PhD Thesis by Publication

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Statement of Candidate

I hereby certify that the work presented in this thesis entitled, "The Capacity Conundrum: How Lawyers Assess Their Client's Decision-making Capacity" has not previously been submitted for a higher degree to any other university or institution.

I also certify that this thesis is an original piece of research and that it has been written by me. Any help and assistance that I have received in the preparation of articles within the thesis itself have been appropriately acknowledged.

I also certify that all sources of information and literature used in the preparation of this thesis have been indicated within the thesis and cited appropriately.

The research presented in this thesis was approved by the Macquarie University Human Research Ethics Committee (Reference: 5201300386) dated 1st August 2013.

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In loving memory of my father Pat and my brothers Sean and David.

Chronological List of Publications

1. Lise Barry, 'He Was Wearing Street Clothes, Not Pyjamas': Common Mistakes in Lawyers' Assessment of Legal Capacity for Vulnerable Older Clients (2018) *Legal Ethics* 21 (1) 3-22.

2. Lise Barry, 'Capacity and Vulnerability: How Lawyers Assess the Legal Capacity of Older Clients' (2017) 25 *Journal of Law and Medicine* 267.

3. Lise Barry, '*Capacity Guidelines in NSW: Time for a Review'* (2017) (prepared for publication)

4. Lise Barry, 'Elder Mediation: What's in a Name?', *Conflict Resolution Quarterly* (2015) 34 (4), 435.

5. 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.

6. Lise Barry and Jane Lonie, 'Capacity, Dementia and Neuropsychology', *Law Society Journal* (October 2014) 78.

7. Lise Barry, 'Elder Mediation' (2013) 24 *Australasian Dispute Resolution Journal* 251.

8. Lise Barry, 'Case Note: *Goddard Elliott v Fritsch* [2012] VSC 87' (2012) 10 *Macquarie Law Journal* 105.

Author Contributions to Joint Publications

Paper 1: 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.

Paper 1 was jointly conceived, prepared, authored and edited with Dr Susannah Sage-Jacobson. Each author made a 50% contribution to the paper.

The case study that appears at the beginning of the article was prepared by me from initial data collected as part of this thesis.

Paper 6: Lise Barry and Jane Lonie, 'Capacity, Dementia and Neuropsychology', *Law Society Journal*, (October 2014) 78-79.

Paper 6 was jointly conceived, written and edited with Dr Jane Lonie. Each author made a 50% contribution to the paper.

Dr Lonie prepared the case study presented as part of this article and had full responsibility for explaining the role of neuropsychologists in assessment of people with dementia.

Signed statements of the author's contributions are at Appendix A.

Abstract

This research aims to improve the way lawyers assess the legal capacity of older Australians. The key contributions of this project are to offer new empirical depth to the analysis of lawyers' practice in New South Wales, and to recommend changes to legal practice that will uphold older people's rights to legal decision-making and help prevent elder abuse.

Older people can become victims of abuse when making significant legal decisions they do not understand. Lawyers who prepare and witness legal documents can help safeguard against abuse by ensuring that older clients have the requisite capacity for legal decisions. However, this process must account for a client's personal circumstances and vulnerabilities, as well as the complexity of decisions to be made. At present, there are significant problems with the content and application of laws, tools and guidelines used by lawyers to address legal capacity in their everyday practice.

This research applies a tripartite theory of elder vulnerability – encompassing inherent, situational and pathogenic aspects – and a broad human rights approach to elder law to fill these gaps by providing a much-needed critical lens through which to view capacity assessment. This theoretical framework forms the foundation for an in-depth empirical investigation of the law, tools and guidelines for capacity assessment through a directed content analysis of capacity complaints made to the Office of the New South Wales Legal Services Commissioner between 2011 and 2013.

The research findings reveal that many lawyers demonstrate poor understanding of cognitive impairment, compounded by deficiencies in legal interview and capacity assessment skills. Family conflict was also found to be a factor driving complaints. This thesis concludes by making recommendations for improvements to the training and regulation of lawyers in capacity assessment, and suggests an agenda for future research.

Original and significant contributions to knowledge

1. An original analysis of capacity assessment combining a philosophical understanding of autonomy and vulnerability within a human rights framework.

2. Application of a tripartite theory of vulnerability developed by Rogers, Mackenzie and Dodds to the capacity assessment process. This lens highlights: the inherent vulnerability of older clients with a cognitive impairment; the situational vulnerability arising from family conflict and their reliance on lawyers who are poorly trained in capacity assessment; and the pathogenic vulnerability created through inconsistent application of guidelines, tools and regulation.

3. A comparative analysis of the published capacity guidelines in NSW demonstrating inconsistencies in their content leading to recommendations for their reform.

4. Original empirical research that examines the content of three years of capacity complaints at the NSW Office of Legal Services Commissioner, providing evidence of common features in the capacity assessment processes of lawyers in NSW that contribute to complaints.

5. Identification of the role of family conflict in capacity complaints, leading to a proposal for increased attention to family conflict resolution, including through elder mediation.

Key Terms

Capacity, Vulnerability, Autonomy, Human Rights, Elder Abuse, Elder Mediation, Cognitive Impairment, Dementia, Legal Ethics, Legal Regulation, Enduring Power of Attorney, Enduring Guardianship, Testamentary Capacity

Acronyms

ACF	Aged Care Facility
ACAT	Aged Care Assessment Team
ADL	Activities of Daily Living
ADR	Alternative Dispute Resolution
ADRAC	Australian Dispute Resolution Advisory Council Inc.
ALRC	Australian Law Reform Commission
ARNLA	Australian Research Network on Law and Ageing
CLE	Continuing Legal Education
CRPD	Convention on the Rights of Persons with a Disability
DMD	Decision Making Disabilities
EPOA	Enduring Power of Attorney
MMSE	Mini Mental State Examination
NCAT	New South Wales Civil and Administrative Tribunal
OLSC	Office of the Legal Services Commission
POA	Power of Attorney
QCAT	Queensland Civil and Administrative Tribunal
RUDAS	Rowland Universal Dementia Assessment Survey
VCAT	Victorian Civil and Administrative Tribunal

Introduction

A thesis by publication requires some introduction for those not familiar with the format. It is comprised in part of publications focussing on discrete aspects of the overarching thesis narrative and written for specific audiences. This provides a challenge for the writer and also for the reader, particularly those more familiar with the traditional thesis. By way of guidance, this thesis by publication is organised into three parts: Part One – an overview of the thesis; Part Two – the publications that form part of the thesis organised into four chapters; and Part Three - conclusions and recommendations arising from the empirical research and further analysis.

PART ONE: Thesis Overview

Part One of the thesis provides an overview. It begins by outlining the context for the project and research questions and delineating the scope of the research. Next, the organisation of the published papers is explained, outlining their arrangement into four distinct chapters and contextualising them by describing the ways in which each paper contributes to the original knowledge claimed for the thesis. The links between the papers and the way that the papers contribute to answering the research questions is examined

The literature review is divided into two parts. Chapter 2 provides the background to the law and capacity guidelines for NSW, while Chapter 3 considers the literature that grounds the human rights and vulnerability frameworks that underscore the research. While each of the published papers necessarily canvases the literature, this chapter addresses key aspects developed in the thesis in more detail. This is also necessary because the literature examined in Chapters 2 and 3 informs the rationale for the directed coding set out in Chapter 4.

Chapter 4 provides a detailed outline of the research methodology: the directed coding analysis adopted in the empirical project is particularised; the sample is delineated; and the limits of the data are acknowledged. Papers 5 and 6 are drawn from the empirical data and while they describe the methodology in brief, Chapter 4 fills the gaps that are the inevitable result of the brevity of publications.

Chapter 1: Synopsis

This chapter commences by outlining the context of the research problem before the research questions are articulated and the scope of this thesis delineated. Next, the structure of the thesis is explained and a short synopsis of the thesis is provided, setting out how each publication addresses the research questions. Finally, the original contributions to knowledge that are claimed in this thesis are established and the significance of this research is highlighted.

1.1 Context of the Research Problem

There is a dearth of knowledge on the actual working of the assessment of legal decision-making capacity in Australia. This is most significant when lawyers serve older clients. The processes are hidden behind a veil of confidentiality and the development of law, tools and guidelines for practice has been largely unexamined. This research will fill that knowledge gap by making practical recommendations for necessary improvements to the capacity assessment of older clients in Australian legal practice.

The right to make legal decisions is a fundamental human right that belongs to all people,[1] including older people with a cognitive impairment.[2] This right has two significant aspects: the right to make any legal decision that you do understand, regardless of the outcome and how others may judge its wisdom;[3] and the right to be protected from making potentially harmful decisions that you do not understand.[4]

Awareness of the problem of elder abuse related to legal decision-making is growing as the population ages.[5] Such abuse is commonly perpetrated when older people make particular legal decisions for the benefit of a third party and capacity for making those decisions may be questioned or contested.[6] Lawyers play an important role in preventing these forms of abuse through witnessing enduring appointments and preparing legal documents on the instructions of older clients.[7] When preparing and witnessing enduring documents, lawyers must certify

[1] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) Art 12.
[2] The terms 'cognitive impairment' and 'dementia' are delineated and defined for the purpose of this thesis in Chapter 1, 1.3 "Scope of the thesis".
[3] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) Art 12 (2).
[4] Ibid, Art 12 (4).
[5] Australian Bureau of Statistics, 'Future Population Growth and Ageing' (Australian Bureau of Statistics, 2009) <http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/LookupAttach/4102.0Publication25.03.092/$File/41020_Populationprojections.pdf>.
[6] Australian Law Reform Commission, 'Elder Abuse - A National Legal Response' (2017), Chapter 5.
[7] In NSW, these advance planning documents typically comprise the appointment of an Enduring Power of Attorney (for future financial decisions), appointment of an Enduring Guardian (for decisions about health care,

that, to the best of their knowledge, their client had the capacity for the decision at the time it was made.[8] Decision-making capacity means that clients could: understand the situation they were in and the decision to be made; evaluate their options and the consequences of those choices; weigh the risks and benefits of the choices; and communicate their decision.[9]

The most common reason for a legal challenge to the decision-making ability of an older Australian is the belief that they have been affected by a condition associated with ageing. However, decline in old age is not inevitable.[10] An incorrect assessment of decision-making capacity could result in older people who do have legal capacity being prevented from making their own decisions, thereby infringing upon their legal decision-making rights. This can also lead to a devastating loss of agency and expensive, stressful and time-consuming legal challenges.

A lawyer's assessment of their client's capacity is a safeguarding measure to uphold these rights to legal decision-making. Older people are often advised to see a lawyer for assistance with advance planning at the same time that they are given a diagnosis of a cognitive impairment or when dementia is perceived to affect their decision-making abilities.[11] Decision-making capacity is relevant across many decision domains in the civil law context, including decisions to: marry, vote or consent to sexual intercourse; instruct a solicitor to commence, continue, or settle legal proceedings; make an advance directive; and enter into property transactions including by sale, testamentary promise or a gift.[12] However, advance planning for older clients typically involves preparing legal instruments in anticipation of a time when a person may lack the ability to make their own decisions. Planning documents may include

accommodation and other lifestyle decisions), making a will and decisions about how to manage property, including real estate.

[8] In this thesis, the terms "legal capacity" and "legal decision-making capacity" are used interchangeably. "Legal capacity" in this sense is not to be confused with legal standing or legal personality.

[9] Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press, 2011) 1.2. See Chapter 2 below for a detailed outline of the law of legal capacity.

[10] Philip Batterham, Helen Christensen and Andrew Mackinnon, 'Comparison of Age and Time-to-Death in the Dedifferentiation of Late-Life Cognitive Abilities ' (2011) 26(4) *Psychology and Aging* 844, 848; Anja Leist, Jenni Kulmala and Fredrica Nyqvist, 'Perspectives on Health and Cognition in Old Age: Why We Need Multidisciplinary Investigations' in Anja Leist, Jenni Kulmala and Fredrica Nyqvist (eds), *Health and Cognition in Old Age: From Biomedical and Life Course Factors to Policy and Practice* (Springer, 2014) 2.

[11] Lawrence Frolik, 'Later Life Legal Planning' in Israel Doron (ed), *Theories on Law and Ageing: The Jurisprudence of Elder Law* (Springer, 2009) 11.

[12] Nola Ries, 'Lawyers and Advance Care and End-of-life Planning: Enhancing Collaboration Between Legal and Health Professions' (2016) 23(4) *Journal of Law and Medicine* 887, 887. See Chapter 2 below for an outline of the test in various contexts.

health care directives,[13] end-of-life treatment decisions, appointment of future substitute decision-makers and making a will.[14]

In NSW, Enduring Guardians may make health, lifestyle and medical decisions for principals once they lose the capacity to do so,[15] while an Enduring Power of Attorney (EPOA) grants financial decision-making powers that commence when principals lose capacity and last until their death.[16] Lawyers are one of a small class of authorised witnesses of these appointments who must certify that they explained the effect of the instrument and that the principal 'appeared to understand the effect'.[17] In an ageing population, advance planning is a growing source of business and income for the legal profession, and has subsequently given rise to an increasing number of complaints and disputes.[18]Armed with Enduring Guardianship and an EPOA, an appointee can exercise total decision-making control for a person deemed to no longer have legal capacity. Lawyers who prepare a contract for the sale of real estate or prepare a will must also ensure that their client has the necessary capacity for these decisions. Taken together, these legal decisions have the potential to confer enormous control over the assets of a person during their lifetime and beyond.[19]

Guardianship Tribunals around Australia are expending increasing resources to deal with disputes over the decision-making capacity of older people,[20] while probate courts have seen an increasing number of challenges to wills made by older people with contested capacity.[21] Capacity assessment thus has an impact on the broader community because challenges consume court time and public resources. Legal regulators have also noted a growing number of complaints in this area and inquiries into elder abuse have recognised the role that lawyers

[13] Technical and Ethical Principal Committee of the Australian Health Ministers' Advisory Council The Clinical, 'A National Framework for Advance Care Directives' (Australian Health Ministers' Advisory Council, 2011) 5.
[14] Frolik, above n 11.
[15] *Guardianship Act 1987 NSW*, s6E. In other States of Australia, there is a single instrument for appointment of an Enduring Guardian and Enduring Power of Attorney. For a summary of the instruments and witnessing requirements in each State, see Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws' (ALRC Report 124) (2014), Appendix 1 and Appendix 2.
[16] *Powers of Attorney Act 2003 NSW*, s19.
[17] *Powers of Attorney Act 2003 NSW*, s19 (c); *Guardianship Act 1987 NSW*, s6C (e).
[18] Office of the Legal Services Commissioner, '2013-2014 Annual Report' (Office of the Legal Services Commissioner, 2014)
<http://www.olsc.nsw.gov.au/Documents/2013_2014%20annual%20report%20accessible.pdf> 32.
[19] Natalia Wuth, 'Enduring Powers of Attorney; With Limited Remedies It's Time to Face the Facts!' (2013) 7 *Elder Law Review* 1, 1. Ann-Louise McCawley et al, 'Access to Assets: Older People With Impaired Capacity and Financial Abuse' (2006) 8(1) *The Journal of Adult Protection* 20.
[20] Christine Fougere, 'The Role of NCAT's Guardianship Division' (University of New South Wales Elder Law Seminar, 2016) 1.
[21] Victorian Law Reform Commission, 'Consultation Paper 11: Wills' (2012) 23.

may play in enabling elder abuse through poor capacity assessment practices.[22] A recent Australian Law Reform Commission (ALRC) Inquiry highlighted that misuse of EPOAs was a common cause of financial abuse of the elderly,[23] a finding echoed in other national research.[24]

These factors combined create an imperative for research to examine the law, tools and guidelines for lawyers engaged in capacity assessment. There have been no prior studies examining the practices of lawyers in this field in New South Wales (NSW). Studies in other Australian states that proceeded by way of surveys and interviews have revealed that lawyers are confused about how to assess functional decision-making capacity.[25] Further research is therefore needed to specifically examine how lawyers interact with older clients with questionable capacity, and how to improve the legal decision-making capacity of older clients. This research sets out to fill these gaps by examining how capacity assessment laws, tools and guidelines are applied by some lawyers in the state of NSW.

1.2 Research Questions

The aim of this research is to improve the way that lawyers assess the decision-making capacity of older Australians. A key outcome will be to promote older people's rights to legal decision-making and help prevent elder abuse. This research therefore addresses the following question: How well do lawyers assess the decision-making capacity of older clients?

Following from this research question, a number of secondary questions then arise:

i. What are the current laws, guidelines and tools available to lawyers for capacity assessment?
ii. Are the laws, guidelines and tools applied and enforced?
iii. Do current practices uphold the human rights of older people to make legal decisions?

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[22] Office of the Legal Services Office of the Legal Services Commissioner, '2014-2015 Annual Report' (2015) <http://www.olsc.nsw.gov.au/Documents/Annual%20Report%202014%202015.pdf>3; Australian Law Reform Commission, 'Elder Abuse (Discussion Paper 83)' (12 December 2016) <https://www.alrc.gov.au/sites/default/files/pdfs/publications/dp83.pdf>; New South Wales Government, 'Whole of Government Response to the Inquiry Into Elder Abuse' (2017) 2.

[23] Australian Law Reform Commission above n 6, 160.

[24] Rae Kaspiew, Rachel Carson and Helen Rhoades, 'Elder Abuse: Understanding Issues, Frameworks and Responses' (Australian Institute of Family Studies, 2016) 11.

[25] E Helmes, V E Lewis and A Allan, 'Australian Lawyers' Views On Competency Issues In Older Adults' (2004) 22 *Behavioral Sciences & the Law* 823; Lindy Willmott and Greg Shoebridge, 'Witnessing EPAs Empirical Research' (2007) 27(5) *Queensland Lawyer* 238; Lindy Willmott and Benjamin White, 'Solicitors and Enduring Documents: Current Practice and Best Practice' (2008) 16(3) *Journal of Law and Medicine* 466; Kelly Purser, *Competency and Capacity: The Legal and Medical Interface* (PhD Thesis, University of New England, 2013).

iv. Does a tripartite theory of vulnerability help to understand all of the above and in particular:
    a. how lawyers assess their client's decision-making capacity?
    b. how capacity assessment practices are regulated?

Before setting out how this thesis addresses the research questions, the following section refines the scope of this research and clarifies key concepts and legal terms.

1.3 Scope of the Research

This research focuses specifically on Australian lawyers' assessment of the capacity of older persons to make legal decisions. Worldwide, definitions of 'old' and 'older' people are contested.[26] In this thesis, older people are defined as those aged over sixty-five and 'very old' as those aged eighty-five years and over. This definition is consistent with Australian Bureau of Statistics demographics and definitions used to generate national health data.[27] Although decision-making capacity is relevant across the life-span, its assessment for older people has emerged as a distinct field.[28] One reason for this is the difference between an assessment of decision-making capacity for a person with profound and life-long decision-making impairments, compared to assessing a person who once had legal decision-making capacity and then experienced cognitive decline in old age.[29]

Legal capacity and incapacity are sometimes described as legal fictions or social constructs,[30] which is not to suggest that they are without utility. The presumption of capacity works to protect individual rights to legal decisions, while findings of incapacity are designed to

[26] Gail Wilson, *Understanding Old Age: Critical and Global Perspectives* (Sage, 2000) 8; Penny Vera-Sanso, 'Experiences in Old Age: A South Indian Example of how Functional Age is Socially Structured' (2006) 34(4) *Oxford Development Studies* 457, 459; Hajime Orimo et al, 'Reviewing the Definition of "Elderly"' (2006) 6(3) *Geriatrics and Gerentology International* 149.

[27] Australian Bureau of Statistics (ABS), *Who Are Australia's Older People? Reflecting a Nation: Stories from the 2011 Census* <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/2071.0main+features752012-2013>. For discussion of the definitional debate around the terms 'old', 'older' and 'very old', see especially Orimo et al, above n 26.

[28] Jennifer Moye and Daniel Marson, 'Assessment of Decision-Making Capacity in Older Adults: An Emerging Area of Practice and Research' (2009) 7 *Focus* 88; Jennifer Moye, Daniel Marson and Barry Edelstein, 'Assessment of Capacity in an Aging Society' (2013) 68(3) *American Psychologist* 158, 158.

[29] These distinctions have been made throughout the history of substitute decision-making. See for instance, Louise Harmon, 'Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment' (1990) 100(1) *Yale Law Journal* 1, 16.

[30] Duncan Kennedy, 'Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power' (1982) 41(4) *Maryland Law Review* 563, 644; Charles Sabatino and Erica Wood, 'The Conceptualization of Capacity of Older Persons in Western Law' in Israel Doron and Ann Snoden (eds), *Beyond Elder Law: New Directions in Law and Aging* (Springer, 2012) 35, 35; Margaret Hall, 'Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability' (2012) 58(1) *McGill Law Journal* 61, 93; Peter Skegg, 'Presuming Competence to Consent: Could Anything Be Sillier' (2011) 30(2) *University of Queensland Law Journal* 165.

safeguard a person from the harmful effects of a decision that they do not understand. This research is concerned with those situations where the task of legal decision-making capacity assessment falls to lawyers, whether that decision is made in isolation, or draws on consultation with family, carers, or medical professionals. Capacity assessment processes used by the medical profession are discussed in reference to some of the complaint files examined in the empirical project; however, a complete discussion of the various assessment methods and tools used by the medical profession is beyond the scope of this research.[31]

In Australia, professional rules require that a lawyer only accept instructions from a person who is 'competent'.[32]Although the term 'competence' is sometimes distinguished to mean legal competence and capacity to mean a determination of mental ability by a health professional,[33] in practice the two terms are often conflated.[34] This thesis uses the term 'capacity' in the first person sense, referring to the ability of a person to make a legal decision for themselves.[35] Notably, this thesis is constrained to discussion of legal decision-making capacity in the civil law context. Assessment of capacity in the criminal law context, including the capacity to stand trial, involves different principles and is beyond the scope of this thesis.[36]

In older populations, there are numerous neurological conditions or cognitive impairments that can affect capacity.[37] Throughout this thesis, the term 'cognitive impairment' refers broadly to any condition or disease that may impact capacity, for instance a brain injury, mental illness,

[31] For a comparison of the approaches of the two professions; See especially, Marshall Kapp, 'Older Clients with Questionable Legal Competence: Elder Law Practitioners and Treating Physicians' (2011) 37 (1) William Mitchell Law Review 99; See also, Marshall B Kapp, 'Decisional Capacity in Theory and Practice: Legal Process Versus 'Bumbling Through'' (2002) 6 *Aging and Mental Health* ; Moye, Marson and Edelstein, above n 28; Kelly Purser and Tuly Rosenfeld, 'Evaluation of Legal Capacity by Doctors and Lawyers: The Need for Collaborative Assessment' (2014) 201(8) *Medical Journal of Australia* 483 . For discussion of medical assessment of capacity generally: See, Mary Donnelly, *Healthcare Decision-Making and the Law: Autonomy, Capacity and the Limits of Liberalism* (Cambridge University Press, 2010).
[32] Law Council of Australia, *Australian Solicitors' Conduct Rules 2015*, r 8.
[33] O'Neill and Peisah, above n 9, 1.2; Kelly Purser and Tuly Rosenfeld, 'Assessing Testamentary and Decision-Making Capacity: Approaches and Models' (2015) 23(1) *Journal of Law and Medicine* 121, 122.
[34] Philip Bielby, 'The Conflation of Competence and Capacity in English Medical Law: A Philosophical Critique' (2005) 8(3) *Medicine, Health Care and Philosophy* 357, 357.
[35] Legal capacity may be used in other contexts to refer to substitute decision-making powers. See also above n 8.
[36] *R v Presser* (1958) 45 VR; Piers Gooding and Charles O'Mahony, 'Laws on Unfitness to Stand Trial and the UN Convention on the Rights of Persons with Disabilities: Comparing Reform in England, Wales, Northern Ireland and Australia' (2016) 45 *International Journal of Law, Crime and Justice* 122, 125.
[37] Jennifer Moye et al, 'Neuropsychological Predictors of Decision-Making Capacity Over 9 Months in Mild-to-Moderate Dementia' (2006) 21(1) *Journal Of General Internal Medicine* 78; Sarah Stormoen et al, 'Cognitive Predictors of Medical Decision-making Capacity in Mild Cognitive Impairment and Alzheimer's Disease' (2014) 29 *International Journal of Geriatric Psychiatry* 1304.

delirium, or a neurodegenerative disorder of some kind.[38] Of particular relevance to this research are the neurodegenerative diseases most associated with ageing and caught by the umbrella term 'dementia'.[39] These include Alzheimer's disease, vascular dementia, Lewy body disease and frontotemporal dementia (or Pick's disease).[40] Dementia is only one category of cognitive impairment. In discussing case studies in this thesis where the cause of a person's alleged lack of capacity was not known, or when referring to all possible causes of loss of capacity, the term 'cognitive impairment' is used throughout. Where the term 'dementia' is used, it relates to a specific diagnosis that has been ascribed to an older person, whether an informed diagnosis by a medical professional or a lay diagnosis by a relative, carer or other person.

The scope of this project makes the findings relevant for lawyers in Australia as a whole, but is primarily engaged with the practice of lawyers in NSW.[41] Regulation of the legal profession in Australia is currently state-based and NSW has the largest proportion of practising lawyers in the country. NSW also houses the largest proportion of the ageing population in Australia.[42] Comparisons can be drawn between NSW and other states of Australia, particularly with respect to the regulatory response to complaints about capacity assessment. However, a comprehensive comparative study is beyond the scope of this thesis. This research includes an empirical component comprising a directed content analysis of the capacity complaints handled by the NSW Office of Legal Services Commissioner (OLSC) between 2011 and 2013. Capacity complaints at the OLSC overwhelmingly deal with complaints related to older persons. The nature of the sample and the methodology applied to this study is outlined further in chapter four.

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[38] A complete discussion of cognitive impairment and its causes is outside the scope of this thesis. See generally Anja Leist and Johan Mackenbach, ' Social, Behavioral, and Contextual Influences on Cognitive Function and Decline over the Life Course ' in Anja Leist, Jenni Kulmala and Fredrica Nyqvist (eds), *Health and Cognition in Old Age: From Biomedical and Life Course Factors to Policy and Practice* (Springer, 2014) ; and in the Australian context: See, Australian Institute of Health and Welfare, *Growing Older* Australian Government <http://www.aihw.gov.au/australias-welfare/2015/growing-older/>.

[39] Alzheimer's Australia, *Statistics, Summary of Dementia Statistics in Australia* <http://www.fightdementia.org.au/understanding-dementia/statistics.aspx>.

[40] Rita Jablonski, 'Dementia is Not Dementia is Not Dementia' (2013) 39(1) *Journal of Gerontological Nursing* 3; National Institute on Aging, 'Frontotemporal Disorders: Information for patients, Families and Caregivers' (National Institute of Health, 2013); Deloitte Access Deloitte Access Economics, 'Dementia Across Australia 2011-2050' (2011).

[41] The generalizability and transferability of the research are discussed further in Chapter 4.

[42] Urbis, '2014 Law Society National Profile' (Law Society of New South Wales, 2015); Australian Institute of Health and Welfare, *Australia's Changing Age and gender Profile* <http://www.aihw.gov.au/ageing/older-australia-at-a-glance/demographics/age-and-gender/>.

The examination of how lawyers assess a client's capacity includes an analysis of all of the reported Australian disciplinary cases dealing specifically with capacity assessment processes and analysis of the leading cases describing capacity assessment principles. There are a number of disciplinary cases in NSW where lawyers have been struck off the roll for taking advantage of older clients with a cognitive impairment.[43] Although these cases were investigated and prosecuted by the OLSC or the Law Society of NSW, only the more serious charges of fraud or misappropriation of funds were pursued rather than questions about capacity assessment. Such cases fall outside the scope of this thesis.

In the field of elder law there has been a particular emphasis on elder mediation as one process that may be utilised to facilitate supported decision making and maximise the exercise of legal capacity.[44] Mediation has also been proposed as an appropriate process to address elder abuse, especially when it occurs in the context of family conflict.[45] An examination of elder mediation and capacity assessment guidelines employed in the mediation field to address the needs of older clients is therefore an appropriate inclusion. Lawyers participating in mediation with or for an older client have an ethical responsibility to assess decision-making capacity. The mediator must also assess the extent to which an older person has capacity to participate in the process, including the capacity to enter into any agreements arising from the mediation.[46]

Having refined the scope of this research, the following section outlines the contribution of the publications that form Part Two of the thesis.

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[43] See for instance: *Berger v Council of the Law Society of NSW* [2013] NSWSC 1080; *Legal Services Commissioner v O'Donnell* [2015] NSWCATOD 17.

[44] Glenn Cohen, 'Negotiating Death: ADR and End of Life Decision-Making' (2004) 9 *Harvard Negotiation Law Review* 253; Alexandra Crampton, 'Elder Mediation in Theory and Practice: Study Results From a National Caregiver Mediation Demonstration Project' (2013) 56(5) *Journal of Gerontological Social Work* 423; Susan Crawford et al, 'From Determining Capacity to Facilitating Competencies: A New Mediation Framework' (2003) 20(4) *Conflict Resolution Quarterly* 385.

[45] Gemma Smyth, 'Mediation in Cases of Elder Abuse and Mistreatment. The Case of University of Windsor Mediation Services' (2011) 30 *Windsor Review of Legal and Social Issues* 121; Karen Williams, 'Elder Mediation in Australia' (2013) 6(7) *Elder Law Review* ;Dispute Resolution Branch Queensland Department of Justice, 'Supported Elder Mediation: Discussion Paper' (2016); Arlene Groh and Rick Linden, 'Addressing Elder Abuse: The Waterloo Restorative Justice Approach to Elder Abuse Project' (2011) 23 *Journal of Elder Abuse & Neglect* 127; Ian Fletcher, 'Can Specialised Family Mediation Prevent Elder Abuse in Australia' (2012) <ftp://ftp.im.com.au/ME12/Final%20papers/Ian%20Fletcher.pdf>; Dale Bagshaw et al, 'Elder Mediation and the Financial Abuse of Older People by a Family Member' (2015) 32(4) *Conflict Resolution Quarterly* 443.

[46] David Spencer, 'Capacity to Enter a Deed of Mediation' (2001) 12(4) *Australasian Dispute Resolution Journal* 209.

1.4 Contribution of the Publications

Part Two of the thesis, comprising Chapters 5 through 8, contains the publications produced as part of this research. These articles are presented thematically rather than chronologically, following themes of: human rights in Chapter 5; the law and guidelines for capacity assessment in Chapter 6; presentation of empirical findings in Chapter 7; and elder mediation in Chapter 8.

In Chapter 5, the human rights framework that underscores the research is explained and the tripartite theory of vulnerability is introduced. This framework makes a significant contribution to the thesis and to the knowledge that is developed about assessing legal decision-making capacity. International human rights law forms one part of the law and capacity assessment guidelines outlined in Chapter 6, informs the coding of the empirical research reported in Chapter 7 and is also a focus of the mediation papers in Chapter 8.

The papers in Chapter 6 ground the research in the law and guidelines for capacity assessment to begin to answer questions about how lawyers should assess the decision-making capacity of older clients. Chapter 6 begins with a paper analysing the first Australian judgment to use the phrase 'capacity negligence', followed by a paper that provides a comprehensive review of the capacity assessment guidelines for lawyers in NSW and detailing the inconsistencies in approach. This paper makes a significant contribution to understanding capacity assessment as this kind of comparative analysis has not previously been undertaken. In addition to identifying deficiencies in the guidelines, commonalities emerged that once again informed the coding scheme for the empirical research. The final paper in Chapter 6 applies this understanding in an article prepared for a professional journal, addressing the discrete practice of referrals by lawyers for medical assessment of legal decision-making capacity.

Having established the human right to legal capacity in Chapter 5, and the way that this right is expressed in the law of capacity and the NSW guidelines in Chapter 6, the empirical research of three years of capacity complaint files at the OLSC reported in the two papers comprising Chapter 7 applies that understanding. The empirical research outlined in papers 5 and 6 is an original contribution to knowledge that addresses the primary research question of how lawyers assess the capacity of older clients and also sheds light on the regulation of lawyers' practices in this area.

Finally, Chapter 8 presents two publications on the topic of elder mediation. Chronologically, these were amongst the first papers to be published as part of this thesis and grew from the

early research and literature review highlighting how often elder mediation was proposed as to address instances of elder abuse. As the empirical research progressed, it became clear that family conflict underpinned many complaints in this area and also influenced how the regulator was able to respond to complaints. Elder mediation thus emerged in a new light, as a process with the potential to improve the legal decision-making capacity of older people caught up in family conflict. In this way, these papers make a new contribution to the elder mediation field and to understandings of potential accommodations that could be made to improve the decision-making of older clients.

In the following section the individual papers are briefly summarised and linked to the research questions and contribution to knowledge.[47]

Paper 1: 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*, (2015 Vandeplas Publishing) 286-302.

This paper, prepared initially for an international conference on the advancement of human rights for older persons,[48]examines the right to legal capacity under the *Convention on the Rights of Persons with a Disability* (*CRPD*) in the context of the law of substitute decision-making in Australia.[49] An analysis of Article 12 of the *CRPD* is applied to the situation of older clients with a cognitive impairment and the importance of safeguards and accommodations for vulnerable persons highlighted. The tripartite theory of vulnerability that forms the conceptual foundation for this research is introduced,[50] and the right to accommodations to maximise decision making capacity is established.

While this paper and paper 7 make proposals for capacity assessment under supported decision-making regimes, the remaining papers primarily examine how lawyers approach capacity assessment within the current legal framework of substitute decision-making.

Chapter 6, comprising papers 2, 3 and 4, deals with the law, tools and guidelines for lawyers' assessment of legal decision-making capacity.

[47] The contribution that each of these papers makes to answering the research questions and contributing to knowledge in the field is further outlined in table form in Appendix B.
[48] The 21st Annual Belle R. and Joseph H. Braun Memorial Symposium: *2014 International Elder Law & Policy Conference*, John Marshall Law School, Chicago, Illinois (July 10-11, 2014).
[49] *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).
[50] Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5(2) *International Journal of Feminist Approaches to Bioethics* 11.

Paper 2: Lise Barry, 'Case Note: *Goddard Elliott v Fritsch* [2012] VSC 87' (2012) 10 *Macquarie Law Journal,* 105 – 110.

Paper 2 is an analysis of a seminal Victorian case that sets out the common law principles for findings of 'capacity negligence' in Australia that may occur when lawyers fail in their obligation to assess their clients' capacity.[51] A proper understanding of this case is essential to addressing research questions related to the law of legal decision-making capacity. Now cited in the commentary to Rule 8 of the Australian Solicitors' Conduct Rules, this case serves to caution lawyers who may be in doubt about whether to take instructions from a client experiencing a cognitive impairment.

Paper 3: Lise Barry, '*Capacity Guidelines in NSW: Time for a Review'* (2017) (prepared for publication).[52]

This paper provides a comprehensive comparative analysis of the law and guidelines for capacity assessment in NSW.

This is the first detailed thematic analysis of all of the guidelines that have been recommended to lawyers in NSW over the past eight years.[53] Following an introduction to the law of legal decision-making capacity, the published capacity guidelines are described and compared across the following domains:

- Guiding principles for capacity assessment, including a human rights analysis in keeping with this thesis.
- Instructions about when to investigate capacity further.
- Instructions about how to conduct an interview for capacity assessment purposes.
- Details about which professionals to consult for a medical opinion about capacity.
- What the documents say about the significance of old age to the question of capacity.
- Assessing for undue influence.
- The requirement of keeping a record of the procedure undertaken.
- The level of information and instruction about how to maximise capacity through the provision of accommodations.

[51] This case is now cited in the commentary to rule 8 of the *Australian Solicitors Rules: Law Council of Australia, Australian Solicitors' Conduct Rules 2011 and Commentary, (2013).*

[52] This paper was prepared for publication in 2015 and revised in 2017 after the NSW Law Society updated their capacity assessment guidelines to reflect the introduction of the Uniform Legal Profession Law in NSW and Victoria.

[53] This analysis includes the guidelines that were in place during 2011 – 2013, the period of analysis for the empirical research of complaint files, as well new guidelines published subsequent.

This analysis provided the basis for codes applied in the directed content analysis reported in papers 5 and 6, and also informed recommendations to revise and update the capacity guidelines contained in Part Three of this thesis.

Paper 4: Lise Barry and Jane Lonie, 'Capacity, Dementia and Neuropsychology', *Law Society Journal*, October 2014, 78-79

While paper 3 establishes that the capacity guidelines for lawyers may create confusion about the most appropriate medical professionals to refer clients to, this paper, prepared for a professional journal, contributes to closing the knowledge gap by providing advice on referral practices and an explanation of the particular expertise of neuropsychologists.

This paper also analyses some of the different symptoms of cognitive impairment in the elderly and how these may manifest in the client's presentation. In this way, the paper contributes to answering questions about how lawyers should assess their client's capacity and feeds into recommendations made in Part Three of the thesis about inter-disciplinary co-operation.

In Chapter 7, the focus moves to reporting the findings of the empirical research that examined three years of capacity complaints at the OLSC.

Paper 5: Lise Barry, 'Capacity and Vulnerability: How Lawyers Assess the Legal Capacity of Older Clients' (2017) 25 *Journal of Law and Medicine* 267

Reporting findings from the empirical research, this paper focuses on the medico-legal interface, with specific examples of how legal and medical professionals may fail to communicate properly with one another. Gaps in lawyers' understanding of dementia are identified, including misuse or misinterpretation of a diagnosis of dementia and cognitive screening tools. Deficiencies in note-taking and poor referral practices are documented and the role of family conflict in capacity disputes is highlighted. These deficiencies in lawyers' practices are further explored in the remaining papers and in part three of this thesis. Examples are provided of both lawyers' and doctors' reports demonstrating a status-based approach to legal capacity, rather than the functional assessment mandated in law. This paper provides a partial answer to the research question of how lawyers assess the capacity of older clients and is an original contribution to knowledge in the field.

Paper 6: Lise Barry, 'He Was Wearing Street Clothes Not Pyjamas: Common Mistakes in Lawyers' Assessment of Legal Capacity for Vulnerable Older Clients' (2018) *Legal Ethics* 21 (1) 3-22

This paper makes two main contributions to the thesis. Firstly, it builds on papers 3 and 5, providing further analysis of the empirical research undertaken at the OLSC organised thematically against the recommended guidelines and common law on legal decision-making capacity assessment. This publication provides empirical evidence of how lawyers assess the decision-making capacity of their older clients organised in the form of four case studies. This paper also emphasises the role of vulnerability theory as an organising principle for the analysis of data and the emerging recommendations. In particular, the three aspects of Rogers, Mackenzie and Dodds' tripartite theory of vulnerability (inherent, situational and pathogenic vulnerability) are more explicitly applied to capacity complaints.[54] The paper concludes with recommendations for reform that are further discussed in Part 3 of this thesis.

In Chapter 8, the two mediation papers shift the focus from the problems of lawyers' assessment of capacity, toward recommendations for reform and the role that mediation might play in capacity assessment.

Paper 7: Lise Barry, 'Elder Mediation' (2013) 24 *Australasian Dispute Resolution Journal* 251.

This paper addresses the assessment of capacity to participate in mediation. In particular, a discrete aspect of capacity assessment in the form of providing accommodations for older people to assist their decision-making within the elder mediation process is discussed. As identified in papers 5 and 6, family conflict is a common underlying feature of disputes over capacity. Given that mediation is considered particularly suitable for addressing family conflict, lawyers and mediators need to assess the capacity of their older clients both to participate in a mediation, and also to make agreements at the end of a mediation.

However, this paper moves beyond the mechanics of capacity assessment, and contributes to the understanding of a human rights approach to maximising client capacity through a discussion of how accommodations may enhance the decision-making abilities of older clients. This focus for elder mediation is an original contribution to the field.

Paper 8: Lise Barry, 'Elder Mediation: What's in a Name?', *Conflict Resolution Quarterly* (2015) 34 (4), 435 – 442.

The final paper further considers the capacity for mediation within a human rights framework. The paper commences with an overview of the development of the elder mediation field and the problematic definitional debates around the term 'elder mediation' are analysed within a

[54] Rogers, Mackenzie and Dodds, above n 50.

human rights lens. The article then provides an overview of the ethics guidelines for elder mediators and argues that the focus in mediation should be on accommodating the participation and legal capacity of older participants to the fullest extent possible.

1.5 Part Three: Recommendations and Conclusion

Chapter 9 looks to the future of capacity assessment and suggests potential reforms and a future research agenda in four particular areas: professional regulation of capacity complaints under the uniform law; law reform proposals for improved guidelines and tools for capacity assessment; use of conflict resolution to address capacity assessment and elder abuse; and proposals for improvements to legal education.

The chapter responds to recent national and State inquiries: The ALRC Inquiry into Equality, Capacity and Disability;[55] the ALRC report on elder abuse released in 2017;[56] and two NSW inquiries, one into elder abuse,[57] the other a review of the Guardianship Act 1987.[58] The specific recommendations for improvements to capacity assessment contained in these reports are evaluated.

Chapter 10 completes this thesis, summarising the conclusions drawn in this research, providing answers to the research questions posed and justifying the claims to original contributions to knowledge outlined below.

1.6 Original Contributions to Knowledge

The following section summarises the gaps in the literature that were identified in this thesis and the ways in which this research responds to those gaps and contributes new knowledge to the field.

[55] Australian Law Reform Commission, above n 15.
[56] Australian Law Reform Commission above n 6.
[57] General Purpose Standing Committee No. 2, 'Elder Abuse in New South Wales' (Report No. 44, New South Wales Parliament, Legislative Council, 2016); New South Wales Law Reform Commission, 'Review of the Guardianship Act 1987: Draft Proposals' (November 2017) <http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Draft%20Proposals/Draft%20Proposals.pdf> .
[58] NSW Law Reform Commission, 'Review of the Guardianship Act 1987' (2017 ongoing).

1.6.1 Human Rights Framework

No other Australian study of lawyer's capacity assessment skills has explicitly considered capacity assessment of older clients from a human rights perspective. Previous research surveying lawyers about their views has not considered the extent to which lawyers apply human rights principles of support and accommodations to improve decision-making capacity.

These competing human rights principles are specifically addressed in relation to legal decision-making in the *CRPD*, Article 12, "Equal Recognition Before the Law".[59] As Australia is a signatory to the convention this is a sound basis for a human rights perspective of the examination of capacity. The human rights framework also expands the vision of responsibility for the way that the law is applied. Article 12 (4) of the *CRPD*, expressly places responsibility for safeguarding in the hands of the State.[60] Therefore, the responsibility for capacity assessment as a safeguarding measure lies not just with individual solicitors but with the State systems of legal education and legal regulation that seek to set standards for how capacity assessment is performed. This thesis thus examines capacity assessment at the individual and institutional levels, filling this gap in the literature. (See papers 1, 5 and 6 in particular).

It follows that capacity assessment should be examined through a theoretical lens that encompasses the individual client, the lawyer and the role of the state in that process, which invites consideration of the tripartite approach to vulnerability applied in this research.

1.6.2 Theoretical Framework of Vulnerability

The protection of vulnerable people is acknowledged as an important rationale for the law of legal capacity and for the application of safeguards in the form of capacity assessment, however the meaning of vulnerability and its application is under-theorised.

This thesis examines the assessment of capacity through the tripartite theory of vulnerability developed by Rogers, Mackenzie and Dodds to fulfil this purpose.[61] The theory is used to examine the inherent vulnerability of older people with a cognitive impairment, the situational vulnerability of these clients when social circumstances create a conflict that requires a legal resolution, and the pathogenic vulnerability that results when the system of capacity assessment established to safeguard those older people fails. This theoretical analysis is an original

[59] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).
[60] 'States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law….'
[61] Rogers, Mackenzie and Dodds, above n 50.

contribution to knowledge in the field, as vulnerability theory has not previously been applied to the process of legal decision-making capacity assessment.

This theoretical lens is particularly appropriate in light of the human rights analysis that has been adopted. As explained above, a human rights approach to capacity assessment encompasses the State sponsored safeguards designed to protect the most vulnerable, so it is appropriate that the theoretical approach encapsulates individual responses of lawyers to their client's vulnerability, processes established to deal with difficulties of assessment and the response of regulatory bodies to poor assessment techniques. Analysis that applies a tripartite theory of vulnerability achieves this.

1.6.3 Existing Guidelines

An analysis of lawyers' practice in capacity assessment needs to be measured against existing guidelines. This is problematic, because there is currently no single guideline for lawyers in NSW involved in assessing their client's capacity to make legal decisions. There has been no prior comparative analysis of the existing guides to identify the strengths and weakness of the different approaches or to compare them with guidelines in other jurisdictions or practice areas.

This research fills that gap in the literature through a comparative study of the various capacity assessment guidelines in NSW in paper 3. Each of the guidelines is examined against key components of good practice identified in case law, scholarly articles and guidelines from within and without the legal profession. Recommendations are made for consolidating the guidelines into a single document and for better dissemination, education and enforcement.

1.6.4 Empirical Research

A key gap in the literature related to how lawyers assess the capacity of older people is that no previous Australian study has examined lawyers' actual practices in this field. Prior research has relied on self-reported behaviour and knowledge, with no way of comparing this against the client's experiences. While important, normative understandings of the capacity assessment process are more effective if they are supplemented by research exposing the realities of practice and the interactions that occur between client, lawyer and family. Understanding the context of a lawyer's work is necessary for a proper examination of their ethical decision-making.[62] The empirical research undertaken as part of this thesis fills this gap in the literature and is an original contribution to the field in papers 5 and 6.

[62] Leslie Levin and Lynn Mather, *Lawyers in Practice: Ethical Decision Making in Context* (The University of Chicago Press, 2012) ebook loc219.

The application of a tripartite theory of vulnerability further demands a broad ranging approach to data collection that can encapsulate the individual experience of capacity assessment as well as the regulatory response to those assessments. The directed content analysis of three years of capacity complaints at the NSW Office of Legal Services also exposed regulatory shortcomings and highlighted the need for consolidating capacity assessment guidelines and providing further education on capacity assessment for the legal profession.

