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Senate Standing Committee on Community Affairs

Submission on the inquiry *Indefinite detention of people with cognitive and psychiatric impairment in Australia*

Public Guardian
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About the Office of the Public Guardian

On 1 July 2014, the Office of the Public Guardian (OPG) was established as a new independent statutory body to protect the rights and well-being of vulnerable adults with impaired decision-making capacity, and children and young people in out-of-home care (foster care, kinship care, residential care) and youth detention. This new statutory body was created as a result of the acceptance by Government of recommendations contained in the report from the Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection*.[1]

The OPG combines roles that were previously separately undertaken by the Office of the Adult Guardian, and the community visitor function of the former Commission for Children and Young People and Child Guardian.

The OPG supports children and young people through two specific programs:

- the community visitor program, which aims to ensure children and young people in out-of-home care are safe and are being properly cared for, and
- the child advocate program, which gives children engaged with the child protection system an independent voice, ensuring their views are taken into consideration when decisions are made that affect them.

The *Child Protection Act 1999*, section 74 and Schedule 1, sets out the Charter of rights for a child in care. This Charter establishes core rights that apply to every child and young person who is in the child protection system in Queensland, including the right to be provided with a safe and stable living environment, and to be placed in care that best meets their needs, and is culturally appropriate.

The OPG also works to protect the rights and interests of adults who have impaired capacity to make their own decisions, recognizing that everyone should be treated equally, regardless of their state of mind or health.

OPG's charter with respect to adults with impaired capacity is to:

- make personal and health decisions if OPG is their guardian
- make health decisions as the statutory health attorney of last resort
- investigate allegations of abuse, neglect or exploitation
- advocate and mediate for people with impaired capacity, and
- educate the public on the guardianship and attorney systems.

The OPG also provides an important protective role in Queensland by administering a community visitor program to protect the rights and interests of the adult if they reside at a visitable site. Visitable sites for children and adult community visitors include mental health services authorised under the *Mental Health Act 2000.*

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* set out OPG's legislative functions and powers, and the *Powers of Attorney Act 1998* regulates the authority for adults to appoint representative decision-makers, and who can act as statutory health attorneys.

[1] Recommendation 12.7, Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection*, June 2013 available at http://www.childprotectioninquiry.qld.gov.au/publications.

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Position of the Public Guardian

The Public Guardian welcomes the opportunity to provide a submission to the Senate Standing Committee on Community Affairs regarding the inquiry into *Indefinite detention of people with cognitive and psychiatric impairment in Australia.*

The OPG works to protect the rights and interests of adults with impaired decision-making capacity and in so doing seeks to implement internationally recognised obligations under the United Nations *Convention on the Rights of Persons with Disabilities.*

All decisions made by the Public Guardian are to be in accordance with the *Guardianship and Administration Act 2000* general principles and the health care principle.

The general principles include:

- a presumption of capacity (Principle 1)
- all adults have the same basic human rights regardless of capacity (Principle 2)
- an adult has the right to respect for their human worth and dignity (Principle 3)
- an adult has the right to be a valued member of society, and should be encouraged and supported to perform social roles valued in society (Principle 4)
- an adult should be encouraged and supported to live in, and take part in, the community (Principle 5)
- an adult should be encouraged and supported to achieve their maximum physical, social, emotional and intellectual potential, and become as self-reliant as possible (Principle 6)
- an adult has the right to participate in decisions affecting their life (Principle 7)
- in exercising substituted judgment, a person or entity must do so in a way that is least restrictive of an adult's rights, and takes into account the adult's views and wishes (Principle 7)
- an adult's existing supportive relationships must be taken into account (Principle 8)
- an adult's cultural and linguistic environment, and values, must be taken into account (Principle 9)
- powers should only be exercised in a way that is appropriate to the adult's characteristics and needs (Principle 10)
- An adult has the right to confidentiality of information.

