Systems Advocacy for adults with impaired decision-making capacity

Office of the Public Advocate

Queensland

Annual Report

2007-2008

Office of the
Public Advocate
Queensland Government

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 2008.

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 2007-2008 and a statement of our financial and operational functions for the year.

Yours sincerely

Michelle Howard
Public Advocate – Queensland

31st October 2008

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The Public Advocate's Retrospective 2007-2008

This is my third report on the performance of the Public Advocate's functions for tabling in the Queensland Parliament. Broadly, as Public Advocate, my Office undertakes systems advocacy which promotes and protects the rights and interests of adults with impaired decision-making capacity. It is my hope that the report adequately conveys the breadth and depth of the issues about which advocacy has been undertaken. As noted in previous reports, it cannot hope to record the complete range of the advocacy in the variety of formats and forums in which it occurs.

People with impaired capacity are a significant portion of the population. Each one of us is potentially a member of this group. Twenty percent or one in five people will experience a mental illness during their lifetime. Many people experience an acquired brain injury as a result of a medical condition or a sporting or motor vehicle accident. Statistics suggest that 1.6% of women and 2.2% of men has one. Another 2% of the population is born with an intellectual disability. Currently, some 1% of the population has dementia. As the population ages, the numbers of people with dementia is expected to rise sharply.

If we personally are not affected by one of these circumstances, statistically we can expect that our parents, our partner, our children or friends will be. Bearing these statistics in mind, the issues traversed in this report are of intimate importance to every member of society.

I consider the ultimate aim of the advocacy undertaken by the Public Advocate is to effect real improvements in the day-to-day lives of vulnerable adults with impaired decision-making capacity. While preparing the material for inclusion in this report, it is timely to reflect upon what has changed, or is in the process of change and whether real improvements are evident in the every day lives of the adults. In this context, I am sometimes asked what our advocacy successes have been. As the report is perused, I invite you to consider whether our advocacy has been successful. I will return to this, after considering some developments, together with questions or issues they raise, in the year that has passed since my last report.

Public Advocate Michelle Howard

The year in review

There has been considerable systems reform activity this year impacting on adults with impaired decision-

making capacity. Some selected developments are considered briefly in this retrospective.

International developments

Last year's report noted the historic passing of the UN *Convention on the Rights of Persons with Disabilities* by the General Assembly of the United Nations, and also Australia's signing of it. Australia subsequently ratified the Convention in July 2008, and ratification became effective as of 16 August 2008. Consideration is now being given to introducing domestic law incorporating the Convention.

The Convention articulates contemporary international standards and expectations and accordingly provides important benchmarks, despite the current absence of domestic law incorporating it. The UN Convention arguably can play an important role in the promotion and protection of rights of people with disabilities, although its effects may not be directly obvious in the lives of the adults concerned. It may affect the laws passed around the world, and the service structures established in a myriad of ways.

In Queensland

Significant unmet need for disability funding persists, despite comparatively large budget allocations in more recent years in this historically neglected area. Families struggle to maintain their loved ones with disability with little or no assistance. Funding is often only allocated following a life crisis. What alternative funding and service delivery models could assist to both alleviate unmet need and improve the quality of life of the vulnerable recipients? Research will shortly be concluded by Griffith University following calls by this Office for investigations in this area. It is hoped that the research findings will provide much needed alternatives for consideration by government.

The review of the Queensland guardianship legislation by the Queensland Law Reform Commission (QLRC) has been underway since late 2005. Amendments to the guardianship regime were recently passed by the Queensland Parliament in the Guardianship and Administration and Other Acts Amendment Bill 2008.

The amendments flow from recommendations made in Stage 1 of the review by the QLRC regarding confidentiality in the guardianship regime. The changes increase openness and transparency. The amendments do not incorporate all of the QLRC recommendations and safeguards, but they will improve the system, and provide some additional protections for vulnerable adults who are the subject of the Tribunal's hearings and members of their support networks. On a day-to-day basis, in individual hearings, the lives of the adults concerned and their access to justice will arguably be enhanced.

In a process of reform of the civil and administrative justice system, the Queensland Government has approved an amalgamation of tribunals. Amongst them is the Guardianship and Administration Tribunal (GAAT). This restructuring is in its early stages, but is to be effected by the creation of a Queensland Civil and Administrative Tribunal (QCAT). Does its creation present a threat to the new safeguards regarding confidentiality in the guardianship regime, and more broadly to features of GAAT's operation which are beneficial for the adults? These currently include less formality than many other tribunals, specialist multi-disciplinary tribunal panels, and an extensive regional program to conduct hearings which meet the convenience of the adults concerned.

In every annual report since the Office was created, concerns about the adequacy of the arrangements for adults with intellectual or other cognitive disability and what is known as 'challenging behaviour' have been reported. This year saw the enactment of

amendments to the *Disability Services Act 2006* and the *Guardianship and Administration Act 2000,* which provide for a system mandating that restrictive practices cannot be used for adults receiving Disability Services Queensland (DSQ)-funded or DSQ-provided services without the authorisation of an independent decision-maker. These may only be authorised when prescribed criteria are met.

Ultimately, through this new system, the use of restrictive practices (including detention and seclusion) should be reduced. However, concerns remain about the actual positive improvements the system will achieve for vulnerable adults who are subject to restrictive practices. The system does not apply to all adults whose fundamental freedoms are denied or constrained by restrictive practices, only to those in DSQ-funded and DSQ-provided services.

Also, although the system seeks to reduce the use of restrictive practices, the fact that approval may be sought for use of them may legitimise what have arguably been 'underground' practices, and the incidence of their use may increase. Further, the fact of authorisation by an independent person does not ensure that a particular practice is applied appropriately and in a humane manner. Additionally, the legislation includes immunities from suit for service providers and support staff provided the legislation is complied with. The breadth of the immunities from suit are of concern to this Office. Ultimately, whether the system will deliver a better quality of life for the adults affected remains to be seen.

In the mental health sphere, there has been much sound policy at a national and state level for some years. However, it has not necessarily translated to positive change on the ground for consumers. It is not consistently implemented in mental health services. This year, a new Queensland Government Plan for Mental Health 2007-2017 was launched. Further, some responsibility for mental health transferred from Queensland Health to DSQ. Queensland Health was recently restructured. Amendments to the *Mental Health Act 2000* give the Director of Mental Health additional responsibilities. What is the impact of these changes for consumers? Will more innovative community programs be funded on an ongoing basis? Will the mental health plan be fully implemented? Will there be greater consistency of service delivery across Queensland mental health services?

Nationwide issues

Last year, this Office reported on work being undertaken regarding the chronic homelessness of adults with impaired decision-making capacity. This advocacy has progressed this year. A research project initiated by the Chronic Homelessness and Impaired Capacity Working Group, including this Office, is being conducted by researchers at Griffith University. A successful forum, *Left Out in the Cold,* was held at Griffith University to increase awareness about the issues.

The Office's focus on this issue coincides with the current Commonwealth Government attention to homelessness. The Green Paper on Homelessness, *Which Way Home? A New Approach to Homelessness,* was released in May 2008. Submissions have been made seeking to ensure that issues for chronically homeless adults with impaired decision-making capacity receive adequate consideration. The White Paper is anticipated shortly. Since 2005, the Queensland Government has considered homelessness a priority issue. It is hoped that interest at both levels of government will generate positive outcomes in the daily lives of some of society's most vulnerable people.

However, where this interest leads is uncertain. Earlier in the Commonwealth consultation process, there were some indications that the group of

chronically homeless people with impaired capacity may be considered 'too hard' to help. More recently, there has been specific recognition of the need for 'wrap around' services for people with complex needs. This is encouraging.

People with impaired decision-making capacity have diminished life expectancy when compared to others in the community. They succumb to preventable disease. They benefit less from preventative health initiatives. In general, they have poorer access to health care. As reported in last year's Annual Report, unmet physical health care and dental needs of adults with impaired decision-making capacity have been a priority issue for advocacy. The Office has developed an issues paper about this topic. The Office's Issues Paper, *In Sickness and in Health: addressing the health care needs of adults with a decision-making disability* was launched on 20 October 2008.

The aim is for the Issues Paper to promote greater awareness and act as a catalyst for productive change in the delivery of health and dental care to vulnerable adults, which hopefully increases their life expectancy and quality of life.

The significant degree of interest in reforming the health system generally at a Commonwealth and State level at this time may assist. This has prompted a myriad of opportunities for advocacy regarding health issues; for example, health care rights, health consumer engagement, reform of the health and hospital system, and development of guidelines regarding the treatment of people with profound brain damage.

Will this body of advocacy ultimately lead to change which results in better health care for vulnerable adults? There are many voices calling for reform. Will the needs of all groups of Australians and Queenslanders inform the change, including those with impaired decision-making capacity?

Some final reflections

As perusal of the report indicates, there has been significant activity in areas targeted by this Office for advocacy and, in some circumstances, following sustained advocacy. Sometimes, we can identify circumstances when reform has led to tangible improvements for vulnerable adults. However, there remain many issues of concern regarding arrangements for adults with impaired capacity, even when apparently positive change is occurring.

Positive reform has the potential to be undone through poor implementation, or failure to implement new policy or practice on the ground. In some instances, it remains to be seen whether reform will result in improved life experiences and positive outcomes for the adults in their daily lives. When policy or legislative change has occurred, it may take some time to translate into change in the everyday lives of the adults affected. It is nevertheless a necessary step in effecting what is hoped will be positive change in the daily lives of the adults. In other situations, it remains to be seen whether issues advocated about by the Office will become items for the change agenda.

It is clear that there is abundant interest and activity across many relevant sectors regarding reform of policy, legislation, and service provision and development. The activity is, in some instances, intended to reform systems for people with impaired capacity. In other instances, the changes are contemplated in respect of arrangements for all Queenslanders and Australians, including vulnerable people. The small team at this Office have worked hard to both create and respond to opportunities to advocate about key issues.

I return to the question posed earlier. What are our advocacy successes?

The work of the Public Advocate is to *influence* appropriate change. The Office has no power to make change directly. This understanding must temper reflections about the role that the Office's advocacy plays in reforming systems.

Change rarely happens quickly. Many years of advocacy may precede reform on an issue. When finally it happens, can we claim our advocacy was a success? Advocacy on an issue may have been done by various individuals and/or organisations. Whose advocacy was the cause of the issue being taken up? Perhaps it was the combination of efforts which sparked action?

Rarely will we know for certain the role our advocacy had in generating change. When the change adopted reflects our recommendations on an issue, we may be entitled to reflect that our work played a key role. Equally, when we raise an issue for consideration, and the issue is taken up, and change is effected, our work may have been instrumental. Sometimes we discover much after the event, the effect of advocacy we undertook, sometimes in unexpected and unforseen ways. On relatively few occasions (and then, sometimes only privately) the Office receives direct acknowledgment that our work was instrumental in the change that occurred.

Sometimes we may advocate for a sustained period around an issue without any obvious change. Reform may come years after advocacy began. If considered early in the advocacy process, in the face of no activity, this advocacy has apparently achieved little. Viewed in hindsight at a later time, it could reflect success.

If, despite our best advocacy efforts, not all of the essential ingredients of ideal systems reform are accepted, is this an advocacy failure? I suggest that it is not. There are many ingredients to a reform process. Decisions are made about the way forward in the reform process by a range of stakeholders for a variety of reasons. Governments and other organisations to which the Office advocates make decisions for diverse reasons: sometimes as a matter of political or organisational expediency; as a response to advocacy by diverse stakeholders with competing interests; and/or in response to budgetary constraints.

In summary, despite sustained work across many areas, this Office most often will not know precisely how our advocacy has influenced events. I have come to the conclusion that a systems advocate cannot know fully the extent of its influence. However, in my view, ultimately this is not important.

As the report demonstrates, change is occurring in key areas about which this Office has undertaken sustained advocacy. There is a significant volume of reform occurring, and advocacy which protects the rights and interests of adults with impaired capacity is essential. In my view, it is reasonable to consider that the work of this Office, as articulated in this report, is playing an influential role across the reform agenda.

Systems advocates cannot be concerned about the personal satisfaction that may come from knowing on every occasion precisely the effect their advocacy is having in driving an issue forward. Rather, the staff of the Office and I strive tirelessly, motivated by our shared passion for social justice for people with impaired capacity and in the knowledge that our work is generating a significant effect over time and across systems.

Sadly, the lives of people with impaired capacity are often characterised by deprivation, poverty marginalisation and social exclusion. In the absence of persistent advocacy, their position will often be poorly understood or overlooked. Knowing that we do endeavour diligently, to put forward the best

argument we can in the circumstances to have their rights and interests protected, forms the basis of belief that our advocacy is a very worthwhile enterprise, whether or not at that time, our advocacy is having the desired effect.

Acknowledgments and thanks

During the year, my staff and I have, as always, enjoyed meeting with people with impaired capacity, their families and other supporters, staff from government and non-government agencies from policy and legislative development, service provision and advocacy agencies, as well as Members of Parliament, members of academia, and professionals from many specialist areas. We are grateful for the cooperative and collaborative manner in which we have been able to work with so many of you.

The unwavering dedication of the small staff of the Office speaks for itself, given the variety and volume of work reported in this Annual Report. There have been some personnel changes during this year. Valued and experienced staff move on to new challenges. However, I have been impressed by the energy, expertise and focus which these changes have brought to the Office. I cannot praise the staff, and their vigorous and unstinting efforts for vulnerable people, highly enough.

Michelle Howard
Public Advocate

PART ONE: Major Systems

PARTS ONE, TWO & THREE will report on the advocacy activities of the Office for 2007-2008. 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) T he 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

A diversity of issues are covered under the Disability System. Matters relating to adults with intellectual disability are addressed here, as well as issues regarding adults with acquired brain injury.

1.1 Reform of systems for adults with 'challenging behaviour'

1.1.1 'Challenging behaviour' and restrictive practices

As reported in each Annual Report since the Office's establishment, the Public Advocate has had long-standing concerns about the adequacy 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.[1] 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).[2] In that paper, the Public Advocate identified several systemic issues to be addressed in considering systems reform for this group of vulnerable people. These are set out in summary form in the Office's 2005-2006 Annual Report.[3] The Office's 2006-2007 Annual Report also outlines some of the risks within existing systems for adults considered to have 'challenging behaviour'.[4] For convenience and context, some background information is briefly summarised in the following sections.

1.1.2 Review by the Hon. W Carter QC

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 (the Review). In May 2007, the report, *Challenging Behaviour and Disability: a Targeted Response*[5] (the Carter Report) was released. The Carter Report contains a range of recommendations which are broadly consistent with the submissions made by this Office to the Review.[6] The Government also released its response to the report entitled *Investing in positive futures: response to recommendations* (the Government Response).[7]

1.1.3 The Government Response to the Carter Report

The Government Response was expressed in general terms. However, it appears that the Queensland Government supports most, if not all, of the recommendations in some way.[8] In 2007-2008, Disability Services Queensland (DSQ) made some progress towards enacting the Carter Report recommendations.

1 The definition of 'challenging behaviour' used by Disability Services Queensland 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'.Refer to ‹http://www.disability.qld.gov.au/support-servicesdsq/intensive-behaviour-support.html#what?› at 11 September 2008.

2 Refer to ‹http://www.publicadvocate.qld.gov.au›.

3 Ibid.

4 Ibid.

5 Refer to ‹http://www.disability.qld.gov.au/key-projects/positive-futures/documents/investing-in-positive-futures-full-report.pdf› at 10 September 2008.

6 Refer to the Office of the Public Advocate *Annual Report 2006-2007* (2007) ‹http://www.publicadvocate.qld.gov.au›.

7 Refer to ‹http://www.disability.qld.gov.au/key-projects/growing-stronger/positive-futures/investing-positive-futures/› at 20 October 2007.

8 Refer to ‹http://www.disability.qld.gov.au/key-projects/growing-stronger/positive-futures/› at 10 January 2008.

1.1.3.1 The legislative response

The Carter Report identified that adults who exhibit severely 'challenging behaviour' are frequently subject to restrictive practices without legal authority. In some instances, these practices have been enacted in ways that were inappropriate and abusive. The need for regulation of restrictive practices was evident.

A Consultation Draft of the Disability Services and Other Legislation Amendment Bill 2007 (the Bill) was made available for targeted consultation by DSQ from October 2007. The Bill was passed and amendments to the *Disability Services Act 2006* and *Guardianship and Administration Act 2000* (the amendments) commenced on 1 July 2008. The amendments apply only to adults with an intellectual or cognitive disability who receive disability services provided or funded by DSQ.

The overall aim of the amendments is to:

- drive service improvements to reduce or eliminate the use of restrictive practices;
- promote positive behaviour support;
- reduce the incidence of 'challenging behaviour'; and
- improve the quality of life for adults with an intellectual or cognitive disability.[9]

DSQ-provided and DSQ-funded service providers have until 31 December 2009 to implement all the legislative requirements. Transitional policies and procedures have also been developed by DSQ and are currently in place for use by services.

1.1.3.2 The Centre of Excellence

The Carter Report and the Government Response proposed the development of a Centre of Excellence (the Centre) to lead best practice in supporting people with 'challenging behaviour'.[10] The Queensland Government has committed $10 million over four years to establish the Centre.[11] In January 2008, it was announced that the University of Queensland would partner with DSQ in this venture. The Centre will be located within the University of Queensland on its Ipswich campus. The Office is aware of concerns within the sector that the Centre will be located on the site of a former institution, and within proximity of current institutions (see Section 1.3, for information regarding past practices of institutionalisation and the history of de-institutionalisation). DSQ is currently recruiting for key Centre personnel. At the time of writing, four of the key directors have been recruited.

1.1.3.3 Specialist Response Service

A major component of the Queensland Government's response, the Specialist Response Service (SRS) is being established to provide therapeutic intervention and specialist approaches in behaviour management practices. It will also promote the use of least restrictive alternatives. SRS teams are required to work collaboratively with DSQ-provided and DSQ-funded services.

The Public Advocate is a member of the Implementation Steering Committee for this service, which met for the first time in October 2007.

Recruitment for positions within the SRS is underway, and SRS teams are being established in six regional

9 Refer to Disability Services and Other Legislation Amendment Bill 2008: Explanatory Notes ‹http://www.austlii.edu.au/au/legis/qld/bill_en/gaaaoaab2008510/gaaaoaab2008510.html› at 9 September 2008.

10 The Public Advocate recommended the development of a Centre of Excellence in its submission to the Carter enquiry.

11 Refer to DSQ, *Queensland Centre of Excellence for Behaviour Support: An Integrative Approach to Excellence* (2007) ‹http://www.disability.qld.gov.au/key-projects/positive-futures/documents/centre-prospectus.doc› at 10 September 2008.

areas throughout Queensland, with 'out-posted' teams located in four provincial centres.

1.1.3.4 Mental Health Assessment and Outreach team

The Carter Report recommended that DSQ and Queensland Health form a co-operative and co-ordinated working relationship to undertake multi-disciplinary assessments in relation to the general and psychiatric health of priority service users with 'challenging behaviour'.

In response to this recommendation, a new Mental Health Assessment and Outreach Team has been established within DSQ as part of a collaborative arrangement with Queensland Health. DSQ advises that the Mental Health Assessment and Outreach Team has been providing services since February 2008 through contracted services while the recruitment process is being progressed.

1.1.3.5 Summary of the Government Response

While considerable progress has been made on the Government Response in the last year, much work still needs to be done. The legislation has established a timeframe within which service providers must meet requirements. There is now an urgent need for important aspects of the restrictive practices regime to be in place so that the legislation can be fully implemented.

1.1.4 The Public Advocate's response

The Office participated in reference groups, and consultation and submission processes on the issue of restrictive practices and 'challenging behaviour'. While the Public Advocate considers that the Government Response to the Carter Report is not appropriate in all respects, the Public Advocate indicated a willingness to the Queensland Government in being closely involved in the development and implementation of all service and legislative responses. In 2007-2008, the Public Advocate was invited by DSQ to comment on the Consultation Draft of the Disability Services and Other Legislation Amendments Bill 2007 (the Bill),[12] participate on the Specialist Response Service Steering Committee, and provide feedback on the draft policy and procedures supporting the legislation.

The Public Advocate identified some concerns and made recommendations for systems reform for adults with severely 'challenging behaviour'. Some key issues are outlined here.

1.1.4.1 Human rights protections

Adults with 'challenging behaviour' often live in isolated circumstances, with little external community scrutiny and interaction. They are vulnerable to abuse, neglect and exploitation.

The Carter Report suggested a scheme that would apply to all adults with 'challenging behaviour' for whom restrictive practices are proposed. However, the Government Response applies only to those adults who live in DSQ-funded or DSQ-provided facilities. 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 additional resource implications arise if the scheme applies more broadly to include people who live in the general community. 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

12 A copy of the Public Advocate's submission is located at ‹http://www.publicadvocate.qld.gov.au›.

commissioned by Government to consider the wider implications, and to revise the scheme in due course.

1.1.4.2 Monitoring

Safeguarding the human rights of vulnerable people subject to restrictive practices requires a regime of rigorous and independent monitoring, both at systems and operational levels.

The Public Advocate has consistently maintained that the monitoring mechanisms proposed through consultations on the Carter Report, and later provided by Government, have insufficient protections for the adults. Occasional visits by Community Visitors and SRS team members, and periodic interaction with the Guardianship and Administration Tribunal and any appointed guardian provide some limited safeguards. This Office considers that these safeguards are useful and should remain in place, but that expert, day-to-day monitoring which is independent of the service provider is essential. Current reliance on service providers as the primary monitors of on-the-ground implementation of restrictive practices is inappropriate and inadequate.

Notably, the UN *Convention on the Rights of Persons with Disabilities* provides clear statements about appropriate contemporary international standards about this matter. Article 16 (Freedom from exploitation, violence and abuse) includes the following statement:

3. *In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.*[13]

The Office urged DSQ to ensure that independent and thorough monitoring is integral to the design of the system, and that a rigorous and proactive scheme is developed and articulated. The Public Advocate offered the following options with regards to the monitoring of restrictive practices:

- monitoring by an independent body that promotes best practice in positive behaviour support and restrictive practices,[14] and has the capacity to monitor practice on the ground;
- regular observation and monitoring of restrictive practices by the adult's psychologist and other relevant professionals where appropriate; and
- the assignment of individual advocates to people with a disability who are subject to restrictive practices.[15]

As work continues in system design and implementation, the Public Advocate will take a continuing interest in this important issue, which will have significant implications for vulnerable people.

1.1.4.3 Resourcing the service sector

This Office has asserted that the legislative and service systems must be fully resourced and operational at the commencement of the system. The legislation cannot adequately protect the rights of the adults without the full cooperation of the service sector, and the sector will be unable to provide

13 Article 16(3) of the United Nations General Assembly, *Convention on the Rights of Persons with Disabilities* UN Doc A/61/611 (2006) ‹http://www.un.org/disabilities/convention/conventionfull.shtml› at 10 January 2008.

14 Note, for example, that the Office of the Senior Practitioner in Victoria has been created for the purpose of *ensuring that the rights of people who are subject to restrictive interventions and compulsory treatment are protected, and that appropriate standards in relation to restrictive interventions and compulsory treatment are complied with.* Refer to ‹http://nps718.dhs.vic.gov.au/ds/disabilitysite.nsf/sectiontwo/senior_practitioner› at 10 January 2008. See also *Disability Services Act 2006* (Vic) ss 23-27. It was recommended that DSQ give serious consideration to the creation of a similar appointment in Queensland, or establishing a similar role within the Centre of Excellence for Behaviour Support.

15 As outlined in the Queensland Disability Services Standards, all service users should have access to a support person of their choice to promote their interests. This support is essential in situations where the person's rights are at risk. See, for example, an equivalent provision in the *Disability Services Act 2006* (Vic) s 143 which requires an Independent Person to interact with the adult regarding matters of restrictive practice and report non-compliance of the legislation to an appointed agency.

that support without the necessary resources and support.

The Public Advocate acknowledges that Government has made $113 million available to implement this initiative over four years. Sixty three million dollars has already been allocated for specialist staff to work with funded services to assist with assessments, planning, and implementation for positive behaviour support plans.

However, the Office has received reports from the service sector expressing concerns about their present capacity to implement the legislation. The amendments are expected to place considerable demands on services in many aspects of service management and provision, including coordination, management, administration, communication with stakeholders, and staff support. Additionally, many service users who are currently subject to restrictive practices (such as chemical restraint) will need to be reviewed by appropriate professionals, and new plans and strategies developed for these individuals where restrictive practices are inappropriate.

Service providers state that they are already stretched to capacity and are unable to absorb these new requirements, especially in situations where they consider that the existing funding for the supported adult is insufficient. Also, staff working with adults with 'challenging behaviour' will need appropriate support, supervision, mentoring and training to ensure that practice is consistent with legislative and policy requirements.

At present, it does not appear that services will receive recurrent funding to meet additional internal demands. Furthermore, resources such as the Centre of Excellence are not sufficiently established to provide the sector-wide support, information and training that is required. Failure to adequately resource service providers to implement the system as intended will facilitate poor outcomes for adults with 'challenging behaviour', and result in excessive pressures for service providers, families and others engaged in the system.

1.1.4.4 Facilitating cultural change within the disability sector

The success of the regime depends upon transforming the culture of the disability sector. This requires a clear vision and determined effort by service providers, and serious commitment of resources and support by government. The dedication and hard work of many disability support workers is acknowledged. However, the Public Advocate is aware that the support culture for adults whose behaviour is challenging to service providers is frequently dysfunctional and institutionalised. This culture presents a highly-resistant barrier to the successful implementation of the new regime.

1.1.4.5 The Centre of Excellence

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, the Public Advocate had strongly recommended that the Centre be independent of DSQ. However, the decision was made for government to partner with the University of Queensland in this venture. Although the Centre will be located within the Ipswich campus of the University of Queensland, it is accountable to DSQ.

1.1.4.6 Legislative response

The Public Advocate agrees with the Carter Report and Government Response which acknowledge the need for a legislative scheme to safeguard the rights of adults with an intellectual or cognitive disability who have 'challenging behaviour', and where

restrictive practices may be used to manage the behaviour.

In addition to many of the recommendations made above, the Public Advocate made further comment in relation to the draft Bill,[16] some of which are outlined here. The amendments incorporated some of the proposals.

Overall intent and objects of the Bill

The Public Advocate argued that the goal of regulating restrictive practices should not override the driving forces behind the Bill. Specifically, restrictive practice must contribute to overall quality of life, person-centred support, and wellbeing of the adults. Legislation should clarify that restrictive practices are appropriately used only in rare and extraordinary circumstances. The Public Advocate therefore recommended that the objects of the Bill be changed to reflect the highly limited intended use of restrictive practice.

On-the-ground implementation of restrictive practices

It is important that decision-makers are independent and sufficiently free from conflict of interest to ensure that the adult's interests are adequately protected. The Public Advocate acknowledges that the Guardianship and Administration Tribunal (GAAT) and appointed guardians are able to make independent decisions about the use of restrictive practices for particular individuals. It needs to be acknowledged, however, that some substitute decision-makers may not always make decisions that prioritise the wellbeing of the adult over their own concerns. Additionally, the Public Advocate raised concerns about the day-to-day implementation of restrictive practices by support workers who may be unable to make independent decisions in the best interests of the adult when they feel personally threatened by the adult's behaviour. That is, the use of restrictive practices may be a reaction to danger, or perceived danger, rather than a proactive response based on the principles of positive behaviour support.

Approval processes

During the consultation process on the Bill, the Public Advocate argued that rigorous approval processes are necessary for all forms of restrictive practice. The Bill, however, outlined varying requirements for different types of restrictive practices across a range of service types.

