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LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 30 March 2010

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Professor P. Darzins, Professor of Geriatric Medicine, Monash University, and Director of Geriatric Medicine, Eastern Health.

The CHAIR — Peteris Darzins, thank you very much for coming to talk to us this afternoon. I think we have about 45 minutes. There are a couple of very quick procedures that you probably know about. This is a Parliamentary committee and is subject to the Parliamentary Committees Act, which means that you are protected by parliamentary privilege. In the case that you say things that might be offensive to somebody, you are fully protected, but do not say them outside the confines of this hearing or outside the building, because you will not be afforded that protection. Hansard is recording the discussion this afternoon, and you will be sent a transcript of that. You can make minor adjustments but not to the substance of it. We will leave it in your hands to talk to us, and we will go from there.

Overheads shown.

Prof. DARZINS — Thank you for having me. I thought I would start by introducing myself so you would know why I am here. I trained in medicine at Flinders University in South Australia as a specialist physician and then as a geriatrician. I then trained as an epidemiologist at the University of Newcastle in New South Wales, and then I worked at the McMaster University in Ontario in Canada. That is really where I developed an interest in the assessment of decision-making capacity. I was working for a research group that was interested in the use of advance health-care directives, and we recognised that we needed a test for capacity because doctors were ignoring people's advance directives and they were saying perhaps the person was incapable when he or she made the directive.

As a result of work in that area the government of Ontario, which was developing the Substitute Decisions Act, retained the group that I was a part of to develop a capacity assessment framework for them. As part of that they developed this six-step capacity assessment. You have got the handout for later on in the talk. We developed the assessment framework for them and the training package. It was basically implemented pretty much as we designed it, with one or two changes that I will have to talk about later. But the government of Ontario decided that they wanted to withhold our research findings because we told them that this approach would work for everyone except a few groups: it would not work for the American aborigines, and it might not work for traditional Chinese peoples, because they have decisions that are made in collectivities — in groups — rather than at the level of the individual. I can talk more about that in detail if you need me to.

Since returning from Canada to Australia in 1997 I have been providing workshops about this. I have published a book, and I have brought a copy for you. For Canada we devised one-day, three-day and two-week-long workshops, so if you really want to be fully trained, that is the sort of complexity we are talking about. But I am happy to talk about the six-step capacity assessment. Here are some publications, and I wanted to declare my potential conflict of interest right up front, because I am the developer and owner of the six-step capacity assessment and of the decisional aid for scoring capacity to complete an advance directive, and who knows, you might end up going down a route that leads to something like that.

What I was going to do was describe the six-step capacity assessment process for you, and then Kerryn sent me some questions which she thought you are likely to want to have addressed. I have written them out, and I have given a short response to each of those. I am happy to try to do that; is that going to be all right?

The CHAIR — Yes, that is great.

Prof. DARZINS — This is a talk that I have given more than 150 times now, so I have a play button. I will have to go through it fairly quickly. I make an analogy using this photo of my son in the Simpson Desert: if you want to travel rough, you need the right gear, you need the skills to know what you are doing, you need to fix problems as they occur and you need to cope with the unexpected. This is a photo of a sandstorm in the desert. Capacity assessment is the same: if you want to do it, you need the right attitude, you need the right tools and you need the knowledge to use them and a willingness to deal with whatever comes up. If you do all that, then you will be okay.

I will give you a handout. You will see that this handout is different to most handouts, because it leaves out all the important bits. You have to fill those in as I go. It is not that hard; it just has a little red asterisk next to each of the key terms as they appear.

The first thing to talk about is that capacity is a legal construct. Usually I give these presentations for health-care audiences, and for a lot of people this comes as a surprise, because although health-care problems obviously can

cause difficulties with capacity it is nonetheless a legal construct. A legal framework, a legal paradigm, prevails rather than a health-care paradigm, and they are really quite different.

