C O R R E C T E D V E R S I O N

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 22 October 2009

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Dr J. Chesterman, Manager, Policy and Education, Office of the Public Advocate.

The CHAIR — Welcome to the hearing of the inquiry into powers of attorney, and welcome to Dr John Chesterman from the Office of the Public Advocate. Thank you very much for coming along. The evidence taken at this hearing is protected by parliamentary privilege, as you know, as provided under the Constitution Act 1975 and further subject to the provisions of the Parliamentary Committees Act 2003, the Defamation Act 2005 and where applicable provisions of reciprocal legislation in other Australian states and territories. Any comments you make outside the hearing may not be afforded such privilege.

You have received and read the guide for witnesses giving evidence before this committee. Having dispensed with that, we have an hour. I would like to thank you for your very comprehensive submission, which we have had a look at. We clearly have some matters that we would like to raise with you, but we will leave it open to you to set up and give us a bit of a talk through your general response to the terms of reference and then we will have a more open discussion.

Dr CHESTERMAN — Thank you very much. Thank you for inviting me here today. I begin by expressing the apology of Colleen Pearce, the Public Advocate, who is unable to attend. I have had many discussions with her about this topic and can speak on her behalf here today. If there are questions where I cannot, I will indicate that later on, but I certainly can in my preliminary comments.

In our submission we call for four main things: the enactment of a stand-alone power of attorneys Act which brings together the three Acts that currently regulate powers of attorney; a uniform test of capacity to sign an enduring power of attorney; a legislative requirement for attorneys to seek out the wishes of donors and where appropriate give force to them; and improved protections to guard against unscrupulous actions by attorneys under enduring powers of attorney.

They are the main things we call for. I would like to make some preliminary comments before moving to the main recommendations we make. Firstly, the Office of the Public Advocate has become, in a sense, a de facto expert on powers of attorney through our variety of roles. We have, as I mention in our submission, a heavily utilised telephone advice service, and most of the calls to that advice service relate to either guardianship administration or enduring powers of attorney. We also have an extensive community education program: we give around about 200 community presentations each year, and powers of attorney form part of the basic presentation that we give. Our community education strategy also involves the highly regarded *Take Control* booklet and DVD which I believe you saw recently. I have copies of the *Take Control* publication if anyone wants them.

Another preliminary comment I would make is that it is very difficult to know how much usage is made of enduring powers of attorney. They are essentially private agreements, and we, the Office of the Public Advocate, are no more enlightened than other people about what the general uptake is of powers of attorney. Even where we give advice about how to complete an enduring power of attorney we do not know if the person does it, but we take the view that they are a good thing. The current Public Advocate continues to advocate the benefit of enduring powers of attorney as an effective means by which individuals can retain some control over their affairs through the assistance of a trusted person in the event of their incapacity.

Having said that, we recognise that the private nature of enduring powers of attorney and the absence of accountability requirements on attorneys make their abuse relatively easy and also make the level of abuse very hard to quantify. In our submission we put a number of case studies forward as examples of the abuse of enduring powers of attorney. These examples can be found in many places, and they range from egregious theft to the more subtle exercise of undue influence.

I will go on to the main recommendations we have made in our submission. In section 7 of the submission we call for all legislation creating and regulating powers of attorney to reside in the one powers of attorney Act. We suggest that enduring powers of attorney should be given uniform legislative names: enduring power of attorney, financial, enduring power of attorney, guardianship, and enduring power of attorney, medical treatment. We also call for standard terminology to be used to identify parties to an enduring power of attorney.

As you would know, at the moment in one of the powers of attorney, the enduring power of attorney, we call people 'attorney' and 'donor'. In another one we have 'enduring guardian' and 'appointor', and in the medical treatment one we have 'agent' and 'donor'. We think there should be standard terminology. Those appointing ought to be called 'principals' and those exercising power should be 'attorneys' or, in the case of guardianship,

'enduring guardians'. This is more than about just semantics and consistency. We think the use of 'principal' in particular is better than 'donor'. We have argued in our submission that we do not want to put across the idea that power is being ceded to another, and 'donor' has that connotation, whereas 'principal' does not.

In section 8 we call for one form combining the three enduring powers of attorney to be created, which could be called an enduring power of attorney, financial, medical and guardianship, which only requires one set of signatures.

On the question of capacity to sign an enduring power of attorney, in section 9 of our submission we call for a uniform test for capacity. A test, which would be in the legislation, would be that a principal has capacity to sign an enduring power of attorney where the principal understands the nature and effect of the enduring power of attorney. It is quite a simple one, but we suggest it should be a uniform one for all enduring powers of attorney. That is on the question of capacity to sign.

On the question of when an enduring power of attorney comes into force and is activated, members of the committee will know that currently an enduring power of attorney, financial, can begin to operate immediately but the other two cannot. This causes problems now and will cause many more in future with a rise in the number of people with fluctuating capacity levels — for example, people with dementia or mental health problems. If you say enduring powers of attorney can only be activated when someone lacks capacity and a person has fluctuating capacity, there is a question about whether the enduring power of attorney is being appropriately used. It is even more complex if you think about capacity as being decision-specific, which is how most tests of capacity are worded. A person might have capacity to make some decisions but not others, so the appropriate use of an enduring power of attorney here, requiring the person to be lacking capacity in regard to the particular decision, is very difficult to be certain about.

