

# CORRECTED VERSION

## LAW REFORM COMMITTEE

### Inquiry into powers of attorney

Melbourne — 22 October 2009

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#### Witness

Ms B. Evans, Senior Advocate, Elder Rights Advocacy.

**The CHAIR** — Thank you very much for coming along, Belinda.

**Ms EVANS** — Thank you very much for the invitation.

**The CHAIR** — Thank you for the submission you have sent us. We have got just under 30 minutes, so we will just give you a few minutes to set up, and we have some questions and matters we would just like to go through with you if that is all right.

**Ms EVANS** — Over and above what I have already put in our submission, I am happy to follow whatever procedure or process you would like. Would you like me to mention some key points here, or go straight into questions?

**The CHAIR** — We could go straight into questions I guess if people are happy to do that. Just to start off with your education program, because we are interested, just in general for me to set up, about the extent of people's understanding of the availability of powers of attorney and what it means. We have been asking the different witnesses who have come in about that. You provide education sessions, do you not?

**Ms EVANS** — That is correct.

**The CHAIR** — Could you perhaps talk to us about how you do them, what sort of information you provide, who comes along and what they ask you?

**Ms EVANS** — Sure. If I may, just in terms of putting the answer into a context, Elder Rights Advocacy is an advocacy service funded by the Commonwealth through the Department of Health and Ageing to provide advocacy services in Victoria to consumers of Commonwealth-funded aged-care services and to their family members. So a lot of the work we do is based on residents of aged-care homes and recipients of certain types of community care or their family members contacting us because they want information, support or advice about their rights. Our education program relates primarily to providing general information about care recipients' rights and providers' responsibilities to care recipients in aged-care homes.

We have one session that is specifically for residents and/or family members which we provide free of charge. Then we have another session which we provide free of charge to staff of aged-care homes; the basis of both of those relates generally to residents' rights. We are also able to advocate for recipients of other Commonwealth-funded aged-care services such as community aged-care packages and extended aged-care-at-home packages, but the majority of our work relates to residents.

Those two types of sessions that we call 'general residents' rights information sessions' we provide free of charge at the request of aged care homes. We also provide information sessions to other groups, such as certain allied health professionals — social workers at hospitals, for example; aged care assessment service members; and people involved with psychiatric assessment services. We also have fee-for-service education sessions, which again are primarily for staff of aged-care homes, and they cover a range of topics including recognising and preventing elder abuse, the compulsory reporting requirements of the Commonwealth Aged Care Act, duty of care, restraint, complaints handling, culturally appropriate care and so on. So in terms of issues to do with, whether it be financial powers of attorney, enduring powers of guardianship, medical treatment enduring powers of attorney, questions about those come up more as an incidental matter in the sessions we provide. They are not our key focus, whereas there will be other organisations who I am sure have appeared before you where that is one of their key areas of education, like the Office of the Public Advocate in particular.

I personally come from a legal background, and one of my areas of study has been in substitute decision making, particularly in the medical context, so it is an area in which I have a personal interest, but all of our staff are able to provide general information to consumers and their families and to staff and management of aged-care homes about powers of attorney broadly, but we do not get involved in providing specific advice. We would refer someone to the Office of the Public Advocate, for example, or perhaps to Seniors Rights Victoria, particularly if it is an issue that seems to suggest an element of elder abuse. I should say we are not a legal service. We are an advocacy service, but we do not provide legal services, and I am not employed as a lawyer.

**The CHAIR** — Just finally with these sessions that you run, you said they are by invitation. Do you get a fairly good sampling of residential care facilities who invite you in?

