

21 January 2014

Our ref 328/13

The Executive Director
Australian Law Reform Commission
GPO Box 3708
Sydney NSW 2001

By Post and Email to: disability@alrc.gov.au

Dear Executive Director

Equality, Capacity and Disability in Commonwealth Laws

Thank you for the opportunity to comment on the Issues Paper, *Equality, Capacity and Disability in Commonwealth Laws* (the Issues Paper).

Please note that given the time available to the Society to consider the issues paper it is not intended that this submission is to represent an exhaustive review of all questions posed in the Issues Paper. We provide the following comments in relation to some issues, namely: supported and substituted decision-making, capacity and decision-making, electoral matters, jury service and access to justice, evidence and federal offences.

1. Question 1 and paras [61]–[72] — Supported and substituted decision-making

Question 1. Australia has an Interpretative Declaration in relation to Article 12 of the United Nations Convention on the Rights of Persons with Disabilities. What impact does this have in Australia on:

- (a) provision for supported or substitute decision-making arrangements; and
- (b) the recognition of people with disability before the law and their ability to exercise legal capacity?

The terms supported and substituted decision-making are often used interchangeably and without necessarily intending to signify any major difference between the two.

For example, Queensland's adult guardianship legislation — the *Guardianship and Administration Act 2000* (Qld) (GAA) and the *Powers of Attorney Act 1999* (Qld) (POAA) — are often described in terms of providing 'substitute' decision-making mechanisms for adults with impaired decision-making capacity.

However, the label itself is not determinative. Rather, the relevant issue, as pointed out in the Issues Paper at [65]–[67], is the particular combination of characteristics of the assisted decision-making regime.

In particular, the major concern is to avoid trampling on the individual's autonomy, will and preferences and to preserve the individual's right to make decisions.

In our view, this does not preclude formal assisted decision-making regimes from falling within the 'supported' model rather than the 'substituted' model as long as particular safeguards are met.

In particular, it may sometimes be necessary, as a last resort, to appoint a formal decision-maker for an adult with impaired capacity, not so that someone else can 'take over' the adult's decisions, *but for the very purpose of ensuring that a decision that accords with the adult's wishes as closely as possible can actually be made.*

In order to make legally binding decisions, a person must have legal capacity. Such capacity is presumed. However, where that presumption has been displaced by cogent evidence, some mechanism is needed to give effect to the adult's rights and wishes.

Among the key safeguards for formal assisted decision-making regimes that would meet the 'supported' model are the following:

- Capacity must be presumed, and that presumption displaced only by cogent evidence;
- Formal decision-makers not appointed in advance by the adult himself or herself (for example by an enduring power of attorney) should be appointed only by due process, as a last resort and only for the limited purpose and duration that is necessary;
- Preference should be given to the appointment of members of the adult's informal support network, rather than to statutory bodies such as the Public Trustee; and
- Appointed decision-makers should be required to make decisions not on the basis of paternalistic or objective standards such as the adult's 'best interests', but to preserve the adult's ability to make his or her own decisions to the greatest extent and otherwise to give effect to what the adult himself or herself wishes to the greatest extent.

In considering these matters, particular regard should be had to the recommendations made by the Queensland Law Reform Commission in its *Review of Queensland's Guardianship Laws*, Report No 67 (2010),¹ particularly in relation to the General Principles of the guardianship legislation in that jurisdiction. The recommended amendments to these Principles pay particular attention to the United Nations Convention on the Rights of Persons with Disabilities.² We also note in particular General Principle 7, which relates to substituted judgment.

Perhaps supported decision-making conceptually belongs within "informal decision-making", as it is naturally occurring in many family relationships, spousal relationships and within some cultural groups. Supported decision making could be included as an example in the legislation where there are references to informal decision making.

¹ <http://www qlrc.qld.gov.au/Publications.htm>

² The Executive Summary of this Report is available at www qlrc.qld.gov.au/publications/Executive%20Summary.pdf

As the Queensland Civil and Administrative Tribunal needs to consider all the elements of s12 of the GAA before making an appointment, an informal supportive relationship could be recognised at this point when the Tribunal considers "capacity" and then "need" for an appointment.

Also, by greater use of conferencing/alternative dispute resolution (ADR) in guardianship matters more broadly, as recommended in the QLRC 2010 report, further information and opportunities for informal networks to "work around conflict" before a formal appointment is made, may give greater scope for support networks to operate. Through ADR, support networks can be given a chance to rectify their approach, develop ways to better communicate, and perhaps prevent a formal order from being made, until clearly necessary. This also takes into account concerns raised in the QLRC Report on the Tribunal's approach to conflict in support networks.

