

RESPONSIBLE CARE GUIDELINES

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The Guideposts for Responsible Care

Ethics of Care – the over-arching ethical modality that should apply to care delivery and capacity assessment activities¹, irrespective of the background of the concerned person.

“An ethic grounded in voice and relationships, in the importance of everyone having a voice, being listened to carefully (in their own right and on their own terms) and heard with respect. An ethics of care directs our attention to the need for responsiveness in relationships (paying attention, listening, responding) and to the costs of losing connection with oneself or with others. Its logic is inductive, contextual, psychological, rather than deductive or mathematical.”

The first competency that must be deployed by a person concerned by the decision-making ability of another is paying attention to what the person of concern is saying or communicating. These observations will generally be taken by sight or sound.

The first obligation of observation is to accurately record what is being seen or heard as you pay attention to the person of concern.

Observation therefore has priority over recording. A “checklist” mentality to observation has to be avoided. Using audio or visual recording as an aid so the observer can focus on their observation is to be preferred where practical.

Consider also the particular obligations of Financial Planners under the Corporations Act 2001² viz.:

- (a) identified the objectives, financial situation and needs of the [client](#) that were disclosed to the [provider](#) by the [client](#) through instructions;
- (b) identified:
 - (i) the subject matter of the advice that has been sought by the [client](#) (whether explicitly or implicitly); and
 - (ii) the objectives, financial situation and needs of the [client](#) that would reasonably be considered as relevant to advice sought on that subject matter (the **[client's relevant circumstances](#)**);
- (c) where it was [reasonably apparent](#) that information relating to the [client's](#) relevant circumstances was incomplete or inaccurate, [made](#) reasonable inquiries to obtain complete and accurate information;
- (d) assessed whether the [provider](#) has the expertise required to [provide](#) the [client](#) advice on the subject matter sought and, if not, declined to [provide](#) the advice;
- (e) if, in considering the subject matter of the advice sought, it would be reasonable to consider recommending a [financial product](#):
 - (i) conducted a [reasonable investigation](#) into the [financial products](#) that might achieve those of the objectives and meet those of the needs of the [client](#) that would reasonably be considered as relevant to advice on that subject matter; and
 - (ii) assessed the information gathered in the investigation;
- (f) based all judgements in advising the [client](#) on the [client's](#) relevant circumstances;
- (g) taken any other step that, at the time the advice is [provided](#), would reasonably be regarded as being in the best [interests](#) of the [client](#), given the [client's](#) relevant circumstances .

Note: The matters that must be proved under [subsection \(2\)](#) relate to the subject matter of the advice sought by the [client](#) and the circumstances of the [client](#) relevant to that subject matter (the [client's](#) relevant circumstances). That subject matter and the [client's](#) relevant circumstances may be broad or narrow, and so

¹ <https://ethicsofcare.org/carol-gilligan/>

² http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/ca2001172/s961b.html

the [subsection](#) anticipates that a [client](#) may seek scaled advice and that the inquiries [made](#) by the [provider will](#) be tailored to the advice sought.

Guideposts for Initial Enquiry

Concern

- What concern has brought you here?
- What objective or need is evident?
- With what are you being asked to help?
- In whose interest is this request?
- How are concerns being communicated?
 - Explicitly, or
 - Implicitly
- How is this occurring?

Need

- What is the initially presented need?
- What is the subject matter of concern?
 - An Issue
 - An Objective
 - A Challenge
 - A Change
- What is (as relevant to the subject matter of concern) the living situation, financial situation and needs of the person of concern?
- Are all these considered as those matters that would reasonably be considered as relevant to the subject matter of the concern?
- What are the key facts and evidence that detail the concern to be considered in more detail?
- What response is sought or proposed by the person being evaluated to the concern being presented?
- What impact does that proposal have on the person proposing it and others.
- What other response may be needed to the concern?

Competence to Respond?

- What competence is needed to respond with the concern?
- Who has that competence? and
- What arrangements need to be made to access that competence?
- How are these choices to be further evaluated?
- Now are these choices to be communicated to the person of concern?
- What are the next steps?

Guardianship Principles³

The current legal framework supporting a care relationship once a partial or complete disability occurs.

