PROOF VERSION ONLY

LAW REFORM COMMITTEE

Inquiry into powers of entry, search, seizure and questioning by authorised officers

Melbourne – 13 December 2001

Members

Mr R. H. Bowden
Ms D. G. Hadden
Mr P. A. Katsambanis
Mr T. Languiller
Ms A. L. McCall
Mr R. E. Stensholt
Mr M. H. Thompson

Chairman: Mr M. H. Thompson
Deputy Chairman: Ms D. G. Hadden

Staff

Executive Officer: Ms M. Mason
Research Officer: Ms K. Giles

Witnesses

Mr J. Gardner, Public Advocate;

Ms L. Glanville, Legal Officer to the Public Advocate;

Mr D. Petherick, Manager, Community Visitors Program, Office of the Public Advocate; and

Ms M. Troup, Disability Services, Department of Human Services.

Necessary corrections to be notified to executive officer of committee

The CHAIRMAN — On behalf of the Victorian parliamentary Law Reform Committee I would like to welcome you here this afternoon for the hearings on the powers of entry, search and seizure. The evidence you are giving today will be recorded by Hansard. You will have the opportunity to approve the transcript and get it back to us. It might be a useful basis to use as background information to follow up any matters that you might undertake to review for us.

I invite you to introduce yourselves and make at the outset any comments you would like to make before I provide committee members with the opportunity to ask you questions on relevant matters.

Mr GARDNER — My name is Julian Gardner, and I am the Public Advocate.

Ms GLANVILLE — I am Louise Glanville, Legal Officer for the Public Advocate.

Ms TROUP — My name is Maggie Troup, and I work in the Department of Human Services in disability services.

Mr PETHERICK — My name is David Petherick. I manage the community visitors program for the Public Advocate.

Mr GARDNER — Perhaps I can make some general opening comments. I do not need to indicate to this committee that one of the generalisations you could make about criminal law jurisdiction is that law-makers have to balance the rights of the community to protection against the rights of individual liberties and inappropriate intrusions upon those liberties.

The CHAIRMAN — At this point would you like to outline for the record your wider background over the past 30 years?

Mr GARDNER — Certainly. I am a lawyer. I was throughout the 1980s the Director of Legal Aid in Victoria and established the Legal Aid Commission as it then was called. Subsequently I was the chair of the Workcare Appeals Board, which I established, then a member of the Refugee Review Tribunal, then the national head of the Social Security Appeals Tribunal, then President of the Mental Health Review Board and now Public Advocate. So my background is as a lawyer in a managerial role in a variety of areas that impact upon the rights of people and civil liberties.

Are people familiar with the role of the Public Advocate? I do not need to assist anybody.

As Public Advocate, with responsibility for protecting the rights of people with disabilities, there is a third part of the equation that I would like to mention. In addition to protecting the community and the rights of individuals, my role is to protect those who have disabilities from being harmed by members of the community or indeed being harmed by their own actions. The people for whom my office has primary concern and responsibility, while we include all disabilities, are primarily those who have cognitive disabilities — that is, their disability leads to problems in comprehension, in decision making, in gathering information and in using it effectively. This regrettably leaves some vulnerable to exploitation and abuse and neglect, and therefore there are appropriate reasons for the community to have laws that seek to protect them from those abuses and neglects and indeed protect them from their own behaviour.

I go further by saying not only is it appropriate, but we have an obligation as a community to do that because by reason of their cognitive disability they are arguably the most vulnerable people in our community. So it is in that general context that there are powers that relate to the work of the Public Advocate, the guardian of last resort.

I understand that you have before you some written material that we submitted. It was regrettably somewhat late, and I apologise for that. I have been in five different places over the past few days. I am happy to go through that material in more detail, but for the moment I will just skim over it and say there are powers that can be given to the guardian via the Victorian Civil and Administrative Tribunal which effectively authorise entry into premises to remove a person with the assistance of the police or ambulance officers. These are powers that are given only by way of an order of the tribunal and only either in the process of an order being considered or following the making of an order to appoint a guardian.

The second part of that material which we would like to talk about relates to the work of community visitors. These are volunteers appointed by the Governor in Council. They are charged with the obligation of visiting a variety of premises in order to ensure that the rights of the people with disabilities who are living there are being protected

and that the conditions in which they are living are appropriate.

