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**HOUSE OF
REPRESENTATIVES**

STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL
AFFAIRS

Reference: Older people and the law

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HOUSE OF REPRESENTATIVES
STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

Tuesday, 31 July 2007

Members: Mr Slipper (*Chairman*), Mr Murphy (*Deputy Chair*), Mr Michael Ferguson, Mrs Hull, Mr Kerr, Mr Melham, Mrs Mirabella, Mr Secker, Mr Kelvin Thomson and Mr Tollner

Members in attendance: Mrs Hull, Mr Slipper and Mr Kelvin Thomson

Terms of reference for the inquiry:

To inquire into and report on:

The adequacy of current legislative regimes in addressing the legal needs of older Australians in the following specific areas:

- Fraud;
- Financial abuse;
- General and enduring 'power of attorney' provisions;
- Family agreements;
- Barriers to older Australians accessing legal services; and
- Discrimination.

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Committee met at 9.29 am

CHAIRMAN (Mr Slipper)—Good morning, ladies and gentlemen. I declare open this public hearing of the House of Representatives Standing Committee on Legal and Constitutional Affairs inquiry into older people and the law. The committee has been asked by the Attorney-General to inquire into and report on the adequacy of current legislative regimes in addressing the legal needs of older Australians. We have been asked to focus on the areas of fraud, financial abuse, general and enduring power of attorney provisions, family agreements, discrimination and any barriers to older Australians accessing legal services.

This is the 10th in a series of public hearings for this inquiry. Today the committee will be hearing from a number of individuals and organisations from South Australia. There will also be an opportunity for the committee to hear from members of the public during an open forum from 11.30 until 12.30. During the forum, individuals will be invited to make a three-minute statement on any issue within our terms of reference. If at the present time there are any members of the public who would like to participate in that session, please see the ladies from the secretariat, who will be happy to assist you with the appropriate witness form and formalities.

I would like to welcome everyone here today. I am sure our discussions will once again be very informative and useful. We do not have any media here, but it might be appropriate, in the event that they may turn up, for the committee to authorise the filming and televising of proceedings. Would Mrs Hull be prepared to move that the committee authorises the filming and televising of evidence taken by it this day at the public hearing?

Mrs HULL—So moved.

Mr KELVIN THOMSON—Seconded.

CHAIRMAN—As all members are in favour, the motion is carried.

[9.30 am]

HARLEY, Mr John Maxwell, Public Advocate, Office of the Public Advocate

CHAIRMAN—I welcome as our first witness this morning a gentleman I have not met before but whom I have known by reputation for some time: the Public Advocate of South Australia. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Would you like to make a brief opening statement—say, up to five minutes—and then we may proceed to some questions?

Mr Harley—Certainly. I have not made a written submission, and that was intentional. I have seen some of the submissions that have been put forward. They are very detailed, and there is nothing in many of them that I would want to dispute. In particular, I want to adopt the submission from the Australian Guardianship and Administration Committee dated 28 November 2006, to which I was a party, and also the submission from the New South Wales Public Trustee dated 20 November 2006.

There are only a few heads that I want to discuss. Firstly, in relation to fraud, through our office we get a number of inquiries and reports regarding fraud that has been perpetrated on the elderly. Unfortunately, unless there is an application made to the Guardianship Board, we do not have any power to investigate. In fact, there is no agency that is dedicated to investigating financial elder abuse. If a person makes an application to the Guardianship Board, the board then has power to direct us to conduct an investigation and report to the board. Any report that we provide then attracts qualified privilege. If we did a report without that direction, it would not be privileged. In other states a couple of public advocates have been sued as a result of inquiries that they have done.

One of the matters that I have been seeking is for my office to obtain greater powers to investigate. Although, in the past, when I was on a committee that was investigating the reform of the Guardianship and Administration Act and the Mental Health Act, the recommendation was that we be given greater powers, in fact that was blocked by the police. The police often view these sorts of cases as civil matters, and they do not want to get involved.

On the issue of advance directives: there is at the moment a committee of inquiry looking into advance directives in this state. We have a plethora of advance directives. We have an enduring power of attorney for financial matters; we have an enduring power of guardianship for health and lifestyle matters; we have a medical power of attorney just to deal with medical matters; and then we also have an anticipatory direction, which is a document directing what is to take place at the end of our life—it does not appoint anyone; it just gives directions to the treating team as to what care the person wants. This multiplicity of documents is very confusing for the public and is one of the reasons why, in my view, there is not more take-up of advance directives.

The committee is probably, and it is my recommendation that this occur, looking at having just one document, similar to what Queensland has—one document with different parts for financial,

health, and lifestyle matters. That would be much simpler for people to execute. However, when people prepare advance directives, they really need some advice and some help in framing what their directions might be. Apart from my office, there really is not any service available to people to assist them in filling out those advance directives. There are in place advance care planning schemes. One is the Respecting Patient Choices Program, which Austin Hospital in Victoria is promoting. The Queen Elizabeth Hospital in Adelaide also has a program running there. There are specially trained counsellors to help people fill out those advance care plans. If that program became more universal, there would have to be quite a bit of training of advisers to assist people in filling out those documents.

The next matter I want to talk about is legal aid. In South Australia, legal aid is not available for any civil matters; it is only available for criminal matters. People can go to the Legal Services Commission for half an hour for free but, if it is a civil matter, apart from the advice that the Legal Services Commission will give, no-one will actually open a file or conduct the matter for the client that comes in. There is a need for a specialist legal service for the aged in South Australia. We deal a lot with elderly people who ring up our inquiry service. There are a lot of legal problems that they have in relation to advance directives. There are often problems with planning with respect to their wills and generally consumer type difficulties. Technically, it is not within our ambit to provide advice, but people do tend to ring. I am the only lawyer in the office—fortunately—and so some of the matters are referred to me for advice, but generally there is a lack of services for the elderly in relation to general legal advice to assist the elderly to plan their lives.

The other area I was going to talk about was informal arrangements. They have been dealt with very well in the AGAC submission. There are a lot of barriers to informal arrangements by various bureaucracies—from Medicare to Centrelink—and the banks. Our act—the Guardianship and Administration Act—actually says that the Guardianship Board will not make orders if informal arrangements can work. The bureaucracy is actually quite an impediment to those informal arrangements that have been put in place.

Finally, I mention the lack of uniformity in the state legislation. For example, South Australia does not recognise advance directives executed in other states. There is no reciprocity provision in our legislation to provide for that. In the new Mental Health Act, for which the draft bill will be available in the next week or so, there are extensive provisions for reciprocity of the Mental Health Act orders. But as far as guardianship and administration is concerned, we do not recognise anything from the other states. New South Wales and Victoria do have provisions to recognise advance directives made in South Australia, but there is express statutory provision for that.

I believe the Standing Committee of Attorneys-General has passed resolutions to the effect that there would be an endeavour to get some recognition of other states' advance directives, but South Australia, regrettably, has not got around to doing any of that. It is the same with orders of our Guardianship Board. Our board does not recognise any orders from another state. So, if someone is under an order in New South Wales and they move to South Australia, you have to go through the whole rigmarole again of making an application for the person to be placed under orders. That is all I really want to say as far as an opening is concerned.

CHAIRMAN—Thank you, Mr Harley. You have outlined partly what your office does. Could you tell us how big your office is—how many staff—and, just briefly, the purview of the work of the office?

Mr Harley—I have a staff of 14 altogether. Not all of them work full time. I have 2½ people for administration. The other 11½ are all social workers. The bulk of our work is guardianship. I used to have 1½ people in education. One of the functions of my office is education of the community with respect to the Mental Health Act, the Guardianship and Administration Act, and the Consent to Medical Treatment and Palliative Care Act. Unfortunately, our office has always been grossly underfunded, and I have had to use those positions for guardianship. At one stage, our guardians had case loads of 70. The norm around Australia is 35 to 40.

CHAIRMAN—Yours might be better.