The other thing is the notion that capacity is presumed to be present; it is like innocence, which is a starting point in our legal system. In the same way as there is no need — in fact, there is no mechanism — for proving innocence, the same logic applies to capacity. Strictly speaking there is no need to prove capacity, there is only a need to disprove it. It is a potentially rebuttable proposition. In the same way as you would rebut the presumption of innocence if there is sufficient evidence, that thinking applies to the presumption of capacity — that you rebut that when there is sufficient evidence of incapacity. In the whole process the emphasis has to be on allowing people to act as though they are capable, and should there be sufficient evidence of lack of capacity then something else needs to be done, rather than the other way around. The way the power of attorney forms are written at the moment is that the person who is attesting to the signature is actually attesting to the person's capacity rather than attesting to the absence of evidence of incapacity. I think that is a very important thing to be aware of.

The other thing that is clear in our legal system is that capacity is specific. In the past if you were crazy enough to be put into a lunatic asylum, then you were presumed to be globally incapable and your assets could be seized and used to defray the costs of looking after you. The legal mechanism for that was that you were presumed globally incapable: incapable of your health care; incapable of looking after yourself, your personal care; and, by extension, incapable of your legal affairs. Obviously our law is a lot different to that now; we have got quite clear separation between financial matters, between personal care matters and between health-care matters, and of course regarding wills and the ability to instruct there is a lot of case law.

The government of Ontario asked us to provide a definition of capacity. Remember I have told you that capacity is like innocence, so this is akin to defining innocence. You can imagine that that is an infinitely long definition unless you are defining innocence as the absence of guilt. Capacity could be defined as the absence of incapacity, and you would then have to define what incapacity is, but the governor of Ontario asked us to define it in a positive way. From doing all the things that scientists do — from getting expert opinion from the literature reviews and so on — this is a working definition that we came up with: capable people know the issues they face, they also know the possible approaches for dealing with those issues, they also appreciate the reasonably foreseeable consequences of choices and their decisions are not based on a delusional construct.

If all of those things are true, then the people are capable even if they have cognitive impairment. This latter bit is important because doctors will often confuse the presence of cognitive impairment, such as Alzheimer's dementia, a stroke or acquired brain injury; they will say that because there is cognitive impairment present the person lacks capacity, or that if the cognitive impairment has been present for a long time and is profound then that equals lack of capacity. That may be true, but the logic is not right. It is possible for people to have cognitive impairment without lacking capacity. This is where doctors often get into trouble.

The CHAIR — Can you cite an example of that?

Prof. DARZINS — Someone might have had a diagnosis of Alzheimer's dementia and still be capable of managing her affairs or still be capable of giving an enduring power of attorney.

The CHAIR — Because it is at a particular point in the development?

Prof. DARZINS — That is right; it is early Alzheimer's dementia. The disease is definitely present, so there is impairment of memory, there is impairment of judgement and there is impairment of her ability to manage her day-to-day affairs, so the diagnosis is not in doubt but she might still have sufficient capacity to do things.

This is a list of evidence of incapacity. Each one of those bits could equal evidence of incapacity. If people do not know the issues they face, that could be evidence of incapacity. It could also be that they just have not been told what the problem is, but if they have been told and still do not know the issues they face, that is evidence of incapacity; or they might not know the possible approaches for dealing with their problems; or they might not appreciate the reasonably foreseeable consequences of choices; or their decisions might be based on delusional constructs. If any one of those things is present, then it is important to establish whether there is cognitive impairment present. This is where the involvement of medical practitioners or neuropsychologists is valuable because they can satisfy that last component. My understanding of our legislation is that it is a necessary precondition that there is cognitive impairment present. Without that you cannot say that the person lacks

capacity. The presence of the cognitive impairment alone is not sufficient in itself. You need the cognitive impairment plus at least one of those other things.

That is the background. To consider capacity you need tools. My colleagues and I package them up into this six-step capacity assessment. You have a picture of it there. On the back page I have given you a one-paragraph summary of each of those steps. What I propose to do is very quickly step you through this. Normally what I am doing now takes a couple of hours, but I thought I will step you through it quickly to give you an overview. I am happy to come back with detail at some other time if that is what you want. I am going to talk about each of those steps now.