We have recommended that all enduring powers of attorney should be able to come into force immediately upon their signing, although principals should retain the ability to specify that enduring powers of attorney are only to be operative at certain times. This is consistent with the principle of supported decision making that is becoming increasingly prominent in international human rights developments.

In section 11 we engage the issue that the basis on which the power is granted under the three existing forms of enduring power of attorney is to some extent unclear. There is confusion as to whether those people appointed under enduring powers of attorney should act in accordance with the donor's best interests or according to their pre-incapacity or even their current expressed interests. Our submission details the various ways in which that happens. We recognise the difficulty, of course, of legislating to require a donor's express wishes to have precedence in all situations. It would cast into doubt the whole value of having enduring powers of attorney if the expressed wishes always held sway. At the same time the Office of the Public Advocate believes it is important to place in the legislation the principle that in deciding how to act, attorneys and enduring guardians must consult with, and where reasonable act upon the expressed wishes of principals and take into account any pre-incapacity views the principal held. At the moment it is our opinion that the views of the principal can too easily be ignored.

Such principles receive clear expression in a number of Acts. I recommend to the committee the ACT's Powers of Attorney Act 2006 as a good one to look at in terms of the principles it contains in schedule 1, and also the Queensland Powers of Attorney Act 1998. They both list a range of principles that need to be taken into account.

We recommend that enduring power of attorney legislation should contain a statement of principles to guide attorneys and enduring guardians in the performance of their powers under enduring powers of attorney. Such a statement should include the core requirement that attorneys and enduring guardians must inquire about the wishes of principals when exercising powers under the enduring power of attorney, and that such wishes should be acted upon where it is reasonable to do so. You may wish to have further discussion about this in a minute, and I am happy to do that. What I would say is that those principles would only ever be guidelines; you could not make them enforceable. Ultimately it is the attorney who has to make the judgement call, and our belief is that that is why you nominate someone you trust as your attorney and let them make the judgement call. What we are suggesting is that in making that judgement the attorney should be guided by a range of principles.

On the issue of guarding against fraudulent use of enduring powers of attorney, the evidence suggests, and again it is largely anecdotal, that most abuse of enduring powers of attorney occurs not when enduring powers of attorney are fraudulently executed but when the powers under validly executed enduring powers of attorney are abused. Certainly that is the experience of the Office of the Public Advocate. Again, anecdotal evidence suggests that criminal levels of abuse of enduring powers of attorney are rarely reported to police and that in any case police are reluctant to follow through reported abuses of enduring powers of attorney simply because it is so difficult to prove.

The Office of the Public Advocate recognises that currently there are de facto — what we call point-of-use — safeguards that exist in relation to the enduring power of guardianship and the enduring power of attorney, medical treatment. In other words, there are only certain situations where they can be used and abuses are more easily seen as a result of that. However, that is not so much the case with the enduring power of attorney, financial. Those forms of enduring powers of attorney are wide open to abuse.

In view of this, the Office of the Public Advocate submits that increased safeguards should be adopted in relation to financial abuse. Our recommendations include the creation of an optional category of 'interested persons' in power of attorney legislation for all enduring powers of attorney. The interested persons would not have any role to play in the exercise or execution of an enduring power of attorney, but they would be a person whom a principal can nominate as having an interest in the wellbeing and financial affairs of the principal. We have also recommended that EPA — enduring power of attorney — legislation should require any attorney who benefits financially from the exercise of an enduring power of attorney to advise within 30 days the people listed as interested persons of any such payment or transaction. The idea is simply that it would give the interested person possible grounds on which to challenge the enduring power of attorney at VCAT should they wish to do so.

Another way of guarding against the abuse of enduring powers of attorney is to clarify that such abuse will often constitute theft. We recognise that a specific legislative provision to this extent is technically superfluous — it is theft anyway — but the Office of the Public Advocate is of the view that it would help clarify that abuse of enduring powers of attorney often does amount to theft. On that basis we are recommending that the Crimes Act should be amended to have a specific provision saying that the fraudulent exercise of power under an enduring power of attorney constitutes theft. We also recommend that a provision should be placed in any new power of attorney legislation specifying that VCAT has the power to order an attorney or enduring guardian to compensate a principal or the principal's estate where financial loss has resulted from the abuse of an enduring power of attorney.

In section 12 of our submission we look at medical treatment, and we realise that the provisions of the Medical Treatment Act are not under review by this committee. In the submission we refer to an important inconsistency that exists between the legislation — the Medical Treatment Act — and the Guardianship and Administration Act, which itself is under review by the Law Reform Commission. I will not go through that inconsistency here. Suffice to say that in our submission we are calling for that inconsistency to be removed by strengthening the power of enduring guardians to refuse medical treatment. What we are saying is that the power of enduring guardians ought be the same as the power of agents under the medical treatment legislation. That would not involve any amendment to the medical treatment legislation, just to the Guardianship and Administration Act.

