

8. Wills

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Summary

8.1 Wills are ‘important family, social, economic and legal documents’.¹ Almost 60% of adult Australians have made a will and 93% of people over 70 years of age have a will.² Pressuring older people to make or change their wills in particular ways are examples of financial abuse, both in general guidelines on elder abuse and raised by stakeholders in this Inquiry.

8.2 Advance planning documents, such as wills, are a key part of estate planning and are an expected part of a lawyer’s practice—either because it is the kind of practice the lawyer undertakes or as an aspect of serving the wishes of particular clients. A lawyer has an important role in supporting a client to make a will and understand its nature and content. A lawyer can also protect a client in situations of potential undue influence. As the National Older Persons Legal Services Network commented, advance planning documents ‘can prevent harm and be used to cause harm’.³

1 Cheryl Tilse et al, ‘Having the Last Word? Will Making and Contestation in Australia’ (University of Queensland, 2015) 6.

2 Ibid 8.

3 National Older Persons Legal Services Network, *Submission 363*.

8.3 This chapter considers existing doctrines, particularly those that respond to coerced wills, and notes a number of aspects of succession law generally that may be considered appropriate to reflect upon, in time, through state law reform processes and in a cooperative way as was undertaken through the wide-ranging uniform succession laws project undertaken principally between 1995 and 2009.⁴

8.4 To aid in combating elder abuse and to reduce undue influence in the making of wills, the ALRC recommends a national coordinated response to improving lawyers' understanding, through national best practice guidelines developed by state law societies and the Law Council of Australia. Other professionals, such as financial advisers, may similarly benefit from improved understanding. Where lawyers are not involved in will making, the ALRC recommends community education in addressing the difficulties associated with 'do-it-yourself' wills.

Pressure to change wills and financial abuse

8.5 Most Australians have a will or expect to make one. While most younger people do not have a will, 93% of people over 70 years of age did, and the likelihood of making a will increased with age and the amount of assets.⁵

8.6 Pressure to make or change wills may reflect a range of issues. One clearly goes to control over finances and property and seeking to shore up testamentary benefit. A number of guidelines on elder abuse in Australia include the use of pressure to make or change a will as an example of financial abuse. For example, the Department of Family & Community Services (NSW) published an interagency policy that included the following definition of financial abuse:

Financial abuse is the illegal or improper use of an older person's property or finances. This includes misuse of a power of attorney, forcing or coercing an older person to change their will, taking control of a person's finances against their wishes and denying them access to their own money.⁶

8.7 The Financial Ombudsman Service Australia provided an extensive list of examples of financial abuse of vulnerable older people and included '[g]etting an older

4 The Uniform Succession Laws Project is a useful model of cooperation. It was initiated by the Standing Committee of Attorneys-General in 1991; and in 1995 a National Committee on Uniform Succession Laws was established to direct it. Its brief was to review the laws in the Australian jurisdictions relating to succession and to recommend model national uniform laws. The Queensland Law Reform Commission was the co-ordinating agency and the Committee comprised representatives from all Australian jurisdictions, including a representative from the Australian Law Reform Commission. The publications of the participating agencies towards the project are listed in New South Wales Law Reform Commission, *Uniform Succession Laws: Administration of Estates of Deceased Persons*, Report No 124 (2009) xiv–xv.

5 Tilse et al, above n 1, 8. This finding was based on a national survey of the prevalence of wills in Australia, in-depth interviews with non will makers over 45 years who have decided not to make a will and interviews with other targeted groups who have a will: Cheryl Tilse et al, 'Will-Making Prevalence and Patterns in Australia: Keeping It in the Family' (2015) 50(3) *Australian Journal of Social Issues* 319.

6 Department of Family and Community Services (NSW), *Preventing and Responding to Abuse of Older People: NSW Interagency Policy* (2014).

person to sign a will, deed, contract or power of attorney through deception, coercion or undue influence’.⁷

8.8 Although there is no deprivation to the older person through a change in their will, if the pressure to change a will occurs within a relationship of trust and causes ‘harm or distress’ to the older person, such action fits within the World Health Organization description of elder abuse.⁸

8.9 If descriptions or definitions of elder abuse are narrower, for example defining abuse in terms of ‘harm’ or ‘risk of harm’, and not including the element of ‘distress’, there may be arguments about whether to include pressure to change a will as ‘elder abuse’. Whether or not pressure to change a will is identified and tracked within the data collection on elder abuse is a matter that will need to be considered as part of prevalence studies.⁹

8.10 State Trustees Victoria urged that concepts like ‘harm’ ‘should not be viewed narrowly’:

Unauthorised interference with an older person’s estate planning arrangements (such as their will), even if there is no direct loss to the older person, is harm to that person’s ‘legacy’, and represents an infringement of their rights. For example, if a child of an older person exercises undue influence in getting the older person to change their will in the child’s favour, and the older person dies soon afterwards, the older person may suffer no direct financial or other loss from the child’s actions, but the older person’s intended legacy will be harmed, as their actual testamentary intentions will not be able to be fulfilled.¹⁰

8.11 Stakeholders provided a number of examples where controlling conduct exerted over an older person included pressure to change a will. Some were personal stories;¹¹ others were case studies or examples provided by advocacy groups and other non-government bodies.¹² The Queensland Law Society submission, for example, included the following case study:

In 2013 V, in her 70s, was brought to our office by her ‘partner’ to make a new Will. The partner was adamant that he wanted to be present for the meeting and was very keen to tell the writer what V ‘wanted’. After insisting that we could not see V with him present he reluctantly waited in our reception area. Within a very short time frame it became apparent that V would not have the capacity to make a Will, did not know why she had been brought to the appointment, did not know her date of birth, had no idea about her assets and although she could name her family members (children) had no idea about their ages, relationship status or their children’s name

7 Financial Ombudsman Service Australia, *Banking & Finance—Bulletin 56*, (December 2007) 6.

8 World Health Organization, *The Toronto Declaration on the Global Prevention of Elder Abuse* (2002) ch 1. See ch 2.

9 See ch 3.

10 State Trustees Victoria, *Submission 138*.

11 See, eg, Name Withheld, *Submission 279*; Name Withheld, *Submission 181*; Name Withheld, *Submission 144*; Name Withheld, *Submission 25*. A number of confidential submissions also included changes to wills in the examples of financial abuse.

12 See, eg, Association of Financial Advisers, *Submission 175*; Caxton Legal Centre, *Submission 174*; Seniors Rights Victoria, *Submission 171*; ARAS, *Submission 166*; University of Newcastle Legal Centre, *Submission 44*. See also Carroll & O’Dea, *Submission 335*.

and ages. V also kept changing her mind about what it was that she wanted to do (when she could remain focused on the discussion).¹³

8.12 An additional reason for seeking to lock in testamentary benefit through changes to a will may be the possibility of an enlarged estate through unspent funds under ‘consumer directed care’ arrangements. Aged and Community Services Australia (ACSA) reported concerns of some aged care providers about the ‘rising risk of financial abuse for vulnerable older Australians and an unintended consequence of consumer directed care that is now becoming more evident’:

A risk that will need to be managed is the change from February 2017 requiring unspent funds contributed by older people to be returned back to them or their estate, as it may also provide motivation for some family members to limit home care package spending.

Ensuring that there is a requirement for regular and timely planned reviews of a Home Care Package by the provider, even when a family member or representative is self-managing the package, would allow some level of external oversight to minimise the risk of abuse going unobserved.¹⁴

The law’s response

8.13 The law does not ignore coerced transactions. There are several doctrines that deal with situations that include abuse of older people. Rather than suggesting specific amendments of these doctrines, the focus in this chapter is principally on improving the understanding and contribution of lawyers involved in the making and execution of wills, noting relevant law reform developments.

8.14 Transactions that involve undue pressure may be rendered void or voidable through doctrines of equity and probate. With respect to lifetime transactions, the equitable doctrine of undue influence places the emphasis on the person who seeks to gain under particular transactions to demonstrate that they were not the result of undue influence.¹⁵ Probate also has a doctrine of undue influence, but it is different from the equitable doctrine.¹⁶

8.15 Probate law requires that will-makers have ‘testamentary capacity’ and have knowledge and approval of the contents of their will. Probate law also closely scrutinises wills that benefit ‘strangers’—those unrelated to the testator. Integrity

13 Queensland Law Society, *Submission 159*.

14 Aged and Community Services Australia, *Submission 102*.

15 For a detailed discussion of the inter vivos doctrine of undue influence, see Anthony Duggan, ‘Undue Influence’ in *The Principles of Equity* (Thomson Lawbook Co, 2nd ed, 2003) 393. The doctrine in relation to lifetime transactions is noted in ch 6 on family agreements.

