



OFFICE OF THE PUBLIC ADVOCATE

ANNUAL REPORT **2016**



The Public Advocate is an Independent Official accountable to the Parliament of South Australia

South Australian Office of the Public Advocate

Annual Report 2015-16

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Front Cover: *Flamingos*, mixed media on paper, 2015 by Giorgio Mouzakitis of Tutti Arts



Giorgio Mouzakitis is a young emerging artist whose work is inspired by the natural world; plants, trees, birds, fish and many kinds of animals. Giorgio is extraordinarily observant of the world around him and he often introduces an element of humour into his work. Giorgio is a prolific artist who attends the Visual Arts program at Tutti Arts. Through his connection with Tutti Arts, Giorgio has been able to work in collaboration with international artist, Andres Busrianto, and South Australian artist, Henry Jock Walker, to create installation artwork for the Oz Asia Festival. Giorgio's work was also highly successful at this year's Bowerbird Bazaar as part of the Tutti Arts stall.

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28 September 2016

The Hon. John Rau MP
Attorney-General
45 Pirie Street
ADELAIDE SA 5000

Dear Attorney-General

I have the honour to present to you the twenty second Annual Report of the Public Advocate, as per the provisions of Section 24 of the *Guardianship and Administration Act 1993*.

This Report covers the period from 1 July 2015 to 30 June 2016. The 'General functions of the Public Advocate' section considers major matters that arose during the year and includes a review of programs, consideration of unmet need and advocacy positions taken by the Office. The 'Service Delivery' section provides an overview and statistical data on direct client services provided by this Office.

Yours sincerely



Anne Gale
PUBLIC ADVOCATE

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The year in review

On 20 December 2015 I was appointed as South Australia's fourth Public Advocate. I am honoured to have the opportunity to fulfil the role and statutory responsibilities assigned to me under the *Guardianship and Administration Act 1993*, and those in other Acts in which the Public Advocate has responsibilities. The key acts include the *Advanced Care Directives Act 2013*, *Consent to Medical Treatment and Palliative Care Act, 1995*, *Mental Health Act 2009*, and *Powers of Attorney and Agency Act 1984*.



I would like to acknowledge the former Public Advocate, Dr John Brayley, who served for seven years and was highly dedicated and committed to the role with significant achievements outlined in his annual report of 2014-15.

I also acknowledge Ms Anne Burgess, Acting Public Advocate from September to December 2015, who adeptly managed and maintained the high standards of the Office during this time.

I have inherited a dedicated and professional team who have impressed me with their commitment to their work and belief in the legislation they use to support and advocate for clients on a daily basis. I thank the team for assisting me in my transition to the role of Public Advocate and I look forward to working with them to build on the many strengths of the Office.

During the year the Office has provided invaluable guardianship and advocacy services to the community of South Australia. The Dispute Resolution Service has grown and the Information and Advice service has dealt with over 3000 enquiries from the community and service providers.

At the 30 June 2016 the Office was providing guardianship for 915 clients, had six advocacy matters open and five current investigations. During the year the OPA dealt with 101 applications for dispute resolution.

Since taking up the role I have met with many service providers in a range of sectors including mental health, disability and aged care. I have initiated work in relation to the National Disability Insurance Scheme, supported decision making and mental health. I look forward to working with the new Mental Health Commissioner as he works to develop a new mental health plan for South Australia.

I have established working relationship with the senior executives of the community stream of the South Australian Civil and Administrative Tribunal (SACAT). The Public Advocate's Office acknowledges and appreciates the efforts of SACAT staff since the Tribunal opened its doors in 30 March 2015.

I have also met with a number of ministers and members of parliament who have an interest in the work of the Public Advocate.

General functions of the Public Advocate

Including reviewing programs and identifying unmet need, promoting rights and interests, raising matters with the minister and monitoring the Act

Disability Services

Guardianship and Administration Act 1993

Section 21 (1) The functions of the Public Advocate are—

- (a) to keep under review, within both the public and the private sector, all programmes designed to meet the needs of mentally incapacitated persons;
- (b) to identify any areas of unmet needs, or inappropriately met needs, of mentally incapacitated persons and to recommend to the Minister the development of programmes for meeting those needs or the improvement of existing programmes;

Introduction

The impending introduction of the National Disability Insurance Scheme (NDIS) is having an impact on our work and our response to this will be a priority in 2016-17.

Concerns previously have been raised about how the scheme and the National Disability Insurance Agency (NDIA) will cater for people with complex needs and how such clients may be engaged. People with high needs may need active engagement by providers and support to have their wishes and needs recognised in the insurance based system. The Office has been working proactively with the Department of Communities and Social Inclusion's Disability Services to ensure our clients have a smooth transition to the scheme.

Unmet need data within Disability Services has remained relatively unchanged. We note the theoretical solution the NDIS should make to meet these needs but continue to hold concerns for the 2053 people with a disability who currently have an unmet service need.

Our work in the area of restrictive practices holds a sharp focus for us as we continue to push for a scrupulous approach to their use, including the development of a positive behaviour support plan before consenting to such practices. Again, the NDIS raises practice implications in this area as we consider who should take ownership of policies developed by Disability Services to ensure consistency and best practice across service providers. This work will be a strong focus in the coming year.

Amendments to the *Disability Services Act 2013* were positive, but it is still to be determined how this state legislation fits into the national NDIS framework. The Act lends itself to regulating service delivery for people with disabilities in a way which is more specific than other state based legislation

Unmet need data – Disability Services

The Department for Communities and Social Inclusion releases unmet need reports on a monthly basis.

Unmet Need Categories

Definitions of urgency of need.

Category 1: Critical (homeless/immediate and high risk of harm to self or others);

Category 2: Evident (risk of harm to self or others/ risk of homelessness);

Category 3: Potential (deteriorating health and/or ability of a consumer or carer); and

Category 4: Desirable (enhancement of quality of life).

Service types:

Supported Accommodation —comprises clients who are referred to the Accommodation Placement Panel; *Personal Support* — describes clients requiring up to a maximum 50 hours per week in-home support. If the number of hours is greater than this, the need is considered to be for supported accommodation; *Respite*; *Community Access* — includes day options (daytime activity), learning and life skills development, recreation and community access; and *Community Support*— includes a range of therapies and interventions.

As at June 2016, 2053 people had an unmet need for services provided by Disability Services, a slight increase from 2045 in June 2015. While it is pleasing to see no major increases, the fact that people remain on this list, and in particular in Categories 1 and 2, is of concern. The number of people on Category 1 status increased from 1415 to 1479, while the number on Category 2 status fell from 440 to 436 (from 440).

Restrictive practices in disability settings

There continues to be nationwide concern about the use of restrictive practices in disability settings and restrictive practices have continued to be a strong focus for us over the past year. Much new work has been undertaken to progress the groundwork of previous years, including clarifying what approvals are needed and by whom, and when Section 32 powers in relation to force and coercion should be considered.

The Office of the Public Advocate (OPA) is committed to having mechanisms in place which regulate, reduce and eliminate the use of restrictive practices. Guardians are often asked to consent to the use of restrictive practices in disability settings. The OPA has a strong focus on obtaining detailed and considered Positive Behaviour Support Plans (PBSP) to ensure that restrictive practices are undertaken safely and only as a last resort. Obtaining a PBSP for individual clients can be challenging due to the lack of suitably trained and recognised professionals in this area. Resourcing is also an issue; individuals are often placed on long waiting lists for a PBSP. The Office of the Public Advocate has raised the need for properly resourced and suitably trained positive behaviour professionals as a key consideration for the transition to NDIS.

Within the past year the OPA has worked closely with the disability sector – including the Office of the Senior Practitioner – to assist with the development of external restrictive practices policies. Of

specific interest is the development of the *DCSI Draft Code of Practice for Eliminating the use of Restrictive Practices in South Australia*. This is a key reference for the OPA and for the disability sector in ensuring the rights of Disability SA clients are upheld. The developed policies are consistent with the intent of the United Nations Convention of the Rights of Persons with Disabilities which reflects the need to protect the rights, freedoms and inherent dignity of people with disabilities.

Consideration has been given regarding the 'ownership' of such policies once transition has moved to the NDIS and Disability SA relinquishes its role as the overarching body for disability services in the state. Ongoing discussion will occur with key agencies to ensure that consistency is maintained and the rights of people with disabilities continue to be upheld.

In an effort to ensure the inappropriate use of restrictive practices are escalated accordingly, the OPA and the Office of the Senior Practitioner have in the past year developed a Memorandum of Understanding which addresses information sharing between our two offices.

One goal for the coming year is to update the OPA's *Restrictive Practices in Disability Settings* policy to address the use and consent arrangements for environmental restraint (eg force used to prevent access to a locked pantry). The inter-agency work that has occurred over the past 12 months in relation to restrictive practices will be helpful in completing this task and ensuring consistency across the sector.

The South Australian Senior Practitioner does not currently have statutory powers. One particular benefit would be that such powers would enable the Senior Practitioner to proactively deal with issues relating to restrictive practice. The OPA has advocated for the proposed NDIS National Senior Practitioner to have such statutory powers.

