

Assessing Capacity under the new Mental Health Act

AABHL Conference 2025, Christchurch
Concurrent session B, 13.20pm Sunday 7 December (Id#2005)

Alison Douglass

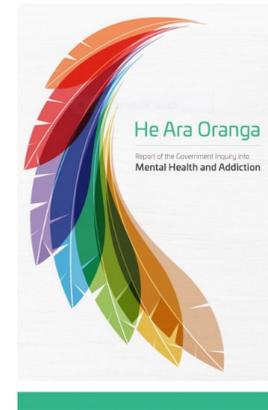
Barrister, Barristers Chambers, Dunedin, Kate Sheppard Chambers
Honorary Senior Lecturer, Bioethics Centre/Te Pokapū Matatika Koiora, University of Otago

www.alisondouglass.co.nz

Professor John McMillan

Bioethics Centre/Te Pokapū Matatika Koiora, University of Otago

New Zealand: Law Reform of the MHA



Lunatics Act 1868 & 1882 (repealed)



Mental Defective Act 1911 (repealed)



Mental Health Act 1969 (repealed)



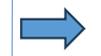
Aged and Infirm Persons Protection Act 1912 and (repealed) 1957, 1969, 1975
Public Trust Office Amendment Act 1912



Mental Health (Compulsory Assessment and Treatment) Act 1992



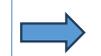
Protection of Personal and Property Rights Act 1988



Intellectual Disability (Compulsory Care and Rehabilitation) Act 2003



NZBORA 1990/ Human Rights Act 1993



Substance Addiction (Compulsory Assessment and Treatment) Act 2017



Health and Disability Commissioner Act 1994 (HDC Code)



Convention on the Rights of Persons with Disabilities (ratified by NZ 2008)



Separate Reviews of Adult Decision-Making Capacity Law and Compulsory Care law/MHA

PPPR Act 1988 - Function

- Adult decision-making law relates to **a person's functioning** and ability to make legal decisions about all aspects of personal care and Welfare, and finances
- Law Commission: Review of the Protection of Personal and Property Rights Act 1988 (PPPR Act) - *Ngā Huarahi Whakatau*
<https://huarahi-whakatau.lawcom.govt.nz/>

MH(CAT) Act 1992 - Status

- The MHA relates to **a person's status**
- *He Ara Oranga* report of Government inquiry into mental health and addiction (2018)
- Ministry of Health:
<https://www.health.govt.nz/regulation-legislation/mental-health-and-addiction/repealing-and-replacing-the-mental-health-act>

Capacity and Human Rights

- Compulsory care laws: exception for when the State may intervene in a person's life to provide mental health treatment without their consent.
- Human rights as a balancing exercise – positive duties vs negative obligations
- Procedural justice: **how** to do what's needed to be done vs. **why**?
- Current definition of MH disorder – two limb test: diagnosis/phenomenon + harm to self or others (or diminished capacity for self-care): lack of capacity is currently not a criterion of the MHCAT Act 1992.

Yet, people with impaired capacity for decision-making comprise:

- 45% of patients in psychiatric settings
- 34% of patients in general medical settings

Forthcoming legislative change: MH Bill Compulsory care criteria (Cl 7)

To be subject to the legislation, a person must have **seriously impaired mental health** that causes or is likely to cause:

- **serious adverse effects** in the near future in the absence of compulsory care (Cl 7(2)), and
- **the person to lack capacity** to make decisions about their own mental health (Cl 9)

Meaning of capacity to make decisions about mental health care (CI 9)

Meaning of capacity to make decisions about mental health care

(1) A person is presumed to have *capacity to make decisions about mental health care* unless they cannot, on a sustained basis,—

- (a) **understand the mental health care options** available to them; or
- (b) **understand the consequences of making a particular decision** to accept or not accept mental health care options; or
- (c) **retain, use, and weigh relevant information** to make decisions about mental health care options; or
- (d) **communicate** decisions about mental health care in any way.

Note: may disregard brief or intermittent indications of capacity, for example, the states described in subsection (1)(a) to (d).

Compulsory care principles (Cl 6)

- (a) Therapeutic purpose
- (b) Least restrictive application, consider voluntary care options
- (c) Supportive and responsive, to person's will and preferences
- (d) **Dignity of risk:**

“Compulsory care should recognise the person's right to take reasonable risks to achieve personal growth, self-esteem, and quality of life”

Substance Addiction (Compulsory Assessment and Treatment) Act 2017 (SACAT)

: *Sheppard v Bay of Plenty* [2018] NZFC 2115

- Review of a CTO
- Man 30s, “Alcohol is bad for your health” but he did not think he suffered any adverse health as a result of alcohol despite liver damage, memory impairment, malnutrition, seizures and falls
- Retain some information but could not integrate that information and apply and weigh the information in the decision-making process

Judge Mabey QC:

“The freedom to make the wrong choice is not the same as making the wrong choice through lack of capacity.”

Human Rights and Insight

PBU & NJE v Mental Health Review Tribunal [2018] VSC 564.

Appeal against decision that patients did not have capacity to refuse ECT under Mental Health Act

- PBU agreed he had a mental illness but not that he had treatment-resistant schizophrenia, as maintained by his doctors
- NJE suffered from treatment-resistant schizophrenia, for which she received voluntary and involuntary treatment.

Judge Bell:

“In both cases, lack of acceptance, belief or insight may be relevant when determining whether a person has the capacity to give informed consent, but it is only one consideration. It would be discriminatory to treat this consideration as determinative in relation to people having mental illness when it is not determinative in relation to people not having mental illness.”

Weaving Ethics, Values and Tikanga into Law:

- Ethical principles in conflict: autonomy v best interests e.g. PPPR Act: promote autonomy v protection from harm
- *Toolkit principles*: liberty, wellbeing and do no harm (John McMillan)
- Examples of Māori concepts embedded in law and practice:
 - Mana/dignity – restoration of person's capacity (SACAT Act)
 - Whakawhanaungatanga – establishing relationships/connections - a platform for Supported Decision-Making (Toolkit: Jo Baxter)



So what principles should apply?

- *The underlying tension: ideas from the CRPD have been shoe-horned into the new MHA – they are aspirational and important.*
- *Are these ideas a good fit for compulsory care legislation?*
- *How will an assessment of capacity to make decisions about MH care be undertaken – what ethical framework will/should apply?*

Nāku te rourou, nāu te rourou, ka ora ai te iwi

With my food basket and your food basket, the people will flourish

Ngā mihi ki a...

Co-authors: Dr Greg Young and Professor Jo Baxter, *Assessment of Mental Capacity: A New Zealand Guide for Doctors and Lawyers*, (2020) THWUP

Judge Phil Recordon, *Human Rights and Insight* Ch 11 Substance Addiction, p 350.

A Ruck Keene KC (Hon), *MHA MCA interface August 2023*

<https://www.mentalcapacitylawandpolicy.org.uk/wp-content/uploads/2020/06/MHA-MCA-interface-August-2023.pdf>

