

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 22 October 2009

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Witnesses

Ms K. Spark, Manager, Seniors Information Victoria,

Ms D. Parnell, Policy Officer, and

Ms J. Wood, President, Council on the Ageing.

The CHAIR — Welcome to Debra Parnell, Janet Wood and Kris Spark from Council on the Ageing. Thank you very much for coming in, and thank you very much for the submission that you sent us. As I am sure you are aware, having given evidence at these sorts of hearings before, that all evidence taken at the hearing is protected by parliamentary privilege as provided by the Constitution Act, the Parliamentary Committees Act and the Defamation Act as well as acts in other jurisdictions, and that any comments you make outside this hearing will not be afforded privilege. Hansard is taking down what we discuss this afternoon, and you will be sent a transcript subsequently that you can make some minor amendments to. We have got half an hour, so we will have to be quick. I will give you some time to set up and speak to your submission and our terms of reference, and then we will have a bit of a discussion. Despite all the microphones and everything, it is pretty informal.

Ms WOOD — Our process was that I would speak very briefly as the President of COTA Victoria and then the two people who really know a lot more than I do would then respond to the questions which we have already been informed are of interest to you. Thank you very much for this opportunity. You have already heard from Seniors Rights Victoria this morning. In a sense that is another COTA submission, in that we are one of the four partners there, so we have two angles to this inquiry into the reform of powers of attorney; our interest is of course in two particular directions.

What we are particularly concerned about from COTA's perspective in a general sense, using as a base the pillar of human rights, is that the ability to continue to make choices and decisions for oneself goes on as long as one wishes it to go on. If we start from that basis — the right to individual choice for as long as possible — then it seems to us that we get somewhere. Of course you have to look at the exceptions and the things that do go awry, but as we emphasised in our submission, COTA is particularly an organisation of, by and for older people, so we begin with participation of older people and then move to policy development and advocacy. Those are the steps we take.

We emphasise participation, but we also emphasise constantly how deeply embedded ageism is in our community and how difficult it is to shift even from those instruments which have been set up in services, government policies et cetera. We obviously promote the idea that a person's age is not an excuse for taking away the ordinarily accepted right of choice and decision making by individuals and that powers of attorney therefore should begin at that point. Rather than start with the need to protect, it starts with the need to acknowledge choices.

Obviously an element of an individual's decision to direct powers of attorney for themselves is peace of mind, knowing that in the future if anything happens, something is in place for them, but we need to emphasise the 'if anything happens' part. The majority of people will never need powers of attorney to be exercised on their behalf, so the important thing is to make sure that the way in which one enters the process is a way which assists, is accessible and is unambiguous. We emphasise of course in our submission that it is the wishes of the person which trump over the best interests, we think. One can make a bad choice at any age. Our offspring often do. As you get older, you do not in fact lose the right to make a bad choice.

We do lament the omission of the medical powers of attorney in this inquiry. We know the reasons why, but for our cohort of older people, making the distinction between different sorts of powers of attorney is very difficult indeed. What we are looking for are preferably national seamless reforms that support the rights of individuals at every age and any stage to be in charge, as far as possible, of their own futures. They are the pillars on which we work, and then that will answer all the difficult questions about how.

The CHAIR — Are you going to make some further comments, Debra?

Ms PARNELL — No. That is really the extent of our general statement, I think.

The CHAIR — Perhaps I will jump in first. You argue in your submission for one piece of legislation that covers all the powers of attorney that are available, and most of the other Australian jurisdictions have done that. Out of that range, is there one body of legislation in any of the states that you would point to as a model that Victoria could benefit from by having a good look at?

Ms PARNELL — We are aware that Queensland has done quite a lot of work in this area in terms of restructuring its powers of attorney regulations. Particularly the advice we get from our Senior Rights Victoria colleagues is that that Queensland model seems very effective and comprehensive. They have had cause to use

that Queensland model because they have had clients who are from interstate jurisdictions, and they have found that particular legislation to be quite straightforward, well developed and easy to understand. They basically were very impressed with it, in particular schedule 2 which goes with that legislation, which provides a checklist of questions and guidance for assessing capacity. They found that very useful and thought it was quite a good model. To that extent I guess we would probably recommend the Queensland model as something that should be considered in this inquiry.

The CHAIR — Good. Did you want to add to that?

Ms SPARK — I will leave it up to Debra.

Mrs VICTORIA — You mentioned that whatever decisions are made should be the wishes of the person in question. We have had some people talk about the interests obviously being somewhat different from the wishes. How do you decide?

