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## **LEGAL EDUCATION AND THE AGEING POPULATION: BUILDING STUDENT KNOWLEDGE AND SKILLS THROUGH EXPERIENTIAL LEARNING IN COLLABORATION WITH COMMUNITY ORGANISATIONS**

### ABSTRACT

The Australian population is ageing and dementia is now the leading cause of disability in persons over the age of 65 years. Lawyers must be prepared to meet the legal needs of older clients, including helping them plan in advance for health, financial and property matters. Lawyers must be able to recognise when cognitive impairment may limit a client's decision-making capacity and take appropriate steps to handle such situations. Legal regulatory bodies in Australia report an increasing incidence of complaints against legal practitioners, including junior lawyers, for failures to identify and manage capacity issues.

This article discusses an experiential learning pilot project designed to build students' knowledge and skills to better meet their professional responsibilities when providing assistance to older clients. The University of Newcastle Law School in New South Wales, Australia, collaborated with local community organisations to deliver: (1) a legal education initiative that included law students in the delivery of legal information seminars for older adults and people with chronic health conditions; and (2) a training module to educate students about client capacity issues.

The article describes the process of embedding research into this project to evaluate students' experiences and to investigate the impact of community legal education on attendees' knowledge and behaviour. Our results demonstrate the value of experiential learning for students and indicate that legal education can enhance attendees' readiness to plan ahead for future periods of incapacity.

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This article includes practical lessons learned from the design, implementation and evaluation of this pilot project.

## I INTRODUCTION

Australia has an ageing population and many people are living longer with chronic illnesses.<sup>1</sup> Half of all Australians over the age of 65 report having a disability,<sup>2</sup> with dementia-related conditions now the leading cause of disability among this age group.<sup>3</sup> The legal profession must be prepared to meet the needs of older adults in two ways: first, by reducing the barriers that make it difficult for older adults to know and act on their legal rights;<sup>4</sup> and second, by ensuring that legal practitioners identify and respond appropriately when a client displays signs of cognitive impairment and reduced decision-making capacity. Worryingly, people who are ‘decisional dependent’ — that is, willing to give another person control over their personal affairs — reportedly have lower levels of knowledge about their legal rights.<sup>5</sup> The Legal Australia-Wide Survey notes the importance of legal education initiatives tailored to meet the needs of different age groups and the typical legal problems they encounter.<sup>6</sup> Older adults are identified as an important group to reach with legal education programs and assistance. This is especially true in relation to advance personal planning through, for example, writing an advance care plan and a will and appointing trusted individuals to make financial and healthcare decisions in the event of future periods of incapacity.<sup>7</sup>

<sup>1</sup> Around 3.4 million Australians are aged 65 and older, a three-fold increase in 50 years, and nearly 460 000 are aged 85 and over, a nine-fold increase: see Australian Institute of Health and Welfare, *Ageing* (2016) <<http://aih.w.gov.au/ageing/>>.

<sup>2</sup> *Ibid.*

<sup>3</sup> Alzheimer’s Australia reports that there are 1700 new cases of dementia diagnosed each week in Australia: Alzheimer’s Australia, *Key Facts and Statistics — Vic* <<https://vic.fightdementia.org.au/vic/about-us/media/key-facts-and-statistics/>>.

<sup>4</sup> Susan Edwards and Antonia Fontana, ‘Legal Information Needs of Older People’ (Report, Law and Justice Foundation of New South Wales, 2004) iv.

<sup>5</sup> Cheryl Tilse et al, ‘Legal Practitioners and Older Clients: Challenges and Opportunities for Effective Practice’ (2002) 1 *Elder Law Review* 34.

<sup>6</sup> Christine Coumarelos et al, ‘Legal Australia-Wide Survey: Legal Need in Australia’ (Report, Law and Justice Foundation of New South Wales, August 2012) xxii.

<sup>7</sup> *Ibid* 173, citing Christine Coumarelos, Zhigang Wei and Albert Z Zhou, ‘Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas’ (Report, Law and Justice Foundation of New South Wales, March 2006):

Although most types of legal problems are less prevalent among older people [including legal problems related to criminal activity, rental housing, credit and debt, child and family disputes], some types of legal problems are relatively common in this age group. In particular, past research has found that wills, estates and power of attorney issues are common in the older age groups ...

A variety of barriers prevent older adults from obtaining legal help, including the costs of legal services and a perception that lawyers are not interested in older clients.<sup>8</sup> Sage-Jacobson explains that ‘[o]lder people do suffer a distinct disadvantage in access to justice. ... [T]he evidence does show that older people face particularly strong barriers to gaining legal assistance and achieving satisfactory resolution compared to other Australians.’<sup>9</sup> Those who do not access the necessary legal help to engage in advance personal planning are at risk of becoming the subjects of decisions that do not accord with their values, wishes and preferences. As a result, they are more likely to experience loss of control, unwanted medical interventions and poorer quality of life as they deal with deteriorating health and reduced independence, and be vulnerable to financial exploitation.

Law schools have an important role in ensuring that students, as future legal practitioners, gain relevant knowledge, skills and experience during their studies that will help them provide effective legal services to older clients and meet their ethical responsibilities in situations where a client’s decision-making capacity may be an issue.<sup>10</sup> Law schools can also engage in outreach activities to educate community members about their legal rights. Students can be involved in the delivery of such programs, thus supporting their practical skill development and fostering their commitment to pro bono contributions.

This article discusses the use of experiential learning in law schools to build students’ knowledge and skills so that they are better equipped to meet their professional responsibilities when providing assistance to older clients and people with conditions that may impair their capacity. We adopt the following definition of experiential learning:

learning in which the learner is directly in touch with the realities being studied. It is contrasted with learning in which the learner only reads about, hears about, and talks or writes about these realities; experiential learning typically involves not merely observing the phenomenon being studied, but also doing something with it: testing the dynamics of that reality to learn more about it, or applying the thing learned to achieve some desired result.<sup>11</sup>

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<sup>8</sup> Edwards and Fontana, above n 4, 11.

<sup>9</sup> Susannah Sage-Jacobson, ‘Access to Justice for Older People in Australia’ (2015) 33(2) *Law in Context* 142, 159.

<sup>10</sup> Nina A Kohn and Edward D Spurgeon, ‘A Call to Action on Elder Law Education: An Assessment and Recommendations Based on a National Survey’ (2013) 21 *Elder Law Journal* 345.

<sup>11</sup> ‘A Boom in Experiential Learning’ in Morris T Keeton and Pamela J Tate (eds), *Learning by Experience — What, Why, How* (Jossey-Bass, San Francisco, 1978) 1, 2, quoted in Barbara Anderson, Dave Boud and Gail Macleod, ‘Experience-Based Learning: How? Why?’ (Paper presented at Australian Consortium on Experiential Education, Sydney, May 1980) preface. Best practice guidelines for clinical legal education in Australia identify the terminological issues with descriptors such as ‘clinical legal education’, ‘experiential education’, ‘service learning’ and so on. The guidelines use ‘experiential learning’ as an umbrella term that encompasses: clinical programs where students interview and advise real clients; simulations where students

This article presents a pilot project with two components undertaken in 2015 at the University of Newcastle Law School (NLS) in New South Wales, Australia. The first component was a legal education initiative that involved law students in the delivery of legal information in community settings to older adults and persons with chronic medical conditions, as well as some family members and carers. The second component was a client capacity training module for law students that included practical skill development and an interactive workshop with persons living with dementia and their carers. The article also describes the process of embedding research into this pilot project to inform the development of methods: first, to understand the impacts of experiential learning for law students; and second, to investigate the impact of community legal education on attendees' knowledge and behaviour. In particular, we sought to trial a research method to determine whether or not attending a legal information seminar enhanced attendees' readiness to plan ahead for the possibility of future periods of incapacity.

NLS conducts a Practice Program that integrates clinical training and practical experience with the academic study of law. Students complete intensive placements at the University of Newcastle Legal Centre (UNLC) as well as with external firms and agencies. NLS places a strong emphasis on clinical legal education, consistent with the following description:

Clinical Legal Education may be defined as the teaching of law and legal practice, procedures and skills through experiential learning. Experiential learning involves the interaction between law faculty staff, students and actual clients in real legal matters. A live client clinic is generally operated by a law faculty, and is effectively the undertaking of a legal practice by law faculty staff with the assistance of law students who are involved in the conduct of the legal practice. This teaching method relies significantly on a clinical model, and in particular, the supervised involvement of students in the conduct of a legal practice.<sup>12</sup>

Experiential learning is a vital component in developing the core competencies needed in the practice of law.<sup>13</sup> For law students who intend to become practising lawyers, the benefits of experiential learning and the live client experience are

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deal with hypothetical clients; external clinical placements; and other lawyerly activities, such as researching and writing law reform submissions and preparing clinical legal education materials. See Adrian Evans et al, 'Best Practices: Australian Clinical Legal Education' (Report, Australian Government Office for Learning and Teaching, September 2012) 4 <[http://www.cald.asn.au/assets/lists/Resources/Best\\_Practices\\_Australian\\_Clinical\\_Legal\\_Education\\_Sept\\_2012.pdf](http://www.cald.asn.au/assets/lists/Resources/Best_Practices_Australian_Clinical_Legal_Education_Sept_2012.pdf)>. Throughout this article, we use the broad term 'experiential learning'. As our Law School operates an in-house clinic, we typically reserve the term 'clinical learning/education' for experiences where students interact one-to-one with a real client.