Role of State disability legislation post NDIS

The *Disability Services Act 1993* legislates for the funding and provision of disability services. When the state is no longer undertaking these tasks, from mid-2017 onwards, aspects of the current Act will be redundant as the *NDIS Act 2013* will regulate services provided by that scheme.

There will still be a role for state-based disability legislation, which can focus on what a person with a disability is entitled to receive from mainstream state government operated services such as health, including mental health, education, training, housing and justice services.

The OPA has commenced discussion with DCSI regarding the ongoing application of this legislation, including future regulation of accommodation services for people with a disability.



Forensic disability services

South Australia does not operate a specific forensic disability service separate from its forensic mental health service. People with a disability (such as intellectual disability, brain injury or autism spectrum disorder) who have been found by a court to be not guilty by reason of mental impairment, or unfit to stand trial, are placed in the custody of the Minister for Mental Health. They are then eligible to be admitted to the forensic mental health facility, James Nash House, where they live with people who have been admitted for mental health treatment.

In the 2014 Budget the State Government allocated \$1.7M to DCSI to fund forensic disability care (corresponding to \$400,000 per year over 4 years indexed). To date, this has resulted in an upgrade of accommodation at James Nash House, with a 10-bed ward operating specifically for people with a disability.

This is a step in the right direction but there remains no clear environmental separation or service delivery difference between those individuals being admitted for mental health treatment and those living with a disability. Ultimately, a complete service separation should remain the long term goal.

The advantages of operating a separate disability unit include:

- increased ability for both disability and mental health services to respond to needs
- increased bed capacity for both groups
- potential economic advantages by employing expert disability care
- increased support for prisoners and community corrections clients with a disability through specialist input from disability experts into forensic care

Mental Health

Introduction

2015-2016 saw the Mental Health Commission commence; national reform to primary health networks including mental health services; and continued work toward the roll-out of the NDIS for adults in South Australia. The NDIS will be of great benefit to some mental health clients but to date it remains unclear how many will benefit. In this context it will be essential to monitor those who find themselves ineligible for NDIS, to ensure they will receive services through the primary health networks and/or other state-based mental health services in the future. The upcoming year will be an opportunity to more effectively plan and connect mental health service delivery in South Australia, through the mental health plan, state-based services and the new national primary health networks mental health services.

Mental Health services

The opening of the 10-bed ward for forensic disability care at James Nash House has theoretically freed up mental health beds in acute units, including secure psychiatric intensive care beds that have been not available for their intended use because of the overflow within forensic services. There are still critical shortages in forensic mental health capacity.

Accommodation for people with a mental illness

The United Nations Convention on the Rights of Persons with Disabilities (UNCRPD), Article 19, defines the right for people with disability to live independently and be included in the community. It states that:

- a. "Persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement."

The need for greater access to supported accommodation has been a consistent theme in the past annual reports of this Office, particularly in relation to disability accommodation, mental health accommodation and associated support services. Current challenges for upholding Article 19 include the significant gaps in supported accommodation in both disability and mental health sectors. These gaps urgently need to be addressed.

Due to the lack of suitable accommodation, guardianship clients with a mental illness can remain in acute hospital settings for extended periods whilst they await an appropriate model of community accommodation and care. In more complex situations the development of an individualised accommodation option is required with appropriate resourcing and qualified staff. This option is rarely available. Housing and Accommodation Support Partnership (HASP) accommodation is available for some mental health clients, but this model does not "fit" for all individuals. In cases where it is suitable, the wait for a vacancy can be lengthy and eligibility criteria can be limiting.

An alternative to HASP accommodation is the Supported Residential Facility (SRF) sector. SRFs are shared accommodation facilities which provide congregate living with meals, medication provision and some level of care. There are considerable variations between providers including lack of access to a private room, heating and cooling considerations and variable food nutrition and palatability.

On occasion the Public Advocate is appointed as guardian for accommodation decisions, specifically to consent to SRF accommodation. Clients may clearly object to such accommodation or be unlikely to receive approval to reside within the SRF sector because of multiple and complex needs. If proper access to a wide variety of suitable accommodation was provided, the appointment of a guardian could in some cases be avoided.

The safety of vulnerable women living in SRFs has been a longstanding concern of this Office. A key focus for the upcoming year will be ongoing advocacy for the provision of different housing models ranging from conjugate housing to permanent independent and supported housing.

Women in prison

During the year, two visits occurred to the Adelaide Women's Prison. The number of women in prison has increased rapidly – a “79.3 per cent increase in the female daily average prisoner population over the past decade.” (Department of Correctional Services *‘Strong Foundations and Clear Pathways: Women Offender Framework and Action Plan’*, p5)

The development of the framework and action plan *Strong Foundations & Clear Pathways: Women Offender Framework and Action Plan 2014-2019* is significant step forward. It includes improvements to the physical site and infrastructure as well as mental health services and community pathways and linkages. A specialised response, such as the new High Dependency Unit at Yatala and the Complex Needs Unit at Port Augusta, would be of great benefit to the Adelaide Women's prison and will assist in better responses to mental health needs of prisoners.

The impact of the NDIS on Mental Health clients

The NDIS will be of great benefit to many South Australians and there is recognition that people with psychosocial needs will be included. In South Australia this group will be the last to transition to the NDIS in 2018. However, there are other people who require mental health support and are currently receiving services that may not be eligible for NDIS. It is unclear to what extent they will be able to receive services from the state mental health services or from Commonwealth-funded primary health networks. Further work is required to explore this and the role of the new Mental Health Commission will be relevant in developing a state plan and addressing this issue.



Photo - staff Barbara Robertson, Belinda Lake & Sharyn Johnson

South Australian Mental Health Commission

The new South Australian Mental Health Commissioner was announced in May 2016, to commence 4 July 2016. This followed the appointment of Interim Commissioner, Dr Stephen Christley, who was in the role from November 2015 to June 2016.

The role of the Mental Health Commission (MHC) is to develop a five-year plan for mental health. It is critical that this plan also considers and connects to the Commonwealth Government mental health plan so it is integrated with state services. It should also reflect the federal reforms in the establishment of primary health networks.

The impact of the NDIS on mental health clients without a permanent disability must be considered. The coming year will see the OPA actively contribute to the integrated state mental health plan to be developed by the MHC.

The appointment of the Commissioner is welcomed. It is noted that the Commissioner does not have statutory powers, therefore, it is important that the MHC is able to report transparently on current gaps including step down facilities, supported accommodation and services for people in supported residential facilities.

The state plan is also an opportunity to provide transparency and clarity in relation to the roles and responsibilities of the various mental health functions including policy, planning, funding and service delivery, connected to the Australian Government / Commonwealth funded mental health services.

National Disability Insurance Scheme & Supported Residential Facilities

For a significant proportion of people with disabilities, the NDIS is a progressive and important social reform. The principles of choice, control and independence are welcomed.

There are some people who may need assistance with decision making regarding their choices. The OPA aims to use supported decision making practices as far as possible as our clients prepare for transition to the NDIS. This will be done in conjunction with current case managers and NDIA staff.

The issue for people living in SRFs in the future is how their accommodation will be regulated. In an NDIS environment, the SA-based regulation of accommodation services is important to enable choice of quality accommodation options. Further work is required regarding the interface of the SRF sector and the NDIS.

Aged Care

The introduction of My Aged Care is in many ways a positive step with regard to older people exercising their rights, independence and choices as consumers.

This Office is concerned, however, for those who may not readily engage with a consumer-driven system, particularly if they prefer to be 'left alone'. For example, some people do not readily engage, may live in squalor or hoard material. This group is relatively small in number but their needs are high and complex and require a specialised response.

To date the available response is not clear and the Commonwealth Aged Care Map states that it will consider the needs of this group over the next two years.

This issue is of particular importance in South Australia given the reforms to aged care and the changes in funding for case management and complex needs. In the past many community aged care organisations provided multi-disciplinary teams to respond to high and complex needs including case management. As this service has changed, this small but complex and high-need consumer group may not receive services unless a crisis arises.

The Public Advocate raised this issue nationally at the Australian Guardianship and Administration Council (AGAC) meeting in February 2016. AGAC acknowledged the issue and has written to the Federal Minister for Social Services, the Hon Christian Porter MP, raising these issues.



Photo - Staff Susan Goldeband, Jeannie Thompson & Ella Nalepa

Promoting rights and interests

Guardianship and Administration Act 1993

Section 21 (1) The functions of the Public Advocate are—

- (c) to speak for and promote the rights and interests of any class of mentally incapacitated persons or of mentally incapacitated persons generally;
- (d) to speak for and negotiate on behalf of any mentally incapacitated person in the resolution of any problem faced by that person arising out of his or her mental incapacity;
- (e) to give support to and promote the interests of carers of mentally incapacitated persons;

The Alliance for the Prevention of Elder Abuse

The Alliance for the Prevention of Elder Abuse (APEA) comprises representatives from the Aged Rights Advocacy Service, the Office of the Public Advocate, the Legal Services Commission, the Public Trustee and the South Australian Police. It is committed to improving the prevention of, and responses to, the abuse and neglect of older people through the provision of publications designed to promote rights, prevent abuse and increase protective mechanism. During the year, APEA commenced a strategic planning process and work is underway.

