

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 1 October 2009

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Professor T. Carney, Faculty of Law, the University of Sydney.

The CHAIR — Professor Carney, my name is Johan Scheffer. I am the chair of the Committee.

Mr CLARK — I am Robert Clark, the deputy chair.

Mr BROOKS — And I am Colin Brooks, a member of the Committee.

The CHAIR — We also have with us, as you know, Kerry Riseley, our executive officer, who is taking responsibility for this Inquiry. Our conversation will be recorded by Hansard, and you will receive a copy of that transcript a little bit later on.

Could I first of all thank you very much for making the time available to talk to us about your knowledge of the matters of powers of attorney. We have got about 45 minutes. Perhaps a good way to start is to hand over to you to talk to us a bit about your experience of this area and some of the things that you think are important, and we will then raise some matters with you that come out of what you say, and also, obviously, some other things that we have prepared.

Prof. CARNEY — That is fine.

The CHAIR — We will hand over to you then.

Prof. CARNEY — My background is as a law professor. This is one of the fields in which I specialised, in terms of research. Originally, 27 years ago, I was deputy chair of the Cocks Committee, between 1980 and 1982, that produced the report of draft legislation for what became the Guardianship Act. I have also been involved in and lead some empirical assessments of how public and private planning operates — the public side is the Guardianship Tribunal, if you like; the private side is enduring powers of attorney and suchlike — assessing how they work on the ground. These were empirical studies. We had a report in 1991 on the guardianship tribunal called *Balanced Accountability*. Then in 1997 we — we being myself and Professor David Tait — published what became a book with Federation Press called *The Guardianship Experiment*. I suppose as far as enduring powers of attorney and suchlike are concerned, probably the piece of mine in 1999 in *New Zealand Universities Law Review*, the title of which I forget, is probably the one that most systematically covers these kinds of things.

Ms RISELEY — We have a copy of that, thank you.

Prof. CARNEY — Good, okay. I have had a look at your terms of reference. I guess the most general point is that there is a real dilemma in this area. People always see great merit in uniformity, consolidation, one-stop shopping and all of those sorts of sentiments. All of which would suggest that Victoria's multiple sort of approach — of enduring powers for property matters in the Instruments Act, other enduring powers in the Guardianship Act and then a third set of powers for medical treatment — does not seem like a good idea and should there not be some amalgamation of criteria or of kinds of forms that the public would fill out? I think there is satisfaction in that one-stop shopping argument, from a customer's perspective.

But one has to ask oneself the question: how many people are going to fill out any of these instruments in the best of all possible worlds? The answer to that appears to be about one in five. All kinds of endeavours have been made to better publicise and educate, there have been lots of research studies and it still appears as though the upper limit is not much more than about 20 per cent, and is often a great deal lower than that. So that causes one to ask: of those who might fill them out, what is the best way of maximising the numbers who do so?

There are multiple reasons one should try to get people to plan privately for these matters rather than by default of having cases coming to the Guardianship Tribunal. They choose the person, it is more efficient and there is the cost — all of these sort of things. Ease of access is certainly critical. When you are thinking about ease of access it is the most straightforward and least number of formalities, or rather 'perceived barriers', which is critical. You weigh against that, as I am sure the Committee is aware, concerns about abuse and minimisation of fraud and misuse of such instruments, and those lead people to require more than one witness for health powers and personal guardianship, having to have one of those people who is specially qualified to witness documents, or public registration — and all of these sorts of things. All of that tends to diminish access. It creates barriers and leads people not to fill the instrument out.

Why did I go through all of that in this longwinded way? Of the three areas that Victoria is targeting, property administration is to most people the most used and arguably ought to be the most accessible. Issues around personal liberty and health decision making are much more sensitive, and there is a much stronger argument for saying, ‘It is more like making a will, so we need more formality’.

For the people who are attracted to just one regime and one document, you are going to get the highest common denominator in the formalities applying to your document. That is likely to mean that for, say, property management, you will actually end up — in the state that does that — with the lowest rate of take-up of what is the most useful and most popular order.

The CHAIR — Could I interrupt you there? I do not think I understood what you meant. You said property administration is the most used.