16 For a consideration of the topic generally, see: Fiona Burns, ‘Elders and Testamentary Undue Influence in Australia’ (2005) 28 *University of New South Wales Law Journal* 145; Fiona Burns, ‘The Elderly and Undue Influence Inter Vivos’ (2003) 23(2) *Legal Studies* 251; Fiona Burns, ‘Undue Influence Inter Vivos and the Elderly’ (2002) 26(3) *Melbourne University Law Review* 499; Pauline Ridge, ‘Equitable Undue Influence and Wills’ (2004) 120 *Law Quarterly Review* 617; Matthew Tyson, ‘An Analysis of the Differences Between the Doctrine of Undue Influence with Respect to Testamentary and Inter Vivos Dispositions’ (1997) 5 *Australian Property Law Journal* 38. The perspective of medical professionals is seen, eg, in Carmelle Peisah et al, ‘The Wills of Older People: Risk Factors for Undue Influence’ (2009) 21(1) *International Psychogeriatrics* 7.

measures are also built in to the formalities of will making. One aspect of this is the rule that witnesses cannot be beneficiaries, known as the ‘witness-beneficiary rule’. Although significantly changed, and in places abolished, the rule reflects a concern for self-interest affecting the validity of another’s will. A further rule of this kind is the forfeiture rule, which prevents a person who has caused the death of another from benefiting from that person’s estate.

Undue influence in probate

8.16 The probate law doctrine of undue influence requires more than just pressure; nor is it presumed in any particular relationship. Professor Gino dal Pont and Ken Mackie summarise the probate doctrine in this way:

Only actual coercion will invalidate a will. Persuasion, influence or indeed importunity is not sufficient—after all, a testator is ordinarily free to accept or reject persuasion—unless the testator is thereby prevented from exercising a free will.¹⁷

8.17 In the leading case of *Wingrove v Wingrove*, endorsed by Australian courts, Sir James Hannen P explained, in his direction to the jury, about the different kinds of coercion, in terms that may be particularly pertinent to older persons:

The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may become so weak and feeble that a very little pressure will be sufficient to bring about the desired result, and it may even be, that the mere talking to him at that stage or illness and pressing something upon him may so fatigue the brain, that the sick person may be induced, for quietness’ sake, to do anything. This would equally be coercion though not actual violence.¹⁸

8.18 ‘Coercion’ is the essential characteristic of undue influence in the probate context—forcing someone to do something against their wishes. Actions that are the result of pressure, and acquiesced in, even where the person knows that others may think what they are doing is unwise, do not amount to ‘undue influence’. Clearly, however, there are no bright lines. As a person’s cognitive ability declines, so their vulnerability to pressure may increase.

8.19 Undue influence is a difficult matter to establish in the probate context, particularly as the onus of proof lies upon the person who alleges undue influence.¹⁹ In its 2013 report, *Succession Laws*, the Victorian Law Reform Commission (VLRC) commented:

The main problem with probate undue influence is that it has been too difficult to prove. This may lead to the Court upholding a will that does not in fact reflect the will-maker’s true intentions. This is particularly concerning given the ageing population and increasing vulnerability of older people making wills. As the

17 Gino Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) [2.39].

18 *Wingrove v Wingrove* (1885) LR 11 PD 81, 82–3. See Dal Pont and Mackie, above n 17, 54 n 151.

19 In 1992 Phillip Hallen reported that in 50 years in New South Wales there had been no successful plea of influence with respect to a will: Phillip Hallen, ‘Undue Influence—What Constitutes?’ (1992) 66(8) *Australian Law Journal* 538. Since then, there have been a handful of cases: see Victorian Law Reform Commission, *Succession Laws*, Report (2013) 16.

population ages, there may be an increasing number of people who, despite having testamentary capacity, are vulnerable to pressure from relatives, caregivers and others.²⁰

8.20 In *Nicholson v Knaggs*, Vickery J made observations about the degree and nature of pressure, particularly as it relates to the ‘vulnerability and susceptibility’ of the individual:

The key concept is that of ‘influence’. The influence moves from being benign and becomes undue at the point where it can no longer be said that in making the testamentary instrument the exercise represents the free, independent and voluntary will of the testator. It is the effect rather than the means which is the focus of the principle.²¹

8.21 Vickery J also commented about the standard of proof:

The test to be applied may be simply stated: in cases where testamentary undue influence is alleged and where the Court is called upon to draw an inference from circumstantial evidence in favour of what is alleged, in order to be satisfied that the allegation has been made out, the Court must be satisfied that the circumstances raise a more probable inference in favour of what is alleged than not, after the evidence on the question has been evaluated as a whole.²²

8.22 The VLRC suggested that, following *Nicholson v Knaggs*, undue influence may now be easier to prove in Victoria.²³ There is also New Zealand authority that supports a similar broadening of the doctrine. In *Carey v Norton*, the New Zealand Court of Appeal stated that the alleged undue influence need not be accompanied by malign intent:

‘Undue’ relates to impairment of judgment rather than the improper conduct on the part of the person possessing influence. It will be ‘undue’ when it can no longer be said that the will represents the will-maker’s independent judgment.²⁴

8.23 Dal Pont and Mackie suggest that the facts in this case did not show ‘coercion in the accepted sense of the word’, which, together with *Nicholson v Knaggs*, may represent ‘the developing trajectory of judicial opinion’ and ‘herald some (limited) convergence between common law and equitable concepts of undue influence’.²⁵

8.24 The VLRC also considered as a reform option the legislative change in British Columbia, which commenced in 2014, to introduce into the probate context the equitable doctrine of undue influence. The section provides:

In a proceeding, if a person claims that a will or any provision of it resulted from another person

20 Victorian Law Reform Commission, *Succession Laws*, Report (2013) 15.

21 *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009) [150].

22 *Ibid* [127].

23 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.67].

24 *Carey v Norton* [1998] 1 NZLR 661, referred to with approval in *Mahon v Mahon* [2015] NZHC 1072, [31].

25 Gino Dal Pont and Ken Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) [2.45].

- (a) being in a position where the potential for dependence or domination of the will-maker was present, and
- (b) using that position to unduly influence the will-maker to make the will or the provision of it that is challenged,

and establishes that the other person was in a position where the potential for dependence or domination of the will-maker was present, the party seeking to defend the will or the provision of it that is challenged or to uphold the gift has the onus of establishing that the person in the position where the potential for dependence or domination of the will-maker was present did not exercise undue influence over the will-maker with respect to the will or the provision of it that is challenged.²⁶

8.25 Stakeholders to the VLRC inquiry were divided about whether to introduce a similar provision in Victoria: some ‘saw advantages in such a change, while others were concerned that the equitable doctrine is not appropriate to the probate context’.²⁷

8.26 The VLRC concluded that the British Columbia provision was ‘groundbreaking’ and could suggest a reform direction for Australia to follow. But the VLRC also pointed to the decision of Vickery J in *Nicholson v Knaggs*, and suggested that ‘the recent developments in the common law probate doctrine appear to have made undue influence easier to prove’, which may mean that legislative change is unnecessary.²⁸ The final recommendation was that Victoria should review the effect of the British Columbia legislation in practice, after it had been in effect for four years, to consider whether a similar provision should then be introduced in Victoria.²⁹ The commencement date for the BC reforms was 31 March 2014. The proposed Victorian review would therefore be undertaken after 31 March 2018.

8.27 The ALRC considers that the emphasis of the proposed law reforms in this Inquiry should be on the role that lawyers, and other professionals, can play in assisting older persons in their estate planning and the instruments to give effect to such plans; and community education strategies that may be developed and enhanced through the National Plan discussed in Chapter 3. Further law reform in relation to specific doctrines can be developed through state and territory law reform inquiries, such as in relation to the effect of the British Columbia reform and through a cooperative approach, as in the uniform succession laws project.

Testamentary capacity

8.28 The test for testamentary capacity, the legal competency to make a will, is a longstanding one, and stems from the 1870 decision of Cockburn CJ in *Banks v Goodfellow*,³⁰ where he stated, in relation to the power to make a will:

It is essential to the exercise of such a power that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to

²⁶ *Wills, Estates and Succession Act*, SBC 2009, c 13, s 52.

²⁷ Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.76].

