



Advocates Discuss: Guardianship and substitute decision making

From June 2022, Disability Advocacy Network Australia ran the "Advocates Discuss" series of fortnightly hour-long discussions via Zoom - creating an opportunity for interested advocates to take a closer look at and speak about a number of key topics emerging in the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission or DRC) and its examination of abuse, violence, exploitation and neglect. Participants were encouraged to share their insights, observations, stories and case studies, and the discussion questions each week included opportunities to share perspectives on what recommendations advocates would like to see being made by the DRC, in relation to the topic in focus.

Identifying details have been removed from the edited transcript below. Participants in each session are identified as advocates from their state or territory, and are also numbered, where multiple advocates from that jurisdiction took part. Participants were informed that sessions would be recorded to capture their insights and observations. Care has been taken but errors may exist in the transcription.

DANA would like to acknowledge the Traditional Owners of the various lands around Australia from which advocates participated in these virtual meetings and pay our respects to Aboriginal and Torres Strait Islander Elders, past, present, and emerging.

DANA would also like to acknowledge the time and generosity of participating advocates from a diverse range of advocacy organisations around Australia, and the funding of the Australian Government Department of Social Services for DANA to provide DRC systemic advocacy support. Visit www.dss.gov.au for more information.

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Transcript from discussion – 20 June 2022

Mary Mallett:

We will get started because we've just got an hour and other people might join as they can.... I'm Mary Mallett, the CEO of DANA, and I'm based in Hobart. I acknowledge the custodians of the land that I am on today and extend my respects to their Elders past and present and to the Aboriginal custodians where you're joining from today.

This is a part of the series that DANA is doing about a whole lot of issues that are relevant for the Royal Commission work. Siobhan is our Royal Commission Policy Officer and she will take over for most of today's meeting. I will just get us started.

We have a series of topics. If you haven't got the information about that, you can put something in the chat and we will make sure that we send them to you. You can use the hand thing if you can, when you want to speak and we will call on you, but also put things in the chat and when you speak, it would be good if you introduce yourself so that everyone else knows what organisation you're from and where you are.

Siobhan Clair:

Hi, everyone. The topic for today is guardianship and substitute decision making. We know that advocates have a lot to say on this and there were some advocacy organisations involved in recent round tables held by the Royal Commission both around supported decision making and guardianship and how we can build a system for... an improved system for the future. Today I think we would be guided by wanting to hear from advocates about the problems on the ground - we know that there are a lot of them - potential solutions, good practice and how we build models of better practice, but then there is what is the role of advocates, because we know that... already independent advocates often play a role of informal support in making decisions because there is a lot of respect for people's will and preferences and this is sort of a guiding principle of a lot of the advocacy work that everyone does, but how do we fit independent advocacy into what we envisage for new models of decision making and representation of the will and preferences of the decision maker with disability.

So we might start off with do people have stories or examples that they want to share first-up about how guardianship has been working?

Mary Mallett:

Or not working.

Siobhan Clair:

Or not working, yes.



[QLD Advocate 1]:

Sorry I'm late, but I work with a few public guardians and that was a very disappointing experience. The public guardians, unfortunately, first of all, they did not want to talk to us. You know, they were not really interested with the information that we can share, with the opinions... we are working with the people basically on a daily basis, so we know the people [under guardianship] quite well. The public guardians often don't have an opportunity to even meet the people sometimes, but they were not really interested in our involvement. They were even obstructing our involvement as much as they could. In one of the circumstances, there was a big problem with the service provider which was chosen by the public guardian against our suggestion and when we were trying to change the service provider, then the public guardian did not want to talk to us without the service provider being present there at the meeting, so they totally refused to talk to us about the service provider.

In another circumstance, it took me over a year to change the service provider for the man who is on SIL (Supported Independent Living) funding, and it was very obvious that the service provider is not doing the right thing. The participant, he was voicing very often his willingness to change the service provider. There was a lot of complaints and the support workers sleeping during the shift, they... not allowing him to come to the staff bedroom. They don't want to go anywhere. They are rude to him. They are taking the air conditioner control off him because he is putting the temperature too high. They were not providing interpreters so he couldn't communicate with the staff and there were constant complaints and we were sending complaints every time, every week, and it took a year to change the service provider. So my experience with public guardians was not very positive. At one stage just recently, [the public guardian] basically said that he is not giving permission to the advocate to be involved, and because that was outside of the catchment area, and I was trying to refer the person to a different organisation, then I know that the organisation did not really challenge the decision, but, yeah.

