

Response to questions on notice

Senate Community Affairs References Committee

Public hearing 16 October 2015

Inquiry into violence, abuse and neglect against people with 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 disability

Public Guardian

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Introduction

On 16 October 2015, the Community Affairs References Committee (the Committee) conducted a public hearing in relation to the Senate inquiry into violence, abuse and neglect against people with 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 disability.

The Acting Public Guardian made submissions at the hearing and took questions on notice from the Committee regarding the following three matters—

1. statistics on the Office of the Public Guardian (OPG) fulltime equivalent staff
2. restrictive practices, and
3. service providers seeking to remove family member guardians due to excessive complaints.

The Acting Public Guardian’s response regarding each of these matters is detailed below.

1. OPG fulltime equivalent staff

The OPG fulltime equivalent staff as at 30 June 2015 is set out in the following table—

Officer	Number
Executive Management	8
Community Visiting Program	158
Guardianship	62
Legal Team	15
Investigations	6
Corporate (including HR, Finance, IT, Communications, Policy and Reporting, and Administration)	25
Total staff	274

2. Restrictive practices

The Committee has requested a summary of the restrictive practices statutory regime.

The statutory regime

The *Guardianship and Administration Act 2000* (GAA) and the *Disability Services Act 2006* (DSA) (collectively, the statutory regime) specify that restrictive practices may be used by a disability service provider for the purpose of reducing the risk of harm to the adult or others.

Restrictive practice means any of the following practices used to respond to the behaviour of an adult with an intellectual or cognitive disability that causes harm to the adult or others—

- containing or secluding the adult
- using chemical, mechanical or physical restraint on the adult, or
- restricting the adult’s access to objects.¹

¹ *Guardianship and Administration Act 2000*, s.80U; *Disability Services Act 2006*, ss.144, 145, 146 and 147.

Harm to a person means physical harm to the person, a serious risk of physical harm to the person, or damage to property involving a serious risk of physical harm to the person.²

The GAA and the DSA safeguard the adult's rights and interests by providing for the assessment, approval, regulation, monitoring and review of the use of restrictive practices by service providers. The statutory regime ensures that the service provider has regard for the human rights of the adult and uses the least restrictive way of preventing harm.³ The Office of the Public Guardian, the Department of Communities, Child Safety and Disability Services (DCCSDS) and the Queensland Civil and Administrative Tribunal (QCAT) are primarily responsible for the administration of the restrictive practices framework.

The statutory regime provides a process for authorisation of actions that may otherwise constitute assault or other criminal offence against the adult. A service provider is not criminally or civilly liable if the service provider uses restrictive practices in accordance with the GAA and the DSA.⁴

The statutory regime applies only to adults with impaired capacity who—

- are 18 years or over
- have an intellectual or cognitive disability
- exhibit behaviour that either causes harm, or represents a serious risk of harm, to the adult or others, and
- are receiving services provided or funded by DCCSDS.⁵

Guardians are appointed by QCAT and are usually family members or close friends of the adult. QCAT may appoint the Public Guardian as a guardian of last resort in circumstances where there is no other appropriate person to appoint as the adult's guardian, or there is intra-family or guardian conflict.⁶ To assist understanding and compliance with the statutory regime, DCCSDS has prepared a [flowchart](#) and [summary table](#).⁷

OPG has a specialised team of guardians to make decisions relating to restrictive practices which assures a consistent and expert approach to the protection of these adults' human rights.

Process for approving the use of restrictive practices

The authorisation process for the use of restrictive practices is dependent on the nominated restrictive practice and other circumstances.

Short term approval (up to six months) may be granted by—

- OPG – for seclusion or containment,⁸ and
- DCCSDS – for restraint (chemical, mechanical or physical) or restricting access to objects,⁹

in circumstances where the service provider has identified an immediate and serious risk of harm to the adult or others and a guardian has not yet been appointed by QCAT.

² *Guardianship and Administration Act 2000*, s.80U; *Disability Services Act 2006*, s.144.

³ *Guardianship and Administration Act 2000*, s.80U; *Disability Services Act 2006*, ss.139 and 141-144.

⁴ *Disability Services Act 2006*, s.189 and 190.

⁵ *Guardianship and Administration Act 2000*, s.80R; *Disability Services Act 2006*, ss.140 and 142. For impaired capacity requirement see *Guardianship and Administration Act 2000*, ss.80V, 80ZD and 80ZH; *Disability Services Act 2006*, s.178.

⁶ *Guardianship and Administration Act 2000*, s.14.

⁷ Flowchart for restrictive practices: <https://www.communities.qld.gov.au/resources/disability/key-projects/positive-behaviour-support/flowchart-operational-procedure-full-legislative-scheme-general-disability-services.pdf>. Summary table for restrictive practices: <https://www.communities.qld.gov.au/resources/disability/key-projects/positive-behaviour-support/restrictive-practice-requirements.pdf>. For further information on the restrictive practices statutory regime, please see the DCCSDS website on positive behaviour support: <https://www.communities.qld.gov.au/disability/key-projects/positive-behaviour-support>.

⁸ *Guardianship and Administration Act 2000*, s.80ZH.

⁹ *Disability Services Act 2006*, s.178.

Consent may be given by a QCAT-appointed guardian for restrictive practice matters for the use of containment or seclusion in respite or community access services, and chemical, mechanical or physical restraint or restricting access to objects across all service types.¹⁰

Consent may be given by an informal decision maker (a member of the adult's support network) for the use of restricting access to objects.¹¹

Approval is given by QCAT for the use of containment or seclusion in accommodation support or community support services (and these practices in combination with other restrictive practices).¹² QCAT may grant approval for up to—

- 12 months for containment or seclusion,¹³ and
- two years for other restrictive practices.