**Ms EVANS** — Yes, I think we do. In fact, the Department of Health and Ageing has targets in terms of the numbers of homes that they would like the advocacy services in each state to reach. For various reasons I imagine some states find those targets easier to reach than others. We have a website. We have brochures. We encourage aged care assessment services, for example, to have our brochures, so when older people come in for an assessment of their care needs, if they are assessed as eligible for Commonwealth-funded care, we hope that the ACAS will give them our brochure so they can contact us and ask any questions or advice. But in terms of the providing of the education sessions, yes, facilities can see about our existence on the internet, but in particular we will send out fliers during the year, like a mass mail-out, and hope that facilities will respond to that and we will then arrange sessions with them according to the sessions that they would like. It is quite common to provide the general residents' rights session to residents and relatives, and for that to take place immediately before or after a session for staff on the same day. And of course from the point of view of the aged-care provider, part of their continuous improvement program, part of what they often like to demonstrate to authorities such as the Department of Health and Ageing or the Aged Care Standards and Accreditation Agency is that they have had information sessions for their residents and relatives groups and for staff about residents' rights.

**Mr CLARK** — I want to take you up on some aspects of your submission, in particular the examples on page 3 about the scope of enduring powers of attorney. You have a couple of examples there which seem quite appalling. I want to question with you the basis on which you conclude that an enduring power of attorney does not extend to making a range of lifestyle-type decisions, because it seems to me that, under the current legislation, the enduring power of attorney covers all things for which an attorney can be appointed other than medical treatment decisions; in other words, the nub of the problem is not what power is being used, but that the appointee is misusing the power. Would you care to comment on what your understanding is as to what sort of actions can be undertaken by attorneys under enduring powers?

**Ms EVANS** — We have not concluded that an enduring power of attorney under the Instruments Act does or does not have a full range of powers beyond those which we customarily think of, such as the powers to handle finances, property, assets et cetera. What we are indicating is that there is uncertainty. We tend to assume — when I say 'we' — that includes lawyers, informed members of the public et cetera tend to just think of enduring powers of attorney under the Instruments Act as documents that empower an attorney to handle finances, property, assets, but I have not actually seen it documented anywhere, and that is part of, I guess, where that page of this submission and the next page lead on to, and perhaps I am going back a little bit to basics, but my thinking is whether you look at the Instruments Acts, which I am sure is not something that every person does, and I say that tongue in cheek, if you look at the form of the enduring power of attorney under the Instruments Act, there is nothing on that form which specifies exactly what powers the attorney does or does not have.

I am aware that the Instruments Act specifically refers to the power not including medical treatment, but not necessarily everyone will be aware of that. I then look at other sources for information, such as the Department of Justice's website, the Office of the Public Advocate's website, the *Take Control* booklet from VLA and the Office of the Public Advocate, which I think is a wonderful publication — it is very, very helpful and very informative — but even those sources refer to a phrase something like 'the power to make financial and legal decisions'. I then ask myself, what is a legal decision? And I do not mean to sound silly by saying that. I mean it quite literally. If these authorities are using that expression, what do they mean by 'legal decision'? I have not found any authority that answers that question, and I think that in part leads to uncertainty amongst consumers and others as to what an enduring financial power of attorney, as they are known, actually does empower an attorney to do.

I have raised this issue amongst colleagues at the Elder Law Committee of the Law Institute, and they look at me and say, 'That's a really good question'. I tend to think of a legal decision as possibly involving anything that affects a person's rights and responsibilities. Others might determine it to be something much more narrow such as instigating or defending litigation. There is a broad range of views.

Some might say certain types of lifestyle decisions, such as choosing where to live, could be seen as a type of legal decision. There are a million and one possibilities, so in looking at the powers of attorney, as I said, I have often asked myself, 'Where do you actually go? What do you look at to find the definitive authority of what powers are encompassed by an enduring financial power of attorney?'

I am aware of the old form of general power of attorney, which I understand other authorities have included in their submissions. I do not know the history and development of powers of attorney over the years, and there may be very sound historical principles that clearly show that what we today regard as an enduring power of attorney under the Instruments Act does in fact only cover assets, property, finances, as we generally assume it does. I am just not aware of that history, so I do not know for a fact whether through common law principles it would be clear to those who undertook research that they were the limitations on such a power or whether it is an open question.