²⁸ *Ibid* [2.81].

²⁹ *Ibid* rec 2.

³⁰ *Banks v Goodfellow* (1870) LR 5 QB 549.

give effect; and, with a view to the latter object, that no disorder of mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties—that no insane delusions shall influence his will in disposing his property and bring about a disposal of it which, if the mind had been sound, would not have been made.³¹

8.29 This is a functional test of capacity, related to the nature of the transaction and the circumstances of the testator at the time of making the will. Peisah and O’Neill summarise it as requiring that will-makers must:

1. understand the nature and effect of a will;
2. know the nature and extent of their property;
3. comprehend and appreciate the claims to which they ought to give effect; and
4. are not affected delusions that influence the disposal of their assets at the time they are making their will.³²

8.30 When wills have been challenged on the basis of a lack of testamentary capacity, judges have emphasised the important role that the lawyer plays in supporting their client. For example, in *Pates v Craig*, Santow J said that the duty of the solicitor taking instructions ‘from an obviously enfeebled testator, where capacity is potentially in doubt’ is ‘to take particular care to gain reasonable assurance as to the testamentary capacity of the testator’.

It is clearly undesirable to attempt to lay down precise and specific rules as to what that necessarily entails for every case. Such rules may lead to a perfunctory, mechanical check list approach. What should be done in each case will depend on the apparent state of the testator at the time and other relevant surrounding circumstances. Any suggestion that someone, potentially interested, has instigated the will, whether or not a client of the will drafts person, should particularly place the solicitor concerned on the alert. At the least, a solicitor should ask the kind of questions designed to probe the testator’s understanding of the basic matters which connote testamentary capacity, as [set out in *Banks v Goodfellow*].³³

8.31 Professional bodies have developed guidelines for solicitors in such cases.³⁴

The doctrine of suspicious circumstances

8.32 The requirement of knowledge and approval of the contents of a will is a separate probate element from establishing that a person had the requisite ‘testamentary capacity’. It must be established that the will-maker knows that the document being signed is their will and that it deals with their property. Where a will benefits someone

31 Ibid 565.

32 Nick O’Neill and Carmelle Peisah, *Capacity and the Law* (Australasian Legal Information Institute (Austlii) Communities, 2nd ed, 2017) [4.3]. On testamentary capacity, see also Dal Pont and Mackie, above n 17, ch 2.

33 *Pates v Craig & Public Trustee; Estate of the Late Joyce Jean Cole* [1995] NSWSC 87, [147]. See discussion in O’Neill and Peisah, above n 32, [4.4].

34 See, eg, Law Society of New South Wales, *When a Client’s Mental Capacity Is in Doubt—A Practical Guide for Solicitors* (2016); Attorney General’s Department (NSW), *Capacity Toolkit* (2008); Law Institute of Victoria, *LIV Capacity Guidelines and Toolkit: Taking Instructions When a Client’s Capacity Is in Doubt* (2016). See also Dal Pont and Mackie, above n 17, ‘Ascertaining the client’s mental capacity’, [24.5]–[24.7].

completely unrelated to the testator, probate calls for greater scrutiny to ensure that the testator had the appropriate knowledge and approval of the contents of the will. Justice Hallen of the New South Wales Supreme Court explained that, where knowledge and approval of a will is challenged, there is generally a two-stage process:

The first stage is to ask whether the circumstances are such as to ‘excite suspicion’ on the part of the court. If so, the burden is on the propounder of the will to establish that the deceased knew and approved the contents of that will. If the circumstances do not ‘excite suspicion’, then the court presumes knowledge and approval in the case of a will that has been duly executed by the deceased who had testamentary capacity.³⁵

8.33 While circumstances that may be raised to suggest undue influence do not satisfy the probate doctrine of undue influence, they may nonetheless point to a lack of knowledge and approval. However, as Dal Pont and Mackie state, ‘this does not mean that undue influence is to be subsumed into suspicious circumstances; it is a separate issue that, where relevant, must be specifically pleaded’.³⁶

8.34 The kinds of matters that ‘excite suspicion’ include:

the circumstances surrounding the preparation of the propounded will; whether a beneficiary was instrumental in the preparation of the propounded will; the extent of physical and mental impairment, if any, of the deceased; whether the will in question constitutes a significant change from a prior will; and whether the will, generally, seems to make testamentary sense.³⁷

8.35 In its 2013 *Succession Laws* report, the VLRC provided the following illustrations of situations that have been considered to constitute suspicious circumstances and have required further investigation of the ‘righteousness of the transaction’, and therefore the validity of the will:

- A beneficiary is involved in the will-making process, for example by witnessing the will, writing or preparing the will or taking the will-maker to a legal practitioner.
- The will-maker is ‘blind, illiterate or mentally or physically enfeebled’.
- The will was not read to or by the will-maker before it was executed.
- The will changes a pattern of previous wills by cutting out ‘natural’ beneficiaries and replacing them with recent acquaintances.³⁸

8.36 The VLRC inquiry involved a specific focus on protecting ‘older and vulnerable will-makers from undue influence’. From this perspective, the VLRC commented that, while the doctrine of suspicious circumstances was a ‘well settled area of the law’, and no changes were suggested, a constructive contribution would be for the Law Institute of Victoria to include a discussion of knowledge and approval and suspicious

35 *Petrovski v Nasev; The Estate of Janakievka* [2011] NSWSC 1275 (17 November 2011) [258].

36 Gino Dal Pont and Ken Mackie, above n 25, [2.46].

37 *Petrovski v Nasev; The Estate of Janakievka* [2011] NSWSC 1275 (17 November 2011) [259].

38 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.93], case references omitted.

circumstances in guidelines on undue influence.³⁹ Recommendation 8–1 is based on the VLRC recommendations.

Wills formalities

8.37 The formalities for wills, including the requirement of witnessing, serve a number of purposes, one of which is to protect a testator from being forced to sign a document they do not wish to sign.⁴⁰ The VLRC *Succession Laws* inquiry included specific consideration of wills formalities and particularly with reference to ‘whether the current requirements for witnessing wills should be revised to better protect older and vulnerable will-makers from undue influence by potential beneficiaries or others’.⁴¹

8.38 The VLRC concluded that, although

widespread concern was expressed ... about potential beneficiaries improperly prevailing upon vulnerable will-makers to make wills that do not reflect their wishes, there was little support for the view that changing the witnessing requirements would deal with this problem’.⁴² The VLRC considered that changing the witnessing requirements was ‘unlikely to prevent undue influence.’⁴³

8.39 However, as the VLRC observed:

increasing concern that older and vulnerable will-makers are being subjected to pressure about their wills has led some judges and commentators to suggest other ways of reducing the risk of undue influence in the will-making process. The key suggestion in this area is to ensure that legal practitioners take greater care when making wills.⁴⁴

8.40 A focus on the role and understanding of legal practitioners informs Recommendation 8–1, considered below.

8.41 The power of the Court to dispense with the formal requirements of a will—the ‘dispensing powers’, may potentially require consideration of elder abuse.⁴⁵ Such powers enable a court to forgive compliance with wills formalities where the deceased intended the particular document in question to be a will. Given that pressure to make a will has been cited as an example of potential elder abuse, a situation might arise where a person may go along with pressure, but not succumb to it by, for example, keeping a draft will, and even signing but not having the draft will witnessed, as a strategy to keep the peace, but fully aware that it was an invalid will. Judges in such circumstances need to continue to exercise vigilance as to whether the supposed testator really intended that document to constitute their will, rather than just intending it to be a draft

39 Ibid [2.95].

40 See, eg, Andrew Lang, ‘Formality v Intention—Wills in an Australian Supermarket’ (1985) 15 *Melbourne University Law Review* 82; Rosalind Croucher and Prue Vines, *Succession: Families, Property and Death* (LexisNexis Butterworths, 4th ed, 2013) [7.4].

41 Victorian Law Reform Commission, *Succession Laws*, Report (2013) x, Terms of Reference.

42 Ibid [2.2].

43 Ibid [2.3].

44 Ibid [2.45].

45 On dispensing powers, see Croucher and Vines, above n 40, ch 8; Dal Pont and Mackie, above n 17, [4.30]–[4.47].

of something not yet completed—not confusing ‘inadvertence’⁴⁶ with a deliberate choice.⁴⁷

Disqualifying beneficiaries

8.42 Two particular doctrines directed towards the disqualification of beneficiaries and others from taking in an estate are the ‘witness-beneficiary rule’ and the ‘rule of forfeiture’.

