

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 22 October 2009

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Ms D. Houseman, Policy Officer, and
Ms E. Samra, Lawyer, Seniors Rights Victoria.

The CHAIR — Elizabeth Samra, Lauren Adamson and Dahni Houseman from Senior Rights Victoria, thank you very much for coming to this hearing this afternoon. Just a quick formality, the evidence that you give at this hearing is protected by parliamentary privilege, and that is under a few Acts: the Constitution Act, the Parliamentary Committees Act and the Defamation Act. It has some applicability in other jurisdictions as well. Comments that you make here may not be afforded such protection if they are made outside the confines of this hearing.

We have just under 45 minutes. Thanks for the submission. We will give you some time to speak to it, and we have obviously got some matters that we would like to raise with you. Despite all the paraphernalia here, it is a pretty informal discussion. I will leave it to you.

Ms ADAMSON — Thank you very much for your invitation to attend today; it is much appreciated. We thought we would start by giving a brief overview of Seniors Rights Victoria and elder abuse, and then perhaps we can move on to answering some questions. We will also give you a case study to look at, which is in context, before we take some questions.

Seniors Rights Victoria, or SRV, was established in April last year. It was established to provide support, information and legal services to senior Victorians who would not otherwise obtain access to justice. It is jointly managed by the Council on the Ageing, the Public Interest Law Clearing House, the Eastern Community Legal Centre and the Loddon-Campaspe Community Legal Centre under a joint venture agreement. COTA is the lead agency in that agreement. The services provided include individual advocacy or more broad advocacy, policy and law reform work, professional education, community education and we provide legal services at SRV itself in its Melbourne offices and the Bendigo offices and also in the eastern suburbs. We also run a number of legal centre clinics at four community hubs around Melbourne. Those clinics are staffed by lawyers from five private law firms. That part of the service is overseen by the Public Interest Law Clearing House.

The focus of SRV is to prevent elder abuse. We take a human rights approach to empower Victorians and older individuals in relation to abuse. I might give you a definition of elder abuse. It is defined by the World Health Organisation as ‘a single or repeat act or lack of appropriate action occurring within a relationship where there is an expectation of trust which causes harm or distress to an older person’. Elder abuse can take many forms, including physical abuse, psychological abuse, financial abuse, sexual assault or harassment or neglect. The problem is often hidden because it is often perpetrated by someone close to the individual concerned.

In the context of this inquiry, powers of attorney, particularly enduring powers, are commonly used as instruments to perpetrate elder abuse. It is SRV’s view that a review of the legislation from a human rights perspective can empower older people and help to limit elder abuse. I will just hand over to Dahni.

Ms HOUSEMAN — As Lauren has said, powers of attorney are often used to perpetuate elder abuse. This might be through misuse or abuse. Either way the result is often a limitation on the human rights of the older person, or the donor. Human rights that are often limited by the actions of an attorney in any given instance of elder abuse may involve a breach of any of the following rights — and these are rights taken from the Charter of Human Rights and Responsibilities Act. They may be recognition and equality before the law, protection from torture and cruel, inhuman or degrading treatment, freedom of movement, privacy and reputation, protection of families or property rights.

Since April 2008, SRV has seen 113 financial abuse cases which have involved powers of attorney or guardianship and administration issues. Additionally, 37 per cent, or 45 of 122 clients seen by outreach clinics located around Melbourne, have involved queries or some kind of assistance in relation to powers of attorney, whether that be drafting of the documents or just explaining what they are and how they work.

With Victoria’s population aged over 65 years projected to quadruple by 2056 and recognition of ageing and dementia as risk factors for human rights abuses, unless we take action now to promote individual empowerment and respect of individual rights, human rights abuses by attorneys, whether intentionally or not, are likely to increase.

Seniors Rights Victoria’s recommendations will, arguably, assist in limiting human rights abuses through a focus on the rights, interests and wishes of the donor, coupled with a multidisciplinary education campaign to assist attorneys to better understand their roles and responsibilities. Liz will now give some examples of the types of cases that we have seen.