The difficulty of examining lawyer and client interviews in the real world presents a particular challenge for the researcher wanting to understand what it is that lawyers actually do in this space and how their clients experience this interaction. Existing surveys, based as they are on self-reported knowledge of capacity assessment processes, rely on the lawyers having sufficient reflexive awareness of their skills and knowledge.[63] Surveys may not reflect actual competence and they shed no light on the client's experience. Client confidentiality and the practical benefits of interviewing clients alone, means that most of what occurs in the lawyer's office remains confidential by virtue of legal professional privilege. An examination of the complaint files at the Office of Legal Services Commissioner addresses this gap in the literature.

1.6.5 Summary of Contributions

In summary, this research makes the following original and significant contributions to knowledge:

1. An original analysis of capacity assessment combining a philosophical understanding of autonomy and vulnerability within a human rights framework.

2. Application of a tripartite theory of vulnerability developed by Rogers, Mackenzie and Dodds to the capacity assessment process. This lens highlights: the inherent vulnerability of older clients with a cognitive impairment; the situational vulnerability arising from family conflict and their reliance on lawyers who are poorly trained in capacity assessment; and the pathogenic vulnerability created through inconsistent application of guidelines, tools and regulation.

3. A comparative analysis of the published capacity guidelines in NSW demonstrating inconsistencies in their content leading to recommendations for their reform.

[63] Helmes, Lewis and Allan, above n 25; Willmott and Shoebridge, above n 25.

4. Original empirical research that examines the content of three years of capacity complaints at the NSW Office of Legal Services Commissioner, providing evidence of common features in the capacity assessment processes of lawyers in NSW that contribute to complaints.

5. Identification of the role of family conflict in capacity complaints, leading to a proposal for increased attention to family conflict resolution, including through elder mediation.

1.7 Significance of the research

The significance of this research lies in the potential contribution to improving lawyers' capacity assessment techniques and thereby upholding the decision-making rights of older Australians. The findings from this research can also contribute to reducing elder abuse, especially financial abuse. Improved capacity assessment by lawyers is an important safeguard for older clients in this respect.

When lawyers are involved in assisting older people to realise their rights to decision-making, they should respond in a way that respects their clients' autonomy and safeguards them against abuse. The right to legal capacity is a human right that applies equally to older people with a cognitive impairment. Viewed through the lens of a tripartite theory of vulnerability, capacity assessment can be conceptualised in a holistic manner, taking into account personal, social, professional and institutional components that effect the exercise of these rights.

The Law Society in NSW has published a number of guidance documents to aid lawyers in upholding their clients' rights to autonomy and safeguarding, however empirical research demonstrates that lawyers do not always apply these guidelines. Legal educators and professional regulators in NSW have failed to adequately address these problems. This creates further vulnerability for older people in NSW and needs to be addressed. This research produced significant findings by exposing some common failings in the way that lawyers approached the capacity of older people:

- Failure to identify cognitive impairment in their client or where it was identified, to appreciate the scope of the impairment.
- Failure to understand and apply a functional test of capacity.
- Failure to follow the published capacity guidelines.
- Lack of documentation of the process of capacity assessment.
- Failure to refer clients for a medical assessment of capacity where appropriate.
- Failure to provide accommodations to improve or support their client's decision-making capacity.
- Failure to ask open-questions to elicit the extent to which the client understood the instructions they purported to provide.
- Failure to protect against undue influence and protect client confidentiality by interviewing the client alone.
- Failure to address underlying conflict that led to the necessity to make new enduring appointments or to alter testamentary promises.
- Thematic analysis of the research files also identified that family conflict was a common feature of the complaint files that was not adequately addressed.

Addressing these shortcomings is the responsibility of individual lawyers, professional regulators, legal education providers and government. This research provides an important contribution to developing a road map for that shared endeavour. Improvements in capacity assessment have the potential to realise the legal decision-making rights of older people and to reduce the incidence of elder abuse.

1.8 Chapter Summary

This chapter has provided a comprehensive overview of the thesis. The research problem was described and the link between poor assessment practices and elder abuse examined. An outline of the research questions followed before the scope of this research was explained, including the parameters of the empirical project examining capacity complaints at the OLSC. A complete synopsis was presented that contextualised the eight publications that form part two, explaining how these papers contribute to the development of this thesis and contributed to recommendations for reform that are addressed in Part 3. This chapter concluded by outlining the original contributions to knowledge and significance of this research.

In the following two chapters, the literature that underpins this thesis is outlined and the gaps in the literature are examined. Chapter 2 analyses and critiques the law, tools and guidelines for capacity assessment and how these are applied by the legal profession. Chapter 3 provides the background to the human rights and vulnerability framework of this thesis.

Chapter 2: The Law and Practice of Assessing Capacity for Legal Decisions

This chapter analyses the common law of legal decision-making capacity and the literature related to capacity assessment methods. The chapter commences with an outline of the general test for capacity in NSW. Next, specific tests for testamentary capacity and enduring appointments are particularised and the lawyer's duties when a client's capacity is in doubt are delineated. These duties are examined within the context of disciplinary cases in this field and the broader law of professional negligence. The wider medico-legal literature on the assessment of decision-making capacity is then reviewed to locate critical knowledge in this field. Finally, existing empirical research of assessment practices is analysed to demonstrate the gaps in the literature that are addressed by this thesis.

As this critique will demonstrate, there is little discussion in the law or literature about the necessary supports and accommodations to maximise capacity that would assist in implementing a human rights approach. As outlined below, the focus in the common law is on describing the functional test for capacity and how lawyers might demonstrate that they have applied this test in assessing their clients' decision-making abilities.

2.1 The General Test for Capacity in NSW

The general law principles for capacity were outlined in *Gibbons v Wright*.[64] The Court held that capacity *'is relative to the particular transaction which is being effected by means of the instrument, and may be described as the capacity to understand the nature of that transaction when it is explained*.'[65] In other words, the test for capacity is a functional test that is decision specific. Despite this, in NSW there has been some debate about whether the functional test for capacity requires the application of an objective test of a person's understanding of a legal decision, or a subjective test that takes account of the specific situation of the client. The debate stems from the oft cited case of *PY v RJS*, in which Powell J considered what it meant for someone to be 'incapable of managing his or her own affairs'.[66] In considering PY's application to be discharged from a mental health facility, Powell J described the test in negative terms as an objective test:

[64] *Gibbons v Wright* (1954) 91 CLR 423.
[65] Ibid [437-438].
[66] [1982] 2 NSWLR 700.

> 'It is my view that a person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears:
>
> (a) that he or she appears incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man; ...'

This objective understanding of the assessment of capacity has since been rejected in NSW. In *PB v BB* Lindsay J opined: 'the question whether a person is incapable of managing his or her own affairs focuses attention on the personal circumstances of that person.'[67] In the 2015 Supreme Court decision, *A v A*,[68] Justice Lindsay further clarified that the expression '(in)capable of managing his or her own affairs' takes flavour from the context in which it appears.[69] As Justice Lindsay decided, the emphasis is on functionality: 'measuring an individual's capacity for self-management against the "affairs" of the particular individual rather than a hypothetical construct such as "the ordinary affairs of man".'[70] It is therefore necessary for any capacity assessor to understand a client and their circumstances sufficiently well to be able to contextualise the assessment of capacity.

A subjective interpretation is also applied in other Australian jurisdictions. For instance in the Victorian case, *Re Erdogan's Application: Erdogan v Ekic*,[71] Dixon J held that that test to be applied must be considered in relation to the affairs of the person in question, not in a generalised sense. This requires an analysis of what those affairs actually are, both at the time of capacity assessment and for the future.[72]

Given that capacity is decision specific, each legal decision requires a different level of capacity. It is beyond the scope of this thesis to provide a detailed analysis of the test of capacity for every legal decision, however legal decisions that are impacted include: capacity to enter

[67] [2013] NSWSC 1223 [6].
[68] [2015] NSWSC 1778.
[69] Ibid [55]
[70] Ibid [64]
[71] [2012] VSC 256. See also *Re MacGregor* [1985] VR 86.
[72] *Re Erdogan's Application: Erdogan v Ekic* [2012] VSC 256 [70].

into a binding contract,[73]decisions to marry,[74] vote,[75] engage in consensual sexual intercourse,[76] and decisions to consent to medical treatment.[77]

Lawyers are more likely to be involved in capacity assessment when the legal decision involves gifting property to a family member,[78] transferring property,[79] making a decision to instruct a solicitor,[80] decisions to commence or continue litigation,[81] making or changing a will and appointing enduring guardians and attorneys. These latter decisions are the most likely to lead to legal challenges about the capacity of the principal and are further discussed below.

2.2 Testamentary Capacity

Capacity to make a will is presumed; but where the challenger raises a reasonable doubt as to capacity the onus to prove capacity shifts to the person claiming validity of the will to be able to prove that the testator had capacity. The traditional test of testamentary capacity was established in *Banks v Goodfellow*.[82] The component parts of the *Banks v Goodfellow* test are that the testator understands the nature of a will and its effect; understands the extent of their property;[83] and appreciates the identity of people who may have a claim on their estate and can weigh those claims, unaffected by any delusions affecting their decisions at the time of making the will.[84] In this vein, the instructions laid down in Hutley's Australian Wills Precedents have been cited with approval:[85]

[73] *Blomley v Ryan* (1954) 99 CLR 362.
[74] *Marriage Act* 1961 (Cth) s238(1)(d); *Brown and Brown* (1982) 92 FLC 232; *AK and NC* (2003) 93 FamCA 178; *Oliver and Oliver* [2014] FamCA 57.
[75] *Commonwealth Electoral Act* 1918 (Cth) s93(8).
[76] Rights to engage in sexual activity are impacted by laws that make it an offence to have sexual intercourse with a person who does not have the capacity to consent because of 'cognitive incapacity'. For example, see *Crimes Act 1900* (NSW) s 61HA(4)(a) and the broad definition of cognitive impairment under s 61H(1A); *Crimes Act 1958* (Vic) ss 50–52.
[77] *Secretary, Department of Health and Community Services v J.W.B. and S.M.B.* (1992) 175 CLR 218 ('Marion's Case').
[78] *Winefield v Clarke* [2008] NSWSC 882.
[79] *Gibbons v Wright* (1954) 91 CLR 423; But see O'Neill and Peisah above n 9, 3.3.2 where the authors argue that although property transfers are a common source of elder abuse, requests for capacity assessment in this area are rare.
[80] *Goddard Elliot v Fritsch* [2012] VSC 87 [555]; *Pistorino v Connell & Ors* [2012] VSC 438 [6].
[81] *Goddard Elliot v Fritsch* [2012] VSC 87 [558]; *Daniel Walton v Terence George Hartmann as Executor of the Estate of Wanda Resler* [2017] NSWSC 1432 [74].
[82] *Banks v Goodfellow* (1870) LR5 QB, 549.
[83] See also *Badram v Kerr* [2004] NSWSC 735 [49].
[84] For a discussion of the relevance of the *Banks v Goodfellow* test, see Kelly Purser, 'Assessing Testamentary Capacity in the 21st century: Is 'Banks v Goodfellow' Still Relevant?' (2015) 38(3) *University of New South Wales Law Journal* 854.
[85] Charles Rowland, *Hutley's Australian Wills Precedents* (Lexis Nexis Butterworths, 7th ed, 2009) 1.14.

> *'Where the solicitor is drafting a will and there is any possibility that the testator's capacity might later be questioned, the solicitor should ask questions the answers to which will establish whether or not each of the requirements for capacity laid down in Banks v Goodfellow is satisfied. It follows that the solicitor taking instructions for a will must have the Banks v Goodfellow tests at the front of her or his mind.'*

The *Banks v Goodfellow* test does not call for a complete absence of impairment, nor does advanced age preclude testamentary capacity, as Kirby P (as his Honour then was) explained in *Re Griffith; Easter v Griffith.*[86] However, it should also be noted that wills made by those in "advanced age" will be carefully scrutinised.[87]

In a dispute over testamentary capacity the Court will decide the issue of capacity on the balance of probabilities, considering all of the circumstances of the making of the will and the person's estate.[88] In such an examination the Court has held that the evidence of the solicitor can be crucial.[89] However, where capacity is called into question:

> 'Any view the solicitor may have formed as to the testator's capacity must be shown to be based on a proper assessment and accurate information or it is worthless; ... the terms of the will may themselves suggest that the solicitor's assessment was not soundly based'.[90]

2.3 Capacity to Appoint a Power of Attorney or Enduring Attorney

Capacity to make a general power of attorney was described by Young J in *Ranclaud v Cabban* as an understanding that:

> '[S]uch a power permits the donee to exercise any function which the donor may lawfully authorise an attorney to do. When considering whether a person is capable of giving that sort of power one would have to be sure not only that she understood

[86] (1995) 217 ALR 284,295.
[87] *Boreham v Prince Henry Hospital* (1955) 29 ALJ 179.
[88] *Bailey v Bailey* (1924) 34 CLR 558 [570] per Isaacs J, Gavan Duffy and Rich JJ concurring.
[89] *Zorbas v Sidiropoulous* (No 2) [2009] NSWCA 197 [89] per Young JA: 'In a probate suit, the vital evidence is very often not given by medical experts, but is given by experienced lay observers. I have said more than once in deciding probate cases at first instance, that the most valuable evidence is usually given by the experienced solicitor who witnessed the will …' See also *Gray v Taylor & Anor; The Estate of the late Stanislaw Zajac* [2017] NSWSC 497.
[90] *Ashkettle v Gwinnett* [2013] EWHC 2125 (Ch); *Vealle v Vealle* [2015] VSCA 60 [210].

that she was authorising someone to look after her affairs but also what sort of things the attorney could do without further reference to her.'[91]

In relation to an EPOA, the donor requires a level of capacity that has been described by Barrett J as possibly more complex than testamentary capacity, because particular dispositions are not involved.[92] Capacity to make an enduring appointment requires instead an appreciation of the lasting and irrevocable nature of the powers being conferred and the ability to decide whether it is in a person's interests to delegate these powers and if so, who should be trusted as the attorney.[93]

2.4 A Solicitor's Duties When a Client's Capacity is in Doubt

Cases that deal with challenges to testamentary capacity or the capacity to appoint an enduring attorney call for the court to examine the evidence for a finding that a person had capacity at the time of the instructions. These cases therefore highlight the duties of solicitors in situations where their client's capacity is in doubt. Although wills prepared by solicitors with poor assessment practices can be admitted into probate,[94] good practices would undoubtedly cut down on disputes in this area.

The requirements of a solicitor when testamentary capacity is in doubt are set out in the decision of Santow J in *Anastasia Pates v Diane Craig and the Public Trustee Estate of the Late Joyce Jean Cole*.[95] They include: Attending on the testator personally; 'fully question[ing] them to determine capacity'; having others present to attest to their capacity, preferably a medical professional who knows them well; keeping a written record including results of the medical examination and taking 'Detailed notes … at every stage of the process.'[96] Justice Santow further recommends particular caution where the arrangements for drawing a will are made by someone other than the testator.

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[91] [1988] NSW Conv R 55-385.
[92] *Szozda v Szozda* [2010] NSWSC 804 [31].
[93] Ibid [34].
[94] *Gray v Taylor & Anor; The Estate of the late Stanislaw Zajac* [2017] NSWSC 497 [129].
[95] [1995] NSWSC 87: see also *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831; and also *Gray v Taylor & Anor; The Estate of the late Stanislaw Zajac* [2017] NSWSC 497 [126] per Slattery J; 'In summary, where testamentary capacity is in doubt, at the very least, a solicitor should ask the testator questions to ascertain the testator's basic understanding, to gain reasonable assurance regarding testamentary capacity.'
[96] *Anastasia Pates v Diane Craig and the Public Trustee Estate of the Late Joyce Jean Cole* [1995] NSWSC 87 [148]; See also the suggestion that seeking a medical opinion is mandatory in some cases involving elderly clients and that solicitors should place more importance on a medical assessment of capacity than on their own view: in O'Neill and Peisah, above n 9, 4.4.

The dual requirements for solicitors to obtain a medical opinion and take careful notes when their client's capacity is in doubt were described by Briggs J as the "golden rule" in the British Court of Chancery case, *Re Key.*[97] The "golden rule" of obtaining a medical opinion in cases of very old or infirm testators has a public policy rationale of trying to circumvent the need for a legal challenge.[98] In Australia, this "rule" has been described as 'a counsel of prudence that must be subject to the circumstances of the case.'[99]

Moves to introduce mandatory medical opinions for a particular class of older will-makers have previously been rejected in Australia, although it has been recognised that solicitors need further guidance in this area.[100] While there can be tensions between medical and legal professionals in the assessment of capacity, as has been judicially noted,[101]researchers have advocated the benefits of professional cooperation in preventing and resolving disputes about testamentary capacity.[102]

In the *Re Key* case, Briggs J was concerned to protect against a situation where an older person might otherwise mask their lack of capacity.[103] Similar sentiments about the ability of older people with dementia to be able to mask their impairments were expressed in the Victorian case of *Nicholson v Knaggs*, in which Vickery J recommended a structured interview technique should be used.[104] Consistent with the theme that older people may 'fool' others into thinking they have capacity, several cases provide a warning to solicitors about older people with a cognitive impairment who may participate in meeting by rote, but who do not actually have the mental capacity to understand what is going on at that meeting.[105] A series of recent Supreme Court decisions have emphasised the need for appropriate interview techniques,[106] highlighting

[97] [2010] 1 WLR 2020, 8.
[98] Roger Kerridge, 'Wills Made in Suspicious Circumstances: The Problem of the Vulnerable Testator' (2000) 59(2) *Cambridge Law Journal* 310, 312.
[99] *Vealle v Vealle* [2015] VSCA 60 [192]; See also *Fradgley v Pocklington [No2]* [2011] QSC 355 [12]
[100] Victorian Law Reform Commission, 'Succession Laws: Final Report' (Victorian Law Reform Commission, 2013) 2.52.
[101] For a discussion of the problems created by professional animosity, see for instance the statements about evidence provided by Dr Kantor (a lawyer) in *Vasahlo v Kantor [2003] VSC 81*[38]: 'as is often found in cases like this, it is clear that Dr Kantor appeared to view the attack on his client's capacity as an attack upon his professional competence and even his integrity. His concern about this was demonstrated, not only in the manner in which he gave evidence before me, but also in the manner in which he communicated with some of the medical practitioners late last year. This is understandable, but it means that I treat his evidence as possibly partisan in the sense that he appeared concerned to defend himself from these attacks.'
[102] Purser and Rosenfeld, above n 31; Ries, above n 12, 887.
[103] [2010] 1 WLR 2020.
[104] *Nicholson v Knaggs* [2009] VSC 64 [664] per Vickery J, holding it was not sufficient simply to read the will to the testator.
[105] *Roche v Roche* [2017] SASC 8 [402]; *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831.
[106] *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007, [101-108].

the need for careful questioning that "tests" for understanding.[107] Open questions requiring more than a 'yes' or 'no' answer are crucial. In *Romascu v Manolache*, Hallen AsJ emphasised that perfunctory questioning was insufficient to establish capacity.[108] Similarly, Slattery J opined in *Gray v Taylor & Anor; The Estate of the late Stanislaw Zajac*, that '**….** where testamentary capacity is in doubt, at the very least, a solicitor should ask the testator questions to ascertain the testator's basic understanding, to gain reasonable assurance regarding testamentary capacity.'[109] However, the extent of questioning required will depend on the circumstances of the case and the potential for doubt about the testator's capacity. For instance, in *Gray v Taylor,*[110] two questions about the day of the week and the current Prime Minister were sufficient to assure the Court that the solicitor behaved in a professional manner as to questions of capacity for making enduring appointments and a will, because there was no evidence to suggest that the client may have lacked capacity.

In the *Romascu* case where the client's capacity was in doubt, the Court had difficulty accepting that the client had testamentary capacity because the interpreter used was unable to explain exactly what was said to the testator or what her responses were.[111] Similarly, the case of *Dellios v Dellios* serves as a caution when dealing with people who require an interpreter. In that case, the lawyer took instructions from an older woman who spoke Macedonian. The interpreter was a family member, so the Court could not be satisfied that the questions or answers were properly interpreted.[112] The solicitor in that case was further criticised for asking mostly leading questions.[113]

Case law also provides useful descriptions of some of the poor practices of solicitors taking instructions for a will or power of attorney. It is quite common for solicitors in these cases to outline a process whereby they describe or explain an instrument and then act on the assumption that the person understands that instrument – an assumption gained either from an absence of questions from the principal, or an affirmative answer to a query about whether they understand.[114] Courts have criticised this approach and explained that reading an instrument is not sufficient to test for understanding.[115]

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[107] *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831.
[108] [2011] NSWSC 1362 [166].
[109] [2017] NSWSC 497 [126]. Hereafter referred to as *Gray v Taylor.*
[110] [2017] NSWSC 497 [98-99].
[111] *Romascu v Manolache* [2011] NSWSC 1362 [218].
[112] *Dellios v Dellios* [2012] NSWSC 868 [48-49].
[113] *Dellios v Dellios* [2012] NSWSC 868 [50].
[114] See for instance: *Szozda v Szozda* [2010] NSWSC 804 [80-81].
[115] *Nicholson v Knaggs* [2009] VSC 64 [679-682].

Certain decisions also provide particularised suggestions about what solicitors might have done better in order to assess capacity. For instance, in *Szozda v Szozda*, it was suggested that the Court might have had more faith in the solicitors' assurances of capacity if they had: (a) given a more fulsome explanation of the enduring powers that Mrs Szozda was assigning; (b) asked for her to repeat the information they had given; (c) asked more particular questions about her specific property and/or affairs to elicit an "informed understanding"; and (d) not relied on appearance, grooming and manners as an indicator of understanding.[116]

The case of *Winefield v Clarke* contains a list of issues that a prudent solicitor should canvas with a client before effecting the transfer of property to a family member.[117] The list includes: (a) the requirement of a complete explanation of the transaction including the differences between joint tenancy and tenancy in common; (b) a referral to a medical professional for a capacity assessment where necessary; and (c) a discussion about the nature and payment of any consideration. The Court held that because there was an absence of evidence from the solicitor about what happened in any one-on-one meetings, they could not be satisfied 'that the transfer was the independent and well-understood act of a woman in a position to exercise a free judgment based on information as full as that of the donee.'[118]

The importance of careful note taking is a common theme across jurisdictions. In *Manning v Hughes – Estate of Ludewig,*[119] White J implied that making sufficient inquiries about capacity and keeping notes of these constituted an element of the solicitor's duty to the court, stating that the court 'ought to have the benefit' of the record of questions and answers. A solicitor's notes can provide cogent contemporaneous evidence of the capacity of the client at the moment that instructions are taken, in keeping with the functional, decision-specific test of capacity.[120] Courts have frequently noted that the contemporaneous notes of interactions with a client will carry some weight in any future dispute over the capacity of the client at the time the

[116] The Court did not rely on these matters alone to decide that it had not been proven that Mrs Szozda had capacity, but they were persuasive matters in that the solicitors were unable to counter the evidence of the medical professionals and family members who gave evidence of incapacity.
[117] *Winefield v Clarke* [2008] NSWSC 882 [46].
[118] *Winefield v Clarke* [2008] NSWSC 882 [50].
[119] *Manning v Hughes – Estate of Ludewig* [2010] NSWSC 226 [49].
[120] See for instance the positive comments about the impact of notes kept by Mr Henley in *Edith White v Judith Liane Wills* [2014] NSWSC 1160 [155], [260] and [497].

instructions were given.[121] Contemporaneous notes of a solicitor may well be preferred over expert medical opinions.[122]

State-based tribunals deal with applications for Guardianship and disputes about enduring appointments so their decisions provide further evidence about the Courts' attitude to how solicitors obtain their instructions and assess the capacity of their clients. In the Queensland decision of *TCAR*,[123] the QCAT held that a solicitor had not made sufficient inquiries about an older woman's decision to transfer a property to an adult child who was her enduring attorney. The Tribunal raised concerns that the woman did not have the capacity to understand the nature and effect of the property transaction. Looking to evidence of what the lawyer had done, the Tribunal held that because the lawyer did not have notes of the extent of the woman's property they could not be confident that the lawyer had explained the full effect of the transfer to their client.[124] The Tribunal felt that 'drawing a pie' was not sufficient for the purpose of an explanation of how the client's assets would be divided. The Tribunal also specifically raised the problem created by the fact that there was no file note of the extent of the client's property that would facilitate such a discussion.[125] Concerned at the size of the asset transfer and the woman's fluctuating cognition, the Tribunal suggested that in these circumstances a solicitor should interview the client more than once and obtain a report from a treating geriatrician.[126]

2.4.1 Applying Capacity Guidelines

Courts in NSW have made few references to the need for solicitors to follow any particular capacity guidelines. In the testamentary capacity case**,** *Romascu v Manolache*, Hallen AsJ recorded that a particularly inexperienced lawyer was not aware of the Law Society capacity guidelines or of the need for a medical opinion.[127] The Court also criticised the lawyer's lack of research around questions of testamentary capacity and the fact that he was unaware of the requirements laid down in *Banks v Goodfellow*.

In 2014, the NSW Civil and Administrative Tribunal (NCAT) was critical of the actions of two lawyers involved in the preparation of an EPOA drawn in 2012 for an eighty-one year old

[121] *Roche v Roche* [2017] SASC 8.
[122] *Zorbas v Sidiropoulous* (No 2) [2009] NSWCA 197 [89].
[123] [2017] QCAT 101.
[124] *TCAR* [2017] QCAT 101 [94].
[125] *TCAR* [2017] QCAT 101 [97].
[126] *TCAR* [2017] QCAT 101 [99].
[127] *Romascu v Manolache* [2011] NSWSC 1362, [105].

woman in which her son and her solicitor were jointly appointed her attorneys.[128] The appointment was witnessed by a second lawyer who worked as a consultant to the family's lawyer.[129] The Tribunal criticised the lack of independence of the consultant lawyer, but described this only as 'unfortunate.'[130] However, the Tribunal went on to criticise his interview techniques. Despite declaring himself familiar with the Law Society guidelines, the consultant lawyer outlined that his procedure was to describe the scope of the EPOA and to stop at points in the description to inquire if the client had any questions.[131] This lawyer also explained that he applied his own Mini Mental test, requiring clients to draw a clock face with the hands shown at ten minutes to two.[132] The Tribunal found this technique was inadequate and did not provide the requisite evidence of capacity, citing with approval the techniques outlined in the NSW Law Society guidelines for preparing a power of attorney.[133]

The Tribunal noted that the new Uniform Solicitors' rules mandate that a client be referred for independent legal advice in situations where the practitioner draws an instrument under which they will benefit financially.[134] Despite implying that the solicitor involved had engaged in poor practices and noting that they had benefited significantly in the form of legal fees, the Tribunal stopped short of direct criticism, specifically noting that the guidelines are 'not mandatory, but they reflect "best practice"'[135]and that applying the guidelines can avoid challenges to capacity in the future.

However, in a sign that the tide may be turning and the courts are responding to calls for heightened regulation of the profession, Justice Kunc recently provided a "postscript" in a Supreme Court judgment, noting 'the need for continuing legal education on questions of capacity'.[136] Justice Kunc was not convinced by a solicitor's view that her client had testamentary capacity, in part because the lawyer 'did not do so with knowledge of or attention to the kinds of matters identified in the guidelines in relation to being satisfied of a client's

[128] *HLT* [2014] NSWCATGD 5.
[129] The consultant lawyer described himself as having 'considerable expertise, gained over of a period of over 30 years, in Wills and Powers of Attorney.' [105].
[130] *HLT* [2014] NSWCATGD 5 [169].
[131] *HLT* [2014] NSWCATGD 5 [114].
[132] *HLT* [2014] NSWCATGD 5 [72].
[133] Law Society of New South Wales, *Guidelines For Solicitors Preparing An Enduring Power of Attorney* <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026516.pdf>.
[134] Legal Services Council, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (NSW) Rule 12.4.2.
[135] *HLT* [2014] NSWCATGD 5 [169].
[136] *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007 [99-108].

testamentary capacity, particularly a client residing in a nursing home.'[137] The postscript referred to 'the desirability of all solicitors being familiar with the guidelines' and proposed 'rules of thumb' in relation to interviewing clients alone, considering capacity and undue influence, asking non-leading questions and recording the questions and answers in a file note and taking particular precautions when clients are over 70 or in care.[138] However this decision falls short of a statement that following the guidelines is mandatory.

A potential difficulty in establishing a clear duty to follow capacity assessment guidelines is that there has been no clarification of which guidelines lawyers should follow. Between 2011 and 2017 there were no fewer than six different sets of capacity guidelines referred to on the website of the NSW Law Society.[139] There has been no systemic review or critique of these guidelines to establish whether or not they offer consistent advice.

However, despite the existence of multiple guidance documents in Queensland,[140] this has not been a barrier to commencing professional disciplinary action in the Queensland Civil and Administrative Tribunal as described below.

2.4.2 Disciplinary Decisions for Failure to Properly Assess Capacity

Disciplinary findings related to the way that a solicitor has dealt with a client who lacks capacity are generally pursued by the legal regulator in that State as cases of 'unsatisfactory professional conduct'. 'Unsatisfactory professional conduct includes conduct of a lawyer

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[137] *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007 [98 (4)].
[138] *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007 [99-108].
[139] Peter Darzins, William Molloy and David Strang, *Who Can Decide? The Six Step Capacity Assessment Process* (Memory Australia Press, 2000); Law Society of New South Wales above n 133; Law Society of New South Wales, 'A Practical Guide for Solicitors: When a Client's Capacity is in Doubt' (Law Society of New South Wales, 2009) <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/023880.pdf>; Law Society of New South Wales, 'Client Capacity Guidelines: Civil and Family Law Matters' (2003) 41(8) (September) *Law Society Journal* 50; Law Society of New South Wales, 'When A Client's Mental Capacity Is In Doubt: A Practical Guide For Solicitors' (Law Society of New South Wales, 2016) <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1191977.pdf>; New South Wales Department of Justice, 'Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales' (2008) < http://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx >; American Bar Association Commission on Law and Aging and American Psychological Association, 'Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers' (2005).
[140] Office of the Adult Guardian, *Capacity Guidelines for Witnesses of Enduring Powers of Attorney* (June 2005); Office of the Public Guardian, 'Guidelines For Witnessing Enduring Documents' (Office of the Public Guardian, Queensland, 2013) <http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity/Guidelines_for_Witnessing_Enduring_Documents_Aug_2013>; Allens Linklaters and Queensland Advocacy Incorporated, 'Queensland Handbook for Practitioners on Legal Capacity' (1 July 2014 2014) <http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity/Queensland_Handbook_for_Practitioners_on_Legal_Capacity>.

occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent lawyer.'[141] The standard of care is not that of a particularly meticulous and conscientious practitioner. The test is what a reasonably competent practitioner would do having regard to the standards normally adopted in their profession.[142]

Eight disciplinary decisions have been made in circumstances where lawyers failed to properly assess the capacity of their client. The first case to establish that a failure to follow guidelines for capacity assessment amounted to unsatisfactory professional conduct was the Queensland case, *Legal Services Commissioner v Ford*.[143] This case concerned the revocation of an EPOA and preparation of a new enduring appointment and will for an 86 year-old resident of a nursing home, with the will cutting out all previous family beneficiaries. The Tribunal made specific mention of the lawyer's 'arrogant' attitude to the guidelines for solicitors drawing up enduring documents, noting he considered them 'a somewhat new-fangled invention.' Ford's evidence about how much care he may have taken in establishing that his client had the capacity to understand the legal effect of the documents she was signing was called into question because of errors that he made in the preparation of the enduring documents and because he ignored warnings from nursing staff that the client had problems with her cognition prior to his attendance on her. In relation to applying the guidelines, specific mention was made of the need to meet the client alone, recording the questions and answers used to establish capacity, the use of open-ended questions and the requirement for note-taking, including a note of any other opinions given about the client's capacity.

Ford was found guilty of unsatisfactory professional conduct and publicly reprimanded. The Tribunal gave careful consideration to whether a fine should be issued, but held that this was an unusual test case. Fryberg J went on to make clear that a fine may be appropriate in future cases, deciding:

> The fact that no pecuniary penalty is imposed would not and should not be taken in cases arising out of events after today to indicate that the Tribunal would, in future, take the same attitude. What is appropriate in the first case which is something of a test case is not appropriate in cases where subsequently practitioners

[141] *Legal Profession Uniform Law* 2015 (NSW) s296; *Legal Profession Act* 2007 (Qld) s418.
[142] *Midland Bank Trust Co Ltd v Hett Stubbs and Kemp* [1979] Ch 384 [403] per Oliver J.
[143] [2008] LPT 12.

have every opportunity to know what their obligations are and to know that they ought to fulfil them.[144]

Three years later, QCAT issued a public reprimand and a fine of $2000 to another lawyer for the manner in which he had taken instructions for enduring power of attorney documents for an elderly couple who had both been diagnosed with dementia.[145] These appointments were subsequently found to be invalid for want of capacity by QCAT with the lawyer agreeing that he had failed to meet a competent standard because: he had not followed the Adult Guardianship Guidelines; had not conducted appropriate enquiries to establish that the clients understood the effect of the documents they were signing; had not sought a medical opinion; and had not kept a written record of the steps he took to ascertain the clients' capacity.

The first Victorian disciplinary decision, *Legal Services Commissioner v McNamara*, was made in 2011.[146] This case involved the drawing of a will and a conflict of interest between the proposed beneficiaries of that will (a widow who had been diagnosed with dementia, and her neighbour). In relation to the question of the client's lack of capacity, the Court emphasised the client's vulnerability given her dementia and the fact that the lawyer was also acting for the neighbours who were her carers. The court was scathing that the practitioner maintained that there was no positive evidence that the client lacked capacity in the face of a Guardianship hearing appointing an administrator to manage her affairs,[147] but did not comment significantly on his capacity assessment methods beyond noting that he should have either had an assessment done (presumably a medical assessment), or ceased to act.[148]

In the case of *Given*,[149] the Queensland Tribunal issued a reprimand and a fine for $1500 on the basis that the lawyer did not see his 76 year-old client alone when taking instructions for a will and EPOA. The Tribunal highlighted some of the "red flags" that should have alerted the lawyer to his client's incapacity, especially that the client had recently had a stroke and because the lawyer was initially contacted by the client's sister (the proposed beneficiary of the enduring powers and the mother of the proposed beneficiaries in the will). The Tribunal was also concerned that the client's wife and first attorney had not been informed of any proposed changes. The lawyer was criticised for: his failure to follow the 'Guidelines for Witnessing

[144] *Legal Services Commissioner v Ford* [2008] LPT 12, 25.
[145] *Legal Services Commissioner v Comino* [2011] QCAT 387.
[146] [2011] VCAT 1228.
[147] The Court described this as 'breathtaking in its audacity': *Legal Services Commission v McNamara* [2011] VCAT 1228 [102].
[148] *Legal Services Commission v McNamara* [2011] VCAT 1228 [102].
[149] *Legal Services Commissioner v Given* [2015] QCAT 225.

Enduring Documents'; for interviewing the client in the presence of his sister; failing to obtain a medical opinion of the client's capacity when he should have been aware that it may be challenged; and failing to document the steps he took to ascertain the client's capacity including recording all questions and answers.

The *Given* matter was distinguished from a 2011 disciplinary case, *Legal Services Commissioner v De Brenni*,[150] partly on the basis that the client in this case was resident in a nursing home, not a private residence. The Tribunal held that this should have put the lawyer on notice of the client's lack of capacity. The lawyer's failure to follow the '*Guidelines for Witnessing Enduring Documents'* to establish that the client understood the legal effect of the documents he was signing was held to fall short of the standard of a competent solicitor.[151]

In the West Australian case, *Legal Profession Complaints Committee and Wells*,[152] the Tribunal found the practitioner guilty of professional misconduct for his reckless conduct in the preparation of a will and EPOA for a terminally ill man resident in a hospice following a stroke. The Tribunal outlined the requirements for the making of a will finding that at a minimum the solicitor should:

> 'a) … determine whether the testator has testamentary capacity;
>
> b) if capacity is in doubt, … ask non-leading questions designed to properly probe that capacity;
>
> c) if capacity is in doubt, …. seek medical advice;
>
> d) …. be alert to possible conflicts of interest where the person instigating the will is a beneficiary, or associated with a beneficiary; and
>
> e) … take proper notes.'[153]

In April 2015, Queensland solicitor Rhonda Penny was reprimanded and fined $1500 for unsatisfactory professional conduct for failing to make adequate inquiries into the capacity of

[150] [2011] QCAT 340.
[151] *Legal Services Commissioner v Comino* [2011] QCAT 340 [11].
[152] [2014] WASAT 112.
[153] *Legal Profession Complaints Committee and Wells* [2014] WASAT 112 [10].

an 85-year year-old client.[154] The agreed facts were that she spent only ten minutes with the client and did not read through the enduring appointment document or assist the client to do so, rather taking her instructions from the new attorney who made the appointment. The Tribunal was particularly critical of the lawyer's failure to keep any file notes. In relation to a failure to seek a second medical opinion, the Tribunal cited the English case *Thorpe v Fellowes Solicitors LLP,*[155] which held that there is no obligation on lawyers to seek a medical opinion in every case where the client is elderly 'just in case' they lack capacity. However, in the circumstances of this case, the client was incontinent, unable to travel, unable to respond to the solicitor's questions and appeared to the solicitor to be very frail such that she admitted that she did question herself as to his capacity. This suggests that disciplinary action for a failure to obtain a medical opinion will only succeed in those cases of unequivocal "evidence" of incapacity.

The most recent disciplinary case to deal with capacity is *Legal Services Commissioner v Ho*.[156] The case involved the preparation of a will and EPOA for a fifty year old woman with a mild intellectual disability. The lawyer was found to have engaged in unsatisfactory professional conduct on the basis that he did not approach the task of taking instructions in line with the Queensland *Guidelines for Witnessing Enduring Documents*.[157] Specifically the Tribunal criticised the lawyer for a failure to document the steps he took to ascertain the client's capacity, failure to ask open questions to elicit her understanding, failure to seek a medical opinion of capacity when he knew that the client had a cognitive impairment and a failure to interview the client alone.

Taken as a whole, the case law establishes that competent solicitors should be alert to the possibility of a challenge to an elderly person's capacity, particularly where they are on notice that the person has a cognitive impairment stemming from an illness or dementia and/or where the person is resident in a nursing home. Where a solicitor is in doubt about their client's capacity, they should ask further open-ended questions to establish whether their client can meet the functional test of capacity for the particular decision that they want to make, taking into account the client's personal circumstances. If doubts remain about the client's capacity, then they should seek a further medical opinion, preferably from a medical practitioner who

[154] *Legal Services Commissioner v Penny* [2015] QCAT 108; Charges were initially laid in relation to the way that Ms Penny took instructions for a will, but these were later withdrawn.
[155] [2011] EWHC 61 (QB) [77].
[156] [2017] QCAT 95.
[157] Office of the Public Guardian, above n 139.

knows the older person. An independent capacity assessment by a specialist such as a neuropsychologist or geriatrician should also be considered. Lawyers should take particular care when an appointment is arranged by someone who is not known to them and when the arrangements are made by a new beneficiary or someone who may benefit from the instructions. The whole of the procedure of capacity assessment should be well documented with contemporaneous notes.

2.4.3 Capacity Negligence

In 2012, a decision of the Supreme Court in Victoria established "capacity negligence" as a specific basis upon which to make a claim against a lawyer.[158] This case, (analysed comprehensively in paper 2) now cited in the commentary to the Australian Solicitors' Conduct Rules,[159] involved negotiations over a matrimonial dispute said to have settled to the client's disadvantage at a time when the client, Mr Fritsch, lacked the capacity to give instructions. Mr Fritsch's lack of capacity stemmed from depression and post-traumatic stress disorder, of which his lawyers were aware, having known about his treatment and his recent suicidal thoughts. Just prior to settlement they had sought and received advice that was equivocal about his decision-making abilities and they had sought ethics advice about whether to proceed.

Justice Bell held that lawyers owe a duty to their clients to assess their capacity to give instructions, characterising this as 'an aspect of the general duty of care which a lawyer owes to their client, for it is always to be expected of a lawyer exercising ordinary skill and competence that they are reasonably satisfied of the client's mental capacity to instruct.'[160] Justice Bell stated that the proper course in the situation where capacity remains in doubt and litigation is on foot is for the lawyers to bring the matter before the court, holding that the decision as to capacity is 'not with the lawyers, not with the doctors, not with the client or party but with the court.'[161] However in this case, the lawyers were protected by the principle of advocate's immunity that applied at the time.

The immunity principle that protected these lawyers from suit was overturned in 2016 by the High Court decision of *Attwells v Jackson Lallic Lawyers Pty Limited,*[162] holding that

[158] *Goddard Elliott v Fritsch* [2012] VSC 87.
[159] Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Commentary,* (2013) r 8.
[160] *Goddard Elliott v Fritsch* [2012] VSC 87 [418].
[161] Ibid [562].
[162] [2016] 90 ALJR 572.

advocate's immunity does not apply to cases of negligent settlement advice. It is now beyond doubt that a failure to accurately establish that a client has the capacity to provide instructions to settle a claim outside of court can ground a claim in negligence. It is similarly possible that a mediator who fails in their duty to establish that a participant has the requisite capacity to make a mediation agreement could be liable in negligence, though this remains unsettled.[163]

2.4.4 Confidentiality and Capacity Assessment

Lawyers have an obligation to act in the best interests of their clients,[164] and a concomitant duty to only accept instructions that are lawful and competent.[165] This necessarily involves lawyers in the task of assessing their client's capacity. The duties to the client are subject however to an overriding duty to the Court and to the administration of justice.[166]

The law is clear that solicitors must raise the question of a client's capacity with the Court where a client's capacity is in doubt and litigation has commenced.[167] It is less clear what lawyers should do where they have doubts about their client's capacity prior to litigation commencing if the client will not agree to a supporting medical assessment. This is because there are currently no exceptions to the rule of client confidentiality that would allow a lawyer to make further inquiries about their client's capacity without the client's consent.[168]

In NSW, the decision of *R v P* has been cited as qualifying the rule of confidentiality.[169] In that case a solicitor sought a public manager for his client's estate against the client's wishes. The Court of Appeal held that a breach of client confidentiality in these circumstances could be justified as a last resort:

> 'the solicitor's concern for the interest of the client, so long as it is reasonably based and so long as it results in no greater disclosure of confidential information than absolutely

[163] *Tapoohi v Lewenberg [No 2]* [2003] VSC 410.
[164] *Law Council of Australia, Australian Solicitors' Conduct Rules (2015),* r 4.4.1.
[165] *Law Council of Australia, Australian Solicitors' Conduct Rules (2015),* r 8.
[166] *Law Council of Australia, Australian Solicitors' Conduct Rules (2015),* r 3.1.
[167] *Pistorino v Connell & Ors* [2012] VSC 438, [6]. 'Once the matter is raised the court will inquire into the question ... In the exercise of jurisdiction the court is acting both to protect the interests of the person with a relevant disability and to protect the court's own processes'.
[168] *Law Council of Australia, Australian Solicitors' Conduct Rules (2015),* r 9. The Law Council of Australia recently commenced a review of the Solicitors' Conduct Rules. For discussion related to rule 9 see Law Council of Australia, 'Review of the Australian Solicitors' Conduct Rules' (2018) <https://www.lawcouncil.asn.au/files/web-pdf/2018%20Feb%20%2001%20ASCR%20Consultation%20Discussion%20Paper.pdf> 41-49.
[169] *R v P* [2001] NSWCA 473; Law Society of New South Wales, above n 139, Appendix E.

necessary, can justify the bringing of proceedings and such disclosure of confidential information as is absolutely necessary for the purpose of such proceedings.'[170]

There is scant case law on this issue; however, any application to the Court must be clearly in the interests of the Court as well as the interests of the client, reflecting the concurrent duties of a lawyer and the difficult balancing act required.[171] Applications for an assessment will not always be approved. For instance, in the recent 2017 case of *NYO,*[172] an administrator for a 92 year-old woman sought an order that she be required to undergo examination by a neuropsychologist to determine whether she had testamentary capacity. In this case the Tribunal refused the application on the grounds that there would be no benefit to the older woman. The Tribunal accepted the submissions of her sons and doctors that she did not want to attend an examination and also held that whether or not the woman had testamentary capacity in 2015 was a matter for a probate court in any future dispute.

The ALRC examined the confidentiality rule in their Inquiry into Equality, Capacity and Disability in Commonwealth Laws, recommending in their final report that the Law Council should examine whether an exception to the rule of confidentiality should be provided where:

> '(a) the solicitor reasonably believes the client is not capable of giving lawful, proper and competent instructions; and
>
> (b) the disclosure is for the purpose of: assessing the client's ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the client's ability to instruct; or seeking the appointment of a litigation representative.'[173]

This proposal was supported by some seniors' rights organisations who considered that the law of confidentiality may restrict access to justice for older people with a cognitive impairment.[174] The danger with the proposal is that lawyers might use such an exception without proper regard for their client's autonomy and without first providing the necessary supports.[175] To date, there have been no such reforms of the Solicitors' Rules, meaning that lawyers whose clients reject their request for a formal assessment of capacity must either rely solely on their own

[170] *R v P* [2001] NSWCA 473 [66].
[171] *Pistorino v Connell & Ors* 2012] VSC 438.
[172] *(Guardianship)* [2017] VCAT 690.
[173] Australian Law Reform Commission (2014), above n 15, Recommendation 7-6.
[174] Lauren Adamson, El-Hage Mary-Anne and Marshall Julianna, 'Incapacity and the Justice System in Victoria' (Public Interest Law Clearing House, 2013).
[175] Ibid 3; Australian Research Network on Law and Ageing, 'Submission to the ALRC: Response to Discussion Paper 81' (2014); Linda Haller, 'Ethical Issues for Administrative Law Practitioners' (Paper presented at the Civil Justice Conference, 2013).

assessment, or withdraw. As has been established, the common law suggests that a medico-legal assessment is the preferred option when a client's capacity is in doubt.