2. Question 4 — Capacity and decision-making

Question 4. Should there be a Commonwealth or nationally consistent approach to defining capacity and assessing a person's ability to exercise their legal capacity? If so, what is the most appropriate mechanism and what are the key elements?

The Society would support a nationally consistent approach to the definition of capacity, with one of the key elements, and perhaps the most important, of any capacity assessment regime being the presumption of capacity. Further, any approach to the definition or assessment of capacity should be a functional approach, rather than a status approach or an outcome approach. To this end, regard should be had to the definition of capacity, endorsed by the Queensland Law Reform Commission, in the GOA and the POAA.³

We also note a submission of the Queensland Public Interest Law Clearing House to the Public Trustee of Queensland entitled 'Incapable of Justice: Capacity and Self-Represented Civil Litigants' (November 2009) which discusses these issues (particularly at pages 11-15).⁴

3. Questions 16 and 17 — Electoral matters

Question 16. What changes, if any, should be made to the Commonwealth Electoral Act 1918 (Cth) or the Referendum (Machinery Provision) Act 1984 (Cth) to enable people with disability to be placed or retained on the Roll of Electors or to vote?

Question 17. What issues arise in relation to electoral matters that may affect the equal recognition before the law of people with disability or their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks to address these issues?

In considering this issue, preference should be given to those methods that are endorsed by people with disability. It should not be assumed that one method is better than another. For

³ See Queensland Law Reform Commission in its *Review of Queensland's Guardianship Laws*, Report No 67 (2010) ch 7.

⁴ The submission can be found here: http://qpilch.org.au/dbase_upl/PTO%20submission%20Nov%202009.pdf, pages 11-15

instance, one commentator who is visually impaired has noted that telephone voting is more accessible than using the internet for most blind persons.⁵

Consideration might be given to updating the provisions dealing with postal voting to enable electronic postal voting by, for example, people who are blind or vision impaired. Such persons might be physically able to attend a polling booth on the day but may not be able to cast a secret vote in the same way as others.

Electronic or telephone voting would assist not only people who are blind or vision impaired, but also people with a reading disability and people who live in remote areas.

However, special regard should be given to the security of casting votes in this or any other electronic form to avoid the risk of tampering or other fraud.

4. Question 20 — Jury service

Question 20. What changes, if any, should be made to Commonwealth laws and legal frameworks to ensure that people with disability are not automatically or inappropriately excluded from serving on a jury or being eligible for jury service?

Consideration should be given to the recommendations made in the Queensland Law Reform Commission's *Review of Jury Selection*, Report No 68 (2011).⁶ See, in particular, Chapter 8 of that Report which made the following recommendations (among others) in relation to the *Jury Act 1995* (Qld):⁷

8-8 Section 4(3)(l) of the Jury Act 1995 (Qld) should be amended to remove the ineligibility of persons with a physical disability.

8-9 Provision should be made for prospective jurors to inform the Sheriff of any physical disabilities and special needs that they have as part of the Questionnaire issued with the Notice to Prospective Juror, and for the Sheriff, after receiving such information, to make such further inquiries as are necessary to give consideration to the facilities that are required and can be made available to accommodate the person's disability.

8-10 The Jury Act 1995 (Qld) should be amended to provide that, if it appears to the Sheriff, after consideration of the facilities that are required and can be made available to accommodate a person's physical disability, that a prospective juror is unable to discharge the duties of a juror effectively, the Sheriff may excuse the person from further attendance.

8-11 The Jury Act 1995 (Qld) should be amended to provide that, if it appears to a judge, after consideration of the facilities that are required and can be made available to accommodate a person's physical disability, that a prospective juror or juror is unable to discharge the duties of a juror effectively, the judge may excuse or discharge the person from further attendance.

⁵ See McCallum, *Participating in political and public life, A challenge for we persons with sensory disabilities* (2011) 36 (2) *Alternative Law Jnl* 80.

⁶ Report available at: www.qjrc.qld.gov.au/reports/r68.pdf

⁷ Queensland Law Reform Commission, *Review of Jury Selection*, Report No 68 (2011) 233–4, Rec 8-8 to 8-13.

