



Having ‘capacity’

‘Capacity’ is a term often used when talking about a person’s ability to make decisions for themselves and understand the consequences of those decisions.

- » What is capacity?
- » Why is capacity important?
- » How do you determine whether someone has lost capacity?

'Capacity' is a term often used when talking about a person's ability to:

- make decisions for themselves and
- understand the consequences of those decisions

People aged over 18 are usually deemed to be legally able to make every decision, big and small, for themselves and to accept the consequences of these decisions. This is called 'having capacity' – sometimes 'legal capacity' or 'mental capacity'.

For people under 18, others (usually parents or other caregivers) make their decisions at first, but as they grow and mature they gradually take on making their own decisions. So, they develop capacity by the time they reach adulthood.

While a few people may never have capacity (perhaps, for example, due to a disability), most people will develop capacity and maintain it throughout their whole life.

Other people may, at some point in life, become no longer able to make their own decisions. This is called 'losing capacity'. It can happen at any age through accidents or illnesses, or it can happen through the neurological effects of ageing that some people experience in later life.



What is capacity?

Australia's states and territories each have slightly different definitions of 'capacity' or use different terms for it, but there are some basic concepts that are common across the country.

A person has capacity if they can:

- understand the facts relating to the decision
- understand the main decision that needs to be made
- weigh up the consequences of the decision
- understand the consequences of the decision
- communicate the decision

People may have trouble communicating their decisions for many reasons, but that doesn't mean they cannot make decisions at all. If they are able to do all the steps listed above, they still have decision-making capacity, and they should be provided with whatever they need to be able to convey their decisions.

For example, a person who has capacity but also has a physical disability that makes speech or communication difficult might need speaking aid technology in order to communicate their decisions.

Someone who speaks a language other than English should be provided with an interpreter, so that they can get the information they need and communicate their decisions in their preferred language.

Is losing capacity always total?

No, capacity can be partial. A person's capacity is 'decision-specific', which means that they might have capacity to make some decisions but not others.

For example, they might not have capacity for big decisions like selling their home and buying another, but they can manage a simple day-to-day budget (such as their Centrelink pension) and make smaller decisions, like what they want to do each day and how much to spend on birthday presents.

For a person with decision-specific capacity, their Enduring Power of Attorney might never be enacted. If they are able to make day-to-day decisions and don't ever need to make big decisions (for example, if their housing and care arrangements are already settled), there would be no reason for their Enduring Power of Attorney to take effect. This is because they still have capacity to make the decisions that they need to for themselves.

NB. Using an agent is not indicative of a loss of capacity. For example, asking your son to pay your electricity account at the bank, or using a tax agent to lodge your tax returns, does not mean you do not have capacity.

Is loss of capacity always permanent?

No, capacity can fluctuate, because its loss may depend on a range of factors.

Sometimes a person's loss of capacity is due to a condition that comes and goes, such as schizophrenia.

Sometimes it relates to the time of day – for example, a person with dementia may have capacity most mornings, but it decreases as the day grows later.

A person who loses capacity while they are in hospital having surgery, recovering from an infection or after an accident may regain capacity over time.

It is recommended that you engage with a treatment team if you have a diagnosed condition, such as severe depression, schizophrenia, or dementia.



Why is capacity important?

Capacity is a fundamental concept that supports an older person's autonomy, from which respecting individual decision-making flows. It's an important factor in a person's future planning because an assessment that their capacity is impaired or lost usually sets their Enduring Power of Attorney into effect.

Also, if an older person loses capacity, can no longer make their own decisions, and does not have an Enduring Power of Attorney in place, a guardian may need to be appointed to assist with their decision-making. In most of Australia, this usually happens as a result of a family member or close friend applying to a third party, such as an Administrative Tribunal, to have a guardian appointed.

Losing capacity is not an uncommon experience (for example, the Australian Institute for Health and Welfare estimates that over 400,000 Australians live with dementia, apart from any other cause, and the numbers of people with dementia increases with age). Understanding capacity and talking about it can help people prepare for the possibility of its loss.

Conversations about capacity, personal values and decision-making preferences are important for ensuring that someone has the best chance of planning for their future and putting safeguards in place for their wellbeing and security.

Talk about capacity now

Sometimes, losing capacity can leave people vulnerable to not being supported and looked after, but talking with others about their preferences and values while they still have capacity can help to ensure future support, respect and care that aligns with their wishes.

