**The Public Advocate 2018 Report and summary**

This year the work of the Public Advocate has primarily focused on:

1. the aged care sector, with a particular focus on the use of unregulated restrictive practices and elder abuse;
2. monitoring aspects of the operation of the mental health system and the Mental Health review Tribunal and the treatment of involuntary patients;
3. working with government to settle a plan for implementation of the recommendations of the Public Advocate’s report *Upholding the right to life and health*;
4. monitoring of the rollout of the National Disability Insurance Scheme (NDIS) in Queensland; and
5. the operation of the forensic disability service and its treatment of residents of the service.

”I would like to make some general observations about the treatment of people with disability by some government agencies and systems in Queensland. While we have some very positive and effective legislation guided by human rights principles, which require decision-makers to proactively consider and protect the human rights of people with disability, there are **significant examples across systems of this not being achieved in practice.”**, Mary Burgess, Public Advocate.

**A legislative framework will only be effective in protecting people’s rights if those working under it are committed to that outcome and respect the law and people’s rights and there are mechanisms for oversight and accountability.** It is very difficult for people with disability to enforce their rights when these things are absent. Often they don’t know what their rights are and assume what is being done to them is lawful. Many people with impaired decision-making capacity are also unaware they can make a complaint, to whom it should be made, or even how to do that. Further, they often need assistance to express their complaint, to understand the process and to gather evidence to support their complaint and to follow it through.

These observations apply equally to the operation of the forensic disability system and the involuntary mental health system and the way people detained under those systems are treated, despite both systems having rights-focused legislative frameworks.

These system failings underline the continuing need for human rights defender agencies like my office, the Public Guardian, the Queensland Ombudsman and the Anti-Discrimination Commission to be **adequately funded to fulfil our functions**. These bodies alone are not able to provide all the support, advice and advocacy required to ensure people with impaired decision-making capacity to have their rights and interests protected. It is essential the government recognises the on-going need for advocacy and legal advice for this vulnerable group in our community and continues to fund these services into the future – and beyond the NDIS rollout.

**NDIS**

The NDIS has now entered its last year of rollout in Queensland, and in terms of participant numbers, the rollout is significantly slower than initial predictions. As at 30 June 2018, there were 16,524 Queensland NDIS participants. This represents only 59% of the predicted number of participants to enter the Scheme in 2017-18 and 54% of the estimated number of participants to have entered the Scheme within the first two years of the rollout period. This slow uptake is likely to place substantial pressure on the Scheme, in terms of supporting Queenslanders to have an NDIS plan in place before the end of the rollout period at the end of June 2019. The Scheme will now need to plan and approve the participation of almost 75,000 Queenslanders in the last year of the rollout.

However, this low number of current participants indicates there will be significant pressure on the system to undertake planning and approve a significant number of applications to reach its Queensland target for participation of 91,000 people. I hold concerns about how this target will be achieved without some impact on the quality of the planning process for participants. When plans do not adequately reflect people’s needs and goals, their rights, health and quality of care are impacted. This office will continue to monitor the NDIS rollout and seek to provide constructive feedback to the National Disability Insurance Agency and other Queensland agencies, as the year proceeds.

**Deinstitutionalisation of people with Intellectual disability or cognitive improvement**

Since the commencement of the Joint Action Plan, 156 younger people with disability have been supported to transition to community living from public health facilities. A further 20 people have been transitioned into community living from other settings. Despite there still being about 537 younger people with disability residing long-term in public health facilities, there will be no actions undertaken under the Joint Action Plan 2018-19 (the final year of the transition to the NDIS in Queensland) to transition these younger people out of institutional care. The Public Advocate believes this premature scaling back of the Joint Action Plan in 2017-18 and 2018-19 is concerning and is inconsistent with the commitment by the Joint Action Plan partners to fulfil their obligation to ‘assist people with disability who are long-stay patients in Queensland public hospitals and health facilities to move out to community living wherever possible, until mid-2019

**Forensic Disability Service**

The Forensic Disability Service is a purpose-built, medium security, residential and treatment facility with the capacity to accommodate and provide care for up to 10 people who are subject to a Forensic Order (Disability) under the *Mental Health Act 2016*. The service, which is established and operates under the *Forensic Disability Act 2011*, is managed by DCDSS and has been operating since July 2011.

The Forensic Disability Act and the Forensic Disability Service were established in response to concerns raised in separate reviews identifying the need for a more appropriate model of care for people with intellectual disability or cognitive impairment who are found to be of unsound mind or unfit for trial.

The Public Advocate has continued to raise concerns about the service and its restrictive and segregated approach to the support and care of people with disability under a Forensic Order.

Of further concern is that Aboriginal and/or Torres Strait Islander people continue to be overrepresented at the service. Three of the six current clients identify as being Aboriginal and/or Torres Strait Islander.29 This continues the trend, where the majority of clients held at the service (including the current clients) are/were from Aboriginal and/or Torres Strait Islander backgrounds.

