

Attorney General's Department of NSW  
Diversity Services  
Goodsell Building, Level 18  
Sydney, NSW 2001

Laurie Glanfield  
Director General

5 July 2006.

Dear Mr. Glanfield,

We would like to thank the Attorney General's Department for providing The Mental Health Co-ordinating Council (MHCC) with the opportunity to make a submission regarding the Discussion Paper: '*Are the rights of people whose capacity is in question being adequately promoted and protected?*'

MHCC is the state peak body for non-government organisations working for mental health throughout NSW. MHCC represents the views and interests of over 160 NGOs in the formation of policy, and acts as a liaison between the government and non-government sectors. Our member organisations specialise in the provision of services and support for people with a disability due to mental illness.

MHCC represents the interests of its members on a number of National and State boards, committees and reference groups including:

National Organisations:

- Consumer Health Forum of Australia Governing Body
- Department of Health and Aged Care Suicide Prevention Strategy
- Mental Health Council of Australia (MHCA)

State Organisations (NSW):

- ACROD Management Committee
- FONGA (Forum of Non-Government Agencies) NCOSS
- Health Care Complaints Commission (HCCC) Consumer Consultative Committee
- Institute of Psychiatry, Consumer Advocate Training Consultative Committee
- Mental Health Association (MHA), Mental Health Promotion Advisory Committee
- NCOSS Health Policy Advisory Group (HPAG)
- Office of the Protective Commissioner Disability Group Interagency Committee
- Quality Management Services (QMS) Human Service Organisation Standards Steering Committee



*Working For  
Mental Health*

Mental Health  
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Mental Health Coordinating Council.  
Submission Attorney General's Office – Capacity. July 2006

*MHCC is the peak  
Body for mental health  
Organisations in NSW  
Funded by NSW Health*

#### State Government Departments (NSW):

- Attorney General's Department, Law Reform Commission, Flexible Service Delivery Consultative Committee.
- Community Housing Disability Consultative Committee, Office of Community Housing
- Department of Education & Training, Disabilities Community Consultative Committee
- Department of Housing – Port Jackson Housing Advisory Committee
- Department of Housing – NGO Advisory Group
- Dual Diagnosis (MISA) TAFE Training Project / Steering Committee
- NSW Community Housing Disability Consultative Committee
- NSW Mental Health Review Systems Committee
- NSW Health Mental Health Taskforce
- NSW Health Mental Health Priority Taskforce
- NSW Health, Housing and Supported Accommodation Initiative (HASI)
  - Steering Committee
  - Advisory Committee
  - Evaluation Committee
- NSW Health NGO Advisory Group
- NSW Suicide Prevention Committee
- NGO Advisory Group Accreditation Sub-committee
- Justice Health Consumer and Community Group
- NSW Health, Centre for Mental Health, NGO Partnerships Forum
- Services Industry Reference Group. (Mental Health Course Development)
- The New Joint Guarantee of Service (JGOS)

#### **The Discussion Paper - 'Are the rights of people whose capacity is in question being adequately promoted and protected?'**

MHCC is concerned that the paper as an initial document for discussion, does not elaborate sufficiently to do justice to the issue, which we recognise as one of legal and ethical complexity.

Organisations such as MHCC, without the support of in-house legal practitioners, need to undertake considerable research in order to meaningfully respond to the submission questions. The time constraint of six weeks (extended to 2 months) for interested stakeholders to respond to questions (which the Capacity Roundtable Consultation grappled with for two years) does not provide adequate time for MHCC to consult broadly with our membership, nor research the issues to our satisfaction.

We would welcome a process by which the subject was presented more fully in a seminar / workshop, during which the legal and ethical issues could be argued by legal and clinical professionals, explaining a diversity of International and Australian legislative and assessment models. By this process, it would be easier to make judgement on the advantages and limitations of any model of legislation or assessment being contemplated.

