



Inquiry into violence, abuse and neglect against people with a disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with a disability.

Response from Queensland Aged and Disability Advocacy Service (QADA).

30 April 2015

Background

Queensland Aged and Disability Advocacy Inc (QADA) is jointly funded by the Australian and Queensland governments to provide individual advocacy support to older people and younger people with disabilities. This includes information, education and individual representation to recipients and potential recipients of aged and disability services including community care services, Australian Government aged care services and residential aged care facilities.

QADA also provides guardianship advocacy services to support adults, including those with a disability and/or a mental illness, whose capacity is being questioned in relation to guardianship and other administrative matters.

QADA is a state-wide service operating from a head office in Brisbane and through seven regional offices located across Queensland. QADA has been supporting vulnerable Queenslanders for more than 23 years and provided services to some 23,000 people in the last year alone.

Within QADA's broader services, the Guardianship Advocacy Service (GAS) provides a specialist advocacy support service for people with a disability and/or age-related condition, in relation to guardianship and administration matters before Queensland Civil and Administrative Tribunal (QCAT). Essentially, this means that the people GAS provide information and advocacy support for are having their decision making ability questioned. This is often as a result of mental illness, intellectual disability, neurological condition, dementia or acquired brain injury. QADA takes direction from our clients, in a way that they are comfortable in communicating with us, so that we can ultimately express their views and wishes to QCAT, concerning their situation and circumstances. In particular we often seek the views of people with a disability in relation to their experiences of substitute decision making, and whether they are being included in decisions being made about them. Also, some of our clients have regained capacity and recovered from their disability, and are seeking revocation of their existing orders.

The Guardianship Advocacy Service provides information and advocacy support to around 200 people in Queensland per year who are subject to (or likely to be subject to) guardianship and administration orders. Of these we support 100 people per year through the QCAT process in guardianship matters.

QADA supports many clients who suffer abuse and neglect, predominantly emotional abuse and financial abuse. This abuse or neglect occurs because of several factors:

- Insufficient awareness of the human rights of people with a disability
- Not understanding the role of a substitute decision maker, whether it is Enduring Power of Attorney (EPOA), Guardian or Administrator (all are substitute decision makers – SDM). Lack of understanding results in unchallenged authority exercised over the person by the SDM, resulting in an abusive or exploitative relationship. For example, a common situation we encounter is when the person is in a facility and not allowed to receive visits or phone calls, or see an independent doctor. Although this behaviour contravenes the general principles of the *Guardianship and Administration Act Queensland 2000 (GAA)*, it is often condoned by residential facilities that are unaware that the decision maker is in breach of their obligations.

Abuse by a SDM is not regarded as a crime or misdemeanor, or an unlawful activity. For example, there is no quick, effective and low cost way for a matter to be prosecuted in the lower courts to secure restitution of monies stolen by an SDM.

QADA is aware of several cases of financial abuse perpetrated by EPOA's or private administrators.

For example, a private administrator, (estranged family member) was appointed by QCAT, when the person (Tony) was in a coma. The person was expected to make a full recovery from their disability within 18mths. The person made a full cognitive recovery, but was left with severe physical deficits, resulting in their being placed, as a young person in an aged care facility.

The administrator (who was appointed for 5 years and not required to fulfil any of the usual reporting duties of administrators) took all of the person's financial assets and then did not regularly pay fees.

QCAT declared the person capable and issued enforceable directions regarding reclaiming outstanding monies.

- Protective Tribunals (QCAT) and relevant Statutory Agencies (Public Trustees and Public Guardians) are often reluctant, probably due to resource constraints, to investigate situations where there are allegations of abuse. This works in conjunction with an underlying assumption or perception that a person with a cognitive disability is an unreliable witness.

This is, in effect, a presumption of a "lack" of capacity of a person with a disability, which is the opposite of "presumption" of capacity, as applies in the legal framework. These results in situations such as Police being uncertain and lacking confidence in starting an investigation, presumably, often having concerns about the reliability of witnesses.

Tied to this, are the professional conduct rules for lawyers that stress that instructions can only be taken from a competent person (ASCR 8.1). Lawyers are apprehensive in working with people with a cognitive disability, in the absence of clear guidelines and concern about jeopardizing their professional career. This gives lawyers little confidence in being able to bring a case before the courts in terms of strict legal rights.

