THE UNIVERSITY of ADELAIDE

South Australian Law Reform Institute

Review of the *Mental Health Act 2009* (SA)

Fact Sheet 2 – Capacity and Supported Decision-making

What is Capacity?

Capacity refers to a person's ability to make their own decisions. These decisions may relate to finances, health care and treatment, personal affairs (such as booking a holiday) or where to live. Under the *Mental Health Act 2009* (SA) ('*MHA*'), a person is presumed to have full decision-making capacity. This means they are able to:

1. Understand information relating to a particular decision, including its outcomes; or
2. Remember this information; or
3. Use this information in the process of making a decision; or
4. Communicate (by any means) their final decision.

Importantly, a person will not lack capacity because:

- They do not understand the specific details of the information;
- Can only remember information for a limited time;
- May fluctuate between having capacity and losing capacity; and
- Make a decision which has a negative outcome for them.

A number of key points can be made about capacity. First, capacity is **decision-specific**, which means it is determined based on a particular decision. Second, it is a person's **right to make mistakes or choices that others may not agree with**. Third, if a person has a mental illness, this **does not mean** they cannot make their own decisions. Where a person may need help making a decision, a supported decision-making approach is preferred, which makes sure a person makes their own decision wherever possible.

Current Issues

SALRI will consider whether the *MHA* upholds human rights, and the role and assessment of decision-making capacity for treatment orders (see Fact Sheets 3 & 4). There are two suggestions to improve the law:

1. When making a treatment order, the *MHA* could be changed to include specific criteria defining capacity and supported decision-making.
2. Where a medical professional concludes a person does not have capacity, they must provide written reasons explaining this decision.

Consultation Questions

1. Should the *MHA* include a clearer definition of 'impaired decision-making capacity' for treatment orders?
2. How can the law better protect the human rights of persons with a lived experience of mental illness and provide supported decision-making?

[1] See, eg, Office of the Public Advocate South Australia, 'What is Supported Decision Making' (Web Page, 10 April 2013) <http://www.opa.sa.gov.au/resources/supported_decision_making/what_is_supported_decision_making>.

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