If you talk with family and friends about now your capacity, your personal values, and how you would make financial decisions, they will have a better idea of what you would want done if you lose capacity. As a result, they will be less likely to inadvertently make a decision for you in the future that you don't like, isn't right for you, or doesn't align with your values.

And when people have chosen guardians and attorneys they can trust, their future planning documents are great safeguarding tools. Remember to talk to your family and friends about where your [Enduring Power of Attorney](#) or [Enduring Guardian](#) document is, so it can be accessed and followed if it's needed.

One way you can share your decision-making preferences while you still have capacity is to ask trustworthy people to help you with some of your matters now. This is called 'supported decision-making', and it recognises that the act of making a decision is a process with several steps. For example, for many of the day-to-day tasks we need to do, the information is provided online, but the internet can be confusing to use. You could ask a friend or family member to help you with accessing and using the websites, so that you can be well informed for making your decisions and managing your affairs.

How do you determine whether someone has lost capacity?

Deciding whether a person has capacity can be very challenging. The first principle for assessing a person's capacity is to assume that they have the capacity to make all decisions about themselves until it is established that they don't.

Sometimes it's obvious that their decision-making ability has diminished, and everyone – including the person themselves – agrees.

Other times, it's not so simple. The person may have capacity for some decisions but not others, which makes it harder to judge the extent of their capacity. Or they may not understand ('have insight') themselves that they have lost capacity, even though it's clear to their family and friends.

Determining whether a person has capacity can be as simple as asking a lawyer or GP to conduct a review or obtaining opinions from experts such as geriatricians, psychiatrists or neuropsychologists.

In some states in Australia, the determination is made between everyone involved, while in other states, an Administrative Tribunal decides.

The New South Wales Department of Communities and Justice (Justice NSW) has a great guide to assessing capacity in their toolkit ([click here](#)), with examples of questions that may be asked, such as:

- How did you reach your decision?
- What things were important to you when you were making your decision?
- How did you balance those things when you were making your decision?

Generally, no one is very good at judging whether they're likely to lose capacity. This short film talks about the likelihood of it happening to us.



What if you don't agree with the determination?

Because making assessments of capacity can be extremely difficult, it's not uncommon for people to disagree with decisions, whether they've been made about themselves or other people.

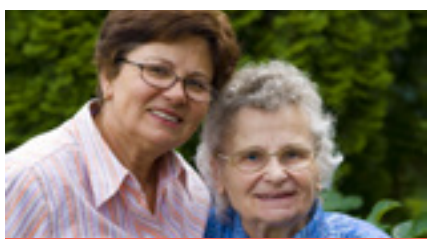
In most states, if there is no agreement about a person's capacity, an application will be made to the state's Administrative Tribunal, usually under its guardianship jurisdiction. When this happens, medical assessments can be undertaken and used by the tribunal to determine capacity.

Sometimes, there will be conflicting evidence and competing assessments of the person's capacity. In this case, the tribunal member will make the best decision possible.

If you still don't agree with the decision, you may be able to appeal for a review, but this can be very costly and time-consuming.

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Future planning



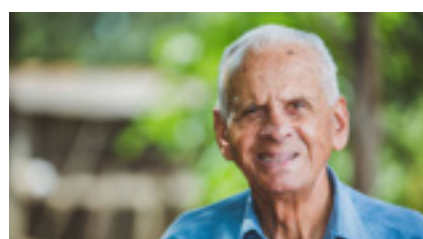
Being an attorney



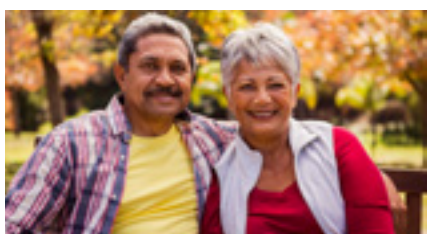
Choosing an attorney



LGBTQIA+ issues



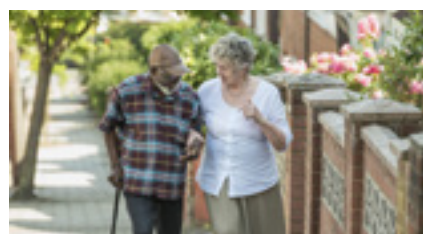
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