

*Annual Report 2006-2007*

# Office of the Public Advocate

*Queensland*



The Honourable Kerry Shine MP  
Attorney-General, Minister for Justice  
and Minister Assisting the Premier in Western Queensland  
State Law Building  
50 Ann Street  
BRISBANE QLD 4000

Dear Attorney,

I am pleased to present the Annual Report on the performance of the Public Advocate's functions for the financial year ended 30 June 2007.

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

The report provides information on the key activities of the Office of the Public Advocate for 2006-07 and a statement of our financial and operational functions for the year.

Yours sincerely

A handwritten signature in black ink, reading "Michelle Howard". The signature is fluid and cursive, with the first name "Michelle" and the last name "Howard" clearly distinguishable.

Michelle Howard  
Public Advocate – Queensland

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# The Public Advocate's Retrospective 2006-07

## The yeast in the dough

My statutory function as a systems advocate is to protect the rights and interests of adults with impaired decision-making capacity. This role calls for sustained and unwavering advocacy for systems reform which will effect real and substantial improvements in the lives of the adults.

In last year's Annual Report, I reflected on my role as Public Advocate, and adopted an analogy which had been suggested to me: that of the Office as a grain of sand in the oyster. This analogy suggests that the Public Advocate exists to maintain a level of 'aggravation' about systemic issues until something valuable is created: systems reform serving the interests of adults with impaired decision-making capacity.

This year I would like to advance another image: that of the Public Advocate as a catalyst, as yeast in the dough. In baking bread, a small amount of yeast is added to the mixture. Although small, its effect is felt throughout: the yeast helps the bread to rise, it strengthens the dough, and it helps release the flavours in the mixture. The yeast works to bring out the essential qualities which already exist in the dough; the end result is freshly baked bread. I will return to this image later.

## The year in review

In addition to reporting on the activities of the Office, the Annual Report provides an opportunity to reflect on the state of the disability, mental health and aged care sectors. The questions which come to many people's minds are these: *Are things getting better or worse? Is the quality of life of vulnerable adults with impaired decision-making improving or declining?*



Public Advocate Michelle Howard

These are not easy questions to answer. There are a number of reasons for discouragement, to which the regular reports of systemic and individual complaints to my Office attests. For example, there is still significant unmet need for disability services and housing, despite some substantial funding increases. Second, some service providers report a growing emphasis on risk management and administrative and statutory compliance, which divert them from serving the needs of vulnerable people. Further, there is ongoing systemic neglect of certain groups of people. Some people and groups continue to feel marginalised or ignored in key decision-making processes, whether in relation to decisions about an

individual's life, or to broader consultation processes within Government.

However, there are also ample grounds for optimism. In the past year we have witnessed a renewed international commitment to the rights of people with a disability. There have been significant increases in mental health funding and a renewed sense of Commonwealth and State leadership in mental health reform. In addition, 2006-07 has seen the first comprehensive attempt by the Queensland Government to grapple with the issue of 'challenging behaviour', and a concerted effort within the Queensland criminal justice system to divert adults with impaired capacity from traditional penalties. There are also ongoing efforts to review and enhance key pieces of legislation and policy which have real effects on the lives of people with impaired capacity. Vulnerable people and, more specifically, people with impaired decision-making, are attracting increasing attention by Government and the community.

## The Annual Report

As required by the *Guardianship and Administration Act 2000*, I must report annually to the Attorney-General and Minister for Justice on the performance of my functions. The Report must be tabled in the Legislative Assembly.

This Report aims to fairly and meaningfully convey information about the most significant advocacy undertaken by the Office over the course of the year. This work may be significant in terms of either the resources expended by the Office, or the importance of the systemic issues for the adults or the systems which serve them. It does not purport to be, and cannot be, a complete record of all advocacy undertaken. Advocacy occurs on so many issues and in such varied contexts: both formally and informally, both orally and in writing, that it is impractical to attempt to report on more.

## UN Convention

Internationally, it has been a significant year with the passing of the *United Nations Convention on the Rights of Persons with Disability*. Brisbane's own Kevin Cocks, Director of Queensland Advocacy Inc. and 2005 Australian Human Rights Medal Recipient, was part of the Australian delegation who attended the historic sittings of the United Nations General Assembly which debated the Draft Convention in September 2006. Australia signed the Convention. At the time of writing, five countries had ratified it. Australia is considering its position, and the Commonwealth Government has indicated its intentions to consult with the States and Territories, and with other stakeholders about this important issue. It is reasonable to consider that the Convention articulates current standards considered appropriate by the international community and so, whether ratified or not, is an important benchmark for disability principles.

## Activities of the Office

The 2006-07 year has been both memorable and demanding, and has involved hard work for the small staff of the Office of the Public Advocate.

### Reviews and activities

The Queensland Law Reform Commission has completed the first stage of its review of the guardianship legislative regime. There have been reviews completed about 'challenging behaviour' (the Carter report) and mental health (the Butler review). There were major machinery of government changes announced in respect of mental health, Home & Community Care and State-run aged care, although ultimately only some of these proceeded. Disability Service Plans have been completed by all State Government departments. Initiatives for younger people in aged care facilities are being implemented. Court diversion initiatives are progressing well.

In the federal arena, the Australian Law Reform Commission is reviewing the *Privacy Act 1988* (Cth) and the House of Representatives Standing Committee on Legal and Constitutional Affairs was given a reference to inquire into older people and the law. Some issues of elder abuse gained prominence and new legislative provisions were introduced in relation to reporting of assaults in aged care facilities. The National Health and Medical Research Council continued work on ethical guidelines for the care of people in post-coma unresponsiveness or minimally responsive state.

Important negotiations occurred between the State and Commonwealth Governments about the fourth Commonwealth State/Territory Disability Agreement.

These are but a few of the matters of interest to the Office about which advocacy activities have been undertaken.

### Legal interventions

There have been several legal interventions in proceedings of systemic interest to the Public Advocate. There were several proceedings before the Guardianship and Administration Tribunal. In one of these proceedings, a reference was subsequently made to the Supreme Court of Queensland on questions of law. The issues involved include the role and scope of power of the Guardianship and Administration Tribunal in the guardianship regime, and issues relating to the appointment and remuneration of administrators. There were also interventions in several coronial inquests into the deaths of people with impaired capacity. These involved systemic issues which contributed to fatal police shootings of people with mental illness, suicide deaths of people with mental illness and the death of a mental health patient under restraint.

### Discussion and Issues Papers

In my Retrospective last year, I indicated that I expected the Office to issue several Discussion or Issues Papers in the 2006-07 period. As demand for attention of the Office has been heavy, it has taken longer than anticipated for this to occur. However, I am pleased to advise that two of the Discussion Papers discussed in the 2005-06 Annual Report are close to release. The paper in relation to physical health care needs of people with impaired capacity is at the printer as I write. Also, the paper about preventing suicide deaths of people with mental illness arising out of an intervention undertaken in coronial inquests is nearing completion.

Last year, I also mooted the possibility of the Office releasing an Annual Review document during the year. Workload has precluded this endeavour. However, a Newsletter was prepared and distributed to stakeholders at the end of the March 2006 quarter to provide information about topical issues between Annual Reports. If possible, newsletters will be issued periodically in the future; once again, this will depend on workload.

### Strategic and business planning for the Office

The Strategic and Business Plans developed for the 2006-08 period have been revised for 2007-10. The Strategic Plan is unchanged in content from the 2006-08 Strategic Plan.

In early May, the Public Advocate's Reference Group gave input which has informed development of the current Business Plan. During the last eighteen months, contact with this Office about systems issues by organisations and individuals has been actively encouraged, and this continues to be so. We have developed a useful resource base from information provided, which has informed the

establishment of priorities. We value and wish to continue to develop this resource and actively encourage contact from interested persons about issues for the adults.

My experience as Public Advocate for the past 18 months has led me to instigate some robust discussions as part of the business planning process about the way in which the staff of the Office and I organise, and take on, our work. As noted above, there is an enormous amount of activity and interest in disability-related issues at all levels. This has led to increasing 'demand' for advocacy by this Office; for example, through input into inquiries and reviews within the scope of the work of this Office and involvement on committees and reference groups. Yet staffing levels remain unchanged. The small team at the Office is dedicated, energetic and highly motivated, but increasingly overloaded as we attempt to cover the field with the advocacy and research priorities identified in our business planning, our committee and monitoring work, as well as the range of emerging issues, inquiries and enquiries to which we have responded.

Accordingly, in order to continue to produce high quality work, achieve a reasonable degree of influence around significant issues and maintain reasonable workloads, we need to fundamentally change the way in which we work. We will work on a lesser number of issues and decrease our committee workload, but do more detailed work in respect of those issues which are identified as priorities in our Business Plan. Across systems, we have identified particular priority issues. These are detailed in our Business Plan, which is available on the Public Advocate's website.

Also, the Public Advocate has a broad monitoring function in respect of services and facilities provided to the adults. Clearly, given the limited resources of the Office, it is not feasible to monitor all of the services and facilities which are used by the adults.

So once again, a discrete number of services/ facilities for monitoring have been identified in the Business Plan.

Interventions in legal proceedings and inquiries will be undertaken when important systems issues arise and it is considered an appropriate avenue to influence or leverage systems change.

Of course, some responsive capacity must be retained, but unless an issue is particularly significant, we will be reluctant to depart from our Business Plan.

It is acknowledged that it is highly desirable for the Office to take on a broader range of issues, and that there are many others deserving of our attention (and in the next year, our priorities may likely change to reflect this reality). However, in the absence of greater staffing levels, this cannot reasonably be achieved or undertaken in a sustainable manner. Of course, the approach to our Business Plan will be closely monitored and, if necessary, changes will be made accordingly.

## Working with stakeholders

My approach as Public Advocate is always to endeavour to work cooperatively with agencies and individuals to influence positive systems change. Nevertheless at times, this role does not make me, or my staff, popular. At times, the nature of my role can be confronting for some.

However, having regard to the specified legislative functions, the Public Advocate has a very positive role to play in influencing systems reform. As I discussed earlier, the Office is like yeast in the baker's dough, which helps the bread to rise, strengthens the dough, and brings out the natural flavours. This advocacy relationship presents challenges for both the Office and for external agencies.

The challenge for Government and its departments, statutory bodies, and other non-government organisations is to take advantage of the resource which systems advocacy provides. Our work may highlight (and sometimes) avoid systemic shortcomings which have the potential to cause harm to adults with impaired capacity. Those departments and organisations which recognise the benefits of specialist, considered advocacy welcome comment from this Office. Ultimately, they may not accept all of the advice provided, and may not welcome our advocacy on some issues, particularly where additional planning and expenditure might be required. Inevitably, sometimes what we provide is criticism. This can be difficult to hear. It is pleasing and commendable that many departments, organisations and entities willingly invite us in and take our advocacy on board.

However, there are still organisations/entities which would prefer not to seek or hear our advocacy, or work with us in a cooperative manner. Sometimes it is made clear that our advocacy is not welcome and the Office is treated with trepidation. It is hoped that as the years progress, this attitude diminishes.

The ongoing challenge for the Office is to reflect on its advocacy practice, to maintain its professionalism and rigour in circumstances which are sometimes trying, to preserve respectful relationships with key stakeholders, to seek feedback from these stakeholders on the Office's provision of advocacy, and to strive for continuous improvement.

In expressing this desire, it is appropriate that I reassure organisations and their representatives of the genuineness of the desire of myself and my staff to work cooperatively towards developing systems which serve the adults well.

## Staff of the Office

Throughout the year, there have been some changes in the structure of staffing within the Office. One of the three Senior Research Officer positions was re-classified and upgraded to Principal Research Officer. The incumbent now has some management responsibilities and supervisory functions in respect of the other research officers. This allows me to be freed up from some of the day-to-day management and administrative responsibilities which are time consuming. However, there has been no increase in staffing levels so our resources remain stretched.

It is my view that the work of the Office would be assisted by the employment of a legal officer. A legal officer would be a resource to me and the Research Officers since understanding and interpretation of existing legislative provisions and regimes is essential to many aspects of our work. Many of the submissions made have a significant legal content. Legal questions arise in the course of the work of the Office, for example, in respect of practices within the various disability and mental health regimes. In conducting legal interventions, documents must be prepared, advice taken, and appearances conducted in courts and tribunals. If a legal officer was employed, it might be anticipated that there would be less necessity to engage external legal counsel. However, legal advisors would still need to be briefed in more complex matters. Throughout the year, I have devoted some energy to exploring funding of a legal officer position. To date, these have not proved fruitful, but will continue. In my view, the nature of the work of the Office makes it essential for a legal officer to complement the skills and work of the Public Advocate and the Research Officers.

## Expressions of appreciation

I cannot conclude my comments without acknowledging the extraordinary dedication and resourcefulness of the staff at the Office of the Public Advocate. Given the small resources we have available, the volume of advocacy which has occurred in the year is remarkable as, I believe, the content of this Report reveals. Their contributions are fuelled by a deep sense of personal commitment to contributing to improvements in the quality of life for adults with impaired decision-making capacity.

Similarly, I am deeply grateful to all of those adults with impaired decision-making capacity and members of their support networks who contacted the Office to explain systems issues experienced by them, as well as to the many representatives of both Government and non-government agencies, academics and service providers who have worked with my staff and I throughout the year.

## In conclusion ...

My staff and I will continue to provide sustained systems advocacy across a range of complex systems, working hard ourselves to be worthy of the enormous privilege of promoting and protecting the rights and interests of the adults. While acknowledging the many dedicated people who work within the relevant systems, the advocacy of the Office will strive to generate a reaction like that of the yeast in bread – inspiring others, working with the systems and with those responsible for designing them, and assisting the sector to rise to the challenge of promoting and protecting the rights and interests of adults with impaired decision-making capacity.

A handwritten signature in black ink, reading "Michelle Howard". The signature is fluid and cursive, with a long, sweeping underline that extends to the left.

Michelle Howard  
Public Advocate



# ADVOCACY ACTIVITIES

## PART ONE: Major Systems

**PARTS ONE, TWO & THREE** report on the advocacy activities of the Office for 2006-07. Advocacy is conducted in accordance with the Public Advocate's statutory functions and powers in the *Guardianship and Administration Act 2000*.

## 209 Functions – systemic advocacy

The public advocate has the following functions –

- (a) promoting and protecting the rights of adults with impaired capacity for a matter;
- (b) promoting the protection of the adults from neglect, exploitation or abuse;
- (c) encouraging the development of programs to help the adults to reach the greatest practicable degree of autonomy;
- (d) promoting the provision of services and facilities for the adults;
- (e) monitoring and reviewing the delivery of services and facilities to the adults.

## 210 Powers

- (1) The public advocate may do all things necessary or convenient to be done to perform the public advocate's functions.
- (2) The public advocate may 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 capacity for a matter.
- (3) However, intervention requires the leave of the court, tribunal or person in charge of the inquiry and is subject to the terms imposed by the court, tribunal or person in charge of the inquiry.

## 1. The Disability System

There is a significant volume of activity and reform underway across the disability system. This activity and interest are pleasing to note. In addition, there are also ongoing issues to monitor. In any reform agenda, care should be taken to ensure that implementation maximises potential gains and improvements in the daily lives of adults with impaired decision-making capacity.

### 1.1 ‘Challenging behaviour’

As reported in every Annual Report since the establishment of the Office, the Public Advocate has had a long-standing concern about the inadequacy of arrangements to serve the needs of adults with impaired decision-making capacity who have what is often termed severely ‘challenging behaviour’ and complex needs. This issue was examined in the Office’s first Issues Paper, *Opening Doors to Citizenship: quality supports for people with intellectual disability who have complex unmet needs and who currently challenge the capability of the service system* (June 2004).<sup>1</sup> In this Issues Paper, the need to obtain the right balance between the safety of the community/staff and the rights/interests of the individual was acknowledged.<sup>2</sup>

The concern extends to the services available to support adults, and the legal basis for the use of restrictive practices, including detention, seclusion and restraint. This issue is identified as a current priority area in the Public Advocate’s 2007-10 Business Plan.

A commonly accepted definition of ‘challenging behaviour’ is as follows:

*Behaviour of such intensity, frequency or duration that the physical safety of the person or others is placed in serious jeopardy or behaviour which is*

*likely to seriously limit or deny access to the use of ordinary community facilities.*<sup>3</sup>

In 2005, the issue of ‘challenging behaviour’ was a central focus for the Public Advocate. Both meetings of the previous Public Advocate’s reference group, held in March and August of 2005, were devoted to the issue and resulted in the creation of a broad-based coalition of service providers, academics and consumer/family groups to take a united position to Government, drawing attention to the issue and calling for systems reform. Over 50 groups were represented in this coalition, which presented its request to the Premier in late 2005.

To re-iterate previous concerns, among other things, it is suggested that individuals with ‘challenging behaviour’, who do not receive appropriate behaviour support, are at risk of:

- being subject to ineffective management programs, with or without a legal basis for use of restrictive practices
- increasing levels of externally imposed control, which may serve to exacerbate ‘challenging behaviour’
- being feared and demonised by staff
- being subjected to chemical restraint
- being subjected to inappropriate treatment by staff who lack understanding or sufficient training or support.

### 1.2 Review by the Hon. W Carter QC

As reported in the last year’s Annual Report, in April 2006 the Queensland Government appointed a panel to develop legislative and service options for the voluntary and involuntary care of adults with intellectual or cognitive disability who exhibit severely challenging and threatening behaviour, and

who present a significant risk of harm to themselves and the community. Former Supreme Court Judge, the Hon. W Carter QC was appointed, together with the Directors-General of the Department of Communities and Disability Services, and of the Department of Housing as co-chairs of the panel.

The Public Advocate had identified a number of key systemic issues to be addressed in considering systems reform for this group of vulnerable people, which are set out in summary form in last year's Annual Report.<sup>4</sup> They were also the subject of a presentation by the Office at the Australian Guardianship and Administration Committee Conference in Melbourne in March 2007<sup>5</sup> and have been repeated in advocacy generally around the issues. In brief, the key recommendations include:

- robust protection of human rights, including appropriate safeguards to prevent abuse, neglect and exploitation in the use of restrictive practices
- vigorous commitment to the principle of using the least restrictive alternative, and provision of appropriate support in the community
- a commitment to prevention – a Positive Behaviour Support framework will result in services designed to prevent the development or escalation of 'challenging behaviour'
- an appropriately-resourced service infrastructure to minimise the development of 'challenging behaviour' and to provide an appropriate service response
- legislative and service integration – the need for a clear and complementary relationship between any new legislative regime, and the guardianship and mental health regimes
- identifying and addressing systemic causes, or escalation, of 'challenging behaviour'

- mechanisms to divert people away from the criminal justice and forensic mental health systems to support them to develop alternative ways of relating with others and their environment
- reform of workplace culture and appropriate selection, training, support and ongoing development of staff.

In May 2007, the report, *Challenging Behaviour and Disability: a targeted response* (the Carter report) was publicly released. The report contains a range of recommendations which are broadly consistent with those made by this Office. The Office had advocated consistently for the report's full public release. The Public Advocate commends the Queensland Government for commissioning this review and releasing the full report. At the time of release of the report, Government also released its response to the report, entitled *Investing in positive futures: response to recommendations* (the Government response).<sup>6</sup>

### 1.3 Responding to the Carter report

The Government response is a brief document. The responses to the recommendations of the Carter report are expressed in general terms; although it appears that the Government supports most, if not all, of the recommendations in some way. It is apparent that there is still much work to be done in developing and implementing service and legislative responses.

Following release of the Government response, the Public Advocate confirmed her interest and willingness in being closely involved in the development and implementation of all service and legislative responses, and in their ongoing monitoring.

It is acknowledged that not all of the Public Advocate's recommendations are accepted by the Carter report or the Government response. However, the Office will continue to advocate vigorously for the development of a regime which appropriately protects the rights and interests of the vulnerable adults whom it will affect.

### 1.3.1 Human rights protections

Adults with 'challenging behaviour' often live in isolated circumstances, with little external community scrutiny and interaction. Accordingly, they are very vulnerable to ineffective and overly restrictive practices, as well as abuse and neglect.

As a result, it is of significant concern that, although the Carter report suggests that a scheme should apply to all adults with 'challenging behaviour' for whom it is proposed to use restrictive practices, the Government response is for a scheme which applies only to adults receiving DSQ-funded or DSQ-provided services. The Public Advocate considers that all adults with impaired capacity and challenging behaviour are entitled to the same human rights protections.

It is acknowledged that there are additional resource implications if the scheme applies more broadly. These resource implications do not appear to have been investigated at this stage. Nevertheless, it is considered by the Public Advocate that a scheme which does not equally protect the rights of all relevant adults cannot be justified. Accordingly, it is recommended that the necessary investigations be commissioned to consider the wider implications, and to revise the scheme in due course.

### 1.3.2 Proposed legislative response

One of the critical aspects of any system for responding to 'challenging behaviour' is the

authorisation of the use of restrictive practices (including detention). Any scheme which proposes the use of restrictive practices to limit the liberty and autonomy of people cannot be taken lightly. By law, such restrictions are permitted in only a limited number of circumstances – for example, as authorised under the *Criminal Code Act 1899* or the *Mental Health Act 2000*. In both cases, there are independent and rigorous processes for the authorisation and review of restrictive practices.

Because of this, the Public Advocate submitted to the Carter review that use of all restrictive practices be approved and reviewed by a 'suitably qualified and independent body'. The Carter report recommended that authorisation for all restrictive practices be provided only by the Guardianship and Administration Tribunal (the Tribunal).

However, in contrast to these recommendations, the Government has announced the creation of a three-tiered system for approving the use of restrictive practices, which will require authorisation by the Tribunal only for the most restrictive practices.

- The use of containment/detention and seclusion may only be authorised by the Tribunal.
- All forms of chemical restraint, and some forms of physical or mechanical restraint, may be authorised by a formally-appointed guardian.
- Other forms of physical or mechanical restraint (not included above), as well as restricted access, may be authorised by a guardian or an informal substitute decision-maker.

It is understood that other special arrangements will be created for emergency situations.

The Public Advocate will continue to advocate for robust authorisation mechanisms.

It is expected that a draft Exposure Bill for consultation purposes will be made available in October/November 2007. The Public Advocate intends to provide detailed comment, and strongly supports broad community consultation and comment on the draft Exposure Bill.

### 1.3.3 Centre of Excellence

The Carter report and the Government response propose a Centre of Excellence to, among other things:

- develop policies and resources for best practice in Positive Behaviour Support
- train specialist and support staff
- promote tertiary education pathways that help develop the skills required in disability services
- undertake research to inform best practice in Positive Behaviour Support.

The Government intends to place this agency within DSQ. The Public Advocate strongly supports the creation of such a Centre, which is in line with options mooted as part of the Public Advocate's Reference Groups in 2005. However, the Public Advocate has consistently advocated that this Centre is more appropriately located at, and as part of, a university. At the time of writing, DSQ had advertised for the position of Centre Director, reporting to the Deputy Director-General of DSQ.

Given that an important function of the Centre in leading best practice will be to influence cultural change across the disability sector generally and within DSQ, this will more likely be successfully achieved through a Centre which is independent of

DSQ. It would be ideally located within a university to ensure an appropriate level of credibility, independence and status. Further, an independent Centre might likely be accepted by the Queensland public as applying greater rigour and evidence-base to their functions, enhancing public support for the Government's response.

