

**Submission
No 21**

INQUIRY INTO ELDER ABUSE IN NEW SOUTH WALES

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Submission to the New South Wales Legislative Council's General Purpose Standing Committee No. 2 Inquiry into Elder Abuse

As a member of the Australian Research Network on Law and Ageing (ARNLA)¹ and a legal academic from Macquarie University in Sydney, I am pleased to have this opportunity to make a submission based on some of the Inquiry's terms of reference.

This submission relates to my ongoing research into how lawyers assess the capacity of older people to instruct them. The information in this submission is relevant to the following terms of the inquiry.

1. The prevalence of abuse (including but not limited to financial abuse, physical abuse, sexual abuse, psychological abuse and neglect) experienced by persons aged 50 years or older in New South Wales
2. The most common forms of abuse experienced by older persons and the most common relationships or settings in which abuse occurs
3. The types of government and/or community support services sought by, or on behalf of, victims of elder abuse and the nature of service received from those agencies and organisations
8. The possible development of long-term systems and proactive measures to respond to the increasing numbers of older persons, including consideration of cultural diversity among older persons, so as to prevent abuse

The Context of my Submission: Capacity Complaints

This submission is based on original empirical research that has been conducted at the Office of Legal Services Commission (OLSC) examining the "Capacity Complaints" dating from 2011 to 2013.² This research is still ongoing, however I would like to share some of the themes and findings that have emerged from my research to date.

"Capacity Complaints" are loosely defined, but involve complaints that a lawyer took instructions from a person at a time when that person was not competent to give them. In most cases that form part of my research, the complainant alleges that the person giving instructions had a form of dementia. The capacity complaints at the OLSC are almost all related to older people. Out of a total of 35 complaints in this two year period, thirty three complaints were about people aged 60 and over. Twenty of the complaints related to older people aged 80 or older.

¹ ARNLA is an Australian wide network of legal scholars who are experts in the field of elder law. Central to the work of ARNLA is the promotion of human rights and freedoms for older persons, drawn from the principal international instruments concerning older persons – the UDHR, ICCPR, ICESCR, CRPD and the UN Principles for Older Persons.

² This research forms part of my PhD research project, "The Capacity Conundrum". The research has received Ethics Approval from the Human Research Ethics Committee at Macquarie University.

Underlying almost all of the OLSC capacity complaints files are allegations of elder abuse. They include direct allegations of financial abuse, physical abuse and psychological abuse perpetrated by family members, neighbours, carers and sometimes lawyers. Where there was no direct allegation, there was an implied allegation that the will of the older person had been overborne by another to grant them substitute decision making powers, or to assign property to them either via a real estate transaction or in a Will, and that a lawyer had failed to protect the older person by making adequate inquiries about their decision making ability.

It can only be presumed that this small number of complaints files represents only the 'tip of the iceberg', especially when it comes to complaints about the abuse of an older person associated with powers of attorney or enduring guardianship.

What emerges from some of these files is a sense that in a lot of instances, the person making the complaint about a lawyer was doing all within their power to raise an allegation about elder abuse and have some action taken, but that they had struck numerous barriers in doing so.

The Lawyers Role in Preventing and Responding to Elder Abuse

Lawyers play an important role in preventing and responding to elder abuse, because they are often consulted in relation to appointing a Power of Attorney, Enduring Attorney or Enduring Guardian for an older person. Used correctly, these instruments are in important way for an older person to express their wishes as to who can make decisions for and with them. However they confer considerable power on substitute decision makers that can leave older people vulnerable to abuse, especially financial abuse.

As Alzheimer's NSW reports:

*"[A] considerable proportion of financial abuse of people with dementia is perpetrated by people appointed as an attorney under an Enduring Power of Attorney (EPOA) not acting in the interests of the person with dementia. Another enabler of financial abuse is the failure of some lawyers to assess the capacity of an individual to appoint a new EPOA."*³

Guardianship in NSW

In New South Wales any person can appoint a Power of Attorney to assist them in managing their affairs. A Power of Attorney ceases to operate once the donor has lost their decision making capacity. Enduring Guardianship (EG) and Enduring Powers of Attorney (EPA) survives the loss of capacity of the donor.

