



people with  
disabilities  
western  
australia

## **Review of the Guardianship and Administration Act 1990 (Project 114)**

Law Reform Commission of Western Australia

**People With Disabilities (WA) Inc.**

**Chair: Nihal Iscel**

**Chief Executive Officer: Brendan Cullinan**

**Author: Shzan Plandowski**

City West Lotteries House, 23/2 Delhi St, West Perth, WA 6005

Email: [brendan@pwdwa.org](mailto:brendan@pwdwa.org)

Tel: (08) 9420 7279

Country Callers: 1800 193 331

Website: [www.pwdwa.org](http://www.pwdwa.org)

## **People With Disabilities WA (PWdWA)**

PWdWA is the lead member-based disability advocacy organisation representing the rights, needs, and equity of all Western Australians with a physical, intellectual, neurological, psychosocial, or sensory disability via individual and systemic advocacy. We provide access to information, and independent individual and systemic advocacy with a focus on those who are most vulnerable.

PWdWA is run by and for people with disabilities and aims to advocate for the rights and empower the voices of all people with disabilities in Western Australia.

### **Summary**

Despite the recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, the Department of the Attorney General (WA), and the Select Committee into Elder Abuse there continues to be serious issues for people with disabilities regarding the guardianship system in Western Australia.

These include but are not limited to the: role of guardians; enduring power of guardianship; access to guardians; access to information from guardians; access to money held by guardians; people moved to congregate housing; refugees and migrants in guardianship; Aboriginal people in guardianship; providers lodging guardianship applications; lack of supported decision making; issues with restrictive practices; issues with the State Administrative Tribunal; and a need for more advocates and funding.

PWdWA clients seek to restore their dignity, autonomy, and quality of life. They wish to actively participate in their community. PWdWA calls for changes to the Guardianship and Administration Act 1990 (WA) that address these issues and brings Western Australian legislation in line with changing societal attitudes towards guardianship and administration orders for people with disabilities.

### **Role of guardian**

It has been noted by the Select Committee into Elder Abuse that the misuse of Enduring Power of Guardianship has emerged as a prominent theme during the committee's inquiry in 2018.<sup>1</sup> It is also the opinion of PWdWA that the guardianship system needs to change because of a number of significant issues that are counter to the Convention on the Rights of Persons with Disabilities (CRPD), which has at its purpose to 'promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect for their inherent dignity'.<sup>2</sup>

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<sup>1</sup> Select Committee into Elder Abuse, 'I Never Thought It Would Happen to Me: When Trust is Broken, Final Report of the Select Committee into Elder Abuse' September 2018, pg 74

<sup>2</sup> Convention on the Rights of Persons with Disabilities, Article 1

Recently guardianship has increased dramatically, and state appointed guardians are struggling to manage the increased number of people under guardianship orders.<sup>3</sup> The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has also noted that the number of guardianship orders has increased and that it appears guardianship orders are not always used as the last resort they are meant to be.<sup>4</sup>

It is the opinion of PWdWA advocates that this is because guardianship has become a default position for: adolescents under the care of the Department of Child Protection (DCP) once they leave the system; and people with disabilities.

However, these cohorts receive no training or education about the role of a guardian in their lives.

**Case Study:**

A young African individual, who had been placed under the care of the Department of Communities during his formative years, recently reached the age of majority, only to find himself subject to guardian and administration orders without clear explanation. Distressed and confused by the circumstances surrounding these orders, he sought representation from PWdWA.

Throughout the process, it became evident that the system within which his case was being handled operated under Westernised norms, potentially exacerbating his distress. What became abundantly clear was that his desire to revoke these orders stemmed not from any malintent but from a fundamental longing for a sense of autonomy and connection to his past.

It emerged that his primary aspiration was to return to his homeland to pay respects to his deceased parents, whose loss he had endured while under the auspices of DCP. The safety and stability he once found under his parents' care resonated deeply with him, contrasting starkly with the trauma he experienced during his time under the department's guardianship.

