JOINT SELECT COMMITTEE ON END OF LIFE CHOICES

INQUIRY INTO THE NEED FOR LAWS IN WESTERN AUSTRALIA TO ALLOW CITIZENS TO MAKE INFORMED DECISIONS REGARDING THEIR OWN END OF LIFE CHOICES

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
THURSDAY, 8 MARCH 2018

SESSION ONE

Members

Ms A. Sanderson, MLA (Chair)
Hon Colin Holt, MLC (Deputy Chair)
Hon Robin Chapple, MLC
Hon Nick Goiran, MLC
Mr J.E. McGrath, MLA
Mr S.A. Millman, MLA
Hon Dr Sally Talbot, MLC
Mr R.R. Whitby, MLA

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Hearing commenced at 10.28 am

REVEREND MARGARET COURT
Minister, Victory Life Centre, examined:

REVEREND BELINDA DOVER
Minister/Consultant, Victory Life Centre, examined:

Mr CAMERON EASTWOOD
Legal Practitioner, Eastwood Law, examined:

The CHAIR: Thank you very much for joining us this morning. On behalf of the committee I would like to thank you for agreeing to appear today to provide evidence in relation to the end-of-life choices inquiry. My name is Amber-Jade Sanderson and I am the Chair of the joint select committee. We have Hon Dr Sally Talbot; John McGrath; Dr Jeannine Purdy, our principal research officer; Hon Colin Holt; Hon Nick Goiran; and Hon Robin Chapple. Shortly to join us will be Reece Whitby and Simon Millman. The purpose of today's hearing is to discuss the current arrangements for end-of-life choices in WA and to highlight any gaps that might exist. It is important that you understand that any deliberate misleading of this committee may be regarded as a contempt of Parliament. I advise that the proceedings of this hearing will be broadcast live within Parliament House and via the internet. The audiovisual recording will be made available on the committee website following the hearing. Do any of you have any questions about your attendance today?

The WITNESSES: No.

The CHAIR: You have indicated that you have an opening statement. Would you like to go ahead?

REV. DOVER: An introduction and an opening statement, if that is okay.

The CHAIR: Yes.

REV. DOVER: Chair, Deputy Chair and members, please allow me to introduce our team. Reverend Margaret Court is a senior minister of Victory Life Centre, Perth, with over 20 years' experience as a minister of religion. Through Margaret Court Community Outreach we assist the community, with over 22 tonnes of food distributed through Perth every week. Cameron Eastwood is a director of Eastwood Law. Cameron is an experienced commercial litigator, having practised commercial litigation and dispute resolution over the past 16 years. Within a short period of time of being admitted as a barrister and solicitor of the Supreme Court of Western Australia, Cameron started his own practice. This practice is currently known as Eastwood Law. Cameron has extensive experience across a large and varied range of commercial litigation matters, and in recent years has increasingly focused upon deceased estate litigation matters and dispute, commonly falling under the description of elder abuse. In particular, Cameron has acted for many families in situations where an adult child has financially abused their elderly parent through undue influence and unconscionable conduct. Cameron regularly appears as counsel in the Supreme Court of Western Australia. Notably, he appeared as junior counsel in Australia's landmark family provision case Mead v Lemon, both in the first instance and on appeal. I, myself—Belinda Dover—am a minister, a consultant and somebody who has recently nursed a beloved father to his death. As Dr Megan Best and Professor Margaret Somerville are unable to be present here today, all questions referring to their papers titled "Euthanasia" and "Unaddressed Issues in the Australian Euthanasia Debate" will be taken on notice. Please allow me to ask Cameron for our opening statement.

Mr EASTWOOD: Chair, Deputy Chair and members, as a legal practitioner who almost exclusively practices in the areas of disputes involving deceased estates and estates of elderly people, my submission is necessarily directed to paragraph (d) and, by implication, paragraph (b) of the proposed terms of reference of this inquiry. The short notice of the opportunity to attend this inquiry means that my opening statement will not have the benefit of a detailed written set of submissions, and that any questions which I am able to answer, having regard to my qualifications and experience as a legal practitioner, will necessarily be taken on notice regrettably. The views expressed are predominantly formed by my own experience in observing an alarming increase in claims centring around undue influence and unconscionable conduct in the Supreme Court, and which often involve family members bringing to bear unreasonable pressure upon their elderly parents to execute a range of legal instruments, which include instruments such as transfer of land documents, wills and enduring powers of attorney. This phenomenon is often referred to as being a product of so-called early inheritance syndrome.

