Hunter Ageing Alliance
Together, we can better plan for older people and make the Hunter an age-friendly community

2024 Elder Law & Capacity Symposium
September 6, 2024 1:30 pm - 5:30 pm
Nu Space, Hunter Street Newcastle

Presented in collaboration with the Newcastle Law Society,
and hosted by Catherine Henry Lawyers.

Facilitated by
former ABC journalist Philippa McDonald

ASSESSING LEGAL CAPACITY

Adjunct Associate Professor Sue Field
Centre for Law & Justice, CSU, author of Elder Law - A Guide to Working with Older Australians

Dr. Sharon Reutens
Psychiatrist/Old Age Psychiatrist
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Capacity is not just a matter of a person's cognitive function but is more nuanced and subtle. Legal capacity for decision making is specific to the particular person, at a particular time and for a particular purpose.

Capacity for what?

A person's capacity in a specific situation will depend on a balance between their cognitive abilities at that time, the complexity of the decision to be made, and the consequences.

- A person may be able to manage their pension and day-to-day finances, but they may not be able to make reasonable and informed decisions about investments and business.

- A person may be capable of deciding where they want to live but may not be capable of selling their house.

- To make a will, a person needs reasoning and judgement, to understand the extent of their assets, know who may have a claim on their will, and understand the implications of their decision.

Legal assessment of capacity is not usually required for general day to day decisions.

Capacity for whom?

Under the law, it must be assumed that a person has capacity, until proven otherwise.

According to the Capacity Toolkit, a person generally has capacity to make a decision if they can:

• understand the facts and the choices involved

• weigh up the consequences, and

• communicate the decision.

Capacity needs may vary according to the persons family structure, and relationships; their legal situation; their wealth and investments; housing ownership; use of technology.

Capacity for when?

- Now?

A person's capacity can change from hour to hour, day to day, and month to month. A person with dementia can be more oriented and understand more at some times of the day than others, and when they are not in pain or otherwise uncomfortable. Or capacity may be temporarily reduced by illness, dehydration, or other circumstance. The environment may be overwhelming, and they may have more capacity in a calmer or more familiar setting, with people they know.

- Later?

People can put in place arrangements for subsequent decision-making for when their capacity declines in the future. This allows them to appoint a person they trust, and who knows their wishes.

Such documents include:

- Power of Attorney https://www.compass.info/featured-topics/powers-of-attorney/
- Enduring Guardianship
- Advanced Care Directives

These documents establish the lines for substitute decision-making, so the person can still effect their decisions even when they're not able to express their own desires.

All people should have these documents in place, even if they don't feel they are at the end of their life or approaching the end of their capacity to make their own decisions.

Capacity exists until proven otherwise.
Capacity is not a state.
Capacity changes from moment to moment and from situation to situation

Assessing capacity

Standard cognitive tests such as the mini mental state examination are not an absolute, and they are culturally and educationally specific. They will not provide guidance on the capacity of this person, at this time, for this decision.

Some useful questions in assessing capacity include:

- do people recognise money?
- can they do simple maths?
- can they read a bank statement?
- can they understand a bill?
- are they aware of scams?

There are also specific legal tests for capacity. However, these need to be considered in view of their relevance to the person (including literacy, language and culture), their situation, and the complexity and consequences of the decision.

We need to educate the professionals who work in health, law, and finance about the importance of the assumption of capacity as a human right, the assessment of capacity for major decisions, and awareness of the potential for coercion and other forms of elder abuse.

Everyone needs to know about mental capacity –
to protect people who might be vulnerable to making bad decisions
but more importantly,
to avoid a just ageism and prejudice about people's autonomy
and right to their own choices.

VOLUNTARY ASSISTED DYING

Dr. Charles Douglas
Clinical Director Voluntary Assisted Dying Unit HNELHD

Madeleine Archer
Member of the Voluntary Assisted Dying team, Australian Centre for Health Law Research, QUT

Six Australian States now have laws that enable Voluntary Assisted Dying (VAD). This process can only be enacted in very specific circumstances and following careful review. Laws vary from state to state.

In NSW the criteria for eligibility are that the person must have:

- advanced and progressive chronic disease that is terminal, with less than six months expected survival (or <12 months for neurodegenerative conditions)
- they need to make three requests
- be approved by two doctors, and
- go through a board

They must have competency to make this decision at all points, including the time of the administration.

Administration maybe by a medical practitioner or can be self-administered.