Guardianship Act NSW 1986

It is the duty of everyone exercising functions under this Act with respect to persons who have disabilities to observe the following principles:

- a) the welfare and interests of such persons should be given paramount consideration,
- b) the freedom of decision and freedom of action of such persons should be restricted as little as possible,
- c) such persons should be encouraged, as far as possible, to live a normal life in the community,
- d) the views of such persons in relation to the exercise of those functions should be taken into consideration,
- e) the importance of preserving the family relationships and the cultural and linguistic environments of such persons should be recognised,
- f) such persons should be encouraged, as far as possible, to be self-reliant in matters relating to their personal, domestic and financial affairs,
- g) such persons should be protected from neglect, abuse and exploitation,
- h) the community should be encouraged to apply and promote these principles.

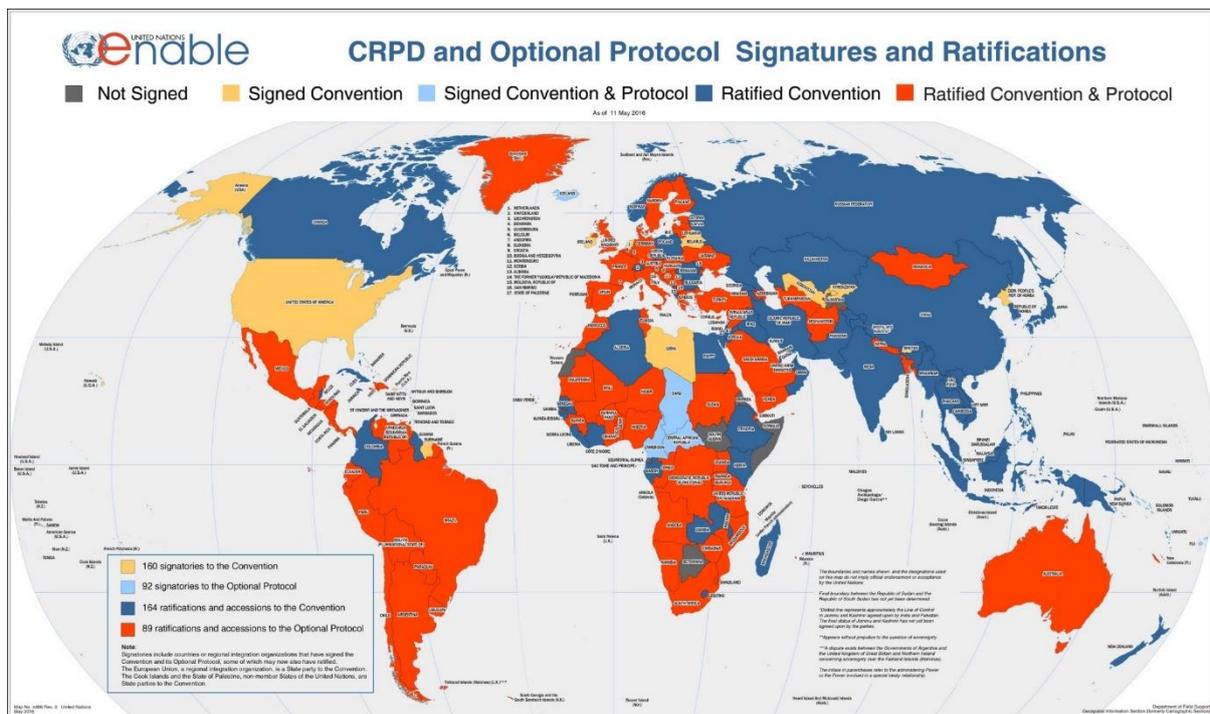
³ See http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/ga1987136/s4.html

Supported Decision Making

Introduction

Supported Decision Making is an approach to care of persons with disabilities that is advocated by the United Nations Convention about the Rights of People with Disabilities⁴.

Australia has ratified the Convention⁵. This graphic illustrates the scale of adoption of the convention in the world:



The National Disability Insurance Scheme is a Commonwealth Government initiative that implements in part, Australia's compliance with the Convention.

The NSW Law Reform Commission has proposed changes to the law of NSW that introduces a regime of legal recognition of supported decision making as a method that supplements the conventional regime of substitute decision making implemented through the use of Powers of Attorney and Powers of Enduring Guardianship.

Supported decision making is also used as a method of implementing care of the interests of impaired decision makers.

