The Public Advocate
Influencing change to transform lives

15 June 2020

Royal Commission into Violence, Abuse, Neglect and
Exploitation of People with Disability
GPO Box 1422
Brisbane QLD 4001

Via email: DRCenquiries@royalcommission.gov.au

Dear Commissioners

Re: Emergency planning and response issues paper

I write in response to the Royal Commission's Issues Paper, *Emergency planning and response* and welcome the Royal Commission's timely interest in this important issue.

As Public Advocate (Queensland), I undertake systemic advocacy to protect and promote the rights and interests of Queensland adults with impaired decision-making capacity.[1] There are a range of conditions that may impact a person's decision-making capacity, which include intellectual disability, acquired brain injury, mental illness, neurological disorders (such as dementia) or problematic alcohol or drug use.

The Australian and Queensland governments should be commended for their timely and appropriate response to the COVID-19 pandemic that has been effective in controlling the spread of the virus within the Australian and Queensland communities. However, legislation recently passed by the Queensland Parliament, namely, the *Justice and Other Legislation (COVID-19 Emergency Response) Amendment Act 2020,* has raised some concerns about the process involved in the development of the policy giving rise to the amendments and their potential negative impact on people with disability.

The Act introduced a range of amendments to various pieces of Queensland legislation, including the *Disability Services Act 2006* and the *Forensic Disability Act 2011*. Both of these Acts contain provisions that affect the rights of people with disability receiving services under both the National Disability Insurance Scheme and Queensland Government-operated Forensic Disability Service. The relevant provisions of the *Justice and Other Legislation (COVID-19 Emergency Response) Amendment Act 2020* amending these Acts are attached for your reference (Attachment 1).

I have serious concerns about the way the Queensland Government approached the preparation of the legislation and the content of the amendments to the *Disability Services Act* and the *Forensic Disability Act*. In my view, the amendments do not align with a 'disability inclusive' response to the COVID-19 pandemic and have the potential for Queensland adults with disability affected by the amendments to be more vulnerable to violence, abuse, neglect and exploitation.

[1] *Guardianship and Administration Act 2000* (Qld) s 209.

I have attached a letter I recently sent to the Honourable Coralee O'Rourke MP, Minister for Communities and Minister for Disability Services and Seniors in Queensland (Attachment 2),[2] outlining my concerns about the amendments. These concerns particularly relate to the lack of inclusion of people with disability or their advocates in emergency planning and response, and the potential for the amendments to breach the rights of people with disability without reasonable justification.

The amendments to the *Disability Services Act 2006* provide for the locking of gates, doors and windows by disability service providers to ensure a person with disability complies with a public health direction. It provides immunity from criminal and civil liability for disability service providers if they act (i) honestly and without negligence; (ii) in compliance with the policy made by the department; and (iii) takes reasonable steps to minimise the impact on a person living at the premises who is not a relevant adult with an intellectual or cognitive disability.

The amendments to the *Forensic Disability Act 2011* allow the Forensic Disability Service to prevent clients with disability from accessing certain services and to stop all 'community treatment' (i.e. external outings), if it is determined that it would pose a risk to the health, safety or welfare of the forensic disability client or another person.

It is concerning that such an intrusive provision restricting the freedom of movement of people with disability should be introduced at a time when the Queensland Government is easing community restrictions on movement and social interactions under the COVID-19 Public Health Directive. Other concerns noted in the letter to Minister O'Rourke include:

- Whether there is evidence of a need for such measures;
- A lack of consultation with people with disability, disability advocates, service providers and the various agencies involved in promoting and protecting the rights of people with disability when preparing the amendments;
- The potential stigmatisation of people with disability;
- The potential negative effects of social isolation on people with disability;
- The commencement of the amendments to the *Disability Services Act* before the departmental policy directing how the locking of gates, doors and windows should be applied were finalised; and
- An absence of requirements for reporting, monitoring or oversight.

