

Advocacy Tasmania

Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability on Guardianship and Administration December 2022

Table of Contents

Introduction	2
Our advocacy work and background.....	3
The loss of agency and choice.....	5
Deidentified Client Story: Kate	5
The Tribunal experience	7
Timeframes and natural justice	7
Access to legal representation and independent support	8
Use of expert evidence in proceedings.....	8
Reasons for decisions	9
Emergency orders.....	10
Deidentified Client Story: Beau	11
Deidentified Client Story: Jennifer.....	12
Lack of communication.....	13
Deidentified Client Story: Sadie.....	13
Deidentified Client Story: George.....	14
Review processes	15
Gag orders	16
Where to from here?	18

Introduction

Advocacy Tasmania Inc. (**AdvoTas**) is an independent, client-directed advocacy service that helps people with disabilities, older people, people living with mental illness, and people who use alcohol and other drugs to resolve problems, make decisions and take back control over their own lives. We are in our clients' corner, helping fight the battles that are most important to them, how and where they want us to, while helping build self-advocacy and decision-making skills and confidence.

Far too often, we advocate for people whose lives have been turned entirely upside down by guardianship and administration systems in Tasmania. We also advocate for people who are subject to involuntary mental health treatment orders, informal detention, restrictive practices, torture, and inhumane and degrading conduct, and for people who are denied their fundamental freedoms, liberty, and rights.

This submission is drawn from the collective stories and suffering of hundreds of our clients over recent years, perpetrated by guardianship, administration, and other substituted decision-making systems in operation in Tasmania.

The people we work for have been subject to immense and regularly state-sanctioned abuse, violence, and neglect through these systems. They tell us about being denied their basic dignity, agency, liberty, and control over their own lives. Their stories are harrowing and cry out for urgent and transformational change. We see levels of disempowerment, detention, torture, neglect, and enforced dependence on the choices and views of others that have no place in modern Australian society.

We seek to do justice to their stories in this submission and to advocate for a more caring, equitable and inclusive society, where people with disability and older people have real choice, control and agency over their own lives, and support to enforce their own will and preferences.

We urge the Royal Commission to recommend the complete replacement of substituted decision-making schemes in operation around Australia. In their place, there should be fully funded and independent support for people with disability and older people to make decisions about their own lives and to give effect to their own will and preferences, in the strongest way possible and on an equal basis with others in the community.

The suffering we witness and give voice to in this submission needs to end, now.

Our advocacy work and background

We work with hundreds of people who experience substitute decision-making under the *Guardianship and Administration Act 1995* (Tas) (**GA Act**) each year and see the immense range of impacts it has on the rights, choice, and control of our clients.

The people we work with who are subject to substitute decision-making under the GA Act experience a wide range of structural and power-based imbalances, often exacerbated by a lack of access to effective and independent support and information throughout the process. The power is often held by others involved in the system; by Government, families, medical practitioners, and aged and disability service providers, who wield immense power and influence over peoples' lives. Often, our clients lack financial resources, educational opportunities and experience considerable vulnerability and disadvantage. They must also often fight against 'experts' and people with significant influence and resources to restore basic freedoms that most of us take for granted.

Many of the people we work with are excellent communicators, and the vast majority can clearly express their will and preferences, and what they want to happen in their lives and why. Where we have clients that need support to have their will and preferences known, we provide that support through our advocacy work.

It is exceedingly rare that we work with people who cannot, with support, communicate their current will and preferences, but in these rare circumstances, we seek to give effect to the strongest possible interpretation of their will, preferences, and human rights.

However, no level of clear communication and independent support is enough to counterbalance the level of power and control built into existing substituted decision-making systems, which often completely override the actual and supported choices of people about their own lives and what's most important to them.

Far too often, our clients' individual and legal agency is entirely overridden and denied. These denials happen both informally without any oversight, through the provisions of the GA Act, and through the *Mental Health Act 2013* (Tas) (**MH Act**). They also happen through a complete failure to provide independent decision supports for people, or to hear voices that are opposed to what 'experts' and others in the system feel are best for people.

