

Systems Advocacy for
adults with impaired
decision-making
capacity

Office of the Public Advocate *Queensland*

Annual Report 2008-2009

The Honourable Cameron Dick MP
Attorney-General and Minister for Industrial Relations
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 2009.

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

The report provides information on the key activities of the Office of the Public Advocate for 2008-2009 and a statement of our financial and operational functions for the year.

Yours sincerely

A handwritten signature in black ink, reading 'Michelle Howard'. The signature is fluid and cursive, with the first name 'Michelle' being larger and more prominent than the last name 'Howard'.

Michelle Howard
Public Advocate, Queensland

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The Public Advocate's Retrospective 2008-2009

The 2008-2009 year has been a watershed for the Office of the Public Advocate, with its abolition being announced in late April 2009. The Queensland Government has announced that the Public Advocate's functions are to be performed by the Adult Guardian. In the circumstances, this may be the final report of the Public Advocate, Queensland.

At the time of writing, Queensland had recently endured a severe dust storm, reportedly the worst for 70 years.¹ During the storm, the dust was thick, visibility was obscured, and the sky and surrounds were indistinct through a murky haze. Throughout this time when the future of systems advocacy within the guardianship regime has been unclear and rumours rife about what the future will hold, it has been a little like standing in the middle of a dust storm, unable to see what lies ahead.

Despite the uncertainty which surrounds this Office, the staff and I continued to do what we have done every other year. It could have been a time of disillusionment and diminished activity: it has been anything but that. I am enormously grateful to this resilient and focussed team for their ongoing support and commitment to the work of this Office. An abiding positive approach has resulted in very productive work throughout what could have been a difficult period for the organisation. I consider that these efforts will position our current target areas for appropriate reform, irrespective of whether these issues continue to be priorities in the reformed systems advocacy framework.



Public Advocate Michelle Howard

The Office of the Public Advocate has amassed a substantial body of work. We have worked tirelessly to protect and promote the rights of vulnerable adults through systems reform, across a broad variety of sectors. We have been robust in our advocacy, but have sought always to maintain good working relationships with the recipients of our advocacy, and have, in most cases, achieved this. We have not shied away from difficult issues. We have, I believe, conducted ourselves in the manner most likely to achieve improvements for the adults we strive to serve.

¹ Trent Dalton, Earth, wind and fire- Southeast smothered in soil blown from Outback, *The Courier-Mail* (Brisbane) 24 September 2009, 2.

I will explain the background to the decision to abolish this Office, and to transfer the functions. I will then briefly review the year and the substantive work performed by this Office over the last 12 months, before turning to the future of systems advocacy embedded within the guardianship regime for people with impaired decision-making capacity.

The Weller Review

An Independent Review of Government Boards, Committees and Statutory Authorities announced by the Queensland Government in March 2008 encompassed the Public Advocate. It was conducted by Professor Patrick Weller AO and Ms Simone Webbe (Review of Government Bodies or the Weller Review). It reviewed 459 bodies and made recommendations about their continued existence or otherwise, against a public interest map developed during the course of the review. Other statutory entities created by the guardianship regime were not included in the Weller Review. A full discussion of the Review of Government Bodies is contained in this Report.²

On 31 March 2009 the *Brokering Balance: A Public Interest Map for Queensland Government Bodies: An Independent Review of Queensland Government Boards, Committees and Statutory Authorities Part B Report* (the Weller Report) recommended that:

Pending analysis of a different finding (in favour) of the structural capability of the Public Advocate to perform its essential role in the current guardianship laws review by the Queensland Law Reform Commission due by 31 December 2009, the Public Advocate should be

*abolished and its functions transferred to the Adult Guardian.*³

The Weller Report's consideration of the Public Advocate covers less than two A4 pages.⁴ It is not done in the context of an understanding of the guardianship regime, the dynamics within it, or the way in which it seeks to safeguard vulnerable adults; nor are the feasibility and ramifications of the Adult Guardian performing the systems advocacy functions considered.

The Weller Report's consideration of the Public Advocate refers to a number of detailed public submissions it received,⁵ which strongly recommended the Public Advocate's continuing contribution.⁶ The Report noted that this Office and the Queensland Law Reform Commission (QLRC), which is responsible for the ongoing comprehensive Guardianship Review, submitted that review of the Public Advocate should appropriately be left to that Review, which is examining the broader guardianship system.⁷

The Report then refers to a view of the Department of Justice and Attorney-General (JAG) that the position should be abolished and the functions transferred to the Adult Guardian:

³ Simone Webbe and Professor Patrick Weller AO, *Brokering Balance: A Public Interest Map for Queensland Government Bodies: An Independent Review of Queensland Government Boards, Committees and Statutory Authorities Part B Report* (March 2009) 143, Recommendation 133.

⁴ Ibid, 141-143.

⁵ These submissions can be viewed at <http://www.premiers.qld.gov.au/Government/Boards_and_committees/Review/Submissions/Submissions_on_Part_A_Report/> at 21 July 2009.

⁶ Simone Webbe and Professor Patrick Weller AO, *Brokering Balance: A Public Interest Map for Queensland Government Bodies: An Independent Review of Queensland Government Boards, Committees and Statutory Authorities Part B Report* (March 2009) 142.

⁷ Ibid.

² See Section 2.3.

*...because, by being separated from the experiences of the Adult Guardian, the Public Advocate does not have sufficient access to information to amass a systemic assessment based on objective data and meet its original objectives.*⁸

As this Office was not made aware of the comments, its submission did not provide a response to them.

The Reviewers stated that if the separate structures had prevented the Public Advocate access to the data and experience necessary to perform its role effectively, then the current organisational form is not fit for (sic) purpose : hence, its recommendation.⁹ However, historically only limited statistical and anecdotal information has been available from any agency, not just the Adult Guardian. The Public Advocate is unable to compel the provision of information it considers necessary or appropriate.

Since its inception the Office of the Public Advocate has relied on the cooperation of agencies to provide information voluntarily. To ensure the provision of information from agencies to the systems advocate would require legislative reform. The Adult Guardian is only one source of information which can be drawn upon to inform systems advocacy.

This Office gathers information from a broad variety of sources relating to a wide range of issues not limited to the guardianship regime. These sources include statistical and other information available from relevant government (state and federal) and non-government agencies; scholarly research; research conducted by this Office; information from members of the public who have a decision-making

disability and their support networks; service providers and other professionals who interact with them; broad stakeholder networks; and sometimes, through interventions in public inquiries, and court and tribunal proceedings. As this Annual Report and previous Annual Reports of the Public Advocate attest, the absence of more information from the Adult Guardian has not prevented the work of this Office.

When the QLRC recommended the establishment of the Public Advocate as a separate entity in 1996,¹⁰ it was cognisant of how systems advocacy was performed in other jurisdictions where the functions were combined, and recommended a separate body. It identified a variety of reasons which remain valid today, including achieving focus and clarity of roles; avoiding a regime in which the agenda of the guardianship entities drive systems advocacy at the expense of broader systemic issues; and minimising conflict of interest.

Conflict of interest is inevitable when a service provider also has the systems advocacy functions. There are conflicting demands for resources, and the pressure of the work for individuals as a guardian, investigator or statutory health attorney may overwhelm the use of resources (as has sometimes occurred in some other jurisdictions).

Also, the Public Advocate has a significant role in monitoring and reviewing the delivery of services and facilities to adults with impaired capacity. The Adult Guardian is one provider of services to people with impaired capacity, and is monitored by the Public Advocate. Information received by the Public Advocate may be critical of the Office

⁸ Ibid.

⁹ Ibid, 143.

¹⁰ Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 (1996) volume 1 chapter 12, 410-438.

of the Adult Guardian, and the performance of its functions. As discussed in this Report, in performing the functions of the Public Advocate, during this year this Office has raised issues with the Office of the Adult Guardian concerning its operations. This demonstrates the conflict inherent in combining the functions of the two Offices. If the Public Advocate's functions are combined with the Adult Guardian's, who will watch the watchdog?

The Government Response to the Weller Report

The Government moved quickly to release its response to the Weller Report. Regarding the Public Advocate, it was stated:

*The government acknowledges that the Review's recommendation is consistent with how the role of the Public Advocate operates in some other Australian jurisdictions. The functions will continue, but will be carried out by the Adult Guardian.*¹¹

The Government is, of course, entitled to make decisions about the future of publicly funded bodies. In this instance, it is unfortunate that the process and reporting of the Weller Review was limited. In this regard, the criticisms of Professor of Public Administration Ken Wiltshire published in *The Courier-Mail*¹² are noted. He described the Weller Report as:

*Based on highly selective research, with scant understanding of the important role of many of these agencies.*¹³

What happens next?

It is commendable that the Government decision maintains the systems advocacy functions. In moving forward to implement the decision, it will be important that the changes made preserve the integrity of systems advocacy within the new structure.

This Office has provided some comments to Government about essential safeguards in any combined structure. These include enhanced powers for the systems advocate; a legislative requirement for other agencies to collect and provide systems-trend information and data, and provide other information reasonably requested; and quarantined resources and staffing. Further, challenges in combining the functions, including the inherent conflict of interest, have been identified and comment provided about strategies to maintain systems integrity.

Since the announcement, no formal steps have been taken to amalgamate the functions of the Public Advocate and the Adult Guardian. At this stage, I do not know when it is proposed to transfer the functions or how the new systems advocacy area might be expected to operate. It is understood that Government is carefully considering how to proceed.

Although the link between the work of this Office and systems change is not always entirely clear and reform may occur only after years of advocacy, as I have previously noted, it is reasonable to consider

11 Queensland Government, *Government response to the report Brokering Balance: A Public Interest Map for Queensland Government Bodies - An Independent Review of Queensland Government Boards, Committees and Statutory Authorities* (April 2009) <<http://www.premiers.qld.gov.au/government/boards-committees/review/government-response.aspx>> at 6 October 2009.

12 Professor Ken Wiltshire, 'Changes promote a worrying lack of oversight' *The Courier-Mail* (Brisbane) Wednesday June 24 2009, 31.

13 Ibid.

that this Office has played an influential role.¹⁴ In my view, a key factor in the Office's success has been the collaborative manner in which it has endeavoured to work with all stakeholders across the government and non-government sectors. Moving forward, it would be constructive for stakeholders to be fully consulted and engaged in the change process.

I am optimistic that Government and stakeholders will work collaboratively to develop a system which enhances systems advocacy activities.

I will return to this issue later in this retrospective.

Possibilities for transformation

Recently, there have been a number of promising developments for people with impaired decision-making capacity.

National Disability Insurance Scheme

Arising from the 2020 Summit, a proposal to establish a National Disability Insurance Scheme was raised for the consideration of the Australian Government. Although the proposal is in a developmental stage, in essence, what may be proposed for Government's consideration is a Medicare-type insurance scheme which, if established, would provide benefits for people under 65 years of age with a disability requiring ongoing support provided eligibility requirements are met. Such a scheme could ensure that people with needs for support could have them met on an entitlement basis.

This Office has suggested that the Australian Government provide more information to the public for comment and debate about what it may be prepared to consider. Concerns have been raised that community expectations are high and it is not clear that, even if a scheme is established, expectations could be met.

Having made these observations, if a scheme is established which does provide an entitlement to support based on need and which is adequate for people with disability, this would be an enormous step forward in the challenge to reform systems which currently entrench systemic disadvantage for those people. It should enable them to participate more readily in a range of community and personal activities which many others take for granted. This could contribute significantly to increased social inclusiveness.

Blue Skies

A committed group of people with disability and their support network members, advocates, service providers, peak body and government representatives, and academics met in June 2009 to develop a bold vision for transformational reform which, if implemented, could create an inclusive society and an alternative future for people with a disability. It requires people with disability, their families and support networks, service providers, government and the community generally to take responsibility for implementing broad change.

The vision is inspiring and motivating. It has generated significant interest across the sector and within Government. It challenges all of us to play our part in achieving a just and inclusive society.

¹⁴ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 8.

Human Rights

Previous Annual Reports have noted Australia's signing in 2007 and subsequent ratification in 2008 of the United Nations *Convention on the Rights of People with Disabilities*. In 2009, Australia announced its intention to accede to the Optional Protocol enabling Australians to make complaints to the United Nations Disabilities Committee in the event that domestic remedies have been exhausted. Also, the Australian Attorney-General recently declared the Convention under the *Human Rights and Equal Opportunity Act 1986* (Cth), enabling the Australian Human Rights Commission to conciliate complaints which are based on breaches of the Convention.

In early October 2009, the Australian Government released the National Human Rights Consultation Report. The Report endorses the development of human rights legislation and education for Australians.

Activities of the Office

This Office has been actively pursuing its business plan. This report details many areas of this Office's advocacy. The aim of the report is to reflect details of advocacy across the variety of areas in which this Office has been active. Where possible, responses to our advocacy are also noted. It is, of course, not possible to record everything that has been done. For present purposes, I mention just a few areas of activity.

Significant efforts have continued around unmet physical health care and dental needs of people with impaired capacity, seeking to encourage broad reform across the health, disability and education systems both within government and non-government spheres. Many stakeholders have

provided comments to this Office about the issues. Also, this Office has actively sought to bring its concerns to the attention of as many people and relevant organisations as possible. This has happily coincided with the major health reform agenda of the Australian Government. Accordingly, there have been many opportunities to provide submissions about health-related issues including the development of the national health reform agenda, the development of a national primary health care strategy, and the development of a national scheme for the regulation of health and allied health professionals.

This Office has continued to pursue its advocacy for chronically homeless adults with impaired capacity. Preliminary research conducted by research partner Griffith University has confirmed the anecdotal perspective of some service providers in the homelessness sector that a high proportion of chronically homeless people who are most difficult to assist out of homelessness have impaired capacity. A broader research project is anticipated.

In the disability sector, implementation of a new regime commenced for the approval and use of restrictive practices within a positive behaviour support framework for persons with intellectual or other cognitive disability and challenging behaviour who receive Disability Services funded or provided services. The arrangements for those adults have been the subject of sustained advocacy by the Public Advocate. Also, the Funding and Service Options Research Final Report, which was instigated and championed by this Office, became available. This research has generated useful recommendations and has created significant interest throughout the sector.

Many guardianship-related issues have been the subject of advocacy. This Office intervened in a Supreme Court proceeding concerning the

Guardianship and Administration Tribunal's failure to apply the presumption of capacity, a concept fundamental to the operation of the guardianship regime. This Office also intervened in a Tribunal proceeding regarding the appointment of a guardian for the use of a chemical restraint under the restrictive practices regime; and a hearing reviewing the appointment of an administrator in which issues about the remuneration charged by corporate administrators, and authorisation of conflict transactions were considered. The QLRC's Guardianship Review continues. This Office has referred a variety of issues to the QLRC for possible consideration in the Review.

The Queensland Civil and Administrative Tribunal (QCAT) is due to commence operation on 1 December 2009. Its jurisdiction will be varied, but it will take on significant human rights jurisdictions including those currently exercised by the Guardianship and Administration Tribunal and the Anti-Discrimination Tribunal. This Office made an active contribution regarding the development of QCAT.

The criminal justice and corrective services systems have been a focus for several years. It is widely accepted that people with impaired capacity are over-represented in the criminal justice and corrective services systems. An intervention in a coronial inquest afforded the opportunity for close scrutiny of a variety of relevant issues and services. Work continued to support existing court diversion activities and commenced on research regarding court diversion and sentencing options. Also, the Review of the Civil and Criminal Justice System which commenced early in 2008-2009¹⁵ was completed and the Reviewer's Report and the Government Response became publicly available.

This year Queensland Corrective Services has signalled some significant positive directions. Some innovative approaches could enable some prisoners with a cognitive disability to have their disability support needs met, and reduce their victimisation while in prison, as well as minimise recidivism rates upon release.

My thanks

As I may not have the opportunity to write another annual report as Public Advocate, I take this opportunity to record some thoughts. It has been my privilege to hold office as the Public Advocate, Queensland. I have worked for and with some remarkable people in this role.

As discussed earlier, despite the frequent lack of clarity regarding the link between the work of the Office and subsequent systems change, change is occurring in areas about which this Office has undertaken sustained advocacy. It is reasonable to consider that this Office has been influential in effecting systems change. To serve people with impaired capacity and work towards improving their life experiences has been challenging and yet enormously rewarding.

In this role, I have had the opportunity to meet and consult with many stakeholders, including vulnerable adults; their family members and other support persons of adults with impaired capacity; community advocates; representatives of peak bodies and disability support organisations; representatives from government departments and statutory agencies; and elected officials; as well as many others. There are many dedicated and amazing people who each play a part in working towards a better future for vulnerable people and protecting

¹⁵ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 72.

them from neglect, abuse and exploitation. Getting to know them and their diverse approaches and perspectives has enriched not only the work of this Office, but my life. I will always be grateful for the generosity of spirit of most of those people I have encountered and the gracious manner in which they have welcomed the interest and advocacy of this Office.

Finally, I thank the staff of the Office. As I said earlier, they have worked tirelessly through current uncertainties and challenges. I have enjoyed their company, their dedication and their tenacity, as we have moved forward with a positive attitude and unstinting vigour.

The future: Waiting for the dust to settle

In the days that followed Queensland's severe dust storm, a crisp clarity was restored to the landscape as the dust settled. As the dust settles around the Government's decision to abolish the Office of the Public Advocate, and decisions are made about the way forward for systems advocacy within the guardianship regime, it is hoped that the future will present bright possibilities.

Independent systems advocacy could be promoted through the provision of greater powers to the advocate, and through legislative requirements for relevant agencies to provide trend data and other information to the systems advocate.

For the sake of vulnerable Queenslanders whose rights and interests the systems advocate strives to protect and promote, it is hoped that the system, whatever shape it may ultimately take, provides

enhancements that will strengthen systems advocacy endeavours.

A handwritten signature in black ink, reading "Michelle Howard". The signature is fluid and cursive, with the first name "Michelle" written in a larger, more prominent script than the last name "Howard".

Michelle Howard
Public Advocate

PARTS ONE, TWO AND THREE will report on the advocacy activities of the Office of the Public Advocate for 2008-2009. Advocacy is conducted in accordance with the Public Advocate's statutory functions and powers in the *Guardianship and Administration Act 2000* (Qld).

209 Functions systemic advocacy

The public advocate has the following functions

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

210 Powers

- (1) The public advocate may do all things necessary or convenient to be done to perform the public advocate's functions.
- (2) The public advocate may intervene in a proceeding before a court or tribunal, or in an official inquiry, involving protection of the rights or interests of adults with impaired capacity for a matter.
- (3) However, intervention requires the leave of the court, tribunal or person in charge of the inquiry and is subject to the terms imposed by the court, tribunal or person in charge of the inquiry.

This report details systems advocacy undertaken by the Office of the Public Advocate. To make the report as meaningful as possible, context to the advocacy is generally also provided, together with this Office's understanding of response/s to advocacy and/or activities underway which are relevant to the issues advocated about by this Office.

Accordingly, this Annual Report contains information provided by many other agencies, service providers, Departments and individuals. While extensive efforts have been made through reasonable enquiries, it is not possible to ensure that all responses to advocacy are known, or that all information provided from external sources is accurate.



ADVOCACY PART ONE: Major Systems ACTIVITIES

1 The Disability System

A diverse range of issues are covered under the disability system. These issues are relevant to adults with intellectual and other cognitive disabilities. In this section, the Department of Communities, Disability, Home and Community Care and Community Mental Health Services is referred to as Disability Services. Disability Services Queensland (DSQ) was the responsible agency prior to the Machinery of Government changes discussed at section 1.18.

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 establishment of the Office,¹⁶ 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.¹⁷ To assist the reader, the background is again set out in this report.

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*.¹⁸

The Public Advocate had identified a number of key systemic issues to be addressed in considering systems reform for this group of vulnerable people which are set out in summary form in the Office's 2005-2006 Annual Report.¹⁹ Adults with challenging behaviour, who are subject to restrictive practices,²⁰ are at risk of physical, psychological or emotional harm, and breaches of their fundamental human rights. To reiterate previous concerns, it was suggested that individuals with challenging behaviour who do not receive appropriate behaviour support are at risk of:

- being subject to ineffective management programs, with or without a legal basis for use of restrictive practices;

16 See Office of the Public Advocate, *Annual Report 2000-2001* (2001) 22 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0001.pdf>> at 6 October 2009; Office of the Public Advocate, *Annual Report 2001-2002* (2002) 38-39 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0102.pdf>> at 6 October 2009; Office of the Public Advocate, *Annual Report 2002-2003* (2003) 21 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0203.pdf>> at 6 October 2009; Office of the Public Advocate, *Annual Report 2003-2004* (2004) 15 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0304.pdf>> at 6 October 2009; Office of the Public Advocate, *Annual Report 2004-2005* (2005) 40 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0405.pdf>> at 6 October 2009; Office of the Public Advocate, *Annual Report 2005-2006* (2006) 20 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0506.pdf>> at 6 October 2009; Office of the Public Advocate, *Annual Report 2006-2007* (2007) 12 <http://www.justice.qld.gov.au/files/Guardianship/Public_Advocate_annual_report_06-07.pdf> at 6 October 2009; Office of the Public Advocate, *Annual Report 2007-2008* (2008) 12 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 6 October 2009.

17 The definition of 'challenging behaviour' used by Disability Services is as follows:
The behaviour displayed by a person with a disability that has the potential to harm themselves and those around them.
Refer to <<http://www.disability.qld.gov.au/support-services/documents/intensive-behaviour-teams-fact-sheet.pdf>> at 12 October 2009.

18 Office of the Public Advocate, *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* (2004) <http://www.justice.qld.gov.au/files/Guardianship/ip1_0604.pdf> at 6 October 2009.

19 Office of the Public Advocate, *Annual Report 2005-2006* (2006) 21-23 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0506.pdf>> at 6 October 2009.

20 Restrictive practice has since been defined as
(a) containing or secluding an adult with an intellectual or cognitive disability; or
(b) using chemical, mechanical or physical restraint on an adult with an intellectual or cognitive disability; or
(c) restricting access of an adult with an intellectual or cognitive disability.
Disability Services Act 2006 (Qld) s 123E. For definitions of 'restrictive practice (general) matter' and 'restrictive practice (respite) matter' refer to the *Guardianship and Administration Act 2000* (Qld) s 80U.

- increasing levels of externally imposed control, which may serve to exacerbate challenging behaviour ;
- being feared and demonised by the community and staff who support them;
- being subjected to chemical and other forms of restraint without considering the risks to the adult; and
- being subjected to inappropriate treatment by staff who lack understanding or sufficient training or support.

It is noted that the Special Rapporteur of the Human Rights Council, United Nations, has taken an interest in severe forms of restraint and seclusion.²¹

1.1.2 Review by the Hon.W.J.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. In May 2007, the report *Challenging Behaviour and Disability: a targeted response*²² (the Carter Report) was released. The Government also released its response to the report entitled *Investing in positive futures: response to recommendations* (the Government Response).²³

The Carter Report contained a range of recommendations which were broadly consistent with the submissions made by this Office to the Review. In brief, key issues outlined in the Carter Report included:

- robust protection of human rights, including appropriate safeguards to prevent abuse, neglect and exploitation in the use of restrictive practices;
- vigorous commitment to the principle of using the least restrictive alternative, and provision of appropriate support in the community;
- a commitment to prevention – a positive behaviour support (PBS) framework will result in services designed to prevent the development or escalation of challenging behaviour ;
- an appropriately resourced service infrastructure to minimise the development of challenging behaviour and to provide an appropriate service response;
- legislative and service integration – the need for a clear and complementary relationship between any new legislative regime, and the guardianship and mental health regimes;
- identifying and addressing systemic causes, or escalation, of challenging behaviour ;
- mechanisms to divert people away from the criminal justice and forensic mental health systems to support them to develop alternative ways of relating with others and their environment; and
- reform of workplace culture and appropriate selection, training, support and ongoing development of staff.

²¹ United Nations Commission on Human Rights, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment (2008)* <<http://www.unhcr.org/refworld/pdfid/48db99e82.pdf>> at 6 October 2009.

²² The Hon. W.J.Carter QC, *Challenging Behaviour and Disability: a Targeted Response* (2006) 135 <<http://www.disability.qld.gov.au/key-projects/positive-futures/documents/investing-in-positive-futures-full-report.pdf>> at 12 October 2009.

²³ Disability Services Queensland, *Investing in positive futures: Response to recommendations* <<http://www.disability.qld.gov.au/key-projects/positive-futures/documents/investing-in-positive-futures-response.pdf>> at 12 October 2009.

1.1.3 The Government Response to the Carter Report: Investing in positive futures

The Government Response was expressed in general terms. However, the Government supported most, if not all, of the recommendations in some way.²⁴

In 2007-2008 and 2008-2009, Disability Services made progress towards enacting the Carter Report recommendations, as discussed below.

1.1.3.1 The legislative response

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

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

The overall aim of the amendments was to:

- drive service improvements to reduce or eliminate the use of restrictive practices;

- provide for restrictive practices to be approved and used in the context of positive behaviour support;
- reduce the incidence of challenging behaviour ; and
- improve the quality of life for adults with an intellectual or cognitive disability.²⁵

Under the transitional arrangements, service providers had until 31 December 2009 to implement all requirements of the legislation.

However, it appeared that service providers would have difficulty meeting this deadline. This appeared from reports to be due to a combination of factors including:

- the larger numbers of persons to whom the regime is applicable than was originally estimated;
- the relatively small numbers of practitioners with relevant skills to involve in the preparation of relevant reports with a view to developing positive behaviour support plans; and
- the resource intense nature of obtaining the relevant reports (taking an average 12 to 16 weeks each to develop).

Also, once an application is made to the Guardianship and Administration Tribunal (the Tribunal) there is necessarily some waiting time to hearing.

The Queensland Government agreed to extend the transitional period to 30 September 2010.²⁶ Although the Public Advocate had concerns about any

²⁴ Disability Services Queensland, *Investing in positive futures: Response to recommendations* (2008) <<http://www.disability.qld.gov.au/key-projects/positive-futures/documents/investing-in-positive-futures-response.pdf>> at 12 October 2009.

²⁵ Explanatory Notes, Disability Services and Other Legislation Amendment Bill 2008 (Qld).

²⁶ In September 2009, the State Penalties Enforcement and Other Legislation Amendment Bill 2009 (Qld) was introduced into Parliament which includes provisions to achieve an extension of the transition period: see clauses 214, 217.

extension to the original lengthy transition period, it is acknowledged that it would be undesirable for the focus to become getting a plan in order to meet timeframes rather than developing optimal plans which have ambitious aims for improved life experiences and outcomes for the adults concerned. Although the initiatives introduced seek to address this issue (see later discussion in this section), it is accepted that currently there are relatively few practitioners who can assess the adults.

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.²⁷ Key functions of the Centre include:

- conducting research to inform policy and best practice in behaviour support, and provide direction within the disability and other service sectors; and
- developing and delivering statewide training based on research, evaluation and policy for government and non-government service providers.²⁸

The Queensland Government had committed \$10 million over four years to establish the Centre.²⁹ In

January 2008 it was announced that The University of Queensland would partner with DSQ in this venture.

The Centre was officially opened in November 2008. It is located within The University of Queensland on its Ipswich campus.

Initially, an acting Director was appointed for the Centre, until the recent appointment to the position of Professor Karen Nankervis, who took up the role in August 2009. She has commenced a process of identifying priorities for the Centre and developing a work plan.

Since appointment, the Director, Learning and Development has consulted widely and developed a number of training programs. A significant component of this training has been targeted to undertaking functional assessments and developing positive behaviour support plans. This training will continue throughout 2009-2010 to support the sector to achieve the requirements of the legislation. Other training has sought to address the sector's need to access and analyse research and develop service delivery protocols formulated on evidence-based practice. In addition, the Learning and Development team has sought to inform and build the capacity of other relevant providers, including general practitioners (who may be prescribing psychotropic medications that may act as a form of chemical restraint) and TAFE teachers.

The Policy Research team has commenced a research program to inform disability policy and service development. Research projects under development include: the development of a template for a comprehensive research agenda for people with intellectual disability and challenging behaviour within a human rights framework; a routine outcome measurement system; a systematic review of quality

²⁷ The Public Advocate recommended the development of a Centre of Excellence in its submission to the Carter review.

²⁸ Refer to Disability Services Queensland, *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 12 October 2009.

²⁹ Refer to Disability Services Queensland, *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 12 October 2009.

of life measures; and an audit of psychotropic medication use within the target population.

The Research in Behaviour Support Team is developing a project that examines the effects of positive behavioural interventions on 20 individuals with an intellectual disability who exhibit challenging behaviour. The goals of the study are to evaluate:

- whether positive behavioural interventions result in an increased quality of life;
- whether the interventions result in decreased rates of challenging behaviour ;
- whether there is a correlation between increased quality of life and decreased rates of challenging behaviour ;
- consumer, staff, and family satisfaction with the intervention; and
- the costs of interventions for each individual.

A second project is examining the similarities and differences in the positive behaviour support model and the recovery model for mental health issues.

It is understood that ongoing consultation with government and statutory entities, policy-makers, administrators, intellectual disability and mental health professionals, non-government organisations, consumers and carers is intended to ensure that the Centre's research and training agenda is responsive to the needs of the sector.

The governance arrangements for the Centre are currently being reconsidered in light of issues arising about the ability of the Directors to seek national competitive funding, including Australian Research Council funding, to support the Centre's work, and the entitlements of staff employed under the joint

venture arrangements. The current constitution of the Advisory Committee to the Centre is also being reviewed. It is presently comprised of academics and representatives of Disability Services, the Centre, the Guardianship and Administration Tribunal, the Queensland Centre for Intellectual and Developmental Disability, and service provider organisations. The Public Advocate considers it is essential that the interests of the vulnerable adults, who are the subject of the Centre's work, be represented. This issue is to be addressed by the Centre's Director.

1.1.3.3 Specialist Response Service

A major component of the Government's Response, the Specialist Response Service (SRS) has been established to provide therapeutic intervention and specialist approaches in behaviour management practices. It also promotes the use of least restrictive alternatives. SRS teams are required to work collaboratively with Disability Services-provided or funded services.

The Public Advocate is a member of the SRS Implementation Steering Committee which was convened in October 2007.

SRS teams have been established in six regional areas throughout Queensland, with out-posted teams located in four provincial centres. Approximately 75 percent of the staff required for these specialist positions have been recruited³⁰ through a national and international recruitment strategy.

³⁰ To 30 June 2009, 67 positions had been recruited.

1.1.3.3.1 Mental Health Assessment and Outreach Team

The Carter Report recommended that DSQ and Queensland Health form a cooperative and coordinated working relationship to undertake multi-disciplinary assessments in relation to the general and psychiatric health of priority clients with challenging behaviour.

In response to this recommendation, a Mental Health Assessment and Outreach Team was established (as part of the SRS) within Disability Services as part of a collaborative arrangement with Queensland Health. Disability Services advises that the Mental Health Assessment and Outreach team has been providing services since February 2008 through contracted services while the recruitment process was progressed.

Recruitment has been a lengthy process. The service has been operating with full time equivalencies of one temporary senior staff psychiatrist and one half psychiatric registrar, together with two appointed clinical nurse consultants and one medical registrar. It is understood that several appointments of permanent senior staff psychiatrists are imminent.

1.1.4 The Public Advocate's response

The Public Advocate continues to participate in reference groups, and consultation and submission processes on issues about restrictive practice. While the Public Advocate considers that the Government Response to the Carter Report is not appropriate in all respects, the Public Advocate has remained closely involved in the development and implementation of service and legislative responses, and in their monitoring.

The Public Advocate identified some key concerns, some of which were also outlined in last year's Annual Report.³¹

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 to apply to all adults with challenging behaviour for whom restrictive practices were proposed. However, the Government Response applies only to adults who receive Disability Services-funded or Disability Services-provided services. All adults with impaired capacity and challenging behaviour are entitled to the same human rights protections. The Public Advocate has consistently maintained that a scheme which fails to provide equal protections for all cannot be justified.

Accordingly, it is recommended that the necessary investigations be commissioned to consider the wider implications, and to revise the scheme in due course.

1.1.4.2 Monitoring

To safeguard the human rights of vulnerable people who will be subject to restrictive practices there must be a regime for rigorous and independent monitoring, both at systems and operational levels.

The Public Advocate has consistently maintained that monitoring mechanisms proposed through the Carter Report and later provided for by Government provide insufficient protections for the adults.

³¹ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 14-18 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 6 October 2009.

This Office considers that these safeguards are useful and should remain in place, but that expert day-to-day monitoring, that is independent of the service provider, is essential. Occasional visits by Community Visitors, occasional interaction with the Guardianship and Administration Tribunal (the Tribunal) and interaction with any appointed guardian provide limited safeguards. Reliance on service providers as primary monitors of the on-the-ground implementation of restrictive practices is inappropriate and inadequate. Further, Community Visitors only visit visitable sites:³² some service users receiving restrictive practices do not live in visitable sites.

Notably, the United Nations *Convention on the Rights of Persons with Disabilities* provides clear statements about appropriate contemporary international standards with regard to 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.*³³ (emphasis added)

This Office urged independent and thorough monitoring in the design of the system. The Public Advocate will take an ongoing interest in this important issue, which has significant implications for vulnerable people and for public confidence in the system.

1.1.4.3 Resourcing the service sector

This Office consistently 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 that support without the necessary resources and support.

This Office received reports from the service sector expressing strong concerns about their capacity to implement the legislation given lack of resources, and their dependence on timeframes outside of their control (including services from the SRS and processing of applications). Service providers indicated that they were already stretched to capacity and unable to absorb these new requirements, especially in situations where they considered that the existing funding for the supported adult was insufficient. Also, staff working with adults with challenging behaviour require appropriate support, supervision, mentoring and training to ensure their practice is consistent with legislative and policy requirements.

The Public Advocate acknowledges that Government has made \$113 million available for the implementation of this initiative over four years. \$63 million of this amount was allocated for specialist staff to work with relevant services to assist with assessments, planning, and implementation for PBS plans. This support is primarily of assistance to those individuals who are contained and/or secluded. The number of individuals for whom physical or chemical restraint may be used is considerably higher than the number subject to containment and seclusion. In 2008-2009, some of this funding was provided directly to service providers to assist with

³² For a definition of a visitable site refer to section 222 of the *Guardianship and Administration Act 2000* (Qld) and schedule 2 of the *Guardianship and Administration Regulation 2000* (Qld).

³³ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc. A/61/611, art 16(3) (entered into force 3 May 2008).

implementation. It is understood that two types of funding were made available to service providers who sought it: namely, non-recurrent funding to service providers to build systems to meet the new requirements, and non-recurrent emergency and crisis funding to increase the level of support to individuals.

Some information received indicates that some services which have had on-site management may be removing it (this applies more broadly than to sites delivering restrictive practices as part of their services) from sites at which services are provided. Removal of on-site management exacerbates concerns regarding the inadequacy of monitoring of the implementation of restrictive practices.

1.1.4.4 Facilitating cultural change within the disability sector

As previously reported, the Office has considered that addressing the culture of the whole of the disability sector is key to the successful implementation of this regime. Establishing a support culture of dignity for people whose behaviour challenges the service system requires a clear vision and determined effort by service providers, and serious commitment of resources and support by government. The Public Advocate argues that the often dysfunctional, punitive and institutionalised support culture for adults whose behaviour is challenging to service providers presents a highly-resistant barrier to the successful implementation of positive behaviour support and the non-abusive use of restrictive practice. The transformation of this culture is therefore fundamental to the success of this regime and to upholding the rights of its recipients.

The transitional period

During the transitional period to date, mixed reports have emerged regarding possible early indications of cultural change.

Some positive reports have been received that as a result of the regime, and the close consideration of an adult's circumstances for the purposes of assessing the adult, alternatives to the use of restrictive practices had emerged, with the result that some adults were no longer subject to them. Also, the Adult Guardian has made statements to the effect that since the introduction of the scheme significant positive changes have resulted for some adults for whom the Adult Guardian is appointed. This may suggest constructive change.

However, there are also indications to the contrary. It is understood that in some instances when chemical restraint has been explored, some adults who previously did not have a diagnosed mental illness were belatedly given one, avoiding the application of the regime. Also, there are suggestions that some service provider compliance with the regime is motivated by fear of the consequences of non-compliance, rather than embracing the positive practices it seeks to promote, namely positive behaviour support and the reduction, and where possible elimination, of the use of restrictive practices. If so, the regime may be viewed by some, primarily as a means for obtaining approval for the use of restrictive practices. If these suggestions are correct, this does not appear to indicate constructive cultural change.

1.1.4.5 The Centre of Excellence

The Public Advocate strongly recommended that the Centre be independent of Disability Services.

Given that an important function of the Centre in leading best practice would be to influence cultural change across the disability sector generally and within Disability Services, this would more likely be successfully achieved through a Centre which was independent from Disability Services, such as a university. A decision was made for Government to partner with The University of Queensland in this venture.

As discussed above, governance arrangements for the Centre are currently under review.

1.1.4.6 Emerging issues and observations

The Carter Report, Government Response and the Public Advocate's submission acknowledged 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 that behaviour.

In addition to many of the recommendations made above, the Public Advocate made comments in relation to the draft Disability Services and Other Legislation Amendment Bill (Qld) as reported in last year's Annual Report.³⁴ Some of the comments made remain of interest as the legislation is implemented. Further, additional issues appear to have emerged since its commencement, including:

Overall intent and objects of the legislation

The Public Advocate has consistently maintained that the goal of regulating restrictive practices must not overshadow the driving forces behind the scheme.

Specifically, restrictive practice must, within a PBS paradigm, contribute to overall quality of life, person-centred support and wellbeing of the adults. It is important to ensure that legitimising the use of restrictive practices does not result in greater usage or community acceptance of them.

As discussed in Section 1.1.4.4 some information from Disability Services, some service providers and the Adult Guardian suggests positive change. Disability Services and some service providers indicate that the legislation may have resulted in a cessation of use of restrictive practices for some individuals, as less restrictive options for their support are identified in the assessment process. The Adult Guardian's comments suggest that since introduction of the scheme there have been positive changes for some individuals for whom the Adult Guardian is appointed.

However, other information suggests that not all affected adults have had positive experiences as a result of the implementation of the regime. Vigilance will be important. The Public Advocate continues to monitor the implementation.

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 prioritised and protected. The Public Advocate acknowledges that the Tribunal and appointed guardians are able to make relatively independent, broader decisions about the use of restrictive practices for particular individuals. However, the Public Advocate has raised concerns about the day-to-day implementation of restrictive practices by support workers who may be unable to make independent decisions in the

³⁴ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 17-18 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 6 October 2009.

interests of the adult because they feel personally threatened by the adult's behaviour.

If information suggesting that on-site management was being removed from some services is correct, this will increase the isolated circumstances within which on-the-ground implementation occurs in those services.

Approval processes

The Public Advocate has argued consistently that rigorous approval processes are necessary for all forms of restrictive practice. The regime outlines 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.

The Public Advocate will take an ongoing interest in whether the current tiered system operates in a manner which protects and promotes the rights and interests of the adults concerned.

Positive Behaviour Support plans

PBS is a key theoretical perspective underpinning the restrictive practice framework. The primary goals of PBS and an explanation of what it seeks to achieve (namely, the establishment of quality of life, safety and wellbeing of the person and others, and eventual reduction in the need for restrictive practice)³⁵ should be clearly articulated and explained.

Some information suggests that, in practice, PBS plans may be variable as to quality and specificity about strategies for PBS, and on the occasions when they represent the least restrictive option, the manner in which restrictive practices may be implemented in accordance with the plan. One area in which particular issues have emerged is physical restraint.

Physical Restraint

Some service providers have expressed concern about distinguishing between physical restraint and other forms of physical contact. This Office has expressed concern that some forms of physical restraint are inherently dangerous and should not be used at all. Further, some individuals, because of their pre-existing medical conditions will be more susceptible to death and other injury during physical restraint.

Some information suggests that the degree of specificity within positive behaviour support plans about how to safely implement physical restraint for individuals may be variable. Also, it seems that service providers consider, train staff for the use of and implement physical restraint in different ways.

Disability Services has developed a fact sheet on physical restraint for the disability sector.³⁶ The Centre of Excellence has commenced a Physical Restraint Project to highlight risks and issues associated with the use of physical restraint and provide strategies that may assist in minimising the risks, informed by contemporary research evidence and consultation with key stakeholders across the sector.

³⁵ Keith McVilly, *Positive Behaviour Support for People with Intellectual Disability: Evidence-based practice, promoting quality of life* (2002).

³⁶ Disability Services, *Physical Restraint* <<http://www.disability.qld.gov.au/key-projects/positive-futures/documents/physical-restraint.rtf>> at 12 October 2009.

Chemical Restraint

In some instances when an adult has not previously been diagnosed with a mental illness, a diagnosis has sometimes been made during the course of seeking assessments for the purposes of implementing the legislative regime. When this occurs, the provision of the medication falls outside of the scheme. If this is indicative of a trend, it is concerning.

An issue has also arisen about whether medication which may otherwise constitute a chemical restraint, if kept by and taken voluntarily by the adult with impaired decision-making capacity may fall outside of the regime (see the intervention of *Re AAG* reported at Section 11.2.2). It is the view of the Public Advocate that such an argument is entirely misplaced. The Tribunal supported this view.

The Public Advocate is monitoring issues relating to chemical restraint, including health practitioners engagement with the regime.

Immunity from civil and criminal liability

The transitional arrangements and the full scheme provide for immunity 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 is or had been abusive.

The Public Advocate remains concerned that for some service providers, hopefully a minority, compliance with the regime has been motivated by a desire to secure immunity, rather than to improve practices and outcomes for the vulnerable adults concerned.

This attitude could result in a focus on getting a plan as opposed to the best and most appropriate plan.

Transitional arrangements

The Public Advocate has consistently maintained that Disability Services has a key leadership role to play in supporting service providers to implement the regime appropriately. Disability Services has devoted resources to informing and supporting service providers throughout the transitional period to enter into the full scheme. However, as discussed in 1.1.3.1 for a variety of reasons, the Government has recently agreed to an extension of the transition period. Disability Services will continue with information and support strategies in 2009-2010.

Short-term approvals

Short-term approvals may be given in prescribed circumstances. It is understood that Disability Services and some service providers consider the current prescribed timeframe of three months for short-term approvals of the use of restrictive practices too short. This view has been expressed in light of the time it is taking to assess an individual and develop a plan for them (on average about three to four months); and the time taken for an application to proceed at the Tribunal (on average two to three months). It is understood that the matter may be considered further.

It will require vigilance to ensure that, if the period is extended, each short-term approval is not automatically given for the maximum period allowed. Given the limited information required to support a short-term approval, it is likely that short-term approvals may sometimes be given for persons for whom restrictive practices are not ultimately approved for use. However, once again, it is important

that the individual's circumstances can be properly considered and an appropriate plan developed, rather than the focus being to ensure a plan is in place simply to meet timeframes.

Support for families

Under the regime, the Tribunal must generally approve the use of containment or seclusion. A guardian for restrictive practices, who may be a family member or other member of the adult's support network, or the Adult Guardian may be appointed to approve the use of other forms of restrictive practices. As discussed at Section 2.15, information suggests that a disproportionately large number of appointments are being made of the Adult Guardian as guardian. There appear to be a number of factors why this may be so, which may relate to the level of support prospective lay guardians receive.

This issue requires careful monitoring and a concerted response to ensure that where possible those persons close to the adult are able to be appointed as guardian for restrictive practices.

Evaluation

Two evaluation projects relating to the Investing in Positive Futures initiative have been approved:

- an evaluation of the Positive Futures initiative to be undertaken over 18 months; and
- evaluative research on outcomes for affected adults to be undertaken over 21 months.

It is anticipated this work will examine the impact of the legislative framework in upholding the human rights of the adults affected by the regime, and will ascertain the outcomes for them, as well as identify the barriers and success factors of the system.

The evaluation projects were submitted to open tender.

One concern that arises is the apparent lack of available output data regarding the use of restrictive practices for individuals.

Forensic response

In accordance with the recommendations made in the Carter Report, the Government Response anticipates that the *Mental Health Act 2000* (Qld) will be amended to make arrangements for forensic patients who do not have a mental illness, but rather an intellectual or other cognitive disability. The Government Response anticipates that in due course, the Mental Health Court will be able to order that these forensic patients be detained in a facility run by Disability Services. A purpose-built facility is under development and discussions have commenced regarding the required legislative arrangements.

Sector engagement

It is understood that sector engagement strategies are currently under review by Disability Services, with a view to strengthening them. This is a positive development in which this Office will take an ongoing interest.

1.1.5 Final observations

As noted in last year's Annual Report, the Queensland Government is to be commended for tackling some difficult issues about how best to provide for the support needs of vulnerable people with challenging behaviour and a cognitive disability.

It is acknowledged that it remains early days for the regime's operation. Available information and data is currently limited as implementation

proceeds. Some positive comments have been made. However, numerous issues have emerged during implementation of the regime. This Office will continue to advocate to protect the rights and interests of the vulnerable adults concerned.

1.2 Blue Skies Scenario

A group of committed family members, advocates, public servants, service providers, peak body representatives, academics, and people with a disability met for three days in June 2009 to undertake development of the Blue Skies Scenario (the Scenario).³⁷ This resulted in the development of a 10 year vision for an alternative future for people with disability, and strategies for achieving that vision. The Scenario sets out expectations of the roles of people with a disability and their support networks, service providers, government and the broader community in achieving the vision.

The vision is underpinned by implementation of the United Nations *Convention on the Rights of Persons with Disabilities*; needs-based universal entitlement to support; a strengths-based approach to support; early intervention and person-centred service responses; capacity-building focusing on community; and urban planning based on universal design principles. The vision anticipates legislative support for these objectives through an Inclusion Act. Ultimately, through the combined efforts of all stakeholders, a truly inclusive society is envisioned.

The Public Advocate congratulates the Scenario team on developing a vision for transformational reform across society, which if realised, would be capable of addressing the systemic disadvantage faced by people with a disability, including cognitive disability. The Public Advocate supports their efforts to achieve

community-wide change which results in an inclusive society.

The Scenario was formally launched by the Queensland Minister for Disability Services and Multicultural Affairs on 22 September 2009.

STOP PRESS

It is understood that the Queensland Government is currently working to establish its 10 year plan to drive action and reform to respond to Queenslanders with a disability. Broad community consultation is expected as this plan is developed.

1.3 Funding and service options

In its Annual Report 2005-2006³⁸ the Office of the Public Advocate identified a need for comprehensive research to be undertaken to identify and evaluate service and funding models in use worldwide, develop alternative models, and make recommendations about locally feasible models. The need for this research arose from significant unmet need for disability support in Queensland. In addition to the need for significant increases in funding for disability support, it was hoped that identification and evaluation of the various models would 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. The research was completed and the *Final Report: Funding and service options for people with disabilities*³⁹ released in June 2009.

38 Office of the Public Advocate, *Annual Report 2005-2006* (2006) 24-25 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0506.pdf>> at 7 October 2009; see also Office of the Public Advocate, *Annual Report 2006-2007* (2007) 81-82 <http://www.justice.qld.gov.au/files/Guardianship/Public_Advocate_annual_report_06-07.pdf> at 7 October 2009.

39 Lesley Chenoweth and Natalie Clements, *Final Report: Funding and service options for people with disabilities* (2009) <http://www.griffith.edu.au/_data/assets/pdf_file/0020/153425/funding-support-options.pdf> at 16 October 2009.

37 For more information about the Blue Skies Scenario, see <www.blue-skies.info> at 28 September 2009.

Key findings of the research are reported at Section 13.1 of this Annual Report. They include an emphasis on self-directed individualised funding, linked to person-centred planning, and phased implementation of individualised funding through the use of pilot sites.

During the project, significant engagement with key stakeholders occurred and the draft report was made widely available to them to generate interest and discussion. In 2008-2009, the lead researcher delivered presentations about the material and trends emerging from the research to stakeholder groups (including Disability Services staff) and at the request of Disability Services, at a forum for government and non-government stakeholders convened by Disability Services in February 2009 to discuss issues related to accommodation and support. Presentations were also made to:

- the National Disability Services conference in October 2008;
- the National Conference on Caring in March 2009 (keynote address);
- Community Resource Unit Workshops, Self directed support and personalised budgets in Queensland in June and July 2009; and
- the National Residential Intellectual Disability Providers Conference New Zealand in July 2009 (keynote address).

It is apparent that the work has generated significant interest. In light of the research outcomes, it is pleasing to note that in the 2009-2010 budget, the Government announced \$1.1 million over two years to pilot a brokerage model of self-directed support with families of children aged zero to six years with a physical disability and people aged 20 to 35 years

with an acquired disability. The pilot will involve 40 families with children and 40 adults.

1.4 Individual and block funding

During 2009, this Office received reports of family members being approached by Disability Services staff to sign documentation agreeing, in effect, to relinquish the Adult Lifestyle Support Packages which had been granted to a family member with disability, and for the funding arrangement for support to be converted into block funding for service providers. Further, information indicated that families were feeling pressured to relinquish the individualised funding packages and had the impression that the ongoing support arrangements for their family member were at risk unless agreement was reached.