In a number of cases in which I am involved, the behaviour of the perpetrators appears to manifest in the justification of a progressive escalation of influence over the decision-making processes of the elderly parent or relative concerned. Not uncommonly, this starts with the isolation of that parent from other family members in varying ways. For example, the child may move into the parent's home for the purposes of providing full-time care. The elderly parent becomes almost entirely dependent on that person and fears that if they are not compliant with proposals relating to the care and management of finances, they will be abandoned by the only family they now have. Often by reason of importunity and not necessarily actual coercion, that parent then executes a range of documents to "keep them happy", including enduring powers of attorney and, perhaps less frequently, enduring powers of guardianship. The suggestion is often made to the elderly person that they can remain in the home and need not own it, and that in any event they should leave that property to that person in their will, given the level of care that they have provided. Not uncommonly, that parent is then placed into an aged-care facility at the time the transfer of land document is signed, as well as an EPA providing the child with, for example, the ability to engage with Centrelink and receive payments on behalf of the elderly person or otherwise withdraw moneys from their bank accounts. These transactions are often stated as being for the benefit of the elderly person, but in many instances there is no proof that the interested person receives any material benefit from those transactions.

The escalation in that behaviour, it appears, is only likely to increase, having regard to the published research into the prevalence of elder abuse both in an increased societal sense and, by necessary extension, the proportional ageing of our population. It is in the context of the confluence between that burgeoning trend and the increased incidence of dementia in our elderly population that the current framework surrounding the use of, and proposed reform of, advance health directives and EPAs and EPGs should be considered. In short, the principal concern is that even if the stated principle undergirding the original legislation which introduced advance health directives is accepted, the problems associated with the current use of advance health directives and the likely solutions proposed by those who wish to fine-tune the legislative measures to facilitate end-of-life choices will, I fear, in the current milieu of abuse of the elderly, lead to an abuse of the worst and most reprehensible kind.

Advance health directives are often regarded as the most important part of advance care planning for the elderly, with the purpose of an advance health directive being a specific form of advance care planning in which the consent or refusal of consent to a specified medical treatment is outlined prior to legal incapacitation, and it is, by definition, a person suffering from dementia who is most likely to make use of such an instrument. However, an analysis of the legislative framework

contained in the Guardianship and Administration Act and the practical experience of those who observe the use of those instruments in aged-care facilities demonstrates that the advance health directive is itself ineffective and underutilised. Insofar as the shortcomings of the legislation is concerned, advocates of those as a means by which to advance so-called end of life would say that the requirement that a person have requisite capacity to execute an AHD in the first place is not sophisticated enough, because section 3(1) of the Guardianship and Administration Act defines dementia as a mental disability, and a person may be found not to have capacity by reason of section 106(2)(b) if, by reason of mental disability, they are unable to make reasonable judgements in respect of matters relating to part or all of their estate.

[10.40 am]

Therefore, an analysis of the varying degrees of decision-making capacity for those who have dementia would for advocates of the reform of AHDs mean that a more sophisticated measure should be enacted to permit persons to execute AHDs, notwithstanding they have dementia. This in turn has led to a discussion as to whether substituted decision-making mechanisms, through for example the use of EPGs, should be used instead. The question of what standards should be applied to any such mechanism is key. It appears generally accepted that the so-called principles of best interests of the person concerned and substituted judgement principles are standards by which the substitute decision-makers can exercise their powers. The Australian Law Reform Commission argues that best interest exemplifies a paternalistic approach based on objective standards reflecting notions of beneficence, such as doing good for the patient, avoiding harm and protecting life. Conversely, substituted judgement is reflective of a person and the respect for their autonomy, and it is said that that standard is preferred. It is said that the best-interests approach does not always promote autonomy, and that measures such as those adopted by South Australia in the Guardianship and Administration Act, which requires substituted decision-makers to reflect the decision that a patient would have made had their decision-making capacity not been impaired, are preferable. However, based on my current experience, in cases where relatives are motivated by financial gain and to gain ascendency and control of an elderly person, such a measure would not serve its legislative purpose but rather enable a person's life to be ended for financial gain.

That completes my brief opening statement. I apologise for its brevity and perhaps lack of comprehensiveness, but unfortunately I come here rather late in the piece. I am happy to take questions if that is going to assist.