In representing him it was apparent that his requests for autonomy and the freedom to navigate his own life were not indicative of any intention to harm himself, but rather an earnest yearning to reconnect with his roots and find solace in honouring his familial bonds.

Subsequently, upon thorough review and advocacy, both the guardian and administration orders were successfully revoked. Now, as we navigate the aftermath

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<sup>3</sup> ABC News, 'Disability royal commission seeks guardianship and administration reform, lifting blanket gag laws', 9 October 2023

<sup>4</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability 'Executive Summary, Our vision for an inclusive Australia and Recommendations' pg 71

of this ordeal, we seek appropriate redress and compensation from the government on behalf of our client, recognizing the profound impact of the trauma he endured during his time in the system.

Additionally it is common for the parents of children with disabilities to be advised to take out guardianship orders.

#### Case Study:

A PWdWA advocate had a client whose parents were advised to pursue a guardianship order upon their child turning 16. This recommendation stems from a pervasive assumption that individuals with disabilities are incapable of self-care upon reaching adulthood.

Additionally, hospital social workers apply for guardianship to fulfil their duty of care. However, guardians cannot take the place of family members or act as patient transport vehicles. Patients should be collected by their family from hospital and not by a guardian.

#### **Enduring power of guardianship**

It is the experience of PWdWA advocates where a family member has been appointed guardian, in the case of a family dispute or falling out, the person with disability may not want that person to have to have the authority to continue with guardianship. However, it is difficult to overturn a guardianship order because applying for revocation is a legal process, which can be lengthy and onerous. Many people with disability lack the capacity to navigate this process by themselves and they need the assistance of an advocate.

When an enduring power of guardianship breaks down it puts people at risk. PWdWA agrees with the recommendation of the Select Committee into Elder Abuse and the Australian Reform Commission that:<sup>5</sup>

*Newly-appointed private guardians and private financial administrators should be required to sign an undertaking with respect to their responsibilities and obligations.*

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<sup>5</sup> Select Committee into Elder Abuse, 'I Never Thought It Would Happen to Me: When Trust is Broken, Final Report of the Select Committee into Elder Abuse' September 2018, pg 89 citing Australian Law Reform Commission, 'Equality, Capacity and Disability in Commonwealth Laws' Issues Paper 44, 15 November 2013, pg 321

**Case Study:**

A PWdWA advocate worked with a young person who was sharing a house with their mother who had guardianship. Due to a falling out with the family, the person was asked to leave the house and forced to leave behind all furniture, his ID, and a set of specialised tools.

**Access to guardians**

It is the experience of PWdWA advocates that guardians are overworked and don't have the time to conduct home visits. Guardians often fail to maintain regular contact with clients and are difficult to get on the phone. Additionally, accessing the emergency team proves to be a challenging task.

**Case Study:**

A PWdWA client experienced exploitation through underpayment by an acquaintance, prompting the involvement of an advocate due to the unavailability of the guardian. Seeking to withdraw her application, the client reached out to our organisation. Following her father's demise, her elder sister assumed control of the family business, while she, the younger sister was placed under the Office of the Public Advocate due to her mother's illness and her sister's business commitments.

While a client with PWdWA it was revealed that the client was subjected to exploitation working seven days a week for substandard wages. Upon bringing this action to the guardian's attention, corrective actions were initiated, resulting in the escalation of the guardianship orders by the presiding member. Subsequently an employment agency was engaged to address the situation, prompting an investigation by the Office of Public Advocate into the unreported cash payments. Furthermore, It is the opinion of PWdWA that the decision by the guardian to place the client in a group home was indicative of the neglect on their part.

**Access to information from guardians**

It has been noted by the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability that people with disability should be enabled to

have autonomy and access – including having access to information that serves a person’s needs.<sup>6</sup>

However, PWdWA advocates continue to work with clients who cannot access information from guardians. PWdWA calls for more accessible and responsive communication channels between the guardians, administrators, and advocates to ensure the clients’ needs are promptly addressed.

