

The Senate

Community Affairs
References Committee

Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability

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44th Parliament

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ABBREVIATIONS

ABS	Australian Bureau of Statistics
Act	<i>Disability Services Act 1986 (Cth)</i>
ACT	Australian Capital Territory
ADACAS	ACT Disability Aged Carer and Advocacy Service
Advocacy Framework	National Disability Advocacy Framework
Advocacy Program	National Disability Advocacy Program
AHRC	Australian Human Rights Commission
ALHR	Australian Lawyers for Human Rights
APS	Australian Psychological Society
AVO	Apprehended Violence Order
Bill	Statutes Amendment (Vulnerable Witnesses) Bill 2015
CCYPWA	Commissioner for Children and Young People Western Australia
CDA	Children with Disability Australia
CEO	Chief Executive Officer
Child Protection Framework	National Framework for Protecting Australia's Children 2009-2020
Child Protection Framework	National Framework for the Protection of Australia's Children
Civil Society Report	Disability Representative, Advocacy, Legal and Human Rights Organisations, <i>Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities</i> , August 2012.
CoAG	Council of Australian Governments
CoMHWa	Consumers of Mental Health WA

Committee	Community Affairs References Committee
CP NMDS	Child Protection National Minimum Data Sets
CRPD	Convention on the Rights of Persons with Disabilities
CSO	community service organisations
DANA	Disability Advocacy Network Australia
DET	Department of Education and Training (New South Wales/ Victoria)
DHHS	Department of Health and Human Services (Victoria)
DHS	Department of Human Services (Victoria)
Disability Alliance	Australian Cross Disability Alliance
Disability Convention	Convention on the Rights of Persons with Disabilities
DNF	New South Wales Disability Network Forum
DRALHRO	Disability Representative, Advocacy, Legal and Human Rights Organisations
DSC	Disability Services Commission
DSP	Disability Support Pension
DSS	Department of Social Services
EPOA	Enduring Power of Attorney
FACS	Department of Family and Community Services (New South Wales)
HOSES	Head of Special Education Services
Hotline	National Abuse and Neglect Hotline
Human Rights Commission	Australian Human Rights Commission
ID	intellectual disability
ILC	Information, Linkages and Capacity Building
Intergovernmental Agreement	Intergovernmental Agreement on Federal Financial Relations
Justice Plan	Disability Justice Plan 2014–2017 (South Australia)

Law Reform Commission	Australian Law Reform Commission
LCA	Law Council of Australia
NAAJA	North Australian Aboriginal Justice Agency
NACAP	National Aged Care Advocacy Program
National Plan	National Plan to Reduce Violence Against Women and Children
NCAT	New South Wales Civil and Administrative Tribunal
NDA	National Disability Agreement
NDA Framework	National Disability Advocacy Framework
NDA SPP	National Disability Agreement Specific Purpose Payment
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme (formerly known as DisabilityCare Australia)
NDIS Act	<i>National Disability Insurance Scheme Act 2013 (Cth)</i>
NDS	National Disability Strategy
NSW	New South Wales
ODPP	Office of the Director of Public Prosecutions
OHS	occupational health and safety
OPA	Office of the Public Advocate
PC	Productivity Commission
PEG	Percutaneous Endoscopic Gastrostomy
PG	Public Guardian
PSS	Personal Safety Survey
PWDA	People with Disability Australia
QADA	Queensland Aged and Disability Advocacy Inc.
QAI	Queensland Advocacy Incorporated
QCAT	Queensland Civil and Administrative Tribunal

RACF	residential aged care facilities
RC	Royal Commission into Institutional Responses to Child Sexual Abuse
Restrictive Practice Framework	National Framework for Reducing and Eliminating the Use of Restrictive Practices
SARU	Self Advocacy Resource Unit
SDM	substitute decision maker
SDS	Special Development School
SP	Senior Practitioner
SRS	supported residential services
STVP	Stop the Violence Project
TAC	Transport Accident Commission
UK	United Kingdom
UN	United Nations
UN Disability Committee	United Nations Committee on the Rights of Persons with Disabilities
VALID	Victorian Advocacy League for Individuals with a Disability
VEOHRC	Victorian Equal Opportunity and Human Rights Commission
WAS	Witness Assistance Service
WID	Witness Intermediary Scheme
WWDA	Women With Disabilities Australia
WWILD	Working Alongside People with Intellectual and Learning Disabilities – Sexual Violence Prevention Association
YDAS	Youth Disability Advocacy Services

LIST OF RECOMMENDATIONS

A Royal Commission

Recommendation 1

10.10 The committee recommends that a Royal Commission into violence, abuse and neglect of people with disability be called, with terms of reference to be determined in consultation with people with disability, their families and supporters, and disability organisations.

National disability complaints mechanism

Recommendation 2

10.16 The committee recommends the Australian Government consider the establishment of a national system for reporting and investigating and eliminating violence, abuse and neglect of people with a disability, which should, at a minimum:

- be required to work in collaboration with existing state and territory oversight mechanisms;
- cover all disability workers, organisations and people with disability, without being restricted to NDIS participants;
- include a mandatory incident reporting scheme; and
- include a national worker registration scheme with pre-employment screening and an excluded worker register.

10.17 These elements are best implemented through the establishment of a national, independent, statutory protection watchdog that has broad functions and powers to protect, investigate and enforce findings related to situations of violence, abuse and neglect of people with disability.

National workforce and workplace regulation

Recommendation 3

10.26 The committee recommends the Australian Government establish a scheme to ensure national consistency in disability worker training, to include the elements of:

- mandatory rights based training to develop core competency skills in recognising and reporting violence, abuse and neglect of people with disability;
- review of current training and qualification levels to be conducted in collaboration with people with disability and the disability sector, with a view to increasing requirements;

- increased levels of training requirements to work with people with disability who have greater needs or vulnerabilities; and
- consideration of the need for an independent training program accreditation agency or body to oversee the scheme.

Recommendation 4

10.27 The committee recommends the Australian Government consider establishing a disability worker registration scheme, to include the elements of:

- nationally consistent pre-employment screening;
- an excluded worker registration scheme, tied to a mandatory incident reporting scheme;
- yearly worker registration scheme, with requirements for national criminal checks every five years;
- requirements for ongoing professional development; and
- a step-up system of registration, which requires increased training and skills to work with people with disability who have increased needs or vulnerabilities.

10.28 The registration worker scheme will be best overseen by the national disability watchdog.

Recommendation 5

10.29 The committee recommends the Australian Government consider establishing a national approach to modify state and territory and Commonwealth service delivery accreditation programs, to:

- ensure national consistency in service delivery accreditation programs;
- impose stronger requirements for facility and client specific induction training for carers;
- impose a mandatory incident reporting requirement tied to ongoing accreditation; and
- consider a scheme to impose service delivery standard requirements on management and boards, similar to occupational health and safety schemes.

10.30 The changes to accreditation schemes will be best overseen by the national disability watchdog.

Access to justice

Recommendation 6

10.32 The committee recommends the Australian Government work with state and territory governments on the implementation of initiatives to improve access to justice for people with disability contained in the reports by the Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, the Human Rights Commission, *Equal Before the Law* and Productivity Commission, *Access to Justice Arrangements*, with particular focus on:

- better intervention and support services;
- expanded Community Visitor's schemes;
- improved witness support services to people with disabilities;
- creation of an assessment protocol that assists police, courts, and correctional institutions in identifying people with disabilities. Where identified, a trained officer will provide support;
- transparent, effective and culturally appropriate complaints handling procedures;
- training for police, lawyers and others in justice in needs of people with disability; and
- where a person who has been found unfit to plead is to be held in detention, demonstrate that all reasonable steps have been taken to avoid this outcome, and that person must be held in a place of therapeutic service delivery.

Recommendation 7

10.33 The committee also recommends that each state and territory implement a Disability Justice Plan.

Recommendation 8

10.34 The committee believes that there is a need for further investigation of access to justice issues, with a focus on:

- national implementation of the South Australian model to ensure people with disability are able to provide evidence;
- the implementation requirements for supported decision-making;
- investigating the potential for the UK system of registered intermediaries;
- the access to justice needs of specific groups such as women, children, culturally and linguistically diverse communities and Aboriginal and, Torres Strait Islander peoples; and
- the indefinite detention of people with cognitive impairment or psychiatric disabilities.

State and Territory reporting and investigating

Recommendation 9

10.38 The committee recommends the Australian Government work with state and territory governments on a nationally consistent approach to existing state and territory disability oversight mechanisms, to include;

- a clear distinction between dispute resolution and complaints investigation processes;
- a requirement that service delivery organisations should not report to funding agencies due to the conflict of interest;
- the principle that immediate action be taken on allegations of abuse to ensure the individual's safety;
- increased funding for community visitor schemes, with consideration these schemes be professionalised in all jurisdictions and with a mandatory reporting requirement for suspected violence, abuse or neglect; and
- greater crossover in oversight and complaints mechanisms between aged care and disability and recognising that over 7000 young people with disability live in aged care facilities, ensure that disability service standards are applicable.

10.39 A nationally consistent approach to disability oversight mechanisms is best overseen by the national disability watchdog.

The right to self-determination

Recommendation 10

10.41 The committee recommends that the Australian Government consider driving a nationally consistent move away from substitute decision-making towards supported decision-making models.

Recommendation 11

10.44 The committee recommends that the Australian Government work with state and territory governments to consider implementing the recommendations of the Australian Law Reform Commission report *Equality, Capacity and Disability in Commonwealth Laws*, in relation to legal capacity and supported decision-making.

Recommendation 12

10.45 The committee recommends the Australian Government work with state and territory governments to create national consistency in the administration of guardianship laws to ensure:

- public advocate and guardianship functions are separate to ensure independent oversight;
- mandatory training on supported decision-making for guardians;
- a requirement for guardianship to achieve positive outcomes, not just avoiding risk of negative outcomes;
- the ability to have nuanced guardianship/decision-making frameworks – to ensure the legal ability of parents to advocate on behalf of adult children without having to establish legal incapacity;
- that service delivery organisations or accommodation providers are never given guardianship;
- automatic increased oversight where service delivery organisations or accommodation providers recommend families lose guardianship; and
- that Aboriginal and Torres Strait Islander peoples' particular circumstances are taken into account in developing guardianship systems.

The right to risk

Recommendation 13

10.48 The committee recommends state and territory and Commonwealth service delivery accreditation programs should be modified to impose additional requirements for positive life outcomes for individual people with disability, rather than a singular focus on the avoidance of negative outcomes. The committee recommends this work is best overseen by the national disability watchdog.

Counselling and support services

Recommendation 14

10.50 The committee recommends all levels of government provide increased funding for support and counselling services. This should be to create specialist disability counselling services where required, as well as to mainstream organisations so they may meet the needs of people with disability.

Advocacy

Recommendation 15

10.52 The committee recommends all levels of government acknowledge the vital role that formal and informal advocacy plays in addressing violence, abuse and neglect of people with disability, by considering:

- increased training for people with disability to recognise violence, abuse and neglect so they can self-report;
- government service contracts to include provisions to enforce access to facilities for advocates, requirement for self-advocacy programs;
- further consideration of the Victorian Self Advocacy Resource Unit, with a view to roll out across other states and territories;
- funded advocacy programs to include training for informal advocates;
- States and Territories not to reduce advocacy funding with the rollout of the NDIS.

Recommendation 16

10.53 The committee recommends the National Disability Advocacy Program implement the following recommendations:

- significant investment to National Disability Advocacy Program funded advocates, to deliver equitable access and representation of issues and to match the increased demand for advocacy anticipated under the NDIS;
- undertake a review to ensure delivered advocacy is appropriately spread across service types and complaint types, to ensure the most vulnerable are receiving advocacy;
- increase funding for self-advocacy programs;
- ensure that current model of funding peak bodies does not inadvertently result in the closure of smaller specialist or local advocacy organisations.
- Improved coordination between the National Disability Advocacy Program and the National Aged Care Advocacy Program.

National Disability Insurance Scheme

Recommendation 17

10.55 The committee recommends of the Government consider the following when rolling out the National Disability Insurance Scheme (NDIS):

- an urgent roll out of capacity-building and advocacy support for individuals undertaking negotiations for self-directed disability support;
- increased training for NDIS planners around intellectual impairment and guidelines on when to require decision-making support;
- further investigation of whether the current NDIS unit pricing will have an impact on incidents of violence, abuse or neglect.
- NDIS quality and safeguarding framework must ensure a zero-tolerance approach to restrictive practice, and be tied to the *National Framework for*

Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector; and

- amendment of the *Quality and Safeguarding Framework* to include advocacy as a key component to reduce and address incidents of violence, abuse and neglect.

Restrictive practice

Recommendation 18

10.58 The committee recommends the Australian Government work with state and territory governments to implement a national zero-tolerance approach to eliminate restrictive practice in all service delivery contexts. This would entail:

- ensuring the national framework is properly implemented across all jurisdictions, as a mandatory, reviewable and enforceable scheme, with oversight by a qualified senior practitioner and with a mandatory element of positive behaviour support;
- a scheme that is not limited to the disability sector, but applies to all places where restrictive practice is used against people with disability; and
- imposing requirements for the use of positive behaviour management tools. These policies and guidelines would be guided by the following principles:
 - Policies and advice need to be available to the general public and linked in with behaviour and discipline policy.
 - The preferred substitution of positive behavioural management tools such as Applied Behavioural Analysis for 'restrictive practices'.

Recommendation 19

10.59 The committee believes that the use of restrictive practice against children must be eliminated as a national priority. The committee recommends the Australian Government work with state and territory governments to implement a zero-tolerance approach to restrictive practice in a schools context, which should include:

- the principle that restrictive practice must not form a part of a behaviour management plan;
- written behaviour management plans must be agreed to by the student, their parents, the school and a Principal Practice Leader or Senior Practitioner (or similar position) within the state education department;
- that parents must be notified should there be an instance of emergency restrictive practice being used;

- specialist support be made available by the state education department to guide and support teachers, students and families through the understanding and implementation of these new policies; and
- a compulsory unit of training should be developed and delivered to all principals, teachers and teachers' aides to ensure that these new policies are clearly understood and implemented. This training should be made available to interested students and families.

Housing options

Recommendation 20

10.62 The committee recommends the Australian Government work with state and territory governments to consider the principle that there should be no enforced shared accommodation for people with disability.

Recommendation 21

10.63 The committee encourages increased resources for public and social housing for people with disability, including models where people with disability may choose to cohabitate with other people with a disability or abled people. The goal being to achieve a move away from institutions and forced congregate housing models.

Recommendation 22

10.64 The committee recommends all accommodation and service delivery funding agreements should have a mandatory gender-sensitivity requirement, particularly that people with disability must have a choice as to the gender of who provides intimate forms of care.

Schools

Recommendation 23

10.66 The committee recommends the Australian Government work in collaboration with the states and territories to address the needs of children and young people with disability in schools to:

- establish a national program to address bullying of students with disability;
- ensure that schools are adequately funded to provide for the needs of students with disability, and ensure schools must spend this funding on those students, not merge it into the mainstream budget;

- ensure adequate funding for improved disability school transport, with a maximum school transport time limit to limit the travel time of students with a disability;
- develop a national requirement that schools may not exclude students with disability from school activities, purely on the basis of the student's disability; and
- ensure that all disability oversight systems must include schools.

Recognition of disability in protective policy

Recommendation 24

10.68 The committee recommends that the Australian Government consider amending the following protective policies to include the specific needs of people with disability, to ensure that people with disability are afforded the full range of rights protections that are available to people without disability:

- the *National Disability Strategy* must be updated to refer to the specific needs of children and young people, must address violence, abuse or neglect of people with disability and should be linked to domestic violence frameworks;
- the *National Plan to Reduce Violence against Women and their Children* must be updated to include institutional and disability accommodation settings;
- the *National Framework for Protecting Australia's Children* must be updated to address the specific needs of children with disability, and
- in order to put effect to these frameworks, there must be increased funding to support women with disability escaping domestic violence.

Data

Recommendation 25

10.74 The committee recommends that the Australian Bureau of Statistics ensures all of its surveys are inclusive of people with disability. The committee further recommends that the Australian Government commits additional funding to ensure the triennial survey of Disability, Ageing and Carers and the Personal Safety Survey include the collection of data on the prevalence of violence, abuse and neglect against people with disability. This data should include the following information:

- age;
- gender;
- type of disability;
- place of residence;
- cultural background; and
- whether the violence, abuse and neglect has been reported to an authority.

Recommendation 26

10.76 The committee recommends that the National Disability Strategy Progress Report should include specific data on Aboriginal and Torres Strait Islander peoples with disability.

Recommendation 27

10.77 The committee recommends that the Department of Social Services publish data relating to the National Disability Abuse and Neglect Hotline on its website every six months. This data should include the following information:

- age;
- gender;
- cultural background;
- type of disability;
- number of complaints;
- number of complaints resolved;
- timeliness of resolution; and
- systemic trends in relation to abuse and neglect.

Recommendation 28

10.78 The committee recommends that the Australian Institute of Health and Welfare's annual report *Child Protection in Australia* should disaggregate data on the basis of disability.

Recommendation 29

10.79 The committee recommends that finalisation of the Child Protection National Minimum Data Sets should be prioritised as this additional data will be a useful addition to policy makers and service providers in this area.

International Human Rights

Recommendation 30

10.80 The committee recommends the Commonwealth review the reports of the United Nations Committee on the Rights of Persons with Disabilities, with a view to giving effect to recommendations that would improve Australia's adherence to the human rights obligations that have been voluntarily undertaken.

Executive Summary

In 2012, Craig McDonnell reported an incident of sexual misconduct by a carer towards a fellow resident in the Yooralla-run disability services house where he lived. Mr McDonnell had himself been a victim of sexual misconduct years earlier by another Yooralla carer, who had taken indecent photos of him without his permission. In his own case, Mr McDonnell reported the abuse but the carer was simply moved to another Yooralla-run residence.

Mr McDonnell was determined that this time, he would make sure his fellow residents and others were protected. He reported the abuse. The carer resigned from his position. And then the victims spoke out...¹

THIS ALLEGATION
OF SEXUAL ASSAULT WAS
RECORDED BY STAFF AS A
SEXUAL HARASSMENT CLAIM

Those poor souls.
And to think that they weren't believed.

He told me to turn off the lights so no-one can see
HE TOLD ME HE WANTED TO BEND HER OVER,
AND DO ALL THESE THINGS TO HER

If she did what he wanted, he would take her to the shops later to buy lollies or treats

...SO THAT CONSTITUTES
QUITE SERIOUS RAPE AT
had been sexually abusing the disabled woman under his care at a local motel and other locations

she was fearful, she thought she was in trouble

I think he was abusing the female client in the room and he didn't want me to see that

...ample opportunity to prey on women whose bodies would not allow them to fend off his advances

When they were at their most vulnerable, that is time that he sexually abused them

1 Richard Baker and Nick McKenzie, 'Love of life affirmed in the blessing of the fisherman', *The Age*, 16 August 2013, and Richard Baker and Nick McKenzie, 'Yooralla senior executives accused of ignoring warning signs on rape claims', *The Age*, 21 November 2013.

The committee finds that violence, abuse and neglect of people with disability is both widespread and takes many forms. This inquiry has not shied away from the fact that the causes, the impacts and the solutions to this issue are complex and there is no easy fix. As one submitter wrote, these issues make people feel uncomfortable and most would prefer to take the easy option and pretend that nothing is wrong. But the reality is far different - the situation for people with disability is unacceptable.

Throughout this inquiry, the evidence presented from people with disability, their families and advocates, showed that a root cause of violence, abuse and neglect of people with disability begins with the de-valuing of people with disability. This de-valuing permeates the attitudes of individual disability workers, service delivery organisations and most disturbingly, government systems designed to protect the rights of individuals.

This de-valuing takes many forms. People with disability are often communicated about, not communicated to and are frequently denied the right to make the most basic of decisions about their lives. They miss out on fundamental learning experiences at school and throughout life, often through a patronising prism of 'protection.' Their choices about day to day living are taken away: sometimes in more benign ways by people trying to 'help', sometimes by service providers in the guise of efficiency, but all too often by people exerting malicious control.

In many cases people with disability have their legal capacity taken away, the very status in law that defines the rights of individuals. From this legal disregard of them as a person in their own right can flow serious and far-reaching repercussions. They lose the right to make decisions about their life, where they live, who they live with, what they eat, who they can see, and even decisions about their own bodies.

Under the guise of 'therapeutic treatment', people with disability can be subjected to forcible actions that could be considered assault in any other context. They are often detained arbitrarily and indefinitely, sometimes being held in prisons without being convicted of any offence.

