

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 1 October 2009

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Ms J. Lee, Elder Law Committee,
Mr D. Davis, Elder Law Committee, and
Ms L. Barratt, Elder Law Committee, Law Institute of Victoria.

The CHAIR — I welcome David Davis, Laura Helm, Jeni Lee and Lynne Barratt from the Law Institute of Victoria. Thank you very much for your submission. There are just a few preliminaries that I need to go through quickly. The evidence taken at this hearing is protected by parliamentary privilege as provided by the Constitution Act 1975 and is further subject to the provisions of the Parliamentary Duties Act 2003, the Defamation Act 2005 and, where applicable, provisions of reciprocal legislation of other Australian states and territories. Any comments that you make outside this hearing will not be afforded such privilege. Hansard staff are recording our conversation this morning. You will be sent a transcript of that after the hearing. You can make minor changes, but the substance will be what it is on the record.

We have 45 minutes. We have drawn some questions from your submission and from the research that has been done. We will hand over to you to set us up, then we will have a discussion and see how we go.

Ms HELM — On behalf of the Law Institute of Victoria I would like to thank the Committee for the opportunity to elaborate on some of the issues that we have raised in our submission to this Inquiry into powers of attorney. The LIV is Victoria's peak body for lawyers, as you would be aware, and those who work with them in the legal sector. We represent over 15 000 members. The LIV has long been active in advocating for policy and law reform of powers of attorney through its Elder Law, Disability Law and Succession Law committees. More recently the LIV has made detailed submissions to the House of Representatives Standing Committee on Legal and Constitutional Affairs' Inquiry into Older People and the Law. In 2008 we also made a submission to the Victorian Attorney-General, Rob Hulls, seeking reform of a number of aspects of enduring powers of attorney (financial).

I would like to start by outlining some preliminary issues that we are disappointed have not been addressed by the government in this Inquiry or in general. In April 2008 the LIV wrote to the Honourable Lisa Neville, Minister for Mental Health, copying the Attorney-General, urging the government to commence a comprehensive review of laws relating to substitute decision making as soon as possible.

In particular we are concerned about the fragmented approach to capacity in laws relating to substitute decision making in Victoria. The issue of capacity is central to the implementation of such decision-making models, yet it is subject to different tests and thresholds under a variety of different legislation, including that relating to mental health, guardianship and powers of attorney. You will be aware that those sets of different laws are actually subject to different reviews by different bodies at present.

In England and Wales the Mental Capacity Act 2005 provides a statutory framework for acting and making decisions on behalf of individuals who lack the mental capacity to do so for themselves. This Act was developed following an extensive period of consultation and research by the Law Commission and the Joint Committee on the Draft Mental Incapacity Bill.

The main concerns discussed in England and Wales included that legislation protecting those with incapacity was built in a piecemeal fashion and was difficult to understand, that enduring powers of attorney would be used without external scrutiny or record, and there were concerns of widespread abuse in the enduring power of attorney system. We believe the same concerns which led to the Mental Capacity Act in England and Wales exist in Victoria. Critically, the Mental Capacity Act sets out one test for capacity, which applies to all powers of attorney and guardianship. The Act also lays down general principles that all persons are presumed to have capacity until proven otherwise and that anything done for a person without capacity should be done in his or her best interests.

The LIV believes a review of capacity and substitute decision making is particularly important in light of the United Nations' Convention on the Rights of Persons with Disabilities, which the Australian government ratified on 17 July 2008. The purpose of the disabilities convention is to:

... promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.

The convention recognises civil, political, economic, social and cultural rights, and is strongly based on the belief that equality for persons with disabilities depends on empowerment, access to opportunities and a shift from the welfare model to a goal of participation and inclusion.

An important aspect of the disabilities convention is article 12, which provides:

2. States Parties shall recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.

Paragraph 4 of article 12 is important for the purposes of this Inquiry. It states:

4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.

The LIV is convening a forum on the issue of capacity later this month at which we will discuss the merits of introducing generic capacity legislation in Victoria and the impact of the disabilities convention. We hope the government will consider undertaking a comprehensive review along the lines of the review undertaken in England and Wales. Such a review would necessarily impact on powers of attorney, and we hope the recommendations arising out of this Inquiry will be made in the context of any broader reform.

The LIV is also concerned that powers of attorney (medical treatment) have not been included in this Inquiry. This position is consistent with our view that a comprehensive review of all substitute decision making is required to ensure consistency of approach in such decision making.

Enduring powers of attorney play an important role in allowing people to exercise control over how decisions are made about them and when they are not able to make decisions for themselves due to incapacity. They are therefore an important expression of autonomy. However, the LIV is concerned about growing evidence of elder abuse and the risk of fraud or misuse of powers of attorney.