Movement away from individualised funding towards block funding approaches would be of concern. It would conflict with international and national trends towards individualised funding. As discussed at Sections 1.3 and 13.1, research instigated and championed by this Office, and undertaken by Griffith University, found that individualised, self-directed and personalised funding is considered more likely to deliver better outcomes for the persons receiving support.

The Public Advocate explored the issues raised with Disability Services.

Disability Services assured the Public Advocate that approval of allocations for individual funding have continued in 2008-2009, and that Disability Services remains committed to individualised service responses. Disability Services advised this Office that:

- In 2008-2009, 98 individuals received a total of \$5.2 million in individual funding allocations for accommodation support through the Adult Lifestyle Support program and Disability Assistance Packages. While there have been no calls for applications for some time, individual funding allocations for accommodation support have been provided based on previously lodged applications.
- To enable the provision of support to as many people as possible, an upper limit of support hours that can be approved through individual funding has been set at 65 hours per week per individual. Where an individual's support needs exceed this upper limit, they may be offered assistance through block-specified funding for shared accommodation support.
- Individuals who are offered block funded accommodation support may also be approved for individual funding for community participation and exceptional in-home accommodation support needs. In 2008-2009, a total of 116 individuals who were approved for block funded shared support were also allocated new individual funding for community participation or retained existing funding for this purpose.
- In instances where individuals have an existing individual funding allocation that does not meet their support needs, all alternative funding and support options are explored for these individuals. This would include the relinquishment of the individual funding allocation for a block funding arrangement.
- It is not a Disability Services policy position or practice intent that individuals or families should feel that their recurrent funding allocations are under threat.

Regarding this final point, it may be that there is a disjunction between policy intent and implementation. That is, that service delivery practice may not consistently reflect policy intent.

The Office of the Public Advocate will take an ongoing interest in this matter.

1.5 Compensation payments and disability funding

This Office's Annual Reports for 2004-2005⁴⁰ and 2007-2008⁴¹ outlined the history of an emerging public policy issue affecting people who are compensated for acquired disabilities: the depletion of injury compensation payments before the end of a person's life, and the expectation that government funds will then be required to meet that person's support needs.

This Office is aware that research is being conducted through the University of Queensland on the impact of depleted compensation funds on people with traumatic injuries and will monitor the progress of this research as results become available.

As reported in this Office's *Annual Report 2007-2008*,⁴² Disability Services has been considering options to guide its future response to notifications required under section 220 of the *Disability Services Act 2006* (Qld). Notification requirements specify that a person (or person/s acting on their behalf) applying for, or in receipt of Disability Services-funded support, is required to notify Disability Services of compensation amounts received (including details of

⁴⁰ Office of the Public Advocate, *Annual Report 2004-2005* (2005) 63 <www.publicadvocate.qld.gov.au> at 7 October 2009.

⁴¹ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 31-32 <www.publicadvocate.qld.gov.au> at 7 October 2009.

⁴² Ibid.

the amount specified for future care), or that may be received at some future time.

In 2008, Disability Services undertook a limited consultation to guide its future response to the notification process. During the consultation, the Office of the Public Advocate commented on the issues likely to arise from enforcement of strict requirements on vulnerable people in need of support, and difficulties in determining the future care component in an out-of-court settlement. Although it had not been suggested, this Office also urged against consideration of any option involving the imposition of mandatory exclusion periods as a consequence of non-disclosure: vulnerable individuals should not be penalised because of the failure of their family, service providers or anyone else to appropriately notify Disability Services.

The Public Advocate also suggested consideration of other factors, including innovative ways to extend the life of compensation funds in order to minimise and/or prevent the need for top up funds.

Recent information suggests that Disability Services has since undertaken further consultation targeting legal professionals through the Bar Association Queensland, Queensland Law Society and the Australian Lawyers Alliance to better understand the litigation and settlement processes. It is understood that Disability Services is close to completing its consideration of feedback from the consultation process and its policy development.

1.6 Proposed National Disability Insurance Scheme

In April 2008, at the Australian Government's 2020 Summit, a proposal to establish a National Disability Insurance Scheme (NDIS) was raised. The

proposal signified recognition of the need to shift from the current crisis-driven, welfare approach to a more planned approach to disability support.⁴³ If established, a NDIS could enable people with disabilities and their families to sustain self and informal care rather than receiving minimal support until they are in a crisis situation.⁴⁴

The Australian Government responded that it will consider the development of a NDIS to meet the costs of long-term care for people with disability, in conjunction with development of the National Disability Strategy (see Section 1.7).

According to the Hon. Bill Shorten MP, Parliamentary Secretary for Disability and Children's Services, the NDIS is a simple, yet exciting and visionary idea, with big implications for our society.⁴⁵ The introduction and subsequent implementation of a NDIS would, in his words, turn our system of disability services on its head.⁴⁶

In April 2008, the Australian Government established the Disability Investment Group to explore innovative funding ideas from the private sector.⁴⁷ A final report from the Disability Investment Group is due to be presented to the Australian Government in late 2009. Many people with disabilities and their support networks view the establishment of a NDIS as an important issue, and believe the facilitation of

⁴³ *National Disability Insurance Scheme: A national disability strategy for all Australians* (2008) <http://www.ndis.org.au/downloads/NDIS_Original%20Submission.pdf> at 11 June 2009.

⁴⁴ *Ibid*, 8.

⁴⁵ B Bonyhady, A National Disability Insurance Scheme Deserves Serious Political Consideration (2009) 18(2) *Link Magazine*, 28-29.

⁴⁶ *Ibid*, 29.

⁴⁷ Australian Government, Government announces Disability Investment Group, (media release, 23 April 2008) <http://www.billshorten.fahcsia.gov.au/Internet/billshorten.nsf/print/disability_insurance_group> at 24 June 2009.

sustainable and appropriate long-term supports must be addressed as a matter of priority.⁴⁸

In principle, the Public Advocate supports a NDIS, and advocated that any proposed NDIS should be broad enough to include the group of people with significant cognitive disabilities so as to reduce the unmet needs of this group.

As noted, it is understood that the Australian Government intends to consider the development of an insurance model, together with the development of the National Disability Strategy, to be announced in 2010.

This Office will continue its advocacy regarding this important issue.

1.7 National Disability Strategy

In December 2008, the Public Advocate made a written submission to the Australian Government in response to its discussion paper regarding the proposed development of a National Disability Strategy (NDS).

The Australian Government stated that the aim of the NDS is to:

- provide a whole-of-government, whole-of-life organising framework that will address both the performance of the disability service system and other mainstream systems for people with disabilities, their families and carers;
- provide an important mechanism to ensure that the principles underpinning the United

Nations *Convention on the Rights of Persons with Disabilities* (the UN Convention) are incorporated into policies and programs affecting people with disabilities and their support network (see Section 8.1); and

- address the barriers faced by Australians with disability and to promote social inclusion.

The Public Advocate's submission identified a range of barriers to social inclusion: barriers that inhibit the opportunities for adults with impaired decision-making capacity to explore their potential, to develop as individuals and to engage with and participate in the community in a genuine way. The submission suggested strategies to remove barriers and improve support where possible that are consistent with the UN Convention. This Office identified a number of areas where further policy and program development, improved service delivery and appropriate allocation of funding have the potential to make a significant contribution to the social inclusion of adults with impaired capacity.

Key issues included:

- Attitudinal barriers, including the range of perspectives, beliefs, approaches and ideologies that influence the way individuals in the community, and communities (and by extension, policy-makers and service providers) respond to people with impaired capacity.
- Barriers arising from approaches to providing accommodation and support services to adults with impaired capacity. Common forms of accommodation and support (including group homes, cluster housing arrangements and large residential centres) can impede social inclusion and an individual's personal development. Adults with impaired capacity often have no

⁴⁸ House of Representatives, Standing Committee on Family, Housing, Community and Youth, *Who Cares? Report on the inquiry into better support for carers* (2009) <<http://www.aph.gov.au/House/committee/fchy/carers/report/fullreport.pdf>> at 12 October 2009.

genuine choice in relation to their accommodation arrangements.

- The apparent relationship between chronic homelessness and impaired capacity. A significant number of people who are chronically homeless have impaired decision-making capacity, and fall between the cracks of homelessness services for reasons related to their impaired capacity (see Section 13.3).
- Approaches to funding models and delivery of disability support services. In an environment of limited resources and significant unmet need, it is essential to ensure that support services are provided to the greatest number of people possible in the most effective way to meet their needs, including their needs to explore their interests and potential and to engage in the community. Research championed by this Office has substantiated the international trend towards an individualised, direct funding approach, which provides for more flexible service delivery and better outcomes for people with disability (see Sections 1.3 and 13.1).
- The barriers faced by adults with impaired capacity in accessing physical health and dental care services. Research conducted by this Office indicates that adults with impaired capacity experience considerable inequity in relation to access to physical and dental health care services, which has significant implications in terms of their health and their participation and inclusion in the community (see Section 5.1).
- The difficulties related to the Criminal Justice and Corrective Services systems. Adults with impaired capacity are over-represented as both victims and offenders. Inadequate access to appropriate support services while incarcerated and upon

release from prison were identified as barriers to social inclusion and participation (see Section 7.1).

- The lack of access to individual social advocacy, which constitutes a primary safeguard in protecting the rights, needs and interests of adults with impaired capacity.
- The importance of planning for the future for people with impaired decision-making capacity in order to maximise their quality of life. This includes planning in relation to a range of issues, including accommodation, employment, education and pursuing personal interests. However, the lack of adequate resources to support people with impaired capacity, their family members and carers to engage in planning for the future constitutes a barrier to social inclusion.

On 5 August 2009, feedback from the submissions and consultations on the National Disability Strategy was published in a report entitled *Shut Out: The Experience of People with Disabilities and their Families in Australia*⁴⁹ (the Shut Out Report). The report was launched by the National People with Disabilities and Carer Council and presented to the Australian Government. It emphasises that people with disabilities have the same desires as others for a fulfilling and productive life, yet too often struggle to access the things most people take for granted. It also demonstrates the determination and strength of people with disabilities, their resourcefulness and innovation.

Two extracts from the Public Advocate's submission were included in the Shut Out Report. They

⁴⁹ National People with Disabilities and Carer Council, *Shut Out: the Experience of People with Disabilities and their Families in Australia* (2009) <http://www.fahcsia.gov.au/sa/disability/pubs/policy/community_consult/Documents/NDS_report.pdf> at 12 October 2009.

highlight the challenges around prevailing negative stereotypes and the lack of suitable accommodation options as follows:

- *There are still widespread misconceptions and stereotypes about people with a disability. These include that they are a danger, a burden, and a threat. It is not uncommon to hear people express the view that people with a disability would be better off in institutions with people of their own kind. There also appears to be a common belief that people with a disability are not able to make a significant contribution to the community, and that they are somehow not of equal value as human beings and members of the community. Many people have low expectations of people with a disability, believing that they cannot learn or are not able to do anything useful. They are often denied opportunities to experience life, to explore their potential and achieve success, because it is assumed that their potential is limited. It is often stated that people with a disability are tolerated in community, but tolerance is not acceptance and genuine inclusion.*

In a society where the values that predominate are power and wealth, physical prowess and beauty, intelligence, competition, autonomy and self-control, many people with a disability are marginalised and devalued. It could well be that many people are fearful about engaging with and including people who live with a disability as a result of a lack of knowledge, and that people with a disability are treated as the other rather than involved.⁵⁰

- *Many people with intellectual disability live in group homes, and while some would argue that this is an improvement on the previous large institutional arrangements, these environments*

still congregate and segregate people in a way which inhibits community inclusion. Further, people living in these arrangements have very little choice about who they live with, whereas non-disabled community members who choose to share accommodation with others generally do have this choice

It is reasonable to argue that very few people living in group homes would choose to live in such a setting if they had a realistic choice. It is a compromise brought about by necessity, as they do not have enough support through funding for paid support, even augmented by their family and informal support networks, to live in their own home. The concept of community living for people with intellectual disability is a much richer concept than a mere physical presence in a community setting, which by itself does not guarantee community integration and inclusion. As support workers often work alone, there remains significant risk of abuse and neglect.⁵¹

The report will inform the National Disability Strategy and help governments to identify the barriers and issues facing people with disabilities, their families and carers, and guide the development of solutions.

The Government has indicated the NDS will be finalised and launched in 2010.

1.8 National Disability Agreement

From January 2009, the National Disability Agreement (NDA) came into effect. The NDA replaces the third Commonwealth-State/Territory Disability Agreement (CSTDA) which expired on 31 December 2008.

⁵⁰ Ibid, 11.

⁵¹ Ibid, 27.

The NDA provides the national framework for the provision of government support to services for people with a disability. It contains statements of objectives, outcomes and outputs in respect of disability services in Australia, agreed to by all Australian jurisdictions.

The overarching objective of the NDA is that:

*People with disability and their carers have an enhanced quality of life and participate as valued members of the community.*⁵²

The NDA is expected to contribute to the following outcomes:

- people with disability achieve economic participation and social inclusion;
- people with disability enjoy choice, wellbeing and the opportunity to live as independently as possible; and
- families and carers are well supported.

The NDA specifies a number of outputs to support the above outcomes. These are:

- services that provide skills and supports to people with disability to enable them to live as independently as possible;
- services that assist people with disability to live in stable and sustainable living arrangements;
- income support for people with disability and their carers; and
- services that assist families and carers in their caring role.

All Governments have agreed to create a service system which enhances the social and economic participation of people with disability and supports their families and carers. The agreed policy directions to achieve this are to:

- improve provision of the skills and opportunities to enhance the capability of people with disability to participate in social, economic and community activities;
- ensure services are person-centred and provide timely access to supports based on assessed needs;
- identify, plan and respond to the development and support needs of people with disability at an early stage and at key life transition points; and
- support the role of families and carers including strengthening their informal support networks.

All Governments have agreed to concentrate initial efforts in several identified priority areas to underpin these policy directions. They are:

- better measurement of need;
- population benchmarking for disability services;
- making older carers a priority;
- quality improvement systems based on disability standards;
- service planning and strategies to simplify access;
- early intervention and prevention, lifelong planning and increasing independence and social participation strategies;
- increased workforce capacity;
- increased access for Indigenous Australians;
- access to aids and equipment; and

⁵² Department of Communities, Disability, HACC and Community Mental Health Services, *National Disability Agreement: New Commonwealth State Financial Arrangements* <<http://www.disability.qld.gov.au/cstda/>> at 16 October 2009.

- improved access to disability care.

This Office will continue to monitor the implementation of the NDA.

1.9 Substitute decision-makers policy

Disability Services developed a Substitute Decision-Makers Policy and Procedures (the Policy) applicable to their Accommodation and Respite Programs and Services. The Office of the Public Advocate commends the development of the policy and procedures about this important issue.

This Office reviewed the policy documents. Feedback was provided to Disability Services that it constitutes a reasonable policy and procedural framework regarding substitute decision-making for adults with impaired decision-making capacity. However, issues were raised that aspects of the policy and procedures did not reflect all the requirements of the guardianship regime.⁵³ In particular:

- The Policy states that Disability Services staff should encourage members of an adult's support network to be involved in any decisions related to the provision of services.

This Office suggested that informal decision-makers, as recognised under the guardianship regime,⁵⁴ should be provided with the relevant information and allowed to make decisions in relation to matters as prescribed under the *Guardianship and Administration Act 2000* (Qld) (the Act).⁵⁵

- The Policy states that Disability Services staff need to ensure the involvement of an adult's formally appointed substitute decision-maker(s).

This Office suggested that formal decision-makers should be provided with the relevant information and allowed to make decisions in relation to matters as prescribed under the Act.

- The Procedures refer to circumstances where existing substitute decision-making arrangements for an adult are considered to be inadequate, and provide direction for Disability Services staff to initiate an application to the Guardianship and Administration Tribunal (the Tribunal) for the appointment of a formal substitute decision-maker.

This Office also suggested that the Procedures could usefully give examples of existing arrangements that would be regarded as inadequate. For example:

where there is no family member or close friend to act as informal decision-maker;

where there are family members or close friends, but these parties decline to be involved, or are not suitable for other reasons (such as neglecting or refusing to make decisions in the interests of the adults) or are not able to perform this role;

where there is no informal decision-maker and no appointed guardian or administrator (depending on the decision required);

where there are concerns that an appointed guardian or administrator is not fulfilling their responsibilities appropriately or adequately; and

⁵³ The Powers of Attorney Act 1998 (Qld) and the Guardianship and Administration Act 2000 (Qld).

⁵⁴ Guardianship and Administration Act 2000 (Qld) s 9 (Range of substitute decision makers).

⁵⁵ Guardianship and Administration Act 2000 (Qld) sch 2 (Types of matters).

Disability Services has a responsibility to make the application to the Tribunal, rather than referring the matter to another agency to make the application, as they are the primary service provider, and already possess the information required for the application.

Sometimes, decisions need to be made within short timeframes. This is not a valid reason to bypass the appropriate substitute decision-making process. Rather, relevant agencies need to ensure that appropriate decision-making processes occur.

While it is acknowledged that paid carers often know the adult with impaired capacity well, and have a valuable contribution to make in the decision-making process, they should not be making decisions on behalf of the adult, including decisions about accommodation.

These issues were raised with Disability Services, who have advised that they have commenced a review of their Substitute Decision-Makers Policy and Procedures, and that the comments provided by this Office will be taken into account in the review process.

e-Learning training package

Subsequent to the issues (described above) being raised, Disability Services have advised that it has been developing an e-learning training package for use by Disability Services and the funded non-government sector. This electronic interactive training package has been designed around the overarching policy suite *Safeguarding the Rights and Wellbeing of People with Disability*.

The intent of the policy suite is to aggregate related policies under an encompassing concept, on the

premise that it will improve outcomes for clients by improving coherence and understanding of policy content and concepts. It includes, for example, modules on Preventing and Responding to Abuse, Neglect and Exploitation of People with Disability, Critical Incident Reporting, Substitute Decision-Making and Duty of Care.

The training package seeks to engender a best practice approach to supporting independence, choice and managed risk as the basis for upholding the rights of people with a disability in the provision of disability support. To this end, it also introduces other positive elements to provide the context for these policies, applying a person-centred, strengths based approach.

Disability Services invited the Public Advocate to a briefing and demonstration of the draft e-learning package. The Public Advocate commends Disability Services on this initiative.

1.10 Accommodation Support and Respite Services

The Accommodation Support and Respite Services (AS&RS) is Disability Services supported accommodation and respite for adults and children with intellectual disability (with children accessing only respite services). The service is based on a group home model where residents share support services and facilities. In late 2008, the AS&RS provided accommodation support for 597 adults in a range of residential settings, and more than 400 adults and children in 11 centre-based respite services.⁵⁶

⁵⁶ Disability Services Queensland, *Review of the capability and capacity of Accommodation Support and Respite Services Directorate to provide quality services to clients with a disability: Mid-point evaluation of implementation* (December 2008) 2.

1.10.1 Reform of AS&RS

In 2005, an independent review of the capability and capacity of the AS&RS was conducted by Mr John Ford as part of an ongoing reform process by Disability Services to provide quality service to clients.⁵⁷ A key finding of the review was that the AS&RS was in need of renewal and reform, and that there needed to be significant cultural change and proficiency improvement, particularly at the point of direct service delivery.⁵⁸ The review made 42 recommendations to achieve this reform across a five year period, with the program due for completion in 2010-2011.

The report *Review of the capability and capacity of Accommodation Support and Respite Services Directorate to provide quality services to clients with a disability: Mid-point evaluation of implementation*⁵⁹ (the Mid-point Evaluation Report) by Mr John Ford, released in December 2008, found that as at the end of September 2008, 35 of the review's recommendations had been fully implemented, with eight sub-projects yet to be completed.

In the report, the reviewer noted that:

...the implementation process to date has delivered unprecedented change to AS&RS service delivery, both in a structural sense and also in facilitating a new perspective on the way workers perceive their roles; that is, much more than just carers, rather, as supporting clients to

*be more actively involved in their everyday lives and assisting their development.*⁶⁰

In his 2008 report, the reviewer identified four fundamental barriers to delivering on the recommendations of the 2005 review. In summary, these barriers are:

- the lack of an agreed and clearly articulated, system-wide good practice framework;
- the lack of flexible and client-responsive work practices related to shift management arrangements and rostering;
- the lack of basic electronic communications technology (such as wireless broadband connections) to facilitate communication, access to policy and procedure documentation, and electronic training programs; and
- outdated human resource practices.

In relation to these issues, AS&RS management have stated that:

- considerable progress has been made on implementing a good practice framework. This includes:

the ongoing rollout of the active support model, which has now been implemented in 75 percent of households;

the ongoing rollout of achievement planning for service delivery staff; and

the ongoing rollout of a progression scheme to enable service delivery staff to progress to more senior levels, based on their

⁵⁷ Disability Services Queensland, *Review of the capability and capacity of Accommodation Support and Respite Services Directorate to provide quality services to clients with a disability* (December 2005) 1.

⁵⁸ Ibid, 2.

⁵⁹ Disability Services Queensland, *Review of the capability and capacity of Accommodation Support and Respite Services Directorate to provide quality services to clients with a disability: Mid-point evaluation of implementation*, December 2008, 3.

⁶⁰ Ibid, 4.

qualifications, proven expertise and on-the-job performance in service delivery;

- consideration of shift and rostering issues has been incorporated into enterprise bargaining agreement activities;
- computers have been provided in respite centres and in some of the Accommodation Support Services cluster housing arrangements. Consideration is being given to a range of issues about installation of computers in all group homes; and
- changes have occurred to a number of recruitment and selection processes and further changes will occur as required.

While recognising that progress has been made in the AS&RS reform process, and that processes are in place to implement the outstanding recommendations, this Office has concerns in relation to a number of issues, including:

Shift and rostering issues

Twelve hour shifts for Residential Care Officers (RCOs) are the most common arrangement in the AS&RS. Originally, 12 hour shifts were the exception, but over time they have become common practice and are well entrenched.

While there is no evidence that 12 hour shifts have an adverse consequence on the health of workers, there appears to be no evidence that 12 hour shifts in the AS&RS benefit either workers or residents. However, the high incidence of sick leave amongst RCOs and the consequent need for RCOs to regularly work overtime raises concerns that may warrant further consideration.

Also support work in the AS&RS can be demanding, as many clients have high support needs. This raises questions about the capacity of RCOs to remain sufficiently alert over a lengthy period to respond effectively and appropriately towards residents. This has implications for the health and safety of RCOs, as well as the residents.

Further, the 12 hour shift and rostering arrangements present challenges to ensuring adequate contact and supervision between RCOs and Service Managers, who work the standard 36.25 hour week. Currently, a Service Manager may have contact with some RCOs as rarely as once a month.

It is hoped that these issues are adequately dealt with in the enterprise bargaining process that is underway.

Recruitment and selection process

The practice has been that people applying for positions with AS&RS have usually been initially employed on a casual basis. As a consequence, many casual staff in need of full-time permanent employment, who may have had the potential to be good support workers move on to other positions, and are lost to the organisation or to the industry. This dynamic challenges the development and retention of a high quality work force.

While noting AS&RS management's assurances that this issue is being progressed, it is disappointing that recruitment and selection issues have not been addressed as a higher priority given the significance of this issue in relation to the quality of direct service delivery.

In the Mid-point Evaluation Report, the reviewer identified that the complexity surrounding direct

service delivery within the AS&RS has increased, and will continue to increase, due to:

- meeting and maintaining quality standards;
- implementation of the reform process; and
- managing the needs of existing clients who are ageing and new clients with complex support needs.

Managing the needs of existing clients who are ageing and new, younger clients with complex support needs is potentially one of the most significant challenges facing AS&RS management. The needs of the majority of the existing long-term residents in the AS&RS, who are now ageing, are very different from the needs of the people now entering the system, who tend to be younger, often with challenging behaviour.

In the context of the assurances given by AS&RS management that a co-tenant will only be moved into a vacancy if their compatibility with existing residents has been assessed and established, it may be difficult for AS&RS management to fill a vacancy in an existing AS&RS household with a younger person entering the system. This presents a challenge for AS&RS as it seeks to meet the needs of the two different groups of people.

An additional challenge for AS&RS is the need to ensure effective deployment of staffing resources to maximise the number of people with a disability supported by the service. Consequently, one of the options that may be explored to achieve this is for people from AS&RS households to be moved into vacant rooms in other AS&RS households to minimise vacancies. Where this happens, there is a need to ensure that the move occurs in a way that minimises the impact of the disruption to the lives of residents

and that all residents are compatible. It is good practice to regularly review people's support needs to ensure that their accommodation remains suitable to their needs, and to ascertain their accommodation preferences regarding where and with who they want to live. However, in doing so, vigilance must be exercised to ensure that the needs and preferences of individuals are considered and are the principal determinant of any move.

In this context, Disability Services policies and procedures regarding substitute decision-making must be implemented consistently to ensure that appropriate decision-making processes occur. This includes ensuring that substitute decision-makers are provided with information and allowed to make any accommodation decision. If there is no informal or formal decision-maker to make the decision, application to the Tribunal⁶¹ for the appointment of a suitable substitute decision-maker is required.

1.10.2 Vacancy Management

In last year's Annual Report, this Office raised concerns about vacancy management practices based on reports that adults with intellectual disability had been placed without adequate consideration being given to compatibility with existing tenants, in order to maximise occupancy rates.

It was reported that AS&RS management had stated that:

- establishing compatibility of co-tenants within AS&RS households was part of the vacancy management process, and that a co-tenant would only be moved into a vacancy if their compatibility

⁶¹ As of 1 December 2009, applications will be made to the Queensland Civil and Administrative Tribunal.

with existing residents had been assessed and established;

- a project was being implemented to maximise occupancy across all AS&RS households, and that at that time, the AS&RS was operating at 97 percent capacity; and
- the AS&RS procedures for vacancy management were being reviewed.

This Office has recently been advised by AS&RS management that:

- the AS&RS is now operating at 94 percent capacity, the decrease primarily due to age-related deaths of a number of existing tenants.
- the AS&RS procedures for vacancy management are being continuously improved as part of the framework for reviewing and improving AS&RS services and procedures; and
- a review of the vacancy management procedure was commenced last year, but this was placed on hold until the outcome/completion of the review of the departmental policy in regard to substitute decision-making (see Section 1.9).

1.10.3 Substitute decision-making

In relation to the substitute decision-making arrangements within the AS&RS system, AS&RS management are not able to advise this Office how many residents supported by the system have recognised informal decision-makers or appointed guardians for personal matters. This is because information about substitute decision-making arrangements is held in the paper-based client files in AS&RS houses, and AS&RS management does not have an information management system which can provide such data.

However, AS&RS management have advised that:

- 11 AS&RS clients have the Adult Guardian appointed for a range of decisions;
- 70 AS&RS clients have a formal guardian appointed for restrictive practices, to date;
- All clients have an appointed administrator for financial matters. For the majority of clients the Public Trustee of Queensland is administrator; and
- For those clients that do not have a formal or informal guardians appointed (sic), decisions are sought in accordance with the guardianship regime.

In last year's Annual Report, concerns were raised in relation to Disability Services's substitute Decision-Making Policy and Procedures (see Section 1.9 for an update regarding this issue).

1.11 Younger People in Residential Aged Care

In February 2006, the Council of Australian Governments (COAG) agreed to initiate a new program, the Younger People in Residential Aged Care (YPIRAC) initiative, to reduce the numbers of younger people with disabilities living in residential aged care facilities throughout Australia. Disability Services manages this initiative which focuses on three objectives:

- to assist young people with disabilities in residential aged care to move to more appropriate disability accommodation, where available, and if this is what the person chooses;
- to divert young people at risk of entering residential aged care to more appropriate accommodation; and

- to increase the delivery of specialist disability support services to people with disabilities who choose to remain in residential aged care facilities or where residential aged care is the only available, suitable option.⁶²

Statistical information provided by Disability Services showed that in 2006, approximately 1,400 Queenslanders aged 65 and under were accommodated within residential aged care facilities, with approximately 240 of these individuals aged 50 years or less. In 2008, this figure had been reduced to approximately 1,355 people with disabilities aged 65 and under, with approximately 194 younger people with disabilities aged 50 or less continuing to reside in residential aged care facilities.

Since the inception of this initiative, Disability Services has developed five service response models: the Integrated Living Model; the Shared Support Model; the Living with Family and Network Supports Model; the Living Independently Model; and the Enhancing Support in Aged Care Model.⁶³ These models seek to address the requirements of younger people with disabilities who are at risk of entering residential aged care facilities; those who choose to remain in residential aged care; and those who choose to transfer from the facility into the community.

This initiative is now in the fourth year of a five year national program. The Australian and Queensland Governments each allocated \$23.9 million for the first five years of this initiative. It is understood that

the funding has now been committed on a recurrent basis.

As at 31 July 2009, 92 Queenslanders with disabilities were in receipt of assistance under this initiative. This includes:

- the diversion of 47 young people identified as being at risk of entering residential aged care;
- 36 young people who have been assisted to transfer from residential aged care facilities to the community; and
- Nine (out of approximately 70 young people with disabilities) who have expressed a preference to continue residing in residential aged care who are now receiving support under this initiative to do so. While the number of individuals who will receive support under this model appears to be limited at this point, Disability Services have advised that funds have been allocated to support at least 22 more people, and additional funding will be allocated to assist others.

Disability Services have further advised that:

- 230 people out of 258 eligible people have completed the full assessment and options planning process. Of the remaining 28 people, some are engaged in the assessment process and others are being progressively referred for assessment; and
- identification of people who are at risk of entering residential aged care is occurring through the development of linkages with hospital discharge planners/social workers and through regional staff assisting to identify unsustainable care arrangements.

62 Disability Services Queensland, *Younger People in Residential Aged Care General Guidelines* (2007) <<http://www.disability.qld.gov.au/support-services/documents/ypirac-general-guidelines.doc>> at 12 October 2009.

63 Refer to Service Specifications at <<http://www.disability.qld.gov.au/support-services/dsq/young-people-in-residential-aged-care.html>> at 12 October 2009.

The Public Advocate has provided input and monitored the issues for younger people in residential aged care and generally supports this initiative.⁶⁴

However, the Public Advocate is concerned that current demand for support under this initiative exceeds available resources, with the result that people who would be eligible for support may be placed on a waiting list.

Further, a range of issues have been identified by this Office regarding the effectiveness and/or implementation of this initiative.

Self-managed funding

The variety of models for this initiative demonstrate flexibility in responding to people's accommodation and support needs. However, there may be a need to consider other support models as individuals and their needs are further identified. The Public Advocate advocated about provision of the initiative through individualised, self-managed funding (see also discussion regarding Funding and Service Options generally at Section 1.3). Disability Services has indicated that this option is available to families, but that there appears to be limited interest expressed by families, with only two families currently liaising with regional staff to explore whether a self-directed model would be beneficial to their situation.

The Public Advocate urges Disability Services to ensure that adequate information regarding the

option of self-managed funding is provided to families.

Indigenous and CALD communities

Exploration of alternative options for providing flexible support to Indigenous and culturally-and-linguistically-diverse (CALD) communities to identify demand and need, as well as methods for providing flexible support to people living in remote locations, may be required.

The Public Advocate has noted Disability Services increased engagement with these individuals and communities, and urges Disability Services to ensure that information regarding the YPIRAC initiative is disseminated effectively in a culturally appropriate manner, especially in remote communities.

Sustaining support networks

One of the service response models for this initiative is the Living with Family and Network Supports Model. This model focuses on supporting people with disabilities and their families to establish innovative and realistic long-term support arrangements. Funding is intended to compliment support provided through informal and family networks, and as such, the model is best suited to families who have substantial and robust informal networks.

This Office has expressed the view that capacity building for families and/or informal support networks is required to maintain ongoing support to an adult with significant support needs over a lengthy period of time. Evidence shows that people who take on the duties of providing support as primary carers do so at significant personal, financial, emotional,

⁶⁴ Office of the Public Advocate, *Annual Report 2005-2006* (2006) 27 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0506.pdf>> at 12 October 2009; Office of the Public Advocate, *Annual Report 2006-2007* (2007) 17 <http://www.justice.qld.gov.au/files/Guardianship/Public_Advocate_annual_report_06-07.pdf> at 12 October 2009; and Office of the Public Advocate, *Annual Report 2007-2008* (2008) 24 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 12 October 2009.

physical and social cost.⁶⁵ If family members and/or informal support network members are to sustain their roles over time, they will require considerable support. This means support beyond the capacity to use block funding in a flexible manner, or having service providers work collaboratively with family members and/or informal support networks to provide paid support.

This Office has been advised by Disability Services that the rights of families to provide the majority of support are being respected. Furthermore, funding is available for training of family members and disability support staff so that they are able to meet the specific requirements of an adult's disability and health care needs. Funding is also available for the purchase of aids and equipment which provide opportunities to enhance the individual's independence, and reduce the dependence on support from family or informal support network members. Respite is also seen as a necessary addition to assist family and informal network members to continue with the provision of care and support over a long period of time.

This Office has taken an interest in the maximum funding levels offered to people with significant support needs under each model. This Office has been advised that in situations where people's needs change in such a way that an increase in funding would be required, careful consideration must be given to ways in which the support for individuals can be sustained. This means that the individual may receive a higher level of care and support under other models within this initiative. However, it is not clear how this will be assessed or what choices will

be provided to people in the event that a change in support is required.

People remaining in residential aged care

Disability Services has advised that nine younger people with disabilities receive support in residential aged care under the YPIRAC initiative. It is understood that an additional 35 younger people with disabilities are expected to receive support under the Enhancing Support in Aged Care Model in 2009-2010. Anecdotal advice indicates that the reasons people are choosing to remain in residential aged care include:

- the limitations imposed by the level of available funding;
- the belief that residential aged care is the more stable response to their increasing support needs, for example, due to degenerative conditions;
- fear of the process for re-admission back into residential aged care in the event that community living does not work, or arrangements are inadequate to meet their requirements;
- satisfaction with their current amenities, for example, an ensuite bathroom, which they may not have within other models under this initiative;
- other options for care and support requiring a move away from their local community; and
- the lack of available service providers, especially in rural and remote communities.

It remains unclear how the Enhancing Support in Aged Care Model will operate within the aged care

⁶⁵ House of Representatives, Standing Committee on Family, Housing, Community and Youth, *Who Cares? Report on the inquiry into better support for carers* (2009) <<http://www.aph.gov.au/House/committee/fchycarers/report/fullreport.pdf>> at 12 October 2009.

sector.⁶⁶ Due to different funding models between the Australian and Queensland Governments, expectations differ, as do responsibilities for enacting policies at various levels of government. Disability Services have advised that funded service providers will develop arrangements with aged care facilities and individuals to clarify roles and expectations.

People between the ages of 50 and 65

The current initiative prioritises people under the age of 50, although adults aged up to 65 years are eligible to apply. To date, 59 assessments have been conducted for people over 50 years of age, with 21 having received support through this initiative. It is unclear how many other people aged over 50 would be interested in accessing the community-based support models instead of continuing to reside in residential aged care.

This Office understands that access into the YPIRAC initiative for people aged between the ages of 50 and 65 years is restricted due to the limited funding available, and urges the Australian and Queensland Governments to ensure that a focus on the needs of younger people below the age of 50 does not result in the needs of people between the ages of 50 and 65 being overlooked.

Identification of adults with impaired decision-making capacity

This Office has received reports of inappropriate decision-making for these adults. For example, it has been reported that in a small number of situations, family members/informal decision-makers have made the decision for the younger person with disability to remain in residential aged care rather

that considering other available support options. Other reports indicate that management at a number of residential aged care facilities have been comfortable for a resident's general practitioner to make accommodation decisions on behalf of the adult. This Office understands that in a number of such situations, advocacy groups were contacted and/or applications were made to the Guardianship and Administration Tribunal for the appointment of a formal guardian, and that in a number of cases, a formal guardian has subsequently lodged a registration of interest in this initiative.

Delays in discharge from Queensland Health facilities

In early 2009 the Public Advocate received information suggesting delays in discharging younger people with acquired brain injuries from hospital. It was reported that a number of younger people with acquired brain injury who had since recovered sufficiently to no longer require hospitalisation were remaining hospitalised, sometimes for considerable periods. It was suggested that these people required disability support services to return to community living but these services were not available.

The information received by this Office also raised issues about the process for assessment of a younger person with disabilities in hospital for placement in a residential aged care facility. While such a placement is not an appropriate or desirable outcome, it is an option to be considered as an alternative to ongoing hospitalisation where there are no other more appropriate facilities or support services available to meet the person's needs. A referral for an assessment in this situation must be provided to the Aged Care Assessment Team (ACAT) by the relevant hospital, accompanied by confirmation from Disability Services that all options to support the person have

⁶⁶ Office of the Public Advocate *Annual Report 2007-2008* (2008) 24 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 12 October 2009.

been explored, and no appropriate support options can be identified. The report to this Office indicated that this process was not occurring in a timely manner. This Office wrote to Queensland Health (QH) and Disability Services Queensland to raise these concerns.

Disability Services reported that they were aware of a number of individuals with a disability in hospitals who required support and/or accommodation before they could be discharged, and that staff had been working with these individuals to explore options for future support. Disability Services has indicated its commitment to giving priority access to younger people with a disability in acute hospital beds to the YPIRAC initiative in order to divert them from entering residential aged care facilities. They advised that, as of April 2009, 13 people who were in hospitals and who would have otherwise been discharged into residential aged care had been assisted through this initiative. They continued to work with a number of other individuals in hospitals at risk of entry to residential aged care to explore options to meet their support needs, including options available through this initiative.

In relation to the assessment of individuals for placement in residential aged care facilities, both QH and Disability Services have acknowledged that there may have been instances in the past where the assessment process may not have been followed, and confirmed that both agencies are committed to ensuring that relevant staff in both departments are aware of and adhere to the process. This process is currently being formalised through a protocol between Disability Services and QH.

Tenancy rights

Questions continue to be asked about tenancy agreements for people seeking accommodation under this initiative, particularly in situations where non-government service providers own the accommodation in which they are delivering support. A requirement of the *Disability Services Act 2006* (Qld) is that service providers do not have control over all aspects of the person's life.⁶⁷ Disability Services has noted that decisions about an individual's financial affairs, their health care, or where they live are made by the person or their decision-maker under guardianship legislation.

Disability Services acknowledge that there is a clear case to provide separate tenancy agreements and separate service delivery agreements to people under this initiative. However, it is unclear how many people in accommodation owned by non-government service providers have separate tenancy agreements or separate service delivery agreements. Furthermore, it is unclear what strategies and safeguards are in place for the person with disabilities when conflicts occur regarding service delivery, particularly when the service provider is also the landlord.

Issues of compatibility

In last year's Annual Report, it was noted that while adults may have compatible support needs, they may not be compatible as housemates. Further, adults sharing accommodation and support options should be provided with choices regarding with whom they live.⁶⁸ Careful consideration of the individual compatibility requirements of younger people with disabilities continue to be required to

⁶⁷ *Disability Services Act 2006* (Qld) s 29.

⁶⁸ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 26 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 12 October 2009.

ensure inappropriate accommodation decisions and subsequent escalation of challenging behaviours do not occur.

Current issues

This Office is concerned that limited funding available to people under this initiative could result in unsustainable arrangements. Without adequate resources, the interests of younger people under this initiative cannot be safeguarded.

The Public Advocate will continue to monitor the situation.

1.12 Baillie Henderson Hospital

Since its inception, this Office has consistently raised concerns about the people with intellectual disability who are inappropriately accommodated at Baillie Henderson Hospital, a psychiatric hospital at Toowoomba.

Approximately 37 people who have intellectual disability, but who do not have a mental illness and do not require mental health services, have lived their adult lives in this institution. Despite ongoing advocacy that these people should be moved into the community with appropriate support, this situation remains unchanged.

This issue was again reported in last year's Annual Report.⁶⁹ It was noted that one of the recommendations of the *Challenging Behaviour and Disability: a Targeted Response* (the Carter Report)⁷⁰

in 2006 was that Disability Services Queensland (DSQ) and Queensland Health (QH) 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. This Office reported its understanding that this recommendation had been supported by government, and that collaborative engagement between DSQ and QH was formal and continuing.

However, another year has passed and none of these adults have moved out of Baillie Henderson Hospital.

This Office recognises that the work between Disability Services and QH is a necessary component in ensuring appropriate outcomes for this group. However, the preliminary nature of the advances made to date are disappointing.

Disability Services advised this Office that options to improve the level of interaction that this group of people have with the broader community are being explored, and that \$250,000 was provided for community access following a visit by the Minister for Disability Services and Multicultural Affairs and her commitment to introduce this, to facilitate community access and participation for people with an intellectual disability living in Baillie Henderson Hospital.

In response to reports received by this Office that only limited community access is occurring at this time, Disability Services advised that direct service provision is due to commence in October 2009. The funded service provider will be working with individuals and their supporters to ensure that each person is provided with an individualised service that matches their needs and preferences, and builds

⁶⁹ Ibid.

⁷⁰ The Hon. W.J. Carter QC, *Challenging Behaviour and Disability: a Targeted Response* (2006) 135 <<http://www.disability.qld.gov.au/key-projects/positive-futures/documents/investing-in-positive-futures-full-report.pdf>> at 12 October 2009.

on existing community connections and informal networks they may have.

Further, Disability Services and QH advised that they continue to work in partnership on strategies to complete the institutional reform process, community linking and participation for people with a disability living in QH facilities, including Baillie Henderson.

The Public Advocate urges both agencies to give this reform process priority to ensure that the adults with impaired capacity currently accommodated inappropriately at Baillie Henderson Hospital are moved into the community. The Public Advocate urges Disability Services and QH to complete the institutional reform process. The Public Advocate supports ensuring that these people have an opportunity to experience community living before residential aged care becomes a suitable option for them.

This Office will continue to monitor the progress of this current reform effort.

1.13 Innovative Support and Housing Program

In 2001 Disability Services Queensland (DSQ) commenced a reform process in relation to the accommodation and support services for people with challenging behaviour (see Section 1.1).

DSQ's reform process was based on a policy framework comprised of three strategies, being:

- alternative models of support;
- intensive support response; and
- innovative support and housing models.

The Innovative Support and Housing Model (IS&H) comprised an accommodation arrangement with intensive support. The concept was intended to be a short-term response to address challenging behaviour, and for the service recipient to be transitioned back to their community in a 12 to 18 month timeframe. The program was also intended to provide an environment in which structured observation and other assessments could be conducted, medication changes made, cognitive and/or behavioural therapy implemented, educational and other skill development programs commenced, and systematic planning for the future undertaken. A number of IS&H pilot programs were planned. The goal of the pilots was to improve the quality of life of people with challenging behaviours.

The Office of the Public Advocate undertook extensive advocacy in relation to this reform process, including the *Innovative Support and Housing Models project*. For example:

- In the 2001-2002 Annual Report,⁷¹ the Public Advocate recommended that DSQ develop a comprehensive and coherent service response in support of people who have challenging behaviour by ensuring that investment in human resource infrastructure is at the centre of its policy and resource commitment, and that an investment should also be made in training and support of those who work directly with individuals.
- This Office expressed concern that the capital infrastructure of the program had been fully funded but that, at the time, recurrent funding of associated support programs had not. This raised the prospect that the proposed facilities would become places of long-term containment

⁷¹ Office of the Public Advocate, *Annual Report 2001-2002* (2002) 39 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0102.pdf>> at 12 October 2009.

rather than a short-term response to challenging behaviour with the intention for residents to return to community living in due course.

- In 2004, this Office developed an Issues Paper, *Opening Doors to Citizenship – quality supports for people who have complex unmet needs and who currently challenge the capability of the service system*.⁷² One of the recommendations in this paper was the establishment of Intensive Behaviour Support Teams.
- In the 2003-2004 Annual Report,⁷³ the Public Advocate provided comments about an independent evaluation process for the *Innovative Support and Housing Models* project, and recommended that a set of benchmark questions be established, including a question about the impact of the pilot service arrangements on the staff required to work with these clients in this setting.
- This Office expressed concerns about the capacity of this service model to deliver personalised supports, and the accountability of the model, given the lack of an external, independent presence to monitor and provide advice.

Two pilot sites, at Morayfield and Wacol, commenced operation in 2005.

The University of Sydney's Centre for Developmental Disability Studies (CDDS) was engaged to undertake a formal independent evaluation of the first three years of the IS&H Pilot's operation. The CDDS's

Evaluation of the Innovative Support and Housing Pilots final report concluded that:

- implementation challenges and limited outcomes of the IS&H pilots seriously question the suitability and sustainability of a time limited withdrawal model that aims to transition individuals back to the community within a 12 to 18 month timeframe; and
- the research literature demonstrates that: a) the IS&H model of support, b) the clients who resided in it, and c) the ability to target and cater for the real need in the Queensland community were not well matched to each other.

These evaluation findings confirm the view expressed by the Hon. W. J. Carter QC in July 2006 about IS&H.⁷⁴

The Public Advocate commended Disability Services for the quality of the evaluation of the IS&H pilot, which was open in its discussion of the issues, thorough in its analysis and provided a credible evidence base upon which to make decisions in relation to the future of the model. Further, the Public Advocate sought confirmation that the model had been discontinued.

Disability Services advised the Public Advocate that:

- as a result of the evaluation, which detailed a number of limitations around the transitional housing model of support and/or its implementation, Disability Services has ceased the IH&S program at Wacol and Morayfield;
- the buildings (designed, built and used in the pilot program) are now used for long-term

⁷² Office of the Public Advocate, *Opening Doors to Citizenship – quality supports for people who have complex unmet needs and who currently challenge the capability of the service system* (2004) <http://www.justice.qld.gov.au/files/Guardianship/ip1_0604.pdf> at 16 October 2009.

⁷³ Office of the Public Advocate, *Annual Report 2003-2004* (2004) 70 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0304.pdf>> at 12 October 2009.

⁷⁴ The Hon. W.J.Carter QC, *Challenging Behaviour and Disability: a Targeted Response* (2006) 96 <<http://www.disability.qld.gov.au/key-projects/positive-futures/documents/investing-in-positive-futures-full-report.pdf>> at 12 October 2009.

accommodation support rather than under a transitional model, with the Accommodation Support and Respite Service (AS&RS) utilising the building at Wacol, and a funded agency utilising the Morayfield building;

- in addition to individualised positive behaviour support, the innovative design and features of these houses continue to suit the needs for long-term housing for some people who exhibit challenging behaviour ;
- one of the features of the Specialist Response Service⁷⁵ is the availability of clinical resources that, by and large, aim to achieve behaviour change in situ by promoting a positive behaviour support approach to responding to individual needs;
- the use of purpose designed accommodation is only considered in particularly complex situations where a targeted built environment is assessed to be necessary and of benefit to the individual; and
- as part of its commitment to ongoing best practice in the field of behaviour support, the SRS uses a continuous improvement approach to its practice framework that builds on the learnings that are acquired through the provision of services. This is supported by strong connections with the Centre of Excellence for Behaviour Support in the interest of building a solid evidence base to guide and further develop practices across the sector.

This Office will continue to monitor Disability Services service delivery responses to adults with challenging behaviour (see Section 1.1 for further information).

1.14 Complaints Management System

Complaints about disability services may be made to the Complaints and Review Branch, Office of the Director-General, Department of Communities. The Disability and Communities Complaints Unit (formally the Complaints and Prevention Unit) located within the Complaints and Review Branch receives, assesses and investigates complaints, and reports on and monitors complaints received.

A complaint will be investigated where it may affect an individual or a group of consumers, or where it concerns:

- the delivery of disability services or any other services delivered or actions taken by the Department of Communities; or
- the delivery of disability services by funded non-government service providers.⁷⁶

In last year's Annual Report this Office reported concerns regarding:⁷⁷

- the effectiveness of complaints mechanisms to safely and adequately resolve concerns of adults with impaired decision-making capacity, or to identify potential abuse, neglect, or exploitation;
- complainants (including persons with a disability, and family members or staff members who complain on behalf of service users) who report improper conduct or abuse being subjected to retribution or workplace bullying; and

⁷⁵ Established in response to recommendations in *Challenging Behaviour and Disability: a Targeted Response* (the Carter Report), a report by the retired Supreme Court Judge the Hon. W.J.Carter QC, 2006.

⁷⁶ Disability Services Queensland, *Complaints Management System* <<http://www.disability.qld.gov.au/complaints/policy.html>> at 24 September 2009.

⁷⁷ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 29-30 <www.publicadvocate.qld.gov.au> at 16 October 2009.

- the inadequacy of the *Disability Services Act 2006* (Qld) in protecting whistleblowers.

Although Queensland Disability Services Standard 7 requires that service providers protect complainants from retribution, and encourage the raising of complaints,⁷⁸ this can be difficult to achieve in circumstances where support workers operate largely unsupervised, and service users have profound decision-making or communication disabilities.⁷⁹

In last year's Annual Report, this Office encouraged stakeholders, including service providers, to develop and implement effective strategies for protecting complainants from retribution.