<sup>12</sup> John Boersig, James Marshall and Georgia Seaton, 'Teaching Law and Legal Practice in a Live Client Clinic' (2002) 6(2) *Newcastle Law Review* 51, 52.

<sup>13</sup> Allan Chay and Frances Gibson, 'Clinical Legal Education and Practical Legal Training' in Sally Kift et al (eds), *Excellence and Innovation in Legal Education* (LexisNexis Butterworths, 2011) 497, 502.

manifold. Our pilot project exposed students to client groups with whom they would not normally interact, including people living with diagnoses of degenerative and terminal illnesses. According to the current literature, '[i]t is increasingly understood that law schools do have an important role in ensuring that law graduates are equipped with a broader range of attributes than pure legal knowledge.'<sup>14</sup>

Aware that community members have unmet legal needs and may face barriers in accessing traditional legal assistance offices, the UNLC operates 'pop-up' clinics and community legal information sessions. For example, the Law on the Beach legal advice clinics operate during summer at a local surf lifesaving club and aim to provide legal outreach and advice to young people in the community. Law students are also involved in delivering legal information sessions to international students who have newly arrived in Australia. In 2015, expanding on NLS's dual commitments to experiential learning and community outreach, we designed, implemented and evaluated the pilot initiative with its two components of community legal education and client capacity training.

This project was developed as a pilot study with the aim of gaining experience and collecting data to inform future course development and community engagement, especially in relation to the legal needs of older adults. This may include the potential introduction of a clinical course that would integrate the experiences trialled in the pilot. Consistent with the purposes of pilot studies,<sup>15</sup> we wanted to assess the feasibility and resource implications of these new experiential learning initiatives, as well as test a survey-based research method. We sought to gauge both the level of student engagement and the interest of community organisations in collaborating with NLS. The surveys were piloted with a smaller number of participants to obtain information about the acceptability of the surveys, their ease of completion and response rate. We also sought to collect preliminary data about the impacts of participation in these initiatives for law students and community members and to gain feedback from attendees on the content of the seminars. Further, we had to consider resource implications (eg, to liaise with community organisations and coordinate seminars; supervision of students) and potential logistical issues (eg, availability of audio-visual equipment in community settings) that could arise. This information and our

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<sup>14</sup> Margaret Castles and Anne Hewitt, 'Can a Law School Help Develop Skilled Legal Professionals? Situational Learning to the Rescue!' (2011) 36 *Alternative Law Journal* 90, 90.

<sup>15</sup> Edwin R van Teijlingen and Vanora Hundley, 'Pilot Study' in Michael S Lewis-Beck, Alan E Bryman and Tim Futing Liao (eds), *The SAGE Encyclopaedia of Social Science Research Methods* (SAGE Publications, 2004) vol 1, 781, 824–5:

Pilot study refers to

1. feasibility or small-scale versions of studies conducted in preparation for the main study and
2. the pretesting of a particular research instrument.

Good pilot studies increase the likelihood of success in the main study. Pilot studies should warn of possible project failures, deviations from protocols, or problems with proposed methods or instruments and, it is hoped, uncover local politics or problems that may affect the research ...

experiences of the pilot delivery are also relevant in seeking external financial support for larger scale programs, as it demonstrates the feasibility to potential funders.

Part II of the article discusses the development of the ‘Planning Ahead’ community legal education initiative, its evaluation model and practical considerations in providing both effective legal training for students and beneficial community legal outreach for older adults. Part III discusses the Client Capacity Training Module. Part IV summarises lessons learned and makes recommendations to inform experiential learning initiatives at other law schools.

## II ‘PLANNING AHEAD’ COMMUNITY LEGAL EDUCATION

### *A Context and Rationale*

Many people, especially older adults, express an interest in planning ahead for their healthcare and other life choices. However, only a minority actually do so. In Australia, a mere 14% of the population have an advance healthcare directive, 30% have appointed someone to manage their finances and 59% have created a will.<sup>16</sup>

In a report on the legal needs of older adults, the New South Wales Law and Justice Foundation identified that many older people lack knowledge of the legal aspects of advance planning.<sup>17</sup> Indeed, there are various barriers to advance planning, including little awareness of or confusion about the legal instruments available to plan ahead, uncertainty about where to get help and the costs involved (eg, ‘do I have to go and pay a solicitor to do all this with me or can I just see my GP?’)<sup>18</sup> and reluctance to think about future illness and dying.<sup>19</sup> Many individuals, including those with diagnoses that involve cognitive decline, either do not realise the importance of planning ahead or they avoid the process until it is too late and they have lost capacity to express their wishes in an informed manner.

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<sup>16</sup> Ben White et al, ‘Prevalence and Predictors of Advance Directives in Australia’ (2014) 44(10) *Internal Medicine Journal* 975. See also Cheryl Tilse et al, ‘Will-Making Prevalence and Patterns in Australia: Keeping it in the Family’ (2015) 50 *Australian Journal of Social Issues* 319.

<sup>17</sup> Sarah Ellison et al, ‘The Legal Needs of Older People in NSW’ (Report, Law and Justice Foundation of New South Wales, 2004) 309.

<sup>18</sup> Jennifer Boddy et al, ‘It’s Just Too Hard! Australian Health Care Practitioner Perspectives on Barriers to Advance Care Planning’ (2012) 19 *Australian Journal of Primary Health* 38, 40. A participant in a health practitioner focus group reported that a patient asked her this question.

<sup>19</sup> Ibid 42, 44. See also Allison Lovell and Patsy Yates, ‘Advance Care Planning in Palliative Care: A Systematic Literature Review of the Contextual Factors Influencing its Uptake 2008–2012’ (2014) 28 *Palliative Medicine* 1026, 1030; Sara M Moorman and Megumi Inoue, ‘Predicting a Partner’s End-of-Life Preferences, or Substituting One’s Own?’ (2013) 75 *Journal of Marriage and Family* 734.

Planning ahead — and exercising the legal rights and executing the legal instruments available to do so — has important benefits. People who say they have their affairs in order report less anxiety about facing the end of life, and planning ahead is cited as a factor in experiencing a ‘good death’.<sup>20</sup> Having a written healthcare directive ‘positively impacts the quality of end-of-life care’<sup>21</sup> and enables substitute decision-makers and healthcare providers to comply with the person’s values, wishes and preferences when they no longer have the capacity to express their own choices. In turn, this reduces family stress and conflicts.<sup>22</sup>

In a recent Australia-wide survey, White et al found that people who had a written healthcare directive were also likely to have a will and a financial power of attorney.<sup>23</sup> The challenge is to promote more people to become ‘planners’ in this regard. Behaviour change theory shows that people transition through stages of knowledge acquisition, contemplation, the development of a sense of self-efficacy and, finally, readiness to act.<sup>24</sup>

We posit that the provision of legal information in community settings can play an important role in facilitating behaviour change by raising awareness of the legal tools available to plan ahead. Participants in our community legal education (CLE) seminar were provided with legally accurate resources and encouraged to make and update advance planning documents with professional legal help and in consultation with significant others, such as family members and healthcare providers. This can help normalise advance preparation and reduce the barriers associated with a lack of knowledge about planning for one’s future. In this pilot project, we sought to trial a research strategy to test this hypothesis.

There is nascent literature on the impacts of providing CLE. CLE is defined as ‘the provision of information and education to members of the community on an individual or group basis, concerning the law and legal processes and the place of these in the structure of society.’<sup>25</sup> CLE aims to bring about ‘changes in participants’ awareness,

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<sup>20</sup> Katharine Abba et al, ‘Interventions to Encourage Discussion of End-of-Life Preferences between Members of the General Population and the People Closest to Them — A Systematic Literature Review’ (2013) 12(40) *BMC Palliative Care* 1.

<sup>21</sup> Arianne Brinkman-Stoppelenburg, Judith A C Rietjens and Agnes van der Heide, ‘The Effects of Advance Care Planning on End-of-Life Care: A Systematic Review’ (2014) 28 *Palliative Medicine* 1000, 1021.

<sup>22</sup> Carmen H M Houben et al, ‘Efficacy of Advance Care Planning: A Systematic Review and Meta-Analysis’ (2014) 15 *Journal of the American Medical Directors Association* 477.

<sup>23</sup> White et al, above n 16, 978.

<sup>24</sup> Rebecca L Sudore et al, ‘Development and Validation of a Questionnaire to Detect Behavior Change in Multiple Advance Care Planning Behaviors’ (2013) 8(9) *PLoS One* <<http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0072465>>.