The GA Act of Tasmania is currently under review and presently allows for a guardian or administrator to be appointed where:

1. a person has a disability, meaning "any restriction or lack (resulting from any absence, loss or abnormality of mental, psychological, physiological or anatomical structure or function) of ability to perform an activity in a normal manner"

2. they are unable due to their disability to make reasonable judgments regarding their circumstances; and
3. they need a guardian.¹

The GA Act further allows for guardianship and administration orders to be made on an emergency basis, for up to two 28-day periods, where there is urgency and there may be grounds for making an order². These emergency orders are a source of great harm and suffering for the people we work for, and we discuss them further in the Emergency orders section below.

We see these provisions of the GA Act leading to both direct and indirect discrimination for people with disability and older people, who endeavour to make decisions about their lives that entail a dignity of risk. These are people who need to meet standards that no one else in the community is required to meet. We so often see people involved in the broader guardianship and administration system making huge assumptions and value-laden judgements about our clients regarding the reasonableness of decisions they make.

We were directly involved in the Tasmanian Law Reform Institute's review of the GA Act in 2017-2018 (**TLRI Review**) and have undertaken substantial systemic advocacy since then, calling for the TLRI Review's recommendations to be implemented in Tasmania alongside the implementation of the broader UN Convention of the Rights of Persons with Disability (**CRPD**) in Tasmanian law. The systemic work above is ongoing, with draft legislation currently under consultation by the Tasmanian Department of Justice.

It is important that we acknowledge the real and lived human experience of guardianship and administration we observe through our work. Our clients often tell us they feel decisions have been stripped from them, they feel abused, detained, and they do not understand how their rights can be taken away so easily. They do not understand how the system can operate the way it does, and how these practices can continue to exist and strip them of their liberty, independence and choice and control over their own lives.

In our experience, guardianship and administration systems trade away the inherent rights of our clients, and in doing so, cause substantial harm and dehumanisation. People's right to safety is not more important than their rights to legal capacity, choice, liberty, and dignity. People need to enjoy all their rights, at the same time, without others choosing which rights are more important for them.

¹ GA Act s 20.

² GA Act s 65.

The loss of agency and choice

We often work with people who have their agency and choice stripped from them after interacting with the broader health system. A short stay in the hospital after a temporary injury can rapidly become a permanent and involuntary placement into residential aged care. Decisions are made quickly for people, and in their 'best interests' without actual consideration of their rights, will and preferences.

We regularly see these choices being made for older people and people with disability. Often, the doctors and social workers involved in people's care form views about what is safe and best for people, that are either entirely different to the person's own views, values and will, or that are made without even understanding what the person's wishes are.

It is well accepted that there is a crisis within Tasmania's health system. Older Tasmanians and those with disability are now afraid to seek health care both at the general practice level and at hospitals for fear of becoming trapped in the guardianship system as this is now known within the community to happen. This crisis is occurring alongside a huge range of ableist and ageist attitudes and beliefs about what people with disability and older people can and cannot do for themselves and concerns about duty of care and discharging to a place of safety.

These broader and systemic concerns have been used for too long to justify the removal of legal capacity and choice from people about their own lives. Incredibly blunt instruments, such as guardianship, administration, and mental health treatment orders, are being used inappropriately to address complex and nuanced social and systemic issues.

As explained by one of our clients subject to substituted decision making: **"I don't think that Guardians and Public Trustee should think I can't make any decisions. I can make plenty of decisions just fine. It's so black and white - you can make decisions, or you can't – but just because someone is unwell or has a disability, they can still make plenty of decisions every day and they know how they feel about things. I think if you're under an order you should be listened to, and treated properly, not ignored sometimes or brushed off, without any explanation."**

Deidentified Client Story: Kate

Kate was voluntarily admitted to a Tasmanian hospital for treatment. It was incredibly important to Kate to receive open and honest communication, to feel safe, and to be treated with dignity and respect. Kate had experienced substantial trauma and was incredibly concerned she could be involuntarily treated in the hospital, which would set back her health and exacerbate her trauma.

While in the hospital, Kate was involuntarily detained and prevented from leaving the hospital. After receiving legal advice she was on no order and was free to leave, Kate attempted to leave the hospital and she was detained on a code black and the hospital applied for emergency guardianship over her.