Ms WOOD — It is such a balancing act, and we all know that. It is particularly difficult in this era when we are going to have an increasing number and percentage of people with cognitive disabilities which will take many years for them to be at the point where they have incapacity. Dementia, as you know, has different stages. There is obviously that very difficult area where people are cognitively not quite as they were and yet they are not in fact totally impaired. We have had a look at Alzheimer's Australia's submission and particularly everything it has said, obviously. There is no doubt it is a problem. It seemed to us, though, that unless we start from the notion of the continuing right to make decisions, we can end up with legislation that is too protective and takes away a right too early. This is a bit off the top of my head, but we have just had lunch together and we were talking about how some of the case studies from SRV have involved people who have gone into hospital for three weeks, six weeks, say, and in the interim their worldly goods have been taken away from them. They come out having recovered from whatever it was, and it is all gone. We must not have legislation that allows an anticipation of incapacity. Increasingly as one can recover from a stroke or all sorts of things like that, there needs to be more of an emphasis on permanent incapacity; we need to be very careful about temporary incapacity.

Ms PARNELL — Just adding to that, we have already highlighted that our focus is on the rights of the donor. I guess there has been a change over time in terms of the power of attorney and guardianship provisions. Once the focus may have been on people who have lifelong disabilities and incapacity where there needed to be a decision-maker who was managing a person's affairs really over a lifetime, where it may not have been possible to discern what that person's wishes may have been and where in fact that person was working in the donor's or person of concern's best interests. In fact now most of the cases that go to VCAT around powers of attorney involve older people. We have really had a shift where what we are talking about now are people who have lived a life and are in a situation where they need someone to manage their affairs for a variety of reasons.

Really what we are saying is that the focus should be on the attorney carrying out the wishes of the individual. It really should be a responsibility of the attorney that they endeavour to understand what the wishes of the person are, what their preferences are, what their lifestyle has been, and therefore what sorts of choices that person would conceivably make. The focus is on carrying out the person's wishes rather than acting in their best interests.

As we have said, people have the right to make bad choices, and it is not about taking over someone's life; it is about enabling their choices to continue to be carried out whether there is lack of capacity or whether there are illness and mobility issues that prevent them from carrying out those tasks themselves.

Mr BROOKS — Like most issues, these problems can be better managed with better education and people understanding more about the issues. It is noted here that you run a program or help provide a program called 'Need to Know?'. I wonder if you could tell us a bit about it, such as how many sessions you run, where you hold them and that sort of stuff.

Ms SPARK — That is why I am here. I manage COTA's information service and the Need to Know? program has developed out of the frequent information requests that come into the service, and one of those is on powers of attorney. We have run the information sessions annually. They are facilitated by an education officer from the Office of the Public Advocate. They are well attended, and I think the main emphasis from the

know Seniors Rights Victoria has had cases where someone had five different powers of attorney, and it was a nightmare trying to working out which ones needed to be revoked, which ones were valid, and therefore which ones were questionable.

One of the other issues related to this — and certainly why we think registration would be useful — is that some agencies — for example, Centrelink — have their own nominated-person process that stands alongside and outside the power of attorney process, which adds to the complexity and potential for abuse. While Centrelink would say its preference would be to work with a power of attorney, it does not undertake to find out if there is a power of attorney; it is not a requirement that the nominated person be a power of attorney or that the power of attorney be notified that someone else has been nominated to be able to access the person's money, to act on their behalf and so on. We feel those types of issues would be addressed through a registration process.

The CHAIR — Following on from Colin's question, who are the people that come to the Need to Know? information sessions? Are they attorneys, principals, family members or what?

Ms SPARK — No, I would say they are the older people looking at setting up their own power of attorney.

The CHAIR — Are you saying most of the questions are coming from that point of view?

Ms SPARK — Yes.

The CHAIR — You have said in the submission and in the comments you have just made now that attorneys are required to comply with principles, roles and duties and that that should be set out in legislation. You have said a number of things now, but if you had to distil them down, what would be the things that should be incorporated in legislation?

Ms PARNELL — We would hope that any principles, roles and duties would really assist in clarifying and enabling people to understand. Certainly we would see that a human rights approach should be the basis of such principles, and that really people need to understand that what they are doing is assisting the person to carry out their wishes, so there should be some requirement for people to understand that they should be talking to the person about what their wishes are, or talking to other family members about what the person would want put in place. It really needs to be underpinned by those sorts of principles.

The CHAIR — This morning one of our witnesses cautioned against making such provisions too prescriptive.