<sup>25</sup> Ania Wilczynski, Maria Karras and Suzie Forell, ‘The Outcomes of Community Legal Education: A Systematic Review’ (Justice Issues Paper No 18, Law and Justice Foundation of New South Wales, December 2014) 2 <<http://www.lawfoundation>.

knowledge, understanding of legal rights and legal issues, skills and confidence, and to increase their understanding of how and when they need legal support.<sup>26</sup> CLE is said to be effective if it ‘causes a change in participants’ knowledge, skills and motivation to act, and/or ideally, it causes a change in their actual behaviour.’<sup>27</sup>

The Law and Justice Foundation of New South Wales recently conducted a systematic review on studies investigating the effectiveness of face-to-face CLE. Only two North American studies satisfied the review’s inclusion criteria, and the Foundation underscored the need for more research to evaluate the impacts of CLE: ‘it is important to note that a lack of definitive evidence demonstrating that CLE is effective does not necessarily mean that CLE is not effective, but rather that the quality of research studies have not allowed for a conclusion at this time.’<sup>28</sup> The Foundation noted the need to develop appropriate outcome measures in evaluating the impacts of CLE, and the importance of publishing results that include a clear description of the educational intervention, the research methods and results.<sup>29</sup> To ensure that our pilot project can contribute to the advancement of such research, we have included relevant details in this article.

### *B Design and Delivery*

The Planning Ahead project involves the delivery of face-to-face CLE seminars targeted at older adults and persons living with chronic illnesses. The seminars are delivered in settings that are familiar to and easily accessible for community members, including places where people regularly go to access health services and supports. Law students participate in the presentation of the seminar, with supervision and assistance by NLS clinical and academic staff members. While we had some minor trepidation about how older seminar participants would receive young law students, we believed the value of the interaction for both students and attendees would overcome any perceived lack of credibility associated with youth. In particular, we thought the participation of young law students would help dispel perceptions that lawyers are uninterested in older adult clients, and the students would gain beneficial insights into the needs of older adults and people living with chronic health conditions. As Berenson argues, ‘elder law’ clinics and related experiential opportunities can be an important site for dialogic encounters between younger and older members of a community.<sup>30</sup>

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net.au/ljf/site/articleIDs/18C587ECBD959D50CA257A91001F76F0/\$file/JI18\_Outcomes\_of\_CLE\_FINAL\_web.pdf>, quoting Combined Community Legal Centres Group, *Your Guide to Community Legal Education* (CCLGG NSW, 2<sup>nd</sup> ed, 2004) 9.

<sup>26</sup> Wilczynski, Karras and Forell, above n 25.

<sup>27</sup> Ibid 3.

<sup>28</sup> Ibid.

<sup>29</sup> Ibid.

<sup>30</sup> Steven Keith Berenson, ‘Can We Talk? Impediments to Intergenerational Communication and Practice in Law School Elder Law Clinics’ (1998) 6 *Elder Law Journal* 185.



The CLE seminar is designed for delivery in a one-hour session, consisting of a 45-minute lecture-style presentation followed by 15 minutes for question and answers and informal discussion. The lecture was designed with a clearly structured format,<sup>31</sup> covering three main legal topics: making a will; appointing a financial decision-maker; and health care decision-making, including the appointment of a decision-maker for health and lifestyle matters and writing an advance care directive. The presentation also emphasised the importance of periodically reviewing and updating legal instruments to reflect any changes in personal circumstances, communicating one's wishes with key people (eg, appointed decision-makers and healthcare providers) and storing documents in a place where they can be easily retrieved when needed. Participants were also informed of e-health records and the option to register for a personally controlled e-health record. Such records ensure key medical details, including information about a care directive, are available in a central repository.<sup>32</sup> Attendees interested in personalised assistance following the seminar were advised of a free drop-in advice clinic at the UNLC, particularly if they wanted to discuss personal matters regarding a legal document and its ramifications, or if they sought a referral to a local solicitor if they had the ability to pay for legal assistance. Participants also received an information package to take home. The pack contained a copy of the presentation slides with links to relevant websites, brochures on appointing a power of attorney or enduring guardian, and sample forms for such appointments and advance care directives.

The Planning Ahead seminars were promoted through electronic and hard copy mail outs to health organisations, including local branches and support groups for organisations such as Alzheimer's Australia, the Motor Neurone Disease Association of NSW, the Cancer Council and the Stroke Recovery Association NSW. Fortuitously, when we started promoting the Planning Ahead seminars, an alliance of the major health service providers in the region<sup>33</sup> was set to launch a campaign to encourage advance healthcare planning. This alliance distributed information about our seminars to over 40 local health organisations. Staff members of these organisations then decided if they wanted to host a Planning Ahead seminar and promoted it to their clients.

In promoting new CLE seminars in the community, we were aware of the need to maintain NLS's relationships with the local legal community who provide professional placements for our law students. We wanted to avoid a misperception that we were taking work away from local lawyers. In fact, raising community awareness

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<sup>31</sup> Structured teaching is much more effective than unstructured, ad hoc teaching. See, eg, Audrey Jusko Friedman et al, 'Effective Teaching Strategies and Methods of Delivery for Patient Education: A Systematic Review and Practice Guideline Recommendations' (2011) 26 *Journal of Cancer Education* 12, 17.

<sup>32</sup> See, eg, Australian Digital Health Agency, *Managing your My Health Record* (27 May 2016) <<https://myhealthrecord.gov.au/internet/mhr/publishing.nsf/Content/managing-your-my-health-record>>.

<sup>33</sup> Our Alliance — Hunter New England, *Home* (2016) <<http://ouralliance.healthpathways.org.au/Home.aspx>>.

about the important role legal advice plays in making or updating advance planning documents could increase referrals to local practitioners.<sup>34</sup> Moreover, the UNLC is only able to provide legal services to people with limited financial means.<sup>35</sup>

Participation in the Planning Ahead seminars was open to senior law students completing their professional placement hours at the UNLC. We delivered five seminars in various settings to reach different client groups, including a community health clinic, a residential aged care facility, support groups for persons with progressive illnesses and a community centre. With the exception of one seminar scheduled for 6 pm, all seminars were run during business hours.

Students who volunteered to participate in the seminars reviewed resources and helped prepare the presentation materials. This ensured they had a strong understanding of the legal rules and statutory requirements relevant to the topics covered. They also practised delivering the seminar to a group of peers. Unexpectedly, the first group of presenting students had the opportunity to do a practice run for two staff members at a community health clinic as the 12 clinic patients who had registered to attend the seminar failed to show up.<sup>36</sup> However, this provided a useful learning opportunity as two clinic staff members, including a nurse practitioner with a special interest in advance care planning, were interested to hear the presentation. After the seminar they gave valuable feedback regarding the content and organisation of information and we adjusted the presentation in response to their suggestions. We recommend doing a practice run of a new CLE seminar for a small community audience to obtain this type of frank feedback.

It is reported that older adults are more comfortable interacting with ‘lawyers who demonstrate friendliness, warmth, ability to communicate and a respectful attitude.’<sup>37</sup> Students were encouraged to be respectful but not overly formal or rigid. The question and answer session after the presentation provided a rich opportunity for discussion among the attendees, the presenting students and supervising staff members. This question and answer period gave students valuable experience in

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<sup>34</sup> Interestingly, one participating organisation said they preferred having a CLE seminar from a ‘neutral’ entity like a law school, rather than a lawyer from a firm who may be perceived as trying to drum up work.

<sup>35</sup> Eligibility is based on the person having a current Health Care Card issued by the Commonwealth Department of Human Services: Department of Human Services, *Eligibility for a Health Care Card* (27 June 2016) <<https://www.humanservices.gov.au/customer/enablers/eligibility-health-care-card>>.

<sup>36</sup> Based on this experience, we recommend offering the CLE seminar at a session people already attend, such as a support group meeting for people with health conditions. This ensures a good turnout and is likely to already be held at a time that best fits client schedules. If the seminar is scheduled at another time, we recommend asking the organisation to register participants and give a reminder by email or phone a day in advance. This ensures the best use of resources and will help avoid the disappointment of travelling to a community organisation only to have no or few attendees.

<sup>37</sup> Edwards and Fontana, above n 4, 14.

thinking on their feet and helped them gain insights into the types of practical issues faced by clients (eg, ‘I made Power of Attorney documents when I lived interstate and I’ve now moved to New South Wales. Do I have to do them again?’).

### *C Evaluation*

To minimise the burden on participants, we developed short surveys that were designed to collect the most pertinent information. We obtained ethics approval to survey both law students and seminar attendees.<sup>38</sup> When surveying students, we wanted to find out what they gained from this experiential learning opportunity. Surveys for attendees focused on their legal needs and the impact of attending a CLE seminar. We informed the community organisations of the research component of the seminar in advance to elicit whether they had any concerns about the distribution of surveys. All were agreeable and one organisation, which typically deals with survey requests from health researchers, commented that participating in a study on legal issues was novel and they wanted to support it.

