

Response to Supplementary Questions from Ms Lise Barry, Macquarie Law School

- 1. In your opening remarks at the hearing (p. 30 of the hearing transcript) you stated that ‘it does seem that more could be done in addressing family conflict’. Can you suggest any particular recommendations here?**

The free conflict resolution services of the NSW Community Justice Centre (CJC) should be promoted and better utilised to assist in the resolution of family conflict.<sup>1</sup> CJC offers free mediation services to people in NSW. Mediation is a cost effective method of addressing family conflict for older people and their families and should be actively promoted as a strategic part of the advanced planning process.

All of the CJC mediators are nationally accredited and satisfaction rates for the process are high. Mediation has been recently recommended by the Queensland Parliament for dealing with issues related to financial abuse of seniors.<sup>2</sup>

Support staff at the Guardianship Tribunal, NCAT and at the OLSC could all be trained to identify underlying family conflict and to promote the services of the CJC. Experience across a number of trials of mediation in situations where there are allegations of elder abuse, have demonstrated that referral to services is a critical issue. In a number of the Guardianship transcripts that I reviewed, there were comments that mediation was “not appropriate” due to high levels of family conflict. Mediation *can* be highly effective in these situations, but it takes time. While the brief settlement focussed mediations offered on the day of a hearing might not bring families to an agreement, a referral out to an external mediation provider may provide families the time and space for facilitated discussions to address some of the conflict. CJC has accredited mediators who are trained in dealing with family conflict and their co-mediation model can accommodate longer mediation sessions than those conducted within a Tribunal setting.

I note that Relationships Australia is currently running an “Elder Relationships Services Trial”. This service is another referral point for families in conflict.

Lawyers and doctors should be educated to identify family conflict and to make appropriate referrals, as the existence of conflict can impact on an older person’s health and capacity for decisions. This issue is highlighted in Nick O’Neill and Carmelle Peisah’s authoritative book, “Capacity and the Law”.<sup>3</sup> O’Neill and Peisah describe many of the decision making deficits that accompany dementia and that are exacerbated in situations of family conflict. O’Neill and Peisah also highlight that an older person with dementia may have difficulties in appraising others, may become suspicious and paranoid of people they once loved and trusted and may experience changes in their personality that render them susceptible to abuse.<sup>4</sup>

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<sup>1</sup> For the purposes of full disclosure, please note that I am currently an accredited mediator with CJC.

<sup>2</sup> Disability Services and Domestic and Family Violence Prevention Committee Communities, 'Inquiry into the Adequacy of Existing Financial Protections for Queensland’s Seniors' (Report 2, Parliament of Queensland, August 2015) Recommendation 29.

<sup>3</sup> Nick O’Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press, 2011) 2.3.2.

<sup>4</sup> *Ibid* 2.3.3.

Screening questions related to family conflict should form part of an assessment of legal decision making capacity. Guidelines for capacity assessment should make it clear that anyone carrying out such an assessment should make enquiries about family dynamics when the capacity of an older person is in doubt.

## **2. What additional powers would you recommend for the Office of the Legal Services Commissioner, in order to improve oversight of legal practitioners?**

In relation to providing oversight of legal practitioners dealing with older people, it is not entirely clear to me why Qld has been more vigorous in pursuing the discipline of lawyers who have taken instructions from older people who did not have the capacity to give them. I have not yet had the opportunity to examine the approach of the Qld Legal Services Commission to compare their complaints handling system in this area. There may be a multitude of reasons why the Qld Legal Services Commissioner has pursued these cases more vigorously, however I don't consider that it is a result of having additional powers.

My own view is that the first step should be better training and more stringent guidelines for the profession, rather than increased powers for the OLSC. The search for solutions to elder abuse should prioritize proactive, rather than reactive approaches.

