



**LAW  
INSTITUTE  
VICTORIA**

# **LIV CAPACITY GUIDELINES AND TOOLKIT** *CONCISE EDITION*

TAKING INSTRUCTIONS WHEN A CLIENT'S CAPACITY IS IN DOUBT



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## Introduction

The Capacity Guidelines and Toolkit is designed to provide a practical overview for legal practitioners who may have concerns about their client's capacity.

While there is a basic common law presumption that every adult person has legal capacity to make their own decisions, in some cases, legal practitioners may find they have doubts about whether their client has the required level of legal capacity.<sup>1</sup>

A person's capacity may be affected by a number of factors including:

- an intellectual disability
- mental illness
- a particular medical condition
- an age-related cognitive disability, such as Alzheimer's disease.

It is fundamental to the practitioner/client relationship that a practitioner relies and acts upon instructions of their client. However, where a practitioner has doubts about a client's capacity to give competent instructions, it is the practitioner's responsibility to explore this issue further. This Toolkit aims to help legal practitioners take a principled approach to this task that is thorough, thoughtful and respectful of each client's particular circumstances. Practitioners who inform themselves of the issues surrounding client capacity and who are aware of the available resources in the area will be better equipped to face the challenges which often arise in this area of practice, while still providing a high standard of legal service to clients.

## What is capacity?

The common law presumes that every adult person (over the age of 18 years) has legal capacity to make their own decisions. In the Supreme Court of Victoria case *Goddard Elliott (a firm) v Fritsch*, Bell J stated that: "The individual is taken to have legal personality because 'rights and duties involve choice' and individuals 'naturally ... enjoy the ability to choose.'"<sup>2</sup> Bell J highlights that this foundational principle of the common law is also an international human right<sup>3</sup> which, in Victoria, is protected by the *Charter of Human Rights and Responsibilities Act 2006 (Vic)*.<sup>4</sup>

Capacity is a legal, rather than a medical, concept and will depend on the relevant law applicable in each situation.

The High Court recognised this in *Gibbons v Wright*<sup>5</sup> and held that "the mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument and may be described as the capacity to understand the nature of that transaction when it is explained".<sup>6</sup>

### General points to consider

As a general rule, capacity will be present where a client:

- understands the information relevant to the decision
- retains that information
- uses or weighs that information as part of the process of making the decision (using reasoned processes)
- communicates their decision.<sup>7</sup>

Capacity as a concept is fluid and decision-specific. Each transaction must be considered in relation to its particular character and circumstances.<sup>8</sup>

Capacity to manage one's affairs hinges on the complexity of the task or activity, but it is ultimately a "functional" issue – one to be judged in a real-life social context of the person's environment and family or other supports. It is a "task-specific" and context-dependent question.<sup>9</sup>

Because a person's capacity may fluctuate, you must consider issues of capacity with reference to an *ongoing relationship* with your client, where you consider their patterns of behaviour, rather than relying on a one-off meeting to evaluate capacity.<sup>10</sup> In addition, if a client has capacity for a particular task, for example, making a will, it does not automatically mean that he or she has capacity for other transactions, such as appointing an attorney.<sup>11</sup>

## 1. Identify the relevant legal test for capacity

What type of legal assistance is your client seeking?

TYPE OF LEGAL TASK	LAW TO CONSIDER
ENTER A LEGAL TRANSACTION/CONTRACT	<i>Gibbons v Wright</i> (1954) 91 CLR 423
APPOINT A MEDICAL AGENT	<i>Powers of Attorney Act 2014</i> (Vic)
	<i>Medical Treatment Act 1988</i> (Vic)
APPOINT A SUPPORTIVE ATTORNEY	<i>Powers of Attorney Act 2014</i> (Vic)
MAKE AN ENDURING POWER OF ATTORNEY	<i>Powers of Attorney Act 2014</i> (Vic)
MAKE A WILL	<i>Banks v Goodfellow</i> (1870) LR 5 QB 549
BRING OR DEFEND CIVIL PROCEEDINGS	<i>Federal Circuit Court Rules 2001</i> (Cth)
	<i>Magistrates' Court General Civil Procedure Rules 2010</i> (Vic)
	<i>County Court Civil Procedure Rules 2008</i> (Vic)
	<i>Supreme Court (General Civil Procedure) Rules 2005</i> (Vic)
	<i>Goddard Elliott v Fritsch</i> [2012] VSC 87
	<i>Pistorino v Connell &amp; Ors</i> [2012] VSC 438
DEFEND CRIMINAL CHARGES	<i>Crimes (Mental Impairment and Unfitness to be Tried) Act 1997</i> (Vic)
ACCESS HEALTH INFORMATION	<i>Health Records Act 2001</i> (Vic)
	<i>Privacy and Data Protection Act 2014</i> (Vic)
MARRIAGE/DIVORCE	<i>Marriage Act 1961</i> (Cth)
	<i>Family Law Act 1975</i> (Cth)