This inquiry heard highly distressing personal accounts from many people with disability. The inquiry also heard from dedicated family members and advocates speaking on behalf of loved ones, some of whom died as a result of violence or neglect. Much of the evidence was received *in camera*, largely due to the personal nature of the evidence, but in some cases because of the possibility of repercussions for speaking out. Witnesses told of their fear of speaking out about abusers who had continued daily access to their homes as disability service workers. Evidence was also presented that showed a propensity for reports to service providers about violence and abuse to be ignored, swept under the carpet or treated as a 'workplace issue' rather than a crime.

In fixing the disability service sector, and the legal frameworks that should protect all people regardless of disability status, people with disability must be put at the centre. This entails going beyond considering the rights of people with disability, it means putting people with disability at the centre of decision making not just in their own lives, but also in amending policies and laws.

In the conduct of this inquiry, the voices, lives and choices of people with disability have been paramount. Indeed, the catalyst for the groundswell of public calls for an inquiry into violence, abuse and neglect of people with disability started with individuals who spoke out about the violence, abuse or neglect they experienced or saw, and started a snowballing of voices that no longer would be silenced.

Chapter 1

Introduction

Violence against people with disability in institutional and residential settings is Australia's hidden shame...The evidence of this national epidemic is extensive and compelling. It is a deeply shameful blight on our society and can no longer remain ignored and unaddressed.¹

1.1 The issue of violence, abuse or neglect of people with disability was most recently brought to national prominence by an ABC TV Four Corners investigation of Yooralla disability services that aired on 24 November 2014.² The report contained allegations of long-term sexual assaults, physical and psychological abuse and neglect of people with disability, as well as the victimisation of whistleblowers. The allegations were not limited to one carer, nor limited to one facility. The proceeding police investigation found five alleged sexual offenders working for Yooralla as disability carers. Yooralla operates over 70 residential care houses across Victoria.

1.2 The Four Corners report generated broad media and public attention to the issue of violence and abuse of people with disability. On the eve of the ABC TV report airing, the Victorian Government and Opposition both pledged to hold an inquiry into that state's disability sector.

1.3 A range of organisations and disability advocates called for a national inquiry, including former National Disability Commissioner, Mr Graeme Innes, who said he believed there were dozens to hundreds of similar abuse and neglect cases throughout Australia, and that the number of independent group homes would shortly be increasing under the National Disability Insurance Scheme (NDIS) rollout, increasing the need for a better system of independent monitoring.

1.4 A coalition of peak disability advocacy groups renewed the campaign for a national inquiry by writing to the Prime Minister on 20 January 2015.³ The letter was endorsed by over 95 state and territory based disability organisations from around Australia, with over 11,000 signatories to a petition calling for an inquiry. In response, a group of Senators referred the matter on 11 February 2015, to the Senate Community Affairs References Committee (committee) for inquiry and report.

1 Australian Cross Disability Alliance, *Submission 147*, p. 6.

2 ABC TV, Four Corners, "[In Our Care](http://www.abc.net.au/4corners/stories/2014/11/24/4132812.htm)", 24 November 2014, <http://www.abc.net.au/4corners/stories/2014/11/24/4132812.htm>, (accessed 10 November 2015).

3 The coalition included Women With Disabilities Australia, People with Disability Australia, National Ethnic Disability Alliance, First People's Disability Network Australia and United Voices for People with Disabilities. See also: <http://www.nationaldisabilityabuseinquiry.com/>

Commonwealth responsibility for disability standards

1.5 As outlined in further detail in chapter two, the Commonwealth has formally assumed certain responsibilities for disability services from 1 January 2009, under the National Disability Agreement (NDA). Formerly, the Commonwealth's role was primarily one of funding states and territories to deliver services, investing in policy priority initiatives and ensuring that Commonwealth legislation is aligned with the United Nations (UN) Convention on the Rights of Persons with Disabilities (the Disability Convention). However, as a signatory to the Disability Convention, the Australian Government retains ultimate responsibility to ensure that the treatment of people with disability in Australia is compatible with the provisions of the Disability Convention.

1.6 Article 4 of the Disability Convention requires states to 'undertake to ensure and promote the full realization of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability'.⁴ This article places a positive obligation on the Australian Government to ensure that these rights are not being infringed within its jurisdiction, regardless of the entity inflicting the infringement.

1.7 Article 16 of the Disability Convention requires states to 'ensure that all facilities and programs designed to serve persons with disabilities are effectively monitored by independent authorities'.⁵ This article places a positive obligation on the Australian Government to ensure that disability services monitoring and complaints handling entities are operating in an effective manner to uphold the rights of people with disability.

1.8 Australia acceded to the Optional Protocol to the Disability Convention, which came into force for Australia on 20 September 2009. The Optional Protocol is a separate instrument to the Disability Convention, and gives the UN Committee on the Rights of Persons with Disabilities the power to receive complaints from individuals and groups who believe that their state has breached the Disability Convention after all domestic remedies have been exhausted.

1.9 There are currently nine individual cases/communications against Australia pending under this mechanism.⁶

4 United Nations, Convention on the Rights of Persons with Disabilities, Article 4.1, <http://www.un.org/disabilities/default.asp?id=199>, (accessed 10 September 2015).

5 United Nations, Convention on the Rights of Persons with Disabilities, Article 6.3, (accessed 10 September 2015).

6 Of the nine pending cases, seven cases relate to the indefinite detention of persons with an intellectual impairment, two relate to the lack of Auslan interpretation for jurors and the last case relates to the denial of a working visa for medical reasons. United Nations, Committee on the Rights of Persons with Disabilities, *Table of pending cases*, <http://www.ohchr.org/EN/HRBodies/CRPD/Pages/Tablependingcases.aspx>, (accessed 10 September 2015).

1.10 Australia is also a signatory to the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child. The Disability Convention captures relevant provisions of these other frameworks as they relate to people with disability.

The committee's area of interest

1.11 The committee has a long-standing interest in the delivery of disability services as part of its portfolio coverage of Health, Social Services and Human Services. The committee's most recent relevant inquiries have focused on aspects of disability service delivery to specific disability sectors. These inquiries have included:

- Adequacy of existing residential care arrangements available for young people with severe physical, mental or intellectual disabilities in Australia (June 2015);
- Prevalence of different types of speech, language and communication disorders and speech pathology services in Australia (September 2014); and
- Care and management of younger and older Australians living with dementia and behavioural and psychiatric symptoms of dementia (March 2014).⁷

1.12 The committee has also inquired into the practice of the forced sterilisation of people with disability and people aging with a disability.⁸

1.13 In this report, the committee examines the issue of violence, abuse and neglect of people with disability from a whole of issue perspective. The committee examines the causes of violence, abuse and neglect of people with disability, what happens when individuals or their carers try to report abuse either to the service delivery entity or through more formal mechanisms, and what was the response to the reporting. The committee examines primary ways that violence, abuse and neglect can be eliminated and how to improve rates of reporting and responses to reporting via systemic changes. The committee also examines secondary mechanisms that can support systemic change, such as education programs, workforce improvements and advocacy programs.

7 Senate Community Affairs References Committee, *Completed inquiries and reports*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/completed_inquiries (accessed 14 September 2015).

8 Senate Community Affairs References Committee, *Involuntary or coerced sterilisation of people with disabilities in Australia*, October 2013 and *Inquiry into Planning Options and Services for People Ageing with a Disability*, July 2011, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Completed_inquiries/2010-13, (accessed 14 September 2015).

Establishment of the inquiry

1.14 On 11 February 2015, the Senate referred an inquiry into violence, abuse and neglect against people with disability to the committee for inquiry and report by 24 June 2015. In order to properly respond to the volume of evidence submitted to the inquiry, a series of extensions were granted by the Senate, with a final reporting date of 25 November 2015.

Focus of the inquiry

1.15 The terms of reference for this inquiry were made deliberately broad, to ensure the inquiry was able to look holistically at the issue of violence, abuse and neglect of people with disability, which has many intersecting causes and impacts. However, the terms of reference do constrain the inquiry to acts of violence, abuse and neglect that occur within the disability service setting. While the committee is aware that violence, abuse and neglect of people with disability is prevalent in the community and is well worth an inquiry itself, the causes and policy settings to address the issue are distinct from such acts perpetrated within a disability service context.

1.16 The terms of reference include a definition of the disability service settings relevant to this inquiry, and also provides a definition of violence.

Terms of reference

1. Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability, with particular reference to:
 - a. the experiences of people directly or indirectly affected by violence, abuse and neglect perpetrated against people with disability in institutional and residential contexts;
 - b. the impact of violence, abuse and neglect on people with disability, their families, advocates, support persons, current and former staff and Australian society as a whole;
 - c. the incidence and prevalence of all forms of violence, abuse and neglect perpetrated against people with disability in institutional and residential settings;
 - d. the responses to violence, abuse and neglect against people with disability, as well as to whistleblowers, by every organisational level of institutions and residential settings, including governance, risk management and reporting practices;
 - e. the different legal, regulatory, policy, governance and data collection frameworks and practices across the Commonwealth, states and territories to address and prevent violence, abuse and neglect against people with disability;

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- f. Australia's compliance with its international obligations as they apply to the rights of people with disability;
 - g. role and challenges of formal and informal disability advocacy in preventing and responding to violence, abuse and neglect against people with disability;
 - h. what should be done to eliminate barriers for responding to violence, abuse and neglect perpetrated against people with disability in institutional and residential settings, including addressing failures in, and barriers to, reporting, investigating and responding to allegations and incidents of violence and abuse;
 - i. what needs to be done to protect people with disability from violence, abuse and neglect in institutional and residential settings in the future, including best practice in regards to prevention, effective reporting and responses;
 - j. identifying the systemic workforce issues contributing to the violence, abuse and neglect of people with disability and how these can be addressed;
 - k. the role of the Commonwealth, states and territories in preventing violence and abuse against people with disability;
 - l. the challenges that arise from moving towards an individualised funding arrangement, like the National Disability Insurance Scheme, including the capacity of service providers to identify, respond to and prevent instances of violence, abuse and neglect against people with disability; and
 - m. what elements are required in a national quality framework that can safeguard people with disability from violence, abuse and neglect in institutional and residential settings.

That for this inquiry:

- a. 'institutional and residential settings' is broadly defined to include the types of institutions that people with disability often experience, including, but not restricted to: residential institutions; boarding houses; group homes; workplaces; respite care services; day centres; recreation programs; mental health facilities; hostels; supported accommodation; prisons; schools; out-of-home care; special schools; boarding schools; school buses; hospitals; juvenile justice facilities; disability services; and aged care facilities; and
- b. 'violence, abuse and neglect' is broadly understood to include, but is not limited to: domestic, family and interpersonal violence; physical and sexual violence and abuse; psychological or emotional harm and abuse; constraints and restrictive practices; forced treatments and interventions; humiliation and harassment; financial abuse; violations of privacy; systemic abuse; physical and emotional neglect; passive neglect; and wilful deprivation.

Conduct of inquiry

1.17 The committee advertised the inquiry in *The Australian* on 15 April 2015. Details of the inquiry were placed on the committee's website and the committee wrote to 140 organisations, inviting submissions by 10 April 2015, which was later extended to 29 May 2015. Submissions continued to be accepted after that date. The committee received over 160 submissions. A list of the individuals and organisations that made submissions to the inquiry is provided at Appendix 1.

1.18 A total of six public hearings were held in Perth on 1 April 2015, Melbourne on 30 June 2015, Canberra on 21 August 2015, Sydney on 27 August 2015, Adelaide on 28 August 2015 and in Brisbane on 16 October 2015. Organisations from Tasmania were invited to participate in the Melbourne hearing, and organisations from the Northern Territory were invited to hearings in South Australia and Brisbane. Transcripts of hearings are available on the committee's website⁹ and a list of the witnesses who gave evidence at the hearings is provided at Appendix 2.

Acknowledgements

1.19 The committee thanks those individuals and organisations who contributed to the inquiry, particularly those who provided evidence of their lived experience of violence, abuse or neglect of themselves or their loved ones.

1.20 The committee is grateful for the cooperation of Commonwealth, state and territory government departments in providing assistance to address this significant national issue.

Accessibility

1.21 The committee commissioned an easy English version of the terms of reference of the inquiry, as well as an easy English guide to how to make a submission. Each guide was made available in a PDF version and a version compatible with communication devices. The guides were published on the website as well as distributed to the disability advocacy network, with advocates encouraged to forward widely throughout their distribution lists. Advocacy organisations provided positive feedback on this initiative, both informally and formally to the committee.¹⁰

1.22 The committee investigated options to allow submissions to be made as audio or video submissions for those unable to provide a written submission. This option was announced via the inquiry website and by email to the disability advocacy network. No audio or video submissions were received.

9 Senate Community Affairs References Committee, *Past public hearings and transcripts*, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Public_Hearings, (accessed 18 September 2015).

10 Ms Mary Mallet, Chief Executive Officer, Disability Advocacy Network Australia, *Committee Hansard*, Canberra, 21 August 2015, p.15.

The structure of the report

1.23 This report has 10 chapters, broken down by theme rather than closely following the terms of reference.

- Chapter two outlines Australia's obligations to people with disability under various international human rights instruments. Chapter two then outlines the frameworks of how disability services are provided, including relevant commonwealth disability agreements which define the different Commonwealth, state and territory roles in funding, policy development and service provision. Chapter two also gives a brief overview of the recent national, state or territory disability-related inquiries and reports.
- Chapter three examines lived experience of violence, abuse and neglect, covering the experiences of people with disability as well as the experiences of family and friends who advocated on their behalf. Chapter three also looks at the prevalence of violence, abuse and neglect of people with disability and issues around data collection.
- Chapter four investigates therapeutic and other disability practice that would be seen in any other area of service as unlawful loss of personal rights or even as acts of violence. This chapter considers issues such as loss of legal capacity, restrictive practice and guardianship.
- Chapter five examines the different legal and policy frameworks for reporting and investigating violence, abuse and neglect, from informal in-service reporting through to investigations by external government bodies such as ombudsmen or commissioners.
- Chapter six explores the issue of access to justice for people with disability, and the barriers they face in reporting and providing evidence of crimes.
- Chapter seven looks at workforce and other systemic issues that increase the risk of violence, abuse or neglect, and examines workplace and systemic changes that could reduce the risk factors.
- Chapter eight examines the important role of informal and formal advocacy in reducing levels of, and responding to, individual acts of violence, abuse or neglect.
- Chapter nine looks at the challenges and opportunities presented by the rollout of the NDIS in reducing violence, abuse and neglect against people with disability.
- Chapter ten draws together the committee conclusions made throughout the report, to present a comprehensive road map for policy and law makers to reduce the prevalence and impact of violence, abuse and neglect of people with disability in institutional and residential settings.

1.24 References to the committee Hansard are to the proof Hansard – page numbers may vary between the proof and official transcript.

Key concepts

Defining disability

1.25 The terms of reference for this inquiry do not provide a definition of disability. The committee has relied on the definition in Article 1 of the Disability Convention:

Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.¹¹

1.26 The UN *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities* provides a more extensive definition, stressing that the impact of disability is not caused by a disability itself, but in the intersection of an impairment which 'in the face of various negative attitudes or physical obstacles, may prevent those persons from participating fully in society'.¹²

1.27 The committee has kept this extended definition in mind when assessing the evidence put forward during the inquiry. It is particularly relevant to the issue of reporting and prosecuting acts of violence, abuse and neglect of people with disability, where the disability is often seen by the justice system as an insurmountable barrier to gathering credible evidence on which to prosecute an offence.

Defining violence, abuse or neglect

1.28 The terms of reference provide a definition of violence. This definition was developed in collaboration with key experts within the disability sector to ensure that all aspects of violence, abuse and neglect relevant to people with disability were captured.

1.29 Although the terms of reference limit the locations relevant to this inquiry to places of institutional or residential care, such as residential institutions, boarding houses, group homes, schools, aged-care facilities etc., the definition of violence includes domestic, family and interpersonal violence. This is to reflect situations where such acts of violence occur within institutional or residential care settings, and the care provider does not live up to their duty of care in protecting their vulnerable clients against such acts of violence, abuse or neglect, regardless of who is the perpetrator.

Numbers of people with disability

1.30 Just under one in five people (4.2 million people or 18.5 per cent of Australians) reported having a disability in 2012. For those people with disability, 3.7 million (88 per cent) had a specific limitation or restriction that meant they were

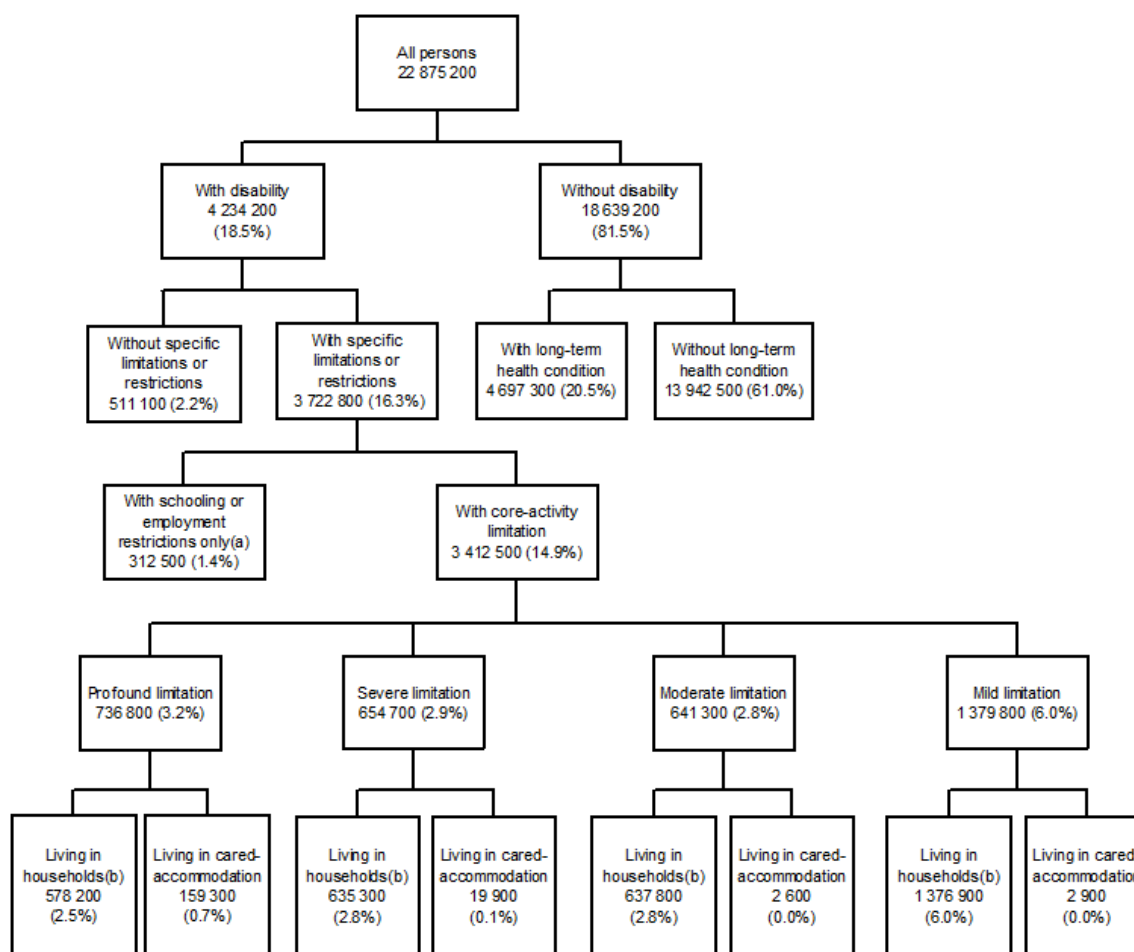
11 United Nations, Convention on the Rights of Persons with Disabilities, Article 1, <http://www.un.org/disabilities/default.asp?id=199> (accessed 10 September 2015).

12 United Nations, *Handbook for Parliamentarians on the Convention on the Rights of Persons with Disabilities, Chapter One: Overview*, <http://www.un.org/disabilities/default.asp?id=212>, (accessed 10 September 2015).

limited in the core activities of self-care, mobility or communication, or restricted in schooling or employment¹³ (see Figure 1.0 below).

