

Navigating the risks of an ageing population

Risk Management Topics:

General Practice

Property and Lending

Wills and Estates



Sophie Duffy

Claims Solicitor

In just 39 years from now, nearly one-quarter of the Australian population is projected to be aged 65 and over ([Australian Government Centre for Population Statement, 2024](#)).

Our ageing population will drive an increase in demand for traditional legal services including conveyancing, estate planning, wills, powers of attorney, guardianships, and specialist legal services (as recognised by The Law Society of NSW and the introduction of a new Specialist Accreditation in Elder Law).

As the demographic landscape shifts, solicitors must adapt their practice to meet the evolving needs of older clients. This includes being increasingly vigilant about issues such as capacity and undue influence, maintaining clarity about who their client is, and ensuring they are always acting in that client's best interests.

i Resources:

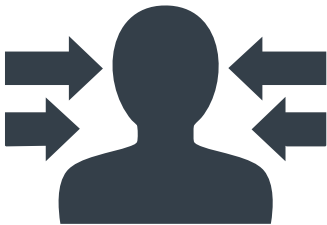
[The Law Council's Best Practice Guide for Legal Practitioners in relation to Elder Financial Abuse](#)

[The Law Council's Best Practice Guide for Legal Practitioners on Assessing Mental Capacity](#)

[The Law Society of New South Wales – Elder Law](#)

Navigating the risks of an ageing population

Capacity and undue influence



There are many factors to consider with every client, however older clients may present additional issues including cognitive decline, complex family dynamics, or heightened vulnerability to external pressures. Solicitors who fail to assess capacity thoroughly or document instructions clearly may find themselves exposed to claims.

In assessing a client's decision-making capacity, a solicitor may need to distinguish between the client's ability to make some decisions but not others, appreciating that capacity is not an all or nothing assessment. Solicitors should be mindful that capacity is task specific and it should not be assumed that a client lacks capacity generally due to their age or frailty.

Further, a person making a bad decision does not necessarily lack capacity. In addition to capacity, when dealing with an older client, solicitors should be turning their minds to undue influence, even if only to dismiss the possibility.

Wills and estate planning



As circumstances evolve and lifespans increase, clients may have partners or children from multiple relationships. These competing interests, combined with the rise in inter vivos transactions, intergenerational wealth transfers, and complex asset protection strategies involving structures such as testamentary trusts, add further complexity to estate planning advice and the drafting of documents that give effect to the client's instructions.

Multi-generational living arrangements are also increasingly common, and estate planning may include consideration of life estates and a right of residence. Unsurprisingly, many of these changes will also result in an increased risk of disputes between family members upon the death of the client.

Navigating the risks of an ageing population

Property



The legal needs of older Australians may also be shaped by housing demand pressures and growing interest in retirement living and residential care, particularly as many seek solutions that allow them to remain in their own homes.

Issues like housing affordability, the cost of care and relationship breakdowns will increasingly lead to requests for advice on property transactions, and the complexities associated with co-ownership, reverse mortgages, and the use of equity and succession planning.

Complex property transactions and transfers can increase the risk of claims against solicitors, particularly in relation to the calculation of duty and input errors on PEXA.

As solicitors face growing challenges and increased risk in the delivery of legal services to older clients, it is important to consistently adopt the practical risk management tips below:

- **Always begin with the presumption of capacity but actively look for red flags.** If in doubt, seek a clinical evaluation.
- **Properly identify the client.** Always ensure the client is interviewed alone and seek instructions by asking non-leading, open-ended questions (*Banks v Goodfellow* (1870) LR 5 QB 549).
- **Watch for signs of undue influence**, especially from family members or caregivers. Consider whether an independent interpreter or support person may be required.
- **Keep detailed file notes of instructions and capacity assessments** and consider retaining these beyond 7 years to defend against future claims.
- **Have systems in place for checking documents** and oversight of data entry to ensure accuracy and avoid typographical or administrative errors.