Any form of restraint is potentially harmful or threatening to its recipient: an adult may experience more harm from some forms of chemical or physical restraint than from occasional or brief periods of seclusion. For this reason, the Office considered that a 'tiered system' of restrictive practice potentially compromises the interests of the adults. An adult with 'challenging behaviour' is at risk of abuse where approval processes do not have sufficiently robust safeguards.

The tiered system of approvals remains in the amendments.

Positive Behaviour Support plans

Positive Behaviour Support is the theoretical basis of the restrictive practice framework. Its goals include the establishment of quality of life, safety and wellbeing of the person and others, and eventual reduction in the need for restrictive practices.[17] The Office advocated that requirements about the content of plans should place heavier emphasis on positive supports such as strategies to:

16 A copy of the Public Advocate's submission is located at ‹http://www.publicadvocate.qld.gov.au›.

17 Keith McVilly, *Positive Behaviour Support for People with Intellectual Disability: Evidence-based practice, promoting quality of life* (2002).

- develop and strengthen the person's skills, abilities, resources, relationships and community connections;
- manage negative aspects of the environment;
- identify behavioural triggers and proactive, less-restrictive and/or positive responses to the triggers;
- identify resources and strategies to manage boredom; and
- develop positive and appropriate communication skills.

The amendments require positive behaviour support plans to incorporate a number of positive support strategies.

Ambiguity of definitions

Several important concepts were not sufficiently clarified in the draft Bill.

Of particular concern was the absence of a definition for 'challenging behaviour'. Although concerns are expressed about labelling adults as having 'challenging behaviour', a wider group of adults face significant risks if the legislation is insufficiently clear about who can be subject to restrictive practice. Without a clear definition of the adults for whom restrictive practices may be considered, there is a real risk that the policy could be applied to a much broader group of people whose behaviours do not warrant the use of such measures.

The amendments and supporting policies and procedures now indicate that this 'threshold' point is determined by the presence of 'harm' caused to self or others.

Immunities from civil and criminal liability

The transitional arrangements and amendments provide for immunities for service providers and service workers using restrictive practices. The Public Advocate consistently expressed concerns about the breadth of the immunities available, especially where the use of restrictive practices has been abusive.

1.1.5 Final observations

The Queensland Government is to be commended for tackling some difficult issues about how best to provide for the support of vulnerable people with 'challenging behaviour'. A number of considerations have already been taken into account in the Government's response. However, several important matters remain. With the full implementation of the new legislative regime required by 31 December 2009, the service sector urgently needs to be fully supported and resourced, and more appropriate monitoring mechanisms need to be explored, to establish an appropriate and fully humane response to this vulnerable group of adults.

It is acknowledged that not all of the Public Advocate's recommendations are accepted by the Carter Report and the Government Response, or included in the provisions under the amendments. However, the Office will continue to advocate vigorously for the development and implementation of a regime which appropriately protects the rights and interests of the vulnerable adults.

1.2 Accommodation Support and Respite Service

The Accommodation Support and Respite Service (AS&RS) operated by DSQ is a significant service provider for adults with intellectual disability. The model comprises group homes where residents

share support services and facilities.[18] In at least one instance, the service supports people living in a cluster housing development.[19] In four other situations, the houses are clustered in a street.

The AS&RS was independently reviewed in 2005.[20] Implementation of the recommendations is currently being evaluated.[21]

Issues and concerns brought to the Office's attention this year include: vacancy management; substitute decision-making; and workforce issues.

1.2.1 Vacancy management

Concerns have been raised with this Office that adults with intellectual disability are being placed in vacant bedrooms in AS&RS group homes without due consideration regarding the compatibility with existing tenants, in order to maximise occupancy rates.

The AS&RS management has stated that:

- the AS&RS is currently operating at 97% capacity;
- a project is currently being implemented to maximise occupancy across all AS&RS households;
- a co-tenant will only be moved into a vacancy if their compatibility with existing residents has been assessed and established;
- establishing compatibility of co-tenants within AS&RS households is part of the vacancy management process, which focuses on the development of profiles for individuals and identifies suitable options for co-tenancy;
- the documentation is extensive and includes trial occupancy periods and gradual transitioning;
- the AS&RS procedures for vacancy management are currently being reviewed; and
- the vacancy management procedure requires that substitute decision-makers are involved throughout the process of entering into an AS&RS household.

1.2.1.1 Crisis response

Concerns have been raised with this Office that adults with intellectual disability in crisis situations[22] are being moved into AS&RS households wherever vacancies exist.

AS&RS management have advised this Office that adults are only housed within the AS&RS service after assessment and compatibility processes are undertaken, and that in some cases people are provided with 24-hour support on an individual basis to enable these assessments to occur.

The Office supports the careful and thorough assessment of compatibility prior to establishing co-tenancy arrangements, as poorly planned and expedient living arrangements where incompatible service users are co-located can lead to distress, poor mental health and 'challenging behaviour'.

1.2.2 Substitute decision-making

In last year's Annual Report, this Office referred to DSQ's *Policy Statement and Procedure in Relation to Substitute Decision-Makers*.[23] It was noted that when

18 A typical household consists of 3-5 people supported by a group of five or six residential care officers ‹http://www.disabiliity.qld.gov.au/support-services/dsq/als.html› at 4 August 2008.

19 Cluster housing is an arrangement where individual houses accommodating people with disability are grouped together and fenced as one 'complex'.

20 More details about the review may be found in the Office of the Public Advocate, *Annual Report 2005-2006* (2006) 23, and Office of the Public Advocate, *Annual Report 2006-07* (2007) 16. Refer to ‹http://www.publicadvocate.qld.gov.au›.

21 For a detailed history see the *Annual Report 2001-2002* (2002), 37 and *Annual Report 2005-2006* (2006), 23.

22 Crisis may occur due to family aging, ill health or death, or the inability of a non-government organisation to continue providing support.

23 Office of the Public Advocate, *Annual Report 2006-2007* (2007) – see Section 1.4.1 Substitute decision-making in AS&RS.

a formal decision-maker has been appointed, the policy and procedure directs DSQ staff to 'ensure the involvement of this person in relation to the power for which they have been appointed'.

This Office has suggested to DSQ that the policy and procedure does not adequately address the requirements of the *Guardianship and Administration Act 2000* (GAA) regarding two issues. Firstly, the GAA provides power for formally appointed decision-makers to make the relevant decisions. Therefore, service providers are obliged to ensure that appropriate decision-making processes occur (this involves identifying formal decision-makers, providing them with the relevant information and allowing them to make the relevant decision). In this context, it may be a personal decision about where and with whom the adult lives, or a financial decision, such as the signing of a tenancy agreement. That is, to ensure that appropriate decision-making processes occur, DSQ must allow the formally appointed decision-maker to make the decision, not just involve them in the decision-making process.

Secondly, in last year's Annual Report, it was noted that DSQ's substitute decision-makers policy and procedure directs DSQ staff to 'encourage the adult's support network to be involved in the decision-making process.'

The GAA recognises both formal and informal decision makers as valid substitute decision-makers. Where no decision-maker has been formally appointed for an adult with impaired capacity, any person who is closely involved as a member of the adult's support network is an informal substitute decision-maker. To ensure that appropriate decision-making processes occur, DSQ must identify informal decision-makers, provide them with the relevant information and allow them to make the decision where appropriate, not just 'actively encourage' the person to be involved in the decision-making process.

The Office understands that DSQ intends to review this policy and procedure, and encourages amendments which ensure the policy and procedure are consistent with the requirements of the GAA.

AS&RS Management has advised this Office that a significant number of adults with impaired capacity accommodated in the AS&RS have no family. Further, they have stated that a significant number of AS&RS service users also have family members who do not wish to be actively involved in the person's life, including as substitute decision-makers. DSQ has also advised this Office that every service user in the AS&RS has a substitute decision-maker for financial matters, but that only nine AS&RS service users have the Adult Guardian appointed to make personal decisions, other than health care decisions, for them.[24] By implication, a significant number of adults with impaired capacity in AS&RS may not have a substitute decision-maker to make personal decisions. In such instances, application should be made to the Guardianship and Administration Tribunal for the appointment of a guardian.

The review of the Substitute Decision-Makers Policy Statement and Procedure provides DSQ with the opportunity to ensure that appropriate decision-making processes are occurring for residents in the AS&RS in relation to personal, financial and health care matters, and in circumstances where members of an adult's support network:

- are not involved in the adult's life; and/or
- refuse to make a decision; and/or
- are making decisions which may not be in the interests of the adult.

24 By virtue of the *Powers of Attorney Act 1998*, ss 62-63, a statutory health attorney will be available to make health care decisions for each person.

1.2.3 Workforce issues

The 2005 review of the AS&RS recommended developing a plan to establish a permanent, full-time workforce to replace the use of casual support staff, although it envisaged retaining some casual staff as part of that workforce.[25]

Concerns have been expressed to this Office that casual staff are being used routinely in the AS&RS. One of the issues of concern raised is that casual staff may not have adequate training, and that they may not be as familiar with service users as permanent staff. This may lead to increased stress for the service user, and disruption to routines, resulting in an escalation of inappropriate behaviours.

AS&RS management have stated that:

- maximising a permanent workforce is the focus of a number of strategies that are being implemented by AS&RS, and that there have been recent improvements in relation to recruitment strategies that have produced some positive outcomes in relation to the number of people applying, and being suitable for employment;
- some casual staff are used, and play an important part in being able to manage the 24 hour operations of the service: for example, casual staff can be used to fill unplanned absences such as sick leave;
- casual staff receive the same induction training as permanent staff; and
- they are currently working towards the development of some appropriate benchmarks that assist with understanding the right balance between permanent, temporary and casual workforce.

1.2.4 Active support

The Active Support model focuses on direct support to service users to enable their participation in meaningful everyday activities. It is a way of working with people which includes activity and support planning, training and assistance, and engaging in supportive interactions. It combines elements which influence the quality of life for residents of disability services, involves proactive planning, and ensures that the majority of staff participation and attention is given to residents when they are constructively engaged. It gives attention to how these interactions might occur more naturally and readily, thereby enabling people to feel valued and competent, with some degree of choice in their lives.

The 2005 review recommended that the AS&RS work with a leading academic institution on an Active Support practice framework.

AS&RS management report that:

- the Active Support model has thus far been implemented across 13 households, and that they are currently working through an implementation strategy to roll out this model of support more broadly across the service; and
- the project has an evaluation strategy that is being oversighted by the University of Sydney's Centre for Developmental Disability Studies and Griffith University. The evaluation will report on the outcomes and improvements to the model.

1.2.5 Tenancy and decision-making

The Public Advocate is concerned about substitute decision-making processes across the government, non-government and private sectors (see Section 3.3 for more information).

25 At the time of the review, casual staff comprised 20% of the workforce.

Office of the Public Advocate staff - Administration Officer Debbie Barber, Principal Research Officer Marcus Richards, Public Advocate Michelle Howard, Senior Research Officer John O'Brien, Senior Research Officer Satti Rakhra and Senior Research Officer Adrienne McGhee

1.3 Institutional approaches to accommodation and support

De-institutionalisation of people with disabilities began in Australia and other Western democracies during the 1970s. This process, which has seen the closure of many large accommodation and support settings where adults with disabilities were congregated and segregated, was based on the recognition that these environments were inappropriate and detrimental to the quality of life of the residents, and that exploitation, abuse and neglect were common occurrences. De-institutionalisation, the movement towards community-based living for people with intellectual disability and psychiatric disability, was considered a major human rights reform that would deliver significant benefits to vulnerable citizens.

In Queensland, the process of de-institutionalisation commenced in the early 1990s, with the closure, or partial closure, of institutions such as Wolston Park, the Challinor Centre and the Basil Stafford Training Centre.

The Office has consistently expressed concerns about institutional approaches to accommodation and support, and the potential for a trend towards increasing institutional practices in accommodation and support services and facilities for adults with impaired capacity. The theme of institutional practices was explored in the Office's first Annual Report in 2000-2001, and has been reported on in subsequent Annual Reports.[26]

The potential for re-institutionalisation of vulnerable people with a decision-making disability was discussed in this Office's *Annual Report 2004-2005*. The Report expressed concerns that the institution as an acceptable service model may re-emerge, as an acceptable service model where:

- *people are perceived as difficult to serve because of their complex needs or behavioural challenges;*
- *people are ageing or their parents, as primary carers, are ageing;*
- *established policy directions are perceived to have failed (as in the deinstitutionalisation of people with mental illness);*
- *people require significant levels of continuing medical care;*
- *people have suffered a catastrophic injury, including brain injury, and either receive no compensation, or whose compensation has expired; and*
- *the restructure of existing services/facilities is seeing the closure of some smaller hostels and a corresponding increase in size of others (e.g. private residential services).*[27]

In its role of monitoring the delivery of services and facilities to adults with impaired capacity, the Office has become aware of recent developments in the delivery of accommodation and support

26 Refer to ‹http://www.publicadvocate.qld.gov.au›.

27 Office of the Public Advocate *Annual Report 2004-2005* (2005) Page 19. Refer to ‹http://www.publicadvocate.qld.gov.au›.

services to adults with intellectual disability that may indicate institutional approaches. For example, recent initiatives presented by DSQ as 'strengthening service delivery through quality environments' include:

- the *Innovative Support and Housing* model of accommodation and support to adults with intellectual disability and complex behaviour;
- the purpose-designed housing projects for people with intellectual disability who have complex support needs; and
- cluster housing projects, including the construction and operation of two purpose-built housing complexes.[28]

Another example involves the development by a non-government organisation (NGO) of a cluster housing complex in a regional area. The Public Advocate conveyed its concerns to the organisation's management that:

- The complex does not present like the surrounding houses or blend in with the neighbourhood. Rather, it presents as a congregate care setting for people who receive support.
- In contrast to the other houses in the area, the yard space is very small. It provides minimal area for the large number of residents to engage in outdoor lifestyle activities.
- A number of the buildings do not have complete kitchens, reducing the potential for residents to learn basic life skills, and for maximum self-reliance and participation in domestic life.

The Office understands that DSQ was aware of this proposed development and provided funding for the project on the condition that additional beds were included.

In exploring this issue with the management of the NGO, the Office became aware that the organisation was also developing plans for a cluster housing complex and day centre in another regional centre. The Public Advocate again conveyed concerns to the management, to the effect that the proposed site constituted a model of congregated and segregated care, an approach that has been broadly discredited and is no longer promoted as a desirable or preferred model.

The Office understands that the residential accommodation aspect of the project has been delayed.

In March 2008, DSQ announced that funding was available for an approved non-government service provider to provide accommodation support for people with an intellectual or cognitive disability who have high physical or healthcare needs. The stated scope of the *Accommodation and Lifestyle Support – Cluster Housing* initiative was to provide accommodation support in purpose-designed and built houses, health care support and community participation support.

The development of these cluster housing projects has amplified concerns about a possible trend towards institutional approaches to accommodation and support for adults with impaired decision-making capacity. In the context of these concerns, the Office has initiated some preliminary research to consider a range of issues, including:

- whether or not institutional approaches to accommodation and support are re-emerging;
- if such a trend is identified, exploring the reasons for such a trend;
- assessing the degree to which institutional models of accommodation and support meet the needs of adults with impaired capacity; and

28 DSQ, *Annual Report 2006-07* (2007) 54-5.

- identifying good practice which meets the adult's needs and is in keeping with legislative expectations and human rights.

The term 'institutional approaches to accommodation and support' refers not only to the physical structures which congregate, segregate and isolate people from the community, but also to the cultures and practices within services which isolate and potentially dehumanise people with disability. This may include rigid household routines, lack of contact with the community, and practices which are undignified and distressing to residents.

This research was initiated in the context of the strong philosophical, legislative and policy frameworks that are in place at state, national and international levels which provide for individualised, person-centred support as both a requirement and goal for all service provision to people with disability. The Office engaged the services of a consultant to undertake this preliminary research, and convened a Steering Committee comprised of key stakeholders in the sector to provide guidance for the research.

1.4 Younger People in Residential Aged Care

In February 2008, the Younger People in Residential Aged Care Initiative entered the third year of its five year program. Forty-six million dollars will be expended over the five years, with equal contributions from the State and Commonwealth Governments.

The Public Advocate has advocated about the creation and funding of programs to address the needs of this group of adults for several years[29] and generally supports the initiative. The Office is part of DSQ's Reference Group for the scheme. However, issues need to be considered and addressed in the roll-out of the project.

1.4.1 People between the ages of 50 and 65 years

The current initiative prioritises younger people under the age of 50, although adults up to 65 years may apply.

In its submission to the Senate Inquiry into Aged Care, the Queensland Government estimated that 226 adults under the age of 50 years resided in aged care facilities. Other figures indicated that approximately 591 adults aged between 50-59 years, and 528 adults aged 60-64, also resided in residential aged care facilities.[30] The Public Advocate urges government to ensure that eligibility and prioritisation processes extend to this group.

1.4.2 Identification of adults with impaired decision-making capacity

It is not certain how many people aged under 65, either living in aged care facilities or at risk of being admitted to them, have impaired capacity for decision-making. However, anecdotal information from the Brain Injury Association of Queensland (BIAQ), DSQ and the Adult Guardian suggest that the number of adults affected is significant. Given the nature and types of decisions to be made by adults who wish to receive services under the initiative, it is important that impaired decision-making be identified.

1.4.3 Improving access for adults with impaired capacity

The Office has expressed concern about ensuring that people with impaired capacity for decision-making

29 Refer to the Office of the Public Advocate's *Annual Report* for *2005-2006* (2006) and *Annual Report 2006-2007* (2007).

30 See Table 4.1 on page 81 of The Senate Community Affairs References Committee, *Quality and Equity in Aged Care* (June 2005).

are appropriately resourced and supported to access this initiative. DSQ, BIAQ's Assessment Service and the Adult Guardian are working collaboratively to ensure that all people and their families are given appropriate and timely information and support to participate in the initiative. The Public Advocate commends these agencies for their efforts.

1.4.4 Finalisation of support models

Four of the five service response models for this group have been developed. Service specifications are currently available for the: *Integrated Living Model*; *Shared Support Model*; *Living with Family Model*; and *Living Independently Model*.[31] Service specifications for the *Support in Aged Care Model* are not yet available. This remaining model will aim to provide disability support to those people who remain in residential aged care.

1.4.5 Flexible responses

The development of five models is commendable. The variety of models demonstrates flexibility in responding to people's accommodation and support needs.

There may, however, be a need to revisit the models as potential service users and their needs are further identified. This includes individuals within Indigenous and culturally-and-linguistically-diverse (CALD) communities, and individuals living in regional and remote areas of Queensland where service options are limited. The Public Advocate is pleased to note that DSQ is increasingly engaged with CALD groups to identify demand and need, and that BIAQ's Assessment Service[32] has done considerable work with the Indigenous networks in far north Queensland.

1.4.6 Progressing the initiative

It is understood that although 49 people have received approval for funding under the initiative, few have actually moved out of aged care facilities, due to the delay between assessment, approval and any actual move.

1.4.7 People remaining in residential aged care

It is anticipated that in some circumstances younger people will remain in residential aged care. However, the *Support in Aged Care Model* will be the last to be rolled out. It is not clear how disability services will operate within the aged care sector. Aged care is predominantly funded by the Commonwealth Government, and disability services by the Queensland Government. This presents challenges including different quality standards, different expectations, and potential cost-shifting arguments arising from different views of responsibilities of each level of government.

1.4.8 Tenancy rights

People with disability may have long life spans.[33] It is likely therefore that the facility to which a person moves may become 'home' for a considerable period of time. It is important that adequate protections are in place to ensure the person's right to continued occupancy in the event of a dispute or complaint.

1.4.9 Issues of compatibility

The main alternative accommodation option for the target group of this initiative involves shared

31 Refer to ‹http://www.disability.qld.gov.au/support-services/dsq/young-people-in-residential-aged-care.html› at 30 September 2008.

32 One of the initial projects involved the appointment of an Assessment Service to ascertain the needs of individuals under the age of 50 who are currently residing in residential aged care or are at imminent risk of moving to an aged care facility. BIAQ is the provider for this Service.

33 See, for example, The Senate Community Affairs References Committee, *Quality and Equity in Aged Care* (June 2005) 79.

support and accommodation.[34] The fact that adults may have compatible support needs does not make them compatible as housemates. Adults sharing accommodation and support should choose with whom they live.

1.4.10 Delays following assessment

Some concerns have been expressed to the Office that the assessment and funding timelines do not take into account the degenerative nature of some conditions. The delay between the initial expression of interest, assessment and eventual response may mean that the original housing and support option is no longer appropriate. Arrangements need to ensure timely reassessment of appropriate options to minimise the risk of the person being readmitted to aged care.

1.4.11 Evaluation of the initiative

Currently State and Commonwealth Governments are working collaboratively on the development of data collection tools and processes for evaluation. The evaluation needs to assess how the lives of the target group have changed as a result of this initiative.

1.5 Baillie Henderson

The Office has previously raised concerns for about 50 people with intellectual disability who are accommodated in Baillie Henderson Hospital, a psychiatric hospital at Toowoomba. During the institutional reform processes over the past few decades, these people were substantially overlooked.[35] These people do not have a mental illness and do not require mental health services. Accordingly, the arrangements are inappropriate.

This was confirmed in the *Challenging Behaviour and Disability: a Targeted Response* (the Carter Report) in 2006.[36]

Despite a degree of concern that exists within government about this issue, and some marginal improvements in the lives of the people due to the good work of Queensland Health mental health staff, this group of people continue to live in an inappropriate institutional setting.

In the past, the Office has acknowledged that it may not have been immediately possible to offer these vulnerable people their rightful place in the community with support and housing appropriate to their needs. However, several years have now passed and the considerations behind this concession are no longer valid as a reason not to have achieved significant reform.

Notably, one of the recommendations of the Carter Report was that DSQ and Queensland Health engage collaboratively to determine the preferable option(s) for accommodating those persons with intellectual disability who have been accommodated at Baillie Henderson Hospital for many years.[37] The Office understands that this recommendation has been supported by government, and that collaborative engagement between DSQ and Queensland Health is formal and continuing.

The Office will monitor the progress of this engagement with considerable interest.

1.6 Disability Sector Quality System

The Disability Sector Quality System (DSQS) commenced on 1 July 2004 to ensure that services

34 Only two options, living with family and independent living, do not involve sharing accommodation with persons (other than family).

35 See Office of the Public Advocate *Annual Report 2001-2002* (2002), *Annual Report 2002-2003* (2003), *Annual Report 2003-2004* (2004) and *Annual Report 2004-2005* (2005). Refer to ‹http://www.publicadvocate.qld.gov.au›.

36 *Challenging Behaviour and Disability: a Targeted Response* (the Carter Report) a report by the retired Supreme Court Judge the Hon. W Carter QC, 2006, 135.

37 Ibid at 19.

provided to people with a disability are based on a quality management framework. Services delivered by, or recurrently funded by, DSQ are required to implement their own quality management system, and achieve the appropriate certification against the Queensland Disability Service Standards, Queensland Disability Advocacy Standards or ISO 9001:2000,[38] by 30 June 2008. Under the DSQS, service providers are required to maintain certification which includes annual maintenance audits and recertification after three years.[39] At the time of writing, DSQ-provided services, and the majority of DSQ-funded non-government organisations (NGOs), had achieved certification.

DSQ's intentions for the DSQS are to:

- develop a self-sustaining culture of quality and continuous improvement across the disability sector;
- ensure that people with a disability are actively involved in how a service develops, operates and maintains its management systems;
- provide opportunities for people with a disability to have a role in assessing the quality of services provided;
- support and promote innovation in the type of services and how they are delivered;
- strengthen the link between funding and the delivery of quality services; and
- ensure the development and implementation of the system is owned by the sector.[40]

Over several years, this Office has been aware of concerns about the DSQS from some organisations and individuals within the disability sector. Concerns included the additional resources required to implement and maintain the system, and the impact of additional administrative requirements on service delivery.

However, comments made to this Office in the first half of 2008 by service providers about the DSQS and its impact on their organisations have been predominantly positive. Service personnel report a number of benefits including:

- organisations becoming more conscious of how they do their work;
- improvements in organisational accountability processes;
- improved consistency in organisational processes as a result of the introduction of policies and procedures;
- increased clarity for support workers regarding their responsibilities;
- increased attention to the training and upskilling of staff; and
- increased awareness of the challenges of communicating effectively with, and seeking useful feedback from, service users.

DSQ provided resources to organisations to assist with the implementation process, such as one-off grants, written and electronic resources, awareness raising and training, and resource and consulting personnel. It is understood that DSQ intends to continue its commitment to support service providers to maintain their quality systems, and to strengthen service user engagement and involvement within services.

38 The International Organisation of Standardization (ISO) developed the ISO 9001, one of the documents that define requirements for the Quality Management System Standard; it contains the actual requirements an organization must be in compliance with to become ISO 9001 Registered. ISO 9001:2000 is the current version of the Standard. Refer to ‹http://www.the9000store.com/Intro-to-ISO-9001.aspx› at 3 September 2008.

39 ‹http://www.disability.qld.gov.au/key-projects/quality/overview/› at 18 August 2008.

40 ‹http://www.disability.qld.gov.au/key-projects/quality/overview/› at 18 August 2008.

The Public Advocate congratulates DSQ on a positive beginning to quality certification in the Queensland disability sector, and looks forward to continuous improvement to its quality systems. However, this Office has concerns about relying on this mechanism to achieve genuine improvements in the quality of life of people with a decision-making disability who are supported through services. Some reasons for these concerns are outlined below:

- Comments from some service providers suggest that quality audit processes were not consistent or rigorous. If so, some service providers may have achieved certification because the benchmark was not high enough, not because they achieved an appropriate standard.
- A quality audit typically determines whether or not the organisation has the required policies and procedures, not ascertain whether those policies are good ones. Quality certification may systematise undesirable practices.
- This Office has heard reports about services which relinquished sound processes and systems in favour of ones of lesser standard so that staff, who were unable or unwilling to undertake more comprehensive practices, implemented them more consistently. If so, the organisation's quality system resulted in the lowering of standards rather than establishing best practice.
- Services have observed that the implementation of the DSQS has resulted in improved organisational processes. However, services have generally been unable to confidently inform this Office that the quality system has resulted in direct and noticeable improvements in quality of life for service users. The Office acknowledges that the system is not yet mature, and benefits to service users may be more evident in the future years.

The Office argues that the aim of a quality system should be to achieve genuine improvements in quality of life for service users, not just maintaining sound organisational processes. Organisational processes may establish minimum standards and thereby provide some benefits, but they may or may not deliver desired outcomes for the recipients of those services. The Office has identified outcomes-based quality systems implemented in overseas jurisdictions that require service providers to deliver specified outcomes for service users, in addition to establishing appropriate management and service delivery frameworks.[41] In contrast, the DSQS is heavily focused on the latter.

The Public Advocate has raised these issues with DSQ, and will continue to monitor the DSQS and its impact on service provision for people with decision-making disabilities.

1.7 Complaints management systems

The Complaints and Prevention Unit (CPU) is responsible for dealing with complaints in relation to services provided by, and recurrently funded by, the Department of Communities and DSQ. It is located within the Department of Communities as part of Complaints, Compliance, Investigations and Misconduct Prevention (CCIMP). The CPU receives, assesses, investigates, reports on and monitors complaints made about services.[42] It receives

41 Refer to the Certification Standards of The Alberta Association of Rehabilitation Centres (*Creating Excellence Standards*) ‹http://www.acds.ca/PDFS/CET%20Manual/1CETStandardsIndicators.pdf› at 15 August 2008. The *Creating Excellence Standards* include Quality of Life standards, Quality of Service standards, and an Organisational Framework. The latter two sets of standards focus on organisational responses within the quality framework. The Quality of Life standards, however, were based on a state-wide, extensive consultation with stakeholders to determine the factors that most contribute to quality of life for service users.