The Public Advocate has continued to advocate around these issues, which unfortunately have not progressed, although the issue has been placed on the agenda of the Complaints Management Quality Committee when it reconvenes later this year.

The potential for retribution and reprisals against complainants is a significant concern. Fear of retribution may prevent people making complaints in the first instance, presenting substantial risks and disadvantage to vulnerable people, and potentially jeopardising their safety and wellbeing. Where the complainant is the subject of the act or behaviour complained about, they may not be in a position to protect themselves from or to report reprisal activity. Such activity may be ongoing, and is often difficult to identify and prove. The degree to which complaints mechanisms are effective in protecting adults with

impaired decision-making capacity is therefore questionable.

Disability Services Queensland noted in its *Final Report July 2008-March 2009* that although a number of public interest disclosures were received in that period (the majority of which concerned inappropriate conduct by staff or specific danger to a person with a disability), only one person requested protection under the *Whistleblowers Protection Act 1994* (Qld).⁸⁰

The Office of the Public Advocate will continue to advocate for a complaints system which adequately protects vulnerable persons and other complainants from retribution.

1.15 Growing Stronger

Growing Stronger is a program of reform to occur over four years, namely 2007-2011. The stated aim is an improved specialist disability service system in Queensland. It is intended to be easier to access, more equitable and more sustainable. The aims of Growing Stronger include:

- easier application processes through a single application form;
- a transparent assessment process and prioritisation framework;
- individualised service responses for individuals; and
- individual, families and community capacity-building to promote sustainability.

In December 2007, the program introduced the single application for support, streamlining the process of applying for specialist disability services. In October

⁷⁸ Disability Services Queensland, *Queensland Disability Service Standards*, Standard 7 <<http://www.disability.qld.gov.au/key-projects/quality/documents/disability-service-standards.pdf>> at 24 September 2009.

⁷⁹ Disability Standard 7.2 relevantly provides *Service users/supports have no fear of retributive action in raising complaints*.

⁸⁰ Disability Services Queensland, *Final Report July 2008-March 2009* (2009), 81.

2008 Disability Services appointed an independent consortium of expert practitioners and researchers to work with program staff to develop a new assessment and prioritisation framework. Over a six month period, a framework comprising of methodology, tools and processes was developed, with input from stakeholders and drawing on examples of best practice from Australia and internationally.

In June 2009 a three month trial of the tools proposed for use in the new disability service system began in South-West Queensland. It is anticipated that approximately 350 people with a disability, their families and carers will participate in these trials, testing either the intake or assessment tools. The outcomes will be used to refine and further develop aspects of the new system before it is implemented in 2010.

The Public Advocate continues to monitor developments.

1.16 Regional Disability Councils

In March 2008, the Queensland Government commissioned Professor Patrick Weller AO and Ms Simone Webb to conduct an independent review of Government Boards, Committees and Statutory Authorities (the Weller Review). The purpose of this review was to reduce bureaucracy and unnecessary red tape; improve the overall efficiency of government bodies; and maintain the integrity and security of necessary regulatory functions.⁸¹ The Review reported in two parts, A and B. The Weller Report Part A proposed a public interest map. The Weller Report Part B considered various bodies

which had been subject to the Weller Review. Part B, containing recommendations on 459 government bodies, was presented to the Hon. Premier of Queensland and publicly released on 31 March 2009.

One of the outcomes from the Review included the recommendation to abolish the Regional Disability Councils. The Office of the Public Advocate had concerns about the assumptions raised within the Weller Report, and was exploring these issues when the Government rejected this recommendation.⁸² Government is to be commended for retaining the Councils. However, this Office has urged Disability Services to consider reviewing the Regional Disability Councils structure, role and functions with a view to strengthening their potential as a mechanism for community engagement.

This Office will take an ongoing interest in Regional Disability Councils as a mechanism for Disability Services to hear the views of people with impaired decision-making capacity.

1.17 Parents with an intellectual disability

As reported in the 2005-2006 Annual Report,⁸³ this Office has previously undertaken advocacy concerning protection of families where parents have an intellectual disability. There are perceptions among some child safety workers and the community that parents with an intellectual disability are unable to properly parent their children because of their disability. These attitudes may result in parents with

⁸¹ Simone Webbe and Professor Patrick Weller AO, *Brokering Balance: A Public Interest Map for Queensland Government Bodies: An Independent Review of Queensland Government Boards, Committees and Statutory Authorities Part B Report* (March 2009).

⁸² Queensland Government, *Government Response to the Report: Brokering Balance: A Public Interest Map for Queensland Government Bodies - An Independent Review of Queensland Government Boards, Committees and Statutory Authorities* (2009), Recommendation 159 <<http://www.premiers.qld.gov.au/government/assets/government-response-to-part-b-report.pdf>> at 12 October 2009.

⁸³ Office of the Public Advocate, *Annual Report 2005-2006* (2006) 57 <www.publicadvocate.qld.gov.au> at 2 October 2009.

an intellectual disability experiencing unjustified prejudice and discrimination, and, in some cases, the removal of a child from a parent's care.⁸⁴

The United Nations *Convention on the Rights of Persons with Disabilities* (see Section 8.1) requires Australia, as a State Party, to take effective and appropriate measures to eliminate discrimination against persons with disabilities in matters relating to family and parenthood, and that where appropriate, assistance be rendered to persons with disabilities in the performance of their child-rearing responsibilities.⁸⁵

In 2009 this Office commenced participation in a working party established to inform a research project intended to explore issues related to persons with an intellectual disability.⁸⁶ The research will identify and examine systemic issues affecting persons with an intellectual disability in the areas of child protection and family law, and recommend strategies for reform.

The Office of the Public Advocate will continue its advocacy around issues which affect persons with impaired decision-making capacity.

1.18 Machinery of Government changes

Following the Queensland election in March 2009, the Hon. Premier of Queensland announced the modernisation of Queensland's public service through effecting significant Machinery of

Government changes. These included the abolition of 14 government departments and the creation of four new departments.⁸⁷ Nine existing departments were also restructured.⁸⁸

The objective in creating 13 super departments was to improve service coordination and delivery.⁸⁹

Of significance was the expanded role of the Department of Communities, encompassing the former Departments of Child Safety, Housing, and Communities; and Disability Services Queensland and Sport and Recreation. The new Department of Communities also includes Aboriginal and Torres Strait Islander Services; Multicultural Affairs Queensland; and the Office for Women. Four separate Ministers hold various responsibilities across the new Department. Functions performed and services provided by the former Departments and agencies are now the responsibility of the new Department.

These changes constitute an amalgamation of major services which play a pivotal role in the lives of many adults with decision-making disability and other vulnerable people, including:

- Disability, Home and Community Care and Community Mental Health Services;
- Housing and Homelessness Services;
- Child Safety, Youth and Families, and Community Participation Services;
- Sport and Recreation Services; and
- Aboriginal and Torres Strait Islander Services.

84 D. McConnell, G. Llewellyn and L. Ferronato 'Parents with a disability and the NSW Children's Court', *The Family Support and Services Project*, University of Sydney (2000) 3.

85 United Nations, *Convention on the Rights of Persons with Disabilities*, Article 23.

86 The working party was established by the WWILD Sexual Violence Prevention Service and the Victims of Crime Disability Training Program.

87 Queensland Audit Office, *Machinery of Government changes* (2009) 2 Inform 1 <http://www.qao.qld.gov.au/downloadables/publications/inform_magazine/Issue_2_for_2009.pdf> at 7 October 2009.

88 Ibid.

89 Premier and Minister for the Arts the Hon. Anna Bligh, *Bligh reforms continue with public service restructure* (Media Release, 26 March 2009) <<http://www.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=63159>> at 22 September 2009.

The merger of the former departments responsible for these services could be advantageous for adults with impaired decision-making capacity by breaking down barriers which previously, at times, inhibited service coordination between departments, and service provision to vulnerable people. However, the amalgamation may potentially have the effect of eliminating previous good practices of the independent departments.

It is hoped that the changes result in improved quality of service delivery and support for adults with impaired decision-making capacity. Care is needed to ensure that the interests of vulnerable adults who access and/or receive services are benefited by the new arrangements. The Office of the Public Advocate will take an ongoing interest in the operation of the new Department.

1.19 Financing and management of lifetime care

Academics from the University of Queensland⁹⁰ have partnered with the Public Trustee of Queensland and the Motor Accident Insurance Commission (Queensland) to explore issues regarding the financing and management of lifetime care for adults with an acquired disability and complex support needs.

This is a topic of increasing public concern in the international community as well as within Australia. Currently, there is no overarching mechanism to coordinate financial management arrangements and areas of responsibility in the provision of lifetime care in Australia.

This research aims to:

- Identify and assess the adequacy and sustainability of current systems of financing and management of lifetime care;
- Identify mechanisms for negotiating lifetime care, and the ongoing management of lifetime care;
- Develop a conceptual understanding of lifetime care within the contemporary care environment; and
- Identify effective mechanisms for financing and management of integrated and sustainable lifetime care.

It is anticipated that the research will be undertaken from late 2008 to mid 2011. This study may be useful to inform the development of a strategic foundation for enhanced lifetime care arrangements.

The Public Advocate contributes as a member of the Reference Group established by the researchers for the project. See also relevant discussion at Sections 1.5 and 1.6.

1.20 Social inclusion of people with disabilities

Inclusion of people with disabilities in the community has been an important aspiration of people with disabilities and their families for some time. It has also been the stated goal of many support strategies and strategic plans.

However, while many people with disabilities may be living in the community, it is arguable that they are not necessarily of c ommunity and that they are not engaged with their community in any meaningful way. They may have a physical presence in a house in

⁹⁰ Dr Michele Foster (Principal Chief Investigator), Dr Paul Henman, Dr Jenny Fleming, A/Professor Cheryl Tilse and Dr Stephen Thornton (Project Manager).

a suburban street, but this does not mean that they have genuine or meaningful relationships with other community members. It does not mean that they are able to pursue opportunities to explore personal interests and to be a part of the fabric of community life, and the sense of belonging this provides.

In the context of social inclusion,⁹¹ it is apparent that many people with disabilities are not socially included.

This Office is developing a discussion paper on social integration and community inclusion of people with a disability. It is intended that the paper will consider:

- the interest of the Australian and Queensland Government in social inclusion ;
- what integration and inclusion mean;
- the difference between physical integration and social integration;
- the deinstitutionalisation movement and community living;
- the history of charitable responses and resultant social isolation and stigma;
- the importance of relationships for people with a disability in the community as safeguards from abuse, exploitation and neglect;
- why social integration has not been achieved: why it is not easy to do; the difficulties for paid workers; and the challenges in relation to people with more severe disabilities; and
- the limitations caused by congregate living and group activity approaches in relation to social inclusion.

The goal of the paper will be to explore practical ideas about how social integration might be achieved. It is anticipated that the discussion paper will be published in the 2009-2010 financial year.



Senior Research Officers, Kathy Buckler, John O'Brien and Satti Rakhra.

⁹¹ Refer to <www.socialinclusion.gov.au> at 16 October 2009.

2 The Guardianship System

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

2.1 Guardianship Review

The Annual Reports for 2005-2006, 2006-2007, and 2007-2008 detail the history to the Guardianship Review which commenced in October 2005.⁹² For ease of the reader, background is again included in this report, as well as an update.

The guardianship regime comprises the *Guardianship and Administration Act 2000* (Qld) and the *Powers of Attorney Act 1998* (Qld). The regime establishes a system for decision-making about personal and financial matters by and for adults with impaired decision-making capacity, and serves to protect their rights and interests. The regime is underpinned by principles including recognition of the adults' human rights, respect for their human worth and dignity, exercising power in the manner least restrictive of adults' rights, and the principle of substituted judgment. However, decisions must be consistent with an adult's proper care and protection.

The guardianship regime also provides for the establishment of the Public Advocate, the Guardianship and Administration Tribunal (the Tribunal), the Adult Guardian, and the Community Visitor Program. It defines the functions of each of these entities within the regime. It recognises the Public Trustee as a possible administrator.

Accordingly, it is a very significant legislative system for adults with impaired decision-making capacity.

In 2005, community groups, and in particular an alliance of community-based organisations known as the Guardianship and Administration Reform Drivers (GARD) publicly raised concerns about Queensland's guardianship regime. In October 2005, the then Attorney-General and Minister for Justice referred the guardianship legislation to the Queensland Law Reform Commission (QLRC) for review. The review has been conducted in two parts:

1. The confidentiality provisions of the guardianship laws (Stage One); and
2. Queensland's guardianship laws more generally (Stage Two).

Accordingly, the review focuses on legislative review and reform.

Stage One

In 2006, the QLRC released a discussion paper in relation to Stage One of the review, *Confidentiality in the Guardianship System: Public Justice, Private Lives* (the Discussion Paper).⁹³ 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. Also, this Office developed a comprehensive submission in response to the substantive issues raised in the Discussion Paper⁹⁴

⁹² Office of the Public Advocate, *Annual Report 2005-2006* (2006) 11 <<http://www.publicadvocate.qld.gov.au>> at 5 October 2009; Office of the Public Advocate, *Annual Report 2006-2007* (2007) 25 <<http://www.publicadvocate.qld.gov.au>> at 5 October 2009; Office of the Public Advocate, *Annual Report 2007-2008* (2008) 34 <<http://www.publicadvocate.qld.gov.au>> at 5 October 2009.

⁹³ Queensland Law Reform Commission, *Confidentiality in the Guardianship System: Public Justice, Private Lives Discussion Paper*, Working Paper No 60 (July 2006).

⁹⁴ Office of the Public Advocate, *Submission of the Public Advocate to the Queensland Law Reform Commission - WP 60 discussion paper on Confidentiality in the Guardianship System* (January 2007) <<http://www.publicadvocate.qld.gov.au>> at 5 October 2009.

which was reported in the 2006-2007 Annual Report. Key issues raised in that submission included:⁹⁵

- 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.
- support was given for Tribunal hearings to be generally open with power to close, or to exclude particular people where allowing them to participate would lead to serious harm or substantial injustice ;
- regarding documents before the Tribunal, support was given for Tribunal power to limit the disclosure of documents to parties, but only in accordance with prescribed criteria, namely, 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 likely be helpful to overcome perceptions of unfairness; and
- 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.

In its June 2007 report *Public Justice, Private Lives: A new approach to Confidentiality in the Guardianship System* the QLRC called for greater openness in the guardianship system to improve community confidence and enhance the quality of decision-

making in relation to adults with impaired decision-making capacity. This central principle guided the recommendations made throughout the report.⁹⁶

Key recommendations were more fully reported in the Office of the Public Advocate's Annual Report 2007-2008 but included:

- lifting the ban on reporting about proceedings before the Tribunal, provided that the adult with a decision-making disability is not identified;
- creating four new types of limitation orders that better reflect the decisions about confidentiality being made;
- more defined provisions about parties rights/ entitlements to inspect documents before Tribunal hearings documents which are credible, directly relevant and significant;
- narrower and better defined limits about when information or documents can be kept confidential from parties to Tribunal hearings only when necessary to avoid serious harm or injustice;
- that an independent third party (the Public Advocate) be invited to comment on whether information should be kept confidential;
- that a hearing only be closed to the public, or a particular person excluded if necessary to avoid serious harm or injustice to a person; and
- that the Tribunal generally give written reasons for making a decision to impose confidentiality.

The Queensland Government tabled its response to the report in Parliament in May 2008. The response was fully reported in the 2007-2008 Annual Report.

⁹⁵ Office of the Public Advocate, *Annual Report 2006-2007* (2007) 25 <<http://www.publicadvocate.qld.gov.au>> at 5 October 2009.

⁹⁶ Queensland Law Reform Commission, *Public Justice, Private Lives: A New Approach to Confidentiality in the Guardianship System Report*, Report No 62 Volume 1 (2007) [3.156] <<http://www qlrc.qld.gov.au/reports/R62Vol1.pdf>> at 14 October 2009.

The majority of the recommendations were fully accepted.

The Government declined to implement the recommendation for the Public Advocate to be invited to make submissions when consideration is given to making a limitation order. It offered a number of reasons, including that it considered this would result in operational difficulties by causing delays in Tribunal hearings and would draw this Office away from its key role of systems advocacy. The proposal rejected was an important one and its omission diminishes the potency of the system safeguards which the QLRC sought to establish. Government decided that the Tribunal must instead provide to the Public Advocate copies of documents, information and the order and reasons for decision after a limitation order has been made.

The *Guardianship and Administration and other Acts Amendment Act 2008* (Qld) incorporating the amendments took effect from 1 January 2009. In the first six months of operation, the Public Advocate received copies of documents after a limitation order had been made on four occasions. The outcomes of the Public Advocate's consideration of the material provided is reported separately at Section 2.11.

Stage Two

The second stage of the Guardianship Review is underway. The Public Advocate continues as a Guardianship Review Reference Group member and contributed to the development of a Discussion Paper through this participation. The QLRC released a further Discussion Paper *Shaping Queensland's*

*Guardianship Legislation: Principles and Capacity*⁹⁷ in November 2008. The Public Advocate has also made detailed submissions to this Discussion Paper. Key submissions⁹⁸ included the following:

The General Principles

- the General Principles (GPs) should be redrafted in conformity with the United Nations *Convention on the Rights of People with Disabilities* which reflects current international standards and expectations;
- the GPs are general and vague and, except in limited circumstances,⁹⁹ provide the only legislative foundation/basis for decision-making by substitute decision-makers;¹⁰⁰
- there are two discrete areas/issues about which greater guidance is justifiable, as follows:
 - (i) a procedural framework for the *process* of decision-making; and
 - (ii) a framework to support *quality of substantive decision-making*;

⁹⁷ Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity Discussion Paper, Working Paper No 64* (September 2008).

⁹⁸ Full versions of the two relevant submissions are available online at <www.publicadvocate.qld.gov.au>.

⁹⁹ In some limited circumstances, the *Guardianship and Administration Act 2000* (Qld) provides more detail about the matters about which a decision-maker must be satisfied before consent may be given: see Chapter 5 Part 3 regarding the requirements about which the Tribunal must be satisfied before consenting to special health care including sterilisation, termination of pregnancy, and donation of tissue; and Chapter 5B regarding the matters about which the Tribunal and other decision-makers must be satisfied regarding restrictive practices. Of course, when an enduring document is executed, a principal may include specific terms about exercising the power for an attorney: *Powers of Attorney Act 1998* (Qld) ss 32, 35.

¹⁰⁰ There are some general responsibilities imposed on guardians, administrators and attorneys: *Guardianship and Administration Act 2000* (Qld) ss 33-55; *Powers of Attorney Act 1998* (Qld) ss 65-89. Broadly these provide some details about substitute decision-makers' powers, how joint substitute decision-makers are to operate; practical requirements (such as keeping the adult's property separate, acting honestly and keeping records) and about what may not be done by substitute decision-makers (for example, regarding conflict transactions and gifts of the adult's property) rather than providing a framework about how to make decision/s for adults with impaired decision-making capacity.

- the GPs do not give adequate weight to the adult's views and wishes;
- a paternalistic best interests approach to decision-making is inappropriate and disrespectful of the rights of the adults for whom decisions are made. It allows subjective decision-making by substitute decision-makers according to their own values rather than the values and interests of the adults concerned;
- a requirement to consult with the members of the adult's support network, together with some examples of those who will fall within this group appears more appropriate than a requirement to consult with all members of specific classes of persons;
- consultation should be mandatory with other substitute decision-makers since decisions taken by an administrator may affect a guardian's/informal personal decision-maker's deliberations and vice versa;
- the GPs should reflect a requirement to protect the adults from abuse, neglect or exploitation; and
- it is preferable to ensure decision-makers engage in proper decision-making processes through provision of positive support, rather than through threat of punitive action. An agency could be given responsibility for broad guardianship capacity-building and support individuals including lay substitute decision-makers and others who interact with the guardianship regime.

The Health Care Principle

- it may be preferable and avoid confusion if all principles to guide substantive decision-making

for health decision-making are included in the Health Care Principle (HCP);

- a procedure for decision-making should be prescribed;
- at present the HCP does not place a positive obligation on a decision-maker. It may be useful to include some positive obligation to seek/ensure treatment which will maintain or promote health or wellbeing of the adult (in this regard note the Issues Paper *In Sickness and In Health* reported at Section 5.1); and
- the HCP should not continue to provide that power for a health matter or special health matter may be exercised when it is in all the circumstances, in the adult's best interests.¹⁰¹ However, if the provision is to remain, it should be limited to circumstances regarding limited and specified health care and special health care only, and the matters to be considered when determining best interests should be specified.

Capacity

- Application of the presumption of capacity is problematic in practice and clarification of requirements is desirable (in this regard, see discussion regarding the Public Advocate's intervention in a Supreme Court appeal regarding the presumption of capacity at Sections 2.6 and 11.1).
- A definition of capacity which respects the autonomy of adults as far as possible and gives them the greatest possible control over their own lives, but access to a substitute decision-maker when necessary serves to protect their

¹⁰¹ *Guardianship and Administration Act 2000* (Qld) sch 1, pt 2, 12.

human rights and to promote their interests to the greatest extent possible.

- The functional approach best facilitates this approach – capacity is decision-specific and time specific.
- Combining the functional approach and the status approach as has occurred in some other jurisdictions may provide a safeguard against interference in the lives of adults who are eccentric or unconventional and who may make decisions from time to time with which others may not agree.
- However, it may result in delays and issues for appointments of substitute decision-makers for some adults with impaired capacity who properly require a substitute decision-maker to safeguard their interests, who will not submit to examination and who do not consult regularly with health professional/s.
- The current functional approach contains three limbs/elements – the second is voluntariness. Whether or not the element of voluntariness is relocated from the definition of capacity, it seems desirable to provide criteria to guide deliberations about voluntariness.
- It would be helpful to declare matters to be disregarded for the purpose of assessing capacity, including, for example, age, appearance, holding particular religious beliefs and living arrangements.
- Under the current regime, fluctuating capacity raises issues in practice, especially for adults who have dementia and adults who have episodic mental illness.
- A code of practice regarding the assessment of capacity is highly desirable to protect the rights

and interests of those adults for whose benefit the regime operates.

Capacity to make an enduring document

- the regime should provide an exhaustive list of matters relevant to an adult's understanding required to execute an enduring document;
- an adult making an enduring document should have capacity within the meaning of the guardianship regime to execute the document; and
- more stringent witnessing requirements in circumstances when there is likely to be an issue about capacity appear to have considerable merit.

The Public Advocate has progressively raised a variety of other issues for consideration by the QLRC for inclusion in the further Discussion Paper which it is anticipated will be issued shortly as part of Stage Two.

This Office will continue to contribute to the Guardianship Review as a Guardianship Review Reference Group member and through detailed submissions in response to discussion papers of the QLRC.

2.2 Queensland Civil and Administration Tribunal

As reported in last year's Annual Report,¹⁰² reform of the civil and administrative justice system in Queensland was initiated by the Queensland Government during 2007-2008. This Office was active in making submissions to promote and protect the rights and interests of vulnerable users of the

¹⁰² Office of the Public Advocate, *Annual Report 2007-2008* (2008) 78 <www.publicadvocate.qld.gov.au> at 6 October 2009.

system in 2007-2008 and 2008-2009. For reader convenience, a brief history of events is provided in this Report, together with an update.

In November 2007, the Department of Justice and Attorney-General released a Discussion Paper on the reform of delivery of civil and administrative justice. Comments were sought regarding possible alternative models. In response, the Public Advocate made a written submission.¹⁰³ Key points made included the following:

- the rights and interests of vulnerable adults should be protected whatever structure is ultimately chosen: reform should aim to improve outcomes for and experiences in the lives of adults with impaired capacity;
- the tribunals most commonly used by people with impaired decision-making capacity are most likely 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 Services Tribunal (CST). These tribunals perform functions which affect fundamental human rights;
- decisions of the GAAT and the MHRT curtail the exercise of basic and fundamental rights of the persons who are the subject of proceedings before them (for example, a person's right to make decisions about how they spend their money and where they live; and involuntary treatment of persons for mental illness);
- if these tribunals, or any of them, is included within a generalist civil and administrative body, government was urged to establish a human rights division and to ensure that 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 supported to engage with the tribunal without disadvantage;
- the GAAT registry plays an important role in ensuring that information is proactively gathered. Specialty functions would need to be protected in order that the interests of the vulnerable adults the subject of proceedings are not compromised;
- independent merits review should be available in respect of all decisions made by the executive government, in addition to rights to judicial review; and
- merits review processes should provide for review of decisions of a substitute decision-maker for a person with impaired capacity.

Subsequently, the Hon. 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, to be operational by the second half of 2009.

An independent panel of experts was established to provide advice to Government on how to implement the initiative, including the jurisdiction of the tribunal, membership and registry structure, and infrastructure needs.¹⁰⁴

¹⁰³ Office of the Public Advocate, *Submission in response to discussion paper Reform of civil and administrative justice* (November 2007) <www.publicadvocate.qld.gov.au> at 6 October 2009.

¹⁰⁴ The independent panel appointed was the Hon. Glen Williams AO QC, former Court of Appeal Judge; Mr Peter Applegarth SC, a senior barrister (who was subsequently appointed as a Judge of the Supreme Court of Queensland and resigned from the Panel after the Panel's first report was completed, but before the completion of the second report); and Ms Julie-Anne Schafer, current Chairperson of the Commercial and Consumer Tribunal.

The Panel called for written submissions about which tribunals should form part of the amalgamated tribunal, structure of the new tribunal and registry, regional and remote access and particular needs of tribunal users to be taken into account. The Panel also met with various stakeholders, including the Public Advocate. Once again, this Office made submissions consistent with the written submission referred to above. The independent panel completed their first report regarding these issues and implementation arrangements in June 2008.

Key features of the recommendations relevant for vulnerable adults include:

- 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;
- the GAAT, ADT, and CST be included in the amalgamated QCAT; the MHRT be excluded;
- a preliminary view was expressed that the QCAT should be organised into divisions and that there should be three divisions, including a human rights division;
- there should be a universal requirement across all divisions for reasons to be provided;
- the QCAT should include an internal appeal process; and
- a phased implementation and commencement of QCAT by 1 December 2009.

The Panel's second report was publicly released in December 2008.¹⁰⁵ It provided detailed advice to Government about the legislation required to meet the Government objectives of achieving implementation of a tribunal which is independent, efficient, expert, accessible, flexible and able to adapt to future pressures.

Exposure Draft Bills of legislation to effect QCAT were released for targeted public consultation in February 2009, although the consultation period was remarkably brief given the volume and complexity of the material. The Public Advocate was active in providing comments to protect and promote the rights and interests of vulnerable adults about the Exposure Draft Bills during the consultation period. Submissions were made with a view to ensuring that at least equivalent legislative safeguards (such as those in place under the existing system) were maintained to achieve human rights protections for vulnerable adults, particularly in the guardianship regime. The Public Advocate raised issues and concerns aimed at maximising the quality and timeliness of services delivered to vulnerable adults with a decision-making incapacity who will be served by the new arrangements. Following the consultation process, some changes consistent with this Office's views were made, including aspects of provisions regarding adjudication of guardianship matters; representation of parties; limitation orders; and other practices and procedures.

The *Queensland Civil and Administrative Tribunal Act 2009* (Qld) and the *Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Act 2009* (Qld) were both passed on

¹⁰⁵ Queensland Government Tribunals Review Independent Panel of Experts, *Queensland Civil and Administrative Tribunal: Stage 2 report on legislative amendments to implement the Tribunal* (October 2008) <http://www.tribunalsreview.qld.gov.au/Tribunals_Review_stage_2_Report.pdf> at 6 October 2009.

17 June 2009. In July 2009, the President, the Hon. Justice Peter Dutney (a Judge of the Supreme Court of Queensland) and the Deputy President, the Hon. Judge Fleur Kingham (a Judge of the District Court) were appointed. Sadly, Justice Dutney died suddenly and unexpectedly on 4 September 2009. At the time of writing, a new President had not been named.

QCAT will commence operations on 1 December 2009. This Office will monitor the effect on vulnerable adults of the implementation and operation of QCAT.

2.3 Review of government bodies

An Independent Review of Government Boards, Committees and Statutory Authorities announced by the Queensland Government in March 2008 encompassed the Public Advocate. It was conducted by Professor Patrick Weller AO and Ms Simone Webbe (the Weller Review). It reviewed 459 bodies and made recommendations about their continued existence or otherwise against a public interest map which was developed as part of the review.¹⁰⁶

Other statutory entities established under the guardianship regime were not included in the Weller Review (however, the Guardianship and Administration Tribunal was included within the Review of the Civil and Administrative Justice System which was also announced in March 2008).¹⁰⁷

In January 2009 the Public Advocate made a detailed submission to the Weller Review.¹⁰⁸ Key submissions included:

Inclusion of the Public Advocate in the Weller Review

- The Public Advocate is subject to the ongoing Queensland Law Reform Commission (QLRC) Guardianship Review, a comprehensive process which is the appropriate avenue for consideration to be given to the Public Advocate for reasons including:

The systems advocacy role of the Public Advocate is a matter of significant public interest as it impacts on the protection of the rights and interests of a very vulnerable group of people.

The QLRC will consider the position, its functions and powers within the context of the guardianship regime holistically.

Consideration of the position in isolation from the whole regime and without a detailed consideration of the role, the reasons for establishment of the body, and the work of the Public Advocate in respect of adults with impaired decision-making capacity within the guardianship regime would be inappropriate and may ultimately lead to poor outcomes for adults with impaired capacity.

¹⁰⁶ Simone Webbe and Professor Pat Weller AO, *A Public Interest Map: An Independent Review of Queensland Government Boards, Committees and Statutory Authorities: Part A Report* (December 2008) <<http://www.premiers.qld.gov.au/government/assets/part-a-report-independent-review-of-govt-bodies.pdf>> at 6 October 2009.

¹⁰⁷ See discussion in Section 2.2 of this Report.

¹⁰⁸ Office of the Public Advocate, *Submission by the Public Advocate - A Public Interest Map: An Independent Review of Queensland Government Boards, Committees and Statutory Authorities* (January 2009) <www.publicadvocate.qld.gov.au> at 6 October 2009.

Comments against the public interest map

- Following a detailed review process, in 1996 the QLRC¹⁰⁹ recommended that a separate and independent entity, the Public Advocate, perform the function of systems advocacy for adults with impaired decision-making capacity for reasons identified including:

Strong stakeholder support for a statutory office to conduct systems advocacy which was considered pivotal to the scheme.¹¹⁰

The desirability of avoiding situations such as those arising in Ward 10B Townsville Hospital and the Basil Stafford Centre.¹¹¹

To minimise conflict of interest, the decision-making role should be separated from the advocacy role.¹¹²

To achieve focus and clarity of roles to avoid loss of advocacy focus in a larger office.¹¹³

The issues arising from the work of the other guardianship entities should not drive the work of the Public Advocate at the expense of broader systemic issues for people with decision-making disability.¹¹⁴
- As Queensland was the last of the States and Territories to formulate a comprehensive guardianship scheme,¹¹⁵ the QLRC was able to consider their experiences when formulating its recommendations.

- In the second reading speech in Parliament after the introduction of the Guardianship and Administration Bill 1999 (Qld) the then Attorney-General noted, among other things that:

The Guardianship and Administration Bill 1999 (Qld) established a Public Advocate to affirm the rights of people with impaired decision-making capacity.¹¹⁶

The creation of the Public Advocate was a key recommendation of the QLRC¹¹⁷ and important functions of the Public Advocate were to promote and protect the rights of the adults and monitor and review delivery of services and facilities to those adults.¹¹⁸

The important role of intervening before a court, tribunal or official inquiry to represent the rights and interests of persons with impaired capacity was noted.¹¹⁹

- The opposition of the day supported the creation of a separate Public Advocate, noting:

The potential for conflict between the Public Advocate and the Government of the day, and that the Government needs to stand ready to address issues raised by the Public Advocate.

The Public Advocate has more credibility than governments or bureaucrats in many cases, there is inherent distrust of governments and bureaucrats.¹²⁰

¹⁰⁹ Queensland Law Reform Commission, *Assisted and Substituted Decisions: Volume One Report* Number 49 (1996). See in particular Chapter 12: The Adult Guardian and the Public Advocate.

¹¹⁰ Ibid, 420-421.

¹¹¹ Ibid, 421.

¹¹² Ibid, 422-423.

¹¹³ Ibid, 423.

¹¹⁴ Ibid, 423.

¹¹⁵ Ibid, 410.

¹¹⁶ Queensland, *Hansard*, Legislative Assembly, 8 December 1999, 6079 (Matt Foley, Attorney-General and Minister for Justice).

¹¹⁷ Ibid, 6080. Note that the QLRC described it as pivotal to the operation of the scheme: Queensland Law Reform Commission, *Assisted and Substituted Decisions: Decision-making by and for people with a decision-making disability*, Report No 49 Volume 1 (1996) 420-421.

¹¹⁸ Queensland, *Hansard*, Legislative Assembly, 8 December 1999, 6080 (Matt Foley, Attorney-General and Minister for Justice).

¹¹⁹ Ibid.

¹²⁰ Queensland, *Hansard*, Legislative Assembly, 11 April 2000, 714-715 (Lawrence Springborg, Member for Warwick).

- It is clear that the creation of the Public Advocate as a separate and independent entity, separate from government and from the Office of the Adult Guardian was thoroughly considered by the QLRC, and a deliberate and thoroughly considered decision by the Government (and supported by other members of Parliament).
- Public awareness, interest in and calls for systems advocacy by government and non-government departments and organisations regarding issues for people with impaired capacity has increased over the years since the creation of the Public Advocate.
- The Reviewers were referred to the Annual Reports of the Public Advocate, containing details of many identified systems issues about which the Public Advocate has sought/seeks to influence appropriate change. It was noted:

the issues traverse a wide variety of systems (including the disability, housing, legal, guardianship, health and mental health, criminal justice, corrective services and advocacy systems) across the government and non-government sectors; and

as the reports disclose, there are more issues which could be addressed, but finite resources preclude all identified issues being targeted for advocacy.

- The international community has recently established clear expectations regarding the protection and provision of human rights for people with disability through the United Nations *Convention on the Rights of Persons with Disabilities* (the UN Convention).
- In 2008, Australia ratified the UN Convention. This arguably makes the role of the Public Advocate

and its continued existence more compelling than at the time of its establishment.

Combined functions with another office

- There are persuasive arguments which clearly demonstrate why a government department cannot, and should not, undertake systems advocacy for adults with impaired decision-making capacity.
- The role requires the identification of and speaking out about problems and deficiencies within legislation, policy and services including those developed and provided by government, together with monitoring the delivery of services and facilities to the adults including those delivered by government.
- Performance of the functions by their nature demand independence from Government activities and require the Public Advocate to speak publicly against current systems and proposals of Government and others which are not in the interests of adults with impaired decision-making capacity.
- If seen as aligned with any sector, government or non-government, or any service provider, credibility and independence is unavoidably compromised.
- If the functions of the Public Advocate were merged with the Adult Guardian role, conflict of interest issues are inherent since the Adult Guardian is a service provider of guardianship and investigative services to adults with a decision-making disability. The Public Advocate monitors and reviews the delivery of these services.

- It would be inappropriate for systems advocacy to be driven as a result of the relatively small number of individual matters in which the OAG is involved.
- The Adult Guardian is the guardian (personal decision-maker) of last resort who may be appointed by the Guardianship and Administration Tribunal (the Tribunal)¹²¹ when informal arrangements are inadequate to protect the rights and interests of the adult concerned and where there is no attorney for personal matters appointed (or considered appropriate to continue in the role), and where the Tribunal has not appointed a family member or close friend of the adult as guardian.
- Accordingly, the experiences of the Adult Guardian regarding systems issues may not be reflective of the experiences of people with impaired capacity whose decisions are made by the many thousands of attorneys (for personal, financial and health matters), administrators, guardians and informal personal decision-makers in the community. Accordingly, the systems advocacy agenda should not be driven by the operational experience of the Adult Guardian.
- A loss of systems advocacy focus may result from the pressure of individual cases where the Adult Guardian and Public Advocate roles are combined.

The Weller Report

On 31 March 2009, the *Brokering Balance: A Public Interest Map for Queensland Government Bodies: An Independent Review of Queensland Government Boards, Committees and Statutory Authorities Part B Report* (the Weller Report) recommended that:

¹²¹ Whereas the Public Trustee may be appointed as the financial decision-maker or administrator.

*Pending analysis of a different finding (in favour) of the structural capability of the Public Advocate to perform its essential role in the current guardianship laws review by the Queensland Law Reform Commission due by 31 December 2009, the Public Advocate should be abolished and its functions transferred to the Adult Guardian.*¹²²

The Weller Report refers to a number of detailed public submissions received,¹²³ which strongly recommended the Public Advocate's continuing contribution.¹²⁴ It does note that this Office, and the QLRC, which is responsible for the ongoing Guardianship Review, submitted that review of the Public Advocate should be part of the Guardianship Review which is examining the broader guardianship system (see discussion about the Guardianship Review in Section 2.1).

It then refers to views of the Department of Justice and Attorney-General that the position should be abolished and the functions transferred to the Adult Guardian:

*because, by being separated from the experiences of the Adult Guardian, the Public Advocate does not have sufficient access to information to amass a systemic assessment based on objective data and meet its original objectives.*¹²⁵

¹²² Simone Webbe and Professor Patrick Weller AO, *Brokering Balance: A Public Interest Map for Queensland Government Bodies: An Independent Review of Queensland Government Boards, Committees and Statutory Authorities Part B Report* (March 2009) 143, Recommendation 133 <<http://www.premiers.qld.gov.au/government/assets/part-b-report-brokering-balance.pdf>> at 6 October 2009.

¹²³ Ibid, 142.

¹²⁴ Ibid.

¹²⁵ Ibid.

It is understood from enquiries subsequently made of the Weller Review secretariat that this contention was made orally. As this Office was not made aware of the comments until the Weller Report was released, it was not responded to in this Office's submission to the Weller Review.

The Government Response

The Government released its response to the Weller Report on 22 April 2009. It was stated in relation to the Public Advocate:

*The government acknowledges that the Review's recommendation is consistent with how the role of the Public Advocate operates in some other Australian jurisdictions. The functions will continue, but will be carried out by the Adult Guardian.*¹²⁶

Subsequent developments

It is understood from anecdotal information, together with copies of press releases, media interviews and articles, copies of letters and emails sent from and copied by various stakeholders to the Office of the Public Advocate that the Government has received comments regarding the need for a separate Public Advocate, and its intention to abolish the Public Advocate and for the functions to be performed by the Adult Guardian.

At the time of writing, amalgamation of the functions of the Public Advocate with those of the Adult Guardian had not commenced.

For information about advocacy undertaken by the Office of the Public Advocate regarding other bodies subject to the Weller Review see Sections 1.16 and 5.8.

2.4 Office of the Adult Guardian

The Office of the Adult Guardian (OAG) has functions as a guardianship service provider. The Adult Guardian can:

- be appointed as guardian to make personal decisions for an adult who does not have a family member/s or close friend/s available, suitable and willing to be appointed;
- investigate complaints or allegations of neglect, exploitation or abuse of an adult, and inappropriate or inadequate decision-making arrangements;
- act as statutory health attorney of last resort; and
- educate and advise persons about the operation of the guardianship legislation.¹²⁷

These are important safeguards for adults with impaired decision-making capacity.

Internal management issues and restructure of the Office of the Adult Guardian

As discussed throughout this report, the Public Advocate has functions to promote and protect the rights and interests of adults with impaired decision-making capacity and to monitor the delivery of services and facilities to the adults. This includes a function to monitor the delivery of guardianship services, including those delivered by the OAG.

¹²⁶ Queensland Government, Government Response to the report *Brokering Balance: A Public Interest Map for Queensland Government Bodies - An Independent Review of Queensland Government Boards, Committees and Statutory Authorities* (April 2009) <<http://www.premiers.qld.gov.au/government/boards-committees/review/government-response.aspx>> at 6 October 2009.

¹²⁷ *Guardianship and Administration Act 2000* (Qld) ss 174; 180.

Monitoring action is taken in a collaborative manner to encourage cooperative engagement around issues.

In approximately February 2009 this Office became aware of internal management issues at the OAG. Mindful of the effect that such issues can have on service provision, in its monitoring capacity the Public Advocate sought from the Adult Guardian:

- assurances that service provision for the vulnerable clients of the OAG had not been compromised; or
- if the assurances could not be given, advice about arrangements in place to minimise the disruption to services provided to the vulnerable people concerned, and therefore, the potential for disadvantage they may experience.

Subsequent to initially raising this issue, this Office received information suggesting possible systemic issues in the performance of the functions of the OAG, as follows:

- delays by the OAG in investigating allegations of abuse, neglect and exploitation and/or inappropriate or inadequate decision-making arrangements for adults with impaired decision-making capacity;
- delays in decision-making in respect of individual clients for whom the OAG is guardian; and
- delays in communicating with clients and their family members.

In order to safeguard the rights and interests of vulnerable adults, this Office referred these matters to the OAG and sought information from the OAG regarding the issues raised, relevant operational procedures/systems of the OAG, and steps being

taken to investigate and/or address these apparent issues.

A delay of some months transpired between the initial requests and any responses received. When a reply was provided, it referred to the development and implementation of a broad long-term strategy to improve office culture and staffing practices. Although some limited additional information was subsequently received, this Office continues to await a response to numerous requests for details and information relevant to the apparent systemic issues identified.

The commitment of many OAG staff is acknowledged. However, this Office continued to hold concerns for vulnerable adults receiving guardianship services, in the context of the OAG's history of high turnover of staff, heavy caseloads, and increasing demand for services, and an apparent lack of a comprehensive policy and procedures framework. Such a framework is important to guide service provision such as decision-making by guardians and the conduct of investigations.

In the absence of adequate responses from the OAG and any powers to directly address concerns, the Public Advocate referred some issues to the Attorney-General. In doing so, the Public Advocate noted that the OAG's resources may not be adequate for the performance of its functions.

More recently, the OAG advised details of a proposed internal restructure. The Public Advocate was pleased to provide some comments to the OAG regarding the restructure. The proposal has the potential to address some of the issues identified by this Office regarding the operation of the guardianship services provided by the OAG.

However, concerns have been raised by this Office regarding the integration of the Community Visitor Program (CVP) into a team structure whereby Community Visitors and their support staff are attached to teams of guardians and investigations officers on the basis of geographical areas. The structure does not appear to adequately recognise the independence of Community Visitor functions from those of the OAG. In this regard, see also Section 2.5 for discussion about the OAG and the CVP.

This Office will continue to monitor developments.

Provision of systemic trend information and data

The power of the Public Advocate to do all things necessary and convenient to perform its broad systems advocacy functions allows requests for information, but does not provide a basis to compel it.

The Office of the Public Advocate relies on information from a wide variety of sources to inform its work. These include relevant available data, statistics and research from many sources, together with anecdotal information from stakeholders including peak bodies, community groups and adults with impaired capacity and their support networks. Information about systemic issues from the OAG represents one source. This Office considers that more detailed systems and trend information, and data may be usefully provided by a range of sources. In the absence of a legislative requirement to this effect, this Office works collaboratively with external agencies to obtain information which is not otherwise available and is useful to its work.

To date, limited information has been available through the OAG, primarily through annual reports

and anecdotally on an ad hoc basis. Agreement was reached in mid-2008 that the OAG would provide certain information regarding systemic issues and/or trend data on a six monthly basis. In particular, it was agreed at that time that the following be provided:

- Available statistics and relevant information regarding systemic issues arising in relation to investigations.
- Available statistics and a list of identified or potential systemic issues regarding persons for whom the OAG is appointed as guardian within five categories, which it was anticipated would change from time to time, depending on the focus of the Public Advocate. (These were at first instance to include prisoners, homeless persons, Indigenous persons and persons in respect of whom restrictive practices had been approved. In addition, a request was made for information in respect of persons accommodated within Disability Services Accommodation Support and Respite Services).
- Information regarding the five most significant systemic or potential systemic issues encountered by the OAG during the period.

Despite further enquiries by the Office of the Public Advocate, little information has been received by this Office.

Recent information suggests that the OAG may be prepared to provide this Office with additional information. Accordingly, a further request was made. However, this Office does not have confirmation that data which may be considered useful by it regarding broad systemic trends is currently routinely collected. In the absence of the information requested, it is unclear how useful the additional information would be to the work of this Office.

2.5 Community Visitor Program

The Community Visitor Program (CVP) is integral to the guardianship regime. Its purpose is to safeguard the rights and interests of adults with impaired decision-making capacity who reside in certain residential facilities through regular visits to these facilities. Community Visitors have inquiry and complaint functions.

Reporting through Office of the Adult Guardian

Since 2005, the CVP had been operating separately under the guardianship regime, reporting to the Director-General of the Department of Justice and Attorney-General as specified in the *Guardianship and Administration Act 2000* (Qld).¹²⁸ In March 2008, an announcement was made by the then Director-General that for limited administrative purposes only, the CVP would report through the Office of the Adult Guardian (OAG). When the Public Advocate became aware of the arrangement, concerns were raised that the placement of the CVP seemed properly a matter for recommendation from the Queensland Law Reform Commission (QLRC) in its Guardianship Review. Placement with the OAG, even for limited administrative/staffing reporting purposes raised some concerns given the potential for conflict of interest. The Public Advocate was advised that an evaluation of the arrangement would be undertaken after an initial period of six months.

It transpired that an evaluation was not undertaken.

In an April 2009 newspaper article the Adult Guardian made comments about the staff of the OAG.¹²⁹ It was inferred that the OAG staff included community visitors.¹³⁰ The Public Advocate requested details from the OAG of the basis for the assertion. A response was not received.

The OAG's Annual Report for 2007-2008 was tabled in Parliament later in April 2009. The report, which had been completed and provided to the Attorney-General several months earlier, referred to the Director-General's announcement in March 2008 that the Department of Justice and Attorney-General's reporting framework would be re-aligned so that the manager of the CVP would report to the Director-General through the Adult Guardian.¹³¹ It is also noted in the report that 'Since March 2008 the Community Visitor Program again reports to the Adult Guardian'.¹³²

It appears that the OAG does not consider the CVP a separate program which is independent from the functions of the Adult Guardian. As referred to in Section 2.4, a recent restructure places Community Visitors and their support staff within teams within the broader OAG structure. This concerns the Public Advocate, since the inquiry and complaint functions exercised by Community Visitors will from time to time include complaints which involve or are about the services of the Adult Guardian. There is an inherent conflict of interest if the Adult Guardian is in a position to direct the work of the Community Visitors, diminishing the safeguards available through the guardianship regime.

¹²⁸ *Guardianship and Administration Act 2000* (Qld) ss 222-237, especially 230, 237. For a period prior to 2005, the CVP was reporting through the Adult Guardian, but due to issues arising this arrangement was ceased.

¹²⁹ Margaret Wenham, Agency probes bully claims: staffer suspended, *The Courier-Mail* (Brisbane) 16 April 2009 <<http://www.news.com.au/couriermail/story/0,23739,25339540-3102,00.html>> at 6 October 2009.

¹³⁰ Ibid.

¹³¹ Office of the Adult Guardian, *Annual Report 2007-2008* (2008) 49.

¹³² Ibid, 11.

Systemic trend data

It is understood that several years ago, the CVP received funding for a new database. It was anticipated that incidentally this database would allow:

- more useful systemic trend data to be provided to the Office of the Public Advocate on a regular basis; and
- discrete interrogation of the database to extract information which from time to time may be of particular interest to this Office.

Unfortunately, it is understood that the database as initially developed did not live up to expectations. Information was received that enhancements were specified, but that lengthy delays occurred in these being undertaken. Regular reports have not been available to this Office. The CVP expressed concern that although the data available was accurate, it became increasingly inaccurate as the interrogation of the system became more specific.

However, in the meantime, anecdotal information from the CVP and some limited reports and referrals have provided some information to inform systems advocacy.

In early April 2009, the CVP advised that the enhancements had reached a stage that regular systems trend reports could be provided. Agreement in principle was reached between the Public Advocate and the CVP for provision of them. It was noted that further enhancements were anticipated which were expected to improve the usefulness of the reports. Also, as had sometimes been the case in the past, some additional specific reports were also requested on a short-term basis.

At that stage, the CVP indicated that consideration would be given to the request for specific reports and ongoing arrangements for regular statistical reporting, but would be confirmed with the Adult Guardian.

At the time of writing, despite repeated follow-up, reports have not been received. More recent information suggests that reports will be provided. It is unclear at this stage the form this information will take and whether or not it will be useful.

2.6 Presumption of capacity

The guardianship system recognises that an adult's right to make decisions is fundamental to their dignity,¹³³ and should be interfered with to the least possible extent.¹³⁴ The purpose of the guardianship regime is to strike an appropriate balance between the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-making and the adult's right to adequate and appropriate support for decision-making.¹³⁵ All adults are presumed under the guardianship regime to have capacity to make their own decisions.¹³⁶ In practice, the presumption of capacity is rebuttable¹³⁷ by information or evidence that a particular adult has impaired capacity for particular matter/s.