Kate wanted to speak and challenge the emergency guardianship and was a strong advocate about her own health, but was given no opportunity. The order was made over the phone the same day, with no notice or hearing, and Kate was detained and involuntary treatment was authorised for her.

Kate complained and advocated for months with our support, for the hospital to involve her in decision-making processes about her own care. She had a voice, views and wishes, and they went entirely unheard. Her distress and desperation continued to grow as her complaints went unresolved for months and she was subjected to the invasive and involuntary treatment she feared most.

Despite numerous requests and escalations, the hospital refused to provide any basis for how it balanced substituted decision-making with anti-discrimination, healthcare and other rights, or to engage with Kate directly. Instead, Kate was punished for seeking independent support and refused medical care if an advocate was present with her.

The hospital was unable to provide a balance because there was none. Kate lost all her rights, firstly because she had a medical condition, and secondly through emergency powers that were exercised without bothering to hear her clear and assertive advocacy about her own life and health.

When Kate finally escaped her ordeal in hospital, she fled the state, leaving behind her beloved house and life here. She couldn't believe that such treatment could still happen anywhere in the country. Her desperation and frustration are shared by too many we have worked with.

Our client's experience, along with so many others who have become trapped in these systems, must urgently change. No one should be stripped of their rights to prop up service systems, or because others have not done the work to understand and see them as complex individuals, with choice, agency, and rights.

The Tribunal experience

Our advocates support and represent people before the Tasmanian Civil and Administrative Tribunal (**TasCAT**) in relation to applications under the GA Act, MH Act and the Anti-Discrimination Act 1998 (Tas) (**AD Act**).

Our advocates are not Legal Practitioners and appear as independent advocacy supports to assist people to understand the Tribunal processes, have their say, share their views, and make their arguments about decisions to be made about their lives.

We have observed that our clients often have:

- limited notice, documentation, and time to prepare for hearings
- no time to have their say, with strict time limits for hearings to be completed within, generally within 30 minutes to 60 minutes for complex matters
- a lack of information about the system, decisions to be made and the potential impact on their lives
- significant barriers to accessing independent medical evidence and reports; and
- limited or inaccessible options for review and oversight.

Timeframes and natural justice

We have observed that the evidence and papers necessary to support people in preparing for TasCAT hearings are often only received shortly before the hearing occurs, leaving a limited opportunity to respond and understand what is in dispute. Evidence packs and papers are generally posted seven days before the hearing by TasCAT, which do not always arrive before the hearing happens.

No personalised information is provided by the system itself to help people understand the process, guardianship and administration system, or the potential impact of orders that may be made.

As explained by one of our clients: **“No one spoke to me, just about me. All these huge decisions were being made about my life and I wasn’t involved at all. It was so shocking how quickly I lost my independence. I think everyone that has a hearing or orders should have independent support offered to them. I couldn’t understand what was happening or what to do next on my own.”**

We have observed that where applications are made through hospitals, they can refuse to provide a copy of their application and the evidence to the person directly, including where requested through their advocate. Without this information, it is next to impossible to achieve natural justice. You must fight, tooth and nail to be free.

Hearings generally occur within thirty minutes for a review, and an hour for a full hearing. We have observed that TasCAT often enforces these time requirements strictly and limits the capacity for our clients to speak as they wish to the Tribunal. When this happens, our clients tell us they feel unheard and like the significant impact on their lives of the orders to be made was not respected.

Without time, information, and support people cannot inform themselves and effectively make a strong case about what they want to happen and why, even if they are perfectly capable of doing so.

Access to legal representation and independent support

According to TasCAT's last annual report, 96.4% of people were self-represented in their Guardianship stream. Given that the orders under the GA Act remove legal agency and liberty and can authorise detention, no one should be forced to self-represent against the State. Guardianship is one of the only areas where decisions are made removing people's fundamental freedoms and liberties on a routine basis, without access to independent support and representation.

Everyone appearing before TasCAT in the Guardianship stream should be entitled to independent legal and advocacy support as a right, with the ability to opt-out of those supports. Supports need to be fully funded and independent of the disability service system, whether through Legal Aid, advocacy services or otherwise.