#### *1 Feedback from Students*

Seven of the 12 students involved in delivering the Planning Ahead seminars responded to the voluntary, anonymous online survey (58% response rate). The results are summarised in Table 1.

**Table 1: What did law students gain through participation in an experiential learning initiative?<sup>39</sup>**

| Question   | Responses |          |
|--|-----------|----------|
|  | Very much | Somewhat |
| Has this experience increased your knowledge of the law relevant to planning ahead for one’s future? | 71.4%     | 28.6%    |
| Did you gain experience explaining legal information to a new type of client group?                  | 83.3%     | 16.7%    |
| Did you value the opportunity to provide legal education in a community setting?                     | 100%      | –        |
| Would you recommend this experience to another student?  | 100%      | –        |

Students were also invited to provide additional feedback. While all survey respondents stated that their legal knowledge increased, they also commented on how the experience enhanced their practical communication and problem-solving skills:

<sup>38</sup> University of Newcastle Human Research Ethics Committee Approval H-2015-0085.

<sup>39</sup> Only two out of the four options have been included because no students selected the other options.

The entire process of the presentation, from preparation to delivery, feedback and reflection, helped to reinforce my legal knowledge and assisted me in developing skills to communicate that knowledge to various groups. The fact that the audience may have been unfamiliar or only slightly aware of the content being discussed helped me to consider different communication techniques in order to convey the information in a clear and straightforward manner.

Very informative, and excellent experience in communication with the community on their legal issues.

The students also valued the opportunity to go into their local community to provide legal education:

This is something I would jump on again if given the opportunity. I would like to talk on many more legal areas that would practically benefit the community, but are often overlooked.

By going out into the community, we are able to interact with clients with whom we would not ordinarily be able to interact and connect with the community on a deeper level. I think this kind of community outreach is incredibly valuable!

The exposure to 'real life' settings and issues also enhanced the students' learning:

It helps to ground your studies with reality.

It was good to see, and converse with real people who are affected by the law. Sometimes it's easier to look at legal problems like just another problem question and it is easy to forget that there are actually people who are affected by what we do. I really enjoyed the face-to-face contact with people from the community, getting to hear their stories and knowing the legal advice being given was going to an actual person and it was not another assessment item.

## *2 Feedback from Seminar Attendees*

Seminar attendees were invited to complete three short surveys: one at the start of the seminar recording basic demographic information and their current knowledge of advance planning instruments, one at the end of the seminar ascertaining their reactions to the information presented, and a follow-up survey approximately one month after the seminar to ask if they had taken steps to engage in advance personal planning. Both surveys distributed at the seminar were completed in hard copy. Attendees provided written consent if they were willing to complete the follow-up survey, which was distributed in accordance with their preferred means of communication: email, regular mail or telephone. Participants who chose the telephone option were contacted by a research assistant who read the survey questions and recorded participants' answers in writing on a paper copy of the survey. This method of communication yielded the most responses, followed by email contact. We chose to distribute the final survey within four to five weeks of the seminar due to research showing that the motivation to act on information learned in community education

programs tends to diminish relatively quickly.<sup>40</sup> Thus if the Planning Ahead seminar were to have any influence on behaviour, it would likely do so within a short time following the event.

### 3 *Demographic Details*

The age of attendees ranged from 20 to 88, with the average age calculated as 60 years. While the seminars were targeted at older adults and persons with chronic illnesses, family members, carers and community organisation staff members also attended and completed the surveys, accounting for the younger ages listed on some responses. The majority of respondents (70%) were female. Most of the participants (81%) stated that their highest level of education was tertiary (apprenticeship/TAFE/university), while 19% indicated high school for the same question. A majority of participants (65%) cited their relationship status as married or living as married, 12% stated they were widowed, 9% were single, 9% were divorced and 5% reported they were separated. A majority of participants (70%) described their current health as good or very good, 11% reported it as poor or very poor with the remainder (19%) stating their health was neither good nor poor. As the surveys were anonymous, we were unable to determine if self-perceived health status was associated with a greater propensity to engage in advance planning behaviours following the CLE attendance. However, previous studies suggest that people living with a serious illness are more likely to engage in advance planning and be interested in doing so.<sup>41</sup>

### 4 *Pre-Seminar Survey*

The survey distributed at the start of the CLE event asked participants about their current level of legal knowledge. We considered asking if the attendees had already prepared advance planning documents but to respect participants' privacy, we ultimately decided to ask questions only about knowledge. We were concerned that some people might be reluctant to disclose if they have completed specific legal documents, particularly if they attended the seminar with a family member or carer who might then question them about their legal affairs. For example, they may be asked who the beneficiaries are in their will.

The results of the pre-seminar survey, which was completed by almost 70% of participants, are summarised in Table 2. All respondents said they knew what a will is. Knowledge of the Enduring Guardian and Advance Care Directive was lower, which is consistent with a 2004 report on the legal information needs of older adults.<sup>42</sup> The persistent lack of knowledge surrounding these important healthcare planning tools suggests a need for further community outreach and education.

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<sup>40</sup> Wilczynski, Karras and Forell, above n 25, 8–9, citing Denise Kendrick et al, 'Home Safety Education and Provision of Safety Equipment for Injury Prevention' (2012) 9 *Cochrane Database of Systematic Reviews* 1, 17.

<sup>41</sup> Lovell and Yates, above n 19.

<sup>42</sup> Edwards and Fontana, above n 4.

**Table 2: Attendees' legal knowledge before the CLE seminar**

| QUESTION  | Yes          | No          | Not sure    |
|---|--------------|-------------|-------------|
| <b>I know what a Will is.</b>   | 43/43 = 100% |             |             |
| <b>I know what an Advance Healthcare Directive is.</b>  | 22/42 = 52%  | 12/42 = 29% | 8/42 = 19%  |
| <b>I know what an Enduring Guardian is.</b>   | 28/43 = 65%  | 4/43 = 9%   | 11/43 = 26% |
| <b>I know what a Power of Attorney is.</b>  | 36/43 = 84%  | 1/43 = 2%   | 6/43 = 14%  |
| <b>To plan for my future, I would like to make or update one or more of these types of documents.</b> | 30/43 = 70%  | 9/43 = 21%  | 4/43 = 9%   |

N = 43 (69% response rate) (note one person did not complete Q2, so N = 42)

### 5 Post-Seminar Survey

This survey was distributed to attendees at the conclusion of the CLE seminar and focused on two key areas: attendees' reactions to the information presented and their ability to access legal services. The results are summarised in Table 3. Slightly fewer attendees completed this survey (approximately 60%) and not all questions were answered. Of those who completed the survey, 90% said their knowledge of the law increased. A majority of participants indicated an interest in making or updating the types of legal documents discussed in the seminar, with many also stating they would like help from a lawyer to do so. Just over half of those who identified barriers to accessing legal help cited cost as an obstacle. In regard to other barriers, one respondent noted their own indecisiveness as a barrier (ie, not yet ready to make these decisions) and another cited difficulty in getting appropriate family members together with their solicitor to discuss matters. Some respondents noted that they already had a solicitor from whom they could seek assistance and only 10% cited lack of access to a lawyer as an impediment to seeking assistance.

In their written comments, some respondents noted they had not been aware of e-health records — indeed, public awareness of e-health records is very low across Australia<sup>43</sup> — and some stated they intended to look up more information about having an e-health record. The comments also revealed that participants did not react negatively to the involvement of young law students in the presentation of seminars. Several attendees recommended that students be reminded of the importance of speaking slowly and clearly, being mindful that some participants may have hearing impairments. As one person wrote: 'Young people speak a bit too

<sup>43</sup> E C Lehnbohm, J E Brien and A J McLachlan, 'Knowledge and Attitudes Regarding the Personally Controlled Electronic Health Record: An Australian National Survey' (2014) 44 *Internal Medicine Journal* 406, 407. Only 5% of members of the public who responded to this survey were aware they could have a personally controlled electronic health record.

fast for old ears but generally very well done and well prepared.’ Another wrote: ‘Very well-organised — very pleasant speakers — made to feel welcome — don’t feel stupid or needy.’ Respondents noted that they valued the time for discussion and a question and answer session. They also suggested the inclusion of additional handouts summarising important information and a glossary of key words and terms used in the presentation.

