



**LAW
INSTITUTE
VICTORIA**

LIV CAPACITY GUIDELINES AND TOOLKIT *CONCISE EDITION*

TAKING INSTRUCTIONS WHEN A CLIENT'S CAPACITY IS IN DOUBT

If you have any questions about this Toolkit, please call the LIV Ethics Line: 03 9607 9336.



Updated November 2020

Introduction

These guidelines have been updated to reflect new medical treatment, voluntary assisted dying, and guardianship and administration laws in Victoria. They are to be used from 1 March 2020.

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

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

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

- an intellectual disability;
- mental illness;
- a particular medical condition; and/or
- 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 the 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*,² 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'".³ Bell J highlights that this foundational principle of the common law is also an international human right⁴ which, in Victoria, is protected by the *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁵

The common law presumption has been codified in a number of statutes, including, the *Powers of Attorney Act 2014* (Vic) and the *Medical Treatment Planning and Decisions Act 2016* (Vic).⁶ The *Guardianship and Administration Act 2019* also includes a presumption that a person has the capacity to make decisions, unless evidence is provided otherwise⁷. It recognises that a person has decision-making capacity if they can make decisions with support.

While the presumption of capacity only applies to persons over the age of 18 years, the *Medical Treatment Planning and Decisions Act 2016* (Vic) provides a child can have decision-making capacity for certain legal decisions.⁸ This includes re-appointing a support person and making an advance care directive.

Capacity is a legal, rather than a medical, concept and will depend on the relevant law applicable in each situation. It is important to note that it is a fluid concept, and decision specific. Each transaction must be considered in relation to its particular character and circumstances.⁹ Another way to think about this is to think of capacity being on a spectrum, a person might have capacity for easy decisions like what to eat for breakfast or what to wear and capacity will fade along the spectrum towards the more complex decisions like managing investments, negotiating with tenants, selling real estate, etc.

An attorney or a VCAT appointed administrator is intended to make up the shortfall in the decision-making capacity of the person they represent. Their role is not to overpower the wishes of or replace the decisions of the person they represent, but to give effect to them to the extent that it is possible and not unreasonable to do so.

Practitioners should also be aware of the factors to take into account when determining whether their client has capacity for the relevant legal transaction.¹⁰ Importantly, the legislation says that a person making a decision which is unwise in the opinion of others is not evidence of lack of decision making capacity¹¹. Unwise decisions can sometimes be difficult to distinguish from a lack of capacity.

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.¹² In addition, if a client has capacity for a particular task, for example, making a will, it does not automatically mean that they have capacity for other transactions, such as appointing an attorney.¹³

Definition of capacity

The High Court recognised in *Gibbons v Wright*¹⁴ 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”.¹⁵

Statute has expanded the common law definition of capacity beyond understanding the information when it is explained to being able to retain that information to the extent necessary to make the decision; use or weigh that information as part of the process of making the decision; and communicate the decision and the person’s views and needs as to the decision in some way, including by speech, gestures or other means.¹⁶

Specialists who can conduct decision-making assessments

The following websites may provide a directory for specialists who can conduct decision-making assessments:

- [Australian Psychological Study](#) (filter: neuropsychological assessment)
- [The Royal Australian & New Zealand College of Psychiatrists](#) (filter: neuropsychiatry)

By becoming a [member](#) of the Australian & New Zealand Society for Geriatric Medicine, you can also access a member directory of physicians and psycho-geriatricians who specialise in decision-making capacity assessments.

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	Gibbons v Wright (1954) 91 CLR 423
Appoint a medical treatment decision-maker	Medical Treatment Planning and Decisions Act 2016 (Vic)
Appoint a support person	Medical Treatment Planning and Decisions Act 2016 (Vic)
Make an advance care directive	Medical Treatment Planning and Decisions Act 2016 (Vic)
Appoint a supportive attorney	Powers of Attorney Act 2014 (Vic)
Application for guardianship and administration order	Guardianship and Administration Act 2019 (Vic)
Making an enduring power of attorney	Powers of Attorney Act 2014 (Vic)
Make a will	Banks v Goodfellow (1870) LR 5 QB 549
Bring or defend civil proceedings	Federal Circuit Court Rules 2001 (Cth)
	Magistrates' Court General Civil Procedure Rules 2010 (Vic)
	County Court Civil Procedure Rules 2008 (Vic)
	Supreme Court (General Civil Procedure) Rules 2015 (Vic)
	Goddard Elliott (a firm) v Fritsch [2012] VSC 87
	Pistorino v Connell & Ors [2012] VSC 438
Defend criminal charges	Crimes (Mental Impairment and Unfitness to be Tried) Act 1997 (Vic)
Access health information	Health Records Act 2001 (Vic)
	Medical Treatment Planning and Decisions Act 2016 (Vic)
	Privacy and Data Protection Act 2014 (Vic)
Marriage/divorce	Marriage Act 1961 (Cth)
	Family Law Act 1975 (Cth)
Assisting with voluntary assisted dying	Voluntary Assisted Dying Act 2017 (Vic)