In section 13 we look at the current inconsistent witnessing requirements across the three enduring powers of attorney, and we argue that the witnessing requirements should be the same. As the committee would know, a relative of the principal can witness an enduring power of attorney under the Instruments Act but not the appointment of an enduring guardian under the Guardianship and Administration Act. That is one example. We also note in this section that we think witnesses to enduring powers of attorney are rarely taking seriously their requirement to attest that the principal appears to understand the document being signed. Our experience and that of other organisations — and I believe you will hear from some of them today — is that witnesses attend simply to attest that they saw the principal sign the document, not that the principal understood it. We submit that a checklist of questions ought be created which witnesses are required to go through with principals before the witness can attest that a principal appears to understand the document.

Our third concern in relation to witnessing relates to the current requirement that one of the witnesses to an enduring power of attorney be a person able to witness statutory declarations. Again, anecdotal evidence

suggests the formulaic witnessing of documents by pharmacists, for example — not that I want to be disparaging about pharmacists, and I did check quickly that no-one was a pharmacist in a previous life — —

Mr FOLEY — Very sensible of you!

Dr CHESTERMAN — The formulaic witnessing of documents by pharmacists places enduring powers of attorney alongside other less significant requests, and our view is that enduring powers of attorney should be distinguished from other witnessed documents. In this section we argue that enduring powers of attorney should require two witnesses neither of whom is related to the principal. One of the witnesses should belong to a group of authorised witnesses, which would include court registrars and lawyers admitted to practice in any state or territory of Australia, so they would be a smaller group of authorised witnesses rather than just anyone who can receive a statutory declaration.

I am just finishing up now. In terms of registration, there was quite a bit of debate within the Office of the Public Advocate about this, but in the end we plumped in favour of compulsory registration. We recommend that a system of enduring power of attorney registration similar to that used in UK should be adopted, and enduring powers of attorney should only be operative once they have been registered. A notice period ought apply to that registration, and any persons nominated on the enduring power of attorney as interested persons by the principal should have to be advised on any registration application. We also think VCAT should be empowered to hear any challenge to the registration of an enduring power of attorney.

We recognise that the call for compulsory registration involves weighing up the benefits and the costs. The benefits are that there will not be disputes about the existence of enduring powers of attorney or about superseded enduring powers of attorney. We also think that registration will act as a subtle disincentive for the abuse of enduring powers of attorney. Of course the cost will be the financial one which will have to accompany registration. That will act as a disincentive for people to sign enduring powers of attorney, but on balance we are in favour of registration.

The last thing I will say is that the Office of the Public Advocate believes a public education campaign should accompany any change to the enduring power of attorney laws and should utilise a multimedia approach that seeks to encourage both young and old Australians and those from culturally and linguistically diverse backgrounds to consider signing enduring powers of attorney.

Finally, a part of the education campaign should also be directed towards authorised witnesses, at least one of whom, we are suggesting, must witness an enduring power of attorney.

The CHAIR — Perhaps we could just go back to the beginning of your presentation. In that presentation and also in your submission you acknowledge the difficulties in assessing the levels of use of these powers of attorney, and you also mentioned as you went through that you run a telephone service. In the context of that I understand the difficulties. You also say it is not as widely used as probably it should be. Why do you think that, on the basis of the evidence that you have or in the experience of the office? And what do you think the barriers are?

Dr CHESTERMAN — The barriers of knowledge are just that they exist. Often the first thing a person hears about the need for an enduring power of attorney is when their parent, for example, is on the cusp of not being able to make their own decisions, and we have a disproportionate number of situations where we experience that — at VCAT hearings, for instance, over guardianship matters where the family may well have organised an enduring power of attorney to be signed some time earlier had they realised that they existed. There is the problem of just general knowledge about them.

I can tell you that our telephone advice service fields a lot of calls — I think it was 16 000 calls in the previous financial year and 14 000 calls last year. Detailed statistics on calls relating to enduring powers of attorney are not kept, but we know the majority of calls are general calls seeking information on either guardianship and administration or enduring powers of attorney.

The CHAIR — Did you do an analysis of those 16 000 calls?

Dr CHESTERMAN — Only in a generic sense. We have broken them up into various groups. At the moment we have one category, which is general information about guardianship and administration and powers of attorney. I cannot disaggregate that.

The CHAIR — Is there a capacity to disaggregate that?

Dr CHESTERMAN — Not on the stats that we have. We will be looking at that in the future. It would be useful. We have statistics on the downloading of *Take Control* from the website. I can tell you that, as stated in our last annual report which has just been tabled in Parliament, in the last financial year there were over 5000 downloads from our website and 4800 downloads from the Victoria Legal Aid website, so that is about 10 000 downloads of that publication; and legal aid has distributed 36 000 copies of that, so it is widely distributed.

But the evidence that more people would use them if they knew about them simply comes when it is almost too late, I guess. We regularly come across situations where people, had they thought about it and had they been able to get their affairs in order, would have signed an enduring power of attorney.

The CHAIR — I realise that is a recent document, but do you have any experience of whether the interest is escalating, or is it pretty well the same?

Dr CHESTERMAN — It is pretty even. I did discuss this with someone who has been at the Office of the Public Advocate far longer than I have.

The CHAIR — But you would expect a bit of a correlation with an increasingly ageing demographic and the number of people who ring you.

Dr CHESTERMAN — Yes, you would. I am not sure that that is matched by the utilisation of resources.

