



# Annual Report

2017-18

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The Honourable Yvette D'Ath MP  
Attorney-General and Minister for Justice  
Leader of the House  
1 William Street  
BRISBANE QLD 4000

17 October 2018

Dear Attorney-General,

I am pleased to present the Public Advocate's Annual Report for the financial year ended 30 June 2018.

The report is made in accordance with the requirements of section 220 of the *Guardianship and Administration Act 2000*.

The Annual Report provides information on the key activities of the Public Advocate and staff of the office for 2017-18 and a statement of our financial and operational functions for the year.

I certify that this Annual Report complies with the requirements set out in the *Annual report requirements for Queensland Government agencies* (June 2018). The Public Advocate is not considered to be a statutory body for the purposes of the *Statutory Bodies Financial Arrangements Act 1982* or the *Financial Accountability Act 2009*.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Mary Burgess', written in a cursive style.

Mary Burgess  
**Public Advocate**



# The year in review

The past year has provided a range of opportunities and challenges for me and the staff who support me in my role protecting the rights and interests of Queensland adults with impaired decision-making capacity through systemic advocacy.

This year the work of the Public Advocate has primarily focused on:

- the aged care sector, with a particular focus on the use of unregulated restrictive practices and elder abuse;
- monitoring aspects of the operation of the mental health system and the Mental Health review Tribunal and the treatment of involuntary patients;
- working with government to settle a plan for implementation of the recommendations of the Public Advocate's report *Upholding the right to life and health*;
- monitoring of the rollout of the National Disability Insurance Scheme (NDIS) in Queensland; and
- the operation of the forensic disability service and its treatment of residents of the service.

Following the release of my paper *Legal Frameworks for the use of restrictive practices in aged care: An analysis of Australian and international jurisdictions* on World Elder Abuse Awareness Day in June 2017, I have initiated a strategy to encourage the Australian Government to commit to implement recommendation 4-10 of the Australian Law Reform Commission's report, *Elder Abuse – A National Legal Response* — that the use of restrictive practices in residential aged care be regulated in aged care legislation.

Since the Australian Law Reform Commission report, the Australian Government has received the report of the *Review of national aged care quality regulatory processes*, which also recommended the regulation of restrictive practices in aged care. There is a current *Inquiry into the quality of care in residential aged care facilities in Australia* by the Standing Committee on Health, Aged Care and Sport, which is yet to release its report. However, I am confident the Committee will make a similar recommendation.

I am writing this 'Year in review' as I travel to Darwin to attend a meeting, where Public Guardians and Advocates from across Australia will consult with representatives of the Commonwealth Attorney-General's Department about the draft National Plan on elder abuse. Considering the over-whelming support for this reform, I am optimistic the Australian Government will commit to regulating restrictive practices in residential aged care as part of its contribution to the National Plan.

Over the past year, a sizable share of my time, and the resources of my office, have been involved in legal interventions in the case of an involuntary mental health patient who is detained in an Authorised Mental Health Service. This patient came to my attention in July 2016 when I became aware of an application for guardianship of which he was the subject. Ten months before, he was placed on an eight month regime of seclusion and twice weekly electroconvulsive therapy (ECT). I was concerned about the long period of seclusion he had been subjected to and the regime of ECT that had been recommended as treatment. Over time I became increasingly concerned about the number and frequency of ECT treatments being administered to the patient and their impact on his cognitive function.

Large numbers of ECT treatments can cause harm to patients. The Queensland Health *Guideline for the administration of electroconvulsive therapy* states that the occurrence of cognitive side effects from ECT is well recognised. The New South Wales *ECT minimum standards of practice guidelines* note that continuation or maintenance of ECT has been demonstrated to cause deficits in learning and frontal function, and recommend regular cognitive assessment with standardised screening instruments.



I am currently making inquiries with the Chief Psychiatrist about patients in the involuntary mental health system who have received a large number of ECT treatments. In my view, the administrators of the Queensland mental health system are bound to actively investigate these matters, and until the treatment risks are clarified, very specific limits should be set on the number of ECT treatments that can be administered to a patient over their lifetime.

On occasion this year, I have sought leave to intervene in proceedings in the Mental Health Review Tribunal, particularly in relation to applications for approval to administer ECT. I have a number of significant concerns about the way that proceedings are being conducted in the Tribunal, however, I am prevented from making any further comment about the proceedings because of the confidentiality provisions of the *Mental Health Act 2016*. In particular, section 790 provides:

**790 Publication of report of other proceedings**

- (1) A person must not publish a report of a proceeding of—
- (a) the tribunal; or
  - (b) the Mental Health Court relating to an appeal against a decision of the tribunal; or
  - (c) the Mental Health Court relating to a review under section 673.

Maximum penalty—200 penalty units or 2 years imprisonment.

- (2) However, a person does not commit an offence against subsection (1) if the person publishes the report with the leave of the tribunal or the Mental Health Court.

- (3) The tribunal or the Mental Health Court may grant leave to publish the report only if it is satisfied—
- (a) publication of the report is in the public interest; and
  - (b) the report does not contain information that identifies, or is likely to identify—
    - (i) the person the subject of the proceeding; or
    - (ii) a person who appears as a witness before the tribunal or court in the proceeding; or
    - (iii) a person mentioned or otherwise involved in the proceeding.

By this section, it is an offence under the Act to publish any 'report' of a proceeding in the Tribunal. This restriction extends beyond protecting involuntary patients from any report that may identify them, also proscribing what would amount to reasonable commentary.

These provisions impede my ability to fulfil my statutory functions to protect the rights and interests of people with impaired decision-making capacity by prohibiting me from commenting about the operation of the Tribunal or airing any concerns about the treatments being approved by the Tribunal and the way those decisions are being made.

These very restrictive confidentiality provisions appear to be unique to the *Mental Health Act*. I am unaware of any other Queensland legislation that limits comment in this way. These provisions also prevent lawyers representing patients before the tribunal from making any comment about the proceedings they have participated in before the Tribunal and from raising their legitimate concerns with agencies, such myself or even with the Minister for Health.

This unsatisfactory position is compounded by the fact the tribunal does not record its proceedings and make copies of the record available in accordance with the requirements of the *Recording of Evidence Act 1962*. As the law currently operates, the Tribunal is a completely closed process that provides no record of what occurs there and all persons are prevented from raising any concerns about its processes, except through an appeal to the Mental Health Court, which process is hampered by the unavailability of the record of the tribunal proceedings.

I would like to make some general observations about the treatment of people with disability by some government agencies and systems in Queensland. While we have some very positive and effective legislation guided by human rights principles, which require decision-makers to proactively consider and protect the human rights of people with disability, there are significant examples across systems of this not being achieved in practice.



A legislative framework will only be effective in protecting people's rights if those working under it are committed to that outcome and respect the law and people's rights and there are mechanisms for oversight and accountability. It is very difficult for people with disability to enforce their rights when these things are absent. Often they don't know what their rights are and assume what is being done to them is lawful. Many people with impaired decision-making capacity are also unaware they can make a complaint, to whom it should be made, or even how to do that. Further, they often need assistance to express their complaint, to understand the process and to gather evidence to support their complaint and to follow it through.

These observations apply equally to the operation of the forensic disability system and the involuntary mental health system and the way people detained under those systems are treated, despite both systems having rights-focused legislative frameworks.

These system failings underline the continuing need for human rights defender agencies like my office, the Public Guardian, the Queensland Ombudsman and the Anti-Discrimination Commission to be adequately funded to fulfil our functions. I am grateful to the Queensland Government for its commitment to supporting and funding these agencies to perform these roles. However, these bodies alone are not able to provide all the support, advice and advocacy required to ensure people with impaired decision-making capacity have their rights and interests protected. It is essential the government recognises the on-going need for advocacy and legal advice for this vulnerable group in our community and continues to fund these services into the future – and beyond the NDIS rollout.

I have continued to engage with government during the year about progressing implementation of the *Upholding the right to life and health* report (of this office). This report reviewed the deaths of 73 people with cognitive disability who died in supported accommodation in Queensland between 2009 and 2014. The report found that many of the people in the study had significant and complex health issues that were not being appropriately managed. It found that 53 percent of the deaths investigated were potentially avoidable.

At the time of writing this, over two and a half years have elapsed since the *Upholding the right to life and health* report was released. It was a landmark document and remains the only published investigation of its kind in Queensland. I will continue to engage with government to seek to develop an implementation plan that can deliver genuine action to address the health needs for this group of vulnerable Queenslanders.

The NDIS has now entered its last year of rollout in Queensland, and in terms of participant numbers, the rollout is significantly slower than initial predictions. As at 30 June 2018, there were 16,524 Queensland NDIS participants. This represents only 59 percent of the predicted number of participants to enter the Scheme in 2017-18 and 54 percent of the estimated number of participants to have entered the Scheme within the first two years of the rollout period. This slow uptake is likely to place substantial pressure on the Scheme, in terms of supporting Queenslanders to have an NDIS plan in place before the end of the rollout period at the end of June 2019. The Scheme will now need to plan and approve the participation of almost 75,000 Queenslanders in the last year of the rollout.

With such an ambitious program of social change, we have to expect there will be some implementation issues. However, this low number of current participants indicates there will be significant pressure on the system to undertake planning and approve a significant number of applications to reach its Queensland target for participation of 91,000 people. I hold concerns about how this target will be achieved without some impact on the quality of the planning process for participants. When plans do not adequately reflect people's needs and goals, their rights, health and quality of care are impacted. This office will continue to monitor the NDIS rollout and seek to provide constructive feedback to the National Disability Insurance Agency and other Queensland agencies, as the year proceeds.



As always, my achievements over this past year are directly attributable to the dedication and unflagging commitment of the staff of my office to the work of the Public Advocate and the various issues we have championed. Because the office is so small, each member of staff plays an important role in each project or issue. They work very hard to ensure the Public Advocate produces high quality, rigorous and defensible papers, submissions and positions on the wide range of challenging and controversial issues we engage with to protect the rights and interests of Queensland adults with impaired decision-making capacity. I am extremely grateful to them for their personal support and loyalty and their unwavering commitment to the work of the office.



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# The work of the Public Advocate

The Public Advocate, and the staff that support the Public Advocate, share the following vision, purpose and values.

## Vision

To realise a just and inclusive society where the rights of all Queenslanders are upheld and their autonomy is respected.

## Purpose

To undertake systemic advocacy to promote the rights and interests of people with impaired decision-making capacity and protect them from neglect, exploitation and abuse.

## Values

**Relationships and influence:** We engage collaboratively with our stakeholders by building goodwill, sharing knowledge and expertise, and fostering confidence in our work.

**Knowledge and leadership:** We are committed to research and analysis that contributes to informed legal and social policy debate to progress sustainable supports and services for Queenslanders with impaired decision-making capacity.

**Courage and integrity:** We champion the rights and views of people with impaired decision-making capacity through our systemic advocacy. We work with clear purpose and commitment, and encourage a culture where accountability and respect are paramount.

## Legislative functions

The Public Advocate is established under chapter 9 of the *Guardianship and Administration Act 2000* (Qld) to promote and protect the rights and interests of Queensland adults with impaired decision-making capacity through systemic advocacy.

Under section 209 of the *Guardianship and Administration Act*, the Public Advocate has the following functions:

- Promoting and protecting the rights of adults with impaired capacity (the adults) for a matter;
- Promoting the protection of the adults from neglect, exploitation or abuse;
- Encouraging the development of programs to help the adults to reach the greatest practicable degree of autonomy;
- Promoting the provision of services and facilities for the adults; and
- Monitoring and reviewing the delivery of services and facilities to the adults.

In exercising functions under the *Guardianship and Administration Act*, the Public Advocate is required to apply the general principles outlined in Schedule 1 of the Act.

Under section 210 of the *Guardianship and Administration Act*, the Public Advocate has power to:

- do all things necessary or convenient to be done to perform the Public Advocate's functions; and
- intervene in a proceeding before a court or tribunal, or in an official inquiry, involving protection of the rights or interests of adults with impaired decision-making capacity for a matter.<sup>1</sup>

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<sup>1</sup> With leave of the court, tribunal or person in charge of the inquiry and subject to any terms imposed.