Therefore, another process, the appointment of a litigation guardian, is required for civil matters. Statutory agencies are averse to taking on this role, as it leaves them exposed to costs orders. (For better discussion of these issues see, Australian Law Reform Commission Report on "Equality, Capacity and Disability in Commonwealth Laws, Chapter 7 - <http://www.alrc.gov.au/publications/7-access-justice/access-justice-issues>).

RESPONSE TO TERMS OF REFERENCE

Experience and Impact of Abuse (Terms 1a & 1b)

The **experience and impact** of abuse and neglect on people with a disability, their families, advocates, support persons, and the society as a whole is profound.

As an advocacy organization, QADA is continually challenged to find ways to simply get the views and wishes of our clients heard, in an environment that may be full of conflict, or where the abusive or neglectful SDM, or the institution or residence they reside in, actively, does not want their voices heard.

One of the impacts in shutting out the voices of people with a disability (upon people with a disability) is the development of a profound lack of confidence, bordering on trauma. When our clients are not involved or consulted about decisions regarding their own lives, they can tend to lose confidence and regard themselves less. Clients report that their requests to: socialize, have any money for minor expenses or to make telephone calls, know their own financial affairs or take a taxi and go out for the day are often refused or belittled by their SDM, or the facility, acting upon instructions of the SDM.

Also, it is not well understood the level of restriction that an accommodation facility can exercise over a person's life. (The Office of the Public Advocate, Victoria, in their 2011 submission to the Victorian Law Reform Commission Response to Guardianship Consultation Paper, identified the unregulated and under regulated accommodation sector was a key human rights issue, resulting in deprivation of liberty for many).

Also, there is no particular professional agency with expertise, skills or experience in offering psychological support for people with a disability who have suffered abuse or exploitation.

d) The responses to violence, abuse and neglect against people with a disability, as well as to whistle blowers, by every organizational level of institutions and residential settings, including governance, risk management and reporting practices.

From QADA's perspective, the main systemic response to abuse or neglect is to be "protective". This usually involves the appointment of an SDM, who may be appointed to assist the person with a disability. For this to occur, QCAT needs to become involved.

This would involve an application to a Tribunal, seeking an order, or replacing an existing SDM, who was abusive or neglectful. This is a fairly unsophisticated response, as there is no direction or even expectation that the person with a disability will be offered any compensation for financial abuse, or therapy or support for emotional abuse.

This response is the antithesis of our international human rights obligations, which is to essentially reduce our reliance on SDM and promote supported decision making (John Chesterman, "Modernising Adult Protection", *Australian Journal of Public Administration*, vol 73, no. 4, pp 517 – 524)

So essentially, the response of QCAT can be:

- to reinforce current SDM (no finding of neglect or abuse), which means that the person with a disability is not believed by QCAT about their experiences, and QCAT sides with the current SDM. This is highlighted in the example below.

"Bill", an older man with intellectual disability found himself placed in a nursing home, despite not being terribly physically frail. His private guardian, his niece, placed severe visiting restrictions, which were resented by Bill. The visiting restrictions were kept in place for a longer period than was originally promised. An application was made to relax the restrictions and allow for Bill's extensive support network to be restored. The niece said she was in the process of reducing the restrictions, and found the need to answer to QCAT bothersome. The application was dismissed.

- To change the SDM, because of neglect, abuse or exploitation, without any discussion or direction for compensation, restitution, or other forms of care or treatment.
- To declare the person with a disability to have “Capacity”, now able to run their own life, free from an SDM. This situation would occur without any assistance provided to the person about seeking compensation, restitution or follow-up care.
- To “stretch” the framework, and make an expedient appointment, without acknowledging support that people with a disability may have or might have.

For example, a young lady with a disability, “Tracey”, who was living with her boyfriend, was being pushed by her brother to spend time with him. She did not feel safe in his company. The brother sought an appointment of an SDM to ensure he could visit his sister. Tracey had not previously had need of an SDM. Although it was mentioned to QCAT that pursuing an order in relation to Domestic and Family Violence may be a more appropriate alternative, that approach was dismissed and the Public Guardian was appointed for contact. The less restrictive human rights approach of enquiring as to whether Tracey had support to access a Domestic Violence service was dismissed by QCAT.

