

# CORRECTED VERSION

## LAW REFORM COMMITTEE

### Inquiry into powers of attorney

Melbourne — 17 December 2009

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#### Witnesses

Mr S. Vido, Executive General Manager, Strategic and Support Services,  
Ms N. Isaks, Senior Social Worker, and  
Ms L. Schween, Manager, Legal and Privacy, Royal District Nursing Service.

**The CHAIR** — Welcome. Hansard will be recording our conversation and you will be sent a transcript subsequent to the hearing. You can make minor editorial changes but obviously not changes to the substance of what has been said. Our proceedings here are held subject to the Parliamentary Committees Act. That basically means that if you were to make remarks here that someone took exception to, you would be protected, but clearly if you make similar remarks outside the confines of the hearing, you would not be afforded that protection.

This is our fourth public hearing. We have heard from a range of people who have interests and expertise in the area of powers of attorney, from the Office of the Public Advocate, VCAT, a variety of legal organisations and interest groups, including members of the medical profession and experts — the usual suspects.

We have just under half an hour. We are in your hands. We will leave it for you to talk to the terms of reference or your submission, which we have received and I thank you for that. Then we will open it up for some discussion.

**Mr VIDO** — It is not my intention to talk for an extended period in terms of an introduction but to say just a little bit about RDNS and highlight the key points in our submission and allow as much time as possible for questions and conversation.

For those of you who might not be aware, the Royal District Nursing Service is a long-established home nursing service here in Melbourne. It is 125 years old. At any point in time we might have 8000 to 9000 clients in our care and we might see 32 000-plus clients per year, so it is a very large group of people, essentially focused on older clients. As you may have seen from some of the stats that we have provided, over 25 per cent of our clients are 85 years plus. In the context of providing services to clients of that age group in their home in a family setting, there are issues with powers of attorney.

**The CHAIR** — What are the other 75 per cent?

**Mr VIDO** — They are 65 plus. There is a breakdown.

**The CHAIR** — I have it here. I did not see that. Thank you.

**Mr VIDO** — Issues around powers of attorney do arise for us on a pretty constant and regular basis. I am assuming you have all read the submission we put forward. I think for us, in terms of the key issues that we have identified in our submission in dot point form, one is certainly around simplification of forms. There are a range of forms in use and a range of powers that can be given. We see that there is a need to simplify those arrangements and make it easier both for people who are appointing attorneys and for attorneys themselves to understand the documentation that sits around this. We are certainly advocating that attorneys should be much better educated and trained around what it means to be an attorney or guardian and to understand their legal obligations and what is expected of them.

In the same vein we would like to see broader community education so that, in our case, clients who are actually creating powers of attorney understand what is involved and the limitations and the scope of powers that have been granted, so that they are fully informed as to the process they are entering into. Within that context, it is certainly important to recognise the special needs of CALD communities in terms of understanding what this is all about as well.

We are very keen to see powers of attorney being registered. One of the biggest frustrations or problems that we have is actually sighting or gaining access to powers of attorney which are relied on more often than not in situations where there is some sort of dispute. We do not necessarily always have access to the documentation, and that becomes a real issue for us. So registration is important. We would advocate a national register if registration were to be pursued and, related to that, access to that register certainly for nominated organisations. We would see ourselves as one of those organisations that should have access to such a register as of right, given the number of clients we are providing services to and the occasions on which this can become an issue in terms of disputes that can arise amongst family members or situations which we see where we believe we need to step in and support a guardianship application.

That is all I wanted to say by way of introduction, and I really open it up for questions and comments.

**The CHAIR** — Do you wish to comment as well, Ms Schween?

**Ms SCHWEEN** — As the in-house lawyer and person responsible for policy at RDNS I would just like to add that one of the key issues is a lack of clarity among laypersons as to what powers a power of attorney actually grants. With respect to a financial power of attorney, some time ago I actually sought external legal advice to confirm what is the extent of those powers when it came to a request for information. The records we have are not medical records; they are nursing records. They contain some documentation from hospitals that constitute medical records, but primarily they are nursing records. The advice was that a financial power of attorney, unless it specifically is limited in some respect, grants powers of decision making as wide as the decision-making powers that the person about whom the power of attorney is made would have. I am sorry; I put that in a confused way.