The first step is to ensure that there is a valid trigger present. The reason for this is that an assessment of capacity is actually an intrusive process, intruding into people's lives. It is something that happens to people by the power of the state. It is like a law suit. It happens to people when there is sufficient reason to do that. For the government of Ontario it was asked what would be a valid trigger, and this is what we developed: events that put either the individuals being assessed or others at risk and that also on the face of it are due to lack of capacity. That would be an adequate trigger. For the powers of attorney we would have to say, 'Here we have an event. This person is going to donate a very major power to someone else, which obviously has potential benefits, but it could be putting the person at risk as well'. You need to cross a high threshold because of the presumption of capacity. We could say that there is no need to do a capacity assessment because of this high threshold aspect. I remind you that the vast majority of irrational choices are made by competent people.

Here is an example: I like desert travel, and here we are camped 300 kilometres north-east of Alice Springs. We camped for five nights and did not see any other man-made lights or sounds, apart from the international jets with lights travelling overhead. You could say that I am putting myself and my family at risk by going into the middle of the desert, but no-one in their right mind would say that this is an incapably made act. They would say I am living life in the way that I want. That is part of the dilemma here: what is an adequate trigger with regard to donating a power of attorney? Is doing it just a part of life and a person making provision for themselves in the future; or is it a risky thing that in itself is sufficient for an assessment of capacity? I think that is one of the questions that needs to be addressed. The next step in doing a capacity assessment is to engage — —

The CHAIR — Sorry, can I just stop you there. You are right, that is a big philosophical question. It has to do with cultural dimensions and a whole lot of other things. But in interrogating that as an adequate trigger — I know you cannot go on for a long time — how is that done to satisfy oneself that those complex dimensions are not being ignored?

Prof. DARZINS — I guess that we would have to say that in the end it is not an internal measure that needs to be satisfied but it would need to be justified externally. In the end I would need to say that I did something intrusive and that the justification was that here the person who is being assessed is at risk and the risk is that someone else is going to be given basically unfettered access to their affairs, and, if that power is abused, the person might be very substantially worse off.

The CHAIR — Perhaps we can take as an example the 16-year-old Dutch child whose parents allowed her to go on a global sea trip. They were relieved of their responsibility by the Dutch government. Is the implication that the parents did not have capacity in that instance?

Prof. DARZINS — I am not sure how a legal scholar would argue it. I do not know all the details of that.

The CHAIR — But you can come up with dilemmas like that.

Prof. DARZINS — You can. We have our own young lady who is younger than 18 and sailing around the world at the moment. I know there are many ways that these questions have been addressed in different settings — for example, at what age can a young woman or a teenager consent to being given the pill? There is the whole notion of a mature minor and when is a risk big enough or small enough. In the end I think that is a value judgement that really has to be made in Parliament taking input from the public. Is this a risk and does it need a mechanism; or is it not a risk so it does not need a mechanism? I cannot think of a way of answering that as a first principle. You tell the people of the assessment and you try and get their input, but you cannot ask for their informed consent to the assessment of capacity because then you would have to see whether they have the capacity to consent to the assessment of their capacity. You can see it is a never-ending loop.

This is where the government in Ontario actually ran into trouble. In the Substitute Decisions Act they did retain the need for the allegedly incapable person to consent to the assessment of decision-making capacity. What happened was that if the doctor's impression was that the person lacked capacity, had a problem and needs help and they asked for that person's consent and the consent was refused, then they would be stuck; they could not go forward. What medical practitioners do is that rather than assess people's capacity using the provisions of the Substitute Decisions Act, which has a defined mechanism and safeguards built into it, they go and assess people as standard clinical practice, which is unregulated and they can do whatever they want, so by building in the need to have consent, in effect, the government of Ontario made that piece of legislation a useless bit of legislation for when it really matters. I just want to point out that as something to avoid.

The third step is to gather information from the person being assessed, most importantly also from the person making the allegation, because this is the trigger. This is the person who will be saying, 'So here's the problem. The problem appears to be causing a risk and is apparently due to lack of capacity'. So that is giving the justification for it. What are the relevant choices? What are the reasonably foreseeable consequences of choices and are there any delusions related to the trigger?

This is really a statement of the case, and that is what is being laid out here. Then it is important to get the picture from the person who is being assessed because often the problems go away when you find out both sides of the story. Having got that information, there is then the education step, and this is to make sure that ignorance of the situation is not being mistaken for incapacity, or that communication failure for any of a large number of reasons is not being mistaken for incapacity. There are lots of barriers — the obvious ones like deafness, blindness, do not speak English — but then there are the not so obvious ones, the power difference, the gender difference, the cultural difference. Lots of those needed to be addressed. So this is the fourth step: this is how I give instructions to my wife. You do not have to write that down.