The CHAIR — Do you have any sense of whether there are particular groups that run more outside the tent in this?

Dr CHESTERMAN — It seems to us pretty clear that people from culturally and linguistically diverse communities are not taking up powers of attorney in proportion to their population figures.

Mr CLARK — Could I pick up some of the points in item 12 of your submission about medical treatment? I see that you have picked up on Julian Gardner's argument, which he put to us when he gave evidence the other week, about combining powers that are currently in the Medical Treatment Act with the Guardianship and Administration Act powers. I must say it was seen as a rather ingenious attempt on his part to bypass our terms of reference!

The point I wanted to put to you was that, apart from that, it seems to me that combining those two sets of powers in fact curtails the freedom of the principal to make choices about what powers they want to give to their appointee. As you would know, the Medical Treatment Act powers are quite draconian in terms of withdrawing food and fluid. A lot of people would not want that to happen to them, whereas they might want to give a general power to authorise medical treatment. Are you not actually confining the flexibility and scope for a principal to take control of their own destiny by mandating that every appointment of a guardian also includes this range of powers that are in the Medical Treatment Act?

Dr CHESTERMAN — No. The principal could just restrict the powers. The question would be that if you have a generic form, would that be likely to restrict the powers, but they would clearly have the capacity to say, 'Not these powers, not this power' and so on. I guess all we are calling for is the possibility that enduring guardians have those powers.

Mr CLARK — Okay. That is slightly different to what Mr Gardner put to us, I think.

Dr CHESTERMAN — I am not sure. He has put that evidence to you, has he?

Mr CLARK — Yes. I took his evidence to say that every form of appointment of a guardian, certainly when they have some capacity to make medical treatment decisions, would include the full range of powers within the Medical Treatment Act, but you are saying something slightly different to that, I think.

Dr CHESTERMAN — I am not speaking for Julian, although I have discussed this with him. I would have thought he would have said a principal can restrict any power they want to restrict the attorney from having. But my position and that of the Office of the Public Advocate is that principals should be able to restrict those powers if they want to.

Mrs VICTORIA — John, you spoke about having a single form in the three particular areas of decision making. If there were three different forms and they were quite universally worded, do you see that might also be another way of tackling it? But if we put all three areas of decision making into one form, do you see that there might be complications, because some of them might relate to different things? For example, they might give different powers to somebody who makes business decisions, who makes medical decisions or who makes whatever type of decision? Do you see that as a complication?

Dr CHESTERMAN — Yes. I guess what I was envisaging was putting that just as a possibility for a person who wanted to appoint the same person to be their attorney. Yes, it would be complicated. If you are saying, 'I want X to have the medical sorts of powers and I want Y to have the financial ones', that becomes too complex. I think in that situation you would have to have separate forms. This is just where the person says, 'I just want my son to exercise all those powers'.

Mrs VICTORIA — I am taking that off the *Take Control* video where they say somebody in the family may well have really good numbers sense but may not have a clue when it comes to medical things.

Dr CHESTERMAN — That is right, absolutely, and in that case separate forms should be signed.

Mr FOLEY — Your view is to balance the compulsory nature of the registration, and I heard your arguments and I had a look at them there. What is your view on where such a register might be located, having a look at other operations around different jurisdictions? Does your office have a view on that? Is your office such a venue?

Dr CHESTERMAN — The office is not keen to be the place where these would be lodged, but its suggestions have been the Land Titles office or the Registry of Births, Deaths and Marriages — either of those two. They have achieved administrative efficiency and they are used to dealing with applications and registrations, I guess.

Mr FOLEY — Does the office have a view?

Dr CHESTERMAN — I am not sure if it has.

Mr BROOKS — The submission that you have given us is really quite detailed. Thank you for that. I think it is excellent. It does not leave us with much doubt about where the office stands on a whole range of issues. We have had evidence that expresses concern about making these agreements more difficult to obtain and that there is a certain benefit in having people able to easily enact these agreements. I am interested in hearing about your position on restricting or having a different class of person having to witness the documents and then the registration, which would entail some cost. Even if it was a reduced cost for some people, that would act to make it a little bit more difficult for people to access. I wonder if you have a comment on finding that balance between encouraging people to make effective and appropriate use of these agreements on the one hand and making it a bit harder for people to access them.

Dr CHESTERMAN — You are absolutely right. They are both disincentives: restricting the group of authorised witnesses and the cost that would be associated with the registration are disincentives; there is no question. We had to balance it up with the knowledge that, as I was saying earlier, it seems to be the case that the abuse of enduring powers of attorney usually happens when they are ultimately signed. It is not as though there is a huge number of forgeries of executions of enduring powers of attorney. It is more the case that they are validly signed, so we are trying to address that. It is a balancing act, absolutely.

When people come and ask us in public presentations — I have given a few presentations to members of the general public on enduring powers of attorney — and they say, 'What is your view? Should we sign an enduring power of attorney?' Our response always is, 'Yes, but only if you can really trust the person you are appointing. You should not appoint people who you think you should appoint, like your eldest child just because they are your eldest child. If you have someone you can absolutely trust, then you should sign an

enduring power of attorney. If you have not, then you ought not to'. That has been our view. It is balancing up, yes, we think they are good things for people to sign, because they do enable someone to exercise some power after they lose capacity for one reason or another. However, they are easily abused, so we are trying to balance those things.