42 Where investigation of the complaint reveals a possible breach of legislation or the service provider's funding agreement with the relevant department, the matter may be referred to the Compliance Investigation Unit. Matters indicating misconduct by public servants may be referred to the Misconduct Prevention Unit. Both of these units are located within CCIMP. Refer to the DSQ Complaints Management Policy ‹http://www.disability.qld.gov.au/complaints/documents/complaints-management-policy.doc› at 14 March 2008.

complaints related to disability, child safety,[43] mental health, aged care and the Indigenous community. According to the CPU, the vast majority of complaints relate to the disability system.

As discussed in last year's Annual Report,[44] the complaints system has undergone significant change in recent years. Changes include:

- the development of protocols between the CPU and the Office of the Adult Guardian regarding complaints notification and investigation;
- the use of individual complaints to inform systems change; and
- strengthened policy and procedures.

The Complaints Management Quality Committee (CMQC) was established in 2005, and provides independent advice to the Minister in relation to the quality, efficiency and effectiveness of the complaints management system. The CMQC also advises the Minister about anomalies, trends or emerging issues in the disability sector.[45] This additional level of scrutiny of the complaints management system is welcomed by the Public Advocate.

The CPU recently underwent an assessment of its complaints management process by the Society of Consumer Affairs Professionals Australia (SOCAP). The results determined that, in comparison to other government and non-government complaints management systems, the CPU system performs to a high standard. The Public Advocate commends this achievement. The CPU also reports that it has implemented a system that prioritises the most serious complaints and aims to resolve them within the shortest allowable timeframe. Not all complaints are resolved within the time period. Given the risks to adults with impaired decision-making capacity, the Public Advocate strongly encourages the CPU to give priority to complaints received in relation to this group, and to continue improving its capacity to resolve complaints in the shortest possible timeframes.

In addition to the CPU, the Disability Sector Quality System requires all DSQ-provided and recurrently-funded services to implement a complaints management system in accordance with Standard 7 (Complaints Management) of the Queensland Disability Service Standards. This is intended to give service users and their families and supporters opportunities to express their dissatisfaction about the services they receive.

This Office acknowledges that complaints systems are widely used for addressing customer dissatisfaction about products and services. However, the Office raises questions about the effectiveness of complaints mechanisms to adequately and safely resolve the concerns of adults with a decision-making disability, or to identify potential abuse, neglect or exploitation. This Office is aware of situations where service users with a disability who make complaints, or staff members who make a complaint on their behalf or who report abuse, have subsequently been subjected to retribution or workplace bullying.

Despite the Queensland Disability Service Standard 7 requirement that service providers protect complainants from retribution, this is often difficult to achieve in situations where:

- support workers work largely unsupervised;
- the service provider controls most aspects of a service user's life.

43 The CPU is only able to accept child safety complaints in relation to a child or family receiving support from DSQ or a NGO, or who are part of the youth justice system (such as youth detention or youth justice conferencing).

44 Refer to Office of the Public Advocate, *Annual Report 2005-2006* (2006) ‹http://www.publicadvocate.qld.gov.au›.

45 Refer to ‹http://www.disability.qld.gov.au/complaints/quality.html› at 27 August 2008.

- service users may have a profound decision-making or communication disability;
- service users have few or no family members or friends actively and regularly engaged in their lives;
- service users are disconnected from most mainstream services and facilities; and/or
- allies or family members are afraid to make complaints because of service provider culture and possible retribution towards the service user.

In the 2005-2006 Annual Report, the Public Advocate identified the need to provide sufficient protections for vulnerable people with disabilities and for whistleblowers who raise complaints or identify abuse, neglect or exploitation of service users.[46] The current *Disability Services Act 2006* does not provide adequate protections. Without protection from retribution for complainants living and working within service settings, there are significant risks that genuine complaints will not be raised, made through complaints processes.

The potential for retribution presents challenges to complaints mechanisms. It raises questions about the degree to which complaints mechanisms should be relied upon as a key strategy to protect vulnerable adults with impaired capacity. While concerns about retribution towards complainants have been addressed with the CPU, the Office also strongly encourages key stakeholders, including service providers, to develop and implement effective on-the-ground strategies for protecting complainants from retribution within their complaints management processes.

The issue of retribution within the context of complaints management will remain a key area for advocacy for the Office.

46 Page 27.

1.8 National Disability Agreement

As reported in the Annual Report 2006-2007, negotiations were underway between the Commonwealth and States and Territories for a fourth Commonwealth, State and Territory Disability Agreement (CSTDA) for 2007-2012. The Public Advocate had raised concerns with the former Commonwealth Government about their proposals for the CSTDA including the low level of indexation, and quality assurance mechanisms duplicating systems being created by the States.

The Commonwealth Government changed before agreement was reached. Negotiations with the incoming Commonwealth Government have taken some new directions. The previous CSTDA will now continue until 31 December 2008 under a variation agreement while negotiations on a new National Disability Agreement (the Agreement) continue. The new Agreement is expected to commence on 1 January 2009, superseding the existing CSTDA funding arrangements.

In 2008, the Public Advocate advocated to the current Commonwealth Government about the high level of unmet need for disability support services and for the adoption of a realistic escalation methodology that reflects the real cost of service provision, through sufficient levels of indexation and growth.

In the meantime, recent Commonwealth disability initiatives, including $900 million in funding nationally, over four years, for the provision of respite and accommodation support (Queensland will receive around $165 million over four years) and $100 million nationally in capital funds (it is understood that Queensland will receive $18.3 million) for the development of respite and accommodation for the adult children of older parent carers are to be commended.

1.9 Compensation payments and disability funding

In its Annual Report 2004-2005,[47] the Office noted an emerging public policy issue: the depletion of compensation payments before the end of a person's life and the expectation that government funds will then be needed to meet support needs. Given the anecdotal evidence about an increasing number of people who would be looking for assistance, the Queensland Government was encouraged to undertake a scoping exercise.

DSQ is currently considering options to guide its future response to notifications of compensation required under section 220 of the *Disability Services Act 2006*. It provides for a person (or a person acting on their behalf) applying for or receiving DSQ-funded or provided support, to notify DSQ of any amount received (and details of any amount specified for future care), or that may be received, relating to the disability. Most commonly, relevant amounts will be damages for personal injuries. DSQ undertook a limited consultation.

The Office was pleased to make comment in the interests of stimulating some research and analysis of the issues that might be examined. These included the following:

- Some persons with compensation funds will have received less funds for their future care for any given period than a person with similar functional impairment supported by a DSQ package. Contributory negligence may reduce a settlement or award. Accordingly a 'top up' of compensation funds in some cases based on needs and equity was supported.
- People with compensation packages who have administrators may make their funds last more effectively than those without an administrator (since requirements imposed on administrators require prudent management of funds).[48] While compensation funds usually include a component for future care, there is no requirement that the money be used for that purpose.[49] It was suggested that people who manage their money carefully and responsibly to ensure it lasted as long as possible should not be at a comparative disadvantage.
- The continued assessment of support needs is required, as people with catastrophic injuries often have conditions that degenerate over time. In some cases, new areas of incapacity develop as a result of their injuries. This secondary incapacity may not be foreseeable when damages are initially assessed. However, the Office acknowledges the interest of the legal profession[50] in seeking to ensure all possible damages reasonably foreseeable at the time of claim are included.

Issues raised about the strict implementation of section 220 of the *Disability Services Act 2000* for adults with impaired decision-making capacity included:

- Problems of enforcement - many administrators may not know of the requirement. The fact of the appointment infers that the person for whom the administrator is appointed has impaired capacity to notify DSQ of any amount received.
- Notification of the amount for future care does not reflect the practice of compromise of claims. An 'all up' settlement specifying one single amount

47 Commencing at page 63.

48 Sections 22-24 *Trusts Act 1973*.

49 Many people that are compensated for catastrophic injury do not have a cognitive impairment. In those cases, administrators are not appointed as the person is deemed to have financial decision-making capacity like that of any other non-cognitively impaired adult.

50 See in particular a recent article by a Brisbane barrister, regarding possible heads of damage that should be considered in spinal and acquired/traumatic brain injury claims in Queensland. Peter Sacre, 'Heads of damage in spinal (paraplegic & quadriplegic/tetraplegic) and acquired/traumatic brain injury claims in Queensland' (2008) *Queensland Law Society Journal* November 2005 - 33.

(without reference to an amount specifically for future care) may often be reached.

- Although the possibility had not been suggested by DSQ, the Office urged against consideration of any option involving imposition of mandatory exclusion periods as a consequence of non-disclosure.

DSQ was encouraged to progress its policy work on these matters, including commissioning research about the likely future need for the cohort of people who have damages awards which are insufficient to meet their continuing support needs.

Information received by the Office suggests that broader systemic issues may result in damages awards which are inadequate to meet the needs of the recipients. The Public Advocate intends to explore these concerns.

1.10 Disability Service Plans

The *Disability Services Act 2006* (DSA) provided for a regime of Disability Service Plans (DSPs), which came into effect in July 2007.[51] The DSA requires each Queensland Government department to prepare and publish a plan that details how it will improve access to services for people with a disability. Plans are to be revised at least every three years. Government departments and agencies finalised and commenced implementing their DSP from 1 July 2007.

As argued in last year's Annual Report, the success of the system lies in the extent to which it can generate meaningful improvements in the lives of vulnerable people with a disability. The Public Advocate advocated that improvements must be rigorously evaluated against established criteria as part of the whole-of-government reporting strategy.

DSQ subsequently engaged the services of an academic with expertise in the area of evaluation, and conducted workshops with representatives from Government Departments and the disability sector for the purpose of developing a framework for the evaluation of DSPs. During these sessions, it was acknowledged that issues for people with cognitive disabilities may be different than for people with physical disabilities, and that all people with disability needed to be considered in developing strategies to better deliver services. The Office commends DSQ for undertaking this project to develop a robust evaluation framework.

A whole-of-government evaluation is planned for 2009. This evaluation will inform the development of Departments' second DSPs to be implemented from July 2010. In the meantime, Government Departments are required to report annually on the implementation of their plans, taking into account the evaluation framework. There are six whole-of-government areas for action which will be reported on in 2008-2009:

- Policies and procedures: ensuring policies, procedures and practices are inclusive, non-discriminatory and barrier-free for people with a disability, their families and carers.
- Information and communication: ensuring information and communication relating to government services is accessible, inclusive and allows equitable opportunity for participation by people with a disability, their families and carers.
- Attitudes and awareness of employees: increasing staff awareness to improve the development and delivery of policies, programs and services to people with a disability by building an organisational culture in which equity and diversity are valued, understood and actively pursued.
- Physical access to public buildings.

51 As reported in the Office of the Public Advocate's *Annual Report 2006-2007* (2007).

- Recruitment and retention: commitment to recruiting and maintaining a diverse workforce, ensuring all recruitment, career development and retention strategies are inclusive and equitable.
- Complaints: ensuring complaints mechanisms are accessible so that people with a disability can lodge a complaint regardless of their communication mode.

As the evaluation framework was developed after the first DSPs were developed, it is understood that all Departments agreed to review their existing plans having regard to the framework. The Office looks forward to learning about the outcomes of the reporting and evaluation processes, and will maintain a continued interest in this area.

1.11 Reference Group on Disability

The Reference Group on Disability to the Chief Executive Officer's (CEO) Sub-Committee on Disability was reported in the Office's 2005-2006 and 2006-2007 Annual Reports. It was established as an advisory body to the CEO Sub-Committee on Disability.

The CEO Sub-Committee comprised the chief executive officers from 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; and representative bodies and community organisations. The Reference Group on Disability met quarterly throughout the 2006-2007 period, having first met in late April 2006.

The CEO Sub-Committee on Disability was disbanded in June 2007. The subsequently formed CEO Committee on Fairer and Safer Queensland was project-based and the work plan contained no specific disability issues. It has now also been concluded. In the interim, the Reference Group became an advisory body to the Director-General of DSQ, while discussions moved forward regarding its future role and terms of reference.

Recent discussions suggest that the Reference Group will serve as a forum for information sharing across government agencies and the non-government and statutory agencies, and providing feedback about specific issues and proposed initiatives on an 'as needs' basis. It is hoped that this will develop as an effective means to advise across government about disability-related issues. DSQ is developing the proposal and draft terms of reference.

1.12 Better Support for Carers

The Office made a submission to the Inquiry, by the Commonwealth Government's House of Representatives Standing Committee Family, Community, Housing and Youth, into Better Support for Carers (see Section 12.1 for more information).

1.13 Funding and Service Options

In light of significant unmet need for disability funding, this Office called for research regarding funding and service options to consider approaches taken elsewhere in Australia and internationally which deliver quality outcomes for the people receiving support. Researchers from Griffith University are well underway with the research project, which is close to completion. The Public Advocate is one of the partners contributing to the research (see Section 13.1 for further information).

2. The Guardianship System

This chapter reports on issues in Queensland's guardianship and administration regime (the guardianship regime) which the Office has dealt with over the last year.

2.1 Guardianship review

The Office's Annual Reports for 2005-2006 and 2006-2007 outlined the history of the guardianship review which commenced in October 2005. To assist the reader, some background information is again provided in this report.

Queensland's guardianship legislation is contained in the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998*. A significant legislative system, it serves to protect the rights and interests of adults with impaired decision-making capacity by establishing a system for decision-making about their personal and financial matters. Its principles include recognising the adults' human rights, respecting their human worth and dignity, exercising power in the manner least restrictive of adults' rights, and substituted judgment. Decisions must also be made consistent with an adult's proper care and protection. The guardianship regime includes the Public Advocate, the Guardianship and Administration Tribunal (GAAT or the Tribunal), the Adult Guardian, and the Community Visitor Program. The legislation defines the functions of each of these entities, and recognises the Public Trustee as a possible administrator.

In October 2005, in response to concerns raised by community groups and, in particular, by an alliance of community-based organisations, the Attorney-General and Minister for Justice referred the guardianship legislation to the Queensland Law Reform Commission (QLRC) for review. The review focuses on legislative reform. It has been conducted in two parts:

1. the confidentiality provisions of the guardianship laws; and

2. Queensland's guardianship laws more generally.

The QLRC released a discussion paper, *Confidentiality in the Guardianship System: Public Justice, Private Lives*[52] on 9 August 2006. As a member of the Guardianship Review Reference Group, the Public Advocate contributed to the development of the discussion paper which was available for public comment. This Office also provided a comprehensive submission, available on the Public Advocate's website,[53] in response to the substantive issues raised in the Discussion Paper.

Key issues raised by the Public Advocate in its submission included:

Role of confidentiality in guardianship

- The issues of open justice, procedural fairness and the nature of the guardianship regime are relevant concepts for determining the role of confidentiality in the guardianship system.
- 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.

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

52 Queensland Law Reform Commission, WP No 60, July 2006.

53 ‹http://www.publicadvocate.qld.gov.au›.

would lead to 'serious harm' or 'substantial injustice'.

Documents before the Tribunal

- Some issues regarding access to Tribunal documents were raised.
- The Public Advocate supported giving the Tribunal power to limit the disclosure of documents to parties, but only in accordance with prescribed criteria, that is, when 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 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 its decision confidential.
- It will rarely be justifiable to keep reasons for decision 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 other 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 a general duty of confidentiality under the guardianship regime, 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.
- 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) should be subject to a general duty of confidentiality, provided appropriate mechanisms are in place for the dissemination of necessary information to allow these officers to perform their functions.

2.1.1 The QLRC Report on Stage 1

The report of the QLRC, *Public Justice, Private Lives: A new approach to Confidentiality in the Guardianship System* (the QLRC Report) was tabled in Parliament on 12 October 2007. The QLRC Report called for greater openness in the guardianship system to improve community confidence and enhance the quality of decision-making in the system, to promote and safeguard the rights and interests of adults with impaired decision-making capacity. This central principle guided the recommendations made throughout the report.[54] Key recommendations contained in the QLRC Report included:

Publication

- Lifting the ban on reporting about proceedings before the Tribunal provided that the adult with a decision-making disability is not identified.

Confidentiality Orders

- Creating four new types of orders that better reflect the decisions about confidentiality being made.

54 Volume 1 ss 3.156, 3-2.

- Inviting an independent third party (the Public Advocate) to comment on whether information should be kept confidential.
- Better defining the narrow limits about when information or documents can be kept confidential from parties in hearings, that is, only when necessary to avoid serious harm or injustice.

Documents before the tribunal

- Defining the provisions about parties rights/ entitlements to inspect documents before hearings, that is, to inspect documents which are credible, directly relevant and significant.

Hearings

- Hearings can only be closed to the public, or a particular person excluded, if necessary to avoid serious harm or injustice to a person.

Reasons for decision

- The Tribunal give written reasons for making a decision to impose confidentiality.
- The Tribunal may, by order, delay notification by up to 14 days of its decision to a person otherwise entitled to notification to avoid serious harm to a person or the decision being defeated.

2.1.2 The Government Response

The Queensland Government tabled its response to the QLRC Report in Parliament in May 2008. The majority of the recommendations were fully accepted, a minority were accepted with amendment, and one was rejected. In particular, the following departures were made from the QLRC's recommendations:

Confidentiality of health information

- In respect of health information, 'serious harm' shall include 'a significant health detriment,' which is defined in a broad manner, potentially diluting the provisions for openness proposed by the QLRC.

Confidentiality orders

- GAAT must provide copies of documents, information and the order and reasons for decision *after* a confidentiality order has been made to the Public Advocate. However, this does not allow the systems issues to be addressed as they arise and may be resource intensive for this Office.

Documents before the Tribunal

- Access to documents has been extended to include access *after* a hearing, to facilitate a party's determination about whether to appeal and to allow parties unable to be at the hearing access. This appears to be a policy decision, which is unrelated to making documents available before and at hearing in order to ensure procedural fairness.

Decisions

- Allowing the Tribunal to delay giving notice of decision of greater than 14 days in exceptional circumstances.

The Queensland Government decided not to implement the recommendation that the Public Advocate be invited to make submissions when consideration is given to making a confidentiality order. The reasons included the risk that it would result in operational difficulties such as delaying Tribunal hearings and diverting this Office away from its key role of systems advocacy. The Government also referred to the existing power of the Public Advocate to intervene in proceedings.

The rejected proposal was important and its omission diminishes the potency of the system safeguards which the QLRC sought to establish. If this Office was not considered to be the appropriate body for the envisaged role, another suitable body could have been identified.

The Guardianship and Administration and Other Acts Amendment Bill 2008 (the Bill) was introduced into Parliament on 14 May 2008, embodying the Government's response. This Office will take an ongoing interest in the implementation of systems reform regarding confidentiality in the guardianship regime.

2.1.3 Stage 2 of the review

The second stage of the guardianship review is now underway. This Office continues to participate as a Reference Group member and will make submissions as the review progresses.

STOP PRESS

The Guardianship and Administration and Other Acts Amendment Bill 2008 was passed on 9 October 2008 and is due to come into effect on a date to be proclaimed.

2.1.4 The impact of the review of the civil and administrative justice system in Queensland

The anticipated development and implementation of the Queensland Civil and Administrative Tribunal (QCAT) arising from the review of the civil and administrative justice system in Queensland impacts upon GAAT. In essence, the Tribunal will be amalgamated with numerous other tribunals, and the resulting body will be QCAT (see Section 7.3 for more detail).

At the time of writing, it is unknown whether it is intended to standardise some procedural matters such as access to documents across QCAT or across divisions of QCAT. This could have an impact upon the reforms arising from the guardianship review. This Office will monitor this issue and provide advocacy as the two processes continue.

2.2 Office of the Adult Guardian

The following developments occurred over the last twelve months:

Increasing Workload

The Adult Guardian reports a significant increase in workload in 2007-2008 due to the appointment of the Adult Guardian as guardian for an increasing number of adults. This trend is expected to continue as Queensland's population ages. Additional funding for five new staff from July 2008 was secured in response to workload demands.

Trends

In terms of the trends in the issues the Adult Guardian deals with, the Adult Guardian has reported that there are a high number of complex cases, with more contentious issues and conflicting parties involved.

Guardianship and Administration Information Days

The Adult Guardian is to be commended for taking the lead in organising a Guardianship and Administration Information Day in Maryborough for the Wide Bay/Burnett region. Representatives of the Office of the Adult Guardian, GAAT, the Public Trustee, the Community Visitor Program and this Office collaborated to present information at a public meeting. This event provided the opportunity for service providers and community members in this region to learn more about guardianship and administration issues.

Further Guardianship and Administration Information Days involving the agencies of the guardianship regime are planned for regional areas of Queensland in 2008-2009.

Townsville Office

A Townsville office of the Office of the Adult Guardian was established in 2007-2008, providing increased assistance in this regional area, with staff more accessible to clients and other relevant parties. It is expected that decision-making will occur in a more timely manner. Strengthened relationships with local service providers and other government agencies will also improve the prospect of improved outcomes for vulnerable clients.

2.3 Practical guardianship initiatives

The Department of Justice and Attorney-General has established a working group, in which this Office participates, to consider practical strategies to address issues identified in recent research by the University of Queensland on asset management and financial abuse of older people. The research, funded by an Australian Research Council (ARC) Linkage Grant and industry partners[55] including the Office of the Public Advocate,[56] highlighted financial abuse arising from the use of enduring powers of attorney.[57]

The working group is considering five areas in which practical strategies might facilitate greater protections within the guardianship regime:

- review of the current enduring power of attorney (EPA) and advance health directive (AHD)[58] forms;
- training for people who witness EPA and AHD forms;
- development of a comprehensive EPA website;
- development of an EPA Code of Practice; and
- proposals in relation to scrutiny of land transactions involving EPAs.

Working group members include representatives from the Department of Justice and Attorney-General, GAAT, the Office of the Adult Guardian, the Elder Abuse Prevention Unit, the Queensland Law Society Elder Law Section, the University of Queensland research team, the Seniors Legal and Support Service, the Public Trust Office and Queensland Aged and Disability Advocacy as well as the Office of the Public Advocate.

It is anticipated that the working group will provide recommendations to the Attorney-General for consideration in the 2008-2009 year.

2.4 Health care related issues

Most health care decisions for people with impaired decision-making capacity will be made under the guardianship system.[59] Most of those decisions must be made by the relevant substitute decision-maker, including decisions to withdraw or withhold life-sustaining measures.

2.4.1 End-of-life decision-making

People with impaired capacity for whom end-of-life decision-making is under consideration are very vulnerable. A major research project about end-of-life decision-making is proposed to commence in the near future. As this Office has taken a significant interest in arrangements which affect these people,[60] it has indicated in-principle agreement to partnering the research. In the meantime, this Office has funded

55 Guardianship and Administration Tribunal, Office of the Adult Guardian, Office of the Public Advocate, Department of Communities, Disability Multicultural Affairs, Seniors and Youth and the Public Trustee.

56 See also reports on the research in *Annual Report 2005-2006* (2006) [11.2] 60.

57 For example, see Anne-Louise McCawley, Cheryl Tilse, Jill Wilson, Linda Rosenman and Deborah Setterlund, 'Access to assets: older people with impaired capacity and financial abuse' (2006) 8 (1) *Journal of Adult Protection* 20.

58 Advance health directives were added to the work plan for the group, in addition to the issues concerning financial matters, as a matter of convenience, since issues about the AHD forms had also been identified by participants and other persons.

59 *Guardianship and Administration Act 2000,* ss 66, 79.

60 Office of the Public Advocate, *Annual Report 2005-2006* (2006) [1.4] 13-14; *Annual Report 2006-2007* (2007) [2.3.1, 2.3.4] 27-29.

some preliminary research in anticipation of the major project (see Section 13.4 for more information).

2.4.2 People with profound brain damage

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

The Annual Reports for 2005-2006 and 2006-2007 reported on the Office's advocacy in response to the development by the National Health and Medical Research Council (NHMRC) of *Ethical Guidelines for the Care of People in Post-Coma Unresponsiveness or Minimally Responsive State* (the Guidelines) and a *Guide for Families and Carers of People with Profound Brain Damage* (the Guide). These earlier Annual Reports more fully outlined the key submissions of the Public Advocate to the NHMRC.[61]

In summary, in response to the Issues Paper, *Developing Ethical Guidelines for the Care of People in Post-Coma Unresponsiveness (Vegetative State) or a Minimally Responsive State* (2006), the Public Advocate suggested timeframes for diagnosis; identified the importance of substitute decision-making as a safeguard for the vulnerable adults concerned; and emphasised the importance of clear communication between family (most often the substitute decision-makers) and health professionals.

Subsequently, the draft Guidelines and Guide were released for public comment. Further submissions were made by the Public Advocate in 2007-2008, noting that the draft Guidelines and Guide largely addressed the comments made by the Public Advocate in response to the Issues Paper. Further submissions were made, mostly about providing greater clarity in the Guidelines for decision-makers. Key comments included:

- the need for clarity about factors which cannot legitimately inform clinical decision-making;
- determination of 'medical best interests' (relevant to clinical decision-making) is not likely to involve consideration of the same factors 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 required to guide decision-makers;
- the meaning of 'burdensome' or 'futile' treatment requires greater clarity;
- the respective roles of clinicians and substitute decision-makers must be clear; and
- the requirements for making valid advance health directives are different in the various States and Territories.[62]

The finalised Guidelines and the Guide were launched by the NHMRC on 19 June 2008.[63] The Guidelines detail some underlying principles to direct the care of the vulnerable people concerned.

2.4.3 National guidelines for advance care directives and related issues

Different laws apply in each Australian state and territory regarding advance directives and end-of-life decision-making.

61 *Annual Report 2005-2006* (2006) [1.4.2] 13-14; *Annual Report 2006-2007* (2007) [2.3.1] 27-28.

62 See 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› at 28 September 2008.

63 The Guidelines and the Guide may be accessed at ‹http://www.nhmrc.gov.au/›.

In Queensland, the guardianship legislation sets out the framework for end-of-life decision-making for people with impaired decision making capacity. Every person with capacity has the right to consent to or refuse life-sustaining health care for him or herself. Those with impaired decision-making capacity have the same right, but it must often be exercised by a substitute decision-maker. When an adult has made a valid advance directive regarding their health before their capacity became impaired, the matter will be dealt with in accordance with the direction given.[64] It should be noted, that there may nevertheless be issues about whether the advance directive applies in the circumstances which have arisen, and whether the person's directive will be followed.[65]

The Clinical, Technical and Ethical Principal Committee of the Australian Health Ministers Advisory Council is currently convening a working group to scope the development of nationally consistent guidelines for advance care directives and related issues concerning end-of-life medical decisions. The Office of the Public Advocate aims to contribute to this work given its significance for vulnerable people, and has advised the committee of its interest in participating in its consultation.

Principal Research Officer Marcus Richards and Part-time Administration Officer Sam Leahy

2.5 Interrelationship between guardianship regime and other related regimes

As identified previously by the Public Advocate,[66] issues arise at the interface between the guardianship regime and other relevant regimes.

2.5.1 Remuneration of private trustee company administrators

Some issues regarding the remuneration of private trustee company administrators have emerged from a legal intervention which is reported at Section 11.1.1 of this report.

The remuneration and payment of expenses of professional administrators are generally provided for by the *Guardianship and Administration Act 2000*.[67] However, in respect of private trustee company administrators, the relevant provisions are contained in the *Trustee Companies Act 1968*.[68] It provides for several alternatives regarding the remuneration which may be charged.[69]

Commission will be payable at rates fixed from time to time by the board of directors, but not exceeding certain specified limits calculated by reference to capital and income.[70] However, there is provision for the payment of any commission or fee agreed upon between the trustee company and 'the parties

64 In Queensland, the *Powers of Attorney Act 1998* provides for adults to make advance health directives; *Guardianship and Administration Act 2000* s 66, provides for a health care decision for a person with impaired capacity to be dealt with in accordance with an advance health directive giving a direction about the health matter, as a priority over substitute decision-making.