These broad substitute decision making powers can leave some older people vulnerable to abuse. An EG may stand to gain financially in the future if they are also provided for in the older person's will. In this case an EG may make their decisions based on their own financial interests. They might refuse to put the needs of the older person first because they do not want to deplete the older person's financial assets by expending money on necessary accommodation or health care. The files that I examined included allegations that older people were being denied adequate care, accommodation and food by children who held EG and EPA.

³ Alzheimer's NSW, 'Preventing Financial Abuse of People With Dementia', p6

The Guardianship Tribunal may review and revoke the appointment of an EG, however reviews of an appointment are only sparked by a request and application to the Tribunal by a person with concerns for the welfare of the donor.⁴ In other words, the appointment of an EG is largely unregulated and unsupervised, leaving the most isolated elderly exposed to abuse because there is no one to make a complaint on their behalf.⁵

An EPA allows the Attorney to make financial decisions on behalf of the donor. Many of the complaint files that I examined include allegations that a person holding EPA has been perpetrating financial abuse upon an older person. Allegations include unnecessary home renovations done for the Attorney’s benefit rather than the older person, property purchases or sales that disadvantage the older person and allegations of theft of the older person’s income or savings. The sums involved range from small amounts up to fifteen million dollars.

There is currently no register or audit of powers of attorney or guardianship. The lack of regulation of how these powers are exercised heightens the need for lawyers to scrupulously ensure that an appointment made by an older person reflects the older person’s true will and preferences.

Of the thirty six complaints examined, twenty two complaints involved a dispute over the instructions for a Power of Attorney. Twenty Three complaints involved a dispute over the instructions for an Enduring Guardian or Enduring Power of Attorney. Further examination of the files reveals that of these complaints, sixteen of the matters were also taken to a hearing at the Guardianship Tribunal. In ten of these hearings, the family member(s) appointed as Guardian was replaced by the Public Guardian and the Public Trustee was granted Financial Management powers for the older person.

Total no of complaints	Complaint involves Power of Attorney	Complaint involves Enduring Powers	Matter also heard in the Guardianship Tribunal	Public Guardian and Public Trustee Appointed
36	22	23	16	10

These figures highlight the enormous cost to the State of dealing with disputes arising from how instructions are taken for a Power of Attorney. The fact that in one third of these situations, a Public Guardian was appointed, also directs attention to the prevalence of underlying family conflict where there are allegations of elder abuse. Under the legislation, a Public Guardian should be an appointment of last resort and is an indication that either there is no family, or that the family is in such conflict that they cannot agree on decisions required for the care or financial protection of a person in need of a guardian.

⁴ Ibid, s6K

⁵ John Billings, ‘Redressing Financial Abuse by an Attorney under an EPA’ (Paper presented at LexisNexis Wills, Succession and Estate Planning Conference, Melbourne, 6 March 2007); Duncan Boldy et al, ‘Addressing Elder Abuse: Western Australian Case Study’ (2005) 24 (1) *Australasian Journal on Ageing* 3, 6-7; Susan Kurrle, ‘Elder Abuse’ (2004) 33(10) *Australian Family Physician* 807, 809. See also Seniors Rights Victoria, Submission to the Victorian Parliament Law Reform, *Inquiry into Powers of Attorney*, 21 August 2009, 31.

Elder Abuse and Family Conflict

Underlying family conflict is a striking feature of the complaints files that I examined. Of the thirty six complaints files, thirty three involve underlying family conflict.