Section 210A of the Act outlines the Public Advocate's information powers, including the right to all information:

- necessary to monitor and review the delivery of services and facilities to adults with impaired capacity for a matter;
- about the arrangements for the provision of services and facilities to a class of the adults; and
- about the policies and procedures of a service or facility that relate to the provision of services and facilities to the adults.

Under section 209A of the Act, the Public Advocate may prepare a report about a matter arising from the performance of the Public Advocate's functions and provide a copy of the report to the Attorney-General, who must table the report in the Queensland Parliament.

## People with impaired decision-making capacity

The Public Advocate undertakes systemic advocacy to benefit all Queensland adults who may experience impaired decision-making capacity. 'Having capacity' means a person is capable of understanding the nature and effect of decisions about a matter, can freely and voluntarily make decisions about it and can communicate their decisions in some way.

There are a number of conditions that may impact a person's decision-making capacity. These include, but are not limited to, intellectual disability, acquired brain injuries, mental illness, neurological disorders (such as dementia) or problematic alcohol and drug use. While not all people with these conditions will experience impaired decision-making capacity, it is likely that many may, at some point in their lives. For some, impaired decision-making capacity may be episodic or temporary, requiring intensive supports at specific times in their lives, while others may require lifelong support with decision-making and communicating choices and decisions.

A person's ability to make decisions may also vary in response to external factors. These factors include the type and complexity of the decision to be made, the context in which the decision is to be made (e.g. the degree of urgency, availability of alternatives), and the level of assistance available from the person's support networks. Over time, some people with impaired decision-making capacity can develop their ability to make decisions with support and through experience.

Experiencing impaired decision-making capacity can happen to any one of us at any time. In the space of a moment our lives can be transformed, through accident or a health event, from ones where we consider ourselves to be in control, employed in responsible jobs, with others who depend upon us, to lives where we may need help and support ourselves.

People with impaired decision-making capacity are a broad and diverse group. They can be found in all age groups, cultures and demographics, and participate socially and economically in society to varying degrees. While some people with impaired capacity receive services that are provided or funded by government, or are involved in the guardianship and administration system, many have little involvement with formal systems.

Given the particular vulnerabilities of people with impaired decision-making capacity, it is critical that their rights and interests are promoted and protected.

## Approach to systemic advocacy

The systemic advocacy undertaken by the Public Advocate is focussed on influencing and changing systems, including the legislative, policy and practice aspects of systems to promote rights and improve opportunities and outcomes for people with impaired decision-making capacity.



The Public Advocate works to address issues that can make a real difference in the lives of people with impaired decision-making capacity. The Public Advocate's priorities are:

- the promotion and protection of the autonomy, rights and interests of people with impaired decision-making capacity;
- the inclusion and participation of all people equally in society;
- equal access to the goods and services available to all citizens; and
- sustainable service systems that improve opportunities and outcomes for individuals.

A key challenge for the Public Advocate is how to most effectively enable people with impaired decision-making capacity to contribute to the development of legislation, government policy and services that impact them. Wherever possible, our activities are underpinned by knowledge gained through research and consultation that includes understanding the lived experience of people with impaired decision-making capacity.

Systemic advocacy differs from individual advocacy. Individual advocacy aims to support people to exercise their rights by providing personal support to voice their concerns, obtain access to information, solve issues of concern and identify and access available options.

People who contact the Public Advocate for help may actually require assistance to resolve an individual complaint or need, rather than reporting a systemic issue. In those cases, people are referred to more appropriate agencies for direct assistance with their individual issue. While the Public Advocate undertakes systemic advocacy, not advocacy for individuals, the issues and experiences of individuals can inform our work, and can be used as case studies to demonstrate issues of concern and serious problems with systems that can be addressed through systemic advocacy.

## Major systems

Given the diversity of people who experience impaired decision-making capacity, the scope of work undertaken by the Public Advocate is necessarily broad. While some people with impaired decision-making capacity have limited involvement with service systems, others interact with a variety of systems, such as justice, disability, aged care, health and mental health.

Fulfilling the statutory functions of the Public Advocate therefore requires a wide-ranging knowledge and understanding of these service systems and how they interact with people with impaired decision-making capacity. Achieving positive change for people with impaired decision-making capacity requires the use of a range of approaches to our work and our engagement with government, including, building positive and collegiate relationships with key stakeholders, staying abreast of systems' issues, and creating and capitalising on opportunities for change.

## Disability

The disability service system is undergoing unprecedented and fundamental change with the rollout of the National Disability Insurance Scheme (NDIS). The NDIS offers the potential for profound and life-transforming change for Queenslanders with disability, through its commitment to giving them 'choice and control' over the disability supports they receive.

The NDIS does not, however, promise to address all issues for people with disability and not all Queenslanders with disability will benefit from the NDIS. Accordingly, many people with disability, including NDIS participants, will continue to need to engage with state-based mainstream and disability systems to access services and supports.

The Public Advocate's systemic advocacy activities during 2017-18 were strongly focused on reforms affecting people with impaired decision-making capacity who were, or will be, eligible for the NDIS, as well as those who, while not eligible, will still have the need for on-going support from other non-NDIS disability and mainstream systems.



## The NDIS

### Queensland rollout

The NDIS rollout has been underway for two years, with one year remaining until the Scheme's full implementation in June 2019. It is anticipated that at full implementation there will be 91,217 Queensland participants in the Scheme.<sup>2</sup> It is estimated that 52 percent of participants will be 'existing' Queensland Government clients who previously received Queensland Government funded or delivered disability services, while the remaining 48 percent of the NDIS intake will be people who were clients of Commonwealth-funded or -delivered programs<sup>3</sup> or who have never before received disability supports.<sup>4</sup>

In terms of participant numbers, the implementation of the Queensland rollout is significantly slower than initial predictions. NDIS data indicates that as at 30 June 2018 (2 years into the rollout), there were 16,524 Queensland NDIS participants. This represents only 59 percent of the predicted number of participants to enter the Scheme in 2017-18 and 54 percent of the estimated number of participants to have entered the Scheme NDIS within the first two years of the rollout period.<sup>5</sup>

The slow uptake of participants is likely to place substantial pressure on the Scheme, in terms of supporting Queenslanders to have an NDIS plan in place before the end of the rollout period. The Scheme will now need to plan and approve the participation of almost 75,000 Queenslanders in the last year of the rollout. This has resulted in genuine concerns that meeting the target of approximately 91,000 participants by June 2019 will compromise the quality of engagement and plan development, leading to adverse outcomes for individuals, their quality of life, and their health and safety.

### People with psychosocial disabilities

The Public Advocate's 2016-17 Annual Report outlined the Public Advocate's submission to the Joint Standing Committee on the NDIS on its inquiry into the *Provision of services under the NDIS for people with psychosocial disabilities related to a mental health condition*.

The submission highlighted considerable barriers to accessing NDIS supports, which included:

- the way NDIS assessors determined eligibility for people with psychosocial disability;
- the challenges for people needing to establish a functional disability while undertaking treatment within a treatment framework that focuses on recovery; and
- successfully linking people experiencing significant additional disadvantage and mental health issues with the NDIS.

The submission also noted that evidence from NDIS trial sites supported widely-held concerns that people with psychosocial disability had a low rate of participation in the NDIS. The Mental Health Coordinating Council reported that in the NDIS trial site in the Hunter, New South Wales, only 22 percent of people receiving support through Partners in Recovery<sup>6</sup> who applied to the NDIS were successful in securing funding packages.<sup>7</sup> Given the highly complex needs of many recipients of the Partners in Recovery service, it was expected that most, if not all, would successfully transition into the NDIS.<sup>8</sup> Similar issues relating to this cohort in Queensland were identified in the Public Advocate's 2016-17 Annual Report, which highlighted that the Queensland Alliance for Mental Health reported that more than half of participants in the Day to Day Living program who were receiving support from a service provider in a Queensland launch site were assessed as ineligible for the NDIS.<sup>9</sup>

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<sup>2</sup> Department of Communities, Child Safety and Disability Services, *The NDIS in Queensland: Rollout data and trends* (2017) 5.

<sup>3</sup> These people did not receive services funded or provided by the Queensland Government.

<sup>4</sup> Department of Communities, Child Safety and Disability Services, above n 2.

<sup>5</sup> National Disability Insurance Scheme, *COAG Disability Reform Council quarterly performance report: Queensland – 30 June 2018* (2018) 5, 7-8.

<sup>6</sup> Partners in Recovery clients have severe and persistent mental illness and complex needs.

<sup>7</sup> Mental Health Coordinating Council, *Further unravelling psychosocial disability: Experiences of the National Disability Insurance Scheme in the NSW trial site: A mental health analysis* (2015) 38.

<sup>8</sup> *Ibid.*

<sup>9</sup> Queensland Alliance for Mental Health, *Queensland transition to NDIS for mental health (QTN Forum) communique* (October 2016) 2.



During the past year, a number of other reports have indicated that this trend has continued. In January 2018, the University of Sydney and Community Mental Health Australia released a report, *Mind the gap: The National Disability Insurance Scheme and psychosocial disability*, (which the Public Advocate contributed to), that warned the NDIS's handling of serious mental health issues could leave many without proper support.

The report noted that 6.4 percent of NDIS participants (at the time of writing the report) had a primary psychosocial disability, which is less than half the expected number. The rate of participants in Queensland as at 30 June 2018, whose primary disability was psychosocial disability, was slightly higher, at 8 percent.<sup>10</sup>

The report noted that the National Disability Insurance Agency (NDIA) estimates that at full rollout, only about 64,000 people with psychosocial disability will be NDIS participants (13.9 percent of all NDIS participants). This figure is well below the total number of people who have been identified as having severe mental illness in Australia. The National Mental Health Commission estimates that of the 3.7 million Australians who experience mental illness, 690,000 live with severe mental illness.<sup>11</sup> This means that about 91 percent of people with severe mental illness will need to rely on non-NDIS community mental health services to meet their needs. This is a serious concern, given reports of existing support services being closed and their funding withdrawn on the assumption they will be replaced by NDIS-funded supports.

The Australian Government Department of Health website<sup>12</sup> states:

The Partner in Recovery initiative is transitioning to the National Disability Insurance Scheme (NDIS). The programme has been extended for three years to support the transition of programme funding to the NDIS. The extension will ensure service continuity for programme clients until the NDIS rollout is completed in each jurisdiction.

However, we know that clients of the Partner in Recovery initiative have had limited success in accessing the NDIS, suggesting there is likely to be a significant gap in services for people with psychosocial disability after the rollout of the NDIS.

The Public Advocate will continue to monitor this issue and raise concerns about the withdrawal of services for this particularly vulnerable group of people with disability.

### **Participants from culturally and linguistically diverse backgrounds**

As reported in the Public Advocate's 2016-17 Annual Report, less than 4 percent of Queensland NDIS participants were from culturally and linguistically diverse (CALD) backgrounds (as at October 2016). This was despite estimates that almost 14 percent of Queensland NDIS participants should be from CALD backgrounds.<sup>13</sup>

Concerns about the accessibility of the NDIS for people from CALD backgrounds continues. As at 30 June 2018, only about 3 percent of Queensland NDIS participants were from CALD backgrounds<sup>14</sup> compared with 9 percent nationally.<sup>15</sup> The delayed participation of people from CALD backgrounds in the NDIS may be partially attributable to the delay in releasing the NDIS *Cultural and linguistic diversity strategy 2018*.

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<sup>10</sup> National Disability Insurance Scheme, above n 5, 10.

<sup>11</sup> National Mental Health Commission, *Contributing lives, thriving communities* (2014) 20.

<sup>12</sup> Department of Health, *Partners in Recovery: Coordinated support and flexible funding for people with severe and persistent mental illness with complex needs* (25 February 2016) Australian Government <<http://www.health.gov.au/internet/main/publishing.nsf/content/mental-pir>>.