The Strategy to Safeguard the Rights of Older South Australians

In 2014 the Minister for Ageing launched the Strategy to Safeguard the Rights of South Australians. The Public Advocate was part of the Steering Committee and, in partnership with others, contributed expert guidance and opinion to the development of the Strategy. A key outcome of the Strategy is the formation of the Safeguard Action Plan 2015 – 2021 which has an emphasis on reducing the risk of abuse to older persons. OPA is a member of the Action Plan Advisory Group.

National Disability Insurance Scheme (NDIS)

From 1 July 2017, adults aged 18-64 years will begin to transition from state-based services to the NDIS. The transition will occur based on where a person resides. The OPA is committed to ensuring that the transition for disability and guardianship clients is as seamless as possible. The OPA is working closely with DCSI Disability Services to identify and collect data about mutual clients who may be eligible for NDIS. Consideration needs to be given to what support should be put in place to ensure that people are not disadvantaged by the transition. The initial focus is on collecting data about clients residing in the northern region, consistent with the NDIS rollout plan.

Supported decision making is a key principle in the operation of the NDIS and alternatives to guardianship for some people will be explored to support people to transition.

A National Senior Officers Group has been established to discuss key outcomes associated with the NDIS. This includes advice and insight from jurisdictions further along the NDIS rollout pathway. Discussion has included guardianship trends as well as alternative models to guardianship and supported decision making. This group will continue to inform our understanding of the NDIS and its impact on individuals and guardianship services.

Supported decision making project

In 2016 the Office of the Public Advocate was successful in our application for a Law Foundation Grant to research supported decision making for people under a Guardianship Order. This research project will identify opportunities, barriers and best practice for implementing supported decision making in guardianship practice in South Australia. It will also make recommendations for legislative and practice reform to enable supported decision making for adults with mental incapacity living in South Australia. The project commenced in June 2016 and will be reported on in the 2016-17 Annual Report.

Monitoring the Act

Guardianship and Administration Act 1993

Section 21 (1) The functions of the Public Advocate are—

- (g) to monitor the administration of this Act and, if he or she thinks fit, make recommendations to the Minister for legislative change;



Over the past year, the OPA has continued to look at the issues of capacity and supported decision making within the *Guardianship Administration Act 1993* (GAA) in comparison to the more recently developed *Advance Care Directives Act 2013* (ACDA).

The GAA definition of capacity does not explicitly refer to decision-specific capacity, reflect a presumption of capacity or indicate that all efforts are made to assist a person to exercise their capacity. Sections 7 and 10 of the ACDA specifies that these requirements must be taken into account. Changes to the GAA should be considered to foster a more rights-based view of decision making capacity criteria which is also consistent with the ACDA.

The GAA also does not recognise any level of supported decision making. The Section 10 principles of the ACDA outline that:

‘(d) a person must be allowed to make their own decisions about their health care, residential and accommodation arrangements and personal affairs to the extent that they are able, and be supported to enable them to make such decision for as long as they can;

(e) a person can exercise their autonomy by making self-determined decisions, delegating decision making to others, making collaborative decisions within a family or community, or a combination of any of these, according to a person’s culture, background, history, spiritual or religious beliefs;’

GAA law reform should occur to reflect supported decision making principles, in line with the ACDA and UNCRPD. The Supported Decision Making project currently being undertaken by this Office is expected to provide recommendations for legislative changes in relation to this issue.

Achieving legislative congruence between these Acts is important for both individuals who come under their remit as well as those who are administering the legislation. A more rights-based approach within the GAA would be welcomed.

Raising matters with the Minister

Guardianship and Administration Act 1993

22—Public Advocate may raise matters with the Minister and the Attorney-General

- (1) The Public Advocate may, at any time, raise with the Minister and the Attorney-General any concerns he or she may have over any matter arising out of or relating to the performance of his or her functions under this Act or any other Act.
- (2) If the Public Advocate so requests, the Attorney-General must cause a report of any matter raised by the Public Advocate under subsection (1) to be laid as soon as practicable before both Houses of Parliament.
- (3) The annual report furnished by the Public Advocate under this Act must include a summary of any matters raised by the Public Advocate under subsection (1).

The Public Advocate regularly meets with ministers, shadow ministers and members of parliament to discuss a range of legislative, policy and funding issues across the law, disability, ageing and mental health. In addition responses were provided on request when approached regarding particular issues.

During 2015-16 the Public Advocate met with relevant ministers and members of parliament in an advocacy role, including:

Hon Leesa Vlahos, MP: Minister for Disabilities, Minister for Mental Health

Hon Tony Piccolo: Member for Light

Hon Susan Close, MP: Minister for Education and Child Development

Hon Kelly Vincent, MLC: Dignity for Disability

Hon Peter Malinauskas, MLC: Minister for Correctional Services

Steven Marshall, MP: State Liberal Leader

Hon Zoe Bettison, MP: Minister for Communities and Social Inclusion, Minister for Social Housing, Minister for Ageing

Section 22 Report

No matters were raised under the formal provision of Section 22 during 2015–16.

Service delivery

Including public guardianship, investigations, Dispute Resolution Service, applications for warrants by the Public Advocate, individual advocacy, advice on legislative powers, complaints and decision reviews

Public guardianship

Guardianship and Administration Act 1993

Section 29 —Guardianship orders

- (1) If the Board is satisfied, on an application made under this Division—
 - (a) that the person the subject of the application has a mental incapacity; and
 - (b) that the person the subject of the application does not have an enduring guardian; and
 - (c) that an order under this section should be made in respect of the person, the Board may, by order, place the person under—
 - (d) the limited guardianship; or
 - (e) if satisfied that an order under paragraph (d) would not be appropriate, the full guardianship,of such person or persons as the Board considers, in all the circumstances of the case, to be the most suitable for the purpose.
- (4) The Public Advocate may be appointed as the guardian, or one of the guardians, of the person, but only if the Board considers that no other order under this section would be appropriate.

The role of a public guardian

Guardians are appointed by the SACAT under section 29 of the *Guardianship and Administration Act 1993* (GAA) to make decisions on behalf of individuals who are unable to do so for themselves due to mental incapacity. A guardian can make substitute decisions for a person in the domains of health care, accommodation and lifestyle, depending on the scope of the order. If decisions about finances or legal matters are required, an administrator can be appointed by SACAT.

The GAA requires the Tribunal to make the order which is the least restrictive to the protected person. The Tribunal must consider whether limiting the order to one or two domains of a person's life will sufficiently address the decision making issues. SACAT only makes a full order (covering health, accommodation and lifestyle) if it is satisfied that a limited order would be inadequate. Further, SACAT must only appoint the Public Advocate as guardian of last resort, when no other suitable person can be identified.

A guardian can use their substitute decision making powers to make a decision if a person does not have capacity to make that specific decision. Where a protected person is able to understand the information pertinent to the decision and can be appropriately supported to make their own decision, OPA guardians respect the person's wishes and decision.

Under the provisions of the *Consent to Medical Treatment and Palliative Care Act 1995*, the Public Advocate – when appointed as a guardian for health care decisions - can provide consent for medical

treatment for a person with impaired decision making capacity. The Act makes it clear that a decision specific approach must be taken to providing substitute consent. It should only be provided when a person is not capable of understanding information related to that particular decision, retaining the information, using the information, or communicating their decision.

Guardianship activity and new appointments

As at 30 June 2016, there were 915 active guardianship cases compared with 1002 at the beginning of the financial year. This is an 8.6% decrease and can be attributed to a focused effort on seeking revocation for orders where it was evident they were no longer needed.