As our client said: "I think everyone should get support through the process of an order if they want it. It's confusing and sometimes scary. When I told them that Legal Aid needs to be involved, I was told that they couldn't be there. I was really glad they were there, there was someone on my side. It should be everyone's right to have a support person or lawyer at the hearing. There should also be support for people to make important decisions in their life instead of sticking them on an order straight away. Give people a chance!"

Use of expert evidence in proceedings

Defending applications for guardianship and administration orders depends on independent medical evidence. This evidence can be near-impossible for people to access within Tasmania, due to both the cost and unavailability of independent medical practitioners to provide an alternate assessment or review of the medical evidence presented in support of applications for orders.

We have needed to support some of our clients to seek funds for interstate independent medical evidence. These processes can take months and face substantial challenges due to the provisions of the GA Act that focus on the person having a disability and the

reasonableness of decision-making as tests for whether a guardian or administrator can be appointed.

The threshold of this test is way too low and leads to abuses of process and people with disability. Particularly for emergency orders, we have observed an extremely low level of objective medical assessments or standardised capacity testing as part of healthcare professional reports.

We are shocked that the current legislative test in Tasmania still requires that a person may have a disability. This test entrenches discrimination throughout the guardianship and administration system and provides an incredibly low threshold of medical evidence when considered alongside the remainder of the GA Act. It invokes huge misunderstandings and assumptions about the ability of people with disability to make their own choices. Medical evidence is then used to remove the legal agency of our clients and it is incredibly difficult for our clients to challenge.

As another client said: **“You should also be able to get support to find a second opinion from a doctor/specialist. I’ve just been through this process, and it was really difficult and time consuming to get a second opinion. Again, I couldn’t do it alone. Legal Aid paid for some assessments, but no one should have to pay for a second opinion.”**

For guardianship and administration proceedings to be fair and just, access to fully funded and independent medical reports is essential. Evidence also needs to be focused on objective, evidence-based assessments, and the purpose of these assessments should be to focus on the consideration and delivery of individualised decision supports. The focus should be on ascertaining whether the person’s will and preferences can be supported to be known and realised, rather than seeking to authorise substituted decision-making.

Reasons for decisions

In our experience supporting clients subject to guardianship and administration proceedings, TasCAT will only provide a statement of reasons for decisions on request, and within a short timeframe. Transcripts and recordings of proceedings are only provided at a cost and ‘where possible’.

When we have supported clients in requesting copies of transcripts and recordings, we have been informed by the Tribunal that they have been lost or are unavailable. Reasons for decisions are not provided orally at the time of the hearing and our advocates must explain to clients what the order means, what happens next, and what their review options are.

Without information, people cannot appeal and challenge the decisions that have been made about them, and there is often a low level of legal and procedural literacy that further disadvantages clients.

Given the serious nature of the orders being made in these proceedings, we consider that statements of reasons, transcripts and/or recordings must be provided as an automatic right to people who are placed on orders.

Our clients also receive limited to no information about the likely impacts on their lives should an order be made unless we provide it ourselves. If you don't understand what an order might mean in your life, it is difficult to impossible for you to exercise your free will and preferences about the order and your legal rights.

We consider that accessible and detailed information about the likely impacts of orders should be made available to individuals subject to guardianship and/or administration proceedings.

Emergency orders

So many of our clients have had horrific experiences with emergency orders under the GA Act. These orders can be made when someone feels there is an immediate risk of harm to health, welfare or property and last for up to two months of a person's life. Emergency orders can apply in a plenary fashion, in that they can cover decisions on all matters, and can lead to permanent disempowerment for people subject to them.

We see incredibly disturbing trends in the use of emergency orders, including how they are requested, what evidence is required for an order to be made, what powers are granted under orders, and the accountability of guardians and administrators (including the Public Guardian and Public Trustee) in ensuring the will and preferences of persons under orders are fully considered and respected.

In our experience, the requirements in the GA Act that a guardian/administrator must consult with the person under orders and take into account their wishes are routinely ignored in practice. The obligation for administrators to support the person under orders to develop their decision-making capacity is functionally not being implemented by the Public Trustee in Tasmania. Instead, our clients are lucky if they receive a single contact from the Public Trustee annually.

