




Annual Report 2019–20

by the Chief Advocate for Residents of
Declared Places Under the *Declared Places
(Mentally Impaired Accused) Act 2015*



The artwork on the front cover and throughout the annual report is by artist Paula W; the work is titled 'Inner World'.

Hon Stephen Dawson MLC

MINISTER FOR DISABILITY SERVICES

In accordance with section 56(3) of the *Declared Places (Mentally Impaired Accused) Act 2015*, I submit for your information and presentation to Parliament the annual report of the Chief Advocate for the financial year ending 30 June 2020.

The report records the activities of the Advocates who provided services to residents of the Bennett Brook Disability Justice Centre, a declared place, during the 2019-20 year.

A handwritten signature in black ink, appearing to read 'Debora Colvin', with a stylized flourish at the end.

Debora Colvin
CHIEF ADVOCATE

October 2020

Contents

Forward by the Chief Advocate	iii
Right of Residents of a Declared Place to Advocacy Services	1
What is a 'declared place'?	1
Who are the residents of a 'declared place'?	1
Criteria and process for admission	2
Leave of Absence Orders	4
The Advocacy Service	4
Role of the Advocates	4
Powers of the Advocates	5
Who are the Advocates?	6
Other Residents' Rights	6
Activities of Advocates	7
Visits and notifications	7
Individual Development Plans (IDP)	7
Other Advocacy Issues	8
Emergency restraint and seclusion	8
Lifestyle choices	8
Permission to reside at the Disability Justice Centre	8
Service model issues restricting admissions	9
COVID-19	9
Reviews by the Mentally Impaired Accused Review Board	9
Meetings with the Minister	10
Cost of the Advocacy Services	10
Glossary	10



Forward by the Chief Advocate

The Bennett Brook Disability Justice Centre has catered for the needs of up to three residents at any one time during the current reporting year. It is a great shame that more people on Custody Orders are not allowed to take advantage of the opportunities offered for habilitation (learning new skills) and rehabilitation (regaining lost skills) with a view to living again in the community. Instead they must stay in prison or the forensic mental health ward which has a dire shortage of beds and is not designed to be anything other than an acute mental health ward.

Because there are so few residents, and they have the right to privacy and confidentiality, the report is necessarily confined to the legislative and structural framework around admission to the Disability Justice Centre and the advocacy services. We are not able to showcase the work done with and by the residents.

I would like to thank the Senior Advocate and the Advocate who visit the Disability Justice Centre for their continued good work through the year supporting the residents.

Debora Colvin
CHIEF ADVOCATE

Right of Residents of a Declared Place to Advocacy Services

Part 10 of the *Declared Places (Mentally Impaired Accused) Act 2015* (the Act) makes it a right of people who are detained in a declared place that they must have access to, and the protection of, advocacy services.

The Act sets out principles and objectives which state that the purpose of the custody is the protection of the community and the residents of the declared place, as well the training and development of the residents. The custodial powers provided in the Act are balanced by a range of safeguards to protect resident welfare which include the provision of advocacy services.

People detained in psychiatric wards in authorised hospitals and prisoners in jail similarly have legislation which provides them with a level of protection¹. This is because detention is by its very nature disempowering and isolating for the person detained and can lead to abuse.

The advocacy services provided under the Act are aimed at providing rights protection while also fostering the development of the resident, with the Advocate working alongside the resident on their individual development plan (IDP) as described in the Act.

What is a 'declared place'?

A 'declared place' is a 'place declared to be a place for the detention of mentally impaired accused by the Governor by an order published in the *Government Gazette*' under the *Criminal Law (Mentally Impaired Accused) Act 1996* (the CLMIA Act).

There is only one declared place in Western Australia - the Bennett Brook Disability Justice Centre (Disability Justice Centre) in Caversham. It is a residential-style facility which can accommodate 10 mentally impaired accused persons, hereafter referred to as residents. The Disability Justice Centre was originally established by the Disability Services Commission (DSC) under the Act. From 1 July 2017 the DSC has become a part of the Department of Communities and is known as Department of Communities (Disability Services) although the Act continues to refer to the DSC. The Disability Justice Service which is a part of the Department of Communities (Disability Services) manages the Disability Justice Centre.