Mr Harley—We have a fourfold function. My role is to protect the rights and interests of all people with a mental incapacity—that is people with an intellectual disability, a neurological disorder, dementia and brain damage. The bulk of them are people with dementia. We have a fourfold role: investigation, but we only do that at the direction of the board; advocacy, but we do not do much of that because most of our time is taken up by the guardianships that we have; education; and the fourth one is the guardianships. We have been going since 1993. I am the second Public Advocate. The first one was called John. He is John the First and I am John the Second. In the last couple of years we have moved into better premises. We are in the ABC building at Collingwood. Before we were sharing premises with the Guardianship Board, which made us look as if we were part of the Guardianship Board, whereas I am an independent statutory officer and I am not accountable to a minister. I report to parliament once a year. I am appointed on a five-year term, and if I upset the government I do not get reappointed. I have been reappointed once. We will wait and see what happens next time. The office has an enormous amount of potential. If it were adequately resourced, it could do far greater work than it does at the moment.

CHAIRMAN—Thank you. You indicated to the committee that you support the submission of the Australian Guardianship and Administration Committee. We have heard evidence in other states that has been quite critical of the guardianship process. In particular, people who feel aggrieved include family members who feel that they have not received a fair hearing or that the proceedings have not been transparent. Have you heard any criticism of the processes in South Australia and do you have any comment on what I have just said?

Mr Harley—Very little criticism, Chairman, and when we have had criticism it has usually been as a result of dysfunctional families. If the case goes against them, they strike out at the authority that is imposing any of the directions. Quite a lot of my time—too much of my time sometimes—is spent on dealing with serial complainers. They go to the minister and they go to the Ombudsman, and if they do not get any satisfaction in South Australia they will go to an authority interstate. It is often not the clients that are the difficulty; the relatives are the difficulty. Unfortunately, it is a jurisdiction that of its very nature attracts dysfunctional families. Because the families are not working, they have to come to the board to get orders to get things to work. You are never going to satisfy them. But compared with other states we have very little problem.

CHAIRMAN—We have also had quite a lot of evidence in relation to powers of attorney and enduring powers of attorney. You yourself have made some comments in relation to advance health directives and so on. I think what you really said was that it would be highly desirable for there to be some sort of nationwide conformity with the same set of rules and also that documents created in one state ought to be applicable in another. The Standing Committee of Attorneys-General has looked at some of those aspects. Not a lot has happened. Would you have any suggestions on how this process could be advanced?

Mr Harley—I cannot see the states handing over powers with respect to powers of attorney, but, if the states pass legislation that provides for recognition of powers from interstate, that would work. South Australia needs to do that. There was an inquiry into the powers of attorney two years ago that the Attorney-General instituted, but nothing has ever come out of it.

CHAIRMAN—With respect to enduring powers of attorney, my understanding is that you can do some things with a power of attorney in one state that you cannot in another. If you were going to have these reciprocal or cross-border arrangements, to what extent, in a state that did not permit a particular form of power of attorney, would you permit what is legal in the other state but not legal in, say, your state to be enforced in your state as part of a reciprocal arrangement, with a document created elsewhere?

Mr Harley—The submission that AGAC made to the Standing Committee of Attorneys-General was that in, say, New South Wales, the law would give the same recognition as would be provided in its state of origin, so that a court in New South Wales would actually look at what the law was in South Australia as far as the operation of that document was concerned.

Mrs HULL—Thank you for attending this morning. We have been grappling with the question of whether we should be recommending mandatory reporting for financial abuse of elderly people in these circumstances. Do you have a view on mandatory reporting by agencies, banks and others of suspected financial abuse?

Mr Harley—I do not support mandatory reporting. Knowing some of the people that we deal with, it could be a very abusive tool in the hands of other disaffected members of the family. We see enough of it in the Guardianship Board now, where families have fallen out over money. I can just imagine them using that device to get at another member of the family. I do not think that it would work well, and it would just create another layer of bureaucracy. I do not think it would be effective.

Mrs HULL—What about for financial institutions? If you were a bank and you had a power of attorney lodged with you and you saw transactions that were not normally taking place with that particular owner of the account now taking place, would you think that there is an onus or an obligation on that financial institution to have somewhere to mandatorily report that kind of behaviour?

Mr Harley—Yes, financial institutions could work that way. I do not actually have much time for banks. They are quite uncooperative. We have a lot of complaints about the banks not recognising powers of attorney or introducing another layer of bureaucracy, requiring a statutory declaration every six months that the power of attorney has not been revoked.

One of the difficulties is that there is no requirement that powers of attorney be registered, so there is no central place that you can go to see whether or not the power of attorney is in existence or whether or not it has been revoked. That is one of the issues that the committee that I am on is looking at: reviewing advance directives. An enormous number of the submissions that we have received so far are actually suggesting that there should be a requirement that all advance directives be registered.

Mrs HULL—That leads into my next question: should there be a national register of powers of attorney?

Mr Harley—Yes.

CHAIRMAN—Should a national register be set up, or should each of the states maintain its own register, which would be accessed nationally?

Mr Harley—I cannot imagine that the states would agree to a national register.

CHAIR—So you would say individual state registers?

Mrs HULL—I said specifically ‘a national register’, and you are saying yes to a national register?

Mr Harley—Yes, if it were practical.

Mrs HULL—Absolutely. That, to me, is quite different from just the states having individual registers.

Mr Harley—Yes.

Mrs HULL—Okay, I just wanted to clarify that.

Mr Harley—All the submissions that we have received are on the basis that it is a requirement that there be a register and there be no charges for it.

Mrs HULL—That is right. So that would mean that cross-border, if you took your mother, father, sister or brother to New South Wales for a holiday or for a period of time, the power of attorney could be recognised in that state rather than having all of the difficulty of having to get some sort of power of attorney set up in New South Wales or Queensland or something.

Mr Harley—Yes. I think the register ought to be not just for powers of attorney but for all advance directives. There is a voluntary register here for medical powers of attorney and anticipatory directions. It is run by MedicAlert, and there is a fee to register. Since the register has been in existence, only 200 have ever been lodged. They have never had a call from a medical practitioner or anyone to find out if there is an advance directive in place.

Mrs HULL—That is very interesting, because I have referred to the MedicAlert system previously in hearings, saying that it is a national register that enables somebody to access the current records of somebody if they are in a motor vehicle accident or somewhere unknown. We

may have to give everyone a bracelet too or a pendant to hang around their neck. That might be simple.

Yesterday, we heard something new in our hearing—that is, the financial abuse of a carer, in that a carer can be caring for an elderly dementia patient who makes way-out kinds of transactions because they are still able to get around and still able to financially transact, and yet then the carer is left responsible for trying to manage the financial mess that the particular dementia patient has been able to create. Have you had experience with that type of thing? It is actually a reverse abuse.

Mr Harley—Yes. Particularly people who have frontal lobe brain damage can still function quite well, except for often a narrow band where you have to deal with them for a while before you realise that they are as mad as meat axes. But they function really quite well in the community. The attorney cannot go to the bank and say, ‘Don’t give that person any more money.’ So the only way you can guard against that is by getting an administration order from the Guardianship Board and then the bank is required to follow the direction of the administrator. Those cases are very difficult. Usually the people can be quite aggressive as well.

Mr KELVIN THOMSON—You directed our attention to the AGAC submission. I noticed a reference in that submission to some religious groups signing up vulnerable older members of their congregations to regular donations generally linked to a promise of salvation. It occurs to me that the committee could recommend that these donations be recoverable if the promise is not honoured but I am not requiring you to comment on that. You talked about anticipatory directions to treating teams. How do those teams know the anticipatory directions exist? Does it depend on the patient or the family informing them of the directions?