65 See 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› at 28 September 2008.

66 Office of the Public Advocate, *Annual Report 2005-2006* (2006) and *Annual Report 2006-2007* (2007).

67 Sections 47-48.

68 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited* [2008] QSC 49.

69 *Trustee Companies Act 1968* ss 41, 44 and 45.

70 *Trustee Companies Act 1968* s 41(1).

interested therein,' which may be in addition to or instead of the commission.[71] It is not uncommon for private trustee companies to reach agreement with their clients about remuneration other than by way of commission. However, when the person concerned has impaired decision-making capacity for financial matters, issues arise about whether such an agreement can be reached and if so, between which 'parties interested therein'. The Supreme Court of Queensland has clarified that a litigation guardian in a personal injuries proceeding is not such a person[72] (see Section 11.1.1 for more detail).

The Supreme Court may allow additional remuneration for the carrying on of the business of a person for whom the private trustee company has been appointed administrator.[73] Further, in addition to the commission and other money payable as referred to, the trustee company administrator is entitled to charge a fee for the value of work done and services rendered including, for example, arranging insurances, preparing taxation returns, inspections and reports upon real estate, and in respect of monies invested and other assets.[74] It is anticipated that issues regarding the amounts which may be charged under this provision will arise for consideration.

2.5.2 Review of Commonwealth privacy regime

Privacy requirements have sometimes worked to the disadvantage of adults with impaired decision-making capacity. In particular, relevant information has sometimes not been provided to substitute decision-makers on the basis these requirements. Accordingly, there is a significant interrelationship between the Queensland guardianship regime and the federal privacy regime. Advocacy regarding the review of the Commonwealth privacy regime is reported at Section 7.2.

2.5.3 Review of the civil and administrative justice system in Queensland

As noted in section 2.1.4, the review of the civil and administrative justice system in Queensland has resulted in a decision by Government to amalgamate various tribunals, including GAAT, into a new body — the Queensland Civil and Administrative Tribunal (QCAT). This is a significant development for the guardianship regime, and the implications for the future conduct of guardianship proceedings are unknown at this stage. Given the possible impact on vulnerable people, this Office has taken a significant interest in this review and subsequent developments. The issue is reported in detail at Section 7.3.

2.5.4 'Challenging behaviour' and restrictive practices

From 1 July 2008, amendments to the GAA and the *Disability Services Act 2006* establish a regime for authorisation of restrictive practices in DSQ-provided and DSQ-funded services (see Section 1.1 for further information).

71 *Trustee Companies Act 1968* s 41(7).

72 *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Limited* [2008] QSC 49.

73 *Trustee Companies Act 1968* s 44.

74 *Trustee Companies Act 1968* s 45.

3. The Housing System

In the Office's Annual Report 2002-2003 it was stated that:

> *Access to secure, affordable and appropriate housing continues as the leading systemic issue for many people with a decision-making disability*[75]

Each year since then, the Office has given substantial coverage to accommodation issues for adults with impaired decision-making capacity.

Major issues/areas of advocacy activity highlighted in recent Annual Reports include homelessness, reforms in the residential services sector, and processes for substituted decision-making about accommodation for adults with impaired capacity. Chronic homelessness for adults with impaired decision-making capacity has again been a major focus for this Office in 2007-2008. This section also provides updates on the Office's work on appropriate practices for decision-making about accommodation and residential service reforms.

3.1 Homelessness in Queensland

In 2005, the Queensland Government announced a new four-year $235.52 million strategy: *Responding to Homelessness* (the Strategy).[76] This Strategy includes funding for new accommodation, connecting people to services, early intervention initiatives, specialised mental health and drug/alcohol services, and addressing the legal needs of people experiencing homelessness.

Significant achievements have been made through the creation of new services, linkages and accommodation. For example, Queensland Health's Homeless Health Outreach Teams have brought a more assertive outreach approach to maintaining wellbeing for people who are homeless and frequent users of both mental health and homelessness services. This is critical given the high rates of mental illness among homeless people (see Section 6.1.2 for further discussion of the Homeless Persons Court Diversion program).

When the Strategy was introduced in 2005-2006, overall numbers of homeless Queenslanders had increased by 9% from 2001 to 2006.[77] It remains to be seen whether the Strategy has succeeded in reducing the number of people without access to shelter in Queensland.

Deteriorating housing affordability and rapid population growth are just two challenges in responding to homelessness. Services are reporting increased pressure in their attempts to meet the needs of homeless people. In addition, homelessness strategies across all levels of government have not adequately responded to the needs of vulnerable people whose impaired decision-making capacity compounds the experience of homelessness.

3.2 Chronic homelessness and impaired capacity

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); and

75 Office of the Public Advocate *Annual Report 2002-2003* (2003), 28.

76 Queensland Government, *Responding to Homelessness* (2007) ‹http://www.housing.qld.gov.au/about/pub/corp/homelessnessl.htm› at 29 September 2008.

77 Refer to Australian Bureau of Statistics, 2050.0. *Australian Census Analytic Program: Counting the Homeless 2006* (2008) ‹http://www.ausstats.abs.gov.au/Ausstats/subscriber.nsf/0/57393A13387C425DCA2574B900162DF0/$File/20500-2008Reissue.pdf› at 29 September 2008.

- people with a mental illness who make up a significant proportion of the primary and secondary homeless population.[78]

During 2006-2007, the Public Advocate's attention was drawn to another group of homeless people: those with impaired capacity who are entrenched in homelessness. Reports from the homelessness sector indicate that many of these chronically homeless individuals appear to have impaired decision-making capacity. They often live with some form of mental illness or cognitive impairment (such as acquired brain injury, intellectual disability or dementia) which may be misdiagnosed, inaccurately assessed or remain unidentified. Transient lifestyles and fleeting, intermittent contact with services, together with lack of awareness about impaired decision-making capacity amongst service staff and professionals, contribute to their vulnerability.

The basic needs of many of these chronically-homeless adults are not being met despite their frequent interactions with a variety of service delivery systems including the mental health, criminal justice, emergency services, health and homelessness sectors. Much of the contact these individuals have with services and systems is uncoordinated and reactive, and many fall between the gaps of the mental health, disability support, housing, homelessness and other related systems.[79]

3.2.1 Chronic Homelessness and Impaired Capacity Working Group

The Office, in partnership with Micah Projects Incorporated, convened a roundtable on 1 June 2007. Participants discussed the problems associated with meeting the needs of chronically homeless people with impaired decision-making capacity, and sought to identify practical strategies and actions.

The Public Advocate, Micah Projects Incorporated, Griffith University and other non-government agencies have developed a partnership to investigate the needs and issues of these groups of people more fully with a view to advocating for appropriate service responses for people who are chronically homeless and have impaired capacity.

3.2.2 *Left Out In The Cold* forum on chronic homelessness and impaired decision-making capacity

To increase awareness about chronically homeless people with impaired capacity, the Working Group referred to in Section 3.2.1 organised a forum entitled, *Left Out In The Cold*. Sponsored by Griffith University, the conference was well attended by service providers, academics and staff from local, State and Commonwealth Government agencies.

Speakers at the conference:

- explored the complexity of chronic homelessness and impaired decision-making capacity;
- outlined good practice examples in working with this group; and
- reiterated the need for proactive, coordinated, collaborative, evidence-based, well-funded and resourced, and flexible responses to people.

The Public Advocate's keynote address to the forum emphasised that current systems and services intended to address homelessness are not responding to the range and complexity of issues experienced by chronically homeless adults with impaired decision-making capacity.[80] The Public

78 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, hostels and other forms of emergency accommodation).

79 Micah Projects Inc & The Office of the Public Advocate – Queensland, *Left Out in the Cold: The Call to Warm to New Idea*s (2007).

80 The full text of this speech is located at ‹http://www.publicadvocate.qld.gov.au›.

Advocate identified the following issues and systems as requiring attention.

- There is general societal exclusion of, and bias against, this group of people. Widespread prejudices and cultural misconceptions about chronic homelessness impact significantly on society's approach to addressing their needs.
- Existing services are unable to meet the demands of this group.
- Research indicates that frontline services, even well organised ones, are struggling to meet the needs of those with the most complex problems.[81]
- Available resources, programs, services and responses are poorly coordinated. Uncoordinated interventions across systems such as health, social services and housing sectors are almost universally cited as one of the main systemic, structural or service failures for homeless people and people with high and complex needs.[82]
- Policy responses lack commitment to end homelessness.
- To date, the Australian response remains largely reactive and crisis-driven. Policy changes in some overseas jurisdictions have produced significant reductions in homelessness. However, at the time of writing, State and Commonwealth Governments are working to reduce homelessness.

Senior Research Officer Adrienne McGhee (left foreground) and Principal Research Officer Marcus Richards (right foreground) at the *Left Out in the Cold* forum.

3.2.3 Research into chronic homelessness and impaired decision-making capacity

The literature reveals that little research has been undertaken in the area of chronic homelessness and impaired capacity. The Office, Micah Projects Incorporated, Mission Australia and HART 4000 have entered into a research partnership with the School of Human Services at Griffith University to investigate the nature and prevalence of impaired capacity in homeless people in several regions in Queensland.

It is anticipated that the research will be completed in 2009. The results are expected to have implications for the development of policy and programs by government, and provide support for further advocacy by the Public Advocate and other members of the Working Group (see Section 13.2 for further information about the research project).

3.2.4 Commonwealth Government initiatives

The current Commonwealth Government has identified homelessness as an important social

81 See Helen Herrman, Helen Evert, Carol Harvey, Oye Gureje, Tony Pinzone and Ian Gordon, 'Disability and Service Use Among Homeless People Living with Psychotic Disorders' (2004) 38 *Australian and New Zealand Journal of Psychiatry* 965-74; Victorian Government Department of Human Services, *Responding to People with Multiple and Complex Needs Project: Summary of Consultation Findings* (September 2002).

82 See, for example: University of Sydney Centre for Developmental Disability Studies, *Innovative Models of Community Support for People with High and Complex Support Needs* (December 2004); United States Department of Health and Human Services – Substance Abuse and Mental Health Services Administration, 'Chapter 6: Use Evidence-Based and Promising Practices' in *Blueprint for Change: Ending Chronic Homelessness for Persons with Serious Mental Illnesses and Co-Occurring Substance Use Disorders* ‹http://mentalhealth.samhsa.gov/publications/allpubs/SMA04-3870/chapter8.asp› at 22 March 2008; Victorian Government Department of Human Services, *Responding to People with Multiple and Complex Needs Project: Summary of Consultation Findings* (September 2002); Kate Amore & Claire Aspinall, 'A Public Health Approach to Homelessness' (October 2007) 20(9) *Parity* 7-8; Andrew Jones, Donna McAuliffe, Tim Reddel, Greg Marston and Alice Thompson, 'Sustaining Tenancies in Public Housing: Understanding and Supporting Tenancies-at-Risk in Queensland' (Final Report School of Social Work and Applied Human Services, The University of Queensland, August 2004).

priority for Australia, committing $150 million during its first term for extra housing for homeless people and commissioning Green and White Papers to examine strategies for tackling homelessness over the next decade.[83]

3.2.5 Commonwealth Government Green Paper on homelessness

On 22 May 2008, the Commomwealth Government released a Green Paper, *Which Way Home? A New Approach to Homelessness* (the Green Paper). The Green Paper promoted public discussion on homelessness, highlighted the challenges faced by people who are homeless, and suggested ways forward.[84] The Minister for Housing invited public discussion on homelessness and written contributions to inform the development of the White Paper to be released in September 2008. The White Paper will set out the Commonwealth Government's national plan of action in this area to 2020.[85]

The Office contributed to one of the open consultation sessions, and provided a written submission to the Green Paper.[86] The submission:

- commended the Commonwealth Government for its frank acknowledgement of inadequacy of existing homelessness systems in Australia, and for taking the important step towards reform of the existing policy and funding frameworks, and service responses;
- commented on the nature and vulnerability of chronically homeless people with impaired capacity;
- outlined some of the reasons why the current initiative to end homelessness must protect the rights and wellbeing of this group; and
- provided comment on the Green Paper as it relates to adults with impaired decision-making capacity who are homeless.

The submission made the following recommendations for systems changes to protect this group of vulnerable adults:

- A highly-coordinated and flexible system for responding to homelessness (including early intervention and prevention, crisis response, and ongoing support) needs to be developed and implemented.
- Continuing support must be provided for this group once they are housed.
- Chronic homelessness and impaired capacity should be established as a major research priority.
- Targets for reducing homelessness must ensure that chronic homelessness is reduced at the same rate as the overall homeless population.
- Cultural prejudice and stigma towards chronically homeless people must be addressed.
- The overall system and its frontline services must be adequately resourced and supported.
- The Supported Accommodation Assistance Program (SAAP) system should be retained as part of the response to homelessness but with some reform.
- The use of mainstream services to meet the needs of this cohort must be carefully evaluated to minimise the risk of exclusion and devaluation.
- Homelessness legislation must be developed and implemented as a foundation of the system.

83 John Ferguson, 'Kevin Rudd pledges $150m to ease homelessness', *Herald Sun* (Victoria), 5 November 2007 ‹http://www.news.com.au/heraldsun/story/0,21985,22703831-5013904,00.html› at 22 March 2008.

84 Refer to ‹http://www.facs.gov.au/internet/facsinternet.nsf/housing/new_approach_stage1.htm#2› at 12 August 2008.

85 Refer to ‹http://www.facs.gov.au/internet/facsinternet.nsf/housing/new_approach_stage1.htm#1› at 12 August 2008. At the time of writing, the White Paper had not been released.

86 This submission is located at ‹http://www.publicadvocate.qld.gov.au›.

- Chronically homeless people with impaired decision-making capacity must be treated with dignity and respect by all participants within the system.

The Public Advocate expressed concerns that, while mental illness was discussed a number of times in the Green Paper, the broader issue of impaired capacity was not addressed. While responding to the needs of people with a mental illness is essential, consideration must be given to individuals who live with other forms of cognitive impairment affecting their ability to end their homelessness and remain housed.

Other causes of homelessness such as domestic violence and increasing house prices are significant contributors to homelessness and must be remedied. However, the Public Advocate urged the Commonwealth Government to give focused attention to the needs of vulnerable adults with impaired decision-making capacity who are entrenched in homelessness.

3.2.6 Submission to National Social Work Services, Centrelink

The Office recognises Centrelink as a front-line agency for many individuals who are chronically homeless and who have decision-making disabilities. The Office attended a meeting of peak agencies and homelessness service providers to discuss Centrelink responses to people who are homeless. The Public Advocate submitted further written comment to Centrelink highlighting the issues for, and vulnerabilities of, chronically homeless people with some form of decision-making difficulty.[87] Recommendations to Centrelink included:

- providing training and professional development for Centrelink staff in engaging appropriately with people with impaired capacity, including the respectful management and de-escalation of 'challenging behaviour'; identifying signs of impaired decision-making capacity; and responding appropriately, (for instance, referring people to relevant community and government based services);
- implementing mechanisms to give effect to the *Guardianship and Administration Act 2000* (GAA). This includes ensuring decisions are made by appropriate substitute decision-makers, and having knowledge about the role of the Adult Guardian; and
- supporting Centrelink's proposal to establish homeless outreach teams to more effectively engage with service providers and service users.

Centrelink Social Work Services has acknowledged the issues raised by the Office and is considering changes to some practices. The Public Advocate commends Centrelink for inviting comment on its services and its openness to feedback. Centrelink is encouraged to continue reviewing its services and developing responses to minimise the severe disadvantage of adults who are both chronically homeless and who live with impaired decision-making capacity.

3.2.7 Other advocacy

The Public Advocate has also expressed concerns about the inadequacy of responses to this group to representatives from local, State and Commonwealth Governments, including the Prime Minister and the Parliamentary Secretary for Social Inclusion.

3.2.8 Final comments

This issue requires urgent action. While this Office acknowledges that chronically homeless people with decision-making disabilities are often the most difficult to provide services for, fundamental human rights should be accorded to all people, including

87 This submission is located at ‹http://www.publicadvocate.qld.gov.au›.

those who significantly challenge the capacity of systems.

The Office of the Public Advocate will continue its work with the Chronic Homelessness and Impaired Decision-Making Capacity Working Group with the aim of raising awareness of this issue in the community and within government, engaging more agencies in the issue, and promoting positive ways forward.

3.3 Tenancy and decision-making

The Public Advocate has been concerned about accommodation decision-making processes for adults with impaired capacity. These concerns were detailed in the Office's 2005-2006 and 2006-2007 Annual Reports, where the systemic issues were identified as:

- accommodation decisions being made by service providers, rather than substitute decision-makers;
- the signing of tenancy agreements, which constitutes a financial decision, being undertaken by parties who are not legitimate decision-makers for the adult;
- inconsistencies in policies and procedures, if they exist at all, occur across different agencies;
- where there are no substitute decision-makers involved, decisions are being made without engaging the guardianship regime to ensure that appropriate decision-making processes occur; and
- inappropriate accommodation decisions being made. For example, adults with impaired capacity who may not be compatible are being housed together, thereby exacerbating 'challenging behaviours'.

Concerns regarding tenancy decisions continue to be heard by the Office. In the year ahead, the Office intends to consider whether agencies or organisations across the government, non-government and private sectors whose activities involve adults with impaired decision-making capacity have adequate policies and procedures for substitute decision-making. Other activities and mechanisms that these organisations have in place, such as training, will be also considered.

3.4 Residential services

In last year's Annual Report, the Office reported on the implementation of the Queensland Government's reform package for the residential services sector. This year's report provides an update on the progress of the reform process, including the external evaluation of the reforms and the performance of the Branch established to implement the regulatory framework.

3.4.1 Evaluation of the residential services sector reforms

In 2006-2007, the Office contributed to an external evaluation of the reform process of the residential services sector. The evaluation, conducted by SGS Economics and Planning, was completed in May 2008.

Overall, the evaluation found that the reform process has been effective in substantially improving the residential services sector. The centrepiece of the reform package was the *Residential Services (Accreditation) Act 2002* (the RSAA), providing the legislative framework for the introduction of a registration and accreditation regime. The registration process requires that a range of building standards be met and that the residential services service provider be determined a suitable person as prescribed by the RSAA. The accreditation process requires that the service provider meet a range of standards in relation to policies, procedures and practices to be accredited and to continue operating.

The evaluation indicates that the reform process appears to have been instrumental in bringing about significant improvements in both the safety and standards of the physical structures of residential services as well as the practices within residential services. It appears that residential services generally now provide a safer accommodation option with less potential for exploitation. This is not to suggest that all residential services were unsafe and exploitative environments. In fact, it is evident that a number of service providers had been operating residential services to acceptable standards prior to the reform process, or have been able to attain compliance without significant changes to their practices. It is acknowledged that, prior to the reforms, there were some service providers who conducted good services and provided assistance to residents above and beyond what the services were required to provide.

The Office has been advised that the majority of residential services in Queensland are now registered and accredited, and the next phase of the process is underway — the re-accreditation of those services which are already accredited. The legislation provides for an accreditation period of one to three years, depending on the number of standards met.

One positive evaluation finding was that many residential service providers acknowledged that the imposition of standards has helped them improve their operating practices. This is an endorsement of the design of the reform package, the way in which the reforms have been implemented, and the efforts of those service providers to address the requirements of the reforms.

The Office acknowledges the positive outcomes of the evaluation. However, the registration and accreditation standards imposed by the *Residential Services (Accreditation) Act 2002* are limited — they can improve the standards of the bricks and mortar, and can ensure policies and procedures to maximise the prospect of good practice are in place, but they cannot guarantee safety and freedom from abuse and exploitation. Ongoing vigilance is required to protect the interests and wellbeing of vulnerable adults with impaired capacity. The Office is interested in collaborating with key stakeholders to conduct research into the impact of the reforms on vulnerable people with disability.

3.4.2 Residential Services Accreditation

Residential Services Accreditation Unit (RSA) within Fair Trading Operations of the Department of Justice and Attorney-General is responsible for implementing and enforcing the *Residential Services (Accreditation) Act 2002*.

The process of attaining compliance with the registration and accreditation standards across the residential services sector was inevitably a balancing act — bringing about improved standards of accommodation by imposing a regulatory regime while minimising the closure of services and the consequent loss of accommodation options for disadvantaged Queenslanders. A significant number of closures have occurred, by and large by service providers who chose not to invest in bringing their accommodation up to the required standard.

Rather than wielding the legislation as a blunt instrument to enforce the registration and accreditation requirements, RSA sought to work constructively with residential services operators to achieve compliance. There have only been two instances (as reported in last year's Annual Report) where RSA instigated legal action in relation to the conducting of unregistered residential services. RSA's approach has been to establish and maintain relationships with service providers, provide information, and ensure consistency and fairness in decision-making.

One example of their constructive approach is the development and implementation of the Accreditation Standards Implementation Review Program (ASIRP). Through this program, service providers whose residential services are due for re-accreditation are supported to self-evaluate their practices in terms of how well they are continuing to meet the accreditation standards. RSA staff members are available to discuss any issues and to provide information about what is required to maintain and achieve ongoing compliance. Participation by service providers in the ASIRP process is not a mandatory requirement for re-accreditation. The program has the full support of the Supported Accommodation Provider's Association (SAPA). This Office understands that service providers have responded positively and engaged willingly with the program.

RSA is to be commended on its constructive approach to achieving compliance across the residential services industry.

3.4.3 Aged rental complexes

In last year's Annual Report, the Office reported on the status of aged rental complexes in relation to the requirements of the *Residential Services (Accreditation) Act 2002*. At that time, in the context of the contractual arrangements between managers and unit owners, it appeared that most aged rental complexes were considered to be covered by the Act.

However, this interpretation of the Act has been re-evaluated, and the Office now understands that the prevailing view is that aged rental complexes are not fully captured by the Act. Proposed amendments have been drafted and consultation has been conducted with industry prior to the amendments being introduced into parliament for its consideration.

3.4.4 Level 3 residential services are not medical facilities

Level 3 residential services provide accommodation, food services and personal care services. The personal care standards place no responsibility on the service provider in relation to medical issues, but are more about support, facilitation and transparency. The intention of the legislation was not to establish Level 3 residential services as medical facilities or as services that provide a high level of care similar to nursing homes.

However, the Office is aware that a number of residents in Level 3 services appear to have needs which suggest they require medical care in a facility such as a nursing home. It would appear that these people are often placed in Level 3 services because no appropriate places are available in other facilities. Alternatively, they may develop needs beyond the scope of the Level 3 service to provide while living at the service, but cannot be moved to a more appropriate setting because of a shortage of available places. Level 3 service providers are sometimes criticised for failing to provide adequate medical or personal care services, but often this is an unfair criticism.

How to appropriately meet the needs of adults living in Level 3 residential services, where their needs are beyond the scope of a Level 3 service, requires further examination.

3.4.5 The impact of fire safety regulations on people with impaired capacity

In last year's Annual Report,[88] the Office reported on the unintended consequences arising from fire safety regulations requiring budget accommodation (typically boarding houses) and supported accommodation services which house six or more

88 Page 35.

residents, to fit self-closers on doors, including the rooms of residents. The purpose of this regulation is to contain any fire that may occur and prevent it spreading.

While the Office endorsed regulations designed to improve the safety of people with disability, concerns were noted by families and supported budget accommodation operators about the unintended consequences arising from the regulation. They noted that some people lacked the strength to operate their doors, and as a result were either secluded in their rooms or prevented from accessing or exiting their rooms once the doors had closed. There were also concerns that in the Queensland climate, considerable heat distress may result. It was noted that many of the rooms were not air-conditioned or cross ventilated.

The Office advocated for alternative closing mechanisms that would allow the doors to stay open, but automatically shut in the event of fire alarm activation. The Office advocated further in response to the Department of Local Government, Planning, Sport and Recreation's (now the Department of Infrastructure and Planning) Discussion Paper, *Residential Care Improvement Strategy* for existing residential care facilities. This Strategy proposed a number of changes to existing residential care facilities, in particular, aged care. One of the proposals was to include a requirement that aged care facilities be subject to the fire safety regime already in place for disability services and budget accommodation (boarding houses) discussed in the previous paragraphs.

Key points made in the Office's submission included the need:

- for some flexibility in the regulation given that residents to be covered have different circumstances and capacities;
- for a multi-system approach noting that it was dangerous to rely on any one particular fire prevention mechanism;
- to note that most fires in large residential settings where fatalities had occurred resulted from the failure to enforce existing regulation, and that more onerous regulation in the absence of enforcement would be of little protection;
- to ensure that costs of implementation were not passed on to residents as the aged and people with disability are least able to absorb the increased costs associated with regulation. Government financial assistance may be needed by some operators to ensure the viability of services; and
- to balance the risk of harm from fire by the creation of fire compartments (by installing self closing doors) and other risks associated with keeping people secluded in their rooms.

3.5 Review of the *Residential Tenancies Act 1994*

The Office reported last year on its submission to the review of the *Residential Tenancies Act 1994* in which it:

- stressed the importance of housing as a basis of having a good quality of life for people with impaired capacity for decision-making;
- noted that people with impaired decision-making capacity who pay rent (including as part of a fee for care services) should enjoy residential tenancy rights equal to other tenants in the community; and
- suggested, given the importance of formal documentation in establishing rights and responsibilities, that legislation provide for nominated individuals to receive all notices that may be issued.

At the time of writing, the Residential Tenancies Authority is working with the Office of the Queensland Parliamentary Counsel to draft the new Residential Tenancies and Rooming Accommodation Bill 2008. This Bill will incorporate the provisions of the *Residential Tenancies Act 1994* and the *Residential Services (Accommodation) Act 2002* proposed amendments. It is anticipated that the new Bill will be introduced into Parliament in late 2008 and commence in 2009.

3.6 Housing peak body for people with disability

In last year's Annual Report, this Office reported on the Minister for Housing's decision to rationalise the Department of Housing's peak body funding. The funding had been allocated to five organisations, but under the new arrangement, just two organisations remained as Department of Housing-funded peaks, Queensland Shelter and the Tenants' Union of Queensland.

In this reorganisation, the Queensland Disability Housing Coalition, who had previously provided advice to the Department of Housing in relation to disability issues, was no longer funded, and Queensland Shelter was funded to perform this role. The Minister for Housing gave the Public Advocate his assurances that this change in funding arrangements would not diminish the capacity of the sector to advocate on behalf of Queenslanders who live with a disability, nor would it erode the department's commitment to meeting the housing needs of the community's most vulnerable and disadvantaged members.

Since that time, Queensland Shelter has restructured their organisation and recruited staff to new positions to fulfil this added responsibility. The Office understands that, during this restructuring process, Queensland Shelter and the other peak bodies have engaged in dialogue in an endeavour to ensure that the changed arrangements for representing the housing issues of people with disability continue to deliver broad and informed advice, reflecting the diversity of perspectives of people with disabilities, their families and service providers.

Queensland Shelter has informed this Office that the restructure has been finalised, and that they have recently attained a full complement of staff. Queensland Shelter has also acknowledged that their organisational restructure to incorporate the role of providing the Department of Housing with advice on disability issues has taken longer than anticipated. It would appear that in the short-term, the changes to the funding of peaks has resulted in a diminished capacity within the sector to provide the Department of Housing with advice on disability issues. However, Queensland Shelter has advised this Office that they are now well-placed to undertake a broad range of work on the housing needs of people with disability, including adults with impaired decision-making capacity.

The Office will continue to monitor the situation, and looks forward to Queensland Shelter fulfilling its expanded role of providing informed advice to the Department of Housing on the housing needs of adults with impaired capacity.

3.7 Accommodation and support for people with mental illness

Accommodation and Support for People with Mental Illness or Psychiatric Disability

The Office has participated in a research project with the Department of Housing, Queensland Health and DSQ in relation to accommodation and support for people with mental illness and psychiatric disability (see Section 13.3 for more information).