Complaints of abuse regarding people with a cognitive disability, who lack capacity, can also be made to the Office of the Public Guardian (OPG), which has extensive powers to investigate. However, OPG have only a handful of people for the whole state. They can suspend an EPOA and refer the matter to QCAT. QADA is not aware of whether the OPG sends cases to the Police for criminal investigation.

Regarding financial abuse, even if it involves large amounts of money, the response is usually complete systemic “paralysis”. Bystanders often state that, “money is gone” or “spent” and cannot simply be returned to the person with a disability. At this point, various agencies and practitioners often feel that “there is nothing to be done”, no point in taking the matter further (mainly because there is nowhere to take the matter), unless someone has the finances to institute a Supreme Court action.

So apart from a change of SDM, the response to the financial damage caused by the actions of an SDM, is that of inertia. Police are likely to view the taking of large amounts of money by an EPOA for the EPOA’s own use, as a “family problem”, and certainly not a crime. Usually, if an EPOA is in place, it is interpreted as a “civil” rather than a “criminal” matter, and as such, is rarely investigated.

f) Australia’s compliance with its international obligations as they apply to the rights of people with disability.

It has been recommended by bodies such as the Queensland Law Reform Commission (2010 Guardianship Report), that Queensland adopts the principles of the United Nations Convention of the Rights of People with a Disability, into the GAA. Despite repeated recommendations that this occur, this has not yet happened.

Steps such as this, which cost little, would send a stronger message regarding rights of people with a disability. The target audience would be: services, service providers, and health professionals, along with a message of support to people with a disability.

In particular, Article 12 requires closer scrutiny and implementation, nationally.

Article 12 of the UNCRPD [Equal recognition before the law](#)

1. States Parties reaffirm that persons with disabilities have the right to recognition everywhere as persons before the law.
2. States Parties shall recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.
3. States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.
4. States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.
5. Subject to the provisions of this article, States Parties shall take all appropriate and effective measures to ensure the equal right of persons with disabilities to own or inherit property, to control their own financial affairs and to have equal access to bank loans, mortgages and other forms of financial credit, and shall ensure that persons with disabilities are not arbitrarily deprived of their property.

Section 4, is currently not the experience of people with a disability in Queensland. Consider “Tony” where there was evidence of a neurological condition that would probably last 18months, was subject to an order lasting 5 years, without review periods built into it. (emphasis added)

g) Role and challenges of formal and informal disability advocacy in preventing and responding to violence, abuse and neglect against people with a disability.

There are many barriers, often invisible to protective bodies that must be faced by a person with a disability who wishes to challenge their current circumstances. These difficulties and barriers are magnified in an institutional and residential setting.

First issue is that many of our clients are fearful of retribution of challenging (directly or indirectly) the facility and their caregivers, whom they rely on for care. Many times the SDM may prevent the person with a disability from receiving phone calls or visits from an advocacy agency. Even though the person with a disability is seeking advocacy support, the facility can prevent phone or physical contact between the person and their advocate.

Second issue stems from the need to provide a health professional or medical report on the person's ability to make their own decisions. Many of our clients report that their doctor also has a professional affiliation to the facility or the SDM. This results in a violation of confidentiality toward the person with a disability. Rather than keeping the information confidential to the person with a disability, there is often a strongly perceived lack of impartiality by the treating doctor. This can result in a report that aligns with the needs of the facility or the SDM, rather than one that

accurately reflects abilities of the individual with a cognitive disability, or no report being produced at all. Often our clients realize this and are reluctant to seek assessment from “their” doctor. It results in difficulties in accessing reports, as often the person in an institutional setting has difficulties accessing another doctor in the community, without attracting more challenges from the institution.