2.5 Medico-Legal Literature on Capacity Assessment

The difficulties of capacity assessment have been well documented.[176] Outside of the formal capacity assessment guidelines published by law societies and mediation regulators around the world,[177] there are numerous publications that outline the process that lawyers should follow to assess capacity for particular legal decisions,[178] as well as a significant body of literature on the assessment of capacity from a medical perspective.[179]

There is also a growing body of empirical research examining the impact of bias, ageism and paternalism on the capacity assessment process that is important to consider in the context of a desire to improve assessment processes for vulnerable older populations.[180] However, this

[176] Darzins, Molloy and Strang, above n 139; Terry Carney, 'Judging the Competence of Older People: An Alternative?' (1995) 15(4) *Ageing and Society* 515; Berna Collier, Chris Coyne and Karen Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (Federation Press, 2005); Lawrence Frolik and Mary Radford, 'Sufficient Capacity: The Contrasting Capacity Requirements for Different Documents' (2006) 2 *NEALA Journal* 303; Jonathan Herring, 'Entering the Fog: On the Borderlines of Mental Capacity' (2008) 83(4) *Indiana Law Journal* 1619; Marshall B Kapp and Douglas Mossman, 'Measuring Decisional Capacity: Cautions on the Construction of a "Capacimeter"' (1996) 2 *Psychology Public Policy and Law* 73; O'Neill and Peisah, above n 9, 6; Moye, Marson and Edelstein, above n 28.

[177] American Bar Association Commission on Law and Aging and American Psychological Association, above n 139; Capacity Assessment Office, 'Guidelines for Conducting Assessments of Capacity' (Ontario Ministry of the Attorney General, 2005); Legal Services Consumer Panel, 'Recognising and Responding to Consumer Vulnerability, A Guide for Legal Services Regulators' (Legal Services Board, 2014) <http://www.legalservicesconsumerpanel.org.uk/ourwork/vulnerableconsumers/Guide%20to%20consumer%20vulnerability%202014%20final.pdf>; 'ADA Mediation Guidelines' (2000) *Cardozo Journal of Conflict Resolution* <http://cardozojcr.com/ada-mediation-guidelines/> ; American Arbitration Association, American Bar Association and Association for Conflict Resolution, 'Model Standards of Conduct for Mediators' (2005).

[178] See e.g.: Kelly Purser and Tuly Rosenfeld, 'Too Ill to Will? Deathbed Wills: Assessing Testamentary Capacity Near the End of Life' (2016) 45 *Age and Ageing* 334; Ries above n 12, 887; Cheryl Tilse et al, 'Enduring Powers of Attorney: Promoting Attorneys' Accountability as Substitute Decision Makers' (2014) 33(3) *Australasian Journal on Ageing* 193; Margaret Castles, 'Mind The Gaps: Ethical Representation of Clients with Questionable Legal Capacity' (2015) 18 *Legal Ethics* 24 ; Peter Margulies, 'Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity: Proceedings of the Conference on Ethical Issues in Representing Older Clients' (1993) 62 *Fordham Law Review* 1073; Cheryl Tilse et al, 'Legal Practitioners and Older Clients: Challenges and Opportunities for Effective Practice' (2002) 1 *Elder Law Review* 34.

[179] See for instance: Paul Applebaum and Thomas Grisso, 'Assessing Patient's Capacities to Consent to Treatment' (1988) 319 *New England Journal of Medicine* 1635; Frolik and Radford, above n 176; C Peisah et al, 'The Wills of Older People: Risk Factors for Undue Influence' (2009) 21(1) *International Psychogeriatrics* 7; Melissa Finucane and Christina Gullion, 'Developing a Tool for Measuring the Decision-Making Competence of Older Adults' (2010) 25(2) *Psychology and Aging* 271; Moye and Marson, above n 28.

[180] Pamela Champine, 'Expertise and Instinct in the Assessment of Testamentary Capacity' (2006) 51 *Villanova Law Review* 25; Frederick Vars, 'Illusory Consent: When An Incapacitated Patient Agrees to Treatment' (2008) 87(2) *Oregon Law Review* 353; Natalie Banner, 'Unreasonable Reasons: Normative Judgements in the Assessment of Mental Capacity' (2012) 18(5) *Journal of Evaluation in Clinical Practice* 1038; Charlotte Emmett et al, 'Homeward Bound or Bound for Home? Assessing the Capacity of Dementia Patients to Make Decisions About Hospital Discharge: Comparing Practice with Legal Standards' (2013) 36(1) *International*

literature relates to the medical assessment of capacity. Empirical research on how lawyers make capacity decisions or assessments in practice is scant.

Given the importance of legal and medical professionals working together to assess capacity,[181] the significance of research into how the two professions co-operate cannot be underestimated. The work of Marshall Kapp is significant in this respect. Kapp has discussed the tensions and problems that flow from a system that requires the cooperation of two different professions, medical and legal, that have different ethical duties toward the person who lacks capacity.[182] Kapp contrasts the medical approach, focused on principles of beneficence, with the lawyers' need for certainty, suggesting that this is a product of the adversarial system within which a lawyer sets out to prove or disprove capacity. Similarly, Walsh has argued that ethical differences between lawyers and social workers can affect their levels of respect and cooperation.[183]

Kapp argues that doctors would respond more positively to requests for decision-specific assessments of capacity and suggests that lawyers could cooperate with physicians to pursue clinical or therapeutic interventions as opposed to legal or adversarial ones,[184] an argument also developed by Scott.[185] Consistent with these arguments, interdisciplinary cooperation is a feature of the recent literature in the field,[186] although there are few empirical studies of interdisciplinary cooperation.[187] In practice, one way that interdisciplinary cooperation is being developed is through health/justice initiatives in which doctors and lawyers are co-located to better serve clients.[188] Early research indicates that these initiatives may improve the ability of

journal of Law and Psychiatry 73; Paula Case, 'Dangerous Liaisons? Psychiatry and Law in the Court of Protection - Expert Discourses of 'Insight' (and 'Compliance')' (2016) 24(3) *Medical Law Review* 360; Cheryl Tilse et al, 'Managing Older People's Money: Assisted and Substitute Decision Making in Residential Aged-Care' (2011) 31 *Ageing and Society* 93.

[181] Jim Cockerill, Berna Collier and Kay Maxwell, 'Legal Requirements and Current Practices' in Berna Collier, Chris Coyne and Karen Sullivan (eds), *Mental Capacity: Powers of Attorney and Advance Health Directives* (Federation Press, 2005) , 54; O'Neill and Peisah, above n 9, 1.1; Kerry Rodabaugh et al, 'A Medical-Legal Partnership as a Component of a Palliative Care Model' (2010) 13(1) *Journal of Palliative Medicine* 15; Ries above n 12, 887.

[182] Kapp (2002) above n 31, 413; see also O'Neill and Peisah, above n 9, 1; Purser and Rosenfeld, above n 31.

[183] Tamara Walsh, 'Lawyers and Social Workers Working Together: Ethic of Care and Feminist Legal Practice in Community Law' (2012) 21 *Griffith Law Review* 752 , 761.

[184] Kapp (2011) above n 31, 115; See also Charity Scott, 'Doctors as Advocates, Lawyers as Healers' (2008) 29 *Hamline Journal of Public Law and Policy* 331; Kelly Purser, Eilis Magner and Jeanne Madison, 'A Therapeutic Approach to Assessing Legal Capacity in Australia' (2015) 38 *International journal of Law and Psychiatry* 18.

[185] Scott, above n 184.

[186] Purser and Rosenfeld, above n 31; Castles, above n 178; Ries, above n 12; Richard Stasi, 'Reform That Understands Our Seniors: How Interdisciplinary Services Can Help Solve the Capacity Riddle in Elder Law' (2012) 45(3) *University of Michigan Journal of Law Reform* 695.

[187] But see Walsh, above n 183.

[188] 'Working Together: A Health Justice Partnership to Address Elder Abuse' (Justice Connect Seniors Law and CoHeath, 2016) <https://www.justiceconnect.org.au/sites/default/files/HJP_first%20year%20report_web.pdf> .

professionals to work collaboratively.[189] Mediation literature similarly addresses the need to improve inter-disciplinary cooperation.[190]

A human rights approach to legal capacity emphasises supporting a person to make decisions and providing accommodations for persons to maximise their capacity.[191] As Kapp asserts, this might involve lawyers seeking the assistance of doctors to improve the decision making capacity of their clients through providing clinical interventions such as nutrition advice or medication.[192] Other researchers have focused on improving cognition through techniques of 'brain training' and education around the decisions to be made.[193] A further body of literature describes practical techniques of accommodating older clients who may have impairments through the provision of practical tools such as hearing loops and visual aids,[194] or through allowing support people to be present to alleviate anxiety during the assessment process.[195] Such aids are often described as 'support with decision-making' as opposed to 'supported decision-making',[196] with much of the literature emanating from the disability sector. There

[189] Ibid 26-28; Liz Curran, 'Aboriginal Health Justice Partnership: Evaluation of First Six Months of Operation' (Redfern Legal Centre and Sydney Health District, 2015) <http://rlc.org.au/sites/default/files/attachments/RLC%27s%20Health%20Justice%20Partnership%20with%20the%20RPA.pdf> 8.

[190] Glenn Cohen, 'Negotiating Death: ADR and End of Life Decision-Making' (2004) 9 *Harvard Negotiation Law Review* 253; Rikk Larsen and Crystal Thorpe, 'Elder Mediation: Optimizing Major Family Transitions' (2006) 293-312 *Marquette Elder's Advisor* ; Judy Cohen, 'ADA Mediation guidelines: An Ongoing Endeavor' (2003) *Mediate.com* <http://www.mediate.com/articles/cohen4.cfm>; Diane Persson and Carmen Castro, 'Mediation in Long-Term Care Facilities: A Pilot Project' (2008) 9(5) *Journal of the American Medical Directors Association* 332; Smyth, above n 45.

[191] Australian Law Reform Commission (2014) above n 15, Principle 2, 11; *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) Art 12 (3).

[192] Kapp (2011) above n 31, 115.

[193] Sharmistha Law, Scott A Hawkins and Fergus IM Craik, 'Repetition-induced Belief in the Elderly: Rehabilitating Age-related Memory Deficits' (1998) 25(2) *Journal of Consumer Research* 91; Fergus IM Craik et al, 'Cognitive Rehabilitation in the Elderly: Effects on Memory' (2007) 13(01) *Journal of the International Neuropsychological Society* 132; Mary Helen McNeal, 'Slow Lawyering: Representing Seniors in Light of Cognitive Changes Accompanying Aging' (2013) 117(4) *Penn State Law Review* 1081 .

[194] Rebecca Bailey, Paul Willner and Simon Dymond, 'A Visual Aid to Decision-making for People With Intellectual Disabilities' (2011) 32(1) *Research in Developmental Disabilities* 37; Colleen Getz, 'Accommodating People with Disabilities, A Reference Guide for Mediators' (British Columbia Mediator Roster Society, 2009) <http://www.mediatebc.com/PDFs/1-23-Resources-%28For-Mediators%29/AccommodatingHandbook-web.aspx>; Human Rights Legal Support Centre, *Access and Accommodation Policy* <http://www.hrlsc.on.ca/en/HRLSCAccommodationPolicy.aspx>.

[195] Tilse et al (2011) above n 180, 184.

[196] Michelle Browning, Christine Bigby and Jacinta Douglas, 'Supported Decision Making: Understanding How its Conceptual Link to Legal Capacity is Influencing the Development of Practice' (2014) 1(1) *Research and Practice in Intellectual and Developmental Disabilities* 34; Wayne Martin et al, 'The Essex Autonomy Project Three Jurisdictions Report: Toward Compliance with CRPD Art. 12 in Capacity/Incapacity Legislation Across the UK' (Essex Autonomy Project, 6 June 2016 2016) <http://autonomy.essex.ac.uk/eap-three-jurisdictions-report>, 23; Queensland Justice Department Dispute Resolution Branch, 'Supported Elder Mediation: Discussion Paper' (2016) 12.

has not been any research into the extent to which lawyers utilise support strategies to improve the capacity of their clients.

In the field of elder mediation, capacity assessments and the provision of accommodations have been observed to dis-incentivise the use of elder mediation to resolve conflicts over guardianship and enduring appointments.[197] Once again there is a dearth of research about how mediators go about conducting capacity assessments, although some mediation experts have applied a human rights framework in arguing that mediators should do all that they can to maximise capacity and should actively avoid screening out older people from participating in mediation through capacity assessment.[198]

2.6 Empirical Research of Assessment Practices

2.6.1 Doctors

There are several empirical studies of capacity assessment in the medical sector. A study by Brown et al examined the frequency and consistency of capacity assessments in psychiatric admissions in South London health services.[199] This retrospective cohort study of 1732 admissions relied on data gleaned from clinical records so it is of limited utility in signifying how well capacity assessments were carried out. However, the authors concluded that medical staff inconsistently applied the legislated criteria for capacity assessments in the United Kingdom.[200] This research included a large sample; but there is no qualitative data on what triggered the capacity assessments, most of which were carried out by doctors. Given that these doctors practice in psychiatric wards where lack of capacity is a frequent occurrence, the lack of consistent practice sounds a warning bell for lawyers who arguably have less training in interviewing people with mental health problems.

Another recent study of capacity assessments within two UK hospitals adds weight to the argument that capacity assessment amongst medical staff is ad hoc.[201] Applying techniques of grounded analysis, Emmet et al conducted an ethnographic study involving twenty-nine patients in two hospitals in the north of England. The study examined the processes used by

[197] Robyn Carroll and Anita Smith, 'Mediation in Guardianship Proceedings for the Elderly: An Australian Perspective' (2010) 28 *Windsor Yearbook of Access to Justice* 53; Karen Williams, 'Elder Mediation in Australia' (2013) 6(7) *Elder Law Review* 2.
[198] Crawford, above n 44; Smyth, above n 45.
[199] Penelope Brown et al, 'Assessments of Mental Capacity in Psychiatric Inpatients: A Retrospective Cohort Study' (2013) 13 *BMC Psychiatry* <http://www.biomedcentral.com/1471-244X/13/115>; ibid
[200] *Mental Capacity Act 2005* (UK)
[201] Emmett et al, above n 180.

staff in assessing whether patients had the capacity to make decisions to return to their homes after discharge or move into a residential care facility. They found that whilst health professionals were aware of the broad legal standards to be applied to capacity assessment, they did not routinely apply the standards.[202] Interestingly, their study highlighted that junior staff, who they characterised as more 'risk averse', were more likely to take an outcomes-based approach to capacity assessment rather than the functional approach prescribed by legislation.[203] This means that if junior staff disapproved of the outcome of a decision by an elderly person then it was more likely that they would assess that person to be lacking decision making capacity. This could suggest that lawyers, who are also generally characterised as being 'risk averse', might be susceptible to making similar decisions. This may lead to infringements upon the rights of elder clients and points to the need for further research in the field.

Some studies of capacity assessment are more openly cynical about the approach of professionals and have pointed to the possibility of 'collusion', highlighting that psychiatrists may play a role in coercing patients into treatments they do not consent to by assessing that the patient lacks capacity to make their own decisions.[204]

2.6.2 Lawyers

To date, Australian studies of lawyers' knowledge and practice of capacity assessment have all proceeded by way of surveys and interviews. A 2004 survey of 302 Australian lawyers by Helmes, Lewis and Allan sought the views of lawyers on their experience and practices of capacity assessment of elder clients.[205] This survey contrasted the routine questions used by lawyers faced with a client with questionable capacity, with those used by mental health practitioners. This methodology seems to presume the efficacy of a medical model of capacity assessment, comparing the methods used by lawyers with those of mental health professionals.[206] The Helmes study categorises lawyers' capacity questions into five broad types: 'General information, details of the intended transaction; Decisions itself; Aberrant behaviour; External knowledge of client; and Other'.[207] The authors found that the most common type of questions used by lawyers in capacity assessment were 'general discussion'

[202] Ibid, 77.
[203] Ibid, 77.
[204] C Umapathy et al, 'Competency Evaluations on the Consultation-Liaison Service: Some Overt and Covert Aspects' (1999) 40(1) *Psychosomatics* 28.
[205] Helmes, Lewis and Allan, above n 25.
[206] Ibid, 825.
[207] Ibid, 827.

(17.6%) and 'general knowledge' (16.2%).[208] While the Helmes study focused on surveying lawyers about the questions that they ask of clients when capacity is in doubt, the authors do not report on what it was that called into question a client's capacity in the first place and nor do they report on the actions taken by lawyers in response to concerns about capacity.

The Helmes study suggested that lawyers are not focused on understanding the motivations of a client in arriving at a particular decision, a key factor in capacity assessment. Only one quarter of lawyers reported that they enquired about a client's goals.[209] The authors conclude that legal education requires a revamp in order to address a lack of lawyers' skill in capacity assessment.[210] Importantly, they also identify the need for further research in this area.

Willmott and Shoebridge examined twelve months of Guardianship Tribunal cases in Queensland, where capacity to make an EPOA was questioned. They identified thirty-four cases where the Guardianship Tribunal revoked an EPOA, around half of which had been witnessed by a lawyer.[211] Willmott and White subsequently reviewed seven Queensland Guardianship Tribunal decisions and two superior court decisions that reflected the practice of solicitors witnessing EPOAs.[212] Based on this small sample, they identified five concerns about solicitors' practices: failure to understand the role of a witness in establishing capacity for an EPOA; failure to obtain an opinion from a health professional; failure of some lawyers to speak to the principal alone; a lack of note-taking; and finally, accepting initial instructions from the proposed attorney rather than the principal.[213] A survey of 186 solicitors administered by the researchers found that 61% were unaware of the capacity guidelines available in that state, with 76% agreeing that further training in capacity assessment would be beneficial.[214]

Purser has examined Australian lawyers' and doctors' understanding of testamentary capacity through questionnaires and semi-structured interviews involving a small snowball sample of ten legal professionals (all with experience in succession law) and twenty medical professionals.[215] Purser's findings were consistent with previous research, finding that the

[208] Ibid.
[209] Ibid, 828.
[210] Ibid, 829.
[211] Willmott and Shoebridge, above n 25, 242.
[212] Willmott and White, above n 25.
[213] Ibid, 11.
[214] Ibid, 15. This research was conducted prior to the Queensland disciplinary case, *Legal Services Commissioner v Ford* [2008] LPT 12 and subsequent cases discussed above (at 2.4.2). Further research would be required to ascertain whether the public disciplinary matters involving capacity assessment in Queensland have led to improvements in understanding and practice.
[215] Purser, above n 25.

relationships between legal and medical professionals was problematic and that they had different understandings of testamentary capacity,[216] with both professions indicating that they required further training in assessing capacity.

The survey-based research has therefore established that lawyers lack knowledge of capacity assessment. However, surveys can only provide a snapshot of self-reported views by a particular group. They cannot shed light on the actual process.[217] This thesis seeks to fill that gap through empirical research examining lawyers' interactions with older clients.

2.7 Chapter Summary

This chapter has outlined the law of capacity and established the key practices that lawyers should implement to uphold their duties to clients whose capacity is in doubt. The tests for legal decision-making capacity were outlined and key aspects of the tests for testamentary capacity and the capacity to make an enduring appointment were described. It was established that the following techniques were regularly emphasised in the common law related to a solicitors' duties: interviewing clients alone; understanding and applying the functional test for capacity; asking open questions; providing support and accommodations to maximise capacity; seeking a medical opinion; and keeping detailed file notes. These are all aspects of competent practice. It was noted that there is a gap in the literature in the form of analysis of the many existing guides for lawyers in NSW. In Chapter 6 (paper 3), the various NSW guidelines for lawyers engaged in the task of capacity assessment are thoroughly critiqued, filling this gap in the literature.

The chapter then examined the literature related to medico-legal skills in capacity assessment, establishing that while there has been observational research of medical professionals engaged in the task of capacity assessment, there has been no empirical research of lawyer's skills in the field beyond self-reports via surveys. This research seeks to fill that gap in the literature through an examination of the capacity complaint files at the Office of Legal Services Commissioner. Before turning to an explanation of the methodology employed in the empirical study of complaint files in Chapter 4, the following chapter explains the theoretical framework that was employed. This framework is then further explored in papers 3, 5 and 6.

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[216] See also Purser and Rosenfeld, above n 31.

[217] Laura Beth Nielsen, 'The Need for Multi-Method Approaches in Empirical Legal Research' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 976 , 953; Shari Seidman Diamond and Laura Beth Nielsen, 'Empirical Research at the ABF' (2010) 21(4) *Researching Law* 1, 4.

Chapter 3: Human Rights and Vulnerability Framework

This chapter examines the human rights law and vulnerability theory underpinning legal decion-making capacity assessment for older people. This framework is introduced in paper 1, and then applied to the empirical study reported in papers 5 and 6. It also informs papers 7 and 8 on Elder Mediation. An overview of the human right to legal capacity highlights the dual importance of autonomy and safeguarding for the most vulnerable. In this context, vulnerability emerges as a key factor in the realisation of decision-making rights. Vulnerability theory and its genesis are explained and delineated and the tripartite theory of vulnerability developed by Rogers, Mackenzie and Dodds is introduced.[218] Inherent vulnerability in the form of ageing and cognitive impairment are explicitly examined.

3.1. Human Right to Legal Capacity

In a 2014 statement, the UN Committee on the Rights of Persons with Disabilities emphasised the importance of providing supports and accommodations that maximise a person's decision-making abilities, a position stressed generally in the human rights literature.[219] However, there has been very little discussion of how lawyers should do this in practice,[220] despite the provision of supports being addressed to varying degrees in existing capacity assessment guidelines.[221] Moreover, there is a dearth of research about lawyers' attitudes to human rights to legal capacity and whether their attitudes to human rights affect their capacity assessment processes. This thesis seeks to address that gap by applying a human rights approach to the study of lawyers' and mediators' responses to capacity questions, including directed codes to capture supports and accommodations being applied in the empirical research project outlined in Chapter 4.

Acknowledgment and respect for the human right to legal capacity underpins this research. A human rights approach to legal capacity encompasses a social model of disability that

[218] Rogers, Mackenzie and Dodds, above n 50, 11.
[219] UN Committee on the Rights of Persons with Disabilities, 'General Comment (Number 1) on Art 12: Equal Recognition Before the Law' (11 April 2014) 11th sess, UN Doc CRPD/C/GC/1, *Concluding Observations on the Initial Report of Australia, Adopted by the Committee at its Tenth Session* (2-13 September 2013) 10th sess, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) [28]
[220] But see McNeal, above n 193.
[221] New South Wales Law Society above n 133, Appendix C; Law Institute Victoria, 'LIV Capacity Guidelines & Toolkit: Taking Instructions When A Client's Capacity Is In Doubt' (Law Institute Victoria, October 2016) <https://www.liv.asn.au/PDF/For-Lawyers/Submissions-and-LIV-Projects/2054_LPP_CapacityGuidelines_FINAL_WEB> 4; American Bar Association Commission on Law and Aging, and American Psychological Association, above n 139, 27; New South Wales Department of Justice, above n 139, Section 6; Darzins, Molloy and Strang, above n 139, 21.

explicitly acknowledges the role of social and institutional factors in creating disabling conditions and has informed the theoretical analysis of legal capacity and vulnerability.

For instance, the preamble to the *CRPD* reads:

> *'Recognizing* that disability is an evolving concept and that disability results from the interaction between persons with impairments and attitudinal and environmental barriers that hinders their full and effective participation in society on an equal basis with others,'

The *CRPD* also emphasises the role of States Parties in ensuring compliance with the Convention. Specifically, Article 4 requires relevantly that States Parties are required:

a) To adopt all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention;

And

i) To promote the training of professionals and staff working with persons with disabilities in the rights recognised in the present Convention so as to better provide the assistance and services guaranteed by those rights.

In other words, respecting rights involves the interplay between law, government policy, professional organisations and institutions.

All people, including older people with a cognitive impairment, have the right to make their own legal decisions.[222] The rights of older persons are encompassed in multiple human rights instruments,[223] although there is currently no convention on the rights of older persons. Debate continues about whether the introduction of such a convention would improve conditions for our ageing population.[224] In the absence of such a convention, the right to legal capacity for

[222] *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd session, 183 plen mtg, UN Doc A/810 (10 December 1948) Art 6 & 7; *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) Articles 16 & 26; *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) Art 12.

[223] Open Ended Working Group on Ageing, 'Compilation of Existing International Legal Instruments, Documents and Programmes That Directly or Indirectly Address the Situation of Older Persons, Including Those of Conferences, Summits, Meetings or International or Regional Seminars Convened by the United Nations and Intergovernmental and Non-Governmental Organizations', Fourth Working Session (12-15 August 2013), A/AC.278/2013/CRP.1.

[224] *Towards a Comprehensive and Integral International Legal Instrument to Promote and Protect the Rights and Dignity of Older Persons,* GA Res 67/139, 67th sess, Agenda Item 27 (b) and (c), UN Doc A/RES/67/139 (13 February 2013); Israel Doron and Itai Apter, 'The Debate Around the Need for an International Convention

older people with a cognitive impairment is captured in the *Convention on the Rights of Persons With Disabilities* (CRPD).[225] Significantly, Article 12 of the CRPD requires 'Equal recognition before the law' and is considered a ground-breaking advance in the rights of people with disabilities to exercise their legal capacity.[226] Art 12 (3) encompasses the right to support for decision-making and Art 12 (4) ensures that people with disabilities are safeguarded from abuses related to the exercise of decision-making rights. Australian Courts have recognised that the CRPD calls for the development of domestic law to respect these rights.[227]

There is ongoing debate in Australia about the extent to which substitute decision-making should be replaced by supported decision-making regimes. This is particularly true in relation to the exercise of decision-making rights for older people with cognitive impairments. Whilst Australia is a signatory to the CRPD, they have made an interpretive declaration in relation to Article 12, signalling that substitute decision-making regimes will continue to operate as a last resort including for people who have advanced dementia and are unable to express their will and preferences.[228] When Australia appeared before the 10th session of the *CRPD* in 2013, the Committee recommended that the Interpretive Declarations of Australia be reviewed and withdrawn,[229] as well as recommending training at all levels on recognition of the legal capacity of persons with disabilities.[230] In particular, the Committee recommended training for legal

on the Rights of Older Persons' (2010) 50(5) *The Gerontologist* 586; 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) 93; Arlene Kanter, 'The United Nations Convention on the Rights of Persons with Disabilities and its Implications for the Rights of Elderly People Under International Law' (2009) 25(3) *Georgia State University Law Review* 527; Frédéric Mégret, 'The Human Rights of Older Persons: A Growing Challenge' (2011) 11(1) *Human Rights Law Review* 37. A more complete discussion of the implementation of a human rights approach to elder abuse is beyond the scope of this thesis, but see: Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36(1) *Sydney Law Review* 99, 114-115.

[225] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008).

[226] Michael Bach and Lana Kerzner, 'A New Paradigm for Protecting Autonomy and the Right to Legal Capacity' (Law Commission of Ontario, 2010) <http://www.lco-cdo.org/en/disabilities-call-for-papers-bach-kerzner>; Ron McCallum, *The United Nations Convention on the Rights of Persons with Disabilities: Some Reflections* <Electronic copy available at: http://ssrn.com/abstract=1563883>; Paul Harpur, 'Embracing the New Disability Rights Paradigm: the Importance of the Convention on the Rights of Persons with Disabilities' (2012) 27(1) *Disability and Society* ; Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: Realising The Right to Support In Exercising Legal Capacity' (2014) 10(1) *International Journal of Law in Context* 81.

[227] *Nicholson v Knaggs* [2009] VSC 64 [15].

[228] *Convention on the Rights of Persons with Disabilities: Declarations and Reservations (Australia)*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008).

[229] Committee on the Rights of Persons with Disabilities, *Concluding Observations on the Initial Report of Australia, Adopted by the Committee at its Tenth Session* (2-13 September 2013) 10th sess, UN Doc CRPD/C/AUS/CO/1 (21 October 2013) [24].

[230] Ibid [26].

practitioners in providing access to justice for people with a disability,[231] and that lawyers should attend mandatory training modules on working with people with disabilities.[232]

In a sign that Australia will not be abandoning substitute decision-making regimes for older people in the near future, the ALRC Inquiry into Equality, Capacity and Disability, recently left the door open for substitute decision-making as a last resort as a safeguard for people who lacked capacity.[233] Echoing the Australian Government position, the ALRC particularly highlighted the needs of an ageing population including people who have advanced dementia and are unable to express their will and preferences.[234] The ALRC Inquiry led to the development of four National Decision-Making Principles: [235]

1) The equal right to make decisions
2) Support
3) Will, preferences and rights
4) Safeguards

Implementing these principles will effect how lawyers assess their client's decision-making. It will require that lawyers support their client's exercise of autonomy; inquire into the supports and accommodations that their clients require to maximise their decision-making abilities; interview clients in a way that develops an understanding of the client's will and preferences; and that lawyers act to safeguard their clients from abuse.[236]

The confluence of personal, social and institutional factors in the creation of disabling circumstances is central to the human rights law that underpins legal capacity. As Quinn argues, this perspective opens the door to relational theories of justice.[237] Importantly, a tripartite theory of vulnerability embraces the personal, situated and relational aspects of legal capacity alongside the regulatory influences. A deeper exploration of vulnerability therefore

[231] Ibid [27].
[232] Ibid [28].
[233] Australian Law Reform Commission (2014) above n 15 [2.108].
[234] Ibid, [2.109]; ACT Law Reform Advisory ACT Law Reform Advisory Council, 'Guardianship Report' (2016), 72.
[235] Australian Law Reform Commission (2014) above n 15, 11.
[236] In the NSW context; See, New South Wales Law Reform Commission, 'Review of the Guardianship Act 1987: Question Paper 3, The Role of Guardians and Financial Managers' (2016), 4.28.
[237] Gerard Quinn, '*Rethinking Personhood: New Questions in Legal Capacity Law and Policy'* (2011 Vancouver University of British Columbia) 52.

can provide a useful theoretical lens for establishing a human rights framework more fully in both research and practice.

3.2 Vulnerability

The rights framework of the CRPD has been lauded for addressing the needs of vulnerable groups,[238] but the meaning of vulnerability has been under-theorised. The following section explains the theoretical understanding of vulnerability underpinning this research and explains why an appropriate theoretical framework for an examination of decision-making capacity for older people is the tripartite theory of vulnerability developed by Rogers, McKenzie and Dodds.[239]

Old age is often viewed paradigmatically as a life-stage characterised by declining physical and cognitive health and older people are often identified as a class or subject group in which old age is equated with incapacity. These assumptions are sometimes used to justify encroachments upon older people's autonomy.[240] In this respect, vulnerability is sometimes used as a synonym for a lack of capacity, or as Hall describes it, vulnerability as a kind of 'incapacity-lite'.[241] This has even led to attempts to measure vulnerability. [242] However vulnerability theory seeks to challenge these models by pointing to vulnerability as a universal experience of ontological significance to all,[243] rather than vulnerability as a form of personal disadvantage or disability.

As an early pioneer of vulnerability theory, Martha Fineman's work has been particularly influential.[244] Fineman's theory of vulnerability emerged as a challenge to what she described

[238] Hasheem Mannan et al, 'Core Concepts of Human Rights and Inclusion of Vulnerable Groups in the United Nations Convention on the Rights of Persons with Disabilities' (2012) 6(3) *European Journal of Disability Research* 159; Francesco Seatzu, 'Reshaping EU Old Age Law in the Light of the Normative Standards in International Human Rights Law in Relation to Older Persons' in Francesca Ippolito and Sara Iglesias Sanchez (eds), *Protecting Vulnerable Groups: The European Human Rights Framework* (Hart Publishing, 2015) 49 .
[239] Rogers, Mackenzie and Dodds, above n 50.
[240] Titti Mattson and Mirjam Katzin, 'Vulnerability and Ageing' in Ann Numhauser-Henning (ed), *Elder Law: Evolving European Perspectives* (Edward Elgar, 2017) 113, 120.
[241] Margaret Hall, 'Material Exploitation and the Autonomy Ideal: The Role of Equity Theory in Adult Protection Legislation' (2008) 5(9) *Elder Law Review* 9.
[242]Donna Pinsker, Ken McFarland and Nancy Pachana, 'Exploitation in Older Adults: Social Vulnerability and Personal Competence Factors' (2010) 29 *Journal of Applied Gerontology* 740, 746.
[243] Mattson and Katzin, above n 240, 117.
[244] Martha Fineman, *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004); Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2009) 20(1) *Yale Journal of Law & Feminism* 1; Martha Fineman, 'The Vulnerable Subject and the Responsive State' (2010) 60 *Emory Law Journal* 251; Martha Fineman, 'Equality, Autonomy, and the Vulnerable Subject in Law and Politics' in Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation For Law and Politics*, Gender in Law, Culture, and Society (Routledge, 2014) 13; see also Margaret Hall, 'Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability' (2012) 58(1) *McGill Law Journal* 61; Catriona Mackenzie, Wendy

as 'The Autonomy Myth'.[245] Although Fineman has applied her theory specifically to old age policy, the theory emerged to challenge normative narratives of the autonomous liberal subject.[246] Fineman's vulnerability theory seeks to critique identity politics and to focus instead on the universal though differentiated experience of vulnerability.

According to Fineman our lives are characterised not by radical autonomy; but by 'the inescapable interrelationship and interdependence that mark[s] human existence.'[247] This world view has particular resonance in any discussion of the way that people make decisions, particularly significant legal decisions, because so few decisions made by humans are a result of individual will.[248]

This theory of inter-dependency complements a human rights framework for legal capacity that seeks to balance the right to autonomous legal capacity articulated in Article 12 (2) of the CRPD, with the right to support of Article 12 (3) and the right to safeguards in Article 12 (4). Similarly, vulnerability theory approaches safety and security as prerequisites for the exercise of autonomy.[249] However, vulnerability is not in opposition to autonomy as some have read Fineman to suggest. Mackenzie for instance has critiqued Fineman's theory on the basis that her view of autonomy is focused on radical notions of liberal autonomy and ignores its relational aspects.[250] Addressing vulnerability can instead be viewed as a precursor to the exercise of rights to legal autonomy.[251]

Vulnerability theory therefore provides a coherent theoretical lens for an examination of the lawyer's role in the exercise of legal capacity for the elderly. Balancing the requirement of autonomy and the reality of vulnerability lies at the very heart of the 'capacity conundrum'

Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2013); Nina Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26(1) *Yale Journal of Law & Feminism* 1.

[245] Fineman (2004), above n 244.

[246] Martha Fineman, '"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2013) 20(2) *Elder Law Journal* 71.

[247] Ibid, 71.

[248] Tom Beauchamp and James Childress, *Principles of Biomedical Ethics* (Oxford University Press, 6 ed, 2009) 101.

[249] Fineman (2013) above n 246, 92.

[250] See, Catriona Mackenzie, 'The Importance of Relational Autonomy and Capabilities for an Ethics of Vulnerability' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2013) 33.

[251] See for instance, International Bioethics Committee, 'Report of IBC on the Principle of Respect for Human Vulnerability and Personal Integrity' (United Nations Educational, Scientific and Cultural Organization, 22 June 2011) 7 - 8.

with which legal ethicists must grapple. The law dictates, and lawyers must understand, that 'autonomy' exercised without capacity safeguards is not necessarily autonomy at all.

The sources of vulnerability for older people include, but extend beyond personal experiences of cognitive impairment. For some older people cognitive impairments can also put strain on the person's usual family and social supports.[252] These disruptions to family can be just as destructive as cognitive changes and can impact further on wellbeing.[253] A person who experiences a cognitive impairment without any family support or within a family riven with conflict, is differently vulnerable to a person who is well supported. A person with cognitive impairment who cannot afford high levels of care will be differently vulnerable than someone with good economic resources. Economic stress can also heighten existing family tensions. Fineman recognises that vulnerability in the form of economic and institutional harms can accumulate over a time, but it has been argued that her theory pays insufficient regard to the impact of privilege.[254]

It is often during a time of family conflict that older people will see a solicitor to make a change to an enduring document, to property ownership, or to a will. The way that the solicitor deals with the question of capacity is thus a further potential source of vulnerability. A lawyer who is not aware of (or is unable to apply) the capacity assessment guidelines may create a source of vulnerability because they may accept instructions that the older person himself or herself does not understand. Further, any systemic problems of capacity assessment within the profession in the form of poor training or regulation can also create a source of vulnerability. Given that the State is responsible for creating and legitimising institutions that react to vulnerability in ways that can heighten disadvantage, the State must take responsibility for those disadvantages.[255]

Just as a rights-based approach to legal capacity under the *CRPD* must acknowledge the societal and institutional contributors to disablement, vulnerability theory must be able to

[252] Linda Lindsey Davis, 'Family Conflicts Around Dementia Home-Care' (1997) 15(1) *Families, Systems, & Health* 85; C. Peisah, H. Brodaty and C. Quadrio, 'Family Conflict in Dementia: Prodigal Sons and Black Sheep' (2006) 21(5) *International Journal of Geriatric Psychiatry* 485; Hilde Lindemann, 'Holding One Another (Well, Wrongly, Clumsily) In a Time of Dementia' (2009) 40(3-4) *Metaphilosophy* 416; Annika Kjallman Alm, Ove Hellzen and Karl-Gustaf Norgergh, 'Experiences of Family Relationships When a Family Member Has Dementia' (2014) *Open Journal of Nursing* .
[253] Sara Qualls, 'Therapy with Aging Families: Rationale, Opportunities and Challenges' (2000) 4(3) *Aging and Mental Health* 191, 191; Fineman, above n 246 (2010) 268.
[254] see for instance Frank Cooper, 'Always Already Suspect: Revising Vulnerability Theory' (2015) 93 *North Carolina Law Review* 1339, 1340.
[255] Fineman (2010), above n 244.

account for the different sources and levels of vulnerability. This research therefore proceeds on the basis that the tripartite theory of vulnerability encompassing inherent, situational and pathogenic vulnerability as outlined by Rogers, Mackenzie and Dodds is an appropriate framework for an examination of capacity.[256]

Firstly, vulnerability is considered at the inherent level, encompassing individual experiences of qualities associated with ageing, including the possibility of physical decline and cognitive impairment. Pausing here, if the analysis of vulnerability stopped at the individual inherent level, then any interventions to address that vulnerability would run the risk of pathologising the elderly person and focusing the gaze of the law only on the victim of any subsequent abuse.[257] Such an approach could also run the risk of pathologising the family and would be a failure to acknowledge a key tenet of vulnerability theory. That is, placing the burden of responsibility for care of the vulnerable on families will render their needs invisible.[258]

This leads us to consider further situational vulnerabilities. The situational context includes the level of support and resources at the disposal of an older client.[259] These supports might encompass professional services, including the support of lawyers involved in assisting clients to meet their legal needs. Resources include the economic and information resources required to access and pay for lawyers. Situational approaches to vulnerability highlight the link between cognitive impairment and elder abuse and posit other reasons why some people with disabilities are more vulnerable without characterising them as inevitably so.[260]

This research extends beyond the overlapping inherent and situational causes of vulnerability to interrogate the pathogenic causes of vulnerability for older people making legal decisions,[261] a concept that resonates with theories of institutional precariousness described in the human rights literature.[262] Institutions respond to and shape our experience of vulnerability and thus can both safeguard or expose the vulnerable subject to heightened risks.[263] At the pathogenic

[256] Rogers, Mackenzie and Dodds, above n 50. See also Catriona Mackenzie and Wendy Rogers, 'Autonomy, Vulnerability and Capacity: a Philosophical Appraisal of the Mental Capacity Act' (2013) 9 *International Journal of Law in Context* 37.
[257] Jaime Lindsey, 'Developing Vulnerability: A Situational Response to the Abuse of Women with Mental Disabilities' (2016) 24(3) *Feminist Legal Studies* 295, 298.
[258] Mattson and Katzin, above n 241, 131.
[259] Rogers, Mackenzie and Dodds, above n 50, 24.
[260] Lindsey, above n 257, 298.
[261] Rogers, Mackenzie and Dodds, above n 50, 24.
[262] Bryan Turner, *Vulnerability and Human Rights* (Penn State University Press, 2006) 32.
[263] Susan Dodds, 'Dependence, Care, and Vulnerability' in Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press, 2013) 181, 198.

level, the way that state-based regulators and professional bodies respond to the difficulty of capacity assessment creates another potential source of vulnerability for clients with a cognitive impairment.

As outlined here, a tripartite theory of vulnerability calls attention to the multi-faceted dimensions of influences in a person's life, including personal, political and legal. It is an appropriate framework for a study of how lawyers assess legal decision-making capacity and it calls for an examination of capacity that is broad-ranging.

In Chapter 4, the empirical research methodology is described and explains how the design of the directed content analysis of files at the OLSC addressed aspects of inherent, situational and pathogenic vulnerability. The following section outlines in more detail aspects of the inherent vulnerability of some older clients.

3.3 Cognitive Impairment in an Ageing Population

A significant source of inherent vulnerability in an ageing population is cognitive impairment. Cognitive impairment in the elderly may be the result of conditions such as temporary illness, fever or delirium, brain damage due to stroke, drug and alcohol induced brain damage, diseases other than dementia, and intellectual disability.[264] However, dementia is the leading cause of disability in Australians aged 65 and over and the most common source of cognitive impairment.[265] It is also possible for dementia to co-exist with these other conditions.[266]

It is beyond contention that dementia diagnosis is associated with ageing;[267] however, dementia can be hard to accurately diagnose, making it difficult to reliably state the number of cases.[268] It is estimated that one in ten people over sixty-five has dementia, rising to three in ten people

[264] Kapp, above n 176, 19.
[265] Alzheimer's Australia, *Statistics, Summary of Dementia Statistics in Australia* <http://www.fightdementia.org.au/understanding-dementia/statistics.aspx>.
[266] For a comprehensive discussion of the causes of cognitive impairments and their potential impact on capacity in various domains, see for instance, O'Neil and Peisah, above n 9.
[267] Elissa Ash, 'What is Dementia?' in Charles Foster, Israel Doron and Jonathan Herring (eds), *Law and Ethics of Dementia* (Bloomsbury Publishing, 2014) , 7. Early onset dementias occurring in people younger than 60 are often associated with hereditary factors.
[268] Israel Doron, 'The Demographics of Dementia' in Charles Foster, Israel Doron and Jonathan Herring (eds), *Law and Ethics of Dementia* (Bloomsbury Publishing, 2014) , 15.

aged over eighty-five.[269] Dementia prevalence amongst residents of nursing homes is even higher than the general population with some estimating the prevalence as high as 90%.[270]

As our population ages the rates of dementia have risen. [271] Dementia is not a single disease but an umbrella term to describe a confluence of symptoms denoting cognitive decline that can include loss of memory, impaired judgement, loss of language and motor skills, decreased planning ability, mood changes and changes in behaviour or personality. [272] There is currently no cure for dementia.

Alzheimer's disease, the most common form of dementia, is associated with increased memory impairment over time; however early memory loss is not a feature of all forms of dementia.[273] In some forms of dementia older memories may be intact, while a person's ability to use and weigh current information (elements of functional capacity) may be impaired.[274] Compared to someone with Alzheimer's disease, a person with vascular dementia may retain their capacity for activities of daily living for longer,[275] but because they may have a greater awareness of their deficits be more likely to experience depression.[276] Fronto-temporal dementias on the other hand are more often associated with personality and behavioural changes.[277] Researchers report that dementia with Lewy bodies, the second most prevalent of dementia diseases, can often be confused with other forms of dementia and so is particularly difficult to diagnose.[278] Even for medical professionals the variability in the forms of dementia means that while screening tests can help to indicate impairments, diagnosis remains a difficult task and relies on a complete cognitive and functional history often with the assistance of the family or carers

[269] Deloitte Access Economics above n 39; Australian Institute of Health and Welfare, above n 37; Doron, above n 269, 18; The National Centre for Social and Economic Modelling NATSEM, '*Economic Cost of Dementia in Australia* 2016-2056' (2016) 2.
[270] Doron, above n 269, 20.
[271] Australian Bureau of Statistics above n 5; Australian Institute of Health and Welfare, above n 41.
[272] Rita Jablonski, 'Dementia is Not Dementia is Not Dementia' (2013) 39(1) *Journal of Gerontological Nursing* 3; Ash, above n 3;Deloitte Access Economics, above n 39.
[273] Doron, above n 269, 18; Alzheimer's Australia, above n 38.
[274] For a discussion of types of memory and the impact this may have on lawyers' interventions, see McNeal, above n 193, 1092.
[275] James Levy and Gordon Chelune, 'Cognitive-Behavioral Profiles of Neurodegenerative Dementias: Beyond Alzheimer's Disease' (2007) 20(4) *Journal of Geriatric Psychiatry and Neurology* 227.
[276] Sandra Black, 'Vascular Cognitive Impairment: Epidemiology, Subtypes, Diagnosis and Management' (2011) 41(1) *Journal of Royal College of Physicians Edinburgh* 49.
[277] Robert Levenson, Virginia Sturm and Claudia Haase, 'Emotional and Behavioural Symptoms in Neurodegenerative Disease: A Model for Studying the Neural Bases of Psychopathology' (2014) 10 *Annual Review of Clinical Psychology* 581, 589.
[278] Namrta Sinha, Michael Firbank and John O'Brien, 'Biomarkers in Dementia with Lewy Bodies: A Review' (2012) 27 *International Journal of Geriatric Psychiatry* 443.

of the person with dementia.[279] Although advanced dementias may be easily recognizable, researchers have warned that it can sometimes be difficult to identify when an older person has impaired decision-making abilities.[280]

It is not uncommon for people with dementia to be advised to write a will, make an advance directive or appoint a substitute decision-maker to act for them in the future.[281] Lawyers should therefore be aware that some of their elderly clients may have dementia or another form of cognitive impairment that can affect their capacity for making legal decisions.[282] In the capacity guidelines, dementia is considered a 'red flag' that should trigger more careful assessment of older clients.[283] The challenge for lawyers lies in: identifying the extent to which dementia or any other form of cognitive impairment has affected their older client's ability to make a legal decision; to understand the accommodations required to maximise their decision-making capacity; and to decide at what point the client requires decision-making support. Performing these assessments is part of the lawyers' role and duties, as established in the law and guidelines on capacity assessment described in the previous chapter and in Chapter 6.