Prof. CARNEY — Yes, the Instruments Act, the enduring power of attorney over property.

The CHAIR — Right, and then you said that the areas like personal liberty and health needed a much more formal approach. You said that was more like a will.

Prof. CARNEY — If you look at the recent amendments in Victoria and even originally, that is why you find these provisions that require that there be two adult witnesses, that they must both be present when the person signs, they must see the other person sign and so on. Or in the case of health powers of attorney, medical powers of attorney, one of the people must be a person who can take a stat dec — authorise the witness’s statutory declaration. Those sorts of requirements are designed to ramp up the protections in a way that makes it less likely that somebody is going to manufacture some fraud or fraudulent instrument.

In Canada at one stage they put the instrument for making an enduring power of attorney on supermarket bags and milk cartons. Why did they do that? They were keen to encourage people to, with the least formality, be able to be in a position to execute one of these documents. Obviously, if you are going to have that degree of accessibility there is going to be very limited witnessing or other protections built into the system.

The CHAIR — Is that where you want to end — at that point?

Prof. CARNEY — I think it is probably easier if I deal with questions rather than talk about things that may be of no interest — —

The CHAIR — That is fine. It is just that when you are not looking at each other you cannot quite read as much into where someone is coming from. Perhaps I could start off with the point you covered in your opening remarks, and I understand you have written about this as well — cautioning us not to see legislation as a panacea to the problems and particularly not to see this one-stop-shop idea as being a way that is going to solve more problems than it can bear. A number of submissions we have received have argued very strongly for a single legislative framework. I wonder out of that range can you say which model might be the best if we wanted to go in that direction. Could you maybe spell out in a little more detail some of the pitfalls, because I took away the sense that you thought that maybe having a more disparate structure such as the one that has grown up in Victoria might not be such a bad thing. Is that what you are saying?

Prof. CARNEY — Yes. I think having ‘horses for courses’, if I can put it that way. For example, for property administration and private planning you have the least degree of formality. Yes, you have formality, but it is the least onerous level of formality. For personal guardianship, because it involves giving somebody the power to say where I am going to live or what my lifestyle is going to be like — you have medium-level increased protections. For something that might involve the Medical Treatment Act, refusal of treatment and so on, you have the highest level of protection.

Having that gradation is a good idea. I am in two minds about whether there should be three documents that people can deal with or just something like a single instrument or document that has three parts to it with differing levels of witnessing and formality, depending on how far down the track you decide to go when filling one out.

The CHAIR — They are the documents, but I guess the other question is that we have three acts here to cover.

Prof. CARNEY — Yes, I think that is not easy for anyone.

The CHAIR — You talked before about your work back in the 1980s on developing the Guardianship Act. Are you saying it should be one piece of legislation or that the Victorian separation of three acts is a good thing?

Prof. CARNEY — No, I do not think it is a good thing to have it across three pieces of legislation. With the Instruments Act provisions, as in many other places, they tend to amalgamate them, incorporate them into the Guardianship Act. That is the home for those provisions. It arguably is also the home for the sorts of provisions that are in the Medical Treatment Act, but there is a political reason why that was separate legislation and introduced as a private members bill because it is contentious, and it is a political judgement as to whether it might be more trouble than it was worth to get the simplicity.

The only argument for having them all in one act is that it is much easier to run an education campaign for the professionals and others who need to know what the criteria and arrangements are, if you can say there is just this one piece of legislation and we will take you through it today. If you tell people that the law is to be found in three or four different places, that does not facilitate them having confidence in it, or learning what they need to know about how to utilise it.

Mr CLARK — Arguably we have got where we are because of the historical evolution from old-fashioned common-law powers of attorney through to general powers of attorney, enduring powers of attorney and then enduring guardianships, and clearly there are advantages in rationalising that in some way. I think the challenge is how do you draw the dividing lines and set up the classification so you can still cover everything from the basic commercial or indeed corporate transaction that requires a power of attorney through to what you have referred to — property management — through to health or lifestyle.

Prof. CARNEY — That is right.

Mr CLARK — Let us take the property management one to start with. Are you talking about a single document that could be either enduring or non-enduring, that could be specific or general? Would it be triggered on disability or would it start immediately and would there be circumstances under which it lapsed and some other power took over?