Siobhan Clair:

Thank you. I know that there's been a lot of media around Queensland with the Four Corners report around Public Trustees and guardians. We will go to Tasmania where Advocacy Tas has been doing brilliant work in raising these issues and campaigning on them.

[TAS Advocate 1]:

Thank you. I'm [from TAS advocacy organisation] and the system in Tasmania is broken to the point where we have had to get fractious and downright aggressive with a public media campaign to achieve any sort of change. In Tasmania there is no



supported decision making structure. There is no legislated structure, there are no programs beyond standard NDAP [National Disability Advocacy Program] and State disability advocacy. So there is no support or you are have substitute decision making. It is very, very rare for us to see guardianship orders that go in place... anything short of full guardianship.

We've had really severe systemic issues since the start of COVID, particularly coming out of the hospitals, that there has become a standardised pipeline where in... somebody who is an older person or a person with a disability will have some sort of medical incident, usually this incident is totally unrelated to the nature of the disability or impairment. So, for example, it might be someone who has a psychosocial disability who has a fall. They will go into hospital for that, and the hospital will then refuse to discharge them and will apply for an emergency guardianship order. In Tasmania there is no legislated requirement to provide proof for an emergency guardianship application. There is no burden of proof whatsoever. So until very recently and even still, people get put onto an emergency guardianship order, and there is also no requirement to advise the person that there has been an emergency guardianship application made in respect of them, so what has happened very frequently with our clients is that they come to us months after the fact where they finally find out that they no longer have control of their own lives.

We had one poor fellow whose case has been very public who was put into a residential aged care facility. He was told it was for respite. It turned out that they gave up his tenancy and sold all of his life's belongings without telling him, and it took him months to find out. We're still trying to get him control back of his life. It happened to my uncle. It's just so common that almost everyone in Tasmania knows someone who has been through this process now. Once someone is on an emergency order, there's 28 days within which you can appeal, but the process takes longer than 28 days. The person isn't aware they're on an order and it gets transferred to an ongoing order and then you have ... a burden of proof to get off the order, which is beyond most people who then have no control of their day-to-day lives or finances, so they can't get access to the funding to get the necessary therapies and supports and reports to get the evidence to get off the order.

Functionally it is a one-way pipeline that people... are not told about. There are some pretty devastating human rights abuses involved. Obviously, I gave a pretty extreme example before, but that baseline day-to-day lack of dignity, you know people come to us because they have just found out that they've got a guardian, they didn't realise, and they may have been on that order, sometimes they may have been on for a year, never heard from the guardian nor... never met them, there's been no communication,



so how can that person be saying with any sort of a straight face that they are acting according to the person's will and preferences. They can't, they don't know that person.

We've been doing a lot of work with our tribunal. They have put in place processes where they're holding hearings for emergency guardianship applications. They are asking for evidence. There's been a slight decrease in the number of applications because of it and there's been an increase in the number getting rejected, but the fact is that none of those are legislated obligations. They can disappear as quickly as they have appeared. They're not actually addressing the problem. None of that addresses the fact that there's no supported decision making in the first place - that needs to exist and it doesn't exist.

Siobhan Clair:

Thank you. Going over to [NSW Advocate 1] now.

[NSW Advocate 1]:

Yeah, I haven't sort of dealt sort of recently with too many... guardianship-related issues, but I recall working for a previous employer and an instance of guardianship, and it was the public guardian in New South Wales that had guardianship for a very good example. A woman found out late into the matter that she had, in fact, had advanced dementia and one of her sons came to us to say that she really wants to ... go back home and leave the nursing home where she was currently... a resident, and getting ... further into the matter then sort of discovering that she did have advanced dementia and the two brothers I don't think were ... even talking to each other. I mean, there was obviously a degree of hostility there. So in that case where you have a dispute amongst the people who were sort of closest to the client, then... I guess that having an organisation like the public guardian being able to sort of step in strikes me as better than any alternative, although certainly some things that [TAS Advocate 1] ... talked about in Tasmania sounds ...scandalous, but when there's a dispute in the family, or if a person is probably vulnerable to somebody being able to sort of latch on to their finances and so on, yeah, having a sort of decision, financial decision maker, seeing if it's better than the alternative, that's said, guardianship and financial management are certainly not fabulous choices by any means, but I think they need to serve a particular purpose, need to be definitely constrained in terms of the time period and what the managers can and cannot do, so, yeah, that particular example stood out, I guess...