The CHAIR: Thank you both for that. I might just explore advance health directives a bit with you. You mentioned that they are currently ineffective and underutilised. Why do you think that is?

Mr EASTWOOD: I will take that question on notice.

The CHAIR: You also outlined that with regards to patients with dementia, a more sophisticated mechanism is required. What would you see that mechanism as being?

Mr EASTWOOD: I will take that question on notice.

The CHAIR: You talked a little bit towards the end about best-interest decision-making and substituted decision-making. We have had evidence from some academics in Queensland who recommended that supported decision-making is a better model. Do you have a view on that?

Mr EASTWOOD: No, I do not have a view on that but I will say only this: the comments that have been made in the opening submissions are informed by real experiences insofar as the gaining of ascendancy by relatives over persons who are infirm by reason of diminished mental capacity. The difficulty is that the issue of capacity to make a decision is not the end of the matter; in fact, it is by reason of someone's vulnerability, which might be a combination of age and other factors where that person's ability to make decisions is compromised, and that is the substance of my concern.

The CHAIR: You have a lot of experience in this area of law. Advance health directives and the use of them is a significant term of reference for us. Can you give us some de-identified examples of where advance health directives have been abused?

Mr EASTWOOD: I cannot readily do so. The best I can say is that my understanding from on-the-ground research that I am aware of is that in fact advance health directives are rarely used at all in residential aged-care facilities. So it may well be that those examples have occurred, but if they are few it is only because they are rarely used.

The CHAIR: Do you have a view as to why they are rarely used in those particular facilities?

Mr EASTWOOD: I will take that question on notice.

The CHAIR: You have talked a bit about the legal framework around advance health directives. What about the legal framework that medical practitioners are currently working under in regards to palliative care and the Criminal Code; in particular the futility of treatment, withdrawal of life-sustaining treatment and relying on the doctrine of double effect? Do you have a view on the current legal framework in regard to palliative care at the very end of life relating to those issues?

Mr EASTWOOD: That is an issue that lies outside the scope of my submission. I am happy to take the question on notice.

Hon COLIN HOLT: You talked about your work being around deceased estates—more so disputes and elder abuse. Have you taken them to court? How do you go about proving undue influence or that someone has done the wrong thing by their parent or elderly relative?

Mr EASTWOOD: It is an interesting question because questions arising in relation to undue influence while someone is alive is a matter of policy, meaning that a finding of undue influence is often made because the relationship between the person concerned—the elderly parent for example—and the child is such that the elderly person has become entirely dependent in a situational sense on the child. In those circumstances the law invokes what they call a presumption of undue influence, and it is for, in fact, the person benefiting from the transaction to positively rebut that presumption and positively prove that in fact it was the choice of the elderly person. So it is not necessary to lead evidence of what actually happened at the time.

Hon COLIN HOLT: Right; it is the other way around?

Mr EASTWOOD: It is.

Mr S.A. MILLMAN: In terms of your litigation practice, have you litigated AHD disputes? Is that something that you have done?

Mr EASTWOOD: No; I have not.

Mr S.A. MILLMAN: That forestalls my second question.

Hon ROBIN CHAPPLE: I am reading from your submission on page 5, where you talk about the arguments against euthanasia in the media. In summary they are that the sanctity of human life forbids it, that euthanasia is unnecessary due to the availability of palliative care to relieve suffering in the terminally ill, the negative social consequences of legalising euthanasia and the danger of abuse due to the slippery slope which is created with the legalisation of euthanasia. I want to ask you some questions on each of those if I may. What is the sanctity of human life that forbids euthanasia?

REV. COURT: The sanctity of life from a religious perspective? So you are talking to me now?

Hon ROBIN CHAPPLE: I am generally approaching you all.

REV. COURT: Well, I guess probably from my side—I can go to the scriptures on it—thou shalt not kill.

Hon ROBIN CHAPPLE: So it is basically from a Judeo–Christian religious upbringing.

REV. COURT: That is right. I was brought up that way. I went to school and I learnt that.

Hon ROBIN CHAPPLE: The next one is that euthanasia is unnecessary due to the availability of palliative care to relieve suffering in the terminally. We have heard from palliative care specialists that it does not have that ability in a number of cases—not all—and also from palliative care practitioners that some people seek to have the termination of their life utilised by those practitioners of which they had to refuse. Palliative care is clearly, as far as the investigation that we have done so far, not the panacea in all cases. In the majority of cases, palliative care is doing a tremendous job and we really, really support that, but there are those occasions when it cannot. We have heard of cases in which people been completely sedated but due to muscular affect and moaning and crying, even though they are fully sedated they are in significant pain and distress. I think the notion, from my observation, that palliative care can relive suffering for the terminally ill as a statement is a bit too broad. Do you have any comments on that?

