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Incarcerated against their will: GP seeks fair deal for the voiceless 5000

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Many people have no one to support them, make decisions in their best interests, or check on the quality of their care

No family, no guardian, no ability to complain about their treatment or leave the home they have been placed in: New Zealanders are being denied their rights. **Virginia McMillan** reports

Sidenotes

People lacking mental capacity and living in residential care without legal authority are one of New Zealand's most vulnerable groups, Wellington GP Ben Gray says.

Hospitals often treat an elderly person, and are ready to discharge them to a rehome or private hospital – but for the fact the patient has lost capacity to decide for themselves.

It's no easy fix when patients lack a person who legally holds enduring power of attorney, the documents intended to cover such situations.

Typically, hospitals have tight length-of-stay demands, and can't wait the many weeks or months it can take to make arrangements. Wellington Regional Hospital makes allowances where Auckland City Hospital is more constrained, Dr Gray says.

DHB staff find themselves tackling legal processes to ensure a person gets power of attorney or a welfare guardian.

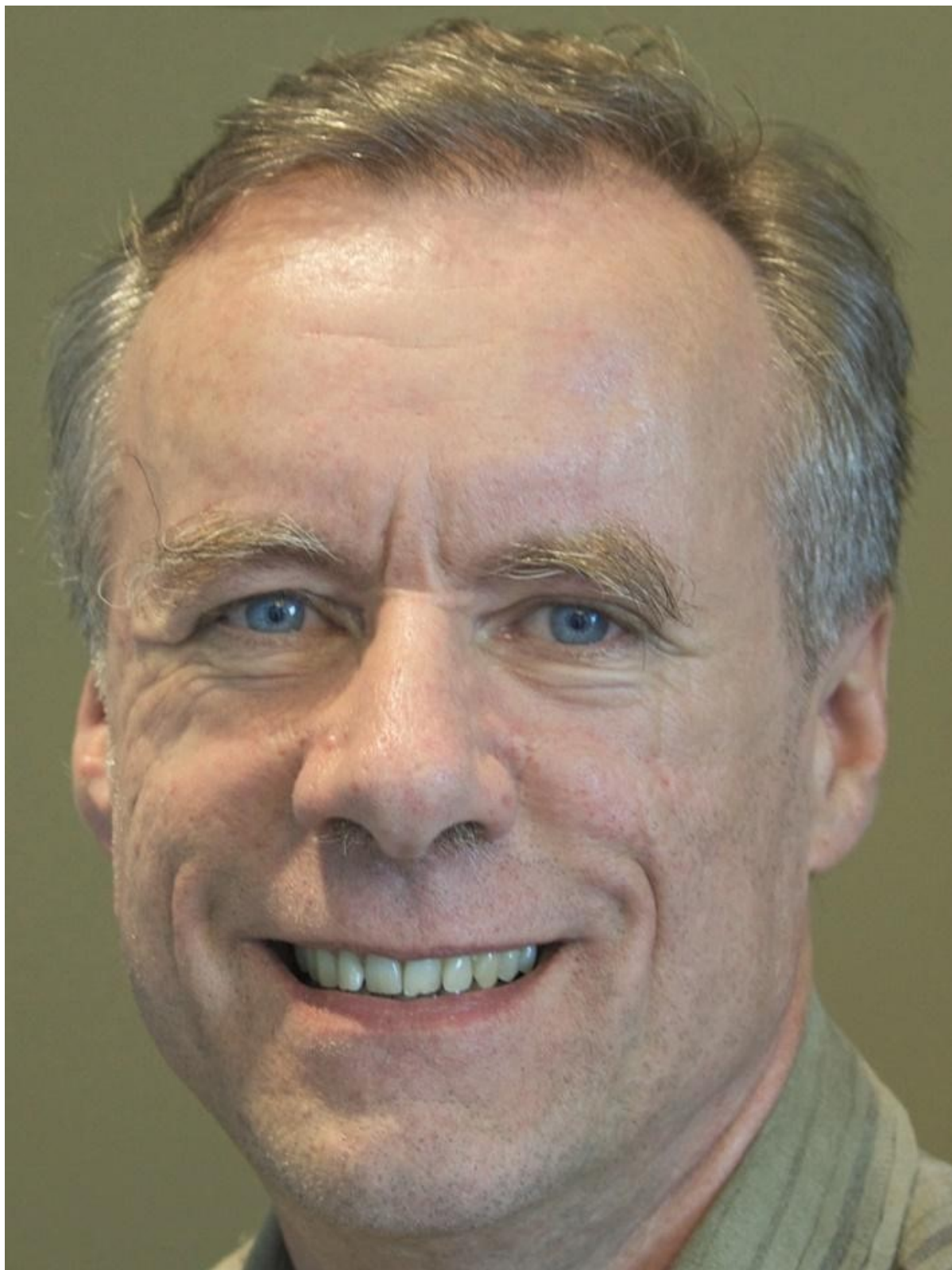
A court order may be obtained allowing the move into care – but Dr Gray points out it's not a sufficient basis for an ongoing stay.