Siobhan Clair:

Yeah, thanks. I haven't gone right through the transcripts from the recent round tables that were held, but I think that mediation issue came up as being used in some



jurisdictions, if you have two family members representing the interests of the person - varies a lot. Going over to [VIC Advocate 1] now.

[VIC Advocate 1]:

Hello, everyone. We're based in Victoria, metro Melbourne... We do have the Office of the Public Advocate. That's our public guardian. And... the legislative framework in Victoria that – VCAT [Victorian Civil and Administrative Tribunal] appointed guardian must adhere to.

They also have an investigation stage. Often when there is a guardianship application what we can ask VCAT to do is to appoint the Office for the Public Advocate to investigate to see whether a guardian is needed. We can't always guarantee for the person with disability that we will get them the outcome that they want in terms of whether VCAT will appoint a guardian or not, but we can at least put that step in. I think that's a positive because quite often - and it's a different team at the Office of the Public Advocate. There's the investigation team and the guardian and advocate team, so they're two distinct teams. So there will be an investigation and that investigator speaks to all people involved in that person's life, including the person with the disability. I think that's a very positive aspect ... to have and it gets some good results.

They then submit a report to VCAT at the end of the investigation period [and] VCAT will make a determination. It may not fit still with what the investigator says, but it does have a strong influence on outcomes. Guardians are limited to their areas of authority, so decision making and their areas of authority, and in Victoria that is 'access to the person', accommodation, so where a represented person may live. It is with whom the represented person may reside. So access to persons would come into - there are exploitative people, people that are harmful to the represented person. The guardian can make a decision that individuals can't have access to the representative person. They are required to take in the preferences and will, legislative requirements of the person. So how well it is done... I don't know, if it's consistent all the time.

I think one of the biggest issues is for both the investigation team and the guardian/advocate side of things, is that resources, what we all face, they are also faced with these resource challenges and there are long wait lists, even where there's an urgent application, there are long wait lists, so that's a challenge and it can sometimes mean that a person has been - VCAT is appointed guardianship, but they are waiting. You can call the Office of the Public Advocate to make a decision, but they're interim decisions and sometimes they won't say... they won't make the decision until there is someone to pick up the case and we could be waiting months, absolute months, for an 'Advocate Guardian' to be appointed.



Some of the biggest challenges we see, which others have mentioned, is when there is a family member who is exploitative and abusive of the person with the disability. I have seen incidents where these are sometimes [people] who are quite manipulative and can present as acting in that person's best interests and they're not. They're good at presenting that to the GP. We will see that those family members have the same GP and they can have a lot of influence over whether that GP will fill out the paperwork to say that person with disability needs a guardian or doesn't need a guardian. That's problematic.

In fact, we have had discussions where a GP is refusing to complete the medical report and here we have a person [who is] disabled where services believe that the family members are being exploitative. It's not our role to say whether that's happening or not, but they can't get to stage one because VCAT will not accept an application or hear the matter without a medical practitioner saying that the represented person lacks capacity. That's very important to have that. We've got these situations where there's exploitation and abuse taking place.

We also see issues where there's 'non-compliance' and these are the terms that are used by 'Advocate Guardians' often - non-compliance by the represented person to remain in the accommodation setting where they've, perhaps, been directed to live or to not engage with those that the guardian has decided shouldn't-- have access to them. What generally happens, and I don't know why they do this, but these are people who really need an 'Advocate Guardian', and we as advocates, disability advocates, are trying to support them and get their wishes expressed to their guardian. They do often... more than not, need some protection. Where there is non-compliance, we often see the public guardian withdrawing. They will say "There's no use us being appointed because they won't comply with what we want".