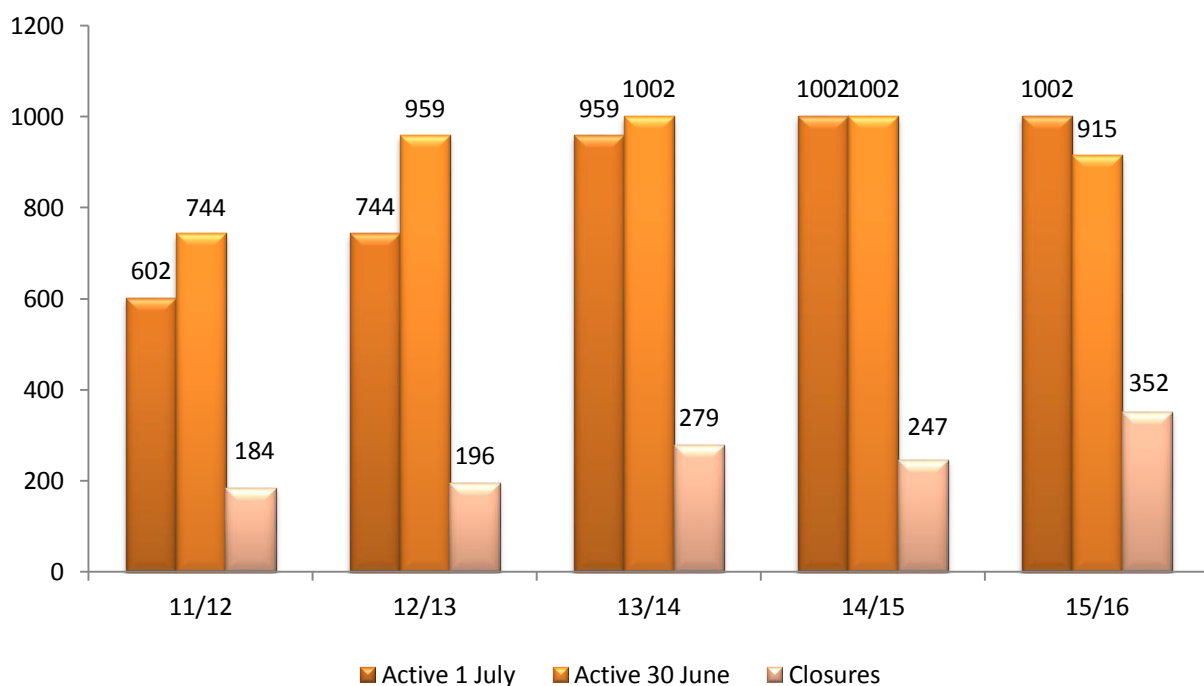


Figure 1: Guardianship Activity 2011–12 to 2015–16

In 2015-16, number of Public Advocate appointments decreased by 9%. This year saw 250 new Public Advocate guardianship appointments compared to 275 appointments in the previous year.

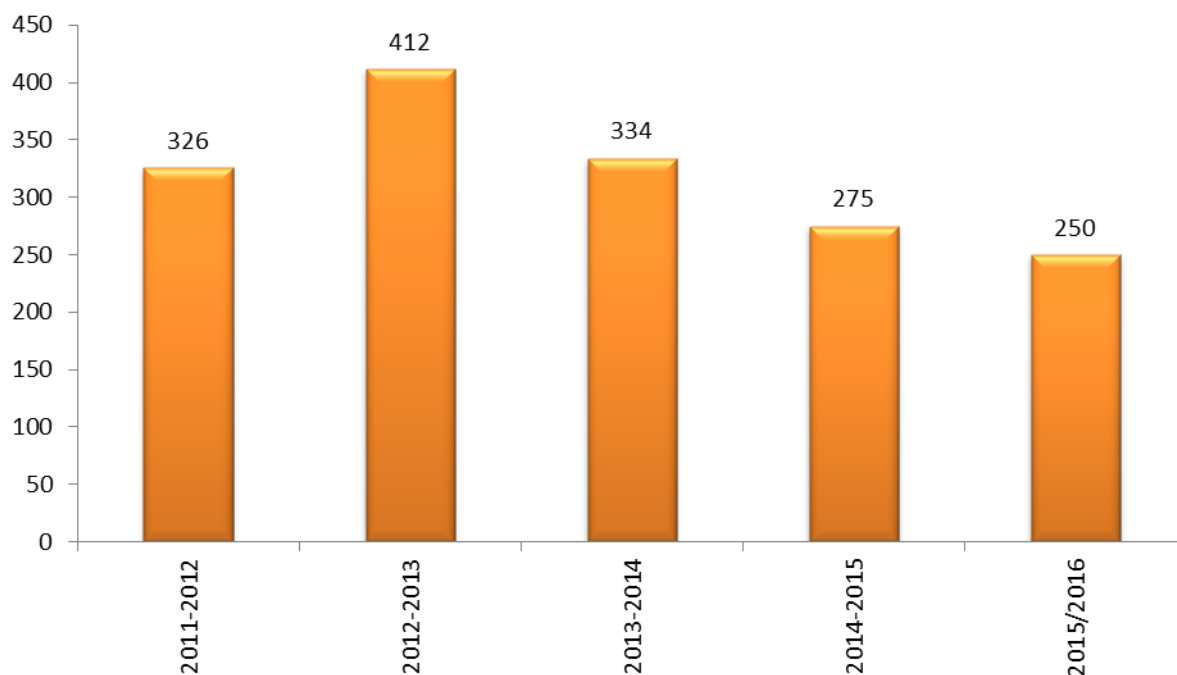


Figure 2: Comparison of new Public Guardianship appointments over the past five years

Recent legislative changes include the introduction of the *Advance Care Directives Act 2013* and amendments to the *Consent to Medical Treatment and Palliative Care Act 1995*. These laws uphold the rights of individuals and provide a legal framework for the role of families and friends, particularly in health care decision making. They also allow interventions by this Office or SACAT to be less intrusive and restrictive in resolving matters than the making of a guardianship order. For example, the OPA's dispute resolution service is now well established and provides mediation services to resolve matters which would otherwise have progressed to guardianship appointments by SACAT.

As predicted in last year's report, the implementation of legislative change providing alternatives to public guardianship has impacted on the pattern of guardianship appointments. A peak was reached in adult guardianship in 2013-14 and the downward trend will be monitored. Further, SACAT's interpretation of the GAA is based on what is least restrictive, resulting in fewer OPA appointments than previously made.

Joint appointments of the Public Advocate with a Private Guardian

If SACAT appoints more than one guardian for a person, the joint guardians must concur on each decision made in relation to that person (section 52 GAA). The Public Advocate may be appointed as joint guardian along with a private guardian, often a person's family member. There has been an 11%

reduction in the number of joint appointments of the Public Advocate with a private guardian. In 2015-16, 24 such orders were made.

Waiting list for allocation of an advocate/guardian

The OPA continues to have a waiting list, although it is important to note that it is not a waiting list in the conventional sense. While awaiting allocation to an individual delegated guardian, the needs of clients on this list are attended to by either the duty officer, or if the matters are more complex, by a senior staff member. Assistant Public Advocates and Senior Advocate Guardians actively manage the waiting list. Key decisions can be made for clients using this system.

OPA staff have worked hard to reduce this list. On 1 July 2015 there were 95 people awaiting allocation to a delegated guardian. The list peaked at 100 in September 2015 and reduced to 28 at 30 June 2016. Whilst decisions for these clients were managed via the OPA's duty system, best practice in decision making is undoubtedly achieved when a guardian can be allocated.

Throughout the year, OPA has been developing a Business Process Improvement strategy. An early intervention pilot project was undertaken as part of this strategy, to analyse ways of improving work processes in order to manage client flow. Following this pilot, staff were able to reduce the waiting list. Sustainability or further reduction of current waiting list numbers will be closely monitored.

Closure of guardianship cases (refer figures 1,3,4,5,6)

During 2015–16, 352 cases were closed. Case closures have increased by 30% this year. The most significant contributor to this figure has been the number of guardianship order revocations, which accounted for 64% of all closures. This figure previously sat below the 50% mark.

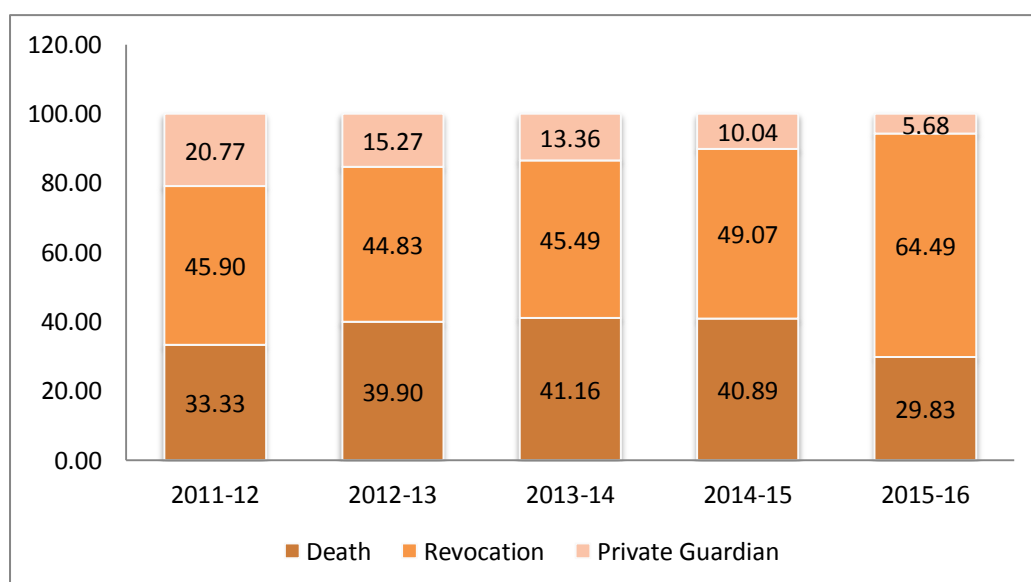


Figure 3: Reasons for closure expressed as a proportion of total closures 2011–12 to 2015–16

In total, 227 revocations were made this year, the highest number recorded. This is reflective of the OPA assertively advocating for least restrictive practices, so that when a guardian is no longer needed, the OPA has sought a revocation. In 2015-16, the OPA focussed effort on seeking

revocations where appropriate. With regards to other reasons for closure, 20 private guardianship appointments were made, 105 protected persons passed away.