<sup>13</sup> National Ethnic Disability Alliance, unpublished data, March 2016, cited in Amparo Advocacy Inc., October 2016, *The NDIS and culturally and linguistically diverse communities: Aiming high for equitable access in Queensland*, 17.

<sup>14</sup> National Disability Insurance Scheme, *COAG Disability Reform Council quarterly performance report: Queensland – 30 June 2018* (2018) 13.

<sup>15</sup> National Disability Insurance Scheme, *COAG Disability Reform Council quarterly performance report: National – 30 June 2018* (2018) 13.



Many people who speak English as a second language continue to experience significant practical problems when attempting to engage with the NDIS using interpreters. Advocates for people with disability from CALD backgrounds have informed the Public Advocate that some NDIS planners do not know how to effectively engage with an interpreter. There have also been reports of NDIS planners undertaking complex and lengthy planning conversations with people over the telephone using interpreters. This practice is not consistent with best practice principles on the use of interpreters and is likely to result in people having inadequate NDIS plans.

There is some good work being undertaken on-the-ground to educate people with CALD backgrounds about the concept of 'disability', the role of the NDIS in providing supports and the types of support that could be provided. However there is still a lot of work to be done. Effective education and engagement with the CALD community is likely to require a long-term investment of effort, considering many people from a CALD background have never accessed government services and supports and may be unfamiliar with many common government social services and programs.

The Public Advocate will continue to campaign for the NDIA to strengthen their investment in appropriate CALD education and engagement strategies, and monitor developments during the remainder of the NDIS rollout.

### **NDIS (Protection and Disclosure of Information – Commissioner) Rules**

In July 2017, the Public Advocate provided feedback on the NDIS (Protection and Disclosure of Information – Commissioner) Rules. The Public Advocate supported the new rules and the guidance they should provide about the NDIS for both participants and supporting government agencies. The Public Advocate's feedback focused on the need for greater clarity in the wording of the rules to help avoid confusion in their application.

### **National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017**

The Public Advocate made a submission to the Standing Committee on Community Affairs in July 2017 for the Inquiry into the *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017*. The submission expressed support for the mechanisms contained in the Bill that are intended to establish a sound safeguarding framework for the NDIS. These include specific provision for a code of conduct, behaviour support and a complaint management system.

At the time of making the submission, the Public Advocate was aware that concerns had been raised regarding the independence of the Registrar, Complaints Commissioner, and the Senior Practitioner as those positions will not be specifically legislated to be separate and independent from the NDIS Commissioner. The Public Advocate acknowledged that the concerns could be alleviated once these positions were established and their independence in the investigation of complaints and other issues within the NDIS system had been demonstrated.

The effectiveness of the further quality and safeguards envisaged in the Bill and outlined in the Explanatory Memorandum will also be contingent on the finalised NDIS Rules and policies, as well as their effective implementation. In particular, in relation to the issue of restrictive practices, the Public Advocate strongly supports the NDIS policy commitment to reduce and eliminate the use of restrictive practices in the care of people with disabilities. However, the submission expressed concern about how effectively these policies will be implemented, monitored and enforced in a new and evolving 'free market' populated by potentially unprecedented numbers of providers, with many of them new to the disability sector.



## Transitional arrangements for the NDIS

In August 2017, the Public Advocate made a submission to the Joint Standing Committee on the NDIS about the transitional arrangements for the NDIS. The Public Advocate expressed concern about the very real barriers that some people will experience in connecting with the NDIS, particularly people with limited decision-making capacity who reside in residential aged care facilities, forensic disability services, authorised mental health facilities, boarding houses, and long-stay health care facilities. Concern was also conveyed about NDIS access for people with decision-making disability who are living highly transient lifestyles (that is, chronically homeless or cycling in and out of the criminal justice system).

Many of these individuals have no family members, advocates or the support of disability service providers to help them access and navigate the NDIS. The Public Advocate advised of the importance for publicly funded agencies who engage with these people to provide intensive assistance to navigate the various aspects of applying for NDIS funding and implementing their plans. The Public Advocate warned that failure to provide appropriate transition supports to these people could result in individuals missing out on the NDIS entirely or, worse, transitioning to the community without adequate supports. For some people with high needs, the consequences may be very serious.

The submission reiterated the concerns already raised by the Public Advocate with the NDIS Chief Executive Officer, principally about the failure of the NDIS planning process to appropriately explore the supports required to ensure the health care needs of people with disability were met. If NDIS plans do not address people's core needs, specifically their health care needs, there is a risk of catastrophic outcomes for some people.<sup>16</sup> The submission warned that the failure to act could result in terrible consequences for NDIS participants and their families, and could seriously impact public confidence in the credibility and effectiveness of one of the great social reforms of our time.

The Public Advocate suggested the NDIS planning process undergo an immediate independent review with the aim of improving both the planning process and the quality of NDIS plans, reducing requests for early reviews, and ensuring that plans address the fundamental needs and interests of participants.

The submission also highlighted the importance for the NDIS Information, Linkages and Capacity Building (ILC) program to deliver a nationally consistent range of services across all jurisdictions, and for the next phase of the ILC program to focus on achieving greater consistency of services and programs across all states and territories.

Finally, the Public Advocate expressed concern about the speed of the NDIS rollout and the impact it is having on the quality of NDIS plans. A rapid rollout can have a detrimental effect on both the quality of participant experiences and the viability of the Scheme as a whole. As mentioned in the Year in Review section of this report, the Public Advocate still holds these concerns entering the final year of the NDIS rollout.

## Queensland Government consultation on the NDIS

In 2017-18, the Public Advocate participated in state government consultations about the rollout of the NDIS. The Public Advocate provided comment on the draft rules for various aspects of the NDIS Quality and Safeguarding Framework, including rules associated with the code of conduct, complaints management and resolution, provider registration and practice standards, restrictive practices and behavior support, the Quality and Safeguards Commission, incident management and reportable incidents, and other aspects of the framework.

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<sup>16</sup> Office of the Public Advocate, 'Upholding the right to life and health: A review of the deaths in care of people with disability in Queensland' (2016); J Trollor, P Srasuebkul, H Xu & S Howlett, 'Cause of death and potentially avoidable deaths in Australian adults with intellectual disability using retrospective linked data', *BMJ Open*, vol 7, iss 2, 2017; J McMillan & S Kinmond, 'The needless deaths of people with intellectual disability must be urgently addressed', *ABC News*, 9 February 2017, <<http://www.abc.net.au/news/2017-02-09/analysis-ombudsman-on-healthcare-for-intellectually-disabled/8255738>>.



The Public Advocate also contributed to the Department of Justice and Attorney-General's (DJAG) NDIS transition working group and planning processes to identify risks for DJAG agencies and their clients during the transition to the NDIS in Queensland. The Public Advocate also regularly contributed to Queensland Government NDIS highlight reports and reports to the NDIS Reform Leaders Group.

## Engagement with government about the *Upholding the right to life and health* report

The Public Advocate's report *Upholding the right to life and health: A review of the deaths in care of people with disability in Queensland (2016)* reviewed 73 cases involving the deaths in care of people with disability. The report published findings about the health and mortality of Queenslanders living with cognitive and intellectual disability which included:

- more than half of all deaths reviewed (59%) were identified by the expert advisory panel as unexpected;
- many of these deaths involved relatively young men and women (47% were in their 40s or younger); and
- more than half (53%) of the deaths were potentially avoidable.

The report provided numerous examples where adverse health outcomes were experienced by people with disability due to such factors as inadequate support for health-related conditions, poor access to adequate medical assessment and health care, and lack of training for disability support staff and medical/health care professionals.

The report made 10 systemic recommendations in three key areas:

1. Governance and accountability;
2. Health practice and standards; and
3. Disability practice and standards.

There have been a number of delays and setbacks since the Premier's commitment to working with the Public Advocate to implement the recommendations of the *Upholding the right to life and health* report. It is disappointing that more than two years since the release of the report there is still no agreed plan of action to effectively implement its recommendations. The departments of Health and Communities, Disability Services and Seniors (DCSS) have been working on proposed responses to the report, however to date, the Public Advocate has not been satisfied their proposals would achieve improved health outcomes for this cohort.

The only way to effectively improve health outcomes for this cohort is to have the engagement of Hospital and Health Services and Primary Health Networks and better coordination of services between those systems for people with disability with complex health conditions. There also need to be appropriate links into key points in the NDIS to ensure participants are being supported to engage with the health services they need.

To date, the NDIA has not committed to fund the supports required for people with disability to meet their broader health needs. While the NDIS does not fund mainstream health services, it should fund the transportation and other supports that people with disability require to access mainstream health services. Failure to do so will increase the risk of negative health outcomes for people with disability.

The Public Advocate has continued to make representations to the Quality and Safeguarding Commissioner about this issue and has encouraged DCDSS to formally advise the NDIA and the NDIS Quality and Safeguards Commissioner of the known health risks for particular people with disability with complex health needs.





Since raising this issue with the Chair of the NDIA Board, the Public Advocate received correspondence from the CEO of the NDIA advising that the NDIS is developing more tailored pathways for specific cohorts, which will include people with more complex needs, potentially including complex health needs. However, the letter fell short of committing to fund the necessary supports required by NDIS participants to ensure their health needs are met. At the time of writing this report, the new complex pathways for entry to the NDIS were still under development.

The Public Advocate will continue to work with Queensland Government agencies and the NDIA to improve mechanisms to achieve better health outcomes for this vulnerable group.

## Section 216 of the Criminal Code

Under section 216 of the *Criminal Code*, it is a crime to engage in sexual activity with a person who has an 'impairment of the mind'. This section effectively criminalises any sexual contact with a person with a condition or disability that may result in a condition that falls within the definition of impairment of the mind, regardless of whether that person has the capacity to consent to and understand the nature of such activities. The law as it currently stands imposes significant restrictions on the right of people with impaired decision-making capacity to freely engage in sexual relationships.

There is inherent tension between ensuring appropriate protections against abuse or exploitation of people with impaired capacity and upholding their right to independence and autonomy, including the right to participate in consensual sexual relations and be recognised as a sexual being with sexual desires. Section 216 of the *Criminal Code* does not properly recognise this balance and instead imposes significant and unjustified limitations on many people who may have the capacity to consent to sexual activity.

The Public Advocate has been examining this issue for some time, with the aim of publishing a paper analysing section 216 in the context of its history, undertaking a comparative analysis with related provisions in other Australian jurisdictions, and examining how this provision sits with other rights-based legal frameworks and international rights conventions. It is anticipated the paper will be finalised before the end of 2018.

## Deinstitutionalisation of people with Intellectual disability or cognitive impairment

The Public Advocate's report, *People with intellectual disability or cognitive impairment residing long-term in health care facilities: Addressing the barriers to deinstitutionalisation*, was tabled in the Queensland Parliament in November 2013. In this report, the Public Advocate recommended the need to develop and implement an action plan to transition people with intellectual disability or cognitive impairment living in health facilities to appropriate and inclusive community-based accommodation and support services. The report also highlighted the need to plan and support the transition of these individuals into the NDIS.

In 2013-14, the Queensland Government launched the *Joint Action Plan – Transition of long-stay younger people with disability from Queensland public health facilities*. The Joint Action Plan is a partnership between DCDSS (the lead agency), Queensland Health, and the Department of Housing and Public Works. These departments work together to support younger people with disability who are long-stay residents in Queensland public health facilities to move to supported accommodation in the community. The Joint Action Plan expires in mid-2019, coinciding with the full rollout of the NDIS in Queensland.

During 2017–18, 32 younger people with disability were supported to transition from living long-term in public health facilities to community living under the Joint Action Plan, with an additional six people transitioned to community living from other settings.<sup>17</sup>

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<sup>17</sup> Letter from Ms Clare O'Conner, Director-General, Department of Communities, Disability Services and Seniors, dated 7 August 2018 and addressed to Ms Mary Burgess, Public Advocate, regarding the Queensland Government's *Joint Action Plan to transition long-stay younger people with disability from Queensland Health facilities*.