We have worked with clients who have had life-altering decisions made on an emergency basis under the GA Act, such as being placed in permanent residential aged care, having

access to community and housing supports terminated and having all their treasured possessions taken to the tip. These decisions can be impossible to undo and should never be made on an emergency (and permanent) basis, but regularly are.

Before 2022, we observed that many emergency orders were made on the papers without an actual hearing, notice or opportunity to speak. Thankfully this practice has now ceased following our considerable systemic advocacy. However, it demonstrated a fundamental problem with the guardianship and administration system – that decisions can be made in a plenary fashion for people, based on very low thresholds and evidence, without the person being present or aware that decisions are even being made about them or what their impact might be. The system allows and supports these huge denials of shared humanity and due process as almost a matter of course. It is appalling that there are so few protections, checks and balances built in to prevent this from occurring.

As said by one of our clients: “I went to hospital after a fall and eventually I was put on an emergency order. No one discussed this with me or invited me to attend a hearing. In fact, the order was done while I was unwell and on loads of medication. At the hearing it was decided that Public Trustee would also be appointed. The Public Trustee went on to sell or throw away all my belongings having never discussed any of it with me. Most of my photos and personal items were just gone for good. I even had a few hundred dollars in a large jar and that money was gone too. They changed the locks to my home. People should be involved in any decisions about their own life. Where I was not. The Guardian and Public Trustee just came in and took over.”

Imagine having your whole life overturned based on an alleged urgency you disagree about, being removed from your home, having all your possessions disposed of, and being forced into residential aged care against your will. You’re telling everyone what you actually want, and they’re ignoring you and aren’t interested. You have no ability to actually challenge what is being inflicted on you and the choices being made for you. It’s horrific, and it happens, again and again.

It’s an insidious violence being perpetrated against the most vulnerable, and it happens at a time when they should be receiving the most support, options, and choice instead.

Deidentified Client Story: Beau

Beau was unaware his decision-making capacity was being assessed by staff when he visited his wife at the aged care facility where they both lived. Beau and family were not told the results of the testing. The aged care facility applied for an emergency order for a Public Guardian to place Beau in a secure dementia ward. Beau and his family were not notified of the hearing until a few hours before it occurred and were unable to seek support or representation.

Beau was placed on two consecutive emergency orders for two months and during this time accommodation and medical treatment decisions were made that resulted in him being physically and chemically restrained. While Beau was under the emergency orders, his wife passed away. He was not offered any support. After being detained in the secure dementia unit for two months, Beau obtained representation to attend a subsequent hearing.

Beau wanted his daughter's support to assist him to move to a different aged care facility and this was agreed, with family to provide support instead of the Public Guardian. He is now living in a new home and his medication has been reassessed with all psychotropic chemical restraint medications now ceased. He endures ongoing trauma as a result of his experience in the guardianship system.

In Beau's own words:

"I had no power, I knew I was dead. I was a lump of meat they didn't care about. My rights were taken away completely. I had no life. Can you imagine? Everything taken off you and you're grieving for your wife. They totally destroyed me, and I couldn't understand why. I still don't. I'm not angry, I'm just upset. I just can't grasp the inhumane treatment I received ... there was no consolation, no treatment, no nothing."

Deidentified Client Story: Jennifer

Jennifer has moderate mobility impairments associated with her condition, but no identified impairments in her mental or decision-making ability. She sought advocacy support when, after a stay in hospital to recover from an injury resulting from a fall, she had been denied the right to discharge herself from the hospital to return home. The advocate sought urgent legal support for Jennifer, which determined that Jennifer was under no legal orders at that time and that she had the right to be discharged.

When Jennifer attempted to leave the hospital, accompanied by her advocate and under legal advice, hospital security was called, and Jennifer was threatened with a Code Black (physical and chemical restraint). Jennifer was unwilling to risk being physically and chemically restrained and elected to wait, at which point the hospital applied for an Emergency Guardianship Order.

Despite no previously identified impairments in Jennifer's decision-making capacity, the 28-day order was granted, and Jennifer was restricted from leaving the hospital. Jennifer wanted to appeal the emergency order, but there were no appeal or review pathways available to her within the 28-day period of the order, such as to TasCAT or the Supreme Court.