8-12 *The Jury Act 1995 (Qld) should be amended to provide that a person who is excused from service by the Sheriff on the basis of physical disability may apply to the judge for a different decision.*

8-13 *The branch of the Department of Justice and Attorney-General that has responsibility for the administration of the Queensland courts (being the branch located within the Brisbane Supreme Court and District Court complex) should consult with peak advocacy organisations for people with physical disabilities on the types of accommodations and assistive technologies that may need to be made or provided by the courts to assist people with disabilities to perform jury service.*

Attention is drawn to the Commission's statement at [8.126] in relation to Recommendation 8-10, that "[t]hese excusal provisions are not intended to provide a means for the Sheriff to exclude people from jury service without making reasonable efforts to enable them to serve."

Exclusion from jury service should not be automatic, and consideration should be required to be given to the provision of reasonable accommodations to enable people with disabilities to perform jury service. This requirement should be explicit. This would accord with Article 5(3) of the United Nations Convention on the Rights of Persons with Disabilities.

To this end, consideration might also be given to the establishment of a 'one stop shop' within (federal) courts for people with disability who are planning to attend the court, either as a party, witness, juror or other participant or member of the public – with a dedicated disability liaison to field enquiries about and coordinate access, and to work with other court staff in providing reasonable accommodations for people with disability to access the courts.

Consideration should also be given to any changes in the legislation that might be needed to enable sign language interpreters to be present in the jury room. In particular, it is observed that it has been suggested that concerns about the presence of a "13th person" in the jury room could be overcome by requiring interpreters to take an appropriate oath or affirmation.⁸

It should also be noted that improving the accessibility of jury service to people with disability also necessitates good practices in trial presentation and jury instructions. This will benefit all jurors and participants in trials, not just those with a disability.

5. Access to justice, evidence and federal offences

Question 23. What issues arise in relation to access to justice that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to access to justice to address these issues?

Question 24. What issues arise in relation to evidence law that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to evidence to address these issues?

Question 25. What issues arise in relation to the law on federal offences that may affect the equal recognition before the law of people with disability and their ability to exercise legal capacity? What changes, if any, should be made to Commonwealth laws and legal frameworks relating to federal offences to address these issues?

⁸ See New South Wales Law Reform Commission, *Blind or Deaf Jurors*, Report 114 (2006) 59, cited in Queensland Law Reform Commission, *Review of Jury Selection*, Report No 68 (2011) [8.89] n 1044.

The Society notes three publications relating to these matters from a Queensland perspective, namely:

- Toombs, D. (2012) *Disability & the Queensland Criminal Justice System*. Pymont, NSW: Thompson Reuters.
- Mason, C., Robb, W. (2010) *Preparing Pathways to Justice: Intervening early for vulnerable people with impaired capacity*. A report for Queensland Advocacy Incorporated.⁹
- French, P. (2007) *Disabled Justice: the barriers to justice for persons with disability in Queensland*. Queensland Advocacy Incorporated.¹⁰

These publications offer detailed examination of some of the issues and practical considerations for legal practitioners who deal with people with disability in criminal justice.

We raise a number of issues which may be relevant to the context of Question 23. Firstly, in relation to children with disability:

- There is inadequate resourcing and funding for mental health and disability assistance. In particular, there are inadequate assessments available for all children in the criminal justice system. Research suggests that a large number of young people in detention suffer from a disability however there is no systematic assessment undertaken.
- A child with disability in the care of Child Safety Services in Queensland is not able to gain access to a specialised disability support worker until they are an adult.
- Children with disability subject to orders in the criminal justice system receive no specialised support. Children are only able to receive the support Child Safety can provide.
- Parents are occasionally advised that, where disability services cannot provide an adequate level of support, they should involve Child Safety to obtain better funding. We note this has been the subject of comment in the Final Report of Queensland's Child Protection Commission of Inquiry.¹¹
- There are often issues arising from reports, where capacity is found to be a concern. It is difficult to appoint an advocate in circumstances where the report determines there to be issues of capacity.
- Young people who are not Australian citizens are often unable to obtain appropriate services to address their disability. Whilst this is the case for all non-citizens, children and young people do not generally determine their country; this decision is undertaken by their parents/guardians.

⁹ Available at: http://www.qai.org.au/images/stories/docs/2010/QAI_Pathways_Report_August_2010.pdf

¹⁰ Available at: http://www.qai.org.au/images/stories/docs/1987-2007/doc_199.pdf

¹¹ Report found at: http://www.childprotectioninquiry.qld.gov.au/_data/assets/pdf_file/0017/202625/QCPCI-FINAL-REPORT-web-version.pdf, the issue of relinquishment of children with a disability discussed at pages 111-112