The long and short of it is that the advice was that it is wide ranging and there is no limitation, really, to the decision making; it is financial and legal decision making, so that person is entitled to access records. By the same token, when we have a medical power of attorney, we do not differentiate. If they request access to records, we give that access. It is one of those situations where I think there does need to be clarity.

**The CHAIR** — Did you want to add something, Nikki?

**Ms ISAKS** — Just to indicate that as social workers within the organisation often our job is difficult to undertake without having a good background regarding the powers of attorney, because the legality and the process for going to VCAT et cetera can be very difficult.

**The CHAIR** — Perhaps starting off with that process, you say in your submission that you ask clients when they come under your care whether a power of attorney has been activated or is in place. Can I just ask you to open up? To what extent do they say yes to that, and then what types of power do they have? Also, I suppose coming out of that is: do you then encourage them to make arrangements so that really everyone you are dealing with has some coverage?

**Ms SCHWEEN** — With respect to the data that you have received, that we have only recently put together for the purposes of this Committee, I need to qualify that it is not necessarily just powers of attorney; it is also those who may be guardians under, for example, an order of VCAT; also there may be clients who have powers of attorney but where we have not sighted evidence, then we do not record that person as having a power of attorney. We are an evidence-based organisation in terms of our records, so therefore we have quite a number of instances of this.

I asked for anecdotal evidence for the purposes of this Committee and I received feedback in respect of a recent incident. We knew that the client had had dementia for many years and inquiries were made by us as to whether there was a power of attorney. The client had two sons: surely one of them had a power of attorney? It turned out that yes, one had a power of attorney and point blank refused to give us a copy of the power of attorney or to sight it. I do not know the explanation why, whether that person considered it private and therefore we should not see it. So that client would be recorded as not having a power of attorney. We have lots of other anecdotal evidence.

**The CHAIR** — That means that your policy is to get clarification of that?

**Ms SCHWEEN** — Yes.

**The CHAIR** — When they come in — just going back to my previous question — what kinds of powers do they have?

**Ms SCHWEEN** — Unfortunately we do not make any record of the types. So we do not record data on it, I am sorry. No, we do not have that information at hand. We do have copies of powers of attorney in our physical paper file, but the data is not readily available.

**Ms ISAKS** — Certainly anecdotally our experience has been that most of our clients who acknowledge they have an enduring power of attorney would have a financial, sometimes medical, but certainly not to the same extent, and very rarely guardianship.

**Mr CLARK** — I want to pick up the point in your submission about not empowering attorneys to exclude visitors to the donor of the power. It seems to me you raise a very valid point about the potential for abuse of such a power. Can I ask, if you did not allow attorneys to exercise that power, how would you envisage nuisance or unwanted visitors being excluded? Following on from that, would it be an alternative to your recommendation that if a donor did exercise a power to exclude visitors, that would need to be disclosed to any requesting visitor as the reason for exclusion thereby enabling them, if they objected, to take it up with VCAT or wherever?

**Ms SCHWEEN** — It is a good point. I had not taken it that one step further as to what you do about troublesome visitors. I think perhaps your suggestion that if an attorney wished to exercise that power, then they would need to justify it to some sort of authority and have that approved, if you like; probably VCAT is the most obvious statutory body.

**Mr FOLEY** — I have two questions. In regard to education around the whole area of powers of attorney, we have had a number of submissions around the need for both professional classes, particularly education for the health and legal communities in this area, and a broader community education process. Does the District Nursing Service have a view about what form that might take? And does your experience lend any particular nuance to that?

