

# Office of the Public Advocate (Queensland) Systems Advocacy

## Submission to the Australian Law Reform Commission

For the Inquiry into Serious Invasions of  
Privacy in the Digital Era

**November 2013**



**Queensland  
Government**

# The Public Advocate

The Public Advocate was established by the *Guardianship and Administration Act 2000* to undertake systems advocacy on behalf of adults with impaired decision-making capacity in Queensland. The primary role of the Public Advocate is to promote and protect the rights, autonomy and participation of Queensland adults with impaired decision-making capacity (the adults) in all aspects of community life.

More specifically, the functions of the Public Advocate are:

- Promoting and protecting the rights of the adults with impaired capacity;
- Promoting the protection of the adults from neglect, exploitation or abuse;
- Encouraging the development of programs to help the adults reach their 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.<sup>1</sup>

In 2013, there are approximately 114,000 Queensland adults with impaired decision-making capacity.<sup>2</sup> Of these vulnerable people, most have a mental illness (54%) or an intellectual disability (26%). This group forms the potential population for our systems advocacy.

---

<sup>1</sup> *Guardianship and Administration Act 2000 (Qld)* s 209.

<sup>2</sup> Office of the Public Advocate 2013, *The potential population for systems advocacy*, Office of the Public Advocate, Brisbane.

# Interest of the Public Advocate

In the matter of serious invasions of privacy in the digital era, the interest of the Public Advocate is two-fold:

1. Our potential population is particularly vulnerable due to their living arrangements and the practices employed in supported accommodation environments.
2. Our potential population may find traditional and mainstream modes of addressing invasions of privacy inaccessible due to cognitive and/or communication impairment.

Adults with impaired decision-making capacity are 70 times more likely to live in supported accommodation than the general population.<sup>3</sup> Recent reports have suggested that the use of electronic monitoring devices at these facilities is increasing.<sup>4</sup> These devices include visual and audio monitors such as closed circuit cameras, mobile devices and baby monitors. The use of these devices presents a systemic risk associated with the potential for serious invasions of privacy for adults with impaired decision-making capacity.

A recent investigation undertaken jointly by my Office, the Office of the Adult Guardian (Queensland) and the Queensland Community Visitor Program has shown that electronic monitoring is being used in 13% of disability accommodation sites with a significant proportion (69%) appearing to lack fundamental safeguards to ensure the protection of residents' privacy. Policies governing the use of electronic monitoring and procedures for seeking and gaining consent from those subject to electronic monitoring are not yet commonplace; nor is any form of regulation currently in operation.

While this submission focuses primarily on accommodation support services, it should be noted that many adults with impaired decision-making capacity also access support services such as respite or community access<sup>5</sup> where electronic monitoring may also be in use.

Many adults with impaired decision-making capacity have a communication impairment (28%)<sup>6</sup> that may impact their ability to make complaints about serious breaches of their privacy and limit the benefit of an option for statutory action.

Furthermore, the conditions associated with an adult's decision-making capacity being impaired, for example intellectual disability, dementia or mental illness, may also diminish an adult's capacity to understand the nature and effect of invasions of their privacy, make complaints to service providers or regulatory bodies, or seek support to progress legal action in these situations.

It should also be noted that our work in this area has highlighted that the use of electronic monitoring, while still representing a serious risk for individual privacy, also has the potential to improve the standard of support that services providers are able to deliver. The vast majority of disability accommodation sites (83%) reported that the use of electronic monitoring improved the support provided to residents while others (20%) identified that the electronic monitors were simply replacing older, out-dated systems.

---

<sup>3</sup> ABS (Australian Bureau of Statistics) 2011, *Microdata: Disability, Ageing and Carers, Australia, 2009*, cat no. 4430.0.30.002, ABS, Canberra.

<sup>4</sup> <http://www.couriermail.com.au/ipad/questions-raised-over-baby-monitors-in-queensland-nursing-homes/story-fn6ck51p-1226544338675> (accessed 6/11/2013)

<sup>5</sup> Office of the Public Advocate 2013, *Adult Guardian Client Profile Report*,

<sup>6</sup> ABS (Australian Bureau of Statistics) 2011, *Microdata: Disability, Ageing and Carers, Australia, 2009*, cat no. 4430.0.30.002, ABS, Canberra.

# Position of the Public Advocate

In considering the terms of reference, I was concerned that the use of electronic monitoring in accommodation support services can represent a serious invasion of privacy that may not be considered in many of the submissions made to the ALRC.