Mr BROOKS — I suppose it is more a comment than the question, but I am happy if you wanted to respond. The public ubiquity I see here is that we are trying to address the abuse that we are pretty sure does occur in some instances but by the very nature of these agreements there is no research into that abuse and how it occurs. Therefore it is very difficult to consider what you might do to change things to stamp out that abuse.

Dr CHESTERMAN — Yes. I think we can be reasonably confident that the abuse does happen more than through badly executed enduring powers of attorney if only because where there was fraud in the execution of a document that would come to light reasonably often, and it does not, whereas we do hear lots of anecdotal stories about abuse. So I think we are on reasonably safe ground in focusing on ensuring that once documents are signed attorneys do not do the wrong thing. We can focus on that. How we do that is a difficult question.

Mrs KRONBERG — I am concerned about the issue of abuse in the case of a principal providing enduring power of attorney to somebody in anticipation of them becoming less capable in their capacity, being on a steady path to being diminished, and the opportunity to review or revoke that. My question centres around that. I can think of an example that comes back to me every time this subject arises. It is the tendency in society of older women to trust men to look after their affairs. There is an example of a woman in her 80s who gave enduring power of attorney to a granddaughter's son, and the marriage broke up.

Dr CHESTERMAN — That was the husband?

Mrs KRONBERG — The granddaughter's husband, yes. That was a really complicated situation. There was an awareness that the attorney's role had deteriorated in terms of, let us say, its integrity.

Dr CHESTERMAN — And the relationship with the family.

Mrs KRONBERG — Yes. How are those sorts of things managed by way of people knowing that they can revoke, can review, can exit that. Whilst they might have provided the enduring power of attorney in anticipation of rapid deterioration of their condition, their decision has crossed over and they are still lucid and able to make decisions themselves.

Dr CHESTERMAN — While they can still make decisions, the power of attorney can be revoked, as you know. That strikes me as a case where that was an inappropriate appointment.

Mrs KRONBERG — Yes.

Dr CHESTERMAN — That goes to the question of ensuring that people know — that is why we have to be careful with our public message about signing enduring powers of attorney. We do not just say, 'Yes, everyone needs one'. The person has to be able to trust their attorney. A situation like that one is fraught. That enduring power of attorney can be revoked. Even if the woman were to lose the capacity to revoke the enduring power of attorney, then an application could be brought to VCAT to have the power of attorney revoked.

Mrs KRONBERG — In terms of the information kits, are they readily available in nursing homes and the offices of people who provide advice and support in centres such as that?

Dr CHESTERMAN — Yes, they are free and available. All someone has to do is put in a request. They can be now downloaded from the website.

Mrs KRONBERG — If you are talking about an 80-year-old person, we cannot really consider any electronic access.

Dr CHESTERMAN — No, that is right.

Mrs KRONBERG — I am talking about something that is available to just go and pick up or that somebody visiting can just go and can pick up in terms of removing barriers to access to information.

Dr CHESTERMAN — We always take them. I spoke to 60 women at the Rosebud RSL a few weeks ago and took down copies of that. The women were very disappointed; they said they thought it was going to be more than only a talk. I took down copies of the *Take Control* and they were available to people.

Mrs KRONBERG — By extension to the RSL interface, would you see Probus and perhaps other service clubs.

Dr CHESTERMAN — Yes. We regularly give talks to groups like that.

Mrs KRONBERG — By invitation or by a routine?

Dr CHESTERMAN — It is a bit of both, usually by invitation. There is a combined talk that has recently been set up where VCAT, State Trustees and the Public Advocate give a travelling show. They are going up to Ararat and Horsham in a couple of weeks time. In a sense it is never enough. There are always groups that could receive the message, and there is a slight problem of over-servicing in some areas and other areas not being spoken to. It is freely available whenever we talk. If people bring up the request, we send one out.

Mrs KRONBERG — I just thought of another entity. Are National Seniors in the loop as well?

Dr CHESTERMAN — I am not sure of that particular group. I know Seniors Rights Victoria is. I think you are hearing from them today. They certainly are.

The CHAIR — Extending a bit the very important point that Jan has raised, it seems to me there is a system to some extent. Maybe it is not the primary responsibility of the Public Advocate to be running a campaign like this, but you do what you can in conjunction with other agencies. How do you think a communication plan such as Jan has touched on could be expanded? What would you like to see?

Dr CHESTERMAN — That is a question. When I joined the Office of the Public Advocate I knew OPA had a clear role with enduring powers of attorney, but it was not altogether clear to me why we did. In a sense the principal role of OPA is the guardian of last resort — people with no others to play that role. It is clearly related — enduring powers of attorney are something someone can sign for in the event they become incapacitated to one extent or another. I think the best way to go would be for the government to take it on — one of the departments, probably Justice — and to run a community awareness campaign through that. We just do not have the resources or the people to be able to do it. I would think the Department of Justice would be the appropriate place for that, and possibly VLA — Victoria Legal Aid.

The CHAIR — So there is a real need for that?

Dr CHESTERMAN — Yes.