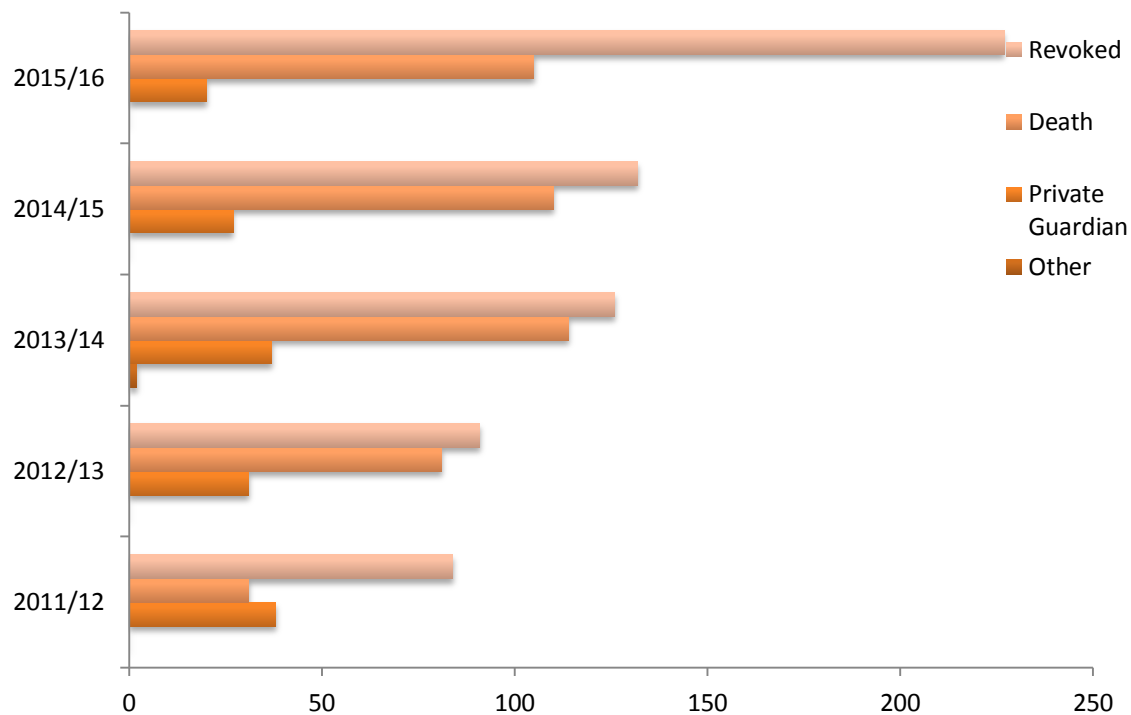


Figure 4: Guardianship numbers by closure type for past five reporting periods

The revocation figure is likely influenced by SACAT’s interpretation of the GAA, where upon review of Guardianship Orders currently in place, it has been determined that revocation is the least restrictive option. Further, the SACAT transition prompted an active review of Guardianship Orders resulting in increased revocations.

When analysing diagnostic groups and length of order for closed cases, a significant increase in cases closed across the three most common diagnostic groups (dementia, mental illness and intellectual disability) can be seen over the last 5 years. This is consistent with the overall increase in cases closed for this period. The length of orders for closed cases has jumped for the intellectual disability diagnostic group (from 1.6 to 3.4 years across 5 years) as well as the dual diagnosis diagnostic group (1.8 years to 4.6 years across 5 years). This last category can largely be attributed to changes in the policy of Disability Services which recognise consent arrangements consistent with the *Consent to Medical Treatment and Palliative Care Act 1995*.

Guardianship cases closed in 2011–12 to 2015–2016								
Diagnosis and length (years) of Guardianship								
Diagnosis		Brain Injury	Dementia and degenerative Conditions	Mental Illness	Intellectual Disability	Dual diagnosis	Other	Total
Numbers of clients	2011-12	21	83	29	26	19	9	184
	2012-13	15	84	42	28	20	14	196
	2013-14	21	109	50	49	33	17	279
	2014-15	20	96	50	53	13	15	247
	2015-16	22	131	79	70	27	23	352
Average length order (years)	2011-12	2.2	1.8	1.7	1.6	1.8	0.7	1.7
	2012-13	2.4	1.5	2.2	2.0	3.1	0.6	1.9
	2013-14	1.8	1.6	1.9	2.7	3.5	0.9	1.4
	2014-15	1.8	2.0	1.9	2.9	3.3	0.6	2.1
	2015-16	3.0	2.1	2.4	3.4	4.6	1.1	2.77

Figure 5: Closed guardianships diagnostic profile and length of guardianship

The overall duration of orders for closed cases is similar across the years, with a smaller number of short orders (up to 6 months) building to a higher number of medium term orders (1-2 years). Following is a slight decrease around the 2 year order mark with peaks at the 3 plus year mark. The most recent reporting period shows a spike in the number of long term orders closed (3 plus years) when compared with previous years.

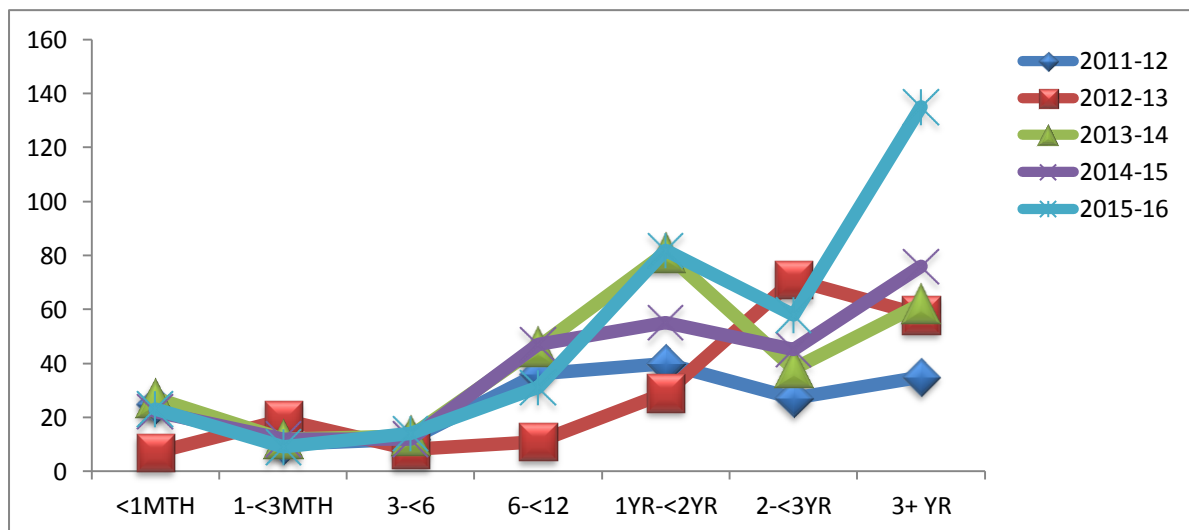


Figure 6: 5-year comparison of length of guardianship for closed cases as at 30 June each year.

This spike in long term orders closed in 2015-16 (134 long term orders closed versus 76 for the previous year) reflects a concerted effort by OPA staff to re-assess the need for Guardianship Orders for longer term clients and seek revocation for these orders. The OPA has a rights-based focus and strongly adheres to the principles outlined in the GAA. If there are appropriate and practical alternatives to guardianship, then OPA asks that these alternatives are seriously considered.

Age and diagnostic profiles (refer figure 7,8)

The highest diagnostic categories are dementia, mental illness and intellectual disability. This is consistent with the previous 5 years. The age profiles of individuals under guardianship have remained relatively consistent over the past 5 years. There is a slight reduction overall in the number of individuals under 41 years of age and a slight increase in individuals over 70, most likely due to the ageing population.

Age Profile of Closed, Active and New Cases 2011-12 to 2015-16

Age	Closed Cases					Active Cases				New Cases				
	(age at closure)					(age at 30 June)				(age at opening)				
	11-12	12-13	13-14	14-15	15-16	11-12	13-14	14-15	15-16	11-12	12-13	13-14	14-15	15-16
Age < 41 years	19%	25%	17%	16%	13%	27%	27%	30%	28%	29%	24%	20%	21%	17%
41 to 70 years	37%	29%	32%	34%	37%	42%	44%	45%	40%	34%	41%	42%	31%	39%
> 70 years	45%	46%	51%	50%	50%	31%	29%	25%	32%	37%	35%	38%	48%	44%

Figure 7: Age profile of guardianship clients 2011–2016

Diagnostic Profile of Guardianship Clients				
Diagnosis	Active at 30/06/2016		Active in 2015–2016	
	Number	Percentage	Number	Percentage
Dementia	195	18%	326	26%
Mental Illness	225	20%	304	24%
Intellectual Disability	303	28%	331	26%
Brain Injury	66	6%	88	7%
Dual Diagnosis	261	24%	149	12%
Other	46	4%	69	5%
Total	915	100%	1267	100%

Figure 8: Diagnostic profile of all active guardianship cases this reporting period

Aboriginal people (refer figure 9)

Aboriginal people constitute approximately 2% of the general South Australian population but 10% of the population of people under OPA adult guardianship in 2015-16. The statistics demonstrate an overrepresentation of Aboriginal people as clients. This is consistent with previous years, and is a reflection of the broader health implications and outcomes faced by Aboriginal clients.

