Royal DistrictNursing Service

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Executive Officer
Victorian Parliament Law Reform Committee
Parliament House
EAST MELBOURNE VIC 3002

Sent via email: **vplrc@parliament.vic.gov.au**

Dear Sir / Madam

Submission in Response to Inquiry into Powers of Attorney (POAs)

Introduction – About Us
Royal District Nursing Service Limited (ACN 052 188 717) ("RDNS") is one of the largest and oldest providers of home nursing and healthcare services in Australia.

Our services are delivered "24/7" to clients primarily in their homes (amongst other places, such as schools and residential facilities). In the 2007-2008 financial year, our clinical and allied health staff attended a total of **32,125** clients and made a total of **1,608,257** visits.

The majority of our clients comprise the elderly, frail and infirm. Approximately 70% of our clients are aged 65 years and older – and we estimate (based on 2006 survey [1]) that of this age group, approximately 30% suffer some form of dementia or other cognitive impairment. This overall percentage increases when taking into account RDNS' clientele younger than 65 years who also may suffer some form of dementia and cognitive impairment.

Relevance of Powers of Attorney to RDNS
For each client admitted to RDNS' service , our staff seek the client's written consent (wherever practicable) to collect , use and share the health information as required by the *Health Records Act* 2001 and in accordance with RDNS written policy and procedure.

It is at this stage of admission that our clinical staff, as a matter of procedure, make enquiries of the client (or others present, eg carer/next of kin/informal advocate) as to whether there is any legal representative who is legally responsible for the client by way of Power of Attorney (POA) or Guardianship/Administration order so we know who should be the one to sign our Consent form.

[1] *Out of the Shadows A Best Practice Community Care Program for People Living with Dementia* published by RDNS Helen Macpherson Smith Institute of Community Health 2007 (and funded by the JO & JR Wicking Trust) : includes the findings of a 2006 " prevalence survey" conducted of 656 RDNS clients aged 65 years and older from four different regional locations. The findings indicated that a total of 32.6% clients had problems with memory loss, 29.4% exhibited signs of confusion and 22.3% had a confirmed medical diagnosis of dementia.

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General issues faced by RDNS

1. Our admission process – consent and legal authority for decision making

The admission process becomes problematic for our staff in that those clients who suffer some form of dementia or cognitive impairment are often confused and unable to reliably advise if they have a POA and/or the type of POA and/or its whereabouts. And there may be no other person present at the admission (or available later) to assist with this information.

Alternatively, the client / representative may confirm that a particular type of POA exists but our staff are unable to obtain evidence of the original or a copy at the relevant time or at a later stage for reasons such as: the lawyer or the attorney holds the original elsewhere & for whatever reason does not readily provide copy; there are no copy facilities in many private homes; it may not be practicable for clients to arrange for copy externally; or clients consider POAs private and do not want a copy to be taken and filed in RDNS' client care record especially as it is kept in the client's home and may be accessible to others in the home. As a consequence, RDNS often has little choice but to provide our services without the benefit of having access to all necessary information and supporting documentation regarding the issue of legal authority.

2. Guardianship and administration applications – existence of POA

RDNS is regularly involved in VCAT proceedings for guardianship and /or administration order applications. Our involvement may be either as the applicant or as a third party which provides a report in support (or otherwise) of an application. Notably, the VCAT application requires an applicant to state, amongst other things, if there is a POA. In our capacity as an applicant, we are for reasons already stated not always able to give a categorical answer to this question.

Specific Issues raised by Committee

Q 1. <u>Should powers of attorney be streamlined. If so, how?</u>

Yes, they should be streamlined.

We recommend this may be done by having the one standard POA – that contains various categories (in say a checklist format) that may be ticked and qualified by time frames and specific examples and exceptions.

Our experience indicates that the powers and implications of different POA's easily confuse many clients as well as lay persons and health professionals involved in the clients care. It is a legal document that non lawyers cannot always easily interpret. All the more so when the document on its face may be ambiguous in its construction. For example, it is not uncommon for the question to arise in RDNS circumstances as to "Who has a right to access RDNS records" when our records are "nursing" records not "medical" records - is it the person holding the Financial POA or the person holding the Medical POA, or both?

Whilst we note that the Committee has not been asked to consider Medical POAs, we ask the Committee to include the issue of "health records" in its consideration of how powers may be categorised (per our earlier suggestion of one all inclusive POA).

Q 2. How should we determine that a donor has capacity at the time he or she creates a POA? What evidence should we require to show that the donor has capacity? For example, should a doctor sign a statement that a donor has capacity?

We draw attention to the view of some professionals [2] that persons should be presumed to have capacity unless there is evidence to the contrary. This means that any medical test or opinion should seek and comment on evidence of incapacity rather than the reverse - and any statement by a doctor should be framed accordingly ie indicate that there is *no evidence that a donor lacks capacity* (rather than stating the donor *has capacity*).

We note that the term "capacity" is often used interchangeably with "competence" and there appears to be some debate as to which of the two is the legal concept and which is the medical assessment.[3]

We suggest that a medical practitioner or legal practitioner should avoid a categorical, unqualified statement that indicates a person *has capacity* - when that assessment may not necessarily apply in every situation or case of decision making. For example, a donor may show that he/she does not lack capacity in making decisions about a particular matter yet show evidence of a lack of capacity in other matters.