1.31 Almost one in five people with disability (19 per cent or 813,900 people) reported a mental or behavioural disorder as the long-term health condition causing them the most problems. This included 5.6 per cent with intellectual and developmental disorders, 3.8 per cent with depression and mood affective disorders and 2.1 per cent with dementia and Alzheimer's disease.¹⁴

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- 13 Australian Bureau of Statistics (ABS), *Survey of Disability, Ageing and Carers, Australia: Summary of Findings, Disability Characteristics*, cat. no. 4430.0, ABS, Canberra 2012. See: <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/3A5561E876CDAC73CA257C210011AB9B?opendocument>
- 14 ABS, *Survey of Disability, Ageing and Carers, Australia: Summary of Findings, Disability Long-Term Health Conditions*, ABS, Canberra, 2012.

Figure 1.1: All Persons, Disability status and living arrangements

Note:

- estimates have been rounded to the nearest one-hundred persons.
- due to rounding and the effect of perturbation the sum of sub-totals may not equal totals.

(a) Excludes people with a disability who have both a core-activity limitation and a schooling or employment restriction.

(b) 'Living in households' comprises all private dwellings and non-private dwellings apart from cared-accommodation.

Source: ABS, [Survey of Disability, Ageing and Carers, Australia: Summary of Findings, Disability Characteristics](#), ABS, Canberra, 2012.

Gender

1.32 Overall, in 2012, there continued to be a smaller proportion of males with disability than females (18 per cent compared with 19 per cent). This difference was most pronounced in older age groups for those with a profound or severe core activity limitation (40 per cent for females compared to 26 per cent for males 75 years and over). The other notable difference between males and females was that more boys than girls in the age group five to 14 years had disability (11.2 per cent compared with 6.2 per cent).¹⁵

15 ABS, [Survey of Disability, Ageing and Carers, Australia: Summary of Findings, Disability Characteristics](#), ABS, Canberra, 2012.

ATSI and CALD communities

1.33 Aboriginal and Torres Strait Islander peoples experience higher rates of disability than do other Australians. After taking into account age differences between the Indigenous and non-Indigenous populations, the rate of disability among Aboriginal and Torres Strait Islander peoples is almost twice as high as that among non-Indigenous people.¹⁶

1.34 People from culturally and linguistically diverse backgrounds—in particular newly arrived migrants such as refugees and special humanitarian entrants—can be particularly vulnerable. Those with disability are likely to experience multiple disadvantages. Lack of accessible information, communication difficulties or cultural sensitivities and differences can create barriers to services and support.¹⁷

Location

1.35 There are differences in disability prevalence across Australia's states and territories, due in part to the differing age structures. In 2012, Tasmania had the highest prevalence of disability, with a quarter of that state's population living with disability, compared with 16 per cent in Western Australia or the Australian Capital Territory and 12 per cent in the Northern Territory. The proportion of the population living with disability increases considerably with age. Tasmania also had the highest proportion of people aged 65 years and over with disability (55 per cent), while the Australian Capital Territory had the lowest proportion (44 per cent).¹⁸

1.36 Overall, there is a smaller proportion of people living with disability in Australia's major cities than in regional areas (17 per cent and 22 per cent, respectively).¹⁹

Older people

1.37 In 2012, of the population of older Australians with disability, most lived in a private dwelling (85 per cent) and needed some form of assistance (56 per cent) with one or more activities of daily life²⁰. While the majority of older people with disability

16 Council of Australian Governments (CoAG), *National Disability Strategy 2010-2020*, February 2011, p. 14. See: https://www.coag.gov.au/sites/default/files/national_disability_strategy_2010-2020.pdf (accessed March 2015).

17 CoAG, [National Disability Strategy 2010-2020](#), February 2011, p. 14.

18 ABS, *Survey of Disability, Ageing and Carers, Australia: Summary of Findings, Disability Characteristics*, ABS, Canberra, 2012, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/3A5561E876CDAC73CA257C210011AB9B?opendocument> (accessed March 2015).

19 ABS, *Survey of Disability, Ageing and Carers, Australia: Summary of Findings, Disability Characteristics*, ABS, Canberra, 2012.

20 ABS, *Survey of Disability, Ageing and Carers, Australia: Summary of Findings, Disability Assistance*, ABS, Canberra, 2012.

lived with others, there were around 61,300 older people with a profound core activity limitation living alone in a private dwelling in 2012.²¹

1.38 In 2012, around 1.4 million older people needed assistance with at least one activity because of disability or age (42 per cent). Assistance was most commonly needed for health care tasks (25 per cent) and property maintenance (23 per cent). Of those people with disability, living in households, older people were more likely to report that their need for assistance had been met in full than those aged under 65 years (64 per cent compared with 58 per cent), while 5.8 per cent of those aged under 65 reported their needs were not being met at all.

Prevalence of violence, abuse and neglect

1.39 There are no definitive statistics on the prevalence of violence, abuse and neglect specific to people with disability, let alone broken down into place of residence such as institutional settings versus private residences. What is known through various studies, discussed in further detail in chapter two, is that the rate of violence and abuse of people with disability is far higher than for people without disability, and that issues of neglect are higher for people who require assistance with the provision of basic living needs.

1.40 The National Disability Strategy reports:

There is a range of evidence which suggests that people with disability are more vulnerable to violence, exploitation and neglect. People with disability fare worse in institutional contexts where violence may be more common. People with disability are more likely to be victims of crime and there are also indications that women face increased risk.

- 18 per cent of people with a disability report being victims of physical or threatened violence compared to 10 per cent without.
- The National Police Research Unit at Flinders University studied 174 people with an intellectual disability and found that they were 10 times more likely to have experienced abuse than non-disabled people.
- A recent US study found that women with disabilities were 37.3 per cent more likely than women without a disability (20.6 per cent) to report experiencing some form of intimate partner violence. 19.7 per cent of women with disabilities reported a history of unwanted sex compared to 8.2 per cent of women without a disability.²²

1.41 The Australian Cross Disability Alliance wrote:

21 ABS, *Survey of Disability, Ageing and Carers, Australia: Summary of Findings, Older People*, ABS, Canberra, 2012.

22 CoAG, National Disability Strategy 2010-2020, February 2011, pp 38-39, https://www.coag.gov.au/sites/default/files/national_disability_strategy_2010-2020.pdf (accessed July 2015)

It is almost impossible, in a written Submission, to do justice to the magnitude of the issue of violence against people with disability in institutional and residential settings in Australia. It is also impossible in a written Submission, to articulate the life-long pain and suffering endured by people with disability who have experienced and who continue to experience violence, abuse, exploitation and neglect in these settings.²³

Committee View

1.40 In preparing this inquiry report, the committee echoes the above sentiment expressed by the disability advocacy sector peak body, the Australian Cross Disability Alliance. It has been a challenging task for this inquiry to adequately capture the scale of the epidemic of violence, abuse and neglect of people with disability and the toll this epidemic has had on individuals and their families. The committee acknowledges the vast body of evidence presented by all submitters and witnesses. Although the final report can only present a small portion of the individual experiences, every individual account of suffering and pain has helped the committee to a greater understanding of the nature and scale of the problem to be addressed. In the words of one witness to the inquiry:

We bear witness to the stories and Australia's shame.²⁴

23 Australian Cross Disability Alliance, *Submission 147*, p. 6.

24 Ms Peta Green, Bolshy Divas, *Committee Hansard*, Perth, 10 April 2015, p. 11.

Chapter 2

International and national frameworks

2.1 This chapter outlines the various frameworks under which disability services are provided in Australia, including:

- Australia's international law obligations;
- Commonwealth, state and territory roles and responsibilities;
- oversight and complaints reporting mechanisms;
- recent disability-related inquiries and reports; and
- data collection used to establish the extent of violence, abuse and neglect against people with disability.

2.2 Australia's compliance with its international law obligations as they apply to the rights of people with disability (term of reference (f)) is also examined.

Australia's international law obligations

2.3 Australia is a party to seven core international human rights treaties—including the Convention on the Rights of Persons with Disabilities (Disability Convention)¹—and a number of other international instruments that are relevant to the treatment of people with disabilities in Australia.²

2.4 This inquiry focuses on specific key articles of the Disability Convention, as this convention generally captures relevant provisions of these other frameworks as they relate to people with disability:

[T]he Disability Convention does not introduce any new human rights but instead seeks to redefine disability and make existing human rights realisable for people with disability by taking account of their experiences and needs and by contesting pervasive medical and individual models of disability which have historically encouraged the discriminatory and paternalistic approaches to rights.³

2.5 However, the committee acknowledges the relevance of all international instruments to which Australia is a party. Those instruments will be referred to as necessary throughout this report.

1 United Nations, Convention on the Rights of Persons with Disabilities (Disability Convention), opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008), <http://www.un.org/disabilities/convention/conventionfull.shtml> (accessed 2 October 2015).

2 The international human rights treaties ratified by Australia are listed at: http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Countries.aspx?CountryCode=AUS&Lang=EN, (accessed 2 October 2015).

3 Dr Linda Steel, School of Law University of Wollongong, *Submission 94*, p.10.

2.6 Some of these instruments are not binding in international law: for example, the United Nations (UN) Declaration on the Rights of Indigenous Peoples, the Declaration on the Elimination of All Forms of Violence Against Women, and the UN Principles for Older Persons. However, this does not mean that those instruments are irrelevant. Professor Hilary Charlesworth, an international law scholar based at the Australian National University, has previously noted:

While General Assembly resolutions are not, strictly speaking, binding, they are increasingly regarded as a source of international law. This is particularly the case when resolutions are couched in terms of obligations of member nations to fulfil their terms. At the very least, resolutions constitute an important statement of the international, community's views and contribute to the formation of customary international law.⁴

2.7 The Law Council of Australia, however, noted that where international instruments are not enacted into domestic law, the realisation of those rights is fragile:

Whilst the ratification of international human rights instruments such as the United Nations Convention of the Rights of People with a Disability (sic) provide a theoretical basis for the understanding and interpretation of human rights for people with disability, it does not make them enforceable. In the absence of domestic legislation implementing such treaties as laws of Australia, the respect for, and translation of, these rights into practice is neither assured nor likely. Therefore it is arguable that Australia fails to meet international obligations regarding rights of persons with disability.⁵

Convention on the Rights of Persons with Disabilities

2.8 The Disability Convention provides the overarching international framework for the protection, promotion and fulfilment of rights for people with disability, and also aims to promote respect for the inherent dignity of people with disability.⁶ It contains general and specific obligations that apply to States Parties. Key articles relevant to the terms of reference for this inquiry include:

- Article 6—Women with disabilities
 - recognises that women and girls with disabilities are vulnerable to multiple forms of discrimination; and

4 Hilary Charlesworth, 'The Declaration on The Elimination of All Forms of Violence Against Women', *ASIL Insight*, 1994, vol. 3, p. 2, <http://www.law-lib.utoronto.ca/diana/fulltext/char3.htm> (accessed 2 October 2015).

5 Law Council of Australia, *Submission 139*, pp 14-15.

6 The Disabilities Convention is supplemented by an Optional Protocol, which provides a complaint mechanism for individuals who allege a violation of their rights under the Convention. Australia ratified this protocol on 21 August 2009.

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- requires States Parties to take all appropriate measures to ensure that women and girls with disabilities exercise and enjoy the human rights and fundamental freedoms set out in the convention;⁷
 - Article 7—Children with disabilities
 - requires States Parties to take all necessary measures to ensure that children with disabilities fully enjoy all human rights and fundamental freedoms on an equal basis with other children;⁸
 - Article 12—Equal recognition before the law
 - requires States Parties to recognise that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life; and
 - requires States Parties to take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity;⁹
 - Article 13—Access to Justice
 - requires States Parties to ensure effective access to justice for persons with disabilities on an equal basis with others (including promotion of appropriate training for those working in the field of justice administration);
 - Article 16—Freedom from exploitation, violence and abuse
 - requires States Parties to take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects;
 - requires States Parties to take all appropriate measures to prevent all forms of exploitation, violence and abuse by ensuring, for example, appropriate forms of gender- and age-sensitive assistance and support for persons with disabilities and their families and caregivers, including through the provision of information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. States Parties shall ensure that protection services are age-, gender- and disability-sensitive;
 - States Parties shall ensure that all facilities and program designed to serve persons with disabilities are effectively monitored by independent authorities;

7 Also see: Convention on the Elimination of All Forms of Discrimination against Women, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx> (accessed 2 October 2015).

8 Also see: Convention on the Rights of the Child, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (accessed 2 October 2015).

9 Also see: International Covenant on Civil and Political Rights, <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx> (accessed 2 October 2015).

- States Parties shall take all appropriate measures to promote the physical, cognitive and psychological recovery, rehabilitation and social reintegration of persons with disabilities who become victims of any form of exploitation, violence or abuse, including through the provision of protection services. Such recovery and reintegration shall take place in an environment that fosters the health, welfare, self-respect, dignity and autonomy of the person and takes into account gender- and age-specific needs; and
- States Parties shall put in place effective legislation and policies, including women- and child-focused legislation and policies, to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.

2.9 The committee notes that in signing the Disability Convention, Australia made a declaration which gives some direction on how Australia interprets the rights contained in certain articles:

...Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;

Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards.¹⁰

Australia's obligations under the Disability Convention

2.10 The Disability Convention entered into force on 3 May 2008 and the UN Committee on the Rights of Persons with Disabilities (UN Disability Committee) monitors its implementation by States Parties. Each State party is obliged to submit regular reports to the UN Disability Committee, initially within two years of its ratification of the Disability Convention and thereafter every four years. The UN Disability Committee examines the reports, and makes observations and recommendations.

10 Disability Convention, *Declarations and Reservations: Australia*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec (accessed 13 October 2015).

2.11 In December 2010, Australia submitted its initial report, which was scrutinised by the UN Disability Committee in September 2013.¹¹ The UN Disability Committee made a number of concluding observations and recommendations, in respect of which Australia is due to respond in its combined second and third report (due in August 2018).¹²

2.12 In general, the UN Disability Committee commended certain initiatives being undertaken by Australia, but expressed concern with Australia's implementation of a number of Disability Convention articles. These concerns included whether Australia was upholding the general obligation to adopt all appropriate measures for the implementation of rights recognised in the Disability Convention (Article 4(1)(a)), and the implementation of specific rights in Articles 6, 12, 13 and 16. For example:

The Committee is concerned at reports of the high incidence of violence against, and sexual abuse of, women with disabilities...the Committee is concerned about the possibility that the regime of substitute decision-making will be maintained and that there is still no detailed and viable framework for supported decision-making in the exercise of legal capacity...the Committee is concerned at the lack of training for judicial officers, legal practitioners and court staff on ensuring access to justice for persons with disabilities, as well as the lack of guidance on access to justice for persons with disabilities.¹³

2.13 The UN Disability Committee also commented on 'reports of high rates of violence perpetrated against women and girls living in institutions and other segregated settings' and recommended:

...that the State party investigate without delay the situations of violence, exploitation and abuse experienced by women and girls with disabilities in institutional settings, and that it take appropriate measures on the findings.¹⁴

Comments from submitters and witnesses

2.14 Submitters and witnesses asserted that Australia was not upholding many of its international law obligations, primarily under the Disability Convention, but also under other relevant conventions and instruments.¹⁵

11 Committee on the Rights of Persons with Disabilities (UN Disability Committee), *Implementation of the Convention on the Rights of Persons with Disabilities, Initial reports submitted by States parties under article 35 of the Convention, Australia*, UN Doc. CRPD/C/AUS/1, 2010, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2f1&Lang=en (accessed 2 October 2015).

12 UN Disability Committee, *Concluding Observations Australia*, UN Doc. CRPD/C/AUS/CO/1, 2013, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2fCO%2f1&Lang=en (accessed 2 October 2015).

13 UN Disability Committee, *Concluding Observations Australia*, UN Doc. CRPD/C/AUS/CO/1, 2013, pp 2–4.

14 UN Disability Committee, *Concluding Observations Australia*, UN Doc. CRPD/C/AUS/CO/1, 2013, p. 5.

2.15 Australian Lawyers for Human Rights (ALHR) contended:

Australia has breached international human rights obligations as they apply to people with disabilities where those people have been subjected to violence, abuse and neglect in institutional and residential settings...Critically, these people must be free from exploitation, violence and abuse, not be subject to torture or cruel, inhuman or degrading treatment or punishment and have their physical and mental integrity protected.¹⁶

2.16 ALHR cited a number of ways in which the rights of people with disability in Australia are breached, including, but not limited to:

- people with disability often cannot choose where they live;
- people with disability are often subject to treatment that may constitute torture, or cruel or unusual punishment¹⁷;
- there is a lack of specific legislation or oversight mechanisms to prevent such treatment;
- women with disability are subjected to more occurrences of violence and restrictive practice in residential settings, and face more obstacles to reporting such occurrences, and
- the lack of appropriate restrictions on compulsory treatments.¹⁸

In conclusion, ALHR has grave concerns regarding Australia's lack of compliance with international human rights obligations provided in the [Disability Convention]. Compliance can be at best described as poor.¹⁹

2.17 The Australian Cross Disability Alliance (Disability Alliance) provided extensive evidence in its submission that many of the obligations on States Parties contained in the Disability Convention are not being adequately upheld by Australia. The Disability Alliance further contended that rights contained in other conventions Australia is signatory to are also not being realised by people with disability:

15 While many submitters alluded to this issue, the following submitters made explicit reference to Australia's international obligations not being met: Families Australia, *Submission 3*; Queensland Aged Disability Advocacy Service, *Submission 30*; Federation of Ethnic Communities Councils of Australia, *Submission 39*; Queensland Advocacy Incorporated, *Submission 43*; Queenslanders with Disability Network, *Submission 52*; Australian Lawyers for Human Rights, *Submission 99*; Deakin University, *Submission 109*; Consumers of Mental Health WA, *Submission 110*; Law Council of Australia, *Submission 139*; Children with Disability Australia, *Submission 144*.

16 Australian Lawyers for Human Rights (ALHR), *Submission 99*, p. 2.

17 As defined by the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

18 *Submission 99*, pp 3-8.

19 *Submission 99*, p. 10.

Significantly, torture and ill-treatment of people with disability, including violence, abuse, exploitation and neglect are frequently subject to commentary in the various concluding observations and recommendations from United Nations (UN) treaty bodies and the Human Rights Council following assessment of Australia's human rights performance.²⁰

2.18 The Disability Alliance summarised the UN Disability Committee's 2013 review of Australia's performance in relation to the Disability Convention and found that the UN Disability Committee's key concerns in relation to the following articles were:

- Articles 6 and 16: there is a high incidence of violence against women with disability;
- Article 7: there is no comprehensive national human rights framework for children, including children with disability;
- Article 14: people deemed unfit for trial can be detained indefinitely without trial, there is an over-representation of people with disability in the prison and juvenile justice systems, and Australian law allows for people with disability to be subjected to medical interventions without consent;
- Article 15: people with disability, are subjected to restrictive practices such as chemical, mechanical and physical restraints in a range of settings; and
- Article 17: Australia continues to allow forced sterilisation.²¹

2.19 The ACT Disability Aged Carer and Advocacy Service (ADACAS) agreed that the rights of people with disability were not being upheld in Australia:

The interactions we have had with our clients have highlighted to us the need for greater protection and support of people with a disability in their interactions with various institutions. The rights of people with disability are protected in this regard in the Convention on the Rights of People with Disabilities 2006, which states in Article 16 (1) that:

'States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.'

It is evident from what we see in our work that this protection is not been afforded to people with disabilities.²²

2.20 Action for More Independence in Disability Accommodation argued that the accommodation restrictions faced by people with disability were also breaches of Australia's Disability Convention obligations and had flow on effects for other rights:

In line with that convention, people with a disability should have the right to a choice of who they live with and where they live and, further, that people with a disability should have the right to good quality housing which is accessible, affordable and

20 Disability Alliance, *Submission 147*, p. 22.

21 *Submission 147*, pp 22-25.

22 Sonia Di Mezza, ADACAS, *Committee Hansard*, 21 August 2015, Canberra, p. 33.

non-institutional, and the right to live in the community with access to the support they need to participate in the community and have a good life. These have all been signed up to but have not been delivered on, and it is our contention that if more work is done to actually deliver on those convention standards and benchmarks then this will reduce abuse, and that, after all, is what we would hope to achieve.²³

2.21 ALHR agreed with this position:

Australia is failing to comply with international human rights obligations by operating institutions and offering residential settings which do not allow people to choose who they live with or access services in the community which are responsive to their needs.²⁴

2.22 Ms Mary Woodward, a former disability communications intermediary in the United Kingdom, provided evidence that she believed Australia's justice system was not inclusive enough to live up to obligations within the Disability Convention:

I think that, despite the [Disability Convention] our current judicial systems do not provide enough modifications for people with communication difficulties to have a voice in the justice system.²⁵

Committee view

2.23 The UN Disability Committee has commended certain disability-related initiatives undertaken in Australia, notably the adoption of the National Disability Strategy, introducing the National Disability Insurance Scheme (NDIS), and the Australian Law Reform Commission's (Law Reform Commission) inquiry into disability justice issues.