REV. DOVER: Could I take that question on notice and allow Megan Best and Margaret Somerville to answer that on our behalf?

Hon ROBIN CHAPPLE: Yes, certainly.

[10.50 am]

Hon NICK GOIRAN: Further, I heard you mention earlier Dr Megan Best and Professor Somerville, and in your response just then to my colleague, and that you would like to take that question on notice. Are you in a position to advise the committee on whether Dr Best or Professor Somerville might be available to the committee at some point?

REV. DOVER: For this day they were not available. I did try to get them over here to be with us for this time but unfortunately I believe Dr Best was overseas and Somerville had appointments. I have been in New South Wales; I worked in New South Wales Parliament and Megan Best came in to speak to us there on this same issue and they were excellent. She was excellent how she had it laid out and she is a leader in the field. I am not sure; that is, of course, why I used her papers, because they are leaders in their field.

REV. COURT: Margaret is on the list; I have spoken to her. I am sure that at some time she would come over.

REV. DOVER: Yes.

Hon NICK GOIRAN: Their non-attendance today is not a lack of desire on their part, it was just an unavailability?

REV. COURT: Yes.

REV. DOVER: Unavailable for this time slot, yes. They would be excellent, both of them.

Hon NICK GOIRAN: Mr Eastwood, I gather you practice in the area of elder law?

Mr EASTWOOD: It is not a term I often use, but that is what it amounts to.

Hon NICK GOIRAN: Sure. Based on your experience, do you have for the committee a sense of the prevalence of unreported and unaddressed elder abuse in the community?

Mr EASTWOOD: I recently glanced at a transcript of an ABC interview where they talk about it being the silent epidemic, I think was the term that was used. I will be honest: the increased incidence of such cases in the Supreme Court is very noticeable. Those, together with claims relating to disputes over wills, are the fastest-growing of any civil disputes and we are getting busier. I do not say that happily, by the way, but it is a fact.

I will outline perhaps a slightly different example which may be of assistance and which demonstrates, I would say, some of the realities of how EPGs and statutory appointments of guardians can sometimes be abused. I am aware of an example—and I will not use names, for obvious reasons—whereby a person who had suffered a catastrophic car injury and became quadriplegic was, of course, admitted into full-time care. At some point—because the father, who had been both his enduring power of attorney and guardian, was himself ill—an issue arose as to who might best look after that young man's interests. As a matter of course, as is usually the case, it was not agreed and the matter was referred to the State Administrative Tribunal. An application was made by the mother to become the guardian of this young man. There were a range of concerns raised about the appointment of that person because of her, perhaps I would say, personality issues, if I can put it politely. Accordingly, SAT was not satisfied that that person could act alone and accordingly appointed both that person and the public advocate jointly to make all of the decisions that are available under the relevant legislation. This young man had in the past suffered from some bouts of pneumonia and, as I understand it—I am not a medical practitioner—people in those circumstances regrettably have ever-increasing problems with each occurrence of such an illness, and therefore the indication was that, "Look, he might not pull through the next time." But what actually happened was this: as I understand it, he suffered a relatively minor bowel complaint which required medical treatment. When I say minor, I do not mean that it was not serious, but it was a matter that could be apparently attended to relatively easily, but that of course required the consent of both the mother and the jointly appointed person, the public advocate. The terms under which the appointment was made were such that the public advocate was required to refer the matter to the brother, who had had longstanding involvement in the care of this young man. To cut a long story short, what happened was the problem arose, the mother decided not to inform anyone and to refuse care and he died. Now, it has apparently subsequently come out—and I say that in an anecdotal sense, because I am not giving evidence—that that condition was readily treatable and was not, in a sense, the gravamen or the spirit behind the appointment in the first place. That is a matter that I made an indication in, in due course. That is a practical example.

Mr J.E. McGRATH: Further, how was the mother able to make that decision, though? Were two people involved in the decision-making?

Mr EASTWOOD: I am happy to take that question on notice and I may or may not provide details because it may not be appropriate. I am sorry I cannot; I have done my best to explain it as I understand it, and it is a very good question.

