

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 22 October 2009

Members

Mr C. Brooks	Mrs J. Kronberg
Mr R. Clark	Mr J. Scheffer
Mr L. Donnellan	Mrs H. Victoria
Mr M. Foley	

Chair: Mr J. Scheffer
Deputy Chair: Mr R. Clark

Staff

Executive Officer: Ms K. Riseley
Research Officers: Ms S. Brent and Ms K. Harrison
Committee Administration Officer: Ms H. Ross-Soden

Witnesses

Ms J. Linklater, Policy and Advocacy Officer, and
Ms P. Hore, Member, Consumer Reference Group, Alzheimer's Australia Vic; and
Ms M. Brown, Adjunct Research Fellow, Hawke Research Institute, University of South Australia.

The CHAIR — I welcome Pamela Hore and Jill Linklater from Alzheimer's Australia Vic. Thank you very much for coming. This hearing operates under the protection of parliamentary privilege which is enshrined explicitly in three Acts of Parliament. That privilege is not afforded outside this hearing. Thank you very much for the submission that we received and read. We will make a start and Margaret Brown will join us via telephone once we have made contact. We have half an hour, so we need to be reasonably snappy. We will give you a few minutes to set up and speak to the terms of reference or your submission, if you would like, and then we have some matters that we would like to raise with you as well.

Ms LINKLATER — I have done a little brief overview to talk to or else I can just table it and leave it with you.

The CHAIR — No. Just talk to that quickly while we are waiting.

Ms LINKLATER — Thank you very much for allowing us to come and present on behalf of Alzheimer's Australia Vic. I am unsure about your background and knowledge of dementia.

The CHAIR — Assume no knowledge.

Ms LINKLATER — Assume no knowledge? I have come assuming no knowledge, but I did not want to be presumptuous!

In 2005 dementia was made a national health priority, and I think it is very important to remember that. The issue in terms of dementia is that we are really talking about people who are having a decline in their cognitive skills, memory, reasoning and communication skills — that is really the big thing we are talking about now with powers of attorney — and their capacity then to make decisions and to carry out activities of daily living. A report issued last month — and I have a copy here for you if you do not have it — identified that we are facing an epidemic of dementia in terms of the ageing population with the longer length of stay of life and also with dementia now affecting 1 in 4 from the point of 85 years and over. When you get to the age of 90-plus it is 1 in 2 who will have dementia. From 65 on it is 1 in 70 and then in the 70s it is 1 in 16. Your chances of getting it increase the longer you live but it is not a disease of ageing. We are also now getting people who are younger Australians getting dementia in their 20s, 30s and 40s — we have about 10 000 of those people in Australia — and the issues for them in terms of decision making and families and work and life are really also major issues and different from those who are in the older age group.

The issue for us is that the most important thing for people with dementia is early diagnosis. It is really important that we get an early diagnosis so that they can then make decisions about planning for their life and what is going to happen whilst they have the capacity to make those decisions.

The other thing is about the importance of having the ability to have the health professionals, the legal profession and the financial professionals understand and know what is required is to help these people make decisions or to give them correct information for decision making.

We also feel that it is important to think about the fact that the financial enduring power of attorney is separated out from the enduring medical power of attorney. It is important to remember, I suppose I should say, that there is an umbrella first of all. We talk to our clientele, our customers, about advanced care planning, but early on they need to make a decision about what they want to do in later life. Under the umbrella of advanced care planning, or advanced care directives, comes the enduring power of attorney for financial matters, decisions about medical treatment and decisions about lifestyle. Therefore to separate any of those out actually makes it more complex for the average person to deal with and make decisions. If they are dealing with different structures, different systems, different legislation, different pieces of paper — that is the confusion for people at the moment in relation to the current system.

There are a number of recommendations that have been put in place. I have summarised those in this document here as well. They keep coming back to the 2006 inquiry into older persons and the law, which was the Australian Government inquiry. It identified the same issues about needing to have a national system and needing to have standardised legislation, standardised documentation, standardised formatting and processes there to protect people. We really are reinforcing and restating that those things are necessary.

In summary, I suppose the other thing we need to say, which I thought was quite a little synopsis, is that the importance for us is really about the personal empowerment of a person diagnosed with dementia, the assurance of having a designated person as somebody that they can trust, whom they have made a decision about so they will carry out their wishes, not somebody else's wishes. It is also about the importance of having a system in place that protects them against the fraud that is happening to them now, which we do hear about and read about in terms of financial fraud that can happen within families. It is about protecting those people against that and having some capacity to put something in place. Financial fraud is really not a crime but it is happening, and there is no capacity for somebody with dementia to be able to know that something has happened to them, that someone is being fraudulent and things are happening. We have to have all these protections at the beginning.

