

The Struggle to Maintain Advocacy

Reflections on
OPA's advocacy
1988 – 2008

Discussion paper

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Accompanied by growth in the number of guardianship cases managed by OPA in the twenty years since the Guardianship and Administration Act was passed, has been a decline in the number of individual advocacy cases managed. OPA played a strong advocacy role throughout deinstitutionalisation for people with a mental illness or intellectual disability moving to community living. While OPA maintains a strong commitment to advocacy, the increasing demands of guardianship have had an impact on the organisation's capacity to take on individual advocacy cases. This discussion paper will argue that, as an alternative to guardianship, statutory advocacy fits a contemporary human rights framework and needs to be better resourced and funded.

Introduction

This report will provide an overview of the Office of the Public Advocate's (OPA's) advocacy role, chart significant milestones in the history of OPA's advocacy efforts, and define a future advocacy role for OPA in the context of the current service system. The purpose of the report is to clearly define statutory advocacy and to examine OPA's capacity to undertake this function.

Background

Throughout the 1900s in Australia, civil commitment laws allowed people to be committed to institutions on the certification of one medical practitioner. Upon admission, individual autonomy and freedom were removed and individuals had little control over their lives.

Policy and legislation guiding state intervention in the lives of people with disabilities remained largely paternalistic and protective until the 1980s. In 1982, in response to developments in international rights law and the introduction of anti-discrimination legislation across Australia, Victoria commenced the task of re-examining its civil commitment laws.¹

Prior to this, the *Mental Health Act 1959*, which dealt predominately with admission, detention and conditions in state institutions, was the umbrella legislation which included people with an intellectual disability and a mental illness. In 1986, three new acts emerged: The *Mental Health Act 1986*, the *Intellectual Disability Services Act 1986* and the *Guardianship and Administration Board Act 1986*.

The new acts provided a legislative framework which would accompany deinstitutionalisation. The new Mental Health Act dealt with civil commitment (of people with a mental illness), the Intellectual Disability Services Act addressed access to services (for people with an intellectual disability) and the Guardianship and Administration Board Act (generic legislation) provided a framework for protecting people from abuse, exploitation and neglect - with guardianship as a central mechanism for achieving this.

The Guardianship and Administration Board Act was intended to be both 'protective' and 'enabling' with a strong focus on rights. It outlines a framework for protecting people from abuse, exploitation and neglect as well as for ensuring that people are able live with dignity in the community. The Office of the Public Advocate was established to achieve these objectives, through guardianship, investigation and advocacy. The title of the office and its office bearer – the *Public Advocate* – underscore how central the role of advocacy was considered to be.

Individual advocacy was a central - and separate - component of OPA's work until the early 2000s. However, the increasing pressure on the organisation to undertake guardianship meant that its capacity to undertake advocacy diminished. While advocacy is still utilised as a tool of guardianship and OPA undertakes advocacy in a variety of forms in different program areas (e.g. systemic

advocacy, the independent third person program, short-term advocacy), the proportion of individual advocacy casework has declined in relation to guardianship and investigations.

What is statutory advocacy?

The Guardianship and Administration Act provides the legislative framework for individual or statutory advocacy. While the Act does not directly define statutory advocacy, the functions, powers and duties of the Public Advocate outlined in section 15 and 16 provide a useful framework for conceptualising it.ⁱⁱ As such, statutory advocacy can be differentiated from other forms of advocacy in that it involves ‘acting through the legislative power of the state’.

Statutory advocacy is conferred on an agency which has been established by the state to ensure that the capacity of the person with a disability to act independently is promoted; restrictions on rights are minimalised and maximum utilisation of services and facilities is ensured. In essence, statutory advocacy ‘is the legislative power vested with OPA in order to protect, defend and promote the interests of people with disabilities.’ⁱⁱⁱ

This is a broader role than that deriving from the requirement outlined in the Act for the Public Advocate to make representations on behalf of or act for a person with a disability and investigate any complaint or allegation that a person is under inappropriate guardianship or is being exploited, abused or in need of guardianship.

In the first year of the operation of OPA, the key objective of the individual advocacy program was defined as seeking ‘a solution with and for people with disabilities to their particular problems or needs so as to ensure their rights and dignity’.^{iv} It was later defined as giving people a voice when their rights, dignity or interests are threatened.^v Statutory advocacy is described in OPA annual reports as a less restrictive intervention than guardianship that may function as an alternative means of resolution to matters which would otherwise proceed to guardianship.

Advocacy has been described as ‘negotiation and liaison with multiple agencies in order to ensure the processes, plans and service delivery necessary to achieve the desired outcomes, including case management, justice plans, access to legal representation or referral to appropriate appeal mechanisms such as the Guardianship and Administration Board, Intellectual Disability Review Panel and Mental Health Review Board’^{vi} In practice this has occurred within or as a function of the guardianship role as well as in stand alone advocacy. Less commonly, advocacy also occurs in the context of an OPA investigation undertaken at the request of VCAT.