Prof. CARNEY — Yes, a variety of them certainly. I suppose the first is the enduring and the non-enduring power for property management. Part of the reason why these are located at the moment in the Instruments Act is on the basis that we always had the non-enduring power. People used that in a variety of commercial settings for a variety of purposes other than the social, if you like, planning purpose we are discussing — the incapacity planning purpose — we are discussing here. So if you take enduring powers of attorney away from the ordinary power of attorney you create some issues in relation to the people who are going to use the non-enduring power. I do not think that is a serious objection to taking enduring powers out of the Instruments Act and putting them into the guardianship legislation, but that is a factor. There were a variety of other questions.

Mr CLARK — I suppose I was generally clustering up the issue of how you draw the dividing lines and delineate the different types of power that you have referred to. In broad terms do you have any thoughts about if you had a separate property management power of attorney, what would be its scope, when is it triggered, what could it cover, how much flexibility was there for the appointer to customise it et cetera?

Prof. CARNEY — Yes, indeed. I think there should be a greater degree of flexibility in the instrument. Obviously one cannot blur the distinction between enduring and non-enduring. That is a critical issue in terms of the capacity of the person to understand what it is that they are executing. Once you have crossed into the enduring category there is little objection that can be taken to giving citizens the ability to craft the kind of instructions and powers that they are wanting to transfer to the attorney.

There is some recent research in another context — in Scotland — in relation to advanced directives, which are the most open-ended capacity for people to provide instructions about the future. There was a lot of concern amongst the medical profession and others that ordinary citizens would misuse that potential by writing down instructions that were silly, unrealistic, unachievable and so on. There has been recent as yet unpublished data putting a lie to that. It demonstrates that citizens are pretty responsible about the kinds of ways that they write down the kinds of instructions they would like and the conditions and so on attached to the way in which substitute decision making might be exercised by somebody. There are a lot of advantages in that.

I know there are two views about whether you need a trigger to bring it into operation or not. The lawyers amongst us say, 'It is messy for Terry Carney to execute a document today when he has still got capacity that legally comes into effect as of today giving both he and the person he has appointed concurrent powers to administer things'. Again, in real life you do not get that overlap. People do not start exercising a power before a person has lost capacity or the need has arisen. I think on balance there is more merit in the argument that says: once executed, the document essentially clothes the person appointed with the power, rather than waiting for some certification in capacity to trigger its operation.

The CHAIR — On that last point, in the instance you mentioned where a person nominates another as their attorney from now when they still have capacity — and you said rarely it is picked up, conflicts do not occur, and it is fairly ordered — do you have evidence at all or can you point us to anything about the relational development that happens? Do people not talk to each other until such future time when the donor is found not to have capacity and then the attorney steps in, or are they developing a relationship on a continuum of support?

Prof. CARNEY — Yes. The reality about the bringing into effect of the thing is the argument that people put for registration and so on of the documents. The argument against registrations on a public registry is that it is a significant deterrent. The Queensland Law Reform Commission put it very well in 1996 in its report as a significant deterrent to people to execute the document because you know it is going to be placed on a public register. The real difficulty is that at the point where the presence or absence of the power becomes an issue the people in the medical profession or the people involved in property transactions and so on do not know whether Terry Carney has executed an enduring power or not.

Having a public registry, usually with the urgency of matters, is not going to help much anyway, and there is the question of whether there is a good relationship between the donor and the recipient of the power or not. Often it is, because people tend to pick family, close friends and such like, and they are the kinds of people who are likely to know that Terry has gone downhill, is hospitalised, in a coma or whatever the case may be. But there is no great guarantee beyond the fact that human nature is that you pick people who you have confidence in and the people you have confidence in are likely to be fairly close to you and have good information.

The real issue is that if you are going to make these instruments much more attractive to the outside world I think you need to think laterally about some sort of smartcard-type solution, in the same way that we bring to attention that somebody has dementia or some serious medical condition. You have got to think of something that is visible to the person who needs an answer to the question 'Does Terry have an enduring power and, if so, over what?' Perhaps it could be part of a wearable USB stick or something!