There's also an issue of... an overlay of family violence orders. The 'Advocate Guardian' then needs to go to the Magistrates Court to make an application for an intervention order at times for their authority [over] decision making to be recognised. They can make a decision. 'We would ask that you don't access this person with a disability', but if that person decides that they are not going to comply, they will keep visiting the represented person causing further harm and in order to stop that, they have to go to the Magistrates Court. So there's these gaps where the authority of the guardian isn't sometimes recognised, but there are also gaps of when the represented person is deemed as being 'noncompliant'.

I've seen cases where there has been an extremely abusive person that becomes quite controlling and doesn't listen to the guardian and will even write from interstate and try [to] remove that represented person interstate, and the 'Advocate Guardian'



has the power within the legislation to prevent that person travelling interstate, to put a watch at train stations, airports, et cetera, and for police to come and turn that person back around, but they get to that point, they say they're going to do that and then they go, 'We don't want to go that far', so sometimes they're not utilising their authority where they can. I find that quite frustrating because [this] person that will come to great harm if they move interstate because the jurisdiction doesn't follow. There's no cross-border jurisdiction. An application would need to be made interstate for guardianship to be appointed interstate for that person and then you've got to hope that you can find them. There are some issues there.

I know that family violence orders now are Australia-wide, so, perhaps, that's something we need to see following suit that at least there's some point of contact interstate to say that we've got this.

I guess there's some things of what works well and what's not working well in Victoria, based on what I've observed. I'm sure there's a lot of other things that I haven't experienced that other people from Victoria might be able to comment on.

Siobhan Clair:

We might just have a short break for the Auslan interpreter because we only have one today. [...]

[QLD Advocate 2]:

Hello. Good morning, good afternoon, depending on where you are. I'm [QLD Advocate 2], I'm based in [QLD city]. I am reasonably new to the formal advocacy role and I'm actually here in this workshop to learn, so I have a couple of contributions. Basically one of the things [VIC Advocate 1] addressed is what we discuss in our office, there is a lack of an advocacy role in general, and that would relate again to - it would be great if advocacy would be recognised in every State the same or a national policy so we don't have issues of... advocacy means something different in every State. My question was how far away are we from addressing issues like... that we have different guardianship policies in different States. Just for my personal background, I come from Europe where we do [not] have individual States, in [my country], these are nationally looked at. This whole issue of every State has their individual issues seems very complicated and that's how things are done here, but is there anything that we can do to move this forward. I know it's not addressing the nitty-gritty bits, and we're talking of a long-term approach, but that would be something that I would flag and I would like to know more about this how we can progress the collaboration and what [VIC Advocate 1] mentioned about if people move interstate, what happens with the guardianship, the Public Trustees, but the administration, how that works. So that was one issue.



With regards to examples for guardianship, my role is usually not in that area. However, I have a case that I'm working with right now where I'm actually struggling because of the issue of how far can or should an advocate go in regards to duty of care around advocacy. I'm actually on the other side like you mentioned, that I'm trying to get a vulnerable person a public guardian because of the abuse and neglect that happens from within his kinship area, and it is really hard for me and it's a very long process because the decision-making on how far to go and how to intervene is really troubling for me on a personal level and that is something that I wanted to share.

Siobhan Clair:

It is hard to get reform happening in this area. We had the big Australian Law Reform Commission Inquiry report in 2014. That was really looking at Commonwealth laws and really trying to get all of this stuff and all the reforms happening. It is a very slow process in that federal structure. We will go to [TAS Advocate 2].

[TAS Advocate 2]:

I just want to speak about a prior experience in another organisation. [TAS Advocate 1] has spoken about the issues in Tasmania dealing with the public substitute decision makers, particularly the Public Trustee, and my experience that I've had previously touches on what [NSW Advocate 1] and I think [VIC Advocate 1] were talking about with significant issues with family members and elder abuse in respect of family members acting as the substitute decision makers and the absence of somewhere else for these people to go because of the significant issues that exist with the Public Trustee, for example. So there is and was a real problem in that you remove the family member or seek to remove the family member, but is it a better option for that person actually to go to the Public Trustee, which was a really difficult decision, and I think as [TAS Advocate 1] touched on is that the issue comes from the legislative framework which is best interests decision making and that's really difficult to challenge.

