

# CORRECTED VERSION

## LAW REFORM COMMITTEE

### Inquiry into powers of attorney

Melbourne — 14 December 2009

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#### Witness

Ms H. Versey, Privacy Commissioner, Office of the Victorian Privacy Commissioner.

**The CHAIR** — Thank you very much for coming along this morning, Helen Versey. I think you are familiar with the procedures at these hearings. Our conversation is covered by parliamentary privilege. The Hansard reporters will be recording the evidence and the transcript will be sent to you in due course to make changes. Do you want to make any preliminary comments or go straight to questions?

**Ms VERSEY** — I do not know whether it might be helpful to the Committee if I did because I have not made a submission and Kerryn kindly sent me some information just as background. I thought it might be helpful to the Committee if I gave a bit of overview of what the Information Privacy Act says about public registers and a few of my thoughts, having turned my mind to this issue, because I know the Committee is looking at this issue of whether it should have a public register of powers of attorney, so I have really concentrated on that area. Obviously I am open to questions in other areas.

What the Information Privacy Act says about public registers is that they must be administered consistently with the 10 information privacy principles which other public authorities are governed by as far as reasonably practicable — that famous phrase. But it is important to note that the obligation of managing a public register is on the administrator of the register, not the user.

This is a very important consideration when the Committee is considering whether there should be a register and who should have access to it, because privacy laws do not apply to individuals who are acting in a private capacity and therefore to create a register to which any member of the public has access means that the privacy laws would not protect the misuse of personal information by individuals getting access to the register.

The other important thing to remember is that technology has changed, very much, the administration of public registers. Whenever Parliament is considering the creation of a new public register, it needs to be mindful of this. In the past when public registers were created it was at a time when they were in paper form, and in order to access them people had to go to an office during office hours, inspect the documents, possibly pay a fee, and this, in effect, provided some privacy protection. But it is a very different thing now that public registers are more and more being put online to enable the public to have ready access to them. Obviously there are great benefits from doing that.

It is a recurrent theme in inquiries to our office that organisations when they decide to put public registers online, if they do it without notice to those whose personal information is contained in the registers, then they often do it without thought about what information is contained in the registers. Once information is available online without any restriction it is capable of being collected, collated with other publicly available information and misused by people who have no legitimate use for it. Any creation of a new searchable, online register needs to take these matters into account.

Obviously the Information Privacy Act requires there to be the balance between the free flow of information and the public interest in providing and protecting individual privacy, so when considering whether to create a register of powers of attorney there needs to be, in my submission, some evidence that there is a public interest in collecting and making available any personal information about those powers of attorney that outweighs the individual's privacy, and there needs to be legislative justification for it.

The first thing would be it would be important for you to articulate what the purpose of any register would be. It seemed to me when reading the background documents that, given the different sorts of powers of attorney that exist in this state, there are different and distinct reasons for there to be a register. It is also necessary to distinguish between a situation where the donor of the power of attorney has a decision-making capacity and when they no longer have such capacity.

The former, who has a decision-making capacity, also has the capacity to choose whether they perhaps wish for the power of attorney to be registered. The latter may need to be protected, and this includes not having their privacy unnecessarily interfered with, because if they cannot choose as to whether their power of attorney is put on the public register, they equally cannot choose to protect their own privacy and will need others to protect their privacy.

It seems to me that in considering this, the distinct public-interest purposes appear to be, firstly, organisations that need to verify the validity of a power of attorney that is being presented to them — and that might be banks, it might be hospitals — in order to act on that document.

Verification of the document is, of course, potentially privacy enhancing because it ensures that someone's personal information is not disclosed based on a fraudulent document; for example, if someone produces a fraudulent power of attorney and therefore gets access to information that they should not have access to.

The other public interest which I think is important is organisations — and I think I had in mind particularly hospitals — being able to ascertain whether a power of attorney actually exists. I had an interesting conversation with someone who was telling me that their parents had Alzheimer's but they had entered into a financial power of attorney before becoming incapacitated. They discovered later that in fact they had also created a medical power of attorney and vice versa. Obviously it is important sometimes when people become incapacitated to be able to ascertain whether a power of attorney exists. As I said, this might be extremely important if a person becomes physically or mentally incapable of providing that information.

