

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 14 December 2009

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Witnesses

Mr S. Taffe, Legal Counsel, and

Ms S. Costar, Manager, Patient and Family Services, Caulfield Hospital, Alfred Health.

The CHAIR — Sally Costar and Stephen Taffe, thank you very much for coming from Alfred Health to talk to us this morning. This hearing operates under parliamentary privilege under a number of Victorian acts, and that basically means that whatever you say here this morning no action can be taken against you, but you will not be afforded that protection outside the confines of the hearing. Hansard will be taking down our discussion, and you will be sent a transcription of that. You can make minor editorial changes to it, but obviously the substance remains as it is.

I thank you for your submission, which we received. I will give you some time to speak to the submission and its terms of reference, and then we have some discussion openers, and we will get clarification on some matters that we need clarified.

Mr TAFFE — My role at Alfred Health is I am Legal Counsel.

Ms COSTAR — I am the Manager of Patient and Family Services at Caulfield Hospital.

Mr TAFFE — At Alfred Health we have significant dealings with power of attorney documents, and we consider the current legislative regime to be confusing and difficult for the general public to understand. Therefore we recommend that one act of Parliament should regulate the various powers of attorney. We also consider that a donor should be able to make all or any of the various appointments on one form; the form should be flexible so that a donor can appoint one or more attorneys to make financial, lifestyle or medical decisions; and the donor should have the ability to specify that the powers can commence at any particular time.

A common example we have in the hospital context is that patients and their families often become frustrated when they are informed that an enduring power of attorney (financial) does not permit them to make medical treatment decisions. That may be obvious if you have a detailed understanding of the legislative regime, but a lot of patients and families do not understand it and become frustrated.

A significant issue for us is that we consider the good character of attorneys should be looked at, because there is evident scope for abuse of vulnerable donors by dishonest attorneys. Currently there are no limits on who can be appointed an attorney and there are no limits on how many appointments an attorney can have. We recommend that the legislation should at least prevent a person who is not of good character from becoming an attorney. If the law prevents a person who has been convicted of a child sex offence from becoming a schoolteacher, then we consider a person who has been convicted of a serious offence such as fraud should be prevented from being an attorney. Sally has some practical examples of that.

Ms COSTAR — Yes. At Alfred Health we have been in the position where we have had an attorney who had a prior conviction for fraud take over the estate of a person who lacked competency, and indeed we believe the attorney was involved in some fraud with the estate. It became extremely difficult for the elderly person involved, who really had no way through. It was really only through the influence of her friends contacting the hospital that we even realised that things were amiss. I think there was no way of this elderly person — the donor — being aware of the attorney's background. So it all became very, very fraught.

I have also been in the position of taking a case to VCAT for a guardianship application where it became evident that the enduring power of attorney was in existence and it was being held by a person who was in jail for a very serious offence and was going to be in jail for a prolonged period. That person was administering the estate over the internet. It seemed to me that there were no checks whatsoever in what was occurring to that estate. My understanding was that there was nothing in law that said this person was not able to be the attorney. My application was purely around guardianship, it was not even around the enduring power of attorney, so I had no way of knowing whether things were in fact amiss or not, but it seemed to me at the time that the potential for things to be amiss in that sort of situation was significant.

Mr TAFFE — To follow on from Sally's examples, the current legislation does not require independent scrutiny of the exercise of powers of attorney, and we think that may not be necessary in the case of medical and lifestyle powers of attorney, because in those cases the decisions usually involve a range of health-care providers and other professionals. However, in the case of attorneys with power to make legal and financial decisions there is significant scope for abuse of vulnerable donors. Therefore we recommend that the legislation require all attorneys to act in the best interests of the donor and not anyone else's interests. Also, we consider that a person holding an enduring power of attorney (financial) should be required to submit a plan regarding

administering the estate, and if the donor's estate is worth more than a specified amount, the attorney should be required to engage an independent auditor to audit the estate each year against the plan.

The estate could pay for the audit, and possibly estates worth less than the specified amount could be excluded from the audit requirement because the issues may be less complex and there may be less temptation for fraud. It is perhaps not surprising that where there is a large estate involved, we see the cases of fraud.

The legislation should contain principles to guide attorneys in performing their role, and we think an attorney who abuses his or her power should be subject to criminal sanctions and should be required to compensate the donor. Did you have an example in that context, Sally?