Of the people who transitioned from public health facilities:

- 6 returned to living at home with their partner and/or family;
- 2 transitioned to an independent social housing unit with shared support; and
- 24 now reside in supported accommodation with shared supports.<sup>18</sup>

Since the commencement of the Joint Action Plan, 156 younger people with disability have been supported to transition to community living from public health facilities. A further 20 people have been transitioned into community living from other settings.<sup>19</sup> The Public Advocate acknowledges the considerable commitment involved in these successful transitions, particularly given the associated capital and recurrent costs and the challenges of multi-agency collaboration.

In previous years, DCDSS has provided the Public Advocate with specific information about the number of people with intellectual disability or cognitive impairment who have transitioned from living long-term in health facilities, or who are yet to be transitioned. This year, the department advised that it 'does not hold records identifying the primary or secondary disability types for these people'<sup>20</sup> i.e. people who fall within the scope of the Joint Action Plan.

The Public Advocate annually requests information from the Joint Action Plan partners about the number of people with intellectual disability or cognitive impairment who are assisted, and remain to be assisted, under the Joint Action Plan as these people may experience impaired decision-making capacity. The inability of DCDSS to provide this information inhibits the ability of the Public Advocate to properly monitor and review the delivery of services and facilities to people with impaired decision-making capacity. We will work more closely with DCDSS with the goal of resolving this information shortfall.

In 2017-18, around \$3 million was invested in capital and operational funding under the Joint Action Plan.<sup>21</sup> This represents a significantly lower financial investment by the Joint Action Plan partners compared to previous years (\$11.1 million was expended in 2016-17 and \$6.3 million in 2015-16).<sup>22</sup> It is also inconsistent with DCDSS' commitment that 'the transition of younger people with disability from public health facilities into the community in the lead-up to full implementation of the NDIS continues to be a priority'.<sup>23</sup>

Despite there still being about 537 younger people with disability residing long-term in public health facilities, there will be no actions undertaken under the Joint Action Plan 2018-19 (the final year of the transition to the NDIS in Queensland) to transition these younger people out of institutional care.<sup>24,25</sup> This premature scaling back of the Joint Action Plan in 2017-18 and 2018-19 is concerning and is inconsistent with the commitment by the Joint Action Plan partners to fulfil their obligation to 'assist people with disability who are long-stay patients in Queensland public hospitals and health facilities to move out to community living wherever possible, until mid-2019'.<sup>26</sup>

DCDSS has advised that people with disability who remain living long-term in public health facilities (i.e. the people who remain to be assisted under the Joint Action Plan) beyond the NDIS transition period, and who are not deemed eligible to receive NDIS funded supports, will continue to be provided with the specialist disability supports they receive from the Queensland Government. This 'continuity of support' provision only applies to people who live in public health facilities who currently receive specialist disability supports (for which funding will cease upon the full implementation of the NDIS).<sup>27</sup>

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<sup>18</sup> Ibid.

<sup>19</sup> Ibid.

<sup>20</sup> Ibid.

<sup>21</sup> Ibid.

<sup>22</sup> The Public Advocate, 'Annual Report 2016-17' (2017) 8; Office of the Public Advocate, 'Annual Report 2015-16' (2016) 22.

<sup>23</sup> Letter from Ms Clare O'Conner, above n 17.

<sup>24</sup> Ibid.

<sup>25</sup> With the exception of providing \$383, 282 in funding to assist people transition from living long-term in public health facilities in the North Coast region.

<sup>26</sup> Department of Communities, Disability Services and Seniors, *Joint action plan: Support for people with a disability to move out of Queensland public health facilities* (25 September 2018) Queensland Government <<https://www.communities.qld.gov.au/disability/service-providers/centre-excellence/positive-behaviour-support/publications-resources/joint-action-plan>>.

<sup>27</sup> Letter from Ms Clare O'Conner, above n 17.



While the continuity of support for this group is welcomed, there are likely to be many people with disability currently residing long-term in public health facilities who do not receive specialist disability supports and will therefore not benefit from the disability supports they require unless they are supported to apply for NDIS funding. DCDSS has informed the Public Advocate that the department is working with Queensland Health and the Public Guardian to assist people to plan for their future, including applying for NDIS funding where appropriate. An NDIS readiness tool is being used to collect and collate information about the level and types of support services each individual will need to live safely and as independently as possible in their chosen accommodation.

The Public Advocate has had long-standing concerns about the many people with impaired decision-making capacity living long-term in other state institutions who may not be deemed eligible for NDIS funding upon the full rollout of the scheme. These individuals include people with mental illness and cognitive and intellectual disability living in Queensland Health Authorised Mental Health Services, as well as people with cognitive and intellectual disability in the Forensic Disability Service. The Public Advocate welcomes the Queensland Government's recent commitment to provide ongoing funding to people aged under 65 years who currently receive state-funded supports and who are determined to be ineligible for NDIS funding. This means the Queensland Government will continue to fund the necessary supports for these people for the duration of their lives or until they enter another service system.

### Forensic Disability Service

The Forensic Disability Service is a purpose-built, medium security, residential and treatment facility with the capacity to accommodate and provide care for up to 10 people who are subject to a Forensic Order (Disability) under the *Mental Health Act 2016*. The service, which is established and operates under the *Forensic Disability Act 2011*, is managed by DCDSS and has been operating since July 2011.

The *Forensic Disability Act* and the Forensic Disability Service were established in response to concerns raised in separate reviews undertaken by Brendan Butler AM SC and the late Hon William Carter QC identifying the need for a more appropriate model of care for people with intellectual disability or cognitive impairment who are found to be of unsound mind or unfit for trial.

The Public Advocate's last Annual Report noted that eight of the original 10 clients admitted in 2011 were still detained in the service. One client had died while another had been transitioned into the community.

During 2017-18, some positive developments have occurred, with four clients transitioned out of the service, leaving four of the original clients remaining. Two new clients have been detained to the service, bringing the total number of clients to six as at 30 June 2018.<sup>28</sup>

The Public Advocate acknowledges the considerable effort that has been invested to transition long-term clients out of the service, including the work of the Public Guardian who continues to advocate for the best treatment and outcomes for Forensic Disability Service clients under public guardianship.

The Public Advocate has continued to raise concerns about the service and its restrictive and segregated approach to the support and care of people with disability under a Forensic Order. Throughout 2017-18 the Public Advocate met with various senior staff at DCDSS to advocate on a systemic level to improve the conditions and supports for clients detained at the service.

Of further concern is that Aboriginal and/or Torres Strait Islander people continue to be overrepresented at the service. Three of the six current clients identify as being Aboriginal and/or Torres Strait Islander.<sup>29</sup> This continues the trend, where the majority of clients held at the service (including the current clients) are/were from Aboriginal and/or Torres Strait Islander backgrounds.

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<sup>28</sup> Letter from Ms Vanda Wieczorkowski, Director of Forensic Disability, dated 27 July 2018 and addressed to Ms Mary Burgess, Public Advocate, regarding the Forensic Disability Service.

<sup>29</sup> Ibid.



## Aged care and elder abuse issues

The issues of elder abuse and the provision of appropriate aged care supports has continued to gain momentum in the Australian media and community. In February 2018, in response to the release of the Australian Law Reform Commission's elder abuse inquiry report, the Australian Government announced it would develop a national plan to ensure the protection of older people in our community.

### Regulation of the use of restrictive practices in residential aged care

The use of restrictive practices to manage the challenging behaviours of people in the aged care and disability sectors is a key human rights issue in Australia. Restrictive practices can include detention, seclusion, physical, chemical and mechanical restraint and electronic forms of restraint and monitoring such as tracking bracelets, camera surveillance or restrictions on the use of media devices. These practices are being used in aged care settings despite research indicating their use may result in negative physical and psychological impacts on the person being restrained and may also constitute a breach of law and human rights.

Some jurisdictions in Australia regulate the use of restrictive practices in the disability and/or mental health sectors.<sup>30</sup> However, the *Aged Care Act 1997* (Cth), which is the primary piece of legislation governing aged care in Australia contains no provisions that address or regulate the use of restrictive practices.<sup>31</sup>

Consequently, the use of restrictive practices in aged care settings, without legal justification or excuse, is unlawful and amounts to elder abuse.

In an unregulated environment, residential aged care workers are working in a professional minefield without a clear statutory basis or legal protections when they use restrictive practices. Evidence suggests that some residential aged care staff do not have the knowledge and skills to manage behaviours appropriately, and that the wellbeing of the person being restrained may be negatively affected as a result. It is concerning that the inappropriate use of restraints in aged care facilities in Australia has been a factor in the deaths of some people upon whom the restraints were used.

In 2017-18, the Public Advocate continued to campaign for the regulation of the use of restrictive practices in aged care settings. Efforts to influence reform have included raising these issues in responses to government consultations and inquiries, contributing to government strategies, participating in meetings and forums, writing to relevant stakeholders and issuing media releases.

In July 2017, the Public Advocate wrote to the Co-Chairs of the Review of National Aged Care Quality Regulatory Processes requesting the issue of unregulated use of restrictive practices in aged care be examined as part of the review. The Public Advocate provided the Co-Chairs with a copy of the paper *Legal frameworks for the use of restrictive practices in residential aged care: An analysis of Australian and international jurisdictions*, published by the Public Advocate in June 2017.

In August 2017, the Public Advocate wrote to the Queensland Health Minister highlighting concerns about the use of restrictive practices in residential aged care facilities in Queensland. The Public Advocate asked the Minister to make representations to the Commonwealth Ministers for Health and Aged Care seeking legislative reform to address this issue.

On 15 June 2018, World Elder Abuse Awareness Day, the Public Advocate issued a media release calling on the Australian Government to urgently end the unregulated use of restrictive practices in residential aged care settings. The Public Advocate expressed deep frustration at the Australian Government's lack of action to address the unregulated use of restraints and other restrictive practices in residential aged care.

<sup>30</sup> See, for example, *Disability Services Act 2006* (Qld) pt 6; *Mental Health Act 2016* (Qld) ch 8.

<sup>31</sup> Michael Williams, John Chesterman and Richard Laufer, 'Consent versus scrutiny: Restricting liberties in post-Bournemouth Victoria' (2014) 21(3) *Journal of Law and Medicine* 641, 644; Judy Allen and Tamara Tulich, 'I want to go home now': Restraint decisions for dementia patients in Western Australia' (2015) 33(2) *Law in Context* 1, 4.



## National plan for elder abuse

The Australian Government has committed to developing a National Plan to address elder abuse by the end of 2018. The Public Advocate has actively participated in a number of discussions with the Commonwealth Attorney-General's office about the development of the plan, and has made a submission to the Queensland Government as part of a whole-of-government consultation about this issue.

The Public Advocate has also provided input into the projects that the Australian Guardianship and Administration Council is undertaking as part of the national plan for elder abuse. This work focusses on the development of:

- a national 'best practice' resource for enduring appointments;
- a discussion paper about enduring appointment laws and practices throughout Australia (with a particular focus on enduring appointments with financial responsibilities); and
- a best practice guideline to maximize the participation of persons the subject of applications in guardianship and administration hearings.

In February 2018, the Public Advocate participated in the national forum 'Elder Abuse: Community Led Strategies for Change' which led to the development of the report *Addressing the abuse of older people in Australia: A community response*. The report was sponsored by the Commonwealth Attorney-General's Department and the Older Persons Advocacy Network, and led by Seniors Rights Service in collaboration with a National Working Group. The report was published to contribute to public discussion about the development of the national plan for elder abuse.

## Parliamentary Inquiry into the quality of residential aged care

In February 2018, the Public Advocate made a submission to the Standing Committee on Health, Aged Care and Sport for the inquiry into the quality of care in residential aged care facilities in Australia. The submission focused on the need to regulate the use of restrictive practices in aged care settings, the need for an aged care community visitor program, and the importance of an effective complaints system and provision of advocacy support.

In April 2018, the Public Advocate appeared as a witness at the Brisbane hearing for the inquiry to further advocate for action in response to the issues raised in the submission.