**Case Study:**

A PWdWA client was subject to family court orders. Lawyers from the Public Trustee and Legal Aid attended PWdWA offices to advise the client they were following strict family court directives to sell her property after she had lost custody of her child. The client was confused and worried as she has been under guardianship orders for acute mental health issues. Upon her recovery, she came to the realisation that everything had been taken away from her with her noticing.

**Access to money held by guardians**

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability recognises that people with disability have the right to respect for their inherent dignity and individual autonomy – autonomy being closely related to the concept of access.<sup>7</sup> Despite this, the guardianship system in Western Australia does not provide autonomy in relation to client funds.

PWdWA advocates consistently observe that individuals under guardianship orders often face significant barriers in accessing their own funds. This deprivation of financial autonomy removes the ability for clients to make choices that should rightfully be theirs. Clients have experienced financial strife, with debt collectors contacting them because they can’t talk to the trustee. People under guardianship should have the opportunity to make their own financial choices. It is noted that guardianship usually inherently means that people with disability lose control of their finances, but they should be heard when expressing what they wish to do with their money and their wishes considered.

It is also the experience of PWdWA advocates that clients lose assets, which are liquidated to pay for their care expenses.

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<sup>6</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ‘Executive Summary, Our vision for an inclusive Australia and Recommendations’ pg 67

<sup>7</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability ‘Executive Summary, Our vision for an inclusive Australia and Recommendations’ pg 67

**Case Study:**

An 82-year-old male was hospitalised for a broken rib. During his stay, a social worker was contacted to arrange necessary adjustments before his discharge.

The social worker placed him under guardian and administration orders. Consequently, the client lost all his possessions, including valuable paintings and books accumulated over his 20-year tenure as a professor.

The client owned two properties in affluent areas, which were cleaned out by individuals who failed to recognise the value of several important documents, resulting in their loss.

His neighbours alerted him about his belongings being discarded in skip bins.

Furthermore, his accountant was instructed to surrender all his assets, which included over one million dollars in stocks and savings. Ultimately, the client was stripped of all control over his assets and his life.

Considering the complexity of the issues and the property losses suffered by the clients, he was advised to seek legal aid or consult a private attorney.

There is a lack of transparency about where funds are being spent and the fees incurred. Clients don't have access to bank statements and there is no auditing required with a guardianship order. There is no accountability or transparency and the clients themselves have to arrange audits. The lack of transparency doesn't give clients choice and control over their finances.

**Case Study:**

A PWdWA advocate worked with a client who knows they have a certain amount of money. However, due to their acquired brain injury which often leads to difficulty in self-regulating emotions, the client can become abusive when frustrated.

The trustee stated that the client has been banned from contact with the trustee via telephone due to abusive phone calls. The client can email or come into the public trustee building in Perth to put in a request for accounts to be paid - neither of which the client can do.

PWdWA requested a system whereby the client could text his needs to the public trustee, but the guardian refused. Despite the client's requests, the guardian continues to withhold his money, and subsequently wants the client is seeking to have his guardianship revoked, which is highly unlikely due to his acquired brain injury. The financial responsibility falls onto the accommodation manager, who is subjected to outbursts of abuse as a result of the client's frustration. The public trustee is receiving public finances to manage the client's needs yet is doing nothing to alleviate the client's frustration.

### **People moved to congregate housing**

PWdWA advocates are observing instances where individuals under guardianship are relocated from their own homes into congregate housing. There is a correlation between guardianship and people losing public housing. Clients are housed together, and guardians show little concern for their preferences, often preferring to consolidate all their clients under one roof. The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability have noted that congregate housing can be 'isolating and prevent residents from participating in their local communities.'<sup>8</sup> The Royal Commission has also stated the following:

*No person with disability should be forced against their will (or, in the case of children, against the will of their parents or guardians) into an environment in which they are physically separated on the basis of disability and isolated from their peers or the community at large.<sup>9</sup>*

Another issue identified is where the NDIA would appear to be moving towards congregate housing as a cost saving measure. People who require one-to-one support are not having this funding approved in their plans and as a result, accommodation providers are reluctant to take clients on and they become homeless.