Older people are particularly at risk of abuse in these situations because research suggests that conflict heightens any decision making difficulties an older person may have. This issue is highlighted in Nick O'Neill and Carmelle Peisah's ebook, "Capacity and the Law".⁶ 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.⁷

As O'Neill and Peisah recommend:

*"The considerations set out above suggests the need for those taking instructions from, and those asked to assess the capacity of, people with cognitive impairment to execute legal documents such as powers of attorney, enduring guardianship and wills to obtain very careful histories of family relationships of the people they are assessing. An assessment of the person's understanding of any conflicts or tensions in his or her environment particularly involving those under consideration for appointment is advisable."*⁸

My research indicates that lawyers and doctors require further education in this area. In the case of lawyers, I would also recommend more stringent requirements related to documenting the interview process to demonstrate that proper inquiries have been made of an older person giving instructions for the appointment of an attorney or enduring guardian.⁹

More research is required about the interview techniques and screening required in situations where elder abuse may be occurring. The literature around 'capacity assessments' of older people is very much focussed on a medical model that sets out to evaluate the cognitive performance of the older individual. There is very little research on how abusive relationships may impact on the older person's decision making or how lawyers or any other professional might effectively ascertain if such abuse is occurring. There is also very little focus on assisting an older person to decide if the person/people they wish to appoint is appropriate for the role.

Lawyers' Skills in Interviewing Older People

When a lawyer or other authorized person witnesses the appointment of an Enduring Guardian or Attorney, they must certify that "The appointer appeared to understand the effect of this instrument and voluntarily executed the instrument in my presence."

⁶ Nick O'Neill and Carmell Peisah, 'Capacity and the Law' (2011), Sydney University Press, <http://worldlii.austlii.edu.au/au/journals/SydUPLawBk/2011/1.html> , 2.3.2.

⁷ Ibid, 2.3.3.

⁸ Ibid, 2.3.5.

⁹ There is currently no definitive requirement that lawyers keep a file note of the interview process for instance.

As disclosed in my research, this sometimes leads to a process whereby the lawyer explains the form and then ascertains that the person understands the instrument by asking “Do you understand?” An answer in the affirmative is not sufficient to ascertain that a person really does understand the powers that they are assigning to a nominee. It may be that an older person has been “schooled” to approve the appointment. Specifically O’Neill and Peisah warn that:

“A person can still be seen in private and ‘influenced’ by the presence of a significant other sitting outside in the waiting room. Those with dementia and frontal lobe impairment often have a tendency to respond to the environment rather than being able to recall and manipulate recalled facts of their life including relationships. It is much easier for such a person to recall and consider the needs or demands of those most recently and concretely in their presence (e.g. the person who brought them to the appointment and is sitting outside in the waiting room) than recall and hold in their minds the needs of others in their lives who they may not have seen recently.”¹⁰

My research indicated a wide variety of practice and sometimes very limited understanding of the kind of interview skills required to determine that an older person has the capacity to appoint a power of attorney or enduring guardian and that they are doing so free of undue influence. Capacity for a particular decision means that the person understands the nature of the particular decision to be made, can weigh up the alternative, understands the consequences of the decision and can communicate it in some way. In the files I examined, it was not uncommon for lawyers to note that the older person “appeared lucid”, “knew what day it was”, “was well dressed”, “described their life history”, or something similarly unrelated to the specific legal decision or appointment they were making. Underlying these kind of statements seems to be the adoption of a kind of mini mental examination of the person’s day to day cognition, rather than comprehensive client interviewing related to the legal decision that an older person wants to make.

There is currently little training for lawyers in the skills required for comprehensive client interviewing. What little training there is for lawyers in working with older people is often focused on recognizing and responding to dementia. A rights based approach to working with older people would focus instead on empowering older people to make their own decisions . Further, lawyers should be trained in an understanding of the prevalence and dynamics of elder abuse and in how to identify underlying family conflict that may impact on the older person’s situation. ¹¹

Evidence of comprehensive client interviewing was absent in many situations described in the complaints files. A variety of reasons for these failures emerged.

- 1) The older person “appeared lucid” to the lawyer.

¹⁰ O’Neill and Peisah above n6.