### 1.3.4 Proposed service response

Under the Government response, a Specialist Response Service is to be established to provide therapeutic intervention and specialist alternatives in behaviour management practices, and promote the use of least restrictive alternatives. The Government has endorsed the Positive Behaviour Support framework. The Public Advocate has been appointed a member of the Implementation Steering Committee for this service, which met for the first time in October 2007.

### 1.3.5 Monitoring

To safeguard the human rights of vulnerable people who will be subject to restrictive practices – who will usually be living in isolated settings – there must be a regime for rigorous and independent monitoring, both at a systems and operational level.

The Government response provides for the Centre of Excellence, located within DSQ, to play a role in monitoring. It also anticipates a role for the Community Visitor Program and the review process of the Tribunal. It has been anticipated that Specialist Response Teams will be involved, and that complaints of non-compliance may be investigated under the *Disability Services Act 2006*.

As work continues in system design, the Public Advocate will continue her advocacy and take an ongoing interest in this important issue, which will have significant implications for vulnerable people

and for public confidence in the Government's service response.

### 1.3.6 Some preliminary observations

The Queensland Government is commended for tackling difficult questions about how best to provide for the support of vulnerable people with 'challenging behaviour.' A number of important considerations have already been taken into account in the Government response; several remain. Much hard work lies ahead, before an appropriate and humane system is fully designed and implemented. For the sake of the adults, it is important that Government consult closely with the community to address essential issues.

## 1.4 Accommodation Support & Respite Service

The implementation of recommendations from the 2005 independent review of the Accommodation Support & Respite Service (AS&RS) continues. Some of these recommendations are targeted at organisational and cultural reform, enhancement of staff capacity and practice frameworks, improved procedures for critical incident reporting, substitute decision-making procedures, and more robust procedures for vacancy management decisions.



Principal Research Officer Lindsay Irons, Administration Officer Debbie Barber and Public Advocate Michelle Howard

The Office supports these ongoing reform measures. However, the Office notes that some 20 per cent of the Service's clients still live in households of four or more people.<sup>7</sup> This raises concerns about the suitability of the group home setting for residents with complex needs and/or 'challenging behaviour.'

The Public Advocate has had regular meetings this year with the senior managers of the AS&RS. It is hoped that the interchange can provide a systemic perspective that might inform changes and adjustments to the service delivery provided by the AS&RS.

### 1.4.1 Substitute decision-making in AS&RS

The *Guardianship and Administration Act 2000* (GAA) provides a framework for substitute decision-making, both formal and informal. Further, the General Principles of the GAA support the maximum participation of adults in decision-making, and the maintenance of existing supportive relationships. However, in 2006-07, the Public Advocate heard of instances in which the wishes and participation of the family were reportedly ignored in decision-making. In addition, there are concerns about how staff should respond if it is perceived that family members are not making sound decisions on behalf of their family member.

DSQ's *Substitute Decision-Makers Policy and Procedures* were introduced in July 2006 to support the inclusion of families in the decision-making framework for clients of AS&RS. The policy includes the following procedures.

- Members of the adult's support network are to be 'actively encouraged' to be involved in 'assisting the adult to make decisions as appropriate'.

- Where there is a formally appointed substitute decision-maker, DSQ staff need to 'ensure the involvement of this person in relation to the power for which they have been appointed'.
- Substitute decision-makers can 'make a choice on behalf of the client...between the services and options offered by [DSQ], but cannot compel [DSQ] to comply with specific requests'.
- There is also a process for DSQ to initiate the appointment of a substitute decision-maker. The Public Advocate understands that, at the time of writing, only a very small number of AS&RS residents are clients of the Adult Guardian. DSQ reports that this is due to the large number of clients who have families or other informal support networks acting as decision-makers.

It is commendable that DSQ has considered policy and procedure development for decision-making processes for its clients. It is hoped that this will accord greater rights to adults with impaired capacity, with respect to accommodation decisions, and that substitute decision-makers will be making these decisions, as provided for under the *GAA*.<sup>8</sup> As the policy is relatively new, no doubt it will be some time before its effect is felt on the ground.

The Department of Housing reports that it intends to work with DSQ to address key issues related to service delivery where residents with a disability share support, including those related to vacancy management. The Office also understands that preliminary discussions concerning accommodation decision-making have commenced between the Department of Housing and the Office of the Adult Guardian.

It is recognised that people with impaired capacity who have no substitute decision-makers (that is,

neither a formally-appointed guardian nor active family/support networks) are at greater risk than people with a support network. It has long been the position of the Public Advocate that accommodation-related decisions (for example, where, and with whom, a person lives) should not be determined by service providers or funding agencies, due to the fundamental conflict of interest. The Public Advocate notes work currently underway by DSQ to develop co-tenancy procedures.

## 1.5 Younger people in residential aged care

The Younger People in Residential Aged Care initiative has progressed during 2006-07 (the second year of a five year program). This has included the following:

- The Brain Injury Association of Queensland was funded to operate an assessment service for the program, and is expected to assess some 200 people during its two year operation. The aim of the assessment service is to ensure people's needs and wishes are properly identified and incorporated into planning for suitable long-term accommodation and support arrangements.
- Following a tender process, funding was allocated to Wesley Mission Brisbane (working in conjunction with YoungCare) and St John's Community Care, Far North Queensland under the Integrated Living Model, for residential and lifestyle support services for up to 16 and 10 people respectively.
- Other models of accommodation and support are being developed which involve shared support and/or accommodation arrangements, support for people living with family and/or their support network, and independent living.

The Office has advocated for the creation and funding of this program for several years, and strongly supports this important initiative.

One issue that is likely to be of ongoing interest to the Public Advocate is the creation of appropriate substitute decision-making arrangements for accommodation decisions, in cases where people lack capacity. It has been anecdotally reported by the department that a high proportion of participants may have impaired decision-making capacity. The Public Advocate has provided advice around a number of issues, including:

- application of the General Principles of the *Guardianship and Administration Act 2000* by (formal or informal) substitute decision-makers
- response where it is believed that decisions are not being made by substitute decision-makers in the interests of the adults with impaired capacity
- sufficient and long-term support, information and advice for individuals and families who might be fearful of leaving residential aged care
- access to advice and advocacy independent of DSQ and the assessment service throughout the process, as well as an appeals process for assessments
- ways in which genuine community inclusion can be fostered for this group of vulnerable people, rather than service models which continue to isolate and marginalise them
- tenancy rights in the new accommodation arrangements
- compatibility issues, where people are co-located

- the capacity to meet medical needs in non-medical settings, and within an overall support framework that is non-medically based
- the capacity to meet non-medical needs in medical settings, for those who remain in residential aged care.

Other issues that are likely to attract the interest of the Public Advocate over the coming year include:

- the level of participation in the initiative of people aged 50-65 years, who comprise over 80 per cent of all people under 65 in aged care facilities<sup>9</sup>
- the program's capacity to create flexible support and accommodation arrangements, which are responsive to people's unique needs, given the diverse needs of this group
- options for people living in regional and rural centres, given the paucity of service infrastructure
- how issues of 'challenging behaviour' will be addressed in this client group
- development of support models to improve the quality of life for people who remain in residential aged care accommodation.

## 1.6 Commonwealth State and Territory Disability Agreement 2007-2012

During the past year, negotiations have been underway for a fourth Commonwealth, State and Territory Disability Agreement (CSTDA) for 2007-2012. At the time of writing, the Public Advocate understands that Ministers from all Australian Governments have endorsed a national framework to underpin a fourth multilateral CSTDA that includes

the priorities of unmet need, early intervention, access for indigenous people with a disability, service quality and continuous improvement, coordination within and between service systems, workforce capacity, and accountability and transparency.

In 2006, the Senate Standing Committee on Community Affairs initiated an inquiry into the funding and operation of the CSTDA. The final report was released in February 2007. The primary recommendation was for ‘substantial additional funding to address identified unmet need for specialist disability services, particularly for accommodation services and support’.<sup>10</sup>

Throughout 2007, the Public Advocate raised a number of concerns with the Federal Minister for Families, Community Services and Indigenous Affairs, with respect to the Commonwealth’s initial proposals for the CSTDA. These concerns related to a number of issues:

- limited growth funding (initial proposals contained no significant additional funds despite the reality that many Queenslanders with a disability cannot access necessary services and supports)
- low level of indexation (the Commonwealth’s initial budget proposals fixed the rate of funding indexation at 1.8 per cent, rather than at a level commensurate with increases in the real cost of services)
- pre-determined priorities which do not take account of state-specific factors and which impede flexibility of response
- accreditation of disability services (initial Commonwealth proposals were for a federally-based accreditation system for disability service providers, which would

have effectively duplicated the systems being created by the States).

## 1.7 Disability Service Plans

The *Disability Services Act 2006* created the Queensland Government’s new regime of Disability Service Plans (DSPs), which came into effect in July 2007. Each Government department is required to prepare and publish a plan, detailing how it will improve access to services for people with a disability.<sup>11</sup> The intention of the scheme is to ‘provide focus, direction and coordination of Government service delivery, policy and program development’.<sup>12</sup> In preparing its DSP, each department is to apply the human rights principle and the 14 service delivery principles of the Act, as well as the Government’s policies for people with a disability.<sup>13</sup>

The new system replaces the Queensland Government’s Annual Progress Reports under its *Queensland Government Strategic Framework for Disability 2002-2005*. The previous Public Advocate criticised this reporting system, and recommended both an external review of the Strategic Framework, and the creation of an independent reporting process with respect to progress achieved under the Framework.<sup>14</sup>

In contrast to the previous reporting regime, the new system embeds the Government’s reporting process in legislation which, in broad terms, mandates the nature and duration of each department’s plan. It also expressly requires whole-of-government collaboration in the provision of services to people with a disability.

The Queensland Government is to be commended for taking this important step towards better service provision, greater accountability and stronger inter-agency collaboration with respect to meeting the needs of Queenslanders with a disability. The

Public Advocate also acknowledges the commitment and energy with which Government departments are reported to have engaged in the process of developing their DSPs.

The test for this new system will lie in the extent to which it can demonstrate meaningful improvements in the lives of vulnerable people with a disability, as evidenced through regular, robust and fair evaluation. Further, the success of Government departments' DSPs will depend in large measure on the extent to which these Plans are effectively implemented and adequately resourced. Leadership, coordinated implementation, and sufficient funding are essential.

### 1.8 Reference Group on Disability to the CEO Sub-Committee on Disability

The Reference Group on Disability to the Chief Executive Officer's (CEO) Sub-Committee on Disability was reported upon for the first time last year.

In late 2005, the Premier approved the establishment of the CEO Sub-Committee on Disability to provide executive leadership in whole-of-government policy, program development and service planning for disability. The Reference Group on Disability was established as an advisory body to the CEO Sub-Committee on Disability, effectively replacing the Framework Implementation Committee which had operated under the *Queensland Government Strategic Framework for Disability 2002-2005*.

The CEO Sub-Committee comprised the CEOs from various Government departments and was chaired by the Director-General of DSQ. The Reference Group comprised representatives from Government departments as well as the Office of the Public Advocate; the Office of the Adult Guardian; the Commission for Children, Young People and Child

Guardian; representative bodies and community organisations. The Reference Group on Disability did not have a decision-making or monitoring role; its function was advisory only. The Reference Group on Disability met quarterly throughout the 2006-07 period, having first met in late April 2006.

The Reference Group was kept informed about the work plan of the CEO Sub-Committee and a variety of DSQ initiatives. The Reference Group had the opportunity to comment on issues related to the Disability Service Plans (DSPs), including development of the DSP guidelines and evaluation of DSPs. The Public Advocate took a significant interest in evaluation and was a member of the evaluation sub-committee. Given that an evaluation framework was not developed at the time the DSPs became operational, the Public Advocate considered that the initial DSPs should be revised by the end of June 2008, after the development of the evaluation framework and assessment criteria. The sub-committee made this out-of-session recommendation to the CEO Sub-Committee, through the Reference Group. It is understood that the agreement of the CEO Sub-Committee was obtained.

The Office is pleased to note that an external consultant has recently been engaged to develop an evaluation framework. A workshop was recently convened to advance the evaluation framework.

At the most recent meeting, the Reference Group was advised that due to a restructure of the CEO Sub-Committees, the Sub-Committee on Disability no longer exists. At the time of writing, the Public Advocate understands that a separate CEO Committee specifically considering disability issues is not anticipated. The Director-General of DSQ has proposed that the Reference Group continue (under new terms of reference) as a reference group to inform her as Director-General. The Public Advocate commends the Director-General for making this

proposal. However, people with impaired decision-making capacity receive services and are potential clients of every Government department and agency. It is necessary not only for DSQ to be advised about disability issues, but the whole of Government.

## 1.9 Disability service quality standards

DSQ has introduced the Queensland Disability Service Standards, and is requiring all recurrently funded or provided services to implement a quality system,<sup>15</sup> and undergo external certification by June 2008.

This new regime has attracted considerable interest, and the Public Advocate has heard concerns from across the sector, particularly with regard to the effectiveness of the system to deliver real improvements for people with a decision-making disability, as well as the impact of the growing number of statutory and other requirements imposed on community-based organisations.

These concerns are acknowledged. However, the Public Advocate supports the creation of consistent, minimum standards, policies and processes for ongoing quality improvement across the sector. This is acknowledged as only one step towards improving the quality of life of vulnerable adults with impaired capacity. It will be important for the disability sector to monitor the ongoing implementation of the quality standards regime, to ensure that community-based organisations are able to maintain their energy and focus on serving vulnerable people, rather than predominantly on meeting administrative and compliance requirements.

## 1.10 Workforce development retention and recruitment

A number of initiatives have been launched under the Queensland Government's *Strengthening Non-government Organisations* strategy,<sup>16</sup> some of which are funded by DSQ.<sup>17</sup> Of these initiatives, the Office has had a longstanding interest in workforce development, recruitment and retention in the disability sector, given the critical role that workers play in the lives of people with impaired decision-making capacity.<sup>18</sup> Issues previously raised by the Office include staff turnover/continuity, workplace culture and access to training.

### 1.10.1 Disability services sector

DSQ's workforce development initiatives focus on providing opportunities for funded service providers to build the capacity of staff, volunteers, management committees and boards. There is an emphasis on assisting organisations to attract, develop and retain suitably skilled staff, and to strengthen management practices. The Office strongly supports these initiatives, which include a skills recognition and training program, education pathways for community services careers and on-line resources.

Important considerations related to this are the need for subsidised training to enable workers to gain certificate level qualifications, and the importance of wages and conditions that are conducive to the recruitment and retention of skilled workers. DSQ has a calendar of free training for service providers and has offered grants to subsidise the costs of travel, accommodation and administration.

### 1.10.2 Employment of people with a disability

Access to appropriate training and employment opportunities in the public sector is also a systemic

issue for some adults with impaired decision-making capacity. The Office is aware that one of the aims of Disability Service Plans is to develop strategies to increase the employment of people with disabilities in Government departments. While the employment of people with decision-making disabilities is complex, Government departments are encouraged to develop creative strategies to progress this issue, which might include the provision of support and reasonable adjustment to working areas, conditions and hours.

During 2006-07, some community concerns were raised with the Public Advocate regarding the (reported) decreasing number of people with a disability being employed in the Queensland Public Service. The Office of the Public Advocate met with representatives of the Office of the Public Service Commissioner (OPSC), to exchange information and views on this issue.

The OPSC has a defined role, under legislation, with respect to this issue. In administering the *Equal Opportunity in Public Employment Act 1992*, the OPSC's role is to ensure that public sector agencies meet their Equal Employment Opportunity (EEO) obligations under this Act. The OPSC monitors the agencies: it must approve their EEO management plans<sup>19</sup> and ensure that they submit annual compliance reports on these plans.<sup>20</sup> Where the OPSC

is dissatisfied with any aspect of the preparation, implementation or outcome of an agency's EEO management plan, it may make recommendations for amendment, and/or refer the matter to the Anti-Discrimination Tribunal.<sup>21</sup>

In exploring the issue further, the Public Advocate has made a number of observations.

- First, it is noted that the *Equal Opportunity in Public Employment Act 1992* specifically includes, within its target groups, people with a 'physical, sensory, intellectual or psychiatric disability (whether the disability presently exists or previously existed but no longer exists)'.<sup>22</sup>
- Second, there are unique challenges for public sector agencies in employing people who have decision-making disabilities. Special programs for support and advice might be useful in assisting agencies to meet these challenges, and to develop creative ways to support people with impaired decision-making to work within the public service.
- Third, there is currently little data available on the employment of people with impaired decision-making. This may be remedied through the departmental Disability Service Plans.



Senior Research Officers Deborah Barrett and Kathleen Dare

## 1.11 Complaints

The DSQ complaints system has undergone significant change over the past few years, and is now part of a wider complaints unit administered by the Department of Communities.<sup>23</sup> This unit deals with complaints related to disability, child safety, mental health, aged care and the Indigenous community. It is understood that protocols are in development between the complaints unit and the Office of the

Adult Guardian, in relation to complaints notification and investigation.

The Public Advocate also notes that part of the new system includes a process whereby individual complaints may inform systemic change. The Office is informed that over 150 systemic issues have been referred by the complaints agency to DSQ. The department has implemented a number of related policies and procedures. These pertain to complaints management; critical incident reporting; and preventing and responding to the abuse, neglect and exploitation of people with a disability.

While implementation is in the early stages, DSQ and the Department of Communities are to be commended for this structural reform and the creation of strengthened policies and procedures. These act as a vital starting point for the proper protection of vulnerable people with a disability, and provide clear expectations of service providers and staff.

The Public Advocate supports these changes, and will take an ongoing interest in this issue. It is critical that the structural and policy changes are fully implemented, adequately resourced, sufficiently independent, and subject to ongoing scrutiny. Proper and timely responses to allegations of abuse, neglect or exploitation are important to protect the rights of vulnerable people, and to sustain community confidence in the Government's ongoing reform of disability services in Queensland.

## 1.12 Human relationships

In August 2006 the Office attended a forum convened by Family Planning Queensland, *Disability and Sexuality: People with an intellectual disability are sexual beings*.

The issues of relationships and sexuality for people with intellectual disability is critical, given that many continue to live in congregate, or group home, settings. It should be acknowledged that love and relationships are part of the universal human condition. This issue cannot be ignored, as its neglect can have serious consequences for the adults including sexual victimisation and, for some, contact with the criminal justice system.

The Office supports ongoing efforts to raise awareness of this issue and develop appropriate systemic responses. Parents continue to express concern that there are no services in Queensland which offer sexual education to young men with intellectual disability. There are services for young women, which have largely arisen in response to their overrepresentation as victims of sexual abuse. Men with an intellectual disability are also at heightened risk of sexual abuse.

This issue is highly complex and sensitive. The Office would advocate for some leadership in this arena, and initiatives aimed at the adults, support workers and family members.

## 1.13 Other advocacy

Throughout the year, the Office provided other advocacy about the disability system.

### *DSQ Strategic Plan 2007-2011*

Key recommendations included improvement of consultation processes supporting both the development of the Strategic Plan and in relation to the department's work. DSQ considered and addressed these recommendations in its final plan.

*DSQ resource kit for responding to abuse, neglect and exploitation*

As part of its support of sector-wide implementation of the policy and procedures about responding to abuse, neglect and exploitation, DSQ engaged independent consultants to develop a resource kit to provide disability service providers in Queensland with a range of tools to support the practical implementation of the policy. The Office had an opportunity to provide input into the development of the kit, commenting on a range of issues including responding to client-on-client abuse and greater protection for staff whistleblowers.

## 2. The Guardianship System

A central part of the guardianship regime is to establish a system for decision-making about many personal issues (including health-related issues) and financial matters by and for adults with impaired decision-making capacity, which serves to protect their rights and interests.<sup>24</sup> The regime also provides for the establishment of the Public Advocate, the Guardianship and Administration Tribunal (the Tribunal), the Adult Guardian and the Community Visitor Program. It defines the functions of each of these entities within the regime. It recognises the Public Trustee as a possible administrator.

The regime is underpinned by principles including recognition of the adults' human rights, respect for their human worth and dignity, the principle of exercising power in the manner least restrictive of adults' rights, the principle of substituted judgment and the importance of maintaining adults' existing supportive relationships, cultural environment and values. Decisions made must be consistent with the adult's proper care and protection.<sup>25</sup>

The effects of the system are far-reaching, given that decisions may be made on personal, financial or health-related matters. These include where a person lives, what services they receive, how their money is to be invested and whether they undergo a surgical procedure.

While the guardianship system is created by legislation, it is inevitable that issues will present about the system's operation. The guardianship regime should be able to deal with the complex realities of people's lives, and the diverse contexts within which decision-making is required.

### 2.1 Review of the guardianship legislative system

Last year's Annual Report outlined the history of the review which commenced in October 2005. For ease of the reader, some background is again included in this Report as well as an update about the current situation.

An alliance of community-based organisations had publicly raised concerns about Queensland's guardianship regime. In October 2005, the Attorney-General and Minister for Justice referred the guardianship legislation to the Queensland Law Reform Commission (QLRC) for review. The review is being conducted in two stages: first, the confidentiality provisions of the legislation; second, Queensland's guardianship laws more generally.

Accordingly, the review focuses on legislative reform, rather than on the operation of the guardianship regime generally.

The QLRC released a discussion paper in relation to the first stage, *Confidentiality in the Guardianship System: public justice, private lives* on 9 August 2006.<sup>26</sup> A companion paper containing a brief guide to the issues, pamphlets outlining the key questions, and an interactive CD-ROM are also available, making participation in the review widely accessible.<sup>27</sup>

The Office participates as a member of the Guardianship Review Reference Group, which contributed to the development of the discussion paper. Also, the Office developed a comprehensive submission in response to the substantive issues raised in the discussion paper. The submission is available on the Public Advocate's website.<sup>28</sup> Key features of the submission include:

*Role of confidentiality in guardianship*

- Open justice, procedural fairness and the nature of the guardianship regime are relevant concepts for determining the role of confidentiality in the guardianship system.
- In respect of the role of confidentiality in the guardianship regime, any conflicts between those concepts should be resolved in favour of the interests of the adults with impaired decision-making capacity for whose benefit the regime was established. Aspects of the common law arguably support such an approach.

*Hearings*

- The Public Advocate argued that Tribunal hearings should generally be open, with power to close, or to exclude particular people.
- Exclusion of parties may be justifiable in the circumstances when allowing them to participate would lead to 'serious harm' or 'substantial injustice'.

*Documents before the Tribunal*

- Some issues regarding access to Tribunal documents were brought to the attention of the QLRC.
- In respect of documents before the Tribunal, the Public Advocate supported giving the Tribunal power to limit the disclosure of documents to parties, but only in accordance with prescribed criteria, for example, that it is necessary to avoid causing serious harm to the health or safety of the adult or another person.
- Greater clarity around the Tribunal's obligations in respect of disclosure of documents would help to overcome any perceptions of unfairness.

*Decision and reasons for decision*

- Although the Tribunal should, in some limited circumstances and in accordance with prescribed criteria, have power to make its reasons for decision confidential, it should not have power to keep the decision itself confidential.
- It will rarely be justifiable to keep reasons confidential from the adult who is the subject of the proceedings, and only when there is a real risk to the health or safety of the adult or another person/s if the reasons are disclosed.

*Publication of information*

- Information about proceedings before the Tribunal should be able to be published without permission in a format that does not lead to identification of the adult who is the subject of the proceedings.
- The meaning of 'publication' should be clarified.
- The Tribunal should have the power to allow publication which identifies the adult in appropriate circumstances.