Ms SAMRA — Some of the cases we have seen today were inquiries made by older people in particular around possible misuses of powers of attorney and include, for example, a lack of consultation from the attorney to the donor in respect of the use of the power. Sometimes we will receive calls from an older person who has not been advised that their house has been sold by the attorney. We have had complaints from donors where an attorney has accessed medical information about the older person's capacity without informing the older person that they would be doing so, and that medical information has been released. There may not have been an authority to release that information, but it has been released, and we have had complaints around that and also attorneys allegedly acting outside their powers. We have received a number of complaints via older people who have appointed a daughter or son to be their financial power of attorney and that attorney has purported to use that power to place that person in a residential aged-care facility, and those facilities have accepted that power.

That power has also been used to, for example, restrict visitors — other family members and friends — and that is a financial power and not an enduring power of guardianship. There are also some other complaints we have received. We have also noticed that there is generally in the community a poor understanding about the scope of the various powers, and that previous example is an illustration of that. There is also a lack of understanding in the community about the scope and the financial powers of attorney as opposed to an enduring power of guardianship.

One issue of importance from SRV's perspective is a family member who is the appointed attorney making a determination that the donor no longer has the capacity to make decisions about his or her finances and deciding to use that power without consulting with the donor at all, and that has been problematic. One specific case — and we have got a number of case examples that we have set out in our submission — I can draw your attention to is the case of Arthur, and this has all been de-identified. Arthur was diagnosed with mild dementia a couple of years ago and was eligible for a community aged-care package; Arthur was living on a farm with his long-term companion. One day Arthur had a stroke and went to hospital. His companion at the time was in the country. Arthur also had one son who he only saw a few times a year, and they did not have a particularly good relationship. Arthur had no other family, and the son came around to the hospital with a person who was authorised to witness stat decs and executed an enduring power of attorney in favour of the son, George. Then George purported to use that power to place Arthur in a residential aged-care facility some 2 hours away from his farm and then sought to evict Arthur's companion from the house. He advised the aged-care facility that no visitors would be able to access or see Arthur until he settled in because Arthur was not happy being there. Arthur advised us when we got in touch with him that he did not know what he was signing. It was only a couple of days after his stroke that the document was executed, and Arthur had no access to any bank accounts. His son had taken all his bank accounts, his cards and personal effects. We got involved at that point.

Mr FOLEY — You cannot choose your family.

The CHAIR — Thank you for that. Perhaps as a way of starting off just with your case studies, Elizabeth, to improve those sorts of abuses that you have described it may require some changes to the law and/or some changes in how we educate ourselves and the general public. In terms of just the legal aspect of it — and this is a question to all of you — are there models for legislative regimes in Australia or internationally that you could point us to that you have had a look at so far that you think might be instructive or beneficial?

Ms SAMRA — We consider the Powers of Attorney Act in Queensland to be a model which is a relatively good model. It sets out some overarching principles in relation to the way that attorneys should be behaving, which is not really defined in current legislation. More importantly it also gives the donor or a person interested in the affairs of the donor the option of seeking recourse. That is currently available to a limited extent in the Instruments Act. An interested party can make an application to VCAT that a donor no longer is capable of making decisions about their financial affairs, for example, but that is limited to revocation or suspending of a power of attorney and asking for a statement of accounts. In terms of restitution, the donor or the person acting on behalf of the donor needs to go to another forum in order to seek compensation, whereas in Queensland there are provisions for breaches of the duties of the attorney, including fines, which we consider to be a good thing, and also remedies available — for example, compensation where there has been misuse of power, which is clearly enunciated in the legislation.

Mr CLARK — You make a number of recommendations about imposing penalties for various non-compliances with the Act and also about VCAT being able to award compensation or restitution. In respect of the compensation or restitution, would you envisage a monetary limit on VCAT's jurisdiction, and in respect

of the penalties, how would you envisage them being policed? Who would do the investigations? Who would do the prosecutions and enforcement?