Ms COSTAR — No, I did not, but my next example was around attorneys mixing up finances. I have certainly come across situations where attorneys have mixed up their own financial affairs with the person they are representing, and it often comes to light when things like a Centrelink assessment are required for a person going into residential care and the attorney has been unable to explain, on the Centrelink paperwork, exactly what the asset basis is.

When I have come across this I have often thought it was not through any intent for things to go awry but it was just that the attorney did not have an understanding of the responsibilities of an attorney and of the notion of how terribly important it is to keep the donor's affairs completely separate so that this kind of exercise, such as a Centrelink assessment, can take place. But it is a significant issue, particularly, I think, with older attorneys.

The CHAIR — So you are saying that mostly it is just innocent carelessness?

Ms COSTAR — It is often around, for example, married couples who may have been married for a long, long time. But there might have been discrete assets at some point. It might be a second marriage, for example — we come across those sorts of circumstances — and the attorney has just gone along in the way that he or she has always gone along and then just put things together because it is easy for them; so they have put shares and so forth into their own name because it is easier for them. I have never had the feeling that there was intent there, but it becomes a muddle.

Mr TAFFE — So even if it is done with honest intentions, the outcome may not be in the donor's best interests and there is also the opportunity for fraud.

Ms COSTAR — Even if it is unintentional.

Mr TAFFE — Currently it is very difficult for hospitals to ascertain whether or not a power of attorney exists, whether or not a power has been withdrawn and whether or not a particular power is the most recent version, and that creates all sorts of problems every day in hospitals. Therefore we recommend the creation of a public register. We think it is very important. Registration of all powers of attorney should be mandatory. The register should record all relevant details such as names, dates and conditions.

On the issue of privacy, we have grappled with the different issues. We thought that the organ donor register could be used as a model, and following that model certain types of institutions such as hospitals could be given access for their purposes, possibly also financial institutions, and those organisations could be subject to confidentiality obligations, and other members of the public could apply to have access.

The CHAIR — Could you give us a bit more detail? How does that work — the organ donor register?

Mr TAFFE — There is specific access that is given to the hospital workers who are involved in managing the organ donor scheme, and they have direct access to the register.

The CHAIR — To all parts of it? Is it layered or — —

Mr TAFFE — I am not entirely familiar with the specifics, and I am sure they liaise with the registry when it comes to accessing the information, but they are able to access the information fairly easily and readily.

We discussed this in more detail, and we thought it may be appropriate for the public to have access to the entire register, or at least to a list of the people who have given a power of attorney, so that anyone at any time could determine that a person has given a power. There may be some reason to challenge it, but currently if family

members, for example, do not know that another family member has given a power, maybe improperly or inappropriately, then those family members would have no knowledge that that document exists.

Ms COSTAR — But this happens quite regularly where we have patients admitted, a person in the family comes forward saying, ‘I hold an enduring power of attorney’, and other family members say, ‘We didn’t know anything about this, and we oppose this person holding the enduring power of attorney’. The donor by this stage may lack competency and be no longer able to give us direction as to what his or her wishes were at the point when the enduring power of attorney was drawn up, so it then becomes very complex. I do think there is a case for a registry to be available — just the names — to the general public.

Mr TAFFE — And another model that could be looked at in that context is the register for registered nurses which we at the hospital regularly access. That is available to the public, so every registered nurse — we have 4000 of them at Alfred Health — and all other registered nurses in Victoria are listed on a website that is available on the internet. It does not list much more than their names — it lists their registration number and it may list some conditions. We think that a public register for powers of attorney could list limited information, maybe even their names, and that might be sufficient to overcome a lot of the problems.

In terms of witnesses, there are currently not enough restrictions on who can witness a power of attorney. A witness needs to understand the concept of competence and be able to discuss the intent of the document with the donor; therefore we recommend that the power to witness a power of attorney be restricted to those professions where we can presume there is a degree of knowledge on the issue of competence, such as health-care professionals and legal practitioners. Those people are already required to assess competence in other situations in their professional capacity, and we think it would be helpful if the legislation contained principles to guide witnesses in performing their roles.

In terms of competence testing we think it would be very helpful for legislation regulating powers of attorney to set out a uniform test for determining competence. This is an issue in every medical treatment decision at the hospital. Competence needs to be assessed, and there are differing views even among health-care professionals who do it daily about what the test should entail, and some guidance on that issue would be very helpful.

I think the legislation should set out principles such as ‘Every adult is presumed to be competent unless proven otherwise’, ‘Competence is decision specific’ and ‘A person may be competent at some times and not at other times’. Some of those basic principles would provide very important guidance.