Capacity to instruct a solicitor

We note in particular the conundrum of what is a solicitor to do in the grey area, when the issue of impaired capacity was not "alive" to the solicitor initially, although it becomes manifest during the progression of the client/lawyer relationship. In particular, a recommendation as contained in the **enclosed** article, 'Representing clients with diminished capacity' at page 58 based on the American Bar Association's model professional rules 1.14 could provide greater clarity for practitioners along with professional certainty of being able to act to protect client's interests.¹²

The case of *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 also sets out the considerations when there is a potential issue with a party's/client's capacity, and what the lawyer's role is.¹³

***R v AAM; ex parte A-G (Qld)* [2010] QCA 305**

An issue which is particularly concerning in the Queensland context are the comments made by the Queensland Supreme Court in the case of *R v AAM; ex parte A-G (Qld)* [2010] QCA 305:

It seems unsatisfactory that the laws of this State make no provision for the determination of the question of fitness to plead to summary offences. It is well documented that mental illness is a common and growing problem amongst those charged with criminal offences. The Magistrates Court has attempted to meet this problem through its Special Circumstances Court Diversion Program which apparently presently operates only in the Brisbane area. This program assists categories of vulnerable people including those with impaired decision-making capacity because of mental illness, intellectual disability, cognitive impairment, or brain and neurological disorders. This commendable initiative, which allows for suitable compassionate supervisory and supportive bail and sentencing orders to be made in appropriate cases, may well be effective in assisting these vulnerable people. But it does not and cannot provide a satisfactory legal solution where people charged with summary offences under the criminal justice system are unfit to plead to those charges. The legislature may wish to consider whether law reform is needed to correct this hiatus in the existing criminal justice system. [references omitted]

The Society echoes these concerns and considers that law reform in this area is vital, particularly with regard to the treatment of summary offences which involve mental health issues. Despite clearly being raised in this case in 2010, Queensland is yet to see legislative reform. We also note that the Special Circumstances Court Diversion program no longer exists in Queensland. To some extent, the Queensland Courts Referral program deals with similar issues.¹⁴

¹² Article by Andrew Taylor, Law Society Journal, February 2010.

¹³ Found at: <http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2012/87.html?stem=0&synonyms=0&query=Goddard+Elliott>, para 545-570.

¹⁴ Further information can be found here: <http://www.courts.qld.gov.au/courts/courts-innovation-programs/queensland-courts-referral>

The Society advocates for better treatment of people suffering from mental health issues and impaired decision-making capacity in the criminal justice system (particularly in relation to summary offences). Specifically what is required is:

- The implementation of processes and programs to identify mental health issues and impaired decision-making capacity in people accused of criminal offences at an early stage, including court diversion programs aimed at addressing the underlying causes of a person's offending behaviour.
- Assistance for the accused and their family through court processes.
- Assistance for the accused and their family to access existing mental health services and treatment facilities in order to reduce rates of recidivism.
- Awareness raising of:
 - mental health issues in the community; and
 - the various processes within the criminal justice system to deal appropriately with people suffering from mental illness.

Forensic orders

The Society notes that forensic disability orders in Queensland are governed by the *Forensic Disability Act 2011*. This legislation was enacted to establish a forensic disability service model to provide for involuntary detention, care and protection of persons with intellectual disabilities. The legislation was based on a report entitled "Challenging Behaviour and Disability: A Targeted Response" (the Carter Report).¹⁵ The Carter Report 'examined a targeted service and legislative response for adults with an intellectual or cognitive disability who present with challenging behaviour of such a nature, intensity or frequency to put themselves or others at risk.'¹⁶

The Society specifically notes the purpose of the legislation stated in section 3 of the *Forensic Disability Act 2011* -

The purpose of this Act is to provide for the involuntary detention, and the care and support and protection, of forensic disability clients, while at the same time –

- (a) *Safeguarding their rights and freedoms; and*
- (b) *Balancing their rights and freedoms with the rights and freedoms of other people; and*
- (c) *Promoting their individual development and enhancing their opportunities for quality of life; and*
- (d) *Maximising their opportunities for reintegration into the community.*

The Society considers that generally this has been a progressive step in the advancement of protections for individuals under forensic orders. However, we note the fact that the Forensic Disability Service is purpose built and away from the mainstream community which may

¹⁵ J. Carter QC, 2006, "Challenging Behaviour and Disability: A Target Response" found at <http://www.courts.qld.gov.au/courts/courts-innovation-programs/queensland-courts-referral>

¹⁶ Explanatory Notes, *Forensic Disability Bill 2011*

hinder the opportunities for reintegration, a noted purpose under s3(d) of the *Forensic Disability Act*.

