

TRANSCRIPT

STANDING COMMITTEE ON LEGAL AND SOCIAL ISSUES

Subcommittee

Inquiry into the retirement housing sector

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Ms Colleen Pearce, Public Advocate, Office of the Public Advocate.

The CHAIR — I will declare open again the Standing Committee on Legal and Social Issues public hearing on the inquiry into the retirement housing sector. I would like to welcome Ms Colleen Pearce, the public advocate. Thank you very much for joining us, Ms Pearce. I will just caution you, as we do for all witnesses, that all evidence taken at this hearing is protected by parliamentary privilege. Therefore you are protected against any action for what you say here today, but if you go outside and repeat the same things, those comments may not be protected by this privilege. We have allowed about half an hour or so. I would invite you make some opening remarks and a statement, and thereafter we will have questions. Thank you very much again for being with us today.

Ms PEARCE — My pleasure, and thank you for the invitation. Today I am going to talk a little bit about the work of my office and one of our volunteer programs, the community visitors program, just really by way of background and then, as you said, open it up for questions if there is anything about the work of my office that may be relevant to the work of this committee.

The Office of the Public Advocate is an independent statutory office with a broad role to promote and safeguard the rights and interests of people with cognitive impairment. This includes people with an intellectual disability, people with a mental illness, people with dementia and people with an acquired brain injury. All Australian jurisdictions have a similar office with similar types of powers and functions.

In Victoria the role of the Office of the Public Advocate is established under the Guardianship and Administration Act 1986. The act also sets out the provisions that secure independence from government and the functions and powers and duties of the public advocate. A major proportion of the work involves guardianship matters, and this is the most significant part of my legislative duties. It is in this capacity that the public advocate is appointed by VCAT to act as guardian of last resort for a person with a disability who is unable, by reason of that disability, to make reasonable judgements in respect of all or any of the matters relating to his or her personal circumstances.

Last year we had 1645 people in the state who were under the guardianship of the OPA and many more under the guardianship of a family or friend. That high demand means that there is a waiting list for services for a guardian. When appointed, a guardian can make decisions around personal lifestyle decisions relating to an individual's health care, accommodation, employment, access to services and access to people. They must always do so in a person's best interests. It may be the case that there are residents in retirement homes that are under limited guardianship, allowing the public advocate to make decisions for those persons, but it is not possible for us to interrogate the data to say how many people may be under a guardianship.

We also have other services — just briefly — including a telephone advice service. Last year we took 17 500 calls on matters related to persons with a disability, but mostly around planning for the future, so around enduring powers of attorney. We have a policy and research team that undertakes research policy development and systemic advocacy. We also have more than 800 volunteers who work with our office. They volunteer in three volunteer programs: the independent third person program, the community guardianship program and community visitors. The program that is most relevant to today's inquiry is the community visitors program, so I just wanted to briefly say a few words about those programs.

Community visitors are independent volunteers who safeguard the rights and interests of people with a disability living in 24-hour residential accommodation services across the state. Established in 1987 the program continues to play a vital role in protecting the human rights of people with a disability or mental illness. Last financial year 416 community visitors completed more than 5000 visits throughout the state. Community visitors are independent of government and are appointed for a three-year term by the Governor in Council. They receive a further mandate through provisions under three key acts: the Mental Health Act 2014, the Disability Act 2006 and the Supported Residential Services (Private Proprietors) Act 2010, so community visitors do in fact visit facilities that are owned and run by private providers. In general terms community visitors serve as a double-check to ensure that these frameworks are being adhered to.

The mandate of community visitors is to ensure the wellbeing of people with a disability. The residents rely on community visitors as the eyes and ears of the community, as they are sometimes the only person in that person's circle of support who is unpaid or personally interested in their wellbeing. The visits help ensure residents and consumers are cared for and supported with dignity and respect. Visits are quarterly and generally unannounced, but they can also occur in relation to a complaint — for example, from the resident themselves or a family member. During their visits community visitors observe staff interactions with residents, inspect

premises, make inquiries, examine documents and, where possible, communicate with residents and patients. I could go on into the roles and functions of community visitors, but that broadly outlines their role. Perhaps I could now open it up for questions.