Nevertheless, based on our current understanding of the issues, we would like to make some recommendations with particular reference to the protection of people with a mental illness disability.

**Recommendation 1.**

That legislation requires decision makers to assume capacity, unless evidence is assessed to the contrary. The guiding principle of legislation regarding capacity must be based on an emphasis of autonomy, respecting the rights of people with a mental illness to exercise the greatest degree of independence possible to make decisions about their own lives. Any decision made or on behalf of the individual should restrict their freedoms and rights as little as possible. An assessment of capacity should not be made on the basis of the way an individual 'looks,' or 'behaves,' or because they have difficulty in communicating their decision.

**Recommendation 2.**

That in making an assessment of capacity, the episodic nature of mental illness must be taken into account. People with a mental illness should generally be considered capable of regaining capacity. Where possible, consumers with an episodic illness should be given the opportunity to prepare advance directives regarding medical treatment and other matters of legal significance. The impact of incapacity on an individual's autonomy needs to be acknowledged and if the individual is thought able to regain capability, any decision that can be delayed will be, until such time as they can make their own decision.

**Recommendation 3.**

That assessment of capacity to make decisions may differ according to the complexity of the decision to be made. People have the right to make 'eccentric' or 'unwise' decisions, and it is their capacity to make decisions, not the decisions themselves that may be in question. Even when a person lacks capacity, assessment must include available evidence and information to fully consider the individual's feelings, beliefs and values. This must include reference to the individual's past history to identify possible preferences.

**Recommendation 4.**

That all efforts be paid to assisting and supporting the individual to communicate preferences, and make the decision for him/herself. Assessment should include the ability to understand the information given, and the consequences of that decision.

**Recommendation 5.**

Professionals, carers and families involved in assessing an individual's capacity, may only do this on a 'decision-specific' basis.

**Recommendation 6.**

That an assessment of incapacity can be reviewed and revoked at any time an individual regains capacity.

**Recommendation 7.**

That any person assessed as incapable have access to an independent body, Tribunal or Court in order that they may challenge a decision.

**Recommendation 8.**

That in conducting an assessment that includes involvement with carers and others, that reasonable steps be taken to identify any conflict of interest.

## Discussion Paper Questions.

### Comments on Issue 1

#### Creating a consistent approach to the assessment of legal capacity

1. 1. Would NSW law benefit from a single legal definition of capacity that could be used in relation to legal decision-making in all circumstances?

*MHCC would support a single definition, if satisfied that it was an appropriate definition. The definition should not be subject to ambiguity and misinterpretation in different contexts.*

*A single definition must be supported by standards and guidelines that take into account cultural and religious diversity. Adequate review and support systems must be in place to ensure the human rights of all individuals.*

1. 2. If so, should that definition be based on a "decision specific" approach to capacity and include as the test "understanding and appreciation" as in the Queensland Guardianship & Administration Act 2000?

*MHCC agree that a 'decision specific' approach to capacity be taken that involves an assessment based on the clinical assessment of professionals known to the individual and support workers, carers and/or family where possible.*

*MHCC propose that the Queensland Guardianship and Administration Act 2000, does not adequately encompass all the considerations that need to be utilised in assessing capability, and that other models Internationally and in Australia be researched.*

*MHCC suggest that future discussion papers on capacity include fuller information that enables greater understanding of the complexity of the possible implications of such a 'single' definition. This might include workshopping 'real life' case scenarios.*

*MHCC consider that it may not be realistic to implement a 'decision specific' approach. It is more likely that incapacity will be assumed to continue rather than reassessed for every decision.*

*In addition, a 'decision specific' approach must be subject to review and challenge at any time.*

1. 3. Should relevant legislation include a presumption of capacity?

*MHCC agree that relevant legislation should include a presumption of capacity. The guiding principle of legislation regarding capacity must be based on an emphasis of autonomy and independence for all individuals to make decisions about their own lives.*

1.4. Should the laws related to decision-making, such as the Guardianship Act, 1987, the Protected Estates Act 1983 and the Powers of Attorney Act 2003 be changed to include a common standard definition based on the "decision specific approach"?