According to a report conducted by Monash University for State Trustees entitled 'Financial Abuse of Elders — A Review of the Evidence' there is a lack of data regarding financial abuse of older people. However, depending on the definition used, between 0.5 per cent and 5 per cent of older Australians have experienced financial elder abuse. Anecdotal evidence from members of the LIV Elder Law Committee suggests that cases of financial elder abuse are common. Committee members report that abuse generally occurs through the unsupervised use of the powers of attorney instrument whereby the donee of the power misuses that power or acts in excess of the grant.

The LIV in conjunction with Monash University will be conducting a joint survey of all LIV members about their experiences of the prevalence of financial elder abuse and the extent to which Victorian legal practitioners encounter financial abuse of older people in their practices. The survey will assist in providing targeted continuing professional development seminars in this area of the law for lawyers as well as collate data on other forms of financial abuse such as theft, misappropriation of funds or misuse of money, property or assets, capacity assessments, undue influence, denial of access to funds, forging or forcing signatures, the signing of wills, contracts or powers of attorney through deception, coercion or undue influence, abusing joint authority on a blank form, and getting an older person to be guarantor for a loan.

In our written submission to this Inquiry the LIV supports measures aimed at addressing the risk of abuse in this area. An important aspect of our submission is our support for the introduction of national powers of attorney legislation which would enable the establishment of a national register. We appreciate this is beyond the scope of this Inquiry but urge you to consider the advantages of a national system.

We support the introduction of a monitoring system for attorneys, which would include mandatory reporting, annual production of records and perhaps auditing of accounts. We suggest that government should undertake a cost-benefit analysis in relation to regulation and structure of the monitoring regime in order to ensure that it is effective in providing safeguards.

We also consider that specific powers that an attorney may exercise on behalf of the donor should be codified in the legislation. We further recommend that the specific duties and responsibilities that an attorney owes to the donor be incorporated in the legislation. These powers and duties exist at common law and arise under the fiduciary relationship between the donor and the attorney.

We also believe that when an attorney signs the statement of acceptance in an enduring power of attorney he or she should be required to acknowledge that he or she understands and accepts these powers and duties. Powers and duties should be set out in the prescribed forms.

Thirdly, we recommend that VCAT's powers be increased to enable it to consider abuse of general powers of attorney in addition to enduring powers and to award compensation in appropriate cases in relation to both general and enduring powers. At present people suffering financial loss must pursue complex and costly litigation if they are to recover any money lost.

In our written submission we also make recommendations which we believe will make powers of attorney instruments more effective and bring them in line with community expectations. For example, we believe that powers of attorney should be streamlined and simplified to ensure that these instruments deliver the autonomy and protection of rights that they aim to provide.

Currently there is a general lack of awareness and understanding of this area of the law in Victoria, where there are four different types of powers of attorney governed by three separate legislative instruments. Our proposals include introducing a Victorian powers of attorney act and prescribing in the legislation only two forms for the various appointment of attorneys. We make these proposals in light of our preference for the introduction of national powers of attorney legislation that I mentioned earlier.

We also recommend amendments to allow for an appointment of more than one alternative attorney to allow the alternative to act where the first appointed attorney is unwilling to act and has completed a resignation form to this effect, and to enable the appointment of a number of attorneys and allowing for a lesser number, normally a majority, to act jointly. This is often referred to as composite attorneys. In our members' experience it is important that the recognition of composite attorneys be retrospective, as many people have actually tried to encompass this type of arrangement in their documents already.

Thank you for the opportunity of making these opening remarks today. I would just like to note that David Davis, Jeni Lee and Lynne Barratt here today are members of the LIV Elder Law Committee, and that Jeni is also a member of the LIV Disability Law Committee. In their respective practices, they have extensive experience in dealing with clients in relation to powers of attorney. I would just like to make the point that, as you know, LIV is a membership organisation and we develop our submissions in consultation with members through our committees. It may be that for some of your questions today, if LIV has not yet formulated a view as an organisation, David, Jeni or Lynne can answer your questions from their own experience.

The CHAIR — Thank you very much, Laura. Perhaps I could start the questions. You mentioned that you are undertaking a survey of your members in relation to incidents of elder abuse and so forth and so on. One of the things that we are interested in is the level of use of the power of attorney across the community, and we have not been able to get a fix on where that is. I guess my opening question is: what sort of data do you have, if any, that could throw some light on that, and inside that are there any particular groups that you think are not using it as much or using it more than others?

