RESPONSE TO THE EQUITY, CAPACITY AND DISABILITY IN COMMONWEALTH LAWS

DISCUSSION PAPER 81

Legal Aid NSW submission

to the Australian Law Reform Commission

July 2014

Legal Aid NSW welcomes the opportunity to respond to two of the questions raised in the ALRC Discussion Paper relating to solicitors rules (Question 7-2) and consumer protection (Question 11-1).

Experience of Legal aid NSW

Our responses to the questions are based on our experience in two areas: homelessness outreach and consumer civil law practice.

Legal Aid NSW, in collaboration with the Homeless Persons Legal Service, operates a number of homeless outreach clinics which are designed to provide assistance to people who are homeless or at risk of homelessness. Many of the clients attending the homeless clinics have a mental illness, intellectual disability or other cognitive disability, which is likely to be a factor contributing to ongoing homelessness or the likelihood that they will become homeless.

Consumer law matters constitute the largest category of the civil law advice and minor assistance work undertaken by Legal Aid NSW, a significant proportion of which relates to debts and debt recovery processes. In 2013, we assisted 8558 clients with consumer law advice.

Question 7–2
Australian Solicitors' Conduct Rules and state and territory legal professional rules

Legal Aid NSW supports the amendments to the Australian Solicitors' Conduct Rules and state and territory professional rules suggested in the Discussion Paper at Question 7-2 and believes that amendments of this type could provide some much needed clarification and guidance to solicitors trying to assist clients who have some degree of diminished capacity.

Determining an appropriate course of action when it becomes apparent that a client's capacity is in question is fundamental to the protection of the human rights of some the most vulnerable members of the community. Capacity is a complex issue and requires careful consideration and balancing when making decisions about how to proceed. There is risk that a person's right to make their own decisions will be interfered with inappropriately or excessively. There is a countervailing danger that failure to take action to protect a client might leave them exposed to physical or financial harm or abuse. In addition, any course of action that interferes with a person's decision making autonomy, whether for good or ill, risks damaging the relationship between solicitor and client. It is important that solicitors assisting these clients have the tools necessary to enable them do the job and are not discouraged from assisting the most vulnerable of clients by the ethical and legal framework in which they must operate.

Legal Aid NSW has recently been involved in a number of cases in which clients have sought assistance, but have lacked capacity to give adequate instructions. In some of these cases our clients were at risk of suffering serious financial harm, including homelessness, if action was not taken to protect their interests.

Case Study

Mr P came to Legal Aid NSW for assistance, having been urged by a Judge of the Supreme Court to do so. Mr P is from a non English speaking background and has no family or friends in Australia. He is the defendant in Supreme Court proceedings which, if the plaintiff succeeds, could leave him homeless. As proceedings progressed it became increasingly apparent that Mr P had a mental illness and was unable to make decisions necessary to progress his case.

While he could not make decisions in relation to the case, Mr P was quite capable of otherwise managing his affairs. He was not being assisted by any services and did not want to seek assistance from community workers. After some months of trying to assist Mr P, including attempting without success to find someone willing to act as Tutor, the case had reached an impasse. The solicitor had to decide to either cease acting or to make an application to have a substitute decision maker appointed. Ceasing to act would have left the client vulnerable in legal proceedings which could potentially result in his becoming homeless.

After giving the matter careful consideration the solicitor commenced proceedings in the Supreme Court seeking to have the NSW Trustee and Guardian appointed to make decisions for the purposes of the litigation only. The matter went before Justice Palmer. His Honour was satisfied that Mr P was unable by reason of his mental illness, to make decisions for himself in relation to the litigation and made the Orders as sought. Noting that it was unusual for the solicitor assisting a client to make an application of this nature, Justice Palmer nonetheless made it clear that in the circumstances, this was an appropriate course of action.

This case study illustrates that capacity is not a static concept. Capacity may be decision specific and can also be time specific. A person may for example, have capacity to manage their day to day affairs such as shopping and paying the bills, yet be unable to manage more complex and stressful situations, such as legal proceedings. Capacity can also fluctuate from time to time. A person may have an episodic mental illness that affects their ability to make decisions while they are unwell, yet regain capacity when they recover, or receive appropriate medical treatment.