Who are the residents of a 'declared place'?

During the 2019-20 period there were three individuals living at the Disability Justice Centre with between two to three residents living there at the same time. One resident had the permission to reside at the Disability Justice Centre revoked and was in prison as at 30 June 2020.

Under the CLMIA Act the only people eligible for detention in a declared place are those who:

- are a mentally impaired accused on a Custody Order
- have reached 16 years of age
- have a disability as defined in the *Disability Services Act 1993* and the predominant reason for the disability is not mental illness.

¹ See Part 20 of the *Mental Health Act 2014* establishing the role of the Chief Mental Health Advocate and advocacy services, and the *Inspector of Custodial Services Act 2003* providing inspection functions and an independent visitor service in prisons and detention centres.

'Mentally impaired accused' persons are accused of a criminal offence but are found to be mentally unfit to stand trial and the charge against them is dismissed without any finding as to guilt or otherwise, or found not guilty on the grounds of unsoundness of mind. If they are put on a Custody Order, the person must be detained indefinitely until the Governor orders that they be released. There are four possible places of detention:

- an authorised hospital (when the accused has a mental illness that is capable of treatment)
- a declared place
- a detention centre (when the accused is under 18 years of age)
- a prison.

A 'disability as defined in the *Disability Services Act 1993*' means that only people on a Custody Order with a disability attributable to an intellectual, cognitive, neurological, sensory, or physical impairment (or a combination of those impairments) can be eligible for a place in the Disability Justice Centre. Those people on a Custody Order due to a mental illness alone are not eligible.

The aim of the Disability Justice Centre is to provide a detention option that is appropriate and rehabilitative for people with intellectual or cognitive disability, or autism, as an alternative to prison and to help prepare them for release into the community. This is why the Disability Justice Centre is managed and funded by the Department of Communities.

Criteria and process for admission

The Mentally Impaired Accused Review Board (the MIAR Board) and the Minister for Disability Services (the Minister) decide whether a person on a Custody Order can be detained in the declared place, that is, the Disability Justice Centre.

“The advocacy services provided under the Act are aimed at providing rights protection while also fostering the development of the resident

During 2019-20 there were 12 new Custody Orders² made by the courts in Western Australia. As at 30 June 2020 there were 50 Custody Orders made (for 49 people):

- two were in the Disability Justice Centre
- 21 were detained at an authorised hospital
- 11 were in prison
- 15 were in the community on conditional release orders.

The MIAR Board determined that one person on a Custody Order be detained in the Disability Justice Centre during the year but this was not consented to by the Minister.

The number of Custody Orders in place at the end of the financial year has increased from 38 to 50 in the past three years.

The MIAR Board must be satisfied that the person meets the criteria described above and have regard to the degree of risk that the accused's detention in the declared place appears to present to the personal safety of people in the community or of any individual in the community. This is a prime consideration.

² Source: Mentally Impaired Accused Board email of 4 August 2020. One person was placed on a Custody Order twice.

► Table 1. Mentally Impaired Accused Persons and place of custody as at 30 June 2018, 2019 and 2020

Location	Number of Custody Orders		
	30 June 2018	30 June 2019	30 June 2020 ³
Authorised Hospital ⁴	9	11	22
Community (subject to a Conditional Release Order)	17	18	15
Subject to a condition they undergo treatment for a mental illness		15	12
Not subject to conditions about treatment for a mental illness		3	3
Declared Place	2	3	2
Prison ⁵	10	10	11
TOTAL	38	42	50

The MIAR Board first asks the Department of Communities (Disability Justice Service) to undertake a 'suitability for placement' assessment for any mentally impaired accused person who they are considering for placement at the Disability Justice Centre. Disability Justice Service clinicians, in consultation with the mentally impaired accused person, their family and/or guardian and the Disability Justice Service Suitability Assessment Panel (the panel) undertake the suitability for placement assessment.


The Disability Justice Service process is to produce an initial assessment which is then considered by the panel comprising of the Director, Disability Justice Service, the Manager of the Disability Justice Centre (or delegate), the clinicians who carried out the assessment, and other relevant representatives. The panel then makes a recommendation and briefs the Assistant Director General, Department of Communities, who approves the report and recommendation and sends the assessment to the MIAR Board stating whether the person is deemed suitable for placement.