The CHAIR — Moving away from that then, you talked in your submission, and we touched on it a bit earlier, about the need for a single Act. In your work have you found a piece of legislation that you would say would be a good model that Victoria should pursue? Could you point us towards that and indicate why you think it is a good model.

Dr CHESTERMAN — The ACT Powers of Attorney Act 2006 is a good one for us to look at. The good parts about that Act are really the principles that are set out in the schedule that an attorney is required to be guided by. I think that is a very good statement. There are some aspects of that Act that would be different. They talk in that Act about dividing up the powers into property, personal care and health. I would still prefer us to talk about financial, guardianship and medical treatment.

The CHAIR — Why is that?

Dr CHESTERMAN — I just think they have a history, and also with our system of guardianship and administration an enduring guardian in many ways has the same powers as a guardian and I guess it is a way of keeping that together. But I think we need to specify, for example, with an enduring power of guardianship what the person has power over, and that is basically where the person lives, key life choices and what health care they receive in a general sense. That should be specified. But I think the ACT legislation is probably the best one to look at. The Queensland one is worth looking at as well — 1998.

The CHAIR — Do you have any knowledge about international legislation in jurisdictions overseas?

Dr CHESTERMAN — No, only a little about the UK and the Mental Capacity Act and their process of registering powers of attorney; not extensive, no.

Mr CLARK — Could I follow up on this reference to the international situation. I thought some of your references to the UK and New York about interested persons and monitors seemed very promising. I was wondering if you could tell us a bit more about how you would envisage a system like that would work in practice or how it works overseas. You make specification recommendations about notifying certain financial transactions. Do you think there is a broader role for these interested persons or monitors to supervise more generally what the appointee does with the powers, and if so, how would you envisage that would work?

Dr CHESTERMAN — It was quite a minimalist suggestion. We have considered a number of factors. One is: do we say a principal cannot make gifts to an attorney? I think that is fraught because often the attorney will be someone who is very close to the person and it may be appropriate. If you require the attorney then to notify some administration body like VCAT, that would just go nowhere I would think. It is very hard unless you then empower it to somehow go through and check these transactions. However, if you have interested persons listed on the enduring power of attorney and a gift is made and you can specify a minimum limit — if the principal pays $1000 to the attorney as a birthday present or something — just to be on the side of ensuring there is no rorting of the enduring power of attorney the submission is that the interested person or persons listed on the enduring power of attorney just have to be notified. That is a simple letter from the attorney saying, 'Dad or Uncle John or whoever gave me $1000' and that may be the end of it. But, as I said earlier, it may also give grounds for the interested person to challenge the enduring power of attorney at VCAT, to say, 'This is inappropriate'.

Of course if there is abuse of the enduring power of attorney, it is unlikely the person would send the letter and tell the interested person, so you have to make that a sub-penalty that would attach to an attorney receiving the benefit and not notifying interested persons.

Mr CLARK — I was wondering if you could take it a bit further and require consultation with nominated interested persons for key decisions, such as if a person is going to have their place of residence relocated, the principal should specify, 'You must consult with X and Y before you make a decision on moving where I live'. One, that would allow a broader circle of people to be involved in these key decisions, but, two, as you say it would give a whistle-blowing opportunity at key points if someone else thought the power was being misused.

Dr CHESTERMAN — That is not something that we engaged in the submission; I think it has merit. The question that immediately springs to mind is: what does consultation mean and what power do the interested people have to query it? I guess simply notifying them that you are planning to move the residence gives them the opportunity to express their opinion, but also, in those small percentage of cases where they may want to challenge that decision, it gives them the opportunity. I think that has merit.

Mrs VICTORIA — I have one quick one and one small one. The quick one is: if a form of registration were brought in, would you make that retrospective, and why?

Dr CHESTERMAN — You would have to say no. We are in favour of compulsory registration, and therefore you would have to say no. I think what you do is have a voluntary retrospective aspect. I am just thinking off the top of my head.

Mrs VICTORIA — Thank you. The other question is: there is quite a bit of discussion about the difference between a principal's best interests and their wishes. Obviously if they have impaired decision-making capabilities, their wishes may not be in their best interests. How do you resolve those situations?

Dr CHESTERMAN — That is the key question for this committee, and it is something I have wrestled with. The short answer is that there is no easy solution to that. What we are saying is that, firstly, it is the attorney's decision. The attorney needs to be a trusted person to be able to work that out, and that can be very complex. To give you a fictitious example, if someone's mental capacity is diminishing and they say they want to give $20 000 to the Lost Dogs Home, should the attorney do that? They say to the attorney, 'I want you to give $20 000 from my account to the Lost Dogs Home'. What we are saying in our submission is that in making their decision the attorney needs to be respectful of the principal's views. One of the guiding principles

is that they need to listen to what the principal has said. That is not going to answer that question; it is just that they need to take that into account. They need also to take into account the broader interests of the person — 'best interests' is the current phrase. We actually favour another phrase: 'Is it in the interests of the personal and social wellbeing of the person?'. We are arguing that 'best interests' is a bit tired and we are making that argument elsewhere, like in the guardianship and administration review.

