

## Decision-Making Capacity

### Introduction

#### Why is decision-making capacity important?

Australia is a signatory to the UN Convention on the Rights of Persons with Disabilities (CRPD), which applies to all persons living with mental illness. Article 12 of the CRPD recognises that people with long-term mental illness enjoy equal legal capacity under the law, and requires that persons be offered support to make their own treatment decisions, as far as possible, and supported to express and give effect to their rights, will and preferences.

It is fundamental to the safeguarding of a person's rights to self-determination and dignity that they be entitled to make decisions about the treatment of their mental illness if they have the decision-making capacity to do so. The CRPD implies that, where required, a person should be supported to make their own decisions to the extent possible.

#### What is the relevance of decision-making capacity to the Mental Health Act 2009?

One of the objects of the Act is to ensure that people with severe mental illness retain – so far as is consistent with their protection, the protection of the public and the proper delivery of services – their freedom, rights, dignity and self-respect.

Therefore, Involuntary Treatment Orders under the Act (including Community Treatment Orders and inpatient treatment orders) may only be made if the treating medical practitioner, authorised mental health professional or the Tribunal (as the case may be) is satisfied that the person has *impaired decision-making capacity* relating to the appropriate treatment of their mental illness.

#### What orders under the Act require an assessment of decision-making capacity?

Under the Act, a Community Treatment Order or Inpatient Treatment Order may be made if it appears after examining the person (or, in the case of a Level 2 CTO or Level 3 ITO, the Tribunal is satisfied that):

- (a) The person has a mental illness; AND
- (b) Because of the mental illness, the person requires treatment for the person's own protection from harm (whether physical or mental, including harm resulting from the deterioration of the person's condition) or the protection of others from harm; AND
- (c) ***The person has impaired decision-making capacity relating to appropriate treatment of the person's mental illness; AND***
- (d) There is no less restrictive means than [the relevant order] of ensuring appropriate treatment of the person's mental illness.

Impaired decision-making capacity is therefore one of the essential criteria for the making of any involuntary treatment order under the Act.

### Guiding Principles

#### What is "impaired decision-making capacity"?

Under s 5A(1) of the Act, a person is presumed to have decision-making capacity unless there is evidence to the contrary.

Under s 5A(2)(a), a person will be taken to have *impaired decision-making capacity in respect of a particular decision relating to the appropriate treatment of their mental illness* if the person cannot:

- (i) Understand any information that may be relevant to the decision (including information related to the consequences of making a particular decision); or
- (ii) Retain such information; or
- (iii) Use such information to make the decision; or
- (iv) Communicate their decision in any manner.

Section 5A(2)(a) does not require all the above elements to apply to a person in respect of a particular decision for them to be taken to have impaired decision-making capacity, but one or more of these elements must apply.

**In assessing whether one or more of these elements apply:**

- A person will not be taken to be incapable of understanding information merely because they are not able to understand technical or trivial matters.
- A person will not be taken to be incapable of retaining information merely because they can only retain the information for a limited time.
- A person will not be taken to be incapable of communicating their decision merely because they are unable to communicate adequately in English.
- A person will not be taken to have impaired decision-making capacity merely because the decision made by the person may result in an adverse outcome for them, even a risk of death.

The test of decision-making capacity is not an objective assessment of what is “reasonable” or in the person’s best interests. Rather, it is an assessment of the ability to think, understand, make a particular decision and communicate this in some way.

A person’s decision-making capacity may fluctuate between impaired and full decision-making capacity; and a person may have impaired decision-making capacity temporarily or permanently.

**What is relevant to an assessment of decision-making capacity?**

- The question is whether the person is *capable of understanding or using* information to make a particular decision about the appropriate treatment of their mental illness.
- There is an overlap between the concepts of whether a person can *understand* the information and whether they can *use* it.
- The totality of the evidence – including but not limited to a person’s lack of insight into the diagnosed mental illness and their consequent lack of insight into the required *appropriate treatment* – may support a conclusion of lack of decision-making capacity.
- However, any assessment of decision-making capacity will be fact- and context-specific.

For an example of the assessment of “decision-making capacity”, see the decision of the South Australian Court of Appeal in [TSC v Department for Health and Wellbeing \[2021\] SASCA 93](#).

**Guidance for Making an Assessment of Decision-Making Capacity**

**When should decision-making capacity be assessed?**

Decision-making capacity should only be tested where there is reason to believe that a person lacks capacity, and that giving effect to their will and preferences will harm their other rights (such as their right to life, or right to health). Assessment of decision-making capacity must always occur at the time consent to treatment is being obtained and, in any event, prior to the making of any involuntary treatment order.

Once a person is placed on an order, the treatment order and the person’s mental and physical health must be regularly reviewed. Decision-making capacity should be re-assessed as soon as treatment is established under a treatment order and then as part of clinical reviews. If a person is re-assessed as having decision-making capacity, the involuntary treatment order must be revoked with the consequence that the person may either continue treatment as a voluntary patient or decline treatment for their mental illness.

**When determining if a person has decision-making capacity you may want to consider the following questions:**

- Does the person have the capacity to understand the nature and effect of the treatment at the time the treatment decision is required? This means, is the person capable of understanding broadly, in simple terms:
  - What the treatment is and what the procedure involves?

- Why the treatment is proposed?
- That there may be other options?
- What it will mean if they don't have the treatment?
- Does the person have the capacity to understand the 'effect' of the treatment? Are they aware, in simple terms, of the main benefits and risks of the treatment?
- Does the person have the ability to indicate whether they want the treatment? Can they communicate any decision made, with assistance if necessary?
- Has the person made the decision freely and voluntarily? A person has a right to refuse treatment. If they have refused, consider:
  - Whether the refusal of treatment is consistent with the person's views and values?
  - Is this behaviour usual for the person, noting this question may be best answered by a carer, friend or family member?
  - Has all the relevant information been given to the person in a way they can understand?

If a person is experiencing difficulty making their own decisions, they should be given support to make them, before being assessed as not having decision-making capacity. An assessment of decision-making capacity should assess the capacity a person with mental illness is able to exercise *with support from others*.

### What documentation is required?

Assessment of decision-making capacity should always be documented in the person's clinical records. This should include a summary of the evidence and reasoning used to reach the conclusion about decision-making capacity. The psychiatrist or authorised medical practitioner confirming a level 1 CTO or level 1 ITO, or making or extending a level 2 ITO, must provide a written statement of reasons (form MRMHA-E) to the Director of the relevant treatment centre. This statement of reasons must summarise the evidence used to determine the person has met the statutory criteria for a treatment order, including that they have impaired decision-making capacity.

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## For more information

**Office of the Chief Psychiatrist**  
**PO Box 287 Rundle Mall, Adelaide SA 5000**  
**Telephone: (08) 8226 1091**  
[www.chiefpsychiatrist.sa.gov.au](http://www.chiefpsychiatrist.sa.gov.au)

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