

CORRECTED VERSION

LAW REFORM COMMITTEE

Inquiry into powers of attorney

Melbourne — 17 December, 2009

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Witnesses

Ms R. Mills, Acting Director of Civil Law Services,
Ms S. Birch, Acting Deputy Manager, Regional Offices, and
Ms T. Higgins, Specialist Mental Health, Human Rights and Civil Law, Victoria Legal Aid.

The CHAIR — Thank you very much for coming in today from Victoria Legal Aid. Hansard will be recording the conversation, and you will be sent a transcript subsequent to the hearing; you can make minor changes to that but obviously not changes in substance. The last thing I need to tell you before we fire off is that our discussions are subject to parliamentary privilege under the Parliamentary Committees Act and some other pieces of legislation. That basically means that you will be protected against any remarks you make that somebody else might consider actionable, but you will not be afforded that protection outside the confines of the hearing.

We have just under half an hour. Thank you very much for coming, thank you for your submission, and we will leave it to you to set up, speak to the terms of reference and make your submission and then we will have a bit more general discussion.

Ms MILLS — Thank you. We have just assumed that you have read our submission.

The CHAIR — Yes.

Ms MILLS — That is basically the view of Victoria Legal Aid, so if the Committee has any questions of us, we would be happy to answer them.

The CHAIR — One of the points that you make is that you think there should be one piece of legislation that covers the different types of powers of attorney, and some states have made some moves in that direction, notably Queensland and New South Wales. Just in your work could you point to what you think would be a best practice model?

Ms MILLS — Victoria Legal Aid strongly believes that there should be one piece of legislation. We also believe that it should include — and I am sure the Committee has heard this before — medical powers of attorney; which we are well aware are not part of this inquiry. As to what type of model should be followed, there are pros and cons in relation to all of the different models, and in particular there is — and I am sure you have heard of this before — the UK Mental Capacity Act, which has some very, very good features.

But we are not here to advocate for any one particular model, just to say that we feel it should be encompassed in one piece of legislation with the capacity to make an area that we feel can be quite complex — particularly for persons who are making powers of attorney — simplified and to have one general capacity test that will save some of the confusion that actually predominates in this area of law. So we are not here to advocate for one particular model. We think each of them has good features, and we think highly of the United Kingdom legislation.

Ms BIRCH — It would seem useful to have consistency of terminology in all sorts of powers of attorney, and if it is all in one piece of legislation, it is easier to define which is which.

The CHAIR — Yes, because there are issues over different definitional questions.

Ms BIRCH — Yes.

Ms HIGGINS — And it makes it easier for our clientele, who normally have some sort of a disability or language problem, if it is easily accessible in the one piece of legislation, and probably easier to translate, if that is necessary, into different languages, and probably economically more efficient if it is in the one piece of legislation.

Mr CLARK — One aspect we are looking at is obviously risks of abuse and how to protect against those. I presume by virtue of the services you provide that you would encounter a higher proportion of abuse incidents than others may. Can you tell the Committee what sort of instances of abuse — assuming there are some — that you find most common and what are the precautionary factors that you think need to be put in place to protect against those risks?

Ms HIGGINS — I think we have agreed — and I have seen the law institute's arguments on this too — that a central registry of the instruments would be a good idea. I think that would serve as a good protection for people. Most of our clientele are not all that wealthy, so a lot of stories we hear are anecdotal. It may be that a carer has simply cleaned out the bank account of somebody they are caring for. They would seem to be the most common stories we have heard.

We are also involved with the elder abuse situations and the Elder Law Committee. We hear a lot more stories from that area of elderly people who do have more assets having had their savings et cetera removed and there have not been any checks in place to deal with that.

Ms MILLS — One thing we have alluded to in our submission is that we do encounter on our daily telephone advice line — where any member of the public can ring up and get either telephone advice or information; I will not run into the differences — people who hold powers of attorney who are not actually certain as to what they involve and what they can or cannot do, or they have held a power of attorney and find that they are at VCAT where VCAT is in the process of looking at whether they are going to revoke the power of attorney because they have misused the power and they have not actually had a full understanding of what was required through the use of the power in the first place.

We have suggested in our submission that there needs to be better community education and more information about what holding a power of attorney actually involves and what you can and cannot do on that power of attorney.

Ms BIRCH — The Committee should also be aware that, particularly in our regional offices, we get people who are ordinary members of the public who just want general information about what a power of attorney is, how they make one, without having any disability or themselves being concerned about what they would do with it; they are just trying to put the right things in place. One of the aims of further community legal education is making sure that ordinary people do take these precautions while they can.