Ms HOUSEMAN — I think this ties into the other recommendations we have regarding a registration system, so if all documents were actually held in one place, you could have that body being responsible for some of the investigations. With regard to limitations, we have not actually turned our minds to what the limitations of VCAT might be in terms of the financial aspects; and with regard to penalties, I think we quite like the way the Queensland Act has applied to penalties. I think 200 penalty units is what they commonly use.

Mr CLARK — Do you have any familiarity with or knowledge of how the Queensland penalty provisions have worked in practice? Are you aware of numbers of prosecutions, successes, rates of prosecutions?

Ms HOUSEMAN — No, we are not.

Ms ADAMSON — We would be happy to investigate that and provide some additional information.

Mr FOLEY — We have heard a number of pieces of evidence stating that the international best practice approach is increasingly the case around replacement decisions versus assisted decisions, because we all get older and all the trends can be identified. Does your organisation have a view on these assisted decisions or replacement decisions for attorneys? Do you come across that at all as an issue? In the example you gave obviously at one point of time Arthur was a particularly bad case, but he then recovered. Does SRV have a view on how the whole approach to attorney rights should be dealt with? Can you have a coming-and-going approach — an assisted versus replacement approach?

Ms ADAMSON — This is where we come back to a discussion about capacity, and SRV's view on capacity is that it is very decision specific. SRV's view is that the donor should be consulted at all times, whether or not they have capacity. Obviously if they do not have capacity, then the decision is made by the attorney, but the consultation should still take place, and at any point where the donor does have capacity, then the donor should be making the decision at that point.

Ms HOUSEMAN — I think it is more around an assisted decision-making process than a substitute decision-making process.

Ms ADAMSON — So far as possible.

Mr FOLEY — Do you have a view on how that would be reflected legislatively or in a regulatory way?

Ms HOUSEMAN — I think with regard to having some kind of schedule regarding attorney responsibilities or the principles that must guide attorney actions — and we refer to that in our submission — it is around the attorney always having to consult with the donor and always having to consider their best wishes. I think sometimes, or in our experience, what happens is that attorneys might be aware of what the donor wants but it is easier for them to do something else. In doing so they actually are perpetrating elder abuse. I think if there was greater scope for them to understand what it was they were doing and why they were being given these powers, and that it was not for them to take away decision-making responsibilities but to assist the older person or the donor in living their life, that might assist in helping them make that distinction.

Mrs KRONBERG — I am particularly concerned about something as evidenced through some case studies — that is, when the person, the donor, was in a residential or care setting and the person with the power of attorney had provided instructions whereby that person would be operating in isolation, with visitors being proscribed and so on. To remedy that in terms of the residential facility, nursing home or collective living environment that that person is in, what suggestions and comments have you got so that in that situation at that point those sorts of instructions can be challenged? Obviously they should be justified.

Ms SAMRA — Under the Commonwealth aged-care legislation there is a set of principles called the Charter of Residents' Rights and Responsibilities. Within that Charter are particular principles which those facilities need to abide by. They need to respect the rights of the residents. They include, among other things, the right to have visitors, the right to privacy and the right to see family members and friends. That is often invoked at that point.

There is also an organisation — I am not sure if you recall it — called Elder Rights Advocacy, which has the jurisdiction to act for residents in aged-care facilities where there are breaches of these rights.

Ms RISELEY — Representatives from that organisation are coming in this afternoon.

Mrs KRONBERG — What actually happens to the management of that facility — the nursing home; the residential setting — if that form of abuse is committed unwittingly, perhaps because the attorney was loquacious or charming or had established their bona fides in other ways and ramped up to being credible over time, working on an agenda, let us say?

Ms SAMRA — In these situations we would refer that part out to Elder Rights Advocacy. They have the jurisdiction to actually go into the facility and meet with management and address those issues.

Mrs KRONBERG — There are no penalties for the management?

