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Submission to the NSW Law Reform Commission Inquiry into the Guardianship Act

Dear Commissioner

Thank you for the opportunity to provide this submission. I write in my capacity as a legal academic with research interest and practical experience in the law of substitute decision making. I am currently researching how lawyers assess and accept instructions from people who may lack the capacity for legal decisions. I am a founding member of the Australian Research Network on Law and Ageing and the co-author with Dr Susannah Sage-Jacobson of the recently published article, 'Human Rights, Older People and Decision Making in Australia'.[1]

In this article, we canvas several issues relevant to this inquiry. In particular:

1) There is a need for reform of the Guardianship Act to reflect a human rights approach to legal decision making.
2) Reforms should emphasize the will and preferences of the person for whom decisions are being made.
3) Legislation should reflect the functional approach to legal decision-making.
4) The legislation should be amended to explicitly state the presumption of capacity.
5) The legislation should be amended to accommodate supported decision making.

"Supported-decision making models require an approach that moves away from status based or outcomes based capacity assessments and recognize that the appropriate question to be asked in determining a person's capacity to make a decision should not be based on their impairment or their capability to exercise their preferences but rather focuses on maintaining the person's autonomy as far as possible. The question becomes; "What types of supports are required for this person to exercise his or her legal capacity?"A human rights based approach to capacity and supported decision making is also consistent with the

[1] *Elder Law Review*, Vol 9 (2015) Article 2.

practical understanding in the medical and disability research concerning fluctuating and diminishing capacity …"[2]

6) The "best interests" approach to guardianship decision making should be replaced. The legislation should be amended to express that any person acting as a substitute decision maker must act in a way that respects the will and preferences of the person under guardianship.
7) The current law of Guardianship and substitute decision making represents a "bright line" approach to loss of capacity that does not reflect the lived experience of people experiencing cognitive decline associated with dementia.

As we write in our article: "With the exception of the seriously injured or acutely ill, most people do not experience loss of legal capacity and the way this impacts on their ability to make their own decisions as a point in time event or a particular moment where a line is crossed. Laws relying on such a fiction that does not reflect the lived experience of diminishing capacity renders it unhelpful to the people it is designed to assist.

The second practical difficulty with the bright line model is that it transfers or affords far too much importance, weight and power to the actual capacity assessment itself. Capacity assessments are the various tests conducted by professionals to ascertain whether a person has lost their legal capacity or not. These tests are known however to be unreliable indicators of the entirety of a persons' real decision making capacity.[3] Under this model the capacity assessment necessarily becomes the blunt arbiter of which side of the bright line a person with diminished capacity is to fall, with significant consequences for that person's rights and wishes if they fall on the "wrong" side. Practical concerns about the bright line view of legal capacity have led to widespread recognition that the law is outdated and in urgent need of reform."[4]

Put another way, legislative reform in NSW should include the principles articulated by the Victorian Law Reform Commission (VLRC) made in the following recommendation:

Capacity Assessment Principles

27. New Guardianship legislation should contain the following capacity assessment principles:

[2] Lise Barry and Susannah Sage-Jacobson, 'Human Rights, Older People and Decision Making in Australia' (2015) 9(Article 2) *Elder Law Review* 1, 11.

[3] See for instance Paul Applebaum and Thomas Grisso, 'Assessing Patient's Capacities to Consent to Treatment' (1988) 319 *New England Journal of Medicine* 1635; Natalie Banner, 'Can Procedural and Substantive Elements of Decision-Making be Reconciled in Assessments of Mental Capacity' (2013) 9(1) *International Journal of Law in Context* 71; 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>.

[4] 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>.; Gerard Quinn, 'Personhood and Legal Capacity, Perspectives on the Paradigm Shift of Article 12 CRPD' (2010) *Paper Presented at the Conference on Disability and Legal Capacity under the CRPD, Harvard Law School* <http://www.inclusionireland.ie/content/page/capacity>.

(a) A person's capacity is specific to the decision to be made.

(b) Impaired decision-making capacity may be temporary or permanent and can fluctuate over time.

(c) An adult's incapacity to make a decision should not be assumed based on their age, appearance, condition, or an aspect of their behaviour.

(d) A person should not be considered to lack the capacity to make a decision merely because they make a decision that others consider to be unwise.

(e) A person should not be considered to lack the capacity to make a decision if it is possible for them to make that decision with appropriate support.

(f) When assessing a person's capacity every attempt should be made to ensure that the assessment occurs at a time and in an environment in which their capacity can most accurately be assessed.[5]

My current research

Finally I would like to raise some issues that arise from my research. I am currently completing a PhD examining how lawyers assess the capacity of older people for legal decisions. As a part of this research, I examined the "Capacity Complaints" from the Office of the Legal Services Commission between 2011 and 2013. Most of these complaints related to elderly residents of NSW and many of the conflicts between family members in these disputes were resolved in the Guardianship Tribunal.

In the period of my research, there were 35 complaints about solicitors and the manner in which they took instructions from someone allegedly lacking the capacity for legal decisions. Of the thirty five complaints examined, twenty two complaints involved a dispute over the instructions for a Power of Attorney. Twenty Three complaints involved a dispute over the instructions for an Enduring Guardian or Enduring Power of Attorney. Further examination of the files reveals that of these complaints, sixteen of the matters were also taken to a hearing at the Guardianship Tribunal. In ten of these hearings, the person appointed as an Attorney was replaced by the Public Guardian and the Public Trustee was granted Financial Management powers for the older person.

[5] Victorian Law Reform Commission, 'Guardianship Final Report 24' (Victorian Law Reform Commission, 2012) Recommendation 27,122.

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

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

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

Several of the complaints files that I examined involved matters that were ultimately decided in the Guardianship Tribunal. Of those matters that went to the Tribunal, there was no reference to complaints of elder abuse being referred for further investigation. In many situations of heightened conflict, the family conflict was not resolved or mediated. Instead, the response of the Guardianship Tribunal in these situations was to strip the Powers of Attorney from a family member and to then appoint a public guardian who would usurp all decision making for the older person. In any other theft or fraud situation, if the solution was to remove all decision making from the person and family members, but not to investigate the allegations, there would be outrage. If Guardianship is to be considered only as a last resort, then more resources need to be allocated to investigating and responding to elder abuse and to family conflict.

Sincerely
Lise Barry