



Decision making and your rights

Everyone wants to make their own decisions about things that affect their lives, and not be dictated to by others. As the law says, we must presume that adults have 'capacity' to make decisions for themselves unless it is proven otherwise. Generally, this means that when making a particular decision, the adult can:

- understand the facts and the choices involved,
- weigh up the consequences, and
- communicate the decision.

Capacity to make decisions may be affected by factors such as stress, illness, injury or age. Loss of capacity may be total or partial, and permanent or temporary. The law recognises that you may have lost capacity to make some more complex decisions, but not others. For example, you may have lost capacity to understand complicated financial arrangements or make a will, but be quite able to decide your medical treatment and where you want to live.

People with loss of capacity are more vulnerable and can be susceptible to abuse by others, including their own family members. This Helpsheet gives tips on what to do if you lose capacity to make your own decisions.

Who will make decisions for me if I lose capacity?

This all depends on whether you plan ahead. You can decide in advance who you would like

to make decisions for you if you can no longer do so – or no longer want to.

For example, advance care planning lets you plan the medical treatment you would prefer if you become too ill in the future to express your wishes. See advancecareplanning.org.au.

Powers of Attorney (POA) are legal documents that enable you to choose someone to make decisions for you. These decisions might be financial (such as accessing your bank account in order to pay your bills, or arranging the sale of your property) or personal (such as where you live or who can visit you, or daily living matters

Important Note:

If you have capacity, you can always make your own decisions EVEN IF you have appointed an Attorney. However, if you lose capacity, the Attorney you have appointed can make decisions for you.

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such as diet or dress). You can also choose someone to help you to make a decision – but not to actually make a decision for you. These people are called supportive Attorneys. (For example, a supportive Attorney might help you to collect information about two different aged care facilities you are considering and help you compare what they are offering but wouldn't actually make the decision about where you would live. You would still make that decision). Powers of Attorney are designed to give you choice and control over how your affairs are handled.

Legislation

The two key pieces of legislation in this area are the *Victorian Powers of Attorney Act 2014* (the POA Act) which commenced on 1 September 2015 and the *Victorian Medical Treatment Planning and Decisions Act 2016* (the Medical Treatment Act) which commenced on 12 March 2018. A copy of both Acts can be found at www.legislation.vic.gov.au.

The person who you appoint to make decisions for you under the POA Act is called your Attorney.

The person who you appoint to make decisions for you under the Medical Treatment Act is called a Medical Treatment Decision Maker ("MTDM").

Important Note:

POAs made before 1 September 2015 remain valid under the new POA Act. Powers of Attorney (Medical Treatment) made before 12 March 2018 remain valid under the new Medical Treatment Act.

For more information about POAs in Victoria contact the Office of the Public Advocate on 1300 309 337 or go to their website www.publicadvocate.vic.gov.au

Who should I choose to be my decision maker?

This is a very important decision. Abuse of POAs is one of the ways that elder abuse occurs. The person you appoint should be someone you trust to do the right thing by you, and should be willing and able to take on the job.

There is a small but critical difference between the decision making role of the Attorney and the decision making role of the Medical Treatment Decision Maker (MTDM). An attorney appointed under a POA is required by law to act according to your known wishes, and in your best interests. A MTDM appointed under the Medical Treatment Act must make the medical treatment decision that the medical treatment decision maker reasonably believes is the decision that the person would have made if the person had decision-making capacity. So, this means that they must act in accordance with your known wishes, and make the decision that they believe you would have made, regardless of their own personal views on the matter.

If you don't know anyone you feel would be suitable, you can appoint an independent trustee company as your attorney, but fees will be charged for its services.

Important Note:

You may wish to get independent legal advice before appointing a decision maker; but whatever you choose to do, don't let anyone pressure you into it.

Revoking a POA or a MTDM

If your Attorney is doing the wrong thing by you (such as taking your money or property without authorisation), or you just no longer feel comfortable with the decision you made (for



example the person you appointed may have moved overseas, or there may have been a family conflict) you can revoke the POA or MTDM as soon as you are aware of this, and a new appointment can be made.

The only time you cannot revoke documents already made is if you have lost your capacity to do so. In that situation, someone with an interest in your welfare will have to step in on your behalf.

This person can apply to the Victorian Civil and Administrative Tribunal (VCAT) to have the attorney's actions looked at and possibly remove them. There are a number of processes to go through to do this.

Who decides if I have lost capacity to make decisions?

The person you have appointed as your decision maker may be the person who decides when you have lost capacity. Or else it may be a lawyer, doctor or service provider who has contact with you and needs to be confident you have capacity to make specific decisions.

An assessment for capacity can be undertaken by a trained medical professional. The best place to start is with your General Practitioner, a Cognitive Dementia Memory Service or an Aged Care Assessment Service. If either you or another person disputes the assessment that is made about your capacity then you or they can make an application to VCAT to determine the matter.

You may wish to specify in your POA who decides if you have lost capacity.

Remember:

- **Just because you may have lost capacity to make certain decisions, you may still be able to make others.**
- **Plan ahead for if or when you lose capacity and consider arranging Powers of Attorney.**

What happens if I don't plan ahead and I lose capacity?

Family members may be able to informally make some decisions for you, particularly lifestyle decisions, but other decisions, particularly those involving legal or financial issues, can only be made by an attorney appointed through a POA.

If you have not appointed an attorney, and there is a need for one, VCAT can appoint someone to make decisions on your behalf.

VCAT must listen to your wishes, but can override them if it thinks they are not in your best interest. If there is a conflict between family members, or medical need, VCAT can appoint someone independent.



More information

Seniors Rights Victoria.

www.seniorsrights.org.au
Tel. 1300 368 821

Also see *Assets for Care: A guide for lawyers.*

Planning Ahead Tools

www.planningaheadtools.com.au
Tel. 1300 887 529

Information, tools and resources to help people plan for their future legal, health and asset decisions.

Advance Care Planning Australia

<http://advancecareplanning.org.au>
Tel. +61 3 9096 1350

Explains the steps you can take to help you plan for your future health care.

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Cognitive Dementia and Memory Service

www.betterhealth.vic.gov.au/health/serviceprofiles/cognitive-dementia-and-memory-service-CDAMS-service
Tel. 1300 650 172

A specialist multidisciplinary diagnostic, referral and educational service for people experiencing memory loss, or changes to their thinking.

Aged Care Assessment Service

www2.health.vic.gov.au/ageing-and-aged-care/aged-care-assessment-services
Tel. 1800 200 422

Independent teams who assist older people and their carers to identify what kind of care will best meet their needs.

Office of the Public Advocate

www.publicadvocate.vic.gov.au
Tel. 1300 309 337

A wealth of information on administration and guardianship, enduring powers of attorney, medical consent and the rights of people with disabilities.

Capacity Australia

<http://capacityaustralia.org.au>
Tel (02) 8987 1944

A not-for-profit charity that promotes autonomy of decision-making, with several resources.

NSW Capacity Toolkit

www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx

A handy guide to capacity for anyone who has concerns about the ability of an adult to make decisions for themselves.

VCAT

www.vcat.vic.gov.au
Tel. (03) 9628 9911

Victoria's independent dispute resolution service, deals with capacity disputes and substitute decision-making.

Victoria Legal Aid

www.legalaid.vic.gov.au
Tel. 1300 792 387

Legal advice on a range of issues.

Legal Aid NSW

www.legalaid.nsw.gov.au/get-legal-help/factsheets-and-resources
Tel. 1300 888 529

Factsheets and resources for older people.

National Dementia Helpline

<https://fightdementia.org.au>
Tel. 1800 100 500

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