#### **Case Study:**

A client with an upcoming hearing had found a property ready to rent in June, however as a result of the guardianship order in place, she was required to relocate from her current location and move 45 km away to a group home. This distance prohibits her from accessing her own property and prevents her sister visiting her.

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<sup>8</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability 'Executive Summary, Our vision for an inclusive Australia and Recommendations' pg 75

<sup>9</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability 'Executive Summary, Our vision for an inclusive Australia and Recommendations' pg 9



## Refugees and migrants in guardianship

PWdWA works with people who are refugees and migrants who have been put under guardianship orders.

### Case Study:

A refugee woman approached the police with her passport and \$13,000, requesting to be repatriated to her homeland. Subsequently, she was placed under a guardianship order, and her funds were transferred to the Public Trustee. She resided in government housing for nearly a decade. Following a brief stay at Bentley Hospital, she was discharged with an NDIS application. Once her application was approved, she was relocated from her studio apartment to a shared residence with another traumatized individual. Clarification was sought as to why she was moved to a shared house some distance away, which has exacerbated her trauma. After enduring several difficult weeks, the client is now in a facility operated by Bentley Mental Health, having lost her independence, secure housing, and personal freedom.

## Aboriginal people in guardianship

The United Nations Declaration on the Rights of Peoples requires that particular attention be paid to the rights and special needs of people with disability.<sup>10</sup> In support of this the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has stated 'The importance of culture and its healing nature for First Nations People is undeniable.'<sup>11</sup>

Despite this, there are instances where guardians are not allowing people to go to Country to reconnect with family. PWdWA calls for support from guardians that enables Indigenous clients to engage with their cultural practices and community, in recognition of the importance of these activities for their mental and emotional well-being.

### Case Study:

PWdWA is currently assisting an Indigenous mother who is under guardianship and administration due to a brain injury. Despite her need for lifelong assistance, the client is deeply distressed and demoralized as she is unable to fulfil her cultural and familial obligations, particularly participating in her young son's initiation ceremony. This is known as Bora or Burbung, which signifies his transition to adulthood.

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<sup>10</sup> United Nation Declaration on the Rights of Indigenous People, art. 22(1)

<sup>11</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability 'Executive Summary, Our vision for an inclusive Australia and Recommendations' pg 144

Due to logistical constraints, the client is unable to travel remotely. For instance, Broome Airport, the only airport in the vicinity with a suitable lift, lacks hoist access, making travel unfeasible for her. This limitation significantly impacts her ability to engage with her community and partake in vital cultural ceremonies.

Furthermore, there has been a concerning issue regarding her financial compensation. At a recent hearing, the client could not locate compensation funds exceeding \$120,000. The Public Trustee has no record of any compensation payments made to her, leading to significant distress and a sense of helplessness. This financial oversight, combined with her inability to be with her son and participate in his initiation ceremony, has severely impacted her quality of life.

PWdWA is seeking a review of the State Administrative Tribunal's decision because the original decisions made by the presiding members were based on incomplete or biased information. PWdWA is also requesting an urgent review and investigation into the missing compensation funds to ensure the client receives the financial support she is entitled to.

### **Providers lodging guardianship applications**

It is the experience of PWdWA advocates that Providers, in particular support coordinators can apply for guardianship orders even if a client hasn't requested this. Sometimes if there is a conflict between what the client wants and what the service provider wants, there is an application made for guardianship. The service provider can negate responsibility in dealing with a client they have deemed to be difficult. They can circumvent the client and speak with the guardian instead and the client's right to make choices can be taken away from them. There is an inherent conflict of interest because the service providers are a for profit business and sometimes what they want is more to do with efficiency and economic profitability than what the client would choose.

Support coordinators lodging guardianship applications goes against the intent of section 51(c) of the Guardianship Act 1990 (WA). This states that the guardian must act in the best interest of the represented person 'in such a way as to encourage and assist the represented person to become capable of caring for himself and of making reasonable judgements in respect of matters relating to his person.'