It is only when an adult has impaired capacity for a matter/s that an administrator for financial matters or guardian for personal matters may be appointed to make decisions about the matter/s for the adult

¹³³ *Guardianship and Administration Act 2000* (Qld) s 5(a).

¹³⁴ *Guardianship and Administration Act 2000* (Qld) s 5(d).

¹³⁵ *Guardianship and Administration Act 2000* (Qld) s 6.

¹³⁶ *Guardianship and Administration Act 2000* (Qld) s 7(a), sch 1, pt 1(1); *Powers of Attorney Act 1998* (Qld) sch 1, pt 1(1).

¹³⁷ *Re Bridges* [2001] 1 Qd R 574, 583.

concerned.¹³⁸ Further it is only when a person has impaired capacity for the matters concerned that a statutory health attorney or an attorney for personal matters under an enduring document may make health or other personal decisions for an adult.¹³⁹

The Public Advocate made submissions¹⁴⁰ to the QLRC in Stage Two of the Guardianship Review¹⁴¹ about concerns regarding the Guardianship and Administration Tribunal's (the Tribunal) practice regarding the application of the presumption of capacity.

Some reasons for decisions of the Tribunal indicated that, although the presumption of capacity was applied at the time of the initial hearing for appointment of a guardian or administrator on a review of the appointment, in some cases, it was not. Instead the Tribunal indicated that it had previously found the adult to have impaired capacity for the matter and that the presumption of capacity remained rebutted until the Tribunal made an order to the contrary.¹⁴² The Public Advocate considers this approach incongruent with the legislative regime.

An opportunity arose to intervene in a Supreme Court appeal about this issue. The intervention is reported in Section 11.1. The Supreme Court of Queensland has confirmed the requirement for the Tribunal to

apply the presumption on review of an appointment or an application for a declaration of capacity.¹⁴³

2.7 Proposed deregulation of trustee company fees

The Council of Australian Governments (COAG) agreed in July 2008 that the Australian Government would assume responsibility for the regulation of trustee companies. In May 2009 an Exposure Draft of the Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 (the Draft Bill) was released for comment.

The Public Advocate was concerned that the Draft Bill did not adequately safeguard the interests of adults with impaired capacity. The proposed arrangements will operate, among other things, to deregulate fees charged by trustee companies acting as financial administrators and enduring attorneys for financial matters for adults with impaired capacity. Further, the Draft Bill perpetuates some current issues regarding contracting out of otherwise applicable fee structures.

The Public Advocate provided a submission to the Australian Government in response to the Draft Bill.¹⁴⁴ Key submissions made included:

- A recommendation that the regime should preferably prescribe reasonable maximum fees chargeable by trustee company administrators and enduring attorneys.
- Preferably, the legislation should provide specifically that contracting out provisions are not applicable to trustee company administrators

¹³⁸ *Guardianship and Administration Act 2000* (Qld) s 12(1)(a).

¹³⁹ *Powers of Attorney Act 1998* (Qld) ss 33(4), 35(1)(c), 36 (1), 62.

¹⁴⁰ See <www.publicadvocate.qld.gov.au/submissions> at 7 October 2009.

¹⁴¹ Queensland Law Reform Commission, *Shaping Queensland's Guardianship Legislation: Principles and Capacity Discussion Paper*, Working Paper No 64 (September 2008) 115-117.

¹⁴² For example, see *Re WM* [2005] QGAAT 43; *Re SAM* [2007] QGAAT 86; *Re WM* [2006] QGAAT 81, and *Re KAF* [2008] QGAAT 91 especially [17-18]. In *Re BAK* [2008] QGAAT 74 the Tribunal said once it had found that BAK has impaired capacity, until such time as the Tribunal made an order to the contrary, the presumption of capacity remained rebutted

¹⁴³ *Bucknall v Guardianship and Administration Tribunal* (No 1) [2009] QSC 128.

¹⁴⁴ The submission is available at <www.publicadvocate.qld.gov.au> at 7 October 2009.

or enduring attorneys for persons with impaired capacity and provide that a principal executing an enduring document may only contract out of protective mechanisms by specific direction and after taking independent advice.

- It may be that the most feasible arrangement is for each State and Territory to make provision as it sees fit for the reasonable remuneration of trustee company administrators and enduring financial attorneys through its guardianship legislation.
- Specific saving of the right to legislate on this issue would avoid any later possible arguments that section 109 of the Commonwealth Constitution prevented the States and Territories from doing so.¹⁴⁵
- It is noted that if relevant courts/tribunals are empowered to authorise contracting out of prescribed fees, legislative guidance about when it might be appropriate to authorise contracting out of the usual fees, for an adult with impaired capacity, is desirable.

The Public Advocate noted that although COAG has agreed that the Australian Government assume responsibility for regulation of trustee companies, there has been no agreement that it would assume responsibility for guardianship and administration-related matters. If the Australian Government does not adequately provide for vulnerable Queenslanders through the proposed amendments, the Queensland Government was urged to act to do so.

The Public Advocate also raised these concerns at the federal level with the Treasurer, the Parliamentary Secretary for Disabilities and Children's Services,

the Minister for Ageing, and the Minister for Families, Housing, Community Services and Indigenous Affairs, and with the Attorney-General of Queensland.

The Bill was introduced to the House of Representatives in late June 2009. Following the Bill's introduction, the Australian Government advised this Office that after further consideration of the issues raised, a provision has been inserted in the Bill requiring a trustee company to notify an agent of an adult with impaired capacity of changed fees.¹⁴⁶

Further, it is noted that the Bill now provides for Draft Regulations. The Draft Regulations state that the trustee company provisions are intended not to apply to the exclusion of prescribed State and Territory laws.¹⁴⁷ The Draft Regulations anticipate that this will include the *Guardianship and Administration Act 2000* (Qld).¹⁴⁸

The deregulation of fees charged by trustee companies will impact on section 48 of the *Guardianship and Administration Act 2000* (Qld), which caps the remuneration of professional administrators for adults with impaired capacity (other than trustee companies and the Public Trustee) as prescribed by the *Trustee Companies Act 1968* (Qld).

The Queensland Attorney-General has taken a significant interest in these issues and is considering options to ensure that vulnerable people are adequately protected. Despite the introduction of the additional provisions noted above, the Public Advocate remains concerned that the Bill does not

¹⁴⁵ In response to any such concerns it is arguable that legislation to provide for fees of administrators under the guardianship regime is legislation about a guardianship matter, rather than legislation about the regulation of trustee companies. But it would be preferable to avoid the need for such arguments to be aired.

¹⁴⁶ Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 s 601TAB(3).

¹⁴⁷ Corporations Legislation Amendment (Financial Services Modernisation) Bill 2009 s 601RAE (4)(b).

¹⁴⁸ Exposure Draft of the Corporations Amendment Regulations 2009 (Cth) sch 8AB.

adequately protect vulnerable people, and recently raised the following further concerns:

- The Bill does not define who is an agent of an adult with impaired decision-making capacity (for the purpose of a trustee company notifying an agent of changed fees) which creates uncertainty. The failure to define agent is problematic where the relevant adult does not have a formally appointed agent. A trustee company appointed as an administrator or an attorney may be an agent, and will be placed in a conflict situation as it will be unable to independently assess the reasonableness of its fees.
- The Bill provides that the trustee company provisions do not apply to the exclusion of State laws. However, on reading the Bill provisions, it might be argued that fees are to be expressly dealt with by the *Corporations Act 2001* (Cth), a Commonwealth law, and compliance with those provisions is adequate. The Public Advocate suggested that these provisions be amended to expressly reflect that fees for administrators and attorneys are within State and Territory regulation.

The Public Advocate also suggested that section 48 of the *Guardianship and Administration Act 2000* (Qld) be amended to improve the safeguards for adults with impaired decision-making capacity by prescribing maximum fees chargeable by a trustee company acting as an administrator or attorney where a client has impaired capacity. This could be achieved by introducing a scale of fees based on an hourly rate, encompassing a reasonableness factor.

The Public Advocate understands the Australian Government considers that trustee companies should be allowed to compete with each other and that the creation of a national market for trustee company services would improve competition generally. The

Public Advocate considers it would be inappropriate to rely on market forces for adults who have impaired capacity, particularly as it would likely result in an unfair advantage for trustee companies. Greater safeguards are required.

This Office will continue to monitor the proposed changes to trustee company fees to advocate for the protection of the rights and interests of adults with impaired decision-making capacity.

2.8 Collapse of a corporate fund manager

During this year the Public Trustee of Queensland instituted legal proceedings to protect the interests of clients with investments in a collapsed fund manager. Media reports¹⁴⁹ stated the Public Trustee was representing 560 listed noteholders who were owed a total of \$359 million, which amounted to an average in excess of \$641,000 per noteholder. The Office of the Public Advocate sought to ascertain whether adults with impaired decision-making capacity were affected and sought information about the level of exposure of any affected clients.

The Public Trustee advised that 21 clients with impaired capacity were affected by the collapse, with investments in the fund manager forming part of a diversified investment strategy for them. The prudent person rule¹⁵⁰ had been considered for all Public Trustee clients with impaired capacity and accordingly excessive risk was not responsible for loss of investments. The prudent person rule imposes duties on an administrator or financial attorney

¹⁴⁹ Anthony Marx, Legal battles play out: Octavio collapse mired in Supreme Court *The Courier-Mail* (Brisbane), 4 March 2009, 31; Kerrie Sinclair, Octavio to have its day in court today *The Courier-Mail* (Brisbane), 10 September 2008, 36.

¹⁵⁰ *Trusts Act 1973* (Qld) pt 3, especially s 22. See also *Guardianship and Administration Act 2000* (Qld) s 51 and sch 4 authorised investments; *Powers of Attorney Act 1998* (Qld) s 84.

when purchasing, selling or otherwise managing investments.

The Public Advocate will continue to monitor the application of the prudent person rule by administrators to protect the investments of adults with impaired decision-making capacity.

2.9 Employee fraud within a trustee company

It was reported in the media in December 2008¹⁵¹ that approximately \$6.2 million of a trustee company's clients' monies had been misappropriated by an employee of the company over a period of several years. This was later confirmed by the trustee company. The company provides administration and financial attorney services. Media reports suggested that the trustee company was relying upon the participation of clients in its process to identify fraudulent transactions.¹⁵²

This Office sought information from the trustee company about the processes in place to ensure that adults with impaired decision-making capacity were not disadvantaged.

This Office understands that the company took several actions to address the situation, including:

- the establishment of a \$7 million restitution fund to compensate approximately 45 clients for their losses;¹⁵³
- accommodating the needs of adults with a disability;

- engaging forensic accountants to assess the extent of the fraud;¹⁵⁴ and
- engaging other specialist professionals where necessary.

Later media reports suggested that adults may be required to sign documents which committed them to:

- refund the amount of any overpayment if it was subsequently demonstrated they were overpaid; and
- keep the terms of their compensation arrangement confidential.¹⁵⁵

The Public Advocate sought assurances that commercial risk management practices were not taking precedence over the company's obligations towards adults with impaired capacity. This Office also raised the issue that conflict transactions, if any, required authorisation.¹⁵⁶

Professional administrators and attorneys play a significant role in the guardianship system. The Office of the Public Advocate continues to monitor financial administration-related issues to protect the rights and interests of vulnerable adults.

¹⁵⁴ Ibid, 9.

¹⁵⁵ Tony Raggatt, 'I'll help investors: Mara's offer to victims of \$7m Trust scandal', *Townsville Bulletin* (Townsville), 21 April 2009, 5.

¹⁵⁶ Conflict transactions can only be entered into by an attorney under the *Powers of Attorney Act 1998* (Qld) if authorised by the principal (section 73), or the Supreme Court or Tribunal (section 118). For an administrator, conflict transactions can only be entered into under the *Guardianship and Administration Act 2000* (Qld) if authorised by the Tribunal (section 37). Under s 37(2) *Guardianship and Administration Act 2000* (Qld), a conflict transaction is a transaction in which there may be conflict, or which results in conflict, between (a) the duty of an administrator towards the adult; and (b) either (i) the interests of the administrator or a person in a close personal or business relationship with the administrator; or (ii) another duty of the administrator.

¹⁵¹ Tony Raggatt, 'The \$7m swindle: Trust Company sets up repayment fund', *Townsville Bulletin* (Townsville), 3 December 2008, 8.

¹⁵² Ibid.

¹⁵³ Trust Company Limited, *Trust Annual Report 2009* (2009) 82 <http://www.trust.com.au/annualreport2009/images/pdf/trust_2009_ar_.pdf> at 29 September 2009.

2.10 Banking and impaired capacity

In 2007 the Office of the Public Advocate received reports of systemic issues regarding the recognition afforded by banks to substitute decision makers. These issues were raised with the Banking and Financial Services Ombudsman,¹⁵⁷ the Productivity Commission's Review of Australia's Consumer Policy Framework,¹⁵⁸ and the Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law.¹⁵⁹ Information received suggested issues arose where an administrator or enduring financial attorney sought to open accounts in the adult's name, or an adult with impaired capacity adopted a pattern of withdrawals from their account which suggested reckless spending.

Some issues of concern arising from this advocacy included:

- For administrators, several banks did not permit accounts to be opened in the name of the adult or X as administrator for Y. These administrators were advised the only option was to create a trust account, which was a breach of the administrator's duties.¹⁶⁰
- Many banks would not prohibit an adult with impaired capacity from accessing their own accounts, even when the bank had notice that the person did not have capacity to manage their own finances and where a substitute decision-maker had been formally appointed. This resulted in the

substitute decision-maker being unable to prevent an adult's reckless spending.

- Most banks left policymaking for providing services to people with impaired decision-making capacity and their substitute decision-makers to be resolved at a branch level, resulting in an inconsistent policy between different branches.

In 2009 the Office of the Public Advocate received reports of similar incidents. This Office has begun exploring the scope of these issues with various stakeholders, and intends to again pursue advocacy to address these issues (see also Section 2.12).

2.11 Limitation orders

As discussed in Section 1.1, as part of its Guardianship Review, the Queensland Law Reform Commission (QLRC) released its June 2007 report *Public Justice, Private Lives: A new approach to Confidentiality in the Guardianship System*. The report contained key recommendations in relation to confidentiality in the guardianship regime, including that confidentiality orders be replaced by four new types of orders (collectively referred to as limitation orders) to be made by the Guardianship and Administration Tribunal (the Tribunal) in appropriate circumstances. These are adult evidence orders, confidentiality orders, closure orders and non-publication orders.¹⁶¹

The QLRC also recommended as a safeguard that the Public Advocate be informed by the Tribunal when a limitation order is being considered, and

¹⁵⁷ Office of the Public Advocate, *Annual Report 2006-2007* (2007) 68 <http://www.justice.qld.gov.au/files/Guardianship/Public_Advocate_annual_report_06-07.pdf> at 1 October 2009.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid; Office of the Public Advocate, *Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law* (2007) <<http://www.justice.qld.gov.au/files/Guardianship/Inquiryintoolderpeopleandlaw.pdf>> at 1 October 2009.

¹⁶⁰ Section 50 of the *Guardianship and Administration Act 2000* (Qld) requires that an administrator for an adult must keep the administrator's property separate from the adult's property.

¹⁶¹ *Guardianship and Administration Act 2000* (Qld) ss 109B (Adult evidence order); 109C (Closure Order); 109D (Non-publication order); 109E (Confidentiality order).

invited to appear and make submissions about the appropriateness of the order.¹⁶²

In its May 2008 response to the QLRC's report, the Queensland Government adopted the recommendations concerning limitation orders. However, as an alternative to the QLRC's recommendations about the Public Advocate's role, it decided that following the making of an order, the Tribunal would provide copies of the order, reasons for the decision, and other relevant documents and information to the Public Advocate to enable reporting on any systemic issues arising from that information.¹⁶³ The rationale provided for this decision was that delays in Tribunal hearings could result if the Public Advocate was to participate in limitation order proceedings, and that it would divert the Public Advocate from its primary function of systems advocacy.¹⁶⁴

The *Guardianship and Administration and Other Acts Amendment Act 2008* (Qld),¹⁶⁵ introduced the limitation order provisions.¹⁶⁶ The *Guardianship and Administration Act 2000* (Qld) now requires the Tribunal to notify and provide a copy of its decision to the Public Advocate as soon as practicable after giving its decision on the making of a limitation order.¹⁶⁷ Within 28 days after making its decision the Tribunal must provide the Public Advocate with all information it considered in making the limitation

order, and where available, its written reasons for the decision.¹⁶⁸

Since the amendments took effect on 1 January 2009, the Office of the Public Advocate has received notifications of four cases in which the Tribunal made limitation orders. Adult evidence orders were made in three of the cases, and confidentiality orders were made in two cases.

Notification of the orders by the Tribunal to the Public Advocate, and provision of the documents and information relied on by the Tribunal in making its decision, occurred in three of the cases. In the fourth case, the order was made at a Tribunal hearing prior to the amendments to the Act taking effect. In that case the hearing was adjourned and finalised after the amendments commenced.

Several issues have emerged from this Office's consideration of the material provided in respect of limitation orders made to date:

- In one case where an adult evidence order was made, the Tribunal did not provide written reasons. While the Act requires the Tribunal to give written reasons in making confidentiality, non-publication and closure orders, it is not mandatory to provide reasons in respect of adult evidence orders.¹⁶⁹ In its report, the QLRC distinguished adult evidence orders from other limitation orders on the basis they have a different criteria and purpose, and may be more frequently made.¹⁷⁰

162 Queensland Law Reform Commission, *Public Justice, Private Lives: A new approach to Confidentiality in the Guardianship System*, Report No. 62 (June 2007) 4.331, 4.336, 4.339.

163 Queensland Government, *Response to the Queensland Law Reform Commission Report Public Justice Private Lives: A new approach to Confidentiality in the Guardianship System* (May 2008) 6.

164 Ibid, 5.

165 This legislation was passed in October 2008.

166 *Guardianship and Administration Act 2000* (Qld) ss 109A–109I.

167 *Guardianship and Administration Act 2000* (Qld) s 109H(2).

168 *Guardianship and Administration Act 2000* (Qld) s 109H(5).

169 *Guardianship and Administration Act 2000* (Qld) s 109I(2).

170 Queensland Law Reform Commission, *Public Justice, Private Lives: A new approach to Confidentiality in the Guardianship System*, Report No. 62 (June 2007) 4.318.

The absence of written reasons where adult evidence orders have been made has been problematic for the Office of the Public Advocate when considering material provided. This Office recognises the value of adult evidence orders in enabling adults to confidentially provide relevant information to the Tribunal. However, as the Public Advocate anticipated, (if the Public Advocate is unable to attend proceedings), later considering the material which the Tribunal relied on in making the order, in the absence of Tribunal reasons justifying the decision is challenging, and of limited value.

- In two of the cases relevant excerpts of the transcript of the record of proceedings were not provided. It is understood that neither of the proceedings were recorded. Where it is anticipated that a limitation order may be made in a hearing, best practice dictates that the proceedings should be tape recorded, and transcript excerpts relevant to the decision be provided to the Public Advocate. This is essential where an adult evidence order is made and the Tribunal elects not to provide written reasons. It would better place the Public Advocate to consider whether procedural fairness was accorded to all parties, and whether, in all the circumstances, systemic issues arise from the making of the order.

The appropriate role for the Public Advocate with respect to limitation orders, and concerns regarding the provision of retrospective information have previously been raised with Government. These issues remain relevant, and include:

- the considerable time before information in a particular case is made known to the Public Advocate;

- any undesirable results flowing from the decision are unable to be addressed as they arise; and
- potential operational burdens, including the provision of voluminous material relevant to the decision, which require perusing in the absence of the opportunity to address issues arising in an effective manner.

The Public Advocate's inability to attend at hearings prevents the identification of systemic issues which may arise during proceedings, and the undertaking of advocacy to address those issues.

The Public Advocate's role in retrospectively receiving material relevant to the making of limitation order decisions has been of limited usefulness to date. These issues have been raised with the Guardianship and Administration Tribunal and the Queensland Law Reform Commission for consideration.

2.12 Enduring documents

As discussed in the last three Annual Reports, Enduring Powers of Attorney and Advanced Health Directives (enduring documents) are crucial in expressing and executing the intentions of an adult in the event they later have impaired decision-making capacity for financial, personal or health matters.¹⁷¹ These instruments enable substitute decision-makers to carry out the wishes of the person with a decision-making disability and safeguard their interests.¹⁷² Significantly, enduring documents allow adults with impaired capacity to appoint a substitute decision-maker of their choosing, and

¹⁷¹ Office of the Public Advocate, *Annual Report 2005-2006* (2006) 15; Office of the Public Advocate, *Annual Report 2006-2007* (2007) 29; Office of the Public Advocate, *Annual Report 2007-2008* (2008) 38. Refer to <www.publicadvocate.qld.gov.au> at 13 October 2009.

¹⁷² House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [3.2].

respect their fundamental right to autonomy and self-determination through decision-making before their capacity becomes impaired.

This Office is aware anecdotally that adults with a decision-making disability and their substitute decision-makers often encounter difficulties in having enduring documents recognised by the banking and financial sector, and other service providers. This issue is likely to become increasingly prevalent as the population ages and more enduring documents are executed. It is essential that financial institutions and other service providers have a comprehensive knowledge and understanding about enduring documents, and appropriate mechanisms in place to recognise these instruments in order to execute the intentions of the individual and to identify and respond to suspected abuse.¹⁷³ For further information regarding banking issues, see Section 2.11.

There is a risk that substitute decision-makers may deliberately or unintentionally misuse powers assigned under enduring documents.¹⁷⁴ Research partnered by the Office of the Public Advocate and conducted by academics from The University of Queensland identified that financial abuse was prevalent in a significant portion of sample Guardianship and Administration Tribunal cases where an enduring power of attorney existed.¹⁷⁵ It is therefore important to ensure that the systems

surrounding the use of enduring documents discourage and protect against abuse, and that greater education, monitoring and support of substitute decision-makers occurs to avoid and prevent financial abuse.¹⁷⁶

Third parties such as solicitors and health professionals each have vital roles to play in preparing and witnessing enduring documents, and in certifying that the adult has capacity to execute the document. Consequently they are well placed to identify potential abuse or exploitation. It is imperative that solicitors and health professionals are cognisant of the law relating to enduring documents, and their respective obligations. Appropriate steps, such as enhanced education and training, are required to improve understanding of enduring documents, and to ensure good practice.¹⁷⁷

Mutual recognition of enduring documents throughout Australia is also a significant issue. Each Australian jurisdiction has different legislation governing enduring documents, which may impede recognition of those documents in other States or Territories.¹⁷⁸ Use of inconsistent and confusing terminology in enduring documents may also create difficulties.¹⁷⁹ A lack of community understanding and awareness regarding substitute decision-making, guardianship and enduring documents is also problematic.¹⁸⁰ These factors can potentially result in the adult's wishes not being properly followed, reluctance or failure to create enduring documents,

¹⁷³ Ibid, 100-107.

¹⁷⁴ Office of the Public Advocate, *Submission to the Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law* (March 2007) 6-7 <www.publicadvocate.qld.gov.au> at 1 October 2009; A McCawley, C Tilse, J Wilson, L Rosenman and D Setterlund, Access to assets: Older people with impaired capacity and financial abuse (2006) 8(1) *Journal of Adult Protection* 20, 21; Office of the Public Advocate, *Submission to the Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law* (March 2007) 6-7 <www.publicadvocate.qld.gov.au> at 1 October 2009.

¹⁷⁵ A McCawley, C Tilse, J Wilson, L Rosenman and D Setterlund, Access to assets: Older people with impaired capacity and financial abuse (2006) 8(1) *Journal of Adult Protection* 20, 26-28.

¹⁷⁶ Ibid, 30.

¹⁷⁷ Lindy Willmott and Ben White, Solicitors and enduring documents: Current practice and best practice (2008) 16 *Journal of Law and Medicine* 466, 487; Office of the Public Advocate, *Submission to the Standing Committee on Legal and Constitutional Affairs Inquiry into Older People and the Law* (March 2007) 6-7 <www.publicadvocate.qld.gov.au> at 1 October 2009.

¹⁷⁸ House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [3.17].

¹⁷⁹ House of Representatives Standing Committee on Family, Community, Housing and Youth, Parliament of Australia, *Who Cares? Report on the inquiry into better support for carers* (April 2009) 110.

¹⁸⁰ Ibid, 111.

uncertainty, unnecessary conflict or undesirable legal consequences.¹⁸¹

Following the recommendations of recent House of Representatives Inquiries¹⁸² for the implementation of uniform enduring documents legislation across the Australian States and Territories, these issues were placed on the agenda of the Standing Committee of Attorneys-General (SCAG). It is understood a SCAG working group is currently exploring avenues for reform, including improvement of the effectiveness of mutual recognition of powers of attorney between jurisdictions.

There are a number of initiatives relating to enduring documents presently being undertaken in Queensland. The University of Queensland and the Queensland University of Technology were awarded a grant to conduct their project *Enduring Documents Improving the Forms, Improving the Outcomes* which will examine the content and useability of enduring documents. As reported in last year's Annual Report, the Department of Justice and Attorney-General convened a working group (of which the Public Advocate is a member) to consider practical strategies to facilitate greater protections around enduring documents within the guardianship regime. Educational materials are currently being developed for Justices of the Peace and legal practitioners on requirements for witnessing enduring documents. A website is also being developed to provide more comprehensive information about enduring documents.

This Office will continue to monitor these issues.

¹⁸¹ Ibid. See also Lindy Willmott, Ben White and Michelle Howard, *Refusing Advance refusals: Advance Directives and Life-Sustaining Medical Treatment* (2006) 30(1) *Melbourne University Law Review* 211.

¹⁸² House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) Recommendation 16; House of Representatives Standing Committee on Legal and Constitutional Affairs, *Inquiry into harmonisation of legal systems within Australia and between Australia and New Zealand* (December 2006) 102.



Senior Research Officer John O'Brien conducting a presentation at the Chermide Guardianship and Administration Forum.

2.13 Guardianship and Administration Forums

The Office of the Public Advocate has participated in a number of Guardianship and Administration Forums along with the other agencies within the guardianship and administration regime. These forums were organised by the OAG which has a function to educate about the operation of the guardianship regime. Also involved in the forums were:

- The Office of the Adult Guardian;
- The Guardianship and Administration Tribunal;
- The Community Visitor Program; and
- The Public Trustee of Queensland.

The purpose of the public forums was to promote increased awareness and understanding within the community about roles of the agencies within the guardianship and administration regime. This year, forums which the Office of the Public Advocate was involved in were held in Caboolture, Chermide, Ipswich, Logan and Townsville.

This Office will continue to participate in future forums.

2.14 Indigenous adults with impaired capacity

In Queensland, the *Guardianship and Administration Act 2000* (Qld) (the Act) provides a definition of impaired capacity, and a framework for substitute decision-making for adults with impaired decision-making capacity. However, there are questions regarding the social and cultural relevance of this system for Indigenous Queenslanders.

This Office has initiated a collaborative research project to explore this issue. For further information, see Section 13.4.

2.15 Restrictive Practices

Amendments to the *Guardianship and Administration Act 2000* (Qld) and the *Disability Services Act 2006* (Qld) which commenced in July 2008 established a new regime for the authorisation and use of restrictive practices in the context of positive behaviour support for adults with impaired decision-making capacity who are receiving Disability Services funded or provided services and who have challenging behaviour. There are transitional arrangements in place for the implementation of the scheme. For more detailed discussion about this regime generally, see Section 1.1.

Under the regime, the Adult Guardian may be appointed as guardian for restrictive practices for an adult.

The Guardianship and Administration Tribunal (the Tribunal) reported that between 1 July 2008 and 30 June 2009 the Adult Guardian was appointed in 49 cases of the 65 appointments of guardians for restrictive practice matters. This represents over 75 percent of appointments. Although the numbers

are small and many more applications have been filed with and determined by the Tribunal in the 2008-2009 financial year, anecdotal information suggests that this trend continues and that between 60-65 percent of appointments are being made to the Adult Guardian. It is understood that the high numbers of appointments to the Adult Guardian are challenging the resources of the Office of the Adult Guardian (OAG) and that additional resources are being sought to accommodate anticipated workload.

Some of the adults concerned do not have a support network, and therefore there is no one else available for appointment. Anecdotal comments suggest that significant numbers of family members decide that they do not wish to accept appointment. The Adult Guardian has commented that the complexity of the regime is cited as a common reason. Some service providers have also indicated that this may be the case.

This apparent trend concerns the Public Advocate. As the guardianship regime recognises generally, those close to a particular adult will usually be better placed, given their intimate knowledge of the person concerned, and greater accessibility than a statutory officer to make decisions for their family member. They will usually know the adult well, see them regularly and be able to frequently and informally monitor implementation by service staff.

If complexity is the reason family members decide not to accept appointment, this may suggest that greater support is needed for them throughout the process of assessment, application, hearing and during the currency of appointment to enable them to have confidence they can undertake the tasks required.

It is noted that some services are working closely with families, and anecdotal information suggests that this is reflected in higher numbers of appointments of family member guardians for restrictive practices for adults in those particular services. Department of Communities, Disability, HACC and Community Mental Health Services (Disability Services) advised that it intends to work with disability service providers to support their efforts to engender confidence in family members to take on the role. The Tribunal has prepared a kit for provision to prospective appointees. It is understood that the Adult Guardian has sought funding for a dedicated staff member to support family members appointed as guardian for restrictive practices. Actions to increase support and capacity-building which maximise family member appointments are commended.

As discussed in Section 2.1, the Public Advocate considers that greater positive support for interaction with the guardianship regime is generally necessary for adults with impaired capacity and their informal decision-makers, family members and other members of their support network, lay guardians and administrators (that is, those who are not statutory officers or corporations), statutory health attorneys and lay attorneys for both personal (including health) and financial matters. It is anticipated that this would minimise appointments of statutory officers, as well as recognise the significant role that people close to the adult play in their lives and the reality that they are, in the majority of circumstances, best placed to act as substitute decision-makers for the adults.

Of course, it is acknowledged that there will always be circumstances when the appointment of a statutory officer is the most appropriate course. Inevitably, some family members will prefer to devote

their energies to supporting the adult in ways other than as substitute decision-maker, while others will have demonstrated an inability to perform the role appropriately. There will also be situations where the adult has been abused by the family member/s or others concerned, or, in some adults' circumstances, there will be no supportive family and friends who could be considered for appointment.

For more discussion about the restrictive practices regime, see Section 1.1.

3 The Housing System

Accommodation that is appropriate, secure and affordable is an important issue for everyone, but is an especially critical issue for adults with impaired capacity. Lack of access to accommodation that is safe and appropriate can heighten vulnerability for this cohort, inhibit their personal development and constitute a barrier to social inclusion. Accordingly, accommodation issues have been the subject of this Office's advocacy since establishment, and have featured prominently in each year's Annual Report.

Accommodation issues are diverse in nature and occur across a range of systems. Issues such as the relationship between chronic homelessness and impaired capacity; reforms in the residential services sector; and the policies of the Department of Communities, Housing and Homelessness Services (HHS) are reported on in this Annual Report under *The Housing System*, while accommodation issues also feature significantly in matters reported under other systems.

For example, under *The Disability System*, accommodation issues are dealt with in relation to the Accommodation Support and Respite Service; the Younger People in Residential Aged Care initiative; the situation of adults with intellectual disability inappropriately accommodated at Baillie Henderson Hospital; the Innovative Support and Housing Program; and substitute decision-making.

3.1 Chronic homelessness and impaired capacity

The issue of chronic homelessness and impaired capacity became a focus for this Office in 2007, based on reports from stakeholders in the

homelessness sector that many people who were chronically homeless appeared to have impaired decision-making capacity, and that their impaired capacity was directly related to their entrenchment in homelessness. Anecdotal information suggested that many of this group lived 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. Issues faced by this cohort include:

- transient lifestyles and fleeting, intermittent contact with services;
- a lack of awareness about impaired decision-making capacity among some homelessness service provider staff and professionals;
- basic needs not being met despite frequent interactions with a variety of service delivery systems, including the mental health, criminal justice, emergency services, health and homelessness sectors; and
- services and systems that are uncoordinated and reactive, with the consequence that many of these people fall between the gaps of the mental health, disability support, housing, homelessness and other related systems.

A number of key stakeholders joined together to form the Chronic Homelessness and Impaired Capacity Working Group (the Working Group) in order to address this issue. The members of this collaborative partnership include this Office, researchers at the Griffith University School of Human Services, Micah Projects Incorporated and a number of other non-government providers of homelessness services. The objectives of this Working Group are to investigate the needs and issues of these groups of people more fully and to advocate for appropriate service responses.

The Working Group:

- Organised the *Left Out In The Cold* forum on chronic homelessness and impaired decision-making capacity. The objective of the forum, held in March 2008, was to increase awareness about and explore the complexity of the issues. The Public Advocate's keynote address to the forum emphasised that the current systems and services intended to address homelessness were not responding to the range and complexity of issues experienced by chronically homeless adults with impaired capacity.
- Commenced a research project into chronic homelessness and impaired decision-making capacity. A review of relevant literature indicated that little research has been undertaken into these areas. Given that the perspectives of the Working Group members was based on anecdotal information, it was determined that it was necessary to conduct a formal research project to provide an evidence-base to advocate for the development of policy and programs by government, and ultimately for improved service responses for this cohort (see Section 13.3 for further information about the research project).

In July 2008, this Office provided a response¹⁸³ to the Commonwealth's Green Paper *Which Way Home? A New Approach to Homelessness* (the Green Paper),¹⁸⁴ recommending systems changes to protect homeless people with impaired capacity. The recommendations included:

- the development of a coordinated and flexible system for responding to homelessness;
- the provision of ongoing support for this group once they are housed;
- the establishment of chronic homelessness and impaired capacity as a major research priority; and
- adequate resourcing of the overall system and its frontline services.

The Commonwealth's White Paper *The Road Home, A National Approach to Reducing Homelessness* (the White Paper),¹⁸⁵ was released in September 2008. Although the issue of impaired decision-making capacity was not addressed specifically, the White Paper outlines a broad range of initiatives. There is also potential for research into the issues for socially excluded groups with multiple and complex problems and people with disability, especially mental health issues.

This Office presented a paper, *Left Out in the Cold: Promoting and Protecting the Rights of Adults with Impaired Decision-Making Capacity who are Chronically Homeless*, at the Australian Guardianship and Administration Council 2009 National Conference.¹⁸⁶ The presentation identified that the systems and services intended to address homelessness are not based on an understanding of, and are not able to respond to, the range and complexity of issues raised by this heterogeneous group. As a result, systems and services struggle,

183 Office of the Public Advocate, *Submission to the Commonwealth Government in response to the Green Paper Which Way Home? A New approach to homelessness* (July 2008) <www.publicadvocate.qld.gov.au> at 11 October 2009.

184 Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs, *Which Way Home? A New Approach to Homelessness* (May 2008) <http://www.fahcsia.gov.au/sa/housing/progserv/homelessness/Documents/homelessness_report/default.htm> at 11 October 2009.

185 Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs, *The Road Home, A National Approach to Reducing Homelessness* (December 2008) <<http://www.fahcsia.gov.au/sa/housing/progserv/homelessness/whitepaper/Documents/default.htm>> at 11 October 2009.

186 Office of the Public Advocate, *Left Out in the Cold: Promoting and Protecting the Rights of Adults with Impaired Decision-Making Capacity who are Chronically Homeless* (2009) <http://www.justice.qld.gov.au/files/Guardianship/Left_out_in_the_cold.pdf> at 11 October 2009.

and often fail to meet their needs and chronically homeless individuals who have conditions which could result in impaired decision-making capacity are falling through the gaps of an uncoordinated and under-resourced complex of systems.

Key issues that need to be addressed in relation to the gaps and failures of existing systems were identified as:

- the widespread prejudices and cultural misconceptions about chronic homelessness, which impact significantly on society's approach to, and ability to address the needs of this cohort;
- the inadequate resourcing of existing services to meet the demands of this group;
- the lack of cohesive resource coordination, with uncoordinated interventions across the health, housing and social services sectors, resulting in a significant service failure for homeless people with high and complex needs; and
- the lack of a commitment within policy responses to end homelessness for chronically homeless adults with impaired capacity.

This Office has continued to advocate on this issue with the Commonwealth Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA) and the Department of Communities, Housing and Homelessness Services (HHS). Both agencies have expressed interest in this issue.

FaHCSIA informed this Office that although people with impaired decision-making capacity are not specifically referred to in the White Paper, the issue of chronic homelessness and people with impaired decision-making capacity is receiving priority as part of the national effort to reduce homelessness. FaHCSIA has stated that the White Paper outlines a

comprehensive suite of initiatives that are expected to address the recommendations put forward in this Office's submission to the Green Paper, specifically:

- *The development of a coordinated and flexible system for responding to homelessness*

The White Paper commits governments to creating a more connected service system. The evidence is clear that to end homelessness, accommodation providers need to work with health, employment and community services to support people to secure a house and keep it for the long term. The White Paper calls for services that break the cycle of homelessness. Too many people cycle through hospitals, shelters and police stations without obtaining assistance to embark on a path to long term stable housing. Improving the response of mainstream services and a 'no wrong doors' philosophy are key aims of the White Paper.

The State and Territory Governments have commenced the roll out of additional services outlined in their Homeless Implementation Plans under the National Partnership Agreement on Homelessness. In Queensland, \$284.6 million in Commonwealth and State funds are available to 2012-2013, of which the Commonwealth has provided \$135.126 million and the Queensland Government \$149.52 million.

- *The provision of ongoing support for this group once they are housed*

Breaking the cycle of homelessness is a major aim of the White Paper. This will be achieved by assisting people who become homeless to move quickly through the crisis system and into stable housing with the support they need to end their homelessness. The White Paper recognises that to

break the cycle, some people who are homeless will need long-term support including specialist models of supported accommodation. The Queensland Implementation Plan has several initiatives that will provide the extra support people need after they are housed.

- *The establishment of chronic homelessness and impaired capacity as a major research priority*

The Federal Minister for Housing announced a new National Homelessness Research Strategy on 5 August 2009. The strategy recognises that research into homelessness is complex due to the nature of the problems and individual circumstances affecting people who are homeless. Among a broad range of target groups for research, socially excluded groups with multiple and complex problems and people with a disability (especially mental health issues) have been prioritised. The Government will be commissioning research that explores issues around service systems and outcomes for these groups.

- *Adequate resourcing of the overall system and its frontline services*

In the White Paper, the Australian Government set a goal to halve homelessness by 2020. In order to achieve this goal, an additional \$800 million was committed for new services to reduce homelessness. As a result, States and Territories have substantial new resources to ensure better resourcing for the whole system that supports homeless people.

HHS informed this Office that:

- Queensland's homelessness strategies include a balance of investment between responding to crisis and chronic homelessness, prevention, early intervention, and better managed transition from health care and statutory services.

- A number of new models are being introduced under the National Partnership Agreement on Homelessness that can assist the target group, such as the principles of Housing First¹⁸⁷ and the provision of support through programs such as Street to Home,¹⁸⁸ Supportive Housing¹⁸⁹ and Home Stay Support Services.¹⁹⁰
- Although impaired decision-making capacity was not explicitly addressed, the White Paper did address many of the systems issues raised in the *Left Out in the Cold* paper and also prominently addressed mental health issues.
- Queensland's Implementation Plan under the National Partnership Agreement on Homelessness includes a number of street to home initiatives targeting people sleeping rough, including the chronically homelessness. For example, the Brisbane Supportive Housing initiative (with features of Common Ground)¹⁹¹ targets chronically

¹⁸⁷ Housing First is a relatively recent innovation in human service programs and in assisting homeless people. In Queensland's case, the principle of Housing First is to offer permanent long term accommodation to homeless people immediately. It differs from a crisis response as people have access to permanent housing, rather than moving homeless individuals through different levels of housing, (for example, from the streets to a crisis shelter, and from a crisis shelter to a transitional housing program, and from there to long term accommodation). Ongoing support complements the housing first model but is also provided in other initiatives.

¹⁸⁸ Street to Home: Assertive Outreach teams will support people living on the streets to move into housing, with the aim of ending their homelessness permanently. The teams will provide people with the support they need until they are ready to move into permanent accommodation and intensive support to resettle.

¹⁸⁹ Supportive Housing: A Common Ground style facility will be developed in inner Brisbane to provide affordable housing with on-site social services that promote health and economic independence for a range of people who are homeless and those earning low incomes.

¹⁹⁰ Home Stay Support Services will assist people at risk of becoming homeless to maintain independent accommodation by providing support to address social and financial issues putting their tenancies at risk. Services will include early intervention and post crisis support.

¹⁹¹ The Australian Government is providing \$40 million to fund a supportive housing project in Brisbane for people who are homeless or on low incomes. The 146 unit development is based on the Common Ground model in New York. Refer to <http://www.alp.org.au/media/0809/mshou210.php> at 12 October 2009.

homeless people and will provide permanent housing with ongoing support.

- Queensland's Implementation Plan includes a number of strategies to improve links with mainstream services and to enhance local service system coordination and community planning.
- The National Partnership Agreement on Homelessness includes targets for 2020 to reduce overall homelessness by 50 percent and to offer accommodation to all people sleeping rough (which would include many chronically homeless people).

This Office acknowledges and commends the initiatives of both FaHCSIA and HHS in addressing homelessness, and recognises that the approaches detailed above by both the Commonwealth and State Governments may benefit adults with impaired decision-making capacity.

However, until the issue of impaired capacity is included specifically on the policy agenda, this Office is concerned that the provision and ongoing development of homelessness services and facilities will fail to adequately and appropriately meet the needs of chronically homeless people with impaired capacity.

This Office looks forward to an ongoing dialogue with FaHCSIA and HHS to address this issue at a policy and program level in government, and will continue to monitor the development and implementation of programs and services for homeless people.

3.2 Special Disability Trusts

In October 2008, an issue was raised with this Office in relation to changes to the eligibility criteria for housing assistance under the Department of

Housing (now the Department of Communities, Housing and Homelessness Services (HHS)) Client Intake and Assessment Process (CIAP).

The concern raised was that the eligibility criteria for the Asset Test (liquid assets) under the CIAP (in relation to the liquid assets limit) is disadvantageous in planning for the future of a family member with disability.

For many families who have a family member with disability, planning for the future of that family member is an important factor in achieving their long-term wellbeing and quality of life. This involves planning for their financial security, their support networks and their accommodation arrangements. Access to secure, appropriate and affordable housing is a critical issue. Applying for and securing public housing is often the most viable way to achieve it.

Under the CIAP, a single-person household with more than \$74,062.50 in liquid assets is not eligible for public housing assistance. Applicants with disabilities whose family members have contributed financial resources in excess of \$74,062.50 for their future care appear to be disadvantaged.

This approach is incongruent with the initiatives of the Australian Government and the Department of Communities, Disability, HACC and Community Mental Health Services (Disability Services), which encourage families to plan for the future of the person with a disability.

Australian taxation law allows for the establishment of Special Disability Trusts solely for succession planning by parents and immediate family members for the future care and accommodation needs of a person with a severe disability. An assets test assessment exemption currently up to \$551,750

and indexed each year is available to the principal beneficiary. This exemption encourages families to take responsibility for future planning. It reduces the likely dependence of people with disability on government funding for support.

At the state level, Disability Services funds several initiatives aimed at encouraging and supporting families to plan for the future of their family members with a disability, including Mamre Association Inc.'s *Pave the Way* project; Parent to Parent's *Succession Planning*; and the Community Resource Centre's *Succession Project*.

This Office raised with HHS the apparent incongruence between the initiatives of the Australian Government and Queensland's Disability Services, and the HHS eligibility criteria for public housing.

It was also noted that funds in a Special Disability Trust are to provide for the accommodation as well as the care needs of the principal beneficiary. However, it is clear that a resource of \$74,062.50 is inadequate to meet the long-term care needs of a person with disability, let alone their accommodation needs. Indeed, arguably for many people with disability, \$551,750 may not be sufficient to provide for long-term care and accommodation needs.

This Office urged the HHS to consider the issues raised and the benefits of encouraging and supporting families to plan for the future of their family members with disability in the context of the current eligibility criteria for public housing.

HHS have advised this Office that they recognise the purpose of a Special Disability Trust is to enable families of people with disabilities to undertake succession planning by establishing a trust to provide

for the future accommodation and support costs of their family members.

HHS has introduced an exemption to the Assets Test (liquid assets) eligibility criteria in cases where an applicant for social housing assistance is the sole beneficiary of a Special Disability Trust.

In line with the Commonwealth exemption, HHS's exemption excludes the value of liquid assets held in a Special Disability Trust up to the indexed amount (currently \$551,750 and indexed each year).¹⁹²

Where the value of the Special Disability Trust is over the current indexed limit, any excess is included in the assessment of liquid assets, and any property assets held in the Special Disability Trust are considered in the assessment of property assets under the Assets Test (property ownership component).¹⁹³

This Office welcomes HHS's introduction of an exemption to the Assets Test (liquid assets) eligibility criteria.

3.3 Appropriateness of current housing

The Department of Communities, Housing and Homelessness Services (HHS) has made changes to the eligibility criteria for housing assistance under the Client Intake and Assessment Process (CIAP) that has been developed as part of the new One Social Housing System policy.

This Office reviewed the revised eligibility for housing assistance documentation, and identified

¹⁹² See <<http://www.fahcsia.gov.au/sa/carers/progserv/pages/specialdisabilitytrusts.aspx>> at 30 September 2009.

¹⁹³ Ibid.

a concern in relation to the eligibility criterion regarding Appropriateness of current housing . Under the criterion a person with disability living at home with their family may be deemed to be appropriately housed and therefore not eligible for social housing. This policy position constitutes an impediment to the aspirations and efforts of families to plan for the future of their family member with a disability. To establish their family member in secure, appropriate and affordable housing, to stabilise their living arrangements and to assist their family member to establish community connections and embeddedness, families need to plan ahead, as these things take time. It cannot be successfully achieved in the short term; nor should it be something that only becomes possible when the family's situation has become untenable, or when there is a crisis, such as the death of a parent/s.

This Office has received reports that families who have a family member with disability living with them have been advised by HHS that the applications for housing assistance for their family member have been cancelled as they have been deemed to be appropriately housed. While this Office accepts that HHS must have policies and eligibility criteria that ensure that those most in need of housing assistance have access to the limited supply of social housing, an eligibility criterion that excludes applicants with disabilities whose families are actively planning for the future of their disabled family member is counter-productive, and constitutes short-sighted and inappropriate implementation of policy.

This Office raised these concerns with HHS and urged that this criterion be amended to facilitate succession planning for adults with disability.

Concerns were also raised regarding the HHS Form 7 *Application for Housing Assistance*.

The current wording of the form may convey an impression that unless an applicant is in an emergency situation or has funding for support, there is little prospect of being deemed eligible for social housing. This may discourage families from assisting their family member with a disability to apply for public housing. This Office urged HHS to review and amend the form to ensure that applicants, or their family members, are not discouraged from applying on the basis of perceptions they will not be deemed eligible.

Reports have also been received by this Office that the criterion has been used to forestall applications for housing assistance for other applicants with disability. For example, a person with disability living in a large group home setting seeking to move to a smaller house shared by fewer people was advised he was not considered to be eligible as he was appropriately housed in his current situation. This outcome is either indicative of an inappropriate policy, or inappropriate policy implementation at a service delivery level.

This Office urged HHS to review and amend the Appropriateness of current housing criterion so that it does not exclude people with disability living in the family home or in group home situations from being eligible for housing assistance. The examples outlined above indicate that there needs to be greater policy and procedural clarity to provide service delivery staff with adequate guidance in relation to making decisions about appropriateness of current housing .

HHS has informed this Office that:

- The Appropriateness of current housing eligibility criterion has been developed to assess whether an applicant has a current housing need. Through the Client Intake and Assessment Process (CIAP), people with a disability living with their parents who want to establish independent living arrangements may still be assessed as being appropriately housed.
- The implementation of the policy allows for an assessment based on a known future event if that event is to occur within the next 12 months. Where it is in HHS's interests to identify the future need as early as possible to ensure that the most appropriate form of housing is provided (e.g. where a specific form of accommodation needs to be provided; or a housing allocation needs to coincide with the availability of a support package), the known future event may occur beyond the 12 month period.
- To provide greater clarification of this issue, HHS is reviewing eligibility criteria to include a response for succession planning, to ensure that people with a disability are not disadvantaged. This change would occur within the Formation of new households criterion.
- People with a disability living in a shared group home setting wishing to move into another arrangement are eligible to register for social housing if they meet the eligibility criteria for the Formation of new households. Eligibility is based on the person being able to verify that they have an approved funding package for support from the Department of Communities, Disability, Home and Community Care and Community Mental Health Services (Disability Services) and that they have a need to establish alternative housing.

This ensures that the person is able to move into alternative housing and will be supported within their new accommodation.

This Office welcomes the commitment by HHS to review the eligibility criteria, and to include a response for succession planning so that people with disability are not disadvantaged. This Office looks forward to contributing to the review.