There are significant obstacles to clients of the Public Guardian in exiting the system of indefinite detention once they have been detained. While the Public Guardian has prepared the response below to the Committee's inquiry, it is noted that many of the issues outlined relate to matters outside the scope of the Commonwealth's jurisdiction, but are provided to highlight certain issues relevant to Queensland.

Indefinite detention – a difficult system to exit

Indefinite detention under the Terms of Reference includes all forms of secure accommodation of a person, without a specific date of release.

In Queensland, there are two main entry points to indefinite detention. Entry can be either through the:

- civil system through eg., involuntary treatment orders under the mental health system; or

- criminal justice system, whether by custody or court diversion programs.

Civil system

Under the civil system a person will not have committed a crime, but may be detained and deprived of their liberty under the *Mental Health Act 2000* (Qld) (Mental Health Act). For a person to meet the treatment criteria and be detained under an involuntary treatment order, they must have a mental illness, and along with other criteria, must be at imminent risk of causing harm to themselves or others, or be likely to suffer serious mental or physical deterioration if treatment is not received immediately.

In Queensland, once a person enters the system as an involuntary mental health patient, there can be significant challenges and obstacles for those with serious mental illness to exit the system, regardless of whether there are regular reviews by the Mental Health Review Tribunal (MHRT). As a result, some issues that this cohort faces includes: disempowerment; institutionalization and loss of critical life skills and lack of support in re-acquiring those skills to live in the community; distrust of medical treatment, particularly where treatment is associated with coercion; stigmatization; and lack of access to independent advocacy on their behalf.

Another means of 'indefinite detention' under the civil system, is through the use of restrictive practices which are unmonitored in the community in private homes. In certain cases, if an adult displays challenging behaviours that could cause harm to themselves, or others, a guardian may be appointed by the Queensland Civil and Administrative Tribunal (QCAT), with special responsibilities to help manage these behaviours. The appointed guardian is required to consider the use of a Positive Behaviour Support Plan which could include a range of 'restrictive practices' including: containment and seclusion; chemical, physical or mechanical restraint; or restrictive access.

While most of the persons subject to the use of restrictive practices live 'in the community', there is anecdotal evidence to suggest that many experience containment and seclusion on an ongoing basis for long periods of time, effectively detained in their own homes. While effectively 'detained' in their own homes, these persons may also be subject to the use of unmonitored physical and/or mechanical restraint. While QCAT may make an appointment regarding the use of restrictive practices, under the current regime, these people may face effective detention for a period of up to 12 months without a review.

Greater accountability is also needed *within* and *between* involuntary systems (mental health and disability). The OPG has observed that our guardianship clients usually end up in either one, or both, of these systems. Some of these clients have entered these systems after successful diversion from the criminal justice system. While all may have multiple, competent clinical assessments and well drafted support plans, after five (often extending to ten years) in the system, it is evident that the plan to transition these clients from detention has failed. While the focus is on whether the person can be habilitated or re-habilitated, there is little scrutiny, public expectation or accountability upon the systems to ensure that these people are transitioned into the community.

The other issue is that while there are numerous programs and interventions designed to assist people to live in the community, these systems often fail to deliver. There are little if any repercussions upon the system that fails to deliver services. In the meantime, the full brunt of the social and personal costs are borne by the person with disability. It is possible that a set of nationally-endorsed public standards and monitoring of these systems with power to enforce the standards, may assist to bring pressure to bear on these systems and 'incentivise' them to transition people from detention to community living.

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Criminal justice system

Individuals with impaired capacity who find themselves charged with a serious offence risk being detained for far longer, and sometimes indefinite periods of time through diversionary court processes, than if they had been tried for the offence and found guilty. Individuals with a mental illness, or intellectual or cognitive disability who have committed an indictable offence can be diverted from the criminal justice system through the Mental Health Court under the Mental Health Act if they are found to have been of unsound mind at the time of the alleged offence, or are unfit to stand trial. These persons may be placed on forensic orders and are at risk of spending far longer periods detained in mental health services, or the forensic disability service, than if they had been sentenced through a mainstream court. Sentences are for a prescribed period of time. While there are changes under the new *Mental Health Act 2016* (Qld) (which is yet to commence) for mandatory minimum sentences for certain serious offences, there is no corresponding provision specifying a maximum time that forensic orders can operate.