Mr Harley—Yes. That is a really practical difficulty with advance directives, particularly if people are admitted in an emergency. The likelihood of them having their advance directives with them when they are admitted is pretty low. The Respecting Patient Choices Program at QEH is only operating in the heart ward, the kidney ward and the cancer ward. They have a green sleeve at the front of a patient’s file. The advance directives are kept there. I have known of cases where I have been the guardian for people and the treating team has put the order on the file and then put more notes on top of that and down the track another member of the team has come in and ignored it because they did not know it was there. That really is something that the hospitals have to organise so as to take better notice of advance directives.

Mr KELVIN THOMSON—Another thing you mentioned in your evidence was a problem with banks recognising powers of attorney. Do you have a view on what might be done about that? More broadly, are there areas in the South Australian legislation governing powers of attorney that you think are in need of reform?

Mr Harley—I think that, if there were a register, that might solve some of the banks’ ambivalence towards enduring powers of attorney. One of the problems is that the legal advice that the banks get is from either Melbourne or Sydney, so, when we ring up a particular branch because they have not recognised an EPA, we find they are acting on advice that they got interstate from lawyers who do not understand our law. I have a letter that has gone to the Commonwealth Bank. They have been particularly difficult with a couple of clients who have called me because they have had great problems. That is why I am sure that a register—

Mr KELVIN THOMSON—That is a national register too, isn't it?

Mr Harley—Yes.

CHAIRMAN—I have one last question. Would you outline for the committee the current arrangements in South Australia for the assessment of the capability or the capacity of older people?

Mr Harley—The present method of assessment is fairly ad hoc. I learned a few months ago that in Victoria, with almost every application that is made, the advice is to get a neuropsychologist's report. Some of the reports that I see, particularly from GPs, are very sketchy. The GP just gives a mini mental and does not do a proper analysis of the level of impairment. Some people seem to think that, if you have mental incapacity, it means you are incapable of making any decisions. In fact, incapacity is not global. There could be some things that a person can still do themselves and other things that they cannot do; it might depend on the time of the day. I know that before executing a will, the Public Trustee, if they have any doubts about a person's mental capacity, will require a medical report that is dated the same day as the client attends to execute the will.

The suggestion has been made that there be some sort of national accreditation of people who conduct those assessments. I do not think that would work, particularly in country areas and particularly in South Australia; there just are not the resources in country areas to do that. However, I acknowledge that this whole issue of assessing mental incapacity is a real one and is a matter of education of the community. In particular, those who are conducting the assessments do need a lot more rigour in the way in which they conduct the assessments.

CHAIRMAN—Thank you very much for your appearance before the committee this morning. We will send you a draft of your evidence as recorded by Hansard just for you to check. If, on reflection, you want to pass any further information on to us, please feel free to do so.

[10.08 am]

KELLY, Ms Margaret Julia, President, The Law Society of South Australia

LENNON, Ms Marilyn Elizabeth, Member and Immediate Past President, Justice Access Committee, The Law Society of South Australia

STIRLING, Ms Paula Denise, Chair, Justice Access Committee, The Law Society of South Australia

CHAIRMAN—Welcome. Although the committee does not require you to give evidence under oath, these hearings are legal proceedings of the parliament and they deserve the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. We have received a submission from the Law Society and it has been authorised for publication. I invite one of you to make a brief opening statement of, say, up to five minutes and then we may ask you some questions.

Ms Stirling—I have prepared a brief opening statement, which I will read into the transcript, if that suits. The Justice Access Committee of the Law Society of South Australia thanks the committee for the opportunity to give evidence in the inquiry into older people and the law. The Law Society's Justice Access Committee provides a forum for the profession to discuss issues relating to access to justice. It aims to promote and participate in law reform in areas affecting access to justice and to promote education and awareness of access-to-justice issues within the profession and the community.

We have read a selection of submissions made to the committee and agree that a major area of unmet legal need for older Australians is the area of civil law. The majority of Commonwealth legal aid funds are spent on family law and state funds on criminal law. As the terms of reference for this inquiry suggests, older people more commonly come into contact with the legal system in areas of civil law such as consumer contracts, wills and estates, powers of attorney and so on. Statistics cited by legal aid commissions suggest that older people receive a disproportionate amount of legal aid funding given the increasing size of their demographic.

Since the Commonwealth's changes to legal aid funding guidelines in 1996, very few civil law matters receive a grant of legal aid funding. There is a need for civil law legal aid funding to be provided across the community, and the need is well illustrated in case of older people. The committee is of the view that legislation in one form or another generally exists to cover cases of fraud or criminal financial abuse, although this is not specifically targeted at older people. The legislation with respect to powers of attorney and powers of guardianship could benefit from some strengthening, such as activities of dire need are monitored and so that cases of potential abuse may be detected at an earlier stage. The efforts of the Standing Committee of Attorneys-General towards uniformity in state legislation in these areas are encouraged.

The major issue for older people, as we see it, is access to justice. Availability of legal aid funding is one aspect of this; proper resourcing of community legal centres is another. Older people, however, face increased barriers to access to justice. Physical mobility may be a factor

preventing older people from attending an appointment with a solicitor. Other factors may include a lack of information about available assistance or family pressure not to involve legal professionals. The committee would support a concerted legal education program aimed at the needs of older people. Further, attention should be given to the establishment of outreach legal assistance to older people. Outreach services have proven to be highly effective in reaching client target groups who would not normally access traditional legal services. Given the restricted ability of some older people to attend additional legal appointments, outreach services to locations frequented by older people may be an effective way to deliver legal assistance to where it is needed. I will now pass to my colleague, Marilyn Lennon, to respond to any specific questions that the committee may have.

CHAIRMAN—I presume that in South Australia you have an elder law section dealing with practitioners who need expertise in a particular area? Do you treat elder law as a speciality?

Ms Kelly—No. We are only just embarking on specialist accreditation for practitioners, if that is what you were looking at. There are a number of practitioners who deal with matters involving estates, powers of attorney, wills and trusts. They are well known and people contacting the Law Society can readily find out those people who specialise in those areas.

CHAIRMAN—Some of the law societies seem to have elder law committees of the society designed to encourage education of practitioners of the needs of older Australians. Is that something that the South Australian Law Society is looking at or could look at?

Ms Kelly—I suppose we could look at it. We certainly have a very strong probate committee. We run a nationally successful succession law conference every year, which attracts national and international speakers. That is very well attended by members of the legal profession.

CHAIRMAN—I was more referring to giving legal practitioners the tools they need to help older people while they are alive and not when they are dead.

Ms Kelly—Certainly, if they are into estate planning and drawing a will, I very much hope they are still alive! There are a number of committees of the Law Society. I suppose the committee that has most to do with vulnerable people—including frail elderly—would be the Justice Access Committee.

CHAIRMAN—I think you quite rightly highlight the difficulty in older people getting legal aid in the area of civil law. You accurately pointed out that older people are more likely, although not in every case, to need assistance in civil law rather than in criminal law. Since 1996 the Commonwealth has had, in my view, the quite sensible view that we should fund legal aid for federal matters and that the states, particularly given the GST, should fund legal aid with respect to state matters. The Victorian Legal Aid Commission, in its submission, suggested that 10 per cent of Commonwealth legal aid should be untied to give the legal aid authorities the flexibility of maybe being able to assist older people in a way that they now cannot. Does your society have a view on that?

Ms Kelly—Can I perhaps throw that to Ms Lennon. Ms Lennon and Ms Stirling are both lawyers with the Legal Services Commission in this state. They are also members of the Law Society and on the committee, of course, in a voluntary capacity.

Ms Lennon—I am not speaking on behalf of the Legal Services Commission but as a person who has experience of the commission's priorities and guidelines. I certainly would endorse that there be some discretion to allocate a percentage—and certainly 10 per cent would be generous—to deal with these sorts of civil issues, particularly in the light of, for example, consumer credit code legislation, which was adopted nationally. In those issues, where you can be dealing on an interstate level with an interstate linked credit provider, there is a concept of a national issue. Whilst it is not a Commonwealth area of law, it was instigated at COAG that that legislation be done nationally, and, whilst it is not a close nexus, it is a nexus that could be explored.