As the notes indicate, four pieces of legislation are involved. The Intellectually Disabled Persons' Services Act involves residential premises where people with intellectual disabilities live. The Disability Services Act involves residential premises which are funded under that act and which primarily involve people with intellectual disabilities but may involve a variety of other disabilities — for example cerebral palsy. Under the Mental Health Act the visits are to in-patient mental health facilities. Under the Health Services Act the visits relate to supported residential services, which are residential accommodation primarily operated by the private sector for profit where the residents may have and particularly at the bottom end do have quite a variety of disabilities.

As you will see from the notes, the legislation does not talk about search or entry or seizure, it talks about visiting and inspecting. Indeed there are no rights of seizure, and I do not think there is any need for any rights of seizure. These powers are exercised in the public interest because of the obligation that we have as a community to ensure that those people who are least able to advocate for themselves have people who can advocate for them either in terms of some small matters relating to their life or in terms of some very significant matters which may involve, for example, inappropriate use of coercion, detention or chemical detention, or it may be as I say a full spectrum of problems that may confront them.

I am happy at this stage to use that by way of a general introduction, and I am more than happy to expand on any of the details that are in these written materials. But it may assist you more, Mr Chairman, to explore by question where you would like us to give you more information.

The CHAIRMAN — Yes. By way of a starting question, how many visits or inspections would be undertaken each year that require an application to be made to a tribunal?

Mr GARDNER — I will clarify the distinction. The visits and inspections are made by community visitors and are unrelated to the tribunal.

The CHAIRMAN — How many tribunals are there?

Mr GARDNER — In the notes we provided we took out some figures which indicate that for the first 11 months this year 11 orders were made under section 26 of the Guardianship and Administration Act. That is where a guardianship order is in place and an additional order is then found to be needed to enter the premises and remove a person. The other power is under section 27, where you are investigating the need for an order, and we could not find any record of the tribunal having made an order in the first 11 months of this year.

The CHAIRMAN — Are you aware of any complaints having been made by stakeholders or clients regarding the use of that power?

Mr GARDNER — Not specifically, but can I temper that answer by saying ours is a jurisdiction which by its definition involves doing things that people do not like. We are generally appointed only when there is either a real problem with somebody or high levels of conflict within a family. It is the nature of our work to go in and in a sense make unpopular decisions, so we get complaints, although I think a very small number given the type of decisions we make. But I cannot think of any that have specifically related to the exercise of that power.

The CHAIRMAN — In the case of a person who might have some medical condition — for example, schizophrenia — what is the correlation between the work of the Public Advocate and the work of an entity that might look after treatment orders for people with that condition? Is there an overlap at all, or if someone is under a treatment program would the Public Advocate not intervene?

Mr GARDNER — There tends not to be an overlap if the person is an involuntary patient under the Mental Health Act, because the nature of making them an involuntary patient means there is power under that act to detain them for the purposes of treatment for the mental illness and therefore there generally may not be a need for a concurrent guardianship order. But on the other hand we may be involved when they are subsequently discharged and there is a need to perhaps deal with their place of accommodation.

The CHAIRMAN — Is the Public Advocate concerned with the role of other agencies intervening in the lives of people?

Mr GARDNER — Yes, I think the annual reports by the community visitors under the Mental Health Act contain references to problems that arise from time to time about the admission of people who have been removed

by a CAT team when they may have been brought into hospital by police rather than in a civil vehicle. Those issues arise from time to time. They cause us concern and we comment on them.

Ms McCALL — One of the things we are discovering is the issue of the training of people who do the removal, if that is the right expression, or the entry or whatever it is. Can you explain to us what sort of training your people have — obviously in sensitivity I would hope, given the circumstances — but what sort of training is there? Is it reviewed? Are regular assessments given? Please give us some guidance as to the professionalism and the breadth of the training involved.

Mr GARDNER — Certainly. Before I specifically deal with that I will deal with the act of entry. If it is necessary for us to act under a section 26 order it is more likely that the entry is not made by my staff but by the police. The effect of the order is to empower the police to do it, so we would never act upon that order alone. To that extent our role in those circumstances is more one of seeking to find the least intrusive possible option. One of our goals and indeed one of our statutory duties is to seek solutions and to make decisions that cause the least intrusion possible on a person's individual liberty. The act of appointing a guardian is exceedingly intrusive because it takes away a person's power to decide where they live, for example.

Having said that, the staff who are involved in this work have a variety of disciplines, which may include social work or law or they might have a health services background, and the training that they have has included dispute resolution. One of the things that we are working on at the moment is a whole new and probably fairly expensive course of training on dispute resolution, not in the sense of formal mediation but in dealing with situations. There are regrettably a number of incidents a year in which my staff are assaulted. You can be assaulted by a 70-year-old with a walking stick, and it is still as frightening as being confronted by a young man with schizophrenia. In fact they tend to be less of a problem.