In Queensland, the system does not necessarily treat all persons with impairment equitably, in providing opportunities for people to be monitored and cared for in the community, rather than in detention. For example, under the new mental health legislation, while provision is made for a new and less restrictive order (treatment support order) as an alternative to a forensic order, this alternative only applies to persons with a mental illness. A person who is found to be of unsound mind or unfit for trial due to an intellectual or cognitive disability can only be placed on the restrictive forensic order. No less restrictive option is available for this cohort. Under the less restrictive order, the default is that persons should be placed upon community category orders, unless it is necessary for the person to be an inpatient. The default position under a forensic order is detention unless the Mental Health Court is satisfied that there is not an unacceptable risk to the safety of the community, because of the person's mental condition, including the risk of serious harm to other persons or property. The result is that the default for people with intellectual or cognitive disability is detention.

The following is an example of a client's current experience[2]:

> Alex has been living in an authorised mental health service for nearly two decades. Alex has an intellectual disability and suffers from a disorder that is not treatable, and has complex health and behavioural issues which require constant management.
>
> Alex has complex behavioural issues which were most likely misdiagnosed as a mental illness. Alex was on an involuntary treatment order for nearly 10 years before it was revoked by the Mental Health Review Tribunal on the basis that Alex did not have a mental illness. Since that time, Alex has been living in the mental health service for several years 'voluntarily,' as no appropriate care and accommodation has been found in the community to meet Alex's ongoing high level and complex needs. Alex is allowed very limited access to the community (3 hours per week in total) and only when accompanied by a support worker.
>
> Alex is institutionalized, and has not been supported or equipped with the skills to transition to living in the community. Alex has recently been charged with serious assault. If Alex's case goes to trial, Alex's lawyers would be able to raise issues in Alex's defence. However, if the matter is heard by the Mental Health Court, Alex may be found unfit for trial, and placed upon a restrictive forensic order leading to a further period of indefinite detention, most likely in an authorised mental health service.

[2] The name of the adult has been changed.

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The pathway to indefinite detention

Point of crisis after years of failed service delivery

Many of the OPG's guardianship clients require and interact with a myriad of different service systems. There are also a number of OPG guardianship clients who have significant, multiple and complex needs, and for whom no one service system response is appropriate or adequate. The primary issue for this group of people is the severe and persistent social exclusion from mainstream services and opportunities. Many of these clients have a combination of dual diagnosis (combination of intellectual/learning disability, mental health issues and/or brain injury); serious medical issues; drug and alcohol problems; behavioural issues; a history with child protection; and frequent interaction with the criminal justice system. These issues are often combined with experience of homelessness or transiency, exclusion from public housing, and no (or highly fragmented/dysfunctional) social networks.

While crisis often leads to a person entering detention, the OPG has observed that the pathway to indefinite detention is complex. It often occurs against a background of years of failed interactions between service systems. Inadequate identification and provision of care and support needs early on in the person's life and into adulthood, coupled with lack of collaboration and transition between service delivery systems are some of the factors that can lead to a person finding themselves in detention.

Once in detention, the immediate priority should be ensuring that the person obtains re-habilitation and habilitation support, aimed at assisting the person to exit from detention, and safely live in the community. The risk is that once the person exits detention they are at high risk of re-entering the system through a revolving door towards indefinite detention. Without appropriate and coordinated transition support from the multiple service systems in the community, this is the likely outcome.

While counter-arguments might be raised in that early intervention, or collaborative service systems in the community are costly and resource intensive, detention of people with impaired capacity and complex behaviours is a far more costly venture to run and maintain.