Witness-beneficiary rule

8.43 From 1752 the law in England was that a witness who was a beneficiary would lose the gift in the will, but the will itself would remain valid.⁴⁸ This rule, known as the ‘witness-beneficiary rule’ was included in the *Wills Act 1837* (UK), which formed the basis of the wills legislation in Australian states and territories.

8.44 If a person or that person’s spouse was a beneficiary, and the person witnessed the will, the gifts were ‘utterly null and void’.⁴⁹ The argument in favour of such a rule was that ‘if a witness or a witness’s spouse were allowed to take a benefit under a will, an opportunity for undue influence would arise’.⁵⁰ Since 1837, however, the rule has been ameliorated, principally because the rule does not distinguish ‘between the innocent and the guilty witness’.⁵¹ In Australia this has led to its abolition in the Australian Capital Territory, South Australia and Victoria.⁵² Change was also achieved through implementation of the model Wills Bill 1997, proposed in the uniform succession laws project.⁵³ In other states and territories, the rule was retained but in the modified manner included in the model Wills Bill, namely that a witness should not be absolutely disqualified from taking a benefit under a will, but should be able to retain the gift if:

- there are at least two other witnesses who are not beneficiaries under the will;
- all the persons who would benefit directly, if the gift were avoided, consent to the distribution of the gift according to the will;
- the court is satisfied that the testator knew and approved of the gift and the gift was given freely and voluntarily.⁵⁴

46 *Estate of Williams* (1984) 36 SASR 423, 425.

47 *Estate of McNamara*, SC (NSW), Powell J, 10 April 1992, Unreported.

48 The background to the rule as an evidentiary rule is explained in DEC Yale, ‘Witnessing Wills and Losing Legacies’ (1984) 100 *Law Quarterly Review* 453.

49 *Wills Act 1837* (UK) s 15.

50 New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Report 85 (1998) [3.17].

51 *Ibid* [3.18].

52 *Wills Act 1968* (ACT) s 15; *Wills Act 1936* (SA) s 17; *Wills Act 1997* (Vic) s 11.

53 See the summary in New South Wales Law Reform Commission, *Uniform Succession Laws: The Law of Wills*, Report 85 (1998) [3.29]–[3.50].

54 *Ibid* 17–18, Model Provision: Clause 12. The provision has been introduced in: *Succession Act 2006* (NSW) s 10; *Succession Act 1981* (Qld) s 11; *Wills Act 2008* (Tas) ss 12, 13. Queensland has an additional provision with respect to interpreters: *Succession Act 1981* (Qld) s 12.

8.45 Additionally, the rule should no longer disqualify the spouse of a witness from taking a benefit.

8.46 The reason for the change in the rules is reflected in the analysis made in the United States in the notes accompanying the Uniform Probate Code. The purpose of the change was ‘not to foster use of interested witnesses’, because ‘attorneys will continue to use disinterested witnesses in execution of wills’. Rather, it was not to penalise ‘the rare and innocent use of a member of the testator’s family on a home-drawn will’:

This approach does not increase appreciably the opportunity for fraud or undue influence. A substantial devise by will to a person who is one of the witnesses to the execution of the will is itself a suspicious circumstance, and the devise might be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of undue influence, the influencer is careful not to sign as a witness, but to procure disinterested witnesses.⁵⁵

8.47 In probate contexts, where the witness-beneficiary rule is abolished, the behaviour of someone who seeks to secure a will in their favour is left to be considered under the doctrine of suspicious circumstances.

Forfeiture

8.48 In succession law, a person who causes the death of another is not permitted to benefit from the person’s estate as a result of that killing. Known as the ‘forfeiture rule’, it is a common law rule of public policy that a person should not benefit from their own wrongdoing.⁵⁶ The rule extends to those claiming through the killer. Applicable to both wills and intestacy, the rule operates as ‘a matter of the civil law (as opposed to the criminal law), proof of the killing must be carried out in the civil court according to the civil law rules of proof, and a previous criminal trial may be irrelevant’.⁵⁷

8.49 There are two exceptions recognised at common law: first, where the killer is found not guilty by reason of mental illness,⁵⁸ and where the will benefiting the killer is made after the criminal act.⁵⁹

55 National Conference of Commissioners on Uniform State Laws, *Uniform Probate Code (1969)* (2010) Comment to s 2-505, 147.

56 It was an expression of the Latin maxim, *nullus commodum capere potest de injuria sua propria*. Details of the rule are set out in Gino Dal Pont and Ken Mackie, above n 25, [7.47]–[7.67]. See also Victorian Law Reform Commission, *The Forfeiture Rule*, Report (2014) ch 2. The Report contains an extensive bibliography relevant to the topic.

57 Croucher and Vines, above n 40, [14.10].

58 See, eg, *Re Plaister: Perpetual Trustee v Crawshaw* (1934) 34 SR (NSW) 547; *Troja v Troja* (1994) 33 NSWLR 269, 283 (Kirby P); *Perpetual Trustee Co Ltd v Gillett* [2004] NSWSC 278, 228; *Public Trustee (NSW) v Fitter* [2005] NSWSC 1188 [40].

59 This exception is ‘more nebulous’ and only applies to a ‘very narrow fact situation’: Dal Pont and Mackie, above n 17, [7.49].

8.50 The VLRC noted a number of concerns with the operation of the common law rule:

- whether the rule applies to every unlawful killing that results from an inadvertent, involuntary or negligent act or omission;
- the relevance of the moral culpability of the person responsible—for example, the difference between murder and manslaughter; and
- the impact of the rule on third parties—such as the children of the person who caused the death;
- the absence of any judicial discretion to respond to such concerns.⁶⁰

8.51 A number of Australian jurisdictions have responded by enacting legislation, following the United Kingdom in 1982:⁶¹ the Australian Capital Territory in 1991 and New South Wales in 1995.⁶² The legislation allows for an application to the Court for an order modifying the effect of the rule.⁶³ In 2007, the Committee for Uniform Succession Laws considered the rule in the context of intestacy and recommended legislation.⁶⁴ In 2014, the VLRC recommended such legislation be introduced in Victoria.⁶⁵

8.52 In the United States, in addition to forfeiture provisions, called ‘slayer’ laws,⁶⁶ a number of states have expanded these statutes to disqualify persons from inheriting when they abuse or financially exploit an elderly or vulnerable adult testator.⁶⁷ Given that a ‘distinguishing aspect’ of elder abuse cases is that family members and trusted individuals may ‘stand to inherit from the victim’, such expanded slayer laws seek to reduce elder abuse:⁶⁸ ‘[b]y recognizing elder abuse as a matter of probate law, the goal

60 Victorian Law Reform Commission, *The Forfeiture Rule*, Report (2014) [1.5]. For a fulsome consideration of the rule in Victoria in a case of defensive homicide see, eg, *Edwards v State Trustees Ltd* [2016] VSCA 28.

61 *Forfeiture Act 1982* (UK).

62 *Forfeiture Act 1991* (ACT); *Forfeiture Act 1995* (NSW). Specific provision in the intestate context is made by: *Succession Act 2006* (NSW) s 139; *Intestacy Act 2010* (Tas) s 40.

63 See summary in Gino Dal Pont and Ken Mackie, above n 25, [7.68]–[7.70]. The NSW provision was amended in 2005 so that, where a person was not guilty by reason of mental illness, the court may nonetheless consider that the forfeiture rule should apply as if the person had been found guilty of murder: *Forfeiture Act 1995* (NSW) s 11. The provision was applied in *Guler & Ors v NSW Trustee and Guardian & Anor* [2012] NSWSC 1369; *Hill v Hill* [2013] NSWSC 524; *Estate of Raul Novosadek* [2016] NSWSC 554.

64 New South Wales Law Reform Commission, *Uniform Succession Laws: Intestacy*, Report No 116 (2007). Rec 42, which was reflected in the Model Intestacy Bill 2006 cl 40, was that: ‘Where the forfeiture rule prevents a person from sharing in the intestate estate or where a person has disclaimed the share to which he or she is otherwise entitled, that person should be deemed to have died before the intestate’.

65 Victorian Law Reform Commission, *The Forfeiture Rule*, Report (2014). An instructive comparative analysis is made in Nicola Peart, ‘Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia’ (2002) 31 *Common Law World Review* 1.

66 Summarised in, eg, Karen J Sneddon, ‘Should Cain’s Children Inherit Abel’s Property?: Wading into the Extended Slayer Rule Quagmire’ (2007) 76(1) *UMKC Law Review* 101.