Separate facilities

Due to the vulnerability of individuals under forensic orders, we consider it is inappropriate to allow them contact with the general prison population. There is also a strong need for services to be within close proximity to the patient's home region to ensure patients are kept near their support network. We note that in Queensland, this facility is located in Brisbane at Wacol and rehabilitation services are needed by forensic patients to assist them towards living in the community.

Restrictive practices

The Society believes that it is important that all appropriate persons readily have access to information, notice of decisions, and an opportunity to request review with regard to seclusion and mechanical restraint practices. We are supportive of the reduction of the use of restrictive practices. We consider that a guardian should be appointed for restrictive practice matters. This guardian should be consulted on the approval, review and use of restrictive practices by disability service providers.

In this regard, we consider that it is important to keep a restrictive practice register in order to accurately record and monitor the use of these practices.

The use of mechanical and/or chemical restraints should require:

- The consent of the adult or their legal guardian or the Queensland Civil and Administrative Tribunal;
- The approval of the Director;
- A report to be provided to the Director on the use of the restrictive practice; and
- The recording of the use of the restrictive practice on an accessible register.

We support the use of Positive Behaviour Support Plans (PBSP) to deal with the application of restrictive practices. As recommended in the Carter Report¹⁷, the adult with disability, his or her parent or guardian, and appropriate specialists should also have the opportunity to participate in the development of the PBSP. We consider that notifications should be made to relevant persons, such as concerned adult or his or her guardian as this is essential to adequately protect the rights of these persons. These comments also apply to both forensic orders in relation to people with mental illness and forensic orders in relation to people with intellectual disability.

Amendments to the *Disability Services Act 2006* (Qld) and the *Guardianship and Administration Act 2000* (Qld) regarding restrictive practices have been introduced in the Queensland Parliament. The Society supports the amendments with particular reference to requiring the service provider to provide a statement regarding the use of restrictive practices.

Allied persons

The *Forensic Disability Act 2011* allows for allied persons to help the client to represent the client's views, wishes and interests relating to the client's assessment, detention, care and

¹⁷ Ibid

support and protection.¹⁸ The Society agrees with the concept of an allied person being appointed to assist the person who is held under a forensic order. An allied person has the right to all documents considered by the Tribunal at the Tribunal hearings. The allied person has the right to attend Tribunal hearings to represent the client's view, wishes and interests, and yet they do not have the right to see the documents considered by the Tribunal. Even though the person under the forensic order has a right to see these documents, they are often not given a copy, or have limited time or means, to pass it on to their allied person. Although we support the role of an allied person, we consider that it should be strengthened to address the issues we have highlighted.

Thank you for the opportunity to provide comments on these issues. Please contact our Senior Policy Solicitor, Ms Binny De Saram on (07) 3842 5885 or b.desaram@qls.com.au; Policy Solicitor, Ms Louise Pennisi on (07) 3842 5872 or l.pennisi@qls.com.au; or Policy Solicitor, Ms Raylene D'Cruz on (07) 3842 5884 or r.dacruz@qls.com.au for further inquiries.

Yours faithfully



Ian Brown
President

Enc: Article, Representing clients with diminished capacity

¹⁸ *Forensic Disability Act 2011 s24*

Representing clients with DIMINISHED

Clarification of solicitor's authority would help

Determining an appropriate course of action when 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.



*Andrew Taylor is solicitor/
coordinator with the Specialist
Homeless Outreach Clinics at
Legal Aid NSW.*

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 and the Homeless Persons Legal Service¹ collaborate in operating 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.

Legal Aid 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.

In one case Mr P came to Legal Aid 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 the 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 who 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. For example, a person may have an episodic mental illness that

CAPACITY

By ANDREW TAYLOR

affects their ability to make decisions while they are unwell, yet regain capacity when they recover, or receive appropriate medical treatment.