In relation to the *Forensic Disability Act* amendments, I am concerned about the unnecessarily broad and ambiguous wording of the discretion to restrict clients' access to services and the community having significant potential to infringe on the rights of people with disability to rehabilitation and their community supports.

I would be pleased to provide any additional information regarding these issues that the Disability Royal Commission should require.

Yours sincerely

Mary Burgess
Public Advocate (Queensland)

[2] Please note that the email referred to in the Letter to Minister O'Rourke has not been provided in Attachment 2.

Part 5 Amendment of disability services legislation

Division 1 Amendment of Disability Services Act 2006

18 Act amended

This division amends the *Disability Services Act 2006*.

19 Insertion of new pt 8, div 2A

Part 8—

insert—

Division 2A Locking of gates, doors and windows—COVID-19 emergency

220A Modified application of div 2

Despite section 216(1)(b)(ii), division 2 applies in relation to the locking of gates, doors or windows for a reason mentioned in that section even if the gates, doors or windows are also locked for a reason mentioned in section 220B(1)(b).

220B Immunity from liability

(1) This section applies if—

(a) a division 2 service provider locks gates, doors or windows at premises where disability services are provided to adults with an intellectual or cognitive disability; and

(b) the only reason, apart from a reason mentioned in section 216(1)(b)(ii), the gates, doors or windows are locked is to ensure a relevant adult with an intellectual or cognitive disability complies with a relevant public health direction.

(2) The division 2 service provider is not civilly or criminally liable for locking gates, doors or windows if—

(a) the division 2 service provider acts honestly and without negligence; and

(b) the division 2 service provider implements the policy made by the department under subsection (5); and

(c) the gates, doors or windows are locked in compliance with the policy made by the department under subsection (5); and

(d) the division 2 service provider takes reasonable steps to minimise the impact of locking the gates, doors or windows on a person living at the premises who is not a relevant adult with an intellectual or cognitive disability.

(3) Subsection (2) applies to the extent that the locking of the gates, doors or windows prevents the free exit from the premises of—

(a) a relevant adult with an intellectual or cognitive disability; or

(b) any other person living at the premises, other than an adult with an intellectual or cognitive disability who is contained within the meaning of part 6.

(4) An individual acting for the division 2 service provider is not civilly or criminally liable for locking gates, doors or windows if the individual acts in compliance with, or reasonably believes

the individual is acting in compliance with, the policy made by the department under subsection (5).

(5) The department must—

(a) have a policy about the locking of gates, doors and windows under this division; and

(b) publish the policy on its website.

(6) In this section—

adult with an intellectual or cognitive disability see section 144.

relevant adult with an intellectual or cognitive disability means an adult with an intellectual or cognitive disability who is at risk of failing to comply with a relevant public health direction because of the adult's disability.

relevant public health direction means any of the following—

(a) a public health direction given under the *Public Health Act 2005*, section 362B;

(b) a direction given under the *Public Health Act 2005*, chapter 8, part 7A, division 3.

220C Expiry

This division expires on 31 December 2020.

Division 2 Amendment of Forensic Disability Act 2011

20 Act amended

This division amends the *Forensic Disability Act 2011*.

21 Insertion of new ch 12, pt 2A

Chapter 12—

insert—

Part 2A Provisions for COVID-19 emergency

149 Purpose of part

(1) The purpose of this part is to protect the health, safety and welfare of forensic disability clients, persons who interact with those clients and persons in the community during the COVID-19 emergency.

(2) In this section—

COVID-19 emergency see the *COVID-19 Emergency Response Act 2020*, schedule 1.

149A Limitation of entry by persons under s 32

(1) Section 32 applies subject to the following—

(a) a public health direction given under the *Public Health Act 2005*, section 362B;

(b) a direction given under the *Public Health Act 2005*, chapter 8, part 7A, division 3.