The CHAIR — Margaret, my name is Johan Scheffer. I am the Chair of the committee. Thank you very much for talking to us. Thus far Jill Linklater has given us a brief overview of where Alzheimer's Australia is coming from in terms of this inquiry. I guess we are just up to asking some questions. What would be useful perhaps would be if you introduce where you come into this discussion from.

MS BROWN — Yes, certainly. My name is, obviously, Margaret Brown. I am a Research Fellow with the University of South Australia. I have taken a particular interest in advance directives, advance decision making, including enduring powers, for many years. I am a social scientist, so this is my area of research. More recently I was the Deputy Chair of the South Australian Advance Directive Review Committee, where we reviewed the South Australian legislation. I have frequently written documents for Alzheimer's Australia.

I also do quite a lot of seminars and teaching for Alzheimer's Australia South Australia. When there are issues related to advance decision making I am frequently asked by the organisation to write some commentary, hence my being asked at this stage.

The CHAIR — Okay. I will jump in with perhaps the first thing we would like to ask you to talk to us about a little bit. Your submission, and Jill in her opening remarks, has argued for one piece of legislation covering all powers of attorney. We note that most other Australian jurisdictions have that. Of those laws is there one that you think exemplifies the best practice model that Victoria would learn the most from? Any one of you can respond to that.

Ms LINKLATER — I do not have that knowledge. Margaret, I do not know if you do.

Ms BROWN — I think there is no such thing as perfect legislation at the moment. Queensland and the ACT have moved more in the direction of combining enduring powers for both health-care decisions and financial decisions, but what I would strongly recommend is that your committee look at the reports from the South Australian review committee because we are recommending quite a significant change in the direction of legislation. Obviously we did not think there was a perfect one in place at the moment.

The CHAIR — Thank you, Margaret. Are there questions from other members of the committee?

Mr BROOKS — This is for any one of the people here. The submission that has been provided talks about a tool for assessing capacity. It has been recommended that we have a look at a toolkit that has been produced by the Attorney-General's office in New South Wales. I was just wondering what the factors are that make that something that we should have a look at.

Ms LINKLATER — When I looked at your terms of reference and in gathering some research and looking at what was happening I did some research and came across this information from New South Wales to see what they were doing. I went through what they had. It is certainly a huge volume of paper in terms of this toolkit. I thought, 'Gosh, that is a mammoth amount of information', but it was really more to bring to your attention that other jurisdictions are looking at trying to do different things to provide information to educate the community about what they need to do and about decision making and capacity. It was really an awareness for you to be aware that that was happening in New South Wales. They have talked a little bit about that. I do not know if Margaret has any knowledge of how the tool kit is functioning and working in New South Wales.

Ms BROWN — Not exactly, other than it has been widely recommended as a very useful advance in this area. Prior to this there has been no consistent definition throughout the country on capacity and no consistent way of assessing capacity. I am sitting on the Guardianship Board today, and I can tell you it is really a very difficult area. We need better education for health professionals and some way of thinking about assessing

capacity. It is a very useful tool. I know that we have recommended in South Australia that it be used here but made applicable to the legislation in South Australia.

Mr FOLEY — Changing tack a little bit, earlier we heard some submissions from the Office of the Public Advocate and others pointing to a number of international experiences of interested persons having a role as to how attorneys' powers could be overseen, or brokered sometimes even, if there were difficulties. I think Japan was another model that we had alerted to us. You have identified that there needs to be increased oversight by third persons. Have you had a look at the UK model? Some people have described it to us as a useful one; others have said it is overly prescriptive. I was wondering what your organisation's views were on that whole notion of a third party more generally and if the UK model was worth any particular attention.

Ms LINKLATER — Could just ask if Margaret has a comment on that first? She may have more expertise in that.

Ms BROWN — Yes, I am really struggling to hear.

Mr FOLEY — Sorry, Margaret.

Ms BROWN — I think I understood the question about the UK model and nominating perhaps what I would call a monitor. Is that your question?

Mr FOLEY — Yes, it is.

Ms BROWN — That is one of our recommendations from the South Australian review committee, that a monitor might be appointed so there is some supervision, particularly in terms of enduring powers of attorney for financial matters. Yes, we would be in favour of that model and leaning a little bit more towards the UK model. I would strongly recommend that.