What we are saying is that one of the key principles has to be that attorneys must listen to principals. In that specific example, what should the attorney do? They have got to make a judgement, and one of the ways in which they can make the judgement is to say, 'Is this a reasoned view' — in other words, does the person who says they want to give $20 000 to the Lost Dogs Home know how that will affect their finances? Have they repeated it? Is it just a one-off? Have they repeated it over several days? Is it consistent with their past interests, for example, the love of dogs and so on, or is it completely out of the blue? Those are things that should be weighed up, as well as how it will affect the finances of the person, by the attorney who needs to make that decision. But it is a decision for the attorney and it is going to be tough.

Mrs VICTORIA — Could it then be challenged, for example, through the courts — take away the Lost Dogs Home and put in the church. The person may not have been the most religious person throughout their life and in their last few weeks they might be lucid at times and say, 'I choose to give $50 000 because I have just found God and I love the local pastor'. When that is not forthcoming after the person dies, even though it may not be in the will but was expressed before a group of people, is that then open to litigation?

Dr CHESTERMAN — It becomes a legal question of when the transaction was made and so on. If the attorney has gone ahead and made that donation just before the person has died I would be reluctant to challenge it if the attorney has come to that view and there is still some wrongdoing by the attorney, because that is the nature of the enduring of attorney; it is a broad power. That is why we have to be able to trust the attorney to make the right call. I would be reluctant to then give grounds for challenging that.

The CHAIR — Just before we leave the first part of the question that Heidi asked about the register, there is the issue of resourcing that I think you touched on in your presentation, but there is also the issue of privacy. Could you comment on that a bit?

Dr CHESTERMAN — We thought about this quite a bit. The original form of powers of attorney, I have been advised by our principal lawyer, contained the phrase — I have forgotten exactly what it is but it was a very public phrase along the lines of 'Know all ye men that I hereby give this power' — a very public document. If it is to work, registration would need to consist of a publicly searchable website where you would just have the person's name and perhaps their date of birth and that is it. It is a bit of a moot point as to: do you then say who the attorney is? I am not sure about that. My view would be you would not. We would have this person's name and date of birth so that a bank can have a look at this secure website and ask, 'Someone has come here with a power of attorney; is it registered and what is the date of registration?'. They go to this person's surname:— yes, date of birth; yes, date of registration; yes, it is valid. There are privacy considerations of course.

The CHAIR — Do you think the body that registers the agreements should also have the power to check that it has been validly created and that it meets whatever the requirements are?

Dr CHESTERMAN — Yes. That then has extensive resource implications, as you know. I think there needs to be a rudimentary check that there are two witnesses and it has been completed. I certainly do not think the registering body should then ring up the witness and say, 'Did you go through and check?'. But, yes, there should be a rudimentary check to see that on the face of it it has been completed.

Mr FOLEY — John, I think you indicated in your submission that the emerging international debate in terms of best practice is around the rights notion that there is supported decision making versus substitute decision making. How would you see an appointed attorney going about that in a practical role? And would there be any regulatory approach or issues there for legislation, governance, agencies et cetera?

Dr CHESTERMAN — That is a hard one.

Mr FOLEY — Presumably that is going to get more of an issue as we get submissions about ageing, the different levels of dementia and other problems, and people getting better and getting crook and all that sort of thing.

Dr CHESTERMAN — Yes. My view is that we ought to have beefed-up principles in the legislation, but it becomes tricky if you start to legislate to say that attorneys have to do certain things at a regular interval. It becomes a bit burdensome for attorneys. You have to be careful about balancing it out.

Mr FOLEY — I suppose I am wondering whether you see any role for legislation or headline regulation around that supported versus substitution decision making, or do you just leave it to the parties to work it out?

Dr CHESTERMAN — My own view — I have not really discussed this — would be to leave the parties to work it out. You are right, there is certainly an international movement towards assisted decision making in preference to substituted decision making. Enduring powers of attorney are our clearest substituted decision making way to appoint someone else to act as though they are you. I think we can move towards, and in our submission it is moving towards, getting the principal to play a greater role by just requiring attorneys to engage in a conversation with the principal, if the principal can, but I would not want to be going further than that.

Mr BROOKS — Just a quick question following up on the comment you made before about the possible register framework. You mentioned just having the name of the principal, or donor, and maybe their date of birth. Is there a reason why you would not have the name of the attorney?

Dr CHESTERMAN — I can just foresee problems with people then contacting the attorney and saying, 'Here you go; power of attorney over such and such', and leaning on the attorney in some way. That is my concern about that.

Mrs KRONBERG — Are there guidelines from the attorneys' perspective in terms of information? They might have a checklist in terms of some fundamental principles — something about the cost of funerals, whether somebody wanted to be buried or cremated; whether somebody still had firm resolve for organ donation; the nature of their interests in society or charitable donations. We talk about the issue of things coming up suddenly perhaps, and implied in that might be that it is whimsical to apportion some money to something that seemed a little bit out of the general belief system or whether that person would like to place things in the past. There could be a checklist for attorneys so that they could have a broader understanding. At that point, I am sure, people would be sitting down talking about things that perhaps nobody had ever spoken about before.

Dr CHESTERMAN — Absolutely. Yes, a checklist would be a very good thing. The question would be whether it would be in the legislation or even in educational materials that would accompany the new scheme. But, yes, those conversations are important. The Office of the Public Advocate is very keen for people to be having those conversations before it is too late. Yes, I just have a query in my mind as to whether that would be in the legislation or elsewhere. Some of those issues you raised would be more testamentary ones than power of attorney ones, but, absolutely, a checklist would be a very useful thing.

