SUBMISSION TO THE AUSTRALIAN LAW REFORM COMMISSION
GUARDIANSHIP LAWS INQUIRY and REVIEW

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By: Bridgette Pace

REMOVE SUBSTITUTE DECISION MAKING FROM THE GUARDIANSHIP ACT

I have read the transcript of the Speech given by Ms. Rosalind Croucher at the Australian Guardianship and Administrative Council published on October 20, 2016 and the subsequent Report released by the ALRC proposing certain law reform recommendations.

The content of those documents are of great concern to me, particularly as a person who has had first hand experience of the devastating effect that plenary guardianship has had on my family and so many others because of the human rights abuses perpetrated by the Guardianship Tribunal, Public Guardian and Public Trustee. Anger and frustration is very difficult to contain when law reformers tip toe around issues of glaring human rights abuses and bureaucratic thuggery. None of those organisations are fit for purpose nor are they truth tellers.

Michael Perlin and Oliver Lewis are two highly respected and experienced international human rights lawyers who have dedicated their lives in the pursuit of justice for society's most vulnerable. They have been at the coal face of atrocities and seen the human rights abuses and violations that happen throughout the world at the hands of the so called "protective" Guardianship Laws. They have had considerable involvement with the creation of the UNCRPD as it speaks to the issue of guardianship and continue to advocate for the removal of draconian regimes and the restoration of one's basic human rights and freedoms. Australia has no such champions.

The UNCRPD was and is a very well considered and formulated instrument and it is the only document that radically changes the scope of international human rights law as it applies to all persons with disabilities and in no area is this more significant than in the mental disability law context. It is a document which can be said to embrace the views of Clarence Darrow, the famous American lawyer who said -

> **"Laws should be made like clothes. They should be made to fit the people they are meant to serve".**

By refusing to legislate by statute the Principles and Guidelines of the UNCRPD, the Australian government has failed in its duty to protect its vulnerable citizens. Australia's ratification in 2008 of the UNCRPD, therefore, became only a "paper victory" as was foreshadowed by the creators of the UNCRPD, and so the denial and deprivation of freedom and basic human rights of vulnerable people in Australia continues.

The UNCRPD is also an extremely important document which, if legislated by statute, would become an <u>effective safeguard</u> for all vulnerable people. This is particularly so as the usual avenues of complaint cannot be relied on to realise that a seemingly benevolent authority (i.e. The Guardianship Tribunal, Public Guardian and Public Trustee) is in fact malevolent, even when the complaint bodies are faced with overwhelming evidence which suggests that this authority is indeed malevolent. In almost every circumstance, the complaint bodies choose to act in a way that merges

with the personality of larger institutional structures and fail to effectively advocate and act on behalf of the vulnerable person.

It took 8 years of dedication by Walkley Award winning Journalist Ms. Joanne McCarthy, Editor Chad Wilson and their supporters to bring about a Royal Commission into the sexual abuse of children primarily within the Catholic Church. Whilst those in authority studiously turned a blind eye, Ms. Mccarthy suffered harassment, vilification and death threats etc. by many powerful organisations and their allies who tried to silence her. Those in authority also put their own ambitions or the status of the church above the need to protect children from harm and recognise crimes. The Royal Commission finally exposed the corruption and systemic cover up of the abuses and those responsible were eventually held accountable.

The human rights abuses suffered by the victims of plenary guardianship abuse have many parallels with the David and Golliath battle between Joan McCarthy and the establishment. When the victims of the draconian guardianship regime finally win their battle for justice, and they will, what excuse will the politicians and those in authority use to explain why they didn't respond to a survivor, or listen, or read a document, or question a response, or investigate, or step slightly beyond their perceived professional boundaries – to try to walk in the shoes of a victim, up against a bureaucratic system that considers itself above the law.

The victims of guardianship laws have yet to find a champion, another Joanne McCarthy, but there are many within our ranks who will continue our pursuit for justice until we do .

> "*Let's not get tired of doing what is good. At just the right time, we will reap a harvest of blessing if we don't give up*." *St. Paul's Epistle to the Galatians.*

Australia's Guardianship Laws sit very uneasily with modern-day conceptions of the right of people with disabilities. Globally there is a shift towards the manner in which Governments operate and this evidenced by the populist political uprising and elevation of minor parties to positions of power. Calls for Law Reform in guardianship laws are no different. For far too long academics pontificating from ivory towers, self-interested organisations and others with a conflict of interest have prevented the legislation of any useful law reforms to stem the human rights violations perpetrated by the guardianship regime.

It is incredible, in view of the damning body of evidence over the past 30 years and continuing, that the removal of "substitute decision making" from guardianship laws is still in question. On every level, plenary guardianship is wrong. No law can justify the retention of substitute decision making on ANY level.