These clinical guidelines use supported decision making principles as a context for the administration of assessment of the decision making ability and capacity of a person of concern. The NSW Office of the Public Guardian about these principles can be found at <http://www.publicguardian.justice.nsw.gov.au/Pages/Supported-Decision-Making.aspx>.

⁴ <https://www.un.org/development/desa/disabilities/convention-on-the-rights-of-persons-with-disabilities.html>

⁵ http://www.un.org/disabilities/documents/2016/Map/DESA-Enable_4496R6_May16.jpg

NSW - Capacity assessment approach and key principles⁶

1. Always presume a person has capacity
2. Capacity is decision specific
3. Don't assume a person lacks capacity based on appearances
4. Assess the person's decision-making ability – not the decision they make
5. Respect a person's privacy
6. Substitute decision-making is a last resort

Lesson 1⁷

Every adult is free to make their own decisions if they have the capacity. As a family member, friend, carer, or other individual involved with a person, you should always make this presumption unless it is established that they don't have the capacity to make a particular decision.

Reflection 1

The idea of an autonomous individual that has no impediments to decision making is qualified by the principle that capacity is decision specific.

Whilst we are directed not to respond to mere appearances, the invocation that we are to assume capacity creates the moral danger that appearance will be accepted over actual ability.

A framework for assessing the decision making ability of a person of concern is proposed to counter-balance this mischief.

Lesson 2⁸

Guidelines for evaluation of a conversation about concern

Preserve Dignity of Risk where practical

The majority of people take chances or make 'bad' decisions once in a while. The right to make a decision includes the right to take risks and to make decisions with which others disagree. This is known as dignity of risk.

Consider decision making ability in the context of what is sought to be done

However, you may question a person's capacity to make a decision if they make a decision that either:

- puts them at significant risk of harm or mistreatment
- is very different from their usual decisions.

⁶ P.27 NSW Capacity Assessment Toolkit - © State of New South Wales through the Attorney General's Department of NSW 2008.

⁷ Et seq. p28

⁸ Et seq. p.36

When questioning a person's capacity, you may also consider:

- the person's past decisions and choices
- whether they are easily influenced or pressured by others
- whether they have developed a medical condition which might affect their decision-making
- providing more information to assist them to understand what's involved in the decision, and its consequences.

Respect a person's right to privacy when you are assessing their capacity or decision making ability

When you are assessing a person's capacity you are dealing with a person's personal information.

'Personal information' generally means any information or any opinion about a person that can identify that person.

Lesson 3 – Potential Capacity and Decision Making Ability Triggers⁹

We need to correlate what facts illustrate the following triggers and identify further triggers.

Our starting point is these triggers already tabulated in the NSW Capacity Assessment Toolkit. These include:

Triggers that involve Concerns About Conduct:

- repeatedly making decisions that put the person at significant risk of harm or mistreatment
- making a decision that is obviously out of character and
- that may cause harm or mistreatment
- often being confused about things that were easily
- understood in the past
- often being confused about times or places
- having noticeable problems with memory, especially
- recent events, which have an effect on the person's
- ability to carry out everyday tasks

⁹ Et seq. p.50. 15 Some of these triggers are adapted from information provided on the Alzheimer's Australia website: www.alzheimers.org.au

- dramatically losing language and social skills. For
- example, having difficulty finding a word, not making
- sense when speaking, not understanding others when
- they speak, having wandering thought patterns, interrupting or
- ignoring a person when they are speaking, or failing to respond to
- communication
- having difficulty expressing emotions appropriately, such as inappropriate anger, sexual expression, humour or tears without actual sadness
- displaying sudden changes in personality. For example, excessive irritability, anxiety, mood swings, aggression, overreaction, impulsiveness, depression, paranoia or the onset of repetitive behaviours
- declining reading and writing skills
- having difficulty judging distance or direction, for example when driving a car.

Triggers that involve Concerns About a Person's Circumstances can include

- not looking after themselves or their home the way they usually do and this being bad for their health or putting them at significant risk. For example, neglecting significant personal concerns such as health, hygiene, personal appearance, housing needs or nutritional needs.
- not paying bills or attending to other financial matters, such as running their business, repaying loans or other debts
- making unnecessary and excessive purchases or giving
- their money away, and this being out of character
- noticeably being taken advantage of by others, such as being persuaded into giving away large assets that they still require such
- as a house, car or savings, or signing contracts that disadvantage them
- having been diagnosed with a condition that may affect their capacity
- having lacked capacity to make decisions in the past.