This is illustrating the use of a communication device to overcome hearing loss, and then there is the actual assessment of capacity. So you can see that we are a long way along the process before we do the assessment, which really suggests that there is no place for a quick, casual assessment like Heidi was mentioning beforehand. How can you assess someone's capacity when you might only be meeting them for 5 or 10 minutes? I think if there is a need to do an assessment of capacity because it has important consequences, then there is a need to do it right and there really is not a place for a casual assessment.

The flip side of that is we all do capacity assessments every day, so when you are entering the roundabout and there is someone coming in from your left and you have got right of way, if that car looks big, old, beaten up and looks like it might not stop, you are going to say, 'Well, I think I will not take my right of way. I am just going to let that driver break the law and sneak in ahead of me'. So we do these practical assessments every day, and in the same way that bank tellers all do very quick assessments, so yes, there is a need for quick, snapshot type-assessments, and that is the reality, but in this sort of situation where there is a special legal context I think there is not a place for Geschtalt assessment. There is a need to have documented all of the steps. My colleagues and I devised a structured interview and a structured scoring method, which if you have time or if you are interested I can show later on.

The emphasis of the capacity assessment is to look for evidence of incapacity. It is not to look for evidence of capacity but to look for evidence of incapacity, and failing to find sufficient evidence of incapacity in the same way as if a court has been given evidence of guilt and there has been insufficient evidence of guilt, then the court finds the challenge on the presumption of innocence is not upheld. In the same way, if there is insufficient evidence of incapacity, again you find that the presumption of capacity stands.

The final step is you need to act on the results of the assessment, and there are only two possibilities if you have done the test right. You either have found lack of capacity or you have not found lack of capacity, and there are mechanisms for dealing with a situation where you have found lack of capacity. If you have not found lack of capacity, that is often a very difficult situation because you have got a person with a problem that you have to help muddle through the problem. That is one dimension. The other dimension is that you have just subjected a person to a very intense personal challenge and that they are often quite upset, and that needs to be managed. That is the six-step capacity assessment. I am happy to talk in detail about that if you have any questions.

Mr BROOKS — When you said that at one of the latter stages you have to look for evidence of lack of capacity, precisely what are you looking for?

Prof. DARZINS — I can show you that. I am writing a new edition of this book, and in looking at powers of attorney this is paperwork that you might use. You might say, 'Who is being assessed? What is the problem? What was the background of the interviews and data gathering?', and document those, and 'What are the circumstances of the assessment?'. Then with regard to the assessment the person should deal with the concept of what is a power of attorney, what can the attorney do, when will the power of attorney start, and the person must be able to appreciate the consequences of both the risks and benefits of giving that, and you would assess them as being 'definitely able', in which case you would check these boxes, 'probably able, 'may be able, 'probably not able' and 'definitely not able'. These are the possible results and if all of the check marks are in one of these nine boxes, then the person would have capacity to donate a power of attorney, or if any of the check marks are in these columns, then the person does not have the ability to donate the power of attorney. My colleagues and I devised a mechanism for getting to those boxes. Remember the columns were 'definitely able' or 'probably able', 'may be able', 'probably not able', and 'definitely not able'. You saw where those went. And this is how you get to those results. So if the person clearly answers questions with minimal or no prompting, then you would score that as a 2 plus and you would score that with regard to registration, so that is being able to take in the information, and with regard to reflection, that is being able to apply the information to the person's own situation. So if, when you go along to the person and say, 'Hi, I am here to talk with you about', and they say, 'Yeah, yeah, I know. You are here to talk to me about my power of attorney, and I know it is a very important tool, and I am giving away a big power, and you just want to check whether it is all okay', then you would say that person has registered the fact that you are talking about a power of attorney and can reflect on what that power means, so you would score that person at a 2 plus in both registration and reflection, and that person is definitely able with regard to what is a power of attorney.

