

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 14 December, 2009

Members

Mr C. Brooks

Mr R. Clark

Mr L. Donnellan

Mr M. Foley

Mrs J. Kronberg

Mr J. Scheffer

Mrs H. Victoria

Chair: Mr J. Scheffer

Deputy Chair: Mr R. Clark

Staff

Executive Officer: Ms K. Riseley

Research Officers: Ms K. Harrison and Ms S. Brent

Administration Officer: Ms H. Ross-Soden

Witness

Ms C. Leslie, Legal and Policy Officer, Mental Health Legal Centre.

The CHAIR — Catherine Leslie, welcome and thank you for coming along and for your submission. Hansard is taking down our conversation, and you will be sent a transcript shortly. You can make some minor editorial changes, but obviously the substance stays as it is. I remind you that the discussions and proceedings of this hearing are covered by parliamentary privilege, so anything that you might say here, to which someone might take exception, is protected, but you would not have the same protection outside this hearing.

Perhaps you would like to make some comments about your submission or about our terms of reference, and then we have some matters that we can raise with you that fall out of that reference.

Ms LESLIE — I just wanted to start with a few statements of principle, particularly around the clients that we work with — people with mental illness in Victoria. Our experience is that people with mental illness routinely suffer discrimination on the basis of their diagnosis, and it is often assumed by health professionals and by other people, that they lack capacity to make decisions for themselves simply by fact of their diagnosis of mental illness.

Couple this with the stigma of mental illness in the community, which in our experience is pervasive and can act to disempower consumers both to articulate what their wishes are around all range of decision making but also to then exercise their autonomy to appoint people to make decisions on their behalf or to actually make those decisions in advance. In particular we note that the Convention on the Rights of Persons with Disabilities is relevant to this review, even though we did not so strongly refer to it in our submission. It does provide a very strong support for people with disabilities, including people with mental illness, to be able to exercise their capacity and their autonomy to be able to make decisions on an equal basis with others.

We believe that enduring powers of attorney are a very important part of enabling a person with mental illness to exercise their capacity and to retain a degree of control over their affairs. In this respect we find it is disappointing that the reference does not include powers of attorney (medical) or decisions under the Medical Treatment Act. We believe that there should be some streamlined uniform legislation for enduring powers of attorney, including enduring powers of attorney (medical) and that there be a consistency of terms. I can come to some of those later.

In particular we also think there needs to be an increase in community education around enduring powers of attorney. We understand that there is a lack of awareness and understanding of enduring powers, both about how they should work and how they can encourage people to use this important tool to be involved in decision making and in appointing persons to make decisions on their behalf in their interests and to be able to express what their wishes are around decision making.

One final point to note, is that we have a slight amendment to make to our submission, and that is around the definition of capacity. I apologise that one aspect of that was incorrectly noted in our submission.

The CHAIR — Would you like to take the opportunity to expand on that?

Ms LESLIE — Yes. Perhaps I will do that now and then we can come back to it if questions arise around the definition of capacity. In relation to section 6.5 of our submission, I have underlined subsection (b) because previously we referred to the ability to appreciate the consequences of making a decision. In fact you will perhaps know that the definition of capacity in the United Kingdom's Mental Capacity Act is more consistent with the common law. Really that criterion should be the ability to retain the information that is relevant to the decision, as one of those four factors that indicate that the person meets a test of capacity.

The CHAIR — Thank you very much for that. Can I just open by asking you to what extent do the people you represent — and your clients at the Centre in particular — avail themselves of power of attorney documents? What are the barriers that are in play that prevent them from using them?

Ms LESLIE — It is difficult for us to comment on the use of enduring powers of attorney. We do not have a sense of how many of our clients do have enduring powers of attorney or how many consumers in Victoria use the documents. Though we do quite a bit of work around situations where substitute decision making is contemplated or is in existence for a person.

If there is anything to be gleaned from that, we know that the clients often were not aware of the opportunities to put in place some of those, if you like, more supported decision-making documents like an enduring power of

attorney, which perhaps may well have avoided the necessity, or the deemed necessity, of, say, a substitute decision-maker being appointed by the tribunal to make financial or other health-care decisions for that person.

The CHAIR — When a person comes to you seeking some kind of legal support or assistance around a particular issue, whether or not they have the power of attorney, that they have conferred on someone, that does not arise in sufficient numbers for you to get a sense of where people are?

Ms LESLIE — No, it does not. It would depend on the particular legal issue that the person was raising. Certainly if a person is coming to us and there is an application, for example, for a guardianship order or an administration order to be put in place, then that may be appropriate to discuss enduring powers of attorney, but it is not a matter of course that we would ask a person whether they had an enduring power of attorney, because it may not impact upon the particular advice that we are giving.

Certainly we are aware more anecdotally of the lack of understanding about enduring powers of attorney even, for example, in the overlap between an enduring power of guardianship and an enduring power of attorney, medical, around medical treatment decision making. In addition, for our clients it appears pretty convincingly that enduring powers of attorney as they currently exist have little or no relevance around psychiatric decision making, which is a big issue for our clients.