Mr J.E. McGRATH: Further, the one thing that people keep saying to us as a committee is that you have to have safeguards in a lot of areas.

Mr EASTWOOD: That is right.

Mr J.E. McGRATH: And by having the second person, at least one person cannot unilaterally make the decision, so there has to be a joint decision, with one of them being an expert.

Mr EASTWOOD: I think the difficulty is that that is what is required by the instrument. But, as is evident from this example, it does not necessarily work and the question is: how do you enforce that at the time? The point of having a joint decision-making process is that both parties make that decision at the time it is required. Someone might just say, "No, I am not going to bother." That means that the appointment itself is ineffective.

Hon ROBIN CHAPPLE: You say there is evidence that elder abuse or the evidence around elder abuse is getting greater.

REV. DOVER: Yes.

Hon ROBIN CHAPPLE: Is that, do you think, either an awareness of people's legal ability to now challenge in areas of elder abuse or to a large degree that we are actually getting an ageing population?

Mr EASTWOOD: I actually think that there are a range of reasons informing increased incidents. I would say that one of them is actually and unfortunately the state of the economy and people becoming increasingly desperate in a financial sense. There are many examples of that. I deal with other cases where—and there have been attempts to reform this area—there are questions of fraud where someone goes and signs a signature on an EPA that is not theirs and they pretend to be their dad and they go and sell the land and run off with the money—that sort of thing. There is in my view, though, perhaps an even more fundamental problem—and I have to say this is a product of or is reflective of many cases that I deal with—that there are particular people in our community who—and I use this term loosely—because they exhibit traits of not being able to be empathetic or to care about others, they are focused on whatever perceived wrong that they have suffered, and that justifies any action that they can reasonably take, including doing things that we have talked about. There are many examples of those sorts of people in our community and in most of the cases we have that relate to these issues, you will continually hear people saying, "You do not know what this person is like. They're a narcissist; they're a sociopath" and I will say, "Look, that is okay, I have heard that every time before. There are only a few people who I regard that are really like that." But it is a common theme that is running through this litigation, that there are people who are saying, "Actually, mum doesn't need the home. She doesn't really need anything. I deserve it, look what I've done, no-one cares about me." I know that this dovetails into what appears to be the slippery slope argument, but I would regard that as being true at a practical level because that is in fact what is happening.

[11.00 am]

Hon ROBIN CHAPPLE: It certainly is a concern of mine.

Going back to the arguments against euthanasia in the media: we do not hear the arguments against euthanasia but in summary they are that there is a negative social consequence from the legalisation of end-of-life choices or euthanasia. Could you identify what they are?

REV. DOVER: We will take that on notice as it is according to the paper that we submitted.

Hon ROBIN CHAPPLE: I was hoping to get some further answers.

REV. DOVER: Sorry.

Hon ROBIN CHAPPLE: Then we go to the last one. There is a danger of abuse due to the slippery slope, which is created with the legislation of euthanasia. Obviously we have heard the comments from your legal colleague. Are there any other aspects of concern that create the slippery slope in what might be defined legislation?

REV. DOVER: Again, sir, I will take that on notice.

Hon COLIN HOLT: Mr Eastwood, do you think we need to review the Guardianship and Administration Act? Do you think it is timely to have a review of it, see how it is operating and how it might be improved?

Mr EASTWOOD: Reviews are always helpful. If you are asking me for a specific answer, I think I would be able to benefit you by providing a written response to that.

Hon COLIN HOLT: If you want to be specific, you can be. In your professional opinion, having worked within the act, do you think it is time for a review to look at how it is operating?

Mr EASTWOOD: I think it would be helpful. If you want specifics, I am happy to take the question on notice and provide that.

Mr S.A. MILLMAN: Mr Eastwood, just in terms of the answer that you provided, the premise underpinning your answer to Mr Chapple was the increase in cases relating to elder abuse. Is that your anecdotal experience personally or is that from a dataset that we can get from the probate office or the Supreme Court?

Mr EASTWOOD: You would have to take it as being anecdotal but I think it would be supported by an analysis. I think that material is available.

Mr S.A. MILLMAN: Can I trouble you to include that in your written response to Mr Holt in terms of the review of the guardianship act?

Mr EASTWOOD: Yes. Will that also be included in the question on notice, as a supplementary?

Mr S.A. MILLMAN: Yes. Thank you very much.