67 A summary is provided in Jennifer Piel, ‘Expanding Slayer Statutes to Elder Abuse’ (2015) 43(3) *The Journal of the American Academy of Psychiatry and the Law* 369.

68 *Ibid* 369.

is to disincentivise elder abuse by those who stand to gain from the death of an elderly individual'.⁶⁹

8.53 An example is the Illinois probate statute of 2004.⁷⁰ It links the disinheritance provision to criminal elder abuse statutes and requires a criminal conviction under those statutes to invoke the disinheritance provision.⁷¹ Another model targets financial abuse.⁷²

8.54 Queensland University of Technology (QUT) academic, Barbara Hamilton, argued that a similar approach should be taken in Australia, using the Illinois statute as an example.⁷³ The trigger for disinheritance is a conviction of an offence of financial exploitation, abuse or neglect of an elderly person or disabled person. 'Financial exploitation' is defined as occurring when a 'person in a position of trust and confidence' knowingly obtains control over an elderly person's property by means of deception or intimidation.⁷⁴ As Hamilton explains:

The aim would be to provide an additional (and potentially powerful) deterrent to combat the serious and widely prevalent problem of family violence, particularly elder abuse, and to encourage through financial incentives (potential disinheritance under a will or intestacy) respectful behaviour towards elderly family members.⁷⁵

8.55 Two stakeholders suggested amending the forfeiture rules along similar lines in Australia in response to elder abuse. The New South Wales Trustee & Guardian said that

[t]he reason for expanding the forfeiture legislation in the USA to financial abuse cases is to help prevent and reduce elder abuse. Family members often stand to inherit from the victim and by recognising elder abuse as a matter of succession law, the aim is to deter elder abuse by those who are likely to gain from the death of an elderly person. The introduction of such measures in Australia are worthy of investigation and evaluation.⁷⁶

8.56 In the Discussion Paper, the ALRC suggested that the other strategies identified for preventing and responding to elder abuse should be considered and evaluated, before consideration is given to amending the forfeiture rule in the way noted above. The Law Council, however, considered that the suggestion of the NSW Trustee & Guardian deserved further attention.⁷⁷

8.57 There are two major constraints on a simple transposition of such provisions into Australia. First, the US forfeiture provisions are linked to specific elder abuse offence

69 Piel, above n 67.

70 Other examples are referred to in Travis Hunt, 'Disincentivizing Elder Abuse Through Disinheritance: Revamping California Probate Code § 259 and Using It as a Model' [2014] (2) *Brigham Young University Law Review* 445, 464–466.

71 Hunt, above n 70.

72 *Ibid* 466–469.

73 Barbara Hamilton, 'Be Nice to Your Parents: Or Else!' [2006] *Elder Law Review* 8.

74 720 Ill Comp Stat 5/16-1.3 (2005); 720 Ill Comp Stat 5/17-56 (2012).

75 Barbara Hamilton, 'Be Nice to Your Parents: Or Else!' [2006] *Elder Law Review* 8 2.

76 NSW Trustee and Guardian, *Submission 120*. Citing Barbara Hamilton, 'Be Nice to Your Parents: Or Else!' [2006] *Elder Law Review* 8. See also P Johnson, *Submission 70*.

77 Law Council of Australia, *Submission 351*.

provisions. The ALRC has concluded against recommending specific alteration to criminal laws in this way, emphasising improved responses to existing laws and an expansion of the jurisdiction of civil and administrative tribunals to handle some of the allegations of financial abuse that may arise, for example with respect to misuse of powers of attorney.⁷⁸

8.58 Secondly, such a specific amendment to forfeiture provisions, as a matter of probate law, would also need to be set in the wider context of succession law in Australia. In particular, in Australia, the distribution of an estate may be affected by family provision laws in each state and territory.⁷⁹ Under such laws, an eligible person who has been left without ‘adequate provision for their proper maintenance, education or advancement in life’⁸⁰ in the will or on the intestacy of a particular family member may apply for provision, or increased provision from the estate.

8.59 In New South Wales this also includes the ability to claw back property into the estate that may otherwise be regarded as lifetime transactions as ‘notional estate’.⁸¹ This means that there are other ‘corrective’ means to the distribution of an estate that may have been affected by the pressures of relatives to benefit them in this context—without the necessity of having to establish a conviction under specific elder abuse offences. This corrective means is not available in the same way in the US.

8.60 Any consideration of the introduction in Australia of amendments to state and territory probate laws, in the form of disinheritance provisions similar to those in the US, would need to be undertaken in the context of a wider consideration of succession law in Australia. The uniform succession laws project provided a significant opportunity for coordinated law reform across all areas of succession law: wills, intestacy, family provision and the administration of estates. While a consideration of forfeiture provisions would be a project of a smaller scale, the necessity for considering it in the wider context of succession laws would still be essential.

8.61 The initiative could be a matter for, and led by, a state law reform agency, such as the specific project undertaken by the VLRC with respect to the forfeiture rule. It could also form part of the ongoing agenda of, for example, succession law and elder abuse committees of the state and territory law societies and the Law Council, together with other issues that have been noted in this Report, including, for example, the undue influence doctrine in probate. The bigger issue surrounding these matters is the way that property law, and particularly inheritance law, expresses ideas of ‘unworthiness’ in families. Civil law and common law systems have approached such matters differently, both in terms of property in marriages and property on death. Reviewing any aspect of inheritance law needs to be located within an understanding of this complex history.⁸²

78 Rec 5-2

79 For an exposition of the Australian laws see, eg, Gino Dal Pont and Ken Mackie, above n 25, pt III.

80 The jurisdictional formula is expressed in these or similar terms: see *Ibid* [17.57].

81 See, eg, *Ibid* [20.57]–[20.77].

82 See, eg, B Willenbacher, ‘Individualism and Traditionalism in Inheritance Law in Germany, France, England and the United States’ (2003) 28 *Journal of Family History* 208; Croucher and Vines, above n 40, [15.41]–[15.46] and the further reading list at [15.47].

The role of the lawyer

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.

Lawyers and advance planning documents

8.62 Stakeholders were broadly supportive of ensuring that lawyers understood the legal issues as well as their responsibilities to their clients in the context of the preparation of advance planning documents. A number pointed to the excellent guidelines that are available in some jurisdictions. While recognising that there are good examples, there is room for a more integrated response, identifying best practice nationally.

8.63 However it was also pointed out that lawyers may not be involved in the preparation of documents and that improving the understanding of solicitors did not address the problem of, for example, ‘do-it-yourself’ wills and other documents. Recommendation 8–1 focuses on the role of the lawyer. Consideration of the importance of community education in addressing the difficulties associated with ‘do-it-yourself’ wills is also considered.

Guidelines for legal practitioners

8.64 Recommendation 8–1 identifies topics that best practice guidelines should cover. Paragraphs (a) and (b) are matters of general understanding about the dynamics of elder abuse and about family relationships in relation to property and how they may be manifested as improper or undue influence in the context of advance planning documents. Paragraph (c) reinforces the lawyer’s role in supporting the client’s autonomy and to ensure that the person’s wishes are obtained personally and separately from anyone else. Paragraph (d) concerns best practice approaches to ensure that the client’s wishes are recorded fully so that any later challenge can be reviewed in the full context of the client’s instructions. Paragraph (e) concerns the specific elements

required to be established for testamentary capacity, should a will be challenged on the basis of a lack of capacity.⁸³ Capacity questions may affect other transactions and lawyers need to understand the legal tests that apply and support a client in circumstances where capacity issues may be raised.⁸⁴

8.65 The guidelines in Recommendation 8–1 are similar to ones recommended by the VLRC in its report, *Succession Laws*, in 2013. They are designed to reduce the risk of undue influence.⁸⁵

8.66 A number of state law societies have prepared or endorsed guidelines on a range of topics included in Recommendation 8–1, particularly relating to legal capacity: as in Victoria,⁸⁶ New South Wales,⁸⁷ Queensland,⁸⁸ and South Australia.⁸⁹ Professors Carmelle Peisah and Nick O’Neill observed that ‘[o]ne of the most fundamental tasks of solicitors is to take instructions from their clients’, adding that ‘[n]evertheless, clients must have the capacity to give those instructions’.⁹⁰

8.67 The South Australian guidelines include, for example, a section on ‘Taking Instructions’ that is expressed in terms of ‘Exploring and Enhancing Client Autonomy’, which emphasise that

client difficulty in communication does not abrogate the lawyer’s obligation diligently to seek a client’s instruction, and may positively require the lawyer to take further action to ensure effective client communication.⁹¹

8.68 The guide endorsed by the Queensland Law Society similarly includes advice on taking instructions in terms of ‘What can I do to maximise my client’s capacity?’.⁹² The use of support persons and interpreters is a matter expressly commented upon in this context, but with an emphasis on ‘extreme caution’ and with the client’s consent

83 See ch 2 on the concept of legal capacity.

84 Examples of guides on the different tests are: Law Society of New South Wales, *When a Client’s Mental Capacity Is in Doubt—A Practical Guide for Solicitors* (2016) 13–15; Allens Linklaters and Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity* (2014) 59–69; Law Society of South Australia, Client Capacity Committee, *Statement of Principles with Guidelines* (2012) 28–41; Law Institute of Victoria, *LIV Capacity Guidelines and Toolkit: Taking Instructions When a Client’s Capacity Is in Doubt* (2016) 3.