GPs, hospital clinicians and residential care providers haven't got their heads around the legal requirements, he says.

Clinicians may also invoke right (4) of the Code of Health and Disability Services Consumers' Rights, enabling them to treat a patient who can't consent. But Dr Gray says that is not sufficient for residential care either; the likelihood is that numerous treatment decisions will need to be made over a long period.

In This is not my home, a report from the Human Rights Commission, Wellington lawyer Iris Reuvecamp writes that relying on right (4) of the code means the degree to which the person's voice is heard is questionable, there is no review or appeal mechanism, and no monitoring or oversight.

Dr Gray says it all amounts to a "dog's breakfast" of poorly understood patient rights and outdated legislation, the Protection of Personal and Property Rights Act.



Wellington academic and GP Ben Gray refers to a “dog’s breakfast” of poorly understood rights and outdated law

Almost 4700 estimated in residential facilities without legal authority

People are frightened of the residential care places, and frightened of the implications of having to go in

ALMOST 4700 people are estimated to be in residential facilities without definite legal authority.

Some will be at risk of substandard care, with no one to monitor their situation. The health and disability complaints system is no help here, Dr Gray says. Who is going to complain?

And the bottom line is, without someone who can legally make decisions on their behalf, these people are “incarcerated against their will”.

Too few New Zealanders are forewarned and forearmed by vesting enduring power of attorney in a relative or other trusted person before they lose capacity, says Dr Gray, a senior lecturer in the primary health care and general practice department at the University of Otago, Wellington.

Too few people even know about power of attorney, too many can't afford the legal fees to get it, and the process is complicated, he says.

To make use of an existing power of attorney requires a doctor to sign off that the patient is no longer competent. That, too, is poorly understood by clinicians, according to Dr Gray, one of the report authors.

Another contributor to *This is not my home*, Auckland lawyer Andrew Finnie, writes that medical reports are often inadequate to support applications to act in the interests of a vulnerable adult.

Mr Finnie says the courts are seeing an increasing number of applications by DHB staff to act for patients.

Co-author Mark Fisher led the surveys that suggest 4693 out of the total New Zealand residential care population are in care without authority.

Dr Fisher, clinical director, liaison psychiatry and mental health services for older people at Auckland DHB, says the legislation is cumbersome and out of date. "It needs to be replaced by something more accessible, cheaper to implement for the family, so things can be put in place quickly when needed."

Ask elderly people what will happen when they get more frail, and none say they want to go into residential care, he says. "People are frightened of the places, and frightened of the implications of having to go in."

No one wants to be a welfare guardian

“NO ONE wants to be a welfare guardian,” says Dr Gray.

A few people do put their hands up. Dr Gray says kudos goes to Dunedin lawyer Geoff Mirkin, foundation chair of the Otago Welfare Guardianship Trust, the first charity recruiting and training volunteers for this role.

A similar organisation was set up in Wellington last year, and Dr Gray is chair. The trust has appointed three welfare guardians to people who would otherwise be on their own, and is working on arranging more.

The need for guardians is not confined to the elderly, and will include people with brain injury and intellectual disability. It’s thought unlikely that enough volunteers will ever be found to cover the need nationwide.

Care facilities should understand they need to be within the law and, if not, do something about it, Dr Gray says.

“What we are talking about here is really important...The resthome makes money but may not necessarily provide good care – and there’s no provision for anyone to go in and keep an eye on it.”

Independent inspectors can visit residential mental health facilities to check on the quality of care for compulsorily admitted patients. “That’s the bare minimum for all residential care, in my view.”

He and others are calling for reforms. These would include a national register of enduring power of attorney agreements, and a publicly appointed person or body to act as an advocate where no suitable person is available.

Another author of *This is not my home* is Dunedin lawyer Alison Douglass, a specialist on these matters nationally and internationally. Ms Douglass points out the code of rights does not define competence or codify a test for it, and the Protection of

Personal and Property Rights Act is not designed to provide oversight of a patient’s detention in care. She would like to see a review of the law and a coordinated Government approach.

Additional reporting by Fiona Thomas

What needs to change?

This is not my home is a series of essays on the provision of aged residential care without consent. It concludes New Zealand needs, among other changes:

- enhanced supported decision-making, and supported decision-making as the default
- support, training and oversight for those who have decision-making authority on behalf of another person
- a code of practice for health and social service providers
- a public advocate or a public guardian
- a central register of enduring power of attorney agreements and court orders
- a possible new Court of Protection
- rapid appointment of welfare guardians (or an equivalent role)
- oversight of aged residential care facilities to ensure people are not being detained arbitrarily
- district inspector-type roles, and • regular inspection and review of places or situations where people might be deprived of their liberty, not just aged care.

Read more

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- Speaking for those who cannot speak - 29 March 2017
- 'Perfect storm' keeps New Zealanders in care without consent or protection - 4 October 2016