We would like to see in a wholesale review of this sort, were medical powers of attorney to be reviewed as well, that advance directives would be a part of that, to enable a person to appoint someone or to at least stipulate their wishes relating to psychiatric treatment and other lifestyle decisions associated with a mental health crisis.

Mr CLARK — Can I pick up this notion of capacity in your changed definition, which is consistent with what we were told earlier about the neuropsychological basis? You also refer in your submission to ‘best interests’. I want to push that borderline of what to do with a person who, either due to mental illness or some sort of cognitive impairment from birth, has what you might call a ‘distorted view of reality’, as the rest of us would judge it.

How do you draw the line between allowing people to control their own destiny and making decisions that are going to bring them to enormous grief, which may well be based on them not being able to either appreciate or to weigh up the relevant information? Are you just transferring a lot of that judgement to the test of an ability to weigh up relevant information? How in practice do you draw that distinction?

Ms LESLIE — I suppose there are a couple of important statements of principle that we would say are relevant. One is the presumption that all adults have the capacity to make a decision, and we all make decisions every day which some people may think are unwise or unreasonable decisions, but we make them on the basis of our own values and beliefs, which may not accord with those of our family or of the medical professional, if it is around medical treatment decision making.

There is also the principle of non-discrimination, that a person with a mental illness, intellectual or cognitive impairment or a person with any other health issue or diagnosis should be able to exercise that same ability to make even an unwise decision and that there should be a consistent standard of capacity applied.

I think it is probably fair to say that we often make decisions which people find uncomfortable and difficult to deal with, but we should be supporting the person to be able to understand the relevant information, if that is necessary, and to be able to allow that person to be informed to make a wise or unwise decision. We should not be judging simply on the basis of what kind of decision they have made, whether that decision itself is reasonable but looking at the way in which the person has made the decision.

If that person is not able to meet the test of capacity, they have failed to understand the relevant information when it has been explained in a manner that they can understand, whether that is using simple language or otherwise, then the law steps in to say, ‘You don’t have capacity. What is the alternative?’. If the person has made an enduring power of attorney while they have the capacity to make the decision, then that should hold. If they have not had capacity and there has been a medical assessment when there has been ambiguity about the person’s capacity, then depending on the circumstance, is there a need for a substitute decision-maker in those circumstances?

I suppose in terms of the best interests question that you asked, I think it is interesting that in the UK, in describing what best interests are and what considerations should be part of determining what a person's best interests are, the wishes of the person feature as the first consideration among others, and we would say that a person should have the opportunity to step out how they would like to have their agent or their donee of the power of attorney exercise the powers under a document like that.

I guess the other question you were asking was — and you can clarify if I am wrong — if there was to be a risk in following the person's wishes. Is that right?

Mr CLARK — I was mainly thinking of where someone was suffering such an acute mental illness or other cognitive impairment that they really did not understand the nature of what they were doing. Even though they may have had a grasp of the relevant facts, they just did not have a real-world appreciation of what acting in a certain way meant. You would know the medical scenarios better than I, but I am pushing the limits. I accept your starting point, but I am saying: when do you say this person, because of their mental illness or their impairment, really does not understand what the nature of their decision is?

Ms LESLIE — I think in our experience it is rare that a person — in fact I think it is true to say that a person almost never lacks capacity in all areas of their life. If we think about capacity as being limited to the particular decision that the person is making and limited to that time, particularly with mental illness, as an episodic illness a person may have fluctuating capacity on a range of issues or even just on certain particular issues.

We know that many people in the community are able to manage their own affairs, by and large, most of the time. It may only be around certain types of decisions that their capacity might fluctuate, and in those circumstances and for the particular time that is necessary and with the minimal restriction on their rights to otherwise determine a range of decisions, it may be appropriate for an agent to act to the extent of an impairment of their capacity.

Mr BROOKS — One of the most concerning parts about the evidence we have gathered is the reporting of abuse, and you have mentioned it in your submission as well. Having sat through the evidence, it would seem that one of the ways that is consistently mentioned of dealing with that abuse is by having a registration system with auditing and compulsory keeping of documents.

I notice in the last part of your submission you mention that compulsory registration of EPAs could decrease the number of agreements written and also have random auditing, basically because people do not want their private affairs subjected to scrutiny. I wondered if you could expand on that and talk a bit about it.

Ms LESLIE — I might take the random auditing question first. I think there is a feeling among some consumers that their privacy is not respected, and many people have had an experience where their personal information has been used in ways that could be used against them. In having a random audit of the registration after lodging and registering a document you assume it is going to be used only when it is necessary. For example, if it is around medical treatment decision making — or when that question arises, there is a risk that what is written in that document could be used against that person.

We know that mental illness or a mental health crisis can impact on a range of areas in a person's life, and it is very important that, for example, information about a person's treatment decisions not be misinterpreted as meaning perhaps that person is now losing their capacity to make decisions. I think a better way of ensuring that there is minimal abuse around the documents would be to have a more stringent process for their execution.