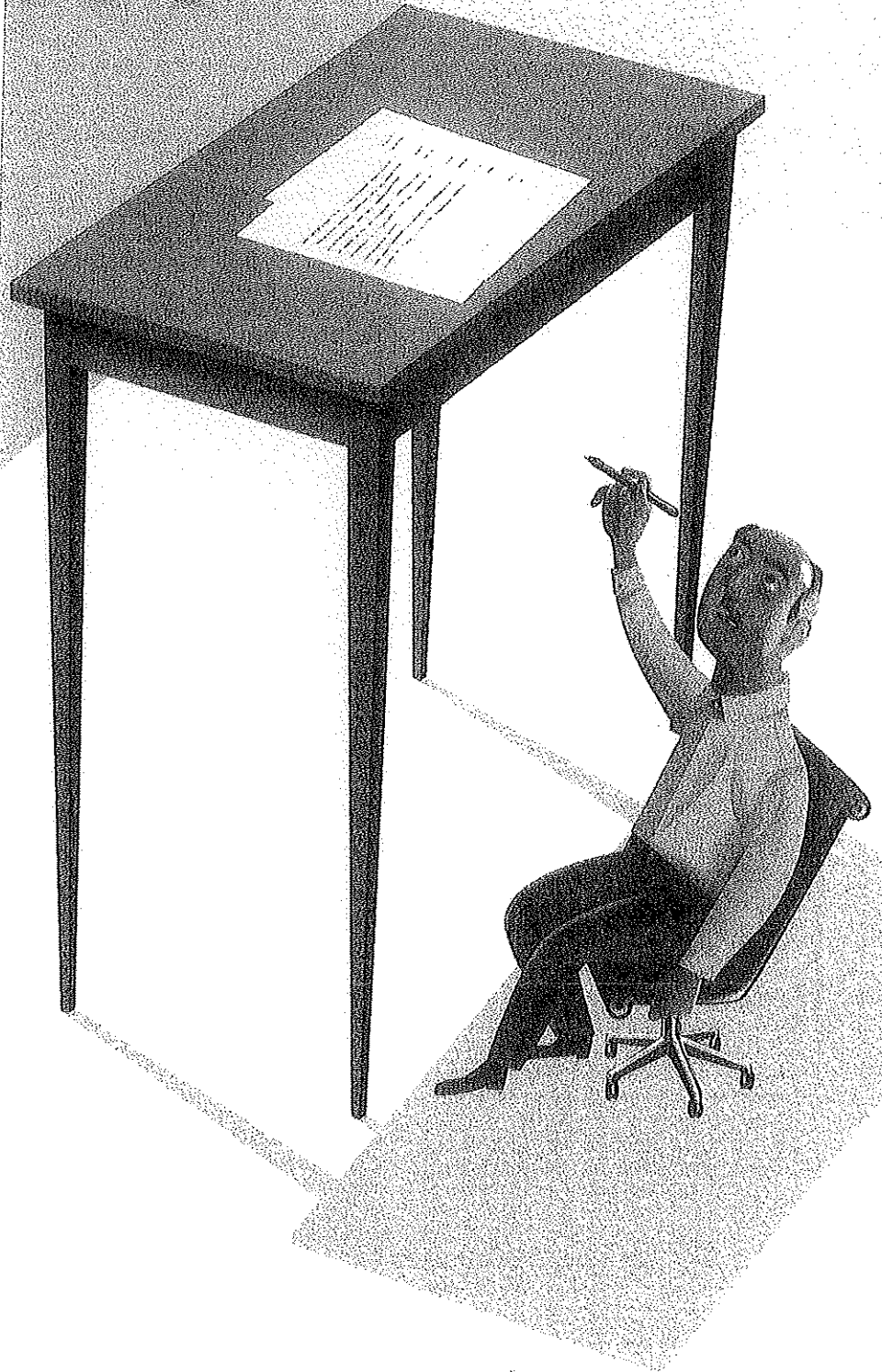
Recently, some useful information has been published providing practical guidance on how to determine whether a person has capacity to make their own decisions. These resources include: the *Capacity Toolkit* from the Attorney General's Department and *When a Client's Capacity is in Doubt* from the Law Society of NSW.² These capacity guides provide information about the nature of capacity, how capacity can be assessed, what can be done to enhance a person's capacity to make decisions and substitute decision-making.

While this information is unquestionably helpful, there remain some significant deficiencies in our ability as solicitors to assist some of the most vulnerable members of the community. This in my view is likely to leave some people at risk of physical or financial harm or abuse. One problem is a lack of clarity in relation to a solicitor's ethical position when a client lacks capacity.

Conflicting ethical position

An example of the conflicting ethical position that solicitors may find themselves in was identified in *R v P* [2001] NSWCA 473. As with the case study above, this case involved an application by a solicitor to have his client declared incapable of managing her affairs, so that a financial manager could be appointed for the purposes of litigation. Like the above example, the court accepted that there was no-one else available to make the application. Referring to the previous authority of *McD*,³ the court observed that: "*McD* did not purport to impose any absolute rule against solicitors bringing such action and I do not think this court should suggest that there is an absolute rule against such action being brought.