Hon Dr SALLY TALBOT: I have a couple of questions to you, Mr Eastwood, about the AHDs. I may have misunderstood what you were saying but I think at one stage you implied that you have some difficulties with the concept of capacity assessment. To make an AHD, you have to have full legal capacity and the medical practitioner has to certify that. Did I understand you to be suggesting that even when a person does have full legal capacity, there could still be a question about coercion or their intent?

Mr EASTWOOD: Quite right.

Hon Dr SALLY TALBOT: Does that apply across the board whatever the person decides? Do you have a fundamental problem with the basic concept of full legal consent?

Mr EASTWOOD: I do not have any problem with the concept.

Hon Dr SALLY TALBOT: If a medical practitioner certifies that somebody does have legal capacity, why would you then want to further question the determinations they make about their own situation?

Mr EASTWOOD: I think I now understand what you are saying. The difficulty arises that that is not the full picture. There are varying degrees. The question of capacity —

Hon Dr SALLY TALBOT: When you say “that is not the full picture”, are you telling me that someone who has full legal capacity is not enough?

Mr EASTWOOD: It is not the full picture in the context of what I have been discussing because I am making reference to that person. If that person is in a relationship in which they are dominated or someone else has the ascendancy in their living situation, the question of whether or not they have capacity is not the point.

Hon Dr SALLY TALBOT: How would you amend that particular section of the act? How does it need to be changed? I am not asking for you to give a statutory amendment but just talk us through a narrative.

Mr EASTWOOD: I will take that question on notice, other than to say that the common law, as I think I have explained, makes the position clear in circumstances in which someone was presumed to have made a decision by reason of undue influence having regard to the totality of their circumstances and the relationship they have with someone else.

Hon Dr SALLY TALBOT: I know that the Chair made this clear in the opening statements, but the purpose of a hearing is not like an exam. We are not giving you a test that we are going to mark you on and you only get to go home when you have 50 per cent. A hearing will often unfold as a conversation between people such as yourselves who have certain beliefs and views and experiences and people like us who are keen to understand those beliefs.

Mr EASTWOOD: I appreciate the point. My perceived reluctance is not by reason of feeling that I am being examined. If I am going to assist you as far as I can, it may be that it is useful for me to put the answer in writing. I am happy to take the question and to address all of your concerns. Is there a particular point that you wish me to now raise?

Hon Dr SALLY TALBOT: Do you have any experience yourself, again, with de-identifying information? We are not asking you to name names, but give us a situation that has arisen in your practice in which clearly the person was deemed as having full legal capacity and signed a legal document, but you want to bring other factors into play in determining whether those intents should be delivered to the person.

Mr EASTWOOD: All right. Let me think for a second. I will try to think of the most appropriate one.

The CHAIR: Perhaps while you are thinking that one through, my question is for Reverend Court. We have heard some of the strongest evidence to this committee and certainly a lot of the opinion polls, if you like, have been from older people who want strengthened advance health directives and access to voluntary assisted dying. Could you comment on that?

REV. COURT: Well, I feel God gives life and God takes life. Even in research today, they are finding ways of—you even look at Alzheimer's, you are looking at things now with medicine. I think often people want to die but then a lot of people feel that it is not time for them to die. I think sometimes people come through. God says, he gives life, he takes life. A lot of people have fear of death; they wonder where they are going. I think sometimes that peace can come into their life or somebody can come alongside them. With our society today and our elderly society, I feel because I am coming from a religious side and God's side, and to know the peace of God, through our Lord Jesus Christ, you do not have any fear of death. There is a way that you can come through in that peace and that love. Our palliative care is tremendous in this nation and you study other nations—Canada and Europe and what is happening there. Dr Margaret Somerville studied it for 40 years, and you look at some of her stuff. That is why I would love her to come and talk to you and the problems that they are now having in these other nations and going off into these other areas that Cam has been talking about in dementia and all these areas, even I think in Europe, they are looking in mental illness, and you think, where does it stop? Once you open that door, how far is it going to go?

The CHAIR: We have had quite a bit of evidence from seniors who want access to this but also from the Motor Neurone Disease Association, and their experience is that their members commit suicide after a diagnosis because of the end, and that palliative care can assist up to a point. We have also had a lot of consistent evidence that around two per cent of palliative care patients still experience very extreme pain. What is the solution for those people, in your view?