So you would then say for 'What is a power of attorney,' you would be able to check that box there, whereas if that person had a lower level of function, then that scoring guideline tells you how you would use that. That is a way of converting your direct interaction with the person into a way of scoring those particular items, scoring what can the attorney do, when would it start and the ability to appreciate the consequences. So this is a direct extension of the tool that I devised, the decision as to scoring capacity and completing an advance directive. We have a health-care one, we have a personal care one and we have a finance one. So you could use this as an assessment system.

Ms RISELEY — Who is administering this test? Is it a medical practitioner?

Prof. DARZINS — I will come back to this, and I will go to that one. I think you asked me who should test capacity. The government of Ontario in its wisdom said that anyone could assess capacity, except doctors. The thinking was that doctors are incapable of following instructions. They jump to conclusions, they are not very good at documenting, and that puts too much power in their hands. Their thinking was that if it is to be a profession, then they are probably the least able to do that. I think there is some justification for that. But they developed a new profession called 'capacity assessors'. These assessors would do a three-day course with us, and then they would practise under supervision. They would do some capacity assessments and send them in to be commented on. Those people still exist at the moment. They work as private practitioners. They can do assessments for people on a fee-for-service basis.

The CHAIR — What is their background?

Prof. DARZINS — They have no specific background. The trouble is that they are not part of a usual system, so that is a parallel process, and they have no special training in dealing with people's communication difficulties or in recognising disease states, so that when they encounter them they just say, 'This is too hard. I cannot progress'.

Who could test it? I think the answer is anyone, but they would need to recognise that this is a not a health-care issue, this is a legal matter and proper process needs to be followed. When a medical assessment is required to assess for status of presence of cognitive impairment, that is where the doctor may have a role to play or a neuropsychologist may have a role to play. If the doctor or the neuropsychologist also want to do the remainder of the assessment, recognising, 'I have diagnosed the disease. I am now taking off my health-care hat and I am putting on my legal hat now. I have finished with the disease. I am now going to turn my mind to the legal things and follow a proper legal process', then that is okay. Often the two are muddled together. What process should be followed? I think that the six-step capacity assessment process really sets out an explicit process for doing that. Do you want to ask any more about those?

The CHAIR — No, people can jump in. We are absorbing.

Prof. DARZINS — Kerryn sent me questions. The questions were, 'Should the legislation set out a definition of capacity and a test of capacity?'; then there was, 'Who tests capacity, by what process?'. There were questions about activation of power of attorney; capacity tools; capacity assessment guidelines and education. I have gone and addressed each of those, and I have made some comments. I have three lots of comments. I am happy to tear through all those if that would suit you.

The CHAIR — Yes, all right.

Prof. DARZINS — Should there be a test of capacity? I think there should be a definition of capacity, but I would suggest that there was a listing of incapacity, of what could constitute evidence of incapacity rather than what constitutes evidence of capacity. That is different to the current paperwork.

I suggest that the six-step capacity assessment process be followed. You could make a power-of-attorney specific tool, but the trouble is that when people are dealing with capacity issues around the time of the power of attorney, they are often dealing with other things as well — health care, finances and personal care. Why would you make one approach for powers of attorney which does not link to all the others? That is why I would recommend that you made a more global approach that is part of a suite of assessments rather than being very specific around power of attorneys.

In reading case law and looking in the area, the lack of capacity is one aspect and undue influence is another aspect. I think you could have separate witnessing of the signature from testing capacity, so that could be a separate conceptual step. You could also ask the person to make a statement about either the complete absence or the presence and extent of evidence of undue influence. For example, the person might come to you by herself. She has made the appointment to see you, has come to your office, has given you the paperwork and said, 'I want you to witness and sign my power of attorney'. Then you would say, 'This looks like there is a complete absence of undue influence'. Whereas if the appointment has been made by the son, and you have gone to the home, and the son is in the room and he has helped fill out most of it, and the mum has just signed it, I think it would be harder to say there has been a complete absence of undue influence. There might be a suspicion of undue influence, and you could document that and you could sign on that. If someone says, 'Hang on. I have just written that your son called me. I came to your home. Your son had filled out the form and all you did was sign it. Gee, that really looks a little bit like influence. I am maybe not willing to sign that there is not undue influence', then that might be a protective mechanism which could be built into it.