And the experience that I had in my previous role was that it was very difficult to get a family member removed as the substitute decision maker and there was a real absence of anyone who did any investigative work, so I was interested to hear [VIC Advocate 1] talk about the dual role in terms of investigation, and I think that is lacking in Tasmania, that the older person would make-- have concerns about what was happening to them - that they had very limited ability to actually produce evidence before the Guardianship Board because the issue came down to their capacity and the medical evidence was that they lacked capacity, so they needed a substitute decision maker and I came across no cases in the time when I was in my other role where someone was able to remove the decision maker even though they were not taking into account the express wishes of the person because it couldn't be



demonstrated that substitute decision maker was doing anything wrong under the legislation because of that focus on best interests. So I think in Tasmania we are really hamstrung by our legislative framework and also the practical operation of the government, the Public Trustee as an alternative place for people to be referred to. I think that's all.

Siobhan Clair:

Thank you. So what some of the things that have been discussed, you know, obviously, there is this need under the Convention on the Rights of Persons with Disabilities to really realise supported decision making as something that is actually there. We know a lot of advocacy organisations have been involved in pilot projects and DANA has been on this advisory group for a paper that is being commissioned by the Royal Commission around ... developing a framework, a practical framework ... the principles and the ideas of supported decision making and making that a reality, which enables people with disability rather than having these decisions substituted, are supported to make the decisions themselves and their will and preferences are interpreted through that process, but figuring out the practicalities of how this works and also all the different reforms that need to happen across different sectors, whether it is in banking or the NDIS or all these things where you're expected to have one representative that can legally say... and authorises different decisions.

I guess we would be really interested to hear from advocates about what role the independent advocacy sector can continue to play both in educating people about supported decision making, providing an oversight or safeguarding of decision support and also whether that role of, can advocates play a formal or even informal decision support role, we would be interested to hear your thoughts in trying to move away from what we have now to something better. I think we've got - [TAS Advocate 2]? We have [NSW Advocate 2] and [QLD Advocate 3].

[NSW Advocate 2]:

From our perspective, the main issue is the lack of parental or family involvement when there is care happening. We've had quite a lot of examples where the - I think you're saying in Tasmania there is no burden of proof and the service provider or even the social worker in the hospital can make an application and get public guardianship. The family doesn't get told about it. If you're on the form as an applicant, that's the only person that gets told about the proceedings that are occurring. So the family members aren't being consulted. They don't know the date that it's even happened. Public guardianship can happen and they don't know.

They're having to quickly rush to make their own... when they're forced into it, when they don't want it, or it's already happened and they can't get access to the person at



all and then they get forced to move far away from the family without any choice, and even when families then have to move to be closer to their loved one, they can't get access to that person, like physical access, even if they phone in to check in, they can't get access because the staff say "only the public guardian can speak to them". We've asked the public guardian this and they say 'it shouldn't be happening', but it's happening. When we... go to the Ombudsman or the official community visitors, both of those avenues are usually "We can't help you". We hear this a bit, families are involved in their child's life, but when that child becomes an adult, there's no information flow. Often it is the family member that is assisting in that and can help especially where there are communication devices involved and eye gazing and the family knows that person really well. That's one issue.

The other is that the public guardian appear to be making decisions without visiting or knowing the person at all. I think that's already been said. I don't think I need to elaborate on that one. Then there was an example in the news where a young adult was in hospital. She had had an outing with her family and decided... she chose to stay at her parents' house that day, at the family home, and police were called by the provider to go and forcibly remove her from her parents' home where she wanted to be, and it was really traumatic for her. So not talking about the voice of the person, it's more about process rather than the substance of the whole purpose of guardianship, and its intent is to protect and safeguard, but it's almost like that they're following the rules for the sake of it. That's another issue.