CHAIRMAN—To what extent in South Australia do you have the view that older people do not have the same access to the law that younger people have?

Ms Lennon—I guess there is statistical analysis in terms of their grants of legal assistance, and comparing that with their representation demographically would be a comparison. I think that both the Australian Government Solicitor's submission and the National Legal Aid submission endorse that one per cent or two per cent of older people get grants of aid. The Legal Services Commission telephone advice line, which approximates 60,000 calls per year, and their face-to-face advice of about 38,000 or 39,000 cover fewer family areas and more civil areas. But that is not a grant of legal aid; it is just minor assistance.

Mr KELVIN THOMSON—You mentioned in your submission that the South Australian Office of Business and Consumer Affairs can institute proceedings on behalf of individual consumers. Does it do that often? How many times would it do a thing like that?

Ms Lennon—I am not absolutely aware of those numbers. I could take that on notice and inquire of the Office of Business and Consumer Affairs.

Mr KELVIN THOMSON—It might be helpful to get something about the frequency of that. Another thing in the submission was the shortcomings in the powers of attorney. It says that, if the donee fails to act properly to preserve accounts and so on, the penalty is just \$1,000. There were also questions of monitoring the performance of the donee's duties and of the Public Advocate not having the legislative authority to recover moneys lost by individuals. Are these things that you think legislative changes need to address?

Ms Kelly—I think legislative change could address those issues, but a registration of powers of attorney and a focus on community legal education may also address those issues.

CHAIRMAN—Following on from that move, the question which we have asked others as well is: should such a registration system be a national system or a state based system?

Ms Kelly—I take the Public Advocate's point that the states may not move in that way and if there were to be a national register then that may be something that would be developed first, and the sooner that you could do something of that nature the better.

CHAIRMAN—I accept what you say and, I think, what Mr Harley said: that a national register is desirable but unlikely, given the fact that the states will not hand over the authority. So the next best thing would be for each state to have a register. Who should get access, in your

view, to the information on that register? Should it be an absolutely open public document, like Torrents title, where anyone can go and do a search, or should there be some qualification to get access to that—balancing privacy with openness?

Ms Lennon—I take your point, and I think that is an issue: that the person should have an interest, rather than just having it open to anyone to have access to that information, to preserve the person's privacy.

CHAIRMAN—I think, with birth certificates, whereas once anyone could go and order a birth certificate of anyone, now there needs to be some degree of interest, doesn't there?

Ms Kelly—I have even heard of legal practitioners having difficulty in accessing the registry on behalf of their clients. So you have to establish some kind of interest, and I think that would probably be appropriate in these circumstances.

CHAIRMAN—Would you like to direct your mind at what ought to be the qualification for access and, upon reflection, send to the secretariat your thoughts on that? We seem to be getting lots of evidence supporting either a national register or a series of state registers, but we have not had a lot of evidence on who should get access to those registers. I would value the view of the Law Society, if not now then later. It is probably unfair to drop it on you but you could take it on notice.

Mrs HULL—Can we come back to this national register? It seems that every time we raise the question of a national register there is quite a lot of support for that national register; but then others feel that the states will not relinquish that type of information in order for it to be a national register, and I am not so sure that that is the case. The chairman seems to direct this type of question against a national register, but could you give me an absolute, honest appraisal as to your real views on a national register—forgetting the fact that there may be problems with the states, because we have confronted problems with states on other issues. Could you just give me an understanding of whether you would legitimately believe a national register is the most appropriate thing to do?

Ms Lennon—I think, given the examples that have been put before the committee, that a national register would be preferable because of the mobility of the Australian population and the nexus with family life. People move to where the work is; children move interstate—

Ms Kelly—That is particularly an issue for South Australia because all of the next generation are moving interstate to find work.

Mrs HULL—Thank you very much. It is just that I want to understand exactly what you feel about a national register, forgetting about the states for the moment.

CHAIRMAN—I think I have been verbaled, just slightly, by my good friend Mrs Hull. I was talking about what was attainable, not what was desirable. I agree strongly that a national register is desirable. But I felt that if we could not have it then we ought to look at fallback options.

Mrs HULL—That is all right. I am just—

CHAIRMAN—You are about to apologise?

Mrs HULL—No, I am not about to, because every time I raise it you say the same thing! Ms Lennon, do you think there is, and is it recognised that there is, less familiarity in the legal profession with elderly people's issues and concerns, or less empathy than there might be for other concerns? Do you think there is enough understanding by the legal fraternity of the specific issues confronting elderly people?

Ms Lennon—I think a significant amount of ad hoc pro bono work goes on in South Australia by solicitors being represented on various other committees. I know that there is in South Australia an alliance for the prevention of elder abuse and that solicitors in the Legal Services Commission are on that and they give community talks. But I am not sure that face-to-face advice is taken by elder persons to the degree that it should be. I think that is potentially because of other access-to-justice issues. It is not a misunderstanding or lack of practice by private practitioners in the state.

Ms Kelly—I do not think the problem is in establishing rapport with an elderly client; I think it is in the elderly client getting to the lawyer. Some of the reasons why that does not happen have been discussed earlier.

Mrs HULL—Could I ask again about power of attorney. It is it desirable, in your view, to have a third party witness to a power of attorney, or a registration of all of the facets of power of attorney? In New South Wales people register conveyancing but do not register general day-to-day function of a power of attorney just for the general shopping, going to the bank or other things. Do you believe it would be desirable to register all aspects and clearly outline what a power of attorney is designed to do and a set of guidelines as to how a power of attorney should operate?

Ms Lennon—When we talk about community legal education, it is not only the education of older persons that we are talking about; it is also education of the donees of those powers of attorney. That is a very important issue, because often the response from the attorney is: 'I didn't understand my responsibilities.' I think that it would be an effective process to have general community education, because it may be that some of the donees of power of attorney have brothers and sisters who are not and who would be able to question and monitor those situations as well.

Mrs HULL—So, if there were a registration process for power of attorney that had a specific set of clear guidelines that required a legal signature to that power of attorney and registration of the power of attorney, that would start to give the person who is operating that power of attorney a far better understanding of what is and is not acceptable.

Ms Lennon—Yes.

CHAIRMAN—Thank you very much for appearing before us today. We have a lot of other questions for the Law Society which we would like to give you in writing after the hearing. If you would be kind enough to take those on notice and respond as soon as possible, we would appreciate it. I repeat: if anyone in the room would like to make a contribution in the public forum, please see the secretariat.

Proceedings suspended from 10.29 am to 10.48 am

CRABTREE, Ms Marilyn, Chief Executive Officer, Aged Rights Advocacy Service Inc.

LYONS, Mrs Susan Frances, Team Leader, Aged Rights Advocacy Service Inc.

CHAIRMAN—I welcome representatives of the Aged Rights Advocacy Service Inc. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceeding of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We have received your submission and have authorised it for publication.

Before I invite you to make a brief opening statement of up to five minutes duration, I would like to reiterate that if people in the audience would like to make a contribution in the public forum section of our meeting they should see the secretariat. So far we have no takers. This is the only place in the country where no-one has wanted to participate in the public forum, which I find interesting. I invite the witnesses to make an opening statement.

Ms Crabtree—We appreciate the opportunity to appear before the committee today. I have made a few notes about some additional things I would like to bring to the committee's notice. ARAS, the Aged Rights Advocacy Service, has been in operation for 17 years. We run four programs. Our written submission to the committee is based on the work of the Abuse Prevention Program, which has been running for 10 years. We provide advocacy support to individuals, so we have a wealth of knowledge of issues facing older people, and we focus our response on financial abuse, although we do deal with all forms of elder abuse as well as concerns about quality of care in aged-care services. So we have a fairly broad picture.

We believe we need to be careful in the language we use, because financial abuse is theft, exploitation and fraud and could often be regarded as a crime. Financial abuse is seen as a subset of the term 'elder abuse'. The fact that it happens to older people does not mean we should disguise what is essentially a crime as elder abuse. When we use the term 'elder abuse' it signifies that the age of the person was a factor in the abuse occurring. Last year in our Abuse Prevention Program we had 887 older people seeking assistance about abuse by family or friends; 587 were seeking assistance with a specific problem that was occurring to them right then, and, of these, 296 reported financial abuse.

