

Outline

- What is capacity?
- General concepts
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What is capacity?

- A person's capacity is their mental ability to make a decision for themselves
- Generally speaking, a person has capacity to make a decision if they can:
 - Understand the facts and main choices involved, and
 - Weigh up the consequences of the choices, and
 - Understand how the consequences affect them, and
 - Communicate their decision
- For some types of decision there is a legal test for capacity
- Generally, this is the case when the decision that needs to be made is significant, or has legal consequences

General concepts

- An adult's capacity must be presumed
- Capacity is decision specific – a person may have capacity to make some decisions, but not others
- Capacity varies from person to person and from situation to situation – a person's capacity may be affected by their abilities and what is happening around them, and by their state of mental health
- Capacity can be regained or increased
- Where there is doubt, a capacity assessment should be conducted
- A person's capacity should be reassessed every time that a decision needs to be made – particularly if the person's ability to make a decision appears to have improved

Capacity assessment principles

- Don't assume that a person lacks capacity based on appearances – the way the person looks, presents, communicates, acts, or their impairment
- Assess the person's decision making ability - not the decision that they make. People with capacity have the right to make “bad” decisions
- Ask whether the person can make **this** decision, **now**?
- Substitute decision making should be a last resort – before a decision is made that a person lacks capacity every effort should be made to help the person to make a decision for themselves

Capacity and the *Mental Health Act 2013*

- The *Mental Health Act 2013* contains two legal tests for capacity – one for adults, and one for children
- The tests identify when a person may be involuntarily assessed or treated under the Act
- The Act recognises the right for a person with decision making capacity to make their own decisions about assessment or treatment for a mental illness
- An Assessment Order may only be affirmed and extended if an approved medical practitioner assesses a person as lacking decision making capacity about his or her own assessment
- A Treatment Order may only be made if the Mental Health Tribunal assesses a person as lacking decision making capacity about his or her own treatment

Capacity test for adults

Section 7 Capacity of adults and children to make decisions about their own assessment and treatment

*(1) For the purposes of the Act, an adult is taken to have the capacity to make a decision about his or her own assessment or treatment (**decision-making capacity**) unless a person or body considering that capacity under the Act is satisfied that:*

- (a) he or she is unable to make the decision because of an impairment of, or disturbance in, the functioning of the mind or brain; and*
- (b) he or she is unable to –*
 - (i) understand information relevant to the decision; or*
 - (ii) retain information relevant to the decision; or*
 - (iii) use or weigh information relevant to the decision; or*
 - (iv) communicate the decision (whether by speech, gesture or other means).*

Capacity test for children

Section 7 Capacity of adults and children to make decisions about their own assessment and treatment

*(2) For the purposes of the Act, a child is taken to have the capacity to make a decision about his or her own assessment or treatment (**decision-making capacity**) only if a person or body considering that capacity under the Act is satisfied that –*

(a) the child is sufficiently mature to make the decision; and

(b) notwithstanding any impairment of, or disturbance in, the functioning of the child's mind or brain, the child is able to –

(i) understand information relevant to the decision; and

(ii) retain information relevant to the decision; and

(iii) use or weigh information relevant to the decision; and

(iv) communicate the decision (whether by speech, gesture or other means).

Capacity test for children (cont.)

- The inclusion of a requirement that a child be sufficiently mature to make a decision is reflective of the Common Law “mature minor” or *Gillick* test of competence
- Matters to be considered in determining whether or not a child is sufficiently mature to make a decision include:
 - Whether the child has sufficient understanding of the family, moral and medical matters involved
 - Whether the child understands the nature of the proposed treatment, the consequences of the treatment in terms of its intended and possible side effects and the anticipated consequences if the treatment is **not** provided
- The requirement to consider the child’s maturity is in addition to the other elements of the capacity test

Matters common to both tests

- An adult or child may be taken to understand information relevant to a decision if it reasonably appears that he or she is able to understand an explanation of the nature and consequences of the decision given in a way that is appropriate to his or her circumstances (whether by words, signs or other means)
- An adult or child may be taken to be able to retain information relevant to a decision even if he or she may only be able to retain the information briefly
- Information relevant to a decision includes information on the consequences of:
 - making the decision one way or the other, and
 - deferring the making of the decision, and
 - failing to make the decision

Who can assess capacity?

- Any member of the treating team can be involved in a capacity assessment process
- Assessment by an approved medical practitioner will be required when an Assessment Order is affirmed/discharged, and when application is made for a Treatment Order
- The Tribunal will consider capacity when deciding whether to make a Treatment Order
- Second opinion/expert involvement should be sought when needed

Useful resources

- The *Mental Health Act 2013* can be accessed at [Tasmanian Legislation Online](#)
- A range of useful information about the Act is available to read, download and print from [the Mental Health Act website](#) including:
 - Approved Forms (see in particular Chief Civil Psychiatrist Approved Form 2A Decision Making Capacity – Adults and Form 2B Decision Making Capacity - Children)
 - Flowcharts
 - Standing Orders and Clinical Guidelines (see in particular Chief Civil and Chief Forensic Psychiatrist Clinical Guideline 2 – Capacity)
 - Online Training Packages and other Education Resources
 - A Clinician’s Guide to the *Mental Health Act 2013*
 - Fact Sheets and other Information for Consumers
 - Statements of Rights
- [Tasmanian Capacity Toolkit](#) (The Toolkit was developed prior to the *Mental Health Act 2013* and while it contains some information which is out of date its general content remains useful and is listed here for that reason)
- [Capacity Australia website](#)

Questions

Any questions?