**Table 3: Attendees’ feedback on the CLE seminar and access to justice issues**

|   |                          |                               |  |
|---|--------------------------|-------------------------------|--|
| <b>I think the content of the seminar was ...</b>   |                          |                               |  |
| Very useful   | Somewhat useful          | Not useful                    | No opinion                                 |
| 34/39 = <b>87%</b>  | 5/39 = <b>13%</b>        | –                             | –  |
| <b>I think the presentation of the seminar was ...</b>  |                          |                               |  |
| Very good   | Good                     | Not good                      | No opinion                                 |
| 29/37 = <b>78%</b>  | 8/37 = <b>22%</b>        | –                             | –  |
| <b>My knowledge about the law has...</b>  |                          |                               |  |
| Increased   | Stayed the same          | Decreased                     | No opinion                                 |
| 35/39 = <b>90%</b>  | 4/39 = <b>10%</b>        | –                             | –  |
| <b>I would like to make or update one or more of the types of documents discussed in the seminar?</b> |                          |                               |  |
| Yes   | Maybe                    | No                            | No opinion                                 |
| 22/36 = <b>61%</b>  | 7/36 = <b>19.5%</b>      | 7/36 = <b>19.5%</b>           | –  |
| <b>I would like a lawyer to help me write documents to plan for my future?</b>                        |                          |                               |  |
| Yes   | Maybe                    | No                            | No opinion                                 |
| 16/36 = <b>44%</b>  | 8/36 = <b>22%</b>        | 11/36 = <b>31%</b>            | 1/36 = <b>3%</b>                           |
| <b>What might stop me from getting help from a lawyer?</b>  |                          |                               |  |
| Cost of lawyer  | Lack of access to lawyer | I don’t think I need a lawyer | Other (please explain in the comment box): |
| 11/20 = <b>55%</b>  | 2/20 = <b>10%</b>        | 4/20 = <b>20%</b>             | 3/20 = <b>15%</b>                          |

### 6 Follow-Up Survey

While the CLE seminars were clearly effective in increasing attendees’ legal knowledge, a change in knowledge does not necessarily result in changed behaviour. Thus the follow-up survey was designed to find out what steps, if any, people had taken to act on the information they had learned. Approximately 37% of the seminar attendees consented to be contacted to do the follow-up survey and, consistent with our expectation that some people would drop out of participating, just over a third of those who were then contacted completed the survey.

As a result, we caution that our results provide preliminary data on the impact of the CLE seminar and, as urged by the Law and Justice Foundation, more research is needed to assess the effectiveness of legal education in promoting behaviour change in target populations. However, running the pilot enabled us to find out useful information about administering the surveys and the response rates that might be expected in implementing and evaluating the CLE initiative on a wider scale. To preserve respondents' anonymity, we did not link the follow-up responses with demographic data and we are unable to indicate personal characteristics that may influence completion of a follow-up survey. This would be useful information to collect, especially in considering different options for administering the survey to boost the response rate.

In regard to our findings, it is reasonable to believe that people who attend a CLE seminar on planning ahead are likely already to be thinking about their legal needs and are primed to take some action. Our results support this view, as one quarter of respondents reported they made or updated legal documents in the month following the seminar and others had met with or made an appointment to see a solicitor.

Making a legal document or seeing a lawyer were not the only outcomes of interest. In accordance with the behaviour change theory discussed earlier, the follow-up survey asked about a range of actions, including looking up resources mentioned in the seminar and talking about values and wishes with family, friends and carers. These can all be positive steps that can help a person feel ready to seek legal assistance and instruct a lawyer. Just over 60% of the follow-up survey respondents said that they had talked to their family or friends about their wishes for the future. Gaining the confidence to initiate such conversations can be a crucial first step for older adults and persons with chronic conditions in articulating their values, wishes and preferences to key people in their lives. Interestingly, none of the survey respondents said they had discussed their wishes with their doctor. It may be that people did not have a medical appointment in the period between the seminar and the follow-up survey. However, other research underscores the need for better communication with healthcare providers to ensure they know of enduring guardian appointments and the patient's wishes for future care, especially if an advance directive has been written.<sup>44</sup>

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<sup>44</sup> See, eg, Daren K Heyland et al, 'Failure to Engage Hospitalized Elderly Patients and Their Families in Advance Care Planning' (2013) 173 *JAMA Internal Medicine* 778; Theresa A Allison and Rebecca L Sudore, 'Disregard of Patients' Preferences is a Medical Error: Comment on "Failure to Engage Hospitalized Elderly Patients and Their Families in Advance Care Planning"' (2013) 173 *JAMA Internal Medicine* 787.



**Table 4: What did attendees do after the CLE seminar?**

| Since the seminar, have you:   | Yes | No   |
|--|-----|------|
| Made or updated the legal documents discussed at the seminar?  | 25% | 75%  |
| Met with a lawyer to help you make or update legal documents to plan for your future?  | 37% | 63%  |
| Made an appointment to see a lawyer to get this help?  | 29% | 71%  |
| Looked up other resources that can help you plan for the future (such as websites mentioned at the seminar or brochures you got at the seminar)? | 25% | 75%  |
| Talked to your family or friends about your wishes for your future?  | 63% | 37%  |
| Talked to your doctor or other healthcare provider about your wishes for your future?  | –   | 100% |

### III THE CLIENT CAPACITY TRAINING MODULE

#### *A Context and Rationale*

The law assumes an adult has decision-making capacity, including the capacity to enter into a contract — such as a retainer for legal services — and to instruct a lawyer.<sup>45</sup> This presumption of legal capacity or competency is the foundation of the solicitor-client relationship.<sup>46</sup> Thus it is essential to the ethical practice of law that lawyers are able to identify and properly deal with issues of client capacity. Statistics on the prevalence of health conditions of persons living in the community involving cognitive impairment suggest many lawyers will encounter clients whose capacity may be in doubt. These conditions include dementia, intellectual disability, acquired brain injury (ABI) and mental illness. An ageing population drives an increase in dementia related conditions — over 240 000 Australians are currently living with dementia. Younger onset dementia also occurs, with nearly 25 000 Australians receiving a diagnosis before the age of 65.<sup>47</sup> More than half a million Australians have an intellectual disability<sup>48</sup> and nearly 440 000 Australians have an ABI, caused by

<sup>45</sup> See *Re MB (An Adult: Medical Treatment)* [1997] 2 FCR 541, 553 (Dame Butler-Sloss LJ).

<sup>46</sup> Law Society of New South Wales, ‘When a Client’s Mental Capacity is in Doubt: A Practical Guide for Solicitors’ (Guidelines, Law Society of New South Wales, 2016).

<sup>47</sup> Alzheimer’s Australia, *What is Younger Onset Dementia?* <<https://www.fightdementia.org.au/national/about-dementia/what-is-younger-onset-dementia>>.

<sup>48</sup> Intellectual disabilities are usually present from birth, or develop during childhood. They may be caused by factors such as in utero exposure to alcohol or drugs, genetic conditions like Down syndrome, or infections that affect the brain, such as meningitis or measles: Australian Institute of Health and Welfare, ‘Disability in Australia: Intellectual Disability’ (2008) 67 *Bulletin* <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442452891>>.

events such as strokes or head trauma, and over 30% of people with ABI experience impaired cognition.<sup>49</sup>

The ability to identify and deal with capacity issues is part of the responsible practice of law; yet legal regulatory authorities are reporting an increase in complaints against lawyers in this area.<sup>50</sup> The 2014–15 Annual Report of the Office of the Legal Services Commissioner in New South Wales drew particular attention to the issue of lawyers' responsibilities in regard to client capacity, especially when working with older clients:

No one can doubt the sometimes profound impact that disputes can have on the elderly, in terms of their personal circumstances, housing, medical treatment and estates. With our aging population, we have seen a gradual increase in complaints about lawyers taking instructions from clients who lack the capacity to give them. Those complaints often include allegations that lawyers have ignored many of the 'red flags' identified in the Law Society's comprehensive *Client Capacity Guidelines: Civil and Family Law*, including ignoring existing medical evidence of incapacity, not taking instructions in private, not testing the client for comprehension of proposed instructions, and acting on unsupported assertions about mismanagement of money and property, amongst other things.

While few of these complaints have risen to the level required to discipline a legal practitioner, we have written to an increasing number of (sometimes very junior) lawyers reminding them of the need for great care and consideration in dealing with older clients. Our position is supported by the accumulation of cases in other jurisdictions (especially Queensland) in which lawyers have been disciplined for acting recklessly in such situations. This is a vital and difficult area of law that we will continue to examine very closely in coming years.<sup>51</sup>

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<sup>49</sup> Australian Institute of Health and Welfare, 'Disability in Australia: Acquired Brain Injury' (2007) 55 *Bulletin* <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=6442453666>>. See also Australian Institute of Health and Welfare, 'Stroke and its Management in Australia: An Update' (Cardiovascular Disease Series No 37, Australian Institute of Health and Welfare, 2013) 10–11 <<http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129543611>>.

<sup>50</sup> The Office of the Legal Services Commissioner, *Annual Report 2012–13*, 30 <[http://www.olsc.nsw.gov.au/Documents/annual%20report%202012\\_2013%20accessible.pdf](http://www.olsc.nsw.gov.au/Documents/annual%20report%202012_2013%20accessible.pdf)>; The Office of the Legal Services Commissioner, *Annual Report 2013–14*, 18 <[http://www.olsc.nsw.gov.au/Documents/2013\\_2014%20annual%20report%20accessible.pdf](http://www.olsc.nsw.gov.au/Documents/2013_2014%20annual%20report%20accessible.pdf)>. The Commissioner is currently undertaking work to determine if professional standards need to be strengthened in this area.