Then this issue about having that extra step, I quite like that idea, where there is some investigation, because that will force some consultation with what we call 'circles of support'. We need some kind of... another lever where alongside teaching people about... as an advocacy sector, about guardianship, we obviously at [NSW advocacy organisation] are against it as an idea, that freely given relationships are the safeguards for a person who is vulnerable. We try to avoid it at all costs because it is a slippery slope, as you've all shared in your various examples. If there's some way of putting forward that it needs to go beyond this process-driven system where it becomes very much about paperwork and rather than how do we really help support this person that's vulnerable in society and that's... making sure that they're seen and heard and how do we do that, and we do that with relationships, so how can we teach that and promote that, how do we get those circles of support. If it doesn't come freely, then how do we consciously create that.

There's one other example which is the other extreme where there was a young lady who was in a group home for five years ... had no concerns and no particular reason to connect with the public guardian and she was non-verbal. She had no formal method of communication or literacy or monetary skills and so she was supported by



the staff that were there, and the public guardian determined that because there was nothing that had popped up over five years, they would withdraw guardianship, even though she had nobody in her life except for the staff in the group home, so that's a bit concerning because, clearly, they didn't know her at all.

That's really one of the main issues... I think [VIC Advocate 1] was saying that the resources are an issue, that there's been a massive, in recent years, defunding of the public guardian, so what's happening with that... so I think they can't get to all the people that they have guardianship orders for, and they're making orders about drugs that people are taking so that a person, one person was very incapacitated because of drugs he was forced to take because of an order, and his father hasn't been able to visit him at all. There's been some kind of court order that the father knew nothing about, that he can't be visited. There's such an imbalance of power once it happens, and as you're saying, the burden of proof is not there to get in, but a massive burden of proof to get out. Just slipping through the cracks... what happens to these people with limited literacy and communication?

Siobhan Clair:

Absolutely. [QLD Advocate 3].

[QLD Advocate 3]:

Hello, thank you. I agree with everything [NSW Advocate 2] just said and the others too. I'm in Queensland. One of the biggest issues that always shocks and surprises is the widespread systemic lack of understanding about how to determine capacity... about what capacity is under the legislative framework, that it's time and decision specific. I can't believe the conversations I have with specialists at Queensland health, with geriatricians, with people that are writing the reports that support these guardianship applications, either by the government through the departments or by service providers that have never heard of the Capacity Guidelines,¹ that have no idea where to find them, don't even tell people that they're doing a capacity assessment when they're doing it. A complete fundamental lack of... I think it's discriminatory and I think it breaches the CRPD, and it's supported nationally. We also see it at QCAT. We see a really diverse scholarship of members. In a hearing recently one member asked me if I was 'kicking the guardianship can down the road on capacity'. Just really shocking stuff. So my biggest issue there with - of course, the funding is just a constant issue, the funding of the supportive organisations like the public guardian, the funding of disability advocacy and other advocacy services to help the individual to truly take

¹ Queensland Capacity Assessment Guidelines (2020) – access here: [Guidelines for assessing decision-making capacity | Your rights, crime and the law | Queensland Government \(www.qld.gov.au\)](https://www.qld.gov.au/your-rights/capacity-assessment-guidelines)



on a supported decision-making role where that role is appropriate, whether that's by an informal decision maker or by a family member or by the public guardian.

I think maybe funding is the reason, but maybe it's also just a fundamental lack of understanding about what capacity is that enables Public Guardian in Queensland delegates to take a bit of a tick and flick approach to supporting the person, and calling it supported decision making when it is really substituted decision making. That would be my perspective.

Siobhan Clair:

Thank you. [VIC Advocate 1].

[VIC Advocate 1]:

Just a few additional things. Once appointed by VCAT the guardian remains involved whilst the decision needs to be made – [their role and] advocacy is not ongoing. For example, if it's the decision needs to be made about accommodation, once that decision is made, they will stay involved for a little while after, possibly for the term of the order to make sure that things are tracking okay. Then it will be handed over to I monitoring team, but guardianship - the guardian will then withdraw, and if a further accommodation decision needed to be made, then the matter needs to return to VCAT for a guardian to be appointed again. You get into a blurred area of when is guardianship needed as opposed to substitute decision making. We have found some services, especially where there is a person with disability with behaviours of concern presenting in accommodation, they may totally disregard that there's been a guardian involved previously, and to make the best interest decision about where that person should live, and they may do some moves, move that person to another setting without there being any - without ... being involved.

