremonies. This is because there is no guarantee that the marriage will be not be void.

Surprise weddings raise an important and unavoidable issue in relation to the legality of the marriage. It is best described as potentially placing undue pressure on the 'surprised' person to agree to the arrangement. Even if there is evidence that the person would previously have agreed to a marriage proposal, their consent must not be assumed. No person can be put under pressure to enter into a marriage and the pressures imposed by a 'surprise' wedding could lead to a void marriage due to a lack of real consent.

Generally, the NOIM should be signed by both parties when it is provided to their authorised celebrant. Subsection 42(3) of the Marriage Act enables an authorised celebrant to accept a NOIM with the signature of one party only where the signature of the other party cannot conveniently be obtained at the time it is

desired to give notice. The intention of this provision is to enable a couple to give notice of their intended marriage with only one party signing the NOIM if the other is overseas or interstate.

It is not intended to enable only one party to provide notice. In the case of a surprise wedding, the signature of the other party can, essentially, be conveniently obtained. Authorised celebrants should not accept a NOIM signed by only one party to facilitate a surprise wedding. Authorised celebrants should contact the party who has not signed the NOIM to confirm that they are aware of the intended marriage.

If a person approaches an authorised celebrant with a request for a 'surprise' marriage ceremony, the authorised celebrant should:

- advise the person of the minimum requirements for a legal marriage, such as giving one month's notice for the NOIM and the need for 'real consent'.
- If a party completes a NOIM with only one signature, the celebrant should tell the person that they will contact the other party to ensure that they are aware that the celebrants has received the NOIM.

Participation by any Commonwealth-registered marriage celebrant in a surprise ceremony may be an offence and could result in prosecution or disciplinary measures being imposed.

If an authorised celebrant is approached to participate in a marriage ceremony being given away as a 'prize', the proposer must be advised that there are minimum requirements for a legal marriage ceremony. Marriage ceremonies can be given away as prizes only if the parties freely enter into the marriage and all legal requirements, for instance proper notice, are met.

Capacity to understand and the nature and effect of marriage (Part 8.6.5 of the guidelines)

In preparation of this part of the activity, AGD used the NSW Attorney-General's *Capacity Toolkit*. This excellent resource is available on the NSW Department of Justice's [website](#) and authorised celebrants may wish to refer to it for further guidance. It contains case studies and guidance for professionals in a broad range of situations. AGD would also like to acknowledge the input of the Australian Cross Disability Alliance and the NSW Council for Intellectual Disability to this part of the activity.

Capacity is a legal concept that refers to a person's ability to make independent decisions. **Every adult** is presumed to have capacity to make decisions. This means that unless there is a valid trigger to justify a further assessment of a person's capacity, authorised celebrants should generally treat everyone as if they are capable of understanding the nature and effect of the marriage ceremony. It is especially important to value and respect the importance of presuming capacity of a person with a disability to make a decision in relation to marriage. Article 23 of the *Convention on the Rights of Persons with a Disability* recognises the right of people with disabilities to marry and have a family. Although the Marriage Act recognises the need to protect a person with disability from exploitation, by voiding a marriage where they did not understand the nature and effect of marriage, it is not intended to result in a barrier for people with a disability to marry.

Capacity is decision-specific; a person who may not have capacity in one area of their life could still have capacity to make other decisions. For instance, a person who is unable to make a decision about purchasing a house may have capacity to make a decision to consent to medical treatment. In cases where there is doubt about whether a party understands the nature and effect of the marriage ceremony, a very simple or general understanding will be sufficient.

Capacity can also fluctuate, a person may have an improved level of capacity in physical surroundings that are quiet or calm, or where they are being given an appropriate amount of support or information. Capacity may suffer if the person is stressed about other issues or where they have an illness that worsens from time to time, such as a mental health issue or by using drugs and alcohol. An authorised celebrant might have been satisfied that a party understood the nature and effect of the marriage ceremony before the ceremony was due to be conducted, but might form a different view as a result of the party's conduct during the marriage ceremony itself.

In such a case the authorised celebrant should not proceed to solemnise the marriage until satisfied that the party is not under duress or is able to understand the nature and effect of the marriage ceremony.

It is important not to assume a person lacks capacity based on appearances. In particular, it should not be assumed that a person lacks capacity because of their advanced age, their disability, physical impairment or where the person has difficulty communicating. Many people may have difficulty communicating and expressing themselves however, with assistance, their capacity for making their own decisions is clear. There are many support tools that can be used to assist in communication, such as Auslan, a word or picture board or other Alternative and Augmentative Communication system (such as picture boards or computer programs) that might be used by the person.

It is also important to assess the person's capacity to make a decision without making a judgment about the decision they are making. Most people make bad decisions which others disagree with at some point in their life. The right to make a decision includes the right to take risks and to make decisions with which others disagree. This is known as 'dignity of risk'. Of course, if the person is making a decision that puts them at significant risk of harm or mistreatment, this may be a trigger for an authorised celebrant to consider whether they have capacity to make that particular decision.