<sup>51</sup> The Office of the Legal Services Commissioner, *Annual Report 2014–15*, 10 <<http://www.olsc.nsw.gov.au/Documents/Annual%20Report%202014%202015.pdf>>.

Some complaints against lawyers have resulted in disciplinary action for failures to properly assess a client's mental capacity prior to executing a legal document<sup>52</sup> and, in some cases, courts have found those documents to be invalid on the basis of the client's incapacity.<sup>53</sup> For example, in *Legal Profession Complaints Committee v Wells*,<sup>54</sup> the practitioner was found guilty of unprofessional conduct where he had taken instructions and executed documents for a client whose lack of capacity was deemed 'obvious' on the evidence presented. In their reasoning, the Committee stated '[m]aking suitable inquiries that a person has the capacity to execute a valid will or EPA [enduring power of attorney] is an essential part of a lawyer's duty once there is a question as to that person's capacity.'<sup>55</sup> Further, the Committee outlined a list of five obligations a solicitor must discharge when taking instructions and executing a valid will: determine whether the testator has capacity; if capacity is in doubt, ask non-leading questions designed to probe that capacity properly; if capacity is in doubt, seek medical advice; be alert to possible conflicts of interest where the person instigating the will is a beneficiary, or associated with a beneficiary; and take proper notes.<sup>56</sup> Such criteria were clearly not complied with in *Dellios v Dellios*<sup>57</sup> and *Fradgley v Pocklington*,<sup>58</sup> where contested wills were held invalid as they were prepared when clients lacked capacity. The judgments criticised solicitors for not adequately probing client capacity, failing to be alert for signs of fluctuating capacity, and meeting with a client in the presence of family members. Lawyers must do their best 'to distinguish mere platitudes from responses based on [clients'] true understanding.'<sup>59</sup>

Despite the importance of capacity in the solicitor-client relationship, there is little empirical data on lawyers' practices in assessing client capacity. Further, there are no national standards for legal capacity assessment.<sup>60</sup> A 2004 study of 302 solicitors reported wide variation in practices:

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<sup>52</sup> *Legal Services Commissioner v O'Donnell* [2015] NSWCATOD 17 (20 March 2015); *Legal Profession Complaints Committee v Wells* [2014] WASAT 112 (16 December 2014); *Legal Services Commissioner v Ford* (2008) QLPT 12 (22 August 2008).

<sup>53</sup> *R v Kerin* (2013) 116 SASR 316; *Dellios v Dellios* [2012] NSWSC 868 (20 July 2012); *A v N* [2012] NSWSC 354 (13 April 2012); *Fradgley v Pocklington* [2011] QSC 227 (10 August 2011); *Szozda v Szozda* [2010] NSWSC 804 (23 July 2010); *Nicholson v Knaggs* [2009] VSC 64 (27 February 2009).

<sup>54</sup> [2014] WASAT 112 (16 December 2014).

<sup>55</sup> *Ibid* [124].

<sup>56</sup> *Ibid* [10]. See also [17], where virtually identical obligations are listed with regard to preparing an Enduring Power of Attorney.

<sup>57</sup> [2012] NSWSC 868 (20 July 2012).

<sup>58</sup> [2011] QSC 227 (10 August 2011).

<sup>59</sup> *Szozda v Szozda* (2010) NSWSC 804 (23 July 2010) [117] (Barrett J). See also [33]–[35] regarding the appropriate tests for assessing client capacity.

<sup>60</sup> For discussion, see Kelly Purser, Eilis S Magner and Jeanne Madison, 'A Therapeutic Approach to Assessing Legal Capacity in Australia' (2015) 38 *International Journal of Law and Psychiatry* 18.

There was a very wide range of practices in determining capacity with no consensus. The most frequent form of questions older clients were asked related to personal and family history. Less than one-quarter asked for the rationale of the decision: the most appropriate form of question in the literature. The results suggest a need for further training of solicitors in the assessment of the capacity of older clients to make legal decisions.<sup>61</sup>

A survey of Australian solicitors revealed a range of means for assessing capacity and some deficiencies in their approaches, such as failing to sufficiently probe clients' decision-making process by asking about the reasoning for their choices.<sup>62</sup> Almost 50% of solicitors expressed interest in further capacity assessment training.

Moreover, it is important for lawyers to be aware of, and acknowledge, shifting social paradigms in approaches to capacity and disability. They need to recognise and avoid paternalistic practices that accentuate deficits rather than abilities, and that undermine respect for a client's autonomy and dignity. In a recent landmark report on the equal rights of persons with disabilities, the Australian Law Reform Commission advocated four national principles: (1) the equal rights of all adults to make decisions about their lives and to have their decisions respected; (2) access to appropriate supports to enable decision-making; (3) the wills and preferences of a person who may require support should direct decision-making; and (4) legal frameworks must provide safeguards for people who may require supports, such as to prevent coercion and abuse.<sup>63</sup> Lawyers should be able to apply these principles when assisting clients who may be experiencing reduced capacity.<sup>64</sup> For example, practitioners should provide appropriate supports to maximise the person's decision-making ability and not prematurely turn to a substitute decision-maker.

All of these factors demonstrate the importance of incorporating capacity training into the legal curriculum. Ideally, such training should include not only doctrinal principles that may be covered in subjects such as contracts, criminal law, and wills and estates, but also experiential learning. This would help students to develop practical skills and hear directly from people who have lived experience with capacity-affecting conditions. To meet the attributes expected of an entry-level lawyer, they must be able to identify ethical issues and comply with the requirements of the law and good practice in discharging their professional duties.<sup>65</sup> Simply lecturing

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<sup>61</sup> E Helmes, V E Lewis and A Allan, 'Australian Lawyers' Views on Competency Issues in Older Adults' (2004) 22 *Behavioural Sciences and the Law* 823, 823.

<sup>62</sup> *Ibid* 827.

<sup>63</sup> Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws' (ALRC Report No 124, 2014).

<sup>64</sup> Mary Helen McNeal, 'Slow Lawyering: Representing Seniors in Light of Cognitive Changes Accompanying Aging' (2013) 117 *Pennsylvania State Law Review* 1081.

<sup>65</sup> See, eg, Law Admissions Consultative Committee, *Practical Legal Training: Competency Standards for Entry-Level Lawyers* (at 1 January 2015) Law Admissions Consultative Committee <[http://www.lawcouncil.asn.au/LACC/images/Competency\\_Standards\\_for\\_Entry-Level\\_Lawyers\\_-\\_1\\_July\\_2015.pdf](http://www.lawcouncil.asn.au/LACC/images/Competency_Standards_for_Entry-Level_Lawyers_-_1_July_2015.pdf)>.

students and instructing them to avoid a paternalistic approach has significantly less impact than students hearing a person with a cognitive disability explain how they feel demeaned, or supported, in their interactions with lawyers and other professionals. These conversations help students to be more conscious of their clients and avoid making assumptions that lawyers have superior judgment about what is in the best interests of older individuals or clients with disabilities. Students may also gain confidence when talking to clients about factors that might affect their capacity, and the types of supports the client prefers. This improved understanding and increased confidence can help minimise paternalistic attitudes and behaviours, as well as the ‘instances in which lawyers refuse to act out of fear that the client lacks capacity.’<sup>66</sup>

### *B Design and Delivery*

We developed the following learning outcomes and designed the Training Module to ensure that, on successful completion, students would be able to:

- explain the concept of capacity and different legal tests for capacity;
- understand the duties of legal practitioners in relation to client capacity;
- identify ‘warning bells’ or ‘red flags’ that may indicate client capacity is an issue;
- identify and apply strategies to maximise client capacity;
- explain the process for obtaining a medical professional assessment of capacity; and
- explain the role of substitute decision-makers.

The learning activities consisted of three sequential components: (1) acquiring core knowledge about the law of capacity and lawyers’ professional duties; (2) applying knowledge and practising skills in a simulated client interview; and (3) a ‘live client’ experience involving interactive discussion with community members who have lived experience of cognitive impairment, or caring for a person with reduced capacity.

For the first component, we adopted a blended or ‘flipped’ learning approach, combining online and in-person learning activities.<sup>67</sup> As a pedagogical tool, this approach has two general advantages. First, the basic legal rules and principles can

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<sup>66</sup> Queensland Law Society, *Queensland Handbook for Practitioners on Legal Capacity* (at 1 July 2014) 6 <[https://www.qls.com.au/files/4422042a-7f34-404f-8df5-a49d00e5f89a/Queensland\\_Handbook\\_for\\_Practitioners\\_on\\_Legal\\_Capacity.pdf](https://www.qls.com.au/files/4422042a-7f34-404f-8df5-a49d00e5f89a/Queensland_Handbook_for_Practitioners_on_Legal_Capacity.pdf)>.