I think that disability advocacy can work well alongside guardians because we do know ...often we know that individual quite well and we come with an independent view. We're not on the family side, we're not on the service provider side, we're they're for the person with the disability. We may not always be right, we may not always have the information that an investigator may have access to. However, at least we have some insight that is more impartial than some. Other people who are carrying their own agenda.. the legislation of Victoria requires the least restrictive measure must be followed. So when the guardian is making a decision, it must be the least restrictive, and so we are able to represent a person at VCAT to say is there a decision that needs to be made and can this decision be made in a supported decision making method, which I've had with clients at VCAT, and to allow that represented person an opportunity to show that with support they can make good decisions for themselves without stepping immediately into guardianship.



I think that's a very important condition to have in legislation, that it must be the least restrictive measure that is imposed alongside taking into consideration the wishes and desires of the represented person. So those two factors are really important in legislation. Guardians here do not stay in an ... they will write their final report to VCAT and say they're withdrawing and sometimes they go back to VCAT earlier to say everything is going well, there is no need for them to be involved. That pretty much reflects their capacity to take on the long list of people that may require a guardian. It also takes into consideration the human rights approach, which is that why does someone need to have a guardian making every decision about their life? To me it's the decision that needs to be made, what is the decision that needs to be made? Can this individual with support make that decision, do though actually need a guardian to make that decision for them. Capacity is around that. What is the decision that needs to be made? We have had investigators coming back with a finding in terms of financial administration that this individual may struggle with financial decisions over \$5,000 but they are very good at managing their day-to-day finances and have done, and it may not be in a way that everyone else likes - they do it day-to-day, they can manage their pension, paying their bills and do those things well. It's only when there's a larger more complex financial decision where support needs to be made, so where you would need a substitute decision maker.

I think that's the big question around capacity, what is the decision being made, because quite often people are under-estimating people with cognitive impairment to make a decision. It seems to be you either can make decisions for yourself or you can't. There is a world of decision making - full of grey. It's not black and white, and I think that that's really important and that's where disability advocacy comes in because we request support for those people where it's an access issue in decision making and help them to find other people in their lives that may, the circles of support, that do act in their best interests... who else, Because we say 'who else can you ask? Who is a person you trust and you feel safe with?' Disability advocacy can help foster those.

Siobhan Clair:

Thank you, [VIC Advocate 1]. Some great points there. [WA Advocate 1], just in our final few minutes.

[WA Advocate 1]:

I am from WA. We're the only advocacy service in WA that has a dedicated SAT [State Administrative Tribunal] service or advocate, so that's all I do. My colleague is just coming on board now and I'm training her. It was a project brought upon by the restricted practices and our office of disability here has extended it for a further 18 months. It was initially only a one-year project. A lot of the stuff that we are seeing is



human rights and is people particularly with intellectual disabilities and acquired brain injury or traumatic sort of cognitive functioning injury.

Coming back and saying 'why wasn't I told that I could have representation?', 'why wasn't I informed about what this means', so we're finding that a lot of applications are being made by service providers when they should never have been made. We're finding that service providers are weaponising applications because people are choosing to take their funding elsewhere and in some of those situations people have been in very vulnerable situations and dangerous situations and the service provider has chosen to do nothing until the individual has decided to move their funding to a different provider. So that's something that we have got a lot of. Our legislation is quite old. It is from 1990. It is based in best interests. We work in a pure advocacy model, so we are there to represent exactly what the individual wants. It's taking quite some time to build a relationship with our Office of the Public Advocate because they work in the best interests model.

However, I think we have seen the change of culture within our Office of Public Advocate which has been really pleasing and really positive, so we are actually getting referrals from guardians now for individuals and recognising the need that individuals need representation and should have access to representation if that's what they want. So we're working with the guardian. We're seeing short orders.

Unfortunately, we don't have what they do in Victoria where it's only issue by issue, we are – instead, seeing five-year orders, which is the maximum, we're seeing one or two-year orders. The members are running the hearings as a conversation more often than not. The person is at the centre of that conversation and that they are really trying to hone into what that person wants and trying to make them feel as comfortable as possible and recognising that it is a threatening environment and it is intimidating and uncomfortable for a lot of people. In that respect it's been really positive.