With that in mind, one way to improve oversight of lawyers in this area would be to clarify the standards for accepting instructions when client capacity is in doubt. One potential model is the NSW Capacity Toolkit.<sup>5</sup> Another is the recently developed Queensland Guide for Legal Practitioners.<sup>6</sup>

## **3. What is your view on other participants' recommendation for mandatory registration of all grants and revocations of power of attorney?**

Mandatory registration alone is not sufficient if there is no requirement for attorneys to demonstrate that they understand the limits of the powers that have been conferred upon them. An attorney should be provided with information and training about their role and the responsibilities that accompany it.

I would like to see greater resources focussed on supported decision making measures that would see less reliance on substitute decision making and thus less need for formal substitute decision making appointments.

However, mandatory registration would have several benefits. Firstly, it would signify that Powers of Attorney are important legal instruments and that the rights of anyone with a POA in place deserve protection.

A searchable register would increase the utility of advance planning because any planning document could be more easily found and referred to.

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<sup>5</sup> Attorney General's Department of NSW, *Capacity Toolkit* (2008).

<sup>6</sup> Allens and Queensland Advocacy Incorporated, 'Queensland Handbook for Practitioners on Legal Capacity' (2014) <[https://www.qls.com.au/Knowledge\\_centre/Ethics/Resources/Client\\_instructions\\_and\\_capacity/Queensland\\_Handbook\\_for\\_Practitioners\\_on\\_Legal\\_Capacity](https://www.qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity/Queensland_Handbook_for_Practitioners_on_Legal_Capacity)>.

Registration would facilitate auditing and research into the prevalence of POAs and their prevailing characteristics.

From a legal capacity perspective, a register would serve to notify any official witness of the number of POAs that have been prepared by a person, and the frequency with which these have been altered – both factors that may indicate either impaired decision making, or some form of undue influence or abuse.

Any system adopted should be consistent nationally, as identified in the recent Queensland Inquiry.<sup>7</sup>

#### **4. What are your views on the potential value of the various provisions in the Victorian Powers of Attorney Act 2014 for New South Wales?**

##### **New Criminal sanctions:**

NSW should reform the Powers of Attorney Act to include similar provisions to those found in Part 9 of the Victorian legislation:

##### **PART 9--GENERAL**

- [135.](#) Offences as to enduring powers of attorney
- [136.](#) Offences of dishonestly obtaining or using [supportive attorney appointment](#)
- [137.](#) Criminal liability of officers of bodies corporate—failure to exercise due diligence

The new Act aims to increase protection against the misuse and abuse of Enduring Powers of Attorney (EPAs), in part through introducing criminal and civil consequences for Attorneys who act dishonestly or cause loss.

Education for Attorneys should include specific information about criminal sanctions for any misuse of a POA.

##### **Compensation provisions**

NSW should adopt compensation provisions for any misuse of a Power of Attorney such as those contained in s77 of the *Powers of Attorney Act 2014* (Vic):

##### **Compensation for acts of attorney**

(1) The Supreme Court or VCAT may order an attorney under an [enduring power of attorney](#) to compensate the [principal](#) for a loss caused by the attorney contravening any provision of this Act relating to enduring powers of attorney when acting as attorney under the power of attorney.

(2) Subsection (1) applies—

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<sup>7</sup> Disability Services and Domestic and Family Violence Prevention Committee Communities, 'Inquiry into the Adequacy of Existing Financial Protections for Queensland's Seniors' (Report 2, Parliament of Queensland, August 2015) 151.

(a) even if the attorney is convicted of an offence in relation to the attorney's contravention;  
and

(b) even if the [principal](#) has died, in which case compensation is payable to the estate of the [principal](#); and

(c) even if the [enduring power of attorney](#) is invalid or has been revoked or, at the time of the contravention, was invalid or had been revoked.

### **Part 7 of the Powers of Attorney Act 2014 (Vic): Supportive Attorneys**

The following response is an extract from a joint publication with Dr Susannah Sage-Jacobson.<sup>8</sup> In this extract we develop an argument for supported decision making and caution that any reform must be accompanied by education for supportive attorneys.