(2) The administrator may refuse entry to a forensic disability service by a person under section 32 if the administrator is satisfied—

(a) a public health direction under the *Public Health Act 2005*, section 362B(2)(c) requires persons not to enter or stay at the service; or

(b) a direction under the *Public Health Act 2005*, section 362I(2)(c) requires the owner

or operator of the service to limit access to the service; or

(c) the refusal is necessary to ensure compliance with another direction under the *Public Health Act 2005*, chapter 8, part 7A; or

(d) the refusal is otherwise necessary for the purpose of this part.

149B Individual development plans

(1) Subsection (2) applies if—

(a) a forensic disability client is authorised to have community treatment under section 20 or is ordered to have community treatment as mentioned in section 21; and

(b) a senior practitioner considers the community treatment would pose a risk to the health, safety or welfare of the forensic disability client or another person, having regard to the purpose of this part.

(2) The senior practitioner may include in the client's individual development plan, or change the client's individual development plan to include, the following—

(a) a requirement that any period of community treatment must end on a stated day, and must not restart until another stated day that is no later than 31 December 2020;

(b) a requirement that the client must not have community treatment during stated periods, whether or not continuous, ending no later than 31 December 2020;

(c) the conditions the senior practitioner considers necessary for managing the client's care and support, and protecting the

client's health or safety or the safety of others, while the client is undertaking community treatment, having regard to the purpose of this part.

(3) Also, a senior practitioner may change a forensic disability client's individual development plan to the extent necessary to protect the health, safety or welfare of a person, having regard to the purpose of this part.

(4) Despite subsections (2) and (3), a senior practitioner must not include in an individual development plan, or change an individual development plan to include, a matter to the extent the matter is inconsistent with an order of the tribunal or Mental Health Court mentioned in section 21.

(5) If a senior practitioner decides to change an individual development plan under subsection (2) or (3), the senior practitioner must comply with section 17(2), (4) and (5).

(6) However, the senior practitioner need not comply with section 17(2), (4) or (5) if compliance would pose a risk to the health, safety or welfare of the client or another person, having regard to the purpose of this part.

(7) A senior practitioner may authorise an authorised practitioner to change an individual development plan under subsection (2) or (3).

(8) Subsections (4), (5) and (6) apply in relation to an authorised practitioner who is authorised under subsection (7) as if a reference in those subsections to a senior practitioner were a reference to the authorised practitioner.

149C Relationship between ch 6 and particular directions under Public Health Act 2005

To remove any doubt, it is declared that—

(a) chapter 6 applies subject to a direction to stay at or in a particular place given under the *Public Health Act 2005*, section 362H; and

(b) a person assisting a forensic disability services client to comply with a direction mentioned in paragraph (a) given to the client is not, of itself, seclusion for chapter 6, part 2, division 3.

149D Expiry

This part expires on 31 December 2020.

Part 6 Amendment of Disaster Management Act 2003

22 Act amended

This part amends the *Disaster Management Act 2003*.

23 Insertion of new pt 12A

After part 12—

insert—

Part 12A COVID-19 emergency provisions

137 Definition for part

In this part—

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1 June 2020

The Honourable Coralee O'Rourke MP
Minister for Communities and Minister for Disability Services and Seniors
GPO Box 806
Brisbane Qld 4001
e: communities@ministerial.qld.gov.au

cc: The Honourable Yvette D'Ath MP, Attorney-General, Minister for Justice and Leader of the House

Dear Minister O'Rourke,

RE: *Justice and Other Legislation (COVID-19 Emergency Response) Amendment Act 2020*

I write in regard to the above-mentioned Act which was introduced to the Queensland Parliament by the Minister for Health, the Honourable Steven Miles on 19 May and was passed on 21 May 2020. In particular, I would like to highlight my specific concerns about the amendments to the *Disability Services Act 2006* and the *Forensic Disability Act 2011* in the amendment Act, and express my concern and disappointment about the lack of lack of consultation with disability, legal and advocacy groups in relation to these significant amendments.