2.24 However, evidence provided indicates Australia has more to do, to ensure people with disability enjoy full realisation of their rights. The committee finds the evidence suggests that the institutional nature of some service delivery contexts contributes to environments that increase the prevalence of violence, abuse and neglect.

2.25 The committee notes the evidence which indicates Australia has failed to uphold the rights of people with disability across a number of United Nations conventions, not just the Disability Convention.

2.26 The committee particularly notes the UN Disability Committee's comments on the need for improved access to justice for people with disability, more appropriate decision-making frameworks and the need for more protection for women and children with disability. The committee also notes the recommendation for Australia to close residential institutions and develop nationally consistent measures for data collection.

23 Pauline Williams, Action for More Independence in Disability Accommodation, *Committee Hansard*, 30 June 2015, Melbourne, p. 52.

24 ALHR, *Submission 99*, p. 3.

25 Ms Mary Woodward, *Committee Hansard*, 27 August 2105, Sydney, p. 31.

Commonwealth, state and territory roles and responsibilities

2.27 Prior to 2009, the Commonwealth had a hands-off role of funding states and territories to deliver disability services. The Australian Government took a more proactive role following the signing of the Disability Convention in 2009 and the development of the NDIS. Currently, the Commonwealth, state and territory governments share responsibility for the provision of disability services in Australia, with the Australian Government taking a lead role in policy development and the enforcement of standards.

2.28 The governments' roles and responsibilities are defined in high-level agreements that have been negotiated in recent years, as governments seek to address the demand for quality services for people with disabilities. Five key initiatives are discussed below:

- National Disability Agreement (NDA);
- National Disability Strategy, 2010–2020 (NDS);
- NDIS (formerly known as DisabilityCare Australia);
- National Plan to Reduce Violence Against Women and their Children 2010-2022 (National Plan); and
- National Framework for the Protection of Australia's Children (Child Protection Framework).

National Disability Agreement

2.29 In November 2008, the Council of Australian Governments (CoAG) agreed the Intergovernmental Agreement on Federal Financial Relations (Intergovernmental Agreement). This agreement established the overarching framework for the Commonwealth's financial relations with the states and territories, and intends to provide for: increased flexibility in service delivery; a clearer specification of the roles and responsibilities of each level of government; and an improved focus on accountability for better outcomes and service delivery.²⁶

Roles and responsibilities

2.30 Schedule F of the Intergovernmental Agreement sets out six National Agreements that define the objectives, outcomes, outputs, performance indicators and benchmarks, and clarify the roles and responsibilities, that guide governments in service delivery across a particular sector.

26 Council of Australian Governments (CoAG), Communiqué, Canberra, 29 November 2008, <https://www.coag.gov.au/sites/default/files/2008-29-11.pdf> (accessed 2 October 2015.)

2.31 One of these National Agreements is the NDA that provides for both separate and shared roles and responsibilities from 1 January 2009.²⁷ The Commonwealth's role is largely financial and includes:

- provision of funds to states and territories, to contribute to the achievement of the objective and outcomes;
- funding disability services delivered by states in accordance with their responsibilities under the agreement for people aged 65 years and over (50 years and over for Aboriginal and Torres Strait Islander peoples);
- where appropriate, investing in initiatives to support nationally agreed policy priorities, in consultation with states and territories; and
- ensuring that Commonwealth legislation is aligned with national priority, reform directions and the Disability Convention.²⁸

The states and territories' roles and responsibilities are:

- the provision of disability services (except disability employment services which are provided by the Commonwealth), including:
 - regulation, service quality and assurance;
 - assessment;
 - policy development;
 - service planning; and
 - workforce and sector development;in a manner which most effectively meets the needs of people with disability, their families and carers, consistent with local needs and priorities;
- (except for Victoria and Western Australia) funding and regulating basic community care services for people under the age of 65 years in line with their principal responsibility for delivery of other disability services under the agreement, except Aboriginal and Torres Strait Islander peoples aged 50 years and over for whom the cost of care will be met by the Commonwealth;
- (except for Victoria and Western Australia) funding packaged community and residential aged care delivered under Commonwealth aged care programs for people under the age of 65 years, except Aboriginal and Torres Strait Islander peoples aged 50 years and over;

27 CoAG, *National Disability Agreement*, November 2008, <http://www.federalfinancialrelations.gov.au/content/npa/disability/national-agreement.pdf> (accessed 2 October 2015).

The shared roles and responsibilities relate to: national policy and reform directions; research; continuity of care; reforms to improve outcomes for Aboriginal and Torres Strait Islander peoples; provision of data; and implementation of commitments under the National Partnership Agreement on Transitioning Responsibilities for Aged Care and Disability Services.

28 CoAG, *National Disability Agreement*, 2008, p. 4.

- ensuring that state and territory legislation and regulations are aligned with the national policy and reform directions; and
- where appropriate, investing in initiatives to support nationally agreed policy priorities, in consultation with the Commonwealth.²⁹

Commonwealth funding amounts

2.32 Under the Intergovernmental Agreement, the Commonwealth committed to ongoing financial support for service delivery (clause 19). For the NDA, this support is provided through general revenue assistance, the NDA Specific Purpose Payment (NDA SPP) (indexed annually in accordance with defined growth factors, currently 3.5 per cent),³⁰ and National Partnership payments.

2.33 On commencement of the NDA, the Commonwealth committed to total funding of \$5.3 billion over five years for the NDA SPP.³¹ In 2015–16 Budget, the Government announced that total funding for the NDA SPP in 2014–15 amounted to \$1.39 billion. The budget provided for \$1.44 billion in 2015–16, with \$4.66 billion in funding over the forward estimates.³² The division of this funding across states and territories is shown in Figure 2.0 below.

Figure 2.1: National Disability Agreement Specific Purpose Payments, states and territories, 2014–19.

National Disability SPP

\$million	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	Total
2014-15	445.9	346.9	280.2	153.4	99.6	30.3	22.9	14.5	1,393.7
2015-16	459.9	359.3	290.2	160.8	102.3	31.0	23.6	15.1	1,442.2
2016-17	474.6	372.3	300.7	168.7	105.1	31.6	24.5	15.7	1,493.2
2017-18	491.6	387.3	312.8	177.6	108.4	32.4	25.4	16.3	1,551.8
2018-19	510.5	403.8	326.2	187.4	112.1	33.2	26.4	17.0	1,616.7

Source: Australian Government, Budget measures: budget paper no. 3: 2015–16, 2015, p. 40.

2.34 It must be noted that although the NDA states that Commonwealth legislation must be aligned with the Disability Convention, it does not require that state and

29 CoAG, *National Disability Agreement*, 2008, p. 5. Under the National Health Reform Agreement, Victoria and Western Australia retain responsibility for basic community care, aged care and disability services, and certain reconciliation arrangements. Accordingly, their responsibilities under the National Disability Agreement are different to other jurisdictions in respect of these areas: Commonwealth of Australia, *National Health Reform Agreement*, 2011, Schedule F, p. 53.

30 Australian Government, *Budget measures: budget paper no. 3: 2015–16*, 2015, p. 10, http://www.budget.gov.au/2015-16/content/bp3/download/BP3_consolidated.pdf (accessed 2 October 2015).

31 CoAG, Communiqué, Canberra, 29 November 2008, p. 2.

32 Australian Government, *Budget measures: budget paper no. 3: 2015–16*, 2015, p. 10, http://www.budget.gov.au/2015-16/content/bp3/download/BP3_consolidated.pdf (accessed 2 October 2015).

territory legislation must be as well. Clearly this creates a potential for key parts of domestic law to fail to meet the requirements of the Disability Convention. Regardless of this, the Commonwealth still retains the overarching obligation to ensure that all treatment of people with disability in Australia is in keeping with the rights enshrined in the Disability Convention, regardless of whether the Commonwealth has explicitly conferred that obligation in a domestic capacity onto the state and territory governments.

National Disability Strategy

2.35 In February 2011, CoAG endorsed the NDS, a 10 year national plan that aims to improve life for people with disability, their families and carers.³³ It is a collaborative strategy which involves all levels of government. As each level of government has specific roles and responsibilities across a wide range of policies and programs, the NDS focuses on creating a more unified approach:

...this is the first time in Australia that a national strategy articulates long-term goals across a number of key policy areas which impact on people with disability, their families and carers. It also provides leadership for a community-wide shift in attitudes to look beyond the disability.³⁴

2.36 The purpose of the NDS is to:

- establish a high level policy framework to give coherence to, and guide government activity across, mainstream and disability-specific areas of public policy;
- drive improved performance of mainstream services in delivering outcomes for people with disability;
- give visibility to disability issues and ensure they are included in the development and implementation of all public policy that impacts on people with disability; and
- provide national leadership toward greater inclusion of people with disability.³⁵

2.37 The NDS is structured around six broad policy areas, which align with the principles articulated in Article 3 of the Disability Convention.³⁶ Under each of these

33 The National Disability Strategy, 2010–2020 was developed in response to a 2009 National People with Disabilities and Carer Council report, *Shut Out: The Experience of People with Disabilities and their Families in Australia*, https://www.dss.gov.au/sites/default/files/documents/05_2012/nds_report.pdf (accessed 2 October 2015).

34 Commonwealth of Australia, *National Disability Strategy, 2010–20*, 2011, p. 9, http://www.coag.gov.au/sites/default/files/national_disability_strategy_2010-2020.pdf (accessed 2 October 2015).

35 Commonwealth of Australia, *National Disability Strategy, 2010–20*, 2011, pp 8–9.

36 The six policy areas are: inclusive and accessible communities; rights protection, justice and legislation; economic security; personal and community support; learning and skills; and health and wellbeing.

areas, the desired outcomes and agreed policy directions are identified, together with areas for future action that are prioritised against specific timelines in the implementation plans.³⁷

Policy Area 2—Rights protection, justice and legislation

2.38 Policy Area 2—Rights protection, justice and legislation aims to promote, uphold and protect the rights of people with disability. It has five policy directions.

- Policy Direction 3: People with disability have access to justice
Effective access to justice for people with disability on an equal basis with others requires appropriate strategies, including aids and equipment, to facilitate their effective participation in all legal proceedings. Greater awareness is needed by the judiciary, legal professionals and court staff of disability issues.
- Policy Direction 4: People with disability to be safe from violence, exploitation and neglect
There is a range of evidence which suggests that people with disability are more vulnerable to violence, exploitation and neglect. People with disability fare worse in institutional contexts where violence may be more common. People with disability are more likely to be victims of crime and there are also indications that women face increased risk.
- Policy Direction 5: More effective responses from the criminal justice system to people with disability who have complex needs or heightened vulnerabilities.
People with disability who have complex needs, multiple disability and multiple forms of disadvantage face even greater obstacles within the justice system. There is an over-representation of people with an intellectual disability both as victims and offenders in the criminal justice system. Significant rates of acquired brain injury are found among male and female prisoners. Research into intellectual disability and acquired brain injury has demonstrated the presence of co-morbidities with mental illness and substance abuse. This complex profile indicates the need for a specialist response.

2.39 Future action areas identified for Policy Area 2—such as improving the reach and effectiveness of complaints mechanisms, and ensuring supported decision-making safeguards are in place, including accountability of guardianship and substitute decision-makers—are discussed in more detail in chapters four, five, and six.³⁸

37 There will be three implementation plans: *Laying the Groundwork 2011–2014*; *Driving Action 2015–2018*; and *Measuring Progress 2019–2020* (only the first has been released).

38 Commonwealth of Australia, *National Disability Strategy, 2010–20*, 2011, p. 41 (especially 2.6– 2.7, 2.9 and 2.11–12).

Comments from submitters and witnesses

2.40 While some submitters and witnesses to this inquiry cited provisions within the NDS as containing general standards that disability services should adhere to, few submitters provided any critical analysis of the NDS itself, with the following exceptions.

2.41 Adelaide People First commented on the lack of strategic implementation:

Another challenge is ensuring the [NDS] is implemented. The [NDS] has barely rated a mention by anyone with influence since the 2013 Federal Election. The Federal Coalition Government has only barely mentioned the [NDS] they haven't explained what it or its purpose in implementing a holistic approach to disability policy reform. No one in the broader community even knows of its existence or its purpose.³⁹

2.42 First People's Disability Network Australia agreed that implementation of the NDS had stalled:

I could not agree more that the [NDS] is something that needs to be reinvigorated and needs a mechanism to oversee it.⁴⁰

2.43 Families Australia and Children with Disability Australia commented that the NDS did not adequately address the needs of children and young people with disability.⁴¹

Committee view

2.44 The committee is concerned that there appears to be a lack of continued focus on the NDS. The committee is of the view the NDS should be updated to bring the framework into line with other relevant protective instruments, together with a renewed focus on implementation.

National Disability Insurance Scheme

2.45 Following release of the NDS, governments focussed on developing a strategic framework for implementing and evaluating the strategy.⁴² In addition, the Australian Government requested the Productivity Commission (PC) to inquire into a long-term disability care and support scheme:

The Productivity Commission inquiry will examine the feasibility, costs and benefits of replacing the current system of disability services with a

39 Adelaide People First, *Submission 116*, p. 30.

40 Mr Damien Grffis, Chief Executive Officer, First Peoples Disability Network Australia; Australian Cross Disability Alliance, *Committee Hansard*, Sydney, 27 August 2015, p. 49.

41 Families Australia, *Submission 3*, p. 3 and Children with Disability Australia, *Submission 144*, pp 35-36.

42 See: Standing Council of Community and Disability Services on the National Disability Strategy, *The National Disability Strategy 2010–2020 Report to COAG 2012*, 2012, <https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/government-international/national-disability-strategy-2010-2020-report-to-coag-2012> (accessed 2 October 2015).

new approach which provides long-term essential care and support for people with severe or profound disabilities however acquired.⁴³

Productivity Commission report

2.46 In August 2011, the PC released its report *Disability Care and Support*.⁴⁴ The PC found:

The current disability support system is underfunded, unfair, fragmented and inefficient, and gives people with a disability little choice and no certainty of access to appropriate supports.

There should be a new national scheme—the National Disability Insurance Scheme (NDIS)—that provides insurance cover for all Australians in the event of significant disability.⁴⁵

2.47 CoAG promptly agreed with the need for a major reform of disability services through a NDIS and Australian governments immediately began collaborative efforts to develop the scheme.⁴⁶

2.48 Introduction of the NDIS commenced in two stages at five launch sites: in Tasmania, South Australia, the Barwon area of Victoria, and the Hunter area of New South Wales (1 July 2013); and the Australian Capital Territory, the Barkly region of the Northern Territory, and the Perth Hills area of Western Australia (1 July 2014).⁴⁷

2.49 The full roll out of the scheme will occur progressively in New South Wales, Victoria, Queensland, South Australia, Tasmania and the Northern Territory from 1 July 2016.⁴⁸ In the Australian Capital Territory, people with disability are

43 The Hon Kevin Rudd MP, Prime Minister, the Hon Nick Sherry MP, Assistant Treasurer, the Hon Jenny Macklin MP, Minister for Families, Housing, Community Services and Indigenous Affairs, the Hon Bill Shorten MP, Parliamentary Secretary for Disabilities and Children's Services, 'Australian Government to consider new approaches to disability', Joint media release No. 093, 23 November 2009, <https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/government-international/national-disability-strategy-2010-2020-report-to-coag-2012> (accessed 2 October 2015).

44 Productivity Commission (PC), *Disability Care and Support*, Report No. 54, Canberra, 31 July 2011, <http://www.pc.gov.au/inquiries/completed/disability-support/report> (accessed 2 October 2015).

45 PC, *Disability Care and Support*, Report No. 54, Volume 1, Canberra, 31 July 2011, p. 2.

46 CoAG, Communiqué, Canberra, 19 August 2011, <http://www.coag.gov.au/node/76> (accessed 2 October 2015).

47 National Disability Insurance Scheme (NDIS), *Our Sites*, <http://www.ndis.gov.au/about-us/our-sites> (accessed 2 October 2015.)

48 NDIS, *Our Sites*, <http://www.ndis.gov.au/about-us/our-sites>, accessed 2 October 2015. Western Australia has not yet signed up to the scheme as it is trialling the National Disability Insurance Scheme My Way model in two locations (Lower South West and Cockburn–Kwinana): <http://disability.wa.gov.au/wa-ndis-my-way/wa-ndis-my-way/> (accessed 5 November 2015).

transitioning into the NDIS based on their date of birth or their academic year (for school age children), in accordance with a flexible timetable.⁴⁹

2.50 Chapter nine examines the challenges and opportunities presented by the NDIS rollout in reducing violence, abuse and neglect against people with disability.

National Plan to Reduce Violence against Women and their Children

2.51 In February 2011, the Australian Government announced the National Plan, a 12 year strategy endorsed by the Commonwealth, states and territories, to reduce violence against women and children.⁵⁰ There will be four three-year action plans, two of which have been released: the First Action Plan: Building a Strong Foundation 2010–2013 (First Action Plan); and the Second Action Plan: Moving Ahead 2013–2016 (Second Action Plan).⁵¹

First Action Plan: Building a Strong Foundation 2010–2013

2.52 The First Action Plan established the groundwork for the National Plan—'the strategic projects and actions that will drive results over the longer term while implementing high-priority actions in the short term'.⁵² Each jurisdiction developed its own implementation plan to reflect its priorities and all jurisdictions collaborated on four joint priorities: Building Primary Prevention Capacity; Enhancing Service Delivery; Strengthening Justice Responses; and Building the Evidence Base. For example, all jurisdictions agreed to work toward development of a comprehensive National Data Collection and Reporting Framework, to be in place by 2022.⁵³

2.53 Key initiatives of the First Action Plan included establishment of Australia's National Research Organisation for Women's Safety and 1800RESPECT, Australia's first national professional telephone and online counselling service for women experiencing, or at risk of, domestic and family violence and sexual assault.

Stop the Violence project

2.54 In addition, Women With Disabilities Australia (WWDA) was funded to investigate and promote ways to support better practice and improvements in service delivery and government responses, to improve the quality of life for women and girls

49 NDIS, *NDIS in the ACT*, <http://www.ndis.gov.au/about-us/our-sites> (accessed 2 October 2015).

50 The Hon Robert McClelland MP, Attorney-General, and the Hon Kate Ellis MP, Minister for the Status of Women, 'National Plan to Reduce Violence Against Women and Children', joint media release, 15 February 2011, <http://kateellis.com.au/newsroom/443/> (accessed 2 October 2015).

51 The Action Plans due for future release are the *Third Action Plan: Promising Results 2016–2019* and the *Fourth Action Plan: Turning the Corner 2019–2022*.

52 Commonwealth of Australia, *First Action Plan: Building a Strong Foundation 2010–2013*, 2012, p. 7, https://www.dss.gov.au/sites/default/files/documents/07_2014/first_action_plan_1.pdf (accessed 2 October 2015).

53 Commonwealth of Australia, *First Action Plan: Building a Strong Foundation 2010–2013*, 2012, p. 27.

with disabilities experiencing or at risk of violence (*Stop the Violence* project).⁵⁴ A Project Steering Group oversaw the project which examined in detail:

...the prevalence and nature of violence against women and girls with disability as well as the responses and services available for addressing such violence. This included the particular susceptibility of Aboriginal and Torres Strait Islander women with disability, and women with disability who are of culturally and linguistically diverse background, and women with disability who are of diverse sexual orientation, gender identity or intersex.⁵⁵

2.55 In October 2013, the Project Steering Group hosted a high-level, cross-sector National Symposium. In its *Report of the Proceedings and Outcomes*, WWDA identified six key thematic areas and two possible future mechanisms to support the development of good policy and the provision of good practice in service provision:

- Area 1—Information education and capacity building for women and girls with disabilities;
- Area 2—Awareness raising for the broader community;
- Area 3—Education and training for service providers;
- Area 4—Service sector development and reform;
- Area 5—Legislation, national agreements and policy frameworks;
- Area 6—Evidence gathering, research and development;
- Area 7—Establishment and development of a Virtual Centre for the Prevention of Violence Against Women and Girls with Disabilities; and
- Area 8—Establishment of a National Women with Disabilities Expert Panel on the Prevention of Violence Against Women and Girls with Disabilities.⁵⁶

2.56 The outcomes of the National Symposium informed the development of the Second Action Plan.⁵⁷

54 Women With Disabilities Australia (WWDA), *About Us*, Stop the Violence website, <http://www.stvp.org.au/about.htm>, accessed 29 September 2015. Also see: Commonwealth of Australia, *Second Action Plan: Moving Ahead 2013–2016*, 2013, p. 54, https://www.dss.gov.au/sites/default/files/documents/09_2014/dss012_14_book_tagged_reduce_d.pdf (accessed 2 October 2015).