Mr LANGUILLER — How do you work through the issues arising out of the need to deal with a multiculturally or religiously diverse community? I would imagine that language is a barrier, and on some occasions even religion may well impose certain complexities on those matters.

Mr GARDNER — Undoubtedly, and bearing in mind that the role of the guardian is that of decision-maker, we would be concerned in all cases to engage somebody who was either a case manager or a family member or a community worker to be doing a lot of the legwork that is involved, for example, in finding the alternative accommodation. So our first starting point would be to engage people who were more familiar with the language and the culture of that individual to ensure that the decisions that we are making take into account as far as possible the cultural values of the individual.

Having said that, I am not going to suggest that that is an easy task always, but obviously we use interpreters where necessary, just as we do with a number of people who are simply non-communicative regardless of their cultural background. I do not know that it presents an issue, because of the small number of cases which involve forcible entry, but it does involve an issue in terms of making lifestyle decisions.

Ms HADDEN — Do you see your powers as being sufficient or would you like an expansion of your powers?

Mr GARDNER — I do not see any need to extend them. I believe they are appropriate. In our notes reference was made to section 18A of the Guardianship and Administration Act, which does not come into force until 1 February next year. We sought an extension of powers. It was to give to me, and to give me the capacity to delegate to certain of my staff, the same powers as a voluntary community visitor, because ironically the legislation made me a member of the board of community visitors but did not give me the same powers, so I was having to ask permission to go into some premises whereas my colleagues were able to walk in. Once that comes into effect I believe these powers will not only be appropriate but will be as extensive as they need to be.

The CHAIRMAN — Building on that question, are you aware of the need to expand or contract the powers of any other agencies that might be dealing with your constituency?

Mr GARDNER — Not in relation to entry, search or seizure, no.

Mr STENSHOLT — Your notes talk about institutions, whereas section 27 does not necessarily restrict itself to institutions. Is there a difference?

Mr GARDNER — Yes there is. The references to sections 26 and 27 are circumstances where powers are

given to me only by an order of the Victorian Civil and Administrative Tribunal in an individual case following an application to that tribunal, so it is either after a guardianship order has been made or in the course of investigating the need for one. Section 18A is an entirely different part of our operations and relates to the community visitors operations.

Mr STENSHOLT — The ongoing?

Mr GARDNER — Yes, and that is where the term 'institutions' is relevant, as I explained before — the range of institutions.

Mr STENSHOLT — So the power of inspection relates only to individuals who are already under guardianship?

Mr GARDNER — No. In fact it is the other way around. The power of inspection, or visits as the acts call it, relates to the operations of the community visitors. Sections 26 and 27, which relate to guardianship orders, give the power to enter premises and remove a person from those premises. If it helps to understand the circumstances in which that might arise, a very typical example would be an elderly person living alone at home who is adamant they are fine there and there is no way they want to go anywhere near a hospital or a nursing home. They have a visiting Royal District Nursing Service nurse, but the gangrene on the leg is getting worse and the opinion is they will have to amputate it if the person — she — does not go in and get some treatment, and she just refuses to go into hospital. So because of her dementia she is not making sound decisions, and the decision is made to remove her to a general hospital for treatment so she will then have an opportunity to go home and enjoy a better lifestyle.

Mr STENSHOLT — Under sections 26 and 27 there is provision for the presence of a police officer. Is that consistent with other or similar sorts of legislation such as child protection? I found that a bit unusual.

Mr GARDNER — Perhaps Louise can answer that better than I. I am not familiar with that situation.

Ms GLANVILLE — My understanding of why the provision exists as it does is that our guardians, who would accompany the police, are often not the best people to be breaking into people's houses. They do not have those skills, whereas the police are clearly more than capable of doing that where the extreme circumstances or the risk to the person in the house requires it. Essentially that is why the provision in the legislation reads as it does. You have the guardian, who makes a decision that this person is at risk and needs treatment, you have the police, who are therefore required to accompany the guardian by virtue of the order of the Victorian Civil and Administrative Tribunal. The police do the entering, which sometimes requires some force if someone is determined not to be removed from their home. The guardian can then go in and hopefully try to work with the person to say, 'Come on, this is where we need to go'.