## 2. Remember the key principles

*Always have these principles in mind during client interviews:*

- Presume a person has capacity
- Capacity is decision-specific
- Capacity is fluid
- Don't assume a person lacks capacity based on appearances (eg because of their age, disability or behaviour)
- Assess the person's decision making ability – not the decision they make
- Respect a person's privacy
- Substitute decision-making is a last resort.<sup>12</sup>

## 3. Look for warning signs

*Are there any warning signs that your client might lack capacity? For example, the client:*

- has difficulty with recall or has memory loss
- has ongoing difficulty with communications
- demonstrates a lack of mental flexibility
- has problems with simple calculations which they did not have previously
- is disoriented
- is in hospital or a residential aged care facility when instructions are taken
- has changed legal practitioners several times over a short period, particularly if there has been a change from a legal practitioner who has advised the client for many years
- is accompanied by many other friends, family or carers to interviews with the legal practitioner but is not given the chance to speak for themselves
- shows a limited ability to interact with the legal practitioner (eg is unable to repeat advice to the legal practitioner and ask key questions about the issues)<sup>13</sup>, or
- suddenly changes core values or long-held beliefs.<sup>14</sup>

You might have a sense that “something about the client has changed<sup>15</sup>”, including deterioration in personal presentation, mood or social withdrawal.

If you are taking instructions for a will and you have doubt about the client's capacity, and the client is elderly or ill but can provide coherent instructions, you should proceed with the will preparation and signing, and obtain a medical assessment of capacity as soon as possible thereafter.

## 4. If there are warning signs, conduct an initial capacity assessment by interviewing your client

*Do you need further expert advice or can you proceed?*

### a. Ask questions to assess if your client understands the particular legal transaction.

- Ask open-ended questions rather than questions which can be answered by “yes” or “no”.
- Do not ask leading questions which suggest the answer.
- Frame your questions to quickly identify any areas of concern for which a person may need support or help, or require a substitute decision-maker.
- Ensure that it is the person being assessed who answers the questions.<sup>16</sup>

### b. Spend sufficient time with the client to explore the issues.

### c. Take detailed file notes and document the process used to establish capacity.

- Where possible, note all questions and answers – ideally verbatim.<sup>17</sup>
- Include opinions of other witnesses about the client's capacity.
- Remember to include basic information about the date, the time of the interview, who was present, the length of the interview and the location.<sup>18</sup>

### d. Meet the client alone at some stage.

- Where advice is sought on wills and/or powers of attorney, you should always meet the client alone (in particular, without proposed beneficiaries/attorneys being present).<sup>19</sup>
- Remember: only take instructions from your client as this will avoid a conflict of interest.
- Be wary of potential undue influence.<sup>20</sup>

## 5. If you continue to have doubts about capacity, obtain a formal capacity assessment from a medical practitioner

### a. Identify the appropriate expert.

- In most cases, it will be appropriate to first approach the client's GP, especially where they have known the client for a significant period of time. Where necessary, the client's GP can refer them to an appropriate specialist.
- There are a number of specialists who can provide a formal capacity assessment of your client. You should consider the client's particular circumstances and possible disability when deciding which doctor or specialist to refer your client to.<sup>21</sup> A list of the types of specialists is provided in the full version of the Toolkit.
- If your client provides information about a current medical condition, this may make it easier to decide on a doctor or specialist.
- If your client is in hospital, then consideration has to be made of the client's treatment and whether medication might affect capacity. Usually a simple phone call to the hospital to speak to the treating doctor will provide you with sufficient information. Ask the doctor to make a note of the patient's capacity on the patient's chart.