It is commonly thought that older people will not speak up, as they are too embarrassed to say that their family is abusing them or too afraid of the consequences or that no-one will believe them, and think they have a dementia. However, we say this is a myth because we did a study of the first 100 people whom we worked directly with and 84 per cent did take action to stop the abuse or minimise the abuse. We believe that, if people have the right kind of support, they will take action to protect their rights. Eighty-eight of the 296 who alleged financial exploitation said it was abuse or misuse of the enduring power of attorney. Psychological abuse often occurs simultaneously with financial abuse, as older people are threatened in order to make them comply. Threats such as, 'You won't see your grandchildren again,' or, 'We'll put you in a nursing home,' are common.

In terms of gender, demographically more women are represented in the age group and make up 75 per cent of the abused clients, and this has been consistent throughout our 10 years. The average age of our clients is 78, so it appears that the older old are more easily targeted for a number of reasons. Mental frailty can be a factor. We have to work with an older person who can give us direction, who has capacity. If the older person lacks capacity, we can work with a person who is representing their best interest or we refer the issue to the Public Advocate. I know some countries are exploring laws specifically to protect older people who lack capacity with an additional criminal offence applying to the mistreatment of a person who lacks capacity.

The Aged Rights Advocacy Service formed an alliance for the prevention of elder abuse which was mentioned by the previous witnesses. The South Australia Police, the Legal Services Commission, the Public Advocate and the Public Trustee are all members of that alliance, and the main focus of the activities has been financial abuse. We have done some work in educating banks and building societies about the misuse of power of attorney and have produced a couple of brochures, including a witnessing documents brochure, aimed at raising the awareness of the justices of the peace who witness the documents, because there have been a lot of issues around witnessing documents. We generally support the registering of the power of attorney, but we do have reservations about how that information would be protected. If it is too easily accessible, a predator could find out if an older person has a power of attorney registered and target them. We are seeing more and more instances where predators make it a profession to seek out and target vulnerable people, unfortunately.

We have had an Aboriginal advocacy program for Aboriginal people for four years, and we have built up a great deal of credibility with Aboriginal communities. We have recognised the need for talking more with the elders about abuse, which is a substantial issue in the communities, and we put together a trial workshop about financial abuse. I think we called it 'money business or funny business'. It is a very difficult topic for Aboriginal people to discuss. It was very well received. We have a number of ideas about how information about financial issues could be promoted to the Aboriginal communities. We have brought some samples from other organisations, really good examples of information for Aboriginal clients.

CHAIRMAN—You mentioned registration of powers of attorney. What sort of registration, and at what level of government, should be pursued?

Ms Crabtree—I am not sure that we are experts to give that opinion.

CHAIRMAN—Should it be a national register or should it be a series of state registers?

Ms Crabtree—A national register would make more sense, given that people do move around and that the law seems to be different in every state. If one is of a mind to seek out opportunities to abuse older people, people could use the differences in the laws in each state to benefit them.

CHAIRMAN—You highlight a valuable point when you talk about access to such a register and the need to protect older people from predators. I do not know whether you have given any detailed thought as to where that level of access should be available or cut off. If you would like to think further about that and come back to us on notice, we would appreciate that, because I think it is pretty obvious that, while a register is desirable, you cannot have everyone in the

community accessing every aspect of the information. So the question is a balance between privacy and convenience.

Ms Crabtree—A number of the older people we talk to often do not know that they have signed anything. This often occurs when they are in hospital and still under the effects of anaesthetic, or they may have dementia. So a lot of times people are not aware that they have signed anything and do have a power of attorney acting for them. That is why we support the register being made.

CHAIRMAN—You said you have an Aboriginal service. Is the age at which you consider an Indigenous person to be ‘aged’ different from the general community?

Ms Crabtree—Yes, we do. It is 50 years for the Aboriginal community.

CHAIRMAN—That is probably a damning indictment of our society, isn’t it?

Ms Crabtree—It certainly is.

Mrs HULL—When I looked at your submission this morning I was very impressed with your first lot of suggestions with regard to power of attorney, which seem to be common sense. It is such common sense that I am struck by why we have not put emphasis on these areas before. Do you think there has been a lack of awareness by all parties, including governments, of the way power of attorney can enable abuse to occur legally? Rather than taking money out of somebody’s bank account or whatever with no authority, when you have power of attorney you can take money out of an account with some authority. It appears to me that maybe there has not been recognition of the power that power of attorney represents.

Mrs Lyons—Yes, that is correct. I know that one of the issues that the Alliance for the Prevention of Elder Abuse has raised—and it is currently drafting a letter to the chief executive of the Justice portfolio here in Australia—is that a lot of enduring power of attorney documents are being witnessed by JPs, who do not have sufficient training. So sometimes when a person has taken the trouble to make a document and decide who they want to give the power to, when they lose the capacity and somebody goes to enact that power, it is invalid because it has not been completed properly. The APEA group is asking to meet to talk about strategies to make sure that JPs are updated and have to go to training—or maybe an accreditation system or other options—to help them to witness appropriately. I like the idea you mentioned before about the lawyers. It might be a better idea if lawyers witnessed those documents.

Mrs HULL—Because it is a document that gives so much capacity, it seems bizarre that it is treated as just a piece of paper that it is sufficient for a JP to witness. We need a set of guidelines. Something I have been realising as we go along is that there are no real directions as to how the donee should be operating. If we were to set up a set of guidelines, should a penalty apply to a donee who operates outside those guidelines and commits financial abuse—that is, withdraws a huge amount of money or sells property, personal artworks and personal effects et cetera to gain a financial benefit?

Ms Crabtree—At the end of the day, it is theft, isn’t it?

Mrs HULL—It is.

Ms Crabtree—But how would one find out that they had been abusing the power of attorney? That is half the problem, especially where a person has dementia. Research in Queensland showed that older people have three thoughts about their families managing their finances: firstly, ‘My son deals with everything and he gives me all the statements and I check everything’; secondly, ‘My son deals with everything and I’m sure he is doing a wonderful job because he loves me’; and, thirdly, ‘I’m too afraid to ask.’

Mrs HULL—Exactly. You would think that if there is a reason for an enduring power of attorney then maybe there is a reason to audit the person’s current assets. Is that too big a stick?

Ms Crabtree—It becomes onerous, though, doesn’t it?

Mrs HULL—Yes.

Ms Crabtree—One of the key things for us is the fact that sometimes people sign a power of attorney when they do not have the mental capacity to do it. One of the other key matters in terms of the rules around organising a power of attorney is that the person would have to be deemed, through some kind of assessment, that they have the capacity to do it. We recommend to older people who are revoking a power of attorney or who have experienced financial abuse by their family to get an assessment so that the family cannot challenge it down the track and say, ‘Our mum did not have the capacity when she made that power of attorney.’

Mrs HULL—I come back to the legal issue. Your question about how we would know this financial abuse is occurring comes back to the possibility of mandatory reporting for financial institutions, lawyers and accountants of what they believe is financial abuse. Could that be a starting point?

Ms Crabtree—Yes. Apparently the banks all deal with it very differently. We have found that different branches of the same bank deal with it differently. Some of the education sessions the alliance has been undertaking have been to try to get the bank to develop policies that are consistent across branches. We have had quite a number of examples of where a power of attorney has been enacted but the bank has not followed through with it—they have allowed the older person to withdraw money even though they know they have lost capacity. The older person may have been befriended by somebody, and things like that. So we often get calls from bank staff who say: ‘I don’t know what to do with this. My manager says, “Don’t do anything; it’s a privacy issue.” We are very worried about this older person because we believe they are being fleeced. But the bank does not have any consistent policy of dealing with it.’ They seem to get confused about privacy and what is confidential and when they should step in and try to protect a very vulnerable older person.