3.4 Chapter Summary

This chapter has outlined the human rights framework for the exercise of decision-making rights and explained how this perspective lends itself to the application of a tripartite theory of vulnerability. Aspects of inherent vulnerability in the form of cognitive impairment have been particularised and the demographics of the ageing population of Australia examined. This legal and theoretical lens has been applied to the empirical study of complaint files as explained in the outline of methodology contained in the following chapter.

[279] Marshal Folstein, Susan Folstein and Paul McHugh, '"Mini Mental State" A Practical Method for Grading the Cognitive State of Patients for the Clinician' (1975) 12(3) *Journal of Psychiatric Research* 189; Tom Tombaugh and Nancy McIntyre, 'The Mini-Mental State Examination' (1992) 40(9) *Journal of the American Geriatrics Society* 922; Emma Devenney and John Hodges, 'The Mini-Mental State Examination: Pitfalls and Limitations' (2017) 17 *Practical Neurology* 79.
[280] Kapp, (1990) above n 176, 18.
[281] Sue Field and Colleen Cartwright, 'Dementia and Your Legal Rights' (Alzheimer's Australia, <https://www.fightdementia.org.au/files/NATIONAL/documents/Dementia-and-your-legal-rights.pdf>.
[282] It should be noted that ageing can enhance decision-making abilities. For a discussion of the ways that ageing may lead to improved decision-making ability: See, McNeal, above n 193.
[283] Law Society of New South Wales (2016) above n 139, 7.

Chapter 4: Research Methodology

In this chapter the multi-method research design including the empirical study of the complaint files is explained in-depth. In part two of this thesis, particularly papers 5 and 6 reporting on the medico-legal interactions and four particular case studies respectively, findings from this research project are discussed in further detail. However, as journal articles are necessarily constrained by tight word limits and the specialist audience, it is not possible to canvas all of the detail of the empirical research project in those papers, nor is it possible to describe the methodology in depth in the journal articles. Chapter 4 therefore provides the necessary overview.

This chapter commences with an outline of the research design before analysing the reliability and limitations of the sample data. The directed content methodology is examined and the coding techniques are explored. Finally, the generalizability, replicability and transferability of this research are examined, highlighting the significance of the complaint files. File data are described, critiquing both the strengths and weaknesses of the variable content and how this impacts the validity of the findings.

4.1 Research Design

The problem of capacity assessments lends itself to a multi-method research design. As Seidman, Diamond and Nielsen argue, 'Multiple research methods are best suited to bring clarity to the complex relationship of law and society'.[284] Additionally, Yin suggests that case study analysis is particularly appropriate to highlight a need for systems reform.[285] This qualitative study involved: (a) doctrinal analysis of the leading cases in capacity assessment outlined in the literature review and papers 2 and 3; (b) comparative analysis of the guidelines for lawyers presented in paper 3; and (c) directed content analysis of three years of capacity complaint files from the NSW OLSC also discussed in papers 5 and 6. As the doctrinal analysis is extensively reported in the literature review and paper three critiques the lawyers' tools and guidelines, this chapter focuses on the content analysis of the complaint files.

This empirical research fills the knowledge gap identified in Chapter 1. As established, while there is a wealth of literature on the topic of capacity assessment the research to date has been focused largely on what lawyers *should* do when assessing a client's capacity, and also on what

[284] Seidman Diamond and Nielsen, above n 217, 4.
[285] Robert Yin, 'Validity and Gerenalization in Future Case Study Evaluations' (2013) 19(3) *Evaluation* 321, 322.

lawyers report that they do. The prior survey-based studies have provided a snapshot of the legal profession's understanding of capacity assessment but are lacking in two ways: they cannot tell us the process that lawyers follow to arrive at a capacity assessment and they lack the client context. This is a problem across many areas of socio-legal research because accessing the client voice or observing lawyer and client interactions is difficult from a practical and ethical standpoint.[286]

4.2 The Sample

This research examined all of the documentary evidence located in the capacity complaint files initiated at the NSW OLSC over a three-year period, from 2011-2013. This period of time correlated with a rise in the number of capacity complaints received annually at the OLSC. The OLSC began to remark on this in their Annual Reports and the mediation and investigation officers at the OLSC developed a heightened awareness of the serious consequences of these complaints.[287] Due to the growing number of complaints, it was in 2011 that the OLSC began to categorise complaints about the way lawyers took instructions from clients with a cognitive impairment as 'capacity complaints'. This was formalised in January 2013 with 'Capacity' added internally as a formal code for ethics complaints.[288] There were thirty-five complaints concerning thirty-six practitioners during the research period.[289]

Complaint files are not necessarily representative of lawyers' techniques of capacity assessment but they do provide 'a rough and ready measure' of ethical behaviour.[290] The capacity complaint files may include complaints that were unfounded, complaints motivated by dislike of a relative rather than dissatisfaction with a service, complaints designed to assist

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[286] Nieke Elbers et al, 'Exploring Lawyer-Client Interaction: A Qualitative Study of Positive Lawyer Characteristics' (2012) 5 *Psychological Injury and Law* 89, 90.

[287] These complaints are usually dealt with as consumer disputes and managed by the Mediation and Investigation officers. For a complete organisational chart of the OLSC see: Office of the Legal Services Commissioner, 'The Office of the Legal Services Commissioner Annual Report 2015-2016' (2016) <http://www.olsc.nsw.gov.au/Documents/2015%202016%20OLSC%20AnnRep%20accessible.pdf> 2.

[288] Each complaint form completed creates a file, and each file has a green summary form that is completed by the OLSC - Green Complaint Assessor Form 3.1 "Assessing the Complaint (AC or Delegate)" The assessors form has seven sections including: 1) Practitioner's details (2) Relationship with client (3) Legal Matter (most of the capacity complaints are in the area of Probate/Wills / Family provisions) (4) Who initial letters will be sent to incl. whether to the Law Society or Bar Association (5) Type of Complaint (Consumer Dispute, Investigation, Tribunal, PS – practitioner Society) (6) Who the complaint was allocated to (7) Binding System to be used. Matters are also further coded by the OLSC including individual codes for ethical concerns such as "conflict of interest", or "instructions not followed"."

[289] The OLSC has reported that they plan to implement a new information technology system. Such a move would raise new issues for researchers related to the data collection, retention and management within the OLSC. See; The Office of the Legal Services Commissioner, '2016-2017 Annual Report' (OLSC, 2017) 4.

[290] Christine Parker, Tahlia Gordon and Steve Mark, 'Regulating Law Firm Ethics Mnagement: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales' (2010) 37(3) *Journal of Law and Society* 466, 479.

in a future legal action,[291] or complaints that were simply ill informed. These factors limit the generalizability of the case studies.

It is possible that the files under-represent unethical behaviour in the field. Research suggests that only a fraction of dissatisfied consumers will make a formal complaint of any kind,[292] with legal clients generally being reluctant to complain about poor service to a third party.[293] A person wishing to complain about the actions of a lawyer in NSW must make their complaint in writing to the OLSC. Clients do not necessarily know that there is a legal right that has been breached,[294] or they may not have the time, skills, or inclination to make a complaint about the service they have received.[295] Capacity complaints are unique at the OLSC in that it is not the client who is making the complaint, but a third party, usually a family member.[296] Making a complaint requires time and effort, so a third party may not have the same motivation to complain about poor service as someone who is directly affected. On the other hand, poor capacity assessment techniques may affect family members considerably if they lead to an older person changing a will or enduring appointment.[297] Research examining consumer complaints, demonstrates that complaining behaviour increases according to the importance of the purchase.[298]

This study is not generalizable to all legal practitioners, or to practitioners who witness enduring documents or prepare wills. There are no statistics kept of how many enduring instruments are prepared or revoked in NSW each year,[299] nor are there statistics about the number of wills that are prepared or how many lawyers interact with older people who may have impaired capacity.

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[291] For instance, a person might make a complaint about a lawyer preparing a will for a person lacking testamentary capacity if they anticipate challenging the will in the future.
[292] Stephen Meili, 'Consumer Protection' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 176, 179.
[293] Linda Haller, 'Regulating the Professions' in Peter Cane and Herbert Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 216, 221; Parker, Gordon and Mark, above n 290, 480.
[294] Leslie Levin and Lynn Mather, *Lawyers in Practice: Ethical Decision Making in Context* (The University of Chicago Press, 2012) Ch 1.
[295] Laura Beth Nielsen, 'The Need For Multi-Method Approaches' in Peter Cane and Herbert Kritzer (eds), *Empirical Legal Research* (Oxford University Press, 2010) 951, 959.
[296] When the *Uniform Law* was introduced in 2015, the category of persons who could complain about a lawyer in consumer disputes was changed to make it harder for third parties to make a complaint. This is further discussed in part three of this thesis.
[297] One of the lawyers who was subject to a complaint suggested that the complainant might be motivated to complain in order to undertake a form of 'discovery' to locate evidence for a future challenge to testamentary capacity. This lawyer wrote to the OLSC that 'it is not unusual for disaffected parties to use your complaints procedure to obtain a form of pre-trial discovery…'
[298] Meili, above n 292, 179.
[299] General Purpose Standing Committee No 2., above n 57, 101.

All of the lawyers complained about were from sole practices or small firms with five or fewer lawyers, with an over-representation of male lawyers aged over forty.[300] This finding is in keeping with previous research suggesting that sole practitioners are over-represented in complaints.[301] Researchers and regulators have noted that family disputes give rise to a high number of complaints about lawyers because of the emotions involved,[302] and it was clear from the files that these were highly emotional disputes. Lawyers in regional and remote areas were also over-represented in the complaints.[303] The OLSC does not report on the geographic location of lawyers about whom complaints are made, so it is not known if this is typical of all complaints, however it has been noted that lawyers who have a more generalist practice, (more likely in regional and rural areas than in the city of Sydney and surrounding suburbs) are possibly more likely to receive complaints.[304] Relevantly, in Victoria a disproportionate number of complaints about wills and estates and family law matters are made about regional lawyers.[305]

The generalizability of the file case studies can be questioned; however, some confidence in the data can be gleaned from the number of case studies provided for analysis. Although not statistically significant, having examined all of the complaints in the three year period, the analytic generalization is greater than if a small number of files had been examined in minute detail.[306] Confidence in the findings is also derived from the overlap between this study and survey based studies that led to similar conclusions about the knowledge gaps of lawyers involved in capacity assessment.[307] As Yin has identified, an emphasis on analytic generalizability focuses on producing key ideas that may be applicable in other situations rather

[300] See Appendix D, Tables 1 and 2.
[301] Linda Haller, 'Restorative Lawyer Discipline in Australia Symposium: Restorative Justice and Attorney Discipline' (2012) 12 *Nevada Law Journal* 316, 321; Alice Woolley, 'Regulation in Practice: The "Ethical Economy' of Lawyer Regulation in Canada and a Case Study in Lawyer Deviance' (2015) 15(2) *Legal Ethics* 243, 245; Parker, Gordon and Mark, above n 290, 481; Lynn Mather, 'How and Why Do Lawyers Misbehave? Lawyers, Discipline and Collegial Control' in Scott Cummings (ed), *The Paradox of Professionalism: Lawyers and the Possibility of Justice* (Cambridge University Press, 2011) 109, 111.
[302] Lynn Mather and Craig McEwan, 'Client Grievance and Lawyer Conduct: The Challenges of Divorce Practice' in Leslie Levin and Lynn Mather (eds), *Lawyers in Practice: Ethical Decision Making in Context* (The Chicago University Press, 2012) 63.
[303] Appendix D, Table 4.
[304] Mather and McEwan above n 302, 121.
[305] Michael McGarvie, 'Regional and Rural Lawyers – Common Complaints & Legal Profession Uniform Law', Deakin CRRLJ, 29 April 2015 < https://www.deakin.edu.au/__data/assets/pdf_file/0011/385265/Michael-McGarvie-LPUL-Act-Implications-Common-Complaints-How-to-Avoid-CRRLJ-29-April-2015.pdf>.
[306] Yin, above n 285, 325.
[307] Willmott and Shoebridge above n 25; Helmes, Lewis and Allen, above n 25.

than creating statistical generalization.[308] Thomas likewise sees value in discovering 'middle axioms', arguing that provided knowledge gained from the particular is contextualised, there should be 'enthusiasm for [its] universal applicability.'[309]

The findings of the study may be transferable to other jurisdictions in Australia where the demographics and education of the profession are comparable and the law, tools and guidelines for capacity assessment broadly similar.[310] However, as discussed in papers 3, 5 and 6, a comparison of disciplinary cases in other states with the facts of the NSW complaints may indicate variability in the way capacity assessment is viewed and the veracity of the complaint handling process. This in turn could trickle down to affect practice in those states.

4.3 File Description

There were significant differences in the content of each of the complaint files. This is an interesting finding in itself, suggesting a lack of consistency in applying the law, tools and guidelines for capacity assessment. It is also a product of the client-driven nature of complaints. This inconsistency is further discussed in part two of this thesis, especially papers 3, 5 and 6. The variability of information provided by clients and lawyers affects the reliability of the data, rendering the value in the thick description of events that emerges.

The files consist of documents that are collected according to OLSC procedures and are developed in a kind of "call and response" pattern. The complaints process is a reactive one. It usually begins with the complainant making a phone call to the OLSC in which they will be given advice about whether the complaint is something that the office can investigate.[311] Once a complaint is made in writing on the standard OLSC form, the complaint is categorised and allocated a file number.[312] The OLSC responds formally to the complainant in writing requesting further information or clarification if necessary. The complainant may then provide

[308] Robert Yin, 'Causality, Generalizability, and the Future of Mixed Methods Research' in Sharlene Nagy Hesse-Biber and R. Burke Johnson (eds), *The Oxford Handbook of Multimethod and Mixed Methods of Research Inquiry* (Oxford Handbooks Online, 2015) .
[309] Gary Thomas, 'The Case: Generalisation, Theory and Phronesis in Case Study' (2011) 37(1) *Oxford Review of Education* 21, 31.
[310] See paper 3 for a discussion of the similarities in law, tools and guidelines throughout Australia and internationally.
[311] For a description of complaint matters and procedures see *Legal Profession Uniform Law (NSW) No 16a*, Part 5.2. See also; Office of the Legal Services Commissioner, 'Making a Complaint' <http://www.olsc.nsw.gov.au/Pages/lsc_complaint/olsc_making_complaint.aspx.>.
[312] Office of the Legal Services Commissioner, 'Complaint Form' (2016) <http://www.olsc.nsw.gov.au/Documents/OLSC%20Complaint%20Form%20July%202016.pdf>.

information or updates. The OLSC then puts the allegations to the lawyer in writing with a series of questions, such as:

1. Who retained you and in what circumstances?
2. What steps did you take to establish that [client's name] had the capacity to give instructions? Please provide copies of the medical reports to which you refer and copies of your contemporaneous file notes relating to [client's] capacity and to her understanding of the documents she was executing …..

The OLSC may ask more questions or seek clarifications after receipt of the lawyer's response and so on, until the fullest picture possible emerges and a decision is made about whether to dismiss the complaint or take disciplinary action. This form of reactive question and answer limits and confines the information provided and affects the validity of the study.

The large amount of variability in the file content was also driven in part by the complainants. Some complainants provided very detailed background information about the older clients and their family circumstances and some had copies of multiple background medical reports about the older client that they forwarded to the OLSC. There were several complainants who included copies of correspondence between family members including personal emails and letters.[313] Cases that were heard in the Guardianship Tribunal also created a large paper trail. It was not uncommon for the complainant to forward the decision of the Tribunal, and sometimes a complete transcript of proceedings to the OLSC. Copies of wills and advance directives were also included in some cases. The files also included memos of phone conversations and corrected drafts of correspondence sent from the OLSC to the complainants and lawyers. In many cases there were multiple copies of the same document. A sample of the broad range of documents contained in an average capacity complaint file is contained in Appendix C. The smallest file contained only two documents: an initial complaint and a notice of withdrawing the complaint, while more serious complaints generated a far greater number of documents.[314] The following section (4.4) explores the data analysis techniques used to assess the content of the files in more depth.

[313] On the value of letters as evidence: See, Rosanne Kennedy, 'Affecting Evidence: Edith Thompson's Epistolary Archive' (2014) 40(1) *Australian Feminist Law Journal* 15, 27, noting that while epistolary critics might rightly 'be suspicious' of the assumption that personal letters are 'the spontaneous outpourings of the true self', nor should we treat them as 'deliberate lies'.

[314] Two files that led to disciplinary action on matters unrelated to legal capacity were particularly extensive and extended over 2 large lever folders each.

The value of a sample based on complaints to the regulator lies in the depth of the available material rather than its representativeness. The richness of the data in the files as explained below, allows multiple viewpoints of the older person who was the subject of a capacity assessment and also of the lawyer who undertook that assessment.

The files included documents such as the complainant's account of the older person's behaviour, medical reports of an older person's decision-making processes or their cognitive impairments, outlines of conversations and copies of documents drafted by the older person, meaning a more holistic account of the client emerged than that provided by the lawyers' description alone. Similarly, the lawyers' self-reported competent procedures could be compared to information within their file notes, evidence given in Tribunal hearings and copies of correspondence sent to the complainant or other third parties. As has been suggested in the limited literature on documentary research, disparate documents can create a more coherent picture of a single 'event' by conveying the same general impression.[315] By drawing on disparate documents in this way, this research proffers a more sophisticated triangulation of viewpoints and opinions which can then be compared and contrasted with the guidelines and best practice tools. A far more detailed picture of the whole process emerges, filling the gaps in our prior knowledge to aid the development of practical recommendations for reform. To that end, the following section more specifically describes the content analysis.

4.4 Directed Content Analysis

The content analysis of the file documents proceeded on the basis of a directed approach. Described by Mayring as a deductive method,[316] directed analysis is considered appropriate where there is existing research about a phenomenon, but further description is beneficial.[317] It was appropriate to adopt a directed method because one purpose of the analysis was to compare the lawyers' techniques with the procedures for capacity assessment described in case law and capacity guidelines and a further purpose was to understand the file content from the perspective of a tripartite theory of vulnerability. Initial coding derived from this dual purpose.

[315] Jennifer Platt, 'Evidence and Proof in Documentary Research I' (1981) 29(1) *The Sociological Review* 31, 45.
[316] Philipp Mayring, *Qualitative Content Analysis: Theoretical Foundation, Basic Procedures and Software Solutions* (SSOAR, 2014).
[317] Hsiu-Fang Hsieh and Sarah Shannon, 'Three Approaches to Qualitative Content Analysis' (2005) 15 *Qualitative Health Research* 1277, 1281.

4.4.1 Initial Coding

In addition to recording demographic information about the lawyers and their clients,[318] codes were therefore developed and refined to account for the elements of capacity assessment described in the common law and in the capacity guidelines and identified through the comparative analysis of the guidelines presented in paper 3. These included:

- "Red flags" such as cognitive impairment, hospital or nursing home admission;
- Lawyer's descriptions of their interview techniques;
- Medical opinions sought or obtained;[319]
- Lawyers' observations of the older client;
- Complainants' observations of the older client;[320]
- The identity of the person who arranged the initial interview;
- Whether the lawyer had previously met the client;[321]
- Who was present during the interview;
- Specific information about the client's understanding of the legal decision (application of a functional, outcome or status approach);[322]
- Lawyers' description of notetaking or samples of notes;
- Lawyers' descriptions of any accommodations they made to improve the clients' capacity;[323]
- Whether the lawyer was aware of the Law Society capacity guidelines;[324]

A directed approach is also appropriate for applying a particular theoretical perspective such as the tripartite theory of vulnerability applied to this study,[325] and the notion of vulnerability further drove the initial coding. Codes were developed to indicate inherent vulnerability, including codes for age and also codes indicating the type and extent of the older client's

[318] Appendix D, tables 1-5.
[319] Coded to note the role of the expert whose opinion was sought eg. Psychogeriatrician, geriatrician, GP, dementia care nurse, psychologist, occupational therapist, physiotherapist.
[320] There was a great deal of variability in the amount of information provided by the complainant, ranging from background medical information to changes in behavior, personal correspondence with the older client and observations about their personality, clothing and how they went about daily tasks.
[321] Where possible the length of time that the lawyer had known their client was also noted.
[322] See Appendix D, table 6 for a summary of instances where lawyers or complainants relied on a status approach to identify capacity or a lack of capacity. The different approaches to capacity assessment are discussed further in paper 1.
[323] Broadly defined to include timing, support people, hearing or vision assistance, language support, expert external advice.
[324] This was also a question that lawyers were routinely asked to respond to in correspondence from the OLSC.
[325] W. James Potter and Deborah Levine-Donnerstein, 'Rethinking Validity and Reliability in Content Analysis' (1999) 27 *Journal of Applied Communication Research* 258, 258.

cognitive impairments where they were known.[326] Elements of potential situational vulnerability were also coded. Codes were initially assigned to allegations of elder abuse using definitions of abuse derived from NSW State government policy documents,[327] with the source of the allegation coded as well.[328] Following coding of a small sample of files, family conflict was identified as a recurring theme and coded as signifying further situational vulnerability. The responses of the OLSC to the complaint and the outcomes in Guardianship Tribunal hearings were coded as potential elements of pathogenic vulnerability.

While there is a potential for bias when coding begins immediately,[329] in this study the actions of the lawyers were largely being compared to particular standards, providing an objective basis for the preliminary coding terms. Given the number of files and the variability within them, the resultant quantitative data cannot be compared using statistical tests of difference, so simple rankings of various code frequencies are presented in Appendix D and in the published papers. Data from this analysis have also been presented in an illustrative manner in papers 5 and 6. The purpose of these representations was to exemplify common deficits in the capacity assessment procedures demonstrated across the files.

The coding schema explained here renders this research replicable in other jurisdictions, both in Australia and also internationally where similar case files may be a key data source in comparable projects. This 'production transparency' is a key strength of the research as it provides a strong analytical framework for exploring capacity assessment techniques in similar contexts.[330]

4.4.2 Coding Method

Each of the files belong to the OLSC and could not be removed from the OLSC offices. The files were therefore transcribed and de-identified in place. Optical character recognition software was used to transcribe a photograph of every page of the files before any identifying

[326] Appendix D, tables 3 and 6.
[327] NSW Government Interagency Working Group, 'Interagency Protocol for Responding to Abuse of Older People' (NSW Government, 2007); NSW Elder Abuse Helpline and Resource Unit, 'NSW Elder Abuse Toolkit - Identifying and Respnding to the Abuse of Older People: the 5-Step Approach' (NSW Government, 2016); See also the Australian Law Reform Commission (2017) above n 6, Chapter 9 on elder abuse and testamentary promises.
[328] Appendix D, tables 9 and 10.
[329] Hsieh and Shannon, above n 317, 1282.
[330] Jeremy Freese and David Peterson, 'Replication in Social Science' (2017) 43 *Annual Review of Sociology* 147, 154.

characteristics were deleted and the files saved. At the same time, demographic information about the clients, complainants and lawyers was separately coded.[331]

Each file was read in its entirety before being manually coded and the coding was revised and refined after a sample of files was completed. Coding for each category was double counted to ensure accuracy after all of the files were closed by the OLSC. The majority of files were coded one by one, however in some cases the complaint investigation was ongoing and the recording and coding occurred over many months in a more piecemeal fashion as the file was made available. One file opened in 2013 was not closed until 2015 and multiple updates were required over a two-year period.

4.5 Research Design Revisited: Strengths and Weaknesses of the Project

The client voice is a particular strength of this project. As Pue has noted, clients are often the absent actor in empirical legal research.[332] Finding a client voice is particularly challenging in the context of research about decision-making capacity and older people. Contacting clients personally has multiple ethical and practical challenges, particularly where those clients may have a cognitive impairment.[333] Some of the clients in this study are no longer alive. Some had died before the complaint was lodged or while it was being investigated. Other clients who may have had capacity have now lost capacity and would be unable to be interviewed. Because clients were not interviewed, it is not possible to know their attitudes toward the complaints or to understand their experience of the lawyers' interview techniques. However, accessing the complaint files gave a surprising amount of insight into the values and character of some of the older clients. Complainants sent the OLSC copies of older people's wills, samples of handwriting, personal letters composed by the older person and other documents as "proof" that their relative had lost capacity. The older person was often described by both sides of a family involved in conflict, by medical professionals, as well as by the lawyer involved in the complaint and these multiple viewpoints added to the richness of the portrait. These documents were a powerful reminder of the client at the heart of the complaints.

[331] See Appendix D for demographic information.
[332] W. Wesley Pue, '"Trajectories of Professionalism?" Legal Professionalism After Abel' (1990) 19 *Manitoba Law Journal* 384, 405.
[333] Leslie Dowson, Colleen Doyle and Victoria Rayner, 'Scoping the Ethics of Dementia Research Within an Australian Human Research Context' (2013) 21(1) *Journal of Law and Medicine* 210, 210.

As Prior asserts, documents are not just a static record, but function to mediate social relationships.[334] Complaint files need to be understood in their context as a record of an investigation. The complainant can be expected to paint the actions of a lawyer in the worst light possible, while conversely, the lawyer may seek to explain away poor conduct, or to paint themselves in the most positive way possible. Meanwhile, the OLSC staff must demonstrate procedural fairness throughout the investigation process, with one eye to the potential that the file may one day form the basis of disciplinary action or prosecution. The complainant and lawyer could be expected to be highly selective in their observations, highlighting only those aspects of the capacity of the client that supported their view, a selectivity of focus that has been observed in other settings.[335]

Much of the complaint handling process is managed over the phone and these telephone conversations were neither observed or recorded. As Prior warns, 'the researcher who wishes to concentrate on the use of documents in action has to be constantly aware as to how the written record is tied into and anchored within other aspects of organizational life such as conversations…..'[336] However, brief hand-written notes on the complaint files did provide a window into the minds of investigation officers at the OLSC and their attitude to some of the capacity complaints. For instance, in one file, a note from the officer taking the complaint over the phone and passing it over to another for follow up wrote that it was a complaint involving 'another typical high conflict family.' In a different file the investigation officer wrote 'the real problem here is that he [the complainant] hates his sister. That's the problem here.' A different file included a notation that the lawyer was 'arrogant', while in another, the investigation officer wrote a notation that a complainant was a 'vile man'. Further research would be required to ascertain the impact that personal feelings of OLSC officers towards complainants has on the complaint handling process; but it is possible to speculate that strong emotions might influence the way an investigation is handled.

Staff of the OLSC were responsible for labelling a particular complaint as a 'capacity complaint' and then locating that file and passing it to this researcher. It is therefore possible that some complaints that were about capacity issues were not correctly coded, or that a complaint that involved other, more serious issues that were the subject of a formal

[334] Lindsay Prior, *Using Documents in Social Research* (Sage Publications, 2003) 51.
[335] Ibid, 54.
[336] Ibid, 56.

investigation may not have been passed on. For instance, one substantial capacity complaint was not forwarded until a year into the study, because the complaint was being investigated as potential misconduct, rather than as a consumer dispute. As such, it was allocated to a legal and investigation officer, not to the mediation and investigation officer who handled the bulk of the capacity complaints. In another case, a complaint was labelled as a capacity complaint on the basis that the client claimed he had poor eyesight and could not properly read a contract. A physical impairment alone is not sufficient to call into question the client's capacity. This coding suggests that at least some staff at the OLSC did not have a proper understanding of legal decision-making capacity and so may have miscoded other complaints.

As previously argued, the strength of the data lies in its richness rather than specific causal links. A lack of disciplinary action was a notable feature on the files, however uncovering the reason for a lack of action is challenging. Only one lawyer involved in these capacity complaints was disciplined for the way in which they took instructions.[337] However, a lack of formal discipline does not necessarily indicate a failure to self-regulate or a will to regulate.[338] As Haller notes, there is no simple linear relationship between regulatory intention and regulatory outcomes.[339] However, research suggests that legal regulators are only likely to take disciplinary action in the most serious cases and where the lawyers' actions are morally unambiguous, usually involving dishonesty,[340] or in cases involving the regulator's own governance,[341] for example a failure to respond to the OLSC.

Precedent created by historical complaints that the OLSC had tried to prosecute in the Civil and Administrative Tribunal may have also played a role in the way complaints were managed. For instance, in one file an officer queried whether further follow up with a view to disciplinary action in the Civil and Administrative Tribunal might be futile because a similar action had been unsuccessful, noting 'I don't think there is any point in obtaining the transcript of proceedings given that we have not been successful with the [lawyers' name deleted] complaint. What do you think?' This notation suggests that some complaints about lawyers were dismissed because OLSC staff were not confident of a successful prosecution. Several

[337] Lack of disciplinary action is discussed further in paper 5 and especially in paper 6.
[338] Pue, above n 332, 405.
[339] Haller, above n 301, 219.
[340] Woolley, above n 301, 249; Haller, above n 301, 321.
[341] Woolley, above n 301, 245.

researchers have noted that regulators will only pursue cases where success is all but guaranteed.[342]

The regulatory response also appeared to be driven in part by the lawyers' past disciplinary record. For instance, one memo between staff included the notation: 'Guardianship Tribunal seems the appropriate forum. I don't think we should get drawn in, unless Tribunal makes some adverse comment about P's role/actions in this sorry task…[Lawyer] does have form, but not for this sort of behaviour.' Examining archives cannot always uncover the underlying reasoning behind a decision or action. As Amodu explains, they are 'snapshots of the official memory defined by the cultural and organizational dictates ….'[343] So while the file archives can provide a window into the process and content of capacity complaints, they will never be the whole picture. They can however provide a context driven portrait. Or as Halkier describes, representations characterised by contingency and instability.[344]

4.6 Chapter Summary

This chapter has highlighted the depth and variability of the documentary material contained in the capacity complaint files at the OLSC. A description of the design of the content analysis has explained how data was extracted from such disparate files, using the law, guidelines and tools for capacity assessment alongside a tripartite theory of vulnerability as the guiding influences upon coding. Wide variety in file content driven by the passions of the complainant, emerged as both a strength and a weakness of this project. This chapter has addressed the reliability, replicability and validity of the data, explaining their limitations and highlighting the analytical generalizability; the richness of the context driven data echoing the overlapping agendas of complainant, lawyer and regulator in the complaints process.

The complaint files are an important sample of lawyers in NSW caught up in disputes over the capacity of older clients. In some cases, the lawyers went out of their way to be satisfied that their clients had the functional capacity for the decisions that they wanted to make. However, the files are replete with examples of poor capacity assessment. It is the intention that these

[342] Ibid, 245.
[343] Tola Amodu, 'For the Record: Understanding Regulatory Processes through Archival Materials: The Example of Planning Agreements' (2008) 35 *Journal of Law and Society* 183, 200.
[344] Bente Halkier, 'Methodological Practicalities in Analytical Generalization' (2011) 17(9) *Qualitative Inquiry* 787, 788.

examples, highlighted in the following publications, can be used to inform the recommendations contained in the publications and in part three of this thesis.

PART TWO: The Publications

Chapter 5: Human Rights and Substitute Decision-Making

5.1 Paper 1, 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*, (2015 Vandeplas Publishing) 286-302.

Pages 74-96 of this thesis have been removed as they contain published material. Please refer to the following citation for details of the article contained in these pages.

Barry, L., & Sage-Jacobson, S. (2015). Substitute decision-making for the elderly in Australia. In R. Ruebner, T. Do, & A. Taylor (Eds.), International and comparative law on the rights of older persons (pp. 286-302). Vandeplas Publishing.

Chapter 6: Law and Guidelines

6.1: Paper 2, Lise Barry, 'Case Note: Goddard Elliott v Fritsch [2012] VSC 87' (2012) 10 *Macquarie Law Journal* 105 – 110.

Pages 97-102 of this thesis have been removed as they contain published material. Please refer to the following citation for details of the article contained in these pages.

Barry, L. (2012). Goddard Elliott v Fritsch [2012] VSC 87. Macquarie law journal, 10, 131-136.

6.2: Paper 3, 'Capacity Guidelines in NSW: Time for a Review' (*prepared for publication 2017*)

Capacity Guidelines in NSW: Time for a Review

Abstract

Solicitors will be increasingly called upon to assess the legal capacity of older clients as the population ages, yet many are unprepared for the task. This article summarizes the current law and reviews the guidelines for solicitors in NSW working with an older client who may be experiencing a cognitive decline. The NSW Law Society refers to six different sets of guidelines in the realm of capacity assessment. The plethora of advice is all non-binding, potentially leaving solicitors feeling confused and swamped by details. The lack of clear, mandatory guidelines puts older people and their families at risk. A lack of clear standards could also hamper the potential prosecution of a lawyer in NSW who fails in their duties to their clients, to the Court, or to the administration of justice. Recommendations are made for the development of clearer guidelines to guide lawyers in NSW and to protect the rights of older Australians.

Introduction

This article provides a review of the current law and guidelines for solicitors in New South Wales related to assessing legal capacity for decision making in civil law matters, particularly as it pertains to older people who may be experiencing cognitive impairment. The author has conducted research examining the files categorized as capacity complaint files of the New South Wales Office of Legal Services Commissioner (OLSC) between 2011 and 2013.[1] In that two year period, thirty five complaints were made about the manner in which a lawyer took instructions from a person who it was alleged lacked capacity for a legal decision at the time. Thirty-three of these complaints involved a client over the age of sixty-five, with the majority of complaints related to clients aged in their eighties and nineties. These numbers may represent the tip of the iceberg. The OLSC only receives complaints when there is someone affected by the decision who is capable and interested enough to put a complaint about the lawyer in writing.[2] The OLSC has reported that the number of complaints is on the rise, [3] however there may be many more similar matters where no complaints are forthcoming.

As the world's population ages,[4] lawyers must respond to the changing client demographic. In Australia, the proportion of people aged 65 years and over increased from 11.9% to 15.0% between 1995 and 2015, while the proportion of people aged 85 years and over almost doubled, from 1.1% of the total population in 1995 to 2% in 2015.[5] Not all older people will develop a

[1] This research was conducted in accordance with Macquarie University Human Research Ethics Approval Ref: 5201300386.
[2] *Legal Profession Uniform Law (NSW)*, s267; *Legal Profession Act 2004 (NSW)*, s505.
[3] Office of the Legal Services Commissioner, '2011-2012 Annual Report' (Office of the Legal Services Commissioner, 2012) <http://www.olsc.nsw.gov.au/Documents/annual%20report%202011_2012%20accessible.pdf>.
[4] *Follow-up to the Second World Assembly on Ageing*, GA Res 67/143, 67th Session, Agenda Item 27 (c) UN Doc A/Res/67/143, (21 February 2013).
[5] Australian Bureau of Statistics, 'Population by Age and Sex, Australia, States and Territories' (Australian Bureau of Statistics, 2015)

disease leading to cognitive decline, however lawyers should be alert to the challenges of this phenomena. Understanding and responding to older people experiencing a cognitive decline is essential from two perspectives: Firstly, in order to uphold the rights of people to make their own autonomous legal decisions; secondly, to protect the lawyer from disciplinary action or claims of negligence.

There is little in the way of published research that examines what lawyers and regulators do in this space. In 2004, Helmes et al published a study of 92 Australian lawyers in which they examined their views on competency issues.[6] They found a wide variance in practices in determining capacity with no consensus about the way assessments should be undertaken. Less than one quarter of respondents to their survey reported asking questions related to the rationale for the decision;[7] a commonly recommended measure in age related capacity decisions. Helmes et al. suggested that lawyers demonstrate a limited knowledge of the issue and the recognized methods of assessment. They also noted that there was a dearth of research and could find no study of how lawyers in Australia evaluate client capacity.[8]

More recently, research into the practices of Queensland lawyers who witness Enduring Powers of Attorney (EPAs),[9] built on a 2006 study of cases before the Guardianship Tribunal in which fifty per cent of the EPAs witnessed by lawyers were held to be invalid on the basis that the principal did not have capacity at the time of providing instructions.[10]As the authors stated:

> *'it is concerning that in half of the cases considered by the Tribunal, the legal practitioner did not take sufficient steps to establish that the adult had capacity. Legal practitioners, more than any other category of witness, should be familiar with and understand the test for capacity that is prescribed in the legislation.'*[11]

A subsequent survey of Queensland lawyers revealed a large disparity in the way that lawyers went about taking and documenting the instructions of a person when their legal decision making capacity was in doubt.[12] Seventy Six per cent of lawyers in that survey observed that they would benefit from training on how to assess capacity. [13]There is a clear need therefore for up to date research about how lawyers go about assessing capacity and to identify their specific education requirements. As Wilmott and White identified, there is "a gap between best practice and current practice as to how solicitors witness enduring documents."[14]

<http://www.abs.gov.au/ausstats/abs@.nsf/Latestproducts/3101.0Feature%20Article2Jun%202015?opendocument&tabname=Summary&prodno=3101.0&issue=Jun%202015&num=&view=>.

[6]E Helmes, V E Lewis and A Allan, 'Australian Lawyers' Views On Competency Issues In Older Adults' (2004) 22 *Behavioral Sciences & the Law* 823.

[7] Ibid, 828.

[8] Ibid, 824.

[9] Lindy Willmott and Benjamin White, 'Solicitors and Enduring Documents: Current Practice and Best Practice' (2008) 16(3) *Journal of Law and Medicine* 466.

[10]Lindy Willmott and Greg Shoebridge, 'Witnessing EPAs Empirical Research' (2007) 27(5) *Queensland Lawyer* 238, 242.

[11] Ibid.

[12] Lindy Willmott and Benjamin White, above n 9, 483.

[13] Ibid.

[14] Ibid, 487.

2

Cognitive impairment in dementia

Dementia is a term that is used to describe a variety of diseases that negatively affect a person's brain function. The most common forms of dementia are Alzheimer's Disease, Vascular dementia, Fronto Temporal Lobar Degeneration, Lewy body dementia, Huntington's disease, alcohol related dementia (Korskoff's syndrome), Creutzfeldt-Jacob disease and Parkinson's disease dementia.[15] The different types of dementia affect the brain differently and at different rates.[16] In the state of New South Wales, the number of people diagnosed with dementia is estimated to rise from 91, 038 in the year 2011, to 303, 673, more than triple, by the year 2050.[17]

Dementia prevalence is currently thought to be 10-30% amongst people aged over 80 years old. However, there is a global push for early diagnosis that some researchers caution could lead to more than double the number of older people being diagnosed.[18] It will therefore become increasingly important that lawyers understand how to approach taking instructions from older people, particularly those who have received a diagnosis. Equally, lawyers will need to understand the impact of various forms of dementia, because different conditions lead to nuances in behaviour that need to be considered in the process of accepting instructions.[19]

To be clear, dementia is not synonymous with loss of capacity for legal decisions, however a diagnosis of cognitive impairment is one factor that should be considered by a lawyer in deciding whether or not to accept instructions from an older person.[20] Of the thirty five capacity complaints made to the NSW Office of Legal Services Commissioner between 2011 and 2013, twenty two of the complainants cited a diagnosis of dementia as an indication that the client had lost their capacity for making a legal decision.

Often, an older person who has been diagnosed with a cognitive impairment will be advised to consider their long term needs and estate planning, including: granting a Power of Attorney, Enduring Guardianship, making a Will, dealing with their assets or writing an advanced care directive before their decision making ability declines. In this respect, lawyers preparing and witnessing these documents play an important role in supporting their clients' autonomous decision making. Solicitors also play a role in preventing and responding to elder abuse. Done correctly, these instruments allow an older person to express their wishes about who can make decisions for and with them. However, they confer considerable power on substitute decision makers and can leave older people vulnerable to abuse, especially financial abuse.[21]

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[15]Alzheimer's Australia, *What is Dementia* <https://fightdementia.org.au/national/about-dementia/what-is-dementia>.
[16] Ibid.
[17]Deloitte Access Economics, 'Dementia Across Australia 2011-2050' (2011).
[18] David Le Couteur et al, 'Political Drive to Screen for Pre-dementia: Not Evidence Based and Ignores the Harms of Diagnosis' (2013) *British Medical Journal* 347.
[19]Kelly Purser and Tuly Rosenfeld, 'AssessingTestamentary and Decision-Making Capacity: Approaches and Models' (2015) 23(1) *Journal of Law and Medicine* 121, 127.
[20] Law Society of New South Wales, 'When A Client's Mental Capacity Is In Doubt: A Practical Guide For Solicitors' (Law Society of New South Wales, 2016) <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1191977.pdf> 5.
[21] Australian Law Reform Commission, 'Elder Abuse - A National Legal Response' (2017) 159-160.

As Alzheimer's NSW stated in their 2014 report on Elder Abuse:

> *"[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."*[22]

The current legal position on capacity to give instructions

The requirement that lawyers only accept instructions from a person with capacity is found in both common law and statute. Everyone is presumed to have capacity, with the burden of proof of incapacity falling on the person making the allegation.[23] In Australia, the classic statement on capacity is contained in the High Court judgment of *Gibbons v Wright:*

> *The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he is doing by his participation.*[24]

In other words, capacity is decision specific and the test to be applied is a functional test. The more complex the decision to be made, the more complex in terms of the 'four limbs' of understanding required: a person is said to have capacity for a decision if they can understand the decision to be made, identify the alternatives, weigh up the consequences of those alternatives and then communicate a decision.[25] This functional test can be compared to a status test, where a person is presumed to lack capacity on the basis of their status as a person of a particular age, or a person with a particular impairment; and also to an outcomes based assessment, where the capacity of a person for a particular decision is decided on the basis of the outcome, or particular decision that the person chooses for themselves. Although the functional test is the acknowledged way of assessing capacity, a review of the law and guidelines as it relates to the decision making of older people reveals that remnants of the status test remain in NSW. This anomaly is problematic and should be remedied as discussed below.

Legal capacity is best described as a construct, used to explain observations about a person and how these observations may assist in assessing whether a person meets a particular test of competence established in case law or statute.[26] The legal tests for functional capacity vary:

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[22]Kylie Miskovski, 'Preventing Financial Abuse of People With Dementia' (Alzheimer's Australia NSW, June 2014) <https://nsw.fightdementia.org.au/sites/default/files/20140618-NSW-Pub-DiscussionPaperFinancialAbuse.pdf> 6.

[23]*Masterman-Lister v Brutton & Co* [2003] 3 All ER 162.

[24]*Gibbons v Wright* (1954) 91 CLR 423.

[25]Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press, 2011)1.2.

[26]Thomas Grisso et al, *Evaluating Competencies, Forensic Assessments and Instruments* (Kluwer Academic Publishers, 2 ed, 2003)22; Peter Darzins, William Molloy and David Strang, *Who Can Decide? The Six Step Capacity Assessment Process* (Memory Australia Press, 2000) 1.

the test for testamentary capacity,[27] differs to the required capacity to appoint a Power of Attorney,[28] or Enduring Guardian,[29] and differs from the capacity required to make decisions to dispose of real estate.[30] These matters were the most commonly complained about in the files of the OLSC.

Decisions about a person's capacity for a legal decision are also contextual, dependent in part on the complexity of the decision and the support and accommodations that the person has in making that decision. A person who lacks decision making ability in one area, may still be able to make other decisions. For instance, a person may be unable to make detailed financial decisions, but still be capable of making a Will.[31] A person able to make a Will, may not have the required capacity to appoint an Enduring Attorney.[32] In a more nuanced distinction, a person who did not have the capacity to make a new Will because they did not have the required understanding of the nature and extent of their assets,[33] might still be able to make a codicil to an existing Will to disinherit a person who they believed had wronged them.[34] These common law tests therefore indicate that capacity assessment can hinge on very fine distinctions.

If the capacity of a person for a legal decision is disputed, the Court will examine the whole of the evidence to determine whether the person had the capacity for the particular decision, at the particular time that decision was made, including the evidence of the solicitor. In testamentary cases for instance, the Court has held that the testimony of a solicitor regarding the capacity of their client may hold more sway than an expert medical opinion.[35] It is therefore vital that lawyers understand the functional approach to capacity assessment and how to effectively interview their clients to gain proper instructions. Documenting those instructions is also an important part of the process. However, there are currently no clear standards or mandatory guidelines for lawyers in NSW who undertake these tasks.

There is no single statutory definition of capacity in NSW. According to the *Civil Procedure Act* (in relation to capacity to instruct in litigation), a "person under legal incapacity" means:

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[27] *Banks v Goodfellow* 1870 LR 5 QB 549.

[28] *Ranclaud v Cabban* (1988) NSW Conv R 55-385: *Szozda v Szozda* [2010] NSWSC 804.

[29] *Adult Guardian (In Re Enduring Power of Attorney of Vera Hagger) v Vera Hagger, Declan James Barry and Albert Craig Ray*(Unreported Supreme Court of Queensland, SC Qld No 1083 of 2001).

[30] *Winefield v Clarke* [2008] NSWSC 882.

[31] *Re Estate of Margaret Bellew* [1992] NSW Supreme Court (Unreported) 13 August 1992; *Fuggle v Sochacki* [1999] NSWSC 1214.

[32] *Szozda v Szozda* [2010] NSWSC 804.

[33] *Read v Carmody* unreported NSWCA, Powell and Stein JJA, 23 July 1998.

[34] *d'Apice v Gutkovich - Estate of Abraham* (No. 2) [2010] NSWSC 1333 "in principle, it should be enough that the testatrix is capable of making a judgment as to whether the person deserves to be excluded from the will." [96].

[35] *Zorbas v Sidiropoulous* (No 2) [2009] NSWCA 197 [89]: "In a probate suit, the vital evidence is very often not given by medical experts, but is given by experienced lay observers. I have said more than once in deciding probate cases at first instance, that the most valuable evidence is usually given by the experienced solicitor who witnessed the will as opposed to a very highly qualified psychiatrist whose evidence is based not on any personal observation of the testator, but who has reasoned his or her opinion from medical and hospital notes."

"any person who is under a legal incapacity in relation to the conduct of legal proceedings ... and, in particular, includes: ....

(c) a person under guardianship within the meaning of the Guardianship Act 1987, and ...