I recognise that we are in unprecedented times responding to the COVID-19 pandemic and acknowledge the great success of the Queensland Government in containing the spread of the virus in the community to date. Challenging circumstances such as these often require difficult decisions to be made to protect the community, including its most vulnerable members. It is, however, difficult to understand why appropriate stakeholder consultation about these amendments did not occur prior to the Bill being introduced, particularly when the amendments were introduced at a time when there was a low prevalence of COVID-19 in Queensland and community restrictions are being eased. This environment does not support a sense of urgency that would warrant bypassing appropriate stakeholder consultation.

The amendments to the *Disability Services Act 2006* provide for the locking of gates, doors and windows by disability service providers to ensure a 'relevant adult'[1] complies with a public health direction. It also provides disability service providers with immunity from criminal and civil liability if the provider acts honestly and without negligence, in compliance with the policy made by the department, and takes reasonable steps to minimise the impact on a person living at the premises who is not a relevant adult with an intellectual or cognitive disability.

The amendments to the *Forensic Disability Act 2011* allow the administrator of the service to refuse entry to health practitioners, other allied health and social workers, as well as legal and other advisors. The administrator must be satisfied that these actions are in compliance with a direction under the *Public Health Act 2005*. It also provides for the Senior Practitioner to change the

[1] 'Relevant adult' is defined as a person with an intellectual or cognitive disability who is risk of failing to comply with a public health direction because of their disability. See *Justice and Other Legislation (COVID-19 Emergency Response) Amendment Act 2020* (Qld) s 9, amending 220B(6) of the DSA.

individual development plans of clients of the Forensic Disability Service and stop all community treatment (i.e. external outings) until 31 December 2020, if the senior practitioner considers the community treatment would pose a risk to the health, safety or welfare of the forensic disability client or another person having regard to the purposes of that Part of the Act. It provides that the Senior Practitioner or other authorised person who changes the plan does not have to comply with the sections of the Act requiring a written record of the change and the reasons for it, and that the changes and the reasons for them be discussed with the resident/client and their guardian or informal decision-maker, 'if compliance would pose a risk to the health, safety or welfare of the client or another person'.

General issues about the amendments to both Acts

A key concern is the absence of any identified or demonstrated need for these amendments. Other than general statements about protecting the health, safety and wellbeing of people with disabilities and the broader community, there is no clear explanation in the explanatory notes or the statement of Consistency with Fundamental Legislative Principles of the purpose of the amendments and why they are needed. For example, have there been instances where people with disabilities and/or the community have been placed in a position of harm because a service provider was unable to ensure they remained in their home? The authorisation of actions that would otherwise amount to criminal or tortious acts amounts to a significant infringement of the fundamental human rights of a group of vulnerable Queenslanders, and should only occur when they are supported by evidence of a specific problem which requires addressing. This has not been provided by representatives of your department in my discussions with them or in the accompanying explanatory material for the Bill.

It is also concerning that such an intrusive provision restricting the freedom of movement of people with disability should be introduced at a time when the Queensland Government is slowly easing community restrictions on movement and social interactions under the COVID-19 Public Health Directive.

The amendments have the potential to stigmatise people with disability by suggesting that there is a need to lock them in because they are uncooperative or unreliable, and likely to spread the virus in the community unless their movement is restricted. The amendments permitting the locking of gates, doors and window feed perceptions in the community of the 'otherness' of people with disability and are misaligned with modern disability rights.

As we are unlikely to see the end of the COVID-19 crisis for some time, the amendments may contribute to people with disability being viewed as a threat to the health of other members of the community, particularly as other COVID-19 community restrictions are being eased. These perceptions could cause further alienation and isolation of people with disability in Queensland communities. The United Nations only recently released a report recognising that the COVID-19 pandemic is intensifying inequalities for people with disability and called for a 'disability-inclusive recovery'.[2] These amendments are not consistent with Australia's obligations under the *Convention on the Rights of Persons with Disabilities* or the approach to COVID-19 recovery advocated by the United Nations.