Mr FOLEY — Yet I know there are communities in Melbourne where that would be highly culturally insulting.

Prof. DARZINS — That would be the way that things happen; that is right.

Mr FOLEY — It may be insulting if you were to insist that they leave or note that that was undue influence. There are all of those sorts of barriers.

Prof. DARZINS — You are right. For that reason you might not say that that totally stops the process going on. You might say, 'I noted it, and in this particular situation it appears to be culturally appropriate'.

The CHAIR — Just to give a bit of a time check, we have about 5 minutes to go.

Prof. DARZINS — I have talked about whether there should be a test. The answer is yes. Who tests capacity? I have talked about the activation of power of attorney and who should assess capacity. I think this is essentially as for the creation of a power of attorney.

The fluctuating capacity is a genuinely difficult area. I think a lot of people recognise that. Do you know about Ulysses contracts? Ulysses tied himself to the mast of his ship, blocked his ears and said, 'Whatever I say, don't listen to what I say until we have passed the island of Lesbos. Otherwise the sirens will sing to me and I will want to go and see them and we will all be doomed'. You can write a Ulysses contract where you say, 'I have bipolar affective disorder. At various times I will be mad. At those times, whatever I say, do not listen to me. Ignore what I say until my mood is normal. You can write a Ulysses contract, giving away your rights for

periods of time. So you would have to define those. They exist. They are very rarely used, but that is something to consider.

What tools could be used? I think the six-step capacity assessment could help. How can the ability of the assessment be assured for different culture, language and education groups? I think faithful adherence to process is important, and then proper use of translators, not families, is important and perhaps having a written provision for that. It should be recognised that decision-making power does not rest with individuals in some ethnic groups, but it rests in other groups in the wider family. I think that is worth being aware of.

In regard to capacity assessment guidelines, yes, I think there is a place for capacity assessment guidelines, and they do exist — and I have got them here.

Is education required for capacity assessments? I recommend that we do not go down the route of the Canadian legislature, where we create a new profession. I think we need to educate existing professions. We need to educate legal professionals, financial professionals and health-care professionals, and each of those needs different types of input. They need to know that capacity is presumed present, that there is rebuttal if there is sufficient evidence, and what that evidence could be. They need to know how to find the evidence using a capacity assessment process, and they need to know that there is a need for proper documentation. I think that is all doable for those different audiences.

I have already talked about separating the witnessing of the signature from a statement about capacity and a statement about undue influence. We could consider the registration of power of attorney. That is what Tasmania does. I think there is a $90 fee payable. Some legislatures have toyed with the idea of needing to pay bonds — that is, that the attorney would pay a substantial bond if there is going to be management of financial matters. But that has basically made that very unattractive when people do not then go and have their matters dealt with in an unregulated and uncontrolled way.

At the moment there is a provision that you can give your power of attorney to two people who are to jointly manage affairs. That already exists. Clever lawyers can draft all sorts of safety mechanisms into it. You could suggest that there is the nominated attorney, and then the donor nominates another party who could check on the attorney's actions and that the other person could be another family member, or if there is no other person, then that could be someone from the Office of the Public Advocate. It is a safety mechanism. The trouble is who will pay, how much it all costs, how intrusive it is and so on. But the attorney is then to contact the other parties when the power of attorney is used.

You could have the donor opt out of that checking mechanism so that would then be the same as what we have at present. How would it work? You could have a nominal fee or it could be like a prepaid funeral. It could be prepaid by the donor or to be paid from the estate as a way of dealing with it. With colleagues we have just done this review which the State Trustees have paid for. Most financial abuse is perpetrated by family members. The power-of-attorney instrument is often used to enable this abuse to occur. I recognise you have got a very big job ahead of you. I have given you a whirlwind — —

The CHAIR — Thank you very much for coming in for what has been really all too brief a time. But unfortunately we are pressed for time. On behalf of the Committee we thank you very much for coming. I hope you will be open to Kerryn and/or Kerry contacting you if there is anything we would like further information on.

Prof. DARZINS — Yes, I would be most delighted. Should any of you want to do a capacity assessment workshop, I can get something that — —

Mr FOLEY — We might be the subjects of it.

Witness withdrew.