### **The need to regulate the use of restrictive practices**

The submission to the inquiry provided an overview of Australian and overseas laws, policies and practices for the use of restrictive practices in residential aged care. It highlighted that Australia has been slow to regulate the use of restrictive practices to manage the challenging behaviour of people with dementia and mental health issues in residential aged care (in comparison with other Western countries).

The Public Advocate encouraged the Australian Government to urgently address this issue, particularly because aged care residents across Australia are being subjected to physical and chemical restraint and seclusion without any oversight or accountability. These actions potentially amount to criminal assaults and other civil and criminal wrongs. The inaction of the Australian Government has occurred amidst seemingly strong agreement among those advising the government that regulation should occur.

The submission called on the Australian Government to improve the quality standards applicable to the treatment and care of people in residential aged care. The standards made no reference to the use of restrictive practices or that restrictive practices should only be used as a last resort. The standards also failed to require residential aged care facilities to train their staff in these matters to meet legislative or accreditation requirements or minimum quality standards.

### **The importance of an effective complaints and oversight system**

The Public Advocate's submission highlighted that an effective complaints mechanism is an integral part of a comprehensive system of safeguards for older people. It highlighted the range of barriers that may prevent many older people, particularly those with impaired decision-making capacity, from having their issues resolved through formal complaints mechanisms.



Complaint systems do not always sufficiently respond to individuals with impaired decision-making capacity who may be unable to take the action necessary to initiate and progress a complaint through to resolution. These adults frequently require additional support to use complaint systems effectively, however this support is not always provided through complaint management systems.

These and other issues are likely to reduce the effectiveness of complaint systems for older people with conditions that impact their capacity. The submission therefore urged the adoption of mechanisms that maximise accessibility of complaint management systems for people with impaired decision-making capacity and support to actively engage in the complaint process.

Additional oversight mechanisms may ameliorate some of the inadequacies of formal complaint management systems. For example, the frequent and on-going presence of external visitors (such as the community visitor program established under the *Public Guardian Act 2014* (Qld)) may assist with identifying and raising issues for people with impaired decision-making capacity and progressing them to resolution. Independent advocates can perform similar functions, although engaging their services generally requires proactive effort that may be beyond the capabilities of some people with impaired decision-making capacity.

The Public Advocate's submission also called for improved reporting about aged care complaints to facilitate greater system transparency and accountability. Considering the high number of complaints made about residential aged care, the unregulated use of restrictive practices, the vulnerability of many consumers and the importance of respecting their human rights, greater detail about the type and nature of complaints received and the outcomes of those complaints should be publicly available.

### **Assistance for residents who do not have available support**

The submission also made the point that an effective complaint system is an important consumer protection, particularly for those who do not have an informal support network. Many older people may require support to use complaint systems effectively, particularly those who do not have family, friends or other people available to provide them with support.

The submission advocated for the Commonwealth Government to ensure the National Aged Care Advocacy Program (NACAP) is adequately funded to meet current and future demand for advocacy services. The insufficient funding of advocacy services could become a significant barrier to aged care residents being able to seek redress for mistreatment and abuse and to access consumer protection mechanisms.

### **Queensland: an age friendly community**

In 2017-18, the Public Advocate continued to contribute to the Respect and Social Inclusion component of the Queensland: An age-friendly community action plan. Under the plan, the Public Advocate had committed to advocating for the implementation of particular Australian Law Reform Commission Elder Abuse Inquiry recommendations, and for national regulation of the use of restrictive practices in residential aged care.

To progress these actions, the Public Advocate:

- participated in discussions with the Commonwealth Attorney-General's office about the national plan for elder abuse;
- contributed to initiatives under the federal government's National Plan for elder abuse via the Australian Guardianship and Administration Council;
- pursued these issues at the 5th National Elder Abuse Conference;
- pursued these issues at the national 'Elder Abuse: Community Led Strategies for Change' workshop; and
- provided input into the national report *Addressing the abuse of older people in Australia: A community response* (see comments above).



# Mental health

## Mental Health Review Tribunal – recording of proceedings

The *Recording of Evidence Act 1962* (Qld) requires the recording of all legal proceedings heard in a court (including any court or tribunal established and constituted under Queensland law). Generally, the way in which this requirement is met by courts and tribunals is through recording the proceedings electronically to enable transcription at a later time as required.

The recording of proceedings is generally considered a fundamental feature of a modern system of justice. Electronic sound recording of legal proceedings is undertaken in all criminal and civil courts (administered by DJAG), as well as the Queensland Civil and Administrative Tribunal (QCAT), however, the Mental Health Review Tribunal (MHRT) has taken the view that the requirement to 'record' a hearing is discharged by having sitting Tribunal members take handwritten notes during proceedings.

In September 2017 the Public Advocate wrote to the then-Minister for Health, the Hon Cameron Dick MP, outlining concerns that the current practices of the Tribunal are not in line with the *Recording of Evidence Act* and the practices of other courts and tribunals. The Public Advocate made the point that the current practice raises issues around the accuracy of evidence and submissions made to the Tribunal and the accountability of those giving evidence and presenting material.

The absence of a formal record of the proceedings also means that it is not possible to know how Tribunal proceedings are being conducted. Further, despite the Tribunal taking the view that Tribunal members' notes are the record of the proceedings for the purposes of the *Recording of Evidence Act*, the Tribunal has no process for making this 'record' available to parties to the proceedings as required under the *Recording of Evidence Act*.

A unique aspect of the MHRT is that the patient does not need to be present during hearings. This can occur for legitimate reasons, such as the patient's health at the time of the hearing. However, under the current recording arrangements, the patient has no reliable means to review what occurred at the hearing.

The Public Advocate received a response from Minister Dick, who took the position that handwritten notes and decision paperwork discharged the Tribunal's responsibilities under the *Recording of Evidence Act*.

The Public Advocate considers that the Minister's response did not adequately address the concerns and has since raised this issue again with the current Minister of Health, the Hon Dr Steven Miles MP. At the time of writing this report, a response from the Minister had not yet been received.

The Public Advocate will continue to advocate about this issue to promote fairness, accountability and accessibility in hearings about the detention and treatment of some of the most vulnerable people in our community.

## Comparative analysis of involuntary mental health regimes

The *Mental Health Act 2016* (Qld) establishes a legislative scheme for the involuntary treatment of people with a mental illness who do not have the capacity to consent to be treated. One of the main objects of the Act is to enable people to be diverted from the criminal justice system if they are found to have been of unsound mind at the time of committing an unlawful act or to be unfit for trial. The main objects of the Act are to be achieved in a way that:

- safeguards the rights of people;
- is the least restrictive of the rights and liberties of a person who has mental illness; and
- promotes the person's recovery and ability to live in the community without the need for involuntary treatment and care.



While the objects of the *Mental Health Act* sound ideal, some individual cases of people detained in the mental health system in Queensland and the regimes of involuntary treatment being approved by the MHRT have given rise to concerns about whether the system is sufficiently transparent and accountable, and whether appropriate regard is being paid to patients' human rights.

As part of its functions to promote and protect the rights of adults with impaired capacity, the Public Advocate is undertaking a project to review and compare:

- the involuntary mental health legislative frameworks that operate in selected jurisdictions, including the frameworks for the operation of the tribunals or other entities that review the detention of people under involuntary mental health orders and how they operate in practice;
- the human rights protections that exist under these regimes and whether they are operating effectively; and
- the transparency and accountability of decision-making processes under the *Mental Health Act*.

### Approval and administration of ECT and emergency ECT in mental health facilities

The Public Advocate has concerns about the processes for approval of electroconvulsive therapy (ECT) in Queensland and the regimes of treatment that are being administered to involuntary patients in Queensland mental health facilities.

The Public Advocate is liaising with the Chief Psychiatrist about:

- improved oversight and monitoring of the Queensland ECT Guidelines;
- the use of second opinions prior to the authorisation of ECT;
- the quality and reliability of evidence being tendered in the MHRT; and
- the use of emergency ECT certificates outside of the usual MHRT application process.

A review of the *Mental Health Act* provisions about emergency ECT has highlighted the absence of any oversight mechanism to safeguard the rights of mental health consumers and ensure certificates are only being issued and ECT administered in the circumstances provided for under the Act. The Public Advocate has raised this issue with the Chief Psychiatrist with a view to having this legislative gap addressed in the forthcoming review of the *Mental Health Act*. Involvement in this matter has also raised questions about the level of professional oversight of psychiatrists in Queensland public hospitals and has raised questions about the degree to which psychiatrists understand the legal framework within which they are working, and their responsibilities under relevant legislation.

### Queensland Mental Health Commission

The Public Advocate works closely with the Queensland Mental Health Commission on issues and projects of mutual interest. The Commission is currently reviewing the *Queensland mental health, drug and alcohol strategic plan*, which aims to improve the mental health and wellbeing of people in Queensland, including those with mental illness, problematic alcohol and other drug use and those at risk of suicide. During the year, the Public Advocate provided feedback on the renewed plan, with a particular focus on recognising the rights of people with impaired decision-making capacity.

The Public Advocate continues to work with the Queensland Mental Health Commission on various projects.

#### **Human rights research project**

The Queensland Mental Health Commission has commenced a project investigating the oversight mechanisms of the *Queensland Mental Health Act* to protect the human rights of people living with a mental illness. The Public Advocate is a member of the project advisory group to guide the implementation of the project.





# Law and justice

## Coroners Court of Queensland

### Inquest

The Public Advocate was invited by the Deputy State Coroner to make submissions regarding an inquest into the death of a man with impaired capacity in an aged care facility.<sup>32</sup> The man died from choking on food. The Coroner asked for submissions from the Public Advocate as a result of the work undertaken by this office for the report, *Upholding the right to life and health: A review of the deaths in care of people with disability in Queensland*, which identified a range of issues for people with dysphagia (difficulty swallowing) that contributed to their deaths.

The deceased was a 53 year old man who was diagnosed with Huntington's disease. He required assistance with activities of daily living and mobility due to involuntary movements as a result of his condition, and was identified as having swallowing difficulties and be at risk of choking. Medical assessments recommended that he should only be provided with minced, moist foods and fluids, and given other, more challenging foods only when appropriate and at a time when meal supervision could be provided. Despite these medical instructions, the deceased was provided with food that included sandwiches, and was left to eat alone in his room. Within two hours he was found deceased after choking.

In the Public Advocate's report, *Upholding the right to life and health*, a number of food choking deaths were reviewed. The presence of documented swallowing assessments and mealtime management plans were not sufficient to prevent these deaths. This was due in large part to an apparent lack of compliance by support staff with the plans and/or periods where the person was left unsupervised during a meal. A number of recommendations were made in the report to prevent choking deaths, including better training of staff about supporting clients with swallowing issues, closer working relationships with health practitioners and strict compliance with and review of mealtime management plans.

The Public Advocate made a number of submissions to the Coroner including that staff must be kept up to date with mealtime management plans, and that regular health checks and plan reviews be undertaken.

It was further submitted that the Coroner consider establishing a Residential Aged Care Death Review Process (or alternatively, an Elder Abuse Death Review process that could include the review of deaths in residential aged care) and a Disability Care Death Review Process. These submissions were made on the basis that the Public Advocate felt there was value in taking a broader systemic approach with input from people with specialist medical and aged/disability care knowledge and experience, to reduce these avoidable deaths.

Other concerns raised by the Public Advocate involved the *Aged care accreditation standards*, which it was submitted do not provide sufficient guidance to aged care staff about expected levels of care and staff resourcing. The accreditation standards focus primarily on outcomes, which is problematic when they make no provision for the identification of intermediate outcomes that could operate as red flags about the level and quality of care for a resident before they experience a catastrophic outcome.

The Coroner concluded that the aged care facility had implemented changes that were consistent with the recommendations in the Public Advocate's report, including strict compliance with mealtime plans, regular reviews of mealtime plans and increased training of staff. The Coroner made no further recommendations to the aged care facility, but considered that some of the direct preventative recommendations made by the Public Advocate should be considered by the aged care industry generally, as well as other residential services providing care to vulnerable people, such as within the NDIS.