¹¹ See for instance Deborah O’Connor, Margaret Hall and Martha Donnelly, ‘Assessing Capacity Within a Context of Abuse or Neglect’, 21 (2009) 2, 156, 162.

In law there is a presumption of capacity and this is reiterated in training tools provided to lawyers and others who may be required to assess capacity.¹² Quite rightly, this means that lawyers shouldn't presume that an older person lacks capacity.

The difficulty with this presumption is that lawyers with little experience of working with people with a cognitive impairment might not be alert to situations of "gratuitous concurrence" that may mask a lack of understanding in an older person. Put simply, in order to avoid the embarrassment of admitting that they do not understand a lawyer's explanation of a document such as an Enduring Power of Attorney, an older person may "agree" with a lawyer, not ask questions when they don't understand, and sign documents that they cannot follow.

The law of client legal privilege requires that lawyers should interview an older person alone, treating everything that they are told in the course of providing advice about a Power of Attorney or Enduring instrument as confidential. Interviewing the person away from family members may provide the opportunity to discuss or screen for elder abuse if lawyers are educated to be aware of the possibility.

For this reason, it is vital that lawyers understand how to conduct an interview in such a way as to be assured that their clients understands the decisions that they are making and that they are making the decision free of any undue influence. This is not an easy task for a lawyer who may be meeting with an older person for the first time, is unaware of any changes in the person's thinking over time and has no knowledge of the underlying family dynamics or of possible abuse.

For instance in one complaint, notes written by a psychogeriatrician and provided to the OLSC by a complainant stated, "I will speak to the "new solicitor" who, I suspect does not realise just how impaired is. She can certainly present well and certainly forcefully."

2) Professional differences

Lawyers may be reluctant to seek a second opinion about the older person's decision making capacity because it may be at odds with what the older person initially wants to do, or because the outcome of an assessment would be that the older person could not appoint an Attorney and would need to resort to the more onerous process of going through the Guardianship Tribunal. In some situations, lawyers are not aware of the range of medical professionals who can provide an opinion about a person's decision making capabilities.¹³

Capacity assessment itself can be a source of conflict. It is not an exact science, and in some cases, there was conflicting medical and legal opinion on a file about an older person's decision making capacity.

¹² Law Society of New South Wales, 'A Practical Guide for Solicitors: When a Client's Capacity is in Doubt' (2009) <<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/023880.pdf>>; New South Wales Attorney General's Department, 'Capacity Toolkit: Information for government and community workers, professionals, families and carers in New South Wales.' <http://www.diversityservices.lawlink.nsw.gov.au/agdbasev7wr/divserv/documents/pdf/capacity_toolkit0609.pdf>

¹³ Lise Barry and Jane Lonie, 'Capacity, Dementia and Neuropsychology', Law Society Journal, October 2014, 78-79.

For instance in the case of one older person, a woman in her early 80s, the family were at odds about whether she had capacity to appoint a power of attorney or to change her will. On the one hand, one daughter had a medical report from a GP that stated

“Despite some mild cognitive impairment I would say she has adequate testamentary capacity.”

On the other side of the fence was the daughter who had been cut out of a new will who possessed a report by a psychogeriatrician with the opinion,

“On examination she presents a little defensive and minimising of her memory deficits, she clearly had significant sight impairments and a tendency to repeat answers. She presented with a degree of insightlessness into her situation and her judgement was impaired, with her feeling as if she could cope with more than was possible with her complex deficits. She was vulnerable through impaired vision and planning deficits in terms of her finances and self-care issues.”

There was a second report from a different medical practitioner that stated that the woman:

“does not hold capacity in the domains of appointing an Enduring Guardian or Power of Attorney, and does not have testamentary capacity. It would be reasonable to state that these problems are secondary to the known organic pathology of dementia, mainly vascular based ”.