Current guardianship laws state that substitute decision making should only be used as "a last resort" yet the Tribunals use it as a default position in almost every case that comes before it. A person with full spectrum of appropriate supports is still placed under plenary guardianship by the Tribunal contrary to the mandates of Guardianship Act and in defiance of UNCRPD.

The ALRC's suggestion that supported decision should be incorporated as another step in the decision making process, whilst retaining substitute decision making in the context of current guardianship model, is ridiculous. This additional step will only serve as an irritant to the Tribunals, Public Guardian and Public Trustee. It will **not stop** them from pushing the substituted

decision making default button - it will simply delay it and use the same purile spin to justify their actions.

Ms. Croucher states " Public Guardians or Administrators are accountable for their activities to their employers". Clearly, this is a case of theory and practice being very poor bedfellows. I wonder how many individuals and families under plenary guardianship Ms. Croucher and her Committee members have actually interviewed or personally spoken with in order to legitimately place any credence to that statement. Is it because of the Tribunal's gag clause and the $20,000 fine which silences the victims or is it because the ALRC finds it more comfortable accepting the glib lip service paid to it by the self serving organisations who profit from those under plenary guardianship rather than giving due weight and attention to the plaintive cries of the victims of the guardianship regime. Again, law on the books is not law in practice particulary when that "rule" is not governed by statute.

Ms. Croucher makes reference to "safeguards" being in place for persons who require decision making support. Again, these views are based on theory and certainly not in practice. There are <u>NO</u> effective safeguards upon which a vulnerable person may rely. There is nowhere for a person to go and seek remedies when the alleged "safeguards" have been breached and abused by the very authorities who have been mandated to protect them. There is no useful or independent authority to ensure that the representative officer of the protected person complies with those "safeguards" <u>and</u> there are no punishments levied against the officer(s) who abuses those safeguards. Therefore, the alleged "safeguards" relied upon by the ALRC are purely academic and legal fiction.

It is extremely troubling when authorities rely on the so called rhetorical "safeguards" to excuse them from taking action to address the overwhelming evidence that there are NO effective safeguards for victims of the guardianship system. When the ALRC and other academics suggest that words such as "reaffirm", "ensure", "code of conduct", "guidelines and principles" etc. are sufficient and effective safeguards in the legal framework of the proposed law reform, it is not only highly insulting to the victims of guardianship abuse but makes a mockery of this whole review process.

<u>Unless safeguards are legislated by statue</u>, the status quo will remain the same, and the sole purpose of the alleged "safeguards" will be to reinforce the means by which abusers manipulate the system for their own advantge just as they have done in the past, with total impunity.

Whistleblowers are vilified and dismissed. Officers with a moral compass who question the directives of their superiors or the wrongdoings of their colleagues are white-anted, bullied, demoted or moved aside. Media exposure is limited because of legal threats by the guardianship authorities and most victims' families have little financial means to apply to the Supreme Court in the hope of receiving some natural justice. Going to the AAT, ADT or similar is an exercise in abject futility as is the onerous round robin, biased and bureaucratic process of internal guardianship reviews. The Boys club is alive and well!

Ms. Croucher's comment that "*the development of codes of practice, guidance and accountability measures will, **over time,** lead to a shift in culture and practice*" is not only unacceptable but unconscionable. On a daily basis, people are suffering under plenary guardianship and need effective law reform **now - not if and when** the hypothetical "shift in culture occurs over time". For the past thirty years, Inquiries, law reform recommendations, submissions et al have not resulted in any effective changes in guardianship laws which restore a disabled person's basic human rights and freedoms. Is

it to be another 30 years before the "*bright light*" of reason finally hits the mark and justice is restored? Or will wilful blindness, academic shuttlecock, and self-interest win out yet again.

I concur with the statement of Graeme Smith in so far as he states -

> *"....we must begin with a clean slate so to speak. We must imagine a world where a person can easily access the support they need to enable them to exercise their legal capacity rather than the existing binary system in which we operation where a person's diminished mental capacity equals the appointment of a substitute decision maker*. "

Until substitute decision is totally abolished, the guardianship regime will remain an abusive authority guilty of perpetrating human rights violations and serve as the perfect vehicle for other predators to achieve their goals. A new model providing various levels of supports is not difficult to implement and should be provided to all persons, as requested, and on an informal basis. Money spent in formulating a network of this kind would be far more effective for the disabled person rather than being wasted on the draconian and abusive regime of the Guardianship Tribunal, Public Guardian and Public Trustee. Funds would also be well spent in creating a totally independent Advocacy Commission which would have the legal authority, bound by rules of law and evidence, to investigate and prosecute perpetrators of all persuasions who emotionally, financially and physically abuse disabled and vulnerable persons.