Further, this Office is interested to consider the grounds on which decisions are made by HHS staff regarding the needs of a person in a shared housing situation to establish alternative housing. While recognising the need for a policy framework to allow discretion, sufficient policy and procedural guidance needs to be provided to ensure appropriate and consistent decision-making.



Principal Research Officer Marcus Richards.

3.4 Coronial recommendations regarding Level 3 residential services

The conduct of residential services (hostels and boarding houses) is in part regulated under the *Residential Services (Accreditation) Act 2002* (Qld) (the Act) and the *Residential Services (Accreditation) Regulation 2002* (Qld) (the Regulation). Level 3 residential services provide personal care services in addition to accommodation and (most often) food services.

Residential services are private sector enterprises, commercially driven and operated to provide a profit to service providers. In contrast to the broader government or non-government human services sector, private residential services do not receive government funding. Their income to fund their operation derives from residents' income. For a significant majority of residents Centrelink benefits are their only source of income.

Following the death of a resident at a Level 3 residential service in January 2007, a coronial inquest was conducted. The Coroner conducted hearings in 2008, and delivered her findings in May 2009.¹⁹⁴

The Coroner made recommendations in relation to a range of issues, several of which require careful consideration. These include recommendations that:

- Consideration be given to a requirement, depending on the size of the facility and type of residents, that a registered nurse be employed.
- The provisions concerning the conduct of Level 3 residential services should include requirements

regarding the storage and distribution of medication.

- Emergency phone and/or panic/alert buttons be installed.

Issues that need to be taken into account when considering these recommendations include:

- A requirement that a registered nurse be employed would impose a significant financial obligation on services operating as commercial enterprises, and may result in some service providers choosing to cease operations. This would likely result in vulnerable people who already live in tertiary homelessness, many of whom require support with medications, becoming primary or secondary homeless.¹⁹⁵ This in turn would place further pressure on the public housing sector and the mental health and/or disability services sectors.
- In relation to medication management, section 7 of the Regulation states:

If residents ask for support to manage their medication, help is given in accordance with medical directions.

That is, the obligations on a service provider providing this service are limited under the current regulatory regime. There is currently no requirement for medical expertise. If the Regulation were amended to include a requirement for Level 3 residential services to provide medication management involving medical responsibilities, this would significantly

¹⁹⁴ Queensland Coroners Court, *Inquest into the death Raleigh Hoy* (5 May 2009).

¹⁹⁵ The experience of homelessness falls into three broad categories:

- Primary homelessness - sleeping rough (eg: in parks, under bridges, in cars);
- Secondary homelessness - temporary accommodation, such as in a crisis service or staying with friends or relatives; and
- Tertiary homelessness - boarding houses or caravan parks with no secure lease, and no private facilities, such as a bathroom.

increase costs and may, as an unintended consequence, threaten the financial viability of the services.

Further, service providers are not required to provide the full range of personal care services as set out under the Regulation, and can choose not to offer medication management as part of their service. This may occur if service providers form the view that providing assistance with medication management may increase their costs and/or expose them to higher level legal risk. This outcome would be detrimental to those residents who benefit from the level of support currently provided in Level 3 residential services, for whom current arrangements are adequate.

Alternatively, service providers may evict residents perceived as having medication management needs or may choose not to provide accommodation to such residents.

- The installation of an emergency phone and/or panic/alert buttons would be more appropriate in a residential care facility rather than a private residential service. Further, installation of such phones/buttons would incur significant costs, and may constitute a challenge in relation to the financial viability of the industry.

The intended purpose of residential services must be considered. While Level 3 residential services provide personal care services, the extent of this personal care, as prescribed under the Regulation, is limited. That is, Level 3 residential services were not intended to provide a level of personal care that would be expected in a residential aged care facility, for example.

Many residents in Level 3 residential services may have care needs which would be more appropriately met in another type of facility or service. However, many reside in a Level 3 residential service because they cannot find a placement in another service or facility or do not have a disability support package. There is significant unmet need for support and accommodation in the disability sector. The Department of Communities, Disability, Home and Community Care and Community Mental Health Services (Disability Services) provides support within the constraints of existing limited resources, with the consequence that many people who have needs that would benefit from disability support, and who are eligible for support, receive no funding.

While upgrading the level of personal care services in Level 3 residential services, as recommended by the Coroner, is an option, such a move could have unintended negative outcomes. It would increase costs and decrease the viability of this industry, with the consequence that Level 3 service providers could cease providing Level 3 services, or withdraw from the industry entirely, thereby reducing the number of Level 3 services operating. Also, it may discourage potential service providers from entering the industry.

It may be more appropriate to increase the capacity of supported accommodation options in the disability sector, in the residential aged care sector for those residents who are over 65 years of age, or to develop an alternative supported accommodation model to respond to this range of need.

The Public Advocate urged the Minister for Tourism and Fair Trading to take these matters into consideration when reviewing the Coroner's recommendations.

3.5 Machinery of Government changes

Following the State election in March 2009, the Hon. Premier of Queensland announced significant Machinery of Government changes, which included the abolishing and restructuring of government departments to create 13 super departments.¹⁹⁶

The Department of Communities was expanded to encompass departments including the former Departments of Child Safety, Housing, and Communities; and Disability Services Queensland and Sport and Recreation. Functions and services performed and provided by the former Department of Housing are now the responsibility of the Department of Communities.

For further discussion about the Machinery of Government changes, see Section 1.18.

¹⁹⁶ Premier and Minister for Arts the Hon. Anna Bligh, Bligh reforms continue with public service restructure (Media Release, 26 March 2009) <www.cabinet.qld.gov.au> at 22 September 2009.

4 The Mental Health System

A reform process across the national mental health sector over recent years is the result of high-level political commitment to address systemic failures, a heightened public awareness of mental health issues, and a significant increase in Commonwealth and State funding.

In Queensland, the *Queensland Plan for Mental Health 2007-2017* (QPMH) is providing a framework for broad systemic reform. This includes the development and implementation of a wide range of clinical and non-clinical services.

Mental health issues have implications across a range of systems. For example, a significant number of prisoners in correctional facilities have a mental illness, and the role of forensic mental health services in providing support to these prisoners is significant. Substitute decision-making for health care is also an issue in relation to mental health, and has implications in terms of the role played by mental health professionals. Mental health issues are also significant for the Queensland Police Service, who are required to respond to situations involving people experiencing an acute mental health crisis.

The reforms that are occurring across a range of systems to identify and better respond to people with mental health issues or psychiatric disability are encouraging.

4.1 Queensland Plan for Mental Health 2007-2017

The *Queensland Plan for Mental Health 2007-2017* (QPMH) provides a 10 year framework for reform and growth of mental health services in Queensland. It identifies five priority areas for action and service

development needed to improve access to quality mental health care. These are:

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

The QPMH provides a guide to investment in and reform of mental health services across government and with key government partners including the non-government and community sectors.

In last year's Annual Report,¹⁹⁷ this Office commented that considerable resources and concerted effort would be required to implement the QPMH and encouraged the Queensland Government to ensure that sufficient resources were allocated for the implementation of the QPMH.

This Office acknowledges that progress has since been made across all five priority areas of the QPMH.

\$617.4 million has been provided by the Queensland Government to implement the QPMH over five years. This funding is in addition to the Queensland Government's budget for government departments and non-government organisations for the provision of services for people with mental illness. A significant proportion of the investment in the QPMH has been expanding community-based mental health services in both public mental health services that provide clinical services and non-government sectors including the provision of non-clinical services.

¹⁹⁷ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 54.

The Community Mental Health Branch (CMHB) of the Department of Communities, Disability, HACC and Community Mental Health Services is, under the QPMH, developing services and programs in the non-clinical community mental health sector. Developments in this sector are important in the endeavour to achieve an effective, comprehensive and balanced mental health system. Non-clinical community-based supports and services have an important role in minimising or preventing the development of more serious mental illnesses that require a person to be hospitalised for treatment, and in assisting people in their recovery from mental illness when they leave hospital.

While some of these services are still in the pilot program stage and/or are limited in geographical coverage, they are positive indications of constructive reform. Establishment of a diverse range of non-clinical community mental health programs and services across the State will contribute to a more effective, comprehensive and balanced mental health system.

This Office will continue to monitor implementation of the QPMH.

Advocacy for people with mental illness

In last year's Annual Report,¹⁹⁸ the Public Advocate raised the issue of the need for additional independent, individual advocacy for people with mental illness or psychiatric disability. This matter was not addressed in the *Queensland Plan for Mental Health 2007-2017*.

It was recognised that existing non-government individual advocacy agencies for people with

disability undertake advocacy for people with mental illness. However, under the current funding arrangements this sector cannot meet the existing need. Increased access to independent individual advocacy for people with mental illness or psychiatric disability could be achieved through providing increased resources to the existing advocacy agencies, or through the development of additional advocacy organisations.

While consumer, carer and advisory mechanisms within the mental health sector have important roles to play, individual advocacy that is independent from and external to mental health service providers offers important opportunities for the promotion and protection of the interests and rights of adults with impaired capacity, and minimises potential conflicts of interest.

The Public Advocate urges the Department of Health and the Department of Communities to consider providing additional funding specifically for the development and provision of independent, individual advocacy in the mental health sector.

4.2 Prison Mental Health Service

The Prison Mental Health Service (PMHS) is operated by Queensland Health (QH) as part of the State's forensic mental health system. Its function is to provide forensic mental health services for prisoners with a mental illness. It aims to provide these services in a timely and responsive manner.¹⁹⁹

The PMHS provides services to approximately 1,200 prisoners across eight correctional facilities at any time. However, annually it provides services to a significantly higher number of prisoners, as there are

¹⁹⁸ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 55.

¹⁹⁹ Queensland Health, *Mental Health Services* <<http://www.health.qld.gov.au/rbwh/services/mh-services.asp>> at 13 October 2009.

many offenders received and released every week. Anecdotal information suggests the prevalence of mental illnesses within the prisoner population are:

- psychotic illness 10 to 15 percent;²⁰⁰
- depressive illness 30 percent; and
- anxiety disorder 25 to 30 percent.

Reports suggest that most of these prisoners have co-existing substance abuse psychological/developmental disorders, or intellectual disability.

Through intervention in a coronial inquest this Office explored systemic issues relating to the PMHS (see Section 11.3).

4.2.1 Resourcing issues

It has been estimated by some sources that despite a recent funding increase through budget allocations, the PMHS currently remains underfunded to meet the demand for mental health services in the prison population by 50 percent. The PMHS employs three and a half full-time equivalent psychiatrists and a full-time psychiatric registrar. There appears to be conflicting information regarding how often and what format patient sessions take. It is understood that short monthly patient sessions are conducted face to face in South-East Queensland. In some regional areas, the PMHS advised that weekly sessions are provided via video link. The PMHS also advised that these are supplemented by fortnightly face-to-face sessions, however other reports received by this Office suggest face-to-face sessions may have a frequency of up to three months.

Because of resource limitations, compounded by Queensland Corrective Services (QCS) operational practices such as muster and lockdowns, sessions in some prisons are restricted to approximately 15 minutes for each prisoner. By comparison, there are some views within the psychiatric profession that an assessment of a person who has complex mental health issues or co-morbidity can require up to four hours. Another comparative view is that assessment of a prisoner via video link is inadequate, for reasons including:

- a psychiatrist is unable to access the prisoner's entire medical record, which remains with the prisoner;
- personal contact leads to more accurate diagnosis of a person, as there is a greater likelihood a psychiatrist will miss some subtle movements or behaviour when making observations through videoconferencing;
- prisoners are less likely to disclose relevant information in the presence of a correctional officer, who might be attending the video link for security purposes in the absence of the physical presence of the psychiatrist; and
- there is limited ability to talk to officers or staff, who may have information which is relevant to the treatment of the prisoner.

The Public Advocate made submissions to a coronial inquest recommending that government increase funding to the PMHS to ensure prisoners can receive mental health services to an equivalent level as community members (see Section 11.3).

²⁰⁰ Other anecdotal information suggests the prevalence of psychotic mental illnesses within the patient group may be as high as 30 percent.

4.2.2 PMHS support of prisoners without mental illness

Information suggests that prisoners with impaired capacity who do not have a mental illness (for example, those with an intellectual disability, acquired brain injury or dementia) also gravitate to the PMHS in the absence of other support options available to meet their needs. Again, short appointments are provided. These prisoners may need ongoing disability support. In the absence of disability support services in prison, the PMHS provides nominal support to these prisoners. Little statistical information is available on this issue as QCS and the PMHS do not collect data on how many prisoners have one or more of these conditions.

Although the PMHS is able to provide mental health services for prisoners who have a dual diagnosis, it cannot provide disability support to people with a disability who need assistance with day-to-day living; engaging with programs or other people; health management; participating in prison life; or exercising their rights. The result is that limited PMHS services are further stretched, while prisoners with a non-mental health based impairment receive some attention, but little substantive support.

The Public Advocate submitted that the Coroner recommend provision of disability support to prisoners with a cognitive impairment. Subsequently, QCS has advised that a specialised disability support unit will be developed within the Woodford Correctional Centre (see Section 7.1.2).

Some positive developments have occurred recently which may lead to a change in arrangements. For example, a screening tool is being finalised by the PMHS with the support of QCS to identify prisoners with an intellectual disability or cognitive impairment.

These agencies anticipate that by determining the prevalence of offenders with an intellectual disability, greater understanding will guide the planning of future service provision (see Section 7.2.1).

4.2.3 Information sharing with QCS

QCS Officers who directly manage offenders have the opportunity to make frequent and extended observations of prisoners. Although these observations may include the possible symptoms of mental illness, such as hallucinations, delusions or self-harm, currently no systematic mechanism exists within QCS for regular information provision to a prisoner's psychiatrist, other than through health centre staff. This is problematic. If a prisoner does not display these symptoms during a brief psychiatric session, it may lead to increased risk of misdiagnosis or insufficient/inappropriate treatment.

The Public Advocate made a submission to a coronial inquest (see Section 11.3) recommending that PMHS and QCS develop a Memorandum of Understanding or protocol between the two agencies to ensure relevant information about a prisoner is referred to the PMHS. QCS and Queensland Health (QH) have since advised that it is now intended to plan and develop a Memorandum of Understanding between QCS and QH regarding information provision.

4.2.4 Transfers for assessment

In the 2006-2007 Annual Report,²⁰¹ this Office reported on difficulties in effecting transfers of prisoners to authorised mental health services. Some psychiatrists continue to report long delays

²⁰¹ Office of the Public Advocate, *Annual Report 2006–2007* (2007) 57 <http://www.justice.qld.gov.au/files/Guardianship/Public_Advocate_annual_report_06-07.pdf> at 16 September 2009.

in admission of prisoners who require involuntary assessment and treatment. QCS has also advised that it is sometimes required to manage offenders assessed as requiring admission to an authorised mental health service for extended periods of time due to a lack of bed availability.

This Office has urged the Coroner to make recommendations that Government increase the capacity of mental health services to accommodate people with mental health issues who require admission from prison. The Public Advocate also recommended the Director of Mental Health develop and implement procedures to ensure prisoners are not disadvantaged by comparison to community members when accessing inpatient mental health assessment and treatment.

4.3 Capacity and decision-making issues

The Office of the Public Advocate Annual Reports 2005-2006²⁰² and 2006-2007²⁰³ explored issues regarding decision-making for health care, and in particular, the interrelationship between the *Mental Health Act 2000* (Qld) and the *Guardianship and Administration Act 2000* (Qld). The common law provides for the fundamental right of adults with capacity to refuse or consent to health care. In limited circumstances prescribed by the *Mental Health Act 2000* (Qld), assessment and treatment for a mental illness may be given without consent. Under the guardianship regime, it is an offence to give health care to a person with impaired decision-making capacity for health matters unless it is authorised to

be given without consent; consent is given under the guardianship regime or other relevant legislation; or it is authorised by an order of the Supreme Court of Queensland.²⁰⁴

Many persons receiving involuntary mental health treatment will have capacity to make decisions about health care which may be recommended. For people with impaired capacity for health matters as a result of mental health issues, most health care, other than treatment which may be given for a mental illness without consent, requires the consent of a substitute decision-maker under the guardianship regime.

The Public Advocate has expressed concerns that there is confusion and uncertainty about the extent of the treatment which may be given without consent to patients who are subject to involuntary treatment orders and forensic orders under the *Mental Health Act 2000* (Qld).

It is understood that the Director of Mental Health is making arrangements for the development of a training package for mental health professionals that considers:

- the practical application of determining an individual's capacity to consent to assessment and treatment for mental illness as well as health care generally; and
- the substituted decision-making regime provided by the guardianship regime for individuals who do not have capacity to make the health decisions concerned.

The Public Advocate commends this initiative which it is hoped will assist to protect the fundamental rights of persons with mental health issues.

202 Office of the Public Advocate, *Annual Report 2005-2006* (2006) 14-15 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0506.pdf>> at 7 October 2009.

203 Office of the Public Advocate, *Annual Report 2006-2007* (2007) 29 <http://www.justice.qld.gov.au/files/Guardianship/Public_Advocate_annual_report_06-07.pdf> at 7 October 2009.

204 *Guardianship and Administration Act 2000* (Qld) s79.

4.4 Revised National Standards

The National Standards for Mental Health Services²⁰⁵ provide a framework for mental health service delivery. Those standards have been reviewed by the Australian Council on Healthcare Standards on behalf of the Commonwealth Department of Health and Ageing. The revision, which commenced in 2006, is intended to reflect developments in mental health service provision over the intervening period. Several consultation processes have been undertaken in a phased manner. The third and final phase involved pilot surveys which resulted in the inclusion of a new Standard entitled *Supporting Recovery*.

Recovery has emerged as a key concept in the mental health service delivery sector as a result of increasing consumer involvement and the mental health rehabilitation movement. Recovery has various meanings. It was defined in the National Mental Health Plan 2003-2008 as:

*A deeply personal, unique process of changing one's attitudes, feelings, goals, skills and/or roles. It is a way of living a satisfying, hopeful and contributing life. Recovery involves the development of a new meaning and purpose in one's life as one grows beyond the catastrophic effects of psychiatric disability.*²⁰⁶

The Public Advocate participated in consultation about the draft Recovery Standard. The Standard aims to ensure that mental health services aid the journey of recovery and assist consumers to attain

wellbeing, not just treat their illness. It appears that this is to be achieved primarily through providing consumers with access or referral to a range of support programs. Guidelines forming part of the Standard indicate the types of practices envisaged in mental health services and the types of information to be provided to consumers and their carers.

The Public Advocate endorsed the inclusion of the Recovery Standard as an important acknowledgement of the need to prepare people with mental health issues for their life in the community, and the role that mental health services play in the preparation.

It was noted that many people with mental health issues will not be affected by impaired decision-making capacity, either during or after mental health treatment. However, for some people, impaired capacity will be a feature of an ongoing psychiatric disability.

The following comments by the Public Advocate were directed to the needs of those people who experience impairment of their decision-making capacity through ongoing psychiatric disability:

- This group is arguably the most difficult to support/encourage/facilitate recovery for. It is now well-accepted that people with mental health issues are over-represented amongst the homeless population²⁰⁷ and in the criminal justice system.²⁰⁸

²⁰⁵ Australian Health Ministers Advisory Council's National Mental Health Working Group, *National Standards for Mental Health Services* (1996) <[http://www.health.gov.au/internet/main/Publishing.nsf/Content/F795ACEC60FEF91DCA25723D007F9A8C/\\$File/servstds.pdf](http://www.health.gov.au/internet/main/Publishing.nsf/Content/F795ACEC60FEF91DCA25723D007F9A8C/$File/servstds.pdf)> at 13 October 2009.

²⁰⁶ *National Mental Health Plan 2003-2008*, 11 <<http://www.health.gov.au/internet/main/publishing.nsf/Content/mental-pubs-n-plan03>> at 29 July 2009.

²⁰⁷ For example, see Maree Teesson, Tracey Hodder & Neil Buhrich, *Psychiatric Disorders in Homeless Men and Women in Inner Sydney* (2004) 38(3) *Australian and New Zealand Journal of Psychiatry* 162-8.

²⁰⁸ For example, see Phillip French, *Disabled Justice: People with Disability in the Criminal Justice System* (2007) 25-28 <http://www.qai.org.au/documents/doc_199.pdf> at 24 February 2009.

- Some of the individuals concerned may cycle between homelessness and mental health services, and/or the criminal justice and corrective services systems and mental health services.
- The Recovery Standard places significant emphasis upon providing access or referrals to support programs. Although this is useful, it does rely upon the person with mental health issues to be sufficiently well and organised to make contacts with appropriate agencies themselves, or having others in their lives who can assist them to do so.
- For people with significant psychiatric disability as a result of their mental health issues, this may be inadequate to encourage/support recovery and appropriate support should be given in these circumstances.
- Substitute decision-makers for the adults concerned are not referred to in the Recovery Standard. It would be inappropriate not to provide a guardian or enduring attorney appointed to make personal decisions with relevant information and referrals.
- Each mental health service should ensure that appropriate decision-making processes are followed.

4.5 Mental Health Intervention Project

The management of acute mental health crises by police officers has been of interest to the Office of the Public Advocate for some time. In 2004-2005, this Office supported the Queensland Government's decision to fund a Mental Health Crisis Intervention

Project (the Project).²⁰⁹ In 2005, this Office produced a discussion paper, *Preserving life and dignity in distress: Responding to critical mental health incidents*,²¹⁰ as a contribution to work already undertaken by the Queensland Police Service (QPS) and Queensland Health (QH).

In some cases, acute mental health incidents have resulted in fatal police shootings of the person in crisis. Between 2006 and 2008, the Public Advocate intervened in four coronial inquests involving the shooting deaths of people during an acute mental health crisis.²¹¹ This Office made recommendations to the Coroner in the interests of people who may face similar circumstances.

Implementation of the Project began in 2006 to provide a skilled capability for police, paramedics and mental health workers to de-escalate situations involving people with a mental illness.²¹² The project was intended to provide faster, more personalised and localised responses in order to reduce the risk of harm to people with mental health issues and to present a more dignified approach to interacting with people with a mental illness. As a tri-agency partnership between the QPS, QH and the Queensland Ambulance Service, the program requires a high level of inter-agency cooperation to provide effective service delivery.

209 Office of the Public Advocate, *Annual Report 2004-2005* (2005) 17 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0405.pdf>> at 25 September 2009.

210 Office of the Public Advocate, *Preserving life and dignity in distress: Responding to critical mental health incidents* (2005) <http://www.justice.qld.gov.au/files/Guardianship/p4_0305.pdf> at 25 September 2009.

211 Refer to Office of the Public Advocate, *Annual Report 2006-2007* (2007) 73 <http://www.justice.qld.gov.au/files/Guardianship/Public_Advocate_annual_report_06-07.pdf> at 25 September 2009; Office of the Public Advocate, *Annual Report 2007-2008* (2008) 94-95 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 25 September 2009.

212 Queensland Police Service, *Annual Report 2007-2008* (2008) 23 <http://www.police.qld.gov.au/documents/QPS_Annual_Report_07-08.pdf> at 16 March 2009.

The Project was due to be completed in 2009. However, the Office of the Public Advocate understands the program has been integrated as a core business component of the QPS and now has ongoing funding. Police officers now also use the training provided when dealing with people who do not have a mental illness, but where their behaviour suggests the presence of cognitive impairment. The program has been rolled out across the State, with training provided to 6,500 police officers; 1,409 paramedics; and 787 health workers. The QPS intends for all police officers to eventually receive this training. Anecdotal information suggests that police officers are keen to develop strategies which assist them to respond appropriately to vulnerable people in crisis. The Public Advocate commends the ongoing funding and broadening of the work of the Project.

However, some information suggests that the Project may not have been utilised during a recent mental health crisis which led to the deployment of a taser resulting in the death of a person. The Office of the Public Advocate intends to explore possible associated systemic issues (see Section 4.6).

4.6 Fatalities of people in acute mental health crisis and the use of tasers

In previous years, the Office of the Public Advocate had reported on its intervention into four coronial inquests regarding fatal shootings by police officers of people experiencing an acute mental health crisis.²¹³ Last year, this Office reported on the recommendations arising from the inquests. The

Coroner found that had the police officers involved in these incidents had access to a taser it was likely each of the incidents would have been resolved without anyone being killed.²¹⁴ The Coroner also commented on the controversy surrounding the use of tasers in other jurisdictions arising from their implication in numerous deaths.²¹⁵

The Coroner recommended that a Queensland Police Service (QPS) trial of tasers continue and that the evaluation consider international experiences of their use. The Government's response supported the Coroner's recommendation.²¹⁶

The taser trial concluded on 30 June 2008 and the evaluation was released in 2009.²¹⁷ The evaluation concluded that:

- tasers were an important alternative force option for police officers;²¹⁸
- 17 percent of incidents in which a taser was deployed involved a person with a mental illness;²¹⁹ almost all of these people were subsequently the subject of an Emergency Examination Order;²²⁰ and
- two percent of incidents involved a person with a developmental disorder.²²¹

213 Refer to Office of the Public Advocate, *Annual Report 2005-2006* (2006) 35 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0506.pdf>> at 21 September 2009; Office of the Public Advocate, *Annual Report 2006-2007* (2007) 73 <http://www.justice.qld.gov.au/files/Guardianship/Public_Advocate_annual_report_06-07.pdf> at 21 September 2009; Office of the Public Advocate, *Annual Report 2007-2008* (2008) 94 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 21 September 2009.

214 Queensland Coroners Court, *Inquest into the deaths of Thomas Dion Waite, Mieng Huynh, James Henry Jacobs and James Michael Gear* (17 March 2008) 139 <<http://www.courts.qld.gov.au/OSC-Inquest-Waite-and-ORs-20080317.pdf>> at 18 September 2009.

215 Ibid.

216 Queensland Government, *Queensland Government's Response to Coronial Recommendations 2008* (August 2009) 24 <www.justice.qld.gov.au> at 2 October 2009.

217 Queensland Police Service, *Review of the Queensland Police Service Taser Trial* (2009) <<http://www.police.qld.gov.au/Resources/Internet/news%20and%20alerts/campaigns/taser/documents/ReviewoftheQPSTasertrial.pdf>> at 22 October 2009.

218 Ibid, 3.

219 Ibid, 16, 18.

220 *Mental Health Act 2000* (Qld) ch 2, pt 3, div 3.

221 Queensland Police Service, *Review of the Queensland Police Service Taser Trial* (2009) 18 <<http://www.police.qld.gov.au/Resources/Internet/news%20and%20alerts/campaigns/taser/documents/ReviewoftheQPSTasertrial.pdf>> at 22 October 2009.

The evaluation also noted that in the United States, mental illness was a common factor in many fatal outcomes.²²² However, it did not recommend particular practices to reduce the risk of fatalities for people with a mental illness.

After the trial and evaluation, a person with a mental illness died in North Queensland when a taser was deployed during an apparent acute mental health crisis.²²³ In response to the incident, the QPS and the Crime and Misconduct Commission conducted a joint review. It recommended police officers involved in similar incidents obtain the assistance of the Queensland Ambulance Service and discuss options with a mental health professional.²²⁴ The QPS has since suspended the roll out of tasers until the changes recommended by the review are implemented.²²⁵

The Public Advocate has sought information regarding the incident and indicated interest in the coronial inquest into the death of the person in North Queensland. The Public Advocate is interested in considering possible systemic issues and will continue to monitor developments.

222 Ibid, 56; see also Amnesty International, *USA: Amnesty International's continuing concerns about Taser use* Amnesty International (2006) <[http://web.amnesty.org/library/pdf/AMR510302006ENGLISH/\\$File/AMR5103006.pdf](http://web.amnesty.org/library/pdf/AMR510302006ENGLISH/$File/AMR5103006.pdf)> at 21 September 2009.

223 See for example Taser death *Townsville Bulletin* (Townsville) 13 June 2009, 1.

224 Queensland Police Service and the Crime and Misconduct Commission, *Review of Taser Policy, Training, and Monitoring and Review Practices* (2009) 3 <<http://www.cmc.qld.gov.au/data/portal/00000005/content/16225001252029372054.pdf>> at 21 September 2009.

225 ABC News Online, Queensland stalls Taser roll-out <<http://www.abc.net.au/news/stories/2009/09/04/2676235.htm>> at 21 September 2009.

5 The Health System

Access to adequate and appropriate health care is essential for physical wellbeing. Unmet physical health care needs of adults with impaired decision-making capacity have previously been identified by this Office as a major systemic issue. This year's report provides more information about these concerns.

Adults with impaired capacity are a significant proportion of health service users. This Office has noted²²⁶ that:

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

The Australian Government is currently undertaking significant national health reform. 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 process.

5.1 Unmet physical health and dental care needs: Issues Paper

In 2007-2008 this Office published an Issues Paper *In Sickness and in Health: addressing the health care needs of adults with a decision-making disability*²²⁷ (the Issues Paper) which was formally launched in October 2008. The research identified that for many people with severe disabilities, life is characterised by lack of social networks, isolation, poverty and significant unmet needs, including physical health care needs. Dental hygiene is an often overlooked aspect of health care for these adults.

It is recognised that these individuals have poorer access to health care than the general population. These adults, as well as their families and carers, struggle to understand the type of care they need, the range of services that may be available, and how services can best meet their needs. Moreover, many service providers across the medical, allied health and community support systems experience confusion about what they should do.²²⁸

The Issues Paper 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.

²²⁶ Office of the Public Advocate, *In Sickness and in Health: addressing the health care needs of adults with a decision-making disability* (2008) 8 <www.publicadvocate.qld.gov.au> at 10 October 2009.

²²⁷ Office of the Public Advocate, *In Sickness and in Health: addressing the health care needs of adults with a decision-making disability* (2008) <<http://www.publicadvocate.qld.gov.au/papersandarticles>> at 7 October 2009.

²²⁸ Ibid, 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 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. Systems need to ensure that decision-making for health matters within the context of service provision is undertaken by appropriate decision-makers.

Over 450 individuals currently working in a range of health, allied health, disability, education and community sector settings across Australia were targeted for comment and feedback, and to raise awareness and encourage leadership within affected sectors. The Australian and Queensland Governments, national bodies (including the Australian Guardianship and Administration Council) and international bodies (including the International

Guardianship Network) were also offered the opportunity to comment, and to be a part of the leadership and development of solutions.

Throughout 2008-2009 direct representation about these issues has been made to a variety of reviews and other initiatives, including in relation to the:

- *National Health and Hospital Reform Commission.* This Office's submission highlighted the vulnerabilities of adults with impaired decision-making capacity when accessing health care systems, and the need for all stakeholders to work together to address the complex needs of this group²²⁹ (see Section 5.3).
- *National Disability Strategy.* The Public Advocate affirmed the need for Australian and Queensland Governments to develop structures, strategies and systems that fully support social inclusion of people with a disability, particularly those with decision-making disabilities, and that result in the full implementation of the United Nations Convention.²³⁰ Addressing health care needs was urged (see Section 1.7).
- *Draft National Charter of Patient Rights.* In its submission, the Public Advocate stated that people with decision-making disabilities should not be disadvantaged as health service users because of an inability to comply with requirements, and health care providers must take responsibility for providing appropriate and relevant information to health service users with impaired decision-making capacity. Further, the Public Advocate urged a carefully drafted Charter

229 Office of the Public Advocate, *Submission of the Office of the Public Advocate to the National Health and Hospital Reform Commission* (June 2008) <www.publicadvocate.qld.gov.au> at 7 October 2009.

230 Office of the Public Advocate, *Submission of the Office of the Public Advocate in relation to the National Disability Strategy Discussion Paper* (December 2008) <www.publicadvocate.qld.gov.au> at 7 October 2009.

to ensure that it cannot become a basis to deny or delay health care if people with decision-making disabilities are unable to comply with articulated responsibilities²³¹ (see Section 5.5).

- *Good Medical Practice: A Code of Conduct for Doctors in Australia*. The Public Advocate supported the development of a code of professional conduct outlining the standard of ethical and professional conduct expected of doctors in Australia by their professional peers and the community. In particular, this Office supported the development of a code containing standards that promote and protect the rights and meet the health care needs of vulnerable Australians, including adults with decision-making disabilities²³² (see Section 5.9).
- *Exposure Draft of the Health Practitioner Regulation National Law Bill 2009*. The Public Advocate urged the development of reasonable content in accreditation standards and curriculum for health practitioners in relation to mental illness and disability. Broadened grounds of complaint about a health practitioner, and provisions specifically enabling support of an adult with impaired capacity to make a complaint about a health professional were also advocated²³³ (see Section 5.6).

Feedback received by this Office on this agenda-setting paper has demonstrated that the issues confronted by adults with decision-making

disabilities in obtaining physical health and dental care resonate with stakeholders across a variety of sectors. For example, observations were made by stakeholders about:

- limited access to specialist medical practitioners for people with a range of disabilities;
- difficulty in diagnosing conditions for people with limited speech and sometimes unconventional methods of expressing pain;
- the role of family support and/or workers in advocating for adults with impaired decision-making capacity at health-related appointments;
- problems arising for adults with impaired decision-making capacity when they attend medical appointments without health care plans;
- some adults with decision-making disabilities experience difficulties in accessing dental care in rural and remote areas of Queensland;
- inappropriate management of the health care of adults with developmental disabilities or acquired brain injuries who do not have a mental illness by mental health practitioners;
- the desirability of continued education for health professionals to ensure awareness of current practices and attitudes in supporting adults with impaired decision-making capacity;
- adults with impaired decision-making capacity who are referred from Queensland Corrective Services to Queensland Health for health care matters. In some instances, it was noted that this was often the first time many people in the criminal justice system had received appropriate health treatment;

231 Office of the Public Advocate, *Submission of the Office of the Public Advocate to the Australian Commission on Safety and Quality in Health Care - Draft National Patient Charter of Rights* (March 2008) <www.publicadvocate.qld.gov.au> at 7 October 2009.

232 Office of the Public Advocate, *Submission of the Office of the Public Advocate to the Australian Medical Council in relation to Good Medical Practice: A Draft Code of Professional Conduct* (December 2008) <www.publicadvocate.qld.gov.au> at 7 October 2009.

233 Office of the Public Advocate, *Submission of the Office of the Public Advocate - Exposure Draft of the Health Practitioner Regulation National Law 2009* (July 2009) <www.publicadvocate.qld.gov.au> at 7 October 2009.

- similarity of unmet health care issues for adults with decision-making disabilities in other Australian states; and
- changes need to be made to tertiary and vocational education curriculum to ensure that health practitioners are properly equipped to address issues of capacity and the health care needs of vulnerable adults.

This Office considers that it is essential for government and non-government stakeholders to re-examine current systems and to address the unmet physical health and dental care needs of people with impaired decision-making capacity. This Office commends Queensland Health for taking steps to progress these issues, both within its department as well as within inter-departmental committees.

This Office also commends the Department of Communities, Disability, HACC and Community Mental Health Services (Disability Services) for implementing the Comprehensive Health Assessment Program (CHAP) in June 2008. This Program is available for every adult with an intellectual disability who receives a Disability Services provided or funded service.²³⁴ Research seeking feedback from general practitioners and advocates, and research data indicates that the responses to CHAP have been very positive.²³⁵ Results include a 30-fold increase in hearing tests for clients using the CHAP, an eight-fold increase in pap smears, and significantly more disease detection.²³⁶

However, information received by this Office suggests that people with severe and chronic mental illness or psychiatric disabilities, people with acquired disabilities, and other vulnerable individuals not currently in receipt of Disability Services supports and services are unable to access CHAP without paying for an individual licence. Efforts to expand access to this program are encouraged.

A collaborative approach, encompassing the medical, health, allied health, disability, aged care, education and community sectors will improve the quality of health care provided to individuals with decision-making disabilities, as well as safeguard the rights and interests of vulnerable people in this area.

Unmet health and dental care needs of adults with impaired decision-making capacity remains a priority issue for the Office of the Public Advocate. This Office will continue to encourage key organisations to take a leadership role to address these issues.



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

²³⁴ For more information about the Comprehensive Health Assessment Program see <<http://www.disability.qld.gov.au/support-services/providers/chap/>> at 30 August 2009.

²³⁵ Nick Lennox, Christopher Bain, Therese Rey-Conde, David Purdie, Robert Bush and Nirmala Pandeya, Effects of a Comprehensive Health Assessment Programme for Australian Adults with Intellectual Disability: A Cluster Randomised Trial (2007) 36(1) *International Journal of Epidemiology* 139-146.

²³⁶ Ibid, 13.

5.2 National Primary Health Care Strategy

In October 2008 the Commonwealth Department of Health and Ageing sought input into its proposal for the development of a draft strategy on national primary health care.²³⁷ Primary health care refers to those services within the health system which people interact with frequently, such as general practitioners, pharmacists and dentists.²³⁸

Ten key elements to underpin a primary health care system were proposed in the Discussion Paper *Towards a National Primary Health Care Strategy*, which aim to enhance equity in access to services and health outcomes and to improve transparency.²³⁹ Key elements relevant to adults with impaired decision-making capacity included:

All Australians should have access to primary health care services which keep people well and manage ill-health by being:

1. *Accessible, clinically and culturally appropriate, timely and affordable;*
2. *Patient-centred and supportive of health literacy, self-management and individual preference;*
3. *More focussed on preventive care, including support of healthy lifestyles;*
4. *Well-integrated, coordinated, and providing continuity of care, particularly for those with multiple, ongoing, and complex conditions.*

²³⁷ Department of Health and Ageing, *Towards a National Primary Health Care Strategy: A Discussion Paper from the Australian Government* (2008), 8 <www.health.gov.au/primaryhealthcare> at 2 October 2009.

²³⁸ Ibid, 10.

²³⁹ Department of Health and Ageing, *Towards a National Primary Health Care Strategy: A Discussion Paper from the Australian Government* (2008), 13.

Service delivery arrangements should support:

5. ...
6. *Better management of health information, underpinned by efficient and effective use of eHealth; and*
7. *Flexibility to best respond to local community needs and circumstances through sustainable and efficient operational models.*

8. ...

Supporting the primary health care workforce are:

9. *High quality education and training arrangements for both new and existing workforces.*²⁴⁰

In February 2009 the Public Advocate provided a submission in response to the Discussion Paper. The Public Advocate noted:

- Health conditions of vulnerable adults are often poorly managed and sometimes not recognised at all, and poor dental health is common.
- Health practitioners may focus on the patient's underlying cognitive disability or mental illness rather than diagnosing physical illness.
- The health care needs of this cohort are not being met due to factors including:
 - communication difficulties;
 - lack of ability to navigate the various elements of a complex health system;
 - the need for additional supports; and
 - the failure of some health care professionals to identify a patient's impaired capacity and

²⁴⁰ Ibid.

to seek consent for treatment from the adult's substitute decision-maker.

The issues associated with the physical health care of adults with impaired decision-making capacity are explored in detail in the Office of the Public Advocate's 2008 Issues Paper *In Sickness and in Health: addressing the health care needs of adults with a decision-making disability*²⁴¹ (see Section 5.1).

In addressing the key elements noted above, the Public Advocate submitted:

- The definition of 'access' in the context of access to required primary health care services requires clarification. People with a decision-making disability are often subject to indirect discrimination due to services treating access for all service users the same. They may therefore experience barriers to accessing services which the general population does not. A systemic denial of services may ensue if these barriers are not identified, acknowledged and resolved.
- If the health system is to adopt a holistic approach to health care, it must interface with other relevant systems which address psycho-social issues such as the housing and disability systems.
- To improve accessibility for service users with a decision-making disability, the paradigm of the health care system must be proactive (with a focus on prevention) rather than reactive.
- Services for people with a decision-making disability would be improved through the implementation of an 'open system'²⁴² of health

care which would interact with feedback from service users and their carers; and would better resist systems decay.

- A targeted prevention strategy should be developed to limit the risk of people with impaired decision-making capacity experiencing poor health care outcomes.
- Vulnerable adults often require longer health care consultations due to different support needs. Consideration should be given to quarantined funding for the additional time required to provide health care support to people with a decision-making disability.
- Active clinical care and service coordination would benefit adults with a decision-making disability, with a targeted sub-group for individuals with challenging behaviour, as their behaviour often seriously limits or denies them access to the use of facilities.
- Support network members (who often initially raise health care concerns) should be included in the health care information sharing network to provide a holistic response/strategy for people with impaired decision-making capacity.
- Information sharing can be crucial to identify health needs and appropriate treatment for people with impaired decision-making capacity. This Office supports the use of the Queensland Centre for Intellectual and Developmental Disability's Comprehensive Health Assessment Plan (CHAP), and recommended the Department of Health and Ageing incorporate this tool into plans for the development of e-Health to improve information sharing between health professionals and disability support providers.
- People with impaired decision-making capacity living in rural and remote communities do not

²⁴¹ Office of the Public Advocate, *In Sickness and in Health: addressing the health care needs of adults with a decision-making disability* (2008) 8 <www.publicadvocate.qld.gov.au> at 10 October 2009.

²⁴² An 'open system' is one which interacts with its environment continually. By these interactions, the system gains new inputs and learns how external elements view its outputs: Bartol et al, *Management: a Pacific Rim focus* (2008).

have the same access to those services as those in metropolitan areas, and may therefore incur higher costs to access primary health care.

- Education and training for primary health care professionals should ensure the needs of people with impaired decision-making capacity are adequately addressed. Education and training should include capacity for cross-sector collaboration.

The Public Advocate urged the establishment of reforms and development of systems that ensure the health care needs of adults with impaired decision-making capacity who access health systems are met to the same standards as other Australians. Their needs should guide reforms to ensure they no longer experience poorer health or die prematurely.

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*Building a 21st Century Primary Health Care System: A Draft of Australia's First National Primary Health Care Strategy*²⁴³ and an accompanying Report²⁴⁴ were released by the Commonwealth Department of Health and Ageing on 31 August 2009. This Office will consider the Draft Strategy and Report, and will continue to advocate the health care needs of adults with impaired decision-making capacity.

5.3 National Health and Hospitals Reform Commission

As reported in the 2007-2008 Annual Report, in April 2008 the Office of the Public Advocate provided a submission to the National Health and Hospitals Reform Commission (the Commission). The Commission was established to develop a long-term health reform plan for Australia. It sought comment about principles it had identified as appropriate to reform the health and aged care systems in which it urged consideration of the health care needs of adults with a decision-making disability when formulating proposals for reform.²⁴⁵

This Office's submission identified significant issues for adults with impaired decision-making capacity when accessing health care systems, including:

- vulnerable adults may experience barriers to accessing appropriate health care due to the complexity of current health care systems;
- the need for additional supports for vulnerable adults to ensure that preventative checks, vaccinations and specialist health care needs are undertaken and addressed;
- difficulties for adults in communicating their symptoms to assist diagnosis and treatment; and
- the necessity for health professionals and providers to be cognisant of their obligations under guardianship regimes, and to be able to identify the impaired capacity of patients.²⁴⁶

This Office also argued that:

²⁴³ Department of Health and Ageing, *Building a 21st Century Primary Health Care System: A Draft of Australia's First National Primary Health Care Strategy* (2009) <www.yourhealth.gov.au> at 2 October 2009.

²⁴⁴ Department of Health and Ageing, *Building a 21st Century Primary Health Care System: A Draft of Australia's First National Primary Health Care Strategy* (2009) <www.yourhealth.gov.au> at 2 October 2009.

²⁴⁵ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 65 <www.publicadvocate.qld.gov.au> at 5 October 2009.

²⁴⁶ Office of the Public Advocate, *Submission to the National Health and Hospitals Reform Commission in regard to the recent consultation process* (July 2008) <www.publicadvocate.qld.gov.au> at 5 October 2009.

- the reforms and systems established should ensure the health needs of adults with a decision-making disability are met to the same standard as other Australians;
- stakeholders need to collaborate to address the complex needs of vulnerable people to improve their health outcomes;
- the needs of vulnerable people should be central to the reform process and that the development of a vulnerable persons framework should be considered; and
- the Commission should thoroughly review other Australian health reform initiatives and create a design principle which emphasises the need for a coordinated health care and hospital system.²⁴⁷

In July 2009, the Commission released its Final Report *A Healthier Future for all Australians*.²⁴⁸ The Commission made 123 recommendations for reform which are aimed to:

- address access and equity issues that affect health outcomes;
- redesign the health system so that it is better able to respond; and
- create a health system which is sustainable in the future.²⁴⁹

Some key priorities for reform include:

- improved care for people with serious mental illness;

- improved oral health and access to dental health care;
- connecting and integrating health and aged care services;
- improving health outcomes for Indigenous people;
- greater focus on prevention and early intervention;
- changes to Medicare; and
- implementation of a national e-Health system (see Section 5.4).²⁵⁰

In August 2009 this Office attended a forum hosted by the federal Minister for Health to discuss the reforms proposed in the Report. This Office will continue to advocate throughout the health reform process about the health needs of adults with impaired decision-making capacity.

5.4 National e-Health

The Office of the Public Advocate has previously advocated regarding proposals by the Australian Government to implement an access card system through which every Australian person would be provided with a single card to receive health and social services.²⁵¹ The Public Advocate expressed concerns about the possible impact of the proposal on adults with impaired capacity, and the effect of the proposal on personal security and privacy.

A key reform to the health system discussed in the Final Report of the National Health and Hospitals Reform Commission (see Section 5.3 above) is the establishment of an electronic health (e-Health) system, through which electronic communication and

²⁴⁷ Ibid.

²⁴⁸ National Health and Hospitals Reform Commission, *Final Report A Healthier Future for all Australians* (June 2009) 34 <<http://www.health.gov.au/internet/nhhrc/publishing.nsf/Content/nhhrc-report>> at 5 October 2009.

²⁴⁹ Ibid 3.

²⁵⁰ Ibid, 16-36.

²⁵¹ Department of Human Services, *The Access Card System* (13 December 2006).

information technology would be used to improve the exchange of health information, and health care delivery.²⁵²

Part of the e-Health initiative is the establishment of a national Healthcare Identifier Service, whereby all Australian residents and others accessing health care in Australia would be assigned a unique identifying number to facilitate accurate and secure electronic recording and communication of health information between a patient's health care team.²⁵³ The proposal may be distinguished from the former access card system proposal in that healthcare identifiers would be used for health purposes only.

The Australian Health Ministers Advisory Council undertook a consultation to obtain stakeholder feedback on the proposal for the introduction of healthcare identifiers. It also sought submissions about proposed national health privacy arrangements (see Section 8.4 for further details). The Office of the Public Advocate provided a response to both issues.²⁵⁴ In relation to healthcare identifiers, this Office made the following key submissions:

- The implementation of healthcare identifiers may be beneficial for adults with impaired decision-making capacity. For example, the proposal may:

ensure more efficient and reliable communication of health information between providers delivering care to those adults;

may reduce medication, diagnostic and treatment errors;

may improve patient safety and consumer access to personal health information;

may ensure accurate identification of individuals who receive health care services; and

may enhance the overall quality of health care provided.

- Strong penalties for unauthorised use or disclosure of healthcare identifiers should be introduced to ensure appropriate handling, disclosure and use of information, and for deterrent effect.
- Appropriate definitions of health care service and health care service provider should be formulated to ensure that only those services involved in the provision of relevant treatment, advice, diagnosis and prescribing and dispensing of medication are privy to the personal information accessible through the national electronic health information systems.

The Australian Government has also proposed as part of the e-Health initiatives that an Individual Electronic Health Records (IEHR) system be implemented by 2012.²⁵⁵ It is proposed that each Australian will have a personal electronic health record which designated health care providers and carers may access.²⁵⁶ While the IEHR proposal was not within

²⁵² Australian Health Minister's Conference, *National E-Health Strategy Summary* (2008) <[http://www.health.gov.au/internet/main/publishing.nsf/Content/604CF066BE48789DCA25751D000C15C7/\\$File/Summary%20of%20National%20E-Health%20Strategy-final051208.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/604CF066BE48789DCA25751D000C15C7/$File/Summary%20of%20National%20E-Health%20Strategy-final051208.pdf)> at 26 August 2009.

²⁵³ Australian Health Minister's Advisory Council, *Healthcare identifiers and privacy: Discussion paper on proposals for legislative support* (July 2009) <[http://www.health.gov.au/internet/main/publishing.nsf/Content/pacd-ehealth-consultation/\\$File/Typeset%20discussion%20paper%20-%20public%20release%20version%20070709.pdf](http://www.health.gov.au/internet/main/publishing.nsf/Content/pacd-ehealth-consultation/$File/Typeset%20discussion%20paper%20-%20public%20release%20version%20070709.pdf)> at 26 August 2009.

²⁵⁴ Office of the Public Advocate, *Submission by the Office of the Public Advocate - Queensland: Healthcare Identifiers and Privacy* (August 2009) <www.publicadvocate.qld.gov.au> at 14 August 2009.

²⁵⁵ National Health and Hospitals Reform Commission, *Final Report A Healthier Future for all Australians* (June 2009) 34 <<http://www.health.gov.au/internet/nhhrc/publishing.nsf/Content/nhhrc-report>> at 5 October 2009.

²⁵⁶ Ibid.

the scope of the Healthcare Identifiers consultation, this Office advocated for all details regarding it to be made available for public consultation to enable consideration of the impact of the IEHR system upon vulnerable adults.