There's still a lot of work to do. Especially culturally, we have got quite a strong partnership with the Aboriginal legal service here in Perth, so we get a lot of referrals from them as well, and like everything in the justice system, unfortunately, people who are from an Aboriginal or Torres Strait Islander background or from a CALD [background] are over represented. Their orders are quite punitive. People won't understand the need for it so they go to SAT and get angry and then they will end up with a list of orders as long as your arm.

The other disappointing thing is that we have found just through our data from running this project for 18 months now is that if you have an advocate, your outcome is going to be far better than if you don't. Disappointingly, we've had individuals who have gone



ADVOCATES DISCUSS



through their original applications, asked for a review of the hearing and appealed that, and they've had the same outcome. We have gone back with... representing them and they've had their orders revoked. It is... sad that it sends a message that "We won't listen to you unless you have representation".

Siobhan Clair:

Thank you. I think we should probably wind up and not run too far over time. So thank you for all the interpreters and for everyone's excellent contributions, including those who put comments in the chat. Feel free to email me. I will be putting this together as a de-identified submission to make sure that advocates' perspectives are being heard on this topic by the Royal Commission. So thank you, everyone, for coming.

END OF MEETING



Comments In Chat

[TAS Advocate 1]:

To put it brutally, many of our clients have told us outright that they'd rather be financially abused by a family member than financially abused by the Public Trustee. There must be safeguards that can be implemented short of substitute decision making in its current manifestation.

[TAS Advocate 1]:

Further to [TAS Advocate 2]'s comments about the best interests approach- recently the Tas PT [Public Trustee] started setting up a "customer reference group" after a great deal of public pressure- they thought an acceptable form for a customer reference group was a group of service CEOs plus one or two actual customers, who had been given no support to understand the purpose of the group, to prepare, or participate. There is a fundamental lack of understanding of people's support needs built into the culture of the people making decisions about those supports.

Putting people with reduced capacity in the power dynamic of sitting at a table with service CEOs, to ostensibly provide feedback about how those services were letting them down and abusing them, without preparation or support was actively traumatic for those people.

[WA Advocate 1]:

In WA families have been educated prior to NDIS that once their child turns 18 that they have to have a Guardian. We are providing education that this is not the case and that individuals families and service providers need to be learning about and implementing Supported Decision Making, sadly many people still have not heard of Supported Decision Making

[WA Advocate 1]:

There needs to be some threshold of when a new application for Guardianship and/or Administration is submitted. We see so many that once they get to a hearing are revoked. This creates trauma for the individual and puts further pressure on a system that is already at capacity

[TAS Advocate 1]:

[WA Advocate 1] agree the intersection of NDIS and guardianship is deeply fraught. We often see a guardian being given "limited" decision making power over a person's NDIS plan but no other part of their life- but having control of a person's NDIS plan puts the guardian in control of where they live, who they live with, what they do day to



day, what therapies they receive and who they receive them from, what assistive technologies they use. Although there's technically the power to appoint partial nominees for only certain types of support, so the guardian's "limited" power could actually be limited, we've literally never seen a partial nominee appointed.

[VIC Advocate 2]:

There are times that NDIS are pushing guardianship to proceed with plan reviews - A very restrictive approach

[WA Advocate 1]:

Yes, NDIS tell service providers and families that in order to get NDIS an order is needed - we even had a Planner direct a Support Coordinator make application - this was without any discussion with the individual or their family and funded through the individuals plan!

At the Hearing it was found that there was no need for orders however the individual and their family chose orders to protect themselves from NDIS and service providers!

[WA Advocate 2]:

There is a need to ensure that Advocacy is not by default doing the "home work" that the appointed Guardian should be doing. Especially if the Guardian appointed is a Public Guardian

I have concerns that when a Public Guardian is appointed there is an over reliance on service providers with a conflict of interest

[VIC Advocate 1]:

Yes have to agree with what [WA Advocate 1] has said about service providers weaponising guardianship applications against a PWD [person with disability]. We receive many calls from service providers asking us to make an application to VCAT. We decline saying our role is to advocate for what the PWD wants (that is they may not want a Guardian and our role is to help the PWD to express their views to the tribunal. We also state you need to let the PWD know that an application is being made.