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Assessing capacity in the context of testamentary, enduring power of attorney, and advance care directive documents in Australia

Dr Kelly Purser

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### Overview

- The current assessment environment
- Methodology and framework
- Main themes
- Promising practices
  - The relationship between lawyers and doctors
  - Need for national guidelines
  - Training and education

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### The current assessment environment

- Relationship between lawyers and doctors in assessing capacity
  - Testamentary and substitute decision-making context
- Ageing population + increase in mentally disabling conditions
  - 2050: incidences of dementia will increase to 1.13m
  - 2060s: spending on dementia set to outstrip other health conditions (approx 11% of entire health & residential aged care sector spending)
  - Dementia is already the largest single cause of disability in Australians (aged 65 years +)
  - About 1/3 of people with dementia will suffer from delusions which could affect testamentary dispositions
  - 30% of people will have depressive illnesses which may present as delusions of poverty

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**Current approach to assessments**

- No nationally accepted assessment guidelines/principles
- Terminological and methodological miscommunication and misunderstanding
- Assessments undertaken on an ad hoc basis
  - Jurisdiction and practitioner
- Issue of individual autonomy v protection
- 'Should there be a Commonwealth or nationally consistent approach to defining and assessing capacity and assessing a person's ability to exercise their legal capacity? If so, what is the most appropriate mechanism and what are the key elements?'
  - ALRC, 'Equality, Capacity and Disability in Commonwealth Laws' Issues Paper Nov 2013

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**Methodology**

- Doctrinal analysis current legal position
  - Secondary sources, cases, legislation
- Empirical research
  - practising (specialist) lawyers and doctors surveyed, interviewed
  - 20 doctors Australia wide
  - 10 lawyers Australia wide
- Suggestions made for 'promising practices'

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**Main themes**

- The relationship between lawyers and doctors
- The utility of national guidelines
- What such guidelines should contain
- Training and education

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### The relationship between lawyers and doctors

**Both professions:**

- Try and get it right
- Respect for other profession
- Positive about other profession

**But, lack of:**

- Guidelines
- Communication/terminology
- Commonality of approach
- Shared knowledge

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### The relationship between lawyers and doctors

- Constraints: time, budgets, fees
- Issue of litigation and liability
  - Expectation and fear of involvement
- The impact of miscommunication and misunderstanding on assessments

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### Clarification needed

- Clear **definitions and instructions**
  - What is being assessed?
  - For what purpose?
  - What information is needed/expected format of report?
- Who should be responsible for assessments
  - Need for **interdisciplinary approach**
  - **Role of each profession** should be clarified
  - Strengthen relationship between professions
- Best practice model - national guidelines

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Need for national guidelines?

- National guidelines
- 3 stages:
  - (1) Initial legal assessment
  - (2) Clinical assessment (if necessary)
  - (3) Final determination of legal capacity
- Guiding principles

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National Guidelines

- Consider: definitions, triggers, lifestyle, morals, format of instructions and report
- Assessment: individual's ability to understand, appreciate, reason/justify and communicate the decision
- Weigh:
  - The individual's ability to receive, understand, retain and recall relevant information
  - Select between options
  - Understand the reasons for the decision
  - Apply the information received to the individual's circumstances
  - Evaluate the benefits and risks of the choice
  - Communicate, and then persevere with, that choice (at least until the decision is acted upon)
- Interaction of legal and medical professionals in assessing legal capacity

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Training and education

- Clear communication necessary
- Increase knowledge and understanding
- Professional training
- Community education

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In summary

- Current situation = ad hoc assessment
- Ageing population + mentally disabling conditions increasing
- Need for flexible approach acknowledging current environment:
  - National paradigm
  - Strengthening relationship between legal and medical professionals
  - Increased training and education

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