The CHAIR — Thank you very much for that. Just coming back to the beginning, you talked about the importance of having a single piece of legislation that covers all powers of attorney, and also you talked about having a consolidated document where people register their power of attorney and pass that on. We are aware that New South Wales and Queensland have consolidated documents. Have you come across a preferred model? Have you looked at those acts?

Mr TAFFE — I am not familiar with the specifics of those acts, but I do consider that a consolidated document should also, if possible, include the medical powers of attorney which are currently governed by the Medical Treatment Act, which I understand is beyond the terms of reference of this Committee.

The CHAIR — Yes.

Mr TAFFE — That is a document that we deal with quite regularly, and having that incorporated in one form would be very useful.

The CHAIR — Would you like to see that single act also contain in it some principles surrounding competence and capacity, for example?

Mr TAFFE — Ideally.

The CHAIR — All that?

Ms COSTAR — Yes.

Mr CLARK — To pick up on the last remark you made in your evidence a few moments ago about competence being decision specific, which seems to me to make a lot of sense, I wonder how you would then

go about specifying criteria for competence in the context of different types of decisions, given that we often have an all-or-nothing threshold. Is there a standard practice or a manual or are there established procedures around for that sort of competence determination?

Ms COSTAR — I think our neuropsychology colleagues who are going to be giving evidence after us would be far more helpful than we can be around that. However, at the moment we go forward with, for example, VCAT applications for guardianship applications where we have actually made a delineation that we are applying for guardianship, for example, for accommodation only. The person is quite able to give direction around their medical treatment, and they are able to give direction around access to persons, but they are not able to make a decision around accommodation.

I think that sort of model, if you like, already exists. We are doing that now, and it seems to me that it in fact works quite well. One of the issues that is probably going to arise is that this sort of very careful testing can take place within public hospitals because we have that kind of range of resources, but I think our colleagues in the community would struggle far more with that kind of scenario. It seems to me that one of the really important issues that needs to be incorporated in the guidelines in your proposed legislation is to give advice to people doing competency testing in the community as to where to go if they are uncertain or unsure of the capacity of a person around some of those more diffuse issues, if you like. A referral could be made to a psychologist, a memory clinic, a geriatrician or a lawyer, depending on the issues. That is something that could be really helpful, because I think we must be mindful that this kind of testing does not take place just in public hospitals.

Mr FOLEY — I take it that your guiding approach is the notion of what is in the donor's best interests. You are from a large metropolitan top hospital and are dealing all the time with the issues around front-end testing and verification as to who can be made donors et cetera and the good character test, but what if someone is relatively competent and quite openly chooses someone who is close to them who has been convicted of fraud and who does have bad character? There are a lot of people out there along these lines. Is the question for the community more broadly an issue of where to build the hurdles? Do you build them at the front end to prevent certain people from getting in, or do you build them at the back end to slow down and catch bad behaviour?

Ms COSTAR — If anything has happened?

Mr FOLEY — Yes. I took it from your submission that it was a bit of both, and I do not think it is an either/or situation. It is a balance between the person's best interests and the community's overall choice. Is that an accurate assessment?

Ms COSTAR — Yes, it is. I was faced with exactly this kind of dilemma with an application to VCAT for a person to become an administrator. At the VCAT hearing the proposed attorney identified himself as an undischarged bankrupt, and the VCAT member said, 'I cannot proceed and appoint you'. Even though everyone in the room felt that this person would have in fact done a very good job, the VCAT member could not proceed. My feeling is that if you are really going to do something about the exploitation that we know is occurring, unfortunately we probably do have to exclude some people who could in fact do a very good job. There are some instances where barriers should be put up, and my view is that fraud, perhaps serious crime and bankruptcy should be put up as hurdles.

Mrs VICTORIA — I had a different question, but to carry on from that one, once somebody has served time, is it not assumed that they have done their penance? Never to excuse crime, but if you are talking serious crime or if you are talking fraud, the circumstance might have been that the fraud was perpetuated by circumstances at the time. That is not to say they are going to rip their mother off. So at what stage do you say that we are going to do a blanket coverage of this and rule everybody out who has a criminal conviction — —

Ms COSTAR — From 20 years ago.

Mrs VICTORIA — Yes, but of this type of calibre; and at what stage do you say people can actually reform?

Ms COSTAR — And I am sure that legislation could be sensitive to that and make a decision around that. My view is that somebody who is actually in jail administering an estate over the internet where there are no checks and balances — —

Mrs VICTORIA — That is a problem logistically, too.