A lawyer in this situation might be guided by whoever attends their office with the older person. If family support people provide medical opinions that attest to the older person’s decision making capacity, then a lawyer might not investigate this issue any further. This highlights once more the need for sophisticated client interviewing techniques and the need for lawyers to understand some of the symptoms of dementia, other causes of cognitive decline and signs of elder abuse. More than that, lawyers should be educated to enhance an older person’s decision making abilities by providing optimum interview conditions and accommodations.¹⁴

3) Time and cost

Lawyers may be discouraged from seeking a professional opinion about an older person’s capacity because it can be both time consuming and costly.

A comprehensive assessment of a person’s capacity for a particular decision can take many hours. One professional assessment of the time required in a contentious case, is at least two hours of personal one on one interviews (fully recorded). In addition, there would be a need to interview the person more than once to ensure consistency of their instructions, and time spent reviewing any documentary evidence of previous decisions such as a Will, or instrument of appointment of an Attorney so that any marked changes in decisions could be explored. A professional assessment of this kind would be prohibitively expensive for many older people.

¹⁴ Lise Barry & Susannah Sage-Jacobson, "Substitute Decision Making for the Elderly in Australia", in Ralph Ruebner, Teresa Do and Amy Taylor (eds) International and Comparative Law on the Rights of Older Persons, (Vandeplas Publishing 2015) 286-302

Discipline of Lawyers Related to Taking Instructions

NSW has the largest proportion of lawyers in Australia (41.6%), yet no lawyer in NSW has been prosecuted for the way in which they have taken instructions from an older person. The situation in New South Wales can be contrasted with Queensland (with only 15.7% of the nations lawyers), where the case of *Ford* lay the foundation for three other disciplinary matters involving instances of lawyers taking instructions from older people with cognitive impairments.¹⁵ For instance in the 2015 case *Legal Services Commissioner v Penny*, solicitor Rhonda Penny was successfully prosecuted for failing to maintain reasonable standards of competence and diligence –

*where the conduct occurred in the course of arranging a power of attorney and a new will – where the respondent’s suspicions were raised as to her client’s capacity to make or sign the relevant documents – where the respondent sought no medical opinion, failed to read the documents to her client, failed to conduct interview in accordance with the “capacity guidelines”, failed to make written records of her conference and failed to keep a file – where the respondent admits that she failed to maintain the requisite standard ...*¹⁶

One of the difficulties of pursuing these cases is that there are no clear regulations in NSW regarding the procedure for taking instructions for a power of attorney or enduring guardian appointment, or in situations where an older person’s capacity to give instructions is in doubt. For instance there is no binding requirement that a lawyer follow the guidelines set down in the NSW Capacity Toolkit or the Law Society’s own guidelines.¹⁷ There is not even an absolute requirement that the lawyer maintain file notes of the manner in which they took instructions or of how they ascertained that an older person understood the ramifications of appointing an attorney or guardian.

In NSW, prosecution of a lawyer for misconduct has occurred in related circumstances, in situations where lawyers have sought to benefit themselves from the estate of an older person who lacks capacity. These can rightly be characterized as elder abuse. Each of these cases involved an older person with cognitive impairment or a mental health problem.

In the case of *Legal Services Commissioner v O’Donnell* [2015] NSWCATOD 17, a solicitor was struck off after being found guilty of professional misconduct for charging professional fees for tasks ostensibly performed under a Power of Attorney.

In *Legal Services Commissioner of New South Wales v Reymond* [2014] NSWCATOD 14, a solicitor was reprimanded and ordered to pay compensation to the family of an older woman he had befriended after he drew a will in which he was the sole beneficiary, executor and trustee. The Court held that Mr Reymond had deceived the older woman by not disclosing the requirement that she should receive independent advice about drawing a will.

¹⁵ *Legal Services Commissioner v Ford* [2008] LPT 12; *Legal Services Commissioner v de Brenni* [2011] QCAT 340 ; *Legal Services Commissioner v Comino* [2011] QCAT 387; *Legal Services Commissioner v Penny*[2015] QCAT 108.

¹⁶ *Legal Services Commissioner v Penny*[2015] QCAT 108.