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

Consider “Donna” (a young lady with an intellectual disability living in an aged care facility), whose sister (Liza) was her EPOA. Liza was emotionally abusive, making Donna clean her house before a friend of Liza’s came around to “clean” the house for Donna (for which Donna had to pay above community service rates). Liza also prevented Donna from keeping magazines in her villa (she loved to keep up to date with popular culture), saying she was hoarding them. Donna and Liza shared a GP. Donna was reluctant to see this GP to discuss her situation and get an opinion as to whether she had capacity to revoke the EPOA. She mentioned a GP she used to see in another State a couple of years ago, and gave authority for QADA to contact them. This GP immediately understood the dilemma facing his former client, naming the likely breaches of confidentiality and forwarding his report and other reports substantiating his view of Donna’s capacity. Donna was able to revoke the EPOA and resume her own decision making.

Later she was able to go to her previous GP and state how abused she was and unsupported by her breaches of confidentiality. She was eventually understood and was promised that her confidentiality would now be respected.

Third, lack of dispute resolution mechanisms that are “user-friendly” for people with a disability. Currently, for people seeking to review their current order, they need to complete a 19 page application form, find a doctor who will complete a 10 page report and submit this documentation in order to have a formal hearing. This is the only option available, when a more informal meeting (less restrictive), chaired by an impartial facilitator may be the best way of initially progressing the person’s concerns.

(h) what should be done to eliminate barriers for responding to violence, abuse and neglect perpetrated against people with disability in institutional and residential settings, including addressing failures in, and barriers to, reporting, investigating and responding to allegations and incidents of violence and abuse;

Many of our clients continue to suffer some form of abuse at the hands of their SDM. More readily accessible and informal dispute resolution services are required. However, they need to be linked to a court or Tribunal process, in order to encourage and motivate all parties to participate. (Consider analogies here to the mediator’s ability to issue a certificate of participation in mediation in family law matters, which is allied to Family Law legal framework).

Otherwise, without this pressure, many SDM’s may not participate.

Service providers and health professionals require further education, on the General Principles and how decision makers are meant to make EPOA and guardianship decisions. Once these “third parties” have a greater understanding on how decisions are to be made in an inclusive and least restrictive way, they are more likely to challenge an overly restrictive approach by an SDM.

Ensure Tribunal members have both legal knowledge and experience in disability or aged care sector. Also involve some type of independent feedback so that Tribunals can be given an opportunity to develop greater understanding of practical barriers that confront the person with a disability, to progress their matter.

For example, greater use of Tribunal's investigative powers, so that the views of the person with a disability is regularly ascertained. This can prevent hearings from occurring when the person who is likely to be subject to an order does not know about the hearing and is unable to defend themselves against an order. This lack of communication can result in unnecessary hearings being run, resulting in unnecessary orders being made.

Complete a national "Prosecutors Handbook", similar to that in the USA and Canada, to show, in practical terms how to investigate and take evidence from people with disabilities and vulnerabilities, so that there evidence is not discounted from the beginning.

<http://www.eldersandcourts.org/~media/Microsites/Files/cec/Prosecution%20Collaboration.ashx>

Provide training from the handbook to relevant police and prosecutors.

(j) identifying the systemic workforce issues contributing to the violence, abuse and neglect of people with disability and how these can be addressed;

From the above discussion, much more education on practical application of human rights issues is required.

Greater awareness of human rights breaches and their impacts are required by:
Police, health professionals, disability and aged care services and Tribunals.

Also, it is QADA's experience that the experience of Aboriginal & Torres Strait Islander and Culturally and Linguistically Diverse populations are not well served. There is little capacity in the guardianship system to accommodate cultural and linguistic diversity. This occurs at all levels including assistance to lodge forms, accessing an interpreter and having a decision maker with appropriate cultural understanding.

k) Role of government-

Commonwealth to implement recent ALRC recommendations in Chapter 7 Equality, Capacity and Disability in Commonwealth Laws,

Recently, Queensland reviewed its Queensland Law Reform Commission Report on Guardianship Laws and identified several actions for immediate implementation. This needs to be implemented, in particular the Principles of the United Nations Convention of the Rights of People with a Disability.

Conclusion

This submission covers more subtle issues that often don't come to light when considering violence, exploitation and abuse of people with a disability. The examples QADA provides are in reaction to inappropriate and restrictive protective measures, which actually continue to perpetrate abuse, rather than support or protect the person.

QADA strongly endorses three of the five recommendations recently expressed by John Chesterman (article cited earlier). These are:

- Reduce reliance on substitute decision making
- Facilitate independent complaints
- Fund advocacy programs