Mrs HULL—You have raised a very interesting point. Maybe there is a need for this committee to consider a policy that financial institutions should adhere to. Maybe there should be a consistent set of guidelines as to how you deal with a power of attorney and what regulatory authority you have to act on behalf of, or in the best interests of, a person when you believe there could be possible abuse.

Ms Crabtree—That would be fabulous.

Mrs Lyons—That could even be broadened to enduring power of attorney or allegations or suspicions of financial abuse. There are other cases where people have gone into the bank with one of their children and have been made to take money out of their account. They might have gone in four times a week with this particular person to take out money. The staff know it is not normal but they are not sure what to do with that information.

Mr KELVIN THOMSON—You describe financial abuse as a crime but the older persons obviously have different states of mind. Clearly, if they know what is going on and care about what is going on but feel powerless to stop it, then financial abuse is occurring—and it is probably clear enough that if they do not know what is going on then financial abuse of a criminal nature might be occurring. What about where the older person does not really care and they are quite happy about their assets being taken by sons, daughters or other relatives? What you think about those situations?

Ms Crabtree—Sometimes older people will make a choice to continue to see their grandchildren and have contact with family and suffer the effects of the abuse. But I do not think there is the one response from everyone. Some older people are only making that decision to let the abuse continue because they are afraid of losing contact with their family. They want to continue to see their grandchildren. It might be that it depends on the amount of abuse—for example, it might be taking every last cent and putting them in debt so they cannot pay the debts, the electricity bills and all those sorts of things. So I think it depends on the extent of the abuse. If your family has taken \$10,000 but that is only a small percentage of your assets, you might elect to do that. Sometimes older people do not realise there are a number of choices they can make. There are a number of levels of response; it does not have to be all or nothing. It might be that they can put in a process to stop any further financial abuse—they can halt it while still retaining contact with their families. It is about people, so every case and every response looks slightly different.

Mr KELVIN THOMSON—Of course. It has occurred to me that each case is different and the state of mind of the older person may vary widely across the range of imaginable cases. I guess what I am interested in conceptually is: can financial abuse occur if the older party is willing and, if you like, complicit in it? A third party might think it is outrageous that they would hand their house over to one or another of the children or whatever, but they might say, ‘That is what I want to do.’

Ms Crabtree—There has been some research—mostly international research, not research done here. But, yes, people would say that is not financial abuse. If I elect to do that voluntarily and it is an intentional decision on my part, then it would not be classified as abuse.

Mr KELVIN THOMSON—On the question of making sure that the donees are probably exercising their powers: in Western Australia, the people with the power of attorney are required to keep records of transactions they have made, in case of disputes. Do think that is a useful approach or do you think there should be a requirement that people with the power of attorney produce annual financial statements?

Ms Crabtree—We have to be mindful that abuse of the power of attorney is occurring for only a small percentage of people. For the majority of older people, a power of attorney is a very useful document. It helps to protect the rights and helps them to uphold their rights. Whatever type of auditing or accounting was put in place would have to be not too onerous so as not to spoil it for everybody else.

Mr KELVIN THOMSON—From the data you have produced on the amount of financial exploitation and so on, it seems like it is a problem all right. What are the remedies? Where do you think this could or should go?

Ms Crabtree—That is a million-dollar question.

Mr KELVIN THOMSON—That is why we get to ask it!

I Ms Crabtree—I think registering powers of attorney would be very useful. I am interested to see what South Australia does in terms of the review into the advance directives. I think that has a lot of promise. Nationally, there is a lot more interest in elder abuse and, within that, financial abuse of older people. Some states have developed elder abuse prevention action plans, and we are currently developing that here. The states' individual awareness of the abuse of elder residents is certainly heartening. There is an opportunity, and the timing of this inquiry is very good. If they could get some kind of national consistency, wouldn't that be good.

Mr KELVIN THOMSON—Yes. I guess a subcategory of that is Aboriginal people. You mentioned that you work with Aboriginal people and there is evidence of financial abuse occurring there. Is there an approach or strategy that could better address that problem?

Ms Crabtree—We were trying to do that through the financial abuse workshops that we developed. As I said, they were very well received—and we have applied for more funding for that. What we have found with our Aboriginal program is that we are very fortunate to have as our Aboriginal advocate a very well-respected elder who knows just about every family in South Australia. So we come from a very advantageous point. But we have to use that knowledge of the communities and the people. To work on them you have to be very credible, and it has taken a long time to develop that. We have to help people to take control of the abusive situations within the community rather than approaching it from the outside. We have to help the community to develop the capacity to deal with that. But because there are so many forms of abuse occurring in Aboriginal communities, financial abuse is only one side of it. It is often linked, of course, to domestic violence and all sorts of other issues.

CHAIRMAN—Alcohol.

Ms Crabtree—Everything. We were talking about non-Aboriginal communities before. We see an increase in abuse. The alleged abuser would be into drugs, alcohol, pokies and gambling in general.

Mrs Lyons—There might be mental health issues.

Ms Crabtree—Yes. We have seen quite an increase over the 10 years we have been doing this job.

Mrs Lyons—The other point I would like to mention is the difficulty of older people accessing legal advice. Quite often, when they ring us, we might say, ‘You need to get some legal advice,’ and they do not know quite where to go. They are worried about the cost, because everybody thinks that lawyers are going to cost a lot of money. The Legal Services Commission and community legal services may only provide advice; they will not actually assist someone. I heard before the Legal Services Commission talking about taking civil action. Sometimes the time frames for the case to be heard are quite long, and people might be very ill in between because of the stress. They might be under severe financial pressure because of that time.

Also, I noted the mention of the difficulty people have in accessing services because of their physical limitations. They might not have access to transport. They might have mobility problems. They can ring the advice line, but they might have hearing impairments. They might not be able to write down the information they are given. They often prefer to discuss very personal matters about their family face to face; they would not necessarily want to do it over the phone. So I think some sort of home-visiting outreach service for older people would be very useful for our clients.

Ms Crabtree—We advocate for it, obviously, as part of the job, to make sure that the people who come to us do access legal services. The Legal Services Commission has been very supportive of that. But, for the people who do not access us, how do they manage? What is the system for them?

Mrs HULL—In your submission you mentioned formal agreements or forms of protection for family arrangements involving money or assets. Do you see that a family agreement, where possible, should be put together and that that should be a registered document, with legal practitioners?

Ms Crabtree—Yes.

Mrs HULL—Would you comment on this: as an associated document with a power of attorney, would it be desirable to have a family agreement?

Ms Crabtree—I am not sure I understand the question.

Mrs HULL—When somebody is preparing a power of attorney and you have a donee and a donor with the power of attorney, would it be a greater benefit, at the same time, to prepare a family agreement as to the circumstances of the family and the agreement as to how all of the issues of, say, a dementia sufferer are going to be dealt with by the donee?

Ms Crabtree—I see. So you are looking at an advance directive specifically.

Mrs HULL—Yes.

Ms Crabtree—Certainly we think that there would be benefit in having one form of advance directive which covers guardianship et cetera, but the formal agreements we were looking at are where the family have convinced an older person to move in with them, sell them the house—all sorts of things—and then take advantage of the person. There is no trail of evidence, I guess. I had a call yesterday saying: ‘We’re going to build a house on my daughter’s land. What should

we be doing about that? We're paying for the house, but the land belongs to her. Should we be talking to somebody?' I said: 'Definitely. You go and get legal advice and a contract.' It is just that sort of formal agreement we were talking about.

Mrs Lyons—It is even loans of money. People say later, 'I loaned my family \$50,000 to put towards the deposit on a house,' and then the family say, 'No, it was a gift; Mum gave it to me.' But there is no evidence. It is hard to prove.

Ms Crabtree—This should be easier somehow. Old people need to see the importance of it. It might be because of lack of awareness: 'Because everything looks fine now and I trust you, I don't think about when you get divorced and you lose your job, and how it's going to impact on me.' It may be lack of awareness.