Ms PARNELL — Well, yes, I think you do need to have some balance in potentially what that person's role might be but I think there does need to be clarification. The feeling that we have through our senior rights service is that a lot of difficult situations arise fairly innocently because people are not clear about what they can and cannot do and what the basis of their role as attorney actually is. So I think clarifying, through principles and guidelines of this nature, would certainly assist both the donor and the attorney to have a better understanding of the approach, but we would stress that it needs to be based on that premise: that what it is about is the individual's wishes and that the attorney is carrying out those wishes, not taking over the estate or the assets of the individual.

Mr FOLEY — I think you have kind of answered it in talking about that principles approach, but if the approach is going to be based around a rights agenda — and as Janet has already said people now for a whole range of reasons are coming in and out of incapacity and recovery and living better lives — how would you see it dealing with that aspect of assisted decision making versus substituted decision making in terms of an actual instrument? Would it just be a general principle or would it be, in your view, a more prescribed vehicle?

Ms WOOD — I am 50 per cent one way and 50 per cent the other way, and that is obviously the issue. The Seniors Rights Victoria submission is pretty prescriptive on these things, and we take a lot of advice from them because that is where our lawyers are. What I think we are trying to say is: work out where you start from, which is the choices, which is the carrying out of the wishes, and yes, the prescriptive approach would be very difficult because whatever you write into legislation can be problematic in that sense. I am not pretending I know the answer to that one. I am hoping you will work that particular one out in reforming. What we are obviously looking for is clarity so that the object of the reform, which is the person making the decision to enter the powers of attorney process, understands entirely what they are doing, which is why we look for

consolidation of the instruments instead of having different ones — there are about four different ones you could have. We would look for consolidation because that helps people understand what they are doing. We would look for less ambiguity in terms, even though things like the definition of capacity would have to have some open-endedness and some flexibility about it. I am not trying to spin or prevaricate.

Mr FOLEY — No. It is a very difficult subject.

Ms WOOD — I am just saying it is really difficult.

Mr FOLEY — The minute you prescribe is the minute you rule out anything that does not necessarily — —

Mr CLARK — I will toss in a related question. If you look at enduring powers of attorney, they take effect from the time you sign them including while you have legal capacity. If you look at an enduring guardianship, that does not take effect until you lose capacity. We have had mixed evidence so far from witnesses as to whether they think instruments should take effect immediately or only when people lose capacity. Do you have a view on that subject?

Ms WOOD — Yes. Again, this is a tentative view rather than a strong view, and it is that they should not take effect until there is a lack of capacity. This is because of a sense, rather than evidence-based research, that people would put off making these powers. The sense that I in my right mind today would hand over powers right now I think might put off a lot of people getting involved early enough and really thinking and planning for it — even though I love my children and I am assuming they love me; one cannot be sure of anything in this life. This is not evidence-based research, it is a gut feeling that it might in fact put off some of our older people from effecting what they want to happen early enough.

Ms PARNELL — There are clearly pros and cons to both. People already have the right to stipulate when their power of attorney comes into effect, although I think the fact that the different instruments do have different terms and arrangements around them makes it very confusing, and then inconsistency — in that this instrument comes into effect at this time but this one does not come into effect until another time and so on — I think does create difficulties. So certainly, consolidation and more harmonisation across instruments would make it a lot better.

Certainly some people put powers of attorney in place even though they have capacity. There could be a range of reasons — from illness and mobility issues to just wanting someone else to deal with those decisions I suppose. People should have that right. I know that the Office of the Public Advocate argued that they should come into effect as soon as they are signed and that this provides some process for assisted decision making, but yes, our concern might be what other issues it throws up. I think it is difficult.

Clearly the issue of determining when someone loses capacity or no longer has capacity is an extremely difficult one, especially given the fact that people can fluctuate in their capacity and therefore the issue of what the role is also a difficult one. I think that is where we need to strengthen the roles and obligations of the attorney and make that much stronger and the accountability processes much stronger. If people are aware that they have to account for decisions that they make, they may be less inclined to say, ‘Mum has had a stroke so we are going to sell the house because we anticipate she will have to go into a nursing home’ — those types of decisions that may not be warranted. They may be done supposedly in the best interests of the person but still if people have to account for some of those decisions and what happens to assets, then they may be less likely to make them without a better process of decision making around them.

The CHAIR — The following scenario has been put to me, and I will just run it by you and see what you think about it. An elderly lady in care in an institution is approached by a worker around instigating a power of attorney and she says, ‘Yes, my child is outside; I’ll get them to come in’, and the forms are duly signed and dispatched and all the rest of it, but nobody else in the family is aware of it at all and it turns out that this person who has been so nominated is not a reliable person for various reasons that I will not go into, and it is not discovered until some time later, by a sibling through a passing remark, by which stage some of the money has already been disposed of. How do we protect against something like that?