(e) an incommunicate person, being a person who has such a physical or mental disability that he or she is unable to receive communications, or express his or her will, with respect to his or her property or affairs.[36]

Turning to the *Guardianship Act, "a* 'person in need of a guardian' means a person who, because of a disability, is totally or partially incapable of managing his or her person."[37] What it means to be "incapable of managing" your own affairs has recently been reconsidered by the NSW Supreme Court. The classic formulation of capacity to manage affairs was explained by Justice Powell in *PY v RJS & Ors.*[38]

"A person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears:

(a) that he or she appears incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man; and

(b) that, by reason of that lack of competence there is shown to be a real risk that either:

(i) he or she may be disadvantaged in the conduct of such affairs; or

(ii) that such moneys or property which he or she may possess may be dissipated or lost;

... it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner ..."

However this test was refined in the 2015 Supreme Court decision, *A v A.*[39] Justice Lindsay clarified that the "expression '(in)capable of managing his or her own affairs' takes flavour from the context in which it appears."[40] As Justice Lindsay decided, the emphasis is on functionality: "measuring an individual's capacity for self-management against the "affairs" of

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[36] *Civil Procedure Act* (2005) NSW s 3.

[37] *Guardianship Act* (1987) NSW s 3. To the extent that a person can be considered to be 'incapable' only if they have the status of a person with a disability, this test of incapacity is a status test that invites the conclusion that it is in breach of the *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008). The NSW Law Reform Commission is currently conducting a review of the *Guardianship Act*. One of the terms of reference of that review is: "Whether the language of 'disability' is the appropriate conceptual language for the guardianship and financial management regime and to what extent 'decision making capacity' is more appropriate." See NSW Law Reform Commission, Review of the Guardianship Act 1987, *Terms of Reference* (2016) http://www.lawreform.justice.nsw.gov.au/Pages/Guardianship-Review-Terms-of-Reference.aspx/.

[38] *PY v RJS & Ors* (1982) 2 NSWLR 700 at 702.

[39] *A v A* [2015] NSWSC 1778 per Lindsay J.

[40] Ibid [55].

the particular individual rather than a hypothetical construct such as "the ordinary affairs of man".[41] It is therefore necessary for any capacity assessor to understand the person and their circumstances well enough to make an assessment of legal capacity in the proper context.

Accepting or refusing instructions

Acting for an older client who does not have the capacity for a decision may place a solicitor in a difficult situation, caught between the choice of demanding a formal assessment that the older person may not want, refusing to act on their instructions, terminating a retainer, or suggesting a substitute decision maker be appointed.[42] In relation to this choice, a solicitor may terminate a retainer for "just cause" and on "reasonable notice".[43] According to one set of guidelines, "The basis for termination of the retainer would be that the solicitor cannot obtain proper instructions."[44]

For a client and their family, the consequences that flow from a lawyer accepting instructions from an older person who does not have the capacity to give them, can range from feelings of frustration and anger through to practical implications such as the loss of assets. The appointment of a Power of Attorney or Enduring Guardian, alterations to a Will, or the sale of real estate, can lead to or exacerbate family conflict, elder abuse, and in some cases as found in the author's research, lead to financial losses of millions of dollars. On the flipside, refusing to act for a person who does have decision making capacity also has the serious consequence of infringing upon their right to make legal decisions and similarly can lead to family conflict, loss of assets and elder abuse. It is therefore imperative that there are clear guidelines for solicitors in this situation.

Professional Rules and Standards

The general rule on accepting instructions is found in the Australian Solicitors' Rules: "A solicitor must follow a client's lawful, proper *and competent* [my emphasis] instructions."[45] As noted in the commentary to the Rules, a failure to properly assess a client's capacity for a particular decision can give rise to a claim in negligence, as well as the possibility of professional disciplinary proceedings.[46] As Justice Adamson recently held, "The protection of the public is advanced, not merely by regulating those who are entitled to practise and removing

[41] Ibid [64]
[42] For a discussion of the alternatives, see Linda Haller, 'Ethical Issues for Administrative Law Practitioners' (Paper presented at the Civil Justice Conference, 2013). See also Margaret Castles, 'Mind The Gaps: Ethical Representation of Clients with Questionable Legal Capacity' (2015) 18 *Legal Ethics* 24 .
[43] Law Institute Victoria, *LIV Capacity Guidelines and Toolkit* Law Institute Victoria <http://www.liv.asn.au/capacityguidelines> r13.1.3.
[44] Law Society of New South Wales, 'Client Capacity Guidelines: Civil and Family Law Matters' (2003) 41(8) (September) *Law Society Journal* 50, point 8.
[45] Legal Services Council, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* (at 1 July 2015) r 8.
[46] *Goddard Elliott v Fritsch [2012] VSC 87; Law Council of Australia, Australian Solicitors' Conduct Rules 2011 and Commentary, (2013) r 8.*

from practise those who are no longer fit, but also by educating the profession, and the public, as to the applicable standards of professional conduct." [47]

In order to succeed in a claim for negligence, it is necessary to demonstrate that the lawyer did not meet the required standard of care for professionals found in the *Civil Liability Act* 2002 (NSW):

> *(1) A person practising a profession ("a professional") does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.* [48]

In a negligence claim, it is ultimately for the Court to decide whether the standard of care has been met. Differing opinion about the components of competency in a matter is not a bar to a suit for negligence,[49] however, the clearer the practice standards, the easier it is to establish whether there has been a breach. The High Court has held that "Evidence of a particular practice or standard of conduct, whether laid down by a professional body or sanctioned by common usage, may be relevant to establishing a standard of care in a case of professional negligence..."[50] Where a lawyer falls short of the required standards, then they may also be subject to professional discipline, the primary purpose of which is the protection of the public.[51] It is therefore in the interests of justice that clear standards for competency assessment be articulated to the profession.

As the OLSC routinely notifies complainants, the Commissioner does not have the power to find a practitioner guilty of professional misconduct. The OLSC can only refer disciplinary matters to the NSW Civil and Administrative Tribunal when there is a reasonable likelihood that the practitioner will be found guilty of unsatisfactory professional conduct or professional misconduct.[52]

Under the *Uniform Law* and the precursor legislation, unsatisfactory professional conduct includes:

> *conduct of an Australian legal practitioner occurring in connection with the practice of law that 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.*[53]

Professional misconduct includes:

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[47] *BRJ v Council of the New South Wales Bar Association* [2016] NSWSC 146 [106].
[48] *Civil Liability Act* 2002 (NSW) s 5O.
[49] *Civil Liability Act 2002* (NSW) s 5O(3)(4).
[50] *CGU Insurance Limited v Porthouse* [2008] HCA 30 [72].
[51] *Clyne v New South Wales Bar Association* (1960) 104 CLR 186.
[52] *Legal Profession Uniform Law* (2015) s270.
[53] *Legal Profession Uniform Law* 2015 (NSW) s296; *Legal Profession Act* 2004 (NSW) s 496.

> *(a) unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence, and*
>
> *(b) conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.*[54]

In NSW, disciplinary action of any kind for a failure to properly assess capacity is rare. No solicitor in NSW has been successfully prosecuted for their manner of accepting instructions from an elderly person with a cognitive impairment. In contrast, there have been six such prosecutions in Queensland,[55] where one of the grounds for a finding of unsatisfactory conduct in each case was a failure to follow the relevant guidelines. Given that Queensland has significantly lower numbers of lawyers compared to NSW,[56] it is difficult to understand why there have been five successful prosecutions in Queensland and none in NSW. One factor may be the uncertainty around standards in NSW and inconsistencies across the available guidelines.[57] Where the guidelines for lawyers are inconsistent, it may be more difficult to definitively state what a "reasonably competent" lawyer should do in the circumstances.

The NSW guidelines

As the Hon Michael Kirby noted extra-curially in relation to the importance of guidelines for capacity assessment, "there is a clear awareness of the puzzling dilemmas and the inescapable significance of the individual attitudes and predilections of decision makers. Hence the admirable endeavour to discipline such decisions by imposing on them a systemic and rigorous approach."[58] Unfortunately the reality of capacity assessment guidelines is somewhat different. A lawyer in NSW, faced with a client who appears to lack the capacity for a particular decision may look to numerous documents for advice. These guidelines are not consistent.

The "Ethics" pages of the Law Society website contains two documents that lawyers might refer to in relation to client capacity:

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[54] *Legal Profession Uniform Law* 2015 (NSW) s297; *Legal Profession Act* 2004 (NSW) s 497.

[55] *Legal Services Commissioner v Ford* [2008] LPT 12; *Legal Services Commissioner v Comino* [2011] QCAT 387; *Legal Services Commissioner v de Brenni* [2011] QCAT 340; *Legal Services Commissioner v Given* [2015] QCAT 225; *Legal Services Commissioner v Penny* [2015] QCAT 108; *Legal Services Commissioner v Ho* [2017] QCAT 95.

[56] In 2014 the number of lawyers Australia wide was reported to be 66, 221. Of those, 41.6% were registered in NSW compared to 15.7% in Queensland: Urbis, '2014 Profile of the Solicitors of New South Wales' (Law Society of New South Wales, 2015) <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/942948.pdf>.

[57] Further research would be required to determine the underlying cause of differences between the jurisdictions.

[58] Michael Kirby, cited in Peter Darzins, William Molloy and David Strang, above n 26, vi.

1) *When a Client's Mental Capacity is in Doubt – A Practical Guide for Solicitors* (hereafter referred to as the *'Practical Guide'*) [59]
2) *Guidelines for Solicitors Preparing an Enduring Power of Attorney* (hereafter referred to as *'Enduring Guidelines'*)[60]

A further document was available between the years 2003 up until 2015.

3) *Client Capacity Guidelines: Civil and Family Law Matters* (hereafter referred to as '*Capacity Guidelines'*).[61]

These documents are not well sign-posted. The Practical Guide can be found under Ethics page of "Protocols and Guidelines" while the Elder Law section of the Law Society web page only contains a reference to the *Enduring Guidelines*.[62]

Readers are also encouraged to keep in mind the capacity principles within a fourth document, the *Capacity Toolkit (*hereafter referred to as *The Toolkit)*, published by the NSW Attorney General's Department.[63] A person who reads *The Toolkit* will also find advice that "it may be helpful to refer to an assessment tool such as those included in *Who Can Decide: The Six Step Capacity Assessment Process*." (Hereafter referred to as *Who Can Decide*). [64] The *Practical Guide* also draws on comprehensive guidelines prepared by The American Bar Association Commission on Law and Aging and the American Psychological Association.[65] In short then, there are five different sets of guidelines published in Australia and one published in the United States that NSW lawyers might refer to.

It also merits noting that the guidelines referenced above are listed under a disclaimer that reads: "The Law Society has produced a series of protocol and guidelines to assist solicitors in a range of complex areas. These protocols and guidelines are advisory only and not binding on

[59] Law Society of New South Wales, '*Practical Guide*', above n 20. This document is a revised version of the previous guidance document, Law Society of New South Wales, 'A Practical Guide for Solicitors: When a Client's Capacity is in Doubt' (Law Society of New South Wales, 2009) <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/023880.pdf>.
[60] Law Society NSW, *Guidelines for Solicitors Preparing an Enduring Power of Attorney* <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026516.pdf>.
[61] Law Society of New South Wales, '*Capacity Guidelines*' above n 44.
[62] However, these Guidelines themselves state that solicitors should refer to Document 3, the Client Capacity Guidelines, although this document was removed from the website in 2016 when the Practical Guide was updated.
[63] New South Wales Department of Justice, 'Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales' (2008) < http://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx >.
[64] Peter Darzins, William Molloy and David Strang, above n 26. This publication was also listed as a resource in the NSW Law Society, *Capacity Guidelines*.
[65] The American Bar Association Commission on Law and Aging and the American Psychological Association, 'Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers' (American Bar Association and American Psychological Association, 2005) <https://www.apa.org/pi/aging/resources/guides/diminished-capacity.pdf>.

solicitors."[66] Lawyers in NSW who are subject to a complaint might then feel justified in disregarding any protocols or guidelines listed on the pages of the Law Society website. For instance, one solicitor in a case reviewed by the author in this study responded to a request for further particulars about the manner in which they interviewed an elderly client with a cognitive impairment by writing:

> *"I have seen that the Law Society has produced a series of protocol and guidelines to assist solicitors in a range of complex areas. These protocols and guidelines are advisory only and not binding on solicitors …."*

Similarly, in responding to some complainants, the OLSC has noted that lawyers are not bound by any of the published guidance on capacity.[67] In one response to a complainant for instance, the Commissioner wrote,

> *"While I take the view that the lawyers in this case should have exercised best practice by obtaining further medical reports their failure to do so does not in my view constitute misconduct..... In the letter from this office .... I referred to the Law Society of NSW Guidelines relating to taking instructions from clients whose capacity may be in question, as you do..... valuable as these guidelines may be they are to assist legal practitioners and are not legal requirements. A breach of such guidelines could not constitute misconduct."*

In Queensland by comparison, ignoring the published Guidelines *has* formed the basis of misconduct findings.[68]

Core Principles and focus of the guidelines

A starting point for analysis of the various guidelines is a comparison of their genesis, purpose and core principles. As outlined below, the six guideline documents represent different approaches to assessing capacity. Without a clearly defined and articulated framework, a person relying on one of the guidelines may lose sight of the individual rights and freedoms that are at stake.

Who Can Decide, places capacity assessment within a human rights framework. This begins with the foreword of the book, written by The Hon Justice Michael Kirby, through clear declarations such as "Capacity assessments are no trivial matter. They must balance the need to protect those who lack capacity against the need to respect individuals' rights and freedoms."[69] This book, published in 2000 and edited by three geriatricians, provides the most structured of all the approaches to capacity assessment. The process described is intended for

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[66] Law Society of New South Wales, '*Protocols and Guidelines*' (2017) http://www.lawsociety.com.au/ForSolictors/professionalstandards/Ethics/Protocolsguidelines/index.htm (accessed 26/4/17).

[67] Note however that the guidelines have been referred to with approval in NSW. See for instance *HLT* [2014] NSWCATGD 5 [105]. See also discussion of the guidelines in Purser and Rosenfeld, above n 19.

[68] *Legal Services Commissioner v Ford* [2008] LPT 12; *Legal Services Commissioner v Comino* [2011] QCAT 387; *Legal Services Commissioner v de Brenni* [2011] QCAT 340; *Legal Services Commissioner v Penny* [2015] QCAT 108; *Legal Services Commissioner v Ho* [2017] QCAT 95.

[69] Peter Darzins, William Molloy and David Strang, above n 26, 3.

assessors trained in its use and is primarily aimed at health professionals, although the editors also recommend the work to legal professionals.[70] Given the age of this print publication and the specialist training required in the assessment processes, it is unlikely that many solicitors would be familiar with its contents.

The first principle of capacity articulated in *The Toolkit* is a less explicit expression of the rights-based approach: "Always presume a person has capacity". *The Toolkit,* first published in 2008 and developed in conjunction with a reference group consisting of legal and health professionals for the NSW Attorney General's department, is a far more generalist document. *The Toolkit* provides information in plain English for a broad audience that includes anyone (including professionals) who has "concerns about the ability of an adult to make a decision for themself [sic]."[71] Despite the title, the authors write "The Capacity Toolkit is not an assessment tool."[72] It is therefore designed as an information booklet and refers back to *Who Can Decide* for anyone wanting a more detailed assessment instrument.[73]

Both the *Practical Guide* and the *Capacity Guidelines* were developed by the NSW Law Society and published by them in 2009 and 2003 respectively.[74] They each emphasise client autonomy, but outside of a rights framework. The emphasis is rather on the independence of the client *vis-a-vis* the lawyer, consistent with the fiduciary nature of the professional relationship. Perhaps worryingly for a document developed and published by a Law Society for the use of its members, the *Practical Guide* includes the disclaimer: "The Law Society of New South Wales and the authors accept no responsibility for the accuracy of the information or the opinions contained herein."[75]

Finally, the *Enduring Guidelines* do not articulate any underlying principles, focusing instead on the practical details of preparing the legal instrument. These guidelines were prepared and published by the Law Society in 2003 in response to changes to the *Powers of Attorney Act* requiring a witness to attest that they had explained the nature of the legal instrument and that the donee "appeared to understand the effect of the power of attorney."[76]The Enduring Guidelines are more directive than the other Law Society publications, and in places uses the language of obligation without any disclaimer or suggestion that the advice is optional. For instance, in relation to a client in an aged care facility, the Enduring Guidelines suggest it is mandatory for a lawyer to consult with a medical professional in relation to the client's

[70]Ibid, xii.
[71] Attorney General's Department of NSW, above n 63. 10.
[72]Ibid, 13.
[73]Ibid.
[74] The Law Society of New South Wales, *"Practical Guide' above n 20, was* updated in 2016 to reflect the new *Uniform Law* introduced in 2015. It was renamed, but otherwise remains true to the 2009 version.
[75] Law Society of New South Wales, *"Practical Guide' above n 20.*
[76]*Powers of Attorney Act 2003* (NSW) s19 (1)(c)(ii).

capacity.[77] Despite this, the guidelines themselves, although referred to in decisions of the Guardianship Tribunal, are non- binding, rendering the obligation moot.

Leaving aside the underlying nature and purpose of these documents, the fact that they are all referred to in one way or another on the website for the NSW Law Society would suggest that the Law Society endorses all of these documents as providing appropriate guidance for lawyers who are concerned about the capacity of their clients. Unfortunately, the guidance is inconsistent, as discussed in further detail below.

Thematic analysis of the six capacity guidelines reveals inconsistency in key areas:

1)When to investigate capacity further;

2) How to conduct an interview with a client in circumstances where their capacity is in doubt;

3) Who to consult for a second opinion;

4) The significance of old age in capacity assessment;

5) Assessment for undue influence;

6) Recording the process of capacity assessment; and

7) How to maximise the capacity for a client to make a legal decision including an understanding of accommodations.

1) When to investigate capacity further

In law, there is a presumption of capacity, meaning in practice that in most situations, lawyers do not need to investigate whether or not their client has the capacity to make a particular decision. At the other end of the spectrum, it will sometimes be very clear that a person cannot make a legal decision, such as in the case of an older person in the last stages of Alzheimer's disease who may have lost their ability to understand what is going on around them and to communicate.[78] In between these two certainties, there may be clients who give the lawyer cause for concern. In these situations, a lawyer may need guidance about when to explore decision-making capacity further and when to refer their client for a clinical assessment of capacity.

As summarised in Table 1, the existing guidelines provide a confusing array of criteria for lawyers, applying a mix of approaches to assessing decision-making capacity.

An appendix to the *Enduring Guidelines* appears to adopt a status-based approach in suggesting that it is mandatory for a solicitor to obtain a medical report in the following situations:

> *"(b) Where a solicitor is aware that the donor is the subject of medical care for a condition which may affect mental capacity, or is in hospital, or is in an aged care facility, the solicitor* ***must*** *[my emphasis] check this with the donor's doctor or other*

[77] Law Society of New South Wales, '*Enduring Guidelines*', above n 60, 4(b).
[78]Alzheimer's Australia, *The Later Stages of Dementia* <https://fightdementia.org.au/national/support-and-services/carers/later-stages-of-dementia>.

relevant health care professional and either obtain a report or make a note confirming how they decided that the donor has the mental capacity to execute an enduring power of attorney."[79]

In contrast, *Who Can Decide,* adopts a more risk-based approach where an assessment is viewed as a last resort and "should only be performed in response to valid triggers."[80] The trigger events are "events that put individuals being assessed, or others, at risk, and on the face of it, are caused by a lack of capacity."[81]In *The Toolkit* however, the concept of assessment as a last resort in response to a known risk is absent. *The Toolkit* also describes 'triggers', but defines these as "particular circumstances, events or behaviours [that] might lead you to question a person's capacity at a point in time."[82]According to *The Toolkit*, once a trigger is identified, assessment should proceed "if all other attempts to solve the problem have failed and the conduct of the person is causing, or is likely to cause, significant harm to the person or someone else. Or if there are important legal consequences of the decision."[83]*The Toolkit* goes on to list a series of potential triggers centred around "the person's conduct" and "the person's circumstances".[84] The *Practical Guide* is written in terms of a list of 'warning signs and red flags',[85] whilst the *Capacity Guidelines* again provide more of a status-based approach in listing a series of "conditions that impair capacity" with accompanying "indicators" under each condition.[86]

Table 1: When to Assess

Title	When to assess
Who Can Decide?	Risk of harm If person known or suspected to have impaired decision making Only assess if appointment of a substitute decision maker if necessary will solve the problem
The Toolkit	Risk of harm Important legal consequences 'Trigger' exists All other attempts to solve problem have failed If capacity improves
Practical Guide	If the lawyer doubts client has capacity to give instructions or make their own legal decisions Warning bells and red flags exist
Capacity Guidelines	When lawyer forms the suspicion that a client may not be competent to give proper instructions. Investigate if "warning signs" exist

[79] Law Society of New South Wales, '*Enduring Guidelines*', above n 60, Appendix A (b).
[80]Peter Darzins, William Molloy and David Strang, above n 26, 13.
[81]Ibid.
[82] New South Wales Department of Justice, above n 63, 50.
[83]Ibid.
[84]Ibid, 50-53.
[85] Law Society of New South Wales, *"Practical Guide' above n 20,* 4.
[86] Law Society of New South Wales, '*Capacity Guidelines*' above n 44.

	List of "Common indicators of conditions that impair capacity"
Enduring Guidelines	4(b) "Where a solicitor is aware that the donor is the subject of medical care for a condition which may affect mental capacity, or is in hospital, or is in an aged care facility, the solicitor must check this with the donor's doctor or other relevant health care professional and either obtain a report or make a note confirming how they decided that the donor has the mental capacity to execute an enduring power of attorney."

2) How to conduct an interview

In situations where a lawyer may have concerns about the capacity of an older person, an integral part of the process is a thorough client interview to ascertain whether concerns are warranted. In order to appreciate a person's method of reasoning, a careful interview technique is required, founded on open questions. It is this process that will assist the lawyer to understand the rationale and motivations behind a client's decisions, which are key to ascertaining capacity to make that decision.[87] Careful interviewing can also uncover whether there is coherence and authenticity to the client's decision to allay any concerns about incapacity.[88]A capable person: "knows the context of the decision at hand, knows the choices available; appreciates the consequences of specific choices" and the decisions "are not based on delusional constructs."[89] Moreover, it has been held that detailed conversations can provide "compelling evidence" in situations where capacity is contested in the future.[90] Only comprehensive client interviewing can achieve these aims. Explaining the necessity and techniques for this style of interview should be integral to any guidelines for lawyers, however the five guiding documents directed at lawyers in NSW are inconsistent in this regard.

Who Can Decide provides the most detailed interview techniques, beginning with open-ended questions and contained within loosely structured interviews that are carefully recorded. The nature of the decisions asked gradually narrows, with additional prompts to reflect the difficulty a person may have in responding.[91]Each decision domain description (personal care, health care, property and finance, advance directives, Wills and Power of Attorney) is accompanied by specific areas for questioning and a decisional aid, with the emphasis on an objective and holistic enquiry.

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[87] The component parts of this process have been further described. See for instance Peter Margulies, 'Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity: Proceedings of the Conference on Ethical Issues in Representing Older Clients' (1993) 62 *Fordham Law Review* 1073, 1085. Referred to as the Marguiles/Fordham criteria within the American Bar Association Handbook, above n 65, 18.

[88]John Christman, *The Politics of Persons* (Cambridge University Press, 2009) 155.

[89]Darzins, Molloy and Strang, above n 26, 9.

[90] Department of Social Services, 'Aged Care Assessment Program Guidelines' (Australian Government Department of Social Services, 2015) <https://www.dss.gov.au/sites/default/files/documents/05_2015/acap_guidelines_-_accessible_version_-_may_2015_0.pdf>; *Legal Services Commissioner v Penny* [2015] QCAT 108.

[91] Darzins, Molloy and Strang, above n 26, 45.

The Toolkit similarly provides guidance across different decision domains including enduring guardianship, accommodation and support, health care, finances and property, power of attorney and wills. Helpfully, specific questions are provided in each decision domain alongside the more general prompts to: "ask open-ended questions; do not ask leading questions; frame your questions to quickly identify any areas of concern for which a person may need support or help or require a substitute decision maker; ensure it is the person being assessed who answers the questions."[92] These general guidelines and *The Toolkit* itself are also referenced in the *Practical Guide*.[93]

In contrast to the specific guidance provided in *The Toolkit* and the *Practical Guide*, the *Capacity Guidelines* provide no real guidance about how to go about interviewing a client beyond the admonishment to "frame questions to the client very carefully and seek feedback to find out whether the client can understand sufficient aspects of the particular transaction or proceedings to give competent instructions."[94]

Finally, the *Enduring Guidelines* caution that a solicitor must do more than explain enduring guardianship; they must ensure that the client understands the powers they are conferring. Specific guidance about how to do this is limited. Solicitors are warned that "Questions susceptible to yes/no answer may be inadequate for the purpose of assessing the donor client's capacity."[95] For the purposes of illustrating appropriate open-ended questions, two examples are given: "What will your attorney be able to do?" and "What will happen if you become mentally incapable?"

3) Who to consult

A further illustration of inconsistency between the guidelines lies in the example of deciding who is best qualified to provide a specialist opinion about the capacity of an older person experiencing some cognitive decline. At common law, the evidence of lay people and of solicitors who have observed the older person over time will carry weight and may be preferred to an expert medical opinion.[96]Medical opinions about a person's cognition should be considered,[97] but a clinical assessment of capacity is only one factor in establishing legal capacity and cannot substitute for the lawyer's view. At common law, when capacity is contested the Court will examine all of the circumstances that surround the taking of instructions.[98] It is always open to the Court to reject expert evidence. As has been held, the question of capacity is a legal question, rather than a medical one.[99] However, obtaining an

[92] See for instance New South Wales Department of Justice, above n 63, 113-114.
[93]Law Society of New South Wales, *"Practical Guide' above n 20*.
[94] Law Society of New South Wales, '*Capacity Guidelines*' above n 44.
[95] Law Society of New South Wales, '*Enduring Guidelines*', above n 60, 10.
[96]*Zorbas v Sidiropoulous*(No 2) [2009] NSWCA 197; *Re: the Estate of Iris McLaren; Mariconte v Nobarani* [2015] NSWSC 667 at 56**;** *Nicholson v Knaggs* [2009] VSC 64; *The Estate of Stanislaw Budniak; NSW Trustee & Guardian v Budniak* [2015] NSWSC 934.
[97] *Romascu v Manolache* [2011] NSWSC 1362 [105].
[98] *Nicholson v Knaggs* [2009] VSC 64; Nick O'Neill and Carmelle Peisah, above n 25, 2.3.3.
[99] *Zorbas v Sidiropoulous*(No 2) [2009] NSWCA 197; *Briton v Kiripitidis* [2015] NSWSC 1499.

opinion from a medical practitioner is sound advice repeated in various forms across the guidelines.

In situations where an older person has a diagnosis of dementia or is experiencing cognitive decline, a clinical assessment might assist a lawyer in clarifying the impact of the disease on an older person's instructions. For instance, a lawyer aware that an older person has a diagnosis of dementia might consider the impact of the disease on their client's view of family relationships in situations where the client is seeking to change a will or enduring appointment, because dementia may sometimes lead to suspicion and paranoia.[100]As outlined in Table 2, there is conflicting advice about which medical professionals are best qualified to provide an opinion about an older person's capacity and whether a person's usual GP is in a good position to provide advice.

In a disputed matter, the views of a person's usual general practitioner would be given significant weight, particularly where they have known the older person for some time.[101] Where a person's usual practitioner is not called as a witness, the Court may also draw certain inferences.[102]A practitioner with long term personal knowledge of the client is in a better position to appreciate whether changes in relationships or decisions accompany the progress of disease or have other explanations. It would be useful if the guidelines more clearly stipulated that any health professional who has known the older person for some time may be able to contribute information to inform the lawyer's assessment of their client. Specialist clinicians are less likely to have a personal history of the client and their family, although they may be experts in cognition and ageing. Specialist's evidence will carry more weight if they met with someone prior to that person providing instructions to a lawyer, rather than if they are asked to give an opinion about capacity retrospectively.

None of the guidelines specifically mention the role that an allied health professional such as an Aged Care nurse, community mental health practitioner, occupational therapist or aged care attendant might be able to play in this situation. An allied health professional may have had daily or weekly contact with an older client and be able to provide sufficient information about the older person's abilities to render a further formal assessment unnecessary.

As illustrated in Table 2, three of the five guidelines specifically mention that a GP may be consulted. The *Practical Guide* emphasizes that clinical assessment should be undertaken by specialists in capacity, rather than prioritizing medical practitioners with personal knowledge of the client. In contrast, *Who Can Decide* proposes that assessment is always done by the person trained in the six step method, but suggests consulting an expert in the particular decision subject matter for insight into the component parts of any decision, as opposed to finding a medical expert to comment on the client.

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[100]Nick O'Neill and Carmelle Peisah, above n 25, 2.3.3; Darzins, Molloy and Strang, above n 26, 19.
[101] *Revie v Druitt* [2005] NSWSC 902.
[102] *Szozda v Szozda* [2010] NSWSC 804.

Table 2: Specialist referrals

Who Can Decide	Referral not mandated: Consult experts in the decision domain not experts in capacity
The Toolkit	Referral not mandated. Recommended where capacity is disputed and where the decision is 'serious' • GP • Psychiatrist • psychologist • geriatrician • neuro- psychologist
Practical Guide	Referral not mandated. • Psychiatrist • Psychologist • Neuropsychologist • Psychogeriatrician • Geriatrician • Neurologist • Gerontologist • ACAT
Capacity Guidelines	If dementia then: • Geriatrician • Old-age psychiatrist • 'long term' or 'usual' GP
Enduring Guidelines	*Must* get a second opinion if donor has "a condition which may affect mental capacity, or is in hospital, or is in an aged care facility" • Long term GP • Geriatrician • Clinical Psychologist • "suitably qualified specialist"

4) Ageing and capacity

Age alone does not indicate anything about a person's capacity. On the topic of old age, the professional rules and guidelines can be contradictory. On the one hand, the commentary to the Australian Solicitors' Conduct Rules promotes an outdated ageist and status-based approach to capacity in arguing "*Characteristics which may displace the presumption include old age…* "[103] On the other hand, the commentary to the rules promotes the use of State based capacity toolkits.[104] These tool kits are explicit in promoting a functional approach to capacity assessment. As discussed, *The Toolkit* contains six "Capacity Assessment Principles", the first

[103]Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Commentary* (2013), r 8.
[104]Ibid.

of which is "Always presume a person has capacity".[105] Principle three of the guide states "Don't Assume a person lacks capacity based on appearances" and is followed by the sage advice that "It is wrong to assume a person lacks capacity *because of their age*, appearance, disability, behaviour, language skills or any other condition or characteristic."[106]

The *Enduring Guidelines* on the other hand state that where "the client is of advanced age, or is hospitalized or resides in a nursing home" the solicitor should take particular care to "personally attend the client to obtain instructions."[107] There is no definition of 'advanced age' provided in the guidelines. This approach to capacity assessment is arguably an example of age and disability discrimination because the emphasis in on the person's status, rather than their functional decision making abilities.

5) Undue Influence

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." In part, this certification is designed to draw attention to the possibility of undue influence. Undue influence may also be a factor in changes to testamentary promises and was a recurring allegation in the complaint files reviewed by the author at the OLSC.

Lawyers play an important role in detecting when an older person is being improperly influenced to hand over legal decision making powers to another person. This can be difficult to assess with a person with dementia who may have 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."*[108]

Lawyers who have clients with a diagnosis of dementia should be alert to the ways in which the disease can impact on their ability to make judgements about people in their lives.[109] They should be particularly alert to this possibility if a third person, rather than the older person themselves, arranges the appointment with the lawyer. Likewise, lawyers should also be alert

[105] New South Wales Department of Justice, above n 63, 27.
[106] Ibid, 33.
[107] Law Society of New South Wales, '*Enduring Guidelines*', above n 60, 3(a)(iii).
[108] Nick O'Neill and Carmelle Peisah, above n 25, 2.3.5.
[109] See for instance New South Wales Department of Justice, above n 63 (at 40 - 46).

to a loss of capacity as the possible underlying reason for an older person with impairment to want to change Attorneys or make substantial changes to a Will.[110]

For this reason, all of the guidelines discuss the possibility of undue influence although at different levels of specificity. *Who Can Decide* has the most comprehensive discussion of undue influence, describing the many forms it may take, elements to indicate undue influence, the power dynamics of abuse and the necessity for comprehensive investigation. Consistent with the rights-based approach adopted throughout, only *Who Can Decide* mentions the possibility of pressure from institutions, as opposed to an individual, warning that advanced directives may be designed for the benefit of third parties, rather than the older person.[111] *The Toolkit* and *Enduring Guidelines* both mention undue influence in general terms, cautioning that additional inquiries might be necessary where it is suspected, but with no particular guidance about the kind of inquiries to be made. The *Practical Guide* and *Capacity Guidelines* on the other hand describe the type of relationship that an older person may have with someone exerting undue influence, and caution the solicitor to take particular care when a third party attends an appointment, purports to speak on behalf of a client, or has a conflict of interest with the client.

More generally, family conflict could be a sign that the older person is at risk of undue influence and can inhibit a person's decision making capacity. A study by Peisah, Brodati and Quadrio examining disputes before the Guardianship tribunal found underlying family conflict was a feature of many of the applications.[112] As Peisah et al discuss, "Dysfunctional family alliances ... form a fertile ground for legal disputes about wills, powers of attorney, financial management and guardianship."[113]Significantly, family conflict also underlies many challenges to a lawyers' assessment of capacity. In the files of the OLSC studied as part of this research project, the author identified family conflict as a significant theme.[114] Lawyers and their older clients would benefit if the guidelines specifically outlined the significance of family conflict to capacity assessment. This is not currently the case.

6) Note taking

Many disputes about capacity reach fruition months or even years after the instructions are taken. Without file notes, it is very difficult to retrospectively establish the process of questioning and reasoning that led a lawyer to the conclusion that a person either did, or did not have capacity for a particular decision. Yet despite this, there is no absolute requirement in NSW that a lawyer keep a file note of the process that they followed, even in situations where they experienced doubts about a client's capacity. The rules and commentary are also silent on the requirement for a file note, although the related disciplinary cases in Queensland

[110] O'Neill and Peisah, above n 25, 2.3.4
[111] Darzins, Molloy and Strang, above n 26, 91.
[112]Carmelle Peisah, Henry Brodaty and Carolyn Quadrio, 'Family Conflict in Dementia: Prodigal Sons and Black Sheep' (2006) 21 *International Journal of Geriatric Psychiatry* 485.
[113]Ibid, 486.
[114] Family conflict was a factor in 33 of the 35 complaints. An analysis of the types of conflict and the impact of the conflict on the complaint is forthcoming but beyond the scope of this article.

have listed an absence of notes as one element of unsatisfactory conduct.[115] As Justice Thomas noted in the recent *Penny* decision: "The greater the concern about capacity, the greater the desirability of the practitioner keeping detailed notes. "[116]

The guidelines differ in the instructions on note taking. At one end of the spectrum, *Who Can Decide* involves a careful process of recording observations, questions asked and the responses provided. At the other end, *Capacity Guidelines* does not mention the need to document the process at all. As a result of the inconsistency in this area, it may be more difficult to establish a standard of practice that could form the basis for a negligence claim or disciplinary action.

Table3: Note Taking

Who Can Decide	Essential part of the process. Very detailed and prescriptive note taking required
The Toolkit	"Keeping *detailed notes* is essential"
Practical Guide	" Fundamental that solicitors take *thorough, comprehensive and contemporaneous file notes* of any consultation with clients where capacity is in issue"
Capacity Guidelines	No discussion of solicitor record keeping
Enduring Guidelines	Requires *either* notes or a medical report where person has a medical condition or is in care

7) Accommodations to maximise capacity

Finally, given that decisions about a person's legal capacity impact on the exercise of their right to autonomy and fundamental freedom of decision-making, it is important for lawyers to maximise the conditions for any capacity assessment through the provision of appropriate accommodations.[117] Accommodations are a fundamental anti-discrimination measure that maximise the opportunity for people with a disability to exercise their rights.[118] Once again, the guidelines are inconsistent in this area. They differ in the extent to which they acknowledge that a person conducting a capacity assessment should optimise the conditions for the assessment, and the purpose and nature of suggested accommodations and supports is described inconsistently.

Who Can Decide provides the most comprehensive description of accommodations and stresses the personalised nature of the whole process in keeping with the rights-based approach. This guide also cautions that a professional with limited communication skills is unlikely to deal appropriately with the wide range of conditions that might impair capacity or make communication a challenge.[119]It is suggested that experience communicating with people who

[115] *Legal Services Commissioner v de Brenni* [2011] QCAT 340; *Legal Services Commissioner v Penny* [2015] QCAT 108; *Legal Services Commissioner v Ho* [2017] QCAT 95.
[116] *Legal Services Commissioner v Penny* [2015] QCAT 108 [47].
[117] Lise Barry, 'Elder Mediation' (2013) 24 *Australasian Dispute Resolution Journal* 251, 256.
[118]*Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), Art 5 (3). See for instance *Re R* [2014] NSWSC 1810 (at par 96).
[119] Darzins, Molloy and Strang, above n 26, 21.

have conditions such as hearing impairment, physical difficulty in speaking, language impairments due to brain damage, or people who require an interpreter is an advantage.[120]Lawyers would benefit from training in these areas, particularly if questions about capacity are a regular feature of their work.

Step two of the six steps in *Who Can Decide*, explains the process for educating a person about why an assessment is being undertaken. This is an important educative tool that is largely absent from the other models. A person who understands the purpose and triggers for an assessment is far less likely to be uncooperative or suspicious of any subsequent interview questions. Step four is an educative process to ensure that the person is adequately educated about the decision itself, lest ignorance is confused with incapacity. This education process as a whole is designed to maximise cognition and reduce the need for appointment of substitute decision makers or supporters.

The remaining guides focus less on maximising capacity and more on improving communication. *The Toolkit* provides some specific suggestions for communicating appropriately including the use of Alternative and Augmentative Communication systems.[121] There is also a section on putting people at ease.[122]

Readers of the *Practical Guide* must turn to Appendix C for: "Techniques Lawyers Can Use to Enhance Client Capacity". These techniques are focused solely on older clients, and are taken from the Handbook developed by the American Bar Association Commission on Law and Aging and the American Psychological Association.[123]Appendix C stands out in its focus on the elderly and the caution to practitioners to consider whether their own ageist assumptions might be influencing their attitudes to their client's capacity. The practical steps discussed include: 'Engendering client trust and confidence', 'accommodating sensory changes', 'accommodating cognitive impairments', and 'strengthening client engagement in the decision-making process'. These are achieved through a process of gradual client counselling.[124] All of the techniques are valuable suggestions; however they may lose some impact through being included as an appendix, rather than as an integral part of the process.

The *Capacity Guidelines* present accommodations as a risk mitigation strategy, rather than a human rights necessity, stating "If a solicitor does not thoroughly investigate different means of establishing communication, it is possible that they could unlawfully discriminate against the client under the *Disability Discrimination Act* (Cth)."[125]The suggested accommodations are limited to "alternative interviewing techniques, such as writing down the main points", interviewing the person at a later date, turning to a support person for assistance, "interviewing in an appropriate way" and considering whether medication may assist. The decision making

[120]Ibid.
[121] New South Wales Department of Justice, above n 63, 149.
[122]Ibid, 151.
[123] The American Bar Association Commission on Law and Aging and the American Psychological Association, above n 65.
[124] Law Society of New South Wales, '*Practical Guide*', above n 20.
[125] Law Society of New South Wales, '*Capacity Guidelines*' above n 44, point 3.

flow chart that forms the basis of the capacity assessment process in the guidelines makes no mention of the role of optimising the conditions for a capacity assessment or providing accommodations to improve capacity.

Finally, the *Enduring Guidelines* merely refer back to the *Capacity Guidelines*, stating "Solicitors should also refer to the Law Society's Client Capacity Guidelines, September 2003 for further information about communication with clients where capacity may be in issue."[126] This is problematic, as the 2003 guidelines are no longer available on the website.

Conclusion

Taken together, the five guides on capacity assessment that are currently referenced on the NSW Law Society website provide an overwhelming amount of sometimes conflicting material. *Who Can Decide* is a comprehensive tool, however it is aimed primarily at people specifically trained in the particular method of interviewing and capacity assessment. *The Toolkit* is also quite comprehensive, but it has a diverse audience and purpose and isn't well targeted at solicitors who may easily dismiss its plain English approach. At one hundred and eighty pages it is a long read for a lawyer seeking guidance. Solicitors are more likely to turn to guidelines with the Law Society imprimatur. However, as mentioned above, the Law Society's principal guidelines contain a disclaimer that renders it essentially meaningless as a credible source of guidance for practitioners. The Law Society removed the *Capacity Guidelines* from their website in 2016, yet the *Enduring Guidelines* remain online in the Elder Law section and refer back to them. This should be remedied. It is suggested that the three documents published by the Law Society: The *Practical Guide*, the *Capacity Guidelines* and the *Enduring Guide* should be replaced by a single document that comprehensively discusses client capacity and addresses the six key elements of capacity assessment discussed here. Practical and continuing legal education should be reformed, so lawyers are trained to respond to a diverse range of clients of all ages, culture and capacity.

Capacity assessment is too important to be left to chance. Older people in NSW rely on solicitors to enforce their rights to make legal decisions and in some situations to prevent elder abuse through an accurate assessment of their decision making capacity. The guidelines should be updated, so that in time, these reforms will contribute to a process of education for lawyers in NSW.

[126] Law Society of New South Wales, '*Enduring Guidelines*', above n 60, 10.

6.3: Paper 4, Lise Barry and Jane Lonie, ' Capacity, Dementia and Neuropsychology' (2014) *Law Society Journal* 78

Pages 126-127 of this thesis have been removed as they contain published material. Please refer to the following citation for details of the article contained in these pages.

Barry, L., & Lonie, J. (2014). Legal updates: elder law : Capacity, dementia and neuropsychology. LSJ : Law Society of NSW journal, 1(5), 78-79.

Chapter 7: Empirical Findings and Analysis

7.1: Paper 5, 'Capacity and Vulnerability: How Lawyers Assess the Legal Capacity of Older Clients' 25 (2017) *Journal of Law and Medicine* 267.

Pages 128-143 of this thesis have been removed as they contain published material. Please refer to the following citation for details of the article contained in these pages.

Barry, L. (2017). Capacity and vulnerability: how lawyers assess the legal capacity of older clients. Journal of Law and Medicine, 25(1), 267-282.

7.2: Paper 6, 'He Was Wearing Street Clothes Not Pyjamas: Common Mistakes in Lawyers' Assessment of Legal Capacity for Vulnerable Older Clients' (2018) 21 *Legal Ethics* 1, 3-22

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'He was wearing street clothes, not pyjamas': common mistakes in lawyers' assessment of legal capacity for vulnerable older clients

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ABSTRACT

Lawyers are increasingly called upon to deal with older clients and have ethical responsibilities to attest to their capacity for legal decision-making. As witnesses to enduring documents, the making of wills and other significant advance planning transactions, lawyers play a role in preventing elder abuse and in upholding the rights of older people. To date however, there has been very little empirical research examining how lawyers assess an older person's legal decision-making capacity. This article presents research examining three years of capacity complaints made to the New South Wales Office of Legal Services Commissioner. Four case studies from the complaint files expose some common failings in the way that lawyers interact with older clients who have experienced cognitive impairment. The process of capacity assessment is viewed through the theoretical lens of vulnerability to highlight how the actions of lawyers and regulators can exacerbate the inherent and situational vulnerability of older people with a cognitive impairment. The author argues that improvements in capacity guidelines, legal education and robust enforcement of ethical rules are required to safeguard the rights of older clients and help prevent abuse. The findings will have implications for lawyers and regulators everywhere dealing with an ageing population.

KEYWORDS

Elder law; capacity; vulnerability; legal ethics; legal regulation; legal profession; cognitive impairment; ageing

Introduction

Vulnerability theory has been increasingly recognised as a valuable framework for measuring the success of institutional responses to injustice and disadvantage.[1] In this article, the author applies a tri-partite theory of vulnerability to examine how lawyers in one state in Australia served vulnerable older clients whose capacity for legal decisions was in doubt. This project demonstrates that when lawyers are not well trained to work with clients with

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[1]Michael Dunn, Isabel Clare and Anthony Holland, 'To Empower or to Protect? Constructing the "Vulnerable Adult" in English Law and Public Policy' (2008) 28(2) *Legal Studies* 234; Catriona Mackenzie, Wendy Rogers and Susan Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy* (Oxford University Press 2013) Martha Fineman and Anna Grear (eds), *Vulnerability: Reflections on a New Ethical Foundation For Law and Politics*, Gender in Law, Culture, and Society (Routledge 2014); Jonathan Herring, *Vulnerable Adults and the Law* (Oxford University Press 2016); Ann Numhauser-Henning (ed), *Elder Law: Evolving European Perspectives* (Edward Elgar 2017).

cognitive impairments, the vulnerability of those clients is increased. These vulnerabilities are further exacerbated by the failure of the profession and regulators to adequately address the problem.

This article reports the findings of research examining three years of Capacity Complaints made to the Office of Legal Services Commissioner (OLSC),[2] the independent regulator for the legal profession in New South Wales (NSW), Australia.[3] Previous research in this area has proceeded by way of surveys or interviews, concluding that lawyers are confused about the capacity assessment process.[4] This is the first research project to examine the capacity complaint files and provides compelling empirical evidence of the ways that lawyers interact with older clients with a cognitive impairment.[5] This research makes a vital contribution to our understanding of legal ethics in this area because it goes beyond the lawyers' self-reported knowledge of capacity assessment to provide evidence of what actually occurs in practice.