Lack of communication

Many of our clients who have been placed under guardianship or administration orders tell us that they are not contacted by their guardian/administrator, or not consulted on decisions that have significant and permanent impacts on their lives. People tell us they can't contact the Public Trustee and request an advocate to make contact on their behalf because the Public Trustee does not respond to their calls.

We have worked with people who received no communication from the Public Trustee throughout the entirety of their administration order, with decisions being instead made on the advice of the Public Guardian and service providers involved in the client's life. These clients have had no input into major and minor decisions about their own lives.

As said by another of our clients, **"I didn't even know what a Public Trustee order was or what they did or what authority they had over me. It wasn't explained. I haven't had much contact with the law. I went to that first hearing and did not get a chance to explain about my life and how I had managed up until then. They didn't investigate it properly. When they took the keys of my house off me, they sold things, and took the rest to the tip. So many meaningful things went to the tip. My house is empty now. No one from the Public Trustee asked me what I wanted to keep."**

Where there is communication, guardians and administrators are not required to give effect to the known will and preferences of the person under the GA Act, but rather 'consider' their wishes as an aspect of their best interests. In practice, this leads to wishes being routinely overridden and ignored, even when they could easily be given effect.

The independent review into Tasmania's Public Trustee in 2021 determined that the Public Trustee had misunderstood their obligations in relation to considering client wishes and building decision capacity, so had not been undertaking these obligations as required. These findings were consistent with our experiences with individual clients, who tell us they do not feel heard, or consulted or that their views and wishes have been taken into account. They feel invisible and powerless in a system that controls the basic and most important decisions about your life.

Where there is communication, we have observed a strong focus on protection, family views and safety as well as service providers opinions and that these perspectives are given significantly more weight than rights to self-determination, liberty and choice and control of our clients.

Deidentified Client Story: Sadie

Sadie lived independently in the community with in-home support provided through a level 4 Home Care Package (HCP) until she had a fall and was admitted to hospital.

An emergency Guardian and Administrator was appointed, and Sadie was moved to a Residential Aged Care Facility (RACF) on a permanent basis.

Sadie believed, at that time, she was only staying in residential care for a short period so when she was asked by her HCP Case Manager if she wanted anything from home, she said no. Consequently, the Public Trustee arranged for Sadie's personal belongings to be sold or otherwise disposed. With the support of an Advocate, Sadie eventually learned about the whereabouts of her personal belongings and was supported to lodge a complaint with the Public Trustee.

The Public Trustee advised that they had difficulty verbally communicating via phone with Sadie about her situation, and emails showed they took direction from her Case Manager and a hospital Social Worker, neither of whom had authority to make decisions on Sadie's behalf. Written correspondence between the Public Trustee and the Office of the Public Guardian demonstrates that both parties were aware of Sadie's belief that her stay in residential care was only temporary. Sadie did not receive written communication from the Public Trustee about their intention to relinquish her tenancy and sell her personal belongings, and so Sadie was left out of crucial decisions affecting her life. She feels if she had received a letter, she would have sought help sooner.

Contrary to requirements under the GA Act, Sadie feels her best interests were not taken into consideration by the Public Trustee as she is now left without an independent home and all her treasured items and personal belongings have been sold or disposed of. Sadie is furious that her rights were not respected, including her right to be fully informed, to be involved in decisions affecting her life, and to be treated with dignity and respect.

Deidentified Client Story: George

In George's own words:

"I went to hospital after a fall and eventually I was put on an emergency guardianship order. No one discussed this with me or invited me to attend a hearing. In fact, the order was done while I was unwell and on loads of medication. At the hearing it was decided that Public Trustee would also be appointed. The Public Trustee went on to sell or throw away all my belongings having never discussed any of it with me. Most of my photos and personal items were just gone for good. I even had a few hundred dollars in a large jar and that money was gone too. They changed the locks to my home. My dog disappeared and I have no idea what happened to him. They also cancelled my funeral plan which I had paid over

\$5000 into, and which was very important to me. I had been paying into the funeral plan for 12 years and the funeral company had sent letters to my home prior to cancelling it however I was obviously no longer there. I wanted to be sure that my funeral could be paid for without any issue. This was very distressing for me.

