

**From:**

**To:** [Madeleine Foley](#)

**Cc:**

**Subject:** Submission to the Upper House Committee on Elder Abuse

**Date:** Thursday, 17 March 2016 2:09:54 PM

Madeleine

I've spoken to Natalie Udovic (in February before my annual leave) and Merrin Thompson (yesterday) about what useful contribution the Office of the Legal Services Commissioner (OLSC) can make to Committee's hearing.

Our knowledge of "elder abuse", as it is defined, mostly comes out of our dealings with complaints about lawyers who are alleged to have ignored the lack of competence or capacity of their aged clients, or in some way acted inappropriately as the executor of an estate. That is to say, that our knowledge seldom relates directly to the issues of most concern to the Committee.

With the above in mind, I offer the following comments.

13.3% (334 ) of all complaints received by the OLSC in 2014-15 related to issues arising out of wills and probate matters.

Complaints about lawyers arising from such matters have been gradually increasing (along with our aging population) over time, to the point where two years ago we started recording complaints that go specifically to the issue of capacity of a client, or occasionally a beneficiary of a will.

The problem is only going to become more important as the population ages.

There were 17 such complaints in 2014-15.

The presumption that an adult has capacity to give instructions plays a part in any lawyer's consideration of a matter.

Complaints are most often made about the inappropriate involvement of lawyers with elderly clients in removing or putting in place enduring guardianship, powers of attorney or altering wills.

The more serious allegations relate to lawyers ignoring medical and other evidence of a client's incapacity.

Other than not considering or seeking medical opinions, there are indicators of issues of concern including overriding existing POAs (see the Law Society POA Guidelines) without due consideration, taking instructions without meeting clients and acting to benefit certain potential beneficiaries of the client's will without considering all parties.

There is developing case law (particularly in Queensland ie [Legal Services Commissioner v Ford](#) [2008] LPT 1) that emphasises the need for lawyers to take proper detailed notes in dealing with elderly clients.

The distinction between a client's testamentary capacity and their capacity to exercise their judgement with respect to other aspects of their life (management of finances, medical issues and accommodation for instance) is an important, and not always well understood, consideration.

Whilst the existing guidelines (eg Law Society Capacity Guidelines in NSW) are a valuable resource for all concerned with the interaction between lawyers and elderly clients, there is a need for all such guidelines across Australian jurisdictions to be reviewed, consolidated and better publicised.

Keeping in mind the confidentiality provisions of our legislation (the Legal Profession Uniform Law) we are more than happy to respond to specific requests from the Committee.

If you have any questions please call.

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