Project 300

Project 300 (P300) assists people with psychiatric disability, who have become long-stay residents of mental health facilities due to the lack of community support services, to move to community living. The Office urges the relevant government agencies to collaborate in seeking increased funds for P300 and to give consideration to extending the scope of P300 to provide services to a broader cohort (see Section 4.6 for more information).

Housing and Support Program

The Housing and Support Program (HASP) is a joint initiative between DSQ, Queensland Health and the Department of Housing, and aims to enable people with a psychiatric disability to transition from Queensland Health facilities to community living through the development of sustainable tenancies (see Section 4.7 for more information).

4. The Mental Health System

As noted in last year's report, the Commonwealth and State Governments have given significant attention and additional funding to serious systemic issues in the mental health system.

The *Queensland Plan for Mental Health 2007-2017* was launched this year. In addition, this year saw the transfer of some responsibility for mental health from Queensland Health to Disability Services Queensland (DSQ).

4.1 Machinery of government changes – DSQ responsibility for mental health

Last year's report noted machinery of government changes which saw the transfer of some mental health responsibilities from Queensland Health to DSQ.[89] The transfer took place in September 2007 when DSQ assumed primary responsibility for funding, developing and implementing all existing and new mental health programs delivered through non-government service providers. DSQ 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. Funding responsibility for 48 community mental health non-government organisations (NGOs) transferred from Queensland Health to DSQ. These organisations receive in excess of $13.5 million recurrently, and deliver a variety of service activities across Queensland.

In the 2007-2008 State Budget, the Queensland Government committed $98.09 million to developing new community-based mental health initiatives. Some $35.64 million has been committed over four years to purchase a range of accommodation and recovery-focused lifestyle support services from the NGOs. Also, $22.45 million over four years has been allocated for non-clinical support for people with psychiatric disability entering social housing.

4.1.1 New initiatives

The Mental Health Branch is rolling out several new initiatives over 2008, including:

A Transitional Recovery Program:

This program aims to offer flexible support for people moving from acute care to supported accommodation, and finally independent community living. The Gold Coast was identified as an area that would benefit greatly from such a service, and a local service provider has been funded to operate the program.

A Resident Recovery Program:

The aim of this program is to break the cycle between acute care, hostels and boarding houses and homelessness. The program will provide individualised, flexible responses to assist participants with lifestyle skills and community links. Two services, one at Eight Mile Plains and the other at New Farm, have been funded to conduct this program in their areas.

A Transition from Correctional Facilities Program:

The aim of this program is to provide planning, skill development and non-clinical support, underpinned by recovery principles, to assist individuals exiting a correctional facility to successfully transition to a stable community lifestyle. The program will provide transitional support for men and women with moderate to severe mental illness who are being released from facilities. Work is currently underway to implement this program for people in Lotus Glen (Mareeba) and Townsville correctional facilities.

89 Office of the Public Advocate, *Annual Report 2006-2007* (2007) [4.7] 48-49.

It is hoped that prisoners with a mental illness and a need for transitional support will not be excluded on the basis that their illness is not 'severe' enough (see Section 6.2 for further information regarding transitional programs for prisoners).

It is always pleasing to hear of new initiatives with the potential to significantly assist people with mental illness/psychiatric disability — to improve their quality of life and their capacity to live independently in the community. These initiatives are currently on a small and localised scale, more in the nature of pilot arrangements than broad programmatic responses, and will only be available to relatively few people in need of them.

The Office will closely monitor the progress of the implementation and evaluation of these initiatives, and the expansion of these programs to other areas.

4.1.2 Sector Development Strategy

A state-wide Sector Development Strategy has also been funded by DSQ. The aim of this program is to assist mental health community-based organisations deliver improved support to people with mental illness. Key NGOs, including Queensland Alliance, Self Help Queensland and the Workforce Council, have been allocated funds to support mental health organisations and self-help groups throughout the state with strategic planning, governance and workforce development, office equipment, website development, recruitment strategies, staff training and resources.

Providing community-based organisations with infrastructure support is a constructive approach to improving the efficiency and effectiveness of the sector. The Office commends this initiative.

4.1.3 Peer Operated Accommodation Services

Another proposed initiative, Peer Operated Services, was not funded for the 2007-2008 period, although some preliminary work has been undertaken. Funds have been allocated for the 2008-2009 period. The proposed aim of this program will be to provide short-term accommodation for people with mental illness or psychiatric disability who are in emergency or crisis situations, from services being operated by people who experience mental health issues themselves. The Office understands the initial scoping, including a literature review, has been completed, and that a number of projects are being planned.

The Office will monitor the development and implementation of this initiative.

4.2 Queensland Plan for Mental Health 2007–2017

The Queensland Government launched the *Queensland Plan for Mental Health 2007–2017* (the Plan). The Plan provides a ten year framework for reform and growth of mental health services in Queensland, and outlines a whole-of-government approach structured on the premise that an effective, integrated mental health system must be based on partnerships between the government and NGOs, and must involve consumers and their carers.

The plan sets out six principles to guide and support the reform. These are:

- consumer and carer participation;
- resilience and recovery;
- social inclusion;
- collaboration and partnerships;
- promotion, prevention and early intervention; and
- evidence-based practice.

The Plan also identifies five priority areas for action to enable mental health services to better respond to existing and future demand. These priorities for reform are:

- promotion, prevention and early intervention;
- improving and integrating the care system;
- participation in the community;
- coordinating care; and
- workforce, information quality and safety.

Under each priority, a range of proposed actions are articulated, with anticipated outcomes within specified timeframes set out. The Office commends the Queensland Government for developing what appears to be a relevant and relatively comprehensive blueprint for a way forward in regard to the provision of mental health services in this State.

Having developed the Plan, the Queensland Government must now implement it. This will require considerable resources and concerted effort. This Office encourages the Queensland Government to ensure that sufficient resources are allocated for implementation of this Plan, and will monitor the situation in the coming year.

One important issue which is not addressed in the Plan is access for people with mental illness or psychiatric disability to independent, individual advocacy.

In the Public Advocate's Annual Report 2005-2006, Queensland Health was strongly encouraged to consider introducing independent, professional advocacy for people accessing mental health services. The use of consumer and carer consultants was acknowledged and supported, but it was pointed out that these workers are employees of the district mental health services and, as such, have a conflict of interest.

While existing individual advocacy agencies for people with disability undertake advocacy for people with mental illness, the sector cannot meet the existing need. Whether increased access to advocacy for people with mental illness or psychiatric disability is best achieved through providing increased resources to the existing advocacy sector, or through the development of new advocacy agencies, is a matter requiring consideration.

The *Queensland Plan for Mental Health 2007–2017* is a whole-of-government initiative, and the Office encourages responsible agencies to work collaboratively to address this issue.

4.3 Reducing use of restraint and seclusion in mental health facilities

As reported in the Annual Reports for 2005-2006[90] and 2006-2007,[91] the Public Advocate has concerns about the use of restraint and seclusion in mental health facilities and supports the implementation of an articulated national safety priority of the National Mental Health Working Group regarding;

> *Reducing use of, and where possible eliminating, restraint and seclusion.*[92]

The recently released Queensland Health publication, *Patient Safety: From learning to action II Second Queensland Health Report on Clinical Incidents in the Queensland Public Health System 2006/7*[93] reports deaths associated with physical restraint during inpatient mental health care.[94] For each death which occurs, it is likely that there are many other persons

90 [4.3] 34-35, [8.1.1] 49-50.

91 [4.3] 43-45, [11.3] 73-74.

92 *National Safety Priorities in Mental Health: a National Plan for Reducing Harm* (2005) 17. This plan was endorsed by the Australian Health Ministers Advisory Council in October 2005.

93 Available at ‹http://www.health.qld.gov.au/patientsafety/default.asp#› at 29 September 2008.

94 Ibid, 21.

who experience an adverse outcome from restraint, but which does not result in death. Restraint and/or seclusion is traumatic for the consumer, their support networks and the staff involved.

The issue was identified as a high priority in Queensland Health and led to the establishment of a Seclusion and Restraint Subgroup of the Statewide Mental Health Network, which has almost completed work on policy documentation for use throughout the State. The Mental Health Clinical Collaborative is also addressing this as a priority issue.

As reported in last year's Annual Report, Queensland Health commenced work on reducing and, where possible, eliminating the use of restraint and seclusion in mental health services with a statewide mental health forum in February 2007. Evidence presented demonstrated that it is a realistic goal to significantly reduce, and virtually eliminate, restraint and seclusion in mental health services (including forensic and high secure wards). Change can be achieved with strong leadership in reforming the culture of mental health services. Reduction in the use of restraint and seclusion leads to better outcomes for patients, and safer and more satisfying work environments for staff.

The Public Advocate participated in the 2007 forum, and has provided support for the Director of Mental Health's goal of reducing restraint and seclusion in Queensland mental health services by 90% over a five year period.

Queensland is involved in this project at a national level. Under national initiatives, 11 beacon sites have been established throughout Australia, to trial methods of reducing seclusion and restraint. In 2008, the Public Advocate participated in a national forum of the National Mental Health Seclusion and Restraint Project at which there was an opportunity to hear of the achievements of the beacon sites. The reports of progress made were heartening. In Queensland, beacon sites are operating at Cairns and The Park Centre for Mental Health.

In Queensland, a further forum about reducing and where possible eliminating the use of seclusion and restraint is scheduled for November 2008.

Efforts to reduce harm to mental health consumers through implementing this project are commended.

4.4 Working to prevent suicide of people with mental illness

It is well known that people with mental illness face a greater than average risk of suicide. Queensland Health recently reported on deaths during 2006-2007 of some 27 consumers of mental health services as a result of suspected suicide, and estimated the suicide rate for persons with serious mental illness at 7-10 times that of the general population.[95]

During 2007-2008, the Office released an Issues Paper, *Preventing suicide deaths of Queenslanders with a mental illness*.[96] The release of the Issues Paper follows a long history of documented advocacy concerning suicide of people with mental illness.[97]

4.4.1 The Background to the Issues Paper: Coronial inquests

In the Annual Reports for 2005-2006[98] and 2006-2007,[99] the Public Advocate reported on legal

95 Queensland Health, *Patient Safety: From learning to action II Second Queensland Health Report on Clinical Incidents in the Queensland Public Health System 2006/7* (2008) 21, 37-38 ‹http://www.health.qld.gov.au/patientsafety/default.asp#› at 29 September 2008.

96 Public Advocate, *Preventing suicide deaths of Queenslanders with a mental illness* (2008). Refer to ‹http://www.publicadvocate.qld.gov.au›.

97 *Annual Report 2003-2004* (2004) [10.4.2] 31-32; *Annual Report 2004-2005* (2005) [5.5.17] 47-48; *Annual Report 2005-2006* (2006) [4.4, 8.1.2, &11.5] 35, 50-51, 61-62; *Annual Report 2006-2007* (2007) [4.4,11.1] 45-46, 73.

98 [8.1.2] 50.

99 [4.4] 45-46 and [11.1] 73.

interventions into Coronial inquests conducted into the suicide deaths of three Queenslanders with a mental illness. In summary, the Public Advocate made a written submission to this inquiry which provided an analysis of the systemic issues arising from the coronial evidence, and made over 40 recommendations for change under 11 broad headings. Key recommendations made were in relation to:

- 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;
- timely access to patient information across the State, by inpatient and community staff;
- comprehensive and early discharge planning;
- intensive post-discharge support for patients who have presented with suicide ideation or who have been assessed at risk of suicide;
- greater funding for a range of community-based services for people with mental illness;
- 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 (GPs) who treat patients who have a mental illness or who exhibit signs of suicidal ideation;
- improved systems of culturally-appropriate care for Aboriginal and Torres Strait Islander people with a mental illness;
- an expansion in the scope of Queensland Health's Sentinel Events program, 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;
- 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;
- 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;
- systems to improve the monitoring of the implementation of Commonwealth and Queensland Governments' mental health policy and procedures across district mental health services; and
- review of the *Queensland Government Suicide Prevention Strategy 2003-2008*.

On 15 December 2006, the Coroner handed down her findings.[100] The Coroner's recommendations included many of those of the Public Advocate.

4.4.2 Release of the Issues Paper

Work was subsequently undertaken to convert the Public Advocate's submission to the Coronial inquest to an Issues Paper for public release.

This work culminated in the release of *Preventing suicide deaths of Queenslanders with a mental illness: An Issues Paper*.[101] It addresses the same issues as were raised before the Coroner, and provides details, where known, of work underway to address the concerns raised.

100 See: *Inquest into the deaths of Charles Edward Barlow, Patrick Douglas Lusk and Emily Jane Baggott, Coroner Previtera, Cairns, 15 December 2006. Inquest, suicide by mental health patients* ‹http://www.justice.qld.gov.au/courts/coroner/findings.htm› at 8 October 2007.

101 Office of the Public Advocate, *Preventing suicide deaths of Queenslanders with a mental illness* (2008). Refer to ‹http www.publicadvocate.qld.gov.au›.

4.4.3 Implementation of recommendations by Queensland Health

The Public Advocate expressed interest in Queensland Health's implementation of the Coronial findings.

Various activities are being undertaken within Queensland Health to improve outcomes for people with a mental illness who are at risk of suicide. These include the dissemination of *Guidelines for the management of patients with suicidal behaviour or risk*, first developed in 2004. Additional work has occurred as a result of the 2005 Queensland Health report, *Achieving Balance: Report of the Queensland Review of Fatal Mental Health Sentinel Events 2002-2003*. Implementation of the nine key recommendations commenced in March 2005. Most were completed by June 2008.[102] Key recommendations regarding standardisation of clinical documentation and service provision for clients with a dual diagnosis are due to be completed by June 2009. A number of the recommendations are consistent with those made in the Public Advocate's submission.

The Director of Mental Health and Queensland Health Patient Safety Centre are responsible for overseeing the implementation of the recommendations of *Achieving Balance*.

The Patient Safety Centre coordinates Queensland Health's response to the Coroner's recommendations, while implementation rests with the responsible business unit. Consideration and implementation of the recommendations has been underway across relevant sections of Queensland Health since January 2007. A detailed Coroner's Action Plan regarding implementation has been prepared. It is understood that many of the recommendations have been fully implemented.

Regular and publicly-disseminated updates are being provided on the progress of a range of key mental health service reform initiatives such as:

- standardisation of core processes of mental health assessment and treatment;
- greater support of, and the creation of partnerships, with GPs;
- creation of a statewide electronic patient information system;
- greater integration of mental health and substance abuse services; and
- ongoing monitoring and analysis of mental health sentinel events.

This work is linked to other work underway through the Statewide Mental Health Network and the *Queensland Government Suicide Prevention Strategy 2003-2008*. The Public Advocate will take an ongoing interest in the reform process.

4.5 Restructure of Queensland Health

The Office has consistently advocated for structural reform within Queensland Health which will facilitate the implementation of agreed Commonwealth Government and State mental health policy, guidelines, standards and priorities.[103] Despite some sound mental health policy at a national and state level, this policy has often not been implemented at a local level. While acknowledging the dedication and professionalism of many hard-working mental health professionals throughout Queensland, the standard and practices of service provision delivered to consumers at mental health services varies

102 ‹http://www.health.qld.gov.au/patientsafety/mh/webpages/mhserec.asp› at 8 October 2007.

103 For example, see Office of the Public Advocate, *Annual Report 2006-2007* [4.3(2)] 44, [4.4 (j-k)] 45; [4.47] 49-50; Office of the Public Advocate, *Preventing suicide deaths of Queenslanders with a mental illness: An Issues Paper* (January 2008) [2.10].

considerably. Unfortunately, this has resulted in poor outcomes for mental health consumers.[104]

It should be noted that amendments to the *Mental Health Act 2000*, which were passed in the 2007-2008 year, broadened the functions of the Director of Mental Health.[105] These now include monitoring and auditing compliance with the requirements of the *Mental Health Act 2000*[106] and issuing policy and practice guidelines about treatment and care of patients.[107] These amendments should lead to more consistent implementation of endorsed policy and procedure.[108] However at this stage, it is difficult to assess their impact.

In August 2008, a restructure of Queensland Health was announced. The restructure involves the disbanding of the three areas health services, and forming a reduced number of health districts (reduced from 20 to 15). The Public Advocate sought clarification about the impact of this restructure on the delivery of mental health services and requested details of the accountability mechanisms, with a view to overcoming historical failure of at least some services to implement endorsed policy and procedure.

At the time of writing, it was not entirely clear how the changed arrangements would impact on mental health services. However, some specialist mental health positions (for example, staff responsible for Indigenous liaison and advice, and homelessness services) will now report directly to Mental Health Branch, Corporate Office.

Established mental health networks have been considered useful and it appears they will continue to operate. The abolition of the area health services and establishment of a reduced number of district health services suggests reduced barriers between mental health service delivery and the policy, planning and legislative roles performed by the Director of Mental Health and Corporate Office.

It is hoped these changes will encourage the consistent adoption of sound mental health policy and procedure and result in better outcomes for consumers.

4.6 Project 300

In 1995, Project 300 (P300) was established in Queensland. Its aim was to assist people with psychiatric disability, who had become long stay residents of mental health facilities due to the lack of community support services, to move to community living. It involved the provision of support packages, including mental health clinical services, non-clinical disability support services and public housing. Service responses were individualised. The target group had suffered a long period of systemic neglect, during which time it was generally believed that no other option existed for their care, other than long-term/permanent institutionalisation. P300 was a collaborative initiative by Queensland Health, DSQ, and the Department of Housing.

The Office has consistently made positive comments about the success of P300. The program has significantly enhanced the quality of life of highly vulnerable people, often against the odds and in the face of some entrenched scepticism. The Office

104 For example, see Office of the Public Advocate, *Annual Report 2005-2006* (2006); *Annual Report 2006-2007* (2007) for details of legal interventions regarding matters before the Coroners Court in which this Office has intervened regarding mental health services and section 11.3 of this Report; Office of the Public Advocate, *Preventing suicide deaths of Queenslanders with a mental illness: An Issues Paper* (January 2008).

105 These formed part of the recommendations from the *Final Report of the Review of the Mental Health Act 2000*, *Promoting Balance in the Forensic Mental Health System*, conducted by Mr Brendan Butler AM SC (as he then was). For discussion about this review, see Office of the Public Advocate, *Annual Report 2006-2007* (2007), [4.1] 41-43.

106 Section 489 (1)(ca).

107 Section 309A regarding forensic patients and s 493A regarding other patients.

108 Consistent with the Director of Mental Health's new functions and responsibilities, a *Mental Health Act 2000 Resource Guide* for administrative and clinical staff was disseminated in April, 2008.

has recognised P300 as an excellent example of interagency collaboration. It has suggested that a strategic approach similar to P300 be considered to develop housing and support responses for a broader range of adult Queenslanders who have a decision-making disability, and who are identified as being highly vulnerable to individual abuse or systemic neglect.

The Housing and Support Program (see Section 4.7) is based on a similar approach, but differs from P300 in that it targets people in both acute and long stay mental health facilities. Individuals supported through HASP may not have experienced the same length of institutional care as individuals supported through P300, and may have greater experience living in the community and possibly lower ongoing support needs.

Support funding under P300 continues to be available at this time, and P300 remains an important option for people with a psychiatric disability leaving mental health facilities. However, the Office understands that there are more people who are ready and able to leave mental health facilities than can be provided support under the program, due to the lack of adequate funding.

In this regard, it is noted that one of the policy implications identified in the final report of a collaborative research project (involving the Department of Housing, Queensland Health, DSQ and the Office of the Public Advocate) was consideration of an extended P300 (see Section 13.3 for more information). The proposal was for P300 to be available for people with mental illness who are homeless, at risk of homelessness or leaving institutional care, including corrective services.

The Office urges the relevant government agencies to collaborate in:

- seeking increased funds for P300 to increase the capacity of the program to respond to people within its current target group; and
- extending the scope of P300 to provide services to a broader cohort of people as proposed in the *Housing and Associated Support for People with Mental Illness or Psychiatric Disability* report (see Section 13.3 for more information).

Office of the Public Advocate staff – Senior Research Officer John O'Brien, Principal Research Officer Marcus Richards, Senior Research Officer Adrienne McGhee, Public Advocate Michelle Howard and Senior Research Officer Satti Rakhra

4.7 Housing and Support Program (HASP)

The Housing and Support Program (HASP) is a joint initiative between DSQ, Queensland Health and the Department of Housing. The aim of the program is to enable people with a psychiatric disability to transition from Queensland Health facilities to community living. The program aims to achieve this through the development of sustainable tenancies with the provision of social housing, and support from clinical and non-clinical services. The target group are individuals who have psychiatric disability and are ready and able to transition from Queensland Health extended treatment or acute mental health facilities. To access this program, individuals must be eligible for social housing through the Department of Housing, and for services and support through DSQ.

The roles of the government departments are as follows:

- Queensland Health identifies individuals who are able to access this program, and provides ongoing clinical support as appropriate;
- the Department of Housing provides housing; and
- non-clinical support is provided by DSQ-funded non-government service providers.

HASP commenced in June 2006. The target for 2006-2007 was to house 80 people. The Department of Housing allocated $20 million to source housing stock for these 80 individuals. DSQ and Queensland Health did not receive additional funding in 2006-2007, as all people supported through HASP already had recurrent funding. In 2007-2008, $22.45 million was allocated to DSQ to provide non-clinical support to consumers moving into social housing, with $40 million being allocated to the Department of Housing to provide up to 160 housing options for HASP consumers over four years.

Since 2006, 114 individuals have been housed through HASP with ongoing non-clinical support, and clinical support provided where required.

The Office understands that the lower than expected number of people initially housed was due to a range of unforseen operational and implementation issues. These matters appear to have been addressed, and the program is now operating more effectively. The Department of Housing, DSQ and Queensland Health have contributed funding to a formal evaluation of HASP.

The Government agencies involved in the development and implementation of HASP are to be commended on this constructive response to the housing and support needs of adults with a psychiatric disability.

4.8 Accommodation and support for people with mental illness or psychiatric disability

The Office has participated in a research project with the Department of Housing, Queensland Health and DSQ in relation to accommodation and associated support issues for adults with mental illness or psychiatric disability. (See Section 13.3 for more information.)

4.9 Baillie Henderson Hospital

Despite institutional reform over recent decades, a group of people with intellectual disability (and who do not have mental illness) remain accommodated at Baillie Henderson Hospital, a psychiatric hospital at Toowoomba. This Office and others have called for this situation to be remedied and for appropriate accommodation and support to be provided for the individuals concerned (see Section 1.5 for more information).

5. The Health System

Access to adequate and appropriate health care is essential for physical wellbeing. In last year's Annual Report, the unmet physical health care needs of adults with impaired decision-making capacity was identified as a major systemic issue.

This year's report provides more information about these concerns as well as about the launch of the Office's Issues Paper *In Sickness and In Health: addressing the health care needs of adults with a decision-making disability.*

It should be understood that adults with impaired capacity are a significant proportion of health service users. In this regard, it is noted[109] that:

- at some time in their life, one in five people will have a mental illness;
- people with intellectual disability comprise, 2% of the population;
- an estimated 1.6% of women and 2.2% of men have an acquired brain injury; and
- currently, some 1% of the population has dementia: however, as the impact of the worldwide phenomenon of the ageing population continues, the numbers affected are likely to increase dramatically.

The Commonwealth and State Governments are currently engaged in significant activities to reform the health system. Through its advocacy, this Office strives to ensure that the rights and interests of vulnerable adults with impaired decision-making capacity are appropriately addressed during the reform processes.

5.1 Physical health and dental 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. After considerable background research and key stakeholder consultation, the Office prepared an Issues Paper on the issue entitled *In Sickness and In Health: addressing the health care needs of adults with a decision-making disability.*

As the Paper reveals, the research is unambiguous. Despite increasing longevity, the mortality and morbidity rates for adults with impaired capacity are significantly higher than for the general population. Further, greater numbers of adults with impaired capacity succumb to preventable disease, benefit less from preventative health measures and existing health promotion initiatives, and in general have poorer access to all levels of health care than the general population. 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 needs of adults with impaired capacity are often overlooked.

Despite the introduction of several initiatives to address this problem, a more concerted and comprehensive response on the part of several stakeholder groups is needed. The Issues Paper has identified the following as priority action areas:

- Development and implementation of targeted health education and promotion strategies across the systems and support networks involved in the care of people with decision-making disabilities.
- Establishment and maintenance of simplified and timely access to low-cost health care services, including dental services.

109 Office of the Public Advocate, *In Sickness and in Health: addressing the health care needs of adults with a decision-making disability* (2008) 8.

- Development and maintenance of effective systems within formal support services to ensure that health care is a priority, and that people's health care needs are met to a high standard.
- Significantly improved and increased training for disability support workers in health promotion and management of health care, and in community connectedness for service users.
- Improved and increased education and support to health and allied health professionals regarding the needs of people with impaired decision-making capacity (with particular attention paid to General Practitioners (GPs) as a key access point for people seeking health care support).
- Quarantined funding to cover the additional costs of ensuring high-quality health care support to people with impaired decision-making (for instance, the adjustment of the Medicare Benefits Schedule to accommodate the additional time required to consult with a person with impaired decision-making capacity).
- Improved support for people with decision-making disabilities to make their own health care decisions when possible and appropriate. Also, systems need to ensure that decision-making for health matters within the context of service provision is undertaken by appropriate decision-makers.

Two initiatives in particular show promise for the future:

- the Comprehensive Health Assessment Program (CHAP), developed by the Queensland Centre for Intellectual and Developmental Disability (QCIDD) specifically for people with an intellectual disability;[110] and
- a change to the Medicare Benefits Schedule (MBS) for GP health assessments of people with intellectual disability. The initiative consists of new MBS items (numbers 718 and 719) which allow GPs to provide annual health assessments for adults with intellectual disability.

Both of these initiatives are described in greater detail in the Public Advocate's Issues Paper and 2006-2007 Annual Report.[111] The Office looks forward to receiving wide-ranging comment/feedback on the issues following the launch of the paper.

STOP PRESS

The paper, *In Sickness and In Health: addressing the health care needs of adults with a decision-making disability,* was launched on 20 October by the Hon. Karen Struthers MP (Member for Algester and Parliamentary Secretary for the Hon. Stephen Robertson MP, Minister for Health). Copies of the paper are available from the Public Advocate's website, or by contacting the Office.

Presenters – Associate Professor Nick Lennox, Professor Lesley Chenoweth, Associate Professor Malcom Parker and Public Advocate Michelle Howard at the launch of the Issues Paper *In Sickness and In Health.*

110 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.

111 Refer to ‹http://www.publicadvocate.qld.gov.au›.

5.2 Queensland Draft Code of Health Rights and Responsibilities

A draft Code of Health Rights and Responsibilities was developed and made available for public consultation by the Health Quality and Complaints Commission (HQCC) during the 2007-2008 year.[112] The Office of the Public Advocate supports the development, implementation and monitoring of a Code. However, various submissions were made about the content of the draft Code.

Suggestions were made that the following issues be addressed or reflected by the Code:

- Greater regard to the needs of people with impaired decision-making capacity as health service users is necessary.
- Health service provision should not be contingent upon health service users with impaired decision-making capacity fulfilling stated responsibilities.
- It is an offence to give health care to an adult with impaired decision-making capacity without authorisation,[113] and most commonly consent from the person or their substitute decision-maker is required.
- The decision-specific nature of impaired capacity and the role of substitute decision-makers (in particular, substitute decision-makers are not custodians who can ensure compliance with instructions or requirements) must be clearly understood by health professionals.
- Information must be provided to adults with impaired capacity in a manner and format appropriate to the characteristics of the person.
- The rights of patients should be clearly articulated, and for people with impaired capacity, the draft Code should indicate how those rights are to be accorded (given that they will often be unable to effectively advocate to promote the respecting of their rights).
- The Code should clearly establish that adults with impaired decision-making must not be discriminated against as health service users.
- People with impaired decision-making capacity and members of their support networks require support to access complaint processes.