Mrs HULL—So maybe there needs to be a more official set of guidelines and descriptors put down for many of the greater aspects of how you are going to deal—say, like building a house on your daughter's or son's land. What entitlements do you have financially? Can they remove you from that house at any given time, et cetera? Maybe there has to be a clearer set of the principles that direct.

Ms Crabtree—It would be quite good, in a sense, too, because it would take away that embarrassment of having to actually broach it with your family: 'I do trust you; however, I would like to have this formal agreement.' But, if it were known that a formal agreement was the usual way to do these things, it would put a different perspective on it. That is a good idea, yes.

Mrs HULL—Basically, with respect to the registration or the power of attorney itself, if you were to have a set of guidelines or principles that direct the way in which you as a donee have to perform or should be performing under that, would you consider that to be a form of deterrent for an abuse?

Ms Crabtree—It may deter some people. Some people are just set on doing this. They think that parents owe them or, 'I'm going to get it anyway; why not have it now?' There are all sorts of rationales that people provide for themselves. If somebody is really going to do it, they are going to find a way to do it. But it might put off a few people.

CHAIRMAN—On behalf of the committee, I would like to thank you very much. We do have a few more questions. We are out of time, but we would like to send the questions to you, if you could take them on notice and maybe come back to us after you have had the opportunity of crafting an answer.

Ms Crabtree—We would be pleased to do that. Thank you very much.

CHAIRMAN—Thank you. We will send you a draft of your evidence for you to check. If you could get that back to the secretariat as soon as possible, we would also appreciate that. Thank you.

I now ask once again for anyone who wants to make a contribution in the open forum to please see the secretariat and complete a form.

[11.16 am]

MASCHMEDT, Mr John, Private capacity

CHAIRMAN—Welcome to the inquiry, and thank you for coming in to give evidence to us. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and maybe regarded as a contempt of parliament. We would ask that in providing your evidence today you do not name individuals or provide information that would adversely identify individuals. As a committee, we are interested in the broader issues relating to our terms of reference, and we do not want to provide the protection of parliamentary privilege to allegations about particular individuals.

The committee has received your submission. It has been authorised for partial publication. Would you like to make a brief opening statement of up to two minutes, and then we might ask you some questions.

Mr Maschmedt—Thank you. First of all, would you indulge me by allowing me to read what I have to say? I find myself these days losing my train of thought quite a bit, and I do not want to waste your time searching for my thoughts.

CHAIRMAN—Yes.

Mr Maschmedt—Thank you for the opportunity of putting the personal view of an aged person on the law. At 83 years of age, I feel that I just qualify on that score. Could I briefly put before you my wish list—there are actually four of them. No. 1 is a federal government education campaign on advance directives. The enduring power of attorney for finance and guardianship is reasonably widely used. However, the community must be informed of the need and in fact the responsibility to communicate their wishes regarding their medical treatment and their end-of-life decisions via either an advance directive or the appointing of a medical agent, or both.

No-one wants to confront the prospect of dying, and to be asked to commit those thoughts to paper or to another person probably comes high on the procrastination list—or is it that we are too lazy minded to think through the consequences of not making the effort? There is an ever-growing urgency for this to be publicised, due to our growing aged population, and also a very real need in relation to the rapidly growing number of people who are at risk of losing cognitive ability, making advice on advance directives an imperative for them whilst still cognitively active and able. Dementia diagnosis, for instance, is increasing by more than 1,000 people diagnosed each week Australia wide. Estimates put the number by the year 2010 at 240,000. So in about three years there will be an estimated 240,000 people suffering dementia.

My No. 2 wish is to do with the aged, the law and common language. Concern has been expressed at the low take-up of powers of attorney, particularly for lifestyle and end of life. I am sure, from comments I have heard, that if legal terminology could be modified to everyday

language more people would avail themselves of the service. People are intimidated by terminology they are unfamiliar with and are fearful of the possible consequences.

No. 3 is the establishment of a free register of directives, available to all who need access to this information if it is in the donor's best interest. No. 4 is an advisory access point for information on any aspect related to the various legal and informal directives or alternatively, or in addition, an information booklet, as suggested as a possibility in the South Australian government's discussion paper 'Planning ahead'. Later, if time permits, I would like to put to you my version of an advance directive coordinator.

CHAIRMAN—Do you have your view of that in written form?

Mr Maschmedt—What is that?

Mrs HULL—Your view of the advance directive coordinator.

Mr Maschmedt—Yes.

CHAIRMAN—Were you going to read it to us?

Mr Maschmedt—Yes, it is rather abbreviated.

CHAIRMAN—How long will it take?

Mr Maschmedt—Probably five minutes.

CHAIRMAN—Okay, would you like to proceed with that?

Mr Maschmedt—Yes. This is my vision for the advance directive. It would be a folder of four sections, each section separated and detachable. Each section would have headings for enduring power of attorney, for finance, for health, for lifestyle and for end of life. This would ensure easy location, with all aspects covered in one folder. The four directives could be witnessed by the same person at the same time or at convenient times. Coordinating donor, donee and witness can be quite a logistic exercise, I know. Often, directives relating to health and end of life situations need to be produced urgently. Having them all in one folder in a known place is an added bonus. Privacy always seems to be quite an issue for many people. Having the directives detachable would overcome this. This may sound too simplistic, but it could form the basis for discussion on this very important issue. We could make a start by reaching agreement on common terminology. It seems that every jurisdiction in Australia uses different words and phrases for virtually the same situation. I leave that with you.

CHAIRMAN—From your own personal experience, you found the advance care directive that your wife signed to be useful?

Mr Maschmedt—Yes, definitely.

CHAIRMAN—What would have happened if she had not signed the advance care directive?

Mr Maschmedt—I think that anything could have happened. The so-called directives are quite flexible, particularly when it comes to end-of-life decisions. When the situation is a definitely recognised end-of-life situation, the director of nursing or whoever is in charge of the medical situation of the person is allowed quite a bit of flexibility. I was in the fortunate situation of my wife having known the doctor for many years. Before she lost cognitive ability, my wife and I discussed it and this was what she wanted. It was a verbal directive as well as a written directive. The doctor was quite familiar with what her real desires were. So it was not a happy outcome but it was certainly an outcome that could have been much different had she not had the advance directive.

CHAIRMAN—What form of advance care directive was it? Was it a standard government form?

Mr Maschmedt—Yes. It was an enduring power of attorney from 1995.

CHAIRMAN—So it was a standard form. Did you find it user-friendly and easy to complete?

Mr Maschmedt—Yes, with common sense and a certain amount of compassion from all concerned. If it can be interpreted in the way that I feel it should be interpreted, then I think it is an excellent document.

CHAIRMAN—The suggestion you make that there ought to be different sorts of documentation depending on how big the estate is, or the quantity of property, is interesting. No-one else has suggested that. You are suggesting that, for someone who does not have very much, it could be a simpler form of power of attorney.

Mr Maschmedt—Yes. I did have that, but I did not bring it with me because I thought I might run over time with more important things. But it is, I feel, a very important point. I imagine that the majority of people who will fill out the advance directives will be people with a reasonably modest lifestyle. As I have classed it, if they are receiving any Centrelink consideration at all and their income and assets are below a certain benchmark or—

Mrs HULL—Threshold.

Mr Maschmedt—threshold, yes—then they could elect to go to, say, form A rather than form B. That might attract quite a lot of people in my situation, where they have no great financial problems or complications. But there could be people, obviously, with those sorts of things, and they would use form B. It is beyond my powers to draw up the legislation, but I think if the broad headlines were there it could be worked on so that it is made evident to people in financial situations such as I am—and I would elect to use that form rather than the other form.

Mrs HULL—When you were drawing up your agreement, would it have been better if you had had a set of guidelines attached that showed you the parameters in that agreement within which you could act?

Mr Maschmedt—Yes, and that is what I would envisage for an information booklet or an information point that you could phone or write to to get specific advice on your particular problem.