Ms LEE — The dominant feature of this review, that will be revealed I am sure, is the lack of data about how many are held, which is why there would be a consistency across the submissions that there be some form of registration. We can discuss how later. It seems to be that there is a requirement now for people going into aged care to have enduring powers of attorney. That would be one way of accessing data on the numbers of instruments that actually exist because that now is a requirement. Some of our findings are that in terms of abuse, data could be collected from State Trustees, who themselves draw up enduring powers of attorney. They have a big group of constituents who come to them to draft the documents and so they hold those as attorneys.

The other source of data is of course VCAT. People apply to VCAT when there is a misuse of powers, so it would be interesting to collect the data from there. The data may be doubly counted. The other thing is that State Trustees, through the nursing home system, have applications for administration orders because of misuse of powers. Where bills are not paid and accounts are not met, the nursing home proprietors make an application to VCAT for an administrator to be appointed and that is usually State Trustees. There is a whole area of data that is available. Of course solicitors do not hold them in their custody. It is not like a will; you may keep a will. At this stage it is very difficult to determine. You just get an inkling that the more educated and the more

financially astute people are able to sign them. You may get people with disabilities or people who are on the pension may not have them.

Mr DAVIS — Another matter that arises, too — and it muddies the waters is that there is more than one source of representation besides the power of attorney to control another's affairs, for instance. There might be joint signatories on bank accounts or, as we were discussing this morning before the meeting, Centrelink requires a responsible person on record. Certainly there is some indication that they take that person in preference to anyone else who might appear with a power of attorney under which they have been duly appointed. Centrelink will say, 'We don't recognise the power of attorney because we have on record someone else, who is really responsible for the information we are seeking'. That is part of the difficulties.

The CHAIR — Thank you.

Ms BARRATT — Laura, you compiled these briefing notes. You have a reference here to evidence that was given to the Slipper report, and there is a figure here of 11 per cent of the population with valid powers of attorney and 14 per cent of people residing outside capital cities. Perhaps you could refer that paragraph to the Committee.

Ms HELM — Yes, that is available in the Older Persons and the Law report.

Ms LEE — We are not sure where that data came from, either.

The CHAIR — That is really useful. Thank you.

Mr CLARK — Can I follow up on the issue of elder abuse and the question of what can and should be done about it. We heard a horrific example given in evidence previously about someone who purported to use a financial power of attorney to try to deny medical treatment to the donor. On the evidence that was given, the hospital did not check that the power related to what was purported to be exercised.

You mentioned the issue of a register of powers of attorney as one safeguard, and that makes a lot of sense. Do you have other suggestions, both legal in terms of attaching sanctions or penalties to misuse, or practical ones like ensuring that people know what the remedies are if they suspect elder abuse, that they can get on to the Public Advocate or VCAT, or that they should check what is in a document or there should be better warnings in the documentation that is currently issued encouraging people to issue enduring powers? Do you have views along those lines?

Ms LEE — I think the document itself needs to be strengthened so that the powers are clearly stated and outlined and codified. I notice you are interested in that. I think the question of even having a register is interesting, and how you go about doing that. I notice when you fill in your Medicare form it has a little box that says: are you an organ donor? That might be one way of at least registering the numbers and then you would have an idea how many were there. I am sure that is a question for the Committee to address.

There is also an inequity. If you are an administrator appointed by the Guardianship Board, you are required each year to put in a statement of accounts. Yet if you have an enduring power of attorney, there is no regular auditing that is required of you. That would be an horrendous task because I think there are 7000 administrator orders currently operating and so VCAT already receives 7000 statements of account for people who have administration orders. Some sort of accounting mechanism I think is required. The three are: a register, the codification of requirements and the strengthening of the accountability requirements.

We are currently finding that, even though the instrument has some responsibilities and you need to address fiduciary duties of the attorney when it is being drawn up and you sign it, if there is concern about it or we might have concern about the relationship between the donor and the donee, the parties will disappear out of your office and go to the chemist or go to the dentist or go somewhere else to have it signed, where there may not be the same attention paid to the capacity issues of the donor. I do not know; I cannot be judgemental about that. Those things need to be strengthened to build in mechanisms where people are more accountable and take their responsibilities more seriously.

Mr BROOKS — I want to ask a question about the suggestion that you have made in your submission that there be a harmonisation of the power of attorney legislation across the country. Can you point to any particular

states that have either very admirable legislation or even parts of it that you might think are worth us picking up or having a look at?

Ms HELM — I think there has been discussion about the Queensland model. It is not something that at the Law Institute we have considered in detail, but that has been anecdotally the model that has been preferred, and particularly the schedules setting out in detail the duties and powers and that sort of thing, but I think David had some comments about the New South Wales forms as well.