These types of triggers may be noticed by the person of concern, or by someone else who is seeking a capacity assessment for the person or simply someone concerned for the welfare of another.

Lesson 4 – Who might a supporter or substitute decision maker be?¹⁰

Initially that person may be:

- (a) the person's [guardian](#), if any, but only if the order or instrument appointing the [guardian](#) provides for the [guardian](#) to exercise the function proposed.
- (b) the [spouse](#) of the person, if any, if:
 - (i) the relationship between the person and the [spouse](#) is close and continuing, and
 - (ii) the [spouse](#) is not a [person under guardianship](#),
- (c) a person who has the care of the person,
- (d) a close friend or relative of the person.

A person who has the care of a person:

includes (but is not limited to) the case where the person, otherwise than for [remuneration](#) (whether from the other person or any other source), on a regular basis:

- (a) provides domestic services and support to the other person, or
- (b) arranges for the other person to be provided with such services and support.

A person who resides in an institution (such as a hospital, nursing home, group home, boarding-house or hostel) at which he or she is cared for by some other person is not, merely because of that fact, to be regarded as being in the care of that other person, and remains in the care of the person in whose care he or she was immediately before residing in the institution.

A close friend or relative is defined by the Guardianship Act 1987 (NSW) to be:

"close friend or relative" of another person for the purposes of this Act if the person maintains both a close personal relationship with the other person through frequent personal contact and a personal interest in the other person's welfare. However, a person is not to be regarded as a [close friend or relative](#) if the person is receiving [remuneration](#) (whether from the other person or some other source) for, or has a financial interest in, any services that he or she performs for the other person in relation to the person's care.

When dealing with close friends or relatives, anyone undertaking an enquiry in response to concern needs to consider the interest of the person in the outcome of the enquiry and actively manage any conflict of interest that is then observed.

¹⁰ Drawn from http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/nsw/consol_act/ga1987136/s33a.html

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Lesson 5 – Examples of Enquiries triggered by Concerns

Applying Decision Making Impairment Testing

Using the Impaired Decision Making Enquiry Framework

Procedural Method and Approach

Decision Ability Assessment – initial problem, situation and ability assessment

Concern

- What concern has brought you here?
- What objective or need is evident?
- With what are you being asked to help?
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- What response is sought or proposed by the person being evaluated to the concern being presented
- What impact does that proposal have on the person proposing it and others?

- What other response may be needed to the concern?

Competence to Respond

- What competence is needed to respond with the concern?
 - Who has that competence? And
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- Now are these choices to be communicated to the person of concern?
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Assessment

Identifying the will and preference of the Client

1. Identifying the objectives the client wants to achieve
2. Identifying the needs of the client
3. Identifying the impact of the client's proposed action on those to whom they hold themselves accountable.
4. Identifying the risks that may impair the Client achieving those objectives
5. Assessing the Clients response to the risks and impairments identified
6. Assessing the ability of the client to proceed unaided or not with the proposed course of action
7. Proposing method to proceed to achieve will and preference of client (the initial scope of work)

Safe to Proceed Reflection

1. Why are we doing this work?
2. For whom are we completing this assignment and in whose interest are we acting??
3. Are we satisfied with their capacity?
4. Are we satisfied with their identity?
5. Are we satisfied with the identity of the persons to whom they hold themselves accountable?
6. Does the client or their beneficiaries have a special disadvantage?

7. Does the client have a carer or representative through which or in conjunction with, we must act? Why?
8. To what legal jurisdictions is the client accountable and why?
9. What are the jurisdictional connections of our client, their family, beneficiaries, estate structures and business connections?
10. What objectives or concerns of the client must be addressed by this enquiry?
11. How does the proposed action have to interact with other elements of the client's estate administration?
12. To whom does the client owe a special duty or responsibility? How is this to be dealt with by the proposed action?
13. How concerned is the client about the defensibility of their document from 3rd party attack?
14. What are the non negotiable elements of this engagement?
15. Does the client have a connection to someone else for whom we act?
16. If yes, Is there a conflict of interest?
17. If not, why not?
18. Do not forget, a husband and wife are separate clients!