85 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.57].

86 Law Institute of Victoria, *LIV Capacity Guidelines and Toolkit: Taking Instructions When a Client’s Capacity Is in Doubt* (2016).

87 Law Society of New South Wales, *When a Client’s Mental Capacity Is in Doubt—A Practical Guide for Solicitors* (2016). The Law Society has also produced a quick access information sheet for lawyers on wills and estates: Law Society of New South Wales, *Wills & Estates FAQs* <www.lawsociety.com.au>.

88 Allens Linklaters and Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity* (2014). The handbook was endorsed by Queensland Law Society.

89 Law Society of South Australia, Client Capacity Committee, *Statement of Principles with Guidelines* (2012).

90 O’Neill and Peisah, above n 32, [1.5].

91 Law Society of South Australia, Client Capacity Committee, *Statement of Principles with Guidelines* (2012) [35]. Similarly, the New South Wales guide includes as an Appendix an extract on ‘Techniques lawyers can use to enhance client mental capacity’, drawn from a document prepared for the American Bar Association in 2005: Law Society of New South Wales, *When a Client’s Mental Capacity Is in Doubt—A Practical Guide for Solicitors* (2016) Appendix C.

92 Allens Linklaters and Queensland Advocacy Incorporated, *Queensland Handbook for Practitioners on Legal Capacity* (2014) [5.3].

for any third party involvement.⁹³ However, there is danger inherent in any situation where instructions are obtained and someone else is involved, even if by way of support, especially if this involves interpreting, where that person is a family member.

8.69 The South Australian guide includes reference to enhancing communication through interpreters and other supporters, but with similar cautions about third party assistance:

Having as much information to assist in advising a client is always the preferred position of lawyers.

However, seeking information from apparently helpful, well meaning or ‘innocuous sources’ close to the client is an invasive step and contrary to professional duties if it should occur without the consent of the client.

Although most people are well intentioned, a person’s familiarity with the client’s lifestyle and with the role of giving practical assistance, can sometimes lead to their overstepping the boundaries of sought after assistance.

Do not assume the client’s carer or support person knows that the client has sought the lawyer’s advice and assistance.

Do not assume that presence of others will be welcomed or make a client comfortable. Sometimes it may have the reverse effect and may increase anxiety.

Even where not sought out, family or others may raise issues of lack of client capacity with the lawyer. Where this occurs, the lawyer should raise the matter with the client and explore the extent to which the client concurs with the concern. The client may instruct the lawyer to explore the matter further. Importantly, the lawyer should test the ‘supposition’ with other information known and shared with them.⁹⁴

8.70 The VLRC acknowledged the availability of such resources for legal practitioners on assessing legal capacity when this was in doubt, but recommended that more was needed. To minimise the risk of undue influence, the VLRC recommended that the Law Institute of Victoria, as the professional body of Victorian legal practitioners, should prepare best practice guidelines ‘on the detection and prevention of undue influence when preparing a will’.⁹⁵ The VLRC also said that the guidelines could draw from existing guides and resources that document best practice when taking instructions for a will.⁹⁶

93 Ibid [5.3] (e), (j).

94 Law Society of South Australia, Client Capacity Committee, *Statement of Principles with Guidelines* (2012) [36.1]. There is also a section on steps to be taken before any third party attends with the client: [38].

95 Victorian Law Reform Commission, *Succession Laws*, Report (2013) rec 1.

96 Ibid [2.58]. The VLRC noted in particular, British Columbia Law Institute, ‘Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide’ (61, 2011); Kenneth Schulman, ‘Assessment of Testamentary Capacity and Vulnerability to Undue Influence’ (2007) 164(5) *American Journal of Psychiatry* 725; O’Neill and Peisah, above n 32, ch 4.

8.71 Stakeholders in the VLRC inquiry suggested a range of matters that guidelines on undue influence should contain:

- the importance of taking instructions from the will-maker alone
- common characteristics of how a person subject to undue influence may present
- common warning signs of undue influence, for example a sudden change in beneficiary from close family member to recent acquaintance
- the role of interpreters who accompany the will-maker
- the importance of making enquiries about previous wills, and possibly obtaining previous wills
- the need to take and retain detailed file notes in the event that a will is challenged.⁹⁷

8.72 In this ALRC Inquiry stakeholders emphasised similar points, noting available guidelines and making suggestions as to matters that should be included in a coordinated national approach as included in Recommendation 8–1. The Law Council of Australia also suggested that consistency in succession legislation and advance care planning frameworks would assist in developing national guidelines.⁹⁸

8.73 The Australian Research Network on Law and Ageing, for example, suggested that guidelines should stress ‘the importance of asking open-ended questions’ to ensure that the person understands the nature of the document and knows and approves of its contents. An example of poor practice was given ‘of lawyers explaining or reading the content of a Will and then following up with the closed question “do you understand?”’⁹⁹

8.74 The Eastern Community Legal Centre and the Eastern Elder Abuse Network recommended that the guidelines ‘include information on obtaining medical assessments of capacity where the legal practitioner is alerted to any doubts around testamentary capacity’.¹⁰⁰ Another said that such a strategy could be used to support a client and head off a later challenge:

In addition the question of the mental competence of the person at the time should be clearly established to prevent the Will being challenged later, on the alleged basis of mental impairment at the time.¹⁰¹

8.75 The importance of using interpreters was emphasised by the Federation of Ethnic Communities Councils of Australia. They also reiterated that ‘the use of family members and friends as “interpreters” is not supported by policy in Australia’.¹⁰²

The person making a will, codicil, powers of attorney or any form of transfer of property or vesting of rights, must clearly understand the content of the instrument they are required to sign. Most of these documents use technical jargon that the person

97 Victorian Law Reform Commission, *Succession Laws*, Report (2013) [2.54].

98 Law Council of Australia, *Submission 351*.

99 Australian Research Network on Law and Ageing, *Submission 262*.

100 Eastern Community Legal Centre, *Submission 357*.

101 W Millist, *Submission 230*.

102 FECCA, *Submission 292*. See also Australian Research Network on Law and Ageing, *Submission 262*.

making a will may not be familiar with. Thus, the respective professionals who are involved in drafting these documents must ensure that the individuals understand the content of the document and facilitate meeting the translation or interpreting needs of older people from CALD backgrounds.¹⁰³

8.76 The Financial Planning Association of Australia (FPA) urged that the guidelines need to ensure that legal practitioners ‘have the relevant education, training and experience to provide estate planning advice’. The FPA also expressed concern that ‘inappropriate estate planning advice has been provided to clients by generalist lawyers who have not had the requisite training or experience’. At a minimum, FPA urged, ‘estate planning training should be promoted via continued professional development’.¹⁰⁴

A national approach

8.77 Recommendation 8–1 advocates a national approach and affirms the important role that law societies and the Law Council, can play in assisting lawyers. Seniors Rights Victoria pointed to the important role of the National Elder Law Committee of the Law Council of Australia currently plays in identifying critical issues relating to elder abuse. These include: legal capacity; undue influence; entering into guarantees and reverse mortgages in the interests of others; and misuse of influence by carers.¹⁰⁵

8.78 The Institute of Legal Executives (Victoria) pointed out that legal practitioners in that state had a ‘plethora of information sources’. However, with ‘the best will in the world’,

it is difficult to be completely ‘across’ all of these matters and completely up to date at any given time. We would very much like to see ‘one’ major source/resource covering all of these particular ethical matters, and agree that the Law Council of Australia would be the most efficient developmental vehicle.¹⁰⁶

8.79 A coordinated national approach would assist in overcoming the problem identified by a group of QUT academics, ‘that each of these sets of guidelines is being produced independently of the others’:

As such, they all cover similar ground but differences exist which can cause confusion and undermine attempts at establishing best practice. Guidelines, such as those with respect to assessing capacity ... have recently been updated in, for example, New South Wales and Queensland and yet they differ markedly from one another.¹⁰⁷

8.80 The QUT group also noted the importance of involving other professionals in developing guidelines on capacity assessment:

An interdisciplinary approach through the inclusion of health professionals in the preparation of guidelines will expose the process to wider scrutiny. Such external investigation will strengthen the development and application of any guidelines,

103 FECCA, *Submission 292*.

104 Financial Planning Association of Australia (FPA), *Submission 295*.

105 Seniors Rights Victoria, *Submission 383*. The work of the committee is set out at *Elder Law—National Elder Law and Succession Law Committee* <www.lawcouncil.asn.au>.