The Office of the Public Advocate's submissions about the proposed National Privacy Reforms are discussed in detail in Section 8.4.²⁵⁷

5.5 Australian Charter of Health Care Rights

As reported in the 2007-2008 Annual Report,²⁵⁸ the Public Advocate made submissions regarding the draft Australian Charter of Health Care Rights developed by the Australian Commission on Safety and Quality in Health Care (ACSQHC) and a draft Code of Health Care Rights and Responsibilities developed in Queensland by the Health Quality and Complaints Commission.

In essence, the Public Advocate's submissions were directed to ensuring that the rights and interests of adults with impaired decision-making capacity were considered and provided for by the Code and Charter. The following considerations were raised:

- the need to provide for the circumstances of adults with impaired capacity;
- people with impaired capacity should not be disadvantaged as health service users through an inability to comply with requirements;

- information and communication must be provided in a manner and format which is meaningful to the recipient;
- the general requirement for consent and the role of substitute decision-makers should be clear; and
- complaints processes must include support for people with impaired capacity.

The *Australian Charter of Healthcare Rights*²⁵⁹ was endorsed by the Australian Health Ministers in July 2008. The Charter is the pre-eminent health care charter for Australia and constitutes an important step forward in the recognition of health consumers rights. Significantly the Charter recognises that every person has the right to be able to access health care and a right to information in a way the individual can understand. It also recognises the Australian Government's commitment to international human rights agreements recognising every person's right to the highest possible standard of physical and mental health.

The Public Advocate has made some enquiries regarding the implementation of the Charter in the interests of protecting and promoting the rights and interests of adults with a decision-making disability in the health system. Queensland Health (QH) has advised that it is working with ACSQHC towards a national approach to implementation and the promotion of the Charter to the general community. QH states that the Charter now underpins policies, planning and the provision of health services nationally. Further, QH advises that it is developing an Implementation Standard and Governance Policy and other health consumer documentation to

²⁵⁷ Office of the Public Advocate, *Submission by the Office of the Public Advocate - Queensland: Healthcare Identifiers and Privacy* (2009) <www.publicadvocate.qld.gov.au> at 14 August 2009.

²⁵⁸ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 64-65 <www.publicadvocate.qld.gov.au> at 7 October 2009.

²⁵⁹ Australian Charter of Healthcare Rights <<http://www.health.gov.au/internet/safety/publishing.nsf/Content/PriorityProgram-01>> at 29 October 2009.

support implementation. However, it appears that at this stage implementation of the Charter has not commenced. The Public Advocate intends to take an ongoing interest in implementation of the Charter.

5.6 National regulation of health practitioners

In March 2008 the Council of Australian Governments (COAG) signed an Inter-Governmental Agreement on the health workforce which included a commitment to establish a national registration and accreditation system for health professionals.

The Office of the Public Advocate participated in August 2008 in a state forum regarding the implementation of the National Registration and Accreditation Scheme for Health Professionals (the Scheme). The *Health Practitioner Regulation (Administrative Arrangements) National Law Act 2008* (Qld) establishes the new Scheme's structure and confers powers and functions on the bodies within the Scheme.²⁶⁰

The Australian Health Workforce Ministerial Council released in June 2009 the Exposure Draft of the Health Practitioner Regulation National Law Bill 2009 (the Exposure Draft Bill). The Exposure Draft Bill sets out the proposed framework for the Scheme. Its aims include protection of the public by ensuring that only suitably qualified, competent and trained health practitioners are registered to practice, and that they maintain appropriate standards of practice.²⁶¹ It also provides for the registration of students studying to become health professionals, to ensure the public is

not at risk while students undertake their studies.²⁶²

The Scheme will oversee the registration and accreditation of health professionals,²⁶³ as well as regulating complaints, performance, and practitioner health and conduct.

The Office of the Public Advocate participated in several stakeholder forums about the Scheme, and provided a written submission about the Exposure Draft Bill.²⁶⁴ Key points included the following:

- Adults with decision-making disabilities continue to experience significant unmet needs in the area of physical health and dental health care. Many health professionals lack training, skills and experience in treating adults with impaired capacity. The curriculum for health practitioners to attain registration, and the accreditation standards, should include increased content relating to mental illness and disability. Targeted education and training to address the needs of this cohort should be implemented as part of the accreditation process.
- The functions of the proposed Public Interest Assessor (an independent person to be appointed to assess and determine responses to complaints) should include the investigation of systemic issues relating to health practitioners and the health system. Where appropriate, submissions for recommendation and reform could be made. This would serve to protect the public interest,

²⁶⁰ Australian Health Practitioner Regulation Agency <<http://www.ahpra.gov.au/>> at 2 September 2009. See also the *Health Practitioner Regulation (Administrative Arrangements) National Law Act 2008*.

²⁶¹ Exposure Draft Health Practitioner Regulation National Law Bill 2009 s 3(a).

²⁶² Exposure Draft Health Practitioner Regulation National Law Bill 2009 s 3(b).

²⁶³ The Scheme will regulate the following health professions: Aboriginal and Torres Strait Islander health practice, Chinese medicine, chiropractic, dental, medical, medical radiation, nursing and midwifery, optometry, osteopathy, pharmacy, physiotherapy, podiatry and psychology.

²⁶⁴ Office of the Public Advocate, *Exposure Draft of the Health Practitioner Regulation National Law 2009: Submission by the Office of the Public Advocate* Queensland (July 2009) <www.publicadvocate.qld.gov.au> at 5 October 2009.

and may improve the safety and quality of health care.

- The proposed Law should include provisions specifically enabling a guardian, family member or support person to support adults who lack capacity in making complaints about health professionals.
- The grounds for complaint about a health practitioner should be broadened to protect the interests of health consumers. This Office proposed that any aspect of the conduct or practice of a health practitioner which may affect his or her suitability for registration should constitute a ground for complaint.

STOP PRESS

On 6 October 2009 the Health Practitioner Regulation National Law Bill 2009 was introduced into the Queensland Parliament. At the time of writing, the Bill had been adjourned for further debate.

The National Scheme (as proposed by the Bill) is expected to commence on 1 July 2010, and draft legislation to adopt the National Law (if it is passed in Queensland) will be introduced into the Australian States and Territories parliaments prior to the national scheme's commencement.²⁶⁵

5.7 Health Consumers Queensland

In late 2006, the Public Advocate made submissions and provided advice to Queensland Health (QH)

regarding the creation of a consumer health council. Key issues identified by the Public Advocate included:

- the challenges faced by adults with impaired decision-making capacity in accessing adequate treatment;
- the requirement for special consideration to be given to vulnerable Queenslanders including people with impaired decision-making capacity, who are often unable to advocate for themselves; and
- the requirement for the council established to:
 - be a fully independent, high level and eminently reputable entity committed to long-term reform;
 - interact with the wider community with integrity, and engage with the health sector in a productive manner;
 - be structured to make meaningful contributions to the continuing health reform process;
 - have the capacity to undertake independent research, policy development and provision of training to the health districts on consumer issues and engagement; and
 - be funded from a portfolio other than from QH.

This advocacy was more fully reported in the Annual Report 2006-2007.²⁶⁶

In May 2007 the Queensland Government released its final report which provided for Health Consumers Queensland (HCQ) as a ministerial advisory committee for consumer issues. The Queensland Government announced HCQ's inaugural membership on 11 August 2008. The current members have been

²⁶⁵ Deputy Premier and Minister for Health the Hon. Paul Lucas, Queensland: State Government introduces National Registration and Accreditation into Parliament (Media Release, 6 October 2009).

²⁶⁶ Office of the Public Advocate, *Annual Report 2006-2007* (2007) 66-67 <www.publicadvocate.qld.gov.au> at 7 October 2009.

appointed for a two year period. HCQ is supported by a secretariat through the Director-General's Office, QH.

HCQ supports the voice of Queensland consumers to achieve better health outcomes.²⁶⁷ It aims to strengthen consumer perspectives in health services policy, systems and service development.²⁶⁸ The Public Advocate was pleased to present at the February 2009 launch of HCQ's Strategic Plan 2008-2010. This Office supports HCQ's important role to facilitate consumer engagement in health service planning and the collaborative approach taken by HCQ to its role.

Throughout 2008-2009 this Office participated in a number of activities organised by HCQ. These included:

- providing feedback to HCQ on forms to be used by agencies to engage consumer representatives through the Consumer Representatives Program; and
- participating in:
 - a number of consumer engagement activities concerning work being undertaken nationally and in Queensland about the National Registration and Accreditation Scheme for Health Professionals;
 - health consumer engagement processes;
 - the development by the Australian Medical Council of a Code of Good Medical Practice; and
 - advocacy in the health system.

It is hoped that at the expiration of the term of the inaugural membership on 31 August 2010 that government will establish HCQ as an independent statutory entity.

5.8 Health Community Councils

In March 2008, the Queensland Government commissioned Professor Patrick Weller AO and Ms Simone Webb to conduct an independent review of Government Boards, Committees and Statutory Authorities (the Weller Review). The stated purpose of this review was to reduce bureaucracy and unnecessary red tape; improve the overall efficiency of government bodies; and maintain the integrity and security of necessary regulatory functions.²⁶⁹ The Review reported in two parts. The Weller Report Part B considered various bodies which had been subject to the Weller Review against the public interest map. Part B, which contains recommendations about 459 government bodies, was presented to the Hon. Premier of Queensland and publicly released on 31 March 2009.

One of the outcomes from the Weller Review included the recommendation to abolish Health Community Councils (the Councils).²⁷⁰ The Office of the Public Advocate had concerns about assumptions raised about the Councils within the Weller Report, and was exploring these issues when the government

²⁶⁷ Health Consumers Queensland, *Your voice in health* (2009) <http://www.health.qld.gov.au/hcq/maca_eoi/brochure_3.pdf> at 7 October 2009.

²⁶⁸ Health Consumers Queensland, *Health Consumers Queensland home page* <<http://www.health.qld.gov.au/hcq>> at 7 October 2009.

²⁶⁹ Simone Webb and Professor Patrick Weller AO, *Brokering Balance: A Public Interest Map for Queensland Government Bodies: An Independent Review of Queensland Government Boards, Committees and Statutory Authorities Part B Report* (March 2009) 143, Recommendation 133 <<http://www.premiers.qld.gov.au/government/assets/part-b-report-brokering-balance.pdf>> at 6 October 2009.

²⁷⁰ Ibid, Recommendation 190.

rejected this recommendation.²⁷¹ The Public Advocate commended the Government for retaining the Councils. However, this Office urged Queensland Health (QH) to consider conducting a consultative review of the Councils' structures, roles and functions with a view to strengthening their potential as a mechanism for community engagement. In recent months, QH has undertaken an extensive consultation process to review how the Councils are structured and aligned with local Health Service Districts. The review was due for completion at the end of August 2009.

This Office looks forward to receiving details about the outcomes of the review, and will take an ongoing interest in the Councils.

5.9 Good Medical Practice: A Code of Conduct for Doctors in Australia

In August 2008 the Australian Medical Council (AMC) commenced a consultation process in relation to the development of a national code of professional conduct for medical practitioners (the Code). The development of the Code was undertaken at the request of the state and territory medical boards in preparation for the implementation of the National Registration and Accreditation Scheme for health professionals in July 2010.²⁷² (see Section 5.6).

A draft Code was circulated as part of the consultation process. The purpose of the draft Code was to set out what is expected of Australian doctors by the profession and the community, including the

standard of ethical and professional conduct.²⁷³

The Code was also intended to establish nationally consistent standards and principles that characterise good medical practice in Australia.²⁷⁴

In November 2008 the Office of the Public Advocate participated in a consumer consultation forum regarding the draft Code and raised key issues relevant to the interests of vulnerable adults. This Office subsequently provided a submission about the draft Code to the AMC.²⁷⁵ The Public Advocate commended the AMC for developing a code of professional conduct, and recommended the final code incorporate concepts of good practice and standards to promote and protect the rights of adults with impaired decision-making capacity. Key points raised included:

- Article 25 of the United Nations *Convention on the Rights of Persons with Disabilities* establishes the right to the enjoyment of the highest attainable standard of health without discrimination. This right is being compromised for adults with a decision-making disability. The content of the final Code should promote Article 25 and include positive strategies for addressing vulnerability and severe disadvantage. Proper professional and ethical responses from the medical profession are key to addressing this situation.
- The concept of vulnerability within the draft Code should be elaborated on, with a focus on groups likely to experience marginalisation, disadvantage or discrimination, such as people

²⁷¹ Queensland Government, *Government response to the report Brokering Balance: A Public Interest Map for Queensland Government Bodies - An Independent Review of Queensland Government Boards, Committees and Statutory Authorities* (April 2009) <<http://www.premiers.qld.gov.au/government/boards-committees/review/government-response.aspx>> at 6 October 2009.

²⁷² Good Medical Practice, *National Code of Professional Conduct: Good Medical Practice: National Consultation* (2008).

²⁷³ Australian Medical Council, *Good Medical Practice - A Draft Code of Professional Conduct (Consultation document)* (August 2008) 1.

²⁷⁴ Ibid; Good Medical Practice: A Code of Conduct for Doctors in Australia, *Background* <<http://goodmedicalpractice.org.au/>> at 13 October 2009.

²⁷⁵ Office of the Public Advocate, *Submission to the Australian Medical Council in relation to Good Medical Practice: A Draft Code of Professional Conduct* (December 2008) <www.publicadvocate.qld.gov.au> at 13 October 2009.

with impaired decision-making capacity. Given the high proportion of vulnerable persons who access the Australian health system, the concept of vulnerability should be given considerable attention throughout the final Code, particularly with respect to doctors' responsibilities to address the needs of vulnerable groups.

- Greater emphasis on and provisions regarding:
 - the importance of autonomy and self-determination (which is fundamental to health law); and
 - substituted decision-making for adults with impaired capacity and doctors' obligations under the guardianship regime
 need to be provided for in the final Code.
- The final Code should address the establishment and maintenance of relationships by medical practitioners with bodies and systems beyond the medical and health systems which support good health care for vulnerable people, such as the disability, carer, aged and homelessness sectors.

On 10 August 2009 *Good Medical Practice: A Code of Conduct for Doctors in Australia* was released. The Code has been recommended to state and territory medical boards for adoption or endorsement.²⁷⁶

²⁷⁶ Australian Medical Council, AMC Directors Endorse Code of Conduct (Media Release, 10 August 2009).

6 The Criminal Justice System

People with intellectual and cognitive disability, acquired brain injury and mental illness are widely accepted as being over-represented in the criminal justice system as victims and offenders.

Socio-economic disadvantage, such as homelessness and poverty, are often contributing factors to offending behaviour by people within this cohort.²⁷⁷ Vulnerability in criminal justice processes may also result in difficulties in dealing with law enforcement authorities, refusal of bail, false confessions, wrongful convictions, and incarceration.²⁷⁸

This cohort is also particularly vulnerable to criminal victimisation through exploitation, abuse or neglect, resulting in ongoing trauma for both the individual involved and their family.²⁷⁹

Widespread recognition of the vulnerable cohort of people with impaired capacity within the criminal justice system offers opportunities for constructive change. Court diversion programs are one mechanism to address the disadvantage and vulnerability experienced by persons with a decision-making disability. The interests of the individuals concerned and the community will likely best be served by looking for solutions which adequately address the needs of vulnerable individuals and minimise reoffending behaviours.

²⁷⁷ New South Wales Law Reform Commission, *People with an Intellectual Disability and the Criminal Justice System* (1996) Report 80, [2.10 2.19] <<http://www.lawlink.nsw.gov.au>> at 6 October 2009; Phillip French, *Disabled Justice: People with Disability in the Criminal Justice System* (2007) 28-37 <http://www.qai.org.au/documents/doc_199.pdf> at 6 October 2009.

²⁷⁸ Ibid.

²⁷⁹ Phillip French, *Disabled Justice: People with Disability in the Criminal Justice System* (2007) 20 <http://www.qai.org.au/documents/doc_199.pdf> at 6 October 2009.

6.1 Review of the civil and criminal justice system in Queensland

In July 2008 the State Government commissioned the Hon. Martin Moynihan AO QC to undertake a review of the civil and criminal justice system in Queensland. The terms of reference of the review were limited to the monetary limits for the civil jurisdiction; summary disposition of indictable offences; reform of the committal proceedings process; sentencing discounts for early pleas; and case conferencing.²⁸⁰

The Office of the Public Advocate made a submission urging consideration of the effect of the current criminal justice system on adults with impaired decision-making capacity, and the impact of any changes on that cohort when formulating recommendations. Other key submissions and observations included:

- Adults with impaired decision-making capacity are disadvantaged in a system which provides sentencing discounts for an early plea as their impairment may prevent them from understanding the consequences of such a plea.
- Some individuals may have impaired capacity to plead but may not meet the criteria for referral to the Mental Health Court. They may go through the conventional court process and be found guilty, despite their legal incapacity.
- When adults with impaired decision-making capacity are incarcerated, they are generally more vulnerable in the prison population as they are less equipped to advocate for themselves, and to protect themselves from abuse or exploitation.
- Vulnerable adults may develop challenging behaviours in the prison environment, which

²⁸⁰ The Hon. Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland*, (December 2008) 17.

may ultimately lead to isolation within corrective facilities, or further offending upon release.

- Some of the committal proceeding reform options proposed may be disadvantageous to adults with impaired capacity. They may experience difficulty in understanding the process and the instructions sought by their legal representatives.
- The criminal justice system must guard against perpetuating the disadvantage of vulnerable, marginalised individuals with cognitive impairment whose offending behaviour occurs in the context of untreated mental illness and/or unmet disability support needs.

The *Review of the civil and criminal justice system in Queensland report* (the Report), and the Government's Response were released in July 2009. The Report made several observations in relation to offenders with impaired capacity, including:

- Recognition of the high representation of people with impaired decision-making capacity to be accommodated by the criminal justice system.²⁸¹
- Changes to the jurisdiction of the Magistrates Court may impact adversely on individuals with a decision-making disability.²⁸²
- The importance of early access to legal advice and representation for defendants with impaired decision-making capacity. A defendant's capacity to plead may impact on whether the plea is entered at an early stage, and that the timing of pleas may be later than for a defendant with capacity. Magistrates should take into consideration the lack of legal representation of a defendant with impaired decision-making capacity

when determining whether a defendant is fit to plead, and whether to accept a guilty plea.²⁸³

- A key aspect of the Rule of Law (which underpins Queensland's criminal justice system) is that:

*The concepts of equal justice for all and fairness connote the necessity for a criminal justice system to take into account and address the consequences of disadvantage, disability or the like for individuals and groups in our society when they come before the courts.*²⁸⁴

Key recommendations for reform of the criminal justice system, which were supported by the Queensland Government in its response, included:

- An increase in the District Court's criminal jurisdiction from indictable offences with a maximum penalty of 14 years imprisonment or less to offences with a maximum of 20 years imprisonment or less.²⁸⁵
- Changes to the criminal jurisdiction of the Magistrates Court to hear and determine indictable offences, including that all Criminal Code offences with a maximum penalty of three years imprisonment must be heard summarily subject to limited exceptions.²⁸⁶
- Streamlining of the committal process to improve efficiency and finalise cases earlier.²⁸⁷

²⁸³ Ibid, 232.

²⁸⁴ Ibid, 28.

²⁸⁵ Ibid, 11.

²⁸⁶ Ibid, 12.

²⁸⁷ Queensland Government, The Queensland Government's response to the *Review of the civil and criminal justice system in Queensland* (July 2009) 12.

²⁸¹ Ibid, 56.

²⁸² Ibid, 155.

- Reforms to sentencing laws to encourage early guilty pleas, and to provide greater transparency regarding the benefits of an early plea.²⁸⁸
- A review of Legal Aid Queensland to identify service priorities and address funding requirements.²⁸⁹

The Queensland Government indicated that the reforms will be implemented in a staged process, with changes to disclosure, civil monetary limits, summary disposition of offences, sentencing discounts and the committal process to be given initial priority. It is understood that a Bill outlining the first stage of reforms will be introduced to Parliament by the end of 2009.²⁹⁰ A Criminal Justice Procedure Act and uniform criminal procedure rules will be developed at a later stage.²⁹¹

While it was pleasing to see issues concerning offenders with impaired decision-making capacity recognised in the Report, the Public Advocate remains concerned that the disadvantage of these offenders remains largely unaddressed.

See Section 8.5 for information about changes to the Queensland civil legal system.

6.2 Court diversion

In the last three annual reports this Office reported on court diversion initiatives in Queensland, and in particular the Homeless Persons Court Diversion Program Pilot and Special Circumstances List for people who are homeless (including those with

impaired decision-making capacity). This Office continued its advocacy and support of court diversion initiatives for vulnerable adults.

People with intellectual and cognitive disability, acquired brain injury and mental illness are widely accepted as being over-represented in the criminal justice system. Court diversion programs aim to divert vulnerable defendants from the criminal justice system by providing alternative bail and sentencing options, and refer defendants to appropriate mental health and other services that can address the underlying causes of their offending behaviour.

In March 2009 the Office of the Public Advocate highlighted the systemic disadvantages experienced by offenders, defendants and victims with impaired decision-making capacity in Queensland through its paper *Criminal injustice for vulnerable people*, which was presented at the Australian Guardianship and Administration Council Conference (see Section 7.1.3). The paper discussed Queensland's court diversion initiatives, and identified other serious criminal justice issues which adversely affect adults with a decision-making disability.

Throughout the year this Office advocated to government departments and agencies about court diversion and support for vulnerable offenders. This Office also supported court diversion initiatives, and recognised the need for diversion options for offenders with impaired decision-making capacity in its submissions to a coronial inquest.

The Homeless Persons Court Diversion Program Pilot operated in the Brisbane Magistrates Court from 2006 to 2008 as a diversionary program for

²⁸⁸ Ibid, 14; The Hon. Martin Moynihan AO QC, *Review of the civil and criminal justice system in Queensland* (December 2008) 16.

²⁸⁹ Queensland Government, *The Queensland Government's response to the Review of the Civil and Criminal justice system in Queensland* (December 2008), 4.

²⁹⁰ Ibid, 1.

²⁹¹ Ibid.

homeless adults charged with minor offences.²⁹² The Special Circumstances List was developed to deal with homeless individuals whose disability or mental illness contributed to their offending behaviour.

In last year's Annual Report, it was reported that the program had not been successful in obtaining ongoing funding. Due to the uncertainty surrounding the program's future, agencies in the government and non-government sectors agreed to provide support from their budgets to enable the program's operation for an additional 12 months. Subsequently, in the 2009-2010 State Budget the Queensland Government provided funding of \$3.7 million over the next three years to expand the Homeless Persons Court Diversion Program Pilot into the Special Circumstances Program (the Program).

This Office contributes as a member of the Special Circumstances Program Implementation Team. The key objectives of the Program include to:

- support people with impaired decision-making capacity, and homeless people charged with public order and other minor offences through the court process;
- divert those people from the criminal justice system through referral to services to address accommodation, health and other needs which may be contributing to their offending behaviour;
- prevent the further entrenchment of those people in a cycle of offending and punishment;

- reduce the number of fines for these offences being made against people who have little or no capacity to pay;
- reduce the risk of imprisonment through fine default and ongoing offending; and
- to assist in developing an alternative sentencing regime for such persons.²⁹³

The additional funding has enabled another Magistrate to be appointed to the Court (previously one Magistrate was assigned), and for the Court to sit three days each week instead of one. An additional Court Case Co-ordinator has been appointed, and a psychologist will shortly be employed to support the court by providing assessment of defendants. Funding has also been allocated to provide a dedicated Police Prosecutor, a Probation and Parole Officer, and a Legal Aid Queensland solicitor.

The eligibility criteria for participation in the Program enables all adults with impaired decision-making capacity as a result of either mental illness, intellectual disability, cognitive impairment, or brain/neurological disorders to participate, regardless of whether the adult is homeless. The eligible offences for participation in the Program remain unchanged from those of the Homeless Persons Court Diversion Program Pilot.

An additional \$40,000 in brokerage money has also been allocated to provide assistance to individuals participating in the Program. This Office advocated about the allocation of the funds, and how they could be best applied to assist those persons. It is understood that the brokerage money will be utilised to assist participants through the provision of food vouchers, phone cards, travel permits, toiletry packs,

²⁹² Office of the Public Advocate, *Annual Report 2005-2006* (2006) 38 <<http://www.publicadvocate.qld.gov.au>> at 5 October 2009; Office of the Public Advocate, *Annual Report 2006-2007* (2007) 54 <<http://www.publicadvocate.qld.gov.au>> at 5 October 2009; Office of the Public Advocate, *Annual Report 2007-2008* (2008) 70 <<http://www.publicadvocate.qld.gov.au>> at 5 October 2009.

²⁹³ Information provided by the Department of Justice and Attorney-General.

and, in limited circumstances, payment of medical fees and bonds/accommodation.

This Office is presently undertaking research regarding the need for broader court diversion initiatives and sentencing options for adults with impaired decision-making capacity (see Section 6.3).

6.3 Court diversion research

As noted in Section 6.2 persons with impaired decision-making capacity are over-represented in the criminal justice system. While this Office supports the court diversion programs implemented to date, there remains a significant unmet need for appropriate diversion initiatives and sentencing options for adults with impaired decision-making capacity.

The Office of the Public Advocate has commenced research in relation to court diversion initiatives for this cohort. It is anticipated the research will explore issues including capacity/fitness to plead guilty; criminal responsibility; the eligibility criteria for participation in current court diversion programs; diversionary options in other Australian jurisdictions; and alternative sentencing options.

It is intended that the issues identified in the research will be raised in a discussion paper for consultation and publication.

6.4 Sentencing of federal offenders

In last year's Annual Report,²⁹⁴ this Office reported on its advocacy to the Australian Government about court diversion programs and alternative sentencing options for offenders with impaired capacity. This

followed the Australian Law Reform Commission's recommendation in its 2006 report *Same Crime, Same Time: Sentencing of Federal Offenders* that the Australian Government undertake an inquiry into issues concerning sentencing of people in the federal criminal justice system who have a mental illness, intellectual disability or cognitive impairment.²⁹⁵ As reported, the Australian Government advised last year that it was developing proposals for the reform of federal sentencing and offender management laws.

Throughout 2008-2009 this Office continued to advocate to the Australian Government for sentencing reform for adults with impaired decision-making capacity. It is well recognised that the absence of alternative sentencing options is a major contributing factor to the over-representation in prison of persons with a mental illness.²⁹⁶

Following further advocacy by this Office, the Australian Government recently confirmed its review is continuing, and that detailed reform proposals which will aim to provide clear, comprehensible legislative provisions that avoid unnecessary technicality and complexity and provide varied and flexible options for sentencing and offender management are currently being finalised. The Australian Government has advised that public consultation on the proposed reforms is expected to occur in the first half of 2010.

6.5 SPER debt relief options

The Office of the Public Advocate has taken an interest in the impact of the financial burden of fines

²⁹⁴ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 70 <<http://www.publicadvocate.qld.gov.au>> at 5 October 2009.

²⁹⁵ Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006) Recommendation 28.1.

²⁹⁶ Senate Select Committee on Mental Health, *A National approach to mental health: From Crisis to Community* (2006) <<http://www.aph.gov.au>> at 5 October 2009.

and the utilisation of debt relief orders on people with impaired decision-making capacity.²⁹⁷ Many people with impaired decision-making capacity who incur fines will have lived in disadvantaged and impoverished circumstances in the community. Their lives will often have been characterised by poverty, social exclusion, unemployment, homelessness, and regular contact with police.²⁹⁸

Some of these people have significant unpaid fines registered with the State Penalties Enforcement Registry (SPER) for enforcement. These fines may be incurred through committing crimes of necessity such as using public transport without a ticket. Some people may exhibit offending or challenging behaviours as a result of unmet support needs and be charged with public nuisance offences. They are often reliant on social security benefits. Many are unlikely to ever satisfy these debts.

SPER is able to offer debtors the option of a Good Behaviour Order (GBO), which is an agreement that the debtor will not commit any more offences or infringements for a fixed period after the order is approved. The minimum period of a GBO is six months and the maximum period is three years, depending on the amount outstanding. If no other offences or infringements are committed within this time, the outstanding amount with SPER will no longer be payable.

For a debtor to be eligible to apply for a GBO, the following criteria must be met:

- The debtor is not suitable to perform community service under a Fine Option Order;

- The debtor has an ongoing inability to pay all or part of the unpaid amount; and
- It would be inappropriate to issue a warrant for arrest and imprisonment.²⁹⁹

This criteria may be difficult for some offenders with impaired decision-making capacity to satisfy, particularly where they are unemployed, living in poverty or in receipt of Centrelink benefits. The Office of the Public Advocate has commenced exploring these issues with stakeholders.

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On 16 September 2009, the State Penalties Enforcement and Other Legislation Amendment Bill 2009 (Qld) was introduced to Parliament. The Bill proposes to strengthen the compliance and enforcement capabilities of the State Penalties Enforcement Registry by:

- expanding driver licence suspension to unpaid amounts for non-motor vehicle related offences;
- creating new powers and processes for the SPER to immobilise, seize and sell vehicles owned by recalcitrant high-value debtors ;
- strengthening the SPER's existing powers of seizure and sale; and
- allowing the SPER to use SMS (mobile phone texting) technology to communicate with debtors, without requiring debtors' consent.

The Office of the Public Advocate intends to consider the potential impact of the proposed amendments on vulnerable people.

²⁹⁷ Debt relief orders are those orders under the *State Penalties Enforcement Act 1999* (Qld) which provide an option for the conditional waiver of a person's fine debts, s 118 and pt 7.

²⁹⁸ Tamara Walsh, *No Vagrancy: An examination of the impact of the criminal justice system on people living in poverty in Queensland* (2007) 7 <http://www.qpilch.org.au/_dbase_upl/no-vagrancy-combined.pdf> at 12 October 2009.

²⁹⁹ *State Penalties Enforcement Act 1999* (Qld) s118.

6.6 Justice Support Program

The Justice Support Program is a pilot program established by Queensland Advocacy Incorporated. Its purpose is to provide assistance to people with disabilities who are alleged offenders, victims or witnesses of crime, and are required to participate in police interviews or court proceedings. The program utilises volunteer support persons to attend police interviews or court appearances, and to provide assistance for people with a disability to understand what is happening and their rights at each stage of the criminal justice process.

The aim of the program is to fill a system gap, namely an unmet need for support for people with a disability when they encounter the criminal justice system.³⁰⁰ In a police interview or court hearing, a volunteer support person can assist a person with impaired capacity by:

- helping them understand and exercise their rights;
- helping them to get legal advice and understand it;
- raising with police or the Court the individual needs of the person; and
- helping the person to understand outcomes, conditions and consequences.³⁰¹

To fund the pilot program, Queensland Advocacy Incorporated obtained a grant for 10 months funding

from the Legal Practitioner Interest on Trust Accounts Fund (LPITAF) Grants Fund through the Department of Justice and Attorney-General. The pilot is being trialled in the North Brisbane area. Further LPITAF funding for the program was recently granted.

The Public Advocate commends Queensland Advocacy Incorporated on this initiative. This Office supports the program by participating as a reference group member.

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On 15 September 2009, Queensland Advocacy Incorporated won an Outstanding Initiative Award at the Disability Action Week Awards for the creation of the Justice Support Program.

6.7 Victim Assist Queensland

The current criminal injury compensation scheme under the *Criminal Offence Victims Act 1995* (Qld) is intended to compensate victims for personal injuries caused by an indictable offence.

In recent years, the scheme has been criticised by a broad range of stakeholders as outdated, complex, costly and failing to deliver compensation when it is needed.³⁰²

In 2007, the Queensland Government announced the Victims of Crime Review to investigate options to make the scheme simpler and more accessible. The government released the *Victims of Crime Review*

³⁰⁰ See for example, Phillip French, *Disabled Justice: People with Disability in the Criminal Justice System* (2007) 69–70 <http://www.qai.org.au/documents/doc_199.pdf> at 24 February 2009; WestWood Spice, *Evaluation of the Criminal Justice Support Network (CJSN)* (2005) <<http://www.idrs.org.au/cjsn/evaluation05.pdf>> at 14 July 2009.

³⁰¹ Jim Simpson, Meredith Martin and Jenny Green, *The Framework Report: Appropriate community services in NSW for offenders with intellectual disabilities and those at risk of offending* (2001) 28 <http://www.idrs.org.au/pdf/fw_main.pdf> at 18 March 2009.

³⁰² Department of Justice and Attorney General, *Victims of Crime Review Report*, November 2008, 3 <http://www.justice.qld.gov.au/files/CourtsAndTribunals/Victims_of_crime_review_report.pdf> at 1 June 2009.

*Report*³⁰³ in February 2009, which recommended reforms to the current scheme.

Key recommendations called for a change of focus from compensating a victim with a lump sum payment under the present compensation scheme to the recovery of victims by a financial assistance model called the *Victims Financial Assistance Scheme* (since renamed *Victim Assist Queensland*). A scheme manager will oversee the scheme and a multi-disciplinary team of government assessors will consider the applications of victims. Review of decisions made by the scheme manager and government assessors will be available through the Queensland Civil and Administrative Tribunal.

This Office made a submission proposing various amendments to the Exposure Draft of the Victims of Crime Assistance Bill 2009 (Qld).³⁰⁴ Recommendations made by this Office were:

- increased levels of financial assistance for people with impaired capacity to reflect the special assistance required to produce an outcome equal to that of other victims;
- amendments to prevent the consideration of a victim's disability or capacity as a reason for reducing assistance;
- payment of all significant lump sum payments to a formally appointed substitute decision-maker. However, there should generally be a requirement to pay money for ongoing support in instalments directly to the victim; and

- policy development to ensure staff of Victim Assist Queensland apply for the appointment of an administrator where appropriate.

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

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The *Victims of Crime Assistance Act 2009* (Qld) was passed by the Queensland Parliament on 17 September 2009. It is understood the new victims financial assistance regime will commence on 1 December 2009.

³⁰³ Department of Justice and Attorney General, *Victims of Crime Review Report*, November 2008 <http://www.justice.qld.gov.au/files/CourtsAndTribunals/Victims_of_crime_review_report.pdf> at 1 June 2009.

³⁰⁴ <http://www.justice.qld.gov.au/files/AboutUs/Draft_Victims_of_Crime_Assistance_Bill_2009.pdf> at 6 July 2009.

7 The Corrective Services System

Many prisoners with impaired decision-making capacity will have lived in disadvantaged and impoverished circumstances in the community. Their lives will often have been characterised by poverty, social exclusion, unemployment, homelessness, and regular contact with police.³⁰⁵ They are often disadvantaged in receiving health services and education, and are most often reliant on social security benefits. These adults enter prison at an extreme disadvantage.

Following incarceration, their disadvantage may be exacerbated. It is an environment where people who are vulnerable are at risk of abuse, exploitation, manipulation, intimidation and negative influences. As a result, offending behaviour may be reinforced in prison rather than reduced.³⁰⁶

7.1 Disability support in prison

7.1.1 MOU DSQ and QCS

Last year, the Office of the Public Advocate reported about the Memorandum of Understanding (MOU) between Disability Services Queensland (DSQ) and Queensland Corrective Services (QCS).³⁰⁷

In 2007, DSQ and QCS signed an MOU to provide a framework for each department's responsibilities for shared clients. Shared clients were identified in

the MOU as offenders with an intellectual disability or cognitive impairment who, prior to conviction, received or may have been eligible to receive disability support.³⁰⁸

The MOU provided that:

- QCS was responsible for providing services to meet the medical, psychological and physical needs of offenders;
- DSQ funding and services which an offender received before incarceration would cease pending the prisoner's release;
- prisoners would have minimal contact with DSQ;
- the agencies would facilitate a resumption of interrupted services by incarceration for a period of less than 12 months; and
- prisoners would be supported in registering for disability support services upon their release.

Although the MOU stated the roles and responsibilities of the respective departments, the agreement did not address how appropriate disability support would be provided for prisoners. The MOU expired in 2009 and was extended for a further year to permit development and review of a new framework between QCS and the Department of Communities, Disability, HACC and Community Mental Health Services (Disability Services).

This Office has called for a framework which addresses and provides for the disability support needs of prisoners and enhances rehabilitation prospects for their benefit and the safety of the community. QCS has signalled the renegotiation of the current arrangements with Disability Services for

³⁰⁵ Tamara Walsh, *No Vagrancy: An examination of the impact of the criminal justice system on people living in poverty in Queensland* (2007) 7 <http://www.qpilch.org.au/_dbase_upl/no-vagrancy-combined.pdf> at 12 October 2009.

³⁰⁶ Office of the Public Advocate, *Issues for People with a Cognitive Disability in the Corrections System* (2005) 12 <http://www.justice.qld.gov.au/files/Guardianship/ip_0505.pdf> at 24 February 2009.

³⁰⁷ Office of the Public Advocate, *Annual Report 2007–2008* (2008) 73 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 1 October 2009.

³⁰⁸ *Memorandum of Understanding between Disability Services Queensland and Queensland Corrective Services 2007–2009* (2007) 3.

offenders with a disability. The Office of the Public Advocate commends these efforts and is interested in contributing to shaping this new framework.

7.1.2 Disability support

It is widely accepted that prisoners with a cognitive disability are over-represented within the prison population. They do not receive disability support which they ordinarily receive or are eligible to receive in the community. They may be unable to be involved in all aspects of prison life or to participate in and benefit from the full range of programs and other resources available in prison which may reduce their likelihood of reoffending after release. Although there are some programs available which might assist, the complex needs of these offenders may result in them not being prioritised.

Throughout 2008-2009 this Office advocated for regular disability support for vulnerable prisoners, and reform that will address their offending behaviour, and ultimately improve their life experiences and community safety through reduced recidivism rates.

As reported in Section 11.3, the Public Advocate intervened in a coronial inquest into the death of a person killed by a recently released prisoner with impaired capacity. A variety of systems issues emerged for consideration by the Coroner. The Office of the Public Advocate advocated on the issue of disability support for prisoners and made submissions regarding arrangements, such as those in Victoria, which provide for disability support

through an inter-agency disability framework and protocol.³⁰⁹ The Coroner is yet to deliver his findings.

The inaugural Queensland Commissioner for Corrective Services convened a roundtable discussion on 4 June 2009, bringing together representatives from key government and statutory agencies, including Disability Services, the Adult Guardian, the Prison Mental Health Service, Queensland Health and this Office. Representatives from Corrections Victoria delivered a presentation concerning innovative approaches taken in Victoria supporting prisoners who have an intellectual disability.

In Victoria, a comprehensive Protocol³¹⁰ between Victoria Corrections, the Department of Human Services and the Department of Justice, as well as a Disability Framework³¹¹ underpin the arrangements for prisoners with a disability. This approach involves operating specialist units within the prison setting for prisoners with an intellectual disability. Some especially vulnerable prisoners reside in these units and receive support from prison staff with disability expertise (in accordance with offender management plans prepared by specialist practitioners), and other support from the Department of Human Services (the

309 Refer to; Victorian Government Department of Justice, *Addressing the Barriers Corrections Victoria Disability Framework 2007-2009* (2007) <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb68fe4a548234e/Corrections_Victoria_Disability_Framework_2007-09.pdf> at 17 March 2009; Victorian Department of Human Services, *Protocol between Corrections Victoria, Department of Justice and Disability Services, Department of Human Services 2008* (2008) <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebe3f64af55de70/Protocol_CV_Disability_Services_DHS_2008.pdf> at 17 March 2009.

310 Victorian Department of Human Services, *Protocol between Corrections Victoria, Department of Justice and Disability Services, Department of Human Services 2008* (2008) <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/ebe3f64af55de70/Protocol_CV_Disability_Services_DHS_2008.pdf> at 17 March 2009.

311 Victorian Government Department of Justice, *Addressing the Barriers Corrections Victoria Disability Framework 2007-2009* (2007) <http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/resources/file/eb68fe4a548234e/Corrections_Victoria_Disability_Framework_2007-09.pdf> at 17 March 2009.

equivalent of Disability Services). Other prisoners attend at the unit on a regular basis to participate in programs modified to suit their needs.

Queensland Corrective Services (QCS) has made arrangements for a similar specialist pilot unit to commence operation at Woodford Correctional Centre.

QCS intends to use the roundtable discussion as a basis for a formal inter-agency advisory group to inform the implementation of the Bridging the Gap project (a new program to provide transitional support to prisoners with a cognitive impairment or intellectual disability: see Section 7.3). QCS has advised it will also continue with efforts to make its suite of rehabilitation and criminogenic programs accessible.

This Office commends QCS for these initiatives.

7.1.3 Community presentations

In February 2009, the Public Advocate made a presentation entitled *Criminal Justice? Alternatives to traditional court and prison processes*³¹² at a Sisters Inside forum. The following month, this Office presented a paper entitled *Criminal injustice for vulnerable people*³¹³ at the Australian Guardianship and Administration Council Conference. In these presentations this Office advocated for greater provision of court diversion options to address offending behaviour (see Section 6.2), and disability support in prison to promote better life outcomes for

vulnerable individuals and to enhance community safety by reducing recidivism rates. This Office noted issues including:

- Although QCS supports prisoners with a physical disability, it is failing to provide support for prisoners with a cognitive impairment. The support which these prisoners require is assistance with daily living activities including communication; participation in prison life and programs; and compliance with directions.
- Because disability support is unavailable to address challenging behaviour of prisoners with impaired capacity, the prison environment could be a trigger for an escalation of behaviours. New challenging behaviours could also be learned from other prisoners, or in response to victimisation.

The Public Advocate encouraged a detailed exploration of these issues and rigorous processes to identify alternatives to the traditional prison system.

7.1.4 Coronial inquest

During 2008-2009, the Public Advocate intervened in a coronial inquest which raised systemic issues regarding disability support in prison (see Section 11.3).

7.2 Screening tools

7.2.1 Prison Mental Health Service

This Office previously reported that QCS had supported research by the Prison Mental Health Service (PMHS) into the development of a screening tool for the identification of prisoners with

³¹² Michelle Howard, *Criminal Justice? Alternatives to traditional court and prison processes* (Speech delivered at the Sisters Inside: Alternatives Beyond Punishment forum, Brisbane, 24 February 2009 <http://www.justice.qld.gov.au/files/Guardianship/Sisters_inside_forum.doc> accessed 25 August 2009.

³¹³ Office of the Public Advocate, *Criminal injustice for vulnerable people* (2009) <http://www.justice.qld.gov.au/files/Guardianship/Criminal_injustice_for_vulnerable_people.pdf> accessed 25 August 2009.

intellectual and cognitive impairment.³¹⁴ However, during a recent coronial inquest (see Section 11.3), the Coroner heard evidence that a screening tool to identify vulnerable prisoners was not in use. This Office understands that the screening tool is in its final stages of development and is due for release in March 2010.

The screening tool was designed to identify those prisoners who have an intellectual disability or cognitive impairment. It is understood the screening tool is intended to take less than 10 minutes to use and will not require any special skills or training for the person administering the test. As a result, the PMHS anticipates the screening tool may be used in a variety of settings throughout the criminal justice system. It is intended the tool will identify prisoners who require further assessment and assistance rather than identify the prisoner's particular impairment or needs.

PMHS has advised that validation of the screening tool is underway, with the current tool being validated for use on Australian-born, non-Indigenous prisoners between 18 and 95 years of age. Further research is required to validate the tool for use with prisoners who are 17 years old, Indigenous, or from culturally and linguistically diverse backgrounds.

7.2.2 Legal Aid Queensland

In 2005, Legal Aid Queensland (LAQ) and various government departments initiated an inter-agency project for the use of a screening tool to identify people with an intellectual disability or cognitive

impairment and to improve pathways for these clients in the criminal justice system.³¹⁵ Between May and August 2008, LAQ piloted a trial of the Hayes Ability Screening Tool (HASI), screening clients at selected points of the criminal justice and corrective services systems. It is understood the evaluation of the pilot is complete. Conclusions/issues emerging from the trial included:

- the statistics indicated that of the 1,400 clients who participated in the trial, approximately 24 percent of clients in prison and 8 percent of clients in the community returned scores indicating a possible intellectual disability/cognitive impairment;
- the tool increased the awareness of staff about capacity issues of clients, particularly where staff were working with prisoners;
- some legal staff indicated that knowing in advance about a client's capacity helped them better conduct the interview with the client;
- whether the screening tool should be implemented in full or in a shortened form to flag capacity issues; and
- access to grants of legal aid for representation was improved for clients with impaired capacity or a cognitive impairment as a direct result of those clients being identified by the screening tool.

LAQ subsequently decided to permanently implement a shortened form of the screening tool. The implementation initially focuses on service areas where legal advice is provided in person, and the following stage will consider how the screening tool may be utilised for managing the provision of services via telephone.

³¹⁴ Office of the Public Advocate, *Annual Report 2004–2005* (2005) 61 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0405.pdf>> at 10 September 2009; Office of the Public Advocate, *Annual Report 2005–2006* (2006) 19 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0506.pdf>> at 10 September 2009; Office of the Public Advocate, *Annual Report 2007–2008* (2008) 73 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 10 September 2009.

³¹⁵ Other departments initially involved in the project included the Department of Justice and Attorney-General, Queensland Corrective Services, Disability Services Queensland, the Queensland Police Service and the Office for Women.

7.2.3 Comments

The development and implementation of two screening tools raises some concerns that resources could have been better used to develop a uniform screening tool. Regardless, the Office of the Public Advocate commends the initiatives of the PMHS (with the support of QCS) and LAQ to develop and implement screening tools as a step in addressing service delivery issues for clients with impaired capacity or cognitive impairment. The Office of the Public Advocate will continue to monitor further developments.

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On 15 September 2009, LAQ's use of the screening tool won an Outstanding Initiative Award at the Disability Action Week Awards.

7.3 Criminogenic and transitional programs

Successful completion of criminogenic and transitional programs by offenders prior to and following release from prison are important steps towards rehabilitation. Criminogenic programs are intended to address those underlying needs, thoughts and behaviours which lead a prisoner to offend, while transitional programs are aimed at providing the support necessary to prepare an offender for their eventual release into the community.

For offenders with a cognitive impairment, standard criminogenic and transitional programs are often unsuitable for their rehabilitative requirements. These offenders require programs which provide individualised support which addresses their

particular needs. When these needs are unmet, prisoners with a cognitive impairment are disadvantaged. Failure to complete these programs may adversely affect the prisoner's parole applications, or leave them at risk of reoffending after release.

For these reasons the accessibility and suitability of criminogenic and transitional programs are of interest to this Office.

7.3.1 Throughcare framework

In last year's Annual Report, this Office commended QCS for enhancing transition initiatives with the Throughcare framework.³¹⁶ Programs developed to implement the Throughcare framework aim to provide a continuity of care and service provision from prison to community release with the goal of reducing reoffending. These programs provide individualised support to prepare prisoners for their release and include:

- The *Transitions Program*: a pre-release program which intends to address all post release issues. A range of community agencies are involved in the program to directly support prisoners and assist them with developing a release plan. However, some stakeholders suggest the Transitions Program is too passive and more active support should be provided.
- The *Transitional Support Service*: this is for short-term prisoners to help them develop a transitional plan to identify strategies for overcoming reintegration issues, and to provide them with links to community agencies.

³¹⁶ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 74 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 15 September 2009.

- The *Offender Reintegration Support Service*: this service is delivered by contracted specialist non-government organisations which work with offenders while they are in custody and then continue to support them in the community following their release. The program focuses on providing offenders with opportunities to gain skills, addressing the causes of their offending, and re-establishing links with their families and community.
- The *Advance2Work employment program* involves funded service providers working with offenders before and after their release to assist them to obtain and maintain employment.

The Office of the Public Advocate requested statistics from QCS to ascertain the accessibility and completion rates for offenders with impaired capacity. However, QCS is unable to provide this information as it has not yet implemented a screening tool to identify offenders with a cognitive impairment (see Section 7.2).

It is understood that \$1.46 million over the next three years has recently been committed by the Queensland Government to a new program, Bridging the Gap, which is targeted to address the transitional needs of prisoners with impaired cognitive functioning and decision-making disabilities. In 2009-2010 some of this funding will be used to provide specialist support services and differentiated activities for offenders with impaired cognitive functioning throughout their cycle of incarceration. The Office of the Public Advocate commends the Queensland Government on this initiative.

This Office will continue to monitor these programs.

7.3.2 Transitional programs for remand prisoners

Last year the Office of the Public Advocate reported on the absence of reintegration support for remand prisoners with impaired capacity who were released from prison or a court hearing into the community.³¹⁷ Without an active support network, some people are at risk of falling into homelessness and reoffending in order to meet their most basic needs.

It was understood that a number of options for providing appropriate Throughcare support to prisoners on remand were under consideration. QCS has advised that it is piloting a support service for remand offenders, by funding Court Network Australia to run the Restart pilot program for six months from 1 April 2009. Under the program, Court Network staff are available to provide support and assistance to consenting offenders who are discharged directly from court following a period on remand. The support provided to these prisoners includes:

- a brief assessment of community resettlement needs;
- provision of information regarding parole and probation requirements;
- a basic resettlement pack containing:
 - personal amenities;
 - access to second hand clothing, non-perishable groceries, public transport and accommodation; and
 - financial assistance; and

³¹⁷ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 72 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 15 September 2009.