Mr DAVIS — Yes. In the New South Wales legislation there is the form that allows you to choose, by ticking a box, whether this document is to be a general power of attorney or an enduring power of attorney. Then it goes on to also allow you to choose to say: I want to give a gift to the attorney, or in some way remuneration, which is raised directly within that document. Again, it gets down to a question of informed consent, not only on the question of whether the donor of the power understands the implications of what is being done but also whether the attorney understands the implications of what is being done. I think that is also part of what was referred to here — the codification or at least an explanation of, ‘This is what your attorney can do’. The donor says, ‘Yes, I understand that; I am happy with that’, and the attorney says, ‘Now I understand what it is I am supposed to do and I understand the limits of my powers’. Therefore if there is a subsequent question raised as to the adequacy of the attorney’s attention to detail and duties, then it is far more difficult for the attorney to argue that ‘I didn’t know’, or ‘This is what he would have wanted anyway’, particularly if it comes out to be something where the attorney is benefiting himself or herself.

The CHAIR — On Colin’s point about models in other jurisdictions, do you have a view, can you point to any?

Mr DAVIS — Again, on the Queensland documentation, there is a consensus here that that has been constructed very carefully to try to alert the attorney as well as the donor to the issues, and the New South Wales legislation specifically directs the attention to whether there is a general or enduring financial, but also the question of remuneration.

The CHAIR — We have received submissions and you have talked, too, about the abuse of powers by attorneys often being inadvertent. Do you agree with that, that it is not so much that people may be conspiring and doing something deliberately, but it is just something that comes out of a lack of information on their part, and what do you think can be done about that, if anything?

Mr DAVIS — I guess the first aspect is there is evidence that, yes, people just do not know the limits. I had a matter recently where, as it turned out, there were two concurrent powers of attorney, each appointing a separate individual as a financial power of attorney. They could operate independently without the other knowing what was going on. One was the daughter of the woman; the other was her accountant. The daughter had written, through her solicitor, to me wanting the originals of all of mum’s documents, including the title. It turned out that it was difficult to track down, but we actually ascertained that there was a second power of attorney, and the accountant had the information that the daughter was undergoing some financial difficulty, and that raised immediate suspicions about what are the merits of her request. I refused that.

So it is something where people perhaps do not see that they are not acting in the best interests of the donor of the power. The donor of the power, for instance — and it was something that was discussed earlier — might have previously been contributing to the school fees, and then the son or the daughter appointed as an attorney takes up that role and continues to withdraw the money for the school fees, because that is what mum and dad had always done. Whether that continues to be in the best interests and actually breaches their obligations is something they had not turned their minds to. It is just that this is a continuation of a circumstance that happened in the past.

However, there are more blatant disregards where clearly the attorney is out to benefit himself. There was a matter that I had in VCAT not too long ago, where there was a son, who was I guess the black sheep of the family, but the family felt that he needed some role in life to help with mum’s affairs, and they were happy to appoint him as attorney. It then turned out that mum was suddenly divested of properties. The interesting aspect of that was she was actually signing off on the transfers herself without the power of attorney being used, and yet he was the attorney. The power of attorney itself was framed to operate immediately as from the date of

execution, not from incapacity. So there was a number of very complex issues that had to be resolved in that case, and it was not an easy matter.

So the question of abuse arises, but it is usually after the fact and after someone has raised the alarm to say, 'I'm not quite sure why there is a "for sale" sign outside of mum's home. I've come down from interstate to see her. She's not there. I find she is in a nursing home. What's happening?'. It may be just a very simple case where the family just has not communicated that mum had to go in. The home had to be sold. There has been an ACAS assessment that mum cannot manage her own affairs any more, and it is absolutely essential that this step be taken. It is just that the attorney got so busy trying to juggle everything and get mum in and also run a family home with kids and school fees that he just did not think of it.

The CHAIR — Is this particular problem just part of life, that we just deal with and live with in a community, or do you think there are regulatory measures or procedures that can be put in place that might minimise it?

Mr DAVIS — Certainly my view is there should be regulatory procedures to flag these things so that people see there is a threshold that has to be attended to before certain steps are taken, and therefore the incidence of the abuse — whether intentional or otherwise — can at least be addressed proactively. That is my view, but I am sure other members — —

Ms LEE — The misuse of powers occurs on every level, and it occurs when people who are care providers misunderstand that a financial power of attorney does not mean that the holder of that power can decide where mum lives or that they therefore have the decision-making power over every decision that affects their mother. I think that is probably a public education campaign or a professional development campaign, so that people who actually work with these instruments are better themselves aware of what the holder of that power is entitled to instruct them about. I also think, and David has pointed out, that there are behaviours that are normal behaviours within a family, and the majority of families seem to manage okay. There might be a little bit of spending that may be not in the best interests of the person. Then there is the blatant misuse, where the person is totally disadvantaged and without a home because there has been a mortgage against the home.

