15 April 2005

The Secretary
House of Representatives
Standing Committee on Legal and Constitutional Affairs
Parliament House
CANBERRA ACT 2600

Dear Secretary

Inquiry into Harmonisation of Legal Systems

Thank you for the invitation to make a submission to this inquiry, and for agreeing to extend the deadline for this submission until 30 April 2005.

I am writing to draw to your attention the practical difficulties arising from different regimes across Australia dealing with instruments such as enduring powers of attorney and advance health care directives.

Background

These instruments are proving to be very effective in allowing individuals control over their futures, in circumstances in which they may be incapacitated (whether temporarily or permanently) or otherwise not available to deal with their affairs (for example, if they are overseas). They are particularly useful in enabling people suffering from degenerative illnesses to determine how their affairs will be administered, and decisions made, when they are no longer in a position to deal with these issues themselves.

I note that government entities such as the Office of the Community Advocate in the Australian Capital Territory recognise the usefulness of these kinds of instruments, and advocate that, at the same time an individual makes a will, he or she should also execute an enduring power of attorney.

It is foreseeable that, as the community becomes increasingly aware of the role and operation of these instruments, their use may become more prevalent. For example, the recent publicity given to the case in the United States of Ms Schiavo, in which media reports highlighted the lack of a 'living will', may prompt members of the community to execute advance health care directives to make clear their wishes should they be placed in an analogous situation. Also, I note research indicating that the numbers of people in Australia being diagnosed with various kinds of dementia

will continue to increase, given the ageing population. In my experience, once such individuals and their families first come into contact with organisations and agencies such as Alzheimer's Australia, Carers' Australia and aged care assessment teams, they will be advised to arrange, as early as possible, for the execution of enduring powers of attorney and advance health care directives, to ensure that their wishes for their affairs and their care are respected. General practitioners, too, are increasingly likely to encourage their patients and families to enter into such arrangements.

In any event, it is important that those who execute enduring powers of attorney and advance health care directives, those who exercise powers under them and those who rely on them in dealing with donees, should be confident in the validity of these instruments and the acts committed in reliance upon them. This includes, of course, businesses who deal in good faith to provide goods and services to donees of powers.

The problem

However, that confidence is currently undermined by the divergent statutory regimes governing the execution and operation of enduring powers of attorney and advance health care directives. For example, my father, who lives in Queensland, executed an enduring power of attorney very shortly after being diagnosed with Alzheimer's Disease. He appointed as donees my mother, myself and a family friend (who also lives in Queensland). My father is currently cared for at home by my mother. Should my mother predecease my father, then my sister (who lives in Victoria) and I would need to consider whether to bring my father to live in either the Australian Capital Territory or Victoria, or whether he should remain in Queensland. Should we move my father interstate, questions would arise as to whether the enduring power of attorney could be relied on outside Queensland.

I have been advised by the Office of the Community Advocate that, under relevant legislation in the ACT, I would not be entitled to rely on the Queensland instrument to make decisions (for example, health care decisions) for my father were he to move to the ACT. Instead, the OCA advises me that I will need to go through the process of seeking a guardianship order. From a practical perspective, requiring donees to seek guardianship orders because existing instruments are not treated as valid across the Commonwealth only adds to the pressures of an already stressful and emotionally difficult situation. In addition, such applications to guardianship tribunals could impose a resource burden on governments.

However, I am aware that there is legal opinion to the contrary effect about the ACT legislation, so the matter is not free from doubt for donors, donees or third parties. I am also aware of a number of other families in similar circumstances. No doubt, with a mobile population, and the likelihood of increasing use of these kinds of instruments, this will not be an uncommon concern for donors and donees.

In 2004, the ACT Department of Justice released an Issues Paper called *Substituted Decision-Making – Review of the Powers of Attorney Act 1956*. Part 10 of this Paper raised the issue to which I am drawing your attention. The Paper acknowledges that legislation in the ACT does not have a specific provision for recognising interstate powers of attorney, while noting that other jurisdictions do have explicit provisions for interjurisdictional recognition. However, the mechanisms currently used in

various jurisdictions are not consistent (for example, compare section 25, *Powers of Attorney Act 2003* (NSW) with section 44, *Powers of Attorney Act 2000* (Tas)).

A way forward?

Harmonising laws between jurisdictions would imbue donors, donees and third parties such as businesses with confidence that they could rely on instruments throughout Australia. Existing provisions for interstate recognition are unsatisfactory because, first, they are inconsistent (leading to uncertainty) and, second, some of them rely on mechanisms such as the provision of certificates of validity by legal practitioners. This is a barrier to the usefulness of these instruments because legal advice is not readily accessible to all Australians.

I am not in a position to form a view on the most appropriate means by which to achieve interjurisdictional recognition of enduring powers of attorney and advance health care directives. However, of the options suggested in the *Background Brief* published on your website, I am most attracted to the template model. The referral of powers model has, as noted in your Brief, attracted significant criticism and is flawed by uncertainty, which is a problem that already exists in relation to recognition of these instruments. I think the possibility of a Constitutional amendment is not particularly likely, and complementary schemes do not always achieve a satisfactory level of consistency and certainty.

Conclusion

The issue I have raised is a practical 'bread and butter', day to day, issue faced by a growing number of ordinary Australians. An initiative by the Australian Government to harmonise laws relating to enduring powers of attorney and advance health care directives is likely to be welcomed enthusiastically by all stakeholders, such as peak groups representing the aged and disabled, as well as businesses who are asked to rely on such instruments in transactions with donees.

Thank you for your consideration of this submission. I am happy to discuss it further with you should you wish me to do so.

Yours faithfully

Susan F Cochrane