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<sup>32</sup> Coroners Court of Queensland, *Inquest into the death of Paul Joseph Milward* (5 June 2018) 2015/3395.



The specific recommendations made by the Coroner were that:

- choking deaths of people in care with a disability be specifically acknowledged as a systemic issue and strategies to manage, monitor, review and report on this issue should be built into the NDIS quality assurance and reporting framework;
- all staff involved in the care of residential aged and disability residents be informed of any change to a resident's care plan prior to the commencement of their next shift, either by an oral handover or some other form of information sharing;
- residents in aged and disability care should have their care plans routinely reviewed at least three monthly and sooner if circumstances have changed; and
- residents in aged and disability care with conditions that affect their ability to swallow should undergo regular medical examinations at intervals recommended by a medical practitioner to assess their respiratory health in order to identify and treat aspiration pneumonia.

### Coroners conference

In May 2018, the Public Advocate was invited to speak at the annual Coroners Conference held in Brisbane. The Public Advocate presented the report *Upholding the right to life and health: a review of the deaths in care of people with disability in Queensland*.

### Human Rights Watch report

In February 2018, Human Rights Watch released the report, *Abuse and neglect of prisoners with disabilities in Australia*. It examined how prisoners with disabilities, including Aboriginal and Torres Strait Islander prisoners, were at high risk of bullying, harassment, violence and abuse. The report also found that solitary confinement was widely used on prisoners with psychosocial disabilities.

Of significant concern was the finding that people with impaired capacity were dramatically overrepresented in the criminal justice system, and also in prisons.

Human Rights Watch investigated 14 adult prisons across Western Australia and Queensland. During the research stages, the Public Advocate met with Human Rights Watch to discuss concerns about people with disabilities in the criminal justice system.

At the Queensland launch for the report, the Public Advocate chaired a panel of guests and led a discussion about the issues covered in the report.

## Guardianship and administration

### *Guardianship and Administration and Other Legislation Amendment Bill*

In September 2017, the Public Advocate made a submission to the Legal Affairs and Community Safety Committee on the *Guardianship and Administration and Other Legislation Amendment Bill 2017*. The submission supported the majority of the proposed changes that stemmed from the 2010 Queensland Law Reform Commission's report *A review of Queensland's guardianship laws*.

The Public Advocate expressed concern that the proposed redrafting of the general and health care principles will have the effect of making them less readable and harder to digest than the current wording. The proposed re-wording included many clauses and brackets which would make the principles less accessible for people who are not accustomed to reading and interpreting legislation. The general principles should more closely reflect the Convention on the Rights of Persons with Disabilities, however they must also be expressed in simple language that can be understood by the people whose rights they are intended to protect and those assisting them or making decisions on their behalf. Article 9 of the Convention on the Rights of Persons with Disabilities deals with accessibility and recognises the right of every person with a disability to have 'access on an equal basis with others to the physical environment, to transportation, to information and communications'.



The Public Advocate also supported the creation of guidelines to assist people to make capacity assessments in a manner that is consistent and reflects a best practice approach, as endorsed by the Queensland Law Reform Commission. As highlighted in the *Decision-making support and Queensland's guardianship system report* (published by this office in 2016), the establishment of practical guidance and requirements for the assessment of capacity may facilitate an improved understanding of capacity within the community and relevant professions.

In October 2017, the Public Advocate appeared as a witness at the Brisbane hearing for the inquiry.

The Bill that was introduced in 2017 lapsed due to the Queensland state election, however it was reintroduced in 2018 as the *Guardianship and Administration and Other Legislation Amendment Bill 2018* on February 2018. This Bill is yet to be debated in the Queensland Parliament.

### Effective decision-making support for people with cognitive impairment

In 2017-18, the Public Advocate continued to contribute to the Australian Research Council Linkage research partnership led by La Trobe University on effective decision-making support for people with cognitive impairment. The Public Advocate is a partner investigator in this four year project, which focuses on people with intellectual disability or acquired brain injury who require decision-making assistance.

The research aims to address the gaps in knowledge, expertise and resources that exist in respect of providing support for decision-making. An educational program that trains people to provide decision-making support has been developed and will be evaluated. The educational program aims to improve the quality of the decision-making support provided to people with cognitive impairment. The evaluation of the program will assess whether it results in better outcomes for the person requiring decision-making assistance. The learnings from the research are expected to apply to a broader range of people with cognitive impairment.

The Queensland project partners and researchers met in October 2017 to discuss different ways that the partner organisation can assist with the recruitment of participants and contribute to the project in other ways. Following this meeting, the Public Advocate coordinated letters from the Queensland project partners to the Directors-General of Queensland Health and the DCDSS. The letters sought the assistance of these departments in identifying potential research participants.

In February 2018, the Public Advocate participated in a national partner teleconference to discuss the progress of the project and strategies to assist with the recruitment of participants.

### Key systems impacting people with impaired capacity monitoring project

The goal of this project is to collect and collate data held by multiple Queensland Government agencies that engage with adults with impaired decision-making capacity. The core project deliverable will be an annual public report presenting key statistics and trends about the interactions of people with impaired decision-making capacity with government agencies.

The commencement of this project was delayed in 2017-18 due to internal resourcing issues and competing priorities, however, it will be progressed in 2018-19.

The project will be led by the Public Advocate, with partner agencies to include the Office of the Public Guardian, the Public Trustee of Queensland and QCAT. It is anticipated that other Queensland agencies, such as the MHRT, Coroner's Court, DCDSS and Queensland Health may also contribute data to the project.

The project will establish an evidence base that will provide a snapshot of system demand and trends about the people who interact with Queensland's public guardianship, administration and other systems that deal with people with impaired decision-making capacity. Currently, agency-specific data is collected and reported by individual agencies.



## Improving Queensland's guardianship and administration system

Throughout 2017-18, the Public Advocate continued to monitor the operation of legislation, policy and practice aspects of Queensland's guardianship and administration system and contributed to system improvements through working with DJAG, the Public Guardian, the Public Trustee and QCAT. For example, the Public Advocate provided input into a review of Community Visitor Program reports and processes and contributed to the work being done by DJAG to improve enduring documents.

## Legal interventions

The main function of the Public Advocate is to undertake systemic advocacy. While this generally excludes the Public Advocate investigating specific complaints or allegations that concern an individual, the Public Advocate may also intervene in legal proceedings involving the protection of the rights or interests of adults with impaired decision-making capacity.

Legal interventions can provide an excellent opportunity to closely examine and test the operation of systems and their treatment of people with impaired decision-making capacity. However, legal processes of any type require a significant commitment, financially and in terms of staff resources. This office will only become involved in a legal matter where there are significant systems and/or rights issues for consideration. We view our legal interventions as being part of a broader advocacy strategy around the particular issue under consideration.

## Supreme Court judicial review application

In March 2018, the Public Advocate initiated a Judicial Review application to the Supreme Court of Queensland to review an emergency electroconvulsive therapy (ECT) certificate issued by psychiatrists to administer ECT to an involuntary mental health patient who had received over 140 ECT treatments since November 2015. The *Mental Health Act 2016*, requires that emergency ECT can only be performed to prevent a patient's death or irreparable harm. The basis for performing the emergency ECT was unclear, giving rise to questions about whether it complied with the Act.

In response to the application, the Supreme Court issued an interim order for the treating team to refrain from administering further ECT to the patient without informing the Public Guardian. Ultimately, the matter was resolved by consent.

The Public Advocate continues to liaise with the Office of the Chief Psychiatrist and other government agencies to improve systems for the oversight of the administration of emergency ECT to involuntary patients in Queensland.

## Engagement and consultation

To fulfil the Public Advocate's statutory function to advocate for the protection of the rights and interests of people with impaired decision-making capacity, this office continually seeks to understand the lived experience of people with impaired capacity and ensure that issues impacting them are considered in public and policy discussions and debates. Stakeholder engagement is one strategy for gaining knowledge and understanding of the lived experience of people with impaired decision-making capacity, however it is also a means by which we influence and effect positive change in their lives.

This office is committed to building relationships and working collaboratively with government, non-government and community stakeholders in the health, aged and disability sectors. These relationships allow us to highlight the key issues impacting people with impaired decision-making capacity, and to generate discussion and develop effective strategies and solutions that are responsive to the views and needs of people with impaired decision-making capacity.



## Public Advocate speaking engagements

In 2017-18, the Public Advocate received numerous invitations to speak and participate in panel discussions on issues impacting people with impaired decision-making capacity. These speaking engagements are listed in Appendix 1.

## Contribution to special interest groups

### Australian Guardianship and Administration Council

The Australian Guardianship and Administration Council (AGAC) is the national forum of Public Advocates, Public Guardians, Guardianship Boards and Tribunals, and Public Trustees or their equivalents across Australia. The Queensland members of AGAC are the Public Guardian, Public Trustee, the Senior Member of the Human Rights Division of QCAT and the Public Advocate.

AGAC members meet biannually over two days, except in years when the AGAC Conference is held. AGAC meetings provide an opportunity for members to discuss matters of mutual concern and/or national significance, and to formulate an Australia-wide approach to issues relating to guardianship, administration and associated systems.

In 2017-18, the Public Advocate attended AGAC meetings in Adelaide and Perth and contributed to the work of the AGAC outside these meetings (e.g. providing input into the projects that AGAC is undertaking as part of the national plan for elder abuse, and participating in discussions with the Commonwealth Attorney-General's office about the development of the national plan).

The Public Advocate also became a member of the organising committee for the 2019 AGAC conference and contributed to the work of the committee.

### Queensland Guardianship and Administration Council

The Queensland Guardianship and Administration Council members are the Public Guardian, Public Trustee, the Senior Member of the Human Rights Division of QCAT and the Public Advocate. Meetings were established in 2017-18 and occur on a quarterly basis. The meetings provide an opportunity for the Queensland guardianship and Tribunal agency members of AGAC to come together informally to discuss current and emerging issues of mutual concern. The Public Advocate coordinates these meetings.

### Elder Abuse Prevention Unit Reference Group

The quarterly meetings of the Elder Abuse Prevention Unit Reference Group are attended by a broad range of stakeholder representatives, including the Public Advocate, Office of the Public Guardian, QCAT, the Public Trustee, Australian Pensioners and Superannuants League, DCDSS, Queensland universities and non-government organisations.

The Elder Abuse Prevention Unit chairs the Reference Group meetings which discuss emerging and current issues about elder abuse, the current work and initiatives of member agencies, and strategies and actions that may be required to address issues. The Public Advocate has been a long-term member of the Reference Group.

### Enduring Powers of Attorney Reference Group

The Enduring Powers Of Attorney Reference Group was established in response to the Communities, Disability Services and Domestic and Family Violence Prevention Committee 2015 report on the Inquiry into the adequacy of existing financial protections for Queensland's seniors. The Office of the Public Guardian chairs the meetings, which focus on broad reforms and ways to change how Queenslanders engage with and think about enduring documents through education, training, engagement and research. The Public Advocate continued to participate as a reference group member in 2017-18.



## Queensland: An Age-Friendly Community Senior Officers Group

The Queensland Age-Friendly Community Strategy Senior Officers Group is convened by the Office for Seniors within DCDSS. The group was developed for members to discuss, develop and advance the delivery of the age friendly communities strategy in Queensland. The Public Advocate participated in meetings and continued to contribute to the *Queensland: An age-friendly community strategy*, action plan and implementation schedule in 2017-18.

## Domestic and Family Violence Sub Committee – Disability Working Group

The Domestic and Family Violence Sub Committee – Disability Working Group has been established to support and augment the Department of Youth, Child Safety and Women's review to address the impact of domestic and family violence on people with disabilities, as per recommendation 10 of the *Not now not ever: Putting an end to domestic and family violence in Queensland* report. The working group comprises government and non-government members with experience and expertise in the disability sector. The Public Advocate continued participation in the disability working group in 2017-18.