Social isolation can also be an issue. In our experience a considerable number of homeless and disadvantaged people, especially those with a mental illness, are extremely socially isolated and are not connected to community services and nor do they wish to be. In some cases there is no-one available who is willing or able to assist and even in cases where there is someone able to assist, this may not be the in the client's interests. A particular family member or friend, while willing to assist, may not be appropriate due to a conflict of interest or because they are trying to take advantage of the client.

The adoption of the proposed rule would provide guidance and encourage solicitors to explore a variety of options prior to making an application to have a substitute decision maker appointed. In the event that it was necessary for the solicitor to make such an application, the proposed amendments to the Rule would make clear that such action is permissible and ethically responsible.

In making these submissions, we recognise that the solicitor client relationship is one of confidence and trust and the duty of confidentiality is central to fostering this relationship. There is an understandable concern that taking protective action that is contrary to a client's instructions and which may involve disclosing confidential information to a third party could damage the solicitor client relationship.

We note that exceptions to the duty of confidentiality already exist. Disclosure is permitted in certain cases, for example where it is necessary to properly carry out the terms of the retainer in order to safeguard the client's interests, or where such disclosure is permitted or compelled by law. An example is section 29 of the *Children and Young Persons (Care and Protection) Act 1998*, which allows disclosure of confidential information to the Director General of the Department of Community Services where there is a child or young person at risk of harm.

The solicitor client relationship may be damaged by such a disclosure. However, it is important to keep this in perspective. A solicitor client relationship may be damaged for any number of reasons, including the client not liking the advice they are being given, or how much they are being charged. When considering the duty of confidentiality it is useful to bear in mind another rationale for the duty of confidentiality, which is to foster public trust in the profession and the administration of justice.

An amendment to the Solicitors Rules would provide some much needed guidance and clarify a solicitor's authority to act, enabling the more effective provision of legal services to clients with diminished capacity.

An example of a rule designed for this purpose, and similar to the proposed rule change, can be found in the American Bar Association (ABA) Model Rules for Professional Conduct:

Rule 1.14 Clients with Diminished Capacity

a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.
c) Information relating to the representation of a client with diminished capacity is protected by rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.

In addition to providing guidance, such an amendment would be consistent with another purpose of the Solicitors Rules, which is to demonstrate the profession's commitment to integrity and public service. It would also be consistent with a solicitor's duty to the Court to ensure the proper and efficient administration of justice, making it less likely that solicitors will simply cease acting in the face of the ethical complexity and the risk of a complaint being made to the Law Society.

Question 11-1 Should provisions similar to the responsible lending provisions of the *National Consumer Credit Protection Act 2009* (Cth) (NCCPA) apply to other consumer contracts?

Existing responsible lending provisions contained in the NCCPA provide important safeguards for vulnerable consumers. It would be too onerous for suppliers to make reasonable enquiries about consumers 'requirements and objectives' in relation to every consumer contract. This would cover a very broad range of contracts, and is unrealistic in practice. We consider that there is a need for reform in relation to financial products, particularly insurance, as well as reforms that target particular product types and business models such as life insurance, funeral insurance and door to door and telephone sales.

The Australian Consumer Law (ACL) already contains consumer guarantees that apply to goods and services, including a requirement that the product is reasonably fit for any specified purpose. However, these laws do not apply to insurance contracts. We think that there is a strong case for existing consumer guarantees contained in ACL and the *Australian Securities and Investments Commission Act 2001* (the ASIC Act) to apply to consumer contracts for all financial products, including insurance. We also support the introduction of responsible lending provisions for consumer contracts entered into for financial products. Financial products tend to involve more complex consumer contracts and there is invariably significant information asymmetry which would be exacerbated in situations where the consumer had impaired decision making ability.

The requirements set out in sections 130 and 131 of the *National Consumer Credit Protection Act 2009* provide important safeguards, particularly for vulnerable consumers. ASIC's Regulatory Guide 209 "Credit Licensing: Responsible lending conduct" requires lenders to relevantly consider 'the capacity of the consumer to understand the credit contract'. For vulnerable consumers, this is a significant precautionary safeguard. It represents an important acknowledgment that traders have some role to play in protecting consumers from harm in relation to the products they sell.