Mrs HULL—So you would have a set of general rules, say under a power of attorney, that indicated how a donee should operate under that power, and, if you did not specifically fit that set of guidelines, you would have some contact or reference point to go to to seek further information on your specific circumstances?

Mr Maschmedt—Yes, that would be my ideal situation.

Mrs HULL—So you would have almost a process of prospectus—you would have the forms to fill out but you would have an explanatory section on each of the forms that you might require under the circumstances?

Mr Maschmedt—Yes. Obviously, each individual is going to have different needs. If they could read, say, the booklet we are talking about and say, ‘That doesn’t interest me in my situation but this does,’ it would be ideal.

Mrs HULL—Yours was a particularly good circumstance in that you were able to understand your wife’s requirements, desires and wishes and you were able to act accordingly.

Mr Maschmedt—Yes.

Mrs HULL—There might be other circumstances in which that might not be the case. You might not have acted in accordance with your wife’s wishes. Should there be some sort of overriding watchdog that could ensure you were acting in accordance with that direction and that could, if it were brought to its attention that you were not, take that power away from you? Do you think that is something that could be entertained?

Mr Maschmedt—Yes. I have no doubt that situations could vary. I do not think that there would be any exploitation in this, but there could be differences of opinion in families. That is why I advocate that the utmost discussion take place within families before or while directives are being either spoken or written—so that everyone is completely at ease with what the donor is hoping for.

Mr KELVIN THOMSON—I agree with you that advance care directives are good. I think it is exactly right that we should be promoting them. One thing I am a bit troubled about is the question of to whom they should be made available. You said in your wish list that the register should be made available if that is in the donor’s best interests. The questions in my mind are: how do you determine that and who determines that?

Mr Maschmedt—I would advocate that everyone thoroughly instruct their agent as to what exactly they want. That should cover a situation like that.

Mr KELVIN THOMSON—They would then make that decision about to whom the register would be shown?

Mr Maschmedt—Yes.

Mr KELVIN THOMSON—Thank you. That is all from me.

CHAIRMAN—Thank you very much for appearing. We will send you a draft of your evidence. If you could check that and get it back to us, we would appreciate it.

[11.35 am]

DAWSON, Mr Michael John Dean, Chief Executive, Victim Support Service

SINCLAIR, Dr Ronald Gordon, Chairman, National Consumers Committee, Alzheimer's Australia

STORER, Mrs Helen Gray, President, Older Women's Advisory Committee

CHAIRMAN—Welcome. The committee has set aside a period for members of the public to make brief, three-minute statements to the committee. I remind speakers that the committee is not able to investigate individual cases, provide legal advice or provide advice in relation to personal matters. Statements should focus on one or more aspects of our terms of reference. Dr Horne will signal with the bell when you have 30 seconds remaining and will signal more vigorously once the three minutes has expired.

Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House itself. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. We ask that in providing your evidence today you do not name individuals or provide information that would adversely identify individuals. The committee is interested in the broader principles related to the terms of reference and is not prepared to provide the protection of parliamentary privilege to allegations about particular individuals. Mrs Storer, the floor is yours.

Mrs Storer—My comments are going to be very short. I would like, on behalf of our group, to agree that a national register of powers of attorney, inclusive of all areas of powers and directives, be made. It would be preferable that it be national, but, if it were done state by state, could it not be linked up as, I understand, motor registrations are? The police in South Australia can find a person with a car with another state's registration pretty smartly. That is just one suggestion.

I would like to see special funds for legal assistance for older people and, more importantly, education and publicity about the need for powers of attorney and for the availability of legal aid. It is so important. As older people, we do not realise what we need to know until we need to know it. We have found, over 20 years of advising older women, that we can have speakers on a subject and it is not heeded. You can ask about it the next year, and no-one has needed it so nobody knows about it.

Another suggestion that did come up at one of our meetings was that when someone has a power of attorney the rest of the family also get the bank statements every three months, which keeps it all very honest and straightforward. That would be agreed to by the family when the whole thing was being fixed up.

CHAIRMAN—There has also been a suggestion that maybe those people who are exercising power of attorney should each year put in an audited statement of what has happened.

Mrs Storer—That would be another way of covering the same suggestion.

CHAIRMAN—Thank you very much, Mrs Storer. I now call Mr Michael Dawson.

Mr Dawson—The Victim Support Service is the South Australian crime victims advocacy and counselling service. I was intending to prepare a written submission, so I have not come particularly well prepared this morning. But, given that there is this opportunity, I thought I would just flag some of the issues that we are particularly concerned about. The first issue is some misrepresentation, if you like, by media about the level of crime that exists in the community and the vulnerability of elder people particularly; whereas we find that, statistically, elder people are not as vulnerable as they certainly fear. I think the media has some role to play in that. So I think that is a broad issue.

To pick up on the fear issue: the biggest problem that we as a victim support agency see is that elder people are particularly fearful of being victimised. Not a lot is done about that. We as a community need to be addressing that, I think, and that links up to the effect of the media. Some of that fear relates to a fear of gangs or gatherings of individuals. Particularly in this state at the moment, we have had a lot of publicity about young people committing crime and about Aboriginal so-called gangs. The validity of those claims is not clear, but they have certainly been gaining a lot of publicity. I think that is compounding elder people's fear and lack of understanding about what is occurring in the community. There is fear particularly of home invasion—which is a colloquial term, I suppose, for a break and enter while someone is at home. Many people, as we know, do remain at home for whatever reasons and can feel particularly unsafe now in their home, which has, prior to now, been very much their safe place. So I think that is an issue we need to be looking at.

Obviously transport is an issue as well. We need people to feel safe and be safe on public transport, or their whole quality of life is restricted further.

Just quickly, on participation in the legal process: I think there are certainly some disincentives and some barriers in enabling people to do that—I will speed up. Some of those relate to the cost of representation and the cost in time to do so; the lack of knowledge about the court system and the legal processes, which relates to the former comments about education; the lack or perceived lack of knowledge about support which is available for people to attend various courts; and the issue of compensation, which is not available through the federal system.

CHAIRMAN—Thank you. If you wish to make a more fulsome written submission, even at this late stage, please feel free to send it to the secretariat. The committee has had quite a flexible view of accepting late submissions. We want to consider the views of as many people as possible. Without pre-empting the committee's decision, I have a feeling that it will be okay. If you send it in, we would like to get it. I now call Dr Sinclair.

Dr Sinclair—I mainly wanted to speak this morning about advance directives as well—powers of attorney and enduring guardianship. We for some time have been struggling with the issue of the fact that many of these documents have different meanings in different states and that they do not carry across from one state to another. We would very much like to see the issue brought before the attorneys-general on a national scale for this to be considered.

One of the issues we also would like to see addressed is the fact that, quite often, either it is unknown that advance directives exist or they are not accepted by the people who are supposed to be accepting them. We have been discussing as well, with the South Australian carers committee, ways in which advance directives could be brought to people's notice. One of the suggestions is that perhaps there could be a national registry where advance directives could be lodged. In order for that to be useful, though, there would have to be some legal obligation on medical practitioners and health professionals to actually consult that registry and to ensure that they know the position of that individual person. Another suggestion was perhaps some notification on a Medicare card or health card that advance directives are in place, or, similarly, something like an organ donor card that people might even carry in their wallets, because people can be knocked down in the street, not able to speak and not able to express their own wishes. There needs to be some system in which the medical professionals are required to check to see whether such an advance directive is in place. I think John Maschmedt made the other points.

CHAIRMAN—If you also wanted to let us have something more formal in writing, we would be pleased to receive it.

Dr Sinclair—Okay.

CHAIRMAN—Thank you very much for participating in our open forum. I was getting a bit desperate there for a while—I thought no-one was going to make a contribution—but we had three very able contributions.

Resolved (on motion by **Mr Thomson**, seconded by **Mrs Hull**):

That this committee authorises publication of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 11.46 am