55 Australian Human Rights Commission (AHRC), *Submission 57*, p. 2.

56 WWDA, *Report of the Proceedings and Outcomes, National Symposium on Violence Against Women and Girls with Disabilities*, Sydney, 25 October 2013, pp 22-30, <http://www.stvp.org.au/documents/STVP%20Outcomes%20Paper.pdf> (accessed 2 October 2015).

57 Commonwealth of Australia, *Second Action Plan: Moving Ahead 2013–2016*, 2013, p. 54.

Second Action Plan: Moving Ahead 2013–2016

2.57 The Second Action Plan channels government efforts toward ongoing and new priorities, and further engages sectors, groups and communities.⁵⁸ There are five national priorities:

- Driving whole of community action to prevent violence;
- Understanding diverse experiences of violence;
- Supporting innovative services and integrated systems;
- Improving perpetrator interventions; and
- Continuing to build the evidence base.

Twenty-six practical actions are identified, with the plan noting:

These actions are designed to drive national improvements and most involve efforts of all governments. They will not all necessarily be progressed by all jurisdictions, or in the same way. Jurisdictions will focus on local priorities and delivery approaches.⁵⁹

2.58 Under National Priority Two: Understanding diverse experiences of violence, Action 12 specifically focuses on tailoring responses to meet the needs of women with disability:

Under the Second Action Plan, governments will work with expert organisations, including Women With Disabilities Australia to prioritise and implement key outcomes from the Stop the Violence project. This will include:

- bringing together and disseminating good practice information on preventing violence against women with disability;
- training for frontline workers to recognise and prevent violence against women and children with disability; and
- providing accessible information and support in National Plan communications.⁶⁰

2.59 The Second Action Plan will be independently evaluated in 2016–2017, with a key question regarding the effectiveness of the National Plan in engaging with and supporting women with diverse experiences or who are more vulnerable to violence (such as women with disability).⁶¹

58 Commonwealth of Australia, *Second Action Plan: Moving Ahead 2013–2016*, 2013, p. 11.

59 Commonwealth of Australia, *Second Action Plan: Moving Ahead 2013–2016*, 2013, p. 11.

60 WWDA, Report of the Proceedings and Outcomes, National Symposium on Violence Against Women and Girls with Disabilities, Sydney, 25 October 2013, p. 28.

61 Health Outcomes International, *National Plan to Reduce Violence against Women and their Children 2010–2022, Evaluation Plan*, 3 June 2014, pp 12 and 17, https://www.dss.gov.au/sites/default/files/documents/06_2014/evaluation_plan.pdf (accessed 2 October 2015).

National Framework for the Protection of Australia's Children

2.60 In April 2009, CoAG released the Child Protection Framework which aims to ensure that Australia's children and young people are safe and well.⁶² To achieve this high-level outcome, governments and the non-government sector committed to achieving a substantial and sustained reduction in child abuse and neglect in Australia over time. The Child Protection Framework identifies the following six supporting outcomes:

- children live in safe and supportive families and communities;
- children and families access adequate support to promote safety and intervene early;
- risk factors for child abuse and neglect are addressed;
- children who have been abused or neglected receive the support and care they need for their safety and wellbeing;
- Aboriginal and Torres Strait Islander children are supported and safe in their families and communities; and
- child sexual abuse and exploitation is prevented and survivors receive adequate support.⁶³

2.61 Ms Carolyn Frohmader, Executive Director of WWDA, commented:

So you have these national frameworks and policy frameworks... Then over here we have the National Plan to Reduce Violence against Women and their Children. Then we have the National Framework for Protecting Australia's Children. The National Disability Strategy is not connected to the national violence plan. The national violence plan is only focused on intimate partner violence, and does not include institutional settings. The way the National Disability Strategy addresses violence against people with disabilities is to say 'make sure we implement the national plan to prevent violence against women'.⁶⁴

62 CoAG, Communiqué, Hobart, 30 April 2009, <https://www.coag.gov.au/sites/default/files/2009-04-30.pdf> (accessed 2 October 2015).

CoAG, *Protecting Children is Everyone's Business, National Framework for the Protection of Australia's Children 2009–2020*, 2009, https://www.coag.gov.au/sites/default/files/child_protection_framework.pdf (accessed 2 October 2015).

63 CoAG, *Protecting Children is Everyone's Business, National Framework for the Protection of Australia's Children 2009–2020*, 2009, p. 11.

64 *Committee Hansard*, Sydney, 27 August 2015, p. 40.

Committee view

2.62 The Committee notes with some concern, the evidence provided that there is a lack of cross-over with various national policies and approaches that are relevant to women and children with disability. The committee is concerned that there does not appear to be provision for follow-up evaluations of how those policies are being implemented, or their effectiveness. Of particular concern is the lack of inclusion of the specific needs of women and children with disability within mainstream protective frameworks.

Oversight and complaints reporting mechanisms

2.63 As indicated throughout this chapter, there are a number of international and national policy frameworks that seek to safeguard the rights of people with disability. Each of these inter-related frameworks has its own review and reporting mechanisms. However, the states and territories are most often responsible for the provision of disability services in Australia. Accordingly, each jurisdiction has its own policy and legal frameworks that are not necessarily consistent or clear.

2.64 Evidence to the inquiry indicated that the existing oversight and complaints reporting mechanisms vary considerably state-to-state. Disability advocates and people with disability described mechanisms that are complicated and inadequate in terms of access and enforceable outcomes.

2.65 Chapter four presents a detailed examination of the legal and policy frameworks for reporting and investigating violence, abuse and neglect of people with disability.

Recent disability-related inquiries and reports

2.66 In recent years, along with the increased government focus on disability policy and service delivery, there have been a number of disability-related inquiries. These inquiries have focussed on matters such as the vulnerability of people with disabilities to violence, abuse or neglect, the ability of people with disabilities to access the criminal justice system, and safeguards within the disability services sector. This section of the report highlights a few of these inquiries.

- Parliament of Victoria

In August 2015, the Family and Community Development Committee tabled its interim report in the *Inquiry into Abuse in Disability Services*. Stage 1 of the inquiry examined Victoria's regulation of the disability services system, and made eight recommendations on the proposed NDIS quality and safeguarding framework.⁶⁵ The final reporting date is 1 March 2016 and will examine what safeguards are required in Victoria prior to the transition to the NDIS.

65 Parliament of Victoria, Family and Community Development Committee, *Inquiry into Abuse in Disability Services*, August 2015, http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/58th/Abuse_in_disability_services/FCDC_58-01_Interim_Report_-_Abuse_in_Disability_Services.pdf (accessed 2 October 2015).

- Victorian Ombudsman

In June 2015, the Victorian Ombudsman tabled the Phase 1 report in the *Investigation into disability abuse reporting*. The report examined the effectiveness of statutory oversight in Victoria, and concluded that, despite areas of good practice, the arrangements are 'fragmented, complicated and confusing, even to those who work in the field'. Consequently, the system is failing to provide coherent and consistent protection to people with disabilities.⁶⁶ Phase 2 will report late in 2015 and will look in greater depth at the process for reporting and investigating abuse, drawing on lived experiences.

- Australian Human Rights Commission (AHRC)

In February 2014, the AHRC presented its report, *Equal before the law: towards disability justice strategies*. The AHRC found that access to justice in the criminal justice system for people with disability who need communication supports, or who have complex and multiple support needs, is a 'significant problem in every jurisdiction in Australia', and recommended that each jurisdiction develop an 'holistic, over-arching' disability justice strategy.⁶⁷ The committee notes that South Australia is the only jurisdiction so far to implement a disability justice strategy consistent with this recommendation (discussed in detail in chapter 6), and the Queensland Department of Justice and Attorney-General is in the process of implementing a disability service plan.⁶⁸

- Victorian Equal Opportunity and Human Rights Commission (VEOHRC)

VEOHRC's report titled *Beyond doubt: the experiences of people with disabilities reporting crime* stated that, in Victoria, people with disability are routinely denied access to justice and safety, as the criminal justice system is ill-equipped to meet their needs. The report identified some significant and complex barriers to the reporting of crime, noting that people with disability

66 Victorian Ombudsman, *Reporting and investigation of allegations of abuse in the disability sectors: Phase 1—the effectiveness of statutory oversight*, June 2015, <https://www.ombudsman.vic.gov.au/Investigations/Investigation-into-disability-abuse-reporting> (accessed 2 October 2015).

67 AHRC, *Equal before the law: towards disability justice strategies*, February 2014, p. 1, <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law> (accessed 2 October 2015).

68 See: Additional information, *Department of Justice and Attorney-General Disability Service Plan 2014-16: Year one progress report*, from Queensland Department of Justice and Attorney-General, received 12 October 2015.

fear that they will not be believed, or will be seen as lacking credibility, when a crime is reported to police.⁶⁹

- Law Reform Commission

The inquiry into *Equality, Capacity and Disability in Commonwealth Laws* examined Commonwealth laws and legal frameworks that deny, or diminish, the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity. The Law Reform Commission noted that most laws relating to legal capacity are entrenched in state law and considered that the Commonwealth could model the principles of individual autonomy and independence, as a template for state and territory reform.⁷⁰

- Royal Commission into Institutional Responses to Child Sexual Abuse (RC)

The 2014 *Interim Report* stated that children with disabilities are more vulnerable to sexual abuse than children without disabilities, and are often segregated, to varying degrees, from the mainstream community for long periods, which increases the risk of abuse. The RC commented that pre-employment screening is an important first step in preventing abuse but screening is not consistent across Australia.⁷¹ Further, governments do not

69 Victorian Equal Opportunity and Human Rights Commission, *Beyond Doubt: the experiences of people with disabilities reporting crime*, July 2014, pp 6–9, <http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/reports/item/894-beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime> (accessed 2 October 2015). The report addressed a number of recommendations to the Victorian Government, Victoria Police, the Department of Justice and others.

70 Australian Law Reform Commission (ALRC), *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124, August 2014, <http://www.alrc.gov.au/inquiries/legal-barriers-people-disability> (accessed 2 October 2015).

71 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report, Volume 1 2014*, 2014, pp 8 and 112–113, <http://www.childabuseroyalcommission.gov.au/getattachment/7014dd2f-3832-465e-9345-6e3f94dd40eb/Volume-1> (accessed 2 October 30 September 2015).

agree on whether a national system is appropriate or feasible.⁷² In August 2015, the RC recommended that states and territories make legislative amendments to implement a series of standards identified in its working with children check report, and that the Commonwealth facilitate a national model for working with children checks.⁷³

- People with Disability Australia (PWDA)

Rights Denied: Towards a national policy agenda about abuse, neglect and exploitation of persons with cognitive impairment was a 2009 research study that investigated the barriers encountered by people with cognitive disabilities, which prevented, or inhibited, realisation of the human right to freedom from abuse, neglect and exploitation, and the attainment of appropriate remedies for the violation of these rights.⁷⁴

2.67 Chapters five and six examine specific aspects of, and recommendations in, these reports, as well as the committee's views on the need for a national approach to improving access to justice for people with disability.

Data on violence, abuse and neglect

2.68 The committee notes that there are currently no nationally consistent data sets available to describe the extent of violence, abuse and neglect of people with disability. This raises two fundamental problems. First, there is overwhelming anecdotal evidence of violence, abuse and neglect of people with disability—made in submissions and during public hearings to this inquiry. There is a need to formally recognise and quantify the extent of this abuse. The second issue is that the absence of

72 In December 2010, COAG Community and Disability Services Ministers established a working group to develop a nationally consistent approach to Working with Children Checks in response to an action item under the *National Framework for Protecting Australia's Children 2009-2020*. The position paper prepared by the working group in 2011 noted that legislative reform and alignment of screening practices as a stand-alone measure 'does not afford sufficient protection to children' and would require 'substantial investment of resources to bring the data and related information management mechanisms into line'. Rather than nationally harmonised legislation, the working group favoured 'a national commitment to ongoing checking, consistent risk management strategies at the organisational level and communication strategies that make it simpler to find out what is allowed when working or volunteering in another jurisdiction'. Consistent with this position, in its annual report on the Framework to COAG in 2011-12, DSS noted that jurisdictions have 'undertaken a range of reforms and implemented program revisions on an individual basis'. See: Department of Social Services, 'Position Paper: Toward a Nationally Consistent Approach to Working with Children Checks', June 2011, <https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/a-nationally-consistent-approach-to-working-with-children-checks-2011> (accessed 20 November 2015).

73 Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report*, 17 August 2015, p. 6, <https://www.childabuseroyalcommission.gov.au/policy-and-research/working-with-children-checks> (accessed 20 November 2015).

74 P French et al, *Rights Denied: Towards a national policy agenda about abuse, neglect and exploitation of persons with cognitive impairment*, People with Disability Australia, 2009, <http://www.pwd.org.au/documents/pubs/RightsDenied2010.doc> (accessed 2 October 2015).

official nationally consistent data sets in itself is a critical roadblock to these issues being addressed. Nationally consistent data on this issue is an essential element to guide long-term policy development to eliminate instances of violence, abuse and neglect against people with disability.

2.69 In a summary paper entitled *The nature and extent of sexual assault and abuse in Australia*, the Australian Institute of Family Studies notes that there 'is no standard national data collection that includes the experiences of sexual violence amongst adults with a disability'. This paper was only able to identify two findings that shed some light on the extent of this issue. First, and most startlingly, is that 'women with intellectual disability are 50–90 per cent more likely to be subjected to a sexual assault than women in the general population'. Second, in 2007 the Victorian Police found that over 25 per cent of all sexual assault victims identified as having a disability.⁷⁵

2.70 The two main surveys conducted by the Australian Bureau of Statistics (ABS) on disability do not collect data on violence, abuse or neglect:

Despite being the major national data collection regarding the status and experiences of adults with a disability, the ABS Survey of Disability, Ageing and Carers, does not invite participants to report on their experiences of violence or abuse. Similarly, the ABS (2006) Personal Safety Survey report, which specifically investigates experiences of violence, does not identify the disability status of participants, and the International Violence Against Women Survey...specifically excluded women with an illness or disability from the sample for the survey.⁷⁶

This is despite evidence that 'approximately 20 per cent of Australian women, and 6 per cent of men, will experience sexual violence in their lifetime'.⁷⁷

2.71 PWDA also noted the shortcomings of these two surveys and also the General Social Survey conducted by the ABS:

The Australian Bureau of Statistics (ABS) Personal Safety Survey (PSS), generally understood to be the most accurate source of national data about prevalence of violence, does not disaggregate by disability, Indigenous status or mental illness, and only recruits those currently residing in private dwellings, excluding institutional residential settings. It also excludes those who might require some form of communication support—such as some people with intellectual disability, some Deaf people, some people with hearing impairment, and people from culturally and linguistically diverse backgrounds. Additionally, it frames its questions around intimate partner

75 Australian Institute of Family Studies, *The nature and extent of sexual assault and abuse in Australia*, 2012, <http://www3.aifs.gov.au/acssa/pubs/sheets/rs5/>, (accessed 29 September 2015).

76 Dr Suellen Murray and Dr Anastasia Powell, 'Sexual assault and adults with a disability: Enabling recognition, disclosure and a just response', Issue No. 9/2008, AIFS, <http://www3.aifs.gov.au/acssa/pubs/issue/i9.html>, (accessed 29 September 2015).

77 Dr Suellen Murray and Dr Anastasia Powell, 'Sexual assault and adults with a disability: Enabling recognition, disclosure and a just response', Issue No. 9/2008, AIFS.

violence, thus excluding the relationships in which people with disability experience violence.

Similarly, although the General Social Survey (GSS) does disaggregate by disability status, it also excludes institutional residential settings. The Disability, Ageing and Carers (DAC) survey does not address any issues around violence, abuse or neglect, and relies on carers answering on behalf of people with disability. In all cases, these surveys exclude those who live in remote areas, which means that Aboriginal and Torres Strait Islander people with disability living in these areas (a cohort who may be at particular risk) are excluded from the data.⁷⁸

2.72 In correspondence to the committee, the ABS noted that it is currently undergoing a 'major redesign of [its] statistical collections, methods, products and services' in order to 'extract greater value from all available data'. The ABS highlighted that it is collaborating closely with a range of government agencies and non-government entities on a range of projects. The committee is most interested in the potential for the National Centre for Longitudinal Data to commence a longitudinal study of people with disability. Part of this study could focus on the prevalence of violence perpetrated against people with disability.⁷⁹

2.73 In the most recent PSS (2012), a disability descriptor question was included; however, this data did not include people living in institutional care or differentiate between physical or sexual violence. It is the committee's view that there is a fundamental need to disaggregate this data further. The ABS also noted that the 2014–15 National Aboriginal and Torres Strait Islander Social Survey is currently collecting information on whether a person is living with a disability with these statistics being made available from April 2016.⁸⁰ Whilst the committee reserves its judgement on the adequacy of these statistics, it commends the ABS on these preliminary steps to collect data that disaggregates on the basis of disability.

2.74 The Australian Institute of Health and Welfare compiles an annual report titled *Child Protection Australia*. This publication contains data and analysis on notifications and substantiations of child abuse and neglect within the child protection system. Currently this report does not disaggregate data on the basis of disability. The committee understands that one of the objectives of the Child Protection National

78 People with Disability Australia Incorporated, *Submission 77*, p. 2.

79 Answers to questions on notice, received from Australian Bureau of Statistics (ABS) on 11 November 2015, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect/Additional_Documents (accessed 11 November 2015). See also: Department of Social Services, *National Centre for Longitudinal Data*, 23 October 2015, <https://www.dss.gov.au/about-the-department/national-centre-for-longitudinal-data> (accessed 11 November 2015).

80 Answers to questions on notice, received from Australian Bureau of Statistics (ABS) on 11 November 2015.

Minimum Data Sets (CP NMDS) is to 'allow reporting in identified priorities areas (such as disability, cultural and linguistic diversity and locality)'.⁸¹

Committee view

2.75 The committee considers that finalisation of the CP NMDS should be prioritised as this additional data will be a useful addition to policy makers and service providers in this area.

2.76 Another dataset that may be helpful in better understanding this issue is held by the National Disability Abuse and Neglect Hotline. This hotline is operated through the Department of Social Services (DSS) with its purpose being to allow callers to report abuse or neglect against both government-funded and private organisations. The hotline refers the caller to the most appropriate body to help resolve the complaint or allegation.⁸² Evidence to the committee suggests that data collected by this service is not being made available to the community:

The national disability abuse hotline, which now has carriage under the CRRS [Complaints Resolution and Referral Service], I think, with People with Disability Australia, data does not go anywhere. The data goes to government and you are not able to FOI that data...

It is not available via FOI. I know that a number of people have tried it.⁸³

2.77 In its submission to the inquiry, DSS provided a breakdown of the types of calls it has received since 2012. In the period July 2012 to June 2013, there were 404 complaints received by the hotline and 346 during July 2013 to June 2014. The most prevalent complaints were systemic abuse (23 per cent), physical abuse (16 per cent), psychological abuse (16 per cent), physical neglect (15 per cent) and emotional neglect (nine per cent). Although this helps to begin to understand the extent of violence, abuse and neglect that is perpetuated against people with disability, the submission noted:

It should also be remembered that the Hotline is one of many ways to report a case of abuse or neglect and that people may be more inclined to report some types of abuse or neglect compared to others, for example sexual assaults.⁸⁴

81 Australian Institute of Health and Welfare, *A new approach to national child protection data: implementation of the Child Protection National Minimum Data Set*, Child Welfare Series No. 59, 2014, p. 4, <http://www.aihw.gov.au/WorkArea/DownloadAsset.aspx?id=60129548810> (accessed 6 October 2015).

82 National Disability Abuse and Neglect Hotline, <http://www.disabilityhotline.net.au/about-the-hotline/> (accessed 29 September 2015).