If people with disability have their ability to move freely in the community and exercise their autonomy and agency limited, they will have fewer opportunities to use and practice their social and other skills and self-management. The potential of these restrictions to cause a deterioration in the ability of some people with disability to manage themselves and exercise agency in their lives is a serious concern. With the proposal that these restrictions may remain in place for more than six months (and likely longer), there is a high likelihood that some people will lose skills that they may not regain in their lifetimes.

[2] United Nations, 'Coronavirus and human rights: New UN report calls for disability-inclusive recovery' (UN News, 6 May 2020) <https://news.un.org/en/story/2020/05/1063242>.

There are also the negative psychological and psychiatric impacts of preventing people with disability from leaving their homes and the effects of social isolation that accompany the COVID-19 restrictions. Many people in the Australian community who do not live with disability and have much stronger social networks have been experiencing significant negative effects on their mental health and wellbeing from the COVID-19 restrictions. We should expect that people with disability subject to these additional restrictions will experience more serious impacts. I would appreciate your advice about what additional services and supports your department is proposing to put in place to address the potential loss of capacity and deterioration of the mental health of people with disability who are subject to these restrictions.

***Disability Services Act* amendments**

I am concerned about a number of aspects of the *Disability Services Act* amendments. First, the amendments refer to the Department's policy guiding the application of the provisions for locking gates, doors and windows. The legislation had been passed and commenced before a draft of the policy was available. I have identified a number of concerns relating to the policy which have been provided to your departmental officers (see attached). Three days after the commencement of the legislation the finalised policy is still not available. Accordingly, it is difficult to ascertain the level of direction and restriction on the exercise of these powers by service providers, exposing people with disability subject to these restrictions, to greater risk.

The amendments do not require service providers to report on their use of these powers. It will not be possible to determine how many people with disability were subject to these powers, for how long, or in what circumstances. This is very concerning because these amendments permit what would otherwise be a restrictive practice without any formal process to approve or record their use.

The amendments also do not provide for any oversight of the use of these powers in relation to very vulnerable people. Again, the concern about this is that the amendments permit what is otherwise a restrictive practice without a formal legal framework or any oversight. Ordinarily, the Public Guardian would have oversight of people subject to restrictive practices under the restrictive practice provisions of the *Disability Services Act.* This will not be the case under the new amendments.

The amendments amount to an infringement of people's fundamental human rights without accompanying safeguards and oversight. It is strongly suggested that the Queensland Government consider additional provisions requiring disability service providers using these powers to report this to the Department of Communities, Disability Services and Seniors and to the Public Guardian. This would ensure the use of these powers can be reviewed by the Department and we can ensure that they are used in the least restrictive way and for the least time necessary. The premises where these restrictions are being applied should also become 'visitable sites' for the Public Guardian's Community Visitor Program, which could provide a level of independent oversight of the use of these powers and could report providers acting inappropriately.

I respectfully suggest that further consideration should have been given to the unintended consequences of extending civil and criminal immunity. In particular, there should have been further consideration of whether immunity provisions may fail to achieve their purpose by making members of the disability community more vulnerable to abuse and neglect.

The amendments risk doors being locked in circumstances which do not meet the criteria of the immunity, particularly in view of initial service provider confusion in the application of Public Health Directions to their work. Locking people within their homes increases their vulnerability to abuse and neglect. Despite the establishment of a national phone help line and proactive contact by the National Disability Insurance Agency to participants of the National Disability Insurance Scheme, people with disability can still be reluctant to speak out given the power service providers have over them and their fear of repercussions.

While the new immunity provisions expire at the end of the year, seven months is a significant period in a person's life. I am concerned that the extension of immunity may entrench a service system culture of locked gates, doors and windows which may prove difficult to unwind.