*General duty of confidentiality*

- In respect of any general duty of confidentiality, it is undesirable for lay guardians, administrators and attorneys to be subject to artificial and unenforceable requirements, although it is legitimate and desirable for the adult's privacy to be respected.
- It is reasonable for statutory officers and Government employees (including Tribunal members and staff; the Adult Guardian and staff; the Public Advocate and staff; and the Public Trustee and staff) to be subject to a general duty of confidentiality provided

that there are appropriate mechanisms for the dissemination of necessary information in order for the performance of the officer's functions.

- When information is already in the public domain, there should be an exception to the requirement for confidentiality so reasonable comment can be made.

Following the close of submissions and detailed consideration of the issues, the report of the QLRC was presented to the Attorney-General and Minister for Justice in July 2007.

Involvement of this Office in the second stage of the review will continue through the Reference Group and formal submissions to the QLRC in due course. The Public Advocate looks forward to the enhancement of the guardianship regime in Queensland as a result of the review.

## STOP PRESS

The report of the QLRC, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System* was tabled in Parliament on 12 October 2007, shortly before this report went to print.

Briefly, the report recommends greater openness, including allowing Tribunal proceedings to be publicly reported, provided the adult with a decision-making disability is not identified. It also proposes new limits on the circumstances in which information and documents can be kept confidential from parties to a proceeding (essentially, only where it is necessary to avoid serious harm or injustice). A new role is recommended for an independent person, the Public Advocate, to be invited to comment on whether information should be kept confidential.

## 2.2 Extent of the power of the Tribunal in the guardianship system

As reported in a *Stop Press* in last year's Annual Report, the Tribunal decision in *Re WFM*<sup>29</sup> (discussed in this Report at Section 12.2), confirmed that the Tribunal may give a direction to a substitute decision-maker, effectively making the decision about a matter for which the decision-maker has power.

## 2.3 Health care related issues

Most health care decisions are made for adults with impaired decision-making capacity under the guardianship system. Limited types of health care may be given without consent under the regime,<sup>30</sup> or other relevant legislation, including the *Mental Health Act 2000*.<sup>31</sup> Mostly, the decisions will be made by close family or friends of the adults.<sup>32</sup>

### 2.3.1 People in post-coma unresponsiveness or with profound brain damage

People in a post-coma unresponsive state, or minimally responsive state, are highly vulnerable and have impaired decision-making capacity for health care. For example, it may be proposed that life-sustaining measures be withdrawn or withheld. They are in need of care and health care to meet their needs.

In last year's Annual Report, the Public Advocate outlined the key issues within its response to the National Health and Medical Research Council (NHMRC) issues paper, *Developing Ethical Guidelines for the Care of People in Post-Coma Unresponsiveness (Vegetative State) or a Minimally Responsive State*. The issues included time frames for diagnosis, the importance of substitute decision-making as a safeguard for the vulnerable adults concerned, and the importance of clear communication between

family (most often the substitute decision-makers) and health professionals.

Subsequently, draft NHMRC *Ethical Guidelines for the Care of People in Post-Coma Unresponsiveness or Minimally Responsive State* (the Guidelines) and *Guide for Families and Carers of People with Profound Brain Damage* (the Guide) were released for public comment. Although the Public Advocate's submission in response was dated early in the 2007-08 year, it is timely to update developments since last year's Annual Report.

The draft Guidelines and Guide largely addressed the comments made by the Public Advocate in response to the issues paper. A number of further submissions were made, mostly in relation to providing greater clarity in the guidelines for decision-makers.

- There is a need for clarity about those factors which cannot legitimately inform clinical decision-making.
- The relevant factors in determining medical 'best interests' (relevant to clinical decision-making) are not likely to be the same as those informing a consideration of 'personal best interests' (relevant to substitute decision-making). Attempts to provide one list of factors relevant to both may lead to confusion;

greater clarity is needed to guide decision-makers.

- The meaning of 'burdensome or futile treatment' requires greater clarity.
- The respective roles of clinicians and substitute decision-makers are unclear.
- The requirements for making valid advance health directives are different in the various States and Territories.<sup>33</sup>

It is anticipated that the Guidelines and the Guide will be completed in the 2008-09 period.

### 2.3.2 Organ and tissue donation guidelines

The Office responded to the NHMRC's draft, *Organ and Tissue Donation by Living Donors: Ethical Guidelines for Health Professionals*. The aim was to articulate the ethical issues and inform decisions about living donation of organs and tissues. The guidelines included the ethical principles involved in donation and guidance about how these principles could be put into practice.

The submission of the Office made reference to existing Queensland law, (primarily the *Guardianship and Administration Act 2000*) which has implications for people with impaired decision-making capacity who are potential donors. It discussed the need for an application for consent to the Tribunal. Although there has been no recorded decision of either the Tribunal or the Supreme Court regarding organ or tissue donation, the Tribunal has published a list of matters which it would consider: *Dealing with Special Health Care*.<sup>34</sup>

The Office recommended that the paper include specific references to the need to refer health practitioners to the various State guardianship regimes which provide for consent mechanisms.



Senior Research Officers Deborah Barrett and Kathleen Dare, and Principal Research Officer Lindsay Irons

### 2.3.3 Authorisation/consent to treatment of forensic patients other than for mental illness

See Sections 2.4 and 4.2.

### 2.3.4 Withdrawing and withholding life-sustaining measures

As reported in last year's Annual Report, the Public Advocate delivered a paper in July 2005 at an international conference, the joint 11th Australasian Bioethics Association Conference and 10th Conference of the Australian and New Zealand Institute of Health, Law and Ethics, about aspects of end-of-life decision-making under the guardianship regime in Queensland. The presentation considered the demonstrable inadequacy of the General Principles and Health Care Principle to guide end-of-life decision-making under the regime.<sup>35</sup> Particular attention was directed to apparent inadequacies when the substitute decision-maker is a lay person, with no specialist legal knowledge of the guardianship regime or human rights.<sup>36</sup> An article on which the presentation was based has now been published.<sup>37</sup>

## 2.4 Interrelationship between guardianship regime and other related regimes

Last year's Annual Report highlighted some issues arising at the interface of the guardianship regime and other relevant regimes. The need to carefully consider the interrelationships when drafting new legislation was stressed. This is important in order to avoid situations where, for example, it is unclear under which regime an issue can be decided or resolved or who has responsibility or power about an issue. In the 2006-07 year, some specific issues have arisen.

- Issues emerged during this year in circumstances when an administrator may also have been appointed as trustee following the sanctioning of a settlement of damages for an adult with impaired decision-making capacity. See discussion in Section 12.1 relating to a legal intervention of the Public Advocate.
- Issues have been raised by the Public Advocate in relation to the authorisation of treatment/consent to health care of forensic mental health patients who do not have a mental illness, or have a dual diagnosis of a mental illness and an intellectual or other cognitive disability and require treatment other than for a mental illness. The Minister for Health approved the establishment of a Working Group to examine issues and develop options to resolve them. This issue is more fully discussed in the Mental Health System in Section 4.2.
- As reported at Section 1.3.2, a draft Exposure Bill about legislative amendments to reflect the Government's response to the Carter report is expected in late 2007. As noted in last year's Annual Report, the interrelationships between the various legislative regimes warrant close attention to avoid future issues.

## 2.5 Enduring documents

Competent adults have the right to make enduring documents (enduring powers of attorney and advance health directives). These documents enable people to make decisions which are effective after their capacity has become impaired, and to appoint a substitute decision-maker of their choosing. Research in which the Office of the Public Advocate was an industry partner involved a recent analysis of cases heard before the Tribunal. Financial abuse

was suspected in over 25 per cent of the sample of cases considered. In a significant portion of these cases, there was an enduring power of attorney.<sup>38</sup> It is therefore important to ensure that the systems surrounding the use of enduring documents are free from abuse. The Public Advocate has encouraged and supported research and programs with these aims. Following the results of the research, the Tribunal, at the request of the Attorney-General and Minister for Justice, convened a working group to consider options. The Public Advocate participated in the working group which put forward recommendations to the Attorney-General.

Additionally, the Public Advocate has provided feedback and comment to the Legal Services Commissioner about the development of interactive scenarios to assist legal practitioners to identify and respond to issues relating to enduring documents in a practical sense. Solicitors are frequently called upon to prepare or witness enduring documents. They are well placed to identify situations of potential abuse or exploitation: for example, situations in which a request is made for an enduring document to be executed where the adult concerned lacks the capacity to do so. The interactive scenarios are available on the website of the Legal Services Commissioner.<sup>39</sup>

Researchers from the Queensland University of Technology sought comment from the Public Advocate on the content of a survey of legal practitioners in relation to their practices with respect to enduring documents.<sup>40</sup> The Public Advocate provided written comment with a view to assisting the research process, in order to strengthen the protections for people with impaired decision-making capacity.

## 2.6 The Community Visitor Program

The Community Visitor Program (CVP) is an integral part of the guardianship regime in Queensland. Its purpose is to safeguard the rights and interests of adults with impaired capacity or a mental or intellectual impairment who live in certain residential facilities, through regular visits to these facilities. Community visitors have inquiry and complaint functions. A visitor inquires into, and seeks to resolve, complaints. Where complaints cannot be resolved, they may make referrals to appropriate entities for further investigations or resolution.

In 2006-07, the CVP reports that some 3775 inquiries and complaints were recorded. Some 3.4 per cent of these, or 129, were referred for attention to other relevant agencies (for example, Queensland Health or Disability Services Queensland). Six were referred directly to the Public Advocate. These six referrals reported a range of issues.

### *Private residential services:*

- social isolation and a lack of support networks
- limited access to the Resident Support Program in some areas
- no access to the Resident Support Program for clients who do not receive the Disability Support Pension.

### *Mental health institutions:*

- placement of people who have an intellectual disability or dementia (but no mental illness) in these facilities, reportedly because of their 'challenging behaviour', and the lack of appropriate support
- residents with dementia who are reportedly unable to return to aged care services, due to

their more complex support needs (associated with behavioural issues)

- limited opportunities for community access.

Referrals from the CVP, as with other sources, inform the advocacy of the Office. In several cases, informal contact was made with the relevant service provider to discuss the issues raised, and some follow-up enquiries were made.

During the year, the CVP also requested input from a range of stakeholders including the Public Advocate on how to make visitor reports as useful as possible. Input was provided by the Office. Subsequently, all visitors have attended a Reader Focus Report Writing Training Program. The CVP, and the Community Visitors throughout the State, are to be commended for working to improve their practice, and to enhance the important role this program plays in the lives of vulnerable adults.

### 3. The Housing System

Stable housing and a real home are foundational to improving the lives of adults with impaired capacity. The lack of affordable housing particularly affects socially and economically disadvantaged groups. Adults with impaired decision-making are highly vulnerable, given their lack of capacity to advocate in their own interests. In this context, advocacy for people with impaired capacity around housing issues is critical (refer further to Section 8.5).

Recently, the United Nations released its report on adequate housing in Australia.<sup>41</sup> Systemic issues identified include a lack of modified housing, high risk of homelessness for women with disabilities, lack of access to the private rental market, and the lack of facilities for people with mental illness to live independently.

#### 3.1 Residential services

The Public Advocate continued its monitoring role with respect to the implementation of the Queensland Government's reform package for the private residential services sector, with a particular interest in:

- the Resident Support Program
- the compliance of Level 3 services (which provide some form of personal care services)
- the development of guidelines for the management of medication in residential services
- unintended consequences of the implementation of fire safety regulations.

During 2006-07 an external evaluation of the entire reform package was initiated, and is expected to be

completed by the end of 2007. The Public Advocate provided some input for consideration, including:

- avoiding undue influence from managers/owners on input residents provide
- clear consent process for adults with impaired capacity
- the need to consider residents' unmet needs
- unintentional consequences of the reforms, and the extent of genuine cross-government implementation of all aspects of the reforms.

##### 3.1.1 Resident Support Program

The Public Advocate considers the Resident Support Program (RSP) to be a critical component of the reform process, as it serves to address personal care, health care, and community access issues (including access to training and education) for vulnerable residents. The Public Advocate has taken a continuing interest and advocated about a range of issues. With additional funding, the RSP now operates in six locations. Changes were made to the RSP in 2006 to provide greater continuity of support, with one service provider delivering both personal support and community access services.

The Public Advocate is aware of ongoing challenges facing the RSP.

- There is a need for support agencies to have sufficient staff who are trained and experienced in the provision of disability services, rather than in generic community services or aged care work. There are issues of low status and low pay in these positions. Staff shortages in service provision mean that residents' personal care needs (for example, bathing) may sometimes not be regularly or fully met.

- There are challenges in working successfully with residents whose vulnerability is compounded by drug and alcohol issues.
- It is difficult to facilitate genuine community access for people who have no supportive family or friends outside the hostel.

Other programmatic issues have also been recognised and continue to be reported.

- The lack of physical health and dental care remains a major issue for residents. Refer further to Section 5.1 for a discussion of this issue.
- There is a lack of discretionary funding for transport and support to assist residents to access community activities and health care services. This process requires more than referring the person to an appropriate service. People need assistance to make, and often attend, appointments.<sup>42</sup> Many people with decision-making disabilities have had adverse experiences in medical settings and may need considerable support to access health care.
- Some degree of inequity exists, whereby some residents receive RSP services while others, who appear to have a similar level of need and disadvantage, do not. To be eligible for the RSP, residents must first complete and lodge an application under DSQ's register of needs, and be eligible for DSQ services. Strict eligibility criteria may exclude some residents from access, even where they have a disability and a need for services.
- DSQ advises that the *Disability Services Act 2006*, and a requirement under the Commonwealth State/Territory Disability Funding Agreement, restrict RSP services to DSQ-eligible residents. However, regardless of any legislative or administrative basis,

narrow and inflexible eligibility criteria place vulnerable residents at risk, and deny them access to services and support.

### 3.1.2 Protocol on responding to abuse and neglect

In its 2004-05 Annual Report,<sup>43</sup> the Public Advocate reported that a cross-agency protocol was under development for coordinating investigations of abuse, neglect or exploitation of people with a disability in residential services. During 2006-07, a protocol was developed by the Department of Communities. The endorsement of partner agencies will be sought in 2007-08.

The proposed agreement defines the roles and responsibilities of stakeholders, which include the key departments and agencies involved in the residential services reform. The agreement proposes a response similar to that in place for closures and significant changes. Local response teams would deal with allegations of abuse, neglect or exploitation of residents. Complex or unresolved issues would be referred to a senior officers' group.

This progress is welcome, particularly given that the protection of vulnerable people from abuse and neglect was a key driver behind the Government's reform of the private residential services.

### 3.1.3 Research on private residential services

The Public Advocate provided input into an independent research project, funded by DSQ and Queensland Health, on the needs of residents of private residential services. The research will explore current service use, assess the extent and nature of unmet needs, and identify factors that facilitate or impede access to support services. It is intended that the research will canvass residents of private

residential services generally, not only those who receive the RSP.

The Office's contribution included a range of issues.

- The research should consider a broad range of issues including disability, mental health, substance abuse, financial management, social relationship skills, and experiences of abuse or neglect.
- Given people's complex needs, there is a need for one agency to be tasked with coordinating service access.
- Some adults with impaired decision-making may not have the capacity to identify or articulate their needs. Informal, supportive relationships can assist people to do this. Government funding can assist community agencies to help build and sustain these supportive, informal relationships.
- In some cases, residents only have owners and managers to assist them identify needs and access services. While these owners and managers are commended, there could be a more concerted effort to raise awareness across the sector about the availability of existing services.



Kathleen Dare, Lindsay Irons, Michelle Howard, Deborah Barrett and Debbie Barber

- For people who cannot give the necessary consents, there needs to be an appropriate substitute decision-making process in place.

Prior to this research, comprehensive data on the needs of residents had not been sought to inform the Government's reform process. It is hoped that the current research will provide comprehensive, reliable information about the needs of this vulnerable group of people.

### 3.1.4 Enforcement under the *Residential Services (Accreditation) Act 2002*

During 2006-07, the Residential Services Accreditation Branch of the Office of Fair Trading (OFT) undertook successful legal action in relation to circumstances where individuals were operating unregistered residential services, thereby placing the health and well-being of vulnerable residents at risk. The Public Advocate met with relevant officers from both the community and Government sectors involved in these situations, and acknowledges the efforts of the OFT accreditation and compliance officers in pursuing these cases.

One case involved the operation of an unregistered residential service where many residents had complex needs. They were reported as living in poor conditions, being charged excessive rent and not receiving adequate or appropriate care. For example, it was reported that some of the residents had untreated sores and wounds, and teeth which had rotted down to the gum. The OFT successfully sought an injunction from the District Court in order to stop the operation of the unregistered residential service. This action enabled several Government agencies, under the coordination of the OFT, to quickly assess and address the needs of the residents, including finding suitable alternative accommodation and appropriate health care.

These cases were also instructive for Government to the extent that they helped to highlight complex issues and barriers involved in the enforcement of the legislation. Some of these issues may require ongoing refinement, and include:

- how to provide swift and effective intervention and relocations, while minimising the trauma and upheaval to vulnerable residents throughout this process
- how to facilitate access to independent advocacy for residents, in cases where rapid closure responses are required<sup>44</sup>
- the need to secure the full and timely engagement and information-sharing from all relevant agencies, both Government and non-government.

The Public Advocate commends the inter-agency response team for its efforts in improving the quality of life of people with impaired decision-making.

### 3.1.5 The impact of fire safety regulations on people with impaired capacity

Issues were raised with the Public Advocate by key stakeholders towards the end of 2006-07 regarding the impact of new fire safety regulations (as proposed under the *Building and Other Legislation Amendment Act 2002*) on people with impaired capacity.

There are concerns that, while the regulations may improve fire safety, the way in which they are implemented could have unintended, adverse impacts on the quality of life for adults with impaired decision-making. The issues of potential concern include:

- creating fire safety regulations which focus entirely on the buildings themselves, and are solely in response to risk management

imperatives, without adequate consideration of the needs, dignity and rights of the adults who live there

- the use of doors with heavy self-closing mechanisms (which help to prevent the spread of fire), which may leave people either secluded in their rooms or unable to access parts of the building, unless they have intensive assistance from staff to operate the doors
- whether other measures may effectively deliver the same protection – for example, the use of doors which can be kept open but which close in the event of an alarm. (It is acknowledged that Part 14 of the Queensland Development Code provides for a range of fire safety options in budget accommodation buildings, including door closers, increased levels of evacuation support, sprinklers and interconnected smoke alarms, and alternative solutions.)

The Public Advocate provided a submission to the Department of Local Government, Planning Sport and Recreation to discuss these issues further, and advocated for a balanced approach. Notwithstanding these matters, it continues to be the Public Advocate's position that measures which afford people with impaired capacity protection from harm are to be commended.

### 3.1.6 Review of the *Residential Services (Accommodation) Act 2002*

The Office contributed comments to inform the review of the *Residential Services (Accommodation) Act 2002* undertaken by the Residential Tenancies Authority (RTA). The Policy Review Paper included many of the issues proposed in a submission made by the Office in response to an earlier Discussion Paper released in 2004-05. In particular, the proposal

extended coverage of the legislation to include all rented rooming-style accommodation which is a person's principal place of residence and to include Government-funded or operated facilities.

The Public Advocate supported several proposed amendments, including:

- the inclusion of Government-operated or funded premises, leading to consistency and clarity across the sector
- changes to definitions to make them more compatible with the *Residential Tenancies Act 1994*
- provision for service cost reduction in the event of absences, enforceable by the Small Claims Tribunal
- food and personal care services being specified in agreements for Level 2 and 3 private residential services
- the right of residents to have full access to health professionals, advocates and community care workers.

The Office endorsed a recommendation that certain issues for people with impaired capacity be referred to the guardianship regime, rather than be dealt with under tenancy law. It also supported the RTA in progressing discussions across Government agencies with respect to enhancing the rights of tenants in rented accommodation and private residential services.

### 3.1.7 Aged rental complexes

During 2006-07 some complaints were raised with the Public Advocate regarding the treatment of older people in aged rental complexes. In these services people generally receive food and accommodation; in return they pay up to 85 per cent of their pension.

Some of these residents may have, or may develop, impaired capacity. The issues raised with the Office included:

- lack of security of tenure
- people being arbitrarily evicted, in some cases when they suffered an illness or lost some functioning (the services are designed for older people who are 'independent')
- complaints about the quality of the food and other services provided
- allegations of intimidation and bullying by management.

Since the introduction of the residential services reforms, there has been some ambiguity about whether aged rental complexes are covered by the legislation. Recent information from the OFT indicates that, in the light of the contractual arrangements between managers and unit owners, most of these facilities are considered to be covered.

Underlying these concerns, there is a broader systemic issue: the lack of affordable housing for older people. There have been financial viability issues for some aged rental complexes. As a result, if these services were to seek to attract other types of residents, people reliant on the aged pension will face diminishing housing options.

The Public Advocate continues to explore these issues, and to gather information from relevant stakeholders in the sector.

## 3.2 Homelessness in Queensland

In 2005, the Queensland Government announced a new four-year strategy: *Responding to Homelessness*. This Strategy included funding for new accommodation, connecting people to services,

specialised mental health and drug/alcohol services, and addressing the legal needs of the homeless. This includes the Homeless Person's Court Diversion project (see Section 6.2).

A number of significant gains have been made through the creation of new services, linkages and accommodation. For example, Queensland Health's mental health outreach teams have brought a more assertive approach to maintaining well-being for people who are homeless and frequent users of both mental health and homeless services. This is particularly critical given the high rates of mental illness among the homeless population. It is reported that cross-government coordination has facilitated the effective implementation of the Homelessness Strategy.

Historically, the Public Advocate's interest in homelessness has centred on two groups:

- highly vulnerable people with impaired capacity who experience tertiary homelessness (that is, they reside in supported accommodation hostels or boarding houses)
- people with a mental illness who make up a significant proportion of the primary and secondary homeless.<sup>45</sup>

### 3.2.1 Impaired capacity and homelessness

During 2006-07, the Public Advocate's attention was drawn to other groups of homeless people: those with impaired capacity who cannot escape the cycle of homelessness because of a range of complex issues related to their impaired capacity. These groups of people are difficult to define and diagnose. However, experience from the homeless sector indicates that most have some form of impaired decision-making capacity. Sometimes this impairment is identified by service providers; often it

goes undetected. The reasons for the impairment are frequently linked to one or, in most cases, several of the following:

- an intellectual or learning disability, or a developmental disorder (such as Autism Spectrum Disorder and Asperger's Syndrome)
- an acquired and permanent brain injury (ABI) from traumatic head injury, stroke, drug and alcohol abuse, or other cause
- a psychiatric illness that impairs decision-making ability
- early onset of dementia
- emotional and/or physical trauma (past or present).

The advocacy of the Office is based on the experience by homeless agencies that some of the needs of these groups of people are not currently being met by existing services, despite their periodic interaction with a variety of systems (including the mental health, criminal justice, and homelessness sectors). Experience from the field strongly suggests that the solutions are not to be found through creating more targeted assessments, formulating more sophisticated diagnostic tools, or developing more highly specialised services. In fact these have contributed to the current and ongoing exclusion of these groups.

In partnership with Micah Projects Inc., the Public Advocate is leading a coalition of non-government agencies to investigate the needs and issues of these groups of people, with a view to advocating for the creation of new housing and support service responses for people who are homeless and have impaired capacity. It is hoped that this work will directly contribute to the extensive work already underway as part of the Queensland Government's homelessness strategy. The Public Advocate expects

to report more fully on this work in the 2007-08 Annual Report.