## NDIS Interest Group of the Justice and Human Rights Agencies

Convened by the Public Trustee of Queensland, the NDIS Interest Group meetings attended by the Public Trustee, Office of the Public Guardian, QCAT and Public Advocate continued throughout 2017-18. The purpose of this group is to discuss the progress of the NDIS rollout in Queensland and its impacts on the guardianship and administration system in Queensland. The participant agencies shared information about the rollout of the Scheme, discussed areas of mutual interest and considered the potential needs of people eligible to access the Scheme. The Public Advocate appreciates the Public Trustee initiating and coordinating these valuable meetings.

## OPCAT Queensland Working Group

The optional protocol to the United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (OPCAT) exists to protect people, detained against their will, from torture and other cruel, inhuman or degrading treatment or punishment. The whole-of-government OPCAT working group was established to provide advice to the Queensland Government about how it might approach reporting to the Commonwealth Government under OPCAT. The Public Advocate has participated in the working group since its inception and provided feedback on the draft agreement.

## Observer status on Queensland Law Society Committees

The Public Advocate has been granted permission to observe the Health and Disability Law and Elder Law Committees of the Queensland Law Society. The Health and Disability Law Committee was established to monitor, improve, and develop legal services, legislation and practice which affect individuals with disabilities or who are mentally vulnerable including those who are detained or held under the *Mental Health Act*.

The Elder Law Committee was established to develop policies and review proposed legislative amendments in the area of elder law, focusing on the rights and responsibilities of aged persons, including in relation to aged care facilities, retirement, estate planning and pensions.

The Public Advocate has continued to observe committee meetings in 2017-18 and expresses warm appreciation to the Queensland Law Society for enabling attendance at these meetings. This engagement with members of the legal profession has provided invaluable opportunities to learn more about the intersection of law and medicine and better understand issues of concern.

## DJAG Guardianship Implementation Reference Group

The department is conducting a review of the Enduring Power of Attorney and Advance Health Directive forms, including the introduction of explanatory guides, and the development of capacity assessment guidelines. The Public Advocate is a member of the DJAG Guardianship Implementation Reference Group which was established in 2017-18 to provide advice and support for these initiatives.



## DJAG Justice Services Division Board of Management

The Board of Management is a key leadership, decision-making and accountability mechanism for the Justice Services Division of DJAG. The Public Advocate is a member of the Justice Services Division Board of Management and participates in the monthly meetings and quarterly leadership meetings.

## Public Interest Disclosures Agency Network Training

The Public Interest Disclosures Agency Network Training meetings are convened by the Queensland Ombudsman each quarter. Meetings are attended by Public Interest Disclosure (PID) Coordinators and practitioners in human resources, corporate governance, ethical standards and complaints who may be required to assess and manage a PID. The meetings provide an opportunity to discuss current issues, developments in case law, and for group discussion on applying the PID Act. The Public Advocate is represented at these meetings by the Administration Officer who is the Office PID Coordinator.

## DJAG Privacy Contact Officer Network

The DJAG Privacy Contact Officer (PCO) network meetings are convened by the DJAG Right to Information and Privacy Unit. As a member of the PCO network, the Office of the Public Advocate attends network meetings where discussions between members include updates on the *Information Privacy Act 2009*, DJAG policy and activities, current information privacy concerns and case studies.

## Consultation, workshops and events

Appendix 2 lists the consultations, workshops and events in which the Public Advocate and/or staff of the office participated in 2017-18. These events provide opportunities to advance systemic advocacy for people with impaired decision-making capacity, contribute to broader community and policy debates, and develop and maintain relationships with stakeholders.

# The Office of the Public Advocate

## People and processes

The Public Advocate is an independent statutory position under the *Guardianship and Administration Act* and appointed by the Governor in Council on the recommendation of the Attorney-General. The current Public Advocate, Mary Burgess, was appointed in October 2016 for a four year term.

The *Guardianship and Administration Act* provides that staff may be appointed to assist the Public Advocate in performing their statutory functions. Staff that support the Public Advocate are appointed under the *Public Service Act 2008* (Qld), and the office relies on DJAG for core business supports, such as information technology and human resources.

## Our team

The staffing establishment provides for five officers (5.0 FTE) to support the Public Advocate:

- 1 x Manager;
- 1 x Principal Policy and Research Officer;
- 1 x Senior Research Officer;
- 1 x Senior Legal Officer; and
- 1 x Administration Officer.



The permanent separation rate of the office in 2017-18 was 25 percent<sup>33</sup>, with the departure of one permanent employee.

Workforce planning processes aim to continually align the needs of the office with those of staff. The Public Advocate supports staff to achieve an appropriate work-life balance and effectively manage their emotional and physical wellbeing and mental health. The Public Advocate continued to provide flexible working options which included accessing accrued time, working part time and telecommuting. Where appropriate, staff were provided with information about self-care strategies and access to the confidential employee assistance service offered to DJAG employees.

Performance management is integrated into the day-to-day running of the office where all staff are provided with regular feedback and recognition and participate in performance and career development planning. As part of this planning, discussions focus on expectations, performance, behaviour, work direction and professional development.

The office that supports the Public Advocate was relocated within the State Law Building in Brisbane city in December 2017. The move was undertaken efficiently, with only minor disruption to the work being undertaken by the office.

### Code of Conduct and public sector values

As DJAG employees, our staff abide by the Code of Conduct for the Queensland Public Service and the DJAG Workplace Policy. The Code of Conduct reflects ethical values contained in the *Public Sector Ethics Act 1994 (Qld)* and is based on principles and values including integrity and impartiality, promoting the public good, commitment to the system of government, and accountability and transparency.

Staff are introduced to the Code of Conduct and related department policy and expectations upon commencement with the office, and can readily access the Code of Conduct and supporting resources at any time through DJAG's intranet website. Staff are periodically reminded about the Code of Conduct and complete workplace ethics training annually. Breaches of the Code of Conduct are managed in line with the Public Service Commission's Discipline Guide.

Our office upholds the Queensland Public Service values, which are: customers first; ideas into action; unleash potential; be courageous; and empower people.

### Learning and development

The Public Advocate is committed to providing staff with professional development opportunities to help advance their knowledge and skills and to help the office protect and advance the interests of people with impaired decision-making capacity. Staff attended a range of learning and development opportunities including conferences, events and training sessions in 2017-18.

Each year, staff observe a series of QCAT hearings for guardianship and administration matters. The hearings provide invaluable experience for staff to gain first-hand knowledge and understanding of guardianship and administration matters, contributing an informed perspective to our systemic advocacy work. The Public Advocate would like to express appreciation to QCAT for facilitating staff observation at these hearings.

### Communications

Effective communication is critical to promoting the rights and interests of people with impaired decision-making capacity and protecting them from neglect and abuse. A specific focus of our communications is to increase understanding of the Public Advocate's role and promote the contribution that the Public Advocate can make in examining and addressing issues impacting people with impaired decision-making capacity.

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<sup>33</sup> In 2017-18, only four of the five positions were filled on a permanent basis.





Our stakeholder engagement strategy identifies our key stakeholders and aims to ensure engagement across all sectors dealing with people with impaired decision-making capacity.

In 2017-18, the Public Advocate continued to enhance its website content and use email communications to inform people about the work of the Public Advocate and current issues impacting the rights and interests of people with impaired decision-making capacity. In the coming year, further website enhancements will improve the availability and accessibility of information.

## Information systems and recordkeeping

Our office uses the online record management system eDocs to manage electronic and physical documents and follows DJAG policies and processes for record keeping. Staff are trained in how to use the eDocs system.

In 2017-18, the office continued to improve record keeping processes to enhance compliance with the *Public Records Act 2002* (Qld) and Queensland State Archives Records Governance Policy, and to improve office effectiveness and efficiency.

These activities included:

- the completion of a large record keeping project involving the archival and destruction of historical office files in line with the DJAG General Retention and Disposal Schedule (GRDS);
- an appraisal and re-organisation of files stored in the eDocs information management system;
- improved digital and hard copy record organisation in accordance with the GRDS to streamline the appraisal, retention and disposal of records;
- improved monitoring of office files held at the State Archives and increased adherence to retention and disposal dates, including importing data into Queensland State Archives information management system;
- improving procedures for records management, including the management of website content; and
- remaining abreast of right to information and information privacy issues and participation in the DJAG Privacy Contact Officer Network.

## Planning

The Public Advocate held business and strategic planning days with staff in 2017-18 to identify, define and prioritise our work program. These meetings provided opportunities to discuss how our office might prioritise and advance key issues within limited resources. The process also enabled the identification of strategic and operational risks, for which we formulated strategies to mitigate any impacts.

In 2017-18, the Public Advocate engaged with a small number of external stakeholders regarding the development of the Public Advocate's business plan for 2018-19. Stakeholder feedback was sought in relation to the Public Advocate's proposed priorities, critical issues facing people with impaired decision-making capacity, emerging opportunities and key challenges in progressing critical issues. The Public Advocate thanks these stakeholders for their input.

## Governance

The Public Advocate is required to fulfil the statutory functions under Chapter 9 of the *Guardianship and Administration Act*. Under the Act, the Public Advocate is appointed for a fixed term, but for no longer than five years. Under section 215(3) of the Act, the Public Advocate may be removed from office by the Governor in Council for physical or mental incapacity, neglect of duty, dishonourable conduct or being found guilty of an offence the Attorney-General considers makes the person inappropriate to perform official duties.

The Public Advocate continued to fulfil DJAG's corporate governance requirements in 2017-18. The office that supports the Public Advocate was not subject to any departmental or external reviews during the period.



## Right to information and information privacy

The Public Advocate did not receive any right to information applications or information privacy applications during 2017–18.

## Financial statement

The Public Advocate is not a statutory body for the *Statutory Bodies Financial Arrangements Act 1982* (Qld) or the *Financial Accountability Act 2009* (Qld). Funding for the office is appropriated from the Queensland Government as part of the appropriation for DJAG, with the Director-General of the department being the accountable officer pursuant to the *Financial Accountability Act*. Detailed financial information relating to the operations of the department are reported in the annual report for DJAG.

A summary of the expenditure for the office for the financial year 2017-18 is presented below.

### Office of the Public Advocate Financial Summary 2017-18

Expenditure item	Amount
Employee related expenses*	\$644,000
Supplies and Services	\$226,000
Grants	\$5,000
Depreciation#	\$2,000
<b>Total</b>	<b>\$874,000</b>

\* The employee expenditure figure reflects intermittent staff vacancies throughout 2017-18.

# The office did not incur any amortisation and deferred maintenance expenditure.

Note: Expenditure figures have been rounded to nearest \$1,000.

## Grants

In 2017-18, our office contributed a \$5,000 grant to the Australian Research Council Linkage research project into 'Effective decision-making support for people with cognitive impairment' led by La Trobe University. This project is funded by an Australian Research Council Linkage Grant and other project partners.

## Overseas travel

There was no overseas travel undertaken by the Public Advocate or office staff in 2017-18.