Instruction completeness reflection – will making example – are client intentions in sufficient evidence?

What work does the will have to do?

Lawyers Action – operation of will	Client intention – the job of the will	Client situation – drives intention
Operates on property beneficially owned by the will maker at the time they die	I want my property that I have when I die to be given away in accordance with the rules I define, subject to the law.	What is my property and how is it owned or controlled?
Appoint Executor	I want this person to handle my affairs following my death	Who do I trust? Why?
Appoint Trustee	I want this person to be the trustee of some or all of my estate following my death	Who is appropriate? Why?
Make Specific Gifts – General Property	I want these people to have the following property when I die (on the following conditions, as appropriate)	What benefits do I want to create? How do I want to create them? When do I want them delivered?
Make Specific Gifts – Special Property	I want the following property dealt with in the special way I define e.g. Control shares in Trustee Companies Business equity subject to buy sell arrangements SMSF trustee succession	What benefits do I want to create? How do I want to create them? When do I want them delivered?

	SMSF benefit discretion Estate equalisation Property subject to contracts, guarantees or other representations or arrangements	
Exercise powers of appointment	I want the following powers of appointment that I have been given in my life to be exercised in the following way after my death.	What actions need to be taken after my death to complete tasks I have been given in my life?
Representative Succession	If the first people I appoint as executors and trustees are not available or cannot perform their role, then the succession of that role is to happen as follows:	Who is most appropriate to carry on my representatives' roles?
Estate Management Discretion Control	I want the estate management discretions I create to be exercised in accordance with the following conditions, prescriptions or objectives:	Why are discretions necessary in managing my affairs? Flexibility, wealth preservation or both?
Beneficiary inclusion	I only want the following people included in my estate, irrespective of their estate claim rights	To whom am I accountable and why?
Beneficiary exclusion	I only want the following people excluded in my estate, irrespective of their estate claim rights	To whom am I accountable and why? Are spouses of beneficiaries in or out?
Estate Residue Management	I want the residue of my estate dealt with in the following way: Gifts v. trusts; short or long term; general or special conditions	To whom am I accountable and why? What benefits do I want to create? When and Why? What vulnerability am I responding to in my beneficiaries, if any?
Estate General Power and Authorities	My executors and trustees are to have the following power to do their job.	How best can I equip my representatives with the appropriate scope of power to do the job I am giving them?

Establishing a Plan for Action – will making example

On what assumptions is your will based?

Scenario modelling based approaches are needed. For example:

Other than the briefing you provide us, you have no particular wishes in relation to any of the following estate administration objectives other than handing over such of your estate that is available after payment of your debts, funeral and other permitted expenses to the beneficiaries your nominate in the proportions, asset description (e.g. my principal place of residence or publicly listed shares) or amounts that you nominate:

1. Family Governance and Continuity
2. Wealth Preservation and Transfer
3. Financial Security and Legal Compliance
4. Personal Representation and Succession
5. Family Business Retention or Disposal'

All your property is solely owned by you in your personal capacity (rather than as a company, trustee, partnership, venture or comparable form of property ownership).

There is no reason why any of beneficiaries should not receive their gift from you as a direct gift as soon as practical following your death.

You do not intend to create any long term administration of your estate following your death.

You do not wish to impose any particular restriction on the management of your estate by any of your legal personal representatives during your life or following your death.

There is no property or asset owned by you that requires special provisions in your will (for example, powers of appointment under trusts, collectables, geared investment property, intra family loans, business equity, direct interests in estate structures such as a company, unit trust, partnership GST liable enterprise or other venture).

It is appropriate for your primary beneficiaries to also be the executors and trustees of your estate. You see no material conflict of interest between you and your legal personal representative that needs particular consideration in the making of your will.

You are not concerned that any person appointed as your attorney, executor, trustee, guardian, agent or carer has a conflict of interest with your interests or may abuse the power given to them as your representative.

No person other than your spouse is dependent upon you.

You have only simple requirements for the appointment of testamentary guardians of any infant children, funeral requirements or handling insurance superannuation benefit succession.

You have no assets that are located outside New South Wales.

You do not believe there is any risk of your will being challenged by your estate claimants.