Ms WOOD — The aged-care facility itself should have better processes in place. There is absolutely no excuse for that happening in an aged-care facility.

The CHAIR — Let us say it is a friend of a friend’s lawyer who happens to come into the equation, not an institution.

Ms WOOD — Oh! A friend of a friend’s lawyer.

The CHAIR — I mean, let us say they have got a lawyer, that they have got somebody who comes in and does not know the family that well but thinks they should process this.

Ms WOOD — I am just thinking that through. You could have written in the need for the GP’s medical assessment, you could have in place a legal tool to check capacity. If you had those sorts of things in place — —

The CHAIR — But this is the capacity of the attorney I am talking about.

Ms WOOD — The capacity of the attorney.

The CHAIR — Yes, the attorney is somebody who has filched money and is not a reliable person. And nobody knows that that person — —

Ms WOOD — We could extend police checks.

Ms PARNELL — There are issues around the witnessing of powers.

The CHAIR — Okay, so that protects them.

Ms PARNELL — And I know that some people have called for the requirement that witnesses not be members of the family and that one of the witnesses be an authorised witness and that there be some education for those people to stipulate what their role in witnessing such documents is.

I know there have been other calls for an interested party who should be informed about decisions. I think these are valid considerations. I think anything that puts additional checks and balances into place is a good thing. The issues that may come up of course are how onerous a process that creates and what is put in place to address the issue of people who feel they do not have a person of interest who they can call on to take on that role. They are good options but there are issues. They will still be issues in relation to them.

The CHAIR — Your submission provides an example of a donor who successfully recovered funds that were misused by an attorney. I guess you might have drawn out of my example. But you are right that too often there is no rule on the part of the older person to seek redress through legal action. Can you just talk to us very briefly about why you think older people are reluctant to take up those legal avenues?

Ms SPARK — We are also often asked about where to have a will done. Again, it is an issue of cost, so it could be that that is the reason. So people are looking for a low-cost option to do that. Not all community legal centres do wills, so that could be another issue. It is an interesting situation, but just one of the other sort of themes that come through working in the service for 10 years is that as people age they fear losing control, so I think therefore the controls that are put into place have to show they are not going to lose control. So there must be some sort of fear there, at times, that if we put this into place, as Janet said before, that we may be handing over control at a time where we can still control. When you said about the people who come along to the sessions, there are people wanting to get it all tied up, all done and tied up, so they know exactly what is going to happen in their lives. There must be other people who like to stay in control but avoid those legalities. They might see they are going to lose that sense of control.

Ms WOOD — I think the issue for older people who do not pursue avenues of redress relates to the very human business of being in a family. I mean obviously the older you get, the more there are. I should not say the more there, but there are issues about feeling alone, about feeling fragile, about not wanting to upset the family — because where does your support come from if not from the family? — and about not wanting to split the family. For many people the new marriage arrangements, partnering, re-partnering and reshaping, mean that there are some vulnerable parents out there; they are very vulnerable, they are all by themselves in a sense. If they offend the new daughter-in-law or the new son-in-law — —

So there are issues around that, which is why we exist, I mean, and in a sense why we need agencies. I guess they are catering to a whole range of services. This is not the only thing that helps support, protect and keep older people feeling good about being in their community. It is all those other policies as well.

Ms PARNELL — Certainly in terms of the cost of pursuing, I have heard people relate stories of where they have wanted to seek redress but the cost is too great for them. It is too long a process, or the fact is that even when there may be a finding in their favour that, yes, someone has defrauded them through the powers of attorney process or they have done, you know, something terribly wrong as an attorney, there is no effective redress. There is no calling to account in a real way the attorneys. Often moneys cannot be recovered. It is too late; the house is gone; the person is in a residential care facility. All too often it is very hard to actually regain what they have lost. So certainly some of those accountability processes and much more clarity around the expectations of the attorney I think would help in that respect. An auditing process or calling people to account for decisions they make may address some of those.

The CHAIR — We had better call it a day. Thank you again very much for the submission. Thank you for coming along and giving us your time. You will receive a copy of the transcript. I hope you would be happy if Kerryn or Kerry were to call you to clarify any matters that need to be tidied up.

Ms PARNELL — Thank you very much for the opportunity. Good luck with your deliberations.

Ms WOOD — We will all be watching.

Witnesses withdrew.