Mr STENSHOLT — Would it be too much to ask if the legal area of the Department of Human Services could look at the provisions of the various acts that cover that and do some sort of table to show the different arrangements for entry, et cetera?

Ms TROUP — I am not the person who is coordinating the departmental response, but I can ask them if they would do that.

Mr STENSHOLT — Thank you. That would be useful.

Ms McCALL — Can I go back to your analogy of the difficult old lady. There are many of them in my electorate. I am trying to get a handle on the difference between someone who is just stubborn and determined to stay at home in spite of the gangrene in their leg and someone who, in your terms, has finally succumbed to Alzheimer's or whatever and should be removed. How does somebody make that judgment? That must be awfully difficult.

Mr GARDNER — It is, or it can be in some circumstances. The basic rule is that we all have a right to decide whether or not we are going to be treated, and we do not have to make sensible decisions. But if there is sufficient medical evidence for the tribunal to reach the conclusion that this person has a disability and that the disability affects their capacity for sound decision making — —

Ms McCALL — So there is a process beforehand?

Mr GARDNER — Yes, with the exception of section 27, which can be used where there is reason to believe that somebody is being held against their will or that there is a serious risk of their health deteriorating if they are not medically examined in order to determine that question. But having said that, we could not find any record of one of those orders being made this year. In some circumstances, as you can imagine, it is necessary in order to find out whether a person is just a stubborn old person or is in fact — —

Ms McCALL — Or potentially has a life-threatening condition, and you have to determine that?

Mr GARDNER — Yes. You are right in saying it can be difficult, because I am sure we have all come across people about whom it could be said they are just cantankerous, and that is not a medical condition.

Mr STENSHOLT — Although it can be life threatening.

Mr GARDNER — It might be life threatening, yes.

Ms HADDEN — Can I ask whether you keep a record of complaints?

Mr GARDNER — We do. We have a published complaints process; we have a leaflet we give people to tell them how to complain; and internally we keep what we call a complaints register. For every complaint that comes in we have a one-page, quick summary, which I keep primarily so we can look at it to see if there are any lessons to be learnt for quality improvement.

The CHAIRMAN — Ms Hadden, was your question based upon complaints about inspectors or more general complaints?

Ms HADDEN — My question was based on both: complaints relating to the use of inspectors and more general complaints.

Mr GARDNER — My answer to that is that I cannot remember any complaints made this year that have related to these sorts of powers. With community visitors, that is a bit difficult. I will ask Mr Petherick if he can think of any complaints that related to this exercise of power.

Mr PETHERICK — From time to time we certainly get complaints from service providers either about the conduct of the community visitor or questioning the powers of the community visitor and whether they are appropriate. There were over 4000 visits by community visitors last year, and we keep a record of complaints and deal with them in a written format, and we also have a published process that deals with people's complaints.

Generally the situation is that the service providers have misunderstood the powers and the reason for them. We try in all instances to resolve those things with the service providers rather than in any adversarial way, and I think we are largely successful at that.

Mr GARDNER — We are aware, as I assume you are, of some correspondence that may have been forwarded to you from an organisation calling itself Residents Rights. Has this organisation come to your attention?

Ms GILES — It has come to the committee's attention, but we have not received any such submission.

Mr GARDNER — They seem to have fired off letters to a number of people, including some of my staff, my ex-staff and volunteers, for whom they seem to have found home addresses. The correspondence comes from a post box in Tasmania, and we have been unable to track down the organisation's identity. Indeed, people in the department have received letters from them too. It would be inappropriate for me to convey our speculation as to who the organisation is.

To follow up on what Mr Petherick said, obviously from time to time there can be proprietors of whom community visitors make requests to improve their premises and who find that hard to comply with, and sometimes that results in complaints. It is hard to know whether they are what you would call complaints or whether they are just people who do not like somebody pointing out to them the fact that there is no heating in the middle of winter.

I do not know if it would assist the committee to leave with you copies of the community visitor reports. I am sure as members of Parliament you all have these, but you may need to have them drawn to your attention.

The CHAIRMAN — Our staff officer will take those.

Mr GARDNER — Just by way of explanation, there are three annual reports of community visitors because there are three different acts and they deal with the three different services. I also have the report of the Office of the Public Advocate.

The only closing remark I would make is to repeat my answer to your question, and that is I believe the powers are appropriate but I do not believe there is any need to extend them.

The CHAIRMAN — Thank you very much for your time. I wish all the submissions were as succinct and as adept as yours; our task would be easy.

Witnesses withdrew.