I encourage the Australian Law Reform Commission (ALRC) to consider the vulnerability of adults with impaired decision-making capacity, both in terms of the higher level of risk that breaches of privacy may occur as well as the potential for the nature of a person's impairment to diminish their capacity to make and pursue remedies to actual breaches.

## Considerations for adults with impaired decision-making capacity

Any statutory cause of action for serious invasions of privacy should include necessary accommodations for people with a disability, including adults with impaired decision-making capacity. These accommodations should:

1. Ensure adequate recognition of and/or accommodation for a litigation guardian (or similar) to initiate and manage legal proceedings on behalf of an adult with impaired decision-making capacity.
2. Ensure that, in the event that an adult with impaired decision-making capacity is required to give evidence in Court, provisions similar to those relating to special witnesses in the *Evidence Act 1977* are available. These provisions should have regard to:
  - factors that may enable an adult with impaired decision-making capacity to give evidence such as the pre-recording of evidence so that it is not forgotten over time, the provision of rest breaks, directions that questions are to be kept simple, or directions that questions are to be limited in time and/or number; and
  - factors that may assist a reluctant witness (for example, an adult who is reluctant to speak out against a service provider) such as the pre-recording of evidence, the closing of a courtroom, the other party being excluded or obscured from the view of the adult, the presence of a support person, or the adult giving evidence from another room via video-link.

This may be achieved either through legislation that makes specific provision for these accommodations (such as the *Evidence Act 1977*) or more general legislation that enables a Court hearing a matter to give directions about the examination, cross-examination and re-examination of a person as the court considers appropriate.

3. Ensure that any legal remedy is suitable to the situation of an adult with impaired decision-making capacity who is living in supported accommodation and taking action against an accommodation provider. This should take into account that:
  - the adult may still reside with the same accommodation or service provider during and after the legal proceedings and will, in most cases, continue to require support after legal proceedings are concluded;

- the continued use of electronic monitoring will, in some instances, be justified in the course of providing accommodation support services to the adult; and
- the provision of monetary damages to an adult with impaired decision-making capacity alone may be an insufficient or inappropriate remedy.

## Considerations for service provision

In the course of considering any recommendations for statutory action in response to the issues associated with the use of electronic monitoring for adults with impaired decision-making capacity, I would encourage the ALRC to consider the potential ramifications of doing so for providers of disability accommodation support services.

If not appropriately contextualised, such action may act as a deterrent to these service providers when considering whether to support particular individuals, particularly where they may have concerns regarding their ability to safely support a person. I am concerned that, without appropriate allowances in the statute, these service providers will be unable or unwilling to employ this technology even where it has the potential to deliver a genuine improvement to the standard of service provided to residents.

Appropriate allowances for accommodation service providers could include:

1. exemptions that describe when and how electronic monitoring may be used without the consent of adult being monitored, and the associated safeguards that must be put in place in such instances to uphold the rights of the adult; and
2. acknowledgement for the mechanisms of substituted decision-making in providing consent to be electronically monitored, and the factors that should be considered by a substitute decision-maker in considering whether to provide consent.

## Conclusion

In considering the issue of electronic monitoring of adults with impaired decision-making capacity within the context of serious invasions of privacy in the digital era, there is a need to strike an appropriate balance between upholding the rights of the person to privacy while not compromising the potential for electronic monitoring to be used as a means by which to improve and enhance support for adults with impaired decision-making capacity.

Furthermore, any statutory provisions in relation to serious invasions of privacy should not only take account of adults with impaired decision-making capacity in the protections they may afford but must also include provisions that enable adults with impaired decision-making capacity to exercise their right to privacy by ensuring that they have the opportunity to convey their views either independently or with support.

Specific provisions for obtaining informed consent from adults with impaired decision-making capacity within a supported decision-making framework should also be considered. Such provisions should take account of factors that may need to be addressed when the adult's expressed views conflict with what others might consider to be in their best interests.

I am pleased to lend my support to the ALRC as it progresses this inquiry and would be pleased to make myself available should there be an opportunity to provide further detail on upholding rights and ensuring reasonable accommodation for adults with impaired decision-making capacity in relation to the issue of serious invasions of privacy in the digital era.



**Jodie Cook**  
**Public Advocate (Queensland)**

---

### Office of the Public Advocate (Queensland)

Website [www.publicadvocate.qld.gov.au](http://www.publicadvocate.qld.gov.au)

Email [public.advocate@justice.qld.gov.au](mailto:public.advocate@justice.qld.gov.au)

Write to GPO Box 149, BRISBANE QLD 4001

Telephone (07) 3224 7424

Fax (07) 3224 7364