



Review of the *Ageing and Adult Safeguarding Act 1995 (SA)*

Fact Sheet 9 – Capacity and Consent

Consent

Under the adult safeguarding provisions, the Adult Safeguarding Unit (ASU) cannot investigate or refer a matter without the consent of the person to whom the report relates. For consent to be legally valid, **the person giving consent must:**

- have decision-making capacity in relation to the decision (such as whether to accept or refuse the ASU's support or safeguarding actions); and
- be doing so of their own free will, without coercion.

The consent of a vulnerable adult is paramount before the ASU takes an action. The ASU may only take action in respect of a report *without consent* of the vulnerable adult, if:

1. the vulnerable adult's life or physical safety is at immediate risk; or
2. the report relates to an allegation that a serious criminal offence has been, or is likely to be, committed against the vulnerable person; or
3. the vulnerable adult has impaired decision-making capacity in respect of a decision to consent to action being taken; or
4. the Adult Safeguarding Unit has not been able to contact the vulnerable adult.

What is decision-making capacity?

Decision making capacity refers to a person's ability to make their own decisions. This may relate to finances, health care and treatment, lifestyle (such as booking a holiday) or where to live.

Under the *Ageing and Adult Safeguarding Act 1995 (SA)* ('the Act') it is presumed the person has decision-making capacity unless there is evidence otherwise. Secondly, capacity is decision-specific, which means it is determined based on a particular decision. Thirdly, it is a person's right to make choices that others may not agree with. Where a person may need help making a decision, the person should be supported to make their own decision.

Under the Act, a person will have **impaired decision-making capacity** if they cannot:

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; or
5. Or if a person has given an advance care directive in which the person sets out when they are to be considered to have impaired decision-making capacity (however described) in respect of a relevant 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.

Current Issues

It is undoubtedly important to respect the dignity and autonomy of adults with full decision-making capacity. If a person with decision-making capacity does not consent to action being taken, the ASU is not able to take any action. This may even be the case if the person is in a compromising situation or under duress or coercion by the alleged abuser.

The Act appears inconsistent, however, about the circumstances in which consent is needed. For instance the ASU does not need consent of the vulnerable adult to undertake an assessment of the report, which often means gathering a whole range of personal information under the Act's information gathering provisions. The Act is also silent on actions to take following an investigation and therefore silent on the issue of consent in relation to subsequent action. In contrast, the Act requires consent for actions like referring a case to another organisation such as the Aged Care Quality and Safeguarding Commission, which members of the general community can do at any time without seeking consent.

Consultation Questions

1. In what circumstances, if any, should the ASU be able to take action without the consent of a vulnerable adult with decision making capacity? How would this look in practice?
2. In what circumstances should consent be obtained before an action is taken? How can this be made more consistent in the Act?
3. What implications does fluctuating capacity have on the ASU's ability to obtain consent?
4. How can the Act best promote and protect the autonomy of adults with impaired decision-making capacity?

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