### 3.2.2 Young people with intellectual disability exiting the child protection system

During 2005-07, the Public Advocate contributed to a research project undertaken by the Community Living Association, examining outcomes for young people with intellectual disability who exit from the child protection system.<sup>46</sup> Potential outcomes include homelessness. For more discussion, refer to Section 13.2 on research projects.

## 3.3 Review of the *Residential Tenancies Act 1994*

During 2006-07, the Residential Tenancy Authority commenced a review of the *Residential Tenancies Act 1994*. A number of issues were raised in the Public Advocate's submission.

- People with impaired capacity should be supported to exercise their tenancy rights.
- There should be legislative and procedural consistency across accommodation types.
- Where in-home services are provided, the legislation should safeguard tenants' right to quiet enjoyment of their own home, notwithstanding that their residences are also workplaces for disability support workers.<sup>47</sup>
- Coverage should be sufficiently broad, to ensure accommodation providers do not convert hostel/ boarding house accommodation to a form that is outside the coverage of the Act, while still permanently accommodating people with a disability.<sup>48</sup>
- Where a tenant lacks capacity for an accommodation decision, the legislation

should include provision for substitute decision-making. Nominated people should receive all notices that may be issued under the Act (including those relating to breaches and evictions). This would ensure that support networks are aware of issues that may be placing the person's tenure at risk, so they may assist in remedying breaches before they reach crisis point.

The Public Advocate's submission also highlighted the issue of 'challenging behaviour'. Where the behaviour is a consequence of a person's disability, tenancy agreements that include strict behavioural obligations effectively place vulnerable people at risk of eviction. Some may lack the capacity to understand and comply. Some adults with impaired capacity will be unable to maintain their housing without some level of tenancy support and/or disability support.

It is tempting to view this issue as solely one of disability support, however it highlights the interface between the housing, disability and guardianship systems. This issue has a direct impact on whether adults with impaired decision-making can access their tenancy rights and sustain their housing.

The challenges facing disability-specific accommodation providers was brought to the Public Advocate's attention in 2006-07, through an individual complaint alleging unfair breach and eviction practices. There is a need to create tenancy agreements which take sufficient account of this issue and place neither the individual exhibiting the behaviour, nor their co-residents (who are often also vulnerable), at risk. These issues equally apply to residents under the *Residential Services (Accommodation) Act 2002*.

### 3.4 Tenancy and decision-making

In last year's Annual Report, the Public Advocate signalled its interest in decision-making processes with regard to housing and accommodation decisions.<sup>49</sup> These issues have been of concern to the Public Advocate for several years.<sup>50</sup> In discussion with advocates and members of the community, the Public Advocate has identified a range of interrelated issues. These systemic issues have been well-known to the sector for some time, and include:

- inconsistent decision-making practices across the sector
- decisions being made by service providers (rather than substitute decision-makers)
- where there are no substitute decision-makers, decisions being made without engaging the guardianship regime so that an appropriate substitute decision-making process can occur, as required under the *Guardianship and Administration Act 2000*
- decisions to house together adults with impaired capacity who are ill-suited to living together, some of whom may have 'challenging behaviours'; these decisions may jeopardise the tenancy and well-being of all residents in the home
- consent issues that arise with respect to the signing of tenancy agreements.

Some of these issues may be addressed by the Disability Sector Quality System; one of the disability service standards focuses on decision-making practices. Furthermore, the Public Advocate acknowledges that there are some systemic issues underlying these reported decision-making problems. These include the lack of affordable and social housing and financial viability issues for

service providers. They also have potential resource implications for the guardianship regime.

Some challenges also exist in non-government services with regards to exercising tenancy agreements for adults with impaired capacity. Refer to Section 1.1 regarding clients with 'challenging behaviour'. It is essential for the housing and disability sectors to monitor these issues, given their impact on the well-being and rights of adults with impaired decision-making.

### 3.5 State planning policy

The Office made a submission to the Discussion Paper, *Dynamic Planning for a Growing State*, released by the Department of Local Government, Planning, Sport and Recreation. This paper supported the proposed *State Planning Policy*, which provides that:

*Access to appropriate housing assists individuals, families and communities to contribute to the social and economic wellbeing of the whole community. A wide range of housing options provides individuals, families and communities with opportunities to meet their evolving and diverse housing needs and to be part of and contribute to inclusive and sustainable neighbourhoods.*

The following issues were discussed in the submission, with regard to the future development needs for people with disability.

- The concept of *social well-being* encompasses the notion of diversity, and the principle of social inclusion for all members of the community, irrespective of their capacity.
- The number of people with impaired capacity and special needs are increasing. Particular

focus is needed to ensure their inclusion in strategic planning processes.

- All planning applications should include an impact statement about the effect of the proposed development on disadvantaged groups. All planning applications should include an access statement about how their plans are accessible and inclusive.
- Infrastructure contributions should not be limited to land contributions, but could also include the creation of appropriate meeting places for vulnerable adults and space for the provision of support services, both indoor and outdoor.
- The principles of Universal Housing Design should be included in planning applications.<sup>51</sup>



Senior Research Officers Deborah Barrett and Kathleen Dare, and Principal Research Officer Lindsay Irons

## 4. The Mental Health System

Over the last two years, Australia has witnessed a significant level of attention to mental health. There has been an renewed acknowledgement of the serious systemic issues in the mental health sector, and their impact on vulnerable people with a mental illness. In response, concerted leadership at both the Commonwealth and State levels has emerged. This has seen several important developments including the creation of a Commonwealth mental health plan, and additional Commonwealth and State funding.

For the Office of the Public Advocate and the broader mental health sector, it is pleasing to see such accomplishments which follow many years of sustained advocacy. A unique opportunity is being presented with regard to mental health reform: one which may not be presented again for some time. It is hoped that these achievements will result in real and lasting improvement in the well-being of vulnerable people with a mental illness or psychiatric disability.

### 4.1 Review of the *Mental Health Act 2000*

The *Mental Health Act 2000 (MHA)* is a significant piece of legislation for adults with a mental illness. It provides for people to receive treatment for their mental illness without consent in certain specified circumstances. It is only in few situations that the law allows for people to be given treatment or health care without consent. The Queensland *MHA* has generally been considered to be a progressive involuntary regime in accordance with international principles.

In May 2006, the Minister for Health announced a review of the *MHA*. Brendan Butler AM SC was appointed to conduct the review, which commenced in July 2006.<sup>52</sup> The review was prompted by media concerns about allowing persons charged with serious criminal offences, who had become forensic

patients after being found to be of unsound mind or unfit for trial due to mental illness or intellectual disability, to return to the community on limited community treatment (LCT). Concern was also expressed about the level of consultation and information afforded to victims and their families when decisions about the approval of LCT for forensic patients are made.

The review examined the efficacy of the current legislation and administrative arrangements in taking sufficient account of the interests of victims and their families, and whether an appropriate balance between protection of the community and rehabilitation of forensic patients has been struck.

The Public Advocate made a detailed written submission to the review. The submission highlighted a number of legislative issues.

- References to community safety should only appear in those sections of the *MHA* which make provisions for forensic orders, otherwise the Act may reinforce stigmatising misconceptions about people with a mental illness in general. Forensic provisions of the *MHA* apply to only a small number of patients, relative to all those who come under involuntary treatment provisions.
- Minimum detention periods for forensic patients are inappropriate, as diversion into the mental health system is for the purpose of treatment, rather than punishment.
- Greater transparency and accountability in decision-making processes was supported. For example, a Statement of Reasons could be provided in all cases where Mental Health Review Tribunal (MHRT) decisions alter the status of a forensic patient.

- There may be some advantage to incorporating, in the *MHA*, the Persons of Special Notification (PSN) category, for patients who have committed serious criminal offences – if this would facilitate early identification of patients who present a higher risk. Provided there was additional funding, the PSN notification could help ensure that sufficient treatment, risk assessment and management are in place.
- Legislative amendment requiring the Mental Health Court (MHC) or MHRT to ensure appropriate accommodation is available to the patient prior to approving LCT was not supported. These decision-making bodies are unable to influence the availability of appropriate housing.
- Greater certainty, transparency and procedural fairness for patients in respect of reports prepared by Limited Community Treatment Review Committees (LCTRC) were supported. Recognition of the LCTRC in the *MHA* would be also supported if it achieved this aim.
- The provision of medical/psychiatric information to victims about a patient's treatment was not supported. However, the Public Advocate supports the provision of limited information to victims (who are not infrequently themselves adults with impaired decision-making capacity).
- Greater inclusion of victims and appropriate support mechanisms for victims were supported, and must be appropriately balanced with patient rights.
- Early identification of patients who represent a greater risk of violence would assist to ensure appropriate treatment is provided at the earliest possible point. Ongoing risk assessment and monitoring would likely be useful, provided sufficient mental health funding is available for these services.
- More effective and integrated clinical and non-clinical supports for people with mental illness and drug/alcohol issues are needed, given that dual diagnosis can increase the risk of violent behaviour in some people.
- Access to accurate and timely clinical information by appropriate health services across the State would improve the provision of services to this group of patients.
- Uniform implementation of risk assessment frameworks, competency-based training, policies and procedures, quality assurance frameworks and independent clinical audits across mental health districts were supported by the Office.
- A greater onus should be placed on mental health services for follow-up, treatment and support of patients in the event of non-compliance with the conditions of LCT, especially where the risk profile indicates a potential for dangerousness. This highlights the need for adequate community-based supports.
- The provision of court support and counselling services for victims is supported.

The submission also highlighted a number of other issues.

The review made recommendations primarily to assist victims gain access to information throughout the forensic process, and to ensure that greater safeguards are in place for victims and the community. Additionally, the review recommended the establishment of a victims support service.<sup>53</sup> The Government accepted the recommendations of the

review, and amendments are to be made in a staged manner to the *MHA*.

## 4.2 Consent to treatment of forensic patients other than for mental illness

Advocacy was undertaken during 2006-07 with respect to systemic issues relating to the authorisation of involuntary treatment for forensic mental health patients in an authorised mental health service, who are not receiving treatment for a mental illness.

Under the *MHA*, forensic orders may be made for people who have an intellectual disability but no mental illness, or who have a dual diagnosis (that is, a mental illness and co-existing intellectual or other cognitive disability). Once a forensic order is made, a person may either be detained in an authorised mental health service or given LCT.<sup>54</sup> Patients who are subject to forensic orders may be treated without consent.<sup>55</sup> Treatment is defined as *anything done, or to be done, with the intention of having a therapeutic effect on the person's illness*.<sup>56</sup>

Under the *MHA*, a person is not considered to have a mental illness merely because they have an intellectual disability.<sup>57</sup> Therefore, the *MHA* does not appear to provide a mechanism for treatment without consent for a person with an intellectual disability who does not have a diagnosed mental illness. If a person has a dual diagnosis, only their mental illness may be treated without consent under the *MHA*. This raises systemic issues: in particular, whether any involuntary treatment can be provided for this group of people (other than treatment for a mental illness), and what is the appropriate mechanism of consent for treatment which cannot be given involuntarily.

In 2007, the Public Advocate raised these issues with the Minister for Health. In response, the Minister

approved the establishment of a working group to examine the issues and develop options to address them. The working group includes the Director of Mental Health, the Public Advocate, the Adult Guardian, and officers from the Department of the Premier and Cabinet, Disability Services Queensland and Crown Law.

These issues are related to those considered by the Carter report, discussed at Section 1.2. Under the Government's response to the Carter report, it is understood that any legislative regime will only apply to services which are funded or provided by DSQ. The legislation will not apply to authorised mental health services, as these are funded and provided by Queensland Health. Therefore it appears that some forensic patients receiving treatment for conditions other than a mental illness will not be covered by the legislative safeguards and authorisation processes which are to be put in place for the use of restrictive practices in disability services.

The usual requirement for consent is founded on the fundamental ethical principle of autonomy, which is highly regarded in our society and which underpins many aspects of our legal system. This fundamental ethical and legal consideration has resulted in narrow limits on the types of treatment which can be given without consent.

Advocacy continues around appropriate systems reform with respect to these issues.

## 4.3 Use of restraint in mental health facilities

As discussed at Section 11.3, in 2006 the Public Advocate intervened in a coronial inquest into the restraint death of a person with a mental illness, which occurred in an inpatient acute mental health facility. Based on the evidence before the coroner,

the Public Advocate's submission included the following recommendations.

1. In accordance with the *National Safety Priorities in Mental Health: a national plan for reducing harm*,<sup>58</sup> Queensland Health should develop and implement State-wide policies, procedures, guidelines and training for:
  - reducing, and where possible eliminating, restraint and seclusion in mental health services (p. 17 of the *National Safety Priorities in Mental Health*)
  - regular competency-based training for health professionals and protective security staff in the prevention and de-escalation of aggressive behaviour.
2. There should be significant structural changes within Queensland Health to facilitate the implementation of agreed national mental health policy, guidelines, standards and priorities.
3. The Director of Mental Health should review the use of mechanical restraint in mental health settings (noting that some districts already use some forms of mechanical restraint).
4. The Director of Mental Health should review the use of rapid tranquilisation, and Queensland Health should review its Use of Force Model against current industry standards.
5. There should be strict recruitment, qualification and training standards for all security personnel.
6. Additional community-based accommodation and support services should be developed for forensic mental health patients, particularly where LCT is revoked for non-therapeutic reasons. For example, LCT may be revoked for non-compliance with medication, though a patient is not clinically unwell.

7. There should be greater integration between mental health and substance use services.
8. There should be a more equitable distribution of resources between district mental health services within Queensland to allow for consistent quality of service provision.

#### 4.3.1 Reducing restraint and seclusion

To its credit, Queensland Health has commenced work on reducing and, where possible, eliminating the use of restraint and seclusion in mental health services. A State-wide mental health forum was held in February 2007, in which substantial evidence was provided to demonstrate that it is both possible and realistic to significantly reduce, and virtually eliminate, restraint and seclusion in mental health services, including forensic and high secure wards. Such change occurs through ongoing and concerted leadership in reforming the culture of mental health services. Further, a reduction in the use of restraint and seclusion not only leads to better outcomes for patients, but also to safer and more satisfying work environments for staff. The Public Advocate attended and participated in this forum, and has provided strong support for:

- the Director of Mental Health's draft *Policy Statement for the Reduction and where possible Elimination of Restraint and Seclusion in Queensland Mental Health Services*
- the Director's goal of reducing restraint and seclusion in Queensland mental health services by 90 per cent over the next five years
- the efforts that some local services throughout Queensland are already undertaking to achieve this goal. During the recent forum, the work of the Rockhampton Mental Health Service was highlighted as one example.

This momentum affords Queensland a unique opportunity to assume a leadership role in Australia in the reduction and elimination of restraint and seclusion practices in mental health. Queensland Health is to be commended for the progress already achieved; future accomplishments in this area are anticipated.

#### 4.4 Suicide of people with a mental illness

In last year's Annual Report, the Public Advocate reported on legal interventions in coronial inquests about the suicide deaths of three Queenslanders with a mental illness.<sup>59</sup> In September 2006, the Public Advocate made its final written submission to this inquiry. The submission provided an analysis of the systemic issues arising from the coronial evidence, and made over 40 recommendations for change under 11 broad headings. Some of the key recommendations made were in relation to:

- a) assessment of mental health status and suicide risk – development and consistent implementation of assessment tools, staff training, assessment prior to discharge – including the assessment of non-clinical needs
- b) timely access to patient information across the State, by inpatient and community staff
- c) comprehensive and early discharge planning
- d) intensive post-discharge support for patients who have presented with suicide ideation or who have been assessed at risk of suicide
- e) greater funding for a range of community-based services for people with mental illness
- f) active engagement with a person's family or informal support network by medical staff, and

systems for better liaison between mental health services and General Practitioners who treat patients who have a mental illness or who exhibit signs of suicidality

- g) improved systems of culturally-appropriate care for Aboriginal and Torres Strait Islander people with a mental illness
- h) an expansion in the scope of Queensland Health's Sentinel Events program, in order to track information about suicides which occur after discharge from hospital, while being treated by a community health team, or after being refused services by a health service
- i) full implementation across Queensland Health of the Open Disclosure Standard, which promotes consistent and open communication with patients/carers following an adverse event, such as the death of a patient
- j) appropriate mandate and resources for the Director of Mental Health to fully lead and support implementation of the ongoing reform in mental health across district services
- k) systems to improve the monitoring of the implementation of Commonwealth and State mental health policy and procedures across district mental health services
- l) review of the *Queensland Government Suicide Prevention Strategy 2003-08*.

An Issues Paper based on the Public Advocate's submission to the coronial inquests will shortly be publicly released: *Preventing suicide deaths of Queenslanders with a mental illness*.<sup>60</sup>

#### 4.4.1 Working to prevent suicide

In December 2006, the coroner handed down her findings.<sup>61</sup> The coroner's recommendations included those of the Public Advocate.

In April 2007, the Public Advocate wrote to the Director of Mental Health, to express her interest in Queensland Health's implementation of the coronial findings, and to indicate her willingness to provide further assistance to Queensland Health.

Various activities are being undertaken within Queensland Health to improve outcomes for people with a mental illness who are at risk of suicide. This includes the dissemination of *Guidelines for the management of patients with suicidal behaviour or risk*, first developed in 2004. Additional work is occurring as a result of the Queensland Health report, *Achieving Balance: Report of the Queensland Review of Fatal Mental Health Sentinel Events 2002-03*, including implementation of the report's nine key recommendations.<sup>62</sup> A number of these recommendations are consistent with those made in the Public Advocate's submission.

A Mental Health Program has been established within Queensland Health's Patient Safety Centre, which is tasked with implementing the recommendations of *Achieving Balance*, and ensuring integration of

suicide risk management and service improvements across the department. It is hoped that this will see greater continuity of suicide risk detection and management.

Regular and publicly-disseminated updates are being provided with respect to a range of key mental health service reform initiatives being progressed such as:

- standardisation of core processes of mental health assessment and treatment
- greater support of, and the creation of partnerships with, General Practitioners (GPs)
- creation of a State-wide electronic patient information system
- greater integration of mental health and substance abuse services
- enhanced mental health assessment and treatment models within emergency departments
- removal of potential means of suicide from inpatient mental health facilities
- ongoing monitoring and analysis of mental health sentinel events.

It is hoped these initiatives will improve systems responses to suicidality.

#### 4.5 Critical mental health incidents

For some time, the Public Advocate has maintained an interest in critical mental health incidents: that is, the responses by police and mental health workers to people in acute mental health crisis. These incidents are complex, and place the lives of people with a mental illness, emergency services personnel, and others in the community at risk. In extreme cases, they have led to the shooting deaths of people with a mental illness by police.



Senior Research Officers Deborah Barrett and Kathleen Dare

In the 2005-06 State Budget, the Queensland Government announced recurrent funding for the Mental Health Intervention Project (MHIP), to be led by the Queensland Police Service in partnership with Queensland Health and the Queensland Ambulance Service. Its aim is to prevent and/or safely resolve incidents involving persons experiencing a mental health emergency. The Public Advocate has consistently voiced her support for this important program, which is considered to be an Australian-first.

During 2006-07, the Public Advocate intervened in coronial inquests into the police shooting deaths of four adults with a mental illness. (Refer to Section 11.2 for more details.)

Notwithstanding the Public Advocate's strong support for the full implementation of the MHIP, the submission of the Office made over 40 recommendations for systems change for Queensland Health, the Queensland Police Service, the Queensland Ambulance Service, and Queensland Corrective Services (one of the four individuals had been released from prison shortly before his death). It is understood that the MHIP was not in operation at the time of the four deaths and/or in the locations where they occurred.

Key recommendations included the following.

- a) Greater clarity is required about the specific model being implemented under the MHIP, particularly in respect of the nature and extent of police training. It was unclear at the time of the inquiry whether, and to what extent, the MHIP will address the underlying systemic issues. The Public Advocate's 2005 Discussion Paper<sup>63</sup> made specific recommendations for the model, based on good practice in other jurisdictions. It is also understood that the MHIP is in operation in only some districts in Queensland.
- b) Frameworks for clinical governance, clinical audits and clinical supervision need to be reviewed and strengthened within the mental health system.
- c) There is a need for more consistent application of mental health assessment frameworks for the risk of violent or aggressive behaviour in community clients, and systems for more assertive case management. In addition, improved decision-making with respect to the case-closure of patients from (public) community mental health services is needed.
- d) There is a need for greater consistency within the mental health system to facilitate the appropriate use of corroborative information from families, carers and support networks.
- e) Greater integration of mental health and substance use services is needed.
- f) The number of Authorised Mental Health Practitioners should be increased.
- g) There is a need for improved treatment for prisoners with a mental illness, including basic mental health training for correctional officers. This would require additional funding, to build on the \$2.4m increase in the 2006-07 budget.
- h) Stronger partnerships are needed between the correctional system and the mental health system (both the Prison Mental Health Service, and inpatient and community mental health services), to enable improved pre- and post-release treatment and planning.

Significant achievements are already being reported from the MHIP, which is being established in 17 health service districts around the State. This has included:

- further development of local partnerships between health, police and ambulance staff
- training across all three partner agencies, to help emergency services personnel better respond to mental health emergencies. This includes training of some 550 health staff, 3,500 police officers and 350 paramedics.

#### 4.6 The consumer voice in mental health

During 2006-07, funds were provided by Queensland Health for a *Consumer Voice Project*, undertaken by the Queensland Alliance of Mental Illness and Psychiatric Disability Groups Inc. Considerable research and State-wide consultation was undertaken, with a view to developing a mechanism for high-level consumer/carer leadership and representation.

Forums were held for consumers and carers in various rural and regional areas, as well as in major cities throughout the State. Attendees at these forums elected a total of 25 representatives who then met in Brisbane for a two-day convention where the underlying principles and structure for a representative and robust voice to inform Government about consumer and carer perspectives on mental health policy and service delivery issues.

The model proposed is for the creation of a State-wide independent consumer/carer association.<sup>64</sup> Queensland Health is working with the Queensland Alliance to further develop the proposed consumer and carer association model, to ensure sustainability and effective provision of leadership and representation. The Public Advocate strongly supports this endeavour, and has been advocating on this issue for some years.<sup>65</sup> In its 2003-04 Annual Report, the Public Advocate stated that it supported *the revival of a consumer/carer advisory mechanism*

*– one that can provide high-level, independent and cross-government advice on mental health and psychiatric disability in Queensland.*<sup>66</sup>

The Office of the Public Advocate also undertook several consultations with consumer-run mental health groups. The purpose of these meetings was to provide support for advancing consumer-run services in Queensland, and to consult with local groups about ongoing systemic issues in mental health.

The Public Advocate provided some informal advocacy on behalf of mental health self-help and peer support groups. Empirical evidence is emerging that such non-clinical supports can significantly enhance well-being and reduce hospital re-admissions for people with a mental illness.<sup>67</sup>

#### 4.7 Proposed machinery of government changes

During 2006-07, the Queensland Government proposed some machinery of government changes. These included the transfer of some mental health responsibilities (in respect of funding, legislation and oversight of policy implementation) from Queensland Health to the Department of Communities. The Public Advocate provided support to Government for this model, as it would have allowed the Director of Mental Health to better ensure and monitor the consistent implementation of mental health policy and service delivery across the State.

Ultimately, the proposed mental health changes did not proceed, with the exception of funding provided to non-government mental health agencies. These funds were ultimately transferred to Disability Services Queensland, which has established a Mental Health Branch to oversee the delivery of community-based responses to people with a mental illness, including those with a psychiatric disability. This includes non-government mental health

policy and program development, implementation and evaluation, sector development, quality improvement, and integration of the non-government sector with the public and private systems.