Ms COSTAR — That is highly problematic to me. But I do feel that legislation can be thought through and can be sensitive to people being able to take on responsibilities, but perhaps you could say no to an undischarged bankrupt.

Mr TAFFE — Another alternative might be for there to be an application process. So the person might initially be refused, but there might be a process whereby the person can apply to the court or to VCAT and, depending on the circumstances, the court or tribunal might decide that it is appropriate for that person to be appointed despite the initial rule prohibiting their becoming an attorney.

Ms COSTAR — And the donor may have particular views that need to be taken into account too.

Mrs VICTORIA — You said if there was a compulsory register and if it was online or whatever, we could do it so only the name of the person was available. My actual question was: how would you then sort out all the Bob Smiths or the Pete Smiths or the Joneses and things like that without some other identifying feature?

Ms COSTAR — Does the name of the donor in a sense identify that person?

Mrs VICTORIA — Not if it is a common name.

Ms COSTAR — If it is a common name, no; that is difficult. I do not know.

The CHAIR — Anyway, it is food for thought.

Ms COSTAR — Yes. I am sorry I cannot come up with an immediate — —

The CHAIR — We do not have to have all the answers here.

Mrs VICTORIA — I did not know whether that was something you had contemplated.

Mr TAFFE — It was a good question. Sorry we do not have all the answers.

The CHAIR — We are just having the discussion.

Mr BROOKS — My question would come generally under that one. Given that the Privacy Commissioner expressed concerns, as you would expect, about having that sort of public register open for everybody, and given what was just said regarding the situation that you mentioned before where there might be an agreement struck and family members, for example, find out down the track and it is too late, are there any other ways you might be able to ensure, maybe at the witness stage, that an authorised person or witness, maybe a legal practitioner or a doctor, has to ask a series of questions around whether there are other siblings or other people that you would expect to be considered as having an interest in this agreement? I suppose it would then be up to the donor to decide whether or not they want those people. As long as they have been canvassed, that would probably be one way of getting around that situation.

Ms COSTAR — Yes, indeed, and maybe it does come down to the donor's wishes.

Mr BROOKS — They might not wish to have the rest of the family involved in the actual agreement.

Mr TAFFE — I agree that that is a good suggestion. I think the legislation should contain principles that guide witnesses on how they should perform their roles, and a requirement that they make reasonable inquiries of the donor and of the donor's circumstances. I think that would be in the donor's best interests. It would help to flesh out some of those issues.

The CHAIR — Are there people who have serial powers of attorney conferred on them? Can you reflect on that for a moment?

Ms COSTAR — Yes, there are.

The CHAIR — Is it a problem?

Ms COSTAR — We could have a circumstance where a person has four maiden aunts, all of whom require an attorney. So the person steps in and does that. That is a different situation, I think, from a person who befriends people and takes on the task of being their attorney. We have certainly come across that situation. I have come across that situation in the hospital where I have come across the same attorney a couple of times, several years apart. It was just one of those things that I came across this person. It alarmed me, but I have had no evidence at all that there was anything amiss. His view was that he was helping elderly people who lived in his street.

The CHAIR — I know there is an obvious reason why you were alarmed that someone was doing something untoward in relation to these people and seemed to gain from it. But is that a one out of the box example or is this something you see in a recurring way? Do you think it is an organised thing at all?

Ms COSTAR — I do not think that it is organised but I do think that with people living longer, often living alone and being more vulnerable, that it is something that some people in the community are aware of as a way of probably at the beginning supporting neighbours and then, because the whole situation at the moment lacks any transparency at all, it is a temptation.

Mr TAFFE — There is tremendous opportunity for abuse given the fact that the documents are such private documents.

Ms COSTAR — There is no transparency at all.

Mr TAFFE — Transparency would address some of those concerns there if there were annual audits.

Ms COSTAR — Yes.

The CHAIR — I have one more question. It has been brought to our attention that some healthcare professionals do not understand the different types of powers of attorney. What training is there?

Ms COSTAR — I think that it is tremendously important for professionals to be trained in this area. My own view is that this could be very nicely incorporated into professional development across various professional groups. Most of us have to do a certain amount of professional development in order to maintain registration and I feel this is an absolutely ideal area to be incorporated.

The CHAIR — Thank you very much for your submission and also for your insights this morning. You will receive a copy of the Hansard transcript. Hopefully you will not mind if we get in touch with you again.

Witnesses withdrew.