I think that a well-constructed advance plan on what the estate is to be used for in the provision of long-term care or care, such as 'The home is not to be sold unless', so that there are conditions included in the financial power, and there is space on the document for those. There might even be a suggestion as to how that is managed. Then everybody knows exactly what is to happen, and the family is aware of when the house is to be sold, so it does not surprise the family that mum is to be kept at home as long as she wants to be, that the money, instead of going to school fees, is now to be spent on her care to make sure she stays at home. That is sort of almost an end-of-life management plan, and it is part of that, which is probably separate from: as mum gets a bit unsure of how to manage her money, she calls family in to manage that. So it is around the whole capacity thing, too, I think as well, but I think that makes it clearer.

Mr CLARK — Yes, that was very helpful. Can I follow on and explore how what you are proposing would be set up in relation to how much of that is hard-wired into the powers that are given under the power of attorney and how much is an expression of wishes or intention that are sort of next to but do not legally constrain. It is getting back to the point of whether, when you have an integrated power, you sort of tick a box: I'm appointing you for financial, you for lifestyle and you for medical, in those broad fields or whether you can customise it. Clearly, the issue with customising is one that gives more power, more scope and more control but on the other hand it makes it more complicated to work out whether or not an attorney is acting within power. Do you have a view as to how you would formally identify the heads of power that be granted to an attorney versus what you would record somewhere else as an expression of intention?

Ms LEE — I think a lot of that is an expression of intention. I think that if the document is too restrictive, families are unable to then act in the best interests, but as long as those wishes are known and they are documented, that makes the document fully operational. I think it is about making those wishes known, and then if there is a challenge to it, you have actually got it written. If it is seen as a misuse, then you have got written down that power and what the intent of the donor was. David, have you thought about that?

Mr DAVIS — The issue from a solicitor's viewpoint is my obligation is to my client to make sure the donor understands the implications of everything and also to be able to ensure that the document he is signing will be

effective to achieve his intentions. It is not my job technically to try to educate the donee of the power. Yet there is that tendency, even now, to get the statutory information from the Department of Justice to say, 'Here's the copy of the power of attorney that has been made in which you are appointed; here's the information that says: this is what you can and cannot do — you know, the extent and the limits of your duties'. I find that to me a necessary step to ensure that I have done my duty by my client. It raises the question too as to whether or not the donee of the power needs to then go off and get separate legal advice to say, 'Well, what do I do now?', because of course the level of capacity again is the donor understands, but does the donee comprehend? Sometimes people are not actually suited for the task they have been appointed to do.

So in answer to your question, or hopefully a partial answer at least to your question: it is important to flag these issues so that, again, there is informed consent: do you understand what you are getting into? Because the whole issue of capacity, and certainly the thrust of Australian law is that capacity is equivalent to understanding of a particular task at a particular time. The level of complexity of that task also then can vary, as determined by your capacity required to actually grapple with what is involved. It really works two ways, not only from the donor but also from the donee. If you have closed that loop, then I think you have gone a long way to proactively address the issue of abuse, intentional or otherwise.

Mr CLARK — That makes good sense. How, finally, do you think the donor should be able to specify what powers are or are not given? Should a donor be able to say, 'I appoint you as my attorney for financial matters', or can the donor also say, 'I appoint you as my attorney for financial matters in relation to my property, share portfolio, bank account, or other conditions or limitations'?

Mr DAVIS — With your approval, my view is that it is a similar matter to appointing executors under a will. So, for instance, Robert, you might be very good at managing the finances and the business. I have a personal business and I am sole proprietor of the business. You are the executor for that. On the other hand, Johan, you are very good at seeing the big picture, and at organising and administrating things — you deal with my personal estate. So I can actually appoint two separate executors to deal with two different aspects of my affairs after I die. I see that analogous to trying to get horses for courses: who is the best person for the job in relation to this particular set of assets, or who might be best for that particular category of tasks required to look after my personal affairs if I lose capacity? I say again that sometimes I have been put to the task of having to do concurrent non-revoking powers of attorney for just that kind of event, to say: Robert is best suited to deal with really hard property development, financial affairs, and Johan is best suited to deal with the other administrative aspects of my particular affairs.