The MIAR Board considers the report and determination along with any other materials or expert reports available to it. The CLMIA Act also requires that a person who works for the DSC, must be a member of the MIAR Board and be present when the

³ Source: Mentally Impaired Accused Board email of 4 August 2020 based on Place of Custody Orders as at 30 June 2020.

⁴ Mentally impaired accused persons on Custody Orders who are inpatients in authorised hospitals may be participating in a leave of absence from the hospital.

⁵ Mentally impaired accused persons on Custody Orders may be participating in a leave of absence from prison.



MIAR Board is making a decision regarding any placement at the Bennett Brook Disability Justice Centre. In practical terms that person is from the Department of Communities (Disability Services). The Department of Communities (Disability Services) representative on the MIAR Board does not undertake the suitability for placement assessment.

If the MIAR Board decides to recommend the detention of the mentally impaired accused at the Disability Justice Centre it sends the Minister a statutory report containing a comprehensive and detailed summary of all the accused's circumstances, and the MIAR Board's reasons for recommending placement. The Minister then decides whether to consent to the placement. If consent is refused, the person is likely to remain in prison or an authorised hospital (if they also have a mental health condition).

Leave of Absence Orders

Mentally impaired accused persons, whether in a declared place, authorised hospital or a prison, may be given Leave of Absence (LOAs) orders. The LOA orders are granted by the MIAR Board following approval by the Governor. They cannot exceed 14 days and the MIAR Board is to have regard to risk and compliance factors. LOA orders are relied on by the Disability Justice Centre as central to the programs used to assist with preparing residents for reintegration into the community and ultimate release. Residents therefore spend a considerable amount of time outside the Disability Justice Centre on day and overnight leave as determined by the MIAR Board's LOA orders. Consent to placement in the Disability Justice Centre includes consideration of risk to the community in providing LOA orders.

The Advocacy Service

Part 10 of the Act establishes the advocacy services for residents of a declared place including a Chief Advocate and Advocates. The Chief Advocate must be informed of the arrival of every new resident in the declared place no later than 48 hours after their arrival. The Chief Advocate must then ensure that the resident is visited or otherwise contacted by an Advocate within seven days of the resident's arrival (the statutory contact).

Residents can request visits or contact outside the statutory contact and an Advocate must contact them within 72 hours of the request being made. The Chief Advocate must also ensure that an Advocate makes contact with each resident on request and at least four times a year. Residents can, however, decline to be contacted.


The Chief Advocate must also report to the Minister on the activities of the Advocates as soon as practicable at the end of a financial year and the Minister must, within 14 days after receiving the report, cause a copy to be laid before each house of Parliament.

Role of the Advocates

The role of the Advocates is to protect residents' rights and, as the name suggests, advocate for them. In particular, they must be involved in the preparation and review of a resident's IDP and the Chief Advocate must be advised of the use of regulated behaviour management which includes medication, restraint and seclusion.

Each Advocate has these functions (see section 53 of the Act):

- a. visiting or otherwise contacting residents
- b. acting as the personal Advocate of residents to safeguard their health and safety and foster their development
- c. monitoring orders under section 10 of the Act restricting freedom of communication
- d. monitoring the use of regulated behaviour management
- e. inquiring into or investigating any matter relating to an environmental condition



of the declared place that is adversely affecting, or is likely to adversely affect, the health, safety or wellbeing of residents

- f.** inquiring into or investigating the extent to which explanations of the rights of residents have been given in accordance with the Act and the extent to which those rights are being, or have been, observed
- g.** assisting residents to protect and enforce their rights
- h.** inquiring into, and seeking to resolve, complaints made to Advocates about the management or care of residents
- i.** assisting a resident to make a complaint to the person who operates the declared place
- j.** assisting a resident to make a complaint under the *Disability Services Act 1993*
- k.** being a resident's representative in respect of a complaint if recognised as the resident's representative under the *Disability Services Act 1993*
- l.** liaising with the resident's enduring guardian or guardian
- m.** assisting residents to access legal services
- n.** referring any issues arising out of the performance of a function of the Advocate to the appropriate person to deal with those issues, including to the Chief Advocate, if the Advocate cannot resolve the issue or otherwise considers it appropriate to refer the matter
- o.** participating in the planning and provision of services received by residents and the preparation of their IDPs.