Any person can make a complaint about a lawyer.[6] Complaints in these cases were made by a relative or carer of the older client. The majority of files contain allegations that a lawyer accepted instructions from an older person who lacked the capacity to make legal decisions.[7] The files contain rich empirical data, including details of the complainants' allegations, the lawyer's response including their file notes and observations of their older clients, medical records, expert capacity assessments and transcripts from the Guardianship Tribunal.

A directive approach was applied to the content analysis of the file documents using codes derived from the common assessment criteria outlined in the case law and capacity guidelines published in Australia and internationally.[8] Stated simply, the key criteria are

[2]There were 35 complaints categorised as 'capacity complaints' between 2011 and 2013. Responsibility for categorising a complaint as a 'capacity complaint' fell to the OLSC investigation and mediation officers.

[3]*Legal Profession Uniform Law (NSW)*, Part 5.2.

[4]E Helmes, V E Lewis and A Allan, 'Australian Lawyers' Views on Competency Issues in Older Adults' (2004) 22 *Behavioral Sciences & the Law* 823; Lindy Willmott and Greg Shoebridge, 'Witnessing EPAs Empirical Research' (2007) 27(5) *Queensland Lawyer* 238; Lindy Willmott and Benjamin White, 'Solicitors and Enduring Documents: Current Practice and Best Practice' (2008) 16(3) *Journal of Law and Medicine* 466; Kelly Purser, *Competency and Capacity: The Legal and Medical Interface* (PhD Thesis, University of New England 2013).

[5]In twenty-two of the files the complainant cited a diagnosis of dementia as the cause of the client's loss of legal capacity. Other causes of cognitive impairment cited by complainants or lawyers included mental health conditions, brain damage caused by accidents, intellectual disability and diseases such as Parkinson's disease. A complete discussion of cognitive impairment in old age is beyond the scope of this article.

[6]*Legal Profession Uniform Law (NSW)* s266 (1).

[7]This research was undertaken in the context of concerns about rising numbers of capacity complaints at the OLSC. See especially, The Office of the Legal Services Commissioner, '2012–13 Annual Report' (2013) 30. The research was conducted in accordance with Macquarie University Ethics Approval Ref: 5201300386.

[8]During the life of the research project there were three different guides referred to on the website of the local Law Society: New South Wales Attorney General's Department, 'Capacity Toolkit' (2008) <http://www.diversityservices.lawlink.nsw.gov.au/agdbasev7wr/divserv/documents/pdf/capacity_toolkit0609.pdf>; Law Society of New South Wales, 'A Practical Guide for Solicitors: When a Client's Capacity is in Doubt' (Law Society of New South Wales 2009) <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/023880.pdf>; Law Society of New South Wales, *Guidelines For Solicitors Preparing An Enduring Power of Attorney* <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/026516.pdf>; These guides also make reference to the American Bar Association Commission on Law and Aging and American Psychological Association, 'Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers' (2005) and Peter Darzins, William Molloy and David Strang, *Who Can Decide? The Six Step Capacity Assessment Process* (Memory Australia Press 2000); In addition, the author analysed the following national and international guidelines: Allens Linklaters and Queensland Advocacy Incorporated, 'Queensland Handbook for Practitioners on Legal Capacity' (1 July 2014 2014) <http://www.qls.com.au/Knowledge_centre/Ethics/Resources/Client_instructions_and_capacity/Queensland_Handbook_for_Practitioners_on_Legal_Capacity>; Law Institute Victoria, 'LIV Capacity Guidelines & Toolkit: Taking Instructions When A Client's Capacity Is In Doubt' (Law Institute Victoria, October 2016) <https://www.liv.asn.au/PDF/For-Lawyers/Submissions-and-LIV-Projects/2054_LPP_CapacityGuidelines_

the ability to recognise and respond to warning signs of loss of capacity; applying a functional test for capacity;[9] interviewing the client alone; asking open questions to establish the extent of the client's understanding of their instructions; referral for a medical opinion in cases of doubt; providing accommodations to enhance decision-making abilities and keeping detailed file notes of the process followed. Further codes were developed focussing on elements of inherent, situational and pathogenic vulnerability. Of particular significance were allegations of elder abuse[10] and statements and documents that demonstrated family conflict was an important factor in the complaints.[11]

The complaint files highlight the ways that lawyers are failing their clients.[12] Firstly, not all lawyers understand the functional test of capacity or how to apply it. Secondly, lawyers have insufficient understanding of cognitive impairment in older people: how to identify it and its effects. Thirdly, they fail to apply the capacity guidelines developed to protect the rights of clients with diminished capacity. These practices increase the vulnerability of older clients, are a concern worldwide due to the ageing population and need to be addressed by the profession. Failing to address these problems creates a further source of vulnerability.

The article commences by outlining a tri-partite theory of vulnerability through which to examine the legal response to cognitive impairment in the elderly.[13] This theory encompasses inherent, situational and pathogenic vulnerabilities. Applying this theory locates the vulnerability of the older client in their personal experiences, in the response of lawyers to that vulnerability and in the way the profession responds to known deficiencies in the assessment of legal capacity. Part one also provides an outline of the law of capacity and the capacity guidelines that lawyers should apply.

Part two of the article provides a brief outline of four case studies from the complaint files, highlighting the inherent and situational vulnerability of the clients. The case studies provide specific examples of how a lawyer's actions can heighten these vulnerabilities. These case studies were not the most extreme examples of poor capacity assessment, but were chosen as exemplars of the most common failings of lawyers in the study. Lawyers who fail in their assessments of legal capacity expose their clients to the possibility of abuse and increase the likelihood of Guardianship hearings to resolve disputes about their decision-making ability.

FINAL_WEB>; Law Society of South Australia, 'Client Capacity Guidelines South Australia' (2012) <http://www.lawsocietysa.asn.au/PDF/ClientCapacityGuidelines.pdf>; Case law was extensively analysed as part of the coding. See, eg, *Banks v Goodfellow* (1870) LRS, QB 549; *Re Griffith; Easter v Griffith* (1995) 217 ALR; *Pates v Craig and Public Trustee, Estate of Cole* [1995] NSWSC 87; *Zorbas v Sidiropoulous* (No 2) [2009] NSWCA 197; *Szozda v Szozda* [2010] NSWSC 804; *Goddard Elliott v Fritsch* [2012] VSC 87; *Edith White v Judith Liane Wills* [2014] NSWSC 1160.

[9]The functional test is a decision specific test of ability to understand and appreciate a decision, weigh the options and communicate a decision. For a more detailed description of the functional test of capacity in different contexts, see below fn 43 and accompanying text.

[10]There were allegations of elder abuse and/or neglect in 29 of the complaint files. These were identified using descriptors taken from the NSW Government Interagency Working Group, 'Interagency Protocol for Responding to Abuse of Older People' (NSW Government 2007) 6–8; NSW Elder Abuse Helpline and Resource Unit, 'NSW Elder Abuse Toolkit – Identifying and Respnding to the Abuse of Older People: the 5-Step Approach' (NSW Government 2016) Tool 1.

[11]Inter-personal conflict between family members or carers was a feature in 33 of the 35 complaint files. Twenty-one of the complaints files outline significant conflict between the children of the older person.

[12]These complaint files by their nature only represent those cases where a relative or carer is willing to make a complaint on behalf of an older person who does not have legal capacity. The full extent of malpractice in the witnessing of enduring powers of attorney and guardianship and the preparation of wills for people who have, or who lack the capacity to provide instructions is unknown.

[13]Wendy Rogers, Catriona Mackenzie and Susan Dodds, 'Why Bioethics Needs a Concept of Vulnerability' (2012) 5(2) *International Journal of Feminist Approaches to Bioethics* 11.

In part three of the article, the author argues that inherent and situational vulnerabilities are exacerbated through regulatory failings, creating an environment of pathogenic vulnerability. The lack of clear and consistent guidelines and a weak regime of enforcement allows poor capacity assessment processes to flourish. The article concludes with proposals for further research and professional education, arguing that the profession must improve their practices in order to uphold human rights to autonomy and safeguarding for vulnerable older clients.[14]

Part one: vulnerability and legal capacity

Vulnerability theory

Vulnerability theory is an appropriate framework for examining lawyers and legal regulators because it focuses on the intersection of the individual condition and state sponsored responses said to promote justice for all.[15] The vulnerability perspective challenges the profession to think beyond the liberal tradition of the autonomous, rational client,[16] often at the heart of legal ethics and to focus instead on our shared experience of vulnerability. This framework of universal vulnerability acknowledges the reality of our embodiment and is particularly apt for examining responses to those older clients whose lived experience is of cognitive decline in older age,[17] clients at the heart of the Capacity Complaints at the OLSC. Vulnerability theory also challenges the profession because it locates vulnerability in institutional responses, not just individual circumstances.[18]

Vulnerability can be understood in three overlapping ways; inherent, situational and pathogenic, each of which is embodied in the tri-partite theory of vulnerability developed by Rogers, Mackenzie and Dodds.[19] Firstly, vulnerability is inherent. Ageing is a shared inevitability that we will each experience differently. Inherent vulnerabilities describe the differentiated experience of physical and cognitive conditions considered subjectively, sometimes described as 'emic' vulnerability.[20] For instance, a person aged in their 90s, living in an isolated property and with dementia, may be differently inherently vulnerable than a less resilient older person living in the same circumstances.

Physical changes over the life span are inevitable.[21] Changes in cognition will also occur, however not all older people will experience cognitive decline.[22] Our experiences

[14]*Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), Art 12.
[15]Martha Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2009) 20(1) *Yale Journal of Law & Feminism* 1; Nina Kohn, 'Vulnerability Theory and the Role of Government' (2014) 26(1) *Yale Journal of Law & Feminism* 1; Titti Mattson and Mirjam Katzin, 'Vulnerability and Ageing' in Ann Numhauser-Henning (ed), *Elder Law: Evolving European Perspectives* (Edward Elgar 2017) 113.
[16]Stephen Pepper, 'Integrating Morality and Law in Legal Practice: A Reply to Professor Simon' (2010) 23 *Georgetown Journal of Legal Ethics* 1011, 1016.
[17]Martha Fineman, '"Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility' (2013) 20(2) *Elder Law Journal* 71, 110; Margaret Hall, 'Mental Capacity in the (Civil) Law: Capacity, Autonomy, and Vulnerability' (2012) 58(1) *McGill Law Journal* 61.
[18]Fineman, 'Elderly as Vulnerable' (n 17) 109; Kohn (n 15); Rogers, Mackenzie and Dodds, 'Bioethics' (n 13) 25.
[19]Rogers, Mackenzie and Dodds, 'Bioethics' (n 13); Mackenzie, Rogers and Dodds 'Vulnerability' (n 1).
[20]Emic definitions of vulnerability can be contrasted with "etic", or externally evaluated vulnerabilities of the kind usually ascribed to particular population groups. See for instance, Judith Spiers, 'New Perspectives on Vulnerability Using Emic and Etic Approaches' (2000) 31(3) *Journal of Advanced Nursing* 715, 71.
[21]Philip Batterham, Helen Christensen and Andrew Mackinnon, 'Comparison of Age and Time-to-Death in the Dedifferentiation of Late-Life Cognitive Abilities' (2011) 26(4) *Psychology and Aging* 844, 850.
[22]Robert Kane, 'What's so Good About Aging?' (2006) 2(3) *Research in Human Development* 103, 107.

of cognitive and physical changes in old age will vary depending on factors such as health or disability, our own personal resources of resilience and coping, as well as family and social supports.[23] These differences in inherent vulnerability should not be viewed as personal weakness or pathology, but as an embodied expression of the corporeality of the human condition.[24]

Next, a person's vulnerability must be understood in situational terms.[25] Vulnerability has 'circumstance-specific' aspects and can be exacerbated according to the person's social, political, economic and environmental context.[26] An older person with dementia who has children who are in conflict, including over the future division of assets, may be more vulnerable than another person experiencing similar inherent conditions. If that person in a situation of family conflict consults a legal practitioner who does not have the skills or training to identify the client's inherent impairment, they may be further situationally vulnerable.

As Lindsey argues, removing the assumed link between disability and vulnerability can focus attention on legal responses to situational causes.[27] In this research project, the situational context was the desire of older clients with a cognitive impairment to make particular legal decisions usually, though not always in response to family conflict. Most commonly, the client wanted to make or revoke an enduring power of attorney or guardianship appointment or to make a will. Lawyers need to exercise caution in taking these instructions to guard against financial abuse.[28] In this respect, the law responds to vulnerability through enhanced witnessing requirements for the appointment of enduring attorneys,[29] with lawyers amongst a small class of people certified for that task.[30] According to Rogers, Mackenzie and Dodds, when responses aimed at ameliorating our inherent and situational vulnerability fail, then new vulnerabilities described as pathogenic vulnerabilities are created.[31] A failure to properly train or regulate lawyers working with older people with a cognitive impairment creates pathogenic vulnerabilities.

The State responds to the heightened vulnerability of clients with cognitive impairment in part through the development of laws and guidelines including in NSW: witnessing requirements for enduring powers of attorney;[32] capacity assessment guidelines;[33] and

[23]Rogers, Mackenzie and Dodds, 'Bioethics' (n 13) 24; Mattson and Katzin (n 15) 131.
[24]Fineman, 'Elderly As Vulnerable' (n 17).
[25]Rogers, Mackenzie and Dodds, 'Bioethics' (n 13) 24.
[26]Jaime Lindsey, 'Developing Vulnerability: A Situational Response to the Abuse of Women with Mental Disabilities' (2016) 24(3) *Feminist Legal Studies* 295, 296; Rogers, Mackenzie and Dodds, 'Bioethics' (n 13) 24.
[27]Lindsey (n 26) 299.
[28]There are no statistics about how many enduring appointments are made and acted on each year in Australia, however there is the potential that these powers can be abused. See for instance, Jessica Marszalek, 'Shocking Rise in Elder Abuse Cases in Queensland', *Courier Mail* (Brisbane), 7 August 2017, quoting Public Guardian Natalie Siegal-Brown: 'the appointment of an enduring power of attorney was often the start of abuse because the person felt the money was now theirs'. See also, Alzheimer's Australia, *Planning Ahead: Decision Making and the Law* <https://www.fightdementia.org.au/files/helpsheets/Helpsheet-YoungerOnsetDementia02-PlanningAhead-DecisionMakingCapacityAndTheLaw_english.pdf>.
[29]*Powers of Attorney Act 2003 (NSW)* s19 (2).
[30]NSW lawyers are amongst a small class of people (lawyers, registrars of the Court, licensed conveyancers or employees of the NSW Trustee and Guardian) authorised to witness enduring powers of attorney: *Powers of Attorney Act 2003 (NSW)* s19 (2). Lawyers are the only authorised witnesses who do not have to complete specialist training in capacity assessment.
[31]Rogers, Mackenzie and Dodds, 'Bioethics' (n 13) 25.
[32]*Powers of Attorney Act 2003 (NSW)* s19 (2).
[33]New South Wales Department of Justice, 'Capacity Toolkit: Information for Government and Community Workers, Professionals, Families and Carers in New South Wales' (2008) <http://www.justice.nsw.gov.au/diversityservices/Pages/divserv/ds_capacity_tool/ds_capacity_tool.aspx>; Law Society of New South Wales, 'Client Capacity Guidelines: Civil and Family Law Matters' (2003) 41(8) (September) *Law Society Journal* 50;

rules of client competency;[34] all designed to promote client autonomy and to safeguard against abuse.[35] In light of their monopoly over the provision of legal advice and the preparation of advance planning instruments, the legal profession arguably owes a heightened responsibility to train its members for these tasks. However, as this research has demonstrated, many lawyers are either not aware of, or do not understand or apply the capacity assessment guidelines. At the pathogenic level, the way that State based regulators and professional bodies respond to the problems of capacity assessment creates another potential source of vulnerability for clients with a cognitive impairment.

The 'problem' of capacity then lies beyond the circumstances of individual older people with a cognitive impairment and their families, and beyond the ways that individual lawyers may fail to meet their needs. Examined through the tri-partite theoretical lens, institutional responsiveness to the question of legal capacity is a further source of vulnerability.

The law of legal capacity

Before turning to the case studies that outline the inherent vulnerabilities of four typical clients in the research project, it is helpful to understand the legal framework in NSW designed to protect the rights of clients with a cognitive disability.

The right to legal capacity for people with a cognitive impairment is expressed in the *Convention on the Rights of Persons with a Disability (CRPD)*.[36] The Article 12 (2) right to equal recognition before the law, aims to protect individual decision-making freedom.[37] However, recognising that some people may be more susceptible to having their free will overborne, the right to safeguarding enshrined in Article 12 (4) establishes institutional protections for the vulnerable to ensure respect for 'the rights, will and preferences of the person' and to protect against 'undue influence'.[38] The witnessing requirements for appointing an enduring guardian and the laws of testamentary capacity are designed as such safeguards. Lawyers need to ensure that the creation of these instruments

[34]Law Council of Australia, *Australian Solicitors Conduct Rules* (2015) r 8.

[35]Additional measures include the law of undue influence, the creation of criminal offences for certain forms of abuse and equitable remedies for older people who have been victims of financial abuse. A complete discussion of these measures is beyond the scope of the article. See eg, Wendy Lacey, 'Neglectful to the Point of Cruelty? Elder Abuse and the Rights of Older Persons in Australia' (2014) 36(1) *Sydney Law Review* 99; Australian Law Reform Commission, 'Elder Abuse – A National Legal Response' (2017); Susan Barkehall Thomas, 'Parent to Child Transfers: Gift or Resulting Trust? ' (2010) 18(1) *Australian Property Law Journal* 75.

[36]*Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), Art 3, Art 12.

[37]'States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life'.

[38]*Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008). 'States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law … '. Article 12 (3) provides a lynchpin between these two principles by guaranteeing support and accommodations to maximise the decision-making abilities of persons with a disability. A comprehensive discussion of accommodations is beyond the scope of this article. For a discussion of what accommodations might include, see for instance 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; Eilionoir Flynn and Anna Arstein-Kerslake, 'Legislating Personhood: Realising The Right to Support In Exercising Legal Capacity' (2014) 10(1) *International Journal of Law in Context* 81; Eva Ryrstedt, 'Dementia and Autonomy' in Ann Numhauser-Henning (ed), *Elder Law: Evolving European Perspectives* (Edward Elgar 2017) 358, 364.

reflects the will and preference of their client.[39] In the wrong hands, advance planning instruments set up to protect clients, can actually enable abuse because of the access they provide to a person's assets.

Lawyers in Australia facilitate the exercise of legal autonomy and safeguard the most vulnerable through honouring Solicitors' Rule 8 of respect for the 'lawful, competent instructions' of their clients.[40] Where a lawyer ascertains that their client has capacity, then they should honour their instructions. If the client does not have legal capacity, then lawyers should consider alternatives such as delaying acting on instructions until capacity is recovered, seeking a substitute decision-maker, or applying to a Court to make a determination about the next steps.[41] Failure to assess legal capacity can result in disciplinary action or a suit in negligence.[42]

The component parts of capacity at their simplest are the ability to understand, appreciate, weigh and communicate: Understand the decision to be made and the client's own situation; appreciate the options that are available; weigh the alternatives and the present and future consequences of those choices; and communicate that choice.[43]

Capacity is a legal construct that serves the purpose of safeguarding vulnerable clients from making legal decisions that they do not understand and that may not be authentically autonomous.[44] Lawyers assessing the capacity of an older person to make an enduring appointment or to alter a will, may find that the decision is neither initiated or understood by the client (and therefore not self-determined and autonomous)[45] and that it is instead being driven by a third party who seeks to benefit from the decision in some way. Legal capacity assessment can thus address two sides of the Article 12 decision-making protections; autonomy and safeguarding. Seen from this perspective, lawyers should not shy away from the complexities of assessment because the results can be rights affirming no matter the outcome. Lawyers traditionally focus on the autonomy of their clients, reifying autonomous choice-making. From a vulnerability and a rights-based perspective, safeguarding is just as important to the exercise of legal capacity as autonomy is.[46]

[39]In this context, both legal capacity and undue influence are significant concerns, however a complete discussion of undue influence is beyond the scope of the article. See generally, C Peisah et al, 'The Wills of Older People: Risk Factors for Undue Influence' (2009) 21(1) *International Psychogeriatrics* 7; Natalia Wuth, 'Enduring Powers of Attorney; With Limited Remedies It's Time to Face the Facts!' (2013) 7 *Elder Law Review* 1; Cheryl Tilse et al, 'Enduring Powers of Attorney: Promoting Attorneys' Accountability as Substitute Decision Makers' (2014) 33(3) *Australasian Journal on Ageing* 193; General Purpose Standing Committee No. 2, 'Elder Abuse in New South Wales' (Report No. 44, New South Wales Parliament, Legislative Council 2016); Australian Law Reform Commission, above n 35.

[40]Law Council of Australia, *Australian Solicitors' Conduct Rules* (2015).

[41]For a more complete discussion about the alternatives in the Australian context, see for instance: Linda Haller, 'Ethical Issues for Administrative Law Practitioners' (Paper presented at the Civil Justice Conference 2013); Margaret Castles, 'Mind The Gaps: Ethical Representation of Clients with Questionable Legal Capacity' (2015) 18 *Legal Ethics* 24.

[42]*Goddard Elliott v Fritsch* [2012] VSC 87; Law Council of Australia, *Australian Solicitors' Conduct Rules and Commentary* (2011) 7.

[43]*Masterman-Lister v Brutton & Co* [2003] 1 WLR 1511; see also, Peter Margulies, 'Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity: Proceedings of the Conference on Ethical Issues in Representing Older Clients' (1993) 62 *Fordham Law Review* 1073, 1085; Thomas Grisso and Paul Applebaum, *Assessing Competence and Consent to Treatment: A Guide for Physicians and Other Health Professionals* (Oxford University Press 1998); Nick O'Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press 2011) 1.2; New South Wales Attorney General's Department (n 8) 18;

[44]Oliver Lewis, 'Advancing Legal Capacity Jurisprudence' (2011) (6) *European Human Rights Law Review* 700; Hall (n 14) 63; Charles Sabatino and Erica Wood, 'The Conceptualization of Capacity of Older Persons in Western Law' in Israel Doron and Ann Snoden (eds), *Beyond Elder Law: New Directions in Law and Aging* (Springer 2012) 35.

[45]For a discussion of the link between self-determination and capacity see, Ryrstedt above (n 38) 364.

[46]See also *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) Art 16

The functional assessment of legal capacity is decision specific and varies according to the client's circumstances.[47] The complaint files most commonly dealt with decisions to revoke or appoint an enduring guardian and the making of wills.[48] Legal capacity to make or revoke an enduring power of attorney is a more demanding standard than the capacity to make a will.[49] While most people understand the nature and purpose of a will, the extent of their assets and the identity of those who may have a claim against them,[50] enduring instruments delegate a variety of decision-making responsibilities for an unknown future. Capacity to make an enduring appointment requires the principal to understand the lasting and irrevocable nature of the broad powers that they are conferring, especially as these powers can only be invoked when the principal has lost capacity and is thereafter at the mercy of their proxy.[51] The lawyer's role is to ensure that the appointment expresses the autonomous wishes of the older client, rather than being a result of impaired reasoning. Where decisions are made without capacity, any consent to that decision is illusory,[52] and cedes the real decision to the lawyer or to a third party.

A series of capacity guidelines have been published to assist lawyers in the process of capacity assessment.[53] These guidelines provide broadly similar advice about how to take instructions from a person when their capacity is in doubt. The guidelines describe a range of 'warning signs', 'red flags' or 'triggers', to prompt lawyers to interrogate capacity. They describe procedural protections and functional assessment principles including the presumption of capacity, careful questioning of the client alone, open questions to assess understanding of the legal decision, medical assessment for further clarification where necessary and careful documentation of the process.

Put together, the law of legal capacity and the capacity guidelines that provide advice about how to apply the law in accepting instructions, should promote autonomous decision decision-making for elderly clients who have capacity and safeguard those who do not have legal capacity. Unfortunately, as the following cases will demonstrate, the law and guidelines are not universally applied, creating further vulnerabilities.

Part two: case studies

Part two outlines four case studies that are illustrative of the common mistakes in the assessment of legal capacity for older clients. The case studies are briefly described and the vulnerabilities that they expose are then analysed.

[47] *Gibbons v Wright* (1954) 91 CLR 423.

[48] Twenty-two complaints involved a dispute over the instructions for a power of attorney and twenty-three complaints involved a dispute over the instructions for an enduring guardian or enduring power of attorney. Fourteen complaints involved instructions for a will or codicil to a will.

[49] A complete discussion of the various common law tests for capacity is beyond the scope of this article. See especially, O'Neill and Peisah (n 35). For a discussion of capacity to make an enduring appointment as compared to capacity to make a will see: *Adult Guardian (In Re Enduring Power of Attorney of Vera Hagger) v Vera Hagger, Declan James Barry and Albert Craig Ray* (Unreported Supreme Court of Queensland, SC Qld No 1083 of 2001); *Szozda v Szozda* [2010] NSWSC 804; *Legal Profession Complaints Committee and Wells* [2014] WASAT 112.

[50] *Banks v Goodfellow* (1870) LR5 QB, 549.

[51] *Szozda v Szozda* [2010] NSWSC 804.

[52] Frederick Vars, 'Illusory Consent: When An Incapacitated Patient Agrees to Treatment' (2008) 87(2) *Oregon Law Review* 353, 355.

[53] For NSW guidelines and similar guidelines in other jurisdictions see (n 8). See also the revised guidelines now published on the NSW Law Society website: The Law Society of New South Wales, 'When a Client's Mental Capacity Is In Doubt: A Practical Guide for Solicitors' (The Law Society of New South Wales 2016) <http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1191977.pdf>.

Case one

An 88-year-old woman (Client 1) wanted to revoke the enduring guardianship appointment of her niece, blaming her for a placement in a high care, aged care facility. A local charity, unaware that Client 1 already had assistance from her long term lawyer, arranged for another local lawyer (Lawyer 1) to attend on her.[54] Ignoring the advice of staff at the facility to wait for the formal medical assessment of capacity that had been arranged by her usual lawyer, Lawyer 1 administered a Mini Mental State Examination (MMSE), a brief screening test of cognitive impairment.[55] Lawyer 1 accepted the elderly woman's instructions, based on her test score of 25/30 which he described as 'being in the range of mild to questionably significant impairment'.

There was no evidence to demonstrate that the client had the functional capacity to understand the decision that she was making to revoke or make new enduring appointments. The lawyer ignored the 'warning signs' of dementia and residency in a high care nursing home, and instead administered a screening test for cognitive impairment which is not designed to test for legal capacity. Lawyer 1 neither referred his client for a medical opinion of capacity nor waited for the assessment that had already been organised. Concerns expressed to the lawyer by both the complainant and nursing staff that the client did not have legal capacity were ignored. No file notes of the procedure that Lawyer 1 followed to ascertain that the client had capacity were forwarded to the OLSC as requested.

The niece challenged the revocation at the Guardianship Tribunal which held her aunt did not have the capacity to make new appointments and appointed the NSW Trustee and Guardian to manage the woman's estate and some friends of the older woman to make accommodation, health and dental decisions on her behalf. The niece also made a complaint to the OLSC, explaining that Lawyer 1 had charged her aunt over $4000 in the process of preparing new enduring documents. The complaint was dismissed and none of the legal fees were refunded.

Case two

A 92-year-old man (Client 2) with Alzheimer's disease had lived for more than four decades with a family whom he had made the beneficiaries of his multi-million-dollar estate. Client 2 had been living at home with assistance until an admission to hospital to investigate internal bleeding precipitated a period of delirium. Hospital staff recommended an application for Guardianship, having assessed that Client 2 lacked capacity to consent to medical treatment. The hospital arranged to discharge Client 2 to a high care aged-care facility.

In the delusional belief that the family had orchestrated the nursing home placement to take premature control of his assets, Client 2 was then encouraged by some friends to disinherit the family and appoint themselves as his enduring attorneys. The older man

[54]Lawyer 1 was a sole practitioner from a rural area in New South Wales. 34% of the lawyers in the complaints were from rural areas, although they make up only 12.8% of the profession (Urbis, '2014 Law Society National Profile' (Law Society of New South Wales 2015)) The OLSC does not provide geographical statistics so it is not known if this is typical.

[55]Marshal Folstein, Susan Folstein and Paul McHugh, '"Mini Mental State" A Practical Method for Grading the Cognitive State of Patients for the Clinician' (1975) 12(3) *Journal of Psychiatric Research* 189.

was taken to see the friends' own lawyer (Lawyer 2),[56] a person he had never met before.[57] Despite being given the hospital discharge notes that documented the client's advanced Alzheimer's disease, the lawyer drew up a new will and enduring appointments without any further medical evidence about Client 2's capacity, only referring him for an assessment following notice of an urgent application for Guardianship made by the family. Lawyer 2 charged $5000 in legal fees for preparing the will and enduring documents and for the Tribunal hearing.

In the course of taking instructions Lawyer 2 made extensive notes about Client 2's wartime service in the 1940s. Lawyer 2 also administered an Activities of Daily Living questionnaire (ADL),[58] recording Client 2's positive answers to a series of questions about skills unrelated to legal capacity including his ability to cook, toilet, shower and clothe himself. No notes were provided to the OLSC that recorded Client 2's understanding of the decisions to make enduring appointments.

At the Guardianship Tribunal hearing held three weeks after the initial instructions, the Tribunal heard evidence that Client 2 had symptoms of advanced dementia and was unaware of his own incontinence and disabilities, factors that should have served as warning signs of his extensive cognitive impairment. The Tribunal found he was unable to provide instructions and did not have capacity to make or revoke enduring appointments. Client 2 could not recall attending a lawyer's office and did not know or recognise his lawyer's name. An order was made entrusting his estate to the Public Trustee, with the Public Guardian assuming responsibility for Client 2's health and accommodation decisions.

The family made a complaint to the OLSC about the way in which Lawyer 2 had failed to properly apply the NSW Capacity Guidelines. The complaint was dismissed and no order was made to refund the legal fees.

Case three

(Lawyer 3) was asked to visit a 92-year-old man at an aged care facility (Client 3), to take instructions for a codicil to a will. Two grand-daughters (aged 16 and 18) who were beneficiaries of his estate were in attendance at the interview and assisted their grandfather in giving details about his assets. During the appointment, a nursing sister advised the lawyer that Client 3 was 'not competent' and 'required a mental capacity assessment'. Staff at the nursing home also refused to witness Client 3's signature on the codicil.

Following a complaint to the OLSC by the older man's son, Lawyer 3 advised the OLSC that a number of factors led him to ignore the nursing home staff's warning, including that

[56]Lawyer 2 was the Principal solicitor in a small suburban firm. All of the lawyers in the study were from small or sole firms which is consistent with previous research noting that lawyers in small firms are over represented in complaints. See for instance Linda Haller, 'Restorative Lawyer Discipline in Australia Symposium: Restorative Justice and Attorney Discipline' (2012) 12 *Nevada Law Journal* 316, 321; Alice Woolley, 'Regulation in Practice: The "Ethical Economy" of Lawyer Regulation in Canada and a Case Study in Lawyer Deviance' (2015) 15(2) *Legal Ethics* 243, 245; Christine Parker, Tahlia Gordon and Steve Mark, 'Regulating Law Firm Ethics Mnagement: An Empirical Assessment of an Innovation in Regulation of the Legal Profession in New South Wales' (2010) 37(3) *Journal of Law and Society* 466, 481; Lynn Mather, 'How and Why Do Lawyers Misbehave? Lawyers, Discipline and Collegial Control' in Scott Cummings (ed), *The Paradox of Professionalism: Lawyers and the Possibility of Justice* (Cambridge University Press 2011) 109, 111.

[57]Justice Santow cautioned against lawyers taking instructions in this kind of situation. See *Pates v Craig and Public Trustee, Estate of Cole* [1995] NSWSC 87 [142]–[148].

[58]Michelle Mlinac and Michelle Feng, 'Assessment of Activities of Daily Living, Self-Care, and Indepenence' (2016) 31(6) *Archives of Clinical Neuropsychology* 506.

Client 3 'seemed lucid and surprisingly fit' and 'was dressed in street clothes, not pyjamas and was not disheveled in any way'. Lawyer 3 also recounted a conversation with his client about his life and military service during the 1930s. The lawyer further justified his actions arguing: 'The expression of a view by a nurse that a patient will "require mental capacity assessment" is not "advice" that the patient lacks capacity … I did not receive "advice" that he lacked capacity. "Advice" assumes that the giver of it is qualified to express a view'.

The complaint was dismissed.

Case four

A 78-year-old man (Client 4), went to (Lawyer 4) accompanied by his daughter to revoke a power of attorney and enduring guardianship previously granted to his estranged wife and to arrange for the sale of his home. Satisfied that the client had legal capacity for the decisions, Lawyer 4 accepted these instructions. Soon after Client 4 left the office, Lawyer 4 received a phone call from the client's estranged wife to warn that her husband was experiencing a Parkinson's related psychosis that included delusions that she was having an affair. Without consulting the client, Lawyer 4 called the client's former treating doctor who advised that he could not breach client confidentiality but that Client 4 'could not be regarded as having capacity to make important decisions due to his psychiatric state'.

With no further inquiries into his legal capacity, Lawyer 4 wrote to the daughter to ask for the return of the documents that had been prepared, arguing that information received from the wife and treating doctor meant that the documents were void.

The daughter subsequently wrote to Lawyer 4 enclosing a formal capacity assessment for her father that concluded that he was 'medically competent'. The assessor reported that:

> (Client 4) has a history of a psychotic illness which was secondary to a Parkinson's disease treatment given last year. This was recognised, the medication withdrawn and the psychosis resolved. He has not had recurrence of psychotic illness. He has no past history known of psychotic or other psychiatric illness.

Despite receiving a contemporaneous expert capacity assessment, Lawyer 4 refused to reassess Client 4's capacity and would not act on the property conveyancing, refusing to accept the client's signature on a contract of sale. Lawyer 4 was accused of a further breach of the client's confidentiality through informing the real estate agent that Client 4 did not have legal capacity. Client 4 was put to the expense of instructing a new solicitor and obtaining a specialist capacity assessment to effect the sale.

The daughter complained to the OLSC that Lawyer 4 refused to act on her father's instructions despite having no concerns about his capacity at the time of the interview and also that the lawyer had breached the duty owed to her father by seeking and releasing confidential information without his permission. The daughter requested a refund of the legal fees and compensation for the costs of having to attend a second solicitor. The OLSC dismissed the complaint and no legal fees were refunded.

Inherent and situational vulnerability

In each of the case studies outlined, the lawyer was faced with questions about the client's legal capacity for a particular decision. Each of the clients was inherently vulnerable by

virtue of their advanced age and current or prior cognitive impairment. Each client was situationally vulnerable due to a conflict within their inner circle of supports that caused the client to make particular legal decisions to appoint or revoke an enduring guardian and to make changes to their wills. The response of lawyers in these situations is vital. In order to protect their client's autonomy and safeguard them from abuse, they had a responsibility to apply the law and the capacity guidelines. As will be discussed in the following section, this did not occur, exacerbating their client's vulnerability.

Inherent vulnerability: cognitive impairment in older clients

The first step in responding to the vulnerable older client is to recognise their inherent vulnerabilities. It is also the first step in applying the capacity guidelines, as impairment serves as a warning sign or red flag triggering the application of careful interview techniques.[59] Only a minority of older people will experience a cognitive impairment, but in the very old, around one third of the population will receive a diagnosis.[60]

In the case studies, the warning signs of impairment included hospital admissions, residency in high care aged care facilities and formal diagnoses. In the first three case studies, the older client was accommodated in a high-care nursing home. This fact alone should have served as a warning sign, as the prevalence of dementia is much higher in the aged care sector than in the general community.[61] Rates are also highest in the 'very old' age bracket of Client 1, Client 2 and Client 3.[62] In cases one, two and three, the clients had a formal diagnosis of dementia.[63]

Situational vulnerability – the lawyers' approach to capacity assessment

These inherently vulnerable clients were then faced with the specific context of needing to make particular legal decisions and of requesting the assistance of lawyers who were not well trained for the task and who did not apply the available capacity guidelines. This creates a further situational vulnerability.

The first element of applying the guidelines involves recognising the possibility that the client may have a cognitive impairment. Twenty-two complainants indicated to the OSLC that the elderly client had a diagnosis of dementia at the time they consulted a lawyer. An understanding of the nature and effects of dementia would have assisted these lawyers in this assessment and in assessing the clients' levels of understanding. In dementia,

[59]New South Wales Attorney General's Department (n 8) 50.

[60]In the general population, 1 in 10 people over the age of 65 has dementia, rising to 1 in 3 in the over 85 population: Australian Institute of Health and Welfare, *Dementia* <http://www.aihw.gov.au/dementia/>.

[61]43% of people aged 65–74, and 52% of people aged 85 and over in permanent residential aged care at 30 June 2014 had dementia: Australian Institute of Health and Welfare, 'Care Needs in Residential Aged Care' (2017) <http://www.aihw.gov.au/aged-care/residential-and-home-care-2013-14/care-needs/>.

[62]For the purposes of this research, older people are defined as those aged over 65 and 'very old' as those aged 85 years and over, consistent with Australian health statistics. For further demographics related to Australia's ageing population see: Australian Institute of Health and Welfare, *Growing Older* Australian Government <http://www.aihw.gov.au/australias-welfare/2015/growing-older/>. Of the 35 complaints that form part of this study, 15 of the clients were very old (aged 85 – 97), from a total of 33 older clients. Only 2 complaints involved a person under the age of 65.

[63]Dementia is an umbrella term to describe a variety of neurodegenerative and ultimately fatal diseases. Dementia is the leading cause of disability in people aged 65 and over: see for instance Alzheimer's Australia, *Statistics, Summary of Dementia Statistics in Australia* <http://www.fightdementia.org.au/understanding-dementia/statistics.aspx>; Deloitte Access Economics, 'Dementia Across Australia 2011–2050' (2011).

knowledge gained in early life is sometimes the last to be lost. For instance, in Alzheimer's disease, social graces might be retained until the late stages of the disease,[64] long after higher order thinking has gone. It is for this reason that Client 1's psychogeriatrician felt that Lawyer 1 may not have realised the extent of Client 1's impairment, writing: 'I suspect (Lawyer 1) does not realise just how impaired (Client 1) is. She can certainly present well and certainly forcefully'.

A person with dementia may have good long term memory, but impaired short term and/or working memory. Working memory refers to the ability to retain information in the short term in order to manipulate the information and use reasoning.[65] It is therefore a key component of legal capacity required for weighing and choosing options. Client 2 and Client 3 were both able to hold conversations about their experiences in the war. It is likely that these personal histories were well rehearsed long term memories, for instance, nursing staff had noted that wartime was a favourite topic for Client 2. Despite good long term memory, Client 2 lacked insight into his current situation.

Self-reported ability of skills is not evidence of capacity. Not only may older people with dementia lack awareness of the skills they have lost, physical skills are also unrelated to legal capacity. Client 1 reported the ability to care for herself at home when the evidence was that she was malnourished and had serious untreated health problems. Client 2 did not know that he was doubly incontinent and reported to his lawyer that he had good toileting skills. Client 3 retained social graces and could recall his wartime service, but as Lawyer 3 acknowledged to the OLSC, details about his property investments were provided by the grand-daughter. Client 3 also seemed to have forgotten the grandson who was not in attendance when he modified his will.

In some dementias, a person may become suspicious or paranoid of people they once trusted.[66] Client 1 and Client 2 both had strong animosity toward people that they had previously appointed as enduring guardians. Lawyer 1 should have further explored Client 1's thoughts and feelings related to her spurned niece. Ideally he needed to establish the basis of Client 1's suspicions which appeared to be grounded in her dementia symptoms. When questioned by a psychogeriatrician as part of a formal medical assessment of capacity, Client 1 said she believed her niece was sleeping in her home, eating her food and then slipping out of the house unseen and that the nursing home staff were hiding possessions such as a shower cap in order to steal them. Client 2 told his lawyer that he wanted to disinherit his family because he believed they were responsible for his nursing home placement. The information on his file established that the family were actually overseas at the time and played no role in the placement. When questioned about his living arrangements by a psychogeriatrician, Client 2 responded that he had been at the nursing home for around two years, when it had actually been less than three months.

Levels of impairment may not always be obvious, and highly educated people may find it easier to mask their symptoms through the ability to retain social conventions and patterns of conversation. For instance, Lawyer 3 reported that Client 3 was:

[64]Robert Levenson, Virginia Sturm and Claudia Haase, 'Emotional and Behavioural Symptoms in Neurodegenerative Disease: A Model for Studying the Neural Bases of Psychopathology' (2014) 10 *Annual Review of Clinical Psychology* 581, 588.
[65]Alzheimer's Disease Education and Referral Center, *Findings From Memory Research Continue to Fascinate* <https://www.nia.nih.gov/alzheimers/features/findings-memory-research-continue-fascinate>.
[66]Levenson, Sturm and Haase (n 64) 590.

> … socially well adjusted, fetching a chair for me from an adjoining room which he would have carried into his room had I not intervened. This means, of course, that he recalled the location of this spare chair, and that he felt under a social obligation to give me somewhere to sit.

Dementia symptoms may fluctuate. Psychosis or delirium may be brought about by a change in medication or an elevated temperature caused by an infection. Once the cause of the psychosis is identified and treated, it may resolve. In case four, Lawyer 4 accepted instructions on the basis that Client 4 demonstrated an understanding of the revocations he wanted to make. Despite this, Lawyer 4 was quick to ask for the return of the documents once told of Client 4's previous diagnosis of psychosis. Lawyer 4 did not consider the possibility that the psychosis may have been successfully treated as subsequently determined by a formal capacity assessment, thus denying the client's decision-making rights. This global assumption of incapacity is contrary to the functional test that should have been applied. A diagnosis is no more proof of incapacity than 'normal' conversations are of capacity. Open questions are required to establish whether or not a client has the capacity to provide instructions.

Open questions

Even in the face of a lack of understanding of dementia, if the lawyers had applied the capacity guidelines and asked open questions about their clients' understanding of the specific legal decision that they wanted to make, then the outcome may have been different. Only open questions can test for understanding,[67] especially in situations where gratuitous concurrence might be in play, in which a person with a cognitive impairment may have learnt to mask their symptoms by feigning understanding and preferring agreement as the path of least resistance.[68]

In cases one and two, the files recorded that the clients' responses to open questions asked as part of the expert medical assessments were confused and disorganised. The procedures of the medical assessors stood in stark contrast to the questioning techniques of the lawyers involved and provided cogent evidence of the need for inter-disciplinary cooperation in these situations.[69]

Interview alone

Capacity Guidelines warn lawyers to take care to interview clients alone,[70] particularly if the appointment is arranged by a beneficiary, as it was in cases two and three. This is one way to guard against undue influence,[71] and is especially important for clients with a

[67]New South Wales Attorney General's Department (n 8) 68; *Legal Services Commissioner v Ho* [2017] QCAT 95.
[68]Seniors Rights Victoria, 'Assets For Care: A Guide for Lawyers to Assist Older Clients at Risk of Financial Abuse' (Council of the Ageing (Vic) 2012) <http://www.eapu.com.au/uploads/EAPU_general_resources/VIC-Assets_for_Care_2012-SRV.pdf> 16; Also referred to as the "Noddy syndrome" in *Nicholson v Knaggs* [2009] VSC 64 [679 -682].
[69]Marshall Kapp, 'Older Persons and Compromised Decisional Capacity: The Role of Public Policy in Defining and Developing Core Professional Competencies' (2014) 26(4) *Journal of Aging & Social Policy* 295; Castles (n 41).
[70]New South Wales Attorney General's Department (n 8) 70; *Legal Services Commissioner v Ho* [2017] QCAT 95; *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007 [107].
[71]New South Wales Attorney General's Department (n 8) 70; *Legal Services Commissioner v de Brenni* [2011] QCAT 340 [4]; *Legal Profession Complaints Committee and Wells* [2014] WASAT 112 [17]; *Legal Services Commissioner v Given* [2015] QCAT 225 [99]; *Legal Services Commissioner v Comino* [2011] QCAT 387.

cognitive impairment who may be dependent on others and particularly susceptible to suggestions and influence.[72] The presence of others also increases the difficulty of accurately assessing the client's true capacity, especially where third parties are 'filling in the gaps' of the client's memory, as was the case for Client 3. Lawyer 3 admitted to the OLSC that the client interview took place with the grand-daughters in the room and that some of the instructions were provided by them.

Note-taking

The requirement to keep notes of the client interview procedures is a further protection for vulnerable clients in the event of a challenge to their decision-making and is mandated in the common law and in the capacity guidelines.[73] None of the lawyers in these case studies were able to provide notes recording open questions and responses relevant to the legal decision to be made. Lawyer 2 kept detailed notes of Client 2's recollections from the 1930s and 1940s, but no records of their understanding of the purpose of an enduring power of attorney. It was not uncommon in the complaint files for the lawyers to have no file notes at all. Only 15 of the 36 lawyers furnished file notes to the OLSC and of these, only seven provided file notes related to a functional assessment of capacity.[74]

Medical opinion

In situations where the lawyer may have doubts about a person's capacity, or where it is suspected that there may be a challenge to capacity at a later date, lawyers are advised to refer their clients for a medical assessment of capacity.[75] None of the lawyers in these case studies made a referral for a capacity assessment prior to accepting instructions.[76]

Lawyer 1 was informed that a formal medical assessment of the client's capacity was pending, yet took instructions anyway and continued to charge the client for his time. Subsequently a psychogeriatrician reported that Client 1 confused a power of attorney with an executor for a will. Lawyer 2 anticipated a challenge to any documents that he prepared, yet failed to refer his client for a medical assessment of capacity until he was given notice of the Guardianship hearing. The medical evidence of his client's lack of capacity was quite overwhelming and the Tribunal found that his client did not have the capacity to instruct a lawyer at the hearing. Lawyer 3 was specifically advised that Client 3 had a cognitive impairment and lacked capacity and nursing staff subsequently refused to sign the codicil as witnesses, confirming their concerns about the instructions. Lawyer 4 might have referred the client for an assessment as a response to the challenge to capacity

[72]Fiona Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28(1) *University of New South Wales Law Journal* 145; C. Peisah, H. Brodaty and C. Quadrio, 'Family Conflict in Dementia: Prodigal Sons and Black Sheep' (2006) 21(5) *International Journal of Geriatric Psychiatry* 485; *Legal Services Commissioner v Ho* – [2017] QCAT 95.