Support coordinators also apply for guardianship orders as a way to navigate the complexity of the NDIS<sup>12</sup> and to manage risk of carrying out restrictive practices for people with mental health issues.

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<sup>12</sup> Commission into Violence, Abuse, Neglect and Exploitation of People with Disability 'Executive Summary, Our vision for an inclusive Australia and Recommendations' pg 71

Case Study:

PWdWA has a client who is hard of hearing, has a visual impairment and schizophrenia. He has a partner and they have been together over 35 years. The partner's relative was the assigned nominee with the NDIS for both of them.

Their funding plan was reviewed, but the nominee asked the provider why they needed an \$8000 dollar holiday to Rottnest with a carer for a week, as the client wanted to go to gym to get healthier.

There were also complaints of abuse from the carer, and this was brought to the support coordinator's attention. The support coordinator then lodged paperwork for guardianship as the client wanted to move their funds to a new agency, stating they were being financially abused by the nominee.

The client was successful in stopping the guardianship order taking effect, but the situation caused them considerable distress for six months while awaiting the outcome from the State Administrative Tribunal.

Case Study:

In a concerning incident highlighting the vulnerabilities of individuals reliant on the National Disability Insurance Scheme (NDIS), a young mother experienced significant financial abuse by her support worker, resulting in the loss of over \$36,000 within a brief two-month period. As a result, the NDIS terminated the support worker's services. However, the sudden cessation of support left the young mother in a vulnerable position, leading to a distressing downward spiral that culminated in a self-harm attempt.

Following this, she received care from Midland Mental Health services to address the aftermath of the exploitation. However, rather than addressing the core issue of financial abuse, the response leaned towards an excessively heavy-handed approach.

Instead of promptly involving the NDIS Quality and Safeguards Commission to investigate the financial wrongdoing, authorities quickly pursued guardianship and administration over the young mother's affairs. This approach not only failed to tackle the root problem but also exacerbated the trauma experienced by the vulnerable individual.

Fortunately, during subsequent proceedings, it became evident that there had been a critical oversight—the absence of prior engagement with the NDIS Quality and Safeguards Commission. This realisation prompted a necessary reassessment of the situation.

The heavy-handed pursuit of guardianship and administration, rather than a focused investigation into the financial abuse, highlights a systemic flaw in our approach to safeguarding vulnerable members of our community. It is essential to re-evaluate our protocols to ensure that responses are balanced, effective, and prioritise the well-being and autonomy of those affected.

Moving forward, collaborative and multi-agency approaches should take precedence, centering the voices and experiences of individuals like this young mother. Empowering them to navigate challenges while upholding their rights and dignity is crucial. This case serves as an important reminder of the need to create a system that not only responds to vulnerabilities but actively works to prevent exploitation and harm.

### **Lack of supported decision making**

The Attorney General of Western Australia has noted that alternatives to the appointment of substituted decision makers should be used when possible.<sup>13</sup> Additionally, the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has stated the following:<sup>14</sup>

*Supported decision-making should be embedded in guardianship and administration law and practice, and other systems over time, to ensure substitute decision-making only happens as a last resort and in the least restrictive manner.*

Also, the Committee into Elder Abuse has noted that if supported decision making was incorporated into the guardianship model it would be a way for the State Administrative Tribunal to meet the needs of an adult who cannot make decisions for themselves, in the least restrictive way possible.<sup>15</sup> Despite this, there remain abuses of the substituted decision making system - which remains in place in Western Australia.

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<sup>13</sup> Department of the Attorney General's 'Statutory Review of the Guardianship and Administration Act 1990' pg 12

<sup>14</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability 'Executive Summary, Our vision for an inclusive Australia and Recommendations' pg 67

<sup>15</sup> Select Committee into Elder Abuse, 'I Never Thought It Would Happen to Me: When Trust is Broken, Final Report of the Select Committee into Elder Abuse' September 2018, pg 90

The Australian Government Attorney General's Department has noted that 'a number of Australian and international jurisdictions and organisations have started to move away from substitute decision-making toward supported decision-making'.<sup>16</sup>

This includes Victoria, and Western Australia should adopt the Victorian standards in legislation.<sup>17</sup> Substituted decision making relieves guardians from the obligation of considering the individual's preferences and needs, despite Article 12 of the CRPD recognising the right to supported decision making.<sup>18</sup> There remains vested interest in having a substituted decision making instead of a supported decision making process because it leaves clients with less choice and control.