Following the consultation process, a substantially revised version of the draft Code was produced by the HQCC. The HQCC is to be commended for the approach it took to addressing issues raised during the consultation process. It is understood that the draft Code was provided to the Minister for Health and is currently under consideration by Government.

5.3 Australian Charter of Healthcare Rights

The Australian Commission on Safety and Quality in Health Care (ACSQHC) released a consultation paper on a Draft National Patient Charter of Rights (Draft Charter) which it envisaged would set out the key rights of patients and articulate a set of nationally agreed principles to underpin the provision of health care. Although there are a number of state and territory charters, the ACSQHC considers in its role to secure safer, more responsive care for patients, that a uniform articulation of patient rights is a basic requirement.

112 *Health Quality and Complaints Commission Act 2006* s 31 required the development of a Code of Health Rights and Responsibilities and submission of the Code for consideration to the Minister for Health by June 2008.

113 *Guardianship and Administration Act 2000* s 79. In limited circumstances, health care is authorised to be given without consent by legislation (for example, see *Mental Health Act 2000; Guardianship and Administration Act 2000* ss 62-64). In most instances, consent is required (for example, see *Guardianship and Administration Act 2000* ss 65-74).

Comments provided by the Public Advocate in respect of the Draft Charter included the following:

- The draft charter should specifically cater for people with impaired decision-making capacity.
- The draft Charter should specifically state that people with impaired decision-making capacity are not to be disadvantaged regarding resource allocation.
- People with impaired decision-making capacity should not be disadvantaged as health service users because of an inability to comply with requirements (for example, to accord respect to their health service provider).
- Communication must occur and information must be provided in a manner and format which is meaningful to a person with impaired decision-making capacity.
- Health care providers must take responsibility for providing appropriate and relevant information to health service users with impaired decision-making capacity.
- Issues regarding the general requirement for consent and the role of substitute decision-makers require clarity in the draft Charter.
- The draft Charter must recognise the need to facilitate and support people with impaired decision-making capacity through complaints processes if they are to be meaningful.
- The Charter must be carefully drafted so that it cannot become a basis to deny or delay health care if articulated responsibilities cannot be complied with by people with impaired decision-making capacity.

Once endorsed by ACSQHC Commissioners, a final revised draft was submitted to Health Ministers. On 22 July 2008, Australian Health Ministers endorsed the *Australian Charter of Healthcare Rights* and its use as the pre-eminent healthcare charter for Australia. The Charter does not specifically address the position of adults with impaired decision-making capacity.

However, it is significant that the Charter establishes guiding principles regarding its application in the Australian health system. These principles include recognition that every person has the right to be able to access health care and the commitment of the Commonwealth Government to international human rights agreements recognising every person's right to have the highest possible standard of physical and mental health. The Charter recognises, among others, a right to health care and a right to information in a way that the individual can understand.

Accordingly, it appears the Charter provides support for ensuring that the health care needs of vulnerable adults are met.

5.4 National Health and Hospitals Reform Commission

In February 2008, the Prime Minister and the Minister for Health and Ageing announced the establishment of the National Health and Hospitals Reform Commission (NHHRC or the Commission). The Commission has been established to develop a long-term health reform plan for Australia.[114]

The Commission has developed a set of principles[115] intended to shape the health and aged care systems, including public and private, hospital and community based services. Comments on these principles were invited in April 2008 as part of the Commission's call for submissions.

114 ‹http://www.nhhrc.org.au/› at 5 September 2008.

115 These principles can be viewed at ‹http://www.nhhrc.org.au/internet/nhhrc/publishing.nsf/Content/principles-lp› at 5 September 2008.

The Commission has undertaken a series of public forums in capital cities and rural and regional centres. The Office attended one of the forums and contributed a written submission to the NHHRC Consultation process.[116]

The Office's submission, highlighted the vulnerabilities of adults with impaired decision-making capacity when accessing health care systems. Key issues were:

- Communication difficulties: Some people with impaired decision-making capacity have limited ability to communicate their symptoms to aid diagnosis and treatment.
- Accessing and navigating a complex health care system: The complexity of the current health and hospital systems acts as a barrier for people with impaired decision-making capacity to accessing appropriate health care.
- The need for additional supports: Adults in this population may require additional supports to ensure that preventative checks, vaccinations and specialist health care needs are undertaken and addressed.
- Appropriate decision-making: It is important that healthcare providers and professionals be able to identify impaired capacity, and be fully aware of their obligations under the guardianship regime.[117]
- Over-reliance on the concept of 'shared responsibility'.[118] If healthcare professionals interact with adults with impaired decision-making capacity on the basis that they should be able to manage their own health conditions, significant deterioration in the person's health may result.

The Office argued that, since this cohort and other vulnerable groups form a sizeable proportion of the health system's target group, their needs should be central to the NHHRC reforms and that a vulnerable persons framework should be incorporated in the NHHRC reform process.

The value of a coordinated healthcare system cannot be underestimated. Accordingly, the Public Advocate recommended that the Commission undertake a thorough review of other health reform initiatives being undertaken across Australia, and create a design principle which highlights the need for a coordinated health care and hospital system.

This Office also submitted that improved health outcomes for adults with impaired decision-making capacity are more likely to occur where all stakeholders work together to address the complexity of needs of this group. It is therefore imperative that hospitals and the health system are closely linked to, and form strong collaborative partnerships with the range of systems and agencies that contribute to quality health care.

In summary, the Public Advocate urged the Commission to establish reforms and develop systems that ensure the health care needs of the many adults with impaired decision-making capacity who access health and hospital systems are met to the same standard as other Australians.

5.5 Health Consumers Queensland

On 11 August 2008, the Minister for Health announced the appointment of 13 members to Health Consumers Queensland (HCQ). Established as a ministerial advisory committee for consumer health issues, HCQ is supported by a secretariat through the Director-General's Office, Queensland Health.

116 The submission can be viewed at ‹http://www.publicadvocate.qld.gov.au›.

117 See generally, discussion at Section 2 of this report regarding health care and the guardianship regime.

118 'Shared responsibility' was, at the time of the Office's submission, one of the proposed design principles for the reform process.

The Public Advocate has taken an active interest in the development of this initiative as part of the reform process within the department. In late 2006, the Public Advocate made submissions and provided advice to Queensland Health about the creation of a consumer health council. This advocacy was reported in the 2006-2007 Annual Report.[119]

In brief, the Public Advocate identified key issues including:

- 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.
- 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.
- The Consumer Health Council should be a fully independent, high-level, and eminently reputable entity committed to long-term systems reform.
- The Consumer Health Council should interact with the wider community with integrity, and should engage with the health sector in a productive manner.
- It should be structured to make a meaningful contribution to the continuing health reform process.
- 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.
- Funding should not be allocated from the Health portfolio, but instead from another portfolio.

119 [5.2], page 51-52.

In May 2007, the Queensland Government released its final report on this project, which provided for the creation of HCQ[120] as a ministerial advisory committee for consumer issues. HCQ's secretariat commenced early 2008 and developed draft terms of reference for HCQ through a consultation process with key consumer, community and government stakeholders, including a full day workshop in April 2008. This Office participated and gave advice to:

- further clarify the roles and functions of committee members;
- ensure the terms of reference outlined accountability and transparency protocols in relation to Queensland health consumers;
- ensure that the interests of vulnerable groups, specifically people with impaired decision-making, will be adequately represented through the proposed terms of reference; and
- emphasise the importance of situating the HCQ independent of government.

Draft terms of reference were subsequently provided to the Minister for Health for consideration and approval, which in part address some issues raised above.[121] In May 2008, a statewide public call for expressions for HCQ committee membership attracted 91 applications, including 12 for the position of chairperson. An independent selection panel assessed applications and made their recommendations to the Minister for Health. As noted, The Queensland Government announced HCQ's committee membership on 11 August 2008.

This Office proposes to engage directly with HCQ about systemic health care issues for adults with impaired capacity.

120 For additional information, refer to ‹http://www.health.qld.gov.au/consumerhlth/default.asp› at 11 September 2008.

121 The finalised terms of reference are located at ‹http://www.health.qld.gov.au/consumerhlth/default.asp› at 11 September 2008.

5.6 Consumer engagement processes

This Office's involvement in two processes regarding consumer engagement in the health system occurred early in the 2008-2009 year and will be reported more fully next year. However, given the significance of the initiatives, they are briefly described in this report:

Australian Commission on Safety and Quality in Health Care

In July 2008, the Australian Commission on Safety and Quality in Health Care released a Background Paper, *Development of a Consumer Engagement Strategy for the Commission*. This Office was represented at a consultation meeting convened in Brisbane to obtain comment on the Background Paper and subsequently provided a written submission regarding the issue. Key points included the following:

- A significant proportion of health consumers have impaired decision-making capacity and the strategy must accommodate their needs.
- A consumer engagement strategy must contain multi-faceted engagement mechanisms to ensure that the rights and interests of this group are protected. For example, stakeholder input should be sought from vulnerable people about their experiences of the health system (support for their stories to be recorded is essential); carers and other members of the support network of vulnerable people; and interest groups, peak bodies and advocacy organisations.
- For engagement to be effective, the education of those to be engaged is essential.
- Consumer engagement must be tied to systems improvement, or otherwise confidence will be lost.

Australian Institute of Health Policy Studies (AIHPS)

A national citizen engagement forum, *Engaging citizens in Australia's future health policy: Building and applying the evidence,* was held on 16 September 2008 in Brisbane by AIHPS. Research recently concluded by AIHPS was presented, together with other papers discussing consumer engagement processes. Documents about the AIHPS Consumer Engagement Project and other papers presented at the forum are electronically available.[122] Workshopping and deliberation of the relevant issues occurred throughout the day and outcomes were reported back by participants. AIHPS also undertook to provide a written record of the outcomes from workshops to all attendees. It will also be electronically available to the public.

The Public Advocate was pleased to present reflections at the end of the forum. The opportunity was taken to reinforce the necessity for multi-faceted consumer engagement strategies which ensure that feedback is drawn from:

- the experiences of vulnerable adults personally;
- the comments of their support networks; and
- peak bodies, other interest groups and advocacy agencies which represent their interests.

This approach should facilitate health policy development that appropriately recognises and protects the rights and interests of health consumers with impaired decision-making capacity.

5.7 Health care related issues in the guardianship regime

Several health care issues directly relevant to the requirements and/or operation of the guardianship regime are reported at Section 2 of this report, that is:

- end-of-life decision-making (Section 2.4.1);
- people with profound brain damage (Section 2.4.2); and
- nationally consistent guidelines for advanced care directives (Section 2.4.3).

122 See ‹http://www.aihps.org› at 1 October 2008.

6. The Criminal Justice and Corrective Services Systems

People with impaired capacity are over-represented as victims and alleged offenders in the criminal justice and corrective services systems.[123] They are often disadvantaged on bail applications and may spend long periods in remand facilities. If they are ultimately found not guilty, they may find themselves back in the community following their court hearing without money and support. Some are immediately at risk of homelessness.

There are some promising court diversion initiatives in Queensland. As observed in previous annual reports,[124] court diversion is not 'soft on crime.' The requirements on offenders are onerous. They increase public safety since they lead to reduced rates of recidivism. They also facilitate better life outcomes for individuals.

People with impaired capacity in the corrective services system are often vulnerable and sometimes victimised. They need opportunities and support to address their offending behaviour, and when they leave prison and re-enter the community, they may require significant support.

123 For example, see Phillip French, Disabled Justice: People with Disability in the Criminal Justice System (2007); Tamara Walsh, INCorrections II: Correcting Government (2005).
There are no reliable statistics about prisoners with intellectual disability, acquired brain injury, mental illness and dementia within the Queensland corrective services system. However, a study in 2004 compiled all existing data sets which indicated that the community presence of major mental illness in Australia was 0.5% -0.7% of the population, and 13.5% of male prisoners and 20% of female prisoners: PE Mullen, CL Holmquist, JRP Ogloff, National Mental Health Scoping Study (2004).
Prevalence studies detailed by the NSW Law Reform Commission support the conclusion that people with intellectual disability and borderline intellectual disability are over-represented in the prison system: New South Wales Law Reform Commission, People with an Intellectual Disability and the Criminal Justice System Report No 80 (1996). There is very little empirical data available in Australia or internationally on the prevalence of people with acquired brain injury in correctional systems.

124 Office of the Public Advocate, *Annual Report 2005-2006* (2006), [5.2] 38-39; *Annual Report 2006-2007* (2007) [6], 53-56.

6.1 Criminal Justice System

6.1.1 Prisoners with cognitive impairment on bail applications

It is understood that the unacceptable risk of re-offending, due to lack of suitable accommodation and supervision options in the community, not infrequently prompts Magistrates to make orders for the remand of persons with impaired decision-making capacity into the custody of Queensland Corrective Services (QCS). The Adult Guardian reports that on occasions when she is appointed as guardian for legal matters, she is unable to support bail applications for similar reasons; no appropriate accommodation and supervision arrangements can be made for the persons concerned.[125]

This is unsatisfactory because:

- People with impaired decision-making capacity are vulnerable in the prison population. They are less equipped to advocate for themselves and to protect themselves from abuse or exploitation.
- Prison may provide an environment in which 'challenging behaviour' may develop as a result of frustration about unmet needs, as a consequence of abuse or exploitation, or learned from others.
- It is understood that prisoners with impaired capacity may spend more time in custody on remand, than they would if convicted and sentenced following an early guilty plea.

Disability Services Queensland (DSQ) has been urged to make provision for disability support which overcomes the disadvantage on bail applications which adults with impaired decision-making capacity experience (see also Section 6.2.1, on issues for remand prisoners upon release).

125 Cf: When children are offenders, conditional bail plans can sometimes be drawn up and they are supervised by the Department of Communities or Child Safety. However, no comparable option is available for adults, especially adults with impaired capacity.

It is noted that bail may be considered in other courts and at watch-houses.[126] The Public Advocate intends to consider these circumstances in the future.

6.1.2 Court Diversion

6.1.2.1 Current Queensland Initiatives

In its last two annual reports, the Office has reported on the *Homeless Persons Court Diversion Program Pilot* and *Special Circumstances List* operating in the Brisbane Magistrates Court for people who are homeless, (including those with impaired decision-making capacity) who are charged with minor offences.[127] The *Homeless Persons Court Diversion Program Pilot* conducted in the Brisbane Central Magistrates Court was funded as part of the Queensland Government's Responding to Homelessness initiatives as a two year pilot from 2006 to 2008. The *Special Circumstances List* is an initiative of the Magistrates Court.

These court diversion initiatives refer eligible disadvantaged people to appropriate mental health, housing, and other services for either support and/or treatment as required. Their progress following referral is reported regularly to the court, which considers the results of the person's court diversion process when finalising the matter. While a recent independent evaluation has not been publicly released, informal feedback indicates that the initiatives have had some success providing a constructive response to the needs of homeless people, including those with impaired decision-making capacity who become involved in the criminal justice system. The program pilot ended on 30 June 2008. It has not been successful in securing recurrent funding.

In the absence of ongoing funding, agencies in the government and non-government sector involved in the pilot have agreed to support the work from their existing budgets for at least another 12 months. These agencies are to be commended. They include the Magistrates Court, Queensland Police Service, Legal Aid Queensland, Department of Justice and Attorney-General, Queensland Health as well as service providers such as Micah Projects Incorporated, HART 4000, Brisbane Homeless Service, Sisters Inside, and Brisbane Youth Service. This commitment is for current service levels and does not provide any increase in resources despite levels of demand.

Court diversion schemes can only be effective with adequate numbers of court staff to run them, and available services to which vulnerable offenders can be diverted for support to avoid re-offending. This Office will continue to advocate for additional and more comprehensive funding of court diversion initiatives.

6.1.3 Advocacy to the Commonwealth Government for court diversion programs

The Office has also advocated to the Commonwealth Government about court diversion programs. During 2008, the Prime Minister expressed concerns about the needs of homeless persons in Australia. The Office drew his attention to the *Homeless Persons Court Diversion Program Pilot* (see Section 6.1.2 above) as an initiative making a positive difference for homeless people in the criminal justice system.

The importance of court diversion for people with mental illness has already been recognised at a national level by the Senate Select Committee on Mental Health (the Senate Inquiry) which identified homelessness and the lack of alternate sentencing

126 See *Bail Act 1980*.

127 Office of the Public Advocate, *Annual Report 2005-2006* (2006), [5.2] 38-39, and *Annual Report 2006-2007* (2007), [6.2] 54-55.

options as a major cause of over-representation of persons with mental illness in prison.[128]

The need for court diversion for people with cognitive impairment (including those with mental illness, intellectual disability, acquired brain injury or dementia) was also recognised in the Australian Law Reform Commission's (ALRC) Report 103, *Same Crime, Same Time: Sentencing of Federal Offenders* (the ALRC Report). It recommended that federal sentencing legislation enable a judicial officer to defer the sentencing of a federal offender with a disability for up to 12 months, so that the offender may have the opportunity to address his or her condition and offending behaviour.

The ALRC recommended that the Commonwealth Government work with States and Territories to improve service provision to federal offenders including court diversionary schemes, and appropriate community programs and accommodation for offenders with mental illness or intellectual disability.

This Office's advocacy encouraged the Commonwealth Government to implement the ALRC's recommendations. Court diversion will remain a focus of the Office's advocacy work.

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The Commonwealth Government has recently advised that it is developing detailed proposals for federal sentencing and offender management reform drawing on the recommendations from the ALRC Report and consultations with government and non-government agencies and interested persons.

6.1.4 Wrongful Convictions

The Department of Justice and Attorney-General is currently convening a working party to examine the circumstances and manner in which criminal convictions should be re-considered in the light of newly available DNA-based evidence.

This Office urged Government to consider expanding the terms of reference for the working party. Doubt may exist about the validity of some convictions made against people whose impaired capacity was not identified, or taken into appropriate account, during the criminal justice process in circumstances when there are not grounds on which to appeal or an appeal is unlikely to be successful. The United Kingdom's Criminal Cases Review Commission is an independent public body established to investigate and refer to the Court of Appeal possible miscarriages of justice. Their database reveals many cases where convictions are reconsidered based on the previously unknown mental state of the accused person.

It is understood that Government does not propose to extend the terms of reference of the working group, whose membership has expertise in the field of DNA evidence.

128 Senate Select Committee on Mental Health, Commonwealth Parliament, A National Approach to Mental Health – From Crisis to Community (2006) ‹http://www.aph.gov.au› at 12 June 2008.

STOP PRESS Review of the civil and criminal justice system in Queensland

A review of the civil and criminal justice system in Queensland was announced early in 2008-2009. The terms of reference include reform of committal proceedings and sentencing discounts for early plea. This Office's submission urged the Reviewers to consider the impact of any changes under consideration on people with impaired capacity when formulating recommendations for consideration by Government. It is anticipated that this issue will be more fully reported next year.

6.2 Corrective Services System

6.2.1 Remand Prisoners

In recent years, it has been increasingly recognised that people leaving prison to reintegrate into the community require support. Initiatives to assist people to make the transition from prison to community were reported in the Office's Annual Report 2005-2006.[129]

However, prisoners on remand who are released after a hearing in the Magistrates Court do not currently attract such support. Their release may follow a successful bail application, or finalisation of the charges. Not all Magistrates Courts are supported by the presence of Queensland Corrective Services (QCS) staff. In instances where they are not, it is understood that defendants remanded in custody are delivered to the courthouse from prison for their hearing. If they are to remain in custody, staff from QCS return to collect them. If not, they must make their own arrangements. For people with impaired decision-making capacity, this may present substantial challenges.

For example, it is understood that convicted prisoners who are due for release can receive assistance from QCS to apply for Centrelink benefits, so they are not released into the community without income security. In contrast, because QCS do not know when a person on remand will be released following their court appearance, those remand prisoners are released from the courthouse without any secure income and, it is understood, often without access to their belongings (including medication for mental illness). It is understood that Centrelink cannot provide a pre-release service to remand prisoners whose release date is unknown. However, prisoners with impaired decision-making capacity released after a period in remand are particularly vulnerable. Without an active support network, they are at risk of falling into homelessness, and perhaps offending to meet their most basic needs.

This issue has been the subject of advocacy by the Office.

It is understood that QCS has conducted research into the transitional support needs of prisoners with high needs who are released from courts or remand centres. This Office understands that options are being developed for providing throughcare support (see Section 6.2.4 below) in these circumstances. Further, it is understood that QCS is seeking funding for a pilot project focussing on meeting the pre- and post-release needs of prisoners with cognitive impairment and developmental disorders at Arthur Gorrie Correctional Centre (for remand prisoners) and Brisbane Women's Correctional Centre (for remand and sentenced prisoners).

This Office will take an ongoing interest in arrangements (see Section 6.1.1 on bail for people with impaired decision-making capacity).

129 [5.1.2] pages 37-38.

6.2.2 MOU – DSQ and QCS

A Memorandum of Understanding (MOU) between DSQ and QCS sets out a framework for each department's responsibilities for offenders with intellectual disability or cognitive impairment which significantly impacts their behaviour and living skills and who, prior to conviction received, or are eligible for a DSQ-provided or DSQ-funded service.

The MOU provides for the resumption of DSQ services if the person has been in prison for a period of less than 12 months, and for support to move back into the community irrespective of the length of the person's sentence. However, this Office continues to hear reports that DSQ funding is not reinstated or available upon release from a correctional facility. There is some lack of clarity for the Public Advocate about whether the MOU currently makes arrangements (and if so, how it is operationalised) to meet the disability support needs of people on remand, and provide for disability services upon release from remand. This issue is being explored.

DSQ and QCS have been urged to closely review current arrangements and to close system gaps through which vulnerable people with impaired capacity can fall. The Public Advocate looks forward to the opportunity to closely scrutinise some aspects of this system through a coronial inquest in which it has intervened (see Section 11.3.2).

6.2.3 Queensland Corrective Services Disability Service Plan 2007-2010

The QCS *Disability Service Plan 2007-2010* adopts a policy principle which supports the identification and addressing of the needs of offenders with a disability. In keeping with this principle, QCS is currently supporting a research submission by the Prison Mental Health Service, *The Lost and Forgotten: The development of a reliable and valid screening tool for intellectual and cognitive impairment in a prison setting* (the Project).

The project aims to develop a screening tool to determine whether some people entering the corrective services system have impaired cognitive functioning. QCS expects this to assist them to better identify the special needs of offenders upon reception to custody. It is anticipated that rehabilitation and reintegration plans can then be appropriately tailored to meet the needs of the individual. The Public Advocate commends this initiative and encourages QCS to collate information about the numbers and circumstances of people with impaired capacity entering custody, as well as outcomes for them.

QCS reports that it has made progress across several action items targeted for completion in 2007-2008 in its Disability Service Plan, including developing a memorandum of understanding with DSQ to work together in relation to offenders with disabilities while in the community or upon release from custody, and to provide disability training for staff .

6.2.4 'Throughcare' Framework

The Office's Annual Report for 2005-2006[130] made positive reference to the QCS 'throughcare' framework. It is embodied in the *Integrated Transitional Support Model*, which aims to provide a continuity of care and service provision from prison to community release with the goal of reducing re-offending. It involves individualised support to prepare prisoners for their release. QCS notes that international best practice confirms that such programs can significantly limit re-offending and deliver benefits for the prisoners and the community.

130 Office of the Public Advocate, *Annual Report 2005-2006* (2006), 37.

QCS advises that in August 2007 the model was improved with the introduction of the Offender Reintegration Support Service (ORSS) which is delivered by contracted specialist non-government organisations who work with offenders while they are in custody and then continue to support them in the community following their release. ORSS operates in all secure centres in Queensland and Darling Downs Correctional Centres; their services are also provided to offenders with intellectual and cognitive impairments.

QCS is commended for enhancing transition initiatives which are likely to result in better outcomes for vulnerable prisoners.

6.2.5 Making Choices Program

The Office's 2005-2006 Annual Report[131] noted a review of key QCS offender programs by a specialist in intellectual disability who recommended changes to better meet the needs of offenders. QCS advises that guidelines about these recommended changes have subsequently been prepared as a resource for staff.

QCS also advises that a wide range of interventions are available to assist offenders after thorough assessments of their needs and risks of re-offending. To ensure offenders have sufficient time to complete the program, QCS targets those people who are serving over 12 months and who have a high risk of re-offending. QCS states that research suggests that prisoners who only partially complete a program can be at a high risk of re-offending. Programs range from four to nine months. Those serving shorter sentences can complete substance abuse, vocational education and transitional support initiatives. Remand prisoners are not prioritised for programs as there is no certainty as to how long they will remain in custody.

It is understood that all programs are conducted in accordance with adult learning principles and are sufficiently flexible to accommodate differences including cognitive impairment and low levels of literacy. However, offenders must be able to engage in group processes. Typically, sessions are for two to three hours, two to three times each week.

This Office continues to receive information indicating that people with complex or high level need, as a result of cognitive impairment, have not participated in programs. The Public Advocate will take an interest in the evaluation of changes following the review of the Making Choices Program. The evaluation should reveal whether more people with cognitive impairment are completing and benefiting from programs.

6.2.6 Corrective Services and Other Legislation Amendment Bill 2008

In May 2008, the Queensland Government introduced the Corrective Services and Other Legislation Amendment Bill 2008 (the Bill) into Parliament which attracted human rights concerns from the Anti-Discrimination Commission Queensland (ADCQ), the Australian Human Rights Commission[132] and others.[133] The Bill aims to limit access to the ADCQ by prisoners unless they first undertake a series of internal prison notifications and complaint processes.

The Office's concerns about the Bill include:

- The requirement for prior notifications denies people with impaired decision-making capacity who are prisoners equal access with other persons in the community to their rights under the *Anti-Discrimination Act 1991* to make a complaint regarding disability discrimination.

131 Office of the Public Advocate, *Annual Report 2005-2006* (2006), 37.

132 See ‹www.humanrights.gov.au/about/media/mdia_releases/2008/54_08.html› at 19 May 2008.

133 For example, see Jane Fynes-Clinton, 'Cry Freedom at such abuse,' *The Courier Mail* at 11 September 2008, 37.

- Only five applications were accepted from prisoners by ADCQ on the basis of disability in the 2007-2008 year. The small number of applications may raise some questions about current levels of support for prisoners with a disability to make complaints to the ADCQ.
- The requirements of the Bill appear to represent a move away from the spirit and principles contained in the United Nations *Convention on the Rights of Persons with Disabilities*.

QCS considers:

- that the Bill does not discriminate on the basis of disability as it applies equally to all prisoners;
- a range of complaint mechanisms are available to prisoners including the Official Visitor, the Ombudsman, Prisoner's Legal Service, and the Office of the Chief Inspector;
- correctional staff provide every available assistance to a prisoner who wishes to lodge a complaint; and
- the Bill supports effective internal resolution of discriminatory practices and supports their elimination in correctional settings.

Eliminating discriminatory practice at the earliest possible stage is supported. However, the Office understands that the length of time taken to resolve internal complaints is a continuing concern. The Office supports the calls to reconsider the proposed amendments.

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The Corrective Services and Other Legislation Amendment Bill 2008 was passed on 9 October 2008. The Act is due to come into effect on a date to be proclaimed.

7. The Legal System

This section reports on the Office's advocacy on aspects of the legal system which do not fall directly within the other specific systems reported upon in this Annual Report.

7.1 UN Convention

Australia became a signatory of the United Nations *Convention on the Rights of Persons with Disabilities* (the Convention) in March 2007 and ratified the Convention on 17 July 2008. As a result, since 16 August 2008, Australia is accountable to the international community for implementing it. Although the Convention is not binding within Australia as it has not been made part of our domestic law, Australia is accountable to the international community if our laws breach the Convention.