[73]New South Wales Attorney General's Department (n 8) 29; *Legal Services Commissioner v Ho* [2017] QCAT 95;

[74]In a recent Supreme Court decision, Kunc J emphasised the importance of detailed file notes in particular in testamentary cases where capacity is in doubt: *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007 [107–108].

[75]New South Wales Attorney General's Department (n 8) 56; *Nicholson v Knaggs* [2009] VSC 64 [39]; *Legal Services Commissioner v Ho* [2017] QCAT 95.

[76]Although twenty-four of the lawyers in the study were on notice that their client may have impaired capacity, only six lawyers made a referral for a further medical opinion and only one lawyer referred their client to a practitioner who specialised in capacity assessment.

rather than withdrawing all support for the client and demanding the return of documents. The subsequent assessment suggests that a report would have vindicated Lawyer 4's decision to accept instructions.

Not only did Lawyer 1 refuse to wait for the results of a pending capacity assessment, he substituted his own testing regime in the form of administering the MMSE – a diagnostic tool he was not qualified to administer and which does not test for legal capacity.[77] Similarly, Lawyer 2 did not request any of the available medical reports, he instead improperly administered the Activities of Daily Living assessment that he downloaded via a Google search, relying on Client 2's impaired self-reporting of ability.

Impact of the failure to follow guidelines

When lawyers fail to apply the law and capacity guidelines established to protect vulnerable clients, then they can expose their clients to further risks, particularly the risk of abuse. For older clients appointing an enduring power of attorney, the most concerning risk is that of financial abuse.[78] Concerned about the motives of the new enduring guardians, the complainants in cases one and two successfully challenged the new appointments in the Guardianship Tribunal. In the interim, the attorneys had complete access to the finances of the older person and the power to make important decisions about their accommodation and health care. In both cases the new appointments were overturned and the NSW Trustee and Guardian was appointed to manage the older person's estate.

The codicil prepared by Lawyer 3 was likely ineffectual but the dispute over its preparation heightened existing family conflicts, while the fate of a new will prepared by Lawyer 2 is not known. Lawyers who comply with guidelines in preparing a will for a person whose capacity may be questioned are more likely to be able to protect their clients' decisions from future legal challenge. There is an increase in probate cases driven in part by the ageing population,[79] but also some suggest because of the oversupply of lawyers and drying up of work in other areas.[80] Undue influence is notoriously difficult to prove,[81] so a lawyer seeking to protect the testamentary dispositions of their clients should be aware of the possibility of a challenge to capacity as an easier way to challenge the validity of a will.[82]

The sale of Client 4's home was delayed and he was put to additional expense instructing a new lawyer and obtaining further evidence of his capacity.[83] All of the clients paid legal fees that were not refunded. In other complaints not reported here there were express allegations of the theft of assets by newly appointed attorneys and reports of wills that overturned testamentary promises of long-standing.

[77]The MMSE has been subject to a variety of criticisms, including that it is particularly unsuited to detecting impairments from frontotemporal dementia. See for instance Emma Devenney and John Hodges, 'The Mini-Mental State Examination: Pitfalls and Limitations' (2017) 17 *Practical Neurology* 79; see also Sabatino and Wood (n 36) 41.
[78]Australian Law Reform Commission (n 35) Chapter 5.
[79]Burns (n 72) 145.
[80]See for instance Auckland District Law Society, *Lawnews*, "Risk Management for Lawyers, International Trends to Watch For", (15 July 2016) http://www.adls.org.nz/for-the-profession/news-and-opinion/2016/7/15/risk-management-for-lawyers-%E2%80%93-international-trends-to-watch-for/.
[81]Burns (n 72) 149; Peisah et al (n 72) 8. *Revie v Druitt* [2005] NSWSC 902 [54].
[82]*Legal Services Commissioner v Ho* [2017] QCAT 95
[83]In other complaints there were reports that enduring guardians appointed by older people who lacked capacity were stealing money from the older person or refusing to pay for required medical care and specialist services.

Part three: pathogenic vulnerability – the role of the profession and regulators

Pathogenic vulnerability

Pathogenic vulnerabilities arise when laws and policies put in place in response to the inherent and situational vulnerabilities of a population are not well applied and increase, rather than ameliorate vulnerability.[84] The current witnessing requirements for an enduring power of attorney are meant to protect older people with a cognitive impairment through prescribing a limited class of persons authorised to oversee their preparation.[85] Similarly, testamentary capacity laws should ensure that wills that are prepared with the assistance of a lawyer are made by those with legal capacity. The public rely on the skill of these witnesses and pay substantial fees for lawyers assuming they have expertise in the area. As this project demonstrates, some lawyers are not properly trained for this task, creating pathogenic vulnerability for these clients. The following section outlines deficiencies in training and regulation that contribute to pathogenic vulnerabilities and suggests ways that these might be improved.

Need for clear national guidelines

During the years of the research project, there were no fewer than three sets of capacity guidelines referenced on the website of the NSW Law Society,[86] in addition there were separate guidelines in Queensland, South Australia, and Victoria. Current guidelines are inconsistent,[87] and include different levels of detail about how to conduct an interview; differences in proposed qualifications of a medical practitioner providing a second opinion of capacity for older clients; the significance of old age to the questions of capacity; whether or not note-taking is mandatory when capacity is in doubt; how to manage potential undue influence; and different levels of detail about how to provide the necessary accommodations for an older person with a cognitive impairment.

The first proposal for curing deficiencies in professional competence is the establishment of clear, national guidelines for assessment of legal capacity as recently proposed by the Australian Law Reform Commission.[88] If the Law Council follows through on Recommendation 8–1, then there is the potential to remedy any deficiencies and inconsistencies between the existing State-based guidelines. Experts in professional regulation have also noted that compliance with professional pronouncements may be a defence to charges of misconduct,[89] further reinforcing the need for the regulators to take the lead in publicising and enforcing capacity guidelines. This task would be simplified if the guidelines were consistent.

Professional regulation

Despite problems with the way that lawyers in this research period assessed their client's capacity for legal decisions, no public disciplinary action was taken in relation to capacity

[84]Rogers, Mackenzie and Dodds, 'Bioethics' (n 13) 24.
[85]Only lawyers, registrars of the Court, or licensed conveyancers or employees of the NSW Trustee and Guardian who have completed an approved course, are "prescribed witnesses": *Powers of Attorney Act 2003 (NSW)* s19 (2).
[86]See above (n 8).
[87]Australian Law Reform Commission (n 35) Recommendation 8–1. See also Castles (n 41) 25.
[88]Australian Law Reform Commission (n 35) Recommendation 8–1.
[89]Gino Dal Pont, *Lawyers' Professional Responsibility* (6th edn, Lawbook Co 2017) 696.

assessments. Lack of regulatory action for failure to follow the capacity guidelines is a source of pathogenic vulnerability of clients because it signals to the profession and to the community that this issue is not sufficiently serious to warrant action. It is also a lost opportunity to educate the profession about the need to follow established capacity guidelines.

In Australia, the common law related to a professional requirement to abide by capacity guidelines is not well developed, though the Court in Queensland has held that adherence to capacity guidelines is an essential element of satisfactory professional conduct,[90] in one case holding 'the guidelines are not optional or recommended they are required to be used by a legal practitioner … '[91] Courts have also made disciplinary findings where lawyers have not made further inquiries about capacity for an older person with a known impairment.[92] The standard of competence is the same for lawyers in Queensland as it is in NSW, yet while there have been six prosecutions in Queensland and prosecutions in Victoria and Western Australia for a failure to properly assess legal capacity,[93] in NSW, no lawyer has been successfully prosecuted in a capacity case,[94] although over 40% of all Australian solicitors practice in the State.[95]

The High Court has held that 'Evidence of a particular practice or standard of conduct, whether laid down by a professional body or sanctioned by common usage, may be relevant to establishing a standard of care in a case of professional negligence … '[96] The dominant purpose of professional regulation is the protection of the public.[97] The profession owes a particular duty to protect the most vulnerable clients, in 'recognition of the social value in the availability of the services provided to the public, combined with an understanding of the vulnerability of many who require such services'.[98] The purpose of guidelines and the need to enforce them should be considered in that context.

[90] *Legal Services Commissioner v Ho* – [2017] QCAT 95; *Legal Services Commissioner v Penny* [2015] QCAT 108; *Legal Services Commissioner v Given* [2015] QCAT 225; *NX* [2015] QCAT 534; *Legal Services Commissioner v Comino* [2011] QCAT 387; *Legal Services Commissioner v de Brenni* [2011] QCAT 340; *Legal Services Commissioner v Ford* [2008] LPT 12.

[91] *NX* [2015] QCAT 534 [32]; see also *Legal Services Commissioner v Ho* – [2017] QCAT 95; *Legal Services Commissioner v Given* [2015] QCAT 225.

[92] *Legal Services Commissioner v McNamara* (Legal Practice) [2011] VCAT 1228.

[93] *Legal Services Commissioner v Ho* – [2017] QCAT 95; *Legal Services Commissioner v Penny* [2015] QCAT 108; *Legal Services Commissioner v Given* [2015] QCAT 225; *NX* [2015] QCAT 534; *Legal Profession Complaints Committee and Wells* [2014] WASAT 112 [17]; *Legal Services Commissioner v Comino* [2011] QCAT 387; *Legal Services Commissioner v de Brenni* [2011] QCAT 340; *Legal Services Commissioner v McNamara* (Legal Practice) [2011] VCAT 1228; *Legal Services Commissioner v Ford* [2008] LPT 12;

[94] A recent case in the NSW Civil and Administrative Tribunal (*NDM* [2016] NSWCATGD 40) resulted in a lawyer being referred to the OLSC by the Court for the manner in which they prepared an Enduring Power of Attorney. An email obtained by the Tribunal suggested that the lawyer (Mr Z) prepared and witnessed an enduring appointment for NDM on the instructions of Mr SYM (son of NDM). When Mr Z subsequently discovered that there was a family dispute over those instructions he apparently destroyed those documents. "Not only is this email concerning in that it is an acknowledgment by an Officer of the Court that he has destroyed a power of attorney, prepared for a client and which he certified the client appeared to understand, but it also confirms that Mr Z was acting on the instructions of Mr SYM, rather than Mrs NDM, who was the donor of the power" [30]. At the time of writing, there have been no further published findings in relation to this referral.

[95] Urbis (n 54) 2.

[96] Willmott and Shoebridge (n 4) 72.

[97] *Southern Law Society v Westbrook* (1910) 10 CLR 609; *NSW Bar Association v Evatt* (1968) 117 CLR 177.

[98] *New South Wales Bar Association v Meakes* [2006] NSWCA 340 [114].

Training

As this research has demonstrated, the existence of guidelines alone is insufficient because lawyers remain confused about how to assess legal capacity.[99] Capacity complaints continue to rise,[100] so consideration should be given to implementing specialist training and accreditation for practitioners, as has occurred in other jurisdictions and in the field of Elder Mediation.[101] Accredited wills and estate specialists are required to possess knowledge and skills in assessing capacity,[102] however any generalist lawyer can currently witness an enduring guardianship appointment.[103] This situation should be remedied. Consistent with the recent recommendation of the Australian Law Reform Commission, eligible witnesses to enduring documents should include at least one professional who has completed specialist training in preparing and witnessing these instruments and in the assessment of legal capacity.[104]

To address some of the deficiencies identified by this research and specialists in working with older clients, legal training should include education about age-related conditions and cognitive impairments, client interviewing techniques, and training in interdisciplinary co-operation with medical professionals.[105] Training can begin at University level. In a general sense, clinical legal education can be improved to provide skills for working with diverse clients including older clients. Specialist units could also address the skills deficit. The Elder Law field in Australia is not well developed, and there are few specialist Elder Law courses available in undergraduate law programmes.[106] Elder law education could be reinforced in Continuing Professional Development units. Improvements in legal education would also serve to cement the required standard of competence for lawyers working with clients who may have a cognitive impairment and signal to the community that the profession takes their responsibilities to these clients seriously.

[99]Cheryl Tilse et al, 'Legal Practitioners and Older Clients: Challenges and Opportunities for Effective Practice' (2002) 1 *Elder Law Review* 34; Helmes, Lewis and Allan (n 4); Willmott and Shoebridge (n 4);Willmott and White (n 4); Kelly Purser and Tuly Rosenfeld, 'Assessing Testamentary and Decision-Making Capacity: Approaches and Models' (2015) 23(1) *Journal of Law and Medicine* 121.

[100]Office of the Legal Services Commissioner, '2014–2015 Annual Report' (2015) <http://www.olsc.nsw.gov.au/Documents/Annual%20Report%202014%202015.pdf>, 10.

[101]National Elder Law Foundation, <http://www.nelf.org/>; Elder Mediation International Network, 'Elder Mediation Certification' (2008) <http://www.eldermediation.ca/page6/page6.html>; Lise Barry, 'Elder Mediation' (2013) 24 *Australasian Dispute Resolution Journal* 251.

[102]Law Society of New South Wales, 'Specialist Accreditation: 2017 Wills & Estates' (2017) <https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/919489.pdf> 2.3.

[103]Only an Australian legal practitioner, Registrar of the Local Court, overseas legal practitioner, or approved officer from NSW Trustee & Guardian or Public Guardian may witness an enduring appointment.

[104]The Australian Law Reform Commission (n 35) 5.44. The Productivity Commission has suggested that elder care law could be opened up to the non-legal sector through issuing limited licenses in this practice area: Productivity Commission, 'Access to Justice Arrangements' (Commonwealth of Australia 2014) 48.

[105]Winsor Schmidt, 'Accountability of Lawyers in Serving Vulnerable, Elderly Clients' (1993) 5(3) *Journal of Elder Abuse & Neglect* 39, 45; Marshall Kapp, 'Older Clients With Questionable Legal Competence: Elder Law Practitioners and Treating Physicians' (2011) 37 (1) *William Mitchell Law Review* 99; Kapp, 'Older Persons and Decisional Capacity' (n 61)298; Nina Kohn and Edward Spurgeon, 'A Call to Expand Elder Law Education' (2014) 35(5) *BiFocal* 123. Tacara Soones et al, '"My Older Clients Fall Through Every Crack in the System": Geriatrics Knowledge of Legal Professionals' (2014) 62(4) *Journal of the American Geriatrics Society* 734; Nola Ries, 'Lawyers and Advance Care and End-of-life Planning: Enhancing Collaboration Between Legal and Health Professions' (2016) 23(4) *Journal of Law and Medicine* 887.

[106]Elder Law can be studied as a specialist unit at Western Sydney University and the University of Sunshine Coast. Elder Law also features in the Continuing Professional Development Courses offered throughout Australia.

Conclusion

The legal profession has been slow to respond to the needs of the ageing population. As this research project has established and recent inquiries into elder abuse have demonstrated, when lawyers ignore the capacity guidelines in the preparation of wills and enduring documents for people with a cognitive impairment, great harm can ensue. If the profession wants to maintain its role as one of the few authorised witnesses of enduring documents, then it should ensure that its members are competent to provide this service by developing definitive guidelines that are well publicised and enforceable and then training the profession in their use. There is also a demonstrated need for lawyers who witness these documents and who prepare wills, to have some training in the causes and symptoms of cognitive impairment in older clients. Continued failure to address these causes of elder abuse will heighten the vulnerability of older clients with a cognitive impairment and runs the risk of eroding faith in the profession.

Vulnerability theory provides a clear lens through which to examine the legal response to clients with a cognitive impairment. When we accept the inevitability of the vulnerable self we must respond at the personal, professional and institutional level because vulnerability cannot be cured, only ameliorated. The law already provides a buffer in the form of legal capacity law and guidelines. It is time now for legal educators, regulators and professional associations to accept responsibility for how the law is applied. Only in this way can we begin to uphold the rights of older people to exercise their rights to legal decision-making and safeguard them from abuse.

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No potential conflict of interest was reported by the author.

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Chapter 8 Elder Mediation

8.1: Paper 7, 'Elder Mediation' (2013) 24 *Australasian Dispute Resolution Journal*, 251.

Pages 164-171 of this thesis have been removed as they contain published material. Please refer to the following citation for details of the article contained in these pages.

Barry, L. (2013). Elder mediation. Australasian Dispute Resolution Journal, 24, 251-258.

8.2: Paper 8, 'Elder Mediation: What's in A Name?', (2015) 32 (4) *Conflict Resolution Quarterly, 435.*

Pages 172-179 of this thesis have been removed as they contain published material. Please refer to the following citation for details of the article contained in these pages.

Barry, L. (2015). Elder Mediation: What's in a Name? Conflict Resolution Quarterly, 32(4), 435-442.

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PART THREE: The Future of Capacity Assessment

Chapter 9: Capacity Assessment: Current State and Future Directions

Chapter 9 deals with advances in the Australian approach to capacity assessment that have occurred during the life of this research. The chapter commences with an overview of recent legislative changes and law reform proposals that could improve safeguards for the rights of older people in Australia in the next decade. The response to these initiatives by the profession in NSW is examined, found wanting and critiqued in light of the role that the profession plays in increasing pathogenic vulnerabilities of older clients.

Recent changes to the *Uniform Law* regulating the legal profession in NSW and Victoria are then analysed. These changes could create further pathogenic vulnerability by sweeping the problem of capacity assessment under the carpet, because they restrict the right of anyone other than a direct client to make a consumer complaint about a lawyer. Chapter 9 concludes by addressing required reforms to legal education.

9.1 Law Reform Proposals

In part one of this thesis, pathogenic vulnerability was described,[345] highlighting the ways state institutions' reactions to vulnerability can create further sources of vulnerability. Over the past three years, a series of state and national law reform inquiries have addressed the vulnerability of older people with a cognitive impairment. As the following analysis will demonstrate, the response of the legal profession to these inquiries has been muted.

9.1.1 NSW Inquiries and the NSW Law Society Response

Papers 3, 5 and 6 established that the current NSW capacity guidelines for lawyers lack consistency. These inconsistencies mean that it may be difficult for lawyers to know how to proceed when the decision-making capacity of a client is in question. Inconsistencies in a particular practice may also create evidentiary difficulties in negligence cases alleging a lack of competent practice in the assessment of capacity.[346] Recent state and national inquiries into elder abuse and guardianship have all recommended the development of consistent national guidelines for capacity assessment.[347] The need for reform of the guidelines is therefore not in

[345] See Chapter 3, 3.2.
[346] Although it is not necessary for a particular practice of a professional to be universal and the Court may choose not to consider evidence of peer professional opinion as to the standard if the Court considers it irrational: *Civil Liability Act* 2002 (NSW) s5O. See also discussion of the existence of "established practice" in *Sparks v Hobson; Gray v Hobson* [2018] NSWCA 29 [25-40] per Basten JA.
[347] General Purpose Standing Committee No. 2., above n 57, 118. Australian Law Reform Commission (2017) above n 6, Recommendation 8 – 1; Australian Law Reform Commission (2014) above n 15, Recommendation 10 – 1.

question, however the less than enthusiastic response of the NSW Law Society suggests that reforms may be a long time coming.

Research suggests that lawyers may be more amenable to reforms to their practices where those reforms are designed in full consultation and cooperation with the profession.[348] There was substantial consultation with the profession during the 2015 NSW Upper House Inquiry into Elder Abuse.[349] One recommendation made by this Committee to the Law Society was:

> 'as it completes the task of reviewing its *Capacity Guidelines*, we strongly encourage the Law Society to consider the evidence documented in this report as to how the guidelines should be consolidated and improved, and to publish a new set as a priority.'[350]

Ultimately the head of the Law Society's Elder Law and Succession Committee undertook to revise the Law Society's guidelines for capacity assessment.[351] However, to date there have been no changes to the NSW Guidelines other than to remove one set of guidelines from the Law Society website,[352] and to update another by referencing the new *Uniform Law;* but without making any substantive changes.[353]

In response to questions from the NSW Law Reform Commission 'Review of the Guardianship Act 1987',[354] the Elder Law and Succession Committee argued that lawyers should be given a monopoly over the role of authorised witness for enduring appointments, without specifying how lawyers should be trained for this task.[355] In contrast, other States have enhanced the witnessing requirements through the addition of a second witness. Furthermore, the Law Society argued 'that it is not necessary for a standard guardianship appointment form to include

[348] Christine Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford University Press, 1999) 134.
[349] Submissions to General Purpose Standing Committee No. 2., above n 57: See for instance; Submission No 6., Cooma Monaro Legal Services; Submission No 19., Justice Connect Seniors Law; Submission No 32, Eastern Community Legal Centre (Vic); Submission No 36., Mid North Coast Community Legal Centre; Submission No 49., Legal Aid NSW; Submission No 93, Australian Lawyers Alliance; and Submission No. 107., The Law Society of New South Wales.
[350] General Purpose Standing Committee No2, above n 57.
[351] Ibid, 109.
[352] The 2003 guidelines, "Client Capacity Guidelines: Civil and Family Law Matters" have been removed, leaving references to three different sets of guidelines: the "Capacity Toolkit", "When a Client's Capacity is in Doubt" and "Guidelines for Preparing an Enduring Power of Attorney". See above n 139: See paper 3 for a discussion of the inconsistencies between these guidelines.
[353] Law Society of New South Wales (2009), above n 139.
[354] New South Wales Law Reform Commission, above n 57.
[355] Law Society of NSW, Elder Law and Succession Committee, 'Submission to the NSW Law Reform Commission Review of the Guardianship Act 1987, Question Paper 4: Safeguards and Procedures' (5 June 2017) 2.

a list indicating what an appointor must understand before signing the document.'[356] In other words, the Law Society argued against the kind of enhanced witnessing requirement that was recently introduced in Victoria and recommended in the ALRC National Inquiry Into Elder Abuse.[357]

In opposing a requirement for a second witness to enduring appointments, the NSW Law Society suggested that enduring guardians did not pose the same threat of elder abuse as enduring attorneys because they made lifestyle and treatment decisions, not financial ones.[358] This suggests that lawyers may lack understanding of the dynamics of elder abuse.[359] Family members making complaints about enduring guardians have highlighted that lifestyle decisions have financial consequences and are therefore also a source of financial abuse.[360] Furthermore, decisions about whether to initiate or continue particular health care treatments, or allow certain visitors, or to decide where to live, are important lifestyle decisions made by enduring guardians that can be sources of emotional abuse or even neglect. Whilst NSW inquiries do not seem to have motivated the profession to reform, it is possible that national ARLC inquiries may provide the necessary prompt.

9.1.2 National Inquiries

There have been several significant law reform inquiries undertaken at the national level during the course of this research that will impact on the development of capacity assessment guidelines in the future. The first of these was the 2014 ALRC inquiry, *Equality, Capacity and Disability in Commonwealth Laws.*[361] This report heralded the introduction of supported decision-making regimes in Australia as discussed in paper 1. The report suggested that even after supported-decision making regimes are introduced, some people with a cognitive impairment will require substitute decision-makers (to be known as representatives).[362] Thus there will remain a role for lawyers in assisting older people to nominate a representative in the event of future incapacity. However, representatives will be required to act on the basis of a person's will and preferences, rather than their best interests.[363] The ALRC *Equality, Capacity*

[356] Ibid.
[357] *Powers of Attorney Act 2014* (Vic), s36 (1)(a)(ii); Australian Law Reform Commission (2017) above n 6, Recommendation 5, discusses at 5.24-5.30.
[358] Law Society of New South Wales above n 355, 3.
[359] General Purpose Standing Committee, above n 57, 85.
[360] For instance, one complainant argued that a decision to move an older woman to a care home was made so that the children could rent her home out and keep the profits.
[361] Australian Law Reform Commission (2014), above n 15.
[362] Ibid, 111.
[363] Ibid, 75.

and Disability Report precipitated the NSW Law Reform Commission review of the *Guardianship Act*,[364] and it is likely that supported decision-making will receive endorsement at the State level as well.[365]

Under proposed legislation, lawyers witnessing an enduring appointment will be required to consider whether their client has the 'decision-making ability' to appoint an 'enduring representative' who must act according to a person's will and preferences where known.[366] There will be a single enduring appointment covering the current enduring guardian and enduring powers of attorney.[367] Therefore, lawyers will need to identify that the client has the decision-making ability to understand more comprehensive enduring powers than is currently the case.

In June 2017 the ALRC released their final report on elder abuse in Australia.[368] The Commission made important strides in improving the guidelines for lawyers preparing wills and enduring documents through recommendations 5 and 8-1. Recommendation 5 included enhanced witnessing requirements that run counter to the recommendations of the NSW Law Society discussed above,[369] and a proposal for the development of a nationally consistent model enduring document.[370] These recommendations are aimed in part at ensuring that the attorney understands their obligations as a fiduciary, thereby reducing the incidence of elder abuse. If States adopt these recommendations, then despite the views of the NSW Law Society, documents prepared and witnessed by a lawyer will require a second witness unrelated to the principal to provide a further assurance of the principal's capacity. Furthermore, the ALRC proposed that one authorised witness 'should be required to be a professional whose licence to practise is dependent on their ongoing integrity and honesty *and who is required to regularly undertake a course of continuing professional education that covers the skills and expertise necessary to witness an enduring document* (my emphasis).'[371] However, the ALRC stopped short of requiring that authorised witnesses should positively certify the capacity of the

[364] New South Wales Law Reform Commission, above n 57.
[365] New South Wales Law Reform Commission, 'Review of the Guardianship Act 1987: Draft Proposals' (November 2017) <http://www.lawreform.justice.nsw.gov.au/Documents/Current-projects/Guardianship/Draft%20Proposals/Draft%20Proposals.pdf> (accessed 22 November 2017)
[366] Ibid, 2.
[367] Ibid.
[368] Australian Law Reform Commission (2017), above n 6.
[369] Ibid, Recommendation 5-1 (c).
[370] Ibid, Recommendation 5-3 (b).
[371] Ibid, 5.44.

principal, agreeing with the Law Council of Australia submission that this requirement was too onerous. Instead, the ALRC agreed with the Law Council that:

> 'a more workable attestation would be that the witness is not aware of anything that causes them to believe that:
>
> - the principal did not freely and voluntarily sign the document;
> - the principal did not understand the nature of the document; or
> - the enduring attorney did not freely and voluntarily sign the document.'[372]

However, the ALRC went a step further in relation to lawyers and assessment of testamentary capacity, suggesting a positive burden to attest to the capacity of clients in this situation. Recommendation 8 promoted the need to develop nationally consistent guidelines for capacity assessment:

> 8. Wills
>
> Recommendation 8–1 The Law Council of Australia, together with state and territory law societies, should develop national best practice guidelines for legal practitioners in relation to the preparation and execution of wills and other advance planning documents to ensure they provide thorough coverage of matters such as:
>
> (a) elder abuse in probate matters;
>
> (b) common risk factors associated with undue influence;
>
> (c) the importance of taking detailed instructions from the person alone;
>
> (d) the need to keep detailed file notes and make inquiries regarding previous wills and advance planning documents; and
>
> (e) the importance of ensuring that the person has 'testamentary capacity'—understanding the nature of the document and knowing and approving of its contents, particularly in circumstances where an unrelated person benefits.[373]

The recommendations made in this research project as outlined in papers 3, 4, 5 and 6 are broadly consistent with, and informed the recommendations made by the ALRC.[374]

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[372] Ibid, 5.46. Noting: 'The ALRC considers that this appropriately balances the need to confirm that the principal understood the nature of the document and was signing voluntarily, with the need to ensure that witnesses are not being asked to make too onerous certifications with respect to the state of mind of the principal or their decision-making ability.'

[373] Australian Law Reform Commission (2017), above n 6.

[374] This research informed two submissions to the ALRC from the Australian Research Network on Law and Ageing: Australian Research Network on Law and Ageing, Submission No 90 to the Australian Law Reform Commission, *Protecting the Rights of Older Persons in Australia from Abuse,* IP 47, 2016; Australian Research

However, although the ALRC highlighted some key deficiencies in capacity assessment techniques, there was a lost opportunity to emphasise the importance of working to improve or maximise the capacity of a client through appropriate accommodations as part of the capacity assessment process.[375] This is particularly unfortunate in light of the rights-based approach that the ALRC adopted to elder abuse. Discussion of providing supports was largely confined to the use of interpreters.[376]

9.1.3 Law Council of Australia Review of the Solicitors' Conduct Rules

In February 2018, following the ALRC inquiries, the Law Council of Australia announced a review of the Australian Solicitors' Conduct Rules. Included in the matters to be reviewed is the question of whether the duty to 'follow a client's lawful, proper and competent instructions' contained in Rule 8, should include:

> a new exception to the duty of confidentiality, where a solicitor reasonably believes the client is not capable of giving 'lawful, proper and competent instructions' and the 'disclosure is for the purpose of assessing the client's ability to give instructions; obtaining assistance for the client in giving instructions; informing the court about the ability to instruct; or seeking the appointment of a litigation representative'?[377]

This proposal follows on from the ALRC Report into Equality, Capacity and Disability that considered submissions suggesting the law of client confidentiality may restrict access to justice for older people who may lack capacity but who refuse a formal assessment process.[378] While appearing to reject this proposal,[379] the Law Council response lacks a comprehensive

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Network on Law and Ageing, Submission No 262 to the Australian Law Reform Commission, *Protecting the Rights of Older Persons in Australia from Abuse,* DP 83, 2017.

[375] The ALRC report mentioned accommodations specifically only in reference to formalised supported decision-making regimes, (Australian Law Reform Commission (2017) above n 6, 10.32), not as part of the capacity assessment process.

[376] Ibid, 8.67-8.69.

[377] Law Council of Australia, 'Review of the Australian Solicitors' Conduct Rules' (2018) <https://www.lawcouncil.asn.au/files/web-pdf/2018%20Feb%20%2001%20ASCR%20Consultation%20Discussion%20Paper.pdf> 35.

[378] Australian Law Reform Commission (2014) above n 15, Recommendation 7-6 and 221-224.

[379] Law Council of Australia above n 377, 40. Of concern, the Law Council cited with approval the now obsolete NSW *Client Capacity Guidelines: Civil and Family Law Matters* as an exemplar (p39 and fn 64) However, these guidelines are no longer available on the NSW Law Society website. See above fn 352; Law Society of New South Wales, 'Protocols and Guidelines', "Client Capacity", https://www.lawsociety.com.au/ForSolictors/professionalstandards/Ethics/Protocolsguidelines/index.htm (accessed 13 March 2018).

discussion of the accommodations and supports that should be provided as routine matters when capacity may be in doubt.

The empirical research presented in part two of this thesis highlighted two forms of accommodations that lawyers need to understand to improve the capacity of older clients, whether for will-making or other advance planning documents. The first of these is practical accommodations. In addition to providing qualified interpreters to assist clients for whom English is a second language,[380] hearing aids, visual aids, building access, medication, education about the decision and appropriate timing are all examples of important accommodations aimed at maximising capacity. The second form of accommodation that could play a role in improving capacity is the provision of conflict resolution services to address underlying family conflict that causes stress to an older person and affects their ability to plan for the future. Unfortunately, preventing family conflict that can underlie abuse was not comprehensively addressed in the ALRC report.

9.2 Conflict Resolution

As the Australian Dispute Resolution Advisory Council (ADRAC) has noted, the ALRC Elder Abuse Inquiry adopted a somewhat narrow, legal rights-based approach to elder abuse that may have sidelined important interest-based approaches to the problem, including relationship factors that might precipitate abuse.[381] This criticism can also be levelled at the proposals around assessing capacity. A focus on procedural requirements for assessing capacity may mean that lawyers are not so focused on identifying underlying causes of loss of capacity such as cognitive impairment and family conflict. Identifying the underlying causes may prompt lawyers to address those causes for the purposes of improving or maximising capacity and could lessen both the client's inherent and situational vulnerabilities.

In a strongly worded submission to the ALRC, ADRAC argue:

> 'To fail to note and address non-justiciable abuse is to overlook abuse that arises within the older person's influential relationships, especially in situations where the elder is a dependent; such abuse, can be and usually is, more immediate and more distressing than some forms of criminal abuse.'[382]

[380] The ALRC did emphasise the importance of using qualified interpreters when taking instructions: Australian Law Reform Commission (2017), above n 6, 8.74.
[381] Australian Dispute Resolution Advisory Council Inc (ADRAC), 'Submission to Australian Law Reform Commission, Elder Abuse' (2016), Submission No 303, 2.
[382] Ibid, 6.

The findings from this research are consistent with ADRAC's views about the importance of addressing underlying conflict in the relationships of older people before it escalates. As was noted in papers 5 and 6, family conflict was a consistent theme in the complaint files but was not addressed either by: the lawyers for the parties; or the OLSC through referral to dispute resolution services. It is possible the elder mediation could address some of the family disagreements that led to older people wanting to change their appointed attorneys. Papers 7 and 8 address this possibility.

Importantly, conflict resolution could potentially play an important role in improving the functional capacity of older people. This should be explored further by the Law Council in their review of the capacity assessment guidelines and the Australian Solicitor's Conduct Rules. It is also recommended that lawyers and regulators should receive further training and information about referral sources for elder mediation.

9.3 Regulation

The capacity complaints studied as part of this thesis were examined at a time when any person could make a complaint involving a consumer dispute with a NSW Lawyer.[383] The relevant section read:

> s504 Making of complaints
> (1) A complaint about an Australian legal practitioner may be made by:
> (a) a client of the practitioner, or
> (b) a Council, or
> (c) the Commissioner, or
> (d) any other person.

In 2015, the *Uniform Law* limited the class of people who could make complaints involving consumer disputes to clients of the lawyer.[384] The Uniform Law is currently in force in NSW and Victoria and therefore applies to the majority of Australian lawyers.[385]

Section 269 of the Uniform Law reads:

> Consumer matters (including costs disputes)

[383] *Legal Profession Act 2004* (NSW) s 504(1)(d).
[384] *Legal Profession Uniform Law (NSW) No 16*, s 269(1).
[385] Urbis, above n 42, i.

(1) A consumer matter is so much of a complaint about a lawyer or a law practice ***as relates to the provision of legal services to the complainant*** (my emphasis) by the lawyer or law practice and as the designated local regulatory authority determines should be resolved by the exercise of functions relating to consumer matters.

As established in papers 5 and 6, capacity complaints are almost uniformly designated as consumer disputes. Section 269 has the effect of restricting the right to make a consumer complaint to direct clients. Third parties, such as the carer or relative of an older person lacking capacity, can be prevented from making a complaint unless it rises to the level of a disciplinary matter. This is concerning, as it may mean that capacity complaints in the future are not properly investigated. The majority of the complaints in this research project were dealt with as consumer disputes and dismissed. Even where a complaint is dismissed, the process of investigation and mediation undertaken by the OLSC is important for both the complainant and the lawyer involved and signals to the community at large that the older clients at the heart of the complaints are valued. As the Legal Services Commissioner has noted in related to these changes,

> The result is a new balance between consumer complaints being confined only to the actual consumers of legal services, whilst the world at large has standing to make complaints about lawyers thought to be seriously transgressing the law or professional standards. It might be said that such a change will result in a better prioritization of regulators' resources. It might also be said that it will prevent attempts at resolution in some cases where previously it was achieved.[386]

Limiting consumer complaints to only those made by a client of a lawyer is a significant barrier to consumers with a cognitive impairment and other clients requiring support. It is a further example of the way in which the law creates pathogenic vulnerabilities for the marginalised through a failure to consider the needs of the many who require support and accommodations to exercise their rights. In the words of Fineman, 'An understanding of equality as a substantive promise to our least advantaged citizens has been sacrificed to a shallow sense of autonomy.'[387]

[386] Office of the Legal Services Commissioner, 'The Office of the Legal Services Commissioner Annual Report 2015-2016' (2016) <http://www.olsc.nsw.gov.au/Documents/2015%202016%20OLSC%20AnnRep%20accessible.pdf> 5.
[387] Fineman (2004) above n 244, 8.

This law should be reformed, and the rights of any person to make a consumer complaint about a lawyer should be reinstated.

The *Uniform Law* should be amended so that a third party may complain about any matter where a client requires support to make a complaint, where the client lacks capacity or where the client is deceased. Aside from the importance of investigating the complaint to prevent poor practices in the future, this would also give the complainant access to a compensation payment and would also provide the Commissioner with the power to make an order that the lawyer in question attend a course of training in capacity assessment, wills and estates, or powers of attorney as appropriate.[388]

In the period of this research no lawyer was ordered to undergo further training in capacity assessment and no orders were made to refund client fees or to provide compensation in a capacity complaint matter. The power to make an order for further training is a disciplinary tool that is not available to courts and that appears to be under-utilised by regulators. Previous research into the statutory regulation of the legal profession has also noted the utility of orders to undertake training, observing that these orders have the potential to protect future clients.[389]

Improvements in lawyers' capacity assessment processes are more likely if there is an appropriate balance between deterring poor practices through discipline procedures and encouraging good practice through improved guidelines and witnessing requirements, and improvements in legal education.[390] Increased regulation alone will not improve capacity assessment procedures, especially given that lawyers are only one class of witnesses to enduring documents.[391] As identified in papers 3, 5 and 6, Queensland adopts a more proactive approach to disciplining lawyers for poor capacity assessment. A comparative study of the capacity assessment practices of lawyers in Queensland and NSW could form a fruitful research agenda.

[388] *Legal Profession Uniform Law (NSW)* s 290.
[389] Linda Haller, 'Australian Discipline: The Story of Isaac Brott' (2012) 15(2) *Legal Ethics* 197, 225.
[390] For further discussion of deterrence vs compliance models of regulation, see for instance Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992); Arie Freiberg, *The Tools of Regulation* (The Federation Press, 2010) 101.
[391] *Guardianship Act 1987* (NSW) s 5.

9.4 Legal Education

The ALRC report on elder abuse will set the agenda for how the law will address elder abuse in the future and must be accompanied by an appropriate regime of legal education. The ALRC itself noted the recommendations arising from the NSW Elder Abuse Inquiry for lawyers to receive more education on assessing capacity,[392] noting that 'knowledge about such matters will not necessarily be gained through the completion of a legal qualification.'[393] This points to an urgent need to reform practical legal training. If legal education does not prepare lawyers for working with clients with a disability, then the profession can be seen to be contributing to their vulnerabilities by exposing them to lawyers who are not prepared for the task. If the profession aims to provide true access to justice,[394] then legal education should be reformed to train lawyers in the needs of all clients; but especially those who are most vulnerable.

Where the ALRC Elder Abuse report did address education, the focus was on postgraduate continuing legal education, particularly in succession law.[395] However, all lawyers are authorised to prepare and witness enduring documents. Any professional who wishes to prepare and witness enduring documents should be required to attend a course of continuing education on the assessment of decision-making capacity. Providing inter-disciplinary training was recommended in a number of submissions to the ALRC and it is also a recommendation that arises from this research.

Although all entry-level lawyers must be able to demonstrate skills in client interviewing, the required skills are very broadly described. Intending lawyers must be able to demonstrate 'awareness of difficulties of communication attributable to cultural differences',[396] and use 'communication techniques appropriate to both the client and the context'. However, there is no specific mention of being able to competently communicate with clients who have a cognitive impairment or require support and accommodations to communicate, other than in relation to testamentary capacity.[397] Qualified lawyers must complete annual Continuing Professional Development training, however the content of that training is not specifically prescribed.[398]

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[392] Australian Law Reform Commission (2014), above n 6, 288.
[393] Ibid, 287.
[394] Nickolas James, 'More Than Merely Work Ready: Vocationalism Versus Professionalism in Legal Education', (2017) 40 (1) *University of New South Wales Law Journal*, 186, 204.
[395] Australian Law Reform Commission (2014), above n 6, 287.
[396] *Legal Profession Uniform Admission Rules 2015* (NSW) Schedule 2, Part 4 (20).
[397] *Legal Profession Uniform Admission Rules 2015* (NSW) Schedule 2, Part 4 (25).
[398] *Legal Profession Uniform Continuing Professional Development (Solicitors) Rules 2015*, r 6.

These failures in education create a further source of pathogenic vulnerability for some clients. Kapp has observed that there are numerous policy barriers to adequate inter-disciplinary training on capacity assessment in the United States that include funding as well as regulation,[399] and many of his observations are applicable to the Australian context. The Australian legal profession admission requirements should be updated to require competence in working with people with disabilities. Authorised witnesses for enduring appointments should similarly be required to receive training in interviewing clients with a cognitive impairment.

As established in part two and discussed above (at 9.2), conflict resolution skills are also necessary for addressing the family conflict that can exacerbate decision-making difficulties. Entry level lawyers are required to be able to demonstrate dispute resolution skills,[400] however the emphasis is on legal disputes, rather than the personal conflict that underlies these disputes. As Granfield and Koenig have observed, ethics education is often designed and delivered without considering the 'messy' context of real-life legal practice and can be devoid of any empirical basis.[401] This research project provides the background upon which to design future education programs on capacity assessment for lawyers. Such programs could be implemented by the state-based professional bodies and the Law Council of Australia as part of the process of consolidating and harmonizing the capacity assessment guidelines around Australia described above.

Online training could provide a partial answer to the training deficit. The Queensland Law Society has already made use of a model of online training that incorporates problem-based scenarios designed to assist lawyers or others to work through complex legal ethical problems.[402] These freely available scenarios are specifically related to the problems of working with older clients and could be adapted for use Australia wide. New scenarios could be developed to highlight some of the pitfalls of capacity assessment and to model good practice. Scenario based learning delivered online has the benefits of being engaging and interactive, is cheap to deliver once developed and can be delivered in a consistent and

[399] Marshall Kapp, 'Older Persons and Compromised Decisional Capacity: The Role of Public Policy in Defining and Developing Core Professional Competencies' (2014) 26(4) *Journal of Aging & Social Policy* 295.
[400] *Legal Profession Uniform Admission Rules 2015* (NSW) Schedule 2, Part 4(20) 7.
[401] Robert Granfield and Thomas Koenig, "'It's Hard to be a Human Being and a Lawyer": Young Attorneys and the Confrontation with Ethical Ambiguity in Legal Practice' (2003) 105(2) *West Virginia Law Review* 495, 504-505.
[402] University of Queensland's Centre for Biological Information Technology, Queensland Law Society and Queensland University of Technology Faculty of Law, *'It's a Grey Area Scenarios'* (2014) <http://www.lsc.qld.gov.au/projects/interactive-scenarios>.

transparent way that standardises the content in a way that is not always possible with face to face training.[403] It would also provide access to training for rural and remote lawyers who are overrepresented in the complaints, as explained in papers 5 and 6. It would be possible to make completion of such a course a recommended part of training for all authorised witnesses. An online module on elder abuse developed by the NSW Elder Abuse Helpline and NSW TAFE (Tertiary and Further Education) may also provide important background training, as may the new modules on elder abuse being developed by the NSW Health and Training Institute.[404] Existing online training modules should be promoted to the legal profession.

Adopting a rights-based approach to such education programs is also necessary so that cognitive impairment is not considered synonymous with lack of legal capacity. This research project has provided a case study of an older person who was at risk of being placed under guardianship because her children disagreed with her decision to sell her home.[405] Recent events in Australia have also served to identify the important role that advocates might play in preventing older people from being stripped of their decision-making rights because they disagree with the views of service providers. In June 2017, the *Sydney Morning Herald* broke the story of Gwyneth Jones who was committed to a psychiatric ward against her wishes and diagnosed with dementia (a diagnosis that was later contested by a psychiatrist), in an apparent attempt to support an application for guardianship so that Gwyneth could be forcibly moved out of a retirement village following a dispute with the village management.[406] Fortunately, the application was withdrawn after the nurse who had lodged the application resigned. The hospital later apologised, stating that 'there may well have been an excessive reliance by our people on information supplied by (and the opinions of) staff at your place of residence.' Were it not for an advocate being involved in her case, Gwyneth may not have obtained the necessary support to fight the process. A human rights approach to capacity assessment that values autonomy in equal measure to safeguarding remains an imperative.

9.5 Chapter Summary

This chapter has highlighted both the promise of law reform and the pitfalls of legislative changes that may impact on capacity assessment in the future. The NSW legal profession's

[403] Geoff Norton et al, 'Designing, Developing and Implementing a Software Tool for Scenario Based Learning' (2012) 28(7) *Australasian Journal of Educational Technology* 1083.
[404] NSW Whole of New South Wales Government, 'Whole of Government Response to the Inquiry Into Elder Abuse' (2017) above n 22, 14
[405] See Paper 6, case study four.
[406] Adele Ferguson, Sarah Danckert, 'Bleed Them Dry Until They Die', *Sydney Morning Herald* 27 June 2017.

response to criticisms of lawyer witnesses to enduring documents has been found wanting. Identifying and responding to family conflict has been identified as a further gap in the reform agenda to address elder abuse. Clear recommendations have been provided to address the training needs of entry-level and experienced lawyers so they may better protect the decision-making rights of their clients.

In the final chapter of this thesis, a future research agenda is identified that can help better address the specific training needs of lawyers involved in assessing legal decision-making capacity and which may point the way forward for further regulatory reform. Chapter 10 summarises the arguments of the thesis and demonstrates how this body of work has addressed the primary research question: How well do lawyers assess the decision-making capacity of older clients?

Chapter 10: Conclusions

Chapter ten concludes this thesis. The research questions are reviewed and the answers to those questions are summarised. The original contributions to knowledge that are claimed in the thesis are revisited and recommendations for a future research agenda to build on the findings from this project are outlined.

This research set out to examine the following primary research question: How well do lawyers assess the decision-making capacity of older clients?

Following from this research question, a number of secondary questions arose:

i. What are the current laws, guidelines and tools available to lawyers for capacity assessment?
ii. Are the laws, guidelines and tools applied and enforced?
iii. Do current practices uphold the human rights of older people to make legal decisions?
iv. Does a tripartite theory of vulnerability help to understand all of the above and in particular:
    a. how lawyers assess their client's decision-making capacity?
    b. how capacity assessment practices are regulated?

The chapter begins by identifying the answers to these questions.