*MHCC support a common standard definition based on a 'decision specific' approach provided it is underpinned by an assessment tool that includes 'awareness' and provided that standards and guidelines are in place to assist assessors in their deliberations.*

*Assessment of awareness would respect an individual's right to make a 'bad' decision when they were able to demonstrate that they understood the consequences.*

*MHCC suggest that future discussions investigate numerous evaluative tools such as the MacCAT-T for Decision Making Capacity, which tests understanding and appreciation, reasoning and communication, but that also takes into account awareness and appreciation.*

1.5. Would a single legal definition result in a more standardised capacity assessment in practice?

*MHCC believe that a single definition would only result in a more standardised capacity assessment provided the appropriate safeguards were in place. This would involve the development of services supporting people to make autonomous decisions.*

## **Comments on Issue 2**

### **Creating resources for capacity assessors**

2.1. Does this section of the Discussion Paper reflect the needs of the various assessors? If not, what additional issues do they face and how can their needs best be met?

*MHCC do not believe that the Discussion Paper explains what needs may be required by various assessors. A description of what issues may present dilemmas for assessors would enable some more detailed comment. For example a psychiatric diagnosis may not be adequate to assess the capacity of people with a mental illness. A much better approach is to assess functionality that includes an ability to assimilate information and articulate awareness.*

*A single definition, if an appropriate one were found, should be informed by standards and guidelines to assist assessors in their deliberations.*

2.2. What resource options listed would be most helpful if they were further developed?

*Standards and guidelines for assessors should be developed in consultation with a broad group of professionals, with an emphasis on consumer and carer participation in their formulation.*

2.3. Should a distinction be made between lay and professional assessments?

*Any assessment may include both professional and lay assessments of equal importance, which would need to be subject to independent review. Therefore a distinction is not significantly relevant.*

### Comments on Issue 3 Promoting and protecting rights

3.1. How can a person whose capacity is questioned be supported to obtain a second opinion when necessary?

*A person whose capacity is in question, who wishes to challenge or have their status reviewed needs to have access to appropriate services to support their unique needs. This may include: advocacy services; interpreters; independent medical or psychiatric assessors and information resources. All services should be free of charge.*

3.2. Is there an appropriate role for Courts and Tribunals, if a person whose capacity is questioned wishes to make a challenge but there is no existing Court or Tribunal order?

*Substituted decision-making should be an act of last resort (UN Ad Hoc Committee on Disability Right Convention, 2005 Article: 12.) Any deprivation of liberty must be subject to judicial review, independent of government (Article: 14). Courts and Tribunals might be the appropriate vehicle through which a challenge could be made.*

3.3. Is the current advocacy framework in NSW sufficient?

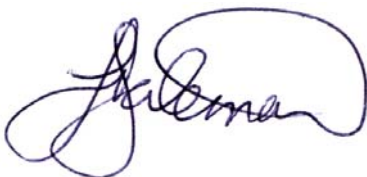
*MHCC assessment of the current advocacy framework is that there are insufficient support services for individuals whose mental capacity is in question. This is particularly problematic in times of crisis, when an individual is unable to communicate their needs effectively.*

Whilst MHCC acknowledges that this Discussion Paper is an initial consultation which focuses on defining and assessing capacity, we wish to highlight the absence of information and discussion on issues concerning the 'impact of finding incapacity'.

We feel that it is important to highlight the principle on which an assisted or substitute decision may be made, in order to respect, promote and protect the autonomy of all individuals in the community, and consider in detail the standards and guidelines appropriate to inform any assessment process.

For further information on this submission please contact Corinne Henderson, Policy Officer at [corinne@mhcc.org.au](mailto:corinne@mhcc.org.au) or Tel: 02 9555 8388 ext 101.

Yours sincerely,



Jenna Bateman  
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