**Regulation of the use of restrictive practices in residential aged care**

The use of restrictive practices to manage the challenging behaviours of people in the aged care and disability sectors is a key human rights issue in Australia. Restrictive practices can include detention, seclusion, physical, chemical and mechanical restraint and electronic forms of restraint and monitoring such as tracking bracelets, camera surveillance or restrictions on the use of media devices. These practices are being used in aged care settings despite research indicating their use may result in negative physical and psychological impacts on the person being restrained and may also constitute a breach of law and human rights. Consequently, the use of restrictive practices in aged care settings, without legal justification or excuse, is unlawful and amounts to elder abuse.

**National plan for elder abuse**

The Australian Government has committed to developing a National Plan to address elder abuse by the end of 2018. The Public Advocate has also provided input into the projects that the Australian Guardianship and Administration Council is undertaking as part of the national plan for elder abuse.

This work focusses on the development of:

1. a national ‘best practice’ resource for enduring appointments;
2. a discussion paper about enduring appointment laws and practices throughout Australia (with a particular focus on enduring appointments with financial responsibilities); and
3. a best practice guideline to maximize the participation of persons the subject of applications in guardianship and administration hearings.

**Mental Health Review Tribunal – recording of proceedings**

The absence of a formal record of the proceedings also means that it is not possible to know how Tribunal proceedings are being conducted. Further, despite the Tribunal taking the view that Tribunal members’ notes are the record of the proceedings for the purposes of the *Recording of Evidence Act*, the Tribunal has no process for making this ‘record’ available to parties to the proceedings as required under the *Recording of Evidence Act*.

A unique aspect of the MHRT is that the patient does not need to be present during hearings. This can occur for legitimate reasons, such as the patient’s health at the time of the hearing. However, under the current recording arrangements, the patient has no reliable means to review what occurred at the hearing. The issue to promote fairness, accountability and accessibility in hearings about the detention and treatment of some of the most vulnerable people in our community needs more considerations.

**Comparative analysis of involuntary mental health regimes**

The *Mental Health Act 2016* (Qld) establishes a legislative scheme for the involuntary treatment of people with a mental illness who do not have the capacity to consent to be treated. One of the main objects of the Act is to enable people to be diverted from the criminal justice system if they are found to have been of unsound mind at the time of committing an unlawful act or to be unfit for trial. The main objects of the Act are to be achieved in a way that:

* safeguards the rights of people;
* is the least restrictive of the rights and liberties of a person who has mental illness; and
* promotes the person’s recovery and ability to live in the community without the need for involuntary treatment and care.

While the objects of the *Mental Health Act* sound ideal, some individual cases of people detained in the mental health system in Queensland and the regimes of involuntary treatment being approved by the MHRT have given rise to concerns about whether the system is sufficiently transparent and accountable, and whether appropriate regard is being paid to patients’ human rights.

**Approval and administration of ECT and emergency ECT in mental health facilities**

The Public Advocate has concerns about the processes for approval of electroconvulsive therapy (ECT) in Queensland and the regimes of treatment that are being administered to involuntary patients in Queensland mental health facilities.

The Public Advocate is liaising with the Chief Psychiatrist about:

 improved oversight and monitoring of the Queensland ECT Guidelines

 the use of second opinions prior to the authorisation of ECT

 the quality and reliability of evidence being tendered in the MHRT

 the use of emergency ECT certificates outside of the usual MHRT application process.

**Abuse and neglect of prisoners with disabilities in Australia**.

The Public Advocate is concerned for the welfare of prisoners with disabilities, including Aboriginal and Torres Strait Islander prisoners, were at high risk of bullying, harassment, violence and abuse. The report also found that solitary confinement was widely used on prisoners with psychosocial disabilities.

Of significant concern was the finding that people with impaired capacity were dramatically overrepresented in the criminal justice system, and also in prisons.

**Guardianship and Administration and Other Legislation Amendment Bill**

The Public Advocate expressed concern that the proposed redrafting of the general and health care principles will have the effect of making them less readable and harder to digest than the current wording. It needs to be expressed in simple language that can be understood by the people whose rights they are intended to protect and those assisting them or making decisions on their behalf. The Public Advocate also supported the creation of guidelines to assist people to make capacity assessments in a manner that is consistent and reflects a best practice approach, as endorsed by the Queensland Law Reform Commission.

**Effective decision-making support for people with cognitive impairment**

An educational program that trains people to provide decision-making support has been developed and will be evaluated. The educational program aims to improve the quality of the decision-making support provided to people with cognitive impairment. The evaluation of the program will assess whether it results in better outcomes for the person requiring decision-making assistance. The learnings from the research are expected to apply to a broader range of people with cognitive impairment.

**Key systems impacting people with impaired capacity monitoring project**

The goal of this project is to collect and collate data held by multiple Queensland Government agencies that engage with adults with impaired decision-making capacity. The core project deliverable will be an annual public report presenting key statistics and trends about the interactions of people with impaired decision-making capacity with government agencies. The project will establish an evidence base that will provide a snapshot of system demand and trends about the people who interact with Queensland’s public guardianship, administration and other systems that deal with people with impaired decision-making capacity.

**The full report can be accessed and read online:** [**https://www.justice.qld.gov.au/\_\_data/assets/pdf\_file/0007/589291/Public-Advocate-Annual-Report-2017-18.pdf**](https://www.justice.qld.gov.au/__data/assets/pdf_file/0007/589291/Public-Advocate-Annual-Report-2017-18.pdf)