ILLUSTRATION: NIGEL BUCHANAN



The bringing of such actions is extremely undesirable because it involves the solicitor in conflict between the duty to do what the solicitor considers best for the client and the duty to act in accordance with the client's instructions; and because of a possible conflict between the solicitor's duty to the client and the solicitor's interest in continuing to act in the proceedings in question and to receive fees for this. Of course, where as in this case the order sought is for the appointment of the Protective Commissioner to be receiver and manager of the client's estate and to have control of the court proceedings, the Protective Commissioner may, if this is considered to be in the client's interests, then dismiss the solicitor and either give effect to the client's wishes in the matter or engage other solicitors ...⁴

R v P involved an application in the Supreme Court to appoint a substitute decision-maker. However, a solicitor may find themselves in an ethically conflicted position well before it gets to this stage. What, for example, should a solicitor do when it first becomes apparent that their client's capacity is in doubt? Should they cease acting or do they have an ethical obligation to continue? If a solicitor continues to act, by what authority are they doing so? What action can they take to protect the interests of the client? To what extent, if any, are solicitors able to reveal client confidential information to third parties in

bers, health professionals or community workers. Without our client's express authority, any disclosure to a third party would on the face of it place us in conflict with our duty of confidentiality as set out in the rule 2.1 of the Revised Professional Conduct and Practice Rules 1995 (Solicitors Rules). The case of *R v P* sets out a qualification to rule 2.1 in the form of an implied consent permitting a lawyer to act in a manner necessary to properly carry out the terms of the retainer. The scope of this implied consent is not clear. However, according to *Riley* it permits, where necessary, the disclosure of confidential information sufficient to enable an application to be made to have the client declared incapable of managing their affairs.⁵

Proposed amendment to the rules

An amendment to the Solicitors Rules could 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 can be found in the American Bar Association (ABA) Model Rules for Professional Conduct:

"Rule 1.14 Clients with diminished capacity

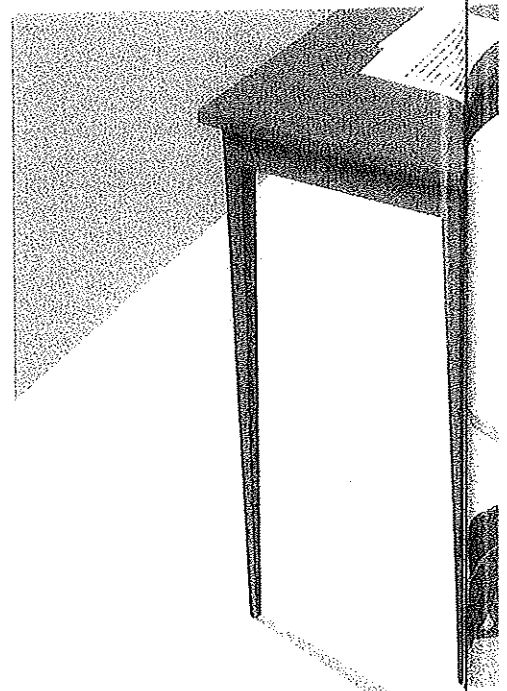
"(a) When a client's capacity to make adequately considered decisions in connection with a representation is dimin-

ent's interests."⁷

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.⁸ It would also be consistent with a solicitor's duty to the court to ensure the proper and efficient administration of justice,⁹ making it less likely that solicitors would simply cease acting in the face of the ethical complexity and the risk of a complaint being made to the Law Society.

The socially isolated client

The guidance provided in resources



"There remain some significant deficiencies in our ability as solicitors to assist some of the most vulnerable members of the community."

order to protect the client's interests? What is the position if there are no family, friends or community workers willing or able to assist? What about situations that do not fall within the terms of the retainer? For example, where a client is about to be awarded a large sum of money and there is serious doubt about their capacity to manage the money or concern about the risk of financial abuse from others? Faced with these ethical dilemmas and the comments made by the court in *R v P*, a solicitor may simply decide to cease acting or ignore the problem. This may get the solicitor off the hook in some respects, but for a client about to lose their home or their compensation payout, this could be a very unsatisfactory solution to the ethical dilemma.

Guidance in relation to these ethical dilemmas is limited and in my view offers little comfort. One of the difficulties faced by solicitors dealing with them is that in order to assist a client with diminished capacity, it may be desirable to enlist the aid of third parties, such as family mem-

bered, 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 1.6.⁶ 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 cli-

ent's interests. The Attorney General's Department and Law Society capacity guides to some extent assumes that there is someone in the community, either a family member, friend or community worker, who can be relied upon to assist the person whose capacity is in question. It may be the case that there is such a person available and willing to assist a person with diminished capacity through informal support, or to act as tutor¹⁰ or next friend or to make an application to have someone appointed as a substitute decision-maker.