The third public interest I considered was protecting a person who no longer has the capacity to make decisions for themselves from the use of the power of attorney by the person who actually validly holds it. In that regard I read with interest the Office of the Public Advocate's submission. They raised it as a significant issue that comes before them. I felt that in the first two examples I gave you there is arguably a real public interest in having a register, but I would say it does not have to be a public one.

The Committee might want to consider in the first example I gave about checking or verifying the fact that a power of attorney presented by a person is a valid one. I do not know how much information you have had about whether there is any widespread problem with people presenting fraudulent powers of attorney. I have not got any information on that, but that is something you might want to consider — whether it is really an issue that needs to be dealt with.

**Ms RISELEY** — The evidence we have received is mostly that it is abuse of valid documents that is the problem.

**Ms VERSEY** — Yes. It may be that you really do not need to be concerned with that aspect. In the last case — that is, the misuse of valid documents which was referred to by the Office of the Public Advocate — I wonder whether you might consider a different approach to a register, because you do not need the register to validate that there is one in existence if it is about misuse. You might therefore be looking at other ways of addressing that such as through specific criminal offences attaching to misuse or audit powers in relation to the exercise of the powers under the power of attorney. I think in that regard you are looking at the UK model of having interested persons who may oversee the exercise of power of attorney. Obviously that could be very important where people do not have the capacity themselves to understand what is going on.

The issue of interested persons obviously raises other issues, because you then have another person having access to an individual's personal information. I think in that sort of case you would need to consider the sort of model you would want to set up. Firstly, who is appropriate to be an interested person and ensuring that the person who has the power of attorney is given notice that there has been an interested person appointed. I think people should be allowed to have a choice as to whether they want to take on the obligations of holding a power of attorney, and they need to know they are going to be overseen and there will be a third party having access to their information and how they are handling the power of attorney.

If the Committee feels they want to go down the road of having a register, then the privacy issues as I see them include data security in relation to the personal information held on the register — and in that regard it might include health information, so obviously you need to consider the Health Records Act as well. You need to consider the type of information that is to be put on the register. For example, if you put on a register that is open to the public identifying information such as date of birth — and that information is widely available on a public register — that inevitably raises issues of identity theft and identity fraud, because the more information you put about an individual on a publicly available register then the more problems you may create in terms of people being able to use that information for unlawful purposes.

I feel the other important issue with having a register of powers of attorney is data quality. How are you going to make sure that any register is keeping the information current and accurate? For example, how do you ensure that when a donor dies that that is registered, or where a donor has decided to withdraw a power of attorney? So keeping the register up to date. You cannot rely on people keeping it up to date. I remember a classic example being the legal practitioners register. Some years ago it was put online but it had to be taken offline very quickly

because it was full of completely inaccurate information — apart from being full of personal information such as dates of birth. That was a prime example of where a register was put online without thought as to whether it was accurate and the amount of information it contained.

I am conscious that the Committee is considering whether or not to have compulsory registration. I feel one of the problems with compulsory registration might be in relation to individuals who are compulsorily required to disclose their personal information if they want to choose to enter into a power of attorney. If they are forced to provide information about themselves and the person they are appointing, it could act as a deterrent to some individuals making powers of attorney which are in their interests, such as medical or enduring powers of attorney, at a time when they should be encouraged to do it because they are capable of making those sorts of decisions for themselves. I think that is an issue that the Committee will need to consider if you are considering whether to make it compulsory or voluntary, although I accept there are some problems if you have a register that is voluntary, you are not therefore going to capture all the information. I am conscious previous witnesses referred to that as being a problem.