83 Ms Samantha Connor, Researcher, People with Disabilities WA, *Committee Hansard*, Perth, 10 April 2015, p. 34.

84 Department of Social Services, *Submission 104*, p. 6.

2.78 Despite providing some data to the committee in its submission, Mr James Christian from DSS acknowledged that the department is selective in what hotline data is released and who it is released to:

I note that some submissions to the committee have called on DSS to share data collected by the National Disability Abuse and Neglect Hotline, a service funded by DSS. DSS recognises that collecting meaningful data on this issue is a challenge and we are keen to do what we can to be part of the solution. To this end, our submission includes data from the hotline, and I trust this has been helpful in your deliberations. DSS does not routinely publish the hotline data, but we have released data to researchers in the past and will continue to consider on a case-by-case basis as we receive those requests. The hotline data has some limitations that must be considered carefully each time it is used.⁸⁵

2.79 The UN Disability Committee has commented on the issue of data collection in Australia, and regretted 'the low level of disaggregated data collected on persons with disabilities and reported publicly' and the 'little data on the specific situation of women and girls with disability', in particular those who identified as Aboriginal and Torres Strait Islander peoples.⁸⁶ It recommended that Australia:

...develop nationally consistent measures for data collection and public reporting of disaggregated data across the full range of obligations provided for in the [Convention on the Rights of People with Disabilities], and that all data be disaggregated by age, gender, type of disability, place of residence and cultural background.⁸⁷

2.80 The UN Disability Committee made similar comments with respect to the situation of children with disability in child protection data and 'the paucity of information on children with disabilities, in particular indigenous children, alternative care for children with disabilities and children with disabilities living in remote or rural areas'.⁸⁸ Accordingly, it recommended that Australia:

...systematically collect, analyse and disseminate data, disaggregated by gender, age and disability, on the status of children, including any form of abuse and violence against children...[and] commission and fund a comprehensive assessment of the situation of children with disabilities in order to establish a baseline of disaggregated data against which future progress towards the implementation of the [Convention on the Rights of People with Disabilities] can be measured.⁸⁹

85 Mr James Christian PSM, Group Manager, Disability Employment and Carers, Department of Social Services, *Committee Hansard*, Canberra, 21 August 2015, p. 1.

86 Disability Convention (CRPD/C/AUS/CO/1), p. 7, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2fCO%2f1&Lang=en (accessed 8 September 2015).

87 Disability Convention (CRPD/C/AUS/CO/1), p. 7.

88 Disability Convention (CRPD/C/AUS/CO/1), p. 8.

89 Disability Convention (CRPD/C/AUS/CO/1), p. 8.

2.81 A key initiative of the NDS was the introduction of a periodic report using trend data to track national progress for people with disability in Australia.⁹⁰ The first National Disability Strategy Progress Report was presented to CoAG in 2014.

2.82 The committee is particularly concerned by the lack of specific data on Aboriginal and Torres Strait Islander people with disability. The AHRC submitted that Aboriginal and Torres Strait Islander peoples are significantly affected by disability compared with the non-Indigenous population and noted that Aboriginal and Torres Strait Islander peoples with disability experience higher rates of exploitation, violence and abuse.⁹¹

2.83 In its 2013 study on indigenous persons with disability, the UN Permanent Forum on Indigenous Issues found that violence against indigenous women and girls with disability occurs in schools, at home, in residential institutions and in disability services.⁹² The study found that available research on Indigenous people with disability:

...shows a serious gap in the implementation and enjoyment of a wide range of rights, ranging from self-determination and individual autonomy to access to justice, education, language, culture and integrity of the person. There are significant unmet needs and rights that are not being addressed, of which gaps in access to health, life expectancy, educational qualifications, income, safety of the person and participation in decision-making are just a few examples.⁹³

2.84 The committee is also concerned by the higher rates of self-harm and suicide amongst young people with disability. In 2014, the National Children's Commissioner, Ms Megan Mitchell, in the *Children's Rights Report 2014*, stated that children and young people with disability can be disproportionately affected by intentional self-harm and suicidal behaviour:

A US study found that 30–64 per cent of children and young people with an intellectual disability develop comorbid mental health disorders, a rate of around 3-4 times that of their peers, including higher rates of depression, anxiety and psychosis. Children and young people with co-occurring chronic physical and mental health conditions are also said to have higher probabilities of self-harm, suicidal ideation, and suicide attempts when

90 Commonwealth of Australia, *National Disability Strategy, 2010–20*, 2011, p. 69, https://www.dss.gov.au/sites/default/files/documents/05_2012/national_disability_strategy_2010_2020.pdf (accessed 12 October 2015).

91 Human Rights Commission, *Submission 57*, p. 3.

92 *Submission 57*, p. 3.

93 UN Permanent Forum on Indigenous Issues, *Study on the situation of indigenous persons with disabilities, with a particular focus on challenges faced with regard to the full enjoyment of human rights and inclusion in development*, E/C.19/2013/6, 5 February 2013, pp 15–16, <http://www.un.org/disabilities/documents/ecosoc/e.c.19.2013.6.pdf> (accessed 24 September 2015).

compared with healthy peers. Research also suggests an association between chronic pain and suicidality in children and young people.⁹⁴

2.85 The AHRC echoed this view and in its submission recommended that further research be conducted to validate a link between institutional and residential settings and intentional self-harm and suicidal behaviour.⁹⁵

Committee view

2.86 The committee concurs with the proposition that where data is collected, it must be in a manner that is 'inclusive of all people with disability'.⁹⁶ Methodologies that exclude people with disability on the basis of where they live—for example, those in residential or institutional settings, or in regional or remote locations—or how interviews are conducted—for example, asking a carer to speak on behalf of a person with disability—is clearly inappropriate. Exclusion of people with disability from the statistics through the omission of a disability identifier question is also not appropriate.

2.87 It is the committee's position that where data exists, it should be made available, albeit in a way that takes into consideration any personal identifiers. It is also the committee's position that where there is an absence of data, that it should be a priority for that data to be collected so that the quantum of violence, abuse and neglect against people with disability can be fully understood.

2.88 The committee supports the view of PWDA that the lack of data on this issue undermines the capacity for evidence-based policy development. This will impact some of the key NDIS policies, such as the quality and safeguards framework which is currently under development. The role of the NDIS quality and safeguards mechanism will be discussed further in chapter nine.

2.89 The committee agrees with the AHRC's suggestion that the collection and publication of disaggregated data could be incorporated into the NDS reports, and provide a foundation for the development of future implementation plans.⁹⁷

94 Human Rights Commission, *Children's Rights Report 2014*, 2014, p. 61, https://www.humanrights.gov.au/sites/default/files/document/publication/Children%27s%20Rights%20Report%202014_2.pdf, (accessed 9 September 2015).

95 Human Rights Commission, *Submission 57*, p. 3.

96 People with Disability Australia Incorporated, *Submission 77*, p. 3.

97 *Submission 57*, p. 2.

Concluding committee view

2.90 A number of expert inquiries and reports have been published in recent years, each looking into specific aspects of disability service provision and the realisation of rights for people with disability.

2.91 Many of the recommendations from those inquiries and reports were put forward as being fundamental to the realisation of rights for people with disability, and essential to Australia meeting its obligations under the Disability Convention and other relevant human rights instruments.

2.92 The committee remains concerned that there is no timetable from relevant levels of government for the implementation of these essential measures, and therefore no foreseeable timetable for Australia fully adhering to the Disability Convention. The impact this has had on violence, abuse and neglect of people with disability is highlighted in following chapters of this report.

2.93 The committee also remains concerned with Australia's declaration regarding reservations on key articles of the Disability Convention.

2.94 The committee is further concerned that key recommendations of the UN Disability Committee are not being appropriately implemented into Australian law and practice.

2.95 The committee is also concerned with the lack of reliable statistical data available for policy development to eliminate violence, abuse and neglect of people with disability. The use of passive and active exclusion of people with disability from the statistical record of our country means that issues of violence, abuse and neglect continue to remain out-of-sight and out-of-mind.

Chapter 3

Lived experience of violence, abuse and neglect

Introduction

3.1 This chapter will examine the first three terms of reference of this inquiry. These terms of reference explore the lived experience of people with disability who have experienced violence, abuse and neglect as a part of their everyday lives.

3.2 The committee is very disturbed by the significant body of evidence it has received which details the cruel, inappropriate and, in many cases, unlawful treatment of Australians with disability. The committee is equally disturbed by the largely inadequate responses that these cases have received when reported to authorities and people in positions of responsibility. The committee is also concerned by the fact that many more cases remain unreported, partly as a result of inadequate responses to reporting. This is clearly unacceptable.

3.3 This chapter will focus on evidence relating to lived experiences in the general community and institutions—such as residential care, and aged care. Chapter five will examine the lived experience of those in schools—particularly as it relates to restrictive practice—and also people subject to guardianship orders.

3.4 The committee notes that although this chapter seeks to detail many examples of violence, abuse and neglect against people with disability, these accounts barely scratch the surface when compared to the huge body of lived experience evidence provided to the committee both in submissions and at hearings.

3.5 The committee has received a great deal of lived experience evidence *in camera*, due to the highly sensitive nature of the material. This evidence has had a profound impact on the committee. Taken as a whole, the evidence shows a systemic failure to protect people with disability, and has influenced the recommendations made in the final chapter of this inquiry report.

Experiences of violence, abuse and neglect: General community

3.6 Although later parts of this chapter will focus on instances of violence, abuse and neglect against people with disability in institutions and schools, as per the terms of reference for this inquiry, this first section looks at the mistreatment that people with disability receive in their homes and in the general community, and the lack of appropriate protective responses from mainstream institutions when such acts of mistreatment are reported.

3.7 The committee has received many accounts from people with disability, their families and friends, advocates, and workers in the industry. The committee has been humbled and shocked by the many examples of lived experience. Each person's personal experience is important and valued, but it is only by taking a consolidated view of this evidence that the enormity of the mistreatment of people with disability in Australia is demonstrated. As Ms Carolyn Frohmader, Executive Director, Women with Disabilities Australia noted in her evidence at the Sydney hearing:

These are not isolated stories. We hear stories like these every single day—not once a week, not once a month, but every single day. Just last night, as I was packing my suitcase in order to fly here to speak to you today, my phone rang. It was a woman with disability trapped in the laundry of her home, hiding behind the washing machine whilst her husband—her carer—raged outside the laundry door, threatening to kill her. Again this is not an isolated incident. Every day, every night, every weekend we hear these stories. So today we stand united to say to you that people with disability in Australia represent the most detained, restrained and violated sector of our population. They are significantly overrepresented in prisons, institutionalised and segregated within communities, locked up in schools, confined in mental health facilities, incarcerated in detention centres and trapped within their own homes.¹

3.8 In its submission, Disability Clothesline, a disability advocacy group², told the committee the experience of Ms Kyla Puhle, a young woman with spastic quadriplegic cerebral palsy and scoliosis, who was found dead in her own home as a result of gross neglect in 2011:

I was left to starve in a beanbag, alone. My parents went to work surrounded by laughing, healthy children. They withdrew me from my services and when they found my body, it weighed 12 kilos. Nobody went to jail.³

3.9 The submission notes:

Puhle's [mother] and her husband were originally charged with Kyla's murder because they had allegedly made a conscious decision to deny her basic care—withdrawing her from her day program and leaving her alone in a beanbag during the day in front of the television, refusing her medical attention. The prosecutor said that it wasn't a momentary lapse, but neglect that continued over an extended period of time...that Kyla was literally starved to death.

When she died, 27 year old Kyla weighed just 12 kilos...

...In South Australia, where Kyla was starved to death, the offence of ill treatment of an animal—whether or not that ill treatment results in death—carries a maximum penalty of \$50,000 or four years in prison.⁴

1 Ms Carolyn Frohmader, Executive Director, Women with Disabilities Australia; Australian Cross Disability Alliance, *Committee Hansard*, Sydney, 27 August 2015, p. 37. See also: Australian Cross Disability Alliance, *Submission 147*, p. 6.

2 The Disability Clothesline collates accounts about people with disability who have been abused or neglected and aims to break the silence about violence, and abuse against people with disability. See: <http://disabilityclothesline.weebly.com/>

3 Disability Clothesline, *Submission 68*, p. [1].

4 *Submission 68*, p. [2].

3.10 The Australian Cross Disability Alliance (Disability Alliance) shared several lived experiences in its submission to the committee. These are three of the 70 separate cases presented to the committee:

Frances was physically beaten by a group of young girls at a regional TAFE institute. The violent attack was captured on CCTV footage. The local police advised Frances not to pursue charges because she was "mentally retarded" and there would be "no chance of any conviction" against the perpetrators...

Andrea lived in a violent relationship with her husband. Police had been called to Andrea's home on a number of occasions as a result of the violence, but advised Andrea there was little they could do for her. Andrea became pregnant. She delivered her baby in the local hospital. A week later police arrived at her house with child welfare officials. The police physically restrained Andrea whilst the child welfare officials took the baby. Andrea was told at the time that her baby was being taken because Andrea had an intellectual disability and because there was a history of domestic violence. Andrea was never offered counselling or any form of support for either the removal of her baby or the domestic violence. Andrea's baby was never returned to her...

Shelley is a young Aboriginal woman with intellectual disability who works at an Australian Disability Enterprise (ADE). Shelley has been subject to ongoing and intense workplace bullying and sexual harassment from 3 or 4 other workers.

One day, one of the male employees who bullies Shelley, took her by the hand, saying, 'Come on, come with me', and then grabbed her on her bottom. Shelley reacted, saying, 'Don't do that, don't touch me like that, I don't like it.'

She complained to her supervisor, who told the male employee that his behaviour was inappropriate. He is known to have sexually assaulted several other female employees. Although, this behaviour is ingrained in the workplace culture, there has been limited intervention by ADE management, in breach of all the usual protections afforded employees by industrial law. The ADE management claim that sexual harassment and sexual assault is the responsibility of the police to investigate, but the police did not respond or investigate these reports.

Shelley began to respond violently to the bullying and sexual harassment, and so ADE management suspended her from her job.⁵

3.11 The issue of hate crimes against people with disability were raised by some submitters to highlight the issue that people with disability are seen as less valued than other members of society:

Frederick Brooks, 17, was another young man with an intellectual disability. He received electric shocks to his penis and testicles, and had a burning sparkler pushed down into his penis; after his toes were crushed

5 Australian Cross Disability Alliance, *Supplementary Submission 147*, p. 8.

and his nose and ears burned with cigarettes, he was allowed to choke to death on his gag.

29 year old Gary O'Dwyer, an intellectually disabled man with an ABI [Acquired Brain Injury] who lived alone. He was seen as an easy target after the killers asked if he had any family, and his body was found with burn marks which were inflicted using a variac machine to apply electric shocks.⁶

3.12 This submission concludes with a poignant observation on how people with disability are viewed in modern day Australia:

People with disability are painted as being 'less than' in Australian culture, and our lives are consequently regarded as less, and 'other'.⁷

Experiences of violence, abuse and neglect: Institutions and residential settings

3.13 It is well-known that 'where people with disabilities live and the cultures of the organisations that provide services, in particular residential services, are significant factors that impact on risk of violence, abuse and neglect'.⁸ Deakin University noted that it is the 'isolation from broader society and the "closed" nature of disability services' that can lead to a 'corruption of care'.⁹

3.14 Ms Samantha Connor, of People with Disability WA, also noted the largest contributing factor for abuse is the lack of transparency in institutional service delivery:

People with a disability are most likely to be abused in segregated service environments, where abusive practices go unrecognised and unreported and where client and family participation in services is devalued. Delivering safe, open and accountable services that respond to individuals with capable staff and comprehensive accountability must be the minimum expectation[.]¹⁰

3.15 In its submission, Disability Clothesline noted the propensity for violence, abuse and neglect of people with disability living in institutional care to be 'swept under the carpet' and not be properly investigated. The submission contended that momentum for investigation and inquiry of any allegations of this nature requires the following thresholds to be met:

- A person with a disability is raped or abused or killed and there is enough evidence to ascertain that this has occurred.

6 Disability Clothesline, *Submission 68*, p. [87].

7 *Submission 68*, p. [88].

8 Deakin University, *Submission 109*, p. 5.

9 *Submission 109*, p. 5. See also: NSW Disability Network Forum, *Submission 55*, p. 2.

10 Ms Samantha Connor, Researcher, People with Disability WA, *Committee Hansard*, Perth, 10 April 2015, p. 33.

- The police or justice system are unable or unwilling to act, for a variety of reasons.
- A parent of a child or adult with a disability manages to garner enough interest (usually via a sympathetic journalist, after much letter writing and pleading to Ministers) to get public attention.
- The relevant Minister is forced to respond.
- A review is announced.
- After some lengthy time, the review is conducted.
- Occasionally an institution is closed. Sometimes changes are made. Often, nothing really happens at all.¹¹

3.16 In most cases, unsurprisingly, the criteria for momentum cannot be met. In most cases, victims and allegations are forgotten; victims are blamed for the crimes perpetuated against them; and the violence, neglect and abuse continues. It is unacceptable that people with disability who are victims of criminal actions cannot make allegations against a perpetrator and expect a normal police investigation and trial. The following section examines the lived experience of people with disability who live in residential settings, including institutional care.

Residential care

3.17 There are a range of residential care types used by people with disability. Residential care or 'cared accommodation' can include a range of shared supported accommodation, respite facilities, hospitals, nursing homes, and psychiatric hospitals. The level of support provided is largely dependent on the type of disability and the extent to which a person is able to complete everyday living tasks themselves. According to the most recent survey by the Australian Bureau of Statistics, there are 12,200 people aged 15–64 years of age that live in 'cared accommodation', the majority of whom (9,100 people) have profound core activity limitations.¹² These are vulnerable people with high level support needs.

3.18 The committee has received substantial evidence about the mistreatment of people with disability at a range of disability accommodation facilities. The Disability Clothesline provided the following accounts:

- A 29 year old man with quadriplegia who could only communicate using his eyes lived at a disability care residence. He was found suffocated with his face buried in his pillow. His death was found to be not suspicious despite an outstanding allegation of sexual misconduct against a staff member.¹³

11 Disability Clothesline, *Submission 68*, p. [67].

12 ABS 4430.0, *Disability, Ageing and Carers, Australia: Summary of Findings*, 2012, <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/4430.02012?OpenDocument> (accessed 25 September 2015).

13 *Submission 68*, p. [83-84].

- Mark, a 39 year old man with an intellectual and physical disability, and epilepsy lives in a group home. Mark uses body language to communicate his needs to others. When Mark refused to go to his day placement activity, two staff members dragged him along the carpet to the bus giving Mark second-degree burns in the process that were not medically treated. Despite a number of incident reports being lodged, the response was inadequate. The Ombudsman found that the 'department showed a disregard for the resident's human rights and the duty of care that the department has to exercises. It was considered that the assault on the resident was clearly a category one incident requiring the police and the family of the victim to be notified.¹⁴
- Client 1 was a 'profoundly disabled' 22 year old woman with a 'mental age equivalent to an infant of five months'. Client 1 had received a serious injury to her head:

an open bloody gash running down the centre of her scalp from crown to hairline...about one cm wide by 5 cm long...this horrible laceration had all the appearances and was consistent with her having been delivered a brutal blow to the head.¹⁵
- It was revealed during this examination that client 1 had not only been sexually assaulted by a staff member at the facility in which she resided but was also pregnant as a result. The child, when born, was taken from client 1. Client 1 was one of 122 people living at the Basil Stafford Centre that had been victims of violence, abuse and neglect.¹⁶

3.19 Ms Joyce Langmaid described the situation at her son's group home during a visit by family:

...a grandmother arrives to see her grandson on a freezing Tasmania winter's day. She finds him locked out of his own home in a courtyard that is used as a cage. No staff are present and she cannot get to him. Staff are located at the rear of the property smoking and laughing. The courtyard was a regular punishment and lockdown space, no amount of family requests or demands or reporting this to the senior practitioner ceased this restrictive practice in three years. But as expected the provider made it clear we the family were the problem and the service decides to stop family visits and drop in and time for Nan to visit him in his own home.¹⁷

3.20 Youth Disability Advocacy Services (YDAS) presented a number of lived experiences in their submission. One focuses on the inappropriate expectations that are forced on people with disability that would not be expected of other Australians:

14 Disability Clothesline, *Submission 68*, p. [67].

15 *Submission 68*, p. [67].

16 *Submission 68*, p. [67]. See also: Queensland Crime and Misconduct Commission, *Report of an inquiry conducted by the Honourable D G Stewart into allegations of official misconduct at the Basil Stafford Centre*, March 1995.