Mr FOLEY — You talk of the need for an understanding of the nature of the effect of the power of attorney that is granted. You also speak of what happens when capacity is lost. I suppose there are three elements about that that leap to mind. The issues about the key elements: the testing capacity, who should conduct the test and the limits, if any, on the class of medical or other professionals who are engaged in that. Does legal aid have a view on any or all those questions?

Ms MILLS — I thought we had under half an hour!

Mr FOLEY — Quickly?

Ms MILLS — That is a very vexing question, it is a very difficult question and I think it is a real question for the Committee to look at. Having said that, Victoria Legal Aid is aware that there are very different views in relation to capacity. As I think we have said in our submission, capacity is something that I think is — I am going to use the wrong word here — situational, in that you may have the ability to have capacity to go down to the bank and do your daily banking, but you may not actually have the capacity to buy and sell a house or make a decision to run a Supreme Court piece of litigation.

I think if we are looking at capacity we really need to be able to look at it in a manner that allows people to have the most freedom to make choices. I do not think that is inconsistent with some of the other submissions that have been put in.

Then, if you are looking at doing a capacity test, the capacity test then has to have that freedom to recognise that you might be able to do your own banking and make your general decisions in relation to life but you may have more difficult decisions you need assistance with. Again, one of the tests that Victoria Legal Aid quite likes is the UK test under the Mental Capacity Act. That has some fluidity and allows for looking at the issue.

We also have difference of views in relation to who assess a capacity. We do not think lawyers off the street should, to the extent — and Sarnia will explain from our regional office perspective — that we do not like people coming in and asking us to sign powers of attorney because we do not feel that we have the capacity to do a capacity test.

Mr BROOKS — You are the first lawyers who have said that, too!

Ms BIRCH — It depends on whether the lawyer has an ongoing relationship, anyway. Probably a few years ago more people would have had a relationship with a lawyer but with most of our clients they are people who do not have lawyers at all, unless they come to a point where they decide they need one. But to then have someone walk in with the documents, probably with their son or daughter or a family friend, and say, 'Please

witness these documents', officially verifying that this person has the capacity to make the power, it does not work that way. We generally say to people, 'Look, we think probably your doctor is the best person to be the witness in this case, because they know you a little bit better than we do'.

Ms MILLS — That follows through to another concern that I think we have had, that members of the legal profession who know families — they can be caught up with relationships with families, caught up with the whole dynamic because of ongoing work that they have done over the years — may not actually be in the best place to make a capacity assessment. Then, if you are going to ask doctors to make capacity assessments, there may be a feeling that doctors do not particularly want to do that. I am sure that we are the first lawyers who have said this: doctors and lawyers sometimes may not see eye to eye on some issues. So the whole question of who should do it is a quite vexed question, we feel.

We feel that that leads through to the need for the education for the legal profession, so that they do understand what capacity is and they do understand how important it is to make sure that if you are signing documents relating to someone's capacity you are actually doing it with some framework or, if it is going to be a doctor or someone with medical qualifications, they actually understand that it is not the family lawyer who has sent their old patient down just to get them out of the office. There needs to be, I think, a greater understanding from the medical profession as to why this is being required because ultimately it is going to protect whoever is making the power.

Mr BROOKS — You mention in your submission that one of the ways you see that abuse can be minimised is through a national register. I have a couple of questions about that, for more detail. One is whether you think it should be compulsory. It seems to me that you think it should be, but I just want to clarify that. Another is who should have access to the register and have you thought about what sort of information should be available to those people who do have access, given privacy concerns? Also, where would the register best be held? We have had suggestions from people that it could be at VCAT, the Office of the Public Advocate or the land titles office. Have you got any thoughts?

Ms HIGGINS — Yes, and we are aware of the fact that it will be difficult to make it a national one, but certainly we think there should be one in Victoria. We had also considered the question of who should have access. Again we thought that that should be nominated — names of people who should be able to access it should be nominated at the time of making the power of attorney — and there should be a central register kept of that information. So if someone wishes to access it, they have to prove who they are, that they are the person who has the right to come and have a look at that.

The CHAIR — Witnesses have come and talked to us about the ageing demographic and a high number of retirees travelling a lot in Australia. This issue of interjurisdictional consistency is of major practical import. When you said that it might be quite hard to get a national register, for example, and consistency of documents, would you agree with that?