During 2007-2008, this Office wrote to the Commonwealth Government supporting ratification of the Convention with its clear and unequivocal statements reflecting contemporary international standards and expectations for the protection of the rights and interests of people with a disability and safeguards to protect them from abuse, neglect and exploitation. The Office's submission also supported the ratification of the Convention as:

- part of Australia's role as an active party in the development and adoption by the United Nations of this important Convention;
- it could support continued development of human rights-based legal protections within Australia;
- a commitment at a national level acknowledging the presence of a vulnerable group of people who have not always had full rights accorded to them;
- inclusion of people with a disability in mainstream society including education, training and workforce participation could be expected to provide benefits for the people concerned and society generally; and
- a logical extension of work already undertaken by the Commonwealth Government for disadvantaged people.

While the ratification of the Convention is important, the Convention does not automatically become part of Australian law as a result of ratification. Legislation would be required to incorporate it into domestic law. However, the Convention provides a framework within which other new and existing domestic law may be reviewed and considered. It also means Australia can participate in the inaugural election of the Committee on the Rights of Persons with Disabilities. The Committee will oversee the implementation of the Convention.

7.2 Australian Law Reform Commission Review of Privacy

This issue was previously reported in the Annual Report 2006-2007. The work of the Office continued into 2007-2008. The privacy regime is important for adults with impaired decision-making capacity since their information should be appropriately protected, but their decision-makers under the guardianship regime should not be hindered in their important role in accessing relevant information.

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 privacy principles under the legislation apply to the Commonwealth public sector and the private sector.

In 2006-2007, this Office made a written submission to the inquiry in response to an Issues Paper and met with representatives of the ALRC to discuss relevant issues. The Office's submission was targeted to those areas of the review of particular relevance to adults with impaired decision-making capacity and was more fully reported in the Annual Report for 2006-2007. Key features of the submission included:

- The need to ensure that the rights, including privacy[134] of adults with a decision-making disability are protected is widely acknowledged.[135] The privacy legislation is an important mechanism for achieving appropriate protection.
- Privacy legislation/requirements need to work for adults with impaired decision-making capacity, and not to their disadvantage. The Commonwealth privacy regime should facilitate the aims of state and territory-based guardianship regimes; failure to do so will likely lead to adverse outcomes for vulnerable adults.
- The array of privacy requirements under federal and state legislation and other rules, codes and guidelines result in fragmentation and complexity in the regulation of personal information which results in some difficulties and likely confusion for substitute decision-makers.
- Arguably, deficiencies are evident in the privacy protection in banking: protective mechanisms must be examined to prevent the incidence of fraud and financial abuse.
- Given the 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.

Subsequently, the ALRC issued a discussion paper and a further submission was made to the inquiry which addressed further issues specifically relevant for adults with impaired decision-making capacity. The submissions were consistent with earlier comments. Some key points in the submission included:

- The privacy regime should support the philosophy of the guardianship regime so that substitute decision-makers are able to perform their important role.
- Education and training for those who implement the new privacy regime is essential since this will support implementation in the intended manner.
- Assessment of capacity is a complex issue, but knowledge of it should offer protections for vulnerable adults, especially in the areas of banking, finance and health.

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On 11 August 2008, the ALRC Report, *For Your Information: Australian Privacy Law and Practice,* Report No. 108 (2008), was tabled in the Australian Parliament and formally launched. The report recommends significant changes to the law aimed at simplifying the protections offered and moving the system forward into the age of electronic information.

The Public Advocate will continue to take an interest in the reform process to the extent that it affects vulnerable adults.

134 See for example, ALRC, *Review of Privacy*, Issues Paper 31(2006) 487; Office of the Privacy Commissioner, *Getting in on the Act: The Review of the Private Sector Provisions of the Privacy Act 1988*, (March 2005); 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), Article 22.

135 See 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* General Assembly Resolution 3447 of 9 December 1975.

7.3 Reform of the civil and administrative justice system in Queensland

Reform of the civil and administrative justice system in Queensland was under consideration by the Queensland Government during 2007-2008. The Office made submissions regarding relevant issues for vulnerable users of the system.

In November 2007, the Department of Justice and Attorney-General released a Discussion Paper on the reform of civil and administrative justice. In particular, comments were sought regarding possible alternative models for reform and secondly, on an administrative review policy to provide a consistent and contestable approach across Government agencies. Key points made in the Public Advocate's written submission included the following:

Protection of rights and interests of vulnerable people

- Whatever structural arrangements are ultimately chosen to deliver civil and administrative justice, the Office's overriding concern is the protection of the rights and interests of vulnerable adults with impaired decision-making capacity.
- Any changes should be made with a view to improving outcomes for and experiences in the lives of adults with impaired capacity, resulting in improved protection of their rights and interests.

Basic human rights are affected by tribunal decisions

- Tribunals most commonly used by people with impaired decision-making capacity are probably the Guardianship and Administration Tribunal (GAAT), the Mental Health Review Tribunal (MHRT), and to a lesser extent the Anti-Discrimination Tribunal (ADT) and the Children's Services Tribunal (CST). These tribunals perform functions which affect fundamental human rights.
- Decisions of GAAT and MHRT curtail the exercise of basic and fundamental rights of the persons the subject of the proceedings before them. For example, GAAT decisions affect a person's right to make decisions about their finances, or personal matters including where they live or who they live with, or what health care they receive; and MHRT decisions facilitate continued detention and involuntary treatment of persons with mental illness.
- Care is required when considering any possible reform to ensure that the rights and interests of vulnerable people appearing before these human rights tribunals are protected and promoted.

A human rights division in any generalist tribunal

- If any, some, or all of these tribunals are included within a generalist civil and administrative body, Government was urged to establish a human rights division and to ensure that all members sitting on matters in the human rights division have appropriate knowledge, skills and expertise.
- Concern was expressed about the possibility of more formality emerging during hearings if the human rights tribunals are part of a large organisation.
- Self-represented persons must be able to engage with the tribunal without disadvantage.

Potential Risks

- The potential exists in any combined tribunal for knowledge about one particular group to drive responses to others.
- Establishing a large generalist tribunal may decrease accessibility in rural and remote areas for tribunals such as the MHRT and GAAT which are currently well-catered for. MHRT sits on hospital premises where involuntary patients are often hospitalised and has members throughout the State; GAAT travels to meet the convenience of

parties and sits in environments which are often not court-like.

The role of the registry

- GAAT registry has an important role in ensuring that information is actively gathered: specialty functions would need to be protected in any amalgamation to avoid compromising the interests of vulnerable adults who are the subject of proceedings.

Merits review of decisions

- Independent merits review should be available in respect of all decisions made by the executive government, in addition to rights to judicial review.
- Merits review processes should contemplate and provide for review by a substitute decision-maker for a person with impaired capacity.

Subsequently, the Premier of Queensland announced the intention to establish a civil and administrative tribunal to provide a single gateway through which community members may access administrative decision-making. This will be operational by the second half of 2009.

An independent panel of experts was established to provide advice to the Queensland Government on how to implement the initiative, including the jurisdiction of the tribunal, membership and registry structure, and infrastructure needs. The independent panel appointed was the Hon. Glen Williams AO QC, former Court of Appeal Judge, Mr Peter Applegarth SC, then a senior barrister (who was subsequently appointed to the Supreme Court of Queensland and resigned from the Panel),[136] and Ms Julie-Anne Schafer, current President of the Commercial and Consumer Tribunal.

The Panel called for written submissions about which tribunals should form part of the amalgamated tribunal, the structure of the new tribunal and registry, regional and remote access issues, and the particular needs of tribunal users to be taken into account. The Panel also met with various stakeholders including the Public Advocate. This Office's submissions were consistent with the earlier written submission referred to above.

The independent panel completed their first report on these issues and implementation arrangements in June 2008, and it became publicly available shortly afterwards.[137] Key features of the recommendations relevant for vulnerable adults include:

Queensland Civil and Administrative Tribunal

- The new body be called the Queensland Civil and Administrative Tribunal (QCAT).
- The President be a Supreme Court Judge, Deputy President be a District Court Judge, and that there be a mix of sessional and full-time members.

GAAT to be included in QCAT

- GAAT, ADT, and CST be included in the amalgamated QCAT.
- MHRT be excluded.

A human rights division

- A preliminary view was expressed that QCAT should be organised into divisions and that there should be three divisions including a 'human rights' division.

Appeals

- QCAT should include an internal appeal process, as of right, on a question of law, where a monetary claim of over $7,500 is involved and, otherwise, with leave of the President.

136 To date, a replacement Panel Member has not been appointed.

137 ‹http://www.tribunalsreview.qld.gov.au› at 29 September 2008.

Implementation

- A phased implementation and commencement of QCAT by 1 December 2009, so that proposed elements of the new tribunal are adopted early by existing tribunals.

It is understood that the Queensland Government has considered the Panel's report and largely supports its recommendations, although details are not available. Work is proceeding to implement the new tribunal by 1 December 2009.

As QCAT is developed and established, the Office will continue in its advocacy role to raise issues and concerns aimed at maximising the quality and timeliness of service delivered to vulnerable adults with a decision-making incapacity who will be served by the new arrangements.

7.4 Coroners

Last year's Annual Report reported on this Office's advocacy about several proposed amendments of the *Coroners Act 2003* and the coronial system to ensure systemic issues are able to be identified by the Coroner and, once identified, adequately addressed.[138]

7.4.1 Specialist Coroners

The *Coroners Act 2003* represented a significant reform in Queensland to facilitate improvement within a variety of systems. Coroners' functions include making comments about systems reform. To avoid similar adverse incidents for vulnerable adults with mental illness, acquired brain injury, intellectual disability, dementia or other cognitive disability, it is crucial that Coroners give proper consideration to the systems issues which arise in matters before them.

One of the recommendations made by the Public Advocate was the desirability for Coroners conducting inquests to develop expertise in conducting the systemic aspects of the inquiries. It was suggested that this could best be achieved through appointments of more designated Coroners. Over the 2007-2008 year, three additional full-time Coroners positions (a total of five, including the State Coroner) have been created. All Magistrates continue to act as Coroners as required, but there is now significantly greater capacity for specialist Coroners to conduct many of the inquiries state-wide.

7.4.2 Report back provisions

Another submission made by this Office was for the legislation to be enhanced by introducing a 'report back' requirement when the Coroner has made comments or recommendations for systemic reform. This has not been adopted.

However, in December 2006, the Queensland Ombudsman announced that he would follow up with relevant agencies after Coroners have made comments.[139] It is understood that the Ombudsman has identified all relevant Coronial recommendations subsequently made and has expressed an intention to audit the responses of the agencies concerned. In the meantime, the Queensland Government has decided that agencies will report their responses to the Department of Justice and Attorney-General, which will publicly release them annually.

7.4.3 Information regarding Coronial inquiries

The State Coroner is to be commended for enhancing the information electronically available regarding completed and pending Coronial inquests. The

138 [7.2] 59-60.

139 Queensland Ombudsman, *The Coronial Recommendations Project*, (December 2006) ‹http://www.ombudsman.qld.gov.au/cms/index.php?option=com_content&task=view&id=36&Itemid=34› at 29 September 2008.

database of findings from inquests has been significantly upgraded, making public access to previous Coronial recommendations regarding systems issues more readily available. The information about completed and pending inquests identifies circumstances of the death. It is understood that all Coronial findings from inquests[140] are now made available on the database. It is hoped that this greater transparency will contribute to systems reform.

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The Coroners and Other Acts Amendment Bill 2008 was introduced to the Queensland Parliament on 7 October 2008.

140 However, findings made following an investigation, in circumstances when an inquest is not held, are not available on this database.

8. The Advocacy System

Under the Commonwealth State/Territory Disability Agreement (CSTDA), advocacy is a shared responsibility of the Commonwealth Government and States and Territories. Advocacy, as defined by Disability Services Queensland (DSQ) 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 emphatic and vigorous.*[141]

Both individual and systemic advocacy in Queensland are funded by the Commonwealth and Queensland Governments as essential components of the advocacy system.

Individual advocacy provides one of the primary safeguards in protecting the rights, needs and interests of individual adults with impaired decision-making capacity. Adults with impaired capacity are often not able to advocate effectively for themselves, and they may not have family members or a supportive network of friends and allies to speak up on their behalf and represent their interests. Consequently, access to competent, independent individual advocacy can be a critical factor in the quality of life for adults with impaired capacity.

Similarly, systems advocacy is essential in illuminating broad, systemic issues that have an impact on the lives of adults with impaired capacity, and in promoting improved policy, legislative and service responses and facilities.

141 ‹http://www.disability.qld.gov.au/publications/strategic-framework-advocacy/definition-types.html› at 30 September 2008.

Existing individual advocacy agencies achieve positive outcomes for many. Nevertheless, the Public Advocate has identified that access for adults with impaired capacity to advocacy is limited by the services' geographical reach and their lack of capacity to respond to demand. The Public Advocate has consistently advocated for increased funding for individual advocacy, and has strongly supported the development of competent and consistent advocacy practices across the State.

The Public Advocate reiterates that any initiatives to increase access to individual advocacy, both geographically as well as numerically, should not lead to a dilution or diminishment of existing advocacy agencies, including systemic advocacy organisations. Rather, additional funding and capacity building are essential.

Both the Commonwealth and Queensland Governments have been engaged in a review of advocacy services.

8.1 Review of the National Disability Advocacy Program

The Commonwealth Government, through the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) manages the National Disability Advocacy Program (NDAP).

Program funding of $12.4 million was available for NDAP funded agencies in 2007-2008. Of this, $1.775 million was provided to Queensland's disability advocacy sector. This comprises 15.6% of the national advocacy budget. A further $70,000 was granted to Queensland-funded agencies to assist them to build capacity.

In May 2007, as part of the 2007-2008 Federal Budget, the Commonwealth Government announced that it would provide an additional $12.2 million

nationally over four years for the NDAP. This was an approximate 20% increase over the previous budget for the national program. One million dollars of this funding, to be offered recurrently over three years, was to be provided to disability advocacy agencies funded under the NDAP to expand the delivery of individual advocacy services into ten regional areas and improve service delivery. Two of the regions identified were in Queensland:

- the Burnett Shire and Bundaberg City Council area; and
- Hervey Bay and Maryborough City Council areas.

The Office understands that FaHCSIA will initiate the process to allocate this funding shortly.

In 2006, following an evaluation in late 2005, FaHCSIA began a process to reform the NDAP to improve its efficiency and effectiveness. An Advocacy Reforms and Management Section was established within the Department's Disability Policy and Co-ordination Branch to oversee the changes to the NDAP and to work with the Department's states and territories offices in managing this program.

The progress of FaHCSIA's review of the NDAP was noted in the Public Advocate's Annual Report last year. This included extending the implementation timetable for the change process to 2012 to allow advocacy agencies more time to prepare for the proposed changes.

The second round of consultation and information sessions was held in all jurisdictions between February and March 2008. In these sessions, FaHCSIA provided information about the quality strategy for advocacy, including an introduction to the Joint Accreditation System of Australia and New Zealand (JAS-ANZ) and third-party certification. The sessions were also used to consult with the disability advocacy sector about some features of the quality strategy, including: advocacy definitions; goals and objectives for a revised NDAP; proposed standards for advocacy; and sample key performance indicators.

FaHCSIA sought comments on two Consultation Papers provided through the consultation and information sessions:

- *Changes to the National Disability Advocacy Programme: Objectives and Principles* (including proposed definitions of advocacy); and
- *Quality Improvement: Disability Advocacy Standards and Key Performance Indicators*.

This Office attended an information session and provided a submission about these matters in May 2008. In the submission, the Office expressed overall support for the recognition of a range of advocacy models that may be used by funded advocacy agencies. Some concerns were raised, including the notion of self-advocacy by adults with impaired decision-making capacity. The Office also expressed general support for introducing an independent third-party certification quality assurance system for advocacy agencies funded under the NDAP, and for developing a set of disability advocacy standards and key performance indicators. Concerns included:

- the lack of recognition of the role of advocacy in seeking out vulnerable people to provide them with opportunities to access advocacy;
- guidelines needed to reflect the diversity of advocacy models;
- auditors in the quality system will need to have a good understanding of the different advocacy models that are funded under the NDAP; and
- the issues of training and support (under Standard 9) would not apply to most advocacy models/agencies, and should only be applicable to agencies funded to support self-advocacy.

It was also noted, as a positive comment, that the proposed standards did not seek to measure the performance of agencies on outcomes of advocacy. This Office understands that FaHCSIA intends to release a report of the consultations and make it accessible on the Department's website.

This Office will take an ongoing interest in the progress of the review.

8.2 Review of Disability Services Queensland-funded disability advocacy services

Disability Services Queensland (DSQ) funds about 15 advocacy agencies in Queensland, and has expended approximately $1.6 million in 2007–2008. In late 2007, DSQ began a review of disability advocacy services in Queensland. The purpose of stage one of the review was to:

- develop an in-depth understanding of advocacy services in Queensland;
- consider access to appropriate advocacy services, including geographical coverage;
- examine how additional funds allocated to advocacy agencies in June 2005 were used;
- examine best-practice in the delivery of advocacy services; and
- examine recommendations from previous research, including national research as well as Queensland-specific research.

It was anticipated that following the completion of stage one of the review, the findings would inform stage two in developing performance measures for advocacy services. A contractor was engaged to conduct the first stage of the project, which included a literature review, an analysis of relevant data and consultations with relevant stakeholders, including staff from advocacy organisations and representatives from the Office of the Public Advocate.

This Office's submission to the contractor included the following comments:

- The current supply of disability advocacy services is insufficient for the significant unmet need in Queensland.
- Advocacy across Queensland is constrained by significant geographical access gaps.
- Some advocacy agencies are unable to meet the need that exists in their geographical area because of insufficient resources.
- The ad hoc nature of the disability advocacy structure and the gaps in regional reach are directly related to inadequate funding levels.
- Increased access to disability advocacy in Queensland is contingent upon increased resources. Efforts to increase access to advocacy in a resource-neutral manner, for example, by simply changing the structure of the current program, would be ill-advised and likely counter-productive.
- Any attempt to restructure the existing disability advocacy sector without significant community capacity-building could lead to significant disruption to disability advocacy services, and a potential loss of knowledge and expertise in the sector.
- Currently, no coherent alternative model is available upon which to base a restructure of the advocacy sector.
- Without substantial, empirical research to validate an alternative structure, together with a focus on capacity building supported by a significant increase in funding, any changes in the structure of the disability advocacy sector would be expected to be disruptive and counter-productive.

The result would likely be poorer outcomes for vulnerable people.

A copy of the submission is available on the Public Advocate's website.

The contractor provided a final report to DSQ which has advised this Office that the report is currently undergoing approval processes. DSQ has also advised that a decision on whether to proceed to stage two of the review — developing performance measures for advocacy services — will be postponed until the Commonwealth Government has finalised the key performance indicators for the National Disability Advocacy Program, following its review (see Section 8.1 for further information).

8.3 Endeavour's Independent Advocacy Policy

Last year, the Office reported positively on the Endeavour Foundation's Independent Advocacy Policy, noting the requirement in the *Disability Services Act 2006* 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"*.[142]

Following the endorsement of the policy by Endeavour's Board of Directors at their September 2007 meeting, the Foundation's Community and Advocacy Support Unit progressively rolled out the policy with all stakeholders. Endeavour is closely monitoring the policy's implementation amongst staff and families. This Office has considerable interest in this matter given the large number of adults with impaired decision-making capacity supported by the Endeavour Foundation.

8.4 Family Support and Advocacy Queensland

As reported in the Office's Annual Report 2006-2007,[143] Carers Queensland obtained funding to operate a Family Support and Advocacy Program. The program provides support and advocacy for family carers of adults with impaired decision-making capacity with the aim of improving the ability of family carers to protect the rights of the adults. The Public Advocate participates in the program's Reference Group. The service has supported over 219 families since its commencement in October 2006. The majority of these families were engaged with the guardianship system.

In 2008, an independent evaluation of the service was commissioned, and is yet to be finalised. The feedback gathered during the evaluation process from external stakeholders and families will provide a basis for reflection for further strengthening the program. It is expected that the evaluation and its outcomes will be more fully reported next year.

142 Section 33.

143 [8.6] page 67.

9. The Aged Care System

In recent years, the Public Advocate has expressed significant concerns about, and undertaken advocacy regarding, elder abuse.[144] Abuse may be physical, sexual, financial, or psychological in nature, and may also include neglect. It is estimated that 3-5% of the Australian population experiences elder abuse, and research suggests that 75% of people aged 65 and older who have experienced abuse have impaired decision-making capacity.[145]

9.1 Joint work with Queensland Law Society, Elder Law Section

As reported last year, the Office of the Public Advocate and the Queensland Law Society Elder Law Section agreed to collaborate on research into the legal aspects of elder abuse. They aimed to produce a report in 2008 to inform both policy and law makers about reform possibilities. The report's completion has been delayed, but a joint presentation by the Chair of the Elder Law Section and the Public Advocate about the issues identified in the research was delivered at the Queensland Law Society's annual Elder Law Conference in July 2008.

It is anticipated that a draft report raising relevant issues will be distributed shortly to key stakeholders for comment. Following this targeted consultation, the report will be made more widely available.

9.2 Seniors Legal and Support Service

Concerns are growing in the community about the prevalence of elder abuse within Queensland, and the lack of services to respond to this issue. Impaired capacity is an issue for a significant number of seniors, and older people experiencing decision-making difficulties are particularly vulnerable to all forms of abuse.

The Department of Communities has allocated funds to pilot specialist Seniors Legal and Support Services (SLSS) in five locations throughout Queensland. Services are located in Brisbane, Cairns, Hervey Bay, Toowoomba and Townsville. Staffed by solicitors and social workers, these services provide free legal, counselling and referral support to older people experiencing, or at risk of, elder abuse and financial exploitation. The aims of the SLSS include promoting the independence and safety of seniors, minimising the risk of further harm, and offering community education about elder abuse and related issues. The pilot has been extended to June 2009.

In 2007, the Department of Communities began an external evaluation of the SLSS pilot. The purpose of the evaluation was to determine the efficiency, appropriateness and effectiveness of the initiative. The Office of the Public Advocate was invited to participate on the Central Reference Group for the evaluation of the program.

The Office made recommendations to the Department of Communities and the SLSS services throughout the evaluation process. Several of these recommendations have been implemented, or are being considered for implementation, such as:

- establishing the need for an evaluation framework;
- increased attention to the issue of impaired capacity during the evaluation process;
- ensuring SLSS social workers and solicitors are trained in the area of impaired capacity, are able to identify impaired capacity in seniors, and provide appropriate referrals; and

144 Refer to The Office of the Public Advocate, *Annual Report 2006-2007* (2007) and The Office of the Public Advocate, *Annual Report 2005-2006* (2006) for recent advocacy undertaken in the area of elder abuse.

145 Queensland Government, *The Strategic Plan for the Prevention of Elder Abuse in Queensland* (2001) 4.

- widespread promotion of SLSS services, and continuing promotional activities on a broad scale.

The Office also identified some service challenges in responding to the needs of seniors with impaired capacity. Anecdotal reports from SLSS service personnel indicate that the percentage of seniors with impaired capacity who access the service is probably less than might be expected for this age group. This suggests that this group is not accessing this service as much as would be expected, given their increased vulnerability to abuse, neglect and exploitation.

It is anticipated that the final evaluation report, due to be completed by the end of 2008, will include data and conclusions based on 12 months operation. The interim report and documented case studies indicate that SLSS is providing a valuable and much-needed service to older Queenslanders.

The Public Advocate encourages SLSS to continue to explore ways to improve access to services and supports for these vulnerable seniors.

9.3 Abuse of seniors in residential facilities

The *Aged Care Amendment (Security and Protection) Act 2007* (Cth) applies to Commonwealth Government subsidised residential aged care services. This legislative reform is intended to strengthen protections for residents in residential aged care who may be the victims of sexual and physical assault within an aged care facility by introducing a form of compulsory reporting of such assaults. Other legislative reforms include greater scrutiny through accreditation processes, police background checks, new complaints investigation procedures, and an Aged Care Commissioner.

The Public Advocate has identified the following as questions and issues that may have an impact on the effectiveness of the legislation to protect seniors with impaired capacity who live in aged care settings. Questions include:

- How effective is compulsory reporting as a protective mechanism?
- What are the key sources of assault risk for seniors with impaired capacity within aged care settings, and how are these risks managed?
- How does the existing investigation framework fit within the complaints process?[146]
- The Accountability Principles referred to in the Act provide that mandatory reporting is not required when assaults are committed by a resident with a 'mental impairment'.[147] What criteria do aged care providers rely on to decide whether to report abuse in cases where it is not mandatory?
- How are the rights of a resident with a 'mental impairment', who assaults another resident, balanced with the rights of the victim who may also have a 'mental impairment'?
- What protections are afforded a resident assaulted by a co-resident with a 'mental impairment' if a decision is made by an aged care provider not to report the incident?
- Does the definition of 'mental impairment' require further elaboration, and how is 'mental impairment' being assessed within residential aged care settings?
- How effectively are aged care providers implementing the legislation in a climate of critical staff shortages?

146 Complaints processes are typically focused on resolving dissatisfaction. Refer to Complaint Handling Australian Standard AS ISO 1002-2006 for guidelines for complaints management in organisations ‹http://webstore.ansi.org/RecordDetail.aspx?sku=ISO+10002%3a2004&source=google&adgroup=iso2&keyword=iso%2010002&gclid=CL_kvPXc7pUCFRs-awod9zAqfg› at 22 September 2008.

147 *Accountability Principles 1998* (Cth) s 1.31.

- What are the investigations processes and how are they evaluated?
- What mechanisms are in place to determine the merits of decisions, in addition to reviewing processes undertaken during investigations?

The Office is interested in the legislation as it relates to residents in aged care facilities who have impaired decision-making capacity. While the Public Advocate strongly supports appropriate measures which protect vulnerable older people from abuse, neglect and exploitation, the legislative response raises questions and issues. The Office will continue to monitor the implementation of the legislation and its implications for seniors with impaired decision-making capacity.

Regional trip - Senior Research Officer Adrienne McGhee with particpants at a regional meeting

10. Workforce Systems

Workforce systems affect people with impaired decision-making capacity in two ways. Employment of people with a disability is essential to social inclusion. It offers opportunities which enhance quality of life. Workforce capacity within human services is also a recognised systems issue. For example, difficulties attracting and retaining staff with the aptitude and skills to deliver quality support and other services is problematic.

10.1 Employment of people with a disability

In its submission to the Commonwealth Department of Education, Employment and Workplace Relations regarding the *National Mental Health and Disability Employment Strategy,* the Office supported the principle that participation in employment is foundational to social inclusion. In addition, the capacity of employment to offer safeguards for people from abuse, neglect, exploitation and isolation, by joining in usual adult activities was observed.

The Office referred to its Issues Paper, *Navigating the Pathways from School to Work: Improving the Access to Vocational Education and Training in Queensland by Young People with a Decision-Making Disability.*[148] It highlighted the particular challenges faced by people with a cognitive disability accessing employment and training and offered suggestions for program development. Essentially, it was suggested that transition brokers should support and provide case management to assist people to access training and gain employment. The model implicitly relies on flexible funding to enable responses tailored to meet the needs of individuals.

148 Refer to ‹http://www.publicadvocate.qld.gov.au›.

The Commonwealth Government is commended for seeking to address barriers to employment for people with disabilities.

10.2 Workforce development and planning

In the Office's Annual Report 2006-2007, Disability Services Queensland's (DSQ) workforce development initiatives under the *Strengthening Non-Government Organisations Strategy* were endorsed.