The second question, which is completely unrelated, is another constant theme is the need to act in the donor's best interest but sometimes the view of the donor with total capacity is, in the view of the person making the assessment about capacity, to not act in their best interest. Do you run into that sort of circumstance and have a view on that?

**Ms ISAKS** — Yes, we do. That is quite frequent, where the donor, say, wishes to behave in a certain way and the guardian or the attorney tries to limit that behaviour. That is an area in which I guess there is such a broad scope of different kinds of issues, particularly in terms of clients in the community who live in their own homes and consequently we cannot monitor things as clearly as you would if they were put in a facility, for example. But I think overall the management of the conflicting interests in terms of the best interest can be problematic and it can be problematic if we do not know whether there is even a power of attorney in place.

In terms of the first question?

**Mr FOLEY** — About education.

**Ms ISAKS** — Education: we certainly see that it is important for any attorney to have scope and that they know the scope or extent of their responsibilities. Up until now, particularly because a lot of people undertake powers of attorney independent of any body — they can do it through the Office of the Public Advocate that has its documents on the web — many people do it without any training or indication that they have a knowledge of what they are doing. As a service, we feel it is really quite important they have that knowledge.

**Ms SCHWEEN** — Can I jump in there? VCAT has, for guardians or administrators who were appointed under an order, an education pack that is available online. I suggest that a similar concept could be developed for attorneys but that you would have to perhaps do an online test — complete a paper or something online — to indicate that you have read that documentation, or even if it is a case of attending somewhere and being asked some simple questions that indicate you have an understanding of what your responsibilities are.

Picking up on your second query, if I may — the issue of acting in the best interest — we have a lot of situations where we are involved in a guardianship application to VCAT, not necessarily as the applicant. We may be writing what we call a third party report, which is a report in support of the applicant. They often involve circumstances of elderly people who are being kept at home where clearly they can no longer live independently, even with the assistance of service providers. They simply need to be placed because they are at serious risk.

There may be a power of attorney in existence, but the attorney is not necessarily willing to place the parent. It is not because they love to have the parent at home; often we suspect it is motivated by finances, because they are worried that if the parent is placed, then that may involve a bond and money going out of the coffers that they hope eventually may come to them. There is that additional issue, so I just gave that as an example.

**The CHAIR** — Can I just follow up on that? There is that issue and I understand that. What about the issue of risk and whether a person has a right to exercise risk?

**Ms ISAKS** — There is a certain amount of risk.

**The CHAIR** — One of the dynamics is between the person's best interest but also the person's wishes, and that is separate from the case you are mentioning where there may well be an exploitation of or a bad motive to it. How do you navigate your way through that?

**Mr FOLEY** — If I want to go to the casino and blow all my money — —

**The CHAIR** — I would stop you!

**Ms SCHWEEN** — Yes. In that respect that is something that I think our social workers come across a lot, don't you?

**Ms ISAKS** — Yes, certainly.

**Ms SCHWEEN** — Another example would be where a client decides they wish to live in very — —

**Ms ISAKS** — In squalor.

**Ms SCHWEEN** — Yes, in squalor — in circumstances that no-one else you know would wish to live in. But unless there is some sort of immediate risk, we accept that that is the way the client wishes to live. That is their decision. They wish to eat this food, or not eat this food; it may not necessarily be the healthiest food, but as long as they are eating they may live in circumstances that other people would be concerned about. That is their decision, as long as they understand their decision.

**Mr BROOKS** — We are obviously dealing a lot with some of the problems in the current arrangements and hopefully this process will address those issues. The power of attorney process has also provided significant benefits to people in terms of their management if they lose capacity in the future so there is an enormous benefit for people to take up these agreements.

Just looking at the figures that you have supplied, both in the submission you made and the data you have given us today, it seems that a significant proportion — at least over 20 per cent — of your clients would be suffering from dementia or cognitive impairments, but a very low proportion have these agreements to have a guardian or a power of attorney. It would just seem to be probably a good thing if more people who had those impairments had good agreements in place.