In our experience at the Legal Aid outreach clinics, 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; 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 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 ABA 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 were necessary for the solicitor to make such an application, the rule makes it clear that such action is permissible and ethically responsible. This, in my view, is an appropriate response and, notwithstanding the apparently discouraging comments of the court in *R v P*, is consist-

or other individuals or entities that have the ability to protect the client. In taking any protective action, the lawyer should be guided by such factors as the wishes and values of the client to the extent known, the client's best interests and the goals of intruding into the client's decision making autonomy to the least extent feasible, maximising client capacities and respecting the client's family and social connections."¹¹

The solicitor/client relationship

The solicitor/client relationship is one of confidence or trust and the duty of confidentiality is central to fostering this

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 simply because they got the bill. 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. Surely disclosure in a limited way, in good faith and in order to protect the best interests of a vulnerable person is in the finest traditions of the

"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."

relationship.¹² 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.

Exceptions to the duty of confidentiality already exist. As mentioned above, disclosure is permitted in certain cases where it is necessary to properly carry out the terms of the retainer in order to safeguard the client's interests.¹³ In addition, rule 2.1.2 of the Solicitors Rules allows disclosure of confidential information where such disclosure is permitted or compelled by law. An example is s.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.

profession and would enhance the public trust in the profession and the administration of justice?

Conclusion

People without the capacity to make decisions in their own best interests are arguably the most in need of the assistance and protection afforded by the legal profession. The ethical dilemmas faced by solicitors in this situation can seem overwhelming and discouraging. We are often reminded that we have a rapidly aging population and that traditional social networks have to some extent broken down. It is likely therefore that solicitors will be increasingly faced with these issues in the coming years. An amendment to the rules designed to provide guidance to solicitors in this difficult area would enable the profession to provide a better service to those most in need. □

ent with legal authority. In addition, the adoption of the ABA rule would provide a pathway through the ethical conflict the court was concerned about in *R v P*.

The ABA commentary on taking protective action includes the following: "If a lawyer reasonably believes that a client is at risk of substantial physical, financial or other harm unless action is taken, and that a normal client-lawyer relationship cannot be maintained as provided in paragraph (a) because the client lacks sufficient capacity to communicate or to make adequately considered decisions in connection with the representation, then paragraph (b) permits the lawyer to take protective measures deemed necessary.

Such measures could include: consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using voluntary surrogate decision-making tools such as durable powers of attorney or consulting with support groups, professional services, adult-protective agencies

ENDNOTES

1. The Homeless Persons Legal Service is an initiative of the Public Interest Advocacy Centre and the Public Interest Law Clearing House.
2. The *Capacity Toolkit* (www.lawlink.nsw.gov.au/diversityservices), a comprehensive resource with information on decision-making capacity, was published by the Diversity Services Unit of the NSW Attorney General's Department in 2008. Jenna MacNab, a lawyer and senior policy adviser in the Diversity Services Unit, wrote an article entitled "Assessing decision-making capacity: A practical guide for lawyers" for the June 2008 edition of the *Law Society Journal* (www.lawsociety.com.au/journal). In March 2009 the Law Society of NSW published *When a Client's Capacity is in Doubt. A Practical Guide for Solicitors*, which is intended to be read in conjunction with the Law Society *Client Capacity Guidelines: Civil and Family Law Matters* (2003). The Law Society also produced *Guidelines for Solicitors Preparing an Enduring Power of Attorney* in 2003, with useful guidance on assessing capacity. The Law Society guides are available

at www.lawsociety.com.au/ethics.

3. *McD v McD* [1983] 3 NSWLR 81.

4. *R v P* [2001] NSWCA 473, para 64.

5. *Riley Solicitors Manual*, LexisNexis, Chapter 8, para [8055.10].

6. Rule 1.6 sets out the duty of confidentiality and exceptions, www.abanet.org/cpr/mrpc/rule_1_6.html.

7. American Bar Association, Model Rules of Professional Conduct, Rule 1.14 www.abanet.org/cpr/mrpc/mrpc_toc.html.

8. *Riley*, op cit Chapter 1, para [1025.15].

9. Law Society of NSW Statement of Ethics, www.lawsociety.com.au/ethics.

10. In our experience it can be difficult to find someone willing to act as a tutor for a number of reasons, including a potential costs risk.

11. American Bar Association Model Rules, Comment on Rule 1.14, www.abanet.org/cpr/mrpc/rule_1_4_comm.html.

12. *Riley*, op cit para [8000].

13. *Riley*, op cit para [8055.10]. □