You might therefore want to consider distinguishing between the different types of power of attorney and whether or not you want to make them compulsory. For example, if my husband was overseas and we were selling our house and he wanted to give me a very temporary power of attorney so I could deal with the legal necessities, would you really see any reason for that to be registered on a register? That is the sort of situation where a power of attorney is created compared to medical powers of attorney where others such as hospitals may need to know whether or not there is a valid power of attorney.

The other issue if you are considering the difference between compulsory and voluntary registration is distinguishing between those who have the capacity to choose and those who do not. For example, you might say a power of attorney does not need to be registered unless the donor has become incapable of making decisions for themselves. I suggest the Committee considers restricting the amount of information that is accessible, and bearing in mind that if you are setting up a register, the fact that in order to register you might collect quite a lot of information does not mean to say it has to be available to third parties. The registrar might hold the information but it not be information that is available, or you could take a layered approach whereby only certain, very limited people would have access to more information. If you want to verify there is a power of attorney, you might get a very limited amount of access, but if, say, you are a doctor who needs to know rather more information, then you may be entitled to have more access. Consider having a layered approach to any information if you have a register.

The other suggestion I was going to make was that the Committee might consider whether a verification scheme is sufficient for some or all of the purposes of the register. For example, if you have a registration scheme, the power of attorney might be given a number, and if the person who wants to check whether a power of attorney is in existence provides a name, number, type of power of attorney and whether it is current, they can then receive a yes or no answer. That is a scheme which is being set up between the Commonwealth and the states — a document verification system. The state and Commonwealth are having a scheme where you can verify identifying documents such as birth certificates, drivers licences. You just get a yes/no answer if it is presented to you. There is already a scheme in existence for birth certificates — a valid verification certificate.

You might consider that that could be a way of dealing with people by at least knowing whether there is a power of attorney in existence, and as I have said, limiting the access to those who need to know. I have to say that in the documents I looked at I could not see anything that really led me to conclude that the public interest outweighed individual privacy in having general public access to the register, such as the scheme in Tasmania or the UK. I felt that the public interest could be met by having a limited access scheme to just those who need to be able to validate that there is a power of attorney or who need to know that there is a power of attorney.

**The CHAIR** — Thank you very much. We have just on 10 minutes, so you are going to have to be a bit brisk in going through this.

**Ms VERSEY** — Sorry; I spoke too long.

**The CHAIR** — No, not at all. You talked to us in the previous inquiry also about the risks in relation to gathering data of a similar type and the public's access to that. You talked then about data mining, and again you mentioned strategies like layering access and verification protocols and so forth. This is not meant to be

critical, but you approached that from a theoretical base. When we were considering previously what you had said we came up against the problem of not having a way forward to look at what kind of evidence there was around some of these things. Have you had the opportunity to see whether the particular approaches you identified, almost from an a priori build-up of the theory, work in the real world?

**Ms VERSEY** — I am just trying to think of a register. As I said, I have mentioned already the document verification system, which is being built at the moment, and the certificate verification system, which is already in existence purely in relation to birth certificates. They are two examples where you have a verification system. Certainly with the document verification system the users provide the information and it goes, for example, to births, deaths and marriages or to the licensing authority or to the passport people. They receive the information and send back a yes/no. All that happens is that they check the information against their database and then the system generates a yes/no response to the request as to whether this is a valid document that has been presented.

**The CHAIR** — And you are confident that all the information that is gathered electronically can be secure?

**Ms VERSEY** — Certainly with the document verification system we have put a lot of effort into that. You can build very secure systems, so that is secure. But you need to have good governance around it as well.

**Mr CLARK** — You mentioned document verification schemes, and you also mentioned the Tasmanian and UK registers. I have a two-part question. First of all, are you aware of any registers of powers of attorney around the world that you would commend to us as good examples or, alternatively, any examples you would recommend that we steer away from as being examples of defective practice?