The CHAIR — Thank you very much, Ms Pearce. I appreciate those introductory remarks, clarifying the role of your office and what you do. I wonder if I could just ask you about what sort of contact your office has from residents of retirement villages, caravan parks and the other groups of accommodation broadly referred to as retirement housing that we are examining, and whether there is significant demand for your services from people within those settings.

Ms PEARCE — Yes, there certainly are. But, as I said, my office deals with people who have a cognitive incapacity. You are probably more likely to see people who perhaps live in rooming houses or caravan parks, perhaps with a mental illness. But in the retirement villages themselves, once a person loses capacity it may be difficult for them to remain in those facilities for a long period of time. I know some retirement villages do market themselves as being open to that particular group, but I think you will find their care needs are higher than the facilities can often provide, so it is more likely to be in those, as I said, rooming houses or caravan parks that we are more likely to see people.

The CHAIR — We are examining caravan parks as well. Do you find that people with cognitive impairment often find themselves in caravan parks and that type of accommodation?

Ms PEARCE — They do, but they are more likely to be in supported residential services because of the level of support that is required. With SRSs, as we call them, people have assistance with meals and perhaps with medication and other personal care. It is extremely limited. But as a person's capacity declines, their ability to look after themselves is limited or can become limited.

Ms HARTLAND — If we took the scenario where someone is in a retirement village and begins to decline — early dementia is coming on — they need that support. We have heard a lot of evidence from residents about what happens when they need to move on — that they are often unfairly dealt with by the management or they find it very difficult to get their bonds back because of the deferred management fees, all of these kinds of things. If someone who has early dementia and is being moved on but does not have any family, is that the kind of role that you could step into or have you had experience with that kind of case?

Ms PEARCE — Yes. That would certainly be the case. An application would need to be made to VCAT. More often than not it is a service provider who will be involved with the care of that individual who will make an application to VCAT, and VCAT would give us powers for accommodation, so to decide where a person might live; access to services, so that is types of services they may need; and where they are in a situation of conflict, then it might be access to persons so we can regulate who would see those individuals. Normally it would be through an application to VCAT, but remember capacity is often situational, so if person has lived in their own home for a long period of time, they may be able to look after much of their daily living and indeed their own finances. But do they have the capacity to enter into a contract to sell their own home? Perhaps not. So the cognitive capacity is individual and decision-specific. It might be that you have a person in a vulnerable situation who may not be, because of the decision that needs to be made, a candidate for guardianship.

Ms HARTLAND — One of the things that again has come up a lot from witnesses is the need to have a specific ombudsperson to deal with retirement housing overall. What do you think about that idea, because your role is very much with people with disability or cognitive impairment, but for the general population, especially when they are in conflict over finances with a village?

Ms PEARCE — The ombudsman needs to have reasonable powers to enable them to effect a decision and an outcome. If the ombudsman is a complaints body without any teeth, then it is probably not worthwhile spending a lot of money to have a situation where you are trying to mediate complaints without specific powers. Should you go down that path, then I would say that the ombudsman or that type of ombudsman needs to have specific powers to enable them to get people to the table, and if people are recalcitrant and do not want to take into account the outcome of a decision, then there have to be some teeth.

Ms HARTLAND — Some consequence.

Ms PEARCE — And some consequence, yes.

Mr MULINO — The OPA was involved in quite a large number of cases — 1645, you cited. Is it fair to say that those cases ranged in the level of formality and seriousness, so some of them involved OPA intervening where a dispute was at a fairly early stage and could be dealt with more informally, and some others involved OPA intervening where it was more complicated and more formal proceedings had been initiated?