Mr BROOKS — I think you have just answered my question. Given your statements that you think there is a need for a system similar to that, Victoria certainly has a range of different options for people that you could argue has some complexity. We have taken evidence from people who have cited concerns about third parties — it might be somebody in a bank, or in one case medical staff — probably through lack of knowledge not knowing the difference between different powers of attorney or not knowing how to handle them. My question was going to be about how we improve that knowledge. I suppose part of the answer would be the card that you have just talked about.

Prof. CARNEY — Yes, because Victoria has already gone a long way down that track. Both the Guardianship and Administration Act and the Medical Treatment Act have good provisions about proving in a documentary way. There are those provisions about the certificates and so on as proof that you can get an authorised copy of your original power and that that is taken to be sufficient authority for the third party to act and so on. They are good as far as they go, but they are an 'old technology' kind of approach that relies on the power of a piece of paper, which is a photocopy or a copy of another instrument. There is the issue of people carrying them with them and, if they do so, that the third party knows to ask for it and knows that the person has it. That is where in the real world it breaks down.

The CHAIR — We have been fairly broad ranging. I suppose you have touched on this a bit, but I want to explore bit more support for users. Kerry tells us that you have written — and I quote you:

A well-supported but difficult-to-use law may prove more appealing to aged people than its well-crafted, user-friendly cousin ...

Could you explain a bit more about what you mean by that? I guess the question under that, part of which you have responded to in other comments you have made, is: what supports are required for laws relating to power of attorney.

Prof. CARNEY — Yes, I think it is a bit of one law’s high-flowing rhetoric.

The CHAIR — Now, now.

Prof. CARNEY — It is not that I do not think that law has an important part to play. It is more that in crafting any laws one needs to immediately think through to ‘What does this look like for the average citizen or the average medical practitioner or the average bank person’ — not that people do their banking in person any more much anyway — ‘the average third party?’. How do we make it comprehensible to the ordinary person on the street? That is the message there.

In a way this may sound like I was into some ‘support’. I think there is merit in, say, the way that places like Alberta has enacted laws which have recently taken effect. I do not have the precise name of the Act. It was passed last year. I think it is the Adult Guardianship and Trusteeship Act. It is the repository for all of the enduring power and guardianship and other provisions; that is number one.

Number two is it has built in a couple of provisions. Section 4 provides for supported decision making. That is an idea that back in 1996 the Queensland Law Reform Commission recommended and was put on the statute book in Queensland. It also provides, I think in section 13, for joint decision making. That is something that here in New South Wales the Public Trustee has just been authorised to do: to be able to share the decision making between the appointed attorney on the one hand and some other member of the community who does not hold any official power. Sometimes that person is the individual themselves because they have a fluctuating capacity or a partial capacity. Hence this idea of supporting them to better realise the decision that they cannot make entirely unaided. But in other cases it is co-decision making.

Those are the sorts of useful mechanisms that can encourage the involvement of ordinary people — of civil society; of friends and relatives — informally in the operation of these instruments. In a way that is a parallel of the way guardianship is constructed. Guardianship legislation does not permit an order to be made if informal arrangements — even if without any legal authority — are unproblematic.

In a way what Alberta and Queensland have done is bring across some of that sort of thinking about creative partnerships between an official instrument conferring some authority on the one hand, and what ordinary people without any involvement of the law do, in partnership — encouraging the building or preservation of relationships that either avoid or minimise the need to rely on the legal instrument to achieve answers, to getting the banking done or whatever it is that is an issue.

Mr CLARK — I think you have rightly referred to the importance of informal arrangements and their potential to work beneficially. Could I ask about the situation where things go wrong, where there is potential abuses of the position of the donor — elder abuse or other abuse? What sorts of protections and remedies can we put in place, both the legal protections in terms of how we specify the law and impose duties and formalities but also the practical protections of how you blow the whistle, who you get to intervene? What sorts of tests and checks do you put in place for a practical use of these documents?

Prof. CARNEY — Yes. One part of that is by legislating for supported or co-decision making, one brings to notice these people who would otherwise be totally outside the purview of the law and of any official notice altogether; potentially putting them into the same sort of position that a private administrator or holder of the power of attorney would be in.