17 Ms Joyce Langmaid, *Submission 115*, p. [1].

Kelly, a 22-year-old woman living in a Community Residential Unit who has physical disabilities and requires full assistance with toileting, menstrual care and showering, made multiple complaints to staff about the lack of female support workers. It is unacceptable to her, and an abuse of her right to bodily autonomy, to be forced to have her personal care needs attended to by male staff. This has resulted in her foregoing showers and delaying bowel movements, leading to multiple and very serious health problems. Kelly was very anxious about staff finding out that she is accessing advocacy services for fear of retaliation and further neglect but could not attend meetings outside the Unit to discuss her case because she needed attendant care to leave the house which is not provided for her. (YDAS client, February 2015)¹⁸

3.21 Neglect within hospitals around the performance of fundamental tasks such as the provision of a safe environment during mealtimes was highlighted by some submitters and witnesses. The intersection of institutional care and transition to a home or other place of residence is significant as this is often where fundamental care needs are overlooked. Mr Peter Marshall provided a detailed case study of a family member who had a long history of being transferred between different residential facilities, interspersed with hospital stays. Mr Marshall submitted that in many instances, the lack of continuity of care resulted in medical neglect:

We ask for a pre-release medical discussion. This does not happen, but we do meet the team after his release. To my absolute amazement neither doctor was one of the three that first met me. They insist that they were in charge all along, and look at me, as if I am a bit tired and emotional.

During this debacle we find out that Eric is on a psychotropic drug every day, and three doses of [Valium] a day...

... Eric is admitted to Westmead again, to Neurology. They ascertain that there is no underlying physical illness. The head of Neurology, asks why Eric is on all these drugs, and suggests that he be immediately, but slowly, taken off them.¹⁹

Further examples of neglect are presented in Box 3.1 below.

18 Youth Disability Advocacy Service, *Submission 88*, pp [2–3].

19 Mr Peter Marshall, *Submission 153*, pp 3-4.

Box 3.1: Examples of neglect against people with disability in government and non-government cared accommodation

Three young men in their early 20s, all with severe intellectual disability (ID)¹, and non-verbal, left alone overnight in their group home while the only staff member on shift went out on a date.

Elderly man with moderate-severe ID and early dementia became incontinent. Staff attributed this to the dementia and failed to follow advice to have a GP check to rule out infection. Man developed a serious kidney infection.

Staff failure to heed a 'difficult' parent's request to have a mole on her intellectually disabled daughter's back checked by a doctor. Mole turned out to be a melanoma which resulted in the young woman's eventual death.

Staff in a high support needs group home spending most of their shifts chatting and drinking coffee while the residents were left to their own devices.

Young woman with severe ID and non-verbal tied to a chair when she became agitated and started to throw objects around in her 24/7 staff-supported individual option.

Woman with mild—moderate ID being given prescribed medications not in accordance with medical directions—medications stopped and started depending on staff opinion. In same group home, staff 'borrowed' money from client's bank accounts to tide themselves over to pay day. Also large amount of prescription sleeping pills (Temazepam) unaccounted for.

Teenager with severe ID, non-verbal and incontinent stripped naked and forcibly held on toilet for up to 30 minutes while she screamed. Investigation revealed that she had a 'mechanical' bladder problem which prevented her urinating unless she was extremely relaxed e.g. travelling in a vehicle or going to sleep at night.

Source: Australian Psychological Society, *Submission 41*, pp 8–9.

3.22 An issue that was repeatedly raised by different submitters to this inquiry is that the abuse reporting mechanisms, discussed in greater detail in chapter five, do not adequately protect people from abuse. In some cases, reporting mechanisms can actually cause abuse:

Retribution is such a difficult thing. You complain about someone who is providing you with very intimate levels of care, and then the management still sends that same person to look after you. That is completely unacceptable, particularly in the nursing home domain. We had one complaint against a nursing home by a number of people. They were so scared that, when we took it to the Aged Care Complaints Scheme, we had to submit that complaint anonymously. They asked, 'How can you submit an anonymous complaint?' and we said, 'They're really scared.' Imagine going to bed at night and you are scared in your own home. That is what was happening.

I do not know the technicalities or the practicalities, but it is clear that, at the very least, if someone has made an allegation of abuse, that person

should not have to receive care or interaction in any way until that person is satisfied.²⁰

Aged care

3.23 The inquiry received evidence from submitters in various states and territories, detailing the abuse of people with disability, often age-related disability, in aged care facilities.

3.24 During the course of this inquiry, a coronial inquest was underway into the murder of a 94 year old man with dementia, in an aged care facility in Canberra. The coronial inquest was told that a nursing assistant found Mr McCulloch in his bed with significant nose and face injuries. Without checking Mr McCulloch's pulse or assessing whether he was alive or dead, the nursing assistant left the room to inform the Director of Nursing. Initially, the nursing assistant was told not to call police; however, nearly an hour later a decision was made to call police:

In the meantime, the scene was left unsecured, Mr McCulloch's body was left unsupervised, and the man staff suspected to be the killer was left free to roam the ward.

Detective Sergeant Casey said there was evidence the body was interfered with, and a doctor later found a pillow had been placed over Mr McCulloch's face.

When they eventually arrived, police also found paper napkins shoved down his throat, something that may have contributed to his death.

The suspect, whose name is suppressed, was left in the same room as the body for periods of time.

He is also thought to have assaulted three others in Jindalee that morning, with the victim of the earliest attack later telling police:

"He grabbed my hair, he grabbed my throat. I'm afraid he's going to kill me."

Staff later found another resident with facial injuries, her head covered by a bloodied pillow. The woman survived the attack.²¹

3.25 Although the Coroner had not handed down his findings at the time of writing this report, it is deeply concerning to note that this is the third inquest into this facility

20 Mrs Sonia Di Mezza, Deputy CEO, ACT Disability, Aged and Carer Advocacy Service, *Committee Hansard*, Canberra, 21 August 2015, p. 35.

21 Christopher Knaus, 'Body left unsupervised, staff not to call police after dementia ward killing', *The Canberra Times*, 4 May 2015, <http://www.canberratimes.com.au/act-news/body-left-unsupervised-staff-told-not-to-call-police-after-dementia-ward-killing-20150504-1mzfry.html> (accessed 25 September 2015).

in recent years.²² The committee notes the distress caused to families who are struggling to get answers to what happened to their loved ones. Similar to other forms of residential care, aged care residents are particularly vulnerable to violence, abuse and neglect due to their age, frailty and specific disabilities such as dementia.

3.26 Those who live in aged care facilities face much the same risks as those living in other cared accommodation. At a public hearing in Canberra, Mrs Sonia Di Mezza told the committee about Katrina:

[A] frail old woman in her 90s who suffered from some mobility issues and who lived in a residential aged care facility. One day Katrina went to the kitchen area of the facility to make herself a cup of coffee. While she was there, a carer approached her, shoved her in a corner and touched her in the genital region. He mocked her and dared her to complain, saying that no one would believe her and that he would be back to give her more. Katrina was shocked and devastated by this. She was afraid to go anywhere in the facility and became depressed.²³

3.27 Box 3.2 contains a number of lived experience examples reported in the Western Australian aged care system in the last six months.

Box 3.2: Examples of abuse and neglect in the Western Australian Aged Care system reported in the last 3–6 months.

Recently during an education session an ambulance driver informed us that she had been called to pick up an elderly lady who was in a facility, had a number of disabilities and had had a fall. She was in her eighties, and the ambulance driver had been told the fall was within the last 24 hours. When collecting the woman the driver noticed that the bruising on the woman's leg was actually green and yellow, indicating the bruise was considerably older than 24 hours. The woman was in a lot of pain when she was moved and transported, and when diagnosed in the hospital she was found to have quite a bad fractured femur. There was no apparent reason for this apart from the fall...

A daughter was concerned that her mother had bruising on the top of her head. She was informed by a facility that this had occurred as a result of a fall; but, as the bruising was right on the top of the head, the daughter was not convinced that this was the way this injury had actually occurred. Later hearsay rather than absolute proof was that somebody had actually hit the woman over the head with the buzzer because she was a person that liked to buzz fairly frequently. The daughter chose not to complain but removed her mother to another aged-care facility because she felt that she was not getting any kind of hearing by the people who worked in the facility...

22 Megan Gorrey and Christopher Knaus, 'Narrabundah Jindalee Aged Care Residence nursing staff did not check pulse of man found dead in dementia ward', *The Canberra Times*, 24 September 2015, <http://www.canberratimes.com.au/act-news/narrabundah-jindalee-aged-care-residence-nursing-staff-did-not-check-pulse-of-man-found-dead-in-dementia-ward-20150924-gjtsuu.html> (accessed 25 September 2015).

23 Mrs Sonia Di Mezza, Deputy CEO, ACT Disability, Aged and Carer Advocacy Service, *Committee Hansard*, Canberra, 21 August 2015, p. 33.

Box 3.2 (continued)

A woman who lives in an aged-care facility in the rural areas had some difficult behaviours but was very well supported by her family and husband in the area. The facility decided that they could not manage her behaviour and informed her husband she would have to be moved. The closest other facility was in excess of 100 kilometres away, so it would have made it impossible for him to visit his wife. At that time he just walked down the street to see her. After a meeting with Advocare staff, family members and the facility staff, it was agreed that they would use the services DBMAS to write a specialised care plan to manage this lady's behaviour. A month or so later the family rang us and said that the facility decided that they did not want to do this, because of the cost that might be involved, and that they were pushing further for the lady to be removed to another facility...

Another lady who lives in a facility in the southern area of Perth liked to sleep with a toy cat. She did like to call staff at night, so staff punished her by removing the cat from her bed. She was found by her family to be crawling around on the floor one morning, looking for the cat and being very confused. She was taken into hospital, where the doctor actually cross-examined the son as to why this woman was so badly covered in bruises. He explained that she was actually in an aged-care facility. The doctor has recommended that the family look into the care that she is being provided, and the family are now contacting the Aged Care Complaints Scheme (see box 3.3 below).

Source: Ms Sharon Richards, Acting CEO, Advocare, *Committee Hansard*, Perth, 10 April 2015, p. 1.

3.28 Box 3.3 outlines the current complaints handling mechanisms and mandatory reporting requirements for Australian Government funded aged care facilities.

Box 3.3: Aged care complaints mechanisms and mandatory reporting requirements

The Aged Care Complaints Scheme (scheme) investigates complaints relating to an approved provider's responsibilities under the *Aged Care Act 1997* or Commonwealth funding agreement. Complaints that fall outside this scope are referred to other organisations. Responsibility for the scheme transferred from the Department of Social Services to the Department of Health in November 2015. From 1 January 2016, responsibility for the scheme will transfer to the new Aged Care Complaints Commissioner.

Under section 63-1AA of the *Aged Care Act 1997*, approved providers of Commonwealth aged care services have clear mandatory reporting requirements in relation to alleged or suspected 'reportable assaults'. Reportable assaults are defined as 'unlawful sexual contact, unreasonable use of force, or assault' as defined by the *Accountability Principles 2014* and must be reported to the police and the Secretary of the Department of Health within 24 hours. The *Accountability Principles 2014* prescribe the circumstances in which the requirement to report an alleged or suspected assault does not apply.

The Productivity Commission's 2011 report on aged care suggested there was not enough evidence to suggest that a review of mandatory reporting requirements for assault in aged care facilities was an 'immediate priority'.

Source: Office of Aged Care Quality and Compliance, *Aged Care Complaints Scheme*, <http://agedcarecomplaints.govspace.gov.au/>; Productivity Commission, *Caring for Older Australians*, vol. 2, August 2011, p. 447, <http://www.pc.gov.au/inquiries/completed/aged-care/report> (accessed 19 November 2015).

3.29 Another issue raised by submitters has been that of young people (aged under 65 years) with severe disability who currently live in residential aged care facilities (RACF). This committee has recently concluded an inquiry into this issue finding that there were over 7,000 young people living in aged care, of which over 90 per cent were aged 50–64 years. This report concluded that aged care was inappropriate for the vast majority of young people for a range of reasons including instances of violence, abuse and neglect.²⁴ In her appearance before the committee in August, Ms Susan Salthouse, Official Visitor for Disability in the Australian Capital Territory concurred with this assessment:

Our major concern is about the quality of life and the safety of people under 65 who live in aged-care facilities. On the whole, their capacity to maintain a level of independence is compromised. They have limited access to age-appropriate activities and they lack appropriate mobility equipment or therapy to maintain their physical capabilities. As a result, many of these individuals whom we visit have narrowed their horizons and no longer seek external contact or activities.²⁵

3.30 The passive disempowerment of individuals—regardless of age—within the aged care environment was also raised by other witnesses to the inquiry. Ms Susan Richards, acting CEO of Advocare noted:

If we want to improve aged care or care that is being given in facilities for every person who lives in there—bearing in mind that most people in there have one disability or another—then we need to be stronger with maintaining their rights as individuals and we need to see them as people who can contribute back. Currently, that is not what is happening. Instead of looking at what the UN sees as the 18 principles for older people, we see people parked in front of televisions who have never watched a television in their life. They are not being treated as individuals, they are being treated as a nuisance more often than not. In part, that is because the staff are very busy, overworked and probably insufficiently trained.²⁶

3.31 Ms Richards also noted the attitude of some aged care providers:

When you speak to aged care facilities, quite often they will say: 'Don't you expect people to deteriorate when they come in here?' and my answer is: 'No.' They are getting three square meals in a day, being looked after in a nice, warm, comfortable environment. I would expect them, in some ways, to improve, not to deteriorate.²⁷

24 Senate Community Affairs References Committee, *Adequacy of existing residential care arrangements available for young people with severe physical, mental or intellectual disabilities in Australia*, June 2015. In the context of aged care, 'young people' are deemed to be 65 years of age or under.

25 Ms Susan Salthouse, *Committee Hansard*, Canberra, 21 August 2015, p. 28.

26 Ms Sharon Richards, *Committee Hansard*, Perth, 10 April 2015, p. 5.

27 Ms Sharon Richards, *Committee Hansard*, Perth, 10 April 2015, p. 3.

3.32 Moreland Community Legal Centre provided a submission which focused on the issue of abuse of people with disability in aged care facilities. The submission included a number of case studies, including the following:

One client reported that she had found her mother blue in the face due to a badly fitting neck collar and on a number of occasions choking on liquid feed administered in a PEG feeding apparatus because of faulty positioning despite her putting a big diagram on the wall to indicate the right position for PEG feeding. She also developed pressure sores which were not properly attended to and became much more severe. When she started attending more frequently she was threatened with being banned from attending her mother altogether because the staff claimed she was bullying them. One staff member refused to attend to her mother in her presence saying she had to leave the room, and would not work under her observation. When she made a complaint to the Aged Care Complaints Line she was threatened by the management of the organisation that she would be banned from attending. She was her mother's only child and there was no-one else to advocate for her.²⁸

3.33 The submission from Moreland Community Legal Centre provided additional analysis of the aged care system and made the following points in regards to provisions of the *Aged Care Act 1997*:

- the Aged Care Quality Standards are not enforceable except as a requirement to retain a service delivery licence or Commonwealth funding;
- mandatory reporting requirements only cover incidents which would be considered a criminal offence;
- the Charter of Residents Rights is not enforceable; and
- the Aged Care Commission lack impartiality as it is not independent of the department that administers aged care, and its aged care complaints scheme focuses on dispute resolution rather than investigation.²⁹

Experiences of violence, abuse and neglect: Schools

3.34 From the mid 1970's Australia has been transitioning and integrating students with disability from segregated special schools into mainstream classrooms. The primary drivers behind this transition have been the principles of inclusion and normalisation for these students.³⁰ Most children with disability attend classes in mainstream schools (65.9 per cent) with 24.3 per cent attending special classes in mainstream schools and 9.9 per cent attending special schools. Students with a

28 Moreland Community Legal Centre, *Submission 87*, p. 3.

29 *Submission 87*, pp 3-6.

30 P.Kell, W. Vialle, D. Konza and G. Vogl (eds), *Learning and the learner: exploring learning for the new times*, University of Wollongong, 2008, p. 39.

disability represent one in 12 of all students enrolled in mainstream Australian schools.³¹

3.35 This section explores evidence, which shows that young people with disability are treated differently to their classmates due to their disability. Abuse, neglect, bullying, and physical and sexual violence are seen as acceptable against people with disability and not responded to in an acceptable and appropriate manner due to the misplaced attitude—by teachers, principals, social workers and police—that those with a disability can be treated differently because of their disability.

3.36 In its submission to the inquiry, Children with Disability posed a series of questions that are asked—directly and indirectly—by many other submitters and witnesses to this inquiry:

Why is it okay for children with disability to be denied access to a toilet? Why is it okay for a student to have his work desk in the sick bay at his school? Why is it okay to leave a child tied in a highchair or pram for hours to restrict movement? Why is it okay to not search for a reason a child is extremely distressed and self-harming? Why is it okay to deny a child use of an essential resource she needs to communicate? The direct experiences of children and young people indicate that many incidents of abuse are deemed acceptable when a child or young person has a disability.³²

3.37 Ms Joyce Langmaid juxtaposed the expectations of the non-disabled and of those living with a disability, and asks why these expectations are not the same:

People take their children to an accredited and quality assured child care and pick them up safe and sound at the end of the day. We do not have that level of safety assured to our son.

Fussy and particular mothers are embraced inside schools as wanting the very best for their child and respected. We do not have that we are vilified, used and ignored because of our son's disabilities.

We just want what is equitable and provided to others without question. Our son did not choose to become ill and become severely disabled. We chose to become parents, no matter what. He is our son and we will stand speak advocate agitate and care no matter what.³³

3.38 Educational institutions such as schools and early childhood learning centres are entrusted by parents on a daily basis to support, nurture and educate their children. Evidence to this committee suggests that this is not the experience for many children and young people in these places.

31 Australian Bureau of Statistics, *4429.0—Profiles of Disability, Australia, 2009: Children at School with Disability*, June 2012, <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/4429.0main+features100302009> (accessed 30 September 2015).

32 Children with Disability Australia, *Submission 144*, p. 6.

33 Ms Joyce Langmaid, *Submission 115*, p. [5].



Image 1: Child with autism being physically restrained in a purpose built chair.

Violence, abuse and neglect

3.39 In its submission, Families Australia noted that there is an increased risk of violence, abuse and neglect for children and young people with disability in 'school and transportation to and from school'.³⁴ The Disability Alliance stated:

Violence and abuse perpetrated against children and young people with disability in schools, educational and child care settings, including out-of-home care, is a widespread, unaddressed problem in Australia. Restraint, seclusion, segregation, sexual violence and abuse, withdrawal of food and drink, bullying and harassment are commonplace yet are often downplayed and justified as 'behaviour management' and/or 'behaviour modification' practices.³⁵

3.40 These experiences range from physical abuse and violence to emotional abuse and bullying from teachers, aides and fellow students alike. A snapshot of these experiences can be seen in Box 3.4.

34 Families Australia, *Submission 3*, p. [3].

35 Australian Cross Disability Alliance, *Submission 147*, p. 40.

Box 3.4: Lived experience of children and young people with disability in the Australian education system

Mainstream schools have not met (my daughter's) needs...(she was) sexually harassed by students and teachers—Parent.

My daughter attended a social program, (where) she was shown and directed to massage violent male students...This was excused away in the complaints process, no one questioned this or supported my daughter's need for specialist counselling. She was manhandled by up to four adults, including males. She learnt about fear, failure, humiliation, isolation, violence, abuse—the list goes on—Parent.

My 7 year old son experienced peer to peer sexual assault at school. I was informed 'x' (the sexual assault counselling service) don't have the capacity to see children with disability.

My brother was beaten by his teacher last year...(He) was in the middle of a seizure while he was beaten. He has a very small vocabulary made up of mostly echolalia and was unable to tell us what happened—Sibling.

On placement in a special school, I saw kids being dragged by their hair and shoved outside— Student teacher.

(My daughter)...was smacked in kindergarten by her teacher. She was the size of a three year old and forced to sit on the floor at the front of the class, she moved off the 'X' he had drawn on the floor and was smacked. As she was non-verbal, the other children told me about it and all gave evidence... No disciplinary action against the teacher (was) taken—Parent.

In 2005 my son began in a mainstream, government school...By mid-2006 ongoing, unchecked and unreported bullying and harassment by older students resulted in a head injury. After I lodged a complaint the school decided they were ill equipped to ensure my son's safety and support his education—Parent.

(My daughter) got so badly bullied, (she was) stabbed with an earring in year three (but) no one cared—Parent.

A 12 year old student was king hit, a sudden and forceful punch to the head, and knocked out by one of his peers. When he regained consciousness he had to phone his parents himself because the school had not done so.

A girl in Grade two who was being regularly bullied by a boy in her class and kept coming home with bruises on her arms. One day the boy ran up to kick her and knocked her to the ground leaving her almost unconscious. The school took no action. Two weeks later she was found at lunchtime hanging by a rope, tied under her armpits, from the top of the slide in the playground. Her mother was not told in person but read about it in the communication book used for regular written correspondence from teachers.