Let us put the abuse situations to one side for one moment. What sorts of things do you think would encourage people to take up those agreements? What sorts of barriers do you think we should take down to encourage people to take them up?

**Ms ISAKS** — I think simplification of how the documentation has to be undertaken would certainly be a big factor for many people undertaking powers of attorney — that would be simplification not only of the process but also the documentation itself, which can be quite cumbersome, certainly for clients who are in the community and are living in their own home but cannot always get out. Trying to get someone to come in and sign these documents can be difficult. But that cross-references the importance of having effective witnesses.

Underlying all this is the competency or capacity of the client. Certainly the social workers within RDNS are very conscious of trying to encourage people to take up enduring powers of attorney when we perceive them to still be competent or have capacity to do so, because that capacity is the most important criterion in terms of someone undertaking an enduring power of attorney. If they do not understand what they are doing, it is too late.

**Mr BROOKS** — Do you mind if I follow up and ask — I might have missed this in your submission — is that part of the training at RDNS: that your staff are trained to broach these subjects at this point, or is it just something that a lot of RDNS staff just do of their own volition?

**Ms ISAKS** — RDNS staff per se — the nursing staff — do not generally take up that option. If the client is indicating that they are interested in undertaking an EPA, they will refer them to the social workers, and certainly as social workers we are experienced and trained in that area. Physically, actually undertaking the process though is not something that we have the capacity to do. We usually have to refer on to either a solicitor or get the family to undertake it with advice from OPA.

**Mr VIDO** — But the issue is touched on through the admission process, given the policies and procedures that we have around admission and assessment.

**Mr BROOKS** — It is, is it? In what way? I am interested to see how that has been done.

**Mr VIDO** — To inquire as to whether there is a power of attorney. That is part of the standard process. It is in our policy. For each client who we are coming into contact with, it is actually part of the process.

**The CHAIR** — You mentioned capacity. Could we just have a bit more detailed talk about that? You say in your submission that capacity should always be assessed by a medical practitioner. I guess there is the assessment of capacity when a person is not in a medical situation and often that is done by lawyers?

**Ms ISAKS** — Yes, it is.

**The CHAIR** — Then when they are in a more medicalised setting because of a health issue, it is assessed by doctors and could be at a point where it is created, and then there is a third point where it is actually activated. Where it is a hospital setting or medical setting, you are basically saying it should be done by a medical practitioner.

Could you just talk to us a bit about what you think should be the elements of that capacity assessment — I note you have got the mini mental that you provided us with, so tell us something about that — and also what kind of medical practitioners would be most appropriately engaged in those processes?

**Ms ISAKS** — The mini-mental test is the very basic test that indicates someone's understanding or capacity, but it is by no means hard and fast.

**The CHAIR** — Who would administer this?

**Ms ISAKS** — Our nurses do that on admission, and we do that from a point of view that we have a benchmark so that at any given point in time we can say, 'On this date the mini-mental test resulted in this' and, 'On this date the mini-mental test resulted in 10 points less'.

**Ms SCHWEEN** — I just want to point out that that is widely used across Australia, not just here.

**The CHAIR** — Yes, we are familiar with it.

**Ms ISAKS** — The mini-mental test, as it stands, does not impact very well with CALD clients, and that is the major issue. There are other tests that can do that, like the RUDAS — you may well have heard about that as well.

We believe that even in the community it should be administered by someone who knows the client well — a medical practitioner — or someone who has a skill base in determining capacity, and that could be either a geriatrician or a neuropsychologist. I suppose the difficulty we have in the community is that accessing geriatricians and neuropsychologists is particularly difficult because unless the client indicates that they consent to do so, it is impossible to get someone to undertake that assessment.

**The CHAIR** — Do you think there are problems with the GP doing it?

**Ms ISAKS** — We certainly think that there are issues with GPs. Some of them are not particularly keen on undertaking a capacity assessment, and Leonie might talk a little bit more about that in terms of how the capacity needs to be viewed in terms not of what the client cannot do but what they can do. I think I got that right.