The Public Advocate participated in a mental health services structure planning day held in April 2007. The planning day focused on the interrelationships of mental health services throughout Queensland and the potential for structural reform. One outcome has been monthly meetings between the Chief Health Officer, the three Area Managers and the Director of Mental Health. However, notwithstanding these informal arrangements, underlying structural impediments to mental health reform persist within Queensland Health.

## 5. The Health System

Physical well-being is critical to life. Adequate, timely health care is an important aspect of physical well-being. Many facets of the general health system impact on adults with impaired capacity. Access to adequate and appropriate care is a systemic issue.

### 5.1 Unmet physical health care needs

During the Public Advocate's 2006 reference group, the physical health care needs of adults with impaired capacity arose as a priority for stakeholder groups. This year, the Office prepared a Discussion Paper on the issue, which involved considerable background research and key stakeholder consultation. The paper, *In Sickness and In Health: addressing the unmet health care needs of adults with a decision-making disability*, is about to be released publicly.

As the report shows, the research is unambiguous. Despite increasing longevity, adults with impaired capacity have significantly higher mortality and morbidity rates than the general population. They succumb to preventable disease in greater numbers, benefit less from preventative health measures and existing health promotion initiatives, and in general have poorer access to all levels of health care. The health care system is highly complex, and difficult for the adults and their carers to navigate. Moreover, with the increasing strain on the health system from the wider community, the voice of adults with impaired capacity is seldom heard.

Despite the introduction of a number of Commonwealth and State initiatives to address this problem, a more concerted and comprehensive response is needed. The Discussion Paper identifies the following as priority action areas:

- a) more diverse and direct support services for people with a decision-making disability and their families and carers
- b) increased resources for support worker training and development
- c) more support for GPs, including the broader dissemination of tools such as the Comprehensive Health Assessment Program (CHAP)
- d) targeted health promotion strategies for people with a decision-making disability and their families
- e) better education and skills for health and allied health professionals
- f) better support for adults with impaired capacity to make their own health care decisions
- g) quarantined funding for specific Medicare items for this group of vulnerable people (refer below).

Two initiatives in particular show promise for the future.

First, CHAP was developed by the Queensland Centre for Intellectual and Developmental Disability (QCIDD) specifically for people with an intellectual disability. The program is currently being used by a number of Governments across Australia, as well as the Endeavour Foundation in Queensland. The program includes a health diary, in the form of a booklet, which covers the person's clinical and residential history, names of all health care providers, and a section which the doctor fills out. The aim of the program is to prompt a comprehensive health assessment and plan for adults with intellectual disability. This may potentially help doctors make better diagnoses, provide appropriate treatment, and ultimately ensure better health outcomes for

adults with intellectual disability. Feedback from GPs and advocates, as well as research data, has been very positive. Results include a thirty-fold increase in hearing tests for clients using the CHAP, an eight-fold increase in pap smears, and significantly more disease detection.<sup>68</sup>

Second, a recent breakthrough has seen a change to the Medicare Benefits Schedule (MBS) for GP health assessments of people with intellectual disability. (This new initiative puts into place the same arrangements that already exist for people over 75 years of age and for Indigenous Australians.) These changes arose largely because of the substantial body of work by QCIDD, and are an example of research evidence driving significant policy and program delivery changes. The initiative consists of new MBS items (numbers 718 and 719) which allow GPs to provide annual health assessments for adults with intellectual disability. These assessments provide for:

- a structured assessment of the physical, psychological and social function of patients
- a review and analysis of the information collected, and an overall assessment of the patient
- identification of any required medical intervention and preventative health care, as well as referral and appropriate follow-up
- advice and a written report to the patient and, if appropriate and the patient agrees, the patient's carer and relevant disability professionals.

These new MBS items took effect from July 2007.<sup>69</sup> The creation of this initiative by the Commonwealth Government may provide a foundation for future work with respect to enhancing the physical health of people with impaired capacity. Following

a consultation period on the Public Advocate's Discussion Paper, consideration will be given to a longer-term advocacy strategy to influence positive systems reform in the area of health care for this vulnerable group.

## 5.2 Consumer representation in Queensland Health

In late 2006, the Public Advocate was invited by Queensland Health to provide input into the creation of a Consumer Health Council as part of the ongoing reform process of the department. A submission by the Public Advocate was tabled with Queensland Health in November 2006, and additional advice was provided during a subsequent workshop. This advice builds on the Public Advocate's established interest in 'consumer participation' in mental health services, which was examined in its 2004-05 Annual Report: *The Office urges Queensland Health to renew its commitment to securing the meaningful input of consumers/carers in policy making, program development, and service delivery.*<sup>70</sup>

In brief, the advice provided by the Public Advocate towards the creation of the Council highlighted the following key issues.

- a) Special consideration should be given to vulnerable Queenslanders including people with impaired decision-making capacity, who are often unable to advocate for themselves in health matters. They are more vulnerable to 'intrusive' measures in health settings (e.g. involuntary treatment, restraint and seclusion), and have higher than average mortality and morbidity rates. Given the pressures on the health system, a concerted effort is required to address the needs of people with a disability.
- b) Adults with impaired decision-making capacity are a diverse group, who have different and

complex health needs. They face a range of different challenges in accessing adequate treatment.

- c) The Council should be a fully independent, high-level, and eminently reputable entity. It should be committed to long-term systems reform, should interact with the wider community with integrity, and should engage with the health sector in a productive manner.
- d) The Council should have a robust charter and highly competent leadership, and should develop a culture that is committed to excellence in independent consumer representation and systems advocacy. It should be structured so as to make a meaningful contribution to the ongoing health reform process.
- e) It may be desirable for the Council to have the capacity for independent research, policy development and provision of training to health districts on consumer issues and engagement.
- f) It was recommended that funding for the Council (if provided by Government) should not be allocated from the Health portfolio, but instead from another portfolio, such as the departments of Justice and Attorney-General or the Premier and Cabinet.



Principal Research Officer Lindsay Irons and Administration Officer Debbie Barber

In May 2007, Queensland Health released its final report on this project, which proposes the creation of *Health Consumers Queensland*.<sup>71</sup>

### 5.3 People in a post-coma unresponsive state

People in a post-coma unresponsive state, or minimally responsive state, are extremely vulnerable. Draft National Health and Medical Research Council (NHMRC) *Ethical Guidelines for the Care of People in Post-Coma Unresponsiveness or Minimally Responsive State* (the Guidelines) and *Guide for Families and Carers of People with Profound Brain Damage* (the Guide) were released for public comment. Submissions were made by the Office about relevant issues. These are reported in Section 2.3.

### 5.4 Withdrawing and withholding life-sustaining measures

The Public Advocate delivered a paper at an international conference about aspects of end-of-life decision-making under the guardianship regime in Queensland. The presentation considered the demonstrable inadequacy of the General Principles and Health Care Principle to guide end-of-life decision-making under the regime. Also, an article upon which the presentation was based has now been published.<sup>72</sup> Refer to Section 2.3.

### 5.5 Organ and tissue donation guidelines

The Office responded to the NHMRC's draft guidelines, *Organ and Tissue Donation by Living Donors: Ethical Guidelines for Health Professionals*. Refer to Section 2.3.

## 6. The Criminal Justice and Corrective Services Systems

People with impaired decision-making are overrepresented in the criminal justice and corrective services systems, both as victims and as alleged perpetrators.<sup>73</sup> Despite substantial evidence of this trend, precise statistics for Queensland are unavailable.

As discussed in last year's Annual Report, diversion options are not 'soft on crime'. The requirements on offenders are onerous, and there is regular monitoring and reporting. A lack of bona fides is quickly identified. People are returned to the mainstream criminal justice system in the event of a failure to comply. Other jurisdictions report that such schemes are highly protective of both the public good and offenders' personal advancement. Public safety is enhanced, as these schemes lead to reduced recidivism rates, lower levels of imprisonment, better life outcomes for individuals, and less need for formal service responses.

### 6.1 *Vulnerable Person Policy*

With respect to the criminal justice system, an important piece of work was completed by the Department of Justice and Attorney-General, with the launch in May 2007 of the department's *Vulnerable Person Policy*. The Policy represents a formal and historic acknowledgement on the part of the Queensland Government that:

*a range of people who are vulnerable still encounter difficulties in accessing or receiving equitable or fair treatment during their contact with the criminal justice system, whether as a victim, witness or defendant.*<sup>74</sup>

The Policy goes on to describe the situation faced by vulnerable people.

*...a lack of awareness of the needs of vulnerable people in the criminal justice system, resulting in inconsistent, poor or discriminatory treatment... [which is] intimidating and bewildering...*

The Policy also acknowledges that these factors have life-long consequences for vulnerable individuals. People with a mental illness, intellectual disability, acquired brain injury or cognitive impairment, as well as people who are homeless, are recognised as among the groups of vulnerable people by the department. The department's commitment to improving its treatment of vulnerable people is underpinned by five principles.

1. Vulnerable people will have access to justice.
2. Vulnerable people's special needs or difficulties are recognised so they receive fair and equitable treatment.
3. Vulnerable people are respected and treated with dignity; there is an appropriate response to their needs, wishes and instructions.
4. The best possible services available are provided to vulnerable people, through the use of appropriate referrals to services provided by other agencies both within and outside the department.
5. Departmental staff will be informed about the needs and difficulties faced by vulnerable people in the criminal justice system, so that staff can respond in accordance with these principles.

Under the Policy, departmental business units will be required to consider how staff may already have contact with vulnerable people, and what new strategies or initiatives could be implemented to improve the responsiveness of the criminal justice system.

The Public Advocate has maintained a long-term interest and advocacy role in the treatment of adults with impaired decision-making in the criminal justice system, dating back to the department's establishment, in 2001, of an interdepartmental working group on people with intellectual disability in the criminal justice system.<sup>75</sup>

The Public Advocate provided advice and support throughout the development of the Policy, and applauds the work of the Department of Justice and Attorney-General. This represents an important step towards achieving greater justice and better outcomes for Queenslanders with impaired capacity. In the coming year, the Public Advocate may consider offering support on two ongoing issues:

- a) the implementation of the Policy across the department, including the creation and funding of any new initiatives
- b) the capacity of other systems outside the department to respond appropriately to referrals, as referred to in Principle 4 above (refer to 6.3).

## 6.2 Current court diversion projects

Two important pilot programs – the Homeless Person's Court Diversion Project, and the Special Circumstances List in the Brisbane Magistrate's Court – are now into their second year. The Homeless Person's Court Diversion Program is part of the Queensland Government's *Responding to Homelessness* Strategy. The Special Circumstances List, which operates weekly, was a creation of the Magistrate's Court. The Public Advocate has provided input and support to both throughout the year. The operational staff of the pilot are to be congratulated on their ongoing, innovative work. During the year there has been considerable progress, including development of a data collection system and increased knowledge about the pilot among

magistrates, lawyers (including Legal Aid and private practitioners), the police and service providers.

As discussed in last year's Annual Report,<sup>76</sup> the Public Advocate strongly supports both initiatives, and has provided input as a member of the stakeholder reference group. The Office has received reports of the benefits of these court diversion programs (in addition to reducing recidivism), through informal discussions with stakeholder agencies over the past year. This includes the following benefits.<sup>77</sup>

- People with impaired capacity generally report that their experience with the criminal justice system is fair and respectful.
- In many cases, people are able to be linked with or, on the orders of the court, diverted to appropriate services, including housing services.
- The involvement of the court helps facilitate compliance with service participation; this lends substantial weight to the seriousness of the matter. That is, people have strong incentives to comply with orders requiring their participation in services.
- An ongoing relationship is established between court liaison officers and people who have impaired capacity, many of whom may have no regular contact with services, despite their periodic service use. (People are required to regularly report back to the court.)
- Attendance and active participation of service and accommodation providers' staff at the court helps to ensure the person will follow-up with the services. It is also critical in building greater coordination and shared responsibility between service providers.
- Court diversion programs can help highlight critical service gaps for this group of people

who, for the most part are outside, or on the periphery, of the existing service system.

- Court diversion programs can present a window of opportunity to facilitate positive change in a vulnerable person's life. The person has come to the attention of the court; this attention can be usefully focussed on addressing a range of needs and issues which have previously been neglected, and which are likely to impact on recidivism.
- Diversion programs can help raise awareness among the judiciary of the needs and issues of the large numbers of adults with impaired decision-making who appear before them in court.

The Department of Justice and Attorney-General and the Magistrate's Court are to be highly commended for their leadership in this field. Funding for the project, including the Court Liaison Officer, concludes at the end of the 2007-08 financial year.

### 6.3 The future of court diversion in Queensland

An evaluation is expected of both pilot programs in late 2007 or early 2008, to which the Public Advocate has also provided input. The Public Advocate strongly supports the expansion of innovative court diversion programs, and has provided advice and advocacy throughout the year to this effect. The experience of the two existing pilot programs would appear to suggest that two sets of systemic reform are needed.

First, additional resources and infrastructure are needed in the criminal justice system, in order to:

- identify people with impaired capacity coming through the courts
- assess people for eligibility for court diversion

- make appropriate recommendations to the court
- locate services, and link the person with these services
- provide some level of ongoing follow-up and case coordination.

Second, court diversion strategies rely on the willingness and capacity of *other* service systems to respond to the needs of people who are diverted from the criminal justice system. Importantly, both the creation of new services, and the expansion of existing services, will be necessary. While some people periodically access a range of services (including homelessness, mental health, disability and drug abuse services), they tend to move in and out of these services in an ad hoc way. There is no single point of accountability; no agency is tasked with the overall case coordination, or for supporting the person to navigate the various service systems.

The challenge for service systems is this: how to respond to people who fall outside their narrowly-defined eligibility criteria. Operating within limited resources and administered under different Governmental departments, each program has its own targeted eligibility criteria, independent from those of other programs. However, many homeless people with impaired capacity appearing before the court fall outside the scope of these stringent criteria.

Despite their ineligibility for support services, these adults are highly vulnerable to the adverse and long-term consequences of interaction with the criminal justice and corrective services systems. They require an active, coordinated response across the full range of services. This will require additional investment by the Queensland Government into a range of sectors. However, future cost savings to the public purse would be expected.<sup>78</sup>

These issues are complex, and the solutions are not simple. However, unless people have appropriate and timely access to the necessary services and case coordination, their circulation through the criminal justice system is likely to continue. If this occurs, the full benefits of a court diversion program will not be realised, either to the adults concerned or the broader community.

#### 6.4 *Disabled Justice* report

Queensland Advocacy Inc. is to be commended for its insightful report, *Disabled Justice: the barriers to justice for persons with disability in Queensland*. A number of the issues raised in *Disabled Justice* are consistent with the Public Advocate's Discussion Paper, *Issues for people with a cognitive disability in the corrections system* (released in 2005), including the need for:

- early intervention services
- appropriate responses to people who develop dementia while imprisoned
- responses to people with impaired capacity who are overrepresented as victims
- rigorous independent research about prisoners and former prisoners
- strategic cross-government alliances to address the needs of this group.

The Public Advocate looks forward to the Government's response.

#### 6.5 Prison mental health

In its 2004-05 Annual Report, the Public Advocate reported on the historically low level of funding for prison mental health services, and advocated for significantly increased resources, given the high rates of mental illness among the prison population.<sup>79</sup>

This issue was also examined by the 2005 Queensland Health Systems Review (the Forster review).

In the Government's 2006-07 Budget, an additional \$2.4m was allocated for this purpose, which has significantly enhanced the capacity of the Prison Mental Health Service to address the mental health needs of prisoners. In addition to providing for more Prison Mental Health Service clinicians, \$450,000 was made available to support the transition of prisoners with a mental illness from prison. This project, delivered by a community-based agency,<sup>80</sup> facilitates access to mental health treatment and helps re-establish connections with a range of services and social supports. The Public Advocate commends Queensland Health for this innovative and important initiative.

Despite increased funding, prison mental health services are still significantly under-resourced relative to the existing need. (It is estimated that, at the time of writing, the Prison Mental Health Service has over 1 000 open cases.<sup>81</sup>) The Public Advocate commends the Government for its commitment to enhanced services, and strongly encourages continued expansion.

Both Queensland Health and Queensland Corrective Services are members of the Government's Mental Health Inter-Departmental Committee. The two departments have governance structures in place for the provision of mental health services in correctional centres. It is reported that regular inter-agency meetings between the two departments are improving their working relationship and enhancing service delivery. The Public Advocate commends this work.

During 2006-07, the Public Advocate participated in a Queensland Health forum on forensic mental health. In the context of an already overstretched

mental health system, prisoners experience systemic barriers to accessing acute inpatient services. There is a widespread view in mental health services that prisoners are ‘undeserving’ of inpatient treatment, and should instead be treated in prison. In addition to addressing attitudinal and funding barriers, prisoner access to inpatient care also requires adequate training and support for staff.

The guiding principles for mental health care provision to prisoners are found in the National Statement of Principles for Forensic Mental Health. These 13 Principles include:

- mental health care that is equivalent to the non-offender
- joint health/justice responsibility
- a comprehensive range of services that are integrated, connected and ethically congruent
- appropriate treatment environments.<sup>82</sup>

All patients should receive adequate mental health treatment, regardless of their status. The Public Advocate strongly supports the expansion of options for the treatment of forensic mental health patients, including access to inpatient mental health care when necessary.

### 6.5.1 Coronial recommendations

As discussed in Section 11.2, during 2006-07 the Public Advocate intervened in four coronial inquests into the police shooting deaths of adults with a mental illness. A number of systemic issues regarding corrective services were raised in these inquests. This was related to the fact that one of the four individuals had been released from prison shortly before his death, and had been treated by both prison and inpatient mental health services.

Based on the evidence before the coroner, a number of systemic issues were identified by the Public Advocate in its submission. Several recommendations were made for:

- routine screening of prisoners for mental illness
- protocols between correctional facility administrators and district mental health services, and between Queensland Corrective Services and the Director of Mental Health, regarding treatment and discharge
- prison mental health records, including discharge summaries, to be accessible to Queensland Health staff (with due regard for confidentiality and privacy considerations)
- minimum, nationally recognised training in mental health for all corrective services staff (for example, the nationally-recognised Mental Health First Aid course)
- the creation of a system for peer-based support among prisoners with a mental illness
- all prisoners to receive appropriate mental health treatment, irrespective of the length of their sentence or their remand status.

## 7. The Legal System

This section is general in nature, and covers aspects of the legal system which are not directly relevant to the other specific systems reported upon in this Annual Report.

### 7.1 Review of *Privacy Act 1988* (Cth)

The privacy regime is significant for adults with decision-making incapacity. It is appropriate that the privacy of vulnerable adults should be adequately protected. However, the protections must be framed in a way that does not prevent substitute decision-makers under the guardianship regime from performing their important role in the adults' lives.<sup>83</sup>

In January 2006, the Commonwealth Attorney-General asked the Australian Law Reform Commission (ALRC) to inquire into the extent to which the *Privacy Act 1988* (Cth) and related laws continue to provide an effective framework for the protection of privacy in Australia.

The Office made a written submission to the Inquiry and met with representatives of the ALRC to discuss relevant issues. The submission was targeted to those areas of the review of particular relevance to adults with impaired decision-making capacity. The

submission is available on the Public Advocate's website.<sup>84</sup> Key features of the submission include:

#### *Privacy and the guardianship regime generally*

- There is widespread acknowledgement of the need to ensure that the rights of adults with a decision-making disability are protected,<sup>85</sup> including protection of privacy.<sup>86</sup> The privacy legislation is an important mechanism for achieving appropriate protection.
- It is necessary to ensure that the privacy legislation/requirements work for adults with impaired decision-making capacity, and not to their disadvantage.
- It is essential that the Commonwealth privacy regime supports and facilitates the aims of State and Territory-based guardianship regimes; failure to do so will likely lead to adverse outcomes for vulnerable adults. It is understood that privacy requirements continue to be cited as a rationale for not providing information relating to an adult's affairs to substitute decision-makers, sometimes even where a formal Tribunal order records the appointment. However, difficulties are most common in cases where the decision-makers act informally, without a formal appointment.

#### *Complexity of privacy requirements and impacts on substitute decision-making*

- The array of privacy requirements under Commonwealth and State legislation and other rules, codes and guidelines result in fragmentation and complexity in the regulation of personal information. This results in some difficulties and likely confusion for substitute decision-makers.<sup>87</sup>



Public Advocate Michelle Howard and Administration Officer Debbie Barber

- It would be preferable for one piece of legislation to contain all of the Commonwealth privacy requirements, with respect to the disclosure of personal information.

could nevertheless form part of one holistic Commonwealth privacy regime.

The ALRC is due to report by 31 March 2008.

### *Informal substitute decision-makers*

- The task of providing a privacy regime which supports the adults, where a substitute decision-maker seeks to act informally, is far from straightforward.
- Under the Queensland guardianship regime, capacity is decision specific. That is, a person may be deemed to have impaired capacity for some types of financial or personal decisions, but not others. There are complexities around prescribing specific requirements and arrangements in order to convince organisations of a person's lack of capacity for a given matter. There are also complexities around convincing departments or organisations that a person is acting as the informal decision-maker for the adult.

## **7.2 Coroners Act 2003**

The *Coroners Act 2003* represents a significant reform in Queensland to facilitate improvement within a variety of systems. The Public Advocate has proposed some amendments to the *Coroners Act 2003* to ensure that systemic issues are able to be identified by the coroner and, once identified, adequately addressed.

### **7.2.1 Report back provisions**

The legislation could be enhanced by introducing a 'report back' requirement where the coroner has made comments or recommendations for systemic reform.

Currently there is no mechanism for 'report back' to the coroner following the making of comments under the *Coroners Act 2003*. There is limited benefit in having coroners empowered to consider and make comments about systemic matters of public health and safety, and ways to prevent similar deaths in the future, unless there is accountability by those agencies in respect of which the comments are made. There should be mechanisms for both reporting back and follow up in respect of these matters. Follow up could be undertaken by an agency independent of the Coroner's Office. In December 2006, the Queensland Ombudsman announced that he would follow up with relevant agencies after coroners have made comments.<sup>88</sup> It seems preferable that the *Coroners Act 2003* provide for this to occur.

It is also recommended that the 'report back' should be publicly accessible, adjacent to the findings and

### *Banking issues*

- Arguably, there are deficiencies in the protection of privacy in the area of banking. There is a need to examine protective mechanisms to prevent fraud and financial abuse, for example with respect to the misuse of PIN numbers and enduring powers of attorney. (Refer to Section 2.5 regarding elder abuse.)

### *Health information issues*

- Given the particular complexities relating to health information, it may be beneficial for all Commonwealth privacy requirements specific to the health sphere to be contained in a National Health Privacy Code. This Code

comments/recommendations. This would bolster accountability and transparency.

It is suggested that consideration could also be given to amending the legislation to provide for the State Coroner to report in their Annual Report about comments made and the responses received from agencies. This would serve the purpose of informing the Parliament about where systemic reform is required, and inform the public of important systems issues.

### 7.2.2 Coroner's comments

Under the Act, the coroner may make comments or recommendations that relate to public health or safety, the administration of justice, or ways to prevent similar deaths from happening in the future.<sup>89</sup> It is recommended that consideration be given to amending the Act, to extend coroners' powers to make recommendations to address identified issues regarding standards of care, supervision of people in care or custody, and any other systemic matter in the public interest.