You have no particular wish to benefit any charity or social or community contribution purpose through the operation of your will.

You do not wish to provide any written guidance to your legal personal representatives about how the administration of your estate should occur in the event of your disability, incapacity or death.

What is the method to proceed? Case Management procedural framework – Estate Planning example

Case Management Process for Private Wealth Advisory Engagements

In taking on a case, the planner must establish how the work undertaken in the case is to be managed. Then the planner must decide how the completion of that work is going to be assigned and its completion is managed. Both tasks require a system for describing work tasks in the context of the procedural workflow of the matter.

Consideration of these issues results in the detail of the client engagement letters and associated paperwork that documents the initiation of the case by the lawyer.

The lawyer engaged in a multidisciplinary team must nonetheless comply with the relevant legislation and practice rules of the legal profession. All professionals in an estates services engagement must understand and agree that a lawyer must engage direct with a client for whom the lawyer is delivering legal services, unless they are otherwise engaged by a law practice as a part of their legal service delivery to the client.

When forming a relationship between estate advisers, a common professional practice for the carrying out of client engagements is needed. The key elements of this process are:
The recommended approach for constructing the relevant checklists and describing this phase of work is set out below on the next pages.

You need a consistent process to manage this work

How will we handle the engagement?	What is the substance of the engagement?	How will we be measured in the engagement?
<p>P100 Matter Administration</p> <p><i>P110</i> Engagement capture</p> <p><i>P111</i> Engagement Design</p> <p><i>P112</i> Work Scope or Specification</p> <p>P120 Matter commencement</p> <p>P130 Matter maintenance</p> <p>P140 Adviser capability mapping, coordination, communication and collaboration</p> <p>P150 Client communication about engagement status</p> <p>P200 Fact Gathering / Due Diligence</p> <p><i>P210</i> Client risks & interest review</p> <p><i>P220</i> Tax</p> <p>Tax Law</p> <p>Tax Accounting</p> <p><i>P230</i> Legal Issues Review</p> <p><i>P231</i> Environmental</p> <p><i>P232</i> Real and Personal Property</p> <p><i>P233</i> Employee / Labour / Stakeholder</p> <p><i>P234</i> Intellectual Property / Intangible Assets</p> <p><i>P240</i> Regulatory Review</p> <p><i>P250</i> Other issues for review</p> <p><i>Territory</i></p> <p><i>Accountability</i></p>	<ol style="list-style-type: none"> 1. The advantage being sought by the client in the engagement 2. Any limitation that may exist on any adviser meeting a fiduciary standard of duty in the engagement. 3. Any engagement limitation imposed by the client. 4. Any engagement limitation imposed by an adviser 5. The role and function of advisers to be able to contribute to the advantage being sought by the client in the engagement 6. The overall budget of the client; 7. The overall work requirement of the client; 8. The charging and pricing model of all advisers; and 9. An accurate cost plus model for the overall work that allows project contribution profitability to be managed. 10. The process by which work is to be completed in the engagement and delivered to the client 	<p>Deliverables</p> <p>What is to be delivered to the clients?</p> <p>Products</p> <p>Services</p> <p>Documents</p> <p>Who is to attend to this work? From where does the client draw the talent bank they need?</p> <ul style="list-style-type: none"> • Financial Planning; • Accounting; • Tax; • Law; • Family Business Consulting; • Psychology • Management; • Organisational Development and Change; and • Family Dynamics, Operations and Dispute Resolution. <p>How do these talent bank members relate to one another and the client's overall objective in the engagement.</p>

<p><i>Representation</i></p> <p><i>Liabilities</i></p> <p><i>Life Risks</i></p> <p><i>Claim risks</i></p> <p><i>Inheritance</i></p> <p><i>Property Ownership</i></p> <p><i>Philanthropy / Social and Community contribution</i></p> <p>c</p> <p>P400 Initial document preparation</p> <p>advice documents</p> <p>transaction documents</p> <p>P500 Document response, negotiation, revision</p> <p>P600 Completion</p> <p>P700 Post Completion</p> <p>P800 Client Relationship and Work Maintenance & Renewal</p> <p>P900 Transactional Advice and Opinion</p> <p><i>P920</i> Ongoing Relationship Advice</p> <p><i>P930</i> Other</p>		
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