Ms HIGGINS — Yes. I think the problem or difficulty is getting the law to be made that has a national effect. I think that is the main issue there. I mean, there is cooperation between the states on issues. For example, I work in the mental health area, and there is starting to be more cooperation between the various providers, where people can be transferred from one state to another. So I think it is achievable if there is goodwill amongst the various governments to have registers there.

Mr BROOKS — The only question we did not get to was who would be best placed to hold the actual register.

Ms HIGGINS — I suppose it is a question of who is prepared to do it. I mean, off the top of your head you would think perhaps the public advocate offices in each state or you could perhaps set up a different central registry. You could suggest someone like State Trustees, but most of our clients are very anti State Trustees and would not be too willing to go there. Not that they do not do a great job, but I do not think our clients would like to go there. I think a lot of older clients would also have that same anti-feeling there, too. So it needs to be an independent group, or someone highly respected everywhere, like the public advocate.

Ms BIRCH — It would be important, too, that only people who have a bona fide reason to access the register would have the right to do so, virtually only when the donee is wishing to prove that they have the relevant authority. There would be no reason for the general public to have access to this register.

Mr BROOKS — No. It has been suggested to us that it might be an online register that might have to be specifically accessed by, say, only bank managers and medical institutions, those sorts of places.

Ms BIRCH — Probably once you start making a list of those sorts of things you are bound to exclude someone who should be on it. I would think that as long as there is some rule whereby people have to establish their bona fides, then that is the way they access it.

Ms HIGGINS — I still think that the person's wishes should be taken account of, so that they should be given the opportunity to name who they would want to be able to access it.

Mr CLARK — Can I follow up on your recommendation about making abuses of powers of attorney a criminal offence? In respect of that, could I ask: how would you envisage defining what abuses were criminal and what may be things done through inadvertence or ignorance, that you would not necessarily want to make criminal, such as mixing up of funds? Perhaps most importantly, who would do the receiving of complaints, investigating and prosecuting? Thirdly, do you think it should be linked to some form of civil recovery, in cases of abuse?

Ms MILLS — That is another full question. That is a very difficult question, because Victoria Legal Aid knows through its contacts with, say, State Trustees and other administrators the real difficulty you have in actually proving fraud. We know that investigations start and in our legal practice we do legal work if we can recover for fraud.

It is really difficult to actually prove fraud in the first place, for the reasons that you just outlined; and secondly, the recovery, because often you will have ripped off the person and there is no money left, or you have covered your tracks. I know from discussions with large administration firms that they will not seek recovery if there are no assets to actually recover. So it is a very vexing, a very difficult area. That is one point.

The second point is in relation to actual criminal proceedings. I am not aware of any cases that have gone before the courts in Victoria, but I stand to be very much corrected on that point because, again, it is a different burden of proof; it is the criminal burden of proof, which is extremely high and, in light of powers of attorney, would be very hard to prove. Having said that, Victoria Legal Aid does think it should be a criminal offence, because if you break the law you should be punished. We go back one step, in that if you have a general ignorance in the first place, that general ignorance is actually solved by setting down what you can and cannot do, to give you that education, to give you that information.

If you do hold a power of attorney, you either go to a class and tick off that you have done it, or you get information and you sign that you have read it, so that you actually have some information and there is some support for you. But also it would make fraud easier to prove. You are saying, 'Yes, here is this knowledge', and that you have this knowledge which would make a criminal proceeding easier to prove because you are saying that you have received this knowledge and you have signed that you have understood this. That may be one way of linking the need for community education and the clarity of what you can and cannot do in with fraud and criminal proceedings in the end.

Ms HIGGINS — I think you were referring to an inadvertent mistake, which might happen; I mean, the person may have signed a register saying that they understand all of this, and then become incompetent and not actually do their job properly as an administrator. I think there should be a power — you would not necessarily prosecute in that circumstance, but a power — for somebody like VCAT to investigate, and at the moment it does investigate issues, and then to take proceedings to try to recover some of the money, where possible, from the inadvertent perpetrator's assets or whatever. Most of the time there is probably not going to be any there, but at least there should be a power to do so, I think.

Mr CLARK — And if it were a criminal offence, would someone with a complaint simply go to the police and have them investigate it? Or would you envisage that someone like the Office of the Public Advocate or another public body would be charged with investigating and initiating prosecutions?

Ms HIGGINS — Probably initiate an investigation by the police, because in the end the police will have to investigate it. It becomes very murky if you get someone like the Office of the Public Advocate investigating criminal matters; it would actually be diluting some of their very important functions in relation to supporting people with disabilities.

Mr FOLEY — In terms of that community education role, how successful do you think the *Take Control* kit, to which there are a lot of references, has been?