I had been asked in the hospital if I was happy to go to aged care for respite but did not at all agree to it being permanent. I do not remember anyone having a conversation with me about it being permanent as I would never have agreed to that. I ended up in a dementia ward for a year which was a horrible experience. I never do remember having anyone from the Public Guardian visit me and speak with me about what was happening. I asked Advocacy Tasmania to support me, and they had a lot of issues with getting information to do that. The transcript was lost apparently and then they said it was not recorded. They said we couldn't get a statement of reasons from the original hearing to understand what had happened. I was also not able to appeal because I didn't have support in time.

I think to be fairer there should be more time after the hearing to request a copy of the transcript and statement of reasons. Similar for the appeal. I didn't even know I could appeal.

There should be more proof needed before you can be placed on an order. The word of one doctor should not be enough especially if they have their own agenda like moving me into aged care to free up a bed in hospital. You should definitely be able to get support to find a second opinion."

Since George exhausted available complaints processes, his only recourse was to take legal action. George has since settled his case with the Public Trustee with \$10,000 compensation paid plus legal fees, which is an insulting low level of compensation that ignores the immense emotional harm, lost possessions, and detention he endured.

Review processes

Currently, review processes are limited for people on Guardianship and Administration Orders. People can appeal to the Supreme Court on a question of law, where they have sought a statement of reasons within 28 days of an order being made, and there are no appeals on questions of fact.

Clients can escalate a complaint about the Public Guardian or Public Trustee to the Tasmanian Ombudsman. But in practice, we have observed these complaints taking over a year to be considered, without meaningful and accessible outcomes for our clients.

As our client said: **“It should be possible to put in a complaint about the Public Trustee and Public Guardian and have it sorted within a reasonable time. The response from the Ombudsman was so incredibly slow, more than a year, and that’s unacceptable.”**

Clients can request a review from TasCAT where their circumstances have materially changed but face substantial barriers to evidencing these changes, particularly where it is unknown why the order was originally made, or there are barriers to accessing independent medical evidence.

Overall, none of the review processes actually help people when they disagree about their lives being controlled by substituted decision-making. They are inaccessible, legalistic, medicalised, slow, and often produce no meaningful outcomes. These gaps fail people with disability day in and day out and deny them rights they would have in a system that actually supported and enshrined those rights and offered practical support to realise them.

Gag orders

Under the GA Act and TasCAT Act, there are a range of provisions that prevent our clients from speaking publicly about their experiences under guardianship and administration orders:

- Section 86 of the GA Act protects the personal information and confidentiality of information before TasCAT; and
- Section 123 of the TasCAT Act prevents the publication of information or photographs calculated to lead to the identification of people whom orders have been brought in relation to.

These provisions have a chilling effect on clients who wish to speak publicly about what happened to them under orders, especially where they feel they have been abused by the system itself.

In our view, these provisions have clear parallels with provisions creating offences for victims of sexual violence from telling their own stories of abuse publicly. These provisions lack any exemptions to enable people to share their own story publicly or to reflect the will and preferences of the person the orders were made in relation to.

We have been undertaking substantial systemic advocacy to see these gag orders amended to allow people to tell their own stories, or have their stories told according to their own will and preferences. Our advertisement from this campaign is below and highlights the impact these laws have on people subjected to substituted decision-making.

~~They~~ ~~would~~ ~~tell you~~

They would tell you their possessions have been sold without their permission.

They would tell you their pets have been taken away and sometimes, euthanised.

They would tell you that their money, their money, is now not under their control. As it steadily disappears.

They would tell you that they are given no choice where they live, and that they are made prisoners of where they are put.

They would tell you that a government appointed stranger dictates who they can see, what they can do and where they can go.

They would tell you that they are ignored when they ask why. And they would tell you that becoming frustrated at all this can lead to being physically and chemically restrained.

They would tell you that this does not feel like Australia.

They would tell you this, and more, much more,
if they were allowed to speak.

'They' are the thousands of Tasmanians who have the Public Trustee and Public Guardians deciding their fate.

We hear them.

We call for the removal of gag provisions that silence them, and for their rights to be upheld and restored.

Now.

**Your
Say**
Advocacy
Tasmania

advocacytasmania.org.au

 AdvocacyTasmania

Where to from here?