### 7.2.3 Reportable deaths

When identifying systemic problems which may have contributed to the death of a person with a disability, it may not be sufficient to investigate only those deaths that occurred when the deceased was accommodated within the institution or facility. For example, *Report of the Commission of Inquiry into the Psychiatric Unit at Townsville General Hospital*<sup>90</sup> found that patients discharged from psychiatric hospitals without proper discharge, diagnosis and adequate treatment were contributing factors to a number of patients' suicides. This issue was again relevant in recent coronial inquests into the suicide deaths of a number of patients post discharge or after being refused admission (see Sections 4.4 and 11.1).

It is therefore recommended that an inquest should be conducted if there is reason to believe that a person had received institutional or inpatient care shortly before their death.<sup>91</sup> It is suggested that careful consideration should be given before prescribing the time frame: one month may be appropriate. This would require the coroner to investigate the death of a person who has recently left a facility (for example, a mental health service, residential service or correctional facility).<sup>92</sup>

### 7.2.4 Specialist coroners

The coroner's function to make comments relating to systems reform is especially important. In order to avoid similar adverse incidents for vulnerable adults with mental illness, acquired brain injury, intellectual disability, dementia or others, it is crucial that coroners give proper consideration to the systems issues which arise in matters before them. Systems consideration is a specialised skill.

Accordingly, it seems highly desirable that coroners conducting inquests develop expertise in thoroughly exploring systems issues. This could best be achieved through appointments of more full-time coroners.

## 7.3 Joint work with Queensland Law Society, Elder Law Section

In June 2006, the Public Advocate addressed the Queensland Law Society's Elder Law Section. The Office and the Elder Law Section agreed to collaborate on research in relation to the legal aspects of elder abuse, and on the production of a report to inform both policy and law makers in relation to necessary reform. It is anticipated that a report will be available for public distribution in 2008.

## 7.4 Legal advocacy

As noted throughout this report, the work of the Office has included a significant legal component, including reviews and recommendations with regard to the following:

### *Legislative reviews, consultations and comment*

- Guardianship review: Section 2.1
- Aspects of the *Justice and other Legislation Amendment Act 2007*
- Review of the *Mental Health Act 2000*: Section 4.1
- Consultation on draft *Mental Health and Other Legislation Amendment Bill 2007*
- Consideration of legislative (and service) options for ‘challenging behaviour’: Section 1.3
- Review of the *Residential Services (Accommodation) Act 2002*: Section 3.1.6
- Review of the *Residential Tenancies Act 1994*: Section 3.3
- Review of the *Integrated Planning Act 1997*: Section 3.5
- *State Penalties Enforcement and Other Legislation Amendment Act 2006*
- *Coroners Act 2003*: Section 7.2
- *Privacy Act 1998 (Cth)*: Section 7.1.

### *Working groups on legal issues*

- Working group established with the approval of the Minister for Health in respect to authorisation of treatment/consent for health care for forensic patients other than treatment for a mental illness: Section 4.2

- Working group held by the Guardianship and Administration Tribunal to consider issues relating to enduring documents: Section 2.5
- Future court diversion initiatives: Section 6.3
- Homeless Person’s Court Diversion Project, and the Special Circumstances List in the Magistrate’s Court: Section 6.2
- *Vulnerable Person Policy*: Section 6.1.

### *Interventions in proceedings before Courts and Tribunals*

- Eight coronial inquests: Section 11
- One Supreme Court of Queensland reference from the Guardianship and Administration Tribunal: Section 10
- Four proceedings of the Guardianship and Administration Tribunal: Section 12.

### *Inquiries*

- House of Representatives Inquiry into Older People and the Law: Section 9.1.

### *Comment on:*

- Disability Service Plans: Section 1.7
- Post-coma unresponsiveness: Section 2.3.1
- Organ and tissue donation: Section 2.3.2
- Interrelationship between the guardianship and other related regimes: Section 2.4
- Enduring documents: Section 2.5
- Impact of fire safety: Section 3.1.5
- Withdrawing and withholding life-sustaining measures: Section 2.3.4.

## 8. The Advocacy System

For people with impaired decision-making capacity, access to individual advocacy is often critical in protecting their individual rights, needs and interests, given that they frequently cannot advocate for themselves and may not have family or support networks to do so. Both individual and systems advocacy are essential to protect the rights and interests of vulnerable adults. Advocacy, as defined by Disability Services Queensland and the Commonwealth Government, is:

*...speaking, acting or writing with minimal conflict of interest on behalf of the interests of a person or group, in order to promote, protect and defend the welfare of and justice for either the person or group by being on their side and no one else's, being primarily concerned with their fundamental needs, and remaining loyal and accountable to them in a way which is empathic and vigorous.<sup>93</sup>*

It is noteworthy that the disability sector quality standards include an indicator on advocacy for non-government services funded by the department:

*Service users are provided with information and support to access a family member, independent advocate or other support person of their choice to assist them when entering or exiting a service.<sup>94</sup>*

Consistent with previous years, during 2006-07 the Public Advocate has taken an interest in the access that people with impaired capacity have to individual advocacy.<sup>95</sup> The Public Advocate strongly supports increased funding for advocacy, as well as opportunities to develop advocacy practice across the State.

In addition, systems advocacy is critical in helping to shed light on, and promote systemic responses to, broad issues impacting on the lives of adults with impaired capacity.

### 8.1 Review of National Disability Advocacy Program

Individual disability advocacy in Queensland is currently funded through both the Commonwealth and Queensland Governments. The Commonwealth currently provides some \$1.8m to Queensland, and the Queensland Government provides approximately \$1.35m. In 2006, the Commonwealth Department of Families, Community Services and Indigenous Affairs announced a review of its National Disability Advocacy Program, which is intended to enhance its efficiency and effectiveness.

The Commonwealth obtained an independent evaluation report<sup>96</sup> in July 2006, which informed its consultation paper on proposed changes to the program (issued in September 2006). The proposals included:

- a more equitable distribution of Commonwealth advocacy funding across Australia, based on actual need
- a greater emphasis on advocacy to address issues of immediate critical concern with less emphasis on proactive and preventative advocacy (such as citizen advocacy and systems advocacy)
- a growing support for individual advocacy, and for increasing the numbers of 'closed advocacy cases'
- the creation of a national advocacy hotline number.

In October 2006 the Office of the Public Advocate participated in the review. The Office provided advocacy, both in person and in a written submission. In its response to the consultation paper the Office provided strong support for:

- enhancing advocacy practices across the State, including the development of advocacy quality standards
- providing additional funding for advocacy in Queensland, based on the State's increasing population (both general and disability population) relative to most other States.

Concerns raised by the Office in its advocacy included:

- the lack of a sound public policy framework, and the lack of reliable data, on which the proposed reforms were based
- inadequate consultation
- the lack of a shared vision and shared responsibility between the Commonwealth and State Governments for disability advocacy
- the diminishing support for systems advocacy, which works to proactively address the broad structural issues impacting on the lives of people with a disability, with a view to preventing problems from occurring in their lives
- the diminishing support for citizen advocacy (a structured approach to assist members of the community to play a long-term advocacy role in the lives of people with a disability, particularly those who do not access mainstream advocacy services). Such a relationship can prevent the person needing urgent, crisis-driven advocacy
- expectations that the creation of a nationwide advocacy hotline will enhance access to, and responsiveness by, disability advocacy
- a stronger focus on crisis advocacy, rather than a vision which aims to improve the autonomy and quality of a person's life,

and to advance their rights and interests. A framework solely oriented towards crisis is likely to perpetuate crisis as the driving force within service systems, and as the dominant dynamic in the lives of vulnerable people.

As part of the 2007-08 Budget, the Commonwealth Government announced additional funding of \$12.2 million over four years. This represents a significant growth in program funding. The aim of the additional funding is to increase access to advocacy, improve geographical coverage, raise awareness about advocacy, and to introduce a quality assurance system.

The Commonwealth's proposed implementation timetable has been extended to allow agencies to prepare for the proposed changes, and consultation and information sessions have since been held in every State and Territory. The Commonwealth will now be developing the quality assurance regime and a competitive tendering process. The Commonwealth reports that it is also seeking input from advocacy agencies about how it can most effectively communicate and work with their organisation throughout the change process.

The Public Advocate wishes to acknowledge the leadership role undertaken by the Combined Advocacy Groups in Queensland. The Public Advocate will continue to take an interest in this issue, given the importance of advocacy in protecting the rights and needs of adults with impaired capacity.

## 8.2 Advocacy for clients of the Endeavour Foundation

The *Disability Services Act 2006* provides that people with a disability should have ...*access to necessary independent advocacy support so they can participate adequately in decision-making about the services they receive.*<sup>97</sup>

This year the Endeavour Foundation's Board of Directors initiated policy development for access to independent advocacy for its service users and families. As stated in the Foundation's discussion paper (developed to inform the final policy document):

*Advocacy is grounded in the principles of social justice, recognising that people with a disability can be disadvantaged, vulnerable to marginalization and exclusion from community life and that there is a social responsibility to address this disadvantage.<sup>98</sup>*

The Office was pleased to be invited onto a reference group to provide advice in relation to the development of this policy. The advocacy of the Office covered a range of matters.

- Independent advocacy has an important role to play in the lives of adults with impaired capacity, particularly those who have no active support network. Any potential conflicts of interest should be minimised.



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- Information derived from individual advocacy matters should be used to inform ongoing systemic change within the Foundation.
- It is important to distinguish between advocacy and decision-making. (The need for independent advocacy may arise independent from any formal decision to be made.)
- The choice of an appropriate advocate for an individual should be made according to their needs and issues at the time.
- It is preferable that advocates know the person well, in order to best understand their wishes and needs, and to help identify any abuse or neglect.
- In addition to independent advocates, Endeavour staff can also play a vital role in making representations on behalf of their vulnerable clients, in providing advocacy to either the Foundation or to external agencies. This is particularly important given the day-to-day interaction that staff have with clients, and the difficulties that are sometimes experienced in accessing independent advocacy.

The policy reflects a thoughtful approach to advocacy. It includes a clear acknowledgement of the Foundation's obligations in regard to independent advocacy. The document is easy to read, with additional material available to expand on important concepts and principles. The policy clarifies that, while staff can assist individuals and families by speaking on their behalf, staff cannot act as independent advocates for a person.

The Endeavour Foundation is a large provider of services to people with decision-making disability in Queensland. The Office commends the Foundation's Board for endorsing the Independent Advocacy Policy, and looks forward to its implementation.

### 8.3 Access to advocacy for mental health patients

The Public Advocate has also had a long-standing interest in access to independent, individual advocacy for adults with a mental illness. While the Public Advocate has publicly supported the use and expansion of consumer consultants within public mental health services, the capacity of such employees to advocate for patients is limited, given their conflict of interest. As stated in the 2003-04 Annual Report, *The Office would... strongly support efforts by Queensland Health to enhance access to independent individual advocacy for mental health inpatients.*<sup>99</sup>

Again in last year's Annual Report, the Public Advocate stated that:

*There appears little evidence to date that the Allied Persons provisions of the Mental Health Act 2000 have acted as a potent safeguard of patient rights. Queensland Health is strongly encouraged to consider introducing independent, professional advocacy for people accessing mental health services.*<sup>100</sup>

During 2006-07, the Public Advocate provided considered comment to the Director of Mental Health on the provision of advocacy to patients of mental health services. This issue is of considerable importance – given the vulnerability of inpatients, their inability to self-advocate, and their frequent lack of family or other informal advocates. While the issues are only under preliminary consideration by the department at present, the Public Advocate provided some in-depth advice on the proposals offered, including the following advocacy.

- a) Appropriate, high-quality advocacy can benefit both the patient and the system, and can in fact bolster community faith in the mental health

system, and ease the persistent calls for public inquiries into systemic failings. Advocacy can help to address problems as they occur – before they escalate – and locally, at the point of service delivery.

- b) The nature of mental illness/psychiatric disability is, in several respects, different from that of intellectual or physical disability. Advocacy models appropriate for people with a mental illness or psychiatric disability should be developed, based on good practice in other jurisdictions.
- c) The success of independent inpatient advocacy depends, in part, on cultural change within the health and mental health systems. A system which fails to understand advocacy, and which is hostile to complaints, will likely undermine any chance of successful advocacy. Clearly there needs to be close, frank and meaningful relationships between district mental health services and advocacy agencies. Further, district mental health services should be supported and encouraged to engage with advocates.
- d) It is wise to avoid a purely 'crisis advocacy model' (one in which all advocacy efforts are aimed at addressing the needs of people in crisis), as this serves to perpetuate crisis as both the driving force within the mental health system, and as the dominant dynamic in people's lives.
- e) There should be some established standards to which advocacy agencies work and are held accountable. Specialised standards should be created for inpatient mental health advocacy, as distinct from generic standards for service delivery.

Queensland Health is strongly encouraged to progress this important initiative. While the

department may or may not advance in the direction of individual advocacy, it may perhaps be up to the community to demonstrate leadership in this regard. At the time of writing, there was only one known advocacy service in Queensland specifically for people with a mental illness or psychiatric disability.<sup>101</sup> However, it is known that at least one other community coalition is considering the formation of an independently-constituted advocacy agency. The Public Advocate would strongly support such an endeavour.

## 8.4 Advocacy for seniors

The Public Advocate provided input and support during 2006-07 for the establishment of a pilot: Seniors Advocacy Information and Legal Service, funded by the Office for Seniors (Department of Communities). Funding has been made available for a one-year project to create and evaluate five senior legal and support services throughout Queensland. Launched in June 2007, the project will operate in Brisbane, Cairns, Hervey Bay, Toowoomba and Townsville. Services will be delivered by both solicitors and social workers, to provide a holistic response to the needs of older people at risk of elder abuse or financial exploitation.<sup>102</sup> These services will include:

- information and advice on legal issues and available support services
- referrals on financial matters
- individual advocacy and community education
- needs assessment and formulation of support plans, including safety plans
- some court support and legal representation
- advice on making or revoking an enduring power of attorney.

In addition, Queensland Aged and Disability Advocacy Inc has received funding through the Department of Justice and Attorney-General for a Legal Advocacy Development Officer. This service will provide legal advice and representation for clients (people who are elderly or who have a disability) in the context of hearings before the Guardianship and Administration Tribunal or other similar bodies. The position is also designed to undertake community education on independent advocacy for the client group through the guardianship legal process.

The Public Advocate welcomes the introduction of both advocacy programs, and hopes that they will benefit people with impaired capacity. It is acknowledged that there are challenges in advocating for people with a decision-making disability, and in ensuring their access to individual advocacy.

## 8.5 Housing advocacy for people with a disability

The Public Advocate acknowledges the long-standing contribution of the Queensland Disability Housing Coalition in providing advocacy around housing issues and rights on behalf of people with a disability. In 2007, a decision was made by the Minister for Housing to rationalise its peak body funding, to the effect that the Coalition has been de-funded, despite advocacy from a number of quarters. The Office advocated that quarantined funding should be maintained for a housing advocacy body specifically for people with a disability.

The department has chosen to fund two peak bodies: the Tenant's Union of Queensland and Queensland Shelter. Both have advocated extensively on behalf of disadvantaged Queenslanders, including people with a disability. The Minister for Housing has considered the advice of the Public Advocate. He has given his assurances that this change in funding arrangements will not diminish the capacity of the sector to

advocate on behalf of Queenslanders who live with a disability; nor will it erode the department's commitment to meeting the housing needs of the community's most vulnerable and disadvantaged members.

As the nation's housing crisis worsens, and affordable housing moves further out of reach for many, this issue will become a critical one for the disability and housing sectors to monitor.

## 8.6 Family Support and Advocacy Program

Although adults with impaired capacity are not the direct recipients of this service, it is noteworthy that Carers Queensland has been successful in obtaining funding to operate a Family Support and Advocacy Program. It is a service which provides support and advocacy for family carers of adults with impaired decision-making capacity. The aim of the program is to enhance the ability of family carers to protect the rights of the adults. The Public Advocate participates in the reference group for the Program. The service has supported over 100 families in its first year of operation. The majority of these have been engaged with the guardianship system. It is hoped that the service will provide benefits for the adults whose family carers are assisted.

## 9. The Aged Care System

The abuse of older adults with impaired capacity is becoming a significant social, legal and economic issue. It affects some three to five per cent of the Australian population, and is set to increase in coming years.<sup>103</sup> Research undertaken by Curtin University of Technology revealed that 75 per cent of people aged 65 and older who experienced abuse had a decision-making disability.<sup>104</sup>

Some research suggests that financial abuse may be the most common form of elder abuse in Australia.<sup>105</sup> In New South Wales in 1996, it was estimated that elder abuse added some \$300 million per year to service costs for older people in that State.<sup>106</sup> Older Australians with impaired decision-making capacity are particularly vulnerable to financial abuse. The Public Advocate has an interest in sufficient protections for this group of adults.

### 9.1 Inquiry into Older People and the Law

In August 2006, the Commonwealth Attorney-General announced an inquiry into Older People and the Law,<sup>107</sup> to be undertaken by the House of Representatives Standing Committee on Legal and Constitutional Affairs. The Terms of Reference were to investigate and report on the adequacy of specific current legislative regimes (regarding fraud, financial abuse, general and enduring powers of attorney, family agreements and discrimination) in addressing the legal needs of older Australians and barriers to their access to legal services.

The Public Advocate provided a written submission outlining issues and possible areas for reform including:

- the desirability of national uniform enduring powers of attorney law

- the possibility of a scheme for banks and financial institutions to monitor and report suspected financial abuse
- recognition that decision-makers formally appointed by an enduring power of attorney or by State Courts and Tribunals take precedence over Centrelink nominees
- the need for a consistent and accurate approach to the assessment of capacity
- a national service to coordinate and overview the many aspects of Commonwealth and State law impacting on elderly people
- a need for improved legal services for adults with impaired capacity, including comprehensive training about disability, ageing, dementia and related legal matters for relevant professionals.

At the time of writing, the Standing Committee had recently released its report.<sup>108</sup>

### 9.2 Advocacy on banking issues for older people

During 2007 the Office made a submission to the Productivity Commission's review of Australia's Consumer Policy Framework. The scope of the inquiry included ways to improve the consumer policy framework to assist and empower consumers (including the disadvantaged and vulnerable), and to address information and other challenges posed by complex product offerings and methods of transacting.<sup>109</sup> The Public Advocate's submission concentrated on the area of banking and included the following:

- older people who lose capacity through dementia may continue to perform complex financial tasks (including banking transactions) without sufficient understanding

- the need for appropriate protections where another person has access to accounts and can exercise influence over them
- a need to train banking staff to identify financial abuse, and development of tools to assist staff with appropriate referral pathways and reporting mechanisms.

The Office referred several of these issues to the Banking and Financial Services Ombudsman. The Ombudsman provides significant information to various groups including the Australian Bankers Association, which has developed a self-regulatory Code of Banking Practice for its members. Clause 6 of that Code provides:

*We recognise the needs of elderly customers and customers with a disability to have access to transaction services, so we will take reasonable measures to enhance their access to those services.*<sup>110</sup>

The Public Advocate sent copies of its submission to the Australian Bankers Association to inform their review of the Code of Banking Practice.

### 9.3 Abuse of seniors in residential facilities

The *Aged Care Amendment (Security and Protection) Act 2007* (Cth) is of interest to the Public Advocate with respect to those residents in aged care facilities who have some form of cognitive impairment. Last year's Annual Report discussed the Office's previous advocacy about proposed Commonwealth/State measures for responding to elder abuse.<sup>111</sup> The legislation applies to Commonwealth Government-subsidised residential aged care services.

The intention of the legislative reform is to strengthen protections from sexual and physical assault. The reforms include police background checks,

greater scrutiny through accreditation processes, a compulsory reporting regime, legislative protections for whistleblowers, new complaints investigation procedures, and a new Aged Care Commissioner.

The Public Advocate strongly supports measures which protect vulnerable older people from all forms of abuse, neglect and exploitation. However, based on the Public Advocate's prior advocacy, a number of issues will continue to be of ongoing interest.

- How effective are the measures, including compulsory reporting, in *preventing* abuse?
- What are the unintended consequences for vulnerable older people?
- What is their impact on services, given the staffing and administrative pressures already facing aged care providers?
- What provisions are in place to assist and support services to improve their quality of care, in addition to monitoring their compliance with the new regime?
- What ongoing police training and resources will be needed under the compulsory reporting regime?
- Many older people with impaired capacity do not live in aged care facilities. How will their rights be protected?

### 9.4 Elder abuse in culturally and linguistically diverse backgrounds

In September 2006, the Prevention of Elder Abuse in Culturally and Linguistically Diverse (CALD) Communities Taskforce held a forum on impaired capacity in CALD Communities. The Office presented a paper, *Elder abuse and impaired capacity in CALD communities*,<sup>112</sup> drawing on research findings from

Western Australia.<sup>113</sup> This research is believed to be the first of its kind in Australia. It found that seniors in CALD communities are at increased risk of elder abuse for several reasons including:

- poor English skills, particularly in relation to written documents
- social isolation and dependency on family members
- unwillingness to disclose mistreatment or neglect because of social stigma
- cross-generational factors resulting in differing expectations of care and support.<sup>114</sup>

People born overseas represent one-third of the elderly population in Australia.<sup>115</sup> This demographic has increased dramatically in recent years and is projected to grow more rapidly through the coming decades. This demographic requires consideration in policy and program development, and in service delivery.<sup>116</sup>

Notwithstanding the above research, the extent of elder abuse in CALD communities is still unknown. Further consultation, research and awareness-raising would be helpful in creating solutions to this systemic problem.



Principal Research Officer Lindsay Irons and Public Advocate Michelle Howard



# ADVOCACY ACTIVITIES

PART TWO: Legal Interventions

## Legal Interventions

The Public Advocate may intervene in legal proceedings and inquiries involving the protection of the rights and interests of adults with impaired decision-making capacity. Legal interventions can be resource intensive. A decision will only be made to become involved where there are significant systems issues for adults with impaired capacity, and where it is considered appropriate and necessary for advocacy to occur in courts and tribunals. Commonly, legal interventions and other advocacy will complement one another.

by the private trustee company administrator (some of which had already been deducted from the adult's funds) was permitted at law;<sup>118</sup> the power of the Tribunal to retrospectively authorise remuneration already paid to an administrator, and to retrospectively authorise conflict transactions.<sup>119</sup>

The Supreme Court recently heard the reference but a decision is not yet available. For further discussion see Section 12.1 below. This matter will be more fully reported in next year's report.

## 10. Supreme Court of Queensland

### 10.1 Legal issues where an administrator may also be a trustee

The Public Advocate participated in the Supreme Court of Queensland in a proceeding to hear a referral of a number of questions of law from the Guardianship and Administration Tribunal (the Tribunal) to the Supreme Court under section 105A of the *Guardianship and Administration Act 2000* (GAA).<sup>117</sup>

In 2006, the Public Advocate had been granted leave to intervene in a Tribunal proceeding concerning the review of the appointment of an administrator. In this case, a person had sustained a severe head injury as a result of a motor vehicle accident. An agreement was reached for a personal injuries settlement. This agreement was sanctioned by the Supreme Court and an administrator appointed some years earlier.

A number of complex systemic issues emerged from the review proceeding. It was argued by the administrator that it was also a trustee because of the wording of the order. Additionally, there were issues about whether the remuneration claimed

## 11. Coronial Inquests

Coronial inquests can be relevant to the protection of the rights and interests of adults with impaired capacity, as systemic failure may result in deaths in facilities provided for the adults, such as mental health facilities and residential services. It is difficult to imagine a worse outcome of systems failure than death. Where this has occurred, it is likely that others are also impacted upon by the systems failure, albeit with non-fatal (yet still serious) life consequences.