At the moment, for those people appointed under the guardianship legislation or the medical treatment legislation, there are very good provisions that require that they keep records of what they do in some way and provide for some sort of annual reporting or some sort of process of then reporting their information and actions to someone. Just by being under that obligation, and getting into a relationship say with an office of public advocate, a body of that sort of character, or a public trustee — it is possible then to deliver education and support programs. There are provisions in the legislation allowing, indeed encouraging, people when in doubt to contact them, and obtain guidance or clarification of powers in regard to the Tribunal or some sort of official.

That is the kind of additional government support beyond the sort of involvement of civil society, as I call it — the relatives and the friends I was talking about earlier. Here now you are finding low-cost ways to discover who are the people exercising this kind of informal support so that you can provide education; you can put some limited obligations on them to keep some records and; from time to time, tell officials, if you like, how things are going.

It is a delicate balance, because these people are ultimately volunteers. You do not want it to become too bureaucratic and too onerous. Whatever the good intentions of public policy-makers in avoiding abuse, you do not want it to become so onerous that they stop involving themselves in the program.

On the abuse itself, at the moment it is fairly readily stopped. I was giving evidence to the New South Wales Social Affairs Committee inquiry early this week. In what is now my state of New South Wales there is no office of public advocate. There is no such ombudsman, watching brief, systemic advocacy — or any of these things that are so well established in Victoria. In Victoria, as elsewhere, you have the same sorts of powers of a guardianship tribunal to step in and immediately terminate an enduring power that has gone off the rails or has been abused. Unlike a state like New South Wales — where that potential is there, but there is nobody looking out to detect, to prevent and to educate. In Victoria the legislation I think has done a pretty good job of devising that all-purpose specialist ombudsman, the Office of Public Advocate. It does a better job of detecting more of these cases and acting more promptly to at least stop the abuse for the future.

Can we avoid the fact that the family home has already been sold because of a case of a greedy son or son-in-law, or whatever, and the money has been spent at Randwick Racecourse; that this is shameful and immoral, and the rest? At the moment the only remedy for that is action in an equitable jurisdiction of a superior court to get that kind of redress. Yes, it is often a grave injustice. Can these statutory instruments and things we are discussing do much to prevent that? Probably not; and there is always some sort of division of costs in any legal system that you are going to devise. I do not have an answer to the redressing of abuse, but the stopping of abuse, yes. Redressing it and setting things back to being right, there is no easy answer to that one.

Mr BROOKS — Should the legislation require that attorneys act in the best interests of the donor?

Prof. CARNEY — Yes. I was talking about this with the New South Wales inquiry too. Queensland is the only state that has said that ‘best interests’ is a totally meaningless, vacuous phrase — and standing on its own, apart from putting a hand over a heart and saying, ‘Of course everybody should act with good intentions’, and so on — it does not actually tell you what is or is not in a person’s best interests. Queensland has recognised that and does not actually use that phrase at all. Some of these sorts of elaborations you find in some parts of the Medical Treatment Act, where best interests include that you must turn your mind to how burdensome or not is the medical intervention. In other words, it starts to identify key heads or issues that a decision-maker should turn their mind to.

In relation to guardianship, it means you are going to say that ‘best interests’ means that you should take account of Terry Carney’s known values and preferences; was he a gambler, was he not a gambler, and that kind of thing. It means that you are going to talk about the dignity of risk. Are you saying that once an instrument like this comes into effect, all the immoral, risky, silly, bad decision-making behaviour that the person would have engaged in beforehand is somehow now to be totally curtailed or not?

The short answer is you are much better off to talk about the kind of principles and values that you think need to be applied, like the sorts you find stated in I think section 4 of the Victorian Guardianship Act, rather than use a phrase like ‘best interests’, which has been described as an empty vessel into which adult prejudices and perceptions are poured. In other words, it is illusory. It does not tell you how to think through the issue. It looks good when I say, ‘I have decided this in your best interests’. It is a bit like the father giving the kid a belting in the old days: ‘This hurts me more than it hurts you’. Why am I doing it? ‘It is in your best interests, son’. ‘Why is it in my best interests?’. ‘Just believe me; it is in your best interests’. It is not a very good guide.