Ms PEARCE — Guardianship is a restriction on an individual's rights and liberties, so it is increasingly more difficult to get a guardianship order, notwithstanding there were 1645 people in this state under guardianship in the last year. By the time it gets to VCAT, the matter is probably reasonably serious. We do have an advocacy function, and so we do take up that function. It is less restrictive of course than guardianship, so that might be a matter that is less restrictive. I would have to look at my annual report to give you a number, but I believe it would be around 350 advocacy cases. We also did around the same number of investigations, but the investigations are not own motion. They are in relation to a guardianship matter, and VCAT may have asked us to investigate a matter to see whether guardianship is warranted.

In terms of the advocacy cases, we do try to intervene earlier to see whether or not the intervention of our office can be of assistance to an individual. I guess that depends on the willingness of the parties involved to sort things out. Where there are professionals involved, then we are likely to get some outcomes. Where it is a matter of a family dispute, then it is probably more difficult and more intractable.

Mr MULINO — Obviously when it comes to a forum like VCAT, the issues of the formality of the forum, or relative formality, can be quite daunting for anybody, but particularly for people with some cognitive impairment, which is the whole reason why your organisation steps in. I am just wondering: are there some ways in which you think procedures might be tweaked that would make it less daunting?

Ms PEARCE — I think VCAT does try to have more informal hearings. They are not adversarial; they are more inquisitorial. But certainly what we are seeing is a greater level of litigation involved. I did not say but 60 per cent of all people under guardianship are over the age of 65 and about 34 per cent of those would have some sort of dementia. What we see is that people under guardianship often do have families, and those families will have longstanding problems and there may be substantial assets that are at stake. So while VCAT hearings can be inquisitorial and informal, it is not unusual now for families to lawyer up. Sometimes they can afford much better lawyers than my office can afford. We often would not be there at the time of a decision being made to appoint a guardian; it would be only after we have been appointed. So I think that is really the nature of the jurisdiction and what is at stake here.

Of course it goes without saying that people are living longer, and as we live longer we have larger amounts of disability as we age and we are in fact more vulnerable. I want to make the point that although my office deals with people who have cognitive incapacity, there is a large group of people who retain cognitive capacity but who are very vulnerable, and it is that group that is vulnerable that does not meet the threshold for my office that can be exploited. You would have heard some of the stories today. It is not just for the retirement villages sector — I understand that that is your inquiry today — but certainly we see large numbers of people, older people in the community, who are vulnerable who do not lack capacity and therefore would not be eligible for guardianship services.

Mr MULINO — This situational aspect of cognitive impairment is an interesting one. When you think about some of the extremely complicated decisions being made and the fact that we as a committee have at times struggled to get on top of the details, like the various fees involved and the way they change over time, it is plausible to imagine that quite a lot of people would be caught within a sensible definition of functional cognitive issues in the context of some of these very difficult contracts.

Ms PEARCE — Absolutely. My office struggles as well. When we are looking at abuse of an enduring power of attorney, the complexity of these matters is very great. But I do say about guardianship that guardianship is a restriction on a person's human rights. They give a substitute decision-maker the power over that individual to make decisions in their best interests on matters like accommodation. So where the subject matter is difficult you still do not want to necessarily limit their rights by appointing a person to make decisions on their behalf, but somebody who has a greater understanding of what the issues are who can act as an advocate and a support person would be much better because you are therefore not limiting a person's human rights.

Guardianship is a protective jurisdiction and you do weigh up the need for an individual's protection against their right to autonomous decision-making, and in many cases we come down in favour of the need to protect them. But that should be for the shortest time possible, whereas in some of the situations you are talking about people may need ongoing support for a longer period of time.

Ms HARTLAND — Colleen, coming back to that point you made that sometimes your office finds the complexities around an enduring power of attorney difficult, I think it goes back to that argument again about the need for an office that just deals with these kinds of issues. Would it also be an argument — because it is complex — that you need a very specialised service?