Supported decision making on the other hand, involves amendments to the law that recognize the legal standing of people who need support for their decision making.<sup>9</sup> Supported decision making has been defined as

a series of relationships, practices, arrangements, and agreements, of more or less formality and intensity, designed to assist an individual with a disability to make and communicate to others decisions about the individual's life.<sup>10</sup>

Under this model, where a person's will and preference is ascertained with the support of another person, that decision becomes be legally enforceable as the decision of the supported person. Significantly, the starting point is not an assessment of capacity, but an assessment of the support required to express a preference.<sup>11</sup> Supported decision making therefore represents a radical departure from the law of substitute decision making and also raises inevitable procedural concerns.<sup>12</sup> If sufficient safeguards concerning education and supervision of supporters are absent from legislation, supported decision making may simply become a form of surrogate guardianship.<sup>13</sup> In British Columbia, however the model of Representation Agreements imposes a positive obligation upon a nominated supporter to consult with the older person who is the subject of any

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<sup>8</sup> Lise Barry and Susannah Sage-Jacobson, 'Human Rights, Older People and Decision Making in Australia' (2015) 9(Article 2) *Elder Law Review* 1

<sup>9</sup> For a comprehensive explanation of the various supported decision making models see Qld Office of the Public Advocate, *A Journey Towards Autonomy? Supported Decision-Making in Theory and Practice*, (2014).

<sup>10</sup> Robert Dinerstein, 'Implementing Legal Capacity Under Article 12 of the UN Convention on the Rights of Persons with Disabilities: The Difficult Road From Guardianship to Supported Decision-Making' (2012) 19(2) *Human Rights Brief* 8, 10.

<sup>11</sup> S Beamer and M Brookes, *Making Decisions: Best Practice and New Ideas for Supporting People with High Support Needs to Make Decisions* (Values into Action, London, 2001); Jo Watson, Submission No 19 to the Victorian Law Reform Commission, *Review of the Guardianship and Administration Act 1986*, May 2010, 10.

<sup>12</sup> Terry Carney and Fleur Beaupert, 'Public and Private Bricolage - Challenges Balancing Law, Services and Civil Society in Advancing CRPD Supported Decision-Making' (2013) 36 *University of New South Wales Law Journal* 175, 200-201; Shih-Ning Then, 'Evolution and Innovation in Guardianship Laws: Assisted Decision-Making' (2013) 35 *Sydney Law Review* 133; Nina Khon, Jeremy Blumenthal and Amy Campbell, 'Supported Decision-Making: A Viable Alternative to Guardianship' (2013) 117(4) *Penn State Law Review* 1111, 1112, 1130; Office of the Public Advocate, 'A Journey Towards Autonomy? Supported Decision-Making in Theory and Practice' (Queensland Department of Justice and Attorney General, 2014), 30;

<sup>13</sup> Carney and Beaupert, above n12, 200.

decision making they are involved in.<sup>14</sup> In some instances, additional oversight of supporters is provided for with the appointment of a monitor.<sup>15</sup> Concerns over how supported decision making may be implemented and achieved in practice in Australia should not necessarily trump consideration of a measure that could assist to prevent older people being subjected to unnecessary control by substitute decision-makers against their will.<sup>16</sup> Further if developments in the Disability sector are indicative of the path for elder law reform,<sup>17</sup> then the increasing influence of human rights on legal policy development is likely to lead ultimately to supported, rather than substitute decision making regimes. Supported decision making has the potential to overcome the determinism of capacity assessments and to prioritise the rights of all older people to plot their own future decision making path.

Thank you for the opportunity to provide these additional submissions.

Lise Barry  
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<sup>14</sup> *Representation Agreement Act*, RSBC 1996, c 405, s 16.

<sup>15</sup> *Representation Agreement Act*, RSBC 1996, c 405, s 16 (8)(b)(ii).

<sup>16</sup> Office of the Public Advocate (South Australia) 58-59.

<sup>17</sup> Doug Surtees, 'What Can Elder Law Learn from Disability law?' in Israel Doron (ed), *Theories on Law and Ageing, the Jurisprudence of Elder Law* (Springer, 2009) 9351.