### b. Obtain client consent to seek a medical report.

- Explain to your client the legal need to record evidence of capacity, to protect against possible future legal challenges to the validity of the legal transaction involved.<sup>22</sup>
- If your client refuses to consent to a medical assessment, the firm may cease to act, giving reasons (see Ethics Committee Ruling R4568).<sup>23</sup>

### c. Prepare a detailed referral letter.

The LIV Elder Law Committee has produced an outline of matters to consider when requesting a medical assessment (to determine a person's capacity), which includes:

- appointment arrangements
- relevant background on the client, including personal, medical and financial information
- details of the legal transaction/proceeding and why the assessment is sought
- clarity on the scope of the request, ie:
  - o the type of assessment
  - o the legal test(s) to be applied, or

- o any guidelines about how the assessment is to be conducted

- administrative matters, including details of the expert's qualifications and expertise and any relevant court or tribunal Practice Direction on expert evidence
- confidentiality and access to the report.<sup>24</sup>

## 6. What if the client refuses to consent to the health report?

Make all possible inquiries and take detailed file notes. According to the LIV Ethics Committee Ruling R4568,<sup>25</sup> if a client refuses to consent to a medical assessment, the firm can cease to act, giving reasons.

If you are in doubt, call the LIV Ethics Advice Line on 03 9607 9336.

See also the full version of the Toolkit for a flowchart on the consequences of incorrectly assessing capacity.

## 7. Consider the medical evidence and make a final judgment about the client's capacity to provide instructions for the particular legal transaction

- The medical report is one source of evidence about capacity – clinical opinions are distinct from a legal determination about capacity.<sup>26 27</sup>
- Take time to thoroughly read and understand the report and to clarify any technical terms or language with the report's author, if necessary.<sup>28</sup>
- Consider the potential consequences of ceasing to act and your duty to your client under the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (Vic)*.
- Be prepared to obtain a report from a medical practitioner should the issue of capacity re-arise.
- If you are in doubt, call the LIV Ethics Advice Line on 03 9607 9336.

## 8. As a last resort, seek the appointment of a substitute decision maker

The appropriate substitute decision maker will depend on the relevant legal transaction.

TYPE OF LEGAL TASK	SUBSTITUTE DECISION MAKER	RELEVANT LAW
<b>1. Entering into a legal transaction/contract</b>	<p>A VCAT appointed administrator</p> <p>An attorney under an enduring power of attorney (financial and/or personal)</p> <p>An attorney under a non-enduring power of attorney</p>	<p><i>Guardianship and Administration Act 1986</i> (Vic) Part 5</p> <p><i>Powers of Attorney Act 2014</i> (Vic) ss12, 27</p> <p><i>Powers of Attorney Act 2014</i> (Vic) s12</p>
<b>2. Bringing or defending civil proceedings</b>	A litigation guardian	<p><i>Federal Circuit Court Rules 2001</i> (Cth)</p> <p><i>Magistrates Court General Civil Procedure Rules 2010</i> (Vic)</p> <p><i>County Court Civil Procedure Rules 2008</i> (Vic)</p> <p><i>Supreme Court (General Civil Procedure) Rules 2005</i> (Vic)</p> <p><i>Goddard Elliott (a firm) v Fritsch</i> [2012] VSC 87</p> <p><i>Pistorino v Connell &amp; Ors</i> [2012] VSC 438</p>
<b>3. Access health information</b>	<p>An attorney appointed under an enduring power of attorney (financial and/or personal)</p> <p>A medical agent appointed under an enduring power of attorney (medical treatment)</p> <p>A person appointed as enduring guardian under an enduring power of guardianship before 1 September 2015</p> <p>A 'person responsible' within the meaning of the <i>Guardianship and Administration Act 1986</i> (Vic)</p> <p>A VCAT appointed guardian</p> <p>A VCAT appointed administrator</p>	<p><i>Health Records Act 2001</i> (Vic) s85</p> <p>See also:</p> <p><i>Privacy and Data Protection Act 2014</i> (Vic) s28</p>
<b>4. Entering into a divorce or a marriage</b>	A Case guardian	<p><i>Family Law Act 1975</i> (Cth)</p> <p><i>Family Law Rules 2004</i> (Cth) Part 6.3</p>