Ms SAMRA — I am not sure. I think complaints can also be made to the complaints investigation scheme in relation to those breaches. As to any penalties, I am not quite sure. Elder Rights Advocacy deals with all those issues. We do not get involved in them.

Ms HOUSEMAN — More broadly, though, there could be some kind of education campaign. A lot of the time people just are not aware that because you hold an enduring power of attorney it does not mean you actually have the authority to engage in that particular kind of action. There is a general perception that ‘If you are an attorney, we just have to listen to what you want’, and that is where this is occurring. If education was undertaken for the staff to understand that there are different types of instruments and that they give people different powers, then that might also give them more confidence in being able to say, ‘Well, actually, no, we can’t assist you with that kind of decision; you don’t have the power to do that’.

The CHAIR — That is part of your charter, is it not, education? How are you going about doing that?

Ms HOUSEMAN — At the moment Seniors Rights Victoria and the staff of the clinics provide education to the community generally. We currently undertake education sessions around powers of attorney for whichever community organisation requests them. That is to assist potential donors, generally speaking, with what they might want. But in terms of education for professionals, which is something we have not yet undertaken, I think it could be done by engaging with and working in consultation with some of the peak bodies — for example, working with the Law Institute of Victoria, General Practice Victoria or the Australian Association of Social Workers — to educate their members around how powers of attorney are supposed to be used. The professionals will be more likely to see how people present these documents to them and that way, if it comes through those bodies, you have a broad reach, and hopefully that will assist.

Mrs KRONBERG — In terms of education, I have detected that you said that when it is requested you would go out and make a presentation to interested parties. Can you conceive of any situation where there could be something like a rolling program of advice and education, in that there was funding to support a rollout rather than other people having to become aware through the ether, almost?

Ms SAMRA — Seniors Rights Victoria currently can only undertake community education. The professional education component is, I understand, currently being outsourced by the Office of Senior Victorians and the Department of Human Services, and they are trying to roll out a professional education strategy, I guess, across Victoria. That is outside the ambit of our service at the moment.

Ms HOUSEMAN — I know that the Federation of Community Legal Centres has made a supplementary submission which talks about professional education for lawyers specifically, recommending that it be compulsory for lawyers to take update education sessions on how to work with powers of attorney. When it comes to educating professional bodies it is much easier to put in place a rolling program, because a lot of these professions have continuing professional development or education requirements. You could incorporate it into those quite easily.

In terms of accessing the community, I think maybe it is a little bit more difficult because you have to identify the groups. A lot of local councils have aged-care and diversity services arms, and you could roll something out through those. A lot of ethnic organisations run education sessions — say the association for older Italians; I do

not know what it is called in Italian — and equivalents. If you identified the different target areas and consulted with them, you could arrange more specific education programs.

I think it would be a lot more resource intensive regarding community education, which is obviously just as important, because these are the people who are actually using these documents.

Mr DONNELLAN — I have dealt with a couple of nursing homes over a couple of years, and I have just got a general power of attorney for someone who has Parkinson's disease. I find that people in nursing homes are very aware of the different powers. I do not have a medical power of attorney; I have just a general power of attorney. They are very aware of the distinction. The managers will frequently say, 'Oh, no. That applies to this'. I am not fighting for more power — I am very happy just to help generally — and I do not want any more. I find people in the nursing homes are quite aware of the distinction between the different powers of attorney, so that is good.

The CHAIR — We will take that as a comment.

Mr DONNELLAN — Yes, that was a comment.

Mrs VICTORIA — This morning somebody gave us some information about what is happening in Japan, where apparently they are appointing a person to oversee what the attorney is doing — that is, the attorney's conduct. It can be a person appointed from outside. It does not necessarily have to be a family member; it could be somebody from a legal firm or something like that. In the cases of abuse that you are seeing, do you think that is something we should contemplate here? Obviously there could well be a cost involved, which is a deterrent, but if there is prevalence of abuse, would that help counter it?