Ms PEARCE — Perhaps I should clarify: it is not the enduring power of attorney that is complex — and part of the role of my office is to provide information on enduring powers of attorney — it is when we might be called to investigate a matter that might be better dealt with by a forensic accountant, for example. So it is that level of complexity; it is not the enduring power of attorney in itself.

Ms HARTLAND — It is more the family and the behaviour.

Ms PEARCE — I think the limitation of my office is that it is for people who lack cognitive capacity. But as I said earlier, we see vulnerable older people all of the time — the neighbour who is concerned about somebody in their home, the family member. Those people have capacity, but where is the protective jurisdiction for them? So I think it is a much broader issue. I hear what you are saying about this particular office, but there are many Victorians who are very vulnerable who are older and we do start with the presumption of capacity.

Ms HARTLAND — So when you talk about own-motion investigations, can you describe what that might look like?

Ms PEARCE — Yes. For my office or more broadly?

Ms HARTLAND — Just for your office.

Ms PEARCE — Okay. For my office VCAT would normally ask us to investigate a particular matter before it is heard. So once they have referred a matter to us, the proceedings are adjourned until such time as we provide an investigation report. That would be related to questions such as: is guardianship warranted, does the person have a disability — that is the threshold question — and sorting out some of the material before VCAT to enable VCAT to make a decision. There have only been, in the eight years I have been in this office, a handful of times where I have instigated an own-motion investigation, but that would be in cases where I think guardianship might be warranted — so it would be where I see a person being abused in the community or in a setting where I think guardianship would be warranted, and then I would make an application to VCAT. But my own-motion powers must be around guardianship only — nothing broader.

Ms HARTLAND — And in those matters you have investigated, is that because it has been triggered by either a community visitor or a neighbour or friend who is concerned about that person?

Ms PEARCE — Yes, generally by community visitors, and it is where I see a person being abused and service providers have not been doing anything and I think there is no-one else in the person's life — no other family member — and I think guardianship may be warranted. And in every case guardianship has been warranted.

I will just give you one other example: for Colanda, the last remaining disability organisation in this state, we put in an application for 17 of those individuals to come under guardianship because we were very concerned that decisions that were being made on their behalf were not in their best interests. So we are now guardians. I call that one case; it involved 17 individuals. It is where guardianship or protection is warranted, and it is usually around abuse or people not acting in an individual's best interests.

Ms HARTLAND — So because of your community visitors program, which is amazing, and going into the SRSs, would that also be something that then triggers that? I am looking, I suppose, more at information not so much about the individual but about the proprietor and how you would deal with the people running the facility when it is quite clear that there has been some kind of either financial or physical abuse.

Ms PEARCE — The powers are related to guardianship, so it does not give me the power to investigate any of the proprietors. A number of the cases have been in SRSs where we have been concerned, but we can then make decisions about whether or not we apply for guardianship or whether we make a formal complaint to another body. So it could trigger those kinds of actions where we may take a matter further.

The CHAIR — Thank you very much, Ms Pearce, for your evidence today and your preparedness to answer our questions. We greatly appreciate it.

Ms PEARCE — Thank you. I have just left some copies of our annual report here and just a little bit on the background of the office.

The CHAIR — Thank you so much.

Ms HARTLAND — Having read over the years the community visitors reports, I just think it is invaluable, that program, especially obviously for alerting possible abuse out in the community. It is just an invaluable service.

Ms PEARCE — They are an extraordinary group of individuals — 415 people who made over 5000 visits — and, as I said earlier, they are often the only people who go into what we would normally call closed environments. They are the only people who go in, see what is happening and can make a call. It is not just that they visit; it is that they have the power to inspect documentation that is the really important part of their work. It means that they can put together stories and look at things, and while they are not investigators in their own right, they can make referrals to other bodies.

Ms HARTLAND — Thank you.

Witness withdrew