A critical issue observed by OPG in relation to individuals with dual diagnoses or multiple challenges, is that they are poorly served by *all* systems. For example, people with both intellectual disability and mental illness are frequently excluded from access to mental health services, *and* provided with inadequate access to disability supports. Service systems have long had problems with providing coordinated service delivery, particularly to those persons who have complex needs across multiple service systems. For example a person with a dual diagnosis of mental illness and intellectual disability will have their mental health needs met through the health system in Queensland, and their disability needs met through the Disability system. These issues may be further complicated with the transition under the National Disability Insurance Scheme (NDIS). For example, a person may have a dual diagnosis with complex behavioural needs which have contributed to the person offending. While reasonable and necessary supports will be provided under the NDIS, this may not extend to the range of complex needs relating to a person's offending behaviour.

The need for better integration of clinical and non-clinical services

The aim of diversionary courts and bodies should be to ensure that those with impaired capacity who are unable to be held accountable for their actions at law, due to being of unsound mind, or unfit for trial, should be diverted from the criminal justice system, and provided with appropriate treatment and care. The aim of diversion in these cases should be recovery (in the case of mental illness), or re-habilitation or habilitation to live in the community, with ongoing treatment and support as required.

These aims however, are less evident in practice. In Queensland, there are limited options for 'step-down' models of care and service provision in the forensic mental health system or within the forensic disability system. Those clients requiring extended rehabilitation to assist their transition into the community have limited, or sometimes no, options available to skill or be re-skilled in fundamental life skills, to manage their challenging behaviour, or to learn how to live either independently, or with support, in the community. For those who have been on long term involuntary treatment orders, step-down, or transitional facilities are similarly not available.

Better integrated models of clinical and non-clinical service provision and care are needed in the civil and criminal systems that are adapted to individualized needs with the priority of habilitation and re-habilitation of the person so that they can live in the community. This is particularly critical for those persons who have spent extended periods of time detained in a facility.

Managing risk in a complicated service system

These issues are complicated further by matters of 'risk'. In many cases, service systems may be unwilling to assume responsibility for managing and monitoring a client with challenging behavior in the community, citing lack of adequate staffing, resources, or even risk of harm to staff. Often, the only alternative for these individuals, particularly those with challenging and complex behaviour, is to remain in detention.

The OPG has observed that indefinite detention has, in some measure, become the default mechanism for managing personal or community risk associated with complex behavior. Where the perceived risk is already borne by one agency (where the person is detained), other agencies operating in the community may be unwilling to have the burden of risk shift to them.

In Queensland, the provision of disability supports are based on eligibility and prioritization, in a resource limited system. The NDIS will offer opportunities for this cohort to live in the community (through the provision of reasonable and necessary disability supports) which may not have previously been provided under rationed and prioritised state based regimes. In circumstances where a person is 'detained' by the state, whether on remand, a forensic order, or an involuntary treatment order, the provision of disability supports under the NDIS will revert back to being the responsibility of the state.

While the transition to the NDIS is ongoing, it remains unclear what level of disability supports will be retained by the states to meet the rehabilitation and habilitation needs of clients detained, and how effective transition to living in the community will be. It is also not clear whether NDIS supports will be available for behavior due to a disability that is indistinguishable from 'offending behaviour'. Without appropriate collaboration between the NDIA, state service systems (for example, housing services), non-government housing, and service providers regarding support for addressing challenging behaviour and managing 'risk' of the person living in the community, any real hope for an alternative to indefinite detention may be illusory.

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The following is an example of a client's current experience[3]:

> Sam has a diagnosis of an acquired brain injury and psychosis. Sam served a sentence and was detained for a period of 10 years, including an extended period of indefinite detention under Queensland's *Dangerous Prisoners Act 2000*. While Sam was imprisoned and during probation reviews, Sam was assessed as posing a low risk if adequate support was provided in the community. No disability service provider in the community was identified who would provide support to Sam, and therefore even when released under a supervision order, Sam was detained at a mental health service.
>
> Sam's conviction was eventually overturned following a successful appeal, and Sam's case was referred to the Mental Health Court where Sam was found permanently unfit for trial, but now placed on a forensic order with full limited community treatment. However, even though there were no legal barriers for Sam to live in the community, and Sam does not require inpatient mental health treatment, no disability service provider will provide services to Sam in the community. Sam remains in 'detention', with no foreseeable prospect of living or receiving support services in the community.