2. Remember the key principles

Always have these principles in mind during client interviews:

- There is a presumption that a person has capacity.
- Capacity is decision specific.
- Capacity is fluid.
- Capacity and lack of capacity are not based on appearances (eg because of their age, disability or behaviour).
- What is being considered is the person's decision-making ability – not the decision they make.
- Respect a person's privacy.
- If the person can make the decision with a lot of assistance that an ordinary person would not need, they have capacity for that decision.
- Substitute decision-making is a last resort.¹⁷

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 rigidity or 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 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 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),¹⁸ or
- suddenly changes core values or long-held beliefs.¹⁹

You might have a sense that “something about the client has changed”,²⁰ 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. Testamentary capacity

The elements of ‘testamentary capacity’ were clearly set out in the High Court case of *Banks v Goodfellow*²¹ The person making the will has to understand:

1. what it means to be making a will;
2. broadly, what assets he or she possesses and is leaving to others; and
3. who are the people who might reasonably expect to be included in the will.

The person must also be free of any delusion that affects their will-making ability.

5. If there are warning signs, interview the client with the specific purpose of assessing (1) if you proceed in this matter; (2) if you need an expert to conduct a capacity assessment

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.
- **Be aware that people with diminished capacity can be vulnerable to subtle influence.**
- Ensure that the questions are answered by the person and not someone else on their behalf.²²
- Be alert to your own expectations of what you expect to hear and whether hearing it falsely satisfies you of capacity.
- Be mindful that some persons with diminished capacity have developed excellent skills to mask their impairment, for example, focusing on the last thing that has been said to them and making polite and neutral comments about that, or reverting the conversation back to the one thing they are confident in or that worries them.
- Respect a person's privacy.

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

c. Take detailed file notes and document the process used to satisfy yourself as to capacity:

- Where possible, note all questions and answers – ideally verbatim.²³
- 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.²⁴

d. Meet the client alone:

- Where advice is sought on wills, advance care planning, or support or substitute decision-making, you should always meet the client alone (in particular, without proposed beneficiaries/substitute decision-makers being present).²⁴
- Remember: only take instructions from your client alone or with a disinterested party, as this may avoid a conflict of interest or potential claims of unconscionable or undue influence down the track.

6. If the client fits the demographic or 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 and has seen them regularly and recently. 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.²⁶ 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.
- Whoever is chosen for the task should be

provided with the letter of instruction setting out what the legal test is that needs to be applied to determine capacity.

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.²⁷
- If your client refuses to consent to a medical assessment, the firm may cease to act, giving reasons (see Ethics Committee Ruling R4568).²⁸
- If the transaction is the making of a will, there is an obligation to still make the will even if the client refuses to undergo an assessment. The obligation includes keeping extremely careful notes in respect of all attendances on the client, so that the solicitor may be the helpful witness to the court, which is the ultimate arbiter of whether the client had capacity and whether the will is valid.

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, i.e.:
 - the type of assessment
 - the legal test(s) to be applied, or
 - 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.²⁹

7. What if the client refuses to consent to the medical report?

Make all possible inquiries and take detailed file notes. According to the LIV Ethics Committee Ruling R4568,³⁰ 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.

8. Carefully consider the medical evidence and make a decision about the client's capacity to provide instructions for the particular legal transaction

- A medical report is an important (but not definitive) source of evidence about capacity – clinical opinions are distinct from a legal determination about capacity.^{31 32}
- Take time to thoroughly read and understand any medical report and to clarify any technical terms or language with the report's author, if necessary.³³
- 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 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.
- If you are in doubt, call the LIV Ethics Advice Line on **03 9607 9336**.