106 Institute of Legal Executives (Vic), *Submission 320*.

107 Dr Kelly Purser, Dr Bridget Lewis, Kirsty Mackie and Prof Karen Sullivan, *Submission 298*.

especially when proposing that the health professionals have a greater role in the context of testamentary and enduring documents as a way to combat elder abuse. ...

Building upon this would then be the inclusion of other relevant stakeholder groups including financial organisations, medical and legal insurers, but also groups representing people who have had their capacity assessed to ensure that superior assessment processes taking into account the lived experiences of the people who will be the subject of such guidelines.¹⁰⁸

8.81 The National Older Persons Legal Services Network also suggested that the Australian Solicitors Conduct Rules could include commentary on the importance of legal practitioners being aware of elder abuse in their practice.¹⁰⁹

What lawyers are required to know

8.82 In the context of an ageing population, and the recognition that wills and other advance planning documents are a significant exercise of autonomy,¹¹⁰ lawyers may well become increasingly called upon to assist in the preparation and execution of such documents. Lawyers may therefore be in a key position to recognise where clients may be affected by cognitive impairments or subject to undue pressure in relation to their preparation. To ensure that lawyers can play this crucial supportive role, they need to have an understanding of legal competency relevant to the particular context, and how to ensure that the documents are freely and voluntarily made by people who are legally competent to do so. Knowledge about such matters will not necessarily be gained through the completion of a legal qualification, hence the importance of providing information about such matters in a coordinated way through law societies and the Law Council.

8.83 A specific knowledge of succession law is not a compulsory requirement for admission to legal practice in Australia. The *Legal Profession Uniform Admission Rules 2015* set out the required ‘academic areas of knowledge’ for admission to practice in Australia,¹¹¹ reflecting the work of the Law Admissions Consultative Committee.¹¹² This includes the topic of ‘property’ and ‘equity’, but no specific requirement for knowledge of the substantive doctrines of succession law and the legal test of testamentary capacity. Lawyers are also required to learn about ‘ethics and professional responsibility’: a practitioner’s duty to the law, to the courts, to clients, and to fellow practitioners. With respect to practical legal training, which is also required for admission to practice, ‘wills and estates practice’ is only an optional practice area. Legal practitioners are also required to undertake mandatory continuing

108 Ibid. The importance of involving health practitioners was also emphasised by W Bonython and B Arnold, *Submission 241*. They pointed to the error of ‘conflating common diagnostic tests for cognitive impairment with the test for legal capacity’ and ‘failure to recognise the context-dependent nature of legal capacity’. The need to reach other professional service providers was also identified: Financial Planning Association of Australia (FPA), *Submission 295*.

109 National Older Persons Legal Services Network, *Submission 363*.

110 See, eg, Tilse et al, above n 1, 9.

111 *Legal Profession Uniform Admission Rules 2015* pt 2.

112 Set out, eg, in Law Admissions Consultative Committee, *Uniform Principles for Assessing Qualifications of Overseas Applicants for Admission to the Australian Legal Profession* (February 2015) sch 1.

education on an annual basis. One common component concerns ethics and professional responsibility.¹¹³

8.84 More particular knowledge about matters relevant to supporting clients in the preparation of wills may be obtained in several ways. Law students may undertake optional units of study in succession law, where available. Lawyers may undertake continuing professional development in a relevant substantive law area related to succession matters, or become accredited specialists in some jurisdictions—as in New South Wales, Queensland and Victoria.

8.85 Many lawyers, therefore, will not necessarily have a good understanding of the range of matters relevant to the preparation and execution of wills and the ways to reduce undue influence. Hamilton Blackstone Lawyers observed, for example, that, while legal practitioners who specialise in estate planning ‘are already well-versed (or should be well-versed)’ with the matters included in Recommendation 8–1, the ‘unfortunate reality’ is that ‘estate planning documentation is often not prepared by estate planning specialists: specifically, documentation is prepared by solicitors with little to no expertise in this space’.¹¹⁴ They also pointed to the reality of ‘the “commoditisation” of estate planning’:

where documents are sold ‘off the shelf’ as ‘products’ or prepared by solicitors with inadequate expertise, meaning ‘templates’ are usually produced with little to no regard to a client’s specific circumstances: DIY and generic versions are available online for less than a few hundred dollars, all at the click of a few buttons on an ‘instruction sheet’ and the provision of credit card details. Those with little to no expertise in estate planning promote ‘wills and estates’ services in a variety of forms, with the end product being a ‘one size fits all’ template which falls well short of being the definitive representation of one’s personal, business and financial circumstances and intentions. Wills are not prepared with the empathy and attention to detail that one should come to expect when reflecting on what should happen with their affairs when they pass away.¹¹⁵

8.86 The importance of continuing legal education was emphasised by stakeholders,¹¹⁶ and particularly for the national implementation of reforms.¹¹⁷ The New South Wales Legislative Council also emphasised the role of continuing education. Its report, *Elder Abuse in New South Wales*, included a specific recommendation:

That the NSW Government liaise with Law Society of New South Wales to request that the Society include a unit on the assessment of mental capacity in respect of

113 The requirements in each state and territory are set out on the website of the relevant professional body: the Law Institute of Victoria and the Law Society in the other states and territories.

114 Hamilton Blackstone Lawyers, *Submission 270*.

115 *Ibid.*

116 See, eg, Australian Research Network on Law and Ageing, *Submission 262*; W Bonython and B Arnold, *Submission 241*; Costantino & Co, *Submission 225*.

117 Seniors Rights Victoria, *Submission 383*.

substitute decision making, wills and property transactions in its Continuing Professional Development Program for legal practitioners.¹¹⁸

How lawyers are required to act

8.87 Even in the absence of specific subject knowledge, conduct rules reflect how lawyers are to behave in practice. Many aspects of these rules are relevant to matters reflected in the ALRC's Recommendation 8–1. For example, the *Australian Solicitors' Conduct Rules 2015*¹¹⁹ include the following obligations:

- as a 'fundamental ethical duty', to act in the best interests of a client in any matter in which the solicitor represents the client;¹²⁰
- a solicitor must provide clear and timely advice to assist a client to understand relevant legal issues and to make informed choices about action to be taken;¹²¹ and
- a solicitor must follow a client's lawful, proper and competent instructions.¹²²

8.88 While these rules depend on adoption in each state and territory, they are illustrative of conduct obligations nationally.

8.89 How these obligations may work in practice in the context of suspected elder abuse is seen in the following example, provided by Seniors Rights Victoria:

In one case a daughter-in-law took her mother-in-law to her own lawyer without discussing the matter with her prior to the visit, and gave 'instructions' to her lawyer of the changes required to her older family member's will. The older person was at an enormous disadvantage in this situation, as she had no prior warning of the reasons for visiting an unknown lawyer. She was from a CALD background and had little experience in dealing with lawyers and limited literacy in English, so was placed in a difficult position, and given inadequate legal advice. Her daughter-in-law was at that time her main carer, and provided transport and assistance she relied on. The will that was produced appointed her daughter-in-law as Executor and also as a beneficiary along with other family members. The older woman was placed under enormous stress through this process and could not voice her concerns or disapproval.¹²³

118 Legislative Council General Purpose Standing Committee No 2, Parliament of New South Wales, *Elder Abuse in New South Wales* (2016) rec 8.