Given the substantial incursion on the rights of this vulnerable group of Queenslanders, a more fulsome consideration of the issues and implications of the amendments is warranted, including whether there are less restrictive and reasonably available ways to achieve the purpose of the amendments.

***Forensic Disability Act* amendments**

I am concerned about a number of issues relating to the *Forensic Disability Act* amendments. The amendments relating to the revocation of community treatment in individual development plans provide for a very broad discretion to be vested in the Senior Practitioner to cease clients' community treatment (if the senior practitioner considers the community treatment would pose a risk to the health, safety or welfare of the forensic disability client or another person having regard to the purposes of that Part of the Act). These provisions are not limited to ensuring compliance with Public Health Directions as is the exercise of the Administrator's discretion to allow people entry to the service. There is no clear explanation for this broad discretion, but it appears to require the Senior Practitioner to consider a wider range of matters, in terms of the risks to the health, safety or welfare of the client or another person, than just the specific requirements of the Public Health Direction. This is more likely to lead to overly cautious decisions by the Senior Practitioner about whether it is safe to permit the person to access the community.

The amendments relating to the revocation of community treatment do not require the Senior Practitioner to apply any 'least restrictive' considerations in the exercise of these discretions. Such a consideration would better uphold the rights of clients and might mitigate the risks of the Senior Practitioner making overly conservative decisions about permitting clients to access community treatment during the COVID-19 emergency.

It is unclear why there should be an exemption for the Senior Practitioner from complying with the accountability requirements for changing individual development plans if compliance would pose a risk to the health, safety or welfare of the client or another person, having regard to the purpose of the amendment. There is no such exemption from compliance in the substantive provisions of the Act. It is difficult to determine how such a circumstance would arise and why it should operate to exempt the Senior Practitioner from the basic accountabilities required by section 17 of the substantive Act.

The purpose of the amendment is to protect the health, safety and welfare of forensic disability clients, people who interact with clients and the wider community during the COVID-19 emergency. I respectfully suggest that this provision should be limited to compliance with public health directions and to protect clients and others from a real risk of COVID-19 infection.

The ability to refuse visitors beyond public health directions is also of concern. It is difficult to identify any circumstances where the administrator would be justified in refusing visitors of the type referred to in section 32 outside the parameters of a public health direction. At minimum, refusal of visitors should only be for the protection of clients and the community from COVID-19 infection, and not for the unnecessarily broad purpose of protection during the COVID-19 emergency.

I query the need for the provision at all, given that there are less restrictive ways of ensuring the health and wellbeing of all people involved in a visit to the Forensic Disability Service. For example, contactless face-to-face visits could occur behind glass, or social distancing could be practiced due to the low number of clients. I note that no equivalent amendment has been made to the *Mental Health Act 2016* to restrict visitors to authorised mental health services, including to high security units. To the contrary, the Office of the Chief Psychiatrist has been supportive of continued visits to patients, including by family members and other supporters, within the parameters of the public health directions.

I encourage the government to consider making further amendments to the Act to introduce higher levels of reporting, monitoring and oversight of the exercise of these powers under the *Disability Services Act 2006* and the *Forensic Disability Act 2011*. Alternatively, I suggest they be referred to the Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee for review, despite the Bill already having being passed. Any recommendations that Committee makes regarding further amendments should be seriously considered.

In these challenging times, it is important that we do not become a society that unnecessarily sacrifices the fundamental human rights of vulnerable people under the guise of protecting them and the broader community.

The Queensland Government has gained community support for its decisions and actions in response to the COVID-19 pandemic by focussing on 'putting Queenslanders first'. I would be pleased to work with the Queensland Government to help put the rights and interests of people with disability first when considering how to better balance health risks with the fundamental rights of people with disability.

Yours sincerely

Mary Burgess
Public Advocate

Encl.