- referrals to a range of community support services including Centrelink assistance.

7.3.3 Making Choices program

In previous Annual Reports, the Office of the Public Advocate reported on the progress of the Making Choices program (the program).³¹⁸

The 10 to 14 week program is the primary intervention undertaken by most high-risk, non-sexual offenders and targets a range of criminogenic needs related to general offending behaviour, including:

- offence-related thought processes;
- criminal associates and attitudes;
- lifestyle balance;
- problem solving; and
- emotional regulation.³¹⁹

It is intended to equip persons who successfully complete the program with necessary skills to avoid reoffending.

As reported in 2006, the program was reviewed by a specialist in intellectual disability, and guidelines were subsequently developed to accommodate the delivery of the program to offenders with a cognitive impairment. These guidelines were implemented and

are followed by staff involved in the delivery of the program.

However, this Office continued to receive information which indicated people who had complex or high level needs due to a cognitive impairment were not participating in the program. The Office of the Public Advocate expressed an interest in reviewing the evaluation of the changes to the program to determine whether prisoners with a cognitive impairment were obtaining the intended benefits.

QCS has advised they are unable to evaluate whether more offenders with a cognitive impairment have been completing the program since the guidelines were implemented. However, it anticipates that the forthcoming implementation of a screening tool to identify prisoners with a cognitive impairment (see Section 7.2) will better place the QCS to evaluate whether those prisoners have improved rates of access and completion of the program.

The Office of the Public Advocate remains interested in the outcome of any evaluations of the program and will continue to explore whether prisoners with a cognitive impairment are appropriately supported to enter and complete the program.

7.3.4 Inclusion Sexual Offending Program

The Inclusion Sexual Offending Program is a 27 week sexual offending program, developed specifically for sexual offenders who have intellectually or socially low functioning. It is only available to offenders with an IQ below 80 or if they have a significant learning deficit which excludes them from participating in some of the mainstream QCS programs. The program is currently offered only at Wolston Correctional Centre.

³¹⁸ Refer to Office of the Public Advocate, *Annual Report 2005–2006* (2006) 37 <<http://www.justice.qld.gov.au/files/Guardianship/anrp0506.pdf>> at 24 September 2009; Office of the Public Advocate, *Annual Report 2007–2008* (2008) 74 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 24 September 2009.

³¹⁹ Queensland Corrective Services, *Guidelines for Referral to Offender Intervention Programs* (2008) 2 <http://www.dcs.qld.gov.au/Resources/Procedures/Offender_Management/documents/ofmappguidefoip.doc> at 24 September 2009.

7.4 Reform of low security custody

On 2 November 2008, the Queensland Government released the Green Paper *Reform of Low Security Custody in Queensland* concerning the expansion of Queensland Corrective Services (QCS) work camp program. Comment was sought from stakeholders.

This expansion proposed a redesignation of all low security correctional facilities to base work camps, and proposed allocation of low risk offenders to camps to work on projects of value to local communities. The criteria for placement in low security required a low risk classification and eligibility for a work order. It was proposed that all other reintegration strategies, such as reintegration and resettlement leave, would be abolished.

This Office made submissions to QCS about the potential for disadvantage for offenders with impaired decision-making capacity compared with the rest of the prisoner population. This Office raised the following issues:

- A scheme for low risk correctional placements should not entrench systemic disadvantage of prisoners with impaired capacity.
- Work orders may result in disadvantage, unless there is reasonable adjustment for prisoners who are unable to work as a result of disability, as there will be no option to provide low security classification to these prisoners under the proposed expansion.
- Work camps located in remote communities may negatively impact on prisoners with impaired capacity who require access to support networks and specialised health and support services.
- Limited approaches to reintegrate people with impaired capacity may result in less opportunity

to address the needs and offending behaviour of these prisoners. This may cause increased recidivism and difficulties with their adjustment to community life.

- Prisoners with impaired capacity who exhibit challenging or inappropriate behaviour may be adversely affected. These prisoners are unlikely to be classified as low risk prisoners under the reforms. They will remain in high security where their behaviours may escalate and new behaviours may be learnt.

The public consultation period in relation to the proposed expansion of the work camp program ended in December 2008. The status of the proposed reforms was not known at the time of writing.

7.5 Offender Health Services

On 1 July 2008, the responsibility for management of health services in Queensland's correctional centres, including services for aged and infirm prisoners, was transferred from Queensland Corrective Services (QCS) to Queensland Health. Both departments reported the decision was made in response to the increasing complexity of prisoners' health care needs, including increased prevalence in the prisoner population of mental health issues, psychological disorders, physical infirmities and problems associated with substance abuse.³²⁰

Offender Health Services, Queensland Health is implementing a new service delivery model, which it is understood is more aligned to the primary health care model available in the general community.

³²⁰ Refer to Queensland Corrective Services, *Annual Report 2007-08* (2008) 37 <http://www.correctiveservices.qld.gov.au/Publications/Corporate_Publications/Annual_Reports/final08-09/QCS_Final%20Report_08-09.pdf> at 9 September 2009; Queensland Health, *Annual Report 2007-08* (2008) 18 <http://www.health.qld.gov.au/publications/corporate/annual_reports/annualreport2008/default.asp> at 9 September 2009.

Before the transition, QCS reported that health and medical services were a major source of complaint for prisoners.³²¹ Prisoners had raised concerns regarding the understaffing of general practitioners, optometrists and dentists.³²² Current statistical information about prisoner complaints regarding medical services varies:

- The Prisoners Legal Service received 54 complaints for 2007-2008.³²³ It is understood this increased to 84 complaints for 2008-2009, representing a 55 percent increase. The Prisoners Legal Service also advised that dental care continues to be a particular area of concern, with anecdotal information suggesting the standard of dental care deteriorated throughout 2008-2009.
- Offender Health Services advised in the first six months following the transition, it received approximately 75 complaints from prisoners regarding their health care, and that this figure was reduced by 40 percent in the following six months.

The Office of the Public Advocate will take an ongoing interest in the development of health services provided to prisoners with impaired decision-making capacity.

7.6 Prison Mental Health Service

The Prison Mental Health Service is operated by Queensland Health as part of the forensic mental health system. It provides mental health services for prisoners with a mental illness.

See Section 4.2 under the Mental Health System.

321 Queensland Corrective Services, *Annual Report 2007-2008* (2008) 46 <http://www.correctiveservices.qld.gov.au/Publications/Corporate_Publications/Annual_Reports/annual07-08/documents/CS_AR_07_08_AR_with_Financials_with_covers.pdf> at 13 October 2009.

322 Prisoners Legal Service Inc. and Catholic Prison Ministry, *2008 Report On Queensland Prisons* (2008) 19 <<http://www.plsqld.com/reports/CPM-PLS%202008%20Prison%20Tour%20Report.pdf>> at 9 September 2009.

323 Prisoners Legal Service Inc. *Annual Report 2007-2008* (2008) 6 <<http://www.plsqld.com/reports/AR0708.doc>> at 6 October 2009.

8 The Legal System

This section is general in nature, and reports on this Office's advocacy on aspects of the legal system such as human rights, privacy, discrimination, and other issues arising from Queensland, Commonwealth and international legal systems which have not been reported elsewhere in this Annual Report.

8.1 Human rights and the United Nations Convention

As discussed in the last two Annual Reports,³²⁴ in March 2007 Australia became a signatory of the United Nations *Convention on the Rights of Persons with Disabilities*³²⁵ (the Convention). The purpose of the Convention is

*to promote, protect and ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities, and to promote respect for their inherent dignity.*³²⁶

In March 2008, the Public Advocate wrote to the Federal Minister for Families, Housing, Community Services and Indigenous Affairs in support of ratification of the Convention.³²⁷ Australia ratified the Convention on 17 July 2008.

The Convention enshrines fundamental human rights for persons with disabilities including:

- the right to equality before the law, and the equal protection and benefit of the law (Article 5);
- the right to accessibility to the physical environment, information technologies, communications, transportation and other services (Article 9);
- the right to life (Article 10);
- the right of equal recognition before the law (Article 12);
- freedom from torture or cruel, inhuman or degrading treatment or punishment (Article 15);
- freedom from exploitation, violence and abuse (Article 16);
- the right to live independently and be included in the community (Article 19);
- the right to education (Article 24), and respect for home and family (Article 23); and
- the right to enjoyment of the highest attainable standard of health without discrimination on the basis of disability (Article 25).

As a State Party, Australia is accountable to the international community if its laws breach the Convention. The Convention imposes obligations which Australia, as a State Party, must comply with, including:

- ensuring and promoting the human rights and fundamental freedoms of persons with disabilities without discrimination;
- adopting appropriate legislation for the implementation of the rights recognised in the Convention;

³²⁴ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 76 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 13 October 2009; Office of the Public Advocate, *Annual Report 2006-2007* (2007) 5 <http://www.justice.qld.gov.au/files/Guardianship/Public_Advocate_annual_report_06-07.pdf> at 13 October 2009.

³²⁵ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc. A/61/611, (entered into force 3 May 2008).

³²⁶ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc. A/61/611, art 1 (entered into force 3 May 2008).

³²⁷ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 76 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 13 October 2009.

- abolishing or modifying existing laws that constitute discrimination against persons with disabilities;
- taking into account the protection and promotion of the human rights of those persons in all policies and programmes;
- refraining from engaging in acts and practices which are inconsistent with the Convention; and
- ensuring public authorities and institutions conform with the Convention.³²⁸

In April 2009 the Australian Government introduced the *Convention on the Rights of Persons with Disabilities Declaration 2009 (Cth)*³²⁹ which declares the Convention an international instrument relating to human rights and freedoms. This Declaration extends the Australian Human Rights Commission's (the Commission) functions to include the human rights cited in the Convention, and enables the Commission to receive, inquire into and conciliate complaints about Convention breaches.³³⁰ If a breach is found to be substantiated, the Commission can report the breach to the Australian Attorney-General, with recommendations.³³¹

Significantly, in July 2009 Australia became a signatory to the Optional Protocol on the Convention, which provides an avenue for individuals to make complaints about violations of the Convention by Australia to the United Nations Committee on the

Rights of Persons with Disabilities, when all domestic remedies have been exhausted.³³²

Following ratification of the Convention, important initiatives to recognise and implement the Convention's principles have been undertaken by the Australian Government, including the development of a National Disability Strategy (see Section 1.7) and a National Human Rights Consultation (see Section 8.2).

While the Office of the Public Advocate welcomes these initiatives and the adoption of the Optional Protocol, incorporation of the Convention into all aspects of Australian law and policy, and ongoing compliance with the Convention is essential to ensure that the rights and interests of adults with disabilities are properly recognised and protected.

8.2 National Human Rights Consultation

On 10 December 2008, the Australian Government launched the National Human Rights Consultation. The aim of the consultation process was to generate public comment about human rights, and the ways in which these can be better integrated into Australian society. The Consultation Committee sought community perspectives on which human rights should be protected and promoted, whether human rights are sufficiently protected and promoted currently, and improvements which could be made by Australia.³³³

³²⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc. A/61/611, art 4 (entered into force 3 May 2008).

³²⁹ This Declaration was declared under the *Human Rights and Equal Opportunity Commission Act 1986* (Cth).

³³⁰ Australian Human Rights Commission, *Improved rights protection for people with disability: Commentary on the 2009 changes to the Disability Discrimination Act 1992 (Cth) and related measures* (August 2009) 15. See also *Australian Human Rights Commission Act 1986* (Cth) s 11(1)(f).

³³¹ *Australian Human Rights Commission Act 1986* (Cth) s 29.

³³² *Optional Protocol to the Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, UN Doc. A/61/611, art 2(d) (entered into force 3 May 2008).

³³³ Australian Human Rights Commission, *Let's Talk about Rights: a toolkit to help individuals and groups participate in the Australian Government's National Human Rights Consultation* (2009) 4.

This Office made a submission³³⁴ to the consultation, which advocated for safeguards to ensure that adults with impaired decision-making capacity are accorded the same human rights which others are better placed to demand.

This Office considers that all basic human rights and responsibilities need to be protected and safeguarded for adults with impaired decision-making capacity. As referred to in this Office's submission, experience and research indicate that people with impaired decision-making capacity frequently encounter:

- challenges in having their human rights safeguarded and respected;
- implied, but not actual, human rights protection;
- frequent deprivation of freedoms and rights on an everyday basis;³³⁵ and
- violations of their human rights that may be caused by, or are the cause of, other violations.

This persists despite a defined shift within Australia's disability policy towards a rights-based perspective recognising equal citizenship of people with disabilities, and their right to participate in all aspects of community life.³³⁶

This Office considers that safeguarding human rights can be problematic to achieve in systems which do not clearly articulate those rights. Vague statements

that persons have human rights are subject to individual interpretation and can place vulnerable people at risk of being exploited or not afforded their dignity or respect by other people.

The Public Advocate considers that mechanisms recognising human rights provide the means to ensure support and implementation of those human rights on the ground. The Australian Government could enact legislation in domestic law, coupled with an education process to support implementation. Developmental work around a national human rights framework is also required. Key points in the submission called for:

- Development of an awareness raising process about human rights for all Australians, including people with impaired decision-making capacity over a sustained period.
- Laws and systems to protect human rights which are accessible and meaningful for people who have a decision-making disability.
- Training and communication across systems and sectors to facilitate the meaningful implementation of human rights for all Australians, including people with impaired capacity.
- A Code of Practice or other tool to support implementation. Without codes or tools, it may be difficult for people in the community to understand whether rights are being met in individual cases, or where and how they are being violated. Also, indicators, tools and benchmarks may assist government to act quickly when the human rights of people with impaired decision-making capacity have been breached or violated.³³⁷

³³⁴ Office of the Public Advocate, *Submission to the National Human Rights Consultation Secretariat regarding the Background Paper: National Human Rights Consultation* (June 2009) <<http://www.publicadvocate.qld.gov.au>> at 2 October 2009.

³³⁵ J Gardner, *Client complexity, compulsory care and human rights* (Presentation to the Australian Guardianship and Administration Committee Symposium, Adelaide, 30 April 2004).

³³⁶ Christine Bigby, *Beset by obstacles: A review of Australian policy develop to support ageing in place for people with intellectual disability* (2008) 33(1) *Journal of Intellectual & Developmental Disability* 76-86; Margaret Ward, *The vision of the Disability Services Act: A never-ending struggle* (2006) 31(4) *Journal of Intellectual & Developmental Disability* 253-254.

³³⁷ For an example of the role tools can play, see Paul French, *Human Rights Indicators for People with Disability* (2008) <www.qai.org.au> at 2 October 2009.

- Development of appropriate monitoring devices.

This Office will continue to take an interest in human rights issues which affect adults with impaired capacity.

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The National Human Rights Consultation Report was released by the Australian Government on 8 October 2009.

Significant recommendations include the adoption of a federal Human Rights Act and that education be prioritised in order to improve and promote human rights in Australia.³³⁸ It further recommends the Australian Government audit all federal legislation, policies and practices to determine compliance with Australia's international human rights obligations, and to make amendments as required to ensure compliance.³³⁹

8.3 Reform of federal disability discrimination laws

The Australian Government recently passed legislation implementing significant changes to anti-discrimination laws under the *Disability Discrimination Act 1992* (Cth) (the Act). The Act applies to areas over which the Commonwealth has constitutional power to legislate.³⁴⁰ Notable amendments include:

- recognition of the United Nations Convention: certain provisions of the Act now have effect to the extent that the provisions give effect to the Convention;³⁴¹
- expanding the definition of disability to render it unlawful to discriminate against a person on the basis of his or her genetic predisposition to a disability; and to include behaviour that is a symptom or manifestation of a disability;³⁴²
- changes to the definition of indirect discrimination;³⁴³
- the defendant to an action has the burden of proving that a requirement or condition to be complied (or proposed to be complied) with by the aggrieved person is reasonable;³⁴⁴ and
- the introduction of a positive duty to make reasonable adjustments for a person with a disability.³⁴⁵

The Act also gives legal effect to the renaming of the Human Rights and Equal Opportunity Commission to the Australian Human Rights Commission.³⁴⁶

It is hoped that these amendments will be successful in reducing and preventing discrimination against adults with a disability.

³³⁸ National Human Rights Consultation Committee, *National Human Rights Consultation Report* (September 2009) Recommendations 1, 18 <<http://www.humanrightsconsultation.gov.au/>> at 9 October 2009.

³³⁹ Ibid, Recommendation 4.

³⁴⁰ Australian Human Rights Commission, *Federal Discrimination Law - The Disability Discrimination Act* (2009) 5.1.3 <http://www.hreoc.gov.au/legal/FDL/pdf/5_DDA.pdf> at 10 September 2009.

³⁴¹ Australian Human Rights Commission, *Improved rights protection for people with disability: Commentary on the 2009 changes to the Disability Discrimination Act 1992* (Cth) and related measures (August 2009), 2.

³⁴² Ibid.

³⁴³ Ibid.

³⁴⁴ Ibid, 5.

³⁴⁵ Ibid, 5-6.

³⁴⁶ Ibid, 14.

8.4 Privacy reform

The work of the Office of the Public Advocate concerning privacy issues continued in 2008-2009.

8.4.1 Commonwealth privacy reform

As reported in its last two Annual Reports³⁴⁷, this Office made submissions to the Australian Law Reform Commission's (ALRC) inquiry into national privacy laws responding to privacy issues of relevance to adults with impaired decision-making capacity. In August 2008 the ALRC released its report *For your Information: Australian Privacy Law and Practice*³⁴⁸ in which it made significant recommendations for privacy law reform, including the development of a national privacy framework and the adoption of a single set of consistent privacy principles to regulate personal information, including health information.³⁴⁹

The ALRC also recommended that the *Privacy Act 1988* (Cth) be amended to include nominee arrangements to recognise nominated substitute decision-makers for adults with impaired decision-making capacity.³⁵⁰ It is proposed that under these arrangements, individuals, or, where a person lacks capacity, an authorised substitute decision-maker, may decide who can act as their agent for the purposes of the *Privacy Act 1988* (Cth).³⁵¹ The nomination would enable an agency or organisation,

such as Centrelink, to deal with the nominee as if that person were the individual.³⁵²

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On 14 October 2009 the Australian Government released its formal response to the ALRC's *For your Information: Australian Privacy Law and Practice* report. It appears that many of the ALRC's recommendations for privacy reform have been accepted. This Office will consider these recommendations.

8.4.2 Queensland privacy reform

Significant changes to Queensland privacy laws also occurred in July 2009 through the introduction of the *Information Privacy Act 2009* (Qld) (IP Act) and the *Right to Information Act 2009* (Qld) (RTI Act). This legislation follows a review of the *Freedom of Information Act 1992* (Qld) (FOI Act). The IP and RTI Acts replace the FOI Act and introduce a new privacy and information regime in Queensland.

The IP Act provides primarily for the collection and handling of personal information in the public sector and right of access by individuals to their own personal information in the government's possession or control.³⁵³ It contains 11 Information Privacy Principles which impose strict obligations on Queensland Government agencies in relation to the collection, storage, use and disclosure of personal information about individuals.³⁵⁴ The RTI

³⁴⁷ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 76 <www.publicadvocate.qld.gov.au> at 2 October 2009; Office of the Public Advocate, *Annual Report 2006-2007* (2007) 58 <www.publicadvocate.qld.gov.au> at 2 October 2009.

³⁴⁸ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (May 2008).

³⁴⁹ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (May 2008) Recommendation 18.2 <<http://www.alrc.gov.au/inquiries/title/alrc108/recomendations.html>> at 1 September 2009.

³⁵⁰ Ibid, Recommendations 70-1 and 70-2.

³⁵¹ Ibid.

³⁵² Ibid, 70.96–70.102.

³⁵³ *Information Privacy Act 2009* (Qld) s 3.

³⁵⁴ *Information Privacy Act 2009* (Qld) sch 3.

Act governs access to information in the Queensland Government's possession or control generally.³⁵⁵

Adults with impaired decision-making capacity and substitute decision-makers have traditionally experienced difficulties in accessing information. Privacy requirements have often been cited as the basis for refusing to disclose information about a vulnerable adult's affairs to substitute decision-makers, particularly where decision-makers act informally. It is hoped that these reforms will improve the accessibility of information for vulnerable adults and their representatives. This Office will continue to take an interest in privacy issues, and whether the new regime enhances transparency, accountability and access to information.

8.4.3 Health Privacy Submission

As part of its response to the Australian Health Ministers' Advisory Council's consultation on healthcare identifiers (for further details, see Section 5.4), the Office of the Public Advocate made submissions about proposed reforms to national privacy laws in the health arena. The proposals flow from the ALRC's report about Australia's privacy laws.³⁵⁶

The following key submissions were made by the Office of the Public Advocate concerning the health system's privacy needs:

- The Commonwealth privacy regime should support and facilitate substitute decision-makers to access relevant health information, while protecting information and privacy, and providing safeguards for vulnerable adults. The proposed

privacy reforms should not compromise other legitimate means by which individuals may access information on behalf of adults with impaired decision-making capacity (such as guardianship regimes).

- The definition of person responsible for an individual's should be expanded (subject to certain limitations) to enable a person to act on behalf of an adult with impaired decision-making capacity in circumstances where information may be used or disclosed. A broader definition may benefit adults with a decision-making disability where, for example, a friend or carer is collecting medication on the adult's behalf, or is supporting the adult at a doctor's appointment.
- Sensitive information should be able to be collected, used and disclosed where there is a serious threat to an individual's welfare. This would enable greater assistance to be given to vulnerable individuals and their families where genuine concerns for the welfare of an adult, or a group of adults exists.
- Government agencies and organisations with a public interest monitoring role should be permitted access to health information in appropriate circumstances to enable scrutiny of health care systems and the performance of systemic functions.
- Health information about deceased individuals should be subject to the same protection as other personal information about deceased persons.

8.5 Review of the civil and criminal justice system in Queensland

As discussed in Section 6.1, the *Review of the civil and criminal justice system in Queensland* report (the Report), and the Queensland Government's response

³⁵⁵ *Right to Information Act 2009* (Qld) s 3.

³⁵⁶ Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report No 108 (May 2008).

were released in July 2009. The Report followed a review of the civil and criminal justice system in Queensland by the Hon. Martin Moynihan AO QC. The Public Advocate made a submission to the review.

A key recommendation for reform of Queensland's civil justice system (which was supported by the Queensland Government in its response) was changes to the monetary limits for civil matters before the courts.

The monetary limits recommended and accepted by the Government in its response are as follows:

- Magistrates Court (increased from \$50,000 to \$150,000);
- District Court (increased from \$250,000 to \$750,000); and
- Small Claims Tribunal (increased from \$7,500 to \$25,000).

The Supreme Court of Queensland will hear civil claims over \$750,000. It is understood these reforms will be among those given initial priority when the State Government commences its staged implementation process of reforms to both the civil and criminal justice system. It is understood that draft legislation will be introduced into the Queensland Parliament in late 2009 concerning reforms to the civil monetary limits, sentencing, committal hearings, disclosure and the criminal jurisdiction.³⁵⁷

8.6 Reform of the civil and administrative justice system in Queensland (QCAT)

The Queensland Government's reform of the civil and administrative justice system in Queensland has continued. The Queensland Civil and Administrative Tribunal (QCAT) will commence operation on 1 December 2009.

For more detailed discussion about the reforms, see Section 2.2.

8.7 Amendments to the Coroners Act 2003

In its last two Annual Reports the Office of the Public Advocate reported on advocacy performed in relation to proposed amendments to the *Coroners Act 2003* (Qld) and the coronial system.³⁵⁸

A significant function of the Coroner following an inquest into a reportable death³⁵⁹ is to make comments and recommendations about systemic issues, including matters of public health and safety; the administration of justice; and ways to prevent future deaths from happening in similar circumstances.³⁶⁰

In recent years this Office advocated for legislative reforms and changes to the coronial system, including providing comments as part of the Government's review of the *Coroners Act 2003* (Qld). Key issues for consideration identified by this Office included the need for:

³⁵⁷ Attorney-General and Minister for Industrial Relations, The Hon. Cameron Dick MP, *Sweeping court reforms to streamline Qld justice system* (Media Release, 21 July 2009) <<http://www.cabinet.qld.gov.au/MMS/StatementDisplaySingle.aspx?id=65265>> at 29 September 2009.

³⁵⁸ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 80 <www.publicadvocate.qld.gov.au> at 2 October 2009; Office of the Public Advocate, *Annual Report 2006-2007* (2007) 59 <www.publicadvocate.qld.gov.au> at 2 October 2009.

³⁵⁹ A Reportable death is defined in the *Coroners Act 2003* (Qld) s 8(3).

³⁶⁰ *Coroners Act 2003* (Qld) s 46.

- reporting mechanisms to enable government agencies and other relevant entities to report back on the implementation of recommendations for systemic reform made by the Coroner;
- reports about the progress of agencies in implementing the Coroner's recommendations to be made publicly available, thereby ensuring accountability and transparency;
- legislative provisions to extend the Coroner's powers to make recommendations regarding identified issues concerning standards of care, supervision of people in care/custody, and other systemic matters in the public interest;
- inquests to be conducted where a person received institutional or inpatient care shortly prior to their death (for example, at a mental health service, residential service or correctional facility); and
- the appointment of more full-time specialist Coroners with expertise in identifying and considering systemic issues to enable proper consideration to be given to those matters, particularly where thorough exploration of those issues may result in the prevention of similar future incidents for other vulnerable persons.

In 2008 the Office of the State Coroner expanded, with the appointment of three additional Coroners, including designated Coroners to Brisbane, and the Northern and Southern Queensland regions. There are now five specialist Coroners (including the State Coroner).

Last year the Queensland Government also introduced a process to ensure the monitoring of responses of public sector agencies to coronial recommendations, and the public reporting of those responses.

In August 2009, the *Queensland Government's Response to Coronial Recommendations 2008*³⁶¹ was released.

The *Coroners and Other Acts Amendment Act 2009* (Qld) received assent in August 2009. It contains the following relevant changes:

- Expansion of the requirement to report a death in care (pursuant to section 9(1)(a)) to the Coroner so that a service provider at the place where the deceased ordinarily lived (for the purpose of being in care) is obliged to report the death, even if the death occurred elsewhere, and even if some other person has reported, or may report, the death.³⁶²
- The introduction of a new category of reportable death, namely, where the death happened in the course of, or as a result of, police operations. This will assist Coroners in ensuring systemic issues relating to deaths in this category are identified.³⁶³ These deaths (other than a death which is also a death in custody) will be subject to a mandatory inquest unless the Coroner considers the circumstances do not necessitate it.³⁶⁴
- A requirement to report health care related deaths which replaces the requirement to report a death not reasonably expected to be the outcome of a health procedure.³⁶⁵
- Where the deceased was detained under the *Public Health Act 2005* (Qld) (where, for

³⁶¹ Queensland Government, *Queensland Government's Response to Coronial Recommendations 2008* (August 2009) <www.justice.qld.gov.au> at 2 October 2009.

³⁶² Explanatory Notes, *Coroners and Other Acts Amendment Bill 2009* (Qld) pt 2, cl 4.

³⁶³ Explanatory Notes, *Coroners and Other Acts Amendment Bill 2009* (Qld) pt 2, cl 5.

³⁶⁴ Explanatory Notes, *Coroners and Other Acts Amendment Bill 2009* (Qld) pt 2, cl 27.

³⁶⁵ Explanatory Notes, *Coroners and Other Acts Amendment Bill 2009* (Qld) pt 2, cl 5.

example, the detention is under the public health emergency powers, or a controlled notifiable condition order) it must be reported to the Coroner. However, an inquest is not mandatory, unless it is also a death in care and the circumstances of the death raise issues about the deceased's care.³⁶⁶

It is understood these amendments will commence on 2 November 2009. The Public Advocate will continue to monitor reportable deaths of persons with impaired decision-making capacity, and will seek leave to intervene (where appropriate) in inquests in some significant cases where systemic issues arise.

8.8 Reform of Queensland's adoption laws

In July 2008 the State Government announced it would proceed with reform of Queensland's adoption laws, and released a policy paper outlining proposals for reform. The Office of the Public Advocate provided a response addressing adoption issues which affect adults with impaired decision-making capacity.

This Office noted the significance of the provisions in the United Nations *Convention on the Rights of Persons with Disabilities* (the UN Convention), and submitted that the principles guiding adoption decisions and practice must expressly reflect and articulate the Convention provisions. The UN Convention is particularly relevant in the context of adoption, as Article 23 requires State Parties to take effective and appropriate measure to eliminate discrimination against persons with disabilities in matters relating to marriage, family, parenthood and relationships on an equal basis with others. Importantly, Article 23(2) expressly provides that

the rights and responsibilities of persons with disabilities be ensured with regard to the adoption of children (subject to the paramount consideration of the best interests of the child), and that appropriate assistance be rendered by State Parties to persons with disabilities in the performance of their child-rearing functions.

It was further submitted that the United Nations *Convention on the Rights of the Child* be adhered to when formulating new adoption laws, in particular, Article 8, which protects a child's right to preserve his or her family relations; and Article 16, which ensures that no child is subject to arbitrary interference with his or her family. This Office submitted:

- that it would be inappropriate for the adoption of the children of persons with disabilities to occur where prejudices/discrimination against the parenting ability of persons with disability underlie the conclusion/assessment that it is in the best interests of the child to be adopted; and
- assessments of parenting ability to ascertain the best interests of the child must occur in the context of adequate support to persons with disability to assist them to meet their child-rearing responsibilities.

It was submitted that only when a complete and proper assessment of parenting ability is made can adoption of a child born to a parent with a disability be considered. Furthermore, proper support must be given to persons with disabilities to allow them to develop and demonstrate their parenting abilities and to meet their responsibilities before any such assessment is considered.

In response to the proposal for the Children's Court to dispense with the need for consent where a birth parent has impaired decision-making capacity, it was

³⁶⁶ Explanatory Notes, Coroners and Other Acts Amendment Bill 2009 (Qld) pt 2, cl 27.

urged that the Court not give the dispensation unless satisfied it would be in the child's best interests for adoption arrangements to be made. It was submitted that there be a mandatory requirement for the views and wishes of the parent, and any guardian or attorney for personal matters to be placed before the Court and taken into account. Such a dispensation should only be given where a parent does not have capacity and appropriate support and information has been given to the parent.

The *Adoption Act 2009* (Qld) was assented to in August 2009 and introduces significant reforms. It provides for the adoption of children in Queensland, and for access to information about parties to adoptions.³⁶⁷ For an adoption to occur, consent must be given by both parents (unless a Court dispenses with the requirement for a parent's consent), and an adoption order must be made by the Children's Court.³⁶⁸ The Act also supports open adoption practice, whereby information sharing between the parties to the adoption may occur. For example, the new Act enables an adoption plan to be made governing contact between the birth parent and child after adoption, and for information to be exchanged.³⁶⁹ The Act recognises that it may be in the child's best interests for contact or information exchange with the birth parents to occur.³⁷⁰

Consent to the adoption must be given by the birth parents freely and voluntarily, and they must have capacity to consent.³⁷¹ A guardian cannot consent to

the adoption of a child on behalf of a birth parent.³⁷²

The consent requirement affects adults with impaired decision-making capacity (who are birth parents of a child being considered for adoption) as follows:

- Except where the Court has dispensed with the need for a parent's consent to an adoption, specified information must be given to each of the child's parents, and counselling of the parents must be carried out.³⁷³ The information and counselling must be given and carried out in a way that enables the parent to understand.³⁷⁴
- Where it is known or suspected by a counsellor or the chief executive of the Department of Child Safety that a parent does not have capacity to consent to an adoption, an application must be made to the Guardianship and Administration Tribunal (the Tribunal) for a declaration about the parent's capacity to give consent.³⁷⁵
- Where the Tribunal declares that the parent does not have capacity to consent, and the parent has no guardian for the matter of dispensation with the need for consent, an application must be made to the Tribunal seeking the appointment of a guardian to represent the parent's interests in a proceeding for the dispensation of the parent's consent.³⁷⁶
- The Department may make an application to the Children's Court seeking an order dispensing with the need for the consent of a parent to the child's adoption.³⁷⁷ A ground for dispensing with consent is that the Tribunal has made a declaration that the parent does not have the capacity to

³⁶⁷ *Adoption Act 2009* (Qld) s 5.

³⁶⁸ *Adoption Act 2009* (Qld) s 175(2).

³⁶⁹ *Adoption Act 2009* (Qld) s 165.

³⁷⁰ *Adoption Act 2009* (Qld) s 6(j).

³⁷¹ *Adoption Act 2009* (Qld) s 17(1).

³⁷² Consenting to the adoption of the child of an adult is a 'special personal matter' for which a guardian may not be given power; and cannot be appointed: *Guardianship and Administration Act 2000* (Qld) sch 2, pt2, ss 3, (d), 14(3).

³⁷³ *Adoption Act 2009* (Qld) ss 15, 21, 23-24.

³⁷⁴ *Adoption Act 2009* (Qld) s 21.

³⁷⁵ *Adoption Act 2009* (Qld) s 29.

³⁷⁶ *Adoption Act 2009* (Qld) s 30.

³⁷⁷ *Adoption Act 2009* (Qld) s 35.

consent.³⁷⁸ This means the parent is not capable of understanding the nature and effect of the adoption; freely and voluntarily making decisions about the adoption; and communicating decisions in some way.³⁷⁹

The Act also makes specific provisions regarding access to identifying information about parties to an adoption by the other parties. Where an adult adopted person or birth parent has impaired decision-making capacity and wishes to request information about another party, a guardian or adult relative of the person may request the information on their behalf.³⁸⁰ Where an adoptive parent or birth parent does not have capacity to consent to the information's release, a substitute decision-maker (as prescribed by the Act) is able to provide consent.³⁸¹

This Office is currently considering issues arising from these reforms for adults with impaired decision-making capacity and intends to make further comment for Government's consideration.

8.9 Prisoner anti-discrimination complaints

As reported in the 2007-2008 Annual Report,³⁸² the *Corrective Services and Other Legislation Amendment Act 2008* (Qld), passed in October 2008, introduced significant amendments to prisoner complaints processes. This Office, the Anti-Discrimination Commission Queensland (ADCQ) and the Australian Human Rights Commission expressed human rights concerns about the new provisions, which restrict

prisoner access to the ADCQ complaints process unless a series of internal prison notifications and complaint processes are first undertaken.

This Office was concerned that the amendments would discriminate against prisoners with impaired decision-making capacity through denying them equal access to their rights to make a complaint to the ADCQ regarding disability discrimination. The *Corrective Services and Other Legislation Amendment Act 2008* (Qld) also appeared to contravene the principles contained in the United Nations *Convention on the Rights of Persons with Disabilities*. The Office of the Public Advocate supported calls for the proposed amendments to be reconsidered.

Since the amendments commenced it is not known how many complaints have been made by prisoners internally through the Department of Corrective Services.³⁸³ However, the ADCQ has advised that in the nine months since the amendments took effect, they have received nine prisoner complaints, as opposed to 24 in the nine month period prior to the amendments. Of those nine complaints, five complaints were made prior to internal complaints mechanisms being exhausted.

These figures represent a significant decrease in the number of complaints received by the ADCQ. This Office's concerns about the potential discriminatory nature of the amendments for prisoners with impaired decision-making capacity remain. The Public Advocate will continue to monitor issues around prisoner complaints.

³⁷⁸ *Adoption Act 2009* (Qld) s 39(10)(b).

³⁷⁹ *Adoption Act 2009* (Qld) sch 3 (capacity).

³⁸⁰ *Adoption Act 2009* (Qld) ss 257, 263, 264, 265.

³⁸¹ *Adoption Act 2009* (Qld) ss 256, 257, 263.

³⁸² Office of the Public Advocate, *Annual Report 2007-2008* (2008) 74-75 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 13 October 2009.

³⁸³ It is expected that this information will be available in Queensland Corrective Services' 2008-2009 report.

8.10 Criminal offences and penalties

In 2003 a respite and accommodation support services facility for adults and children with disabilities became the subject of a wide-ranging investigation by the Adult Guardian and the Queensland Police Service following serious allegations of abuse of residents (including children) with disabilities by carers employed at the facility.³⁸⁴

Following the investigation, various criminal charges were laid against former staff. Some of these charges have been finalised. Recently, a former carer was sentenced to 150 hours of community service and a conviction was recorded for the assault of two residents and deprivation of liberty of one of those residents. At the time of the offences, the residents who were the subject of the offending were children with autism aged between 6 and 13 years old. An appeal against sentence has been lodged by the former carer.

Further proceedings against other former carers are yet to be finalised.

The Public Advocate has raised with the Attorney-General the need for review of criminal offences and penalties where the victim is a vulnerable person. Law reform is necessary in order to send a clear message to the community that offending against persons with impaired decision-making capacity and disability is intolerable and unacceptable.



Senior Legal Officer Penny Neller.

³⁸⁴ Rosemary Odgers, Abuse claims spark care centre overhaul, *The Courier-Mail* (Brisbane, 25 July 2003); Julian Kennedy, Children caged, *Caboolture Shire Herald* (Caboolture) 29 June 2003; Kay Dibben, They are abusing me, *The Sunday Mail* (Brisbane) 28 March 2004, 24.

9 The Aged Care System

In 2008-2009 elder abuse and residential and community aged care services were a focus of the Public Advocate's advocacy around ageing and the aged care system.

It is widely accepted that elder abuse is under-reported.³⁸⁵ Some Australian research suggests approximately three to seven percent of older people over the age of 65 are affected by elder abuse.³⁸⁶

In recent years Queensland has experienced a rapid increase in population. Projections suggest that by 2046, persons over 65 will constitute 25 percent of the Australian population.³⁸⁷ It is estimated that approximately 258,000 Queenslanders and 1.13 million Australians will have dementia by 2050.³⁸⁸ As the population escalates, and average life-expectancy increases, a higher proportion of older people are likely to develop impaired decision-making capacity.

These older persons are vulnerable to abuse, neglect and exploitation. The implementation of legal and policy initiatives to improve understanding,

awareness and prevention of elder abuse is urgently required.

The ageing of the population will also significantly increase the need and demand for services offering quality support and care to older Australians.

9.1 Aged Care Complaints Investigation Scheme review

The *Aged Care Act 1997* (Cth) (the Act) provides for the investigation of complaints which relate to residential and community aged care services subsidised by the Australian Government. The *Investigation Principles 2007* (Cth) (the Principles) (created under the Act) establish the Aged Care Complaints Investigation Scheme (CIS), managed by the Department of Health and Ageing.

The CIS, which began in May 2007, may investigate complaints and issues relating to:

- the delivery of aged care services funded by the Australian Government; and
- an approved provider's responsibilities under the Act.³⁸⁹

The overriding concern of the CIS, when investigating complaints, is whether the approved provider has breached its responsibilities under the Act or the *Aged Care Principles*.³⁹⁰

In June 2009 the Public Advocate expressed concerns to the Australian Government relating, in essence, to the focus of CIS investigations, the lack of power of the Aged Care Commissioner (the Commissioner), and

385 See for example Anne-Louise McCawley, *Financial abuse and older people with impaired capacity: A secondary analysis of Tribunal files* (D Phil Thesis, University of Queensland, October 2006) 1; Pamela Kinnear and Adam Graycar, *Abuse of Older People: Crime or Family Dynamics?* (No 113, Australian Institute of Criminology, 1999) 3; D Rabiner, J O'Keefe and D Brown 'A conceptual framework for financial exploitation of older persons' (2004) 16 (2) *Journal of Elder Abuse and Elder Neglect* 53-73; World Health Organisation, *Prevention of Elder Abuse* <http://www.who.int/ageing/projects/elder_abuse/en/> at 10 October 2009.

386 The Australian Pensioners and Superannuants League of Queensland, *The Strategic Plan for the Prevention of Elder Abuse in Queensland* (2001) 4; Les Jackson 'Elder Abuse and Queensland legislation' (2003) 2 *Elder Law Review* 2.

387 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Older People and the Law* (2007) [1.1].

388 Access Economics, *Keeping dementia front of mind: incidence and prevalence 2009-2050* (August 2009) 3 <<http://www.alzheimers.org.au/content.cfm?infopageid=6012>> at 15 October 2009.

389 *Investigation Principles 2007* (Cth) pt 3.

390 The *Aged Care Principles*, which contain the responsibilities of approved providers, are established under section 96(1) of the *Aged Care Act 1997* (Cth).

other issues which may adversely affect the rights and interests of older persons with impaired capacity.

Complaints received by the CIS generally relate to matters including health and personal care of residents, physical environment, consultation and communication, personnel and abuse.³⁹¹ The CIS also receives compulsory reports from approved providers about reportable assaults³⁹² of residential aged care residents, and unexplained absences of care recipients from residential aged care services.³⁹³

In July 2009 the Federal Minister for Ageing announced a review of the operation of the CIS and sought public input. The Public Advocate provided a detailed submission to the review raising issues and concerns about:

- the investigative methods used by the CIS when investigating complaints;
- the inadequacy of the threshold test applied to investigations, which requires that the CIS determine only the extent to which an approved provider has breached its responsibilities under the Act, rather than whether appropriate and adequate support and care for the recipient was provided;
- the adequacy of information collected and considered in investigations;
- time frames for investigations and reviews of examinable decisions by the Commissioner;

- the Act's reporting requirements;
- monitoring of systemic issues;
- the lack of whistleblower protection for voluntary complainants; and
- the response of the CIS to complaints.³⁹⁴

A significant issue raised by this Office was the Department's power to re-examine decisions independently reviewed by the Commissioner. The Commissioner is an independent statutory appointee who may review examinable decisions of the CIS.³⁹⁵ In recent years there have been instances where the Commissioner's decision about a complaint has not been adopted following reconsideration by the Department.³⁹⁶ The Public Advocate submitted this approach is inappropriate as it compromises the watchdog role of the Commissioner. It was further submitted that the Commissioner's decisions should be binding on the parties, and the Department's powers to re-examine the Commissioner's decisions revoked.

This Office will continue to monitor the complaints regime and its impact upon adults with impaired decision-making capacity.

9.2 Joint work with the Queensland Law Society, Elder Law Section

As reported in the last year's Annual Report, the Office of the Public Advocate and the Elder Law Section of the Queensland Law Society collaborated to undertake research into the adequacy of

³⁹¹ Department of Health and Ageing, *Report on the Operation of the Aged Care Act 1997 - 1 July 2007 to 30 June 2008* <<http://www.health.gov.au/internet/main/publishing.nsf/Content/ageing-reports-acarep-2008.htm~ageing-reports-acarep-2008-5.htm>> at 25 August 2009.

³⁹² These include unlawful sexual contact, unreasonable use of force or other assaults specified by the Accountability Principles: *Aged Care Act 1997* (Cth) s 63-1AA (9).

³⁹³ *Aged Care Act 1997* (Cth) s 63-1AA; *Accountability Principles: Aged Care Act 1997* (Cth) s 1.14A.

³⁹⁴ Office of the Public Advocate, *Aged Care Complaints Investigation Scheme: Submission of the Office of the Public Advocate-Queensland (2009)* <<http://www.publicadvocate.qld.gov.au>> at 2 September 2009.

³⁹⁵ *Investigation Principles 2007* (Cth) s 16A.21.

³⁹⁶ Office of the Aged Care Commissioner, *Annual Report 2007-2008* (2008)19.

Queensland law regarding elder abuse.³⁹⁷ The impetus for the research was shared concerns about difficulties for vulnerable older people, in particular those with impaired decision-making capacity, in obtaining civil and criminal justice, and protection from abuse. These issues are of increasing relevance as the proportion of older people in society rapidly rises. The incidence of elder abuse is likely to escalate as the population ages. The research culminated in the preparation of a discussion paper raising relevant issues.

The Discussion Paper explores key issues including:

- the inadequacy of current civil law remedies (in tort and contract) in redressing financial, physical, sexual and psychological abuse of older people;
- the limitations of the Queensland guardianship regime in protecting vulnerable older persons;
- reporting requirements, including the debate concerning mandatory reporting of elder abuse;
- the inadequacy of the current criminal law in protecting older persons through the absence of specific offences and penalties for elder abuse;
- problems experienced by older persons as victims of crime, including lack of support and protection when providing evidence in court proceedings;
- shortcomings of Domestic Violence Protection Orders and Peace and Good Behaviour Orders in protecting older persons from abuse;
- difficulties experienced by older persons in accessing legal advice and services; and
- legal responses to elder abuse in international jurisdictions.

The paper discusses the need for reform of policy, service and legislative systems to address the complex issues associated with elder abuse.

It is anticipated that the Discussion Paper will be published and available to the public by the end of 2009.

9.3 Senate inquiry into residential and community aged care services

In October 2008, the Australian Senate referred issues concerning the funding, planning, allocation, capital and equity of residential and community aged care in Australia to the Senate Standing Committee on Finance and Public Administration (the Committee) for inquiry and report. The Committee invited submissions.

The Public Advocate made a submission to and appeared before the Committee in relation to issues for adults with impaired decision-making capacity in residential and community aged care services. For further details, see Section 12.1.



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

³⁹⁷ Elder abuse may be defined as any act occurring within a relationship where there is an implication of trust, which results in harm to an older person. Abuse can be physical, sexual, financial, psychological, social and/or neglect: The Australian Network for the Prevention of Elder Abuse, *Preventing elder abuse in an aging world is everybody's business* (2007) <<http://agedrights.asn.au/pdf/ANPEA%20Brochure%20June%202007.pdf>> at 21 September 2009.

10 The Workforce System

Workforce systems affect people with impaired decision-making capacity in two ways: employment of people with a disability is fundamental to social inclusion and provides opportunities to enhance their quality of life; and pressures on workforce capacity, capability and resourcing in the human services sector affects the quality of services delivered to these adults.

10.1 Employment of people with a disability

As reported in its Annual Report 2007-2008,³⁹⁸ in mid-2008 the Office of the Public Advocate made a submission to the Australian Government's consultation for a National Mental Health and Disability Employment Strategy, a plan aimed at getting people with a disability or mental illness into work.³⁹⁹

This Office's submission annexed its Issues Paper, *Navigating the pathways from school to work*,⁴⁰⁰ which identified particular challenges facing young Queenslanders with a decision-making disability. The paper outlined a set of action components for program development, based on successful precedents and pilots in the area of vocational education and training (VET), which led to employment for people with a disability. The paper also included a strategy to improve access to VET and subsequent employment for young people with

a disability in the school education system as well as for young adults one to five years out of school who had not found employment.

On 14 September 2009, the Australian Government released its *National Mental Health and Disability Employment Strategy* (the Strategy). The Strategy set out a number of priority areas to address issues for people with a disability and further the Government's social inclusion agenda. These priority areas are:

- to encourage people with disability to increase their engagement and participation in the community through education, training and employment;
- to improve disability employment services, which must be able to give people with disability the assistance and support they need to enter, remain in and return to the workforce;
- to ensure that people with disability have better access to education and training;
- to improve information and advice services for employers of people with disability and help them realise the benefits of employing people with a disability;
- to set a strong example to all Australian employers through the direct employment of people with disability in the Australian Public Service; and
- to promote and accelerate workplace innovation relating to people with disability.⁴⁰¹

Those actions which target better access to education and training for people with a disability were consistent with the recommendations made by the Office of the Public Advocate. The Australian Government announced in the Strategy:

398 Office of the Public Advocate, *Annual Report 2007-2008* (2008) 89 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 23 September 2009.

399 Office of the Public Advocate, *Annual Report 2007-2008* (2008) 89 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 23 September 2009.

400 Office of the Public Advocate, *Navigating the pathways from school to work* (2004) <http://www.justice.qld.gov.au/files/Guardianship/ip2_0604.pdf> at 23 September 2009.

401 Australian Government, *National Mental Health and Disability Employment Strategy* (2009) 7 <<http://www.workplace.gov.au/NR/rdonlyres/EB5EF168-77F1-454D-B8C9-590976041F24/0/NHMDDES.pdf>> at 23 September 2009.

- the development of a National Disability Coordination Officer program to assist people with a disability to make the transition from school and VET into employment, and to improve linkages between schools, VET providers, and providers of disability programs and assistance;
- collaboration with the States to improve educational outcomes for young Australians, including those with a disability; and
- the creation of a Higher Education Disability Support Program to enable higher education providers to remove barriers to access for students with a disability.⁴⁰²

This Office commends the Australian Government for its leadership in the development of the Strategy and will take an ongoing interest in its implementation in Queensland.

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In September 2009, the Australian Government announced it had signed a number of industry leaders, employment specialists and peak bodies to the *Statement of Intent Working Together for Ability*. It acknowledges the commitment of the Australian Government to work with employers from a range of sectors to improve employment opportunities for people with disability.⁴⁰³ The signatories also engaged in a forum earlier this year to investigate strategies for increasing private sector engagement with people with a disability.