Powers of the Advocates

The Advocates have substantial powers in keeping with their protection of rights and 'watchdog' role which are very similar to the power of Advocates under the *Mental Health Act 2014*.

Apart from doing anything necessary or convenient for the performance of the Advocate's functions under section 54 of the Act they may:

- with or without notice, at any time, and for any length of time —
 - a.** visit a declared place and inspect any part of the place
 - b.** visit, or otherwise have contact with, any one or more residents, except a resident who has declined to be contacted by an Advocate
- ask a person who works at a declared place questions about any of these matters —
 - a.** the welfare, health, care, training, safety, management or security of any resident
 - b.** the operation, control, management, security and good order of a declared place, to the extent to which the matter is relevant to a matter mentioned in paragraph (a)
- inspect and copy any document at a declared place relating to the place
- inspect and copy any of the following documents, wherever held, except a document to which the Advocate has been denied access by the resident —
 - a.** the resident's IDP
 - b.** any other document included, and the information recorded, in the resident's file
 - c.** any of the records listed in section 10(6) (a)(i) and (ii) of the Act that relate to the resident
 - d.** any other document in the possession or control of the person who operates the declared place that relates to the resident
- require a person who works at a declared place to give reasonable assistance to the Advocate for the purpose of the performance of the Advocate's functions under this Act.

It is an offence under section 55 of the Act to not answer the Advocate's questions, to hinder or fail to assist them, or give them wrong information.



The Advocates are under the control of the Chief Advocate and residents always retain the right to decline to be visited or otherwise contacted or to not consent or withdraw consent to the Advocate having access to their records.

Who are the Advocates?

The *Declared Places (Mentally Impaired Accused) Regulations 2015* prescribe that the Chief Mental Health Advocate and Mental Health Advocates as defined in the *Mental Health Act 2014* are the Chief Advocate and Advocates for the Act: they operate as the Mental Health Advocacy Service or MHAS. The functions and powers of Mental Health Advocates under the *Mental Health Act 2014* are very similar to the functions and powers of Advocates under the Act including advocacy and rights protection services for people who

are on Custody Orders due primarily to a mental illness and who are in an authorised hospital or on a conditional release order receiving treatment.

At the start of the 2019-20 year two Advocates and a Senior Advocate engaged by the Chief Advocate under the *Mental Health Act 2014* worked as Advocates under the Act. Both Advocates received training on the Act prior to the Disability Justice Centre opening and continue to stay current with issues to do with advocacy under the Act. Following a restructure within MHAS in September 2019, a new Senior Advocate, who had been visiting the Disability Justice Centre as an Advocate since it opened, was appointed Senior Advocate to the Centre. Currently therefore two people are providing advocacy services to the Disability Justice Centre (the Senior Advocate and another Advocate).

Other Residents' Rights

One of the most fundamental requirements of the Act, and therefore right of residents of a declared place, is that they are to be provided the best possible training including development programs that promote their physical, mental, social and vocational abilities (see section 5(2) of the Act).

Furthermore, pursuant to section 6 of the Act, programs and services for residents must be designed and administered so as to:

- respect the rights of residents to be treated with dignity, courtesy and compassion, without discrimination or stigma, and with equality of opportunity
- be sensitive and responsive to the diverse and individual circumstances and needs of residents taking into account their age, gender, spiritual beliefs, culture or linguistic background, family and lifestyle choices
- reduce the risk of residents offending or re-offending

- assist residents to live, work and participate in the community and be as independent as possible
- maximise quality of life for residents
- assist residents to be trained, developed and cared for in a manner that is the least restrictive option in the circumstances taking into account the need for protection and safety of residents and the community.

The Act also stipulates that an IDP is to be prepared for each resident, and the resident is to be managed and is to receive 'care, support and protection' as required by that plan. The Advocates must be consulted as part of the preparation, review and proposals for change of a resident's IDP and this is a major part of their work with residents.

