

## **Misuse of Guardianship by Facilities:**

4.44 A common theme across multiple submitters, was that guardianship orders are often misused by disability service facilities or other organisations to streamline or create efficiencies in service delivery:

It is very significant, and yet we have very good guardianship legislation in Queensland that says that the voice of the person and their informal supporter should be taken into account. It often—I would say more than often—does not happen that way.

In instances where a service provider does challenge that guardianship—in some cases it is a hospital. They want to move the person out, they know that there is no other accommodation arrangement, they say, 'We're going to send you to a nursing home', the person does not have a capacity issue and says, **'No, I don't want to go', but they will apply for guardianship anyway just to get them out of the hospital.**

**And if a parent is an informal supporter then quite often if they have encountered difficulties with the service provider and there are restrictive practices involved they will feel the need to seek guardianship just to have that authority—which they should not have to do, because, even though it is not meant to strip authority and autonomy from the person, in effect that is what happens in practice.**

Everyone then deals with the guardian. If the service provider does not like the decisions made by the guardian they will certainly challenge their authority and seek to have them removed.<sup>37</sup>

## **4.45 This experience was echoed by Mr Neal Lakshman of Speaking Up For You:**

**I had a gentleman who was in a nursing home. A social worker put in an application for a guardianship. He [the subject of the guardianship application] never knew that the hearing was on and then when he actually went the tribunal found that he had [legal] capacity. If you do not go, it is all—the other issue with some of the hearings is that of restricted practices.**

**All the psych reports, everything, are put in by [Disability Services Queensland (DSQ)] psychs and [Occupational Therapists] and other persons. They work for DSQ and DSQ wants the person to live in the facility because they do not want them to live elsewhere because it is easier for them. So the information going into the guardianship hearing is by the same organisation or place where you are going to be living. I find that quite problematic.<sup>38</sup>**

4.46 Other submitters presented evidence that the guardianship system is managed in favour of the needs of service organisations, instead of the needs of people with disability or their families and advocates:

Many of our clients report that their doctor also has a professional affiliation to the facility or the SDM. This results in a violation of confidentiality toward the person with a disability. Rather than keeping the information confidential to the person with a disability, there is often a strongly perceived lack of impartiality by the treating doctor.

This can result in a report that aligns with the needs of the facility or the SDM, rather than one that accurately reflects abilities of the individual with a cognitive disability, or no report being produced at all.

Often our clients realize this and are reluctant to seek assessment from "their" doctor. It results in difficulties in accessing reports, as often the person in an institutional setting has difficulties accessing another doctor in the community, without attracting more challenges from the institution.

Many of our volunteer advocates spend time trying to access alternative medical reports from another independent doctor. This activity is made more difficult when the SDM is unwilling to pay for a visit or report, which is likely when the purpose of the report is to challenge their authority over the person with a disability.<sup>39</sup>

4.47 In her submission, Ms Julie Phillips wrote that she believed the close working relationship with the Victorian Office of the Public Advocate (OPA) and the Victorian Department of Health and Human Services (DHHS) was 'at times to the detriment of people with disabilities':

However more importantly, the willingness of OPA to provide guardians for people with disabilities could be seen to be assisting DHHS to commonly make guardianship applications against parents, simply when the parents will not agree with something DHHS intends to do to their family member <sup>40</sup>.

4.48 In their submission, Communication Rights Australia and the Disability Discrimination Legal Service presented similar evidence:

...a common mode of response is often a guardianship application made for the individual in an attempt to bypass parents and appoint someone who is more amenable to DHHS/contractors and their decision-making.