Difficulties faced by disability service providers in recruiting and retaining staff are raised regularly with the Office. The relationship between service quality and the quality of service staff is recognised. People receiving services and their advocates routinely report that constant changes in workers undertaking care for people is disappointing and distressing for many service users. The human desire for dignity is not met when strangers arrive to undertake the most personal aspects of care. High staff turnover means that knowledge of the person and their particular interests and ways of communicating is often lost. Sometimes people may manifest their frustration in ways that are poorly understood. This may result in them being labelled as being 'unmanageable', or as having 'challenging behaviour'.

This is not a criticism of individual workers. It appears that attracting and retaining skilled workers to the disability sector on a permanent and sustainable basis is problematic for both DSQ and non-government organisations, as it is across many human service areas.[149]

149 For a recent discussion see Victorian Council of Social Service *Recruitment and Retention in the Community Sector: A snapshot of current concerns, future trends and workforce strategies* (2007) ‹http://www.ncoss.org.au/projects/workforce/downloads/RecruitVCOSSpaper07.doc› at 21 August 2008. These issues were also considered in Disability Services Queensland, *Planning for Capability —Five-Year Workforce Planning Strategy for the Queensland Disability Sector 2001-2006* (2001) ‹http://www.disability.qld.gov.au/workforceplanning/documents/plan_capability.pdf› at 21 August 2008.

Various strategies have been progressed to address these issues. These include the Disability Sector Skilling Plan developed with DSQ and the Department of Education, Training and the Arts. This plan helps service providers to access training grants for new and existing staff. DSQ is working closely with non-government organisations to develop staff skills and knowledge including specialist training in management, leadership, financial management, occupational health and safety, and 'challenging behaviour'. The Disability Sector Training Fund provides skilling opportunities for paid and unpaid staff of funded service providers, and for parents and carers of people with disability. Local coalitions meet regularly in each of the DSQ regions to determine the training and capacity needs for each region.

These and other strategies funded by DSQ[150] are a useful contribution to developing disability staff skills. However, they focus on people already involved in the sector. The disability sector must consider broadly how to attract and retain new workers. This requires a concerted, sustained strategy to identify and examine the critical core competencies of direct care staff, the people who may be attracted to the work, and aspects of workforce training, management, and conditions and benefits that would lead to long-term retention in the sector.

150 Other initiatives include funding National Disability Services to conduct workshops in strategic and operational planning, and the *Sector Engagement Strategy* initiative focused on facilitating an industry-driven approach to identify workforce issues.

ADVOCACY ACTIVITIES

PART TWO: Interventions

Interventions

The Public Advocate may intervene in legal proceedings and official inquiries involving the protection of the rights and interests of adults with impaired decision-making capacity.

Legal interventions can provide an excellent opportunity to closely scrutinise the operation of a system or systems. However, they are resource intensive. This Office will only become involved where there are significant systems issues for consideration and it is considered an appropriate advocacy strategy in relation to the issue/s and system/s concerned. Commonly, other advocacy and legal interventions will complement one another.

11. Legal Interventions

11.1 Supreme Court of Queensland

11.1.1 *Guardianship and Administration Tribunal v. Perpetual Trustees Queensland Ltd*[151]

As reported in last year's Annual Report,[152] the Public Advocate was granted leave in late 2006 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 which had appointed an administrator[153] some years earlier.

A number of complex systemic issues emerged in the review proceeding. The administrator argued that it was also a trustee. Other issues related to whether the remuneration claimed by the private trustee company administrator was permitted at law,[154] and the power of the Tribunal to retrospectively authorise conflict transactions.[155]

The Tribunal referred questions of law to the Supreme Court of Queensland under section 105A of the *Guardianship and Administration Act 2000*.[156] The five questions posed for the Supreme Court's consideration were as follows:

1. Whether the fund held by Perpetual Trustees Queensland Limited (Perpetual) pursuant to the order of Justice Byrne of 5 December 2001 is held by Perpetual as an administrator and not as a trustee.

2. Whether the Tribunal can authorise under subsections (1) and (2) of section 48 of the *Guardianship and Administration Act 2000* that Perpetual be remunerated in excess of the commission contemplated by section 41(1) of the *Trustee Companies Act 1968*.

3. Whether a litigation guardian appointed for an incapacitated adult under the *Uniform Civil Procedure Rules 1999* (UCPR) can enter into a binding agreement under section 41(7)(b) of the *Trustee Companies Act 1968* on behalf of an incapacitated adult with a trustee company about

151 [2008] QSC 049 (07/6519) (Supreme Court of Queensland Mullins J, 14/03/2008).

152 The Office of the Public Advocate, *Annual Report 2006-2007* (2007) [10.1] 72 and [12.1] 75.

153 Initially, the private trustee company and a family member of the adult with impaired capacity had been appointed jointly as administrator: the family member subsequently withdrew as administrator.

154 *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, which 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).

155 *Guardianship and Administration Act 2000* s 37 provides that an administrator may only enter a conflict transaction with Tribunal authorisation.

156 The Tribunal's reasons for decision in relation to the referral to the Supreme Court are reported as *Re TAD* [2007] QGAAT 43.

the amount of remuneration payable to that trustee company in its role as administrator.

4. Whether the Tribunal has power to retrospectively authorise remuneration already paid to Perpetual when making an order under section 48(1) of the *Guardianship and Administration Act 2000*.

5. Whether the Tribunal has power to retrospectively authorise conflict transactions and, if so, whether that power is found in section 37, section 83(2) or some other section of the *Guardianship and Administration Act 2000*.

11.1.2 Public Advocate's position

The Public Advocate's submissions regarding these complex legal issues were to the effect that:

- Perpetual was not a trustee, as well as an administrator.
- An administrator was entitled to remuneration only if the Tribunal had made an order to that effect under section 48(1) of the *Guardianship and Administration Act 2000* and the amount of remuneration is limited under section 48(2).
- A litigation guardian has no power to authorise the amount of remuneration payable to a trustee company in its role as administrator since a litigation guardian's authorisation is in respect of the conduct of the litigation only.
- The Tribunal does not have power to retrospectively authorise remuneration already paid to a trustee company (as opposed to authorising payment for work performed in the past when the amount claimed is not in excess of the amount provided for by legislation) when making an order for the payment of remuneration to a professional trustee.
- As a matter of legal construction/interpretation, the Tribunal does not have power to retrospectively authorise conflict transactions.

11.1.3 Supreme Court's decision

The Supreme Court delivered its decision in March 2008. Its answers and, in brief, the reasons for those answers were as follows:

- The fund held by Perpetual pursuant to the order of the Supreme Court of 5 December 2001 is held as an administrator and not as a trustee. The Court considered this was the proper construction of the order in the context in which it was made.
- The remuneration of Perpetual as administrator for an adult under the *Guardianship and Administration Act 2000* is not regulated by section 48 of the *Guardianship and Administration Act 2000*. The Court concluded that the reservation made in section 48(3) excludes the operation of section 48(1) and (2) when a trustee company (or the Public Trustee of Queensland) is appointed as an administrator under the guardianship legislation. Instead, the remuneration in this situation is regulated by other legislation, namely, the *Trustee Companies Act 1968*.
- A litigation guardian appointed for an incapacitated adult pursuant to rule 95 of the *UCPR* cannot enter into binding agreement under section 41(7)(b) of the *Trustee Companies Act 1968* on behalf of an incapacitated adult with a trustee company about the amount of remuneration payable to that trustee company in its role as administrator for the adult. In essence, this was because the authority of a litigation guardian extends only to doing things in a proceeding, whereas fees payable to an administrator are expended after the proceeding has concluded.

- Implicitly, question 4 assumed that the Tribunal had power to authorise remuneration paid to Perpetual as administrator. As it was decided in answering question 2 that it did not, the Court found it unnecessary to answer question 4.
- The Tribunal has power to retrospectively authorise conflict transactions and that power is found in section 37 of the *Guardianship and Administration Act 2000*. The Court considered the proper construction of the legislative provision did not require that authorisation be obtained prior to the entry into the conflict transaction by the administrator.

11.1.4 Comment

The issues raised in the proceeding are of systemic significance.

The guardianship regime provides for the appointment of a financial decision-maker for people with impaired capacity. An appointment of a trustee will usually be unnecessary and is potentially problematic, as the responsibilities of administrators and trustees do not coincide in all respects.[157] A person could potentially be removed as administrator by the Tribunal but remain a trustee unless removed by the Supreme Court. It should be noted that Supreme Court of Queensland Practice Direction 9 of 2007 (Persons Under a Legal Disability) states that, in most cases following the compromise of a claim when an administrator is appointed for an adult, it will usually be unnecessary to provide for the compromise sum to be held on trust and the unnecessary creation of a trust should be avoided.[158] Accordingly, arguments relating to possible appointment as a trustee as well as an administrator are not likely to arise in respect of orders made since the making of this practice direction.

157 A trustee is vested with legal title in the property of the trust; whereas property does not vest in an administrator.

158 Paragraph 7.

The Supreme Court has clarified some issues regarding the basis for the charging of remuneration by trustee company administrators, although since there are several different rates which may be charged under the *Trustee Companies Act 1968*, some questions remain. Further, it is useful to have an authoritative statement regarding the limits of the powers of the litigation guardian regarding remuneration. Additionally, the Tribunal had previously concluded that it did not have power to retrospectively authorise conflict transactions:[159] its powers have now been clarified.

11.2 Guardianship and Administration Tribunal

11.2.1 Review of the appointment of the administrator

Now that the Supreme Count decision is available (see Section 11.1 above), it remains for the Tribunal to conclude the review of the administrator's appointment. At the time of writing, a further hearing had recently concluded, but a decision had not been delivered by the Tribunal. The confidentiality provisions of the guardianship legislation currently prohibit further reporting about the outstanding issues (see Section 2.1 regarding anticipated changes to the confidentiality provisions). It is anticipated, that the matter will be more fully reported in next years Annual Report.

11.3 Coronial inquests

11.3.1 Police shootings of patients with mental illness

For some time, the Public Advocate has taken 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

159 *Re HAF* [2007] QGAAT 80 (5 December 2007).

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. In 2005, the Office released a Discussion Paper, *Preserving Life and Dignity in Distress: responding to critical mental health incidents,* which was intended to contribute to significant work already undertaken by Queensland Health and Queensland Police Service.

The Public Advocate reported in its Annual Reports for 2005-2006[160] and 2006-2007[161] about Coronial inquests into the shooting deaths by police of four adults with a mental illness.[162]

For the reader's convenience, a brief history is provided here. In 2006-2007, the Public Advocate was given leave to intervene in respect of systemic issues arising from the inquests. Generic witnesses gave evidence on the systemic issues in May 2007. 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.

Key submissions included:

- Greater clarity is required about the specific model being implemented under the Mental Health Intervention Project, particularly in respect of the nature and extent of police training.
- Frameworks for clinical governance, clinical audits and clinical supervision need to be reviewed and strengthened within the mental health system.
- More consistent application is needed of the mental health assessment frameworks for the risk of violent or aggressive behaviour in community clients, and systems for more assertive case management.
- Greater consistency is needed within the mental health system to facilitate the appropriate use of corroborative information from families, carers and support networks.
- Greater integration of mental health and substance use services is needed.
- Improved treatment is needed for prisoners with a mental illness, including basic mental health training for correctional officers.
- 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.

The Coroner's findings were delivered on 17 March 2008.[163] Recommendations for systemic change included:

Mental Health Services

- the development of standardised processes and assessment tools, addressing the giving of insufficient weight to corroborative information, training for staff on the tools/processes and compliance audits of implementation;
- review of assessment decisions made by mental health staff other than psychiatrists, not to

160 [4.5] 35.

161 [4.5] 46-48 and [11.2] 73.

162 Office of the Public Advocate *Annual Repor*t 2005-2006, (2006), [4.5], 35.

163 *Inquest into the deaths of Thomas Dion Waite, Mieng Huynh, James Henry Jacobs and James Michael Gear*, State Coroner, M Barnes, 17 March 2008 available at ‹http://www.courts.qld.gov.au/1680.htm#2008› at 14 September 2008.

proceed with psychiatric assessment and not to admit a person as an inpatient in certain circumstances, and to discharge a patient who has previously received involuntary treatment;

- regular review of the policies regarding management by community mental health services of consumers with dual diagnosis of substance abuse;
- regular evaluation of policies designed to link prisoners with mental illness with community mental health services after release from prison; and
- the development of a protocol to assist case managers to systemically address medication compliance.

Mental Health Intervention Project

- review of restrictions on provision of information by Queensland Health to Queensland Police Service; and
- greater use of pre-crisis planning by Police, Queensland Health and Queensland Ambulance Service.

Police

- review of training regarding warning before using firearms;
- blood testing of officers involved in critical incidents;
- review of training to ensure use of tactical withdrawal in appropriate circumstances;
- development of critical incident review policy; and
- critical incident command training for all operational police officers.

Following delivery of the inquest findings, a supplementary report produced by three of the families of the deceased men was delivered to the Premier of Queensland. It contained additional recommendations for change arising out of the inquests. The Government response to the Coroner's recommendations and the families' supplementary report was considered by the Queensland Cabinet.

At the time of writing, it was understood that Government had recently advised the families of its response. The Public Advocate had not yet received advice of the response. A continuing interest will be taken in the issues, the Government response and the ongoing reform process.

11.3.2 Killing of a homeless person with a mental illness by a person with mental illness recently released from custody

During the year, the Public Advocate was granted leave to intervene in an inquest involving the death of a homeless person with a mental illness. The death occurred following a fatal assault by another person with a mental illness who had been released from the custody of Queensland Corrective Services about one week earlier after serving a three year term of imprisonment. The inquest will consider systemic issues including:

- the role of mental health assessments in prison and the application of the criteria for making of involuntary treatment orders in respect of prisoners;
- the capacity of the mentally ill prisoner to give consent to/refuse treatment;
- whether treatment of prisoners should be enforced and when;
- the role and obligations of Corrective Services when threats are made by a prisoner to commit violence upon release from prison;
- the treatment of mentally ill persons in Corrective Services facilities as opposed to their treatment in authorised mental health services;

- the treatment and management of the prisoner in prison and whether his mental health professionals had full and appropriate access to information (including information regarding threats made by him);
- the role and adequacy of the corrective services system to provide disability support, treatment, other necessary services and programs for prisoners with mental illness and other intellectual, developmental or cognitive disability;
- alternatively, the roles and respective responsibilities of Disability Services Queensland, Queensland Health (Mental Health Services), and Corrective Services to provide treatment and support for prisoners who have a mental illness and an intellectual, developmental or cognitive disability and who are in the custody of Corrective Services;
- the roles and respective responsibilities of Disability Services Queensland, Queensland Health (Mental Health Services), and Corrective Services to provide treatment and support to prisoners who have a mental illness and an intellectual, developmental or cognitive disability and who are about to transition from prison to the community; and
- homelessness issues: what services could be offered to support people with mental illness?

The circumstances of this inquest provide an opportunity for close scrutiny of various systems, and for the possibility of Coronial recommendations for reform which may prevent future deaths. The hearing is scheduled for late 2008.

Principal Research Officer Lindsay Irons and Public Advocate Michelle Howard

12 Inquiries

12.1 Inquiry into Better Support for Carers

The Commonwealth Government, through the House of Representatives Standing Committee on Family, Community, Housing and Youth, is undertaking an Inquiry into Better Support for Carers. The Office welcomes the Commonwealth Government's Inquiry, and made a submission about issues for adults with impaired decision-making capacity.

The Office's submission acknowledged that the role of carers in providing care for those with significant support needs is a valuable contribution not only to the individuals being cared for, but for society. Further, it was recognised that in undertaking care and support for another person, carers may sacrifice their own aspirations or experience barriers to social and economic participation. Certainly, the development of strategies to assist carers to access the same range of opportunities and choices as the wider community is a constructive initiative.

However, in its submission, the Public Advocate emphasised that it is the people being cared for, often people with impaired decision-making capacity, who are the most vulnerable parties in this situation. The Submission encouraged the Committee to ensure that the rights and interests of the people being cared for are protected and promoted, and that they are not disadvantaged by a focus on the needs of carers.

In many instances, the best interests of the carer are consistent with the best interests of the person being cared for. However, this is not always the case.

The Public Advocate also discussed the role of substitute decision-makers for persons with impaired decision-making capacity. Carers often have this role as well as their caring role. In Queensland, the *Guardianship and Administration Act 2000* and the *Powers of Attorney Act 1998* provide a framework for substitute decision-making for adults with impaired capacity.

Carers need to understand the roles under this regime, along with the rights and responsibilities they have as substitute decision-makers, if they also assume this role in addition to their caring role. This Office recommended that carers should be provided with relevant education, information and support in order to promote an improved understanding of the relevant substitute decision-making regimes in their state or territory. Ensuring that appropriate substitute decision-making processes occur, provides protection for carers and protects the interests of adults with impaired decision-making capacity.

The Committee was urged to consider the likely ramifications of any strategies under consideration on those being cared for, and to ensure that the rights, interests and well-being of those being cared for are not compromised.

The Public Advocate was invited to appear before the House of Representatives Standing Committee on Family, Community, Housing and Youth at a public hearing as part of the Inquiry into Better Support for Carers, where the Public Advocate provided further examples and information in relation to the issues raised in the submission. Further, the Public Advocate made the point that providing adults with impaired decision-making capacity with better support for social inclusion constituted a significant safeguard in terms of minimising the potential for exploitation, abuse and neglect as well as increasing opportunities for the adults in terms of their quality of life, which would ultimately result in better support for carers.

ADVOCACY ACTIVITIES

PART THREE: Research

13. Research

13.1 Funding and service options for people with disabilities

Lead Researchers:
Prof Lesley Chenoweth, Griffith University
Natalie Clements, Griffith University

Research Partners:
Office of the Public Advocate
Office of the Adult Guardian
National Disability Services
Queensland Health

Observing the significant unmet need for disability support in Queensland, the Office's Annual Report 2005-2006[164] identified the importance of undertaking comprehensive research to identify and evaluate service and funding models in use worldwide, develop other possible models and make recommendations about local models. It is hoped that identification and evaluation of the various models will generate innovation and development of supports offering people with impaired decision-making capacity the greatest possible opportunities for a high level of quality of life.

In 2006-2007, researchers from Griffith University were commissioned, the proposed research project was refined, the formal proposal finalised, and key stakeholder agencies engaged as partners in the research. The project aims to scope the range of different approaches to funding and service delivery to people with disabilities around the world; identify or develop an evaluation framework based on human rights indicators to assess the approaches; and evaluate each of them against the framework. The research is well underway, and the final report is expected to be released in late 2008. It is anticipated that the report will have implications for policy and program development.

During the year, the Office of the Public Advocate and Griffith University co-hosted a seminar about some of the issues entitled *Opportunities offered through flexible funding in disability services: International comparisons* with guest speaker, Professor Carmel Laragy, Latrobe University, which was attended by representatives from government and non-government organisations, as well as other academics.

13.2 Chronic homelessness and impaired capacity

Lead researcher:
School of Human Services, Griffith University

Research partners:
Office of the Public Advocate
Micah Projects Incorporated
Mission Australia
HART 4000

The literature reveals that little research has been undertaken in the area of chronic homelessness and impaired capacity. This research will investigate the nature and prevalence of impaired capacity in homeless people in several regions in Queensland and aims to:

- engage stakeholders across the homelessness sector to identify gaps in knowledge and practice, and to develop a shared understanding about the issues faced by people who are chronically homeless and who have impaired capacity;
- determine the prevalence of the target group within services;
- review and reflect on the nature of social exclusion as embedded in policy and legislative frameworks;

164 *Annual Report 2005-2006* (2006) [3.4] 24-25; see also discussion in *Annual Report 2006-2007* (2007) [13.6] 81-82.

- identify barriers in the current service system which impede connections to effective supports, and identify enablers that promote connections to effective support; and
- contribute to the development of service delivery that promotes understanding, planning coordination and flexible and sustainable service delivery.

It is anticipated that results will be made available in 2009. The results are expected to have implications for the development of policy and programs by government (see Section 3.2 for further information).

13.3 Accommodation and support for people with mental illness or psychiatric disability

Lead researcher:
University of New South Wales Consortium

Research partners:
Department of Housing
Disability Services Queensland
Queensland Health
Office of the Public Advocate

In December 2004, the Public Advocate convened a roundtable forum of key government and non-government stakeholders to discuss the issue of inadequate and inappropriate housing for people with mental illness or psychiatric disability. In March 2005, the Public Advocate wrote to relevant government agencies expressing an interest in collaborating as research partners in some applied research on this issue.

The Department of Housing had recently commenced a research project to identify innovative and flexible housing and support options that facilitated or supported the recovery for people with a mental illness or psychiatric disability, and invited Queensland Health, Disability Services Queensland (DSQ), and the Office of the Public Advocate to participate in the Research. Representatives from these agencies comprised a steering committee for the project.

The research was conducted by a University of New South Wales Consortium, and comprised three major components. In June 2008, the research consultants produced their final report. Their report proposed ten principles for effective housing and associated support, and identified policy directions for providing housing and associated support services in a way that sustains tenancies for, and supports the recovery of, people with mental illness or psychiatric illness. The proposed principles are:

- Recovery Approach;
- Person-centred services;
- Primacy of the Person's Housing Needs and Preferences;
- Choice for Independent Living;
- Responsiveness to Population Needs;
- Separation of Housing and Support;
- Interagency Coordination;
- Individual and Systemic Advocacy;
- Long-term Perspective of Housing and Support Needs; and
- Preventing Homelessness.

The Public Advocate strongly urges the relevant government agencies to act on the policy implications of this report, and will report on progress towards the implementation of this suite of reforms in next year's Annual Report.

13.4 End-of-life decision-making research

Researchers:
Professor Lindy Willmott, Faculty of Law, Queensland University of Technology

Dr Ben White, Faculty of Law, Queensland University of Technology

Professor Colleen Cartwright, Faculty Arts and Sciences, Southern Cross University

Associate Professor Malcolm Parker, School of Medicine, University of Queensland

Professor Gail Williams, School of Population Health, University of Queensland

People with impaired decision-making capacity for whom end-of-life decision-making is under consideration are very vulnerable. While the level of understanding of the medical profession about the law regarding life-ending decision-making is currently unknown, anecdotal evidence suggests it is inadequate. The research team proposes a major project regarding end-of-life decision-making. In particular, the team intends to consider and analyse the law regarding end-of-life decision-making in three Australian jurisdictions (including Queensland). If indicated by the research, the team will comment on any shortcomings and make recommendations for reform, establish the level of knowledge of medical professionals about the law, and identify strategies to assist medical professionals to improve their understanding. This research is expected to involve a number of stakeholders as partners. This Office has indicated agreement in principle to partnering the research.

This Office agreed to fund some preliminary research in anticipation of the project above commencing. In particular, a grant was provided to fund pilot research into the role of medical professionals in decisions to withdraw and withhold life-sustaining medical treatment from adults who have impaired decision-making capacity under guardianship law in the three jurisdictions. This preliminary research was close to completion at the time of writing. It is anticipated that the results of the pilot research will be disseminated through a scholarly article.

13.5 Issues for Indigenous adults with impaired capacity

Lead Researcher:
Prof Jayne Clapton, Griffith University

The Office has commenced a project to explore understandings of, and issues for, Indigenous Queenslanders with impaired decision-making capacity.

While there is a body of research in relation to disability, cognitive impairment and mental illness for Indigenous Queenslanders, the Office could not identify any specific research in relation to the issue of impaired decision-making capacity and its implications amongst this population. It would appear that little is known or understood about the situation of Indigenous people with impaired capacity. For example, how capacity is determined, how and if decisions are made on behalf of a person, issues in relation to access to guardianship and administration services, and the extent of increased vulnerability are largely unknown.

To address this issue, the Office has entered into research to explore the following questions:

- What are the meanings of impaired decision-making capacity in Indigenous communities?
- How has this issue been addressed within other jurisdictions?

- What is the current situation of people with impaired capacity in Indigenous communities in Queensland?

The first phase of this research involves a comprehensive review of literature on impaired decision-making for Indigenous people. This work is currently underway.

It is envisioned that this initial project will form the basis of a larger project investigating this topic. This will involve the participation of a broader range of stakeholders.

Senior Research Officer Deborah Barrett

ADVOCACY ACTIVITIES

PART FOUR: The Public Advocate's Office

14. 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. All positions are permanently filled. The Office also employs one part-time and one casual Administration Officer.

The significant contribution of Lindsay Irons is acknowledged. Lindsay was employed in the Office for approximately four years. For approximately three years, he was a Senior Research Officer before being appointed to the position of Principal Research Officer. Lindsay made important contributions to the work of the Office, particularly in the areas of mental health, advocacy and housing. He left the Office in late 2007 to take on new challenges.

14.2 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 2007-2008.

A summary is provided below of expenditure for the 2007-2008 financial year.

Expenditure Items	**$ 681,000**
Employee Related Expenses	$452,000
Supplies and Services	$193,000
Grants	$10,000
Depreciation, Amortisation & Deferred Maintenance	$26,000
TOTAL	**$681,000**

14.3 Consultants

Sally Robinson was engaged as a consultant to undertake a research project (see Section 1.3 for further information).

PART FIVE: Appendices

Appendix 1

Committees and working groups

The Office of the Public Advocate participates in a variety of committees and working groups. During 2007-2008 these included the following:

Department of Communities

- Residential Services Stakeholder Advisory Committee
- Central Reference Group for the Seniors Legal and Support Service pilot

Disability Services Queensland

- Reference Group on Disability
- Evaluation of Disability Service Plans Sub-Committee
- Family Rights Issues Sub-Committee
- Reference Group — Young People in Residential Aged Care Initiative
- DSQ Focus Group to examine the Disability Services and Other Legislation Amendment Bill 2008
- SRS Implementation Committee

Department of Justice and Attorney-General

- Stakeholder Reference Group — Homeless Persons Court Diversion Project
- Queensland Law Reform Committee Reference Group for Guardianship Review
- Reference Group – Disability Services Plan
- Practical Guardianship Initiatives Working Group

National

- Australian Guardianship and Administration Council
- Australian Guardianship and Administration Council 2009 Conference Organising Committee

Queensland Health

- Working group established to consider authorisation of treatment for forensic patients
- Health Consumers Queensland Terms of Reference workshop

Networks

- 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
- Seniors Legal and Support Services Reference Group

Other

- Family Support and Advocacy Program Reference Group
- Homelessness & Impaired Capacity Working Group
- Justice Administration Leadership Group
- HOME research meeting – Griffith University
- Elder Abuse Prevention Unit Reference Group
- Mental Health and Housing Research Reference Group
- Accommodation and Associated Support for People with Mental Illness or Psychiatric Disability Steering Committee

Appendix 2

Membership of the Public Advocate's Reference Group 2007-2008

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 input as to how it might direct its limited resources. The reference group meeting was held in May 2008.

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:

Clinton Miles
Amanda Tink
Sharon Pacey
Bruce Milligan
Pat Cartwright
Margaret Deane
Marie Knox
Kay McInness
Mark Phillips
Susan Masotti
Sharna Day
Lesley Chenoweth
Valmae Rose
Jennifer Cullen
Julie-Ann McCullough
Wayne Ahboo
Marj Bloor
Kevin Cocks
Dianne Pendegast

Appendix 3

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 2007-2008 the Office of the Public Advocate conducted community consultations in Bundaberg, Maryborough, Hervey Bay, Munduberra, Cairns, Atherton, Gordonvale and the Gold Coast.

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:

Website: http://www.publicadvocate.qld.gov.au

Write to: Office of the Public Advocate
GPO Box 149
BRISBANE QLD 4001

Telephone: (07) 3224 7424
Fax: (07) 3224 7364

Email: public.advocate@justice.qld.gov.au

Office of the
Public Advocate
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