Other rights include:

- the right to be told their rights

- freedom of lawful communication – though this right may be restricted in certain circumstances in which case the order must be made and the resident's Advocate advised (and the restriction cannot deny the resident access to the Advocate, lawyer or guardian; and the Advocate must monitor the restriction)
- confidentiality
- the right to not be ill-treated
- process and procedure around:
 - incident reporting
 - regulation of behaviour management including seclusion and restraint and notifying the Chief Advocate
 - searching residents.

Activities of Advocates

Visits and notifications

In accordance with the requirements of the Act:


- each resident received four visits during the year⁶ or the equivalent proportion
- the Chief Advocate received quarterly reports for each resident as to whether there had been any regulated behaviour management pursuant to sections 27, 32 or 36 (behaviour management medication, restraint and seclusion).

Individual Development Plans (IDP)

The programs and services at the Disability Justice Centre must be delivered in accordance with the IDP for each resident. The plan must be reviewed before the expiry of six months after it is first prepared and then every 12 months. The IDPs are required to include programs and services designed to:

- promote the resident's development, habilitation (focussing on learning new skills), rehabilitation (focussing on regaining skills lost) and quality of life
- reduce the intensity, frequency and duration of the resident's behaviour that places at risk the health or safety of the resident or others, including positive behaviour support
- support the resident's reintegration into the community and include an outline of the proposed plan for the resident's transition to participation and inclusion in the community.

⁶ Section 52 of the Act requires the Chief Advocate to ensure that each resident is visited or otherwise contacted within seven days of the resident's arrival at a declared place and 'at least' four times a year. The Chief Advocate has determined that the four visits are to be counted in each reporting year which means between the 12 months between 1 July and 30 June and, if a resident arrives or departs from the declared place within that period, the Chief has determined the number of visits required is based on the proportion of the resident's stay in the 12 month period.



All residents had LOA orders made by the MIAR Board which allowed the IDPs to include a program of absences from the Disability Justice Centre. The objective of the LOA orders is to give a staged, gradual and supervised transition back into the community, which is the goal for all residents.

Advocates contributed to the IDPs in various ways including advocating for culturally appropriate care and programs. One IDP took place after the expiration of 12 months. IDP processes are now in place to ensure that all IDP reviews are held within the 12 month period. The Advocates have reported increased detail of documentation in the IDP plans which is welcomed.

In addition the IDP must include:

- what constitutes appropriate or inappropriate regulated behaviour management for the resident's case
- details of any medication prescribed as behaviour management medication
- details of each emergency when a restraint was used on the resident or the resident was placed in or returned to seclusion
- strategies for avoiding, reducing and eliminating any further use of a regulated behaviour management.

Other Advocacy Issues

Emergency restraint and seclusion

There was one emergency restraint and no seclusions notified to the Chief Advocate during the year. The Advocates followed up on the incident checking that the resident's rights were observed, including having a suitably qualified person check on the resident's health and welfare within two hours of the restraint in compliance with section 41(2) of the Act.

It has been previously reported⁷ that section

41(2) was not always complied with. There was one incident in 2019-20 where the check was not made within two hours. The Department of Communities has assured the Chief Advocate that processes are now in place to ensure that the requirement is met in future⁸. It should be noted that, where the requirement was not met, no resident was adversely affected.

Lifestyle choices

Section 6(2) of the Act requires that 'services for residents are to be designed ... so as to be sensitive and responsive to the diverse and individual circumstances ... taking into account their.... life-style choices'.

Considerable advocacy was provided for one resident who wished to use a boxing/punching bag as they had done in their previous place of custody. There are differing opinions about the efficacy of boxing in managing pent-up energy and the Advocate was not successful in getting the resident access to a punching bag. The Disability Justice Centre did try alternative ways of satisfying the request without success.

Another issue raised by residents and therefore by Advocates was smoking. One resident wished to use 'roll your own' cigarettes but this was not allowed. This caused distress to the resident and meant that the resident was required to use tailor-made cigarettes which are more expensive. Disability Justice Centre staff did try to work with the resident on this issue without success.