Regrettably, this might often be the Office of the Public Advocate Guardianship Program.<sup>41</sup>

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4.49 Moreland Community Legal Centre discussed a number of cases where guardians blocked lawyers or advocates access to individuals:



**Mrs Smith was not proven to be (or accused of being) anything other than a caring mother who was attempting to uphold the rights of her daughter. Despite not being able to find any significant fault with Mrs Smith, she was not given guardianship rights, and they were awarded to OPA.43**

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**4.52 Cheryl McDonnell described to the committee the interactions she had with the financial manager assigned to their daughter:**

**Our experience of dealing with [Terri's] case manager was that she would make decisions on Terri's behalf regardless of what Terri wanted or needed and regardless of what myself or Terri's siblings wanted for Terri.44**

**4.53 Ms McDonnell described two circumstances in which Terri's guardian was unable to make appropriate choices for Terri, even with Ms McDonnell and her husband being there to advocate and help guide the guardian to what should be a sensible decision with a sensible outcome.45**

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**4.54 In some cases, guardians are improperly influencing decisions relating to medical treatment:**

**We have received two reports from members of the public concerned that the nominated carer/guardian is abusive and that their capacity to influence treating clinical teams formed part of the pattern of abuse and control (such as influencing decisions about admission or discharge and controlling access to advocates) In both cases, the consumers were male and Western Australia has no domestic violence services for male victims of domestic violence, nor domestic violence programs tailored to the needs of mental health consumers.46**

**4.55 One of the more disturbing pieces of evidence is the threat of forced public guardianship as a means of enforcing silence and compliance on those families or individuals who are deemed to be 'troublemakers':**

**Young people with disabilities and/or their families who make complaints to disability service providers about abuse and neglect are often ignored or ridiculed. Many are categorised as troublemakers, as unnecessarily combative, or even mentally ill, for refusing to withdraw complaints about poor treatment.**

**Some are told that if they do not withdraw their complaints, the service or government will apply or challenge for guardianship so that they can have ultimate decision-making**

control over the young person's life.<sup>47</sup>

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**4.56 Youth Disability Advocacy Service related the story of "Jack" and how the coercive threat of guardianship was held over him and his family:**

**"Jack", a 17-year-old male living in a Community Residential Unit, who has autism and uses non-verbal communication, was one-of-two people allegedly sexually assaulted by a new co-resident with a well-known history of sex offending, not long after he moved in to the Unit.**

**The families of the existing residents made multiple complaints to the service provider and to the DHHS about the inappropriate placement before the alleged assault took place, but were dismissed as over-zealous and intolerant.**

**"Jack's" family were not informed by the service provider about the alleged assault but from the family of the other victim, who needed medical attention for his injuries.**

**The staff member working at the time of the alleged assault did not take steps to prevent the attacks, hiding himself in the locked staff area. He was not dismissed by the service provider despite admitting negligence "Jack's" family are lobbying to have him moved into more suitable housing but must negotiate these new arrangements with the same DHHS staff who have threatened to apply for guardianship if they persist with their complaints. 48**

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**4.57 Another submitter wrote that guardianship relationships can become overly 'functional' in nature, and guardianship laws are mis-used to gag parents or advocates who complain:**

**From my experience, once a Guardianship Order is made, the person simply becomes a commodity. The 'individual' ceases to exist. That person is stripped of any human rights, freedoms or entitlements to interact within the community or maintain family relationships as they would wish.**

**The protected person and the family and friends are also subject to legal action by the Tribunal if they publicly identify the protected person and their complaints whilst under a guardianship order –essentially a legal gag clause.**

**This outcome was NOT the intention of the legislation of the Guardianship Act nor was it the outcome that the Principles and Guidelines of the UNCRPD intended to achieve.<sup>49</sup>**

## **Committee View**

**4.58 The loss of legal capacity has multiple flow-on consequences, one of which is the appointment of guardianship. In many cases guardianship is a positive protective measure, but in too many cases the appointment of a guardian can have a severe negative impact on people's lives:**

- The guardianship process could be considered an abuse itself, particularly because of the loss of rights it entails.**
- In more serious cases, guardianship could be sought in order to enact abuse or neglect:**
- Evidence has shown that even well-meaning guardians can inflict abuse or neglect through lack of understanding of their role or by being risk averse.**
- The fact that a vulnerable person may be prevented through guardianship arrangements from lodging a complaint is also a form of abuse. In many cases, the prevention of reporting violence, abuse and neglect leads to the indefinite perpetuation of inappropriate actions.**