### **Issues with Restrictive Practices**

There are issues with restrictive practices and community treatment orders. In the NDIS system if a young person doesn't want medication, that is acceptable because it's a chemical restraint. However, a community treatment order says if that same person doesn't take medication they won't be let out of hospital.

### **Issues with State Administrative Tribunal**

In the Western Australian Department of the Attorney General's 'Statutory Review of the Guardianship and Administration Act 1990' it is noted that 'The primary concern of the State Administrative Tribunal shall be the best interests of any represented person, or of a person in respect of whom an application is made.'<sup>19</sup>

Moreover, the State Administrative Tribunal pursuant to section 4 of the Guardian and Administrative Act 1990 (WA) must be guided by the principles that every person shall be presumed to be capable of; looking after his own health and safety; making reasonable judgments in respect of matters relating to his person; managing his own affairs; and making reasonable judgements in respect of matters relating to his estate – until the contrary is proved to the satisfaction of the State Administrative Tribunal.

Despite this, it is the experience of the PWdWA advocates that the State Administrative Tribunal continues to use guardianship applications to restrict clients and their choices in a way that does not adhere to section 4 of the Guardianship and Administration Act 1990 (WA).

### **Need for more advocacy and funding**

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<sup>16</sup> Australian Government Attorney General's Department, 'Achieving Greater Consistency in Laws for Financial Enduring Powers of Attorney' September 2023 pg 27 citing Royal Commission Roundtable: Supported decision-making and guardianship: Proposals for reform, pg 7

<sup>17</sup> See the: Powers of Attorney Act 2014 (VIC); Guardianship and Administration Act 2019 (VIC); Medical Treatment Planning and Decisions Act (VIC); Mental Health Act 2014 (VIC)

<sup>18</sup> See also the Commission into Violence, Abuse, Neglect and Exploitation of People with Disability 'Executive Summary, Our vision for an inclusive Australia and Recommendations' pg 70

<sup>19</sup> Department of the Attorney General's 'Statutory Review of the Guardianship and Administration Act 1990' pg 11

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability asserts that funding for disability advocacy must be funded to meet demand.<sup>20</sup> This assertion is grounded in the recognition within the National Disability Framework of the critical role of advocacy.<sup>21</sup>

It is PWdWA's position that more advocate resources should be duly funded to meet demand. The existence of a waiting list maintained by PWdWA underscores the ongoing demand for advocacy services, consistently outstripping the organisation's capacity to accommodate all those in need.

People will often contact PWdWA at a point of critical need such as when they are about to be evicted or have depleted their NDIS funds. Engaging advocacy services at an earlier stage could significantly improve outcomes. By securing additional funding, PWdWA could not only expand its advocate workforce but also enhance community engagement initiatives. This proactive approach would raise awareness of our services, encouraging individuals to seek support before reaching a state of absolute crisis.

While it is acknowledged the federal government has doubled the budget for systemic advocacy in the latest budget, these funds are now reserved for Disability Representative Organisations (DROs), none of which are based in Western Australia. There is an expectation from DRO's that State's contribute to national issues, without providing any remuneration. Furthermore, State based issues are no longer at the fore as DRO's argue they are not sufficiently funded to address local issues. Moreover, despite extensive lobbying by disability advocacy organisations across Australia for increased individual advocacy funding in recent months, it has been overlooked in recent State and Federal budgets. The sector is critically underfunded, which may restrict the number of clients seeking to challenge guardianship orders and accessing advocates in future.

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<sup>20</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability 'Executive Summary, Our vision for an inclusive Australia and Recommendations' pg 67

<sup>21</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability 'Executive Summary, Our vision for an inclusive Australia and Recommendations' pg 75