10.1. What are the Current Laws, Guidelines and Tools Available to Lawyers for Capacity Assessment?

Current laws on the assessment of decision-making capacity (including the human rights law that underpin them) have been highlighted in the literature review for this thesis and reiterated across the publications in part two. The human right to legal capacity emphasises the importance of two main principles: autonomy and safeguarding. These principles require lawyers to ensure that older people with a cognitive impairment are supported to make those decisions they have capacity for and safeguarded from decisions that they don't understand. These human rights principles form the backbone of the legal and theoretical analysis in this thesis.

The functional approach to decision-making capacity established by common law has been described in detail in Chapter 1 and in the publications forming Part Two. Functional capacity comprises the ability to: understand the decision to be made; weigh up the options for the decision and its implications; appreciate the consequences of the decision for self and others;

and communicate the decision. The particularised tests for specific legal decisions outlined in Chapter 1, inform the breadth and depth of dialogue between lawyer and client that capacity assessment requires.

There is no single definitive capacity assessment guideline for lawyers in NSW. The current guidelines for lawyers are comprehensively discussed and analysed in papers 3, 4, 5 and 6 and the guidelines specific to mediators in paper 7. Paper 3 in particular compares and contrasts the lawyers' guidelines across criteria drawn from the common law and capacity assessment guidelines from other jurisdictions. At the time of writing, there are recommendations at the State and national level for capacity assessment guidelines to be revised and consolidated.[407] Chapter 9 further outlines significant prospective reform to the *Guardianship Act 1987 (NSW)* that will necessitate changes to the capacity guidelines to encompass the capacity to appoint a decision-making supporter or future representative.

In Australia's federal system, establishing agreement on a single set of guidelines across all of the State based Law Societies will not be a simple task. As a starting point, the criteria used for analysis in paper 3 could form the basis of analysing the guides across all jurisdictions to identify areas of agreement as well as inconsistency.

This research identified a particular gap in the capacity guidelines and common law is the failure to emphasise the importance of providing the necessary supports and accommodations to maximise autonomous decision-making. The guidelines should specifically prompt lawyers to question whether inter-personal conflict is impacting a client's decision-making ability and whether referral to a dispute resolution service is an appropriate accommodation.

10.2 Are the Laws, Guidelines and Tools Applied and Enforced?

The laws, guidelines and tools for the assessment of capacity are applied inconsistently. It is not possible to find consistency in their application because the guidelines themselves lack consistency, as described above. This is further complicated when the common law decisions about the appropriate techniques are also considered, because they emphasise different aspects of the procedure, as described in Chapter 1.

[407] See discussion in this thesis above at 9.1.

Inconsistency between the recommended procedures creates a potential vulnerability for older clients of lawyers in NSW. This thesis has provided evidence of inconsistent application of the relevant guidelines by lawyers in NSW and recommends improvements in education and regulation to address this problem.

Some lawyers are unable to identify cognitive impairments in older people, while others mistakenly equate cognitive impairment or illness with a loss of legal capacity. Both misunderstandings can lead to an infringement of the rights of an older client. A further finding is that not all doctors have the necessary understanding of legal decision-making capacity to identify when a cognitive impairment might call a patient's decision-making ability into question. This highlights the need for inter-disciplinary training and cooperation in capacity assessment and education that will allow the two professions to work cooperatively to maximise the rights of older people. The introduction of supported decision-making laws respecting the will and preference of the principal will further necessitate inter-disciplinary co-operation.

Professional education should be reformed to place the needs of clients at the forefront and prepare lawyers to work with a much broader range of clients than is currently the case. This requires that lawyers develop an awareness of the impact of cognitive impairment and knowledge of accommodations to maximise decision-making abilities, providing access to justice and safeguards from abuse. This recommendation applies with equal force in the elder mediation sphere.

The lack of disciplinary action against lawyers with poor capacity assessment practices in NSW, as highlighted in this thesis, signals a failed opportunity for enforcement to contribute to improved procedures in this state. The public relies on professional disciplinary procedures to protect them from poor practices and unskilled lawyers. Until both education and regulation in this area are improved, clients with a cognitive impairment will continue to fall through the cracks. In recognition of the vulnerability of clients with a cognitive impairment, only a small class of people are authorised to witness enduring documents. If these institutional protections are to work, then the legal profession has a responsibility to maintain better standards of education, ongoing training and enforcement. To do otherwise only increases the vulnerability of these clients.

There is national inconsistency in the way that the law is enforced. Given the number of lawyers in NSW and the practices identified over a three-year period in this research, it is

anomalous that there have been no prosecutions of lawyers in NSW for unsatisfactory conduct or misconduct on the basis of poor capacity assessment procedures. Further research is required in order to establish why this is the case and to assess the role of Courts, Tribunals, regulators and professional bodies in effecting change.

10.3 Do Current Practices Uphold the Rights of Older People to Make Legal Decisions?

Poor capacity assessment practices identified in this research undermine the promises of autonomy and safeguarding made in the *Convention on the Rights of Persons with Disabilities*.[408] Lawyers are not sufficiently educated about the rights to decision-making and they do not always follow the guidelines that are designed to ensure these rights are upheld. As a result, older people with cognitive impairments are sometimes assumed to lack the ability to make their own decisions even in the face of an assessment indicating they have capacity. Conversely, some older people who do not have the capacity for decisions are not safeguarded from the possibility that those decisions are being driven by third parties.

The right to make legal decisions includes the right to the supports required to exercise legal capacity.[409] This research has demonstrated that these supports are under-utilised and that lawyers require education and training to identify and apply them. Increased inter-disciplinary cooperation with medical and allied health professionals has been recommended as one way to implement these necessary improvements. Conflict resolution services and elder mediation have been examined as specific supports that may improve the decision-making capacity of older people, but these services also need to be alert to a human rights perspective.

10.4 Applying a tripartite theory of vulnerability to help understand all of the above: a) How do lawyers assess their client's decision-making capacity? b) How are capacity assessment practices regulated?

The tripartite theory of vulnerability is a suitable lens for analysis of capacity assessment processes because it shifts the gaze of the researcher from the cognitive impairment of the older client as the source of any 'problems', to the client's personal, social, economic and institutional supports. Furthermore, vulnerability theory can account for how these different layers of vulnerability accumulate disadvantage. This theory not only helps us to understand

[408] *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008), Art 12.
[409] Ibid, Art 12(3).

how lawyers assess capacity, it highlights those aspects of a client's supports that lawyers need to be alert to.

Applying a tripartite theory of vulnerability to the empirical project uncovered layers of vulnerability that may not have otherwise been exposed. Analysis focused on a lawyer's understanding of their task may uncover procedural weaknesses. However, the tripartite vulnerability lens uncovers a more nuanced and multi-layered problem. Inherent vulnerability in the form of old age and cognitive impairment was identified and confirmed as far as possible using a triangulation of sources within the complaint files. Understanding potential situational vulnerabilities led to coding of the complaint files that uncovered family conflict as a recurring problem in the lives of older clients. Having identified family conflict as problematic, elder mediation was proposed as one way to address the conflict and improve the decision-making of older people. Further research into elder mediation is required to measure the efficacy of conflict resolution services in this respect.

To quote Martha Fineman: 'The state and the societal institutions it brings into existence through law collectively play an important role in creating opportunities and options for addressing human vulnerability.'[410] A tripartite theory of vulnerability assists to identify that when the state and institutions fail in their attempts at ameliorating disadvantage, then the legal response can create further pathogenic vulnerabilities.[411] The vulnerability perspective focuses responsibility for addressing weaknesses and problems with the current system of capacity assessment upon the State and professional institutions. Coding for situational and pathogenic vulnerabilities exposed inter-professional communication as a source of vulnerability and highlighted gaps in regulation and training that need to be addressed.

10.5 Future Research Agenda

As Australia progressively embraces supported decision-making as established in the *CRPD* and foreshadowed in proposed reforms to the domestic law of substitute decision making, lawyers will need to understand that the assessment of decision-making ability requires more nuance. Lawyers will need to assist their clients to make assessments of those best placed to play the role of supporters or representatives and to record their clients' will and preferences across decision making domains to inform supported decision-making. The shift away from a

[410] Fineman (2013) above n 246, 73.
[411] Rogers, Mackenzie and Dodds, above n 50, 24.

bright line approach will require a renewed focus on holistic understanding of older clients and a necessary shift in education and training in working with clients with a decision-making disability. There will be an increasing emphasis on providing appropriate supports and accommodations to improve and maximise decision-making ability, and guidelines for the assessment of decision-making ability will need to be updated.

Advances in the understanding of the causes and treatments of cognitive impairments will lead to new ways of augmenting the decision-making of older people through improved accommodations. These may include new drugs, therapies or technological advances to improve a person's decision-making capacity. Lawyers will particularly need to acknowledge and respond to advances in the fields of cognitive science to effect the necessary adjustments in capacity accommodations and assessment.[412] Understanding and responding to these developments will also require updates to capacity guidelines and adjustments to professional training and education. Future researchers will need to consider how the assessment of decision-making for older people with a long life of decision-making history to draw on, is different to assessing the decision-making ability of a younger person with an intellectual disability, brain injury or psychosocial disability.[413]

Supported decision-making regimes will require a renewed research agenda focused on developing models that uphold the promise of rights protection imbued in these schemes.[414] In most instances, substitute decision-makers in the form of guardians will be replaced by supporters or representatives who will be required to make decisions based on the will and preferences of the principal.[415] This may call for new forms of inter-disciplinary cooperation in assessing decision-making ability. For instance, historians, anthropologists and counsellors may prove skilled at assisting clients to develop a record of their will and preferences to assist a supporter or representative in the future. As new integrated health/justice initiatives emerge,[416] there will be increasing opportunities to develop the empirical research to ground improvements in cooperation with the medical and legal professions.

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[412] Carmelle Peisah et al, 'Decisional Capacity: Toward an Inclusionary Approach' (2013) 25(10) *International Psychogeriatrics* 1571, 1575.
[413] 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, 198.
[414] Ibid, 177; Nina Khon, Jeremy Blumenthal and Amy Campbell, 'Supported Decision-Making: A Viable Alternative to Guardianship' (2013) 117(4) *Penn State Law Review* 1111.
[415] Australian Law Reform Commission (2014), above n 15, 1.11.
[416] 'Working Together: A Health Justice Partnership to Address Elder Abuse' (Justice Connect Seniors Law and CoHeath, 2016) <https://www.justiceconnect.org.au/sites/default/files/HJP_first%20year%20report_web.pdf>

10.6 Original Contributions to Knowledge

In part one of this thesis, a claim is made to a number of original and significant contributions to knowledge. In this section, these contributions are reiterated and a summary is provided that reflects the way that knowledge has been developed within this thesis.

1. An original analysis of capacity assessment combining a philosophical understanding of autonomy and vulnerability within a human rights framework.

In the literature review and paper 1of this thesis, the human rights framework for the exercise of legal capacity is explicitly explained and analysed. The importance of autonomy and safeguarding are emphasised to reinforce that these two principles are of equal significance to older people with a cognitive impairment.

This human rights perspective informed the decision to analyse the assessment of decision-making capacity in older people through the theoretical lens of a tripartite theory of vulnerability in papers 5 and 6 because the right to safeguarding expressly acknowledges that autonomy is not an entirely individual pursuit. Rather, our autonomy is dependent on the personal and social resources at our disposal. The fewer resources we have, the more safeguarding is required. Furthermore, exercising autonomy requires the provision of supports and accommodations. The focus on human rights in this research reinforces the need for future education and training for lawyers to incorporate knowledge about how to work with clients with a cognitive impairment.

An understanding of the importance of human rights to autonomy and safeguarding also informs the analysis of elder mediation in papers 7 and 8, challenging models that focus on managing family conflict but marginalise the older person at the heart of family disputes over assets and care. This human rights perspective is a significant advance in the field and can contribute to the debate on the focus and nomenclature of elder mediation.

A human rights perspective has informed recent law reform proposals in Australia recommending the introduction of supported decision-making regimes.[417] This research is therefore particularly timely.

[417] Australian Law Reform Commission (2014) above n 15; New Wales Law Reform Commission above n 57.

2. Application of a tripartite theory of vulnerability developed by Rogers, Mackenzie and Dodds to the capacity assessment process. This lens highlights: the inherent vulnerability of older clients with a cognitive impairment; the situational vulnerability arising from family conflict and their reliance on lawyers who are poorly trained in capacity assessment; and the pathogenic vulnerability created through inconsistent application of guidelines, tools and regulation.

This is the first time this theory has been applied to a specific legal task directed to protecting the rights of a vulnerable population in Australia. The utility of this theoretical perspective is demonstrated and its significance emphasised. Applying this theory of vulnerability encourages holistic assessment of the weaknesses in the current responses to clients with a cognitive impairment. These insights extend beyond the personal disability of the older client and the gaps in individual lawyers' knowledge that are the traditional focus of papers on capacity assessment.

This thesis highlights the inherent vulnerability, comprising old age and cognitive impairments, of older client and established two main sources of situational vulnerability for those older clients already inherently vulnerable: Firstly, the perspective of situational vulnerability highlighted the significance of family conflict as a challenge to autonomy. Older people with a cognitive impairment are far more vulnerable to abuse when they are part of high conflict families. Lawyers who wish to support their client's autonomy must therefore learn to identify the effect of conflict on decision-making abilities and place more emphasis on addressing this conflict. In this thesis, elder mediation is proposed as one method to address this situational vulnerability. Secondly, lawyers who are not well trained in capacity assessment create another form of situational vulnerability either through acting on instructions that the older client is not able to properly understand, or through refusing to act on instructions because the lawyer incorrectly equates a disability with lack of legal capacity.

Finally, the response of the profession can create a further source of pathogenic vulnerability for older clients. This thesis highlights some institutional causes of vulnerability in the form of poor guidelines and legal education, combined with weak enforcement regimes. These factors create an environment in which human rights to autonomy and safeguarding are unprotected and older clients can suffer abuse that is undetected.

The tripartite theory of vulnerability developed by Rogers, Mackenzie and Dodds has proven to be a defensible framework for examining the capacity assessment process. The application of this theory in the thesis has extended knowledge about the assessment of legal decision-making capacity by lawyers in NSW and the response of the profession and regulators, highlighting deficiencies in lawyers' preparedness for this task.

3. A comparative analysis of the published capacity guidelines in NSW demonstrating inconsistencies in their content leading to recommendations for their reform.

Paper 3 comprehensively compares the guidelines that are either published by the NSW Law Society or are cross-referenced in their published guidelines. Recent inquiries have noted that capacity guidelines are inconsistent and need to be revised and consolidated. This analysis could form part of that review,[418] leading to the development of a single set of guidelines for the profession. Improving the regulatory framework will create more certainty for lawyers, regulators and the Court when seeking to establish the most effective process for upholding the decision-making rights of clients. From the perspective of the broader community, a single set of guidelines will provide the public with a better resource through which to assess a lawyer's procedures.

4. Original empirical research that examines the content of three years of capacity complaints at the NSW Office of Legal Services Commissioner, providing evidence of common features in the capacity assessment processes of lawyers in NSW that contribute to complaints.

The thematic content analysis of capacity complaints presented in papers 5 and 6 provides the first concrete examples of how lawyers assess the capacity of older clients. The complaint files provide a comprehensive examination of the clients' circumstances and thus contextualises the capacity assessment procedure.

The analysis of the complaint files highlights common errors in capacity assessment. Notable amongst these are: failure to identify that the client may have a cognitive impairment; failure to understand how cognitive impairments may manifest in older clients; failure to apply a functional assessment of capacity; failure to interview the client alone; failure to ask open questions; failure to keep a record of the assessment process; and failure to provide

[418] Australian Law Reform Commission (2017) above n 6, Recommendation 8.

accommodations to support or improve decision making capacity including dispute resolution services.

The analysis extends beyond the way that lawyers assess capacity to demonstrate some of the misunderstandings of the medical profession as well. Taken together, the importance of improved cooperation between the two professions is highlighted. The empirical evidence of lawyers' procedures and interactions with clients, their families and the regulator is an original contribution to the field.

5. Identification of the role of family conflict in capacity complaints, leading to a proposal for increased attention to family conflict resolution, including through elder mediation.

Family conflict emerges as a significant feature in capacity complaints through the file analysis presented in papers 5 and 6. The recommendations for improved guidelines and education incorporate this finding. In papers 7 and 8, developments for the elder mediation field are recommended so conflict resolution services provided for older people can support their legal capacity. Identifying the significance of conflict resolution and the potential for elder mediation to the exercise of legal capacity is an original contribution to the field.

10.7 Concluding Observations

The findings from this research have important implications for lawyers everywhere and are broadly applicable to professional societies and regulators throughout the common law world. Older people with a cognitive impairment have the right to make their own legal decisions and lawyers play an important role in upholding that right. The privileged place occupied by the profession as one of a small class of authorised witnesses for enduring documents, assumes that lawyers can contribute to the creation of legal relationships through the provision of informed advice. For older Australians with a cognitive impairment, that advice must take account of unique vulnerabilities and recognise that the provision of safeguards is as important as the promotion of autonomy. Careful and considered capacity assessment processes are therefore an important aspect of rights protection.

For too long, the education of the legal profession has neglected the needs of people with a cognitive impairment. Understanding that we are all vulnerable and that these vulnerabilities can be exacerbated by the failings of families, service providers, regulators or professional

associations emphasises the social construction of disability and creates the imperative to address the needs of people with a disability as a priority.

Protecting the rights of vulnerable populations is not an individual pursuit. It requires up to date guidelines, informed education regimes and a regulatory response that promotes the rights of the vulnerable client over the interests of the profession. To do otherwise not only fails to respond to the older person's vulnerabilities, it exacerbates them.

Appendixes

Appendix A: Statements of Authors' Contributions

Statement of author contribution, Paper 1:

I confirm that I am the joint author with Ms Lise Barry of the article:

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. This article was jointly conceived, prepared, authored and edited. I confirm that each author made a 50% contribution to the paper.

Signed ……

Date:……24/05/17

Statement of author contribution, Paper 4:

I confirm that I am the joint author with Ms Lise Barry of the article:

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

This article was jointly conceived, prepared, authored and edited.

I confirm that each author made a 50% contribution to the paper.

Ms Barry took primary responsibility for the accuracy of material related to the role of lawyers in capacity assessment.

I was the author of material related to the role of medical professionals in capacity assessment.

Signed …… ……

Date:……17 May 2017……

Appendix B: Linking the publications to research questions and contributions to knowledge

Paper	**Original Contribution to Knowledge (primary contribution in bold)**	**Research Questions Addressed**
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*, (2015 Vandeplas Publishing) 286-302	**1. An original analysis of capacity assessment combining a philosophical understanding of autonomy and vulnerability within a human rights framework.** 2. Application of a tripartite theory of vulnerability developed by Rogers, Mackenzie and Dodds to the capacity assessment process. This lens highlights: the inherent vulnerability of older clients with a cognitive impairment; the situational vulnerability arising from family conflict and their reliance on lawyers who are poorly trained in capacity assessment; and the pathogenic vulnerability created through inconsistent	i. What are the current laws, guidelines and tools available to lawyers for capacity assessment? ii. Are the laws, guidelines and tools applied and enforced? iii. Do current practices uphold the human rights of older people to make legal decisions? iv. Does a tripartite theory of vulnerability help to understand all of the above and in particular: a. how lawyers assess their client's decision-making capacity?

	application of guidelines, tools and regulation. 4. Original empirical research that examines the content of three years of capacity complaints at the NSW Office of Legal Services Commissioner, providing evidence of common features in the capacity assessment processes of lawyers in NSW that contribute to complaints.	b. how capacity assessment practices are regulated?
Lise Barry, 'Case Note: *Goddard Elliott v Fritsch* [2012] VSC 87' (2012) 10 *Macquarie Law Journal,* 105 – 110.		i. What are the current laws, guidelines and tools available to lawyers for capacity assessment?
Lise Barry, '*Capacity Guidelines in NSW: Time for a Review'* (2017) (prepared for publication)	**3. A comparative analysis of the published capacity guidelines in NSW demonstrating inconsistencies in their content leading to recommendations for their reform.**	i. What are the current laws, guidelines and tools available to lawyers for capacity assessment?

Lise Barry and Jane Lonie, 'Capacity, Dementia and Neuropsychology', *Law Society Journal*, October 2014, 78-79.		ii. Are the laws, guidelines and tools applied and enforced?
Lise Barry, 'Capacity and Vulnerability: How Lawyers Assess the Legal Capacity of Older Clients' (2017) 25, *Journal of Law and Medicine* 267.	**4. Original empirical research that examines the content of three years of capacity complaints at the NSW Office of Legal Services Commissioner, providing evidence of common features in the capacity assessment processes of lawyers in NSW that contribute to complaints.** 2. Application of a tripartite theory of vulnerability developed by Rogers, Mackenzie and Dodds to the capacity assessment process. This lens highlights: the inherent vulnerability of older clients with a cognitive impairment; the situational vulnerability arising from family conflict and their	i. What are the current laws, guidelines and tools available to lawyers for capacity assessment? ii. Are the laws, guidelines and tools applied and enforced? iii. Do current practices uphold the human rights of older people to make legal decisions? iv. Does a tripartite theory of vulnerability help to understand all of the above and in particular: a. how lawyers assess their client's decision-making capacity?

	reliance on lawyers who are poorly trained in capacity assessment; and the pathogenic vulnerability created through inconsistent application of guidelines, tools and regulation. 5. Identification of the role of family conflict in capacity complaints, leading to a proposal for increased attention to family conflict resolution, including through elder mediation.	b. how capacity assessment practices are regulated?
Lise Barry, 'He Was Wearing Street Clothes, Not Pyjamas': Common Mistakes in Lawyers' Assessment of Legal Capacity for Vulnerable Older Clients (2018) *Legal Ethics* 21 (1) 3-22	**4. Original empirical research that examines the content of three years of capacity complaints at the NSW Office of Legal Services Commissioner, providing evidence of common features in the capacity assessment processes of lawyers in NSW that contribute to complaints.**	i. What are the current laws, guidelines and tools available to lawyers for capacity assessment? ii. Are the laws, guidelines and tools applied and enforced? iii. Do current practices uphold the human rights of older people to make legal decisions?

	2. Application of a tripartite theory of vulnerability developed by Rogers, Mackenzie and Dodds to the capacity assessment process. This lens highlights: the inherent vulnerability of older clients with a cognitive impairment; the situational vulnerability arising from family conflict and their reliance on lawyers who are poorly trained in capacity assessment; and the pathogenic vulnerability created through inconsistent application of guidelines, tools and regulation. 5. Identification of the role of family conflict in capacity complaints, leading to a proposal for increased attention to family conflict resolution, including through elder mediation.	iv. Does a tripartite theory of vulnerability help to understand all of the above and in particular: a. how lawyers assess their client's decision-making capacity? b. how capacity assessment practices are regulated?
Lise Barry, 'Elder Mediation' (2013) 24	**5. Identification of the role of family conflict in capacity complaints,**	iii. Do current practices uphold the human rights of

Australasian Dispute Resolution Journal 251.	**leading to a proposal for increased attention to family conflict resolution, including through elder mediation.** 1. An original analysis of capacity assessment combining a philosophical understanding of autonomy and vulnerability within a human rights framework. 3. A comparative analysis of the published capacity guidelines in NSW demonstrates inconsistencies in their content and recommendations are made for their reform.	older people to make legal decisions?
Lise Barry, 'Elder Mediation: What's in a Name?', *Conflict Resolution Quarterly* (2015) 34 (4), 435.	**1. An original analysis of capacity assessment combining a philosophical understanding of autonomy and vulnerability within a human rights framework.** 5. Identification of the role of family conflict in capacity complaints, leading to a proposal for increased attention to family conflict	i. What are the current laws, guidelines and tools available to lawyers for capacity assessment? iii. Do current practices uphold the human rights of older people to make legal decisions?

	resolution, including through elder mediation.	

Appendix C: Sample Correspondence List - Capacity Complaint File #22

Key to table

ACF Aged Care Facility

EPOA Enduring Power of Attorney

C Complainant

L Lawyers

MMSE Mini Mental State Examination

OP Older Person (client)

OLSC NSW Office of the Legal Services Commission

Document	From	To	Summary of content
OLSC Complaint form	C	OLSC	Outline of the complaint
Attachments to the complaint form	C	OLSC	Description of history of the dispute
Email	Lawyer	ACF	Request for copy of EPOA
Memo	OLSC	File only	Notes from telephone conversation with L
Email	ACF	L	Refuse to provide EPOA. Will only recognise C as decision maker
Email	L	ACF	Response to email above

Email	C	L	Complaint and request for invoices to legal fees charged
Email	L	C	Requests C provide copies of paid invoices for OP and acknowledge revocation.
Medical report by psychogeriatrician	C	OLSC L	Finds OP lacks legal capacity
EPOA	C	OLSC	Original EPOA appointing C and another niece
Revocation of EPOA	L	OLSC C	Revocation form signed by OP revoking appointment of C but not other niece.
Email	L	ACF	Details of revocation of EPOA Information about MMSE scores
Invoices	L	OLSC	7 invoices ranging $150 - $450
Letter	OP	Nephew	Details of an account set up by OP for benefit of nephew
Letter	L	OP	Information sheet re ACAT assessments

			Blank draft codicil form Draft revocation of EPOA
Email	OLSC	L	Request for a response to complaint
Email and attachments	L	OLSC	• Copy of OP's Will • Three pages of the textbook 'Elder Law in Australia' including p484 'Testamentary Freedom – When is a Decision a Delusion?' • Extracts from *Fuggle v Shochacki* (1999) NSWSC 1214 • Copy of the decision *Martin v Fletcher* [2003] WASC 59

			• Extracts from the 'Capacity Toolkit' • Extracts from Hutley's Australian Wills Precedents (2009, 7th ed) LexisNexis
Memo	OLSC	File only	Notes from telephone call from C
Memo	OLSC	File only	Notes from telephone call to L
Email	L	OLSC	Response to complaint
Email	C	OLSC	Update on actions taken
Email	Guardianship Tribunal	OLSC	Confirmation that the matter listed for hearing
Memo	OLSC	File only	Notes from telephone call from C following hearing
Email	C	OLSC	Updates about continuing actions of L

Email	L	OLSC	Extracts from Law Society 'Client Capacity Guidelines'
Letter	OLSC	C	Request for response
Report	C	OLSC	Copy of clinical nurse consultant dementia specialist's report to ACF
Letter	C	OLSC	Outline of further complaints
Court order	C	OLSC	Financial Management Order made by Guardianship Tribunal
Court order	C	OLSC	Guardianship order made by Guardianship Tribunal
Memo	OLSC	File only	Notes from telephone call to C
Letter	OLSC	C	Notification of decision to dismiss complaint
Letter	OLSC	L	Notification of decision to dismiss complaint

Appendix D: Summary Tables of Content Analysis

Table 1: Gender of lawyers from complaint files compared to % of total NSW practitioners

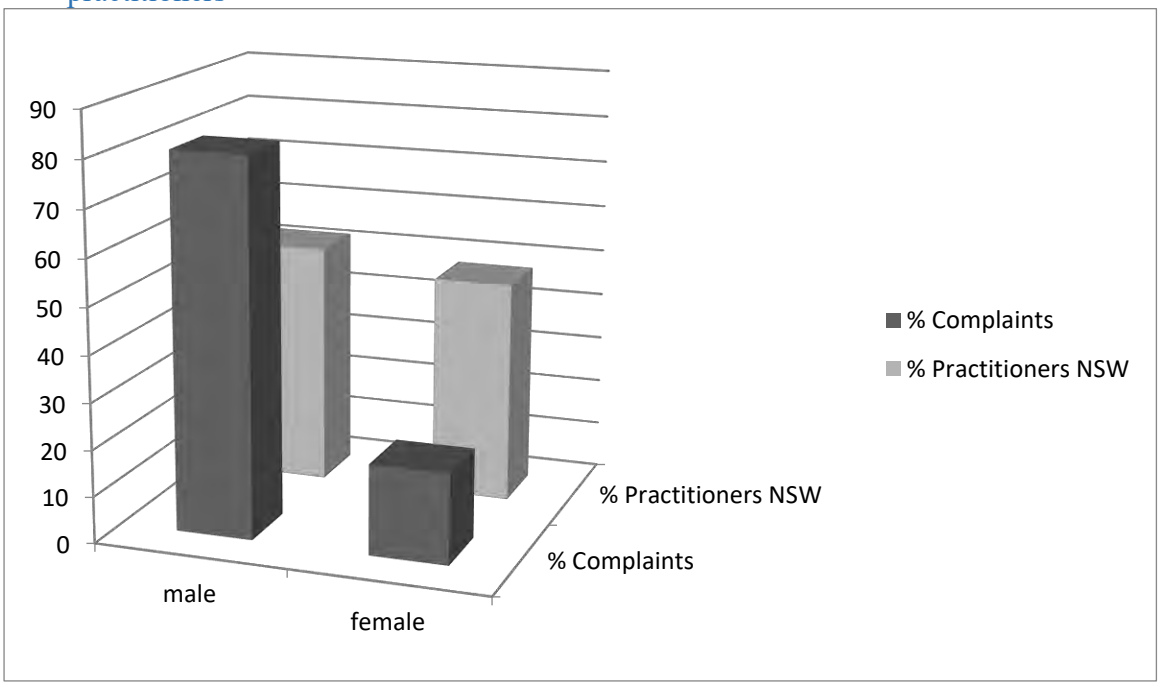

Table 2: Age and gender of lawyers from complaint files compared to NSW totals

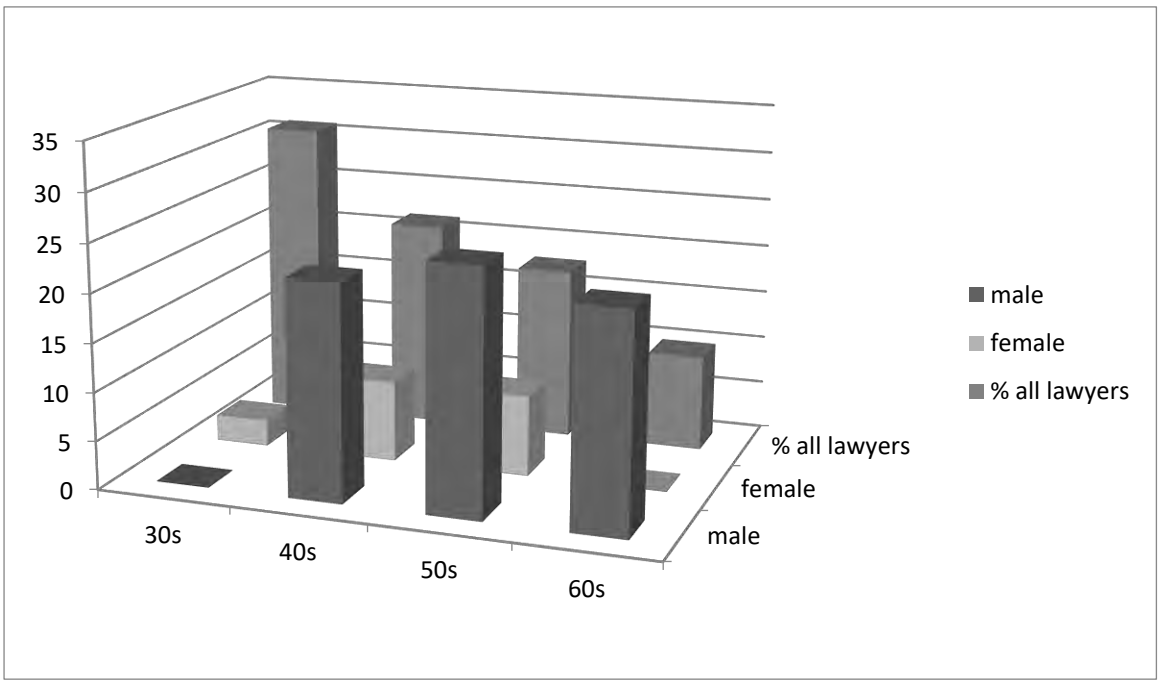

Table 3: Age and gender of older person in the complaint file

Age of older person	Male	Female	Total
Aged in 40s	44 yrs	40s (exact age not specified)	2
Aged in 50s			0
Aged in 60s	60 yrs 60 yrs	66 yrs	3
Aged in 70s	73 yrs 78 yrs 78 yrs	72 yrs 74 yrs 78 yrs 79 yrs	7
Aged in 80s	80s (exact age not specified) 81 yrs 85 yrs 86 yrs 89 yrs	82 yrs 82yrs 83 yrs 87 yrs 88 yrs 88yrs 88 yrs 89 yrs	13
Aged in 90s	90 yrs 90 yrs 90 yrs 92 yrs	93 yrs 93 yrs	7

	97 yrs		
Not specified other than “elderly”	1	2	3
Total	17males	18 females	35

Table 4: Location of lawyer

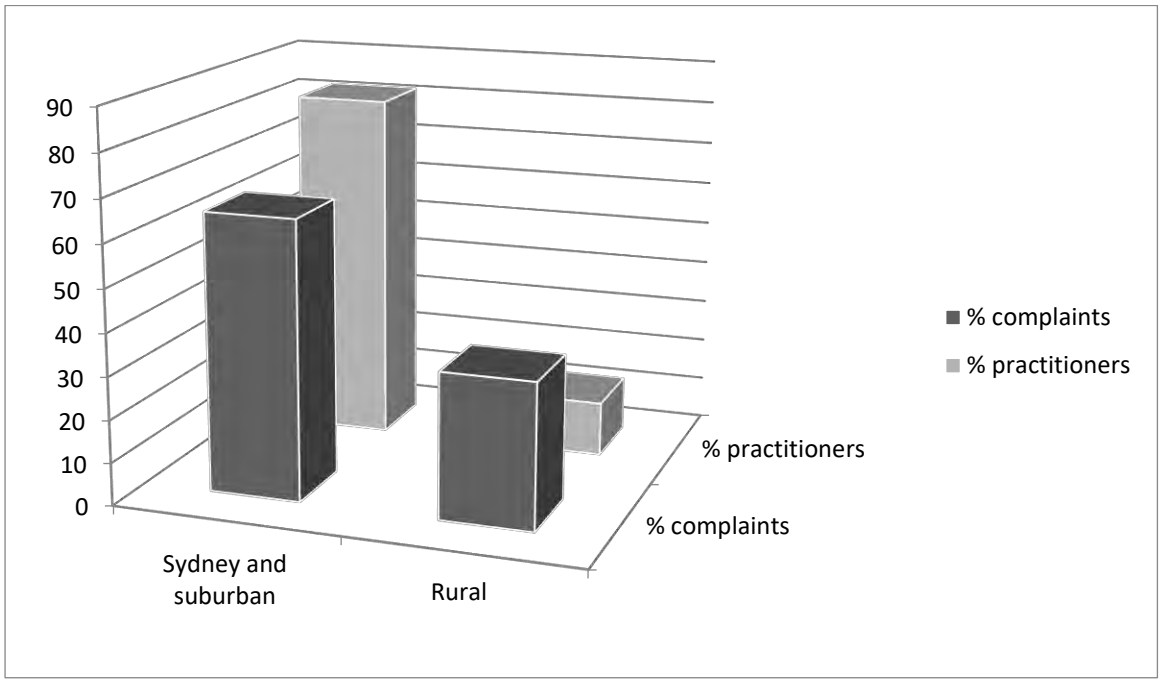

Table 5: Nature of instructions

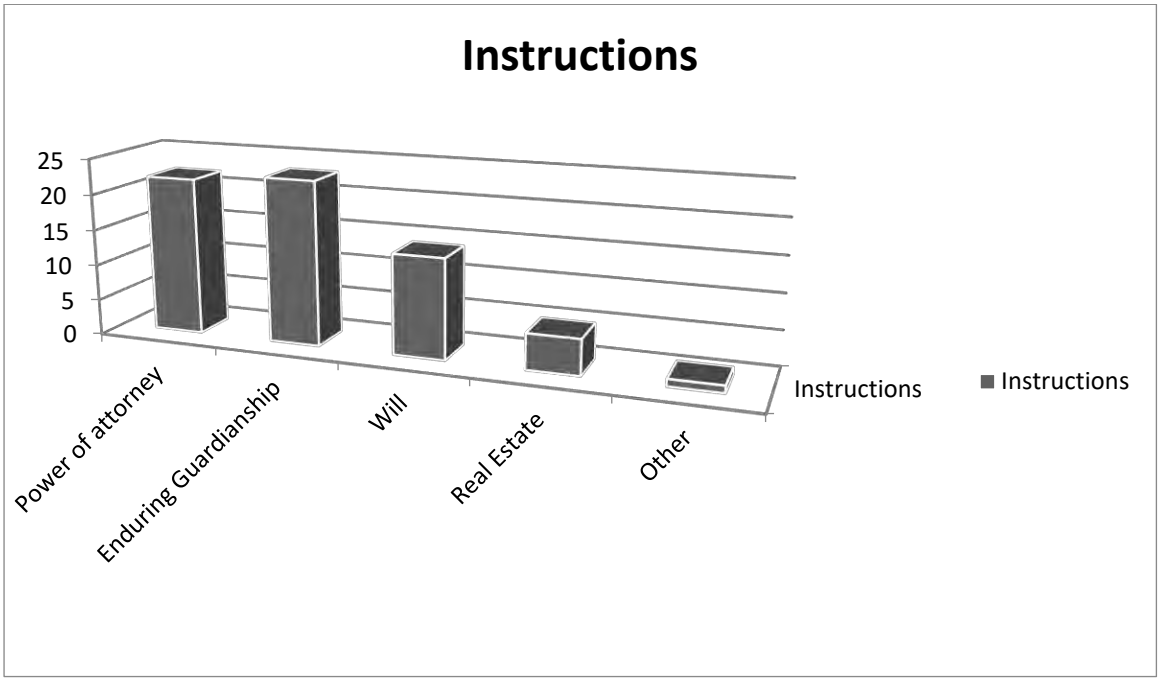

Table 6: Tests or status as evidence of capacity

Nature of medical test or status relied on to support decision about capacity	Lawyer relied on test or status as defence to the complaint	Complainant relied on test or status as "proof" of incapacity
RUDAS	1	2
MMSE	4 (scores from 21/30 – 30/30)	13 (scores from 9/30 up to 25)
ACAT report		8
ADL	1	
Addenbrooke's		1
Dementia	4	24
MRI/CT brain scan		4
Category of nursing home care		6
Hospital notes		3
Other diagnosis/status	1	2 Brain damage 1 Motor Neurone disease 1 Bi-polar, depression, stroke 1 History of paranoia and delusions I Parkinsons diagnosis I Schizophrenia

Table 7: Referral for medical opinion of capacity

Lawyer on notice of impaired capacity or challenge to capacity	Client was known to the lawyer	Referred for medical opinion	Referred to "usual" health professional	Referred for specialist capacity assessment
24	11	7	3	1

Table 8: Notetaking

No notes	Notes	Minimal notes	Detailed notes of capacity assessment process	Detailed notes unrelated to legal capacity
20	15	6	5 for Will 1 for EPOA 1 for financial decision	1 provided details of military service and Activities of Daily Living 1 military service and youth

Table 9: Elder abuse allegations

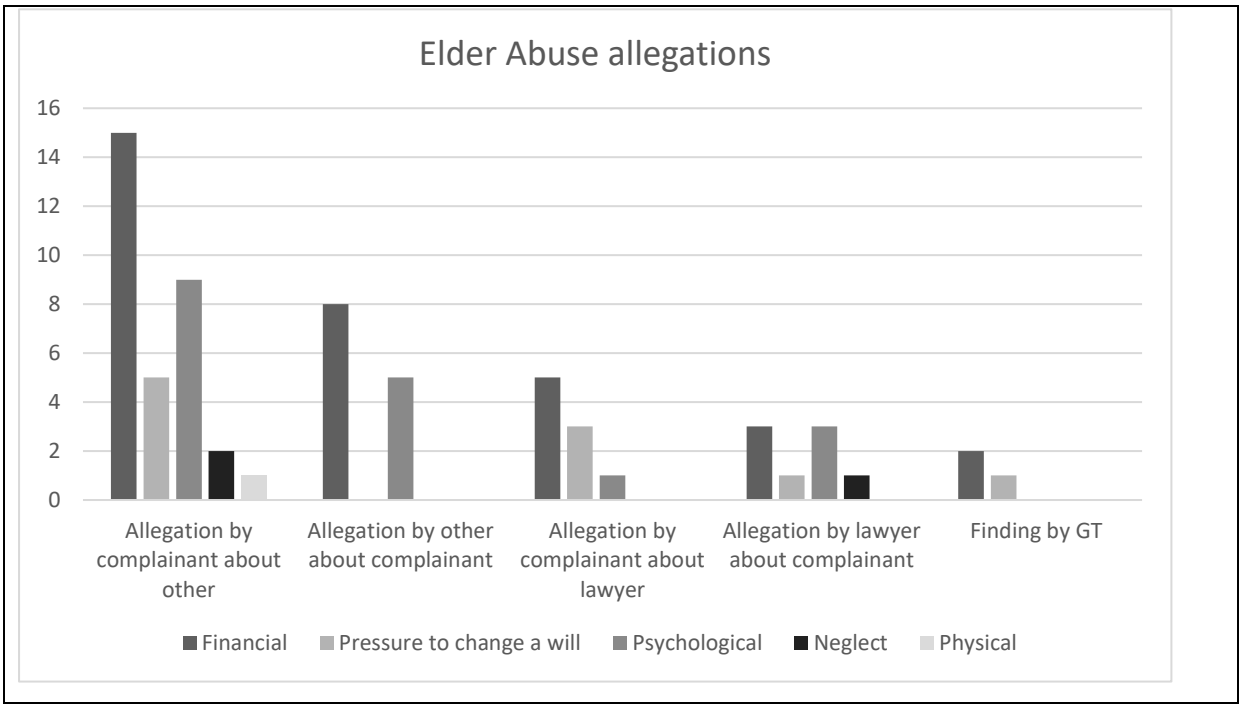

Table 10: Coding sample: abuse

Text	Author	Subject	Type of abuse[419]	Category
'He has without my parents knowledge, through intimidation, elder abuse and trickery had them sign a revocation of my Power of Attorney and without their knowledge sign new Power of Attorneys appointing him'	C[420]	CB[421]	Psychological Financial	Allegation by complainant about other

[419] For descriptors of the behaviours categorised in each type of abuse, see: NSW Government Interagency Working Group, 'Interagency Protocol for Responding to Abuse of Older People' (NSW Government, 2007) 6-8; NSW Elder Abuse Helpline and Resource Unit, 'NSW Elder Abuse Toolkit - Identifying and Respnding to the Abuse of Older People: the 5-Step Approach' (NSW Government, 2016) Tool 1; See also Australian Law Reform Australian Law Reform Commission, 'Elder Abuse (Discussion Paper 83)' (12 December 2016) <https://www.alrc.gov.au/sites/default/files/pdfs/publications/dp83.pdf>, Chapter 9 re pressure to change a will.
[420] C - Complainant
[421] CB – Complainant's brother

'as a result of *CS* being given the Power of Attorney by *L.*[422] It has also cost my mother in excess of $40,000, which I am considering taking legal action to stop further abuse by my sister of my mother's funds.'	C	CS[423]	Financial	Allegation by complainant about other
'I was present today with my mother (after her doctor's appointment) when CB rang them. I hope that all will be revealed at the hearing. He is pressuring my mother to meet him tomorrow, Wednesday, to sign, god knows what more documents. He is getting very aggressive and wants his solicitor to get his parents wills, deeds etc. from their solicitor asap'	C	CB	Financial Psychological	Allegation by complainant about other
'The biggest impact of L's actions, i.e. illegally appointing my CS as mum's power of attorney, enabled my sister to contact *(insurance company)* to arrange for my mother's life insurance payment to be paid directly into a bank account at the Westpac in *(location deleted)*, which my sister organised with my mother. This amounts to approximately $4500 per month. As my mother does not have capacity to use an ATM machine unaided, I would presume that my sister or any other 'carer' will be assisting her to	C	CS	Financial Physical Psychological	Allegation by complainant about other

[422] L - Lawyer
[423] CS – Complainant's sister

withdraw money. Having had my mother stay with me for 3 weeks in December 2010, due to allegations that my sister had beaten my mother and demanded money from her for a holiday, I was able to see that she had only a very small balance remaining in her Westpac bank account.'				
'L refers to your mother's concerns about the conduct of (C and CB) in relation to her finances and her health care. L refers to your Mother's assertions that her BMW and Audi motor had been taken by (C and CB) without her consent. Your mother also claimed that (C and CB) had arranged for the sale of her previous home 'in what she believed was a quick- fire sale and not the true value of the home.' According to L, your mother expressed concern that (C and CB) had arranged to relocate your mother to a new home, 'completely inappropriate for her needs.'	L	C and CB	Financial Psychological	Allegation by lawyer about complainant
'The rental payments are deposited in a separate bank account in C's sole name. C at first gave evidence that she does not draw on that	GT	C	Financial	Finding by GT

account and has no idea as to how much money might be in that account in her own name. However, later in the hearing, C conceded that, about twice a year, she transfers money from that account into another account in her name ... which pays a higher rate of interest ... C also stated that she regarded the money paid by (tenant) as being gift to her from CF,[424] but she would use this money to pay for CF's funeral.'				
'L had not discussed any fees for services with OP and he had wondered what he would have to pay. After approximately six weeks of intense involvement with OP's affairs OP told a close friend that the solicitor had said that L wanted to be left a property in the will. This property is valued at about 2 million dollars….. When other friends have been able to contact him and ask about what was happening he told them that he had to stop contact with his old friend and his doctor because the 'new' solicitor, not the current, had told him that they were leading him in a false direction.'	C	L	Pressure to change a will Financial abuse Psychological abuse	Allegation by complainant about lawyer

[424] CF- complainant's father

Appendix E: Ethics Approval

Approved - Ethics Application - Tomossy (Ref: 5201300386)
1 message

Appendix E (pages 230-232) removed from Open Access version as they may contain sensitive/confidential content.

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