Ms HOUSEMAN — Yes, I think including the option of appointing some kind of interested person, whether it be a family member or a friend, would just help with oversight. You might need to limit, though, the kinds of decisions that they would need to be informed of, because if they were to be informed of every single action that was undertaken by the attorney, that would be quite prohibitive. If you said that, for example, they needed to be informed if the house was sold or the person moved, that could assist, because they could just make sure that they were acting in that person's interests. Ideally it would also be somebody that the donor has appointed whom they believe understands what their wishes would be so that they can help protect their interests as well.

Mrs VICTORIA — I suppose the question from that is: if this person is so trusted as to be the backup, why are they not appointed as the trustee in the first place? I do not know; it is a minefield for me.

Ms HOUSEMAN — I think it could also be that a lot of the time people will appoint family members — and in our experience, their children — as their attorneys, because they just feel most confident with that. It might be that they have a friend who they do not want to give that responsibility to but they think might actually know them a little bit better than their kids might know them. They trust their children to actually undertake the action, but they have a friend, for example, who might help with the oversight of that.

Mrs VICTORIA — You also spoke before about having a register. Where do you envisage that would be kept?

Ms ADAMSON — We envisage that would be kept by the OPA, mainly because it ties in with the oversight we have also recommended as part of the model. Perhaps if I could just describe the proposed registration from our perspective. We propose that there would be two main reasons for having a register: one is for third parties to be able to search to make sure that the power of attorney they have been presented with is valid; the second reason would be to assist or facilitate some oversight of the conduct of the guardian.

We would anticipate that the register would contain the power of attorney document itself and any certificates in relation to capacity. We have also proposed an annual statutory declaration from the attorney saying that they have carried out their functions appropriately.

The information contained there is obviously personal information. There would be two levels of information: one would be the information on the face of the power of attorney document; and then there would be supporting information, which is more confidential. We have proposed an oversight role by someone who we

would also propose to be from OPA to audit the affairs that have been made by attorneys. For that reason we think OPA is an appropriate body to handle the registrations generally.

The CHAIR — Just as a follow-up from Heidi's first question, I know you have touched on the UK legislation in relation to interested persons; do you have any comments to make on that legislation in this regard?

Ms HOUSEMAN — I have not looked at it in that much detail. I have looked more at what OPA has actually had in its submission, which I think is something that we agree with. I do not actually know the specific provisions of the UK Act.

The CHAIR — Fair enough.

Ms SAMRA — We consider the definitions of lacking capacity and inability to make decisions and also the best interests approach in the UK legislation to be instructive.

Mr CLARK — You recommend that legal practitioners or clerks of court be the gatekeepers for assessment of donor capacity. Can you explain the reasons you nominated them and excluded others as the proposed gatekeepers? How would you expect that would work in practice? In particular, would it in effect mean that everyone who wants to make an appointment would have to pay a solicitor to scrutinise their capacity to execute?

Ms SAMRA — We consider that the assessment of whether a person understands the legal nature and effect of the document is a legal test. That is clearly enunciated or set out in the instruments at section 118 at the moment. The witnesses need to satisfy themselves that the donor understands the legal nature and effect of the document into which they are entering. That also goes on to list what it is exactly that the donor needs to understand. That is set out at the moment at section 118(2) of the legislation. That, in and of itself, is an understanding that probably the people who practise in the area would be aware of, but I suspect at the moment a lot of people who are authorised to witness the signing of these documents would not be turning their minds to that legal provision.

We have also attended a number of conferences that have been run by the Law Institute of Victoria where there is a common understanding that if the test is a legal test and if there is a question about whether or not the person has a cognitive impairment, the medical practitioner may say, 'Yes, the person has a cognitive impairment', but it is ultimately up to the legal profession to ensure that the donor understands the legal nature and effect of the document.

There are massive ramifications, I think, if a donor enters into the document without understanding that. Also, I believe that the legal profession would be able to advise the donor of the implications at the time of entering into it and may advise them about restrictions in the event that they believe they are no longer capable of making those decisions.

