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

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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

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
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 vs 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?’

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’

Main themes

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

Both professions: 
- Try and get it right
- Respect for other profession
- Positive about other profession
- Understanding
- Commonality of interest
- Shared knowledge

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

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
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

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

Training and education

- Clear communication necessary

- Increase knowledge and understanding

- Professional training

- Community education
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