

**Supplementary  
Submission  
No 81a**

**INQUIRY INTO INQUIRY INTO ELDER ABUSE IN NEW  
SOUTH WALES**

**Organisation:** Capacity Australia

**Name:** Mr Nick O'Neill

**Date received:** 21/03/2016

---

## **Submission (supplementary) to Inquiry into elder abuse in NSW**

Following discussion, at the public hearing Friday, 18 March 2016, of the standard of competence and diligence expected of legal practitioners in NSW (particularly solicitors) in relation to keeping detailed notes about their conversations with clients whose understanding/decision-making capacity may be in doubt, I wish to draw the Standing Committee to the following quotation from the Queensland case, *Legal Services Commissioner v Given* [2015] QCAT 225 at paragraph [100]:

In this case Mr Given says he was sufficiently aware of the issues surrounding his client's condition that he aimed to act with greater than normal care. In those circumstances, a practitioner, acting with the required standard of competence and diligence should make and retain adequate notes as to the attendances on his client. The notes should have included detail of the questions. This is an important aspect of the solicitor's duty in the circumstances.

The decision is one of Justice David Thomas who is president of QCAT, the Queensland equivalent of NCAT and a Supreme Court judge. The paragraph just quoted, and the surrounding paragraphs, show Thomas J and the solicitor and lay member who assisted him were of the view, as was expressed in paragraph [103] that: "In the circumstances, Mr Given's failure to prepare adequate notes of the interview and the fact that he did not conduct the interview with Mr B. alone until reviewing the documents, is conduct which falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian Legal Practitioner, and so amounts to unsatisfactory professional conduct as is contemplated by s 418 of the *Legal Profession Act 2007 (Qld)*".

Mr Given argued that the definition of unsatisfactory professional conduct may not embrace all cases of error, so that there might be conduct which, whilst amounting to a failure to maintain reasonable standards of competence or diligence, may not be substantial enough to fall within the ambit of the definition. However, while Thomas J accepted that a practitioner's failure had to be "sufficiently substantial", he took view that in this case, given the central importance of a practitioner's evidence as to capacity and given that Mr Given was, on his own evidence, on high alert, the need to take adequate contemporaneous notes was a matter of great significance and sufficiently substantial to fall within the definition of unsatisfactory professional conduct as was contemplated by s 418 of the *Act*. (See [105]-[106]).

I suggest that the standards of competence or diligence for solicitors are the same throughout Australia and that the standard for taking adequate contemporaneous notes in the circumstances of this case is the standard of competence or diligence required of

solicitors in NSW, even though relevant the codes of conduct in NSW do not make this clear. When it comes to the standards expected of members of regulated professions in Australia, including the legal and health professions, what is set down by tribunals and courts with a statutory role in relation to the regulation as to what constitutes a breach of those standards, is binding on the members of that profession.

Consequently, I think it appropriate for the Standing Committee to take the view that the standard concerning noting taking by solicitors when taking instructions from elderly clients exhibiting signs of decision-making disabilities set out in the *Given Case* applies to solicitors in NSW.

Nick O'Neill

Professorial Visiting Fellow, Faculty of Law, UNSW  
Director, Capacity Australia