Ms HOUSEMAN — In relation to the second part of your question regarding the implications for the legal profession, obviously then you would have to see a lawyer to have that done. But there is definitely the potential for that to be rolled out, for example, through community legal centres. It should not be cost prohibitive. Unless there are a lot of concerns around capacity, it is not necessarily going to take a substantial amount of time to actually draft and execute these documents.

Ms HOUSEMAN — For example, at the clinics that we run at the moment we have 45 minute appointments, and that is often enough time to explain everything that needs to be explained and execute two or three different types of documents. There would need to be some work done, but it is definitely viable.

The CHAIR — Just moving forward to the assessment capacity at the time of activation, you say in your submission that it is at that point that there should be medical advice on that. What sort of criteria should play a part in that?

Ms SAMRA — We quite like the schedule in the Queensland legislation. The Queensland legislation, at schedule 2 under 'Types of matters', lists the matters, for example, that relate to the financial or property

matters and include a range of issues which can be discussed or assessed by a medical practitioner possibly at that time with the patient.

The CHAIR — I think I am starting to get hearings muddled. What about the problem that I think was raised in this context about capacity not being uniform?

Ms HOUSEMAN — I think that is why this schedule is quite useful in that you can seek from a medical practitioner an assessment as to a person's ability to make particular kinds of decisions. You can give them example questions like, 'Do you think they might be able to understand what is involved in discharging a mortgage?' or something like that. Because it is going to fluctuate, obviously that might not be lasting, but at least you can try to narrow it down to not just asking 'Generally is this a person with that capacity?' but 'Are they able to make these kinds of decisions at this point in time?'

Mr BROOKS — I just have a question I have asked a few times of different witnesses, playing the devil's advocate. You are talking about a new registration scheme, which has obviously some implications for privacy; penalties for people acting as attorneys being increased; more stringent witnessing requirements; annual reporting; and some oversight. I am looking at that balance between encouraging people to make use of powers of attorney versus these measures, which are aimed at stamping out the abuse. Do you think that is the right balance? Can you see a situation where this might discourage people from being someone's attorney?

Ms HOUSEMAN — It is more onerous than what we already have now. At the moment under a general power I think an attorney does not even have to be informed that they have been appointed, and that can potentially be problematic as well, because they are not signing an acceptance of it. At least this way you are making it uniform in that, regardless of the type of instrument you are executing, the requirements are all going to be the same. Because you are giving the attorney some responsibility in regards to how somebody else may live their life, it is important that they do understand what it is that they are being given the authorisation to do.

It might be more onerous than it is now, but I think it is completely acceptable, because we are not trying to implement a system that is going to abrogate somebody's rights, which is currently what can happen. In terms of the reporting requirements, for example, it was recommended that attorneys have to submit an annual statutory declaration. Administrators appointed by VCAT already have to do that. So why it is currently distinguished, we are not quite sure.

Further, it is not onerous in the sense that they are just signing a form that is already prepared once a year, and the Act already prescribes that they should be keeping these documents. There is just no way of checking that they do. It is not actually a lot of extra work; it is just ensuring that what we have said needs to be done is being followed through with.

Mr BROOKS — In terms of the register and privacy issues, the obvious institutions or places that you would imagine would be able to access this would be financial institutions, banks and residential care facilities. Would there be any others? Who would have access to that register?

Ms HOUSEMAN — We were discussing this yesterday. Broadly it seems to encompass any kind of customer service activity, whether it be banks or any form of health-care provider. We have not actually explored how far that might reach, but the one decision that we did sort of come to — and this is where we differ in our opinion from the UK system — is that it should not be open to just anybody to access the register. It should be people in positions where the documents are likely to be presented, so at the moment we have just come up with customer-service-based industries.

Mr BROOKS — The witness this morning from the Office of the Public Advocate balked at the suggestion of having the name of the attorney listed on the website. What do you think about that? I am not sure of the reason, but they were certainly not — —

The CHAIR — The argument was that it may leave the attorney open to undue pressure from other interests.