Other changes include a 6% decrease in Aboriginal clients this year. The percentage of Aboriginal clients with dementia has dropped by more than 10% and has increased by almost 7% for acquired brain injury.

Diagnostic Profile of Aboriginal Guardianship Clients				
Diagnosis	2014-2015		2015-2016	
	Number	Percentage	Number	Percentage
Dementia	15	23%	9	9.5%
Mental Illness	26	24%	28	29.5%
Intellectual Disability	30	30%	28	29.5%
Brain Injury	13	7%	13	13.7%
Dual Diagnosis	14	12%	14	14.7%
Other	3	4%	3	3%
Total	101	100%	95	100%

Figure 9: Diagnostic Profile of Aboriginal & Torres Strait Islander Guardianship Clients for 2015-16

Court-related matters — litigation guardianship

In civil legal matters, when a person is unable to manage a matter in court because of a mental incapacity, a court may appoint a litigation guardian to assist the person to instruct a lawyer. Where this is not possible, the litigation guardian may be required to make decisions on their behalf. The OPA commenced the reporting period with three active litigation guardianship matters. A further four were opened during 2015–16, and six cases closed.

Attendance at initial hearings of applications for guardianship orders

When an applicant to the SACAT nominates the Public Advocate as a potential guardian for an individual, the OPA will receive a copy of the application. An OPA staff member will attend and participate in the initial hearing. During 2015–2016, the OPA staff attended 362 initial ‘screening’ hearings where the Public Advocate was named as the nominated guardian. This compares with 321 last financial year.

In addition, the Public Advocate is sometimes appointed as guardian without OPA’s prior knowledge of the application or participation in the hearing. This can occur when the Tribunal changes the guardian on review of a private guardianship order or when an emergency order is made. Consequently the number of screening hearings attended by OPA staff does not necessarily match the number of guardianship orders appointing the Public Advocate.

Investigations

Guardianship and Administration Act 1993

Section 28—Investigations by Public Advocate

- (1) The Public Advocate must, if the Board so directs after an application has been lodged with the Board for an order under this Part, investigate the affairs of the person the subject of the application.
- (2) On completing an investigation carried out at the direction of the Board, the Public Advocate must furnish the Board with a copy of the report of the investigation.
- (3) The Board may receive the copy of the report in evidence and may have regard to the matters contained in the report.

Section 28 of the *Guardianship and Administration Act 1993* provides that the Public Advocate can be directed by SACAT to conduct an investigation relevant to an application received by the Tribunal. The aim of the investigation report is to provide a balanced, concise overview of the circumstances.

Investigation reports may be presented as evidence at SACAT hearings and considered along with other evidence.

Number of investigations 2015–2016

The Office of the Public Advocate had 26 investigation matters open during the year.

- 15 were open at the beginning of the reporting period
- 14 were opened during the year
- 17 were completed during the year and
- 5 remained open as at 30 June 2016

The following table provides a five year overview of screening hearings attended and investigations completed. (Figure 10).

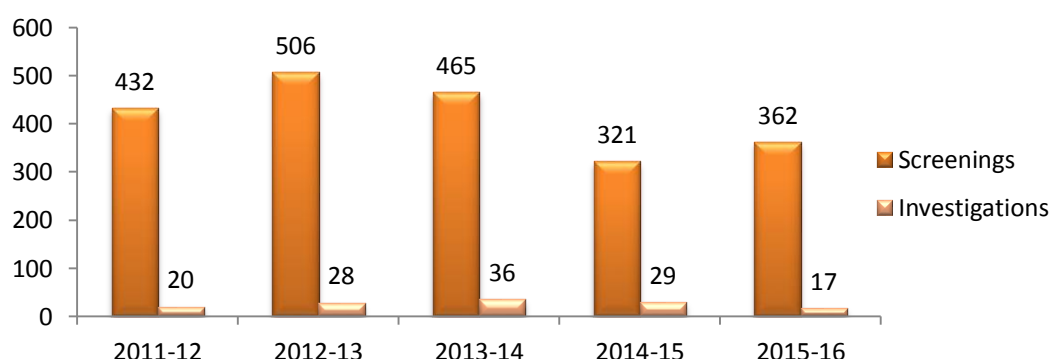


Figure 10: Number of initial guardianship applications screened, & investigations undertaken 2011–12 to 2015–16

Dispute Resolution Service

Advance Care Directives Act 2013

Section 45 —Resolution disputes by Public Advocate

Consent to Medical Treatment & Palliative Care Act 1995

Section 18C - Resolution disputes by Public Advocate

Introduction

The OPA is authorised to resolve disputes by the ACDA and by the *Consent to Medical Treatment and Palliative Care Act 1995* (Consent Act). These Acts authorise the Public Advocate to resolve disputes in the following circumstances:

- If the person has made an advance care directive and there is a disagreement about a health, accommodation or personal decision that has to be made for the person. This includes people who have made an Enduring Power of Guardianship, a Medical Power of Attorney or an Anticipatory Directive prior to 1 July 2014.
- If a person does not have an advance care directive but there is a disagreement about health care and/or medical treatment. This includes disputes involving children under 16 years of age.

Aim of the Dispute Resolution Service (DRS)

The Dispute Resolution Service (DRS) is staffed by qualified mediators. The aim of the DRS is to enable participants who disagree about an issue regarding an advance care directive or a health consent issue to come together in a collaborative and safe environment, to discuss the issues that are in dispute and develop options to resolve the issues.

The OPA dispute resolution model (including a mediation model) takes a rights-based approach and is person centred. The model ensures that all parties to the dispute are able to relay their views about the current situation and discuss options that will bring a resolution to the conflict. Most importantly, the model ensures that the thoughts, views and wishes of the person who is at the centre of the dispute are brought into the resolution process, even if they are not able to directly take part in mediation.

Dispute Resolution Service - the second year

The DRS has now completed its second year of operation. The Service received 101 applications for dispute resolution, the same number as was received in the first year. Of those applications:

- 48 matters were resolved
- 5 matters were withdrawn when the applicant used the information provided by the DRS to resolve the dispute without further DRS assistance
- 4 clients deceased before conclusion of case
- 19 matters were referred to SACAT

- 24 cases were ongoing at the conclusion of the financial year
- 100 cases were closed during the year (some cases closed were opened in the previous year).
-

Figure 11 below shows the range of reasons cases were closed during the year, with almost 60% of cases being resolved by the DRS.

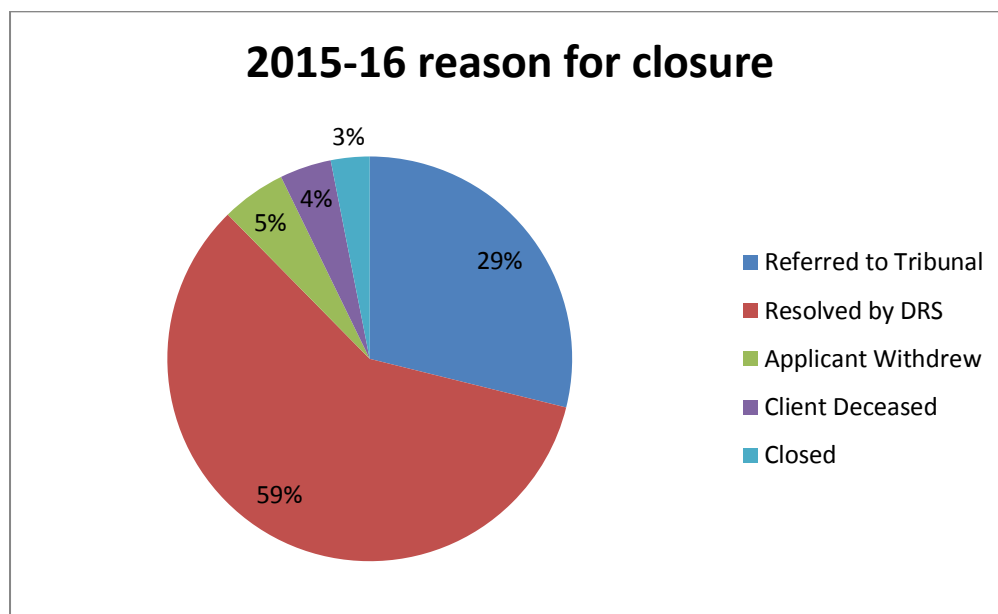


Figure 11 Reason for closure

Nature of the disputes

The majority of applications to the DRS involved family members in dispute about an older adult, often a parent. In most of these cases the person at the centre of the conflict was not involved in the dispute and did not know that it was occurring. There were two applications regarding a dispute over health treatment for a minor (a person under 18 years of age). Reasons for applications included:

- Person with impaired decision making capacity wanting to revoke or alter their advance care directive
- Substitute decision maker/s wanting to renounce their appointment under an advance care directive
- Disputes over end of life decisions for a person in palliative care
- Challenges to the decisions of substitute decision makers / persons responsible
- Accommodation decisions for the person who made the advance care directive
- Lack of communication/consultation between substitute decision makers
- Family members being denied access to a parent or other relative
- Family members or significant others being denied information about the person's health and well-being or location
- Dispute over the person's decision-making capacity
- Challenge to the validity of an advance care directive (concern about someone being coerced to appoint a substitute decision maker when capacity was impaired).