# Appendix 1

## Public Advocate speaking engagements

### **Enduring Power of Attorney Education Resources Launch**

Aged and Disability Advocacy Australia

Presentation: Advance Health Directives for Mental Health

Supreme Court Library Queensland, Queen Elizabeth II Courts of Law, Brisbane

17 August 2017

### **Statewide Seniors Legal and Support Service Conference**

Caxton Legal Centre

Q&A Panel Discussion: Guardianship and Financial Administration, Enduring Appointments and Safeguarding adults at risk

HopgoodGanim Lawyers, Brisbane

7 September 2017

### **Transitional Arrangements for the NDIS Public Hearing**

Joint Standing Committee on the National Disability Insurance Scheme

Appearance to give evidence

Queensland Parliament, Brisbane

26 September 2017

### **Mental Health Week Panel Forum – Shifting Consumer Control and the new Mental Health Act**

Aged and Disability Advocacy Australia

Presentation: Impacts of the implementation of the *Mental Health Act 2016*

Supreme Court Library Queensland, Queen Elizabeth II Courts of Law, Brisbane

11 October 2017

### **Examination of the Guardianship and Administration and Other Legislation Amendment Bill 2017 public briefing**

Legal Affairs and Community Safety Committee

Appearance to give evidence

Queensland Parliament, Brisbane

11 October 2017

### **Leave no one behind: a disability health symposium**

Metro South Hospital and Health Service

Presentation: *Upholding the right to life and health: deaths in care of people with disability* report

Princess Alexandra Hospital campus, Woolloongabba

4 December 2017

### **Human Rights Watch Report launch “I Needed Help, Instead I Was Punished’: Abuse and Neglect of Prisoners with Disabilities in Australia.”**

Human Rights Watch and Queensland Advocacy Incorporated

Panel discussion facilitator

Banco Court, QEII Courts of Law, Brisbane

8 February 2018

### **Clinical Forum – Advance Health Directive for Mental Health**

Aged and Disability Advocacy Australia

Presentation: Decision-making and capacity

Princess Alexandra Hospital campus, Woolloongabba

1 March 2018



### **Inquiry into the Quality of Care in Residential Aged Care Facilities in Australia public hearing**

Standing Committee on Health, Aged Care and Sport

Appearance to give evidence

Queensland Parliament, Brisbane

26 April 2018

### **Queensland Disability Advisory Council meeting**

Department of Communities, Disability Services and Seniors

Discussion: *Upholding the right to life and health: deaths in care of people with disability* report

George Street, Brisbane

22 May 2018

### **2018 Queensland Coroners Conference**

Department of Justice and Attorney-General

Presentation: *Upholding the right to life and health: deaths in care of people with disability* report

Supreme Court Library Queensland, Queen Elizabeth II Courts of Law, Brisbane

30 May 2018



# Appendix 2

## Consultations, workshops and events

### **Law Year Church Service**

Queensland Law Society  
Albert Street Uniting Church, Brisbane  
10 July 2017

### **Project Open Doors Launch**

Griffith University, Anti-discrimination Commission Queensland, Endeavour Foundation, Queenslanders Living with Disability Network, Sporting Wheelies and Disabled Association, and WWILD  
Griffith University, Nathan  
10 July 2017

### **Domestic and Family Violence Implementation Council Meeting – Roundtable discussion on the impact of and Queensland response to the impact of domestic and family violence on people with disability in Queensland**

Department of Premier and Cabinet  
William Street, Brisbane  
12 July 2017

### **Public Lecture: Rights and Regulation by Professor Hilary Charlesworth**

Law Futures Centre and Griffith Law School  
Supreme Court Library Queensland, Queen Elizabeth II Courts of Law, Brisbane  
12 July 2017

### **Restrictive Practices Decision Making Framework**

Queensland Office of the Public Guardian  
Brisbane Magistrates Court, Brisbane  
14 July 2017

### **Public Lecture: Advance Care Planning: Can one size fit all?**

The Australian Centre for Health Law Research and the Queensland Health Ethics and Law Group  
Queensland University of Technology, Gardens Point  
8 August 2017

### **Creating Age Friendly Communities Forum**

Council on the Ageing Queensland  
Brisbane City Hall, Brisbane  
21 August 2017

### **Council on the Ageing Queensland's 60th anniversary**

Council on the Ageing Queensland  
Brisbane City Hall, Brisbane  
21 August 2017

### **Supporting People with Intellectual Disability Experiencing Mental Health Issues/Disorders Workshop**

Community Living Association & WWILD Sexual Violence Prevention Service  
WWILD, Woolloowin  
28 August 2017



**Public Forum: Examining Access to Justice for those with an Enduring Power of Attorney Who are Suffering Financial Abuse**

Australian Centre for Health Law Research, Crime and Justice Research Centre and ADA Australia  
Queensland University of Technology, Gardens Point  
30 August 2017

**My Decisions mobile phone application – Development of mobile phone application to assist people with impaired decision-making capacity to discover and engage with supports in their area**

Brian Atkin, Former Director of the DJAG Digital Transformation unit and University of Queensland  
Brisbane  
August – October 2017

**Fly Exhibition**

KPMG and Access Arts  
KPMG, Eagle Street, Brisbane  
6 September 2017

**Justice in Focus Series: The Perfect Storm: the evolution of Australia's elder abuse crisis**

Caxton Legal Service, Griffith University Law School, Queensland University of Technology Law School  
Banco Court, Queen Elizabeth II Courts of Law, Brisbane  
7 September 2017

**Understanding Guardianship and Administration Framework Workshop**

Aged and Disability Advocacy Australia  
Watermark Hotel, Spring Hill  
13 September 2017

**Mind the mental health gap: the National Disability Insurance Scheme and psychosocial disability report**

University of Sydney, Community Mental Health Australia and VICSERVE  
Stones Corner  
9 October 2017, 29 November 2017, 22 January 2018

**Not Now, Not Ever for People with Disability in Queensland Workshop – Advancing the Queensland government's response to a review into the impact of domestic and family violence on people with disability in Queensland**

Department of Child Safety, Youth and Women  
Adelaide Street, Brisbane  
10 October 2017

**Australian Guardianship and Administration Council meeting**

State Administrative Tribunal Building, Perth  
19-20 October 2017

**2018 Annual General Meeting**

AMPARO Advocacy Inc.  
Prospect Road, Gaythorne  
24 October 2017

**2018 Annual General Meeting**

Queensland Advocacy Incorporated  
Trinity Hall, Woolloongabba  
26 October 2017



**2017 BiiG Network Conference 'Re-imagining Public Work: the future of leadership, innovation and pride in the Queensland public sector'**

BiiG Network, Queensland Treasury

Brisbane Exhibition and Convention Centre, South Brisbane

31 October – 1 November 2017

**Declared unfit to plead Research Report**

Anti-Discrimination Commission Queensland, Queensland Public Guardian, the TC Beirne School of Law and University of Queensland Pro Bo Centre

Brisbane

October 2017 – March 2018

**Queensland Law Society Appreciation Evening**

Queensland Law Society

State Library of Queensland, South Brisbane

15 November 2017

**2018 Annual General Meeting**

Queensland Council of Social Services

Souths Leagues Club Head Office, West End

29 November 2017

**Emeritus Professor Arie Freiberg AM Presentation**

Department of Justice and Attorney-General

Queensland Police Headquarters, Brisbane

30 November 2017

**Development of an integrated Statewide Forensic Mental Health Service Model teleconference**

Office of the Chief Psychiatrist, Mental Health Alcohol & Other Drugs Branch, Department of Health

7 December 2017

**Complex Care Participant Pathway Workshop**

National Disability Insurance Agency

Hotel Grand Chancellor, Brisbane

18 January 2018

**Elder Abuse: Community Led Strategies for Change telephone interview – Framework for a community response towards a government plan on elder abuse**

Seniors Rights Service and national advisory group

17 January 2018

**Advance Care Planning in Queensland Forum**

Office of Advance Care Planning, Queensland Health

Victoria Park Golf Club, Brisbane

5 February 2018

**5th National Elder Abuse Conference — Together Making Change**

Seniors Rights Service

Sofitel, Sydney

19-20 February 2018

**Supported Decision Making and Advance Care Planning Forum**

Metro South Hospital and Health Service

Clem Jones-Sunland Leukaemia Foundation Village, Coopers Plains

21 February 2018



**Elder Abuse: Community Led Strategies for Change Strategy Forum – Framework for a community response towards a government plan on elder abuse**

Seniors Rights Service and national advisory group

Sofitel, Sydney

21 February 2018

**Stories of Strength – Women’s Week Video Launch**

Disability Law Queensland

Common Ground Queensland, South Brisbane

5 March 2018

**Queensland Offender Health Project**

Queensland Health

State Law Building, Brisbane

6 March 2018

**Australian Guardianship and Administration Council meeting**

Stamford Plaza, Adelaide

7-9 March 2018

**Workshop: Seeing is believing: Developing your data visualization skills to communicate effectively and facilitate decision making**

Australasian Evaluation Society Ltd

Novotel, Brisbane

20 March 2018

**Community forum: Evaluation of the Mental Health Act 2016 implementation**

Queensland Health

Albert Street Conference Room, Brisbane

23 March 2018

**‘My rights Qld – A disability rights guide’ launch**

Aged and Disability Advocacy Australia and Legal Aid Queensland

Supreme Court Library Queensland, Queen Elizabeth II Courts of Law, Brisbane

9 April 2018

**Consultation roundtable on violence against people with disability in institutional settings**

Australian Human Rights Commission

State Law Building, Brisbane

19 April 2018

**Elder abuse forum: Bad behaviour or criminal conduct?**

Queensland Law Society

Law Society House, Brisbane

9 May 2018

**Human Rights, Ageing and Dementia: Challenging Current Practice information session, presented by Kate Swaffer**

Aged and Disability Advocacy Australia

Supreme Court Library Queensland, Queen Elizabeth II Courts of Law, Brisbane

10 May 2018

**Cross agency consultation discussion with NDIS Quality and Safeguards Commissioner Designate and Registrar**

DCDSS, Queensland Public Guardian and DJAG

William Street, Brisbane

10 May 2018





### **Queensland Legal Walk – Brisbane**

Department of Justice and Attorney-General

Brisbane

15 May 2018

### **2018 QCOSS State Conference ‘Movement for change’**

Queensland Council of Social Services

Pullman Hotel, Brisbane

16-17 May 2018

### **Hackness to Justice Neighborhood Dispute Resolution opening night**

Department of Justice and Attorney-General

Supreme Court Library Queensland, Queen Elizabeth II Courts of Law, Brisbane

18 May 2018

### **Queensland Disability Advisory Council meeting – Issues, recommendations and implementation of the Upholding the Right to Life and Health: A review of the deaths in care of people with a disability report**

Department of Communities, Disability Services and Seniors

George Street, Brisbane

22 May 2018

### **Mental Health Act impacts on human rights of people in the mental health system research**

Griffith University, University of New South Wales School of Public Health and Community Medicine and Queensland Public Guardian

State Law Building, Brisbane

31 May 2018

### **Funding Support for NDIS clients to access legal support**

Legal Assistance Strategy and Funding, DJAG and Queensland Public Guardian

State Law Building, Brisbane

1 June 2018

### **Southeast and Brisbane Combined Regional Disability Advisory Council quarterly meeting – Issues, recommendations and implementation of the Upholding the Right to Life and Health: A review of the deaths in care of people with a disability report**

Disability and Community Services, Department of Community Services, Disability Services and Seniors

Tansey Street, Beenleigh

4 June 2018

### **People with intellectual disability: How to promote good physical and mental health and healthcare workshop, presented by Professor Nick Lennox**

Australasian Society for Intellectual Disability

C & K Assn Inc., Kedron

4 June 2018

### **Breakfast series: Adverse action: An overview of the new laws in their first year**

Workplace Law team, Crown Law Queensland

Supreme Court Library Queensland, Queen Elizabeth II Courts of Law, Brisbane

5 June 2018

### **Queensland Office of the Public Guardian Community Visitor Report review**

Community Visitor Program, Queensland Office of the Public Guardian

State Law Building, Brisbane

5 June 2018



**Driving Disability Employment seminar**

Department of Premier and Cabinet, Public Service Commission and JobAccess  
Queensland University of Technology, Gardens Point  
11 June 2018

**QCOSS State Budget Breakfast**

Queensland Council of Social Services  
Brisbane Exhibition and Convention Centre, South Brisbane  
15 June 2018

**Prisoner mental health research and project meeting**

Griffith University, University of New South Wales School of Public Health and Community Medicine  
and Prisoners Legal Service  
State Law Building, Brisbane  
18 June 2018

**An evening with Stephen Keim SC**

Citizen Advocacy Trust of Australia  
Supreme Court Library Queensland, Queen Elizabeth II Courts of Law, Brisbane  
21 June 2018

**Queensland Police Service response to restrictive practices in residential aged care facilities**

Domestic, Family Violence & Vulnerable Persons Unit, Queensland Police Service  
Queensland Police Headquarters, Brisbane  
25 June 2018