Mr FOLEY — Family et cetera.

Ms ADAMSON — I guess that comes back to who is entitled to search the register. Under the proposal it would be organisations who are presented with the document generally anyway. The donor is arming the attorney with the power of attorney to start with, which has that information on it. The attorney would then present that document to a third party, so what we are proposing is not really very different so long as the register is only to be able to be searched by service providers rather than anyone in the public, who could be a neighbour who is being nosy and wants to know your business. As long as the people who can search that register are limited, I do not think that would be a problem.

The CHAIR — I come back to the matter that I raised before about the capacity assessment at the time of activation. If the power could come into force at the time of signing, that would have the benefit of enabling the principal and the attorney to negotiate on an ongoing basis how that might unroll in a supportive environment. Is that a direction that you would support, or do you think that might have some pitfalls?

Ms SAMRA — It is an interesting issue, because on the one hand we would say yes; on the other hand in our experience even though our client base do not necessarily lack the capacity or are not incapable of making decisions about their finances, there is still that element unfortunately of dependency a lot of the time on the child. Typically the child will be the appointed attorney. The child might also be the carer of the person, and there is a reliance on that child in all decision-making processes, and quite often that donor or the older person would be vulnerable in any event.

Having said that, a lot of the underlying principles which are set out in the Queensland and the UK legislation talk about the best interests of the donor and also look at constancy of approach between the attorney and the donor. If there were stringent requirements set out in the legislation about the roles and responsibilities of the attorney and the attorney was aware that he or she could only act in accordance with the directions of the donor whilst the donor was capable, we consider that might provide sufficient coverage.

The CHAIR — Just finally, the issue about the best interests of the principal has been described by one of our previous witnesses as being paternalistic, but on the other hand there is the notion of the preferences of the donor. How do you see the balances there?

Ms HOUSEMAN — In an ideal world you would not need to have any provisions relating to the best wishes, because it would just be assumed that would be the way it would be enacted. But unfortunately that is not the case, so sometimes it is really important to actually enunciate things that may seem obvious just to ensure that they are respected. I think that is the same reason, for example, that we have a charter of rights, because they were not being respected, so we had to write down what it was that we needed to be doing. I see best interests in a similar vein.

The CHAIR — So that is a rubric, and underneath that you would put what it entails.

Mr CLARK — I want to ask one question, coming back to the example you gave of Arthur and George. In that example did Arthur have legal capacity to make his own decisions? The reason I ask is it seems to me a lot of problems arise because decisions of people who have legal capacity are purportedly being overridden by their attorneys and not enough regard is being given to the fact that the principal has legal power and therefore can veto whatever the attorney seeks to do. In your example was it the fact that Arthur had or did not have legal capacity?

Ms SAMRA — In relation to the execution of the power of attorney or just generally?

Mr CLARK — And then subsequently. Clearly your example was that he did not at the time he gave that appointment, but then his attorney was moving him subsequently, and it seemed open to interpretation that by that stage Arthur had in fact regained sufficient legal capacity to veto the attorney's decisions.

Ms SAMRA — That case went to VCAT, and a determination was made that Arthur was incapable of making decisions about his finances. The power of attorney was revoked on the grounds that it was void because the donor at the time was not capable of making that decision. We have had other cases, however, where the attorney made a decision to activate, so to speak, the document or the instrument. They have gone to VCAT, and VCAT has found the donors capable of making those decisions, but because of the vulnerabilities of the donors, the donors were incapable of challenging the attorneys at the time. We have encountered quite a number of the latter cases.

The CHAIR — Well done. Thank you very much, as I said earlier, for your submission, which has been really valuable, and for coming in to talk to us today. You will receive a copy of the transcript and can make some minor changes to it, but substantively it will have to stand as a record. No doubt Kerryn or Kerry will be in contact with you to follow up some matters that we need to get further clarification on.

Witnesses withdrew.