In conclusion on this issue, we submit that any assessment (whether made by a medical practitioner or legal practitioner) of a donor's capacity or lack thereof should always be supported by medical evidence and written criteria for the assessor (ie under regulation or guidelines). Perhaps there should also be a supporting declaration from a layperson - who

(i) is not a relative or person "interested" in the proposed POA; and

(ii) has had regular (and recent) contact with the donor for a specified number of years.

[2] Dr Peteris Darzins, Associate Professor of Geriatric Medicine, Monash Ageing Research Center: *Capacity: Distinction between Dementia, Mental Illness and Acquired Brain Injury. Notes for the Law Insitute of Victoria. Elder Law Forum* 2009.

[3] Ibid & Victorian Government *Elder Abuse Practice Guide With respect to age – 2009* Chp 10 (especially 10.2 & 10.3).

Q. 3 Sometimes it is not clear what powers an attorney has. What powers should an attorney have? What limits should there be on an attorney's powers? How should we educate attorneys about what they can and can't do?

We suggest Attorneys should *not* have powers regarding:

- certain legal matters which are non commercial, highly personal in nature and directly and significantly impact on other persons eg. the making of a Will, divorce (which recently occurred in Victoria and had media coverage).
- the restriction/prohibition of a donor's visitors unless there is valid evidence to support that the donor would be at unacceptable risk without that restriction. We suggest that this power is currently abused by attorneys in situations where the donor has, for example, been placed in an aged care facility and the attorney may for reasons unrelated to the donor's welfare instruct the manager of the facility to restrict the visitors without the donor's knowledge.

We suggest education perhaps ought to involve a mandatory course and certification - since the attorney is dealing with another person's life and should not be allowed to undertake the task in ignorance.

Q 4. There are reports that POAs are sometimes abused. For example, there are stories about donors being pressured to grant POAs and attorneys misusing their powers. How big is this problem? How can we make sure that POAs are not abused? For example, should these documents be registered?

We have no statistics to suggest the extent of the problem – but can say that RDNS social workers and nursing staff do encounter from time to time situations where they suspect abuse or misuse of powers under POAs. The problem our staff face is that their suspicions or concerns may not be supported by sufficient evidence to pursue the matter legally.

Perhaps the most common form of suspected abuse or misuse of powers we encounter is *financial.* Such situtations may include where the adult child (attorney) may return to live in the family home not so much to care for the elderly parent but primarily to have the benefit of free accommodation. The attorney then appears to take control of the parent's assets for the attorney's exclusive personal benefit, including making significant financial purchases for themselves which are paid for out of the parent's bank account (eg new car) - whilst essential utilities (eg electricity, gas & phone) may remain unpaid and/or be cut off.

One of the most alarming incidents of confirmed misuse/abuse of this type of matter that came to RDNS' attention in recent years, involved a private individual who acted as an attorney under an Enduring Power of Guardianship for an elderly RDNS client. The attorney was a "stranger" to the client and in fact carried out this function as his commercial "business" (the name of which was unregistered). We initiated applications for both guardianship and revocation of the Enduring Power of Attorney, and were successful in both. Some of the alarming features of this case included this client being invoiced for numerous expenses of the attorney to which the attorney was not legally entitled nor was there evidence of such expenses incurred. And the attorney had been negotiating the sale of the client's house (without the client's knowledge) with a real estate agent who had assumed that the attorney was the owner of the house and had no knowledge that the attorney was acting outside his powers. Of ongoing concern to us was that whilst our client's interests were protected by the outcome of the VCAT hearing, this attorney appeared to be at liberty to continue his "business" and act as attorney for other vulnerable elderly persons, as we were advised that it would be difficult to establish an offence in the circumstances.

RDNS is highly supportive of and strongly recommends the introduction of a register.

- We recommend that the register be accessible to the public at large subject to a regulated process of approval for part or full access. And that statutory bodies, governmental authorities (eg VCAT, Office of Public Advocate, Senior Rights Victoria and Victoria Police) and health providers (eg hospitals, GPs, RDNS) are authorised under legislation to have ready access without having to make application for each individual case.

- The register would promote openness, accountability and certainty. A register would provide a huge benefit to RDNS staff as our staff could, on admission of clients or at any later stage, confirm who has legal authority to consent and make decisions for the client. The Guardianship List of VCAT would also benefit from having this information readily accessible when faced with applications for guardianship or administration. This benefit would apply equally to many other persons and organisations (eg hospitals, banks) who may deal with the donor on various matters.

We recommend legislation to support the introduction of a system of regulation and registration that would require amongst other things:

- probity /police checks for anyone to be appointed POA
- registration of any attorney (natural person or corporate entity) that conducts a "business" as an attorney (as distinct from a private person who acts as attorney for one or more family members)

I am pleased to have had the opportunity to offer this submission on behalf of RDNS and hope it assists the Committee with its Inquiry. I confirm you are welcome to publish our name and the contents of the submission.

For any queries, please contact Leonie Schween, Legal & Privacy Officer on 9536 5222.

Yours sincerely

DAN ROMANIS
Chief Executive Officer