<sup>67</sup> For a discussion of ‘flipped’ learning, see Peter Sankoff, ‘Taking the Instruction of Law Outside the Lecture Hall: How the Flipped Classroom Can Make Learning More Productive and Enjoyable (For Professors and Students)’ (2014) 51 *Alberta Law Review* 891. See also the resources available at LegalED, *Flipping a Law School Course* (2014) <<http://legaledweb.com/flipping-a-law-school-course/>>.

be taught in a recorded lecture format that is available to students to watch and re-visit at their own pace. Second, face-to-face time can be used for active learning in which students apply the law to problem scenarios, participate in group discussion, engage in simulations (eg, client interviews, mediation) and hone thinking, reasoning and communication skills. This mode of delivery enables a deeper level of skill acquisition, and is an approach with which NLS students are familiar, as it has been incorporated in an increasing number of our courses.

We promoted the Training Module by email to fourth and fifth year LLB students and second year Juris Doctor students completing placement hours at the UNLC, as well as students enrolled in a Health Law elective subject. Priority was given to students who had already been involved in delivering the Planning Ahead seminars.

### 1 *Online Learning Materials*

We created an online site for the Training Module using our university's virtual learning platform. We prepared a short, audio-recorded PowerPoint presentation that covered the following topics:

- what is meant by 'capacity', the legal presumption of capacity and the need to determine capacity on a case by case basis, depending on the nature of the decision to be made;
- conditions that can affect capacity, with links to resources for more information on each category of condition (eg, dementia, intellectual disability, ABI, mental illness);
- the basics of capacity assessment;
- signs that a client may have impaired capacity;
- interview techniques to assess a client's capacity; and
- strategies to maximise a client's capacity.

The online site also included links to capacity resources developed by several legal professional bodies.<sup>68</sup> We wanted to ensure students are aware of sources of guidance they can access when or if they enter practice. We drew students' attention to a flowchart in the *Queensland Handbook for Practitioners on Legal Capacity* that provides a useful step-by-step decision-making aid for a lawyer faced with a possible capacity concern.<sup>69</sup> The online learning materials were developed with

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<sup>68</sup> See Law Society of New South Wales, above n 46; Queensland Law Society, above n 66; Law Institute Victoria, *LIV Capacity Guidelines and Toolkit: Taking Instructions when a Client's Capacity is in Doubt* (at September 2015) <[http://www.liv.asn.au/PDF/For-Lawyers/Submissions-and-LIV-Projects/2054\\_LPP\\_CapacityGuidelines\\_FINAL\\_WEB](http://www.liv.asn.au/PDF/For-Lawyers/Submissions-and-LIV-Projects/2054_LPP_CapacityGuidelines_FINAL_WEB)>.

<sup>69</sup> Queensland Law Society, above n 66, 9.

the expectation that students could work through the resources within 30 minutes. The key messages from the online material were reinforced during the introduction to the in-person session.

## 2 *In-Person Session*

We designed the face-to-face component of the Training Module to be delivered over two and half hours, divided between a simulated client interview and an interactive session with guests from Alzheimer's Australia. The guests included a person living with a diagnosis of dementia, two people with experience caring for people with dementia, and a staff member with expertise in community education and support.

In simulations, students are required to perform a lawyering activity using a mock scenario that matches a real-life situation.<sup>70</sup> Simulated activities in a safe learning environment have several educational benefits. They require active learning and foster the development of problem-solving skills.<sup>71</sup> They enable students to practise situations they may face as practitioners and experience legal problems through the lens of a lawyer and client.<sup>72</sup> The opportunity to interact with simulated clients also helps students to integrate the theory learned in the classroom with realistic problems.<sup>73</sup>

A fact scenario for the simulated interview involved a hypothetical older adult client seeking legal help. The client wanted to change a will to make her daughter the sole beneficiary and appoint that same daughter as a financial power of attorney and enduring guardian for healthcare decisions. The scenario also included 'secret facts' that students needed to uncover during the interview, including that the client had recently received a dementia diagnosis. Two law students with strong experience in client interviewing were selected to role-play the client and were provided with the factual scenario and secret facts in advance. They were also briefed on ways in which they could demonstrate subtle indications of cognitive impairment during the interview, based on the warning signs covered in the online lecture. Students were divided into two groups to conduct the interviews. The two NLS Faculty members who developed the Training Module each observed an interview. Following the simulation, students reconvened as a full group for a debriefing.

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<sup>70</sup> Paul S Ferber, 'Adult Learning Theory and Simulations — Designing Simulations to Educate Lawyers' (2002) 9 *Clinical Law Review* 417, 418.

<sup>71</sup> Shaun McCarthy, 'The Rise and Rise of Tribunals — Engaging Law Students in Tribunal Advocacy' (2014) 21(1) *International Journal of Clinical Legal Education* 42, 48.

<sup>72</sup> Richard Grimes, 'Faking it and Making it? Using Simulation with Problem-Based Learning' in Caroline Strevens, Richard Grimes and Edward Phillips (eds), *Legal Education: Simulation in Theory and Practice* (Ashgate Publishing, 2014) 171.

<sup>73</sup> Nicola Ross, Ann Apps and Sher Campbell, 'Shaping the Future Lawyer: Connecting Students with Clients in First-Year Law' in Caroline Strevens, Richard Grimes and Edward Phillips (eds), *Legal Education: Simulation in Theory and Practice* (Ashgate Publishing, 2014) 67.

Students then participated in an interactive session focused on professional communication skills. Guests from Alzheimer's Australia were asked to speak briefly about their experiences dealing with lawyers and other professionals and to recommend communication strategies that help maximise the capacity of a person living with dementia, demonstrate respect and help build an effective professional-client relationship. Students then had the opportunity to ask questions and engage in an informal discussion with the guests. They also received a copy of the Alzheimer's Australia *Dementia Language Guidelines* that explain the 'use of appropriate, inclusive and non-stigmatising language when talking about dementia and people with dementia.'<sup>74</sup>

Following these activities, students shared and reflected on their experiences over an informal tea. As this was a pilot delivery of the Module, students did not complete assessment tasks or receive any credit towards their studies, however, they received a Certificate of Attendance in recognition of their participation. We hope that fostering a commitment to Continuing Professional Development in law school will help students to recognise future gaps in their knowledge and skills as lawyers, and engage in lifelong professional learning.

### *C Evaluation*

Following the workshop, students were invited to complete an anonymous, online survey and 60% of them responded (12 out of 20). A vast majority of the students reported that participation in the training supported their professional development by: increasing knowledge of relevant law (58% agreed and 25% strongly agreed); increasing confidence in their ability to meet professional responsibilities in identifying and handling a client capacity issue (33.3% agreed and 66.7% strongly agreed); and increasing understanding of practical strategies to deal with client capacity issues (50% agreed and 50% strongly agreed).

We also sought feedback on the specific learning activities included in the Training Module. All respondents rated the overall quality of the Training Module as either good (33.3%) or very good (66.7%).<sup>75</sup> Over 90% of respondents rated the session with guests from Alzheimer's Australia as good or very good. Some students suggested conducting the simulated interviews with only two or three students per client, or even on a one-to-one basis. In future offerings of the Training Module, we plan to adopt this suggestion and perhaps increase the number of simulated 'clients' by involving drama students. Admittedly, the group interview format we used is less realistic than a one-to-one simulated interview. However, it allowed students to work together and think on their feet to devise questions based on information elucidated by a peer. They also experimented with different questioning techniques

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<sup>74</sup> The Guidelines are available for download from the Alzheimer's Australia website: Alzheimer's Australia, *Dementia Language Guidelines* <<https://fightdementia.org.au/files/NATIONAL/documents/language-guidelines-full.pdf>>.

<sup>75</sup> The Likert rating scale offered the following choices: poor, fair, no opinion, good, very good.



after observing how a peer's particular style worked, or did not work, in drawing out information from the client.

#### IV CONCLUSIONS

We hope the lessons learned from the design, implementation and evaluation of this pilot project can inform experiential learning initiatives elsewhere. This pilot provides a model for collaboration with community organisations to provide experiential opportunities for law students to enhance their knowledge, skills and readiness to meet the legal needs of older adults and persons with chronic conditions, especially those who may have reduced decision-making capacity. The project also establishes the feasibility of embedding research into these collaborations to investigate the impact of the activities, both for students and community members. As Sage-Jacobson recently argued, further empirical research is crucial to improving our understanding of the legal disadvantages faced by older persons and identifying evidence-based strategies to address unmet needs.<sup>76</sup> Our evaluation provides preliminary evidence for the effectiveness of the Planning Ahead seminars. They increased attendees' knowledge of the law and motivated some participants to take action by discussing their intentions with those close to them and formalising their wishes in legal instruments.

From the law students' perspective, presenting the Planning Ahead seminars and completing the Client Capacity Training Module increased their knowledge and confidence. Further, they were able to practise professional skills in 'real world' settings. Castles and Hewitt observe that:

It is tempting to assume that law students will emerge from their law degree as fully formed legal professionals, like butterflies from a chrysalis. ... Between an incoming student caterpillar and the fully-realised legal butterfly lies an important period of professional learning.<sup>77</sup>

We designed the pilot using several learning modalities and experiential techniques. The simulated interview provided a 'safe environment' for students,<sup>78</sup> while situational interactions with community members in real-life settings enhanced students' education as legal professionals.<sup>79</sup> Both the structured activities and opportunities

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<sup>76</sup> Sage-Jacobson, above n 9, 159.