The CHAIR — We are nearly out of time. Unless other people have further matters, on the issue of the level of abuse, Kerryn again tells us that you have observed that members of some groups in the community are less likely to use the power of attorney documents than others. Could you throw some light on that for us? Which groups do have low levels of use and what might we do about that?

Prof. CARNEY — It is a very critical issue. It is members of South-East Asian communities where family decision making not individual decision making is the normal approach. They cannot get their head around it and will not. It is a deep, cultural, religious principle. A good indication of that is that when the New South Wales Guardianship Act was transplanted into Hong Kong, given to an expat to administer and the president of the New South Wales tribunal went over there on many occasions to train them up, they got a 1 per cent population take-up. Why? Even in an ex-British colony, very British and Anglophile, it is just alien for someone other than the family to be responsible for what we see to be guardianship.

Secondly, it is not just a matter of foreign countries. Research has been done in the US on people from Spanish-speaking communities, on ethnic Chinese, people of all sorts of backgrounds. Or with certain value systems within the non-ethnic origin population, even among those of us who are fatalists, as distinct from those of us who are highly organised. Amongst all of these people, in the case of ethnic communities and second and third generations, there was negligible take-up, suggesting there is something permanent and deeply-embedded in cultural history and values. Even amongst, as I say, the non-ethnic populations, people with a fatalistic approach will not — —

The CHAIR — What does the evidence tell us about how well they do, as it were, keeping these issues inside the family? Do they also have cultural forms that enable them to do that well that we could learn from or do they make as many errors as other cultural groups do?

Prof. CARNEY — They make as many errors as other cultural groups do, and of course the cultural proximity of people and the checks and balances and supports that previously existed are disrupted, decayed. Removed by the kinds of highly mobile labour markets, nuclear families and so on that we now have. No, I do not think there are any lessons out of it other than that in crafting a law you have to take your population as you find it. That is why such a small proportion of people, one in five, is about the maximum you are going to get by way of take-up or enduring powers.

The example I use in teaching postgrads, though, is a couple of studies where people say, ‘This would not be the case if you had a fatal illness and you definitely did not want to be intubated and all of those other nasty things’, although you have just been told in the last few months that you have got a fatal illness, and will be dead in the next three months. ‘The problem is there is not enough education’. ‘People do not understand’. They got these people together for two-hour or three-hour sessions where all the experts came along and talked to them about the advantages of enduring health powers of attorney and so on, and I think the take-up moved from 14 per cent to 20 per cent. Why did the others not sign? They all said, ‘Yes, I want to avoid this catastrophe of intubation and being kept alive on bloody monitors and all that sort of stuff’, but four out of five people said, ‘It’s okay. My wife, my son, my daughter, those around me will sort it out informally’.

They could see the advantage of the instrument and what it would do, but at the end of the day did they sign one? No. Why not? Because their approach to decision making is, ‘She’ll be right, mate’. That is what I mean by the fatalistic, semi-communal communitarian attitudes that are deeply ingrained in a significant proportion, indeed a majority, of our population.

Mr CLARK — I suppose, Terry, one question that flows from that is: is there any evidence as to how that 80 per cent’s outcomes turn out compared with the 20 per cent who do make appointments?

Mr CARNEY — Sorry, there was a bit of noise.

Mr CLARK — I was inquiring as to how things turn out for the 80 per cent compared with the 20 per cent, whether there is any factual or anecdotal research evidence.

Mr CARNEY — The reality is that for people with an enduring power, half the time or more — the medical practitioners, if it is a health power — either do not know that there is one, or if they do know it, they do not properly understand what they are supposed to do. What happens is that what I sometimes call ‘muddling through’ happens, and informal approaches govern pretty much in both populations, with similar degrees of success and unfortunate difficulties. That is the reality.

The CHAIR — We are well and truly out of time, Terry. Can I thank you very much on behalf of the Committee for your very generous contribution and for agreeing to talk to us. I think we heard a motorboat go past earlier on; would that be right? Enjoy the rest of your time there.

Prof. CARNEY — You are very welcome.

Witness withdrew.