Triggers that could suggest a person does not understand the nature or effect of marriage could include the person making inconsistent statements, displaying difficulty in understanding, being confused about times or places, having memory problems, speaking nonsensically, remaining silent or otherwise not communicating, constantly interrupting or displaying emotions that are excessive or inappropriate for the circumstances.

The following questions may assist an authorised celebrant to identify situations where a person may not understand the nature or effect of the marriage:

- Is there any sign that a party does not have capacity to make particular decisions, for example, is a party subject to a guardianship order? NB. A guardianship order is not of itself conclusive evidence of a party's lack of capacity to understand the nature and effect of marriage; it may simply be a trigger for further assessment.
- Does one of the parties seem vague or unclear about the purpose of the meeting with the authorised celebrant, or are they unable to give any information about themselves and why they want to be married?

What steps could be taken if an authorised celebrant thinks there is a significant doubt about the person's understanding of the nature and effect of marriage?

The authorised celebrant should ask the person questions to gauge their level of understanding of the marriage ceremony and what it involves. For example, how did they decide they wanted to get married, what things were important to them in reaching their decision, why do they want to marry the other person and what marriage is. The aim is to ask open-ended questions and draw the person into a discussion.

The discussion should also occur in the absence of third parties such as the other party, parents and other family members or carers. If a person needs assistance to communicate, the authorised celebrant should ensure that the most independent person possible assists with communication.

The authorised celebrant should ensure that ALL forms of available methods of communication used by the person are accepted and facilitated. This could include sign languages, augmentative and alternative communication system or braille. Typically, the celebrant can be guided by the person with a disability, or carer, on how to use any communication system available to them. If a third party is involved, the celebrant should ensure that they are as independent as possible.

The authorised celebrant should also ensure that the person is getting appropriate support to assist them in making an autonomous decision. This could include providing relevant information, such as explaining the nature and effect of marriage or ensuring that the discussion happens at an appropriate location or time of day.

In addition to speaking to the party concerned, other steps an authorised celebrant can take include speaking to third parties (e.g. other people who know the party such as family members, friends, support persons, carers or as a last resort staff at the place a person is living, their doctor or other professional who knows them well).

If speaking to third parties it is important to respect the privacy of the person involved. You should tell the person who you would like to speak to and why, let them know what you are going to say to the person and ask them if it is okay to speak to those people.

Where to go for help?

If the authorised celebrant is still concerned about the person's ability to understand the nature and effect of a marriage, or there is disagreement about whether a person has capacity, you may wish to suggest that they obtain a capacity assessment from a properly qualified person. State and Territory guardianship offices can provide links to organisations, such as aged care or mental health services that may be able to assist. There are also some excellent resources available to assist a celebrant to assess whether a person is able to understand the nature and effect of the marriage, such as the NSW Department of Justice *Capacity Toolkit*.

It may be a difficult and sensitive task to suggest to a person that you may have concerns about their capacity. Sometimes it may help to describe that a capacity assessment is part of a process the authorised celebrant must go through to ensure that the marriage will not be void.

There is an excellent resource by the Law Society of New South Wales, [When a client's capacity is in doubt – a practical guide for solicitors](#) that contains useful information about how to write a request for a capacity assessment and which professionals may be of assistance. It is important that a request for a capacity assessment is specific; otherwise the response from a medical professional may be too general to be of use. For instance a medical professional may focus on whether the person has capacity to attend to their personal needs or live in their own home instead of whether they have a 'general understanding of marriage and its consequences, or an understanding of the specific consequences' to them. ([Babich & Sokur and Anor](#) 2007 FamCA 236 at 251).

Drugs and Alcohol

If alcohol or drugs are involved, the party should be displaying a reasonable level of comprehension or understanding of the nature and effect of marriage. For instance, a person who has had a few drinks prior to the ceremony and who may be mildly inebriated is likely to be able to be in a position to consent to the marriage. However, a person who is intoxicated to the point of making no sense is unlikely to be in a position to form the necessary understanding of the nature and effect of marriage. It is an authorised celebrant's responsibility to refuse to proceed with the solemnisation of the marriage if the parties are so affected by drugs and/or alcohol that the marriage would be void due to a lack of consent. Ultimately, this is something that can only be determined on the day and requires the individual judgment of the celebrant. The celebrant may wish to offer to conduct a commitment ceremony, with the legal marriage being performed at a later date. The celebrant should take the best efforts to extract themselves from the situation as safely as possible. It may be a good idea to explain issues of consent, and your responsibilities, with the couple prior to the day of the ceremony, especially if you think it might become an issue.

Tip – keep detailed records

An authorised celebrant should thoroughly document any conversations they have to assess a person's consent to marry. This means if any questions arise at a later date the celebrant has a record of his or her decision making process. This is important because celebrants may be called upon to give evidence in court as to the consent of the parties. It is also useful in the event that your involvement in any questionable marriage needs to be defended.