Critical shortage of appropriate community based accommodation

Without available and appropriate community based accommodation, the problem of indefinite detention will likely continue. A critical issue for many OPG clients is that there are few (if any) suitable options that are available to meet their individual accommodation or service needs. The work of OPG often involves engaging considerable effort in advocating, negotiating and escalating issues with government funding bodies, and non-government service providers, in order to achieve suitable outcomes for our clients, and protect their rights and interests.

Many of the OPG's clients would benefit from an expanded stock of regular housing in the community, coupled with sufficient levels of support to help them to maintain their tenancy and care for themselves adequately. One of the main problems faced by people with impaired capacity relates to the challenge of maintaining their tenancy, due to behavioural issues and/or an inability to care for themselves and their property. Tailored, integrated support will go a way to addressing these issues.

The OPG has also observed that as the complexity of disability needs increases; the availability in choice of services, supports and accommodation decreases. There are therefore limited accommodation choices for people with high and complex needs. Without inter-governmental commitment to funding and cooperation between the Commonwealth, disability service providers and health and housing prior to full implementation of the NDIS, the impact of the NDIS on people with complex disability support needs and their ability to find more appropriate accommodation may be negligible.

Integrated models of accommodation and support should be prioritised for those persons with disability who have complex needs, and/or require high level, or 24/7 care. It is this cohort that currently finds themselves at the bottom of the queue for available social housing. The problem is exacerbated by a shortage of places that can be called 'home', rather than just a place 'to live'. A person with disability has as equal a right as non-disabled members of the community to having a tenancy, or housing that for example, may provide a backyard, rather than only a unit. Community-based accommodation should be accessible, and provide disability services and support for mainstream clients, let alone for persons with complex and high support needs. Investment in alternative accommodation is required to ensure that these individuals with complex needs are not the 'last cabs off the rank' or 'left behind'. Most

[3] The name of the adult has been changed.

clients in indefinite detention could successfully reside in normal housing, provided they receive appropriate levels of support.

The following is an example of a client's current experience[4]:

> Lou has a mental illness. Lou has been charged with serious assault and has been held for the last 6 months in a correctional centre on remand. Lou has not been able to make a bail application as Lou does not have any family, and the only place available is an unsupported boarding house arrangement. A psychiatric report has indicated that Lou is at high risk of reoffending if Lou is bailed to an address where there is no support in place.
>
> Unless Lou is able to provide evidence of support in the community, it is unlikely that a bail application will be successful. Lou's matter is waiting to be referred to the Mental Health Court, which could take a further twelve months for her matter to be heard. Lou faces remaining in the correctional centre for the entire period of remand, and risks a further period of indefinite detention if a forensic order is made. If, in the event the Mental Health Court finds Lou fit for trial and Lou subsequently pleads guilty to the offence, the time that Lou has spent on remand (not being able to make a bail application) could significantly exceed any custodial sentence Lou may be given.

Concluding Comment

With the implementation of the NDIS, it will be important for coordinated efforts to be made, in particular to assist people to transition between detention (particularly where this is as a result of offending or alleged criminal behaviour) and the community. Appropriate supports need to be identified prior to a person's scheduled release to ensure they have their support needs met at the earliest opportunity to enable them to reintegrate and not fall into a cycle of homelessness and/or reoffending.

The NDIS will also heighten the need for appropriate community based accommodation, complemented by sufficient levels of support to assist people to reside in the community, rather than detention being the default long-term solution.

The OPG would be happy to lend further support as required to the Committee as it progresses this inquiry, in the interests of ensuring that people with impaired capacity are not detained indefinitely due to their disability.

[4] The name of the adult has been changed.