Permission to reside at the Disability Justice Centre

The Minister must give consent for a person to reside at the Disability Justice Centre⁹. There has been one instance this year where the Minister exercised his prerogative to revoke his consent following an occurrence at the Disability Justice Centre. The Chief Advocate raised concerns about this decision which has implications for and reflects the current service model (see below).

7 Annual Report 2018-19.

8 Letter from Director, Disability Justice Service, 17 February 2020.

9 Under section 24(5C) of the Act.



There was a second instance where the MIAR Board recommended the placement of a person in the Disability Justice Centre, but the Minister refused consent.

Both people are now detained in prison until the Governor authorises their release unless the MIAR Board recommends their placement back in the Disability Justice Centre and the Minister consents.

Service model issues restricting admissions

The Chief Advocate and Senior Advocate met with the Deputy Director General of the Department of Communities and the Director, Disability Justice Service on 9 January 2020 raising concerns about the service model under which the Disability Justice Centre operates. In particular, that it is not catering for the wide and diverse range of challenging behaviours of people on Custody Orders. The Chief Advocate raised concerns that people who could substantially benefit from the Disability Justice Centre are being excluded, even though the Act clearly contemplates and makes provision for people with challenging behaviours to be admitted. The current model of care and associated staffing do not allow for this.

This means the 10 bed Disability Justice Centre is not being fully utilised and mentally impaired accused on Custody Orders who might otherwise meet the criteria in the Act are continuing to be detained in prison or the forensic mental health secure ward, the Frankland Centre. The Frankland Centre does not provide the type of rehabilitative or habilitative care that can be provided at the Disability Justice Centre and has an increasing bed shortage with people in prison needing an inpatient bed waiting weeks, and in some cases months, to get admitted¹⁰.

Questions were also raised about the likely impact of long-awaited changes to the CLMIA Act which are already increasing in the number of people on Custody Orders.

COVID-19

The introduction of COVID-19 restrictions were well managed by the Disability Justice Centre. Some activities utilised by the residents for their LOA orders, such as TAFE classes and football training were cancelled but replacement LOA activities were organised to minimise the disruption of lack of off-site activities.

Visitors were restricted based on general public health directions and Government advice for COVID-19 but Advocates and others could contact residents via phone or Skype. There were no specific public health directions made in relation to the Disability Justice Centre.

Reviews by the Mentally Impaired Accused Review Board

Under the CLMIA Act residents are required to be reviewed by the MIAR Board and a report sent to the relevant Minister (the Attorney General) at least once a year and whenever the MIAR Board thinks there are special circumstances which justify doing so. The MIAR Board has agreed to keep the Chief Advocate advised in advance of all Board reviews scheduled for Disability Justice Centre residents. Letters are also sent to the Chief Advocate following a hearing by the MIAR Board containing the decision of the Board, any reasons for that decision, and the next date the matter will be considered by the Board.

Advocates can draft written submissions or, with the permission of the MIAR Board, attend review hearings. The Advocates contacted the residents prior to hearings and reviewed documentation sent to the MIAR Board. Three submissions were made by Advocates to the MIAR Board and Advocates attended two hearings in 2019-20.

10 In September 2018 it was reported by the Inspector of Custodial Services that one third of prisoners who were referred for inpatient care to the Frankland Centre never got there, and 61% of all referrals lapsed without a hospital placement; the reason was a lack of beds. The situation remains unchanged.