If you are of the view that your client does not have capacity, you may make an application to have a substitute decision maker appointed for your client (depending on the particular legal transaction for which instructions are sought).

If your client objects to the application, then you should cease to act, giving reasons.

- 1 The Law Society of New South Wales, *When a Client's Capacity is in Doubt: A Practical Guide for Solicitors* (2009) <<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1191977.pdf>>.
- 2 *Goddard Elliot (a firm) v Fritsch* [2012] VSC 87.
- 3 *Article 16 of the International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UTS 171 [entered into force 23 March 1976] provides: 'Everyone shall have the right to recognition everywhere as a person before the law'.
- 4 See s 8 ('recognition and equality before the law').
- 5 (1954) 91 CLR 423.
- 6 *Ibid* 438 per Dixon CJ and Kitto and Taylor JJ.
- 7 *Powers of Attorney Act 2014* (Vic) s4.
- 8 Richard Waddell 'Assessing Your Client's Capacity' (Seminar Paper, Leo Cussen Institute, March 2011) 6.
- 9 Terry Carney, 'Aged capacity and substitute decision-making in Australia and Japan' (2003/2004) *LAWASIA Journal* 14.
- 10 Professor Jill Wilson, Assets and Ageing Research Team, Transcript of Evidence, 16 July 2007, p.63 as cited in House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, Inquiry into Older People and the Law (2007) 88.
- 11 Nick O'Neil and Carmelle Peisah, 'Chapter 1 – Capacity' [2011] *SydUPLawBk* 3 in *Capacity and the Law* (2011) 3.
- 12 Above n 1.
- 13 Above n 1. See also the American Bar Association Commission on Law and Aging and the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for lawyers* (2005) 13-16 <<http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>>.
- 14 *Julie Ann Nicholson & Ors v Timothy Peter Knaggs & Ors* [2009] VSC 64.
- 15 Above n 1.
- 16 *Ibid*.
- 17 *Legal Services Commissioner v Ford* [2008] LPT 12; Richard Kendall 'Session 2: Knowledge and Approval of Contents of a Will' (Paper presented at the LIV Succession Law Conference 2012, Melbourne, 7 September 2012); See also, Office of the Public Guardian, *Guidelines for Witnessing Enduring Documents*, 6 [http://www.publicguardian.qld.gov.au/\\_data/assets/pdf\\_file/0009/269307/OPG-Fact-Sheet\\_Guidelines-for-Witnessing-Enduring-Documents.pdf](http://www.publicguardian.qld.gov.au/_data/assets/pdf_file/0009/269307/OPG-Fact-Sheet_Guidelines-for-Witnessing-Enduring-Documents.pdf)
- 18 Office of the Public Guardian, above n 17.
- 19 Linda Willmott and Ben White, *Solicitors and enduring documents: Current practice and best practice* (2008) 16 JLM 466, 480.
- 20 *Ibid*.
- 21 Above n 1.
- 22 *Ibid*.
- 23 Law Institute of Victoria, *Wills and estate - Capacity - Duty to Instructions*, R4568, 1 July 2008.
- 24 Law Institute of Victoria Elder Law Committee, *Outline of Matters to Consider When Requesting a Medical Assessment of a Person's Cognitive Capacity*, <https://www.liv.asn.au/PDF/Membership/Sections/Elder/2009CapacityAssessmentLetter>.
- 25 Above n 23.
- 26 Above n 1.
- 27 The American Bar Association Commission on Law and Aging and the American Psychological Association, *Assessment of Older Adults with Diminished Capacity: A Handbook for lawyers* (2005) 39-40 <<http://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>>.
- 28 *Ibid*.



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