119 The Australian Solicitors' Conduct Rules were made as the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 under the Legal Profession Uniform Law which commenced in New South Wales and Victoria on 1 July 2015. The Rules have also been adopted in Queensland and South Australia. Law societies in other states and the territories continue to work towards adoption of the Rules, according to the processes and approvals set out in their respective local legal profession regulatory arrangements. In March and April 2015 the Law Council of Australia approved a number of minor changes to the Conduct Rules, republished as the *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015*: see Law Council of Australia, *Australian Solicitors' Conduct Rules* (2015).

120 *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* [4.1.1].

121 *Ibid* [7.1].

122 *Ibid* [8.1].

123 Seniors Rights Victoria, *Submission 383*.

8.90 Seniors Rights Victoria said that, in this situation, the lawyer should not have accepted instructions in this manner, and ‘it was unclear in retrospect who the actual client was, as the daughter-in-law had paid the lawyer’s account’.

A lawyer must receive instructions for a will from the Testator direct, and also be satisfied of the client’s capacity to provide those instructions.

Equally the conduct of any lawyer who undertakes instructions that alter the legal and financial standing of older people through instigating transactions they regard essentially as transactional matters, is seriously in breach of their ethical and professional conduct standards. The lawyer in this case has, by default, sanctioned elder abuse against an older client.¹²⁴

After the family relationships subsequently broke down, the older woman revoked this will, and was able to then make another will in accordance with her own wishes.¹²⁵

8.91 The problem of identifying who the client is may also arise where other professionals are involved in estate planning. Estate planning advice often involves multiple parties (both legal and natural persons) and includes input from a number of professionals such as lawyers, accountants and financial planners. In this context, it is important to be clear about who is the client. The Code of Professional Practice of the Financial Planning Association of Australia, for example, refers to this in requiring that ‘A Member must identify the client to whom professional services will be provided’.¹²⁶ Financial planners are likely to play an increasing role in relation to advance planning documents, such as binding death benefit nominations in the context of superannuation,¹²⁷ which are considered in Chapter 7. To ensure that they are able to contribute to safeguarding against elder abuse the guidelines available to them could be enhanced in light of the material available to legal practitioners.

Community education

8.92 Recommendation 8–1 considers the role of lawyers in advance planning documents. Chapter 3 discusses matters that a National Plan to combat elder abuse might address, and community education is clearly an important strategy of such a plan. This strategy should include information about the importance of seeking appropriate information and professional advice in relation to advance planning documents.

8.93 In that context, the problem of homemade, ‘do-it-yourself’ (DIY) documents can be targeted. ‘Home made wills are a curse’, said Master Sanderson in the Western Australian case, *Gray v Gray*, which involved a will dispute.¹²⁸ Although the case involved the construction of the will and not a matter of alleged elder abuse, the

124 Ibid.

125 Ibid.

126 Financial Planning Association of Australia, *The Pillars of Our Profession*, Code of Professional Practice (July 2013) rule 1.6.

127 See ch 7.

128 *Gray v Gray* [2013] WASC 387 [1].

remarks are apposite to the problems that may arise in the DIY context and the frustration of a person's intended estate plans as a result:

Occasionally where the assets of a testator are limited and where the beneficiaries are not in dispute no difficulties may arise in the administration of an estate. Flaws in the will can be glossed over and the interests of all parties can be reconciled. But where, as here, the estate of the deceased is substantial, the will is opaque and there is no agreement among the beneficiaries, the inevitable result is an expensive legal battle which is unlikely to satisfy everyone. All of this could have been avoided if the testator had consulted a lawyer and signed off on a will which reflected his wishes. There is no question but that engaging the services of a properly qualified and experienced lawyer to draft a will is money well spent.¹²⁹

8.94 The problems that can arise from 'inadequate templates such as "Will Kits" which can be purchased from local post offices' was also referred to by Hamilton Blackstone Lawyers. This firm said that reforms should focus on 'education, advocacy and awareness on the importance of proper estate planning and the preparation of enduring documents':

The timing for proper education, advocacy and awareness is no more pertinent than it is today. As family dynamics change, a proper will becomes even more critical. Breakdowns in family relationships now occur at a far greater rate than at any time in Australian history. Blended family arrangements are now common. Grandparents and relatives are now more likely than ever to have the full-time care of children, and more people are raising children who aren't biologically related to them. With the growth in superannuation balances and increasing property values, estates are becoming larger and larger, which means tax and social security become even more relevant post-death.

...

We strongly encourage the ongoing development of education, advocacy and awareness programs, led by the Law Societies in each state and territory, to highlight the importance of proper estate planning in consultation with specialists in these critical areas.¹³⁰

8.95 Community education and awareness could also include a focus on encouraging women to make wills:

Unfortunately, women are disadvantaged when it comes to many of the key social and financial indicators which particularly impact their estate planning, which means that proper estate planning becomes particularly critical. The statistics tell us that women endure a disproportionate share of the financial burden of their families, whether because of increased life expectancy, care of elderly relatives, and/or care and custody of children. However, women are also disproportionately subject to financial abuse, domestic violence, and divorce can be financially crippling to them when they also have to manage the financial burden of children and the elderly.¹³¹

129 Ibid.

130 Hamilton Blackstone Lawyers, *Submission 270*.

131 Ibid.

8.96 The ACT Law Society and the Law Institute of Victoria have produced guidelines on wills directed to the general public.¹³² Such initiatives provide an instructive example of community education. The Hume River Community Legal Service (HRCLS) also provided an example of a specific community education strategy to make older persons less vulnerable to financial abuse. They cited wills workshops conducted especially for Aboriginal clients:

Over a two day period in the years 2015 and 2016, Gilbert and Tobin (a private law firm) assisted HRCLS on a pro bono basis with the running of a free Wills, Power of Attorney and Guardianship workshop for Aboriginal people in the Albury Wodonga region. On Day 1, Gilbert and Tobin provided education about legal planning and focused on issues particularly relevant to Aboriginal people. In the afternoon of Day 1, lawyers began taking instructions from people attending the workshop. On Day 2, lawyers drafted wills and power of attorney documents, and returned the completed documents for clients to sign and take home. The workshop in 2015 was held at Albury Wodonga Aboriginal Health Service and the workshop in 2016 was held at the Mungabareena Aboriginal Corporation in Wodonga.

This initiative was taken to address the low numbers of Aboriginal people who have wills or power of attorney documents. By delivering a workshop in partnership with the local Aboriginal Health Service, the workshop was culturally appropriate and also well promoted within the local Aboriginal community. As a result of having wills and power of attorney documents in place, elderly people are less likely to be exposed to elder abuse.¹³³

8.97 Other examples of community education include the campaign of the New South Wales Government, ‘get it in black and white’, explaining ‘Planning Ahead Tools’ as an exercise of a person’s rights: ‘When you have planning ahead documents in place—a Will, Power of Attorney and Enduring Guardianship—you can rest assured that your rights and wishes can be respected because they are properly documented’.¹³⁴ Another example is a guide for making enduring powers of attorney, produced by the Office of the Public Advocate of Victoria, entitled ‘Take Control’.¹³⁵ Such strategies could be complemented by those emphasising the importance of careful estate planning and the assistance that professionals—particularly lawyers and financial advisers—can provide. For example, the Law Society of New South Wales includes community information on its website on making a will, with an opening section on ‘The truth of homemade wills’ and their inherent dangers.¹³⁶ The ACT Law Society’s community education guide on making a will includes a similar message, under the heading ‘How can a solicitor help me?’¹³⁷

132 ACT Law Society, *Making a Will* <www.actlawsociety.asn.au>; Law Institute of Victoria, *Wills and Estates* <www.liv.asn.au>.

133 Hume Riverina CLS, *Submission 186*.

134 New South Wales Government, *3 Easy Ways to Plan Ahead—Planning Ahead Tools* <<http://planningaheadtools.com.au/>>.

135 Office of the Public Advocate (Vic), *Take Control: A Guide to Making Enduring Powers of Attorney* (2015).

136 Law Society of New South Wales, *Making a Will* <www.lawsociety.com.au>.

137 ACT Law Society, above n 132.

8.98 The ALRC recognises that not all older persons will have access to lawyers and other professionals and acknowledges that some may find access to free will making and accompanying advice the only way to gain such support. In the absence of direct access to lawyers in this way, the provision of clear and informative advice provided through law society websites for example is a significant safeguarding step.

8.99 The ALRC commends such initiatives as supportive of older persons in exercising their rights. They provide illustrations of best practice approaches that can inform the education and awareness strategies developed through the National Plan. Community education may also address broader issues about people's rights in relation to will making in Australia.