### 11.1 Suicide deaths

As reported in last year's Annual Report, the Public Advocate intervened in three inquests being heard jointly relating to the suicide deaths of people with mental illness, shortly after discharge from mental health facilities and, in one case, after presentation at a health service. The Office acknowledges that suicide is a complex issue, and that usually a range of factors contribute to the death. However, it seems reasonable for our health and mental health systems to identify and respond appropriately to suicidality.

In these matters, the Public Advocate intervened and provided a submission on systems issues arising in the context of the deaths and made a number of recommendations for systems change within Queensland Health. These related to:

- mental health and suicide risk assessments
- involving carers, informal support networks and general practitioners
- discharge planning and community-based supports
- specific issues affecting the Indigenous community
- review of sentinel deaths, and the implementation and monitoring of mental health policy.

In December 2006, the coroner made extensive recommendations adopting those recommendations made by the Office, and also making other recommendations flowing from the evidence.<sup>120</sup>

For further discussion see Section 4.4.

### 11.2 Police shootings of patients with mental illness

The Public Advocate made reference in last year's Annual Report to upcoming coronial inquests into the shooting deaths by police of four adults with a mental illness.<sup>121</sup> In September 2006, the Public Advocate was given leave to intervene in respect of systemic issues. The Public Advocate provided a submission to the court in March 2007. Generic witnesses gave evidence on the systemic issues in May 2007. At the time of writing, final submissions had recently been called for by the coroner.

The Public Advocate's submission made recommendations in respect of some 42 areas for systems change directed to Queensland Health, the Queensland Police Service, and the Queensland Ambulance Service. Several recommendations were also made to Queensland Corrective Services, as one of the four people had been released from prison shortly before his death, and had received mental health treatment while in prison. For further discussion on the systemic issues underlying the deaths, refer to Sections 4.5 and 6.5.1.

### 11.3 Restraint death of a mental health patient

As reported in last year's Annual Report, the Public Advocate intervened in a coronial inquest concerning the restraint death of a forensic mental health patient, which occurred in an inpatient mental health service. During 2006-07, the inquest proceeded and the coroner's findings and comments were delivered.

The Public Advocate participated in the hearing and, at the conclusion of the inquest, made submissions to the coroner, including a variety of recommendations for systems change. These are discussed in Sections 4.3 and 4.7.

The coroner made four recommendations relating to systems issues:<sup>122</sup>

1. That as a matter of urgency, Queensland Health develop an electronic data base to enable clinicians to instantly access medical records of mental health patients who have been treated at any public health service throughout the State.
2. That the Director of Mental Health mandate a policy that stipulates that patients on forensic orders who abscond are automatically held in high-secure or medium-secure wards when they are returned to the responsible mental health facility until their risk of further flight can be assessed.
3. That as a matter of priority all mental health nursing staff and any security officers who may be called on to assist them undertake the aggressive behaviour management course or any other more appropriate course the department develops; also that appropriate competency-based qualification be a pre-condition to employment as a security officer in a hospital.
4. That pending the achievement of a quality of care that enables mental health patients to be managed without resort to any physical restraint, Queensland Health evaluate the use of soft ties to assist in restraining violent patients.

The coroner also acknowledged the significant evidence about the role of the Director of Mental Health: in particular, the Director's capacity or authority to influence clinical practice and the use of

resources. The coroner noted that he had intended to make recommendations about these issues but refrained from doing so, as he was aware from other ongoing inquests that the issue was receiving attention from within Queensland Health, and that the structure of the mental health branch and its responsibilities were being reviewed. Refer further to Section 4.3.

#### 11.4 Death in care of an adult with high and complex support needs

In 2003, the Public Advocate intervened in a coronial inquest concerning the death in care of a person with high and complex support needs, and referred the court to several systemic issues related to the person's death. The findings from this inquiry were delivered in 2006-07.

Although the coroner did not make formal recommendations about service provision, the Office is aware that the service provider undertook a detailed analysis of service practices, based on the circumstances of the case and the advocacy of the Office. While there was no requirement for the service provider to provide this information, the Office was pleased to engage in dialogue with the service provider about the systemic issues, in order to ensure safe environments and practices for vulnerable people.

## 12. Guardianship and Administration Tribunal Proceedings

During the year, the Public Advocate exercised her power to intervene in a number of proceedings before the Guardianship and Administration Tribunal (the Tribunal). Some, but not all, of these proceedings can be reported on here. Under the *GAA*, the Tribunal may make an order to permit publication of information about a proceeding, if it considers this to be in the public interest. The Tribunal has permitted publication of reasons for decision in de-identified format for proceedings that are reported upon in this Report.<sup>123</sup> Where no such orders have been made, the Public Advocate cannot publish information about the proceedings.<sup>124</sup> Thus the information discussed below is limited, and does not represent a full account of the interventions or submissions of the Public Advocate during 2006-07 – only those proceedings authorised for public disclosure, and only in relation to information which is referred to in the publicly available reasons for decision.

### 12.1 Legal issues where an administrator may also be a trustee: *Re TAD*

As discussed at Section 10.1 above, the Public Advocate intervened in a complex proceeding relating to the review of the appointment of an administrator in which the Tribunal referred a number of questions of law to the Supreme Court for determination under section 105A of the *GAA*.<sup>125</sup> The Supreme Court recently heard the reference. At the time of writing a decision was not available. Once it is available, the review proceeding will be determined in the Tribunal. It is anticipated that this proceeding will then be able to be more fully reported.

### *Comment*

The guardianship regime provides for the appointment of a financial decision-maker for people with impaired capacity. Thus an appointment of a trustee will usually be unnecessary. Further, it is potentially problematic, as the responsibilities of administrators and trustees do not coincide in all respects.<sup>126</sup> A person could potentially be removed as administrator by the Tribunal, but remain a trustee unless removed by the Supreme Court. Issues may also arise in relation to remuneration of the administrator and trustee, since there are different legislative provisions in relation to remuneration and reimbursement of expenses for appointees.<sup>127</sup>

### 12.2 Extent of the Tribunal's power: *Re WFM*

As reported in last year's Annual Report,<sup>128</sup> in September 2006 the Public Advocate was granted leave to intervene in proceedings before the Tribunal in *Re WFM*.<sup>129</sup> The issue involved the role of the Tribunal in the guardianship regime.

Usually, the Tribunal appoints guardians and administrators to make decisions about matters.<sup>130</sup> On occasions it gives advice, directions and recommendations.<sup>131</sup> In *Re WFM*, the Tribunal accepted that it may give a binding direction to a guardian or administrator, effectively making the decision about a matter for which the guardian or administrator is appointed. This includes decisions about where an adult lives, about their health care, and about how their money is to be invested. When the Tribunal gives such a direction, its decision about the particular matter is imposed on the decision-maker, who will be obliged to carry out the Tribunal's decision, rather than make the decision themselves.

The Public Advocate's submissions were consistent with the Tribunal's decision.

### Comment

This decision makes it clear that people other than the appointed guardian (for example, family members or others in the adult's support network) may ask the Tribunal to make the decision about a matter. For example, this might occur in circumstances where the family/friends do not believe that the guardian or administrator is taking all relevant matters into account. In addition, guardians and administrators can ask the Tribunal to make the decision about a matter where they are unsure what decision to make.

In a subsequent Tribunal proceeding, *Re WAC*,<sup>132</sup> the Tribunal considered an application from a service provider who was seeking directions with regard to an accommodation decision for which the appointed guardian had power. The appointed guardian had made a decision to place the adult in a secured residential facility; the service provider believed this to be unnecessary and harmful for the adult. The Tribunal decided that the placement was not appropriate, and made directions that the guardian maintain the adult's current place of residence in the community.

### 12.3 Restrictive practices and the interface between the mental health and guardianship regimes: *Re MLI (no 2)*

Last year's Annual Report reported on an intervention in a proceeding before the Tribunal which considered the power of a guardian to consent to restrictive practices, including seclusion and restraint: *Re MLI*.<sup>133</sup> The Tribunal concluded that a guardian could, in some circumstances, consent to treatment that includes restrictive practices for the treatment of a 'mental condition' provided that:

- this is carried out at the direction, or under the supervision, of a health provider

- it complies with the General Principles and the Health Care Principle of the GAA
- it is the least restrictive option available
- it is in the person's overall best interests
- it is consistent with the adult's proper care and protection

and

- it is necessary to maintain and promote the adult's health and well-being.

Subsequently, review of the appointment of the guardian for the adult has occurred in the Tribunal. The Public Advocate intervened in the review proceeding. The published reasons for decision are available as *Re MLI (No 2)*.<sup>134</sup> At the time of the hearing, the adult had become a forensic patient under the *Mental Health Act 2000*, and remained detained and secluded in a facility run by Disability Services Queensland which had been declared part of an authorised mental health service.<sup>135</sup> As a result, detention of the adult was then authorised under the *Mental Health Act 2000*.

In its reasons for decision, the Tribunal stated:

*[26] MLI's Forensic Order has only been in place for a few months prior to this review. His behaviours are very complex. While a collaborative approach is being undertaken by all his decision makers and carers, the interface between mental health issues and other health issues that potentially may involve restrictive practices and behaviour management is not clearly defined because of the complexity of MLI's issues. A short order, in line with the behaviour management protocol that exists between the Tribunal and the Adult Guardian is considered prudent by the Tribunal at this review to allow time*

*to confirm if there are restrictive practices around MLI that are outside the ambit of the Forensic Order.*<sup>136</sup>

The relevant systemic issues cannot be discussed further here, as this would amount to publishing of information about the proceeding which has not been authorised by the Tribunal. However, it is hoped that other work underway by Government may address issues about the approval of restrictive practices and the publication of information about Tribunal proceedings.<sup>137</sup>



# ADVOCACY ACTIVITIES

PART THREE: Research

## 13. Research Partnerships

Research Project	2001-02	2002-03	2002-03	2004-05	2005-06	2006-07
An integrative model of active ageing	\$10,000				\$5,000	
The management of the financial assets of older people		\$4,545		\$5,000		
Journeys of Exclusion			\$4,545			
Housing and support needs of people with a mental illness				\$5,000		
Post discharge care of high risk psychiatric patients					\$5,000	
Funding and service options						\$5,000
People with an impaired decision-making capacity and chronic homelessness						\$5,000

### 13.1 An integrative model of active ageing

Nature of Research:	Australian Research Council (ARC) Linkage Grant
Lead researcher:	Centre for Social Change Research, Queensland University of Technology
Research Partners:	Endeavour Office of the Public Advocate- Queensland Office of the Public Advocate- Victoria Queensland Department of Housing Queensland Aged and Disability Advocacy Inc.

This project considered issues for adults with lifelong disability as they age. The purposes of the project were to:

- document the lived experiences of older people with an intellectual disability, their family and support providers
- how ageing for this group is conceptualised by different stakeholders
- to identify key issues to inform the development of an active ageing framework.

The researchers' report, *Developing an integrative active ageing model for policy makers and service providers to support older people with lifelong intellectual disability*, has been finalised. In it the researchers make several recommendations to achieve active ageing for this group. The recommendations are supported by an extensive

list of actions which operationalise these recommendations.

Key findings include:

- the need to educate the community about active ageing
- people being supported to be actively involved in stimulating and meaningful activities
- the need to feel secure about having their emotional and future needs met, including congenial living arrangements with satisfying relationships and support to maintain existing relationships.

During 2008 the researchers will continue to present their findings in academic and industry forums. At the date of writing, the report is not publicly available but is expected to be available in 2008.

### 13.2 Journeys of Exclusion

Lead Researchers: Community Living Program  
At Risk Research and Outreach  
Service (ARROS)

Research Partners: Office of the Public Advocate-  
Queensland  
Community Resource Unit

The research report *Journeys of Exclusion*<sup>138</sup> was launched in February 2007. It considered the transition to adulthood for 43 young people with intellectual disability who had exited care of the State. The report found that the participants' experience was one of 'extensive, pervasive' disadvantage including victimisation and abuse, exploitation, isolation and poverty. This was typified by unemployment, homelessness, substance abuse,

being victims of violent crime, and their own children subject to child protection orders.

Two clear issues emerging from the research were the vulnerability of the young people and the lack of adequate support once they leave care. The report called on a review of the funding available for people with disability exiting care of the State when they turn 18, and recommended setting up a specialist agency to help them make the transition from foster care to independent living.

The Community Living Program is planning a public workshop in 2008 to further explore what a detailed response to the issues raised in *Journeys of Exclusion* would look like.

### 13.3 Housing and support needs of people with a mental illness

Lead Researchers: Department of Housing

Research Partners: Queensland Health  
Office of the Public Advocate-  
Queensland  
Disability Services Queensland

The purpose of this research is to identify the characteristics of housing provision and associated supports that contribute to the recovery of people with a mental illness or psychiatric disability by way of literature research. The research aims to inform innovative and flexible housing solutions and identify tangible steps that might be undertaken by the Queensland Government to best meet their needs.

After some initial delays in progressing the research, the project is now underway, with research specifications about to be finalised.

### 13.4 Post-discharge care for mental health patients at risk of suicide

Lead Researchers:	Australian Institute for Suicide Research and Prevention (AISRAP), Griffith University.
Research Partners:	Queensland Health (Gold Coast Integrated Mental Health Service) Lifeline (Gold Coast) Office of the Public Advocate-Queensland

The Office of the Public Advocate is an associate research partner in a project led by AISRAP on post-discharge care and support for high-risk psychiatric patients. The objective of this controlled trial study is to implement and evaluate an Intensive Case Management (ICM) model of treatment for people discharged from inpatient psychiatric care who have been at risk of suicide, given their heightened vulnerability to suicide following discharge. ICM treatment is compared with Treatment As Usual (TAU), which refers to the treatment which patients commonly receive following discharge. Initial research findings reported last year were very positive, including a decrease in self-harming behaviours and suicidal ideation compared to TAU.

This year the researchers used a larger sample to check the reliability of those initial results in a 'real world' setting, located on the Gold Coast. The researchers indicate that the ICM model of care is a more effective, low cost service which provides positive outcomes for people in terms of quality of life and satisfaction with psychiatric care, compared to TAU. As discussed, the results show that this intervention assists people in the vulnerable period of suicidal risk after their immediate release from psychiatric inpatient care.

The researchers expect to publish their results in 2008.

### 13.5 Homelessness and impaired capacity

Research partners:	Office of the Public Advocate-Queensland Micah Projects Inc. Griffith University
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In 2005, the Queensland Government announced a 4-year strategy: *Responding to Homelessness*. While this strategy has made a number of significant gains through the creation of new services, accommodation and linkages, it has not responded adequately to the specific needs of other groups of vulnerable people who experience chronic homelessness: in particular, those whose inability to escape the cycle of homelessness is a result of other, and often multiple, complex issues.

Despite current best practice interventions, they are frequent and repeated users of homelessness and associated services.

Currently the research partners are scoping the topic and a working group auspiced by the Office and Micah Projects Inc has been formed comprising community and Government stakeholders. More details about this work may be found at Section 3.2.

### 13.6 Funding and service options for people with disabilities

Last year's Annual Report identified a need for comprehensive research to be undertaken to identify and evaluate service and funding models in use worldwide, develop other possible models and make recommendations for models that might be feasible in the Queensland context.

During the year, the Public Advocate convened a meeting for representatives from key departmental/statutory agencies and non-government agencies and advocacy bodies, with prospective researchers from Griffith University. The proposed research project was considered, discussed and refined. Subsequently, the formal proposal has been finalised. The proposed research represents an opportunity to closely consider options which may enhance the lives of vulnerable adults.

This Office is committed to working in close partnership with a lead group of agencies to progress the research. The Office has made an initial contribution of research funds to launch this research and is optimistic that other agencies will also wish to financially support and partner the research. Some agencies have already indicated a desire to do so.



# ADVOCACY ACTIVITIES

PART FOUR: The Public Advocate's Office

## 14.1 Organisational structure

The Public Advocate is currently supported by a Principal Research Officer, two Senior Research Officers plus one full time Administration Officer and all positions are permanently filled.

The significant contributions of Senior Research Officers Beverley Funnell and Kathleen Dare are acknowledged. Beverley was the first staff member employed by the Office when it was established in 2000. She had a substantial role in establishing the direction of the Office, and made important contributions to the areas of intellectual disability, challenging behaviour and ageing. Beverley has left to embrace new challenges. Kathleen worked with the Office during 2006-07, and contributed to advocacy primarily in the areas of ageing and mental health.

The office also acknowledges Mena Ward, a former administrative officer, whose photo appears on the front cover and throughout this report. Mena's contribution to the work of the Office was greatly appreciated.

## 14.2 Operational goal

The Office's Strategic Plan 2007-10 includes the following goal: *To conduct systems advocacy effectively and efficiently.*

In support of this objective the Office has:

- developed an individual work plan for each staff member
- developed an individual development plan for each staff member
- conducted regular team meetings for work planning and peer review purposes
- maintained its files on the RecFind records systems

- developed partnerships in relation to research and other project-based work
- devised and implemented an effective library system.

## 14.3 Speeches, presentations and facilitations

The Public Advocate and Staff delivered or contributed to a range of speeches, presentations and facilitated discussions about a variety of issues, some of these are reported throughout this report.

Others included:

- *'Challenging Behaviour': Challenging the ability of systems to respond* delivered at the Australian Guardianship and Administration Committee Conference
- *The Impact of Legislation on the Lives of People with Disability: empowering or disempowering* delivered to students at QUT Carseldine
- Facilitation at the CRU Conference *Myth Busting and Momentum Building*
- *Elder Abuse and Banking* delivered to students at Griffith University
- Presentation to Red Brook Centre, Mental Health Consumer Service.
- *Issues for People with Impaired Capacity in the Criminal Justice System*, Protect All Children Today conference
- *The Role of the Public Advocate* delivered at Endeavour Council Dinner
- Presentation on the The Office of the Public Advocate delivered to the Department of Housing Board of Management
- Presentation to Sunshine Place, Mental Health Consumer Service

- *Issues of Aging, Incapacity and Substitute Decision-Making* delivered at the Consumer Network Meeting
- *Systemic Issues in Mental Health, A Place To Belong* Guiding Group
- *Elder Abuse and Elder Law – A critical examination* delivered at the Becoming Critical – Elder Law Conference of the Queensland Law Society
- *Spotlight on Elder Law* delivered at the State Legal Educators and Young Lawyers Conference of the Queensland Law Society
- *Principles for Withdrawing and Withholding Life Sustaining Measures: a case for legislative reform* delivered at the Joint 11th Conference Australasian Bioethics Association and 10th Conference Australian and New Zealand Institute of Health, Law and Ethics, and to staff of the Office of the Adult Guardian
- *Comment & Observations to Queensland Mental Health Planning Workshop* delivered at Mental Health Planning Day
- *Helping Systems Recover* delivered at the Queensland Alliance Conference
- Community Connection Training For Disability Services Queensland Community Resource Officers & Support Facilitators, conducted by A Place To Belong
- *People's Journeys in Recovery, A Place To Belong* Recovery Forum
- *Addressing Elder Abuse and Impaired Capacity in Cultural and Linguistically Diverse Communities* delivered at the Prevention of Elder Abuse in Culturally and Linguistically Diverse Communities Taskforce
- *Vulnerable Adults and Banking – The case for greater protections in banking practices*

delivered at the Aged Consumer Network Meeting

- *Issues of Aging, Incapacity and Substitute Decision-Making*, delivered to QUT students
- Facilitation at the QCOSS Conference: *Poverty, Prosperity and Progress: Ensuring the Inclusion of all Queenslanders*
- *Advance Refusals of Life-Sustaining Medical Treatment* delivered at the 16th World Congress on Medical Law and the Australian Guardianship and Administration Committee Conference. (This presentation was based on the article at endnote 33, and was made by Professor Lindy Willmott on behalf of the authors.)

## 14.4 Staff training and development

The Office has a strong commitment to the training and professional development of staff. During the course of the year staff undertook the following training:

- Professional Development Plan and Organisational Capability Framework
- Caretaker Conventions
- RedDot training
- SAP & MRT Training
- Budget Preparation Training
- Indigenous Cultural Awareness Program
- Financial Administration Training
- Introduction to QPS Financial Management
- Motivational Interviewing
- The Art of Influence
- Developmental Disabilities and Dementia Assessment Care and Planning Issues

- Community and Specialist Services Autism Seminar
- The Policy Process.

## 14.5 Consultants

Donna McDonald was contracted to assist the Office in writing a discussion paper:

- *In Sickness and in Health.*

## 14.6 Financial summary

Funding for the Office is appropriated from the Queensland Government as part of the Department of Justice and Attorney-General's appropriation. The Director-General of the Department of Justice and Attorney-General is the Accountable Officer pursuant to the *Financial Administration and Audit Act 1977*.

The full financial details relating to the operations of the Office are reported in the Annual Report of the Department of Justice and Attorney-General for 2006-07.

A summary is provided below of expenditure for the 2006-07 financial year.

Expenditure Items	\$ 000
Employee Related Expenses	465
Supplies and Services	143
Grants	10
Depreciation, Amortisation & Deferred Maintenance	2
<b>TOTAL</b>	<b>620</b>



# ADVOCACY ACTIVITIES

PART FIVE: Appendices

## Appendix 1

### The General Principles and the Health Care Principle

All the work of the Office of the Public Advocate is underpinned by the General Principles and the Health Care Principle. Any person or entity who performs a function under the *Guardianship and Administration Act 2000*, must apply the general principles.<sup>139</sup>

#### General Principles – *Guardianship and Administration Act 2000* Schedule 1 Part 1

##### 1. Presumption of capacity

An adult is presumed to have capacity for a matter.

##### 2. Same human rights

- 1) The right of all adults to the same basic human rights regardless of a particular adult's capacity must be recognised and taken into account.
- 2) The importance of empowering an adult to exercise the adult's basic human rights must also be recognised and taken into account.

##### 3. Individual value

An adult's right to respect for his or her human worth and dignity as an individual must be recognised and taken into account.

##### 4. Valued role as member of society

- 1) An adult's right to be a valued member of society must be recognised and taken into account.
- 2) Accordingly, the importance of encouraging and supporting an adult to perform social roles valued in society must be taken into account.

##### 5. Participation in community life

The importance of encouraging and supporting an adult to live a life in the general community, and to take part in activities enjoyed by the general community, must be taken into account.

##### 6. Encouragement of self-reliance

The importance of encouraging and supporting an adult to achieve the adult's maximum physical, social, emotional and intellectual potential, and to become as self-reliant as practicable, must be taken into account.

##### 7. Maximum participation, minimal limitations and substituted judgment

- 1) An adult's right to participate, to the greatest extent practicable, in decisions affecting the adult's life, including the development of policies, programs and services for people with impaired capacity for a matter, must be recognised and taken into account.
- 2) Also, the importance of preserving, to the greatest extent practicable, an adult's right to make his or her own decisions must be taken into account.
- 3) So, for example—
  - (a) the adult must be given any necessary support, and access to information, to enable the adult to participate in decisions affecting the adult's life; and
  - (b) to the greatest extent practicable, for exercising power for a matter for the adult, the adult's views and wishes are to be sought and taken into account; and

(c) a person or other entity in performing a function or exercising a power under this Act must do so in the way least restrictive of the adult's rights.

4) Also, the principle of substituted judgment must be used so that if, from the adult's previous actions, it is reasonably practicable to work out what the adult's views and wishes would be, a person or other entity in performing a function or exercising a power under this Act must take into account what the person or other entity considers would be the adult's views and wishes.