9. 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
1. Entering into a legal transaction /contract	<ul style="list-style-type: none"> ○ A VCAT appointed administrator ○ An attorney under an enduring power of attorney (financial; financial and personal) ○ A person appointed as a guardian under an enduring power of guardianship before 1 September 2015 (Guardianship and Administration Act 1986 Vic) or after 1 September 2015 (Powers of Attorney Act 2014) <p>Note: An enduring guardian or attorney (personal) can only make decisions in relation to personal and lifestyle affairs, such as health care matters, access to support services and living arrangements³⁴.</p>	<ul style="list-style-type: none"> ○ Powers of Attorney Act 2014 (Vic) s 27 ○ Guardianship and Administration Act 1986 (Vic) Part 5 and Guardianship and Administration Act 2019 (Vic) Part 4
2. Bringing or defending civil proceedings	<p>A litigation guardian</p>	<ul style="list-style-type: none"> ○ Federal Circuit Court Rules 2001 (Cth) ○ Magistrates Court General Civil Procedure Rules 2010 (Vic) ○ County Court Civil Procedure Rules 2008 (Vic) ○ Supreme Court (General Civil Procedure) Rules 2015 (Vic) ○ <i>Goddard Elliott (a firm) v Fritsch</i> [2012] VSC 87 ○ <i>Pistorino v Connell & Ors</i> [2012] VSC 43
3. Access health information	<p>The following persons can apply to access health information, though it must relate to their role. For example, a Medical Treatment Decision Maker cannot obtain information unless it relates to a medical treatment decision they are asked to make.</p> <ul style="list-style-type: none"> ○ An attorney appointed under an enduring power of attorney (financial and/or personal) ○ A supportive attorney acting under a supportive attorney appointment ○ A medical treatment decision-maker or support person within the meaning of the Medical Treatment Planning and Decisions Act 2016 (Vic) ○ A person appointed as enduring guardian under an enduring power of guardianship before 1 September 2015 ○ A VCAT appointed guardian ○ A VCAT appointed administrator. ○ A VCAT appointed supportive guardian ○ A VCAT appointed supportive administrator 	<p>Health Records Act 2001 (Vic) s. 85</p> <p>See also:</p> <ul style="list-style-type: none"> ○ Privacy and Data Protection Act 2014 (Vic) s 28 ○ Powers of Attorney Act 2014 (Vic) s 87(2) ○ Medical Treatment Planning and Decisions Act 2016 (Vic) s 94
4. Entering into a divorce or marriage	<p>A case guardian can arrangements for property and parenting matters, but a guardian/administrator/attorney cannot make decisions about entering into or dissolving a marriage.</p>	<ul style="list-style-type: none"> ○ Family Law Act 1975 (Cth) ○ Family Law Rules 2004 (Cth) Part 6.3

Footnotes

- 1 The Law Society of New South Wales, *When a Client's Capacity is in Doubt: A Practical Guide for Solicitors* (2016) <<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1191977.pdf>>.
- 2 [2012] VSC 87.
- 3 Ibid [545].
- 4 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'.
- 5 See s 8 ('recognition and equality before the law').
- 6 *Powers of Attorney Act 2014* (Vic) s 4(2); *Medical Treatment Planning and Decisions Act 2016* (Vic) s 4(2).
- 7 Office of the Public Advocate, 'Public Advocate welcomes new guardianship laws' (Media release, 29 May 2019) <<https://www.publicadvocate.vic.gov.au/media-releases/354-public-advocate-welcomes-new-guardianship-laws>>.
- 8 See, *Medical Treatment Planning and Decisions Act 2016* (Vic) ss 31(1), 13.
- 9 Richard Waddell 'Assessing Your Client's Capacity' (Seminar Paper, Leo Cussen Institute, March 2011) 6.
- 10 See: *Medical Treatment Planning and Decisions Act 2016* (Vic) s4(4) (note: these factors must be taken into account); *Powers of Attorney Act 2014* (Vic) s 4(4)
- 11 *Powers of Attorney Act 2014* (Vic) s 4(4)(d).
- 12 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.
- 13 Nick O'Neil and Carmelle Peisah, 'Chapter 1 – Capacity' [2011] SydUPLawBk 3 in *Capacity and the Law* (2011) 3.
- 14 (1954) 91 CLR 423.
- 15 Ibid 438 per Dixon CJ and Kitto and Taylor JJ
- 16 See: *Powers of Attorney Act 2014* (Vic) s 4(1); *Medical Treatment Planning and Decisions Act 2016* (Vic) s 4(1).
- 17 Above n 1.
- 18 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>>.
- 19 *Julie Ann Nicholson & Ors v Timothy Peter Knaggs & Ors* [2009] VSC 64.
- 20 Above n 1.
- 21 (1870) LR 5 QB 549.
- 22 Above n 1.
- 23 *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/0005/490568/opg-factsheets-guidelines-for-witnessing-enduring-documents.pdf>
- 24 Office of the Public Guardian, 'When Guardianship or administration is needed' (Webpage) <<https://www.publicadvocate.vic.gov.au/guardianship-administration/guardianship>>.
- 25 Linda Willmott and Ben White, *Solicitors and enduring documents: Current practice and best practice* (2008) 16 JLM 466, 480.
- 26 Ibid.
- 27 Above n 1.
- 28 Ibid.
- 29 Law Institute of Victoria, *Wills and estate - Capacity - Duty to Instructions*, R4568, 1 July 2008.
- 30 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/CapacityAssessmentLetter.aspx>>
- 31 Above n 29.
- 32 Above n 1.
- 33 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>>
- 34 Australian Executor Trustees, 'Estate Planning Client Guide' (Brochure) <https://aetlimited.com.au/_data/assets/pdf_file/0009/257976/Power-of-Attorney-Client-Guide-Victoria.pdf> 3.



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