

Seeking welfare guardians for patients with reduced capacity



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Ben Gray says people who don't have a welfare guardian can be in legal limbo

“The current law not terribly workable”

An elderly woman who starved to death because her adult son had mental health issues and couldn't look after her properly is the type of tragic outcome Welfare Guardians Trusts New Zealand aims to prevent.

The organisation, which provides help for people who lack the mental capacity to make health and welfare decisions, is expanding and looking for volunteers.

It has trusts in Waikato, Whanganui, Wellington (including the Hutt Valley), Otago (Dunedin and Central Otago,) and Canterbury, which also covers the West Coast. Steering committees are setting up trusts in Invercargill, Hamilton and Auckland.

Welfare guardians are appointed by the court if someone has dementia or is severely intellectually disabled, for example; and doesn't have a relative or friend who can apply to the courts on their behalf about things like non-urgent medical treatment or accommodation, for example, moving into a rest home. It doesn't include financial or property matters.



Welfare Guardians Trusts New Zealand founder and lawyer Geoff Mirkin

Lawyer Geoff Mirkin MNZM set up the first such trust in Dunedin 11 years ago after hearing from DHB social workers how difficult it was to find health and welfare advocates.

Dysfunctional families

Many families were dysfunctional, or the person's family were all dead. One intellectually handicapped person was an only child, whose parents had both passed away. Mr Mirkin and two hospital social workers, who were involved in elder care, set up a charitable trust to appoint and train volunteers to become welfare guardians. An elder abuse coordinator from Age Concern was also brought on board.

Many people who hold enduring powers of attorney are unsuitable or have their own mental health and paranoia issues. Mr Mirkin says recently a man removed from her house everything his mother could use to cook or make a cup of tea and refused DHB services, saying he was providing all her care and food. However, he wasn't, and by the time police broke into her house, she was lying on the floor having not eaten for days.

Mr Mirkin says she died soon after from malnutrition. In a case like that, a doctor could contact an elder abuse coordinator from Age Concern and a welfare guardian could be appointed by the court to replace the son.

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GPs can refer patients

He once had to apply for a court order for someone to have an ingrown toenail removed because that person didn't have an advocate with enduring power of attorney. He says if a GP thinks a patient lacks the capacity to make medical decisions like that, they can refer them to their local Welfare Guardians Trust for help.

Due to a shortage of psychogeriatricians, a GP may also be called upon to decide whether a patient has the capacity to make their own health and welfare decisions.

Wellington Welfare Guardianship Trust chair Ben Gray, formerly a GP at Newtown Union Health Service in Wellington, says Dunedin lawyer Alison Douglass has developed a good tool for assessing capacity – see below.

Hunting for volunteers

As the population ages, demand for welfare guardians has grown. However, Mr Mirkin says with two people having to work in most households, it's harder to find volunteers.

Dr Gray says welfare guardians tend to be retired professionals from the legal or health sectors.

The organisation recruits volunteers and trains them up. It meets them to see if they're suitable and organises police checks. Hospital social workers request welfare guardians and the trust finds volunteers to match in the same area.

Legal limbo

People who don't have a welfare guardian or haven't given anyone enduring power of attorney can be in legal limbo, says Dr Gray. For example, an elderly person is admitted to hospital with pneumonia, but they have dementia and aren't coping at home. The process of applying for welfare guardianship can take weeks so a hospital can obtain a court order to send the patient to a resthome.

However, there's still no one to make decisions for them. Dr Gray says a 2018 Human Rights Commission report *This Is Not My Home* showed thousands of older people in aged-care facilities had technically speaking been abducted because no one had consented to them being there.

"The current law not terribly workable," says Dr Gray. The Law Commission is reviewing the law relating to adult decision-making capacity. It is consulting this year and will report to the justice minister at the end of next year.