The resolution of disputes about advance care directives upholds the rights of the person who made the directive by enabling the person/s that they chose to remain as substitute decision makers and thus avoid the appointment of a guardian by the Tribunal.

Referrals to SACAT

It is the intention of the ACDA and the Consent Act that applications for dispute resolution should be resolved by the OPA DRS and only proceeds to the more formal SACAT process if resolution is not possible.

Following a review of applications to the DRS and some pre-mediation work, 19 matters were referred to SACAT. Reasons for the referrals were as follows:

- 4 matters where there was a presence, or a high suspicion, of financial abuse to an older person
- 1 matter was referred due to the existence of multiple documents and lack of clarity around the validity of the documents
- 2 matters were considered unsafe for mediation due to potential for violence during the mediation
- 6 matters where a participant refused dispute resolution /mediation
- 1 matter where the person did not have an advance care directive and the dispute was around accommodation
- 1 matter where person who made the ACD wanted to revoke the document
- 4 matters where OPA DRS made an application to SACAT pursuant to Section 51 (2) of the ACDA. This section enables the Public Advocate to apply for the revocation or alteration to an advance care directive due to a change in the personal circumstances of the person who made the advance care directive or those appointed as substitute decision makers.

Ongoing matters

At the close of business on 30 June 2016, there were 24 matters ongoing in the dispute resolution service with work on these cases in various stages of completion. It is significant to note that one reason for matters being ongoing is that participants had agreed to trial an agreement for a period of time, (ie making an interim agreement) before finally settling the matter.

Applications for warrants by the Public Advocate

Guardianship and Administration Regulations 1995

7—Annual report (Public Advocate)—prescribed particulars of warrant applications (section 24)

For the purposes of section 24(2) of the Act, the particulars relating to applications for warrants made during the year that must be included in the Public Advocate's annual report are as follows:

- (a) the number of applications for warrants made during the year;
- (b) the age, sex and details of the alleged mental incapacity of the persons to whom the applications related;
- (c) the grounds on which the applications were based;
- (d) the number of applications withdrawn during the year;
- (e) the number of warrants issued during the year;
- (f) the number of warrants refused during the year;
- (g) in relation to warrants issued—
 - (i) the age, sex and details of the mental incapacity of the persons to whom the warrants related;
 - (ii) the grounds on which the warrants were issued;
 - (iii) the action taken under the warrants.

During 2015–2016, there were no applications for warrants made by the Public Advocate.

Individual advocacy

Guardianship and Administration Act 1993

Section 21 (1) The functions of the Public Advocate are—.

- (d) to speak for and negotiate on behalf of any mentally incapacitated person in the resolution of any problem faced by that person arising out of his or her mental incapacity;

The OPA undertakes advocacy for people under guardianship; as a part of our information and advisory service and through taking on advocacy clients. The OPA advocate/guardians will intervene on behalf of individuals who have a mental incapacity or on behalf of their carers, in an attempt to ensure that they receive assistance or have their rights respected. Private guardians may also be assisted to resolve complex issues through OPA advocacy.

There were six new advocacy cases opened in 2015–2016. Comparison of the past five years is featured below (Figure 12). A significant decrease in new advocacy cases is due to the OPA reviewing its role in relation to advocacy and sharpened its focus on systemic advocacy. New individual advocacy cases have only commenced where there is clear alignment of the issue with the GAA.

	2011- 2012	2012- 2013	2013- 2014	2014- 2015	2015 - 2016
New Cases	46	34	47	31	6

Figure 12: New advocacy clients in each reporting period

Advocacy in matters before the South Australian Civil and Administrative Tribunal

Lack of routine access to advocacy services for clients appearing before the Tribunal for both GAA and *Mental Health Act 2009* matters has been raised by this Office previously. Whilst Section 14(9) of the GAA provides that a person can be represented by the Public Advocate or a recognised advocate, where this Office is not in a position to provide representation, people are referred to other agencies.

It is the view of this Office that there should be a system which ensures that all people have access to either a lawyer or trained lay advocate for mental health, guardianship and administration matters.

Advice on legislative powers

Guardianship and Administration Act 1993

Section 21 (1) The functions of the Public Advocate are—

- (f) to give advice on the powers that may be exercised under this Act in relation to mentally incapacitated persons, on the operation of this Act generally and on appropriate alternatives to taking action under this Act;

Advice about the Act was provided through education and information services.

Education

Information about key legislation, services and systems is provided through the OPA website. During this reporting period there were 29 868 visitors to the site. The website received over 10,000 more visits than last reporting period.

OPA provides education to service providers, community groups and members of the public regarding the legislation that underpins the work of the OPA. Information sessions usually cover the application of legislation, decision making capacity, substitute decision making and the role of guardians and the Dispute Resolution Service.

In 2015–16, OPA conducted 34 education sessions, covering topics such as Advance Care Directives, the GAA and the roles of OPA and SACAT. The Public Advocate and OPA staff also presented at a number of conferences, workshops and training programs during this period, including the 34th International Congress on Law and Mental Health, the Mental Health Professionals Network and an ARAS Elder Abuse Seminar.



Enquiry and information service

The OPA Information Officer provides factual information and practical advice on key legislation in adult protection and SACAT application processes. Duty advocate guardians provide back-up advice regarding more complex matters. The OPA on-call system also provides advice for urgent after-hours matters.

This year there were 3040 discrete episodes of enquiry. A comparison with the previous five years is graphed below (Figure 13).

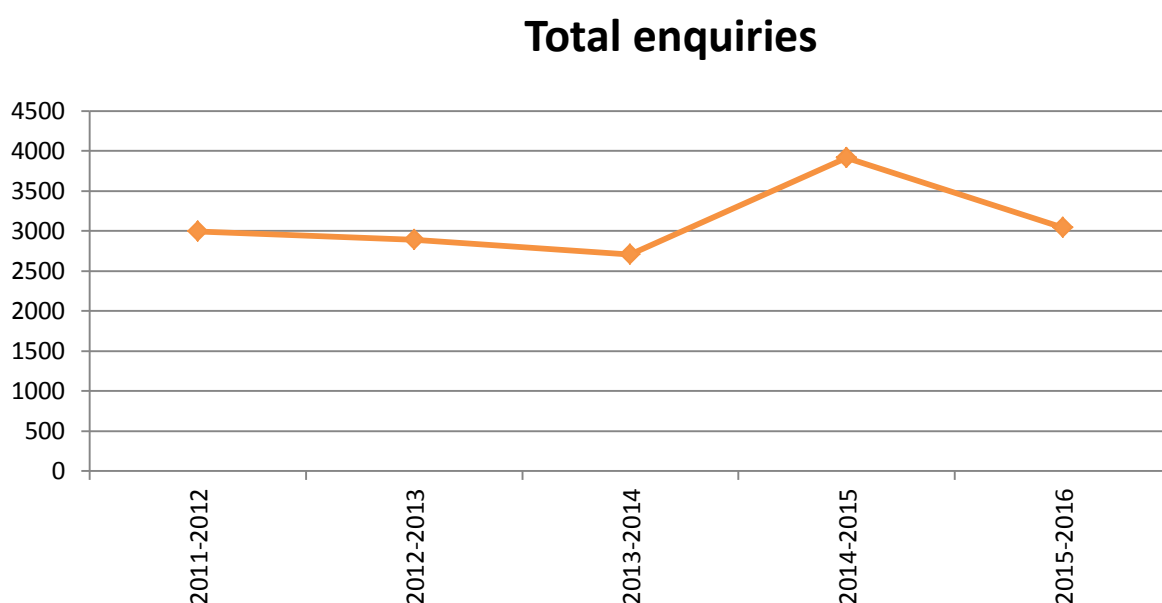


Figure 13: Number of enquiry episodes July 2011 to June 2016

Common reasons for contacting the service include requesting information about advance directives, guardianship and administration orders, SACAT hearings and mental health appeals.

Figure 14 below identifies the main issues raised during the last reporting period as advance directives, administration and guardianship issues. Administration issues relates to the management of someone's legal and financial affairs.