OPA’s advocacy is a ‘best interests’ advocacy which differentiates it from representative advocacy or pure advocacy. The framework and principles underlying OPA’s advocacy practice are contained within the Act: that the wishes of the person must be considered, the best interests of the person must be pursued and the least restrictive option must be sought.

This means that the OPA advocate has a responsibility to consider not only the issues raised by the person themselves but also whether those wishes may be in the person’s best interest. In practice this means that, where an individual holds strong views that the advocate has concluded are not in their best interests, the advocate will, in the context of the case, seek not only to place the views of the individual on the record but also a perspective on what they believe to be in the individual’s best interest.

Thus, it is important to note that whilst OPA may hold that advocacy will be directed in a particular direction, it will always ensure the views of the individual are known. In this sense, OPA advocacy aims to put a comprehensive picture of advocacy on the table: one which identifies not only the wishes of the individual, but considers the possibilities of a situation and argues for a realistic and empowering resolution.

History of OPA's advocacy

In its first ten years of operation, referrals for advocacy came to OPA from external sources, through OPA's intake team and where issues were identified through guardianship. Between 1988/89 and 2001/02, OPA employed individual advocates who exclusively worked in advocacy. For several years, there were as many advocates as guardians employed by the organisation.

Much of OPA's early advocacy was in large state run institutions for people with a mental illness and intellectual disability. For example Caloola Training Centre, Janefield and Kingsbury Training Centres and Aradale Hospital. Advocacy was also provided for residents at Bethany Special Accommodation House, residents at the St Kilda Special Accommodation House, residents on an elderly person's public housing estate and for patients at St Ives Nursing Home in East Melbourne. Between 1991 to 1993 six psychiatric advocates were employed.

There was also significant advocacy work done in relation to the closure of institutions throughout the second ten years of guardianship. Advocacy was undertaken for residents of Pleasant Creek Training Centre and the Kingsbury, Janefield and Plenty Training centres between 1999/00 and 2007/08, with residents at Harper Street Community Residential Service and the Arthur Preston Residential Service. Between 2000/01 and 2007/08, OPA was involved in advocacy for residents of Kew Residential Services.

There has been a gradual reduction in the number of individual advocacy cases since 2001/02 when the advocate/guardian/ investigation roles were integrated as a result of the increasing pressure of guardianship on OPA's work. Prior to the integration of the roles, it was noted that demands on guardianship were having a disproportionate impact on advocacy resources and that the organisation would need to ensure that the 'advocacy program is not overwhelmed by the demand of statutory responsibilities.'^{vii}

Following the integration of the advocate/guardian/investigation roles, there was a drop of 41% in the number of new individual advocacy cases opened for the year and reported in 2002/03. During 2002 and 2006 OPA annual reports reported that the pressure on guardianship was having a direct impact on advocacy services. It was stated in 2002/03 that increasing guardianship numbers were managed by 'reallocating resources away from investigations and client advocacy.'^{viii} It was reported to be 'disturbing that the Office could not provide advocacy in some serious matters of alleged abuse and neglect'.^{ix} Despite consolidation in funding for OPA in 2004/05, the main increases were in the area of investigation and guardianship and there was no real increase in advocacy.^x

Advocacy currently undertaken by OPA

It is difficult to compare current advocacy figures with previous figures as since 2001 there have been changes in the way advocacy data is recorded. The ability to compare data was further compromised in 2008 when all advocacy figures were aggregated in the Resolve data system. All data available is indicative of an overall decline in the proportion of individual advocacy.

Currently the majority of OPA's advocacy is short-term advocacy undertaken by the VCAT legal officer, through the Telephone Advice Service and the Community Visitor Program. Some is also undertaken by team leaders, individual advocate guardians and through triage. However, individual advocacy casework has declined as there is no dedicated program and OPA has a less active profile in the area of advocacy.

It is reasonable to conclude that OPA receives less referrals for advocacy than in the past due to the limited resources available with which it can respond. OPA annual reports throughout the 1980s and 1990s report that advocacy referrals came from a wide range of sources including people with disabilities, their family and friends, the VCAT, community members, doctors, lawyers, police, teachers, social workers, state and local government services, non-government sectors including community health, community legal centres and disability service providers and statutory bodies including Victorian Legal Aid, the Health Services Commissioner and the Equal Opportunity Commission, the Ombudsman, Magistrate's Court and other courts.

Whereas up until 2001, OPA used to receive referrals for advocacy through the intake program or directly to individual advocates or the Public Advocate which would then be delegated, currently OPA does not have the capacity to manage large numbers of individual advocacy cases. Guardians may be appointed to do advocacy and VCAT may request a small amount of advocacy but these numbers are not significant.