<sup>77</sup> Castles and Hewitt, above n 14, 90.

<sup>78</sup> Jeff Giddings and Michael McNamara, 'Preparing Future Generations of Lawyers for Legal Practice: What's Supervision Got to Do with It?' (2014) 37 *University of New South Wales Law Journal* 1226, 1234.

<sup>79</sup> Castles and Hewitt, above n 14, 95. The authors assert:

Situational learning offers students a unique learning experience of immersion in a challenging and dynamic world that can both enhance their academic potential and performance and go a considerable way to creating a newly-emerged butterfly ready to encounter the challenges of further legal learning in a practical setting.

for informal interactions supported student learning and reflection. For example, at a residential aged care facility, a palliative care clinical nurse consultant gave students a tour of the facility and explained how they strive to create welcoming, home-like spaces for residents. She also spoke with students about staff concerns that family members may unduly influence older relatives' decisions, and the apparent readiness of some older people to acquiesce to the wishes of others and avoid familial conflict. The students then witnessed this behaviour first-hand when a few seminar attendees declined to complete the surveys, as they said they did not feel comfortable filling in documents without a family member checking them. Students could see how a similar situation might arise if they were advising an older client on legal documents.

Students were confronted with the challenge of balancing respect for clients' wishes with the need to be on guard for third parties who may try to take advantage of a client's dependence or impaired capacity. It has been observed that developing 'law and older people as an area of study or practice attracts the objection that "elder law" perpetuates the myth that older people are particularly frail or vulnerable.'<sup>80</sup> During the Training Module, students discussed this issue with guests from Alzheimer's Australia and gained insights from people with experience as primary carers for family members with dementia.

The experiences and outcomes from the pilot project provide a solid foundation for expanding the initiative. Ideally, this would take the form of an elective course for senior law students, integrating academic content with experiential activities, including client capacity training and the delivery of CLE seminars. Assessment items would need to be carefully designed to ensure they capture the distinctive elements of experiential learning,<sup>81</sup> including opportunities for students to reflect on how what they have learned and experienced has supported their development as legal professionals.

The 2015 pilot project provided a unique opportunity for students who volunteered to participate. We would encourage other law schools that are interested in developing similar community-based collaborations to consider a pilot as a valuable first step. Once relationships have been established with community organisations,

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<sup>80</sup> Joe Duffy, Subhajit Basu and Katherine C Pearson, 'Older People and Legal Advice — The Need for Joined Up and Creative Approaches' (2012) 34 *Journal of Social Welfare and Family Law* 31, 33.

<sup>81</sup> For literature on the assessment of experiential learning, see Thomas Yates, Jay Wilson and Kendra Purton, 'Surveying Assessment in Experiential Learning: A Single Campus Study' (2015) 6(3) *Canadian Journal for the Scholarship of Teaching and Learning* 1; Liz Curran and Tony Foley, 'Integrating Two Measures of Quality Practice into Clinical and Practical Legal Education Assessment: Good Client Interviewing and Effective Community Legal Education' (2014) 21(1) *International Journal of Clinical Legal Education* 69; Michael David Clements and Bonnie Amelia Cord, 'Assessment Guiding Learning: Developing Graduate Qualities in an Experiential Learning Programme' (2013) 38 *Assessment & Evaluation in Higher Education* 114; Donna M Qualters, 'Bringing the Outside in: Assessing Experiential Education' (2010) 124 *New Directions for Teaching and Learning* 55.

formalisation of the activities into a course would allow increased student participation. Further, it would provide the opportunity for longer-term research and evaluation of the impacts of such experiential learning for law students. Collaborations with organisations serving older adults and people with chronic health conditions can also support research into their legal needs. This, in turn, would foster partnerships between law schools, community organisations, lawyers and health practitioners to help meet the intersecting legal and medical issues of these client groups. In particular, ‘bundling’ CLE seminars with a follow-up appointment with a lawyer would strengthen the effectiveness of the program.<sup>82</sup>

Resourcing is always an issue for innovative learning activities that occur outside the law school, and programs involving community organisations can be time-consuming to organise and deliver. We planned and implemented the Planning Ahead seminars with a small internal grant (\$4000) to hire a law student as a casual research assistant to help with contacting community organisations, coordinating the CLE seminars, and conducting research activities, including literature reviews and administering the follow-up surveys. An initial investment of time is needed to establish relationships with community organisations. Once in place, these connections are a foundation for ongoing collaborations.

In our experience, community organisations welcomed the invitation to host a CLE seminar as a mutually beneficial opportunity for their clients and our law students. Indeed, the interest in hosting CLEs exceeded the capacity of our pilot project. We had requests to deliver the seminar in communities outside our metropolitan area. While we were unable to include rural and regional outreach in our pilot, expanding a student-delivered CLE program to such communities in future would help meet this demand. Students studying in the medical and health science disciplines at the University of Newcastle engage in rural placements, and have established relationships with healthcare facilities in those communities. With additional resourcing, a travelling student legal clinic, a technology-enabled clinic,<sup>83</sup> or an inter-professional clinic involving students from the health disciplines could be organised, with CLE

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<sup>82</sup> See, eg, Suzie Forell and Hugh M McDonald, ‘Beyond Great Expectations: Modest, Meaningful and Measurable Community Legal Education and Information’ (Justice Issues Paper No 21, Law and Justice Foundation of New South Wales, December 2015) 2 <[http://www.lawfoundation.net.au/ljf/site/articleIDs/D1D67F87F681ECBACA257F0F0021C08A/\\$file/JI\\_21\\_Beyond\\_great\\_expectations.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/D1D67F87F681ECBACA257F0F0021C08A/$file/JI_21_Beyond_great_expectations.pdf)> who point out ‘that there are limits on what unbundled forms of legal assistance such as CLEI [community legal education and information] are likely to achieve.’

<sup>83</sup> See, eg, Jeff Giddings and Barbara Hook, ‘The Tyranny of Distance: Clinical Legal Education in the Bush’ (2002) 2 *International Journal of Clinical Legal Education* 64; James E Cabral et al, ‘Using Technology to Enhance Access to Justice’ (2012) 26 *Harvard Journal of Law & Technology* 241; Nola M Ries, Briony Johnston and Shaun McCarthy, ‘Technology-Enabled Legal Service Delivery for Older Adults: What Can Law Learn from TeleHealth? Findings from an International Review of Literature’ (2016) 10 *Elder Law Review* <[https://www.westernsydney.edu.au/\\_\\_data/assets/pdf\\_file/0017/1161521/Technology-Enabled\\_Legal\\_Service\\_Delivery\\_for\\_Older\\_Adults\\_-\\_Nola\\_M\\_Ries,\\_Briony\\_Johnston\\_and\\_Shaun\\_McCarthy.pdf](https://www.westernsydney.edu.au/__data/assets/pdf_file/0017/1161521/Technology-Enabled_Legal_Service_Delivery_for_Older_Adults_-_Nola_M_Ries,_Briony_Johnston_and_Shaun_McCarthy.pdf)>.

included as part of the students' activities. Collaboration with local legal practitioners in these communities would be essential for providing both student supervision and referral pathways for clients.

Additionally, there is scope to run legal education seminars for healthcare providers. In response to our promotion of the Planning Ahead seminars, we received interest from health organisations seeking to provide educational events for staff to enhance their knowledge of the law and increase their confidence when discussing topics like advance care planning with clients. Indeed, recent studies show significant gaps in the legal knowledge of Australian health practitioners in this particular area.<sup>84</sup>

Collaboration between law schools and community organisations can have multiple benefits and involving law students in the kinds of experiential initiatives discussed here helps them develop the professional and ethical attributes necessary to meet the often complex needs of older clients and those living with conditions that can impair decision-making capacity. Embedding research into such initiatives can contribute new findings to advance the evidence-based design and delivery of legal education both in law schools and through community outreach.

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<sup>84</sup> Ben White et al, 'Doctors' Knowledge of the Law on Withholding and Withdrawing Life-Sustaining Medical Treatment' (2015) 201 *Medical Journal of Australia* 229; C Cartwright et al, 'Medical Practitioners' Knowledge and Self-Reported Practices of Substitute Decision Making and Implementation of Advance Care Plans' (2014) 44 *Internal Medicine Journal* 234; William Silvester et al, 'Quality of Advance Care Planning Policy and Practice in Residential Aged Care Facilities in Australia' (2013) 3 *BMJ Supportive & Palliative Care* 349; Colleen Maria Cartwright et al, 'Palliative Care and Other Physicians' Knowledge, Attitudes and Practice Relating to the Law on Withholding/Withdrawing Life-Sustaining Treatment: Survey Results' (2016) 30 *Palliative Medicine* 171.