What I can say is that I do come across situations, as I have mentioned in the submission, where people are confused about what powers are and are not included, such as is illustrated by some of the examples I have given. I would be interested to know, and I hope it will be part of your report, whether there is a history that shows clearly how these powers of attorney have developed and what has been included within them historically. Certainly the reference to words to the effect that ‘I authorise my attorney to do anything I may lawfully authorise an attorney to do’ is very vague. We know it does not mean, ‘I authorise my attorney to do anything I can do lawfully’, because we can see there are exclusions of powers — for example, someone who is an attorney under someone else’s power of attorney cannot delegate that role to their own attorney. Where do you go to find the authority that says what you can lawfully authorise an attorney to do?

**Mr FOLEY** — Belinda, as a subset of that, and noting your earlier comments about your personal interest in the substituted versus supported decision-making issues, how would you see an attorney instrument being empowered to support those supported decision-making practices in practice?

**Ms EVANS** — May I ask what you mean by ‘supported’? Is it as in somebody assisting a person whose capacity may fluctuate?

**Mr FOLEY** — Yes. We have heard evidence that increasingly, for all sorts of reasons, people come in and out of different capacity or incapacity. Increasingly they come back from serious strokes and all sorts of things. That is becoming a pattern more and more. At the same time we have also seen a greater focus on a rights approach to support decision making across all areas, including elder rights. In that context and when the two come together — and if you take the notion that the direction is supported decision making or something like that, but there are instruments that in a sense are based on another approach, which is substituted decision making — how do you design and implement an instrument based on supported decision making?

**Ms EVANS** — I think that raises some very important issues. I do not have a specific answer. I have not actually seen legislation or other materials showing how a supported decision-making model would work. I am definitely aware of the presumption of competence unless established otherwise. Certainly, from listening to a number of key speakers in the geriatric medicine area, I am aware that the question of capacity needs to be looked at on a very decision-specific basis and even a circumstance-specific basis, not on a global one. I think that is perhaps an aspect that is not understood well enough in medical and aged-care circles.

I appreciate that with the sorts of situations that occur when people’s capacity fluctuates it makes it very difficult. I would support the idea of working from an empowerment, rights model rather than from a protective, welfare model. I would like to think that people whose capacity may fluctuate will be supported to make decisions, but how you actually make a definitive decision about whether on a particular day a decision was made while they did have capacity to make that specific type of decision and on another day maybe they did not, unfortunately I cannot offer you an answer as to how to enable that to work from a practical point of view. But it sounds really good in theory.

**Mr BROOKS** — I want to get your view on suggestions that there be a central registration of powers of attorney agreements. We have had some suggestions that there should be the ability to nominate one or maybe more other parties as interested parties.

**Ms EVANS** — I have not seen a proposed model for the registration. I do not know whether the intention is that if one makes an enduring power of attorney, it does not have validity unless and until it is registered — in other words, a mandatory type of process — or whether it is simply a voluntary type process.

I would not like to see unnecessary restrictions on people’s capacity to make powers of attorney, whether they be under the Medical Treatment Act, the Instruments Act or enduring powers of guardianship. My personal feeling is that at this point, and based on my current knowledge, I would not be in favour of a system of

mandatory registration in which the document did not have any power unless and until registered. I think we need to recognise there are people — whether or not they be older people — who want to be able to make their powers of attorney without necessarily seeing a solicitor. The information on the Office of the Public Advocate’s website is very helpful. I think it is fantastic that these documents are accessible, and I would not like to see something that makes it more difficult to make these documents.

I can understand that perhaps a process of registration may be a useful factor in terms of looking at the minimisation of abuse of powers of attorney, but I think it is important that there not be such a degree of restriction that the use of these documents becomes more difficult. I like the fact that I can go to the website of the Office of the Public Advocate and get a fact sheet, and I can download the relevant form and arrange to execute a power of attorney based on that information. I would like to think my document was effective from the moment it is supposed to become effective, and if I happen to forget to register it, or I am not aware of the need to register it, I would hope that would not impact on its effectiveness.

**The CHAIR** — Your submission provides examples where both attorneys and people working in aged-care facilities do not appear to be aware of the differences in the different kinds of powers that are given to attorneys and granted under different Acts. I think you said it shows a need for greater training and education. Could you talk to us a bit more about that?