**Ms VERSEY** — As I said, I was pretty concerned about the idea of having a general public register of powers of attorney. I could not see what the public interest in having that was, to be frank. If it is to safeguard the people making the powers of attorney so it is all out in the open, I think you could perhaps safeguard it by having some oversight function such as an interested persons audit function in relation to people when they are actually exercising their powers. But I cannot honestly see why the general public needs to have access to that information or why the world at large needs to have access to it. It makes it much more complicated as well, because you are putting a register online for anyone in the world to be able to access. The reality of putting something online is that people can access the information. Why would you need that? You also then raise the issue of people being able to mine that public information. I think you will find there is plenty of literature on organisations mining public information and public registers and being able to create profiles. Technology allows organisations to do that now.

**Mr CLARK** — The second part of my question is: is there any manual or analysis document that basically sets out a best practice guide for designing public verification schemes? We have the ones you mentioned, such as working with children. There is a recurring theme as to how we provide limited access to information. Is there a best practice manual or similar document you can refer the Committee to?

**Ms VERSEY** — I do not think I know of a single document. Usually you build the system from scratch, so you build the privacy protective technologies into your system when you are building it and you decide from the beginning who you want to have access to your system and how you are going to ensure that the right people get access to it. You can have guidance, and our office produces some guidance about what to consider when you are considering creating a new public register, but you do it on the basis of the particular register you are creating.

**Mrs VICTORIA** — As a follow-on to that, Tasmania and the UK have come up a couple of times. If they are fairly open registers, is there any documentation available to let us know whether there have been major problems with them?

**Ms VERSEY** — I am not aware of any documentation, but I have not had a huge amount of time to do any detailed research into this. I gather there has been an indication from Tasmania that there have been no privacy issues around it, but I was quite surprised by that. On the other hand, Tasmania is not necessarily proactive in the privacy area, so I cannot comment on that. I think that if you follow that model and just have it as open as that, you are creating problems when you do not need to. The whole thing about protecting people's privacy is that, yes, you have to have that balance of having information publicly available or available to some, but you limit it as much as is necessary to meet your purpose. If you decide what the purpose of your register is going to be, then you can build the privacy protections around it.

**Mr FOLEY** — Just to follow on from that, Helen, in terms of identifying the goals — the why and who and for what purpose — and then building the series of layered protections that you have suggested, my question is to the practicality of the different registers that are out there in Victoria, Australia and comparable systems. How practical is the IT application of those in such a way as to meet the privacy goals that are being balanced against the practical public policy models we are seeking to achieve?

**Ms VERSEY** — I have to confess that I am no technology person. But certainly from advice I get — because obviously I have a technology expert within my office, plus I do read generally around technology — technology can be very privacy enhancing in that you can build the technologies and the access controls into your public registers. I think it is inevitable that people are more and more going to want, and rightly so, to put registers online. It is going to happen, and you can, so I am told, build the privacy protections into that through technology.

**Mr FOLEY** — And still meet the timeliness and accuracy?

**Ms VERSEY** — Yes.

**Mr BROOKS** — Very quickly, one of the specific suggestions that has been put to us in terms of reducing the abuses is having a register, whether it be a limited access register or a public register, and also requiring attorneys to keep records and submit returns, with random audits of their records, and to declare financial benefits, whether it be any benefits or benefits over a certain threshold. I wonder if you have any comment on those specific recommendations over and above or linked to a register?

**Ms VERSEY** — As I said, I considered this fairly briefly. But I think the important thing if you have a system like that is that the attorney is aware of it and, again, that you limit what is required to what is necessary to protect the person who might then be incapacitated. You should ensure that the attorney when agreeing to become a power of attorney has notice of what oversight there is going to be. You would obviously have to do that through public education so that if you have that system, people are aware when they are entering into a power of attorney what it is going to entail and that there is perhaps going to be a certain amount of intrusion on their own personal information as well. I think that would be the first important thing, and also that, again, you limit it to what is necessary to achieve what you want to achieve — that is, the protection of someone who may be vulnerable or incapacitated.

**The CHAIR** — We will have to wind up there. Thank you very much, Helen Versey, for coming in this morning and for your valuable remarks. You will, as you know, receive a copy of the Hansard transcript. I hope you will be able to let Kerry and Kerryn contact you if there is any follow-up.

**Witness withdrew.**