REV. COURT: I think a lot of it in that is that a lot of people get into that and it is loneliness. I think probably the people looking after them—the care, family. You see a lot of people get older and nobody wants them very much. I think there is a lot of loneliness in those areas. I think there is always a way. I do not believe this is a way—finishing life. I know we have an elderly population, but I do not feel that we should go down this road, because it is not God's way.

[11.10 am]

Mr EASTWOOD: I was going to say—I wanted to come back—if you would like me to answer the question, I will give you an example. The example is of an elderly man in his 80s who is of Maltese background. He was married to his wife for 60 years and, of course, as is the cultural practice in that ethnic background, if I can put it that way, he was entirely reliant on his wife. She did everything for him—cooked meals and things like that. They were a very traditional couple. She passed away probably five years before he did. He had a reasonable educational background. He did not speak English as a first language. What happened was that there were four children in that family. I have

to say that I am only giving this by way of an example because I cannot give—I think you told me I can de-identify the issue. It is an example where someone in those circumstances has lost their wife of 60 years. They may have some level—perhaps a minor level—of memory loss but would not be regarded as having lost their capacity as such to make either an enduring power of attorney or an EPG or some other legal instrument. The circumstances that may follow are—perhaps I will now go into hypotheticals because to speak too much of this particular matter might be a problem. You then get in a situation where one or two of the children take full responsibility for looking after that person and make an asserted attempt to cut them off from the other family members. They go and see a doctor and the doctor administers the usual mini mental test and they get 29 out of 30 and all that sort of thing.

Hon Dr SALLY TALBOT: I am sorry to interrupt you, but is this in the process of getting an EPG or an EPA?

Mr EASTWOOD: This is in the case of making a will and making an EPA. Those tests are undertaken. The general practitioner will administer what they regard as being an appropriate test. They might modify that test—you are much better aware of this than I am—to take into account cultural differences and deficiencies in language and that sort of thing, yet the difficulty arises when they go to make a document of that kind and they go and see a legal practitioner. Whether or not that particular person is judged by the law as having really made their own decision—someone has the mental capacity, if you want to put it in those terms, but in those circumstances the court would likely say that if that person has not gone to a legal practitioner themselves and sought out that advice themselves, then it may be that that document or that instrument is impugned by reason of undue influence. You cannot any longer separate who has really made the decision. You have the son sitting there with the lawyer and you ask them, "Do you want to do that?"—"Yes, I do." "Are you here of your own free will?"—"Yes, I am." That is the concern. There really is no distinction between a will or an EPA or an EPG or an AHD for that matter because all of those documents are presented and signed in circumstances where that person does not want to rock the boat because they are going to lose the only person that they have in their life. I have seen that many times. I have another case that involved an elderly Polish woman who was in her 90s and was a prisoner of war. She did something—"I did that because that is what they wanted." Of course, by that stage I could not act for that person. They had lost their capacity. So then you have to get another measure in place whereby you act for another person who stands in their stead and the action is brought in court and then, of course, that person died, so now there is a fight over the will and there is going to be a fight over whether that property that was transferred to the other child in those circumstances should come back into the estate. One of the things that I do not think, in a practical sense, is quite appreciated is the devastation that is wrought on family members through these incidents occurring, not just in a familial sense, but in a financial sense. We are talking hundreds of thousands of dollars in legal costs, which all should be avoided, of course, but sometimes things become intractable and people just cannot give up the fight because at the centre of that is, "What did you do to my mum?" The problem, of course, is that it may not even be the case that anyone ever finds out what really happened, but that is what occurs.

Mr J.E. McGRATH: Further to that question, you have also got the situation where the person might have agreed when two of their siblings took him or her along to the doctor, but then down the track once they have gone into residential aged care or something and the house has been sold, because it is very expensive to get into some of these places—most families cannot afford to do it without selling the parent's home. Then down the track, the father or mother thinks about it and says, "Well, I really wasn't that happy doing it." But at the time they were. At the time they went there they were happy to sit in front of the GP or the medical practitioner with the two siblings and to go

through the process. What is the answer to this? Is the answer that you need all siblings to agree? That will be very difficult to do.

Mr EASTWOOD: The answer is that unless that person themselves says, "I want to do this" and makes contact with a lawyer and does what they can within the confines of their own decision-making ability, there is a problem because there will always be, even if that is what that person in fact wanted, there will be a perception on the part of others but that was not what they wanted. To go one step further and engage with what you have said, there is the additional problem of say, for example, that person does go into an aged-care facility and then the persons who are involved in controlling their affairs decide to keep the Centrelink money and say, "Well, I am using it for mum and dad." And then what you have is a debt that is created in the residential aged-care facility. Then they want to sue the old person for the money. Then they say, "I don't know what's going on. I thought my daughter was looking after this." I have got a case like that too.