¹⁷ See note 13 above.

In the case of *Berger v Council of the Law Society of NSW* [2013] NSWSC 1080, a solicitor of 44 years standing had his practicing certificate suspended after abusing a Power of Attorney and charging professional fees for routine tasks.

More recently, the 2015 Supreme Court decision of *Matouk v Matouk (No 2)* [2015] NSWSC 748 provided a comprehensive example of the possible consequences of a lawyer's failure to properly take instructions from an older person. This case involves two siblings who fraudulently obtained the transfer to them of their 75 yr old mother's home after convincing their mother that she was signing a power of attorney. The solicitor who witnessed the property transfer spoke only English, whilst the mother spoke only Arabic. The same solicitor acted for the mother's son when she lodged a caveat on the title to the home. The solicitor's failure to properly interview the older person, obtain instructions from her personally and ensure that she understood what she was signing, led to lengthy and expensive court proceedings. The solicitor was reprimanded for acting in a matter where there was a conflict of interest and ordered to pay compensation.¹⁸

Further Comments on the Power of Attorney Appointment Process and the Role of Fiduciaries

These matters usually only come to light because of the complaints of close family. If an elderly person does not have anyone to scrutinize the behavior of someone acting under a power of attorney, or purporting to operate as a fiduciary acting in the older person's best interests, then it is relatively easy for an unscrupulous person to steal money or benefit from the estate of the older person and to go undetected.

There is no requirement on the Power of Attorney form that the person witnessing an appointment form should outline to the attorney, the powers and responsibilities that go with the appointment. In short, the emphasis is on the capacity of the donor to show that they have the requisite understanding of the role, but there is no onus on the attorney to do the same. Far more resources should be expended on educating attorneys about their responsibilities.

There is a need for some form of registration of powers of attorney and enduring guardianship, so that the actions of person exercising these powers can be scrutinized. Random audits should be considered and resourced, as these would go some way to protecting the rights of older people to be free of abuse and would signal the serious fiduciary responsibilities of the attorney. Consideration should also be given to more explicitly criminalizing an abuse of fiduciary duties in these circumstances.

Several of the complaints files include full transcripts of Guardianship hearings and of the paperwork that accompanied those applications. Of those matters that went to the Guardianship Tribunal, there was little apparent investigation of the veracity of complaints of elder abuse. Where there was family conflict, these conflicts were not resolved or mediated. Instead, the response of the

¹⁸ OLSA Register of Disciplinary Action, Steven Stojanovich, (2012)
<http://www.lawlink.nsw.gov.au/olsc%5Cnswdr.nsf/LUComplaintsBySurname/8EA1732332650900CA257ABD016A5B1?OpenDocument>.

Guardianship Tribunal in these situations was to appoint a public guardian who would usurp all decision making for the older person.

At the very least, the Guardianship Tribunal should be resourced to provide intensive mediation services to families in conflict so that disputes over Power of Attorney might be more likely resolved without the need for a public guardian appointment. Consideration should also be given to boosting resources to the NSW Community Justice Centre to train their mediators to deal with family conflict around elder law issues.

Training in interviewing skills and in identifying signs and risk factors for elder abuse should be provided to all professionals who are authorised to witness a Power of Attorney or Enduring Guardianship. Authorised witnesses are also in the perfect position to provide information to the older person about how to report financial abuse in the future.

Conclusion

Lawyers are central to the process of older people appointing substitute decision makers, often family members. Under the current law, these appointments give the attorney almost unfettered access to an older person's property, finances and legal decisions, highlighting how vulnerable some older people may be to abuse.

Lawyers should be educated about the prevalence of elder abuse and how powers of attorney and enduring guardianship can be used to perpetrate this abuse. If called upon to witness these appointments, lawyers should take the opportunity to screen for abuse. Such screening would require that lawyers receive enhanced training in interview skills, identifying and responding to family conflict and understanding the impact of dementia, illness and other drivers of cognitive decline upon the decision making capabilities of older people.

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