10.2 Employment screening in human services

The regulation of human services employment screening is shared between the States and the Commonwealth. The administration of employment screening laws is conducted by various departments, each with their own processes. This has led to the duplication of employee screening processes. For example, in Queensland:

- A person who has been screened by the national scheme to work in the aged care sector is not cleared to work with children or in the disability sector without further screening for each of these sectors.
- School teachers (who are screened through teacher registration) and disability support workers (who are screened through the yellow card system) must undergo another screening process via the blue card system (administered by the Commission for Children and Young People and Child Guardian) to provide services to children outside of their employment duties.
- A person who provides services to children with a disability is screened through the yellow card system if the services they provide are in an organisation funded by the Department of Communities, or the blue card system if the organisation is not funded.

It is understood that each process differs from the others as various considerations apply to criminal history screening depending on the type of employment. Therefore it is not a simple matter to make one card suitable and appropriate for all sectors.

⁴⁰² Australian Government, *National Mental Health and Disability Employment Strategy* (2009) 15-16 <<http://www.workplace.gov.au/NR/rdonlyres/EB5EF168-77F1-454D-B8C9-590976041F24/0/NHMDDES.pdf>> at 23 September 2009.

⁴⁰³ Department of Families, Housing, Community Services and Indigenous Affairs, *Statement of Intent Working Together for Ability* (2009) <http://www.fahcsia.gov.au/sa/disability/pubs/employers/Pages/statement_intent.aspx> at 5 October 2009.

Appropriate screening to protect vulnerable people from abuse is supported. However, these various requirements have been criticised for their adverse affect on the fluidity of employment across the human services sectors and the considerable financial costs of meeting the requirements.⁴⁰⁴ These sectors already experience difficulty in the recruitment and retention of staff without the added burden of duplicate processes.⁴⁰⁵

In response to the concerns of stakeholders, the Queensland Government has begun reviewing employment screening across Government with a view to reducing costs, duplication and recruitment delays. The Office of the Public Advocate will continue to monitor developments in relation to the impact of employment screening on adults with impaired decision-making capacity.



Part-time Administration Officer Sam Leahy.

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The Queensland Government has recently released a consultation paper regarding the development of the Criminal History Screening Bill 2009 (Qld) to strengthen safeguards to children and people with a disability while reducing costs, duplication and recruitment delays associated with screening processes. This Office intends to provide a submission to protect the rights and interests of adults with impaired decision-making capacity.

⁴⁰⁴ UnitingCare Centre for Social Justice, *Employment Screening: Safety or Injustice in Human Services?* (2007) <http://www.ucareqld.com.au/SocialJustice/index.php?option=com_docman&task=doc_download&gid=172> at 23 September 2009.

⁴⁰⁵ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 89-90 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 23 September 2009.



ADVOCACY PART TWO: Interventions ACTIVITIES

Interventions

This section reports on advocacy undertaken through interventions in proceedings and inquiries by the Public Advocate in 2008-2009.

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

This Office will become involved in legal interventions where significant systems issues arise, and where it is an appropriate advocacy strategy in relation to the issues and systems concerned. For example, interventions undertaken this year related to fundamental systemic issues affecting adults with impaired decision-making capacity including application of the presumption of capacity; the administration of financial matters; the approval and use of restrictive practices; and mental health services and disability support in prison. Commonly, other advocacy and legal interventions complement one another.

The information reported in this part contains only the views and submissions made by the Public Advocate in the interventions. It does not discuss the submissions or views of other parties to the proceedings, except where integral to discussion of the Public Advocate's advocacy.

11 Legal interventions

11.1 Supreme Court of Queensland

11.1.1 Appeal regarding the presumption of capacity

The Public Advocate intervened in an appeal from the Guardianship and Administration Tribunal (the Tribunal) to the Supreme Court of Queensland.

The Tribunal decision appealed (Re BAK)

The adult concerned was a 48 year old woman who had suffered a brain injury as a result of a cerebro-vascular accident secondary to medical treatment some years earlier. In 2005, she received a damages award arising from the injuries of approximately \$1.95 million. The Supreme Court appointed an administrator to manage the amount. In 2006, the applicant sought a declaration that she had capacity to manage the damages fund and a review of the appointment of the administrator. The Tribunal found that she had impaired capacity for her finances and continued the appointment of the administrator.

In 2008, the Tribunal heard another review of the appointment of the administrator who had been appointed to manage the damages award and another application for a declaration of capacity. It dismissed the application for a declaration of capacity and continued the appointment of the administrator.

The adult appealed to the Supreme Court on several grounds.

In its reasons for decision, the Tribunal said:

[78] The presumption of capacity is a rebuttable presumption, which means that it applies in

the absence of some evidence that the adult had impaired capacity. Once rebutted, the question of capacity becomes a matter for determination on the balance of probabilities after consideration of all the evidence.

[79] The Tribunal has previously found that BAK has impaired capacity and until such time as the Tribunal makes an order to the contrary, the presumption of capacity remains rebutted. To propose otherwise would be to render an appointee (sic) decision making process unworkable.⁴⁰⁶

Appeal to the Supreme Court

The Public Advocate sought leave to intervene on one of the grounds of appeal only: that the Tribunal had misconstrued its statutory obligations in failing to apply the presumption of capacity under General Principle 1 of the *Guardianship and Administration Act 2000* (Qld) (the Act).

The Public Advocate's arguments

In essence, the Public Advocate submitted as follows:

- The presumption of capacity is fundamental to respect for an adult's right to make decisions and autonomy.⁴⁰⁷
- Section 11 of the Act provides:

*(1) A person or other entity who performs a function or exercises a power under this Act for a matter in relation to an adult with impaired capacity for the matter **must apply the principles stated in schedule 1**⁴⁰⁸ (the general principles and,*

for a health matter or special health matter, the health care principle).

- The General Principle 1 provides:

An adult is presumed to have capacity for a matter.⁴⁰⁹

- Capacity is a threshold to jurisdiction to appoint or continue an appointment of an administrator.⁴¹⁰
- Accordingly, the Tribunal erred in law in that it failed to apply the presumption of capacity.
- That construing section 11(1) of the Act as if the words *...for a matter in relation to an adult with impaired capacity for the matter* were omitted would best reflect Parliament's intention.

The Supreme Court Decision

The Supreme Court decided that the legislative scheme requires the presumption of capacity to be applied by the Tribunal on each occasion that capacity is an issue in proceedings before it. This includes a review for appointment of an administrator or an application for a declaration of capacity. It noted that:

- cognitive functions sometimes improve with time;⁴¹¹
- the Act explicitly indicates an expectation that the presumption would apply upon review of appointments; and
- there was no indication that it should not do so when a declaration of capacity is sought.⁴¹²

⁴⁰⁶ *Re BAK* [2008] QGAAT 74 (27 October 2008) [78]-[79].

⁴⁰⁷ See for example *Guardianship and Administration Act 2000* (Qld) ss 5-7, 11, sch 1.

⁴⁰⁸ Emphasis added.

⁴⁰⁹ *Guardianship and Administration Act 2000* (Qld) sch 1.

⁴¹⁰ *Guardianship and Administration Act 2000* (Qld) s 12, 31.

⁴¹¹ *Bucknall v Guardianship and Administration Tribunal (No 1)* [2009] QSC 128 [28].

⁴¹² *Bucknall v Guardianship and Administration Tribunal (No 1)* [2009] QSC 128 [31-34].

The Court determined that section 11(1) should be construed as omitting the words *for a matter in relation to an adult with impaired capacity for the matter* to avoid apparent inconsistency with the otherwise clear intentions within the legislative scheme that the presumption of capacity apply.⁴¹³

The Court also noted that an administrator (whose appointment depends upon the presumption having been rebutted), once appointed, was not required to give effect to the presumption of capacity.⁴¹⁴

Comment

The approach adopted in several other Tribunal decisions suggests that the reasoning that had been applied to preclude the application of the presumption of capacity upon review of an appointment in this proceeding was not an isolated incident.⁴¹⁵ Accordingly, the Public Advocate considered that intervention in this proceeding in the Supreme Court was appropriate to advance arguments to safeguard the fundamental rights of the vulnerable adults whose capacity for decision-making is considered.⁴¹⁶

In the view of the Public Advocate, the presumption of capacity is fundamental to the operation of the guardianship regime. Its application is central to achieving the purpose of the guardianship regime, namely to strike an appropriate balance between the right of an adult with impaired capacity to the greatest possible degree of autonomy in decision-

making and their right to adequate and appropriate support for decision-making.⁴¹⁷

The Supreme Court's decision clarifies the obligations of the Tribunal upon a review of an appointment, and also upon a hearing of applications for declaration of capacity.

Despite the interpretation of section 11(1) adopted by the Supreme Court, the Public Advocate has suggested that the wording of the legislative provision requires consideration in the Queensland Law Reform Commission's Guardianship Review (see Section 2.1).

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The Public Advocate recently received information that BAK's applications had been reheard by the Guardianship and Administration Tribunal. At the time of writing, the reasons for decision were not available online. However, it is understood that BAK was successful on the application for declaration of capacity and in having the administrator removed upon review.

⁴¹³ *Bucknall v Guardianship and Administration Tribunal* (No 1) [2009] QSC 128 [42].

⁴¹⁴ *Bucknall v Guardianship and Administration Tribunal* (No 1) [2009] QSC 128 [23-26].

⁴¹⁵ For example see *Re KAF* [2008] QGAAT 91, *Re WM* [2006] QGAAT 81. Note that the Public Advocate referred this issue to the Queensland Law Reform Commission Guardianship Review (see Section 2.1).

⁴¹⁶ Note that the decision attracted some media attention: Margaret Wenham 'Authority under fire: Trustee told to respect rights', *The Courier-Mail* (Brisbane) 10 July 2009, 15.

⁴¹⁷ *Guardianship and Administration Act 2000* (Qld) s 6.

11.2 Guardianship and Administration Tribunal

11.2.1 *Re TAD* [2008] QGAAT 76 (28 October 2008)

Background to issues and facts

As reported in last year's Annual Report,⁴¹⁸ in August 2007 the Public Advocate intervened in a Supreme Court proceeding concerning significant systemic issues relating to the administration of the financial matters of an adult who had sustained a severe head injury following a motor vehicle accident.⁴¹⁹

The Office of the Public Advocate has had considerable involvement in this case since being granted leave to intervene by the Guardianship and Administration Tribunal (the Tribunal) in the review of the administrator's appointment in late 2006, including supporting the appointment of separate representation for the adult. Complex systemic issues arose during the review proceedings, resulting in the Tribunal referring five questions of law to the Supreme Court of Queensland for consideration.

In essence, the questions of law related to whether the administrator was also a trustee; the remuneration of administrators; the powers of litigation guardians; and the retrospective authorisation of conflict transactions. The Public Advocate's position and the Supreme Court's decision (which was delivered in March 2008) are discussed in detail in this Office's 2007-2008 Annual Report.⁴²⁰

The Tribunal hearing to review⁴²¹ the appointment of an administrator for the adult resumed in August 2008. The Public Advocate and other parties were directed to provide the Tribunal with written submissions on the following questions:

- Is the administrator competent to continue as administrator for the adult?
- Is another person more appropriate for appointment as administrator?

If the Tribunal is satisfied that a continued appointment is required, under section 31(4) of the *Guardianship and Administration Act 2000* (Qld) (the Act) it may make an order to remove an administrator only if the appointee is no longer competent, or another person is more appropriate.

The Tribunal was also asked by the administrator to approve a conflict transaction.

Review of the appointment of the administrator

The Public Advocate's submissions focussed on issues relevant to an administrator's competence to continue. The Public Advocate ultimately submitted that whether or not an administrator should be removed was dependent upon factors including the Tribunal's assessment of the administrator's competence, the adult's wishes, and the costs involved in appointing another administrator.

The Tribunal delivered its decision in October 2008. It considered 12 key issues relevant to the administrator's competence to continue as administrator, including:

⁴¹⁸ The Office of the Public Advocate, *Annual Report 2007-2008* (2008) 93-94.

⁴¹⁹ *Guardianship and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] QSC 049 (07/6519) (Supreme Court of Queensland Mullins J, 14/03/2008).

⁴²⁰ The Office of the Public Advocate, *Annual Report 2007-2008* (2008) 93-94.

⁴²¹ The administrator had lodged an application with the Tribunal in 2004 seeking a review of the appointment of administrators.

- the administrator's management of the adult's expenditure, property and household;
- the administrator's investment of the adult's funds;
- the charging of legal costs incurred by the administrator in responding to the review of its appointment against the adult's funds;
- the administrator's entering into an unauthorised conflict transaction;
- the extent of fees of the administrator charged against the adult's funds;
- outstanding litigation the administrator had instituted; and
- the impact that a change of administrator would have on the adult and the funds under administration.⁴²²

The Tribunal found that although the administrator had failed in respect of five of those issues to exercise its powers as administrator with reasonable diligence, it had either remedied those failures, or the issues were not ongoing.⁴²³ The Tribunal was satisfied that the adult's interests were being properly protected by the administrator, and that it was neither neglecting nor abusing its duties and powers as administrator.⁴²⁴

The Tribunal also considered whether another person would be more appropriate for appointment as administrator.⁴²⁵ The adult's views and wishes for the administrator to continue were strongly relied on by the Tribunal.⁴²⁶ It further noted that changing

administrators would cause substantial emotional and financial costs to the adult.⁴²⁷

It concluded that the administrator was competent to continue.

Conflict Transaction

Following the awarding of settlement monies to the adult in 2001, the administrator paid \$85,000 to the adult's brother for past care and services provided by him and another brother to the adult following the motor vehicle accident. At the time, the adult's brother was a joint administrator for the adult, and had been the adult's litigation guardian. The administrator conceded that the payment amounted to a conflict transaction pursuant to section 37 of the Act, and applied to the Tribunal retrospectively for authorisation of that payment.⁴²⁸

The question of whether the Tribunal has power under section 37 of the Act to authorise a conflict transaction retrospectively was considered by Her Honour Justice Mullins in the Supreme Court proceedings.⁴²⁹ Her Honour considered that although best practice dictates that an administrator should apply for authorisation prior to entering into a conflict transaction, prior authorisation is not mandatory.⁴³⁰ The construction of section 37(1) requires only that the authorisation of the Tribunal be obtained.⁴³¹ The retrospective authorisation by the Tribunal of a conflict transaction is therefore not precluded.

⁴²² *Re TAD* [2008] QGAAT 76 (28 October 2008), [44].

⁴²³ *Re TAD* [2008] QGAAT 76 (28 October 2008), [212].

⁴²⁴ *Re TAD* [2008] QGAAT 76 (28 October 2008), [213].

⁴²⁵ *Re TAD* [2008] QGAAT 76 (28 October 2008), [179] [183].

⁴²⁶ *Re TAD* [2008] QGAAT 76 (28 October 2008), [179].

⁴²⁷ *Re TAD* [2008] QGAAT 76 (28 October 2008), [183].

⁴²⁸ *Re TAD* [2008] QGAAT 76 (28 October 2008), [190].

⁴²⁹ *Guardian and Administration Tribunal v Perpetual Trustees Queensland Ltd* [2008] QSC 049 (07/6519) (Supreme Court of Queensland Mullins J, 14/03/2008).

⁴³⁰ *Ibid*, [77].

⁴³¹ *Ibid*, [74 -75].

The Tribunal was satisfied that the amount of the past care claim was appropriate on the basis it was verified by the evidence for the damages claim in the personal injuries proceedings, had been approved by the adult's Counsel and the administrator, and accorded with the adult's personal wishes.⁴³²

The Tribunal found the payment was appropriate in the circumstances and was in the adult's interests.⁴³³ It considered that to require the amount to be repaid would be unfair to the parties, who had proceeded on the basis the payment was appropriate and lawful.⁴³⁴

The Tribunal retrospectively authorised the payment.

The Tribunal made several other orders including that the administrator compensate the adult for financial losses sustained due to its failure to exercise its powers as administrator reasonably diligently.⁴³⁵

Comment

The Supreme Court proceedings and the Tribunal review of the administrator's appointment resulted in the exposure of complex systemic issues regarding the administration of financial matters of adults with impaired capacity. The proceeding also enabled the clarification of significant issues which may impact on vulnerable adults, including retrospective authorisation of conflict transactions, fees and remuneration of trustee company administrators, and powers of litigation guardians.

The Tribunal acknowledged that the scrutiny experienced by the administrator in this case has caused changes to its processes and management

which may be advantageous to adults with impaired decision-making capacity whose funds are administered by that trustee company.⁴³⁶

This case demonstrates that an administrator's failure to exercise its powers and act reasonably diligently in respect of a number of significant issues pertaining to the adult's financial matters were not considered by the Tribunal to constitute incompetence justifying an administrator's removal.

In another recent case involving a different administrator, the Tribunal found that the administrator of an adult's substantial personal injuries settlement sum failed to take advantage of a superannuation investment strategy according to certain taxation benefits to the adult's estate. Consequently, the adult will incur significant additional taxation liability and expenditure for many years, which is likely to reduce the value of the funds under administration.⁴³⁷ Despite this, the Tribunal approved the administrator's financial management plan for the adult's funds, and did not remove it as administrator.

These decisions raise serious questions about what is required from administrators to protect the interests of vulnerable adults, and when removal of administrators will be considered appropriate. In what circumstances will an administrator be removed?

These proceedings have also clarified the position where an administrator fails to seek the Tribunal's authorisation prior to entering a conflict transaction. Although prior approval remains best practice,

⁴³² *Re TAD* [2008] QGAAT 76 (28 October 2008), [207].

⁴³³ *Re TAD* [2008] QGAAT 76 (28 October 2008), [207].

⁴³⁴ *Re TAD* [2008] QGAAT 76 (28 October 2008), [210].

⁴³⁵ *Re TAD* [2008] QGAAT 76 (28 October 2008), [216-221].

⁴³⁶ *Re TAD* [2008] QGAAT 76 (28 October 2008), [184].

⁴³⁷ *Re CAC* [2009] QGAAT 63. The Tribunal anticipated the adult or the adult's family may consider making a future claim for compensation for the negative effect resulting to the adult's funds, however it made no order for compensation: see paragraphs [41]-[43].

the Supreme Court and Tribunal decisions confirm that the Tribunal is empowered and willing to retrospectively authorise conflict transactions. In authorising the transaction, and in determining the appropriateness of the past care claim, the Tribunal relied upon considerations including the sworn evidence of the adult's brother regarding the care provided; the legal representative's agreement (at the time of settlement) to the amount claimed; and the adult's views and wishes. There was limited consideration of the actual past care provided to the adult in the relevant period following her accident. The Tribunal stated that had authorisation of the conflict transaction been sought by the parties in 2002 (prior to the past care payment being made), it would have been better placed to resolve contradictory evidence from the adult's brother about the amount of care claimed, and to clarify the actual care provided to the adult.

The potential for a conflict transaction to be authorised after the transaction has occurred may represent a legislative gap which may be open to exploitation by administrators.

It has been indicated to this Office that outstanding Supreme Court litigation arising from the proceeding may commence shortly.

11.2.2 *Re AAG* [2009] QGAAT 43 (27 May 2009)

Background facts

This matter primarily involved the limitations of involuntary mental health treatment and the appointment of a guardian for restrictive practices for an adult with an intellectual disability. It was alleged that the adult had committed a number of sexual offences. The Mental Health Court found the adult permanently unfit for trial and made a forensic order

which approved limited community treatment for the adult. The adult does not have a mental illness, but an intellectual disability. A condition of the limited community treatment was that the adult comply with the taking of medication prescribed by a psychiatrist.

Subsequently, an application was made to the Guardianship and Administration Tribunal (the Tribunal) for the appointment of an administrator for financial decisions, and a guardian for personal decisions. In a hearing in December 2008, the Tribunal determined that the adult had capacity for all financial matters and simple personal matters.

The adult was prescribed Androcur to control and/or inhibit his sexual behaviour, with a view to reducing risk to the community. Androcur is anti-libidinal medication, effectively a form of chemical castration. The Tribunal adjourned the hearing of the application for the appointment of a guardian to enable submissions to be provided to the Tribunal. In December 2008, the Tribunal requested the Public Advocate provide the Tribunal with submissions in relation to the following question:

Can an adult who is not able to consent to medication because of an intellectual disability and who does not have a mental illness, be compelled under a forensic order which may include limited community treatment, to take medication prescribed by a treating psychiatrist?

Legal argument about this issue took place at a Tribunal hearing in April 2009.

Public Advocate's submissions

The Public Advocate provided detailed submissions to assist the Tribunal in considering the question posed. The Public Advocate identified two primary issues for consideration in responding to the question, namely:

- Whether the prescription and provision of Androcur to the adult is a treatment which can be administered without consent under the forensic order.
- If it cannot be administered without consent, whether the prescription and provision of Androcur to the adult is health care which can be administered with the consent of a substitute decision-maker under the *Guardianship and Administration Act 2000* (Qld); or whether it is a restrictive practice that could only be administered in accordance with the relevant provisions of the *Guardianship and Administration Act 2000* (Qld) (the Act) and the *Disability Services Act 2006* (Qld).

In relation to the first issue the Public Advocate submitted:

- The adult has an intellectual disability, not a mental illness.
- The *Mental Health Act 2000* (Qld) provides for treatment to be given to a person on a forensic order without consent only in respect of a mental illness.
- Androcur is not prescribed to the adult to treat a mental illness, and is therefore not treatment that can be administered without consent under the provisions of the *Mental Health Act 2000* (Qld).

The Public Advocate argued with respect to the second issue:

- The administration of Androcur to the adult is, in effect, a form of chemical castration.
- If the adult has capacity for decisions about the matter he may consent to the use of Androcur.
- The administration of Androcur is not treatment that falls within the definition of health care as it is not for the purpose of diagnosing, maintaining or treating the adult's physical or mental condition.
- Chemical castration was not contemplated as a restrictive practice when the regime was developed. However, it appears Androcur may be a form of chemical restraint under the Act and the *Disability Services Act 2006* (Qld) provided the relevant provisions of those Acts are complied with. This raises significant policy issues.

The Tribunal's decision

The Tribunal concluded that an adult who does not have a mental illness cannot be compelled under a forensic order to take medication prescribed by a treating psychiatrist for the following reasons:

- Treatment which may be given without consent under the *Mental Health Act 2000* (Qld) does not extend to treatment of an intellectual disability; it is treatment of a mental illness only. A forensic order cannot therefore authorise treatment of a person with an intellectual disability who does not have a mental illness.⁴³⁸
- The adult's intellectual disability prevents him from understanding the consequences of taking Androcur, and from providing informed consent to its use.⁴³⁹

⁴³⁸ *Re AAG* [2009] QGAAT 43 (27 May 2009) [29].

⁴³⁹ *Re AAG* [2009] QGAAT 43 (27 May 2009) [45]-[46].

- A decision to consent to the use of Androcur constitutes a decision about a complex matter.⁴⁴⁰

The Tribunal was satisfied that the appointment of a substitute decision-maker for the adult was necessary for the purpose of making the complex decision about his use of the drug Androcur.⁴⁴¹

The Tribunal further considered whether, in appointing a substitute decision-maker, it could appoint a guardian for health care or personal decisions; or whether the administration of Androcur constituted a restrictive practice requiring the appointment of a guardian to consent to chemical restraint under Part 5B of the Act.

The Tribunal did not resolve these issues at the hearing and adjourned the matter for a further hearing.

The Public Advocate attended the resumption of the hearing in June 2009, however written reasons have not been provided. In giving oral reasons, the Tribunal indicated that it was satisfied that Androcur may constitute a chemical restraint and therefore can be a restrictive practice. The appointment of a guardian for restrictive practices was made. The Tribunal did not make a determination about the broader issue of whether a guardian for health care or personal matters could make a decision about the use of Androcur because in this case the adult received Disability Services funding and services and therefore Part 5B of the Act was applicable.

The Tribunal appointed a guardian for other health care decisions, as well as restrictive practices, in respect of the adult.

Significance of the issues

The practice of chemical castration raises serious policy issues. Chemical castration is a complex and sensitive matter involving potentially serious infringements of human rights of a kind which could be considered fundamentally different from those of other types of restrictive practices. Indeed, as recognised by the Tribunal:

*The consequences of taking Androcur must be evaluated from the multiple perspectives of reducing the risk to the community, of providing flexibility to the adult for his support and care in the community, of minimising the risks of physical harm to him, of providing the means of longer term stability to his health and safety, and from the perspective of recognising his basic human rights.*⁴⁴²

The Public Advocate raised the policy issues for consideration with the Attorney-General of Queensland, the Minister for Disability Services and the Queensland Law Reform Commission.

Also, an argument was suggested during the hearing that the restrictive practices regime could be excluded in circumstances where a vulnerable adult was allowed, in effect, to take a chemical restraint voluntarily : that is, where the service provider supervises the adult but does not administer the medication. The Public Advocate argued against these suggestions and the Tribunal rejected the contention. The restrictive practices regime cannot be avoided by allowing a person who does not have capacity to consent to a restrictive practice to subject themselves to it, simply because the person does not refuse it, and the service provider does not physically administer the medication.

⁴⁴⁰ *Re AAG* [2009] QGAAT 43 (27 May 2009) [46].

⁴⁴¹ *Re AAG* [2009] QGAAT 43 (27 May 2009) [46].

⁴⁴² *Re AAG* [2009] QGAAT 43 (27 May 2009) [45].

This proceeding also highlighted a significant deficiency in the restrictive practices regime which has been the subject of advocacy by the Office of the Public Advocate, namely its failure to safeguard and protect the rights of adults with intellectual or cognitive disability who do not receive Disability Services funded or provided services. The rights and interests of those adults are at greater risk through the absence of appropriate legislative protection.

For broader discussion about restrictive practices, see Sections 1.1, and 2.15.

11.3 Coronial inquests

11.3.1 Killing by a person with mental illness recently released from custody

As reported in last year's Annual Report, during 2008 the Public Advocate was granted leave to intervene in an inquest involving the death of a homeless person following a fatal assault by a person with a mental illness and developmental disability. The offender had been released from the custody of Queensland Corrective Services (QCS) about one week earlier after serving a three year term of imprisonment. He was subsequently found to be of unsound mind in relation to the charge of murder (and another unrelated charge of attempted murder). A forensic order was made by the Mental Health Court and he was detained in an authorised mental health service.

During 2008-2009, several weeks of evidence was heard by the Coroner. The Public Advocate considers that systemic issues arising in the inquest include:

- whether adequate arrangements are in place to identify prisoners with cognitive disability upon entering corrective facilities and for routine collection and reporting of statistical data to

inform ongoing policy and program development and evaluation;

- whether the corrective services system provides for the safety of vulnerable prisoners with cognitive impairment and protects them from abuse and victimisation;
- whether the corrective services system provides adequately for the disability support needs of vulnerable prisoners with cognitive impairment such as to allow them to participate in prison life, activities and available pre-release and criminogenic programs;
- whether current arrangements between Queensland Corrective Services (QCS) and Disability Services provide an adequate and appropriate interface for prisoners with disability;
- whether the Prison Mental Health Service is adequately funded to enable it to provide its services to prisoners who have a mental illness;
- whether prisoners with mental illness face disadvantage vis-a-vis community members in accessing inpatient mental health assessment and treatment;
- whether communication between the Prison Mental Health Service and QCS is adequate;
- whether communication between QCS and substitute decision-makers under the guardianship regime is adequate; and
- whether QCS staff have adequate disability awareness and training.

The Public Advocate provided extensive written submissions urging the Coroner to make recommendations to facilitate systems improvement with the purpose of promoting public health and safety and preventing deaths from

happening in similar circumstances in the future. In particular, the submissions included the following recommendations:

- the need for routine screening of people entering prison, so that prisoners with cognitive disability are identified in order that their vulnerability to abuse and victimisation and their disability support needs inform offender case management planning;
- the routine collection of statistical data about prisoners with cognitive impairment to inform policy and program development, monitoring and evaluation;
- that QCS and Disability Services review service delivery models, policies and procedures and develop a service delivery model which optimises the ability of prisoners with cognitive disability to participate in prison life, activities and programs to address offending behaviour, as well as addresses their vulnerabilities to abuse and victimisation;
- that the Prison Mental Health Service (PMHS) be adequately funded to ensure prisoners can receive mental health services comparable to community members;
- that the Director of Mental Health take steps to ensure prisoners are not disadvantaged in accessing inpatient mental health assessment and treatment;
- that the Queensland Government explore opportunities to provide prisoners with access to Australian Government funding through Medicare;
- that QCS review policy, procedure and program design of criminogenic and transitional support programs to ensure that prisoners with cognitive disability can participate;
- that the Queensland Government provide adequate funding to allow prisoners to receive disability services at a level comparable to community members;
- that communication be improved between QCS and the PMHS regarding prisoners with impaired capacity; and
- that QCS involve substitute decision-makers for adults with impaired capacity in relevant planning, for example, pre-release discussions.

At the time of writing, the Coroner's decision had not been made.

Prison Mental Health Service (PMHS) and a Screening Tool shortly to be implemented by QCS are discussed at Sections 4.2 and 7.2 respectively. As discussed at Section 4.2.3, a Memorandum of Understanding is now to be developed between QCS and Queensland Health regarding information provision about prisoners to PMHS.

Disability support in prison generally, including some recent promising developments, is discussed at Section 7.1. Current arrangements between QCS and Disability Services are now under review as discussed at Section 7.1.1.

Programs, including a new program for people with disability, Bridging the Gap, are discussed at Sections 7.1 and 7.3.

12 Inquiries

12.1 Senate inquiry into residential and community aged care services

In October 2008, the Australian Senate referred issues concerning the funding, planning, allocation, capital and equity of residential and community aged care in Australia to the Senate Standing Committee on Finance and Public Administration (the Committee) for inquiry and report. The Committee invited submissions.

The Public Advocate made a submission in relation to issues for adults with impaired decision-making capacity in January 2009.

This Office submitted that while it was difficult to ascertain how many people with impaired decision-making capacity receive services within the residential and community aged care system, this cohort would comprise a significant portion of the population. Many of these adults rely, or will rely, on government funding to pay for the aged care services they require. The ageing of Australia's population would significantly increase the need for residential and community aged care services, and action is required to ensure that supply is able to meet demand and the quality of services is maintained.

Current funding levels for the residential aged care sector were not sufficient to encourage service providers to invest capital to build new facilities. Inadequate funding levels for the residential aged care sector are likely to result in a reduction of profitability, with the consequence that service providers are likely to have decreased involvement in the sector. This may result in service providers accepting new residents that have lower level care

needs that can be met with the expected future funding, to the exclusion of those with higher care needs.

Consequently, there is a potential for the non-government sector's capacity to respond to the demands of people with psycho-geriatric illness or with complex care needs, including those with dementia and those with challenging behaviour caused by dementia, to be diminished. The likely consequence of this would be that the most vulnerable amongst the aged population requiring residential care facilities would be the most disadvantaged by inadequate levels of funding.

The relative decline in the level of care that can be provided by non-government organisations will also increase the demand for care in Queensland Government settings, such as acute hospital settings and the 20 residential aged care facilities operated by Queensland Health.

A further issue raised was that there are aged residents in Level 3 residential services who have needs that would be more appropriately met through an aged care facility. Exact numbers are not known, but anecdotal information suggests that there are a substantial number of residents in Level 3 residential services who have needs that are not being adequately met, but cannot move into an aged care facility due to lack of available places.

The submission also raised the issue of apparent inequity in user payments between low-care and high-care residents. To address this issue it was suggested by some stakeholders that the distinction between low and high care residents be removed, enabling providers to request an accommodation bond from high care residents who have financial means.

This Office expressed its concern that, in an environment of high demand and under supply, such an approach could disadvantage those older people who are not able to pay higher accommodation costs, because service providers may tend to accept those who can pay more. This is particularly concerning to this Office, as older people with impaired decision-making capacity may be more financially disadvantaged than those with capacity. Those with lifelong disabilities are more likely not to have had the same opportunities and earning capacity as people without disability.

Subsequently, the Public Advocate was invited to appear before the Committee to provide further information. In giving evidence, the Public Advocate expanded on the issues explored in the written submission.

The Senate Standing Committee on Finance and Public Administration report *Residential and Community Aged Care in Australia*, arising from the inquiry, was released in April 2009.⁴⁴³ Key recommendations included:

- the establishment of a national aged care forum to consider current and future challenges to the aged care sector, on an ongoing basis;⁴⁴⁴
- the Department of Health and Ageing, in collaboration with others (including stakeholders) undertake an all-encompassing review of the *Aged Care Act 1997* (Cth) (the Act),⁴⁴⁵ including:

the provision of residential and community aged care services in Australia (including current and future challenges in the provision

of aged care services); and future projections to enable short and longer-term planning;⁴⁴⁶

the expectations and needs of the homeless and other socio-economically disadvantaged persons, and elderly Indigenous Australians and their communities;⁴⁴⁷

analysis to establish a benchmark of care costs;⁴⁴⁸

professional nursing and other aged care staffing requirements⁴⁴⁹; and

the provision of aged care services in rural and remote areas⁴⁵⁰; and

- separate reviews of:
 - the indexation formula used for the aged care sector, including consideration of a mechanism to continually assess the indexation formula;⁴⁵¹ and
 - the implications of incorporating the elderly homeless as a special needs category under the Act.⁴⁵²

The Public Advocate welcomes these recommendations which, it is hoped, will improve understanding of the needs of older persons with impaired decision-making capacity receiving residential and community aged care services, and ultimately improve service delivery to them.

⁴⁴³ Senate Standing Committee on Finance and Public Administration, *Residential and Community Aged Care in Australia* (April 2009) <http://www.aph.gov.au/Senate/committee/fapa_ctte/aged_care/report/report.pdf> at 21 October 2009.

⁴⁴⁴ Ibid, Recommendation 1.

⁴⁴⁵ Ibid, Recommendation 3.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid, Recommendations 19 and 20.

⁴⁴⁸ Ibid, Recommendation 4.

⁴⁴⁹ Ibid, Recommendation 12.

⁴⁵⁰ Ibid, Recommendation 15.

⁴⁵¹ Ibid, Recommendation 14.

⁴⁵² Ibid, Recommendation 18.

12.2 Senate inquiry into better support for carers

As discussed in last year's Annual Report,⁴⁵³ the Office of the Public Advocate made a submission to the House of Representatives Standing Committee on Family, Community, Housing and Youth (the Committee) Inquiry into Better Support for Carers. The Inquiry was initiated to obtain an enhanced understanding of challenges confronted by carers, and their support requirements.⁴⁵⁴ The terms of reference included the role and contribution of carers, and how this should be recognised; barriers to social and economic participation for carers; practical measures to better support carers; and strategies to assist carers to access the same range of opportunities and choices as the wider community.⁴⁵⁵

The Public Advocate's submission recognised the valuable role of carers in society in caring for and supporting other persons. It raised the following key points:

- Conflicts of interest may arise between the interests of the carer and the person being cared for.
- Carers may often be substitute decision-makers under guardianship regimes, and accordingly need to understand their status, rights and responsibilities. Therefore, relevant education, information and support should be provided to carers to improve their understanding of the substitute decision-making regime.

- In considering carers' needs and in developing strategies to better support carers, the Committee was urged to consider the likely ramifications of any strategies on those being cared for, and to ensure that the rights, interests and wellbeing of those being cared for are not compromised.

The Public Advocate was also invited to appear before the Committee at a public hearing, where she gave further examples and information in relation to issues raised in the submission. She made the further point that providing adults with impaired decision-making capacity with better support for social inclusion is a significant safeguard in minimising the potential for abuse, neglect and exploitation, and increases opportunities for the adults in terms of quality of life, which would ultimately result in better support for carers.

In May 2009 the Committee's report *Who Cares? Report on the inquiry into better support for carers* was released. Some of the key recommendations included:

- the development of national carer recognition legislation and a national carer action plan;
- the development of a national strategy to address the skills and training needs of carers;
- a review of the adequacy of case management or care coordination for carers and care receivers using community care, aged care, disability and community mental health services; and
- significant increases to the base rate of income support for carers.⁴⁵⁶

⁴⁵³ Office of the Public Advocate, *Annual Report 2007-2008* (2008) 98 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 12 October 2009.

⁴⁵⁴ Parliament of Australia House of Representatives, *Inquiry into Better Support for Carers: Terms of Reference* <<http://www.aph.gov.au/house/committee/fchy/carers/tor.htm>> at 22 September 2009.

⁴⁵⁵ Ibid.

⁴⁵⁶ The House of Representatives Standing Committee on Family, Community, Housing and Youth, *Who cares? Report on the inquiry into better support for carers* (April 2009) (xxi-xxx).

The Committee also noted the complexities carers confront in relation to guardianship, enduring powers of attorney, advanced health directives, and substitute decision-making generally.⁴⁵⁷ To address these difficulties it recommended:

- The Commonwealth Attorney-General promote national consistency and mutual recognition of powers of attorney and advanced care directives to the Standing Committee of Attorneys-General; and
- A national awareness campaign to raise awareness about the need for, and benefits of enduring powers of attorney and advanced care directives in the general community and among health and community care professionals.⁴⁵⁸

For further information about enduring documents, see Section 2.12.

⁴⁵⁷ Ibid,1 12.

⁴⁵⁸ Ibid,1 13.



ADVOCACY PART THREE: Research ACTIVITIES

13 Research Partnerships

13.1 Funding and service options for people with disabilities

Lead Researchers:

Professor Lesley Chenoweth, School of Human Services and Social Work Griffith University.

Natalie Clements, School of Human Services and Social Work Griffith University.

Industry Partners:

Office of the Public Advocate, Queensland

Office of the Adult Guardian, Queensland

National Disability Services (Queensland)

Queensland Health

The Annual Report 2005-2006⁴⁵⁹ identified a need for comprehensive research to be undertaken to identify and evaluate service and funding models for people with disability in use worldwide, develop other possible models and make recommendations about locally feasible models. The need for the research arises from significant unmet need for disability support in Queensland. In addition to the need for significant increases in funding for disability support, it was hoped that identification and evaluation of the various models would 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 identified, the proposed research project was refined, the formal proposal finalised and key stakeholder agencies involved as partners in the research.

In 2009, the research was completed. The final report entitled *Funding and service options for people with disabilities* was released in June 2009.⁴⁶⁰ The Report considered current trends in approaches to funding and service and supports delivery internationally and throughout Australia to identify overall key trends. Overall emergent trends were identified, namely, self-directed care and individualised funding; and independent living with services in the community. The Report identifies key features of effective approaches to funding as follows:

- a high quality system for allocation of individualised funds, linked to person-centred planning;
- allocation of some block funds to build capacity of services when implementing individualised funding and self-directed support;
- local area coordination, so that local needs shape local services;
- phased implementation of individualised funding through the use of pilot sites;
- adequate infrastructure supports separate from the service system;
- quality systems with a service user outcomes focus;

⁴⁵⁹ Office of the Public Advocate, *Annual Report 2005-2006* (2006) 24-25 <www.publicadvocate.qld.gov.au> at 6 October 2009. See also Office of the Public Advocate, *Annual Report 2006-2007* (2007) [13.6] <www.publicadvocate.qld.gov.au> at 6 October 2009.

⁴⁶⁰ Professor Lesley Chenoweth and Natalie Clements (Griffith University School of Human Services and Social Work), *Final Report: Funding and service options for people with disabilities* (June 2009) <http://www.griffith.edu.au/__data/assets/pdf_file/0020/153425/funding-support-options.pdf> at 6 October 2009.

- increased capacity of mainstream services to respond to specialised needs;
- best practice approaches underpinning all aspects of the system; and
- blended formal and informal supports.

During the project, significant engagement with key stakeholders occurred and the draft report was made widely available to them to generate interest and discussion. In 2008-2009, Professor Chenoweth delivered numerous presentations of the material and trends emerging from the research to:

- Disability Services staff;
- the National Disability Services Conference in October 2008;
- at a forum for government and non-government stakeholders convened by Disability Services Queensland in February 2009 to discuss issues related to accommodation and support;
- the National Conference on Caring (March 2009: keynote address);
- the Community Resource Unit's workshops Self directed support and personalised budgets in Queensland (in June and July 2009); and
- the National Residential Intellectual Disability Providers Conference (New Zealand, July 2009: keynote address).

For more discussion about funding issues see Section 1 (the Disability System).

13.2 End-of-life decision-making

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

Industry Partners:

Guardianship and Administration Tribunal, Queensland

Office of the Adult Guardian, Queensland

Office of the Public Advocate, Queensland

Victorian Civil and Administrative Tribunal

Office of the Public Advocate, Victoria

Guardianship Tribunal, New South Wales

Office of the Public Guardian, New South Wales

People for whom end-of-life decision-making is under consideration are most often 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. In 2008, the research team proposed a major project regarding end-of-life decision-making.

As reported in last year's Annual Report, the team intends to consider and analyse the law regarding end-of-life decision-making in three Australian jurisdictions (including Queensland) and, if indicated by the research, 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 Office funded some preliminary research in anticipation of the project commencing. In particular, a grant was provided to fund pilot research by the researchers 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. The research was completed and was the subject of a presentation at the Australian Guardianship and Administration Council Conference in Brisbane in March 2009.⁴⁶¹ It is anticipated that the results of the pilot research will be disseminated through a scholarly article in due course.

An Australian Research Council (ARC) Linkage Grant was approved for the proposed project in 2009. The research project will be undertaken over three years.

13.3 Chronic homelessness and impaired capacity

Researcher:

Associate Professor Jayne Clapton, School of Human Services and Social Work, Griffith University

Industry Partners:

Office of the Public Advocate
Micah Projects Incorporated
Mission Australia
HART 4000

In last year's Annual Report, the Public Advocate reported on a collaborative research project about the inter-relationship between chronic homelessness and impaired decision-making capacity.⁴⁶²

Anecdotal reports from the homelessness sector indicated that many people who were chronically homeless appeared to have impaired decision-making capacity, and that their impaired capacity was directly related to their entrenchment in homelessness. Based on these reports, it was evident that this group of people had complex needs and appeared to benefit little from existing treatment and housing programs.

This Office participated in a collaborative partnership with the Griffith University School of Human Services and Social Work, Micah Projects Incorporated and other non-government agencies to form the *Chronic Homelessness and Impaired Capacity Working Group* (the Working Group). The objective of the Working Group was to investigate the needs and issues of these groups of people with impaired capacity who were chronically homeless with the view to advocating for appropriate service responses.

A review of literature indicated that little research has been undertaken specifically in relation to chronic homelessness and impaired capacity. Consequently, the Working Group formed the view that it was necessary to conduct a formal research project to establish a credible evidence-base in order to influence change at a government policy and program level, and ultimately for improved service responses for this cohort.

⁴⁶¹ Lindy Willmott, Ben White, Malcolm Parker, Colleen Cartwright, Michelle Howard, Gail Williams, Challenges for doctors as legal actors in decisions to withhold or withdraw life-sustaining medical treatment from adults with impaired capacity (Presentation delivered at the Australian Guardianship and Administration Conference, Brisbane, 19-20 March 2009) <<http://www.agac.org.au/index.php/Conference-Papers/2009-Conference-Papers.html>> at 29 August 2009.

⁴⁶² Office of the Public Advocate, *Annual Report 2007-2008* (2008) 100 <http://www.justice.qld.gov.au/files/Guardianship/Office_of_the_Public_Advocate_Annual_Report_2007_08.pdf> at 12 October 2009.

The objectives of the research were 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 for persons with impaired capacity who experience chronic homelessness, as embedded in policy and legislative frameworks;
- identify barriers in the current service system which impede connections to effective supports, and identify enablers that promote connections to effective supports; and
- contribute to the development of service delivery that promotes understanding, planning coordination and flexible and sustainable service delivery to persons with impaired capacity who experience chronic homelessness.

In late 2008, the Working Group received a grant through the Griffith University Industry Collaborative Scheme to initiate a pilot research project with frontline workers in the homelessness sector, consisting of:

- a qualitative survey; and
- focus groups, to follow up emergent themes from the survey responses.

The survey has been completed, and planning for the focus groups is underway. A final report on the pilot research will be completed by the end of 2009.

In May 2009, the Griffith University researchers, with the support of industry partners including this Office, submitted an application for Australian Research Council Linkage funding to build on the pilot research project. For this purpose, additional Industry Partners have been sought, including the Office of the Adult Guardian. Initial assessor reports have been positive, and the outcome is due to be announced in October 2009.

13.4 Indigenous adults with impaired capacity

In Queensland, the *Guardianship and Administration Act 2000* (Qld) (the Act) provides a definition of impaired capacity, and a framework for substitute decision-making for adults with impaired decision-making capacity. However, there are questions regarding the social and cultural relevance of this system for Indigenous Queenslanders.

This Office conducted initial scoping research and established that while there is a body of research in relation to cognitive impairment including mental illness, acquired brain injury and dementia amongst Indigenous Australians, there appeared to be little specific research regarding the issue of impaired decision-making capacity and its implications amongst this population. For example, there does not appear to be a great deal of clarity about how impaired decision-making capacity is determined in the Indigenous context; about substitute decision-making processes in this context; issues in relation to access to guardianship and administration services; and the extent and nature of increased vulnerability.

In order to establish a more comprehensive understanding of the issues, this Office provided a grant to the Griffith University School of Human

Services and Social Work to conduct a literature review to explore current knowledge of impaired decision-making capacity within Indigenous communities.

This review found that there is little available international and Australian research and literature relating to impaired capacity within Indigenous communities, particularly with regard to Australian Indigenous people. There has been more attention paid to disability and/or mental health in Australian Indigenous communities, particularly relating to Indigenous people with a disability in the criminal justice system and elder abuse.

In relation to issues for Indigenous people arising from the guardianship regime, the review indicates very limited coverage of issues in Queensland, in other Australian jurisdictions, and internationally.

This finding indicated the need for a formal research project to address the following research questions:

- What are the meanings of impaired capacity in Indigenous communities?
- How has the issue of determining capacity for Indigenous people been addressed in Queensland, as well as within other jurisdictions in Australia?
- How are decisions made for Indigenous adults with impaired capacity according to Indigenous cultural expectations and practices?
- Are the requirements of the current guardianship legislative regime socially and culturally relevant for Indigenous Queenslanders? Is the legislation appropriate and advantageous for Indigenous Queenslanders with impaired capacity?

- Are there other factors which need to be considered in relation to substitute decision-making practices for Indigenous Queenslanders with impaired capacity?

This Office identified a number of key stakeholders as potential research partners, and has conducted discussions with representatives from these agencies. These agencies are:

- School of Human Services and Social Work, Griffith University;
- Cape York Partnerships, and Cape York Institute, Cairns;
- Indigenous Australian Studies, James Cook University, Townsville; and
- Nulloo Yumbah, Indigenous Learning, Spirituality and Research Centre, Central Queensland University, Rockhampton.

Each agency has indicated their interest in being involved in a collaborative research partnership.

The next stage in this project will be to:

- conduct interviews and focus groups; and
- conduct a review of relevant legislation and policy.

It is anticipated that a report/discussion paper on the findings of this stage of the research will be completed by June 2010.



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 and one full time Administration Officer. All positions are permanently filled. For some of 2009, the Office of the Public Advocate has also employed a temporary Senior Legal Officer. This Office also employs one part-time and one casual Administration Officer.

Adrienne McGhee was a Senior Research Officer at this Office during the period of 2007-2009. Adrienne's significant contribution to the work of this Office is acknowledged, especially concerning disability system-related issues and chronic homelessness of adults with impaired decision-making capacity.

Also, over 2008-2009, the work of temporary staff is acknowledged Julie McStay, Senior Legal Officer, and Satti Rakhra and Kathy Buckler, Senior Research Officers. Julie's contribution was primarily to legal and aged care system issues; and Satti's and Kathy's work related to disability-system issues.

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* (Qld).

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 2008-2009.

A summary is provided below of expenditure for the 2008-2009 financial year.

Expenditure Items	\$ 716 000
Employee Related Expenses	\$ 538 000
Supplies and Services	\$ 146 000
Grants	\$ 10 000
Depreciation, Amortisation & Deferred Maintenance	\$ 22 000
TOTAL	\$ 716 000



Office of the Public Advocate staff Standing: Public Advocate Michelle Howard; Senior Research Officer John O'Brien; Senior Legal Officer Penny Neller; and Principal Research Officer Marcus Richards; Seated: Administration Officer Debbie Barber and Part-time Administration Officer Sam Leahy.



ADVOCACY PART FIVE: Appendices ACTIVITIES

Appendix 1

The Public Advocate's Reference Group

Over the years, the Office of the Public Advocate has held regular reference group meetings. The Reference Group has contributed to the development and maintenance of constructive relationships with stakeholders; assisted this Office to obtain critical feedback on its performance; and provided input as to how this Office might direct its limited resources.

The reference group has comprised of individuals who have experience of the broad systems issues of interest to the work of this Office. The Reference Group has included senior representatives from Government agencies and statutory bodies, community organisations, academics, advocacy organisations and service providers.

The Office is grateful to the many people who have participated in the Reference Group from time to time over the years.

Appendix 2

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 2008-2009 the Office of the Public Advocate conducted community consultations in Cairns, Atherton, Gordonvale, Townsville, Rockhampton and Toowoomba.

For further information

The Office of the Public Advocate in Queensland has functions different from those 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



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