Approval of restrictive practices by the Public Guardian

The service provider must submit a Positive Behaviour Support Plan (plan) to the Public Guardian, together with a request for consent for the service provider to use certain restrictive practices on the adult.¹⁴ The plan must outline strategies to address the harmful behaviour, reduce or eliminate the use of restrictive practices, and improve the adult's quality of life. DCCSDS has prepared a [model plan](#) to assist service providers with this requirement.¹⁵

The plan must be informed by assessment and will include medical reports and additional information depending on the nominated restrictive practice, for example—

- chemical restraint – clarification of purpose form or letter issued in the preceding 12 months, or
- mechanical or physical restraint – pictorial diagrams of devices and/or staff training.

The plan is allocated to a senior guardian and assessed against the requirements of the DSA and the GAA. The senior guardian liaises with the service provider to revise and amend the plan if necessary to ensure compliance with the statutory regime. When the senior guardian is satisfied with the plan, it is escalated to management or the Public Guardian for approval as required.

Frequency of approval of the use of restrictive practices

The Public Guardian provides consent for the use of restrictive practices for approximately 300 clients per annum. In addition, the Public Guardian also provides a smaller number of some short term approvals. There are currently 11 short term approvals in place.

Monitoring of restrictive practices

Monitoring of the use of restrictive practices is conducted by—

- authorised officers appointed under the DSA,
- the OPG's Community Visitor Program utilising the inquiry/complaint function under the GAA, and
- third-party audits under the Human Services Quality Framework.

¹⁰ *Guardianship and Administration Act 2000*, ss.80ZE and 80ZF.

¹¹ *Guardianship and Administration Act 2000*, s.80ZS.

¹² *Guardianship and Administration Act 2000*, ss.80V and 80X.

¹³ *Guardianship and Administration Act 2000*, s.80Y.

¹⁴ *Guardianship and Administration Act 2000*, s.80U; *Disability Services Act 2006*, ss.144 and 150.

¹⁵ Model plan for restrictive practices: <https://www.communities.qld.gov.au/resources/disability/key-projects/positive-behaviour-support/positive-behaviour-support-plan.pdf>.

Review process

All approvals for the use of restrictive practices are time-limited and must be reviewed regularly.

Approvals for containment and seclusion

As noted above, OPG can provide short term approval for the use of containment and seclusion, for a maximum 6 month period. Otherwise, all applications for containment and seclusion are made to QCAT.

If OPG provides short term approval, at the end of the approval period, a service provider must then apply to QCAT to seek a new approval.

QCAT approvals for containment and seclusion can only be made for a maximum of 12 months. A service provider can apply for a further 12 month approval, at which point, QCAT would consider the request afresh, although information about the previous order would be before the Tribunal. The service provider would prepare a report for QCAT outlining the request and other supporting information.

Appointment of a guardian to authorise restrictive practices

QCAT can also appoint a guardian who has the authority to approve the use of restrictive practices, excluding containment and seclusion, for a period of up to 2 years. The guardian therefore, can authorise any restrictive practice other than containment or seclusion.

The Public Guardian is empowered to approve restrictive practices only when this is expressly provided for in a guardianship order made by QCAT.

The service provider must review the adult's plan every 12 months¹⁶ and, within 30 days of the existing plan's expiration, submit to the Public Guardian—

- a revised plan, or
- a request for an extension of time (if required).

The Public Guardian cannot provide an extension of an existing plan without a formal request.

A person who is dissatisfied with the appointment of the Public Guardian can apply directly to QCAT for the appointment to be reviewed or revoked.¹⁷ They can also seek advice, directions and recommendations from QCAT. QCAT may also give advice, directions or recommendations to the Public Guardian on its own initiative.

After 2 years, QCAT will automatically initiate a review of the guardianship appointment, which may be conducted on the papers or at a hearing. In the process of the review, information as to what was approved by the guardian would be before QCAT, to assist in deciding whether to continue the guardianship appointment.

For further information on QCAT processes please see information sheets and approved forms at <http://www.qcat.qld.gov.au/matter-types/guardianship-for-adults-matters>.

¹⁶ *Disability Services Act 2006*, s.150.

¹⁷ *Guardianship and Administration Act 2000*, s.81.

3. Service providers seeking to remove family member guardians

The Committee has enquired about instances where service providers have sought to have family members removed as guardians because the family has made excessive complaints about the service provided.

There are a number of reasons a service provider may seek to have family member guardianship revoked and the Public Guardian appointed, for example—

- the family is not willing to act as the adult's guardian,
- there is a reasonable belief that a family member guardian is not properly performing their functions or is subjecting the adult to abuse, neglect or exploitation,
- difficulty dealing with the adult's family in situations where multiple guardians have been appointed for different matters and their decisions conflict, and
- the family requesting the Public Guardian be appointed as the adult's guardian for restrictive practice matters only to ensure compliance with the statutory regime.

In some cases, it becomes apparent that a service provider initially sought the Public Guardian's appointment because of conflict between the service provider and the family, sometimes in response to a family member assertively advocating on the adult's behalf.

In other cases, QCAT may make a decision to remove a family member as the adult's guardian independently of any request from a service provider.

Appointment of the Public Guardian may occur as a guardian of last resort in circumstances where there is no other appropriate person to appoint as the adult's guardian, or there is intra-family or guardian conflict.

If the Public Guardian is appointed as an adult's guardian and the OPG becomes aware that the service provider is in conflict with the family—

- the OPG will negotiate with the service provider and the family to resolve the issues and manage the ongoing conflict, and
- if there is a more suitable person willing and able to be appointed as guardian, OPG will liaise with that person and apply to QCAT for a review and revocation of the Public Guardian's appointment.