Main Enquiries Issues	2011-12	2012-13	2013-14	2014-15	2015-16
Mental health issues	264	246	187	98	120
Guardianship issues	1035	811	697	698	564
Administration issues	873	604	499	542	623
Advance Directives	737	656	1052	1283	1002*
Consent / Prescribed Treatment				252	217
Total issues raised	4181	3811	3763	4342	4047
Discrete Episodes	2995	2984	2704	3912	3040

Figure 14: Issues raised in enquiries

*The 1002 'Advance Directives' issues includes queries about enduring powers of guardianship, anticipatory directives and the *Advance Care Directives Act 2013*. It includes 466 contacts related to Enduring Powers of Attorney.

After-hours emergency response

An on-call (telephone) service operates 5:00pm to 9:00am on weekdays and 24 hours a day on weekends and public holidays, staffed by experienced advocate/guardians and OPA senior staff. This service acts as the emergency response for existing OPA clients and an advisory service on the legislation and matters which may require an application to SACAT for emergency orders. SACAT is also available to hear urgent applications outside of working hours. Figure 15 below shows the number after hour calls for this reporting period.

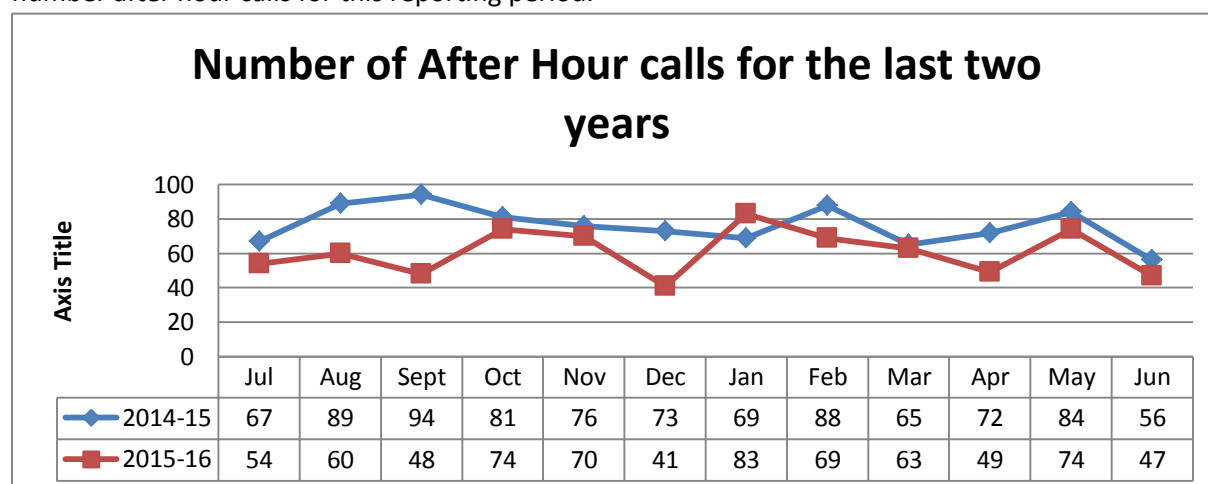


Figure 15 Number of after-hours calls for the last two years

Complaints and decision reviews

Complaints may relate to decisions made in our role as guardian, communication concerns or other matters.

Complex or potentially contentious guardianship decisions are ratified by senior staff before they are implemented to ensure that the decision making process has been comprehensive and the decision thoroughly considered. Reviews of decisions can be undertaken at several levels in the Office; by a Senior Advocate Guardian, Assistant Public Advocate or ultimately by the Public Advocate.

External avenues of complaint include the Ombudsman's Office (to review a process). The GAA has no provisions for dissatisfied parties to lodge external appeals against specific decisions made by this Office. However, if a person is dissatisfied with a decision of the Public Advocate, the Public Advocate may apply to SACAT to seek advice and direction under Section 74 of the *GAA*. This can provide an external forum for discussion and review of the issues. Directions then made by the Tribunal are legally binding on all parties.

Activity

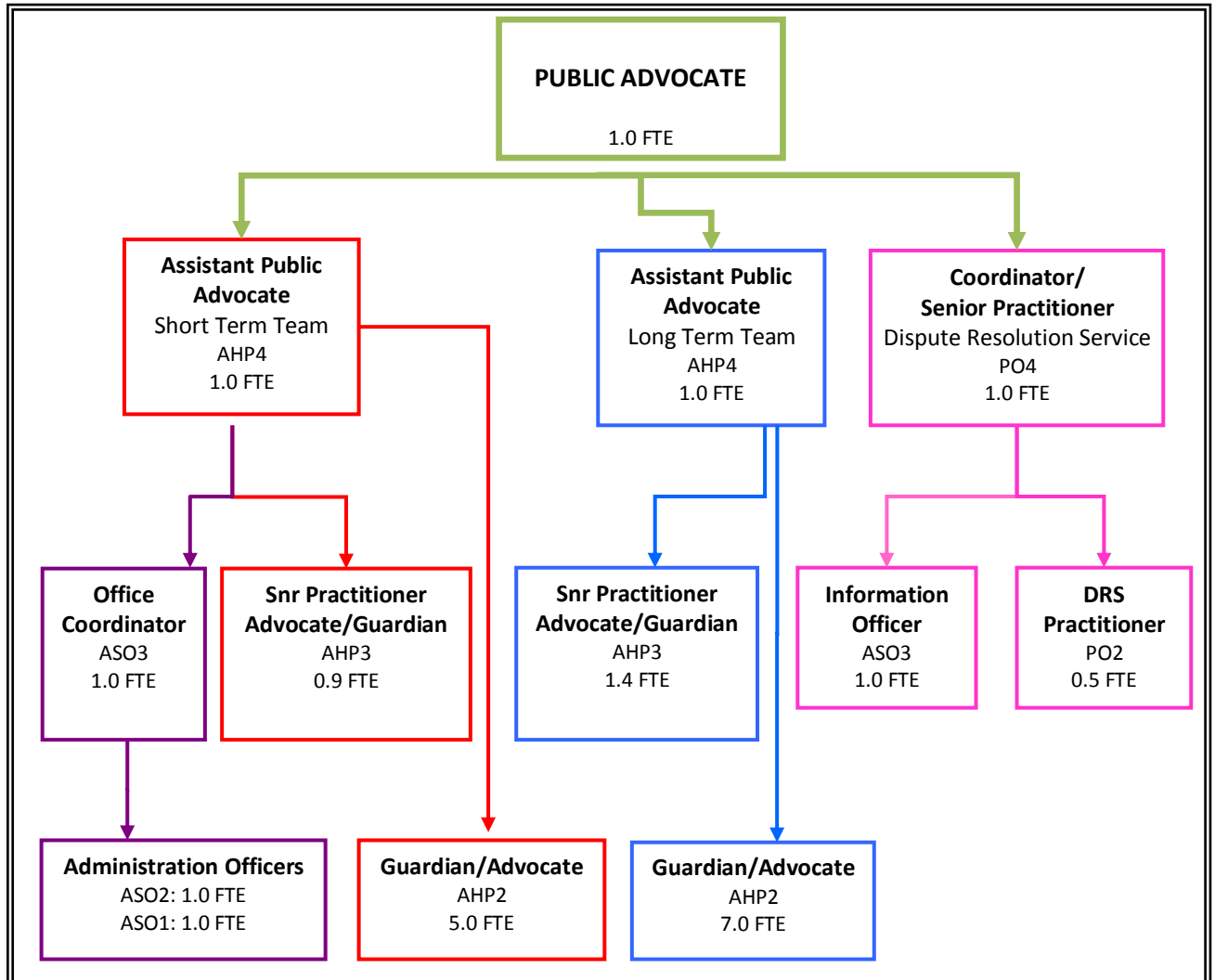
During 2015–16, the OPA acted on 29 separate matters consisting of:

- 19 formal complaints/requests for decision reviews
- 4 Freedom of Information (FOI) applications
- 6 Ministerial and Ombudsman's requests

All matters related to 26 current clients of the OPA. This represents 2% of all active clients during the year.

Work force and human resources

Organisational chart as at 30 June 2016



Workplace safety

OPA is guided by the *Work, Health and Safety Act 2013* and the policies and best practice principles of the Attorney-General's Department (AGD) in relation to Workplace Health, Safety and Injury management. Practical assistance is provided by the AGD on request. OPA has an elected, trained WHS representative and First Aid Officer. WHS matters are routinely discussed in OPA staff and leadership meetings.

Risk review group

The OPA Risk Review Group (RRG) meets on a monthly basis, and provides a forum for discussing risks to clients, staff and the office as a result of fulfilling the office's statutory obligations.

The RRG, in conjunction with the staff member and their line manager, monitors all client situations which have been assessed as presenting a high or extreme risk to employee(s) or other situations identified by employees as needing an organisational response. Ongoing high levels of conflict can have an impact on the emotional wellbeing of staff. The group makes recommendations regarding the future management of the risks associated with the case, provide advice and support to the employee involved in the case, and convene discussions with external parties as required.

For the period July 2015 to June 2016 there were 15 new referrals to the group and a total of 19 cases closed to the register. Incidents which trigger a referral to the RRG are varied and may include threats of harm to staff, significant risk to the safety of clients, and abusive communication from interested parties.

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