Areas where OPA maintains a specialist advocacy role include litigation guardianship, under the new Disability Act in relation to Supervised Treatment Orders, in individual advocacy for the family court in relation to special procedures and children's court in relation to custody issues.

[The demand for statutory advocacy](#)

It is difficult to measure the demand for statutory advocacy services although a system for recording rejected requests has been recently re-established. An internal review of advocacy requests and outcomes undertaken in 2004 found that rejected advocacy cases related to a range of issues including unsuitable accommodation, case management complaints, service provision, alleged elder abuse and exploitation and neglect.^{xi}

The review identified a number of rejected requests but was unable to make any conclusions about why they were rejected due to a lack of documentation. The review recommended clearer procedural guidelines for determining whether advocacy cases are accepted or rejected as well as better systems for documenting advocacy requests. It reported that while the OPA manual provides guidelines for determining whether individual advocacy requests meet OPA's eligibility criteria, they were found not to determine uptake.

Demand for OPA advocacy services is influenced by the community's perception of OPA's role. Whilst it seems clear there is a perception within the disability community that OPA is less able to respond to advocacy requests than previously, it is not so easily established why this may be the case. Visits to disability advocacy services^{xii} undertaken for the purpose of this paper confirm that the perception of OPA is influenced by OPA's role in guardianship.

Issues were raised by disability advocates about the potential conflict between OPA's guardianship role and OPA's independence in advocating for individual rights. When asked whether OPA has a specialist statutory advocacy role to play in relation to abuse, exploitation and neglect, advocates noted that they could conceptualise cases where statutory advocacy could be used as an alternative to guardianship.^{xiii}

It is often anecdotally stated that the decline in OPA's advocacy numbers is related to the decline in the number of large state run institutions for people with a disability. However, with former state run institutions having been replaced by a new set of public or private institutions or environments in which neglect, abuse and exploitation may occur, the need for advocacy clearly still exists.

Types of settings people with disabilities are now living in include private residences, prisons, hospitals, hostels, mental health settings, supported residential settings, community residential units, nursing homes and family settings. OPA is aware of opportunities for statutory advocacy in these settings but its advocacy is constrained by a lack of resources.

It is worth noting too that, as the disability support system evolves into a mosaic of services, the ability of OPA to engage with individuals who may be hidden in the community is diminished. The criminal justice system is another area where an urgent need for advocacy has been identified.

Conclusion

OPA's statutory advocacy role is unique in that the office was established by the state to protect, defend and promote the interests of persons with disabilities. Statutory advocacy aims to ensure that persons with a disability are able to act independently, that restrictions on rights are minimised and that the maximum utilisation of services is achieved. Unlike other organisations, OPA's advocacy has a focus on abuse, exploitation, neglect and the power to act where concerns are raised.

While the Public Advocate's advocacy role is one of the critical enabling features of the Guardianship and Administration Act, OPA's current guardianship workload means that there is a limited capacity to take on statutory advocacy appointments.^{xiv} OPA takes on fewer individual advocacy cases now than in the past where advocacy may have been utilised more often as an alternative to guardianship rather than as a function within guardianship.

As an alternative to guardianship, statutory advocacy fits a contemporary human rights framework defined by the *Convention on the Rights of Person's with Disabilities* and the *Victorian Charter of Human Rights and Responsibilities Act 2006*. The statutory advocacy role of OPA, better funded, could operate as an alternative to guardianship and a mechanism to achieve the rights of persons with disabilities.

ⁱ Cocks, E 1982 *Report of the Minister's Committee on Rights and Protective Legislation for Intellectually Handicapped Persons*, Melbourne.

ⁱⁱ Driscoll, K 1998 *Review of Statutory Advocacy Discussion Paper*, Office of the Public Advocate. Victoria.

ⁱⁱⁱ Driscoll, K 1998 p 5

^{iv} OPA Annual Report 1988/89, p15

^v OPA Annual Report 1992/93, p 11

^{vi} OPA Annual Report 1993/94, p 13

^{vii} OPA Annual Report 2001/02, p17

^{viii} OPA Annual Report 2002/03, p4

^{ix} OPA Annual Report 2002/03, p18

^x See Dearn, L 2010 *Too Much Guardianship? Reflections on Guardianship in Victoria 1988-2008*, Office of the Public Advocate. Victoria.

^{xi} Kamau, S 2004 *Advocacy Rejected*.

^{xii} Visited VALID, AFDO and DARU.

^{xiii} Concerns were also raised about OPA's lack of connectedness to the advocacy efforts of the disability sector more broadly.

^{xiv} See Dearn, L 2010.