Ms MILLS — I have brought one.

The CHAIR — And we have seen the DVD as well.

Mr FOLEY — About that whole issue of being successful or not in getting it both to the community and, to some extent, the legal and other professions, what kind of additional community education practical steps do you think might be needed, and targeted particularly, from your experience, at what sorts of groups? Are we really putting a white Anglo-Saxon construction on all of this material — a white Anglo-Saxon mentally stable construct on all of this?

Ms HIGGINS — I think you could produce pamphlets in different languages and have them available in community centres like community advice areas and distribute them to all the nursing homes. That is where a lot of these problems arise from, so the information should be made available to all of those sorts of outlets, in different languages. I think that would be a starting point for that sort of material to be produced, so people are alerted and they have easy access, and then they have a telephone number to refer them if they are more complicated — because this is more complicated advice.

It is detailed; it is a fantastic resource and it is great to give it out to social workers and other people with education in that. There are a lot of people in the community as a starting point; they then get on the phone and ring us, because they do not quite understand it. We cannot deal with every single phone call or query that might come up. So I think it would be good to have it in a simplified pamphlet form.

Ms BIRCH — It is important, too, to start from the basic information for ordinary people who just want the information about how to do it in the normal course of their business, and then to also make allowance for people who do not understand that there is more detailed advice for them, and then when something goes wrong, advice for those people in that situation as well.

Mr FOLEY — Do you think there are particular communities or sectors of the broader community that need particular emphasis in this regard?

Ms MILLS — Without having any statistics behind us, I think you are probably correct that our *Take Control* book, of which we did over 46 000 last year, is probably aiming more at a white Anglo-Saxon community, which makes Victoria Legal Aid concerned about, say, culturally and linguistically diverse communities.

They should have the same access to the law and what type of education newly arrived migrants are actually getting in relation to their rights with powers of attorney. And also a younger community, because it tends to be traditionally, and the talks we give tend to be traditionally to older communities — to people in my age group and above. But that does not mean that younger people need to not think about wills, powers of attorney, medical powers and guardianship powers, because we could leave here and be hit by the tram. It is sad when you see situations where younger people with younger families have not made provision for the future. So I think we also need to look at that target group.

The CHAIR — We are nearly out of time, but can I come back to the issue of capacity for a minute? In your submission you say that guidelines should be developed for legal practitioners in particular. Have you given thought to what those guidelines might or should include?

Ms MILLS — I think they should include some of the elements that are in the UK capacity legislation. I have some notes here, which you probably already have, about some of the key elements there. They are really looking at, first of all, that you have to accept that somebody actually has capacity until it is proved that they do not. I think you have to start with that concept. It is at section 3 of the UK Mental Capacity Act. Some of those steps actually have real foundation, as to giving guidelines for what should be looked at when you are looking at capacity.

The CHAIR — So you point us to that body of work to look at. Very lastly, I refer to the issue of an expiry date for no longer active referrals of power of attorney. We have heard from some witnesses that maybe every three years they should be either expunged or renewed. What is your view of that?

Ms BIRCH — I do not think that really has much merit at all, because you make a power of attorney to guarantee that you will be looked after when you no longer have capacity. If you have to redo that every three years, then you have the whole question of diminished capacity happening on a regular basis, whereas if you do it properly the first time, then it can continue as long as you want it to continue, whether that be when you lose capacity or not. To me, the requirement that that should happen is really building a lot of blocks to what people might want to do and to being able to be quite satisfied and have confidence in what the decision is that they have already made.

The CHAIR — What about when there is a donor who gives the power of attorney to somebody, and then subsequently the document could — say, today — end up in a drawer somewhere and not really be activated because it is not needed, and then they take out another power of attorney with somebody else? Would a register take care of that? This is partly what I guess it is intended to catch, what those witnesses are suggesting here.

Ms BIRCH — Yes. A register would resolve that if there was a requirement that there be a search of the register before a new power of attorney was registered.

The CHAIR — Okay.

Ms BIRCH — But I think the Committee should also be aware of the convenience of having a power of attorney when someone is perhaps physically frail but mentally quite well and who is not able to go and do things like the banking. It is a good idea for them to have someone who can do those sorts of things for them simply with a power of attorney.

The CHAIR — Thank you for coming to talk to us, and also for your submission. As I said earlier, you will receive a copy of the transcript and you can make minor changes to it. I am sure you will not mind Kerryn and/or Kerry getting in touch with you to follow up with any matters they need to clarify or to get further information. Thank you.

Witnesses withdrew.