Meetings with the Minister

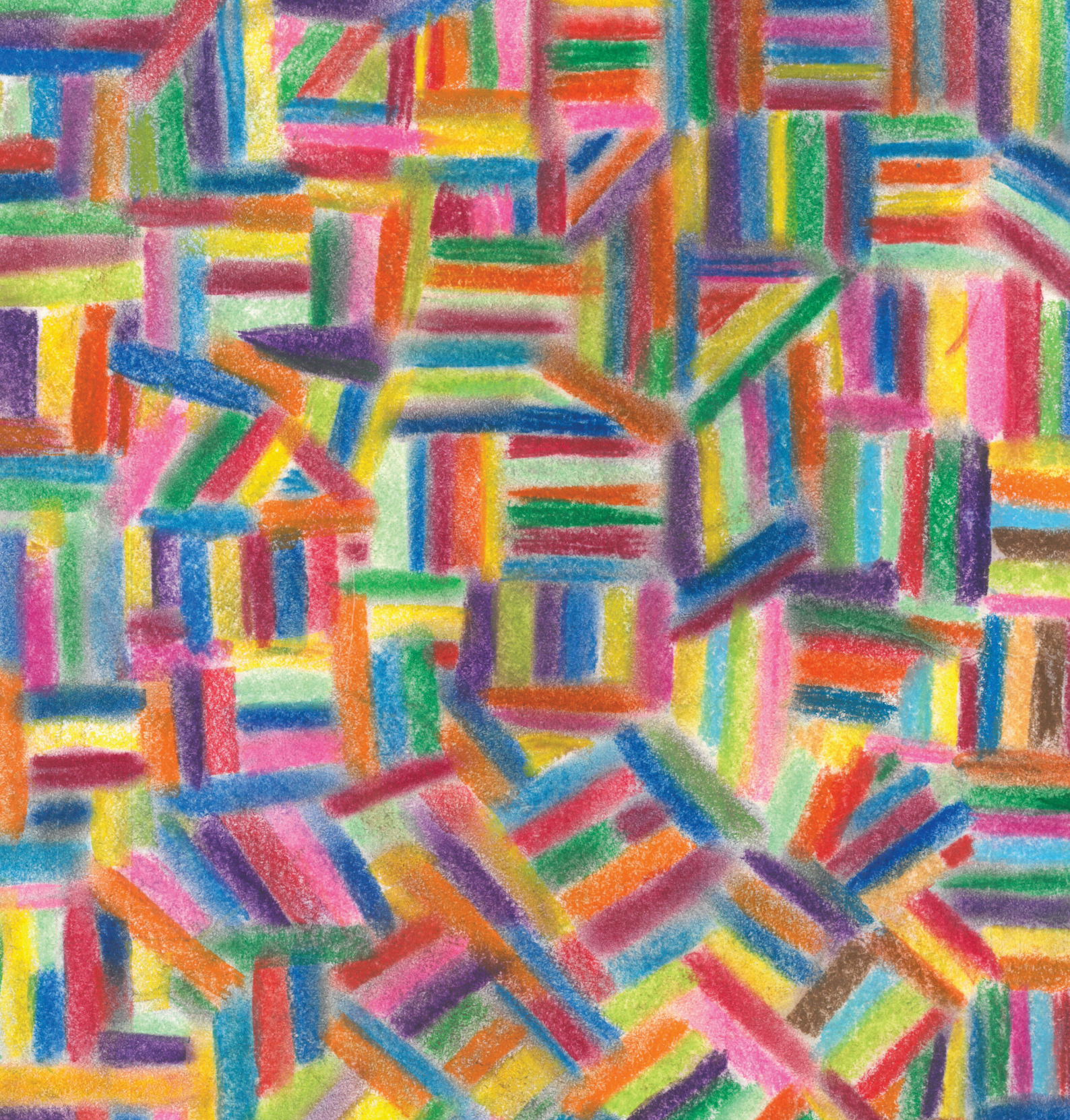
The Chief Advocate did not meet with the Minister for Disability Services during the year. A meeting was planned but postponed due to COVID-19. The Chief Advocate met twice with the Deputy Director of the Department of Communities.

Cost of the Advocacy Services

In accordance with the agreed funding arrangements, the Department of Communities is invoiced for advocacy services provided pursuant to the Act. The cost of the advocacy services in 2019-20 was \$11,115.45.

Glossary

The Act	<i>Declared Places (Mentally Impaired Accused) Act 2015</i>
CLMIA Act	<i>Criminal Law (Mentally Impaired Accused) Act 1996</i>
Disability Justice Centre	The declared place in Caversham known as the Bennett Brook Disability Justice Centre
IDP	Individual Development Plan required by Part 4 of the Act to be prepared at regular intervals for all residents of a declared place
LOA	Leave of Absence order made by the MIAR Board on approval of the Governor
Minister	Minister for Disability Services
MIAR Board	Mentally Impaired Accused Review Board
Residents	Mentally impaired accused persons (as defined in the Act) living at the Disability Justice Centre
Statutory contact	Contact by an Advocate within seven days of the resident's arrival as required by the Act



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