The CHAIR: Before I hand over to my colleague I just would ask very quickly—Mr Eastwood, how do these cases—how they brought to your attention.

Mr EASTWOOD: The client rings me up. Someone rings me and says, "I've had this situation." By referral—is that what you mean?

The CHAIR: Yes.

Mr EASTWOOD: The answer is I do not exactly know. I am just getting a lot of them.

Hon NICK GOIRAN: Just a couple of questions if I can—firstly, to Mr Eastwood. I think I heard during the opening remarks that you practice in commercial litigation.

Mr EASTWOOD: Yes.

Hon NICK GOIRAN: Would you be familiar with the safeguards that are in place when a person signs a guarantee on bank loans?

Mr EASTWOOD: Aside from saying that generally—this is not an area that I—commercial litigation covers a range of areas, but the most common safeguard is that there is what they call a solicitor's certificate. That, some people think, has been used by the banks to ensure that if something goes wrong and they sue the person who has given the guarantee and they say they did not understand it or realise what they were doing, then they can come after the lawyer. The reality is that in the profession most people avoid doing those solicitor's certificates, including myself.

[11.20 am]

Hon NICK GOIRAN: Are there sometimes court actions initiated pleading that those bank safeguards have failed?

Mr EASTWOOD: The most common problem that arises, and there is a case by the name of Amadio, which is a High Court decision that you will be familiar with—that is the classic instance of someone who does not speak English as a first language and they are, in effect, shanghaied into signing a document. I have one of those matters now, as I just took instructions last week. It is a fellow who is in his 80s. His son—this is the most extraordinary situation—had him mortgage his house to allow him to take a considerable amount of money and he is just saying, "I don't understand it." This was a matter that was dealt with by solicitors. There was no interpreter or translator present, and I have got to say that that case, if that matter proceeds, not only will the transaction be set aside, but I am afraid the lawyers involved will be in trouble.

Hon NICK GOIRAN: But in that instance the complainant is alive and able to seek redress.

Mr EASTWOOD: Quite right, yes.

Hon NICK GOIRAN: I also heard earlier, I think, that Victory Life performs some kind of community service, providing goods to people in the community and so forth. I think Ms Dover, you might have mentioned at the beginning that that is part of what Victory Life does.

REV. DOVER: That is right.

Hon NICK GOIRAN: This is just picking up on the point by the Chair earlier about sometimes people feeling lonely with a sense of hopelessness and so forth. I think Hon Dr Sally Talbot asked a question during the public hearing yesterday to a witness and, the member will correct me if I get this wrong, the sense of the question was that there can sometimes be a view that society has a responsibility to those people who are feeling lonely and hopeless to fill that gap. The response from the witness, according to my notes, was "Why would you do that?" In other words, why would society want to fill that gap for the person? Given the work that you do in this space, I would invite your comment as to why would society seek to fill that void of hopelessness and loneliness.

REV. COURT: I think that as a church we have all ages. We have family—we are a very family church. Last week, we had 150 people through in one day in our community services. We have counsellors there. You see the needs of society—you know, young mums—whether they are elderly or not, you try to help in whatever way you can, by visits, home visits and hospital visitation. There are a lot of lonely people out there. As we know, there is an ageing society. I think probably a city could not do without the church and those areas that do help, particularly the Salvation Army. What we do, we have been doing it for 20 years, and I think we need one another. We are to love one another. We are to help others at whatever age, whatever nation—we have very multicultural work, and I think if you love people, you help people.

The CHAIR: Thank you for your evidence before the committee today. A transcript of this hearing will be forwarded to you for correction of minor errors. Any such corrections must be made and the transcript returned within 10 working days from the date of the email attached to the transcript. If the transcript is not returned within that period, it will be deemed to be correct. New material cannot be added via these corrections and the sense of your evidence cannot be altered. If you wish to provide clarifying information or elaborate on your evidence, please provide this in an email for consideration by the committee when you return your corrected transcript of evidence. The committee will write to you with the questions taken on notice during today's hearing. Thank you very much for taking the time to speak to us today, we really appreciate it.

Hearing concluded at 11.24 am

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