I have always had a fond affection for the old 1980 guardianship legislation in which you had a document that enumerated the kinds of roles that the attorney could do, so it was not exclusive but it certainly gave very good guidelines as to, 'I can do this, and I can do that'. That means that if it is not mentioned there, it has to be something that pretty much falls into that kind of list as far as the intent. So hopefully that has been a partial answer to your question.

Mr CLARK — If you do that, how then does the third party know which attorney is valid for which transaction when someone rocks up with a power and says, 'Hey, I'm authorised to do so and so'?

Mr DAVIS — To my mind, it is then enumerated in the actual document itself, to say: this is the limit of the power. As it stands now, for instance, it may be that clients are going overseas and they want to do a power of attorney only for the completion of the sale of their property and once that has all been signed and done, that particular power lapses. To my mind it would be clear on the face of the document, the extent of the power and even the duration. So there is no confusion.

Ms LEE — I think there are two purposes. One is the management of the estate so that the income earned is managed appropriately and well and the other is the intent with which that money, that income, will be spent. I think there needs to be clearly stated in the document that statement of intent of how that money is to be spent in that person's best interests. I think it is something that both the donor and donee should think about, so that it instructs the attorney as to, when the person loses capacity or before, how that income is to be spent in that person's best interests, so it is space there for their wishes to be heard. Otherwise we could end up with the big debate that it financially is not viable if you spend it all, sell all the shares and cash in the trusts to put mum in a good nursing home, because that is not good financial management. It does not make financial sense, but in fact it is in her best interests as what the income should be spent on. Those need to be stated clearly: who is going to

manage it in the best interests of the person for financial returns, and how it is to be spent in the best interests of the donor.

The CHAIR — I know you have talked around this, but just to go into it in a bit more detail, there is this notion of best interests. It is aspirational, and it can be cut in as many ways as there are people forming an assessment. Is there a framework around that that guides the procedure, a way of thinking, that you think is valuable or exists?

Ms LEE — Yes, there is precedent for that. Certainly that is one of the considerations by the Guardianship Board in appointing an administrator and a guardian, that you are required to act in the person's best interests. That is spelt out in various case precedents, as to how that is enacted. I should imagine there would be other case precedents, but the best interests depends on the same as capacity. It depends on the incident of what is occurring and the best interests of the person that has been assessed by the ACAS team as to need high-level care. It is something that is in the developmental stage, as we develop what is in the best interests.

The CHAIR — Because it seems, just in my experience, what sort of cuts across it is that where a person is in need of support, there can be a tendency both in institutions but also in families to think that what is in the best interests of a person is really a management model rather than a rights model.

Ms LEE — Yes, I was going to say — —

The CHAIR — That is quite tricky, because we want to take care according to our own lights, rather than necessarily assessing how the person would have wished to do it.

Ms LEE — That is right. That is why we always focus on the statement of intent, and any instrument that is drawn up has that as its primary focus, that it is the donor of the power that is giving that power to someone to act in their best interests. It basically starts with what it is they would like, so that the human rights framework of self-determination and autonomy is respected.

The other issue is if you go in and assess how a person's best interests is played out, if the person has lost capacity, it is about looking to assess risk reduction as well. You would balance autonomy and self-determination with how much risk is in that person's best interests if they are saying, 'I definitely want to stay at home. Under any circumstances, I need to be left at home', and that statement is played out and is written, quite clearly stated, in this statement of intent. In fact you have to balance that autonomy and self-determination with the risk. It is a balance which people face all the time: how much risk are we prepared to allow or, if they are the guardian, with guardianship power, how do they decide when the person is to go into care or what healthcare needs they have? It is that balance for those people as well, when that is spelt out in the guardianship directional statement.

The CHAIR — Did you want to add to that, Lynne?

Ms BARRATT — On that continuum of risk and protection, any legislative enactment concerning best interests could probably benefit from having a restriction. It is not necessarily in the best interests to do certain things, or it might have an iteration of things that should absolutely be avoided, like conflicts and so on. Getting back to Mr Clark's question about inadvertent abuse, doing something in the best interests of someone has often been the basis of quite a lot of abuse and so the autonomy model is really to be preferred.

I made a submission in our consultation phase that I thought — and this is my view, not a fixed LIV view — that appointed attorneys could benefit from clear instructions about what the document does not entitle them to do. It really involves a two-stage process: firstly, analysing the lifestyle decisions, and then looking at the delegation of powers that you need in order for those decisions to be carried out. The difficulty with the present form of financial power of attorney is that it is expressed in such a global way. Section 115 says 'anything ... the donor can lawfully authorise an attorney to do'. It is fairly global and unfortunately grantees take that as *carte blanche* to take any form of action.