5) However, a person or other entity in performing a function or exercising a power under this Act must do so in a way consistent with the adult's proper care and protection.

6) Views and wishes may be expressed orally, in writing or in another way, including, for example, by conduct.

#### **8. Maintenance of existing supportive relationships**

The importance of maintaining an adult's existing supportive relationships must be taken into account.

#### **9. Maintenance of environment and values**

1) The importance of maintaining an adult's cultural and linguistic environment, and set of values (including any religious beliefs), must be taken into account.

2) For an adult who is a member of an Aboriginal community or a Torres Strait Islander, this means the importance of maintaining the adult's Aboriginal or Torres Strait Islander cultural and linguistic environment, and set of values (including

Aboriginal tradition or Island custom) must be taken into account.

#### **10. Appropriate to circumstances**

Power for a matter should be exercised by a guardian or administrator for an adult in a way that is appropriate to the adult's characteristics and needs.

#### **11. Confidentiality**

An adult's right to confidentiality of information about the adult must be recognised and taken into account.

#### *General Principles – Guardianship and Administration Act 2000 Schedule 1 Part 2*

1) The **health care principle** means power for a health matter, or special health matter, for an adult should be exercised by a guardian, the adult guardian, the tribunal, or for a matter relating to prescribed special health care, another entity-

(a) in the way least restrictive of the adult's rights; and

(b) only if the exercise of the power –

(i) is necessary and appropriate to maintain or promote the adult's health and wellbeing; or

(ii) is, in all the circumstances, in the adult's best interests.

*Example of exercising power in the way least restrictive of the adult's rights –*

If there is a choice between a more or less intrusive way of meeting an identified need, the less intrusive way should be adopted.

- 2) In deciding whether the exercise of a power is appropriate, the guardian, the adult guardian, tribunal or other entity must, to the greatest extent practicable –
  - (a) seek the adult's views and wishes and take them into account; and
  - (b) take the information given by the adult's health provider into account.
- 3) The adult's views and wishes may be expressed –
  - (a) orally; or
  - (b) in writing, for example, in an advance health directive; or
  - (c) in another way, including, for example, by conduct.
- 4) The health care principle does not affect any right an adult has to refuse health care.
- 5) In deciding whether to consent to special health care for an adult, the tribunal or other entity must, to the greatest extent practicable, seek the views of the following person and take them into account–
  - (a) a guardian appointed by the tribunal for the adult;
  - (b) if there is no guardian mentioned in paragraph (a), an attorney for a health matter appointed by the adult;
  - (c) if there is no guardian or attorney mentioned in paragraph (a) or (b), the statutory health attorney for the adult.

## Appendix 2

### Strategic Plan 2007-10

Adults with impaired decision-making capacity live with heightened vulnerability.

### Our Role

The *Guardianship and Administration Act 2000* gives the Public Advocate the function of systemic advocacy for:

- Promoting and protecting the rights of adults with impaired capacity 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
- Monitoring and reviewing the delivery of services and facilities to the adults.

The role of the Public Advocate is to influence change rather than make it.

### Our Vision

Our vision is for a society with systems that serve people well by valuing them, upholding their rights, providing for their needs, supporting their participation in everyday life and protecting them from abuse and neglect.

### Our Guiding Principles

Our advocacy will affirm and reflect the General Principles and Health Care Principle set out in the *Guardianship and Administration Act 2000*.

### Our Challenges

The challenge is to:

- Identify key systemic issues
- Prioritise issues so as to use our limited resources effectively and efficiently
- Develop and maintain constructive relationships with Government and non-government stakeholders
- Be recognised for our relevance and effectiveness
- Ensure our systems advocacy is grounded in the lived experience of people with impaired decision-making capacity.

Our Goals	Our Strategies	Our Performance Indicators
<b>Goal 1:</b> To independently conduct systems advocacy	1.1 Provide systemic advocacy across Government and non-government organisations 1.2 Use a range of systems advocacy tools 1.3 Produce an Annual Report	Stakeholder feedback received Published submissions and Discussion Papers Participated in conferences Engaged in dialogue, stakeholder forums and informal networks Undertaken interventions Held reference group meetings
<b>Goal 1a:</b> To provide proactive, targeted systems advocacy aimed at improving the lives of adults with impaired capacity for decision-making  <b>Goal 1b:</b> To provide responsive advocacy with respect to systemic issues as they arise, aimed at improving the lives of adults with impaired capacity for decision-making	1.4 Review the framework and criteria for prioritising activities 1.5 Use key sources of data, agency links, relationships and referrals 1.6 Initiate, identify and promote strategic networks 1.7 Undertake, sponsor and collaborate in relevant research 1.8 Influence development and/or reform of appropriate legislative and service systems 1.9 Influence policy formulation and implementation of Government and non-government agencies 1.10 Encourage service providers to develop appropriate programs and services which protect the adults' rights, interests, and well-being 1.11 Monitor and review services and facilities	
<b>Goal 2:</b> To conduct systems advocacy effectively and efficiently	2.1 Review the Office's communication strategy 2.2 Routinely invite critical feedback 2.3 Manage limited resources to maximise influence and impact	Stakeholder feedback received

## Appendix 3

### Membership of the Public Advocate's Reference Group 2006-07

The Office of the Public Advocate holds regular reference group meetings to develop and maintain constructive relationships with stakeholders, obtain critical feedback on its performance, and seek input as to how it might direct its limited resources. The reference group meeting was held in May 2007.

The reference group comprised individuals who have experience of the broad disability field and included senior representatives from Government agencies and statutory bodies, community organisations, academia, advocacy organisations and service providers.

The Office thanks the following people for their participation:

Mr Allan Pidgeon

Ms Marj Bloor

Ms Janette Archibald

Ms Catherine Baldwin

Ms Pat Cartwright

Prof Lesley Chenoweth

Ms Marie Knox

Mr Kevin Cocks

Ms Valmae Rose

Ms Margaret Deane

Mr John Dickinson

Mr Tim Feely

Mr Terry Ryan

Ms Carolyn Honeywill

Ms Diane Pendergast

Ms Paige Armstrong

Ms Jan Samuels

Ms Penny Beetson

Ms Jane Sherwin

Ms Kay McInnes

Ms Marie Skinner

Ms Michelle Denton

Mr Neal Price

## Appendix 4

### Committees and Working Groups

The Office of the Public Advocate participates in a variety of committees and working groups. During 2006-07 these included the following:

#### *Department of Communities*

- Residential Services Stakeholder Advisory Committee
- Seniors Legal and Support Services Reference Group.

#### *Disability Services Queensland*

- Reference Group on Disability
- Focus group to examine and provide feedback on draft disability legislation
- Disability Service Plans – Evaluation Working Group Sub Committee
- Family Rights Issues Working Group Sub Committee
- Reference Group – Younger People in Residential Aged Care.

#### *Department of Justice and Attorney-General*

- Court diversionary options for people with impaired capacity
- Statutory Officer's Working Group
- Stakeholder Reference Group – Homeless Person's Court Diversion Project
- Queensland Law Reform Committee Reference Group for Guardianship Review
- Reference Group – Disability Services Plan.

#### *National*

- Australian Guardianship and Administration Committee.

#### *Queensland Health*

- Aged Care Consumer Reference Group
- Working group established to consider authorisation of treatment other than for mental illness for forensic patients.

#### *Networks*

- Vulnerable Adults Stakeholder Group
- Boarding House Action Group
- Young People in Aged Care Alliance (Qld)
- Community Care Coalition
- Queensland Aged Care Network
- Australian Network for the Prevention of Elder Abuse Reference Group.

#### *Other*

- Endeavour Family Support and Advocacy Program Reference Group.

## Appendix 5

### Regional Visits

The Office of the Public Advocate is based in Brisbane. Each year the Public Advocate and staff make regional visits, to meet with a range of stakeholders (including community, families, service providers, adults with impaired capacity and Government) to explore systemic issues impacting on vulnerable adults in regional and rural communities.

In 2006-07 the Office of the Public Advocate conducted community consultations in Rockhampton, Mackay, Ayr, Townsville, Cairns and the Gold Coast. In addition, staff from the Office visited Victoria to hold consultation meetings with a number of guardianship and disability agencies with respect to systemic responses to 'challenging behaviour'.

## Endnotes

- 1 Refer to <http://www.publicadvocate.qld.gov.au>.
- 2 Office of the Public Advocate, *Opening Doors to Citizenship* (2004) 15.
- 3 E Emerson et al, "Challenging Behaviour" and Community Services: Who are the People who Challenge the Services? (1988) 16 *Mental Handicap* 16-9. See also E Emerson, *Challenging Behaviour, Analysis and Intervention in People with Severe Intellectual Disabilities* (2001). This definition is also used as the definition of challenging behaviour by Disability Services Queensland Intensive Behaviour Support Teams.
- 4 Office of the Public Advocate, *2005-06 Annual Report* (2006) 21-3 <http://www.publicadvocate.qld.gov.au>.
- 5 Refer to <http://www.publicadvocate.qld.gov.au>.
- 6 <http://www.disability.qld.gov.au/key-projects/growing-stronger/positive-futures/investing-positive-futures/> at 20 October 2007.
- 7 Disability Services Queensland, 'Accommodation Support and Respite Services: Information for the Disability Council of Qld 15 March 2006' (Presentation to the Disability Council of Queensland 15 March 2006).
- 8 s 9.
- 9 Younger People in Nursing Homes National Alliance (March 2007) <http://www.ypinh.org.au/index.php?/content/view/340/104/> at 14 September 2007.
- 10 Senate Standing Committee on Community Affairs, *Funding and operation of the CSTDA* (2007) ix [http://www.aph.gov.au/Senate/committee/clac\\_ctte/cstda/index.htm](http://www.aph.gov.au/Senate/committee/clac_ctte/cstda/index.htm) at 1 October 2007.
- 11 *Disability Services Act 2006* s 215.
- 12 Explanatory note, Disability Services Bill 2005 5-6.
- 13 *Disability Services Act 2006* s 215(4).
- 14 Office of the Public Advocate, *Annual Report 2004-05* (2005) 9; Office of the Public Advocate, *Annual Report 2003-04* (2004) 14; Office of the Public Advocate, *Annual Report 2002-03* (2003) 8. Available at <http://www.publicadvocate.qld.gov.au>.
- 15 Refer to <http://www.disability.qld.gov.au/quality/standards/index.html>.
- 16 Refer to <http://www.communities.qld.gov.au>.
- 17 Early intervention, day services, and accommodation support initiatives are designed to enhance service delivery. The asset acquisition/replacement, training for the disability services sector, workforce development and organisational planning initiatives are designed to strengthen infrastructure and capacity.
- 18 For example, Office of the Public Advocate, *Annual Report 2004-05* (2005) 22-3 <http://www.publicadvocate.qld.gov.au>.
- 19 s 11.
- 20 s 14.
- 21 s 15.
- 22 s 3.
- 23 Complaints, Compliance Investigations and Misconduct Prevention Branch, comprised of the Compliance Investigation Unit and the Complaints and Prevention Unit.
- 24 The guardianship regime comprises the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*.
- 25 Refer to the General Principles of the *Guardianship and Administration Act 2000* sch 1 pt 1.
- 26 Queensland Law Reform Commission, 'Confidentiality in the Guardianship System: Public Justice, Private Lives' (Working Paper no 60, 2006).
- 27 Refer to <http://www.qlrc.qld.gov.au/publications.htm>.
- 28 Refer to <http://www.publicadvocate.qld.gov.au>.
- 29 [2006] QGAAT 54. Refer to the Australasian Legal Information Institute <http://www.austlii.edu.au>.
- 30 *Guardianship and Administration Act 2000* ss 62-64, 79.
- 31 The *Mental Health Act 2000* provides, for example, for some people to receive treatment for their mental illness without consent: ss 12, 108, 517.
- 32 *Guardianship and Administration Act 2000* ss 65-74, 62-63, 79 and *Powers of Attorney Act 1998*.
- 33 For example, Lindy Willmott, Dr Ben White, and Michelle Howard, 'Refusing Advance Refusals: Advance Directives and Life-Sustaining Medical Treatment' (2006) 30(1) *Melbourne University Law Review* 211 <http://www.austlii.edu.au/au/journals/MULR/2006/7.html>.
- 34 <http://www.justice.qld.gov.au/guardian/gaat/factsheet05.htm> at 16 October 2007.
- 35 The subject of the paper was chosen and researched following consideration of an Issues Paper released in February 2005, by Dr Ben White and (then) Associate Professor Lindy Willmott of Queensland University of Technology, *Rethinking Life-Sustaining Measures: Questions for Queensland* (2005). Dr White and Associate Professor Willmott sought submissions to their Issues Paper by 30 May 2005. A formal submission was made by the current Public Advocate in her personal capacity.
- 36 Refer to <http://www.publicadvocate.qld.gov.au>.
- 37 Michelle Howard, 'Principles for substituted Decision-making about withdrawing and withholding life-sustaining measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166.
- 38 A McCawley, C Tilse, J Wilson, L Rosenman and D Setterlund, 'Access to Assets: Older People with Impaired Capacity and Financial Abuse' (2006) 8(1) *Journal of Adult Protection* 20.
- 39 Refer to <http://www.lsc.qld.gov.au/projects/3scenario.htm#2>.
- 40 The Research Project is entitled, *Improving Service Provision by Legal Practitioners to Clients in Relation to Enduring Powers of Attorney and Advance Health Directives* and is being conducted by Professor Lindy Willmott and Dr Ben White. At this stage, some results of the research are reported in Lindy Willmott and Liza Windle, 'Witnessing Enduring Powers of Attorney-Emperical Research' (2007) 27(5) *Queensland Lawyer* 238.

- 41 Miloon Kothari, *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living* UN Doc A/HRC/4/18/Add.2 (2007).
- 42 For example, in one case a man was dropped off at a busy public health service, but did not know how to approach the front desk to seek help and so missed his appointment. He sat there for a day and came home without being seen; he needed considerable support before he would agree to return.
- 43 p. 50.
- 44 Section 3 of the *Disability Services Act 2006* states that: *Services should be designed and implemented to ensure people with a disability have access to necessary independent advocacy support so they can participate adequately in decision making about the services they receive.*
- 45 Primary homelessness refers to people without conventional accommodation (living on the streets, in deserted buildings, railway carriages, under bridges etc). Secondary homelessness refers to people moving between various forms of temporary shelter (including friends and relatives, youth refuges, night shelters, boarding houses, hostels and other forms of emergency accommodation).
- 46 Community Living Association, *Journeys of Exclusion* (2006) <<http://www.communityliving.org.au>>.
- 47 Office of the Public Advocate, 'The Challenge of Inclusion: People Labelled with "Challenging Behaviour" and the Struggle to Belong' (Speech delivered at the Community Resource Unit Forum 2005) <<http://www.publicadvocate.qld.gov.au>>.
- 48 For example, when a boarding house is re-badged as a hotel, permanent residents are required to move out periodically to satisfy the maximum stay requirements. Information from the sector indicates that this forces residents temporarily onto the street or into homeless shelters.
- 49 p. 30.
- 50 Office of the Public Advocate, *2001-02 Annual Report* (2002) 37 <<http://www.publicadvocate.qld.gov.au>>.
- 51 Refer to Office of the Public Advocate, *Housing Design For All: Universal Housing Design in Queensland* (2005) <<http://www.publicadvocate.qld.gov.au>>.
- 52 Queensland Health, 'Promoting Balance in the Forensic Mental Health System: Final Report December 2006' (2006) (Review of the Queensland Mental Health Act 2000) 1.
- 53 The full text of the recommendations may be found at <<http://reviewmha.com.au/>>.
- 54 *Mental Health Act 2000* ss 288(2), 289, 516.
- 55 *Mental Health Act 2000* s 517.
- 56 *Mental Health Act 2000* sch 2.
- 57 *Mental Health Act 2000* s 12(2)(h).
- 58 National Mental Health Working Group, *National Safety Priorities in Mental Health: A National Plan for Reducing Harm* (2005), Health Priorities and Suicide Prevention Branch, Department of Health and Ageing, Commonwealth of Australia <<http://www.health.gov.au/internet/wcms/Publishing.nsf/Content/mental-pubs>> at 20 October 2007.
- 59 p. 50.
- 60 Office of the Public Advocate, *Preventing Suicide Deaths of Queenslanders with a Mental Illness* (2007) <<http://www.publicadvocate.qld.gov.au>>.
- 61 Coroner Previtera, *In the Matter of an Inquest into the Cause and Matter of Death of Charles Edward Barlow*, Patrick Douglas Lusk and Emily Jane Baggott (2006) Office of the State Coroner <<http://www.justice.qld.gov.au/courts/coroner/findings/barlow151206.htm>> at 8 October 2007.
- 62 <<http://www.health.qld.gov.au/patientsafety/mh/webpages/mhserec.asp>> at 8 October 2007.
- 63 Office of the Public Advocate, *Preventing Suicide Deaths of Queenslanders with a Mental Illness* (2007) <<http://www.publicadvocate.qld.gov.au>>.
- 64 Queensland Alliance, *Consumer Voice Project Report* (2007).
- 65 Office of the Public Advocate, *Annual Report 2003-04*, (2004) 32 <<http://www.publicadvocate.qld.gov.au>>.
- 66 p. 32.
- 67 For example, L Finn, (2005) *Mutual Help Groups and Psychological Wellbeing: A Study of GROW, a Community Mental Health Organisation* (Doctoral Dissertation, Curtin University of Technology, Western Australia 2005).
- 68 N Lennox et al, 'Effects of a Comprehensive Health Assessment Programme for Australian Adults with Intellectual Disability: A Cluster Randomized Trial' (2007) 36(1) *International Journal of Epidemiology* 139-46.
- 69 Refer to <<http://www.health.gov.au/internet/wcms/publishing.nsf/Content/Enhanced+Primary+Care+Program-1>>.
- 70 Section 5.5.15, page 47.
- 71 Refer to <<http://www.health.qld.gov.au/consumerhlth/default.asp>> at 20 October 2007.
- 72 Michelle Howard, 'Principles for Substituted Decision-Making about Withdrawing and Withholding Life-Sustaining Measures in Queensland: A Case for Legislative Reform' (2006) 6(2) *Queensland University of Technology Law and Justice Journal* 166.
- 73 For example: Phillip French, *Disabled Justice: People with Disability in the Criminal Justice System* (2007); Tanya Walsh, *INCorrections II: Correcting Government* (2005).
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- 81 Dr Edward Heffernan, *Statement on Prison Mental Health* (9 May 2007) Office of the State Coroner.
- 82 National Mental Health Strategy, *National Statement of Principles for Forensic Mental Health* (2002).

- 83 Queensland Law Reform Commission, (2007) *Confidentiality in the Guardianship System: Public Justice, Private Lives* [8.532-4].
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- 85 For example: *Guardianship and Administration Act 2000* sch 1; *Powers of Attorney Act 1998* sch 1; United Nations Ad Hoc Committee on a Comprehensive and Integral International Convention on the Promotion and Protection of the Rights and Dignity of Persons with Disabilities, *Draft Report on its Eighth Session* A/AC.265/2006/L.6 (2006); United Nations, *Declaration on the Rights of the Disabled* (1975) General Assembly Resolution 3447 of 9 December 1975.
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- 107 Refer to <<http://www.aph.gov.au/house/committee/laca/olderpeople/report.htm>> at 25 September 2005.
- 108 Refer to <<http://www.aph.gov.au/house/committee/laca/olderpeople/report.htm>> at 25 September 2005.
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- 111 Office of the Public Advocate, *Annual Report 2005-06* (2006) 41 <<http://www.publicadvocate.qld.gov.au>>.
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- 113 Office of the Public Advocate – Western Australia, *Care And Respect: Project to Research Elder Abuse in Culturally and Linguistically Diverse Communities* (2006) 11.
- 114 *Ibid.* p. 7.
- 115 Australian Bureau of Statistics, *4102.0 – Australian Social Trends, 2002 Population Composition: Older Overseas-Born Australians* (2002).
- 116 *Ibid.* p. 11.
- 117 The Tribunal's reasons for decision in relation to the referral to the Supreme Court are reported as *Re TAD* [2007] QGAAT 43. Refer to Australasian Legal Information Institute <<http://www.austlii.edu.au>>.
- 118 *Guardianship and Administration Act 2000* s 48 provides that, if the Tribunal so orders, an administrator who carries on a business of administrations is entitled to remuneration. Remuneration may not be more than the commission payable to a trustee company under the *Trustee Companies Act 1968* if the trustee company were administrator for the adult. The section does not affect the right of the trustee company to remuneration or commission under another Act: s 48(3).
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- 120 Refer to Coroner Previtera, *In the Matter of an Inquest into the Cause and Matter of Death of Charles Edward Barlow, Patrick Douglas Lusk and Emily Jane Baggott* (2006) Office of the

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- 122 Refer to Coroner Barnes, *Inquest into the Death of Sparka Isarva Huntington aka James Philip Huntington* (2007) Office of the State Coroner <<http://www.justice.qld.gov.au/courts/coroner/findings.htm>>.
- 123 Orders of this nature are made before reasons for decision are made available publicly at <<http://www.austlii.edu.au>>.
- 124 *Guardianship and Administration Act 2000* ss 112, 249.
- 125 *Re TAD* [2007] QGAAT 43. Refer to Australasian Legal Information Institute <<http://www.austlii.edu.au>>.
- 126 For example, an administrator must keep his/her property separate from the adult's property: *Guardianship and Administration Act 2000* s 50. On the other hand, a trustee is vested with legal title in the property of the trust.
- 127 *Guardianship and Administration Act 2000* s 48; *Trustee Companies Act 1968* ss 41(1), 41(7), 45; and *Trusts Act 1973* s 101.
- 128 Office of the Public Advocate, *Annual Report 2005-06* (2006) 16 <<http://www.publicadvocate.qld.gov.au>>.
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- 133 [2006] QGAAT 31. Reasons for decision available at Australasian Legal Information Institute <<http://www.austlii.edu.au>>. Commentary in Office of the Public Advocate, *Annual Report 2005-06* (2006) 51-4 <<http://www.publicadvocate.qld.gov.au>>.
- 134 [2006] QGAAT 70. Reasons for decision available at Australasian Legal Information Institute <<http://www.austlii.edu.au>>.
- 135 Office of the Public Advocate, *Annual Report 2005-06* (2006) 36 (regarding concerns expressed about the re-gazetting of 'The Park – Centre for Mental Health' to include two units of Disability Services Queensland's Basil-Stafford residential facility). Refer to <<http://www.publicadvocate.qld.gov.au>>.
- 136 [2006] QGAAT 70 [26]. This may be viewed at <<http://www.austlii.edu.au/au/cases/qld/QGAAT/>>.
- 137 In particular, the implementation of the Carter Review (Section 1.3 of this Report), the Government's Working Group to examine the authorisation of treatment/consent to health care for forensic mental health patients (Section 4.2 of this Report); and the ongoing review of the guardianship legislation by the Queensland Law Reform Commission (Section 2.1 of this Report).
- 138 The report is available at <[http://www.qcoss.org.au/upload/1974\\_JourneysOfExclusion.pdf](http://www.qcoss.org.au/upload/1974_JourneysOfExclusion.pdf)>.
- 139 *Guardianship and Administration Act 2000* s 11.

## For further information

The Office of the Public Advocate in Queensland has different functions to that of the Public Advocate in other Australian States. The role of the Public Advocate in Queensland is systems advocacy for adults with impaired capacity.

If you would like to find out more about the Office of the Public Advocate in Queensland you can do so by:

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