People who are denied eligibility for VAD can challenge the decision in the Supreme Court

- If you have terminal delirium at the time of administration, you are no longer considered able to give consent to VAD.

- Dementia cannot itself be a qualifying condition for VAD. Patients with mild dementia may still have capacity to request VAD, but require some other terminal illness to be eligible.

- VAD cannot be completed from an Advanced Care Directive. There is no room for substitute decision-making

- VAD CAN be suggested by a doctor or other health care professional if this is done appropriately within a discussion of prognosis, treatment options and palliative care options (S10(2) and S10(3) of the Act).

- There can be no coercion.

- VAD cannot be discussed through telehealth because of Commonwealth Criminal Code.

For a physician, administering VAD can be:

- confronting

- sobering

- weird

but it is:

- protected

- logical; and

- an extension of care and prevention

Institutions (for example hospitals and residential aged care facilities run by faith-based organizations) can choose not to 'provide' services relating to VAD, but must not hinder access to information about VAD and must take reasonable steps to facilitate access to VAD. In the case of permanent residents of residential aged care facilities, the facility must allow VAD to occur on site.

RESTRAINTS AND RESTRICTIVE PRACTICES

Penny Webster
Geriatrician, John Hunter Hospital

Rodney Lewis AM
Senior Solicitor Elderlaw Legal Services and author of Elder Law in Australia

Viv Allanson OAM
Chief Executive Officer Maroba Aged Care

The use of restraints and restrictive practises can amount to unlawful imprisonment and place the person at risk of injury or death. These practices can include physical and chemical restraint, mechanical restraint, environmental restraint and seclusion.

According to the Guardianship Division, NSW Civil and Administrative Tribunal (NCAT), restraint means:

> "any practice, device or action that interferes with a consumer's ability to make a decision or restricts a consumer's free movement.
>
> Chemical restraint means a restraint that is, or that involves, the use of medication or a chemical substance for the purpose of influencing a person's

behaviour, other than medication prescribed for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition.

Physical restraint means any restraint other than:

(a) a chemical restraint; or

(b) the use of medication prescribed for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition"

Whether medication is being used to treat a medical condition, or to chemically restrain a person in aged care is a very difficult determination.

Likewise, physical adaptations to the person's environment may be applied for the person's comfort and safety rather than to restrain them: eg. Bedrails or lowered beds to prevent falls, locked doors to protect from intruders.

Generally, aged care staff have a lack of training in using these practises to manage residents with extreme behavioural problems, and in making decisions about their use.

Enduring guardians are not eligible to make decisions about restrictive practises. That is because they do not have the authority to make lawful that which is not lawful. The care facility needs to apply to the New South Wales Civil and Administrative Tribunal to get a guardianship order and enable emergency response powers.

The person can be prescribed therapies for dementia and BPSD, which are medical conditions. It is also important to treat the underlying condition which may be leading to disruptive and difficult behaviours. Such conditions include:

- constipation
- urinary tract infection
- dehydration
- pain
- medications, or
- specific conditions such as "myxoedema madness"

The human rights principle at stake, is one where autonomy and agency are perpetual, regardless of age or capacity.

Rules do not necessarily solve the problems of the need for or the practise of restraints and restrictive practises, and compliance does not bring compassion.

In Newcastle we have a community of practice that includes the NSW Aged Care Commissioner. This group helps practitioners deal with some of these tricky issues.

FURTHER INFORMATION:

Capacity Toolkit
https://dcj.nsw.gov.au/resources/capacity-toolkit.html

Compass - a national website created to help older Australians understand and avoid elder abuse
https://www.compass.info/

PRACTITIONERS HANDBOOK (for VAD)
https://www.health.nsw.gov.au/voluntary-assisted-dying/Pages/practitioner-handbook.aspx

VOLUNTARY ASSISTED DYING IN AUSTRALIA:
A COMPARATIVE AND CRITICAL ANALYSIS OF STATE LAWS
https://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2023/12/Issue-464-10-Waller-et-al.pdf

RESTRICTIVE PRACTICES
NCAT
https://ncat.nsw.gov.au/documents/speeches/20210312_paper_fougere_c_aged_care_role_of_gd.pdf

Restrictive practices in aged care – a last resort
https://www.health.gov.au/topics/aged-care/providing-aged-care-services/training-and-guidance/restrictive-practices-in-aged-care-a-last-resort