As an example of potential misuse, it is common practice now for older residents entering aged care to be told, incorrectly, that they must appoint a financial attorney at the time of entry. In theory, the financial attorney has a range of powers — for example, to liquidate assets and to pay for fees in support of the chosen lifestyle. In my experience, the facility management and the appointed attorney have sometimes used those documents to make

a range of lifestyle decisions, including seclusion and medical treatment, and have even purported to use a document to support an application for an intervention order to prohibit contact by visitors.

This issue that David raised about grantees understanding the limits of their powers or the purpose to which the powers are put is very important. I suggested that one approach to consider is a modification of the family law approach to the compulsory provision of information by means of a pamphlet which the practitioner must depose to having provided. It does not affect that situation of the conflict of interest that David spoke of, where you draw the document on behalf of the grantor. You are not acting for the grantee and yet it is the grantee who struggles with understanding the scope of their powers. I would support a system of referral to another lawyer for independent advice about the scope of the powers. Something less than that would be that the grantee at the time of acknowledgement must acknowledge that they have been given a pamphlet concerning the scope and limitations of their powers.

Mr BROOKS — Just in relation to the establishment of the register of powers of attorney, what would you see as being the major benefits of that register and also the costs in particular, and have you got a view on how the costs should be allocated?

Mr DAVIS — There is certainly a lot of support within our group for that concept because it means that there is a method of tracking administratively the number of powers of attorney that have actually been done. The issues of access we thought would be analogous to what is already done by Births, Deaths and Marriages — people who are family members or people who have clearly demonstrated interest have access to that information. A register of powers of attorney is one thing; however, just because a power of attorney exists does not necessarily mean it has been activated. In my ramblings in the middle of the night, I thought it would also help to know when the buttons have been pushed, and this particular document is now in place.

A third aspect of that is that the accounts be done and lodged — not that they have to be reviewed and assessed, but at least they are there for review should the need arise. If that is not done and there is a clear indication that the document is in use, then it raises a question as to whether that use is being done properly. That is at least the first aspect. You could say, ‘It’s a wonderful idea. How much is it going to cost and who’s going to pay for it?’. We have not really come to terms with that yet. It may be that a lodging fee would help defray some of the cost but certainly, as we said earlier, we really have no idea how many of those things are out there, how many of them are in use and how many are actually being misused. A register and even a national register is something that would certainly assist in keeping track of the issue.

Ms LEE — One of the outcomes of the Inquiry and the report on the legal needs of older people is the increasing number of people who are now mobile — they have an enduring power in one state but they move to another to be cared for. There is some agreement around harmonisation of that legislation. If we have got harmonisation then it seems to me we need to have a commonwealth way of registering at least that they are in existence, whether that is through the Medicare Act, taxation or some other federal body. But also in the overseas jurisdictions, there is a lot of work done in the banking system — the reforms in that area of commonwealth law. The enduring powers of attorney (financial) are registered within the banking system and it is the banking ombudsman that is alerted to any unusual transactions that are taking place. I know this is state-based but there certainly is a need to address wider issues when we look to reforming this piece of legislation. I think harmonisation is one of them and then we need to be aware that the reform can take place and the commonwealth can address the banking and the legislation that is within their jurisdiction’s purview.

Ms BARRATT — Just in terms of the costs, VCAT has a system where administrators under administration orders are required to file annual returns, and I believe it is for a fixed fee — it is not on an ad valorem scale, which I think would probably be resisted. I think it is a modest fee.

Ms LEE — It is \$100.

Ms BARRATT — They could be approached for an idea of the cost of managing and supervising, if 14 per cent of the population decided to lodge at once — they could probably tell you that.

Mr CLARK — In the absence of a national scheme, you recommend two separate forms of powers of attorney under the reforms that you are proposing, and we have had previous evidence saying there should be just one form. Could you tell the Committee why you think there should be two forms and also, although you

have given some explanation in your written submission, could you explain to the Committee how you would differentiate between the two separate forms you are recommending?

Ms HELM — My understanding of the reasoning behind the two forms is that it is to recognise that the activation of the powers would be different, whether it is under a general or an enduring power of attorney, given a general power of attorney would come into operation either immediately or under the events specified in that instrument whereas under an enduring power, because of the issue of incapacity and the fact that it will continue to act, there is just a bit of concern that if it was made into one document the person making the grant may be confused about which type of instrument it was they are making.