**Ms EVANS** — Sure. I think part of this gets back to what we were talking about before. Before we get to the point of further education on different powers of attorney, which I think is really important, we need to have clarification of exactly what powers can and cannot be bestowed on an attorney under the various powers. If we assume for a moment that in fact the law is or becomes that an enduring form of power of attorney under the Instruments Act is limited to what we anecdotally think it is — primarily dealing with assets — that is fine, but we need to have that made clear. I think people need to have a better understanding of the medical treatment form of power of attorney, which I appreciate — in my view, unfortunately — is not part of this review. I think once the law is clearer, or once the understanding of either the current law or law that you are going to propose is clear, there is very much a need for an education program for the community generally which will also embrace people working in medical, aged care and other fields.

Quite regularly we come across situations with aged-care homes where a resident while competent has made out a financial power of attorney in favour, say, of a son or a daughter, and the facility mistakenly believes the attorney can make a full range of decisions, not just with health care but in particular with restricting the access of other family members to the resident. In our experience we find directors of nursing and CEOs of aged-care providers who are not adequately informed about what such a power of attorney does not bestow.

**Mr CLARK** — I will just follow on from that. Let us take a situation where the person abusing the power in your examples does not hold an enduring power of attorney; they hold an enduring power of guardianship. In that instance there would be no doubt that they had the formal capacity to exclude visitors et cetera. But if they were abusing that power, there would still be a question. The question then is what additional remedies should we provide on top of what is available at the moment to enable that sort of abuse to be rectified, or do you consider that the existing remedies are adequate?

**Ms EVANS** — I think there needs also to be greater awareness about the availability of VCAT and the powers of VCAT. I would imagine that in the scenario you are describing, if, say, the proprietor of the aged-care home believes that the enduring guardian is abusing the powers given to him or her, one would hope that the proprietor would know that they could make an application to VCAT and seek an appropriate order. Generally speaking, though, remedies in relation to the misuse or abuse of powers of attorney do not seem to be adequate. Not everybody is going to be able to afford to issue legal proceedings. There are also issues to do with the vulnerability and dependence that donors, particularly older donors, may have on the relevant attorney. Part of the whole education program, perhaps, could involve raising awareness of where people can go to seek advice, particularly at no cost, if that is possible.

I have talked with different people about the lack of appropriate remedies and asked, ‘What do you do if’, and even though some of my legal acquaintances can certainly tell me about legal remedies involving court processes and litigation, it seems to be an area to which more attention needs to be given. I am perhaps focusing from my perspective on older people, looking at where an older person can go if they are aware that the person they have named as attorney is abusing them, particularly financial abuse and particularly, perhaps, where the

older person lives in the same home as the attorney and you have not just the dynamics of the family relationship but often a very high level of dependence and vulnerability. The older person may have an idea of or may be fully aware that the attorney is taking advantage of them, but they may feel they have nowhere else to go. Where does an older person go to escape from an abusive situation when they do not necessarily need to go into an aged-care home, they just need support and advocacy and a place to go — a refuge, if you like? I am not aware of many resources in the community that promote being able to offer that sort of support.

I think a lot of these issues come back to or are related to family dynamics, community support and empowerment. I think empowerment is a really important thing. The more we can clarify the sorts of issues that this committee is looking at, and then have a widespread education and promotion campaign, the more it helps to empower people to make informed choices and to be more confident in the choices they are making, particularly when they are perhaps dealing with someone who is trying to take advantage of them.

**The CHAIR** — We are out of time. Thank you very much for coming in, Belinda, and, as I said before, thank you very much for your submission. You will be sent a copy of the transcript and you can make minor changes, but obviously not to the substance. I hope you would be willing to have further contact if there are questions on which we wish some clarification.

**Ms EVANS** — Certainly. Without meaning to hold things up in any way, the part of our submission that refers to the definition of medical treatment under the Guardianship and Administration Act, in particular the problems created by the exclusion of prescribed medication in recommended dosages from the definition of medical treatment, is another area that I think is very important.

**The CHAIR** — Thank you very much.

**Witness withdrew.**