Ms LINKLATER — I think from our involvement — and maybe even Pamela might want to comment as a consumer herself and having gone through it; she deals with a helpline all the time and has calls every day about enduring powers of attorney and the issues — I think there is concern there that needs to be a higher level of accountability and some oversighting of the process. What that model is I am not sure, but I would be supportive of an external independent person or process to actually ensure that that is happening to the best benefit of that individual who was giving that decision making away to someone else.

Mr FOLEY — What kind of other roles do these people in the relationships to these third parties, from the different models, have to the person who is giving the power of attorney?

Ms LINKLATER — I do not know myself. I cannot answer that, because I do not have the experience and knowledge about those models. I think from my discussions with Margaret — and she might want to confirm — it is sort of like having someone who may be a professional or semiprofessional who is being held to a higher accountability in terms of ensuring that all the boxes are ticked and everything is right and proper. Rather than the current system whereby it can be just between family members and/or the person who is giving away that attorney right to someone and there is not any oversighting or any independent third party to ensure that that has all happened and in the capacity of a person to make that decision they know and understand what they are giving away. What we understand and we hear is that sometimes people do not understand the rights that they are giving away and they were not aware that that is what they were giving away when they actually signed these powers of attorney. It is having some system that ensures that that is in place and there is a monitoring of that.

Ms HORE — I would think so, yes. Quite a lot of our calls are from people who have wayward members of the family who suddenly see an opportunity arise whereby they might fill the role. The caller will ask, 'How do we deal with this?' — the wayward brother who has come home from being away and enjoying life and suddenly realises mum is not so good anymore. I had two calls like that yesterday, simply about money. Also, if powers of attorney have been lodged with banks and yet the bank suddenly lends \$30 000 because the person who has diminished capacity goes along and asks for an extended loan. At the end of the day it is on the file that the power of attorney is in place. Therefore, we need to look at how we are dealing with that.

Ms LINKLATER — The systems.

Ms HORE — The systems that are in place for that sort of thing happening.

Mr BROOKS — I have noticed that you support a system of registration of agreements. I was just wondering about the issue of cost. If there was a small administrative cost to cover the cost of running the scheme, do you think that would impact on the take-up, whether people would maybe be dissuaded from taking on agreements because of the cost?

Ms LINKLATER — The feedback I get from the consumers and the people and the families is that they think one way of ensuring that there is a bit more rigour and a bit more accountability is to have a register. I think there would be different views on whether that is appropriate or not. I do not think that we have a standard position that we should have a register. I think there are some views that there should be a register. I think the bureaucracy and the monitoring of the register is an issue. The costs of it could be something that may or may not make it the best solution. From the people who have spoken to me, it was about we need some way of ensuring that there is some accountability and that people know who has got a power of attorney and that there is rigour around that person being held accountable for what is happening with it.

Whether it is a register or some other system, it is about the accountability for that person who has the power of attorney and other people knowing that that power of attorney is in place. We also have examples where people go into nursing homes and there are powers of attorney but nobody knows. The family members say there is not and somebody else says there is. The system is not supporting the fact that they must actually ensure that there is the power of attorney.

It should be in front. Like you have a ‘not for resuscitation’ in a hospital in the front of a file, if you have an enduring power of attorney, it should be right up there on the file in front of anything. People would know right up-front that, ‘This is the person I deal with; it is not someone else who I go and make decisions with in relation to this person’. The systems are not there to support the rigour and the strictness and the accountability at the moment.

The CHAIR — Margaret, one of the issues that we have wrestled with is this continuum of the donor’s wishes as distinct from the donor’s best interests. We had a previous witness say to us that the notion of protecting or activating the best interests of the donor was very paternalistic. I note recommendation 20 in the Advance Directives Review Committee report basically endorses the position of activating the donor’s wishes, their preferences. What we are thinking about is whether or not that should have a place in guiding principles in legislation. Could you or Jill or Pamela comment on that?

Ms BROWN — There are many things I would like to say, but in brief, if we are talking about enduring powers covering those financial matters and health care provisions here — —

The CHAIR — Yes.

Ms BROWN — I think it is important to have basic principles in the legislation which say what we are aiming to do. We have discussed at some length in our review and decided that we should have the principle of autonomy — of respect for the person’s wishes — as one of the basic principles on which to base these powers. If that is the case, then appointing a decision-maker, be it for health or financial, should involve some sort of discussion and understanding of that person’s wishes so that they are respected.

I might be moving away slightly from the question, but I would like to say that it seems important because we decided against registration — and I will come back to that point if you would like me to. If we are looking at a least restrictive approach moving forward, the documentation should be improved to start with so the person’s wishes could be expressed on the documentation. If we are talking about money, that might be, ‘This is how I would like my money spent or invested’, so the person who is giving the power understands what power they are giving away — have it explained to them — and that the person accepting the power, the attorney, understands that they are accepting some sort of responsibility, that they should be respecting the donor’s wishes and that they are accountable. Perhaps there would be sanctions if they misused that money, and record-keeping would be important. That is when we bring in a monitor as well to perhaps monitor that record-keeping.