Along those lines we have suggested a reduction in the number of people who could witness the documents. Perhaps it was not clear from our submission, but on further thought we would like to see the number of witnesses, in terms of the authorised witness, reduced to people authorised to receive affidavits, plus medical practitioners, who would have greater expertise in ensuring that the person did retain their capacity.

In terms of registration of the documents, again a balance needs to be struck between making it flexible for the person to be able to draft and register the documents if they want to and that becoming prohibitive. Certainly for our clients the cost associated with that would be prohibitive, but perhaps something along the lines of a fee waiver approach, similar to a fee waiver for freedom of information requests would be something that could be considered.

Mr BROOKS — What about a voluntary system so that people could opt in or out?

Ms LESLIE — I think we would support giving people the choice of registering their documents. Obviously there would need to be some commensurate information for people about how their privacy would be protected, in what circumstances and who would be able to access the power of attorney documents.

Certainly around advance directives for mental health, if those were to become part of a general enduring power of attorney-type legislative scheme, which of course we would support, there would need to be clarity for the person around how much of their advance directive and what parts they might want to register, because of course they can contain a lot of personal information which it may not be relevant and desirable that every doctor knows, for example.

The CHAIR — The other matter I want to raise with you is you say in your submission that if we required formal assessment of a person prior to them conferring a power of attorney on someone, that would result in a reduction in the take-up. Can you just spell some of that out for us and how we might remedy it?

Ms LESLIE — Perhaps the starting point for information for witnesses and for people themselves should be that unless there is ambiguity or real evidence that the person is unable to understand and retain the information in the process of weighing up the information and coming to a decision; unless there is a question of the person lacking capacity, there should be no need for a formal assessment of capacity by a medical professional. We believe it adds an extra layer of complexity to the document which should be able to be exercised by anybody and relatively easily. But where there is, as I said, ambiguity or evidence to suggest that the person is unable to make that — —

The CHAIR — That first step?

Ms LESLIE — The first step should be that the person is able to make the document. I think there could be some guidance for witnesses — whether this is prescribed in legislation or otherwise would be something to consider — for example, general statements of principle or some suggested questions that the witness might ask to ensure that there was no displacement of the presumption of that capacity.

Mr CLARK — If, for example, the law were to require that a lawyer be one of the approved witnesses, and as you rightly say, not make medical testing mandatory, would the Mental Health Legal Centre feel comfortable in acting as witnesses for their clients and applying the test of whether or not a particular client had the capacity to give the power of attorney at the time?

Ms LESLIE — I think we would, and we have in the past witnessed a person's power of attorney document. It does not come up very often for us, but that would certainly be a role for us and for other legal centres. Where we did not feel we could attest to that person's capacity that might be an appropriate time to request that their GP or somebody else provide a supporting medical assessment. Similarly, I would hope that JPs and other people who are named as people authorised to receive affidavits would adopt that approach too.

The CHAIR — Other witnesses have also put to us the view that it would be of advantage to a person if they were also encouraged to appoint an interested person. We understand that has been applied in the UK and that it has been reasonably successful. I do not know whether you have had the opportunity to examine that experience or not.

Ms LESLIE — We had a brief look into that. It seems as if that could be a way of minimising potential abuse in circumstances where there would be a financial benefit flowing to the agent or the person who is the donee of the power. Obviously we would want to ensure that the naming of the interested person was done freely and voluntarily without coercion; that would be an important consideration. But that may be a more informal way of preventing abuse compared with, say, an audit function. We would support that, because the person is themselves able to nominate that interested person.

The CHAIR — So on the one hand it creates another set of eyes, overseeing it to the extent that it is developing another accountability. But it has also been raised with the Committee that it also raises another potential for privacy considerations to be brought in. So the net widens and more information that the person has can be compromised?

Ms LESLIE — That would be an important consideration I suppose as well, particularly if the enduring power of attorney document stepped out a person's wishes for treatment or wishes for how they wanted a decision to be made. Yes, it could have some privacy implications. So again there would need to be some appropriate information or independent advice around those.

Mr BROOKS — We have heard that people's capacity to make good decisions often is helped by personal strength, good service provision, information and support. What kind of information, service and support would you say is required to enhance people's ability to make decisions on their own behalf?

Ms LESLIE — Certainly from our perspective the availability and accessibility of independent legal advice, and advocacy if necessary. That is a crucial aspect of being able to make decisions and know about the ability to make decisions and the impact of various types of documents on decision making. We know from the experience of clients that often healthcare professionals can play a significant gatekeeping role in the amount of information that a person is receiving about their opportunities. So it is very important that independent legal advocacy and information be available.

We would like to see people in the community being made more aware of the availability of the documents and their choices around how they could make decisions appointing people or otherwise.

The CHAIR — We are out of time. I would like to conclude by thanking you very much for coming in to talk to us and also for your submission. As I said, you will receive a copy of the Hansard transcript in due course and you may make any editorial changes to that. I hope you would be open to Kerryn or Kerry contacting you again to follow up any information we have not been able to cover adequately.

Ms LESLIE — That is fine. Thank you very much.

Committee adjourned.