In the area of insurance, the law needs modernising. At present, the only protection consumers have from unsafe products that are simply not fit for purpose is the very general obligation for each party to an insurance contract to act with utmost good faith. Insurance contracts are specifically excluded from unfair contract terms laws under the ASIC Act. As the only industry with this special exemption, this means that genuine issues often arise as to whether clauses drafted in standard term contracts protect consumers from loose terms which are not necessary to protect the insurer's legitimate business interests.

Equally, as outlined above, the ASIC Act contains a special exemption in section 12ED(3) of the *Australian Securities and Investments Commission Act 2001* which excludes contracts of insurance from warranties and a fitness for purpose test in relation to the supply of financial services. In the experience of Legal Aid NSW, there are real and significant product safety issues that arise in relation to insurance products and in our view greater consumer protection is required.

For example, we observed several cases in the 2013 Blue Mountains bushfires where consumers were sold a product that covered only half the cost of a rebuild. For these consumers they were simply caught unawares of the realistic cost of a rebuilt. In our view, such a product should not be allowed to be sold without some reasonable assessment as to fitness for purpose. It could be argued that these individuals were effectively sold *unsafe* insurance products. People who have made adjustments to their home in relation to a disability may be particularly susceptible to risks associated with underinsurance.

In our experience, there are some unsafe products and business models which are targeted at the most vulnerable consumers. These include life insurance and funeral insurance as well as door to door and telephone sales. For example, through our casework in Aboriginal communities we invariably find that funeral products sold to families often do not suit their needs. Common issues we have found include:

- Policies that pay out only on certain aspects of a family's funeral expense but fail to provide any level of financial security for the family into the future
- Customers fundamentally misunderstanding the nature of the product and wrongly believing after years of commitment that they have been paying into an endowment fund
- Policies being terminated after years of contributing and payouts not made because payments have been missed
- Payouts being refused because of the fine print of the contract
- Policies costing families an inordinate amount of money that could be spent on basic expenses, including policies taken for children, sometimes from birth.

Many of our Aboriginal clients have very limited financial literacy as a result of a range of historical government policies which controlled their lives and incomes and curtailed any intergenerational transfer of financial knowledge. Where a client had any reduced decision making capacity, this would only compound their vulnerability.

Case study

Sasha, an Aboriginal woman, lost her young son in 1996 when she was 22 years old. Paying for the funeral was a financial strain on her and her family. Having to urgently find between $5000 and $10000 can be a significant cause of hardship for families on low incomes. In 2002 with three children under 8, Sasha signed up to a funeral insurance product when a salesperson came to her door. It was not clear to her that her premiums would go up, and that she would only get a set benefit amount. She thought she was putting money in and she would get that money back. She was not told what would happen if she stopped paying. By 2013 she had made almost $8000 in payments but was forced to stop paying the premium due to lack of income. She is now considering options to pay for her funeral that don't require her to pay more than the cost of the funeral over her lifetime.

There are a range of possible reforms which could address the specific problems with funeral insurance products. Firstly, financial services legislation should be amended to remove the exemption that allows general insurance products which are 'expenses only' to be excluded from financial service regulation. Further, funeral insurance premiums should be capped at an amount which is relative to the 'benefit of the product, that is, the actual cost of a funeral. Product disclosure should also outline the true cost of the product, including the amount that they can expect to pay in premiums if they live to the average Australian life expectancy and the average cost of a funeral. Finally, a fitness for purpose test would be appropriate for this type of product. There is also scope for better tailored products being more readily available to this class of consumer, that is, consumers who live in a remote area, have limited literacy and financial literacy and have a disability.

At present there is no industry Code of Practice in the life insurance industry. Similarly, business models that rely on door to door sales or sell products over the phone can also expose vulnerable consumers to predatory or exploitative practices. Industry Codes of Practice would assist to provide some safeguards for vulnerable consumers who are targeted in relation to life insurance and funeral insurance products, as well as door to door and telephone sales.

Any amendments or law reform in this area should ensure that disadvantaged consumers are not excluded from accessing essential services such as utilities. It would be important to ensure that any reform did not go against the interests of people with impaired decision-making ability to enter contracts for essential services or products. The risk of this occurring could be avoided by targeting legislation at particular business models and products.

Further information

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the Legal Aid Commission Act 1979 (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged.

Legal Aid NSW provides information, community legal education, advice, minor assistance and representation, through a large in-house legal practice and private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 36 community legal centres and 28 women's domestic violence court advocacy services.