The other thing I wanted to add was we found it was very important to improve the witnessing arrangements. It is not just one factor that needs to be altered. But by improving witnessing arrangements we can get more certainty that the person giving away that power understands what they are doing.

Mr CLARK — We had a witness from the Office of the Public Advocate this morning referring to a New York study from the United States Department of Health and Human Services arguing that there is a paradigm shift going on away from focusing on a static act of advance directive completion, as that report referred to it, taking into account a wider range of considerations in working out how to act on behalf of someone with diminished decision-making capacity. Are you aware of that line of reasoning or research, and do you have any comments on it?

Ms BROWN — Is that directed to me? I am not quite sure.

Mr CLARK — Yes, Margaret it is.

Ms BROWN — Have I understood it that it is a New York report? I did not quite get the question.

Mr CLARK — I will just come closer to the telephone; I was at the other end of the room. There is a study by the United States Department of Health and Human Services entitled *Advance Directives and Advance Care Planning — Report to Congress* of August 2008 which was cited in evidence given by our Office of the Public Advocate. It referred to a paradigm shift from focusing on the static act of advance directive completion to a process that involves ongoing communication which emphasises an iterative process over time to discern an individual's priorities. Basically it argues that a single act of advance directive completion is too limited to ascertain a person's wishes. I wonder if you are familiar with that paper and that approach and whether you have any comment on it?

Ms BROWN — I am not familiar with that paper; I would be very interested to see it. If you read our recommendations from the South Australian review, I think you will find that our approach is almost identical. We talk about supported decision making and substituted decision making. Supported decision making really includes involving the person in that ongoing process. It is not just about writing directions and then not revisiting them. It is an ongoing process, and taking the person's current wishes into account as well. I think even though the language might be slightly different, you will find that it is a very similar recommendation to the one we are making.

The CHAIR — This is a question to Jill and Pamela and also to you, Margaret. Your submission refers to the fact that misappropriating family finances under an enduring power of attorney is not regarded as seriously as other forms of theft. I guess we were wondering about your views on how that attitude can be changed in the culture where somehow family money is quarantined off from serious crime.

Ms LINKLATER — The issue we hear about and that comes through the helpline that Pamela deals with as well is about if a person with dementia has diminished capacity to make a decision, often they do not know and they are not aware of these issues happening; that they are being defrauded and there are fraudulent things happening around their finances and that whoever is the attorney is actually taking advantage of them. That is one of the key issues. It does not get as reported, and it is not known by those in the immediate circle in terms of it not being in their best interests.

The CHAIR — If I can just interrupt you there, I think we appreciate that if someone is defrauding someone, that is one question. It is very clearly a crime, and I would expect the person doing that to know it. But it comes to those grey areas where there are quid pro quos and where on balance a person might think it is a reasonable thing to do, but if it was looked at objectively the person might be quite shocked — —

Ms LINKLATER — Yes.

The CHAIR — That it was seen to be theft. That is an attitudinal thing; it is a cultural thing. I guess my question turns on how that might be changed.

Ms LINKLATER — I think that comes into looking at this monitoring and the overseeing of powers of attorney and the accountability for what is happening in terms of that. We made reference before to a third

person, and Margaret alluded to that as well. That is happening in the UK. That may be the way to deal with some of those issues.

The CHAIR — Pamela?

Ms HORE — I would agree with that. I think it is important that there is some feeling of responsibility and accountability so the person of concern who needs that support does not even stand a chance of being defrauded at any time.

The CHAIR — Margaret, do you want to make further comment on that?

Ms BROWN — Yes. I just think this notion of actually changing the expectations right from the word ‘go’ in the documentation that the person is taking responsibility — I think if it is all made more clear — at least that would partly address the problem. Yes, I think that is probably the main thing I would like to say.

The CHAIR — We are out of time. Margaret Brown, on behalf of the committee I thank you very much for making time available. I know it has been a little bit difficult, but thank you for persevering. It has been very valuable. On behalf of the committee I thank the three of you for the submission. You will be sent a copy of the transcript, and you can make slight adjustments to it. We may well be in contact with you to clarify any points that have been raised this afternoon. Thank you very much.

Ms BROWN — Thank you. Goodbye.

Ms LINKLATER — Thanks, Margaret.

Witnesses withdrew.