The Tribunal, Public Guardian and Public Trustee are the Humpty Dumpty of the Guardianship Act. Law Reforms will only plaster over the cracks but can never make it whole. These organisations should be dismantled, the Guardianship Act completely rewritten and the Principles and Guidelines of the UNCRPD adopted, by statute, in its stead.

Disabled people and their estates are the stock in trade of the guardianship regime. Each organisation feeds off one another and none of them will bite the hand that feeds it. The executive level generally belong to a type of boys club and fosters cronyism within its structure. The latest round of 17 appointees to the Administrative Appeals Tribunal selected, without due process, by the paragon of virtue (tongue in cheek) Attorney General George Brandis is a current example. On salaries of upwards of $200,000p.a. and with a tenure of up to 7 years, which one of them will rock the boat and go against the Decisions of the Tribunal, Public Guardian or Public Trustee no matter how wrong, biased or unjust?

Ms. Croucher gives examples of Judges who have developed approaches favouring "substituted" decision making -

> "(a) what a reasonable and ordinary man might do in the position of a 'lunatic' with respect to the disposition of his surplus income—the standard developed by Lord Eldon LC in the leading case concerning the 'substituted judgment' approach; and
> (b) the 'wise and just husband and father' approach in relation to family provision litigation."

Both of these approaches deny a person's right to make a choice and to have their wishes respected not only when they are alive (example a) but also beyond the grave (example b). Why would one bother to make a Will at all? Is one so naive or biased as to presume that only a court appointed Judge has a moral compass or a reasonable mind in order to make a just and proper decision? And

what court appointed Judge has the actual intimate knowledge or full history of the "lunatic" or the "deceased" in order for him/her to stand in their shoes as a "wise and just husband and father" and then overturn their wishes. The same questions apply to publicly appointed substitute decision makers, the caibre of which falls far short than that of a higher court Judge.

Substitute decision making is just wrong. One man's poison is another man's nectar and one man's trash is another man's treasure. We are all uniquely different. Who is considered to be so superior within the bureaucratic ranks that they are permitted to abuse their position of power and denude a vulnerable person of their very personhood and right make their own personal choices?

Guardianship Laws have been under scrutiny for the past 30 years. During that time, no one in the corridors of power has been willing or had the necessary backbone to help the victims of guardianship abuse – is it because the elderly and disabled are just not interesting enough or worth putting their careers on the line in pursuit of justice. No victim of guardianship abuse has been fortunate enough to have a Joanne McCarthy champion their cause. This ALRC Inquiry has the potential to make a difference but what I have read from its proposed model, I doubt any real difference with eventuate to protect the rights of those under guardianship.

Whilst I appreciate the amount of effort the ALRC has expended in producing the Report, victims do not need another 200 odd pages of legal dissertation. The core problems and violations endemic in the guardianship regime have been well documented and have a long and tawdry history. Disabled and vulnerable persons have been marginalised and disenfranchised for so long it is extraordinary that little, if any, genuine attention is paid to their plight. There have been no strategic or constitutional changes to prevent or remedy human rights violations visited upon them despite the myriad of evidence available from case histories, reports, whistleblowers etc. Governments, politicians, law reformers have simply adopted a "business as usual" approach and have done nothing of any value to help people under guardianship.

Human nature is such that laws <u>are required and necessary</u> to protect vulnerable people from predators. The law cannot dictate that one adopts a moral compass, empathy, common sense, ethics, basic intelligence or to know the difference between right and wrong. What legislators can do is to implement laws, by statute, to safeguard and effectively protect vulnerable persons under guardianship including the legislation of legal remedies and punishments for those who abuse their positions of power by physically, emotionally and financially harming the vulnerable person.

Abolition of substitute decision making and the creation of a robust network of various supports would be the first step in the right direction. The development of a fully independent Advocacy Commission with dedicated Counsel well versed in disability matters should follow as a matter of a priority. In general, the Tribunal, Public Guardian, Public Trustee, ADT and AAT are biased in favour of substitute decisioning making and <u>do not</u> protect the rights of society's most vulnerable – in fact they destroy them and allow the guardianship authorities to use the financial estates of vulnerable persons and our tax payers money to do it. The ALRC's has not only a perfect opportunity but also a moral responsibility to make sure that its recommendations address the truth and act accordingly. Failure by the ALRC to recommend and the legislators to comprehensively incorporate into Australian domestic law the human rights of persons with disability as expressed by

CRPD will ensure that those human rights will remain unattainable and create another shameful legacy of Australian guardianship laws and its authorities.