The CHAIR — Do you think it should be in legislation?

Dr CHESTERMAN — I think some of the principles should be in legislation — some of the particulars; asking whether they have thought about keeping enough money for funerals and so on. I think that would be more in educational material rather than in legislation. It is a bit of a moot point; I do not have a firm view about that, but I agree that that would be a good thing for people to be thinking about.

Mrs KRONBERG — My view is that if people are approached to be attorneys, we would want to make that as simple as possible. The ideal person might be the busiest person as well.

Dr CHESTERMAN — That is absolutely right. I am bearing that in mind whenever I am thinking about increasing the regulation of attorneys and their requirement to submit periodic reports and so on, which I am generally not in favour of; it would be a disincentive for a busy person to be occupying that role.

The CHAIR — Extending that a bit more, you talked earlier about public awareness campaigns and so forth generally. I guess the focus there was mainly on principals, but just turning now to witnesses, how might the

system best target a campaign for authorised witnesses? What do you think the key components of such a campaign might be?

Dr CHESTERMAN — The first decision that has to be made is who will be the authorised witnesses. If they were the group that we have suggested, court registrars and lawyers admitted to practice, you would then conduct a public education campaign through their professional organisations. It would be reasonably simple to do: on their website and so on and probably via hard mail as well to all people who are in those positions, saying that if you are asked to witness an enduring power of attorney, these are the things you have to bear in mind and you have to do. I do not think it would be that hard; you would go through the professional organisations.

Mr CLARK — It is an issue both of what the existing law says and what the policy should be going forward. In your submission you followed a common dichotomy or tripartite division between financial, guardianship and medical powers. It seems to me that when you actually look at the existing law there is not a dichotomy that exists — financial in fact is everything except medical; guardianship covers a whole range of things which probably impinge on financial as well as lifestyle. I gather you are agreeing with that. That then follows on then to asking, as a matter of policy, if we are going to divide things up into set categories, how do we draw the boundaries? Or are we better off having a gradation that lets the principal make the decisions? I give one example: the guardianship law explicitly says that the guardian can decide where the principal may live. That may well have financial consequences. If the guardianship appointee wants to move someone to a particular home, but the holder of financial power does not want to fund that move, how is that tension resolved?

Dr CHESTERMAN — That is a very good point. I guess the reason for sticking with the dichotomy is a historic one. There is some level of knowledge about these different powers, and some people do prefer to have someone in charge of their home and their health, and they give more to an accountant-type person the financial powers. I guess it is recognition that there is some historical resonance with those divisions. But you are right, and that is a very good example: choosing where someone lives has financial implications. The enduring guardian and the attorney have to work that out between themselves, and if they cannot, they go to VCAT, and VCAT will make a decision. That is a good example. We would go as far as to consider having the one form appointing the same person to do everything, in which case if there is a problem, they make the decisions. The option is available to people, but that is a good point.

Mr CLARK — Can you envisage any resolution mechanism where there is a conflict, other than going to VCAT to sort out? Can you envisage that the legislation would empower one attorney to have priority over the other or enable the principal to designate one to have priority over the other, in the case of a conflict in overlapping areas, or for the principal to specify how those sorts of conflicts are to be resolved?

Dr CHESTERMAN — I had not thought about that. There is no reason why you could not do that, and in fact we do that in terms of a dispute between an agent under the Medical Treatment Act with power of attorney for medical treatment and an enduring guardian where in the list of persons responsible the agent under the Medical Treatment Act ranks higher than the enduring guardian. It would be quite simple to do; it would be just one provision. I confess I had not thought about that. It probably makes sense.

The CHAIR — In your opening comments you referred to the abuse of a power of attorney, and I think your submission suggests that that is largely a hidden problem, even though we know that it exists. What do you think can be done to increase detection and encourage reporting of these kinds of abuses?

Dr CHESTERMAN — In the submission we make a couple of proposals about that. As you have heard, there is the interested persons one, where if an attorney is paying themselves money, they are required to tell people that. You can then generate a VCAT application to overturn the enduring power of attorney. And the placement in the Crimes Act of a provision specifically saying an abuse of a power of attorney that results in financial benefit that is done deceptively constitutes theft. So those two things, but also a public education campaign is needed, because some people are of the view — and this gets to even the role of witnesses in witnessing a power of attorney being signed — that once they get an enduring power of attorney they have carte blanche to do whatever they like. That is one of the reasons why we say that in this legislation we need to make it clear that principals still have a role in saying what happens. A public education campaign is needed to let people know.

This is happening in a sense with the financial abuse of older people. There is a government strategy and powers of attorney are always raised in discussions about financial abuse of older Australians. So I think a public education campaign is certainly needed.

The CHAIR — Thank you very much for the hour you have spent with us. It has been extremely valuable and very interesting. Thanks again for the submission. You will be sent a copy of the transcript. You can make minor changes to that but obviously in substance it will have to stand. I hope you would be happy if Kerryn or Kerry were to contact you for any further clarification.

Dr CHESTERMAN — Absolutely. Thank you very much for having me.

Witness withdrew.