Ms LEE — I think the general power of attorney is a useful document in its own right. When a person loses capacity and there is an enduring power of attorney, that is the issue for us around misuse and abuse. It seems to be at that stage. That is a more difficult instrument to draw up, and it should be. It is a more important document to register, monitor and keep track of. With the other, the person who has capacity has control over the decisions they are making, and in fact it is determined by the purpose of why it is drawn up. I think it is just more useful to distinguish between those two phases. If we are trying to prevent abuse, then it is the enduring power of attorney that is the one we need to focus on, and still leave people free to draw up a general power.

Mr CLARK — What sort of decisions would each form of power of attorney allow to be made, and would the general power lapse when the enduring power became activated because the donor had become incapable?

Ms LEE — My view would be that they would be two separate instruments and have different responsibilities. They are quite different in terms of the purpose of the instrument.

Mr CLARK — Would a general power cover financial, lifestyle, medical — —

Ms LEE — It is just a general power for a specific purpose that lapses. The person can easily revoke it or it lapses at a particular time. If they are overseas on a study course and they need to have something managed at home then my understanding is that that was the intent — to leave people free to manage that part of their life while they have capacity. But the question of abuse and accountability and registration I think more importantly arises, without the state being too protective, in having a way of managing that enduring state.

Mr CLARK — When you say general power you mean the current schedule 12 of the Instruments Act?

Ms LEE — Yes.

The CHAIR — Just following on from that and looking at the enduring powers, that category, there are two splits there. One view that has been put to us is that in all instances a medical practitioner says, ‘At this point now you have lost capacity’, so you do it as an advance — ‘I have capacity now but later on when I lose capacity this will happen’. The other option is, ‘I have made a decision today that I wish you to be my attorney’, and that will become active from the moment I make that transaction, which would allow a relationship to be developed, and embraces the notion of it being a multidimensional process. Which of those two options do you prefer?

Ms LEE — The instrument we have now has the little boxes to tick, and one is that it can be activated immediately on a specific date or on a specific occasion such as losing capacity. I think that is very confusing for people. They say, ‘Look, tick the first box. It can be activated from today’. It is very confusing. I think people do not understand the extent of the power they are handing over to the same degree. If you said, ‘This is one that you can control and have decisions over. This is a power of attorney that you are signing that you have total control over now, but this one has a particular purpose and that is to protect your interests when you have lost capacity and you then will have different interests which you can state as a statement of intent’.

The CHAIR — I accept the primary distinction between the general and the enduring. But just focusing on the enduring, the enduring has two approaches that can be taken as well. I guess a view that I am entertaining at the moment is that the question of capacity is clearly problematic. It does not happen on 31 July — —

Ms LEE — That is right.

The CHAIR — It is a continuum that has all different factors in it. The argument would be that that is best handled in a relational way. Then the question is: is it better to establish that relationship when the person has

greater capacity rather than at a point where somebody has to make a decision — we are saying a medical practitioner — to say, ‘As at 31 July you can no longer do these things; it becomes this person who substitutes for you?’. It is really around how we navigate our way through that set of problems?

Ms LEE — I think that whilst the person is able to build the relationship and has autonomy and can make decisions is certainly the time to draw that up. I think it can be drawn up to be activated when they do lose capacity and I think when they lose capacity there is the issue of who determines that they have then lost capacity and the document is activated. How we go about that is the other debate we need to have. During that process of cognitive decline they may in fact go in and out of capacity, and there are days when they are fully competent, or competent enough to understand what is happening, and periods when they are not. I think it needs to take account of that. Certainly, it would be drawn up when they are able to build up a relationship and determine who it is they want to be their attorney.

The CHAIR — I am very conscious of the fact that we have kept you 10 minutes longer than we promised we would. I will put the last question. On the issue of the education of legal practitioners, a number of the submissions have highlighted that some practitioners may not fully understand the powers of attorney documents, and they suggest that a regime of training for lawyers be put in place. What is your view on that?

Ms HELM — I guess we do have a CPD program at the Law Institute, and we already run regular seminars on powers of attorney. Recently we had a forum, which was a 3-hour forum, on the issue of powers of attorney and conflict of interest. I guess our problem is that training is mandatory for lawyers but only to the extent of the CPD regime and not on specific topics, so we cannot force our members to train in particular areas, but we do offer that.

The CHAIR — Is there good take-up?

Ms HELM — There is usually a very high turnout, yes.

Ms LEE — We need to educate the medical professional, too.

The CHAIR — You are lawyers, though. We will deal with them later. Thank you, Lynne Barratt, David Davis, Laura Helm and Jeni Lee. It has been very stimulating, and I am sorry to have kept you.

Ms LEE — No, it is our privilege. Thank you for allowing us to appear.

The CHAIR — You will receive a copy of the transcript, and we may contact you later. Thank you very much.

Witnesses withdrew.