Forced interventions, deprivations of liberty, chemical and physical restraint, destruction of treasured possessions, and removal from family, culture, community and independence, cause people immense harm. These harms have, for far too long, been perpetrated against people with disability and older people under the guise of protecting them through substituted decision-making, and now need to be made right.

In the words of Tina Minkowitz, a survivor of substituted decision-making: **“The harm was profound, extensive, and life-altering. It was physical, mental, social and spiritual. I have worked on healing throughout my life, while also bearing witness to the violations and working to end them – and that is not enough. A social dimension of healing and justice is required for victims of human rights violations to be reconciled with the state and society that acquiesced in that harm and abandoned the victims to their fate.”**

This is how the people we work for feel. They feel that the country and Government has supported and endorsed the immense harms and violations perpetrated against them, took away their basic rights, choices, and freedom – what makes us human - and then abandoned them to their fate. They deserved better, and now is the time to start making that right and ensuring it never happens again.

Progress moving from substituted decision-making to supported decision-making has yet to occur within Tasmania. The current system routinely overrides the will, preferences, and legal agency of people across Tasmania, including those who are currently making decisions with informal supports in place. These overrides are experienced as a deep and lasting abuse and a denial of people’s dignity and shared humanity.

While substituted decision-making continues in Australia, it is critical that there are accessible, timely and effective supports for people to enforce their rights throughout the system. In our view, this includes advocacy and legal support being provided as a right for everyone potentially subject to substituted decision-making, provided nationally. It also includes:

- timely and personalised information for people both before and after orders are made
- access to free and independent medical assessments and evidence
- adequate time and notice to prepare for hearings, alongside natural justice
- non-plenary decision-making authorisations.
- provision of reasons for all substituted decisions and orders and transcripts of Tribunal hearings; and

- removal of any gag provisions preventing people from speaking about their experiences of guardianship and administration, or abuse in general.

Our view is that progress towards achieving supported decision-making has been slowed and fragmented by the interpretive approach that both supported and substituted decision-making are compatible and able to coexist in Australia. In particular, this fragmentation has looked like a slow to non-existent progress from substitute decision-making for people that have a disability based on their status, to substitute decision-making for people with impaired medical capacity based on their function.

Both status and function-based approaches treat people with disability significantly worse than others within our community, and subject them to rational and medicalised decision-making requirements that others do not have to face.

We must urgently move beyond treating people as less because of their status or function, and focus instead on their human rights, agency, support needs and giving effect to their will and preferences. The reality is people make decisions in a wide variety of ways. These ways are often personal, emotional, and strongly driven by values and experiences. But for those with disabilities or who are older, we routinely see them denied the dignity to make decisions in this diversity of ways, especially where there is an element of risk.

We need to move past trading the respective rights of people with disability away. The right to safety and to live free from abuse, neglect and violence is not more important than the right to agency, liberty, and legal capacity. We need to support all these rights, concurrently, and in ways the current substituted decision-making approach fails to do.

Transformational, national change is required to provide effective and accessible decision-supports for people, and recognition of those supports in law. No one who can make free and legal decisions, with or without support, should be able to have those decisions overridden through substitute decision-making.

We recommend that the Australian Government urgently withdraw its interpretive declaration on CRPD Article 12 and legislate a national supported-decision framework and funded supports reflecting people's rights under the CRPD and the expanded decision-making principles that have been proposed.

We also recommend as part of this reform that guardianship and administration be replaced as an absolute last resort by supports that seek to give effect to the will, preferences, and rights of people – in a way that accurately reflects their legal agency rather than what others believe would be best for them. These last resort supports should only be possible where supported decision-making supports have been provided and exhausted, and it is not

possible for the actual will and preferences of the person to be established after all available efforts have been exhausted.

The Royal Commission should also ensure there is appropriate restitution and compensation for harms that have been caused, and that progress to implement new systems of support are robust, national, and urgently implemented.

We encourage the Royal Commission strongly to name up what has happened through substituted decision-making systems as being categorically wrong. There has been a gross and long-term denial of rights, freedoms, and too often profound discrimination, torture, cruel, and inhumane conduct. It is a national shame, that must end and never occur again.

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