**Ms SCHWEEN** — No.

**Ms ISAKS** — Anyway, I will get Leonie to talk to that.

Neuropsychologists and geriatricians certainly have the greatest skill. We believe that people who are our staff could be trained to do it because in some ways they know their clients really well, but it is certainly not part of nursing practice.

**The CHAIR** — What sorts of supports might both your staff and general practitioners need to be able to step up to do this in a way that is more useful, given the difficulty in accessing geriatricians and neuropsychologists?

**Ms ISAKS** — I suppose my understanding would be that the protocol of staff — nurses, social workers — means we do not hold any power to formally undertake a capacity assessment. Certainly if it goes to VCAT, it would request that. It has in its application that our local medical officer, who knows the client, would make a report or that it be done by a neuropsychologist or general geriatrician. I believe our staff could be trained, but that is not for me to answer.

**The CHAIR** — There is nothing in place at the moment that would enable some training to be done so that a person could administer something that is more than a mini mental and that would stand up before VCAT?

**Ms SCHWEEN** — No, that is not within our nursing staff's qualifications.

**The CHAIR** — But what you are saying, as I understand you — and I do not want to put words in your mouth — is it would be of advantage if something could be set up to support them?

**Mr VIDO** — Certainly.

**Ms SCHWEEN** — Something officially recognised?

**Ms ISAKS** — Yes.

**Mr VIDO** — We have a very skilled and professional workforce. If there were appropriate protocols and requirements, I am absolutely confident that staff within our organisation could be trained and educated to carry out that function.

**Mr FOLEY** — Just to follow up on that earlier question about education, you got to the need, but do you have a particular view on who should be targeted and what with, in any attempt to prioritise an education campaign, from the RDNS's point of view? Who would you target and what would be the information?

**Ms ISAKS** — Do you mean RDNS taking on the role of educating not attorneys but our staff?

**Mr FOLEY** — For anyone in the whole sector who deals with this area, where would you see the priority for education? I think earlier you talked about seeing the need for health professionals to be a bit more on top of it, but where do you see the need in particular for training and in which particular aspect?

**Ms ISAKS** — I think RDNS is particularly well set in the fact that we have a training institute as part of the RDNS and there are frequent training sessions for our general purpose staff and the field staff, and that is undertaken by professional educators. So that does already occur. But we would have to come back to this process of staff being given due process to do that, to take it any further than that, I believe.

**Mr VIDO** — Your question is about population base — who in the population should be targeted for education.

**Mr FOLEY** — Yes.

**Ms SCHWEEN** — The earlier submission suggests it is more the clients who need to be educated about powers of attorney and perhaps encouraged.

**Ms ISAKS** — Clients as well as the attorneys.

**Ms SCHWEEN** — As the persons holding any power.

**Ms ISAKS** — Yes, the attorney. I think our response has certainly been more about the attorneys, but clients also, and awareness. We need to have a public awareness of the process and the importance of having powers of attorney at a time when people have capacity to give it.

**Mr VIDO** — I am just wondering if we could take that question on notice.

**Mr FOLEY** — By all means.

**Mr VIDO** — We are very well connected — and one of them is here today, who you are going to hear from next — in terms of organisations that have a very immediate interest and represent key stakeholders in this whole discussion. I would not mind if we could perhaps come back to you with a response to that question.

**Mr FOLEY** — Of course.

**The CHAIR** — We are out of time and in fact a bit over. Thank you very much for your time this afternoon and for preparing your submission. As I said, you will receive a copy of the Hansard transcript and you can make some minor editorial changes to that. I hope you will be open to Kerryn and/or Kerry getting in touch with you to follow up with the material that you just indicated you will forward.

**Mr VIDO** — Can I just say that we very much welcome this inquiry, we were happy to provide a submission and we are very grateful for the opportunity to appear today, so thank you.

**Witnesses withdrew.**