(My son) has broken an ankle through bullying, has been beaten up on the way home from school and is now under the care of a psychiatrist and psychologist—Parent.

Box 3.4 (continued)

I received a call at work from the school to come and pick my son up as he had a runny nose. My husband and I were unable to leave work immediately, so my mum collected him from school. Our son was brought out from a room by three teachers, including his own teacher, with a bloodied face. The teachers and receptionist said that he had just had an accident whereby he had sneezed and bit his bottom lip. Mum then drove him home and cleaned up his face. She discovered that it was full of severe scratches, one near the eye, in addition to cuts on his lip. She rang the school for an explanation and was told that his teacher would call back to discuss. His teacher left a message later, but did not return any further calls after my husband and I left messages looking for an explanation...(Later) an incident report was sent home stating that another student had caused the injury—Parent.

I saw one of the staff wrestling a teenage boy with autism to the ground and screaming profanities at him. I think he bit her, not sure. It was all out of control—Parent.

My child was abused at mainstream school. She was humiliated, isolated (and) placed in the corner facing the wall...That is just the tip of the iceberg of what happened to her—Parent.

...Remembering all the times I have been bullied at school, I sink into my darkest times. I am being continually pushed over the edge, no-one has resolved the incident, and my Mum is not supportive enough to get me out of the greatest depression of my life. Now, I am considering killing myself just so no-one can bully me anymore—Student, boy aged 14 years.

For me the worst thing is the bullying. There are just so many kids that are freaked out by disability and some teachers are as well, to be honest. This year I have been hit in the head, punched, called a retard just too many times or on a not so bad day just told I am not normal. I sometimes over-react to the bullying and then I get detentions for my behaviour. Once I had to wear my uniform to parent/teacher day because I had a detention. I then had to empty rubbish bins for 90 minutes. It didn't make me think about my behaviour, it just made me incredibly sad. How does that help someone learn? All this stuff really impacts on a kid's self-esteem you know—Student, boy aged 13 years.

I get bullied about my disability and the way I work. At lunch time I go to the library to avoid this. I wish people would accept me—Student, boy aged 10 years.

My son was horrendously bullied, isolated, humiliated, tormented (and) left to his own devices. My son was self-harming and pushed to the brink of suicide because of the school system—Parent.

Source: Children with Disability, Submission 144.

3.41 Removal or exclusion from normal school activities is common for children with disability. This exclusion by teachers and principals is a form of emotional bullying and can only negatively impact on a child's sense of involvement, community and educational outcomes. As one parent noted:

School says they only (provide) support for 'core learning' (areas) of literacy and numeracy and will not support other disability-specific needs. (My child is) not permitted to attend lunch or any classes after 12pm each day (or) attend sports carnivals, any sports program, interschool sports, excursions or camps—even if we go (to provide support).³⁶

3.42 Ms Fiona Given, a person with cerebral palsy, relates her lived experience at school as a person with disability. Ms Given's submission focuses on the role of her support aide during her high school years. This support aide performed her duties in an inappropriate and insensitive way. Ms Given also felt excluded from regular school activities by the very person who was meant to help maintain connection and participation in this area. For example:

There were always problems with her performance of her duties in supporting me. She spent most of the time socialising with teachers and other students rather than supporting my participation. All she really assisted me with was going to the bathroom and personal care on excursions and camps. She provided minimal support with participation in my actual classes. She made friends with the other girls in my year which hindered my friendships and isolated me, this later created a barrier from me speaking out when the abuse started to occur...

I generally felt bullied by her, overpowered and uncomfortable in her presence.³⁷

3.43 Despite this support aide being reported, she went on to work in other government schools.³⁸ Ms Given says that the reason she did not report her aide for emotional abuse and bullying was that Ms Given did not want to be indirectly punished as a result of this. Ms Given said:

I fought so hard to go to a mainstream school that I feared that if I complained about my aide I would have been sent to a special school. The results of this would have been catastrophic for me. I would not have been able to go on to university and have a career.³⁹

3.44 The prevalence of emotional abuse has been described as rife, 'especially among people with little or no speech' as it is difficult for those people to speak up in their own defence at the time of the incident or later to report it.⁴⁰

36 Children with Disability, *Submission 144*.

37 Ms Fiona Given, *Submission 34*, pp [1–2].

38 *Submission 34*, pp [1–2].

39 Ms Fiona Given, *Committee Hansard*, Sydney, 27 August 2015, p. 14

40 Ms Fiona Given, *Committee Hansard*, Sydney, 27 August 2015, pp 14–15.

3.45 Even teachers who attempt to intervene when students are being inappropriately treated are often left as victims themselves:

I commenced work at BSHS [Brisbane State High School] 2009 and from the moment I began this teacher abused our students without impunity. I complained repeatedly to the HOSES [Head of Special Education Services] head of our department to no avail.

The final straw for me came in 2011 when this teacher in front of two witnesses tried to cause a fight with a very unstable student. The teacher kept pushing the boy in the chest daring the boy to punch him. In my attempt to stop the teacher I was deliberately injured by him to get me to leave. The whole experience was terrifying and left me suffering from PTSD [Post Traumatic Stress Disorder].⁴¹

3.46 Some submitters highlighted that 'there is a false idea that by infantilising people with disabilities and not teaching us these life skills we are being kept safe':

As an example, it appears that many students with disabilities miss out on sex education in school for various reasons, including but not limited to the fact that it is often a component of the physical education curriculum in which many students with physical disabilities, for example, might not participate.

There is also a concerning lack of information about personal safety, relationships and sexuality for people with cognitive impairment and/or low literacy or for people who may not know much about these topics for other reasons, such as their cultural background. What information is available on the subject often seems to assume a certain level of prior knowledge, which is not true of everyone. Some organisations are doing good work in closing these gaps but there is certainly more to be done.⁴²

Transport and other services

3.47 The committee recognises that violence, abuse and neglect is not simply confined to the classroom and the schoolyard. A common place that abuse occurs is on transport to and from school, but can also occur in other environments.⁴³

3.48 In her submission, Mrs Catherine McKenzie described to the committee her autistic son's school bus journey that is itself a form of neglect, because it takes two hours in each direction, despite living only 16 kilometres from the school.

These children are being treated unfairly, how do we expect our children to learn under these conditions when they do so much travel just to get to and from school. They are treated in an inhuman way having NO access to

41 Ms Anna Lorcan, *Submission 24*, p. [1].

42 Ms Kelly Vincent MLC, Dignity for Disability, South Australian Parliament, *Committee Hansard*, Adelaide, 28 August 2015, p. 58. See also: Deakin University, *Submission 109*,

43 Families Australia, *Submission 3*, p. [3].

toilets, cannot stretch their legs in the two hour ride and cannot drink or eat.⁴⁴

3.49 Further to this, Mrs McKenzie noted a range of other side effects that impact on her son's and other children's ability to learn and enjoy a reasonable quality of life as a result of the school bus journey. These include dehydration; sickness, 'more meltdowns' and unable to eat properly due to exhaustion and being run down from the school bus trip; missing out on after school therapies, sports and other activities; medications being administered at sub-optimal times due to being on the bus; the emotional and physical toll on the child and families; and children being 'less attentive' and 'possibly more disruptive' during classes.⁴⁵

3.50 Spending four hours per day on a school bus for a person with a disability is not unusual. In fact, it is Victorian Department of Education and Training (DET) policy that children can 'spend up to two hours one way on a bus from their home to the school'. In addition to not being able to eat, drink, or take bathroom breaks, 'some children may be strapped into a seat for that length of time due to the fact that, understandably, they do not wish to remain seated'. It is also acknowledged that these long trips do not reflect the distance that children live from their school, but rather the lack of bus services that result in all children with disability being loaded into one bus regardless of where they live. Ms Julie Phillips, a disability advocate, notes that this is 'due to a disinterest by the Victorian DET in spending sufficient money in order to ensure that students with disabilities are treated humanely'.⁴⁶

3.51 Mrs Carmen Pratt-Hincks, a disability advocate, highlighted the inappropriate treatment of Corrina, an 11 year old girl, by her school bus driver:

They put [Corrina, 11 years] in a harness on the [school]bus so she could not move. This upset her for the whole day. She started showing distressing behaviours like head banging and tearing her clothes.⁴⁷

3.52 The Bolshy Divas, a disability advocate organisation, presented the lived experience of nearly 40 people with disability, many of them children who cannot speak for themselves:

We bear witness [to] David Gitsham and the other 33 victims of South Australian bus driver Brian Perkins who raped and sexually abused those children and an uncounted number of others during his employment at St Ann's, a Catholic school.

The abuse happened over a long period of time in the eighties and nineties, but the school and church did not tell the parents what had happened for many years. For years David screamed himself awake and would get up in the middle of the night screaming. His parents moved down to sleep in the

44 Mrs Catherine McKenzie, *Submission 100*, p. [1].

45 *Submission 100*, p. [1].

46 Ms Julie Phillips, *Submission 131*, p. 49.

47 Mrs Carmen Pratt-Hincks, *Committee Hansard*, Perth, 10 April 2015, p. 27.

garden shed. Other boys who were abused became aggressively sexual and others were sent to institutions.

We bear witness to David and other children and adults whose voices remain unheard, because of professional cover-ups.⁴⁸

3.53 The Bolshy Divas also detailed the betrayal of the trust of a young girl and her family by an organisation supposed to provide respite to Amber during the school holidays:

We bear witness for Amber, a 12-year-old WA schoolgirl who went to a school holiday program for children with disability in Western Australia last year and returned with a cut so deep to her vagina that she required eight stitches and several days in hospital. Although her mother took her to the hospital, and police and the child protection unit investigated, nobody ever admitted accountability, and the family is now too terrified to access respite. The hospital said that it was unlikely to be an accidental injury caused by a fall as Amber was wearing a continence aid at the time. Amber does not speak and could not tell police what had happened.

We bear witness for Amber and for the other children who have been injured in school holiday programs for children with disability.⁴⁹

3.54 The mother of a young daughter with a disability relates the circumstance in which her daughter was left in the care of a childcare centre:

I took my daughter to a NSW child care service (the centre) one morning and she was well, happy and able to walk inside the building on her own with her usual level of caution. I went to collect her from the centre at lunchtime and found her sitting on the floor of the school hall all by herself. Staff explained that she had been left there to think about her behaviour as she had a temper tantrum and had refused to walk. I saw immediately that she was in pain and incapable of walking and I had to carry her with her legs dangling down, to my car.

I then presented my daughter to the local hospital with x-ray revealing a broken hip.⁵⁰

3.55 Despite her daughter naming the staff member responsible for the injury, that person was cleared of any wrongdoing. The mother was quite proactive on this issue, contacting a range of government bodies (NSW Department of Ageing, Disability and Home Care, Department of Education and Training, Department of Family and Community Services, and the Australian Human Rights Commission), about this incident at the time and shortly after, yet it seems that very little has been done. The mother noted:

48 Ms Zel Iscel, Member, Bolshy Divas, *Committee Hansard*, Perth, 10 April 2015, p. 14. See also evidence from Ms Connor on this page and page 16. The Bolshy Divas came prepared with over 550 stories from individuals and groups of violence, abuse and neglect against people with disability.

49 Ms Jackie Softly, Member, Bolshy Divas, *Committee Hansard*, Perth, 10 April 2015, p. 18.

50 Name withheld, *Submission 54*, p. [1].

It made myself as a parent realise just how vulnerable my daughter and other people with disabilities are, particularly those with limited verbal communication.⁵¹

3.56 The lived experience of Taylor, a 15 year old girl with disability, who was sexually abused on the school bus and her unsuccessful struggle for justice is outlined in Box 3.5.

Box 3.5: Taylor's account

Taylor is 15 years old and she has Prader-Willi syndrome. Two years ago Taylor was raped on the special school bus in the southern suburbs of Perth. She was digitally penetrated by another student, a 16-year-old boy, for an hour. Taylor did not say anything when she got off the bus at home but next day she told the staff she had been raped. The principal told her she had not been raped and talked to her about the seriousness of making accusations. She sent Taylor home with a letter to her parents that said the school would like to talk to them about Taylor being suspended. Taylor's mother asked her to write her account of the rape, and Taylor did—and the account is quite specific. Taylor is adamant that she did not want the student to put his fingers in her vagina and that she said no. Taylor was 13 years old at the time.

A meeting was proposed for the next day and the school told Taylor's mother that the boy who raped Taylor would also be attending the meeting, with his parents. Taylor's mother flatly refused. Taylor's mother attended with her support person, Taylor's psychologist. The mood was hostile. The school had concerns that Taylor continued to use the word 'rape' when referring to the rape that was carried out against her on the bus and it said other students were upset by the use of the word. The solution was to implement a containment policy whereby Taylor would be sent to detention in the office for three weeks. The purpose of this was to minimise the exposure of the other children in the learning support unit to the account of Taylor's rape and to prevent Taylor from speaking out about it. Taylor's mother and the psychologist objected strenuously to this arrangement because 'Taylor should not be punished for being raped'. Eventually it was agreed that she would be let out with the other students at recess and lunchtime but would have to be under the constant supervision of an education assistant.

After the meeting, Taylor was segregated from the other students. It is the mother's opinion that Taylor's segregation and the reinforcement that she had done something bad was almost as damaging to her as what happened to her on the bus. Taylor's mother contacted the Department of Child Protection; there was no mandatory notification made by the school. After some months, the Department of Child Protection said they could not investigate as it was outside their mandate and it had occurred in a community setting. They said they would return the matter to police.

After some further months, they told Taylor's family that the police would not investigate as the perpetrator has an intellectual disability—and no contact was ever made between Taylor, her family and the police. A few years on, Taylor now has suicidal ideation and has been prescribed Prozac. She changed schools and her mother now must now drive her to school every day—a half-hour trip. This means her mother cannot work. Her mother says she lives from day to day.

Source: Ms Samantha Connor, Committee Hansard, Perth, 10 April 2015, p. 31.

51 Name withheld, *Submission 54*, p. [2].

3.57 Another significant source of violence and abuse of children with disability is the use of seclusion and physical restraint in schools. This issue is detailed in chapter four, which discusses disability-specific interventions.

Trauma recovery

3.58 The committee was given first-hand accounts of violence from a large number of people during the course of this inquiry. Many of these witnesses raised the issue of the ongoing trauma as a result of their experience of violence, abuse or neglect, that could not be resolved through achieving a complaints or criminal justice outcome. The need for specialist trauma recovery and counselling services to address these issues was raised by Working Alongside People with Intellectual and Learning Disabilities – Sexual Violence Prevention Association (WWILD):

It is WWILD's experience that people with intellectual disabilities require individual support and advocacy when seeking support and justice when having had experienced violence, abuse and neglect within institutional settings. In many cases that support may be a family member or other committed person, but in many cases it is important and useful for that person to have an independent advocate to raise and address issues alongside them.

3.59 WWILD also outlined the need for individual counselling to assist people to manage trauma, and stressed that such services should understand the disability context:

This work [individual counselling] supports the person to manage the effects of trauma, and often works to support people to understand their own personal relationships, what they do and don't want going forward. This often involves sharing information with important supports in their life about what will help them gain more control in their lives...

On another level, the impacts of the abuse, exploitation and neglect experienced by people with intellectual disabilities in institutional and residential settings is exacerbated and felt more severely due to the lack of recognition of the effects of abuse, the minimising of violence and the silencing of victims.⁵²

3.60 Children with Disability Australia also discussed the need for counselling services that can meet the needs of people with disability, citing instances where children with disability were refused counselling services by mainstream providers:

My 7 year old son experienced peer to peer sexual assault at school. I was informed 'x' (the sexual assault counselling service) don't have the capacity to see children with disability.⁵³

52 Working Alongside People with Intellectual and Learning Disabilities –Sexual Violence Prevention Association, *Submission 127*, pp 3-5.

53 Children with Disability Australia, *Submission 144*, p. 9.

3.61 Of great concern is the evidence presented by Consumers of Mental Health WA (CoMHWA) of mental health providers acting as gatekeepers in preventing access to sexual assault counselling:

CoMHWA is also aware of 2 consumers who experienced gatekeeping of access to sexual assault counselling (assaults external to service delivery environment) by their clinical mental health providers, on account of a diagnosed or suspected psychosis or intellectual disability, resulting in failure to receive sexual assault counselling.⁵⁴

Committee view

3.62 The evidence to this inquiry shows that as well as trauma resulting from the primary act of violence, people with disability are often re-traumatised by the subsequent reporting and investigating procedures.

3.63 The committee is concerned with the lack of appropriate counselling and trauma recovery services available to people with disability who have experienced violence, abuse and neglect. The committee believes that more funding of counselling services is necessary, as well as training and re-purposing of existing mainstream services to ensure that people with disability are not discriminated against by a lack of counselling service provision.

Concluding committee view

3.64 This chapter has outlined an alarming snapshot of what is currently happening within institutional and residential settings charged with providing a safe environment to some of our society's most vulnerable people.

3.65 The committee is convinced that violence, abuse and neglect against people with disability is widespread and is occurring across all Australian communities. At the heart of this mistreatment are questions as to how our society views people with disability.

3.66 The committee thanks witnesses for their bravery in coming forward to share accounts of pain, suffering and humiliation of themselves or their loved ones. The breadth of evidence provided on the range of violence, abuse and neglect of people with disability is highly disturbing and cannot be ignored.

3.67 The committee notes with great concern, the lack of reliable and consistent data on violence, abuse and neglect of people with disability, and the complete lack of data on the outcomes of reporting and investigations. It is impossible to adequately address an issue that has not properly been identified. Part of the work to eliminate violence and abuse of people with disability must surely include quantifying the precise nature of the problem.

54 Consumers of Mental Health WA, *Submission 110*, p. 16.

Concluding committee view continued

3.68 The committee also notes the high rates of abuse of people with disability that occur in aged care and the general community, with limited adequate response from mainstream reporting and investigating mechanisms. Clearly, protecting vulnerable Australians in aged care and the general community should be given greater focus from all levels of government.

3.69 The committee is very distressed by the range of evidence provided which details cases of violence, abuse and neglect of children with disability, particularly within schools. The committee is disturbed by evidence of a lack of appropriate regulation, oversight and independent reporting and investigating mechanisms within the schools framework.

3.70 Although this section has examined examples of the mistreatment of individuals by individuals, chapter four of this report examines systemic disability-specific therapeutic interventions, which in other service contexts would themselves be seen as violence or abuse.

Chapter 4

Disability-specific interventions

Introduction

4.1 There are a range of therapeutic, behavioural management and other disability practices that people with disability are subjected to every day in Australian hospitals, schools and even their homes. If these practices were applied outside the disability services context, many would be viewed as an unlawful loss of personal rights and even, in some cases, as acts of violence.

4.2 The committee has received evidence from witnesses and submitters detailing cases of decision-making removed from the hands of people with disability, with regard to the medical treatments they receive, where they live, their financial affairs, the inappropriate use of restrictive practices in schools and disability services, as well as the inappropriate use of guardianship arrangements to stifle family advocacy.

4.3 As mentioned in the previous chapter on lived experience, some of this behaviour stems from the way people with disability are viewed and treated by the broader Australian society. It is clear that when people with disability are viewed and treated as different to other Australians, it becomes easier to excuse behaviour that would otherwise be completely unacceptable.

4.4 A number of important concepts around decision-making will be examined in this chapter. This chapter will also explore the consequences to individuals of the loss of legal capacity. While these consequences are many, this chapter will focus on the following:

- definitions of legal incapacity;
- therapeutic interventions which would be deemed assault in any other context, otherwise termed 'disability specific lawful violence';
- the appointment of a guardian as an alternative decision-maker;
- the excessive use of restrictive practice; and
- a person losing their 'credible witness status' in raising allegations of violence, abuse or neglect, particularly in criminal prosecutions (addressed in chapter six).

Defining legal incapacity

4.5 A fundamental principle of Australia's rule of law is that all adults, and to some extent minors, have a right to make decisions that affect their lives and to have those decisions respected. The Australian Law Reform Commission (Law Reform Commission) has noted:

...the common law recognises—as a "long cherished" right—that all adults must be presumed to have capacity until the contrary is proved. Where capacity is contested at law, the burden of proof lies with the person asserting the incapacity.¹

4.6 In some circumstances, a person is deemed to have a legal incapacity to make their own decisions. Disability-related legal incapacity refers to:

[T]he level of cognitive ability that is required before a person can lawfully do various things. Because lack of capacity can prevent people from participating in many of the activities that form part of daily life, alternative decision-making arrangements are necessary.²

4.7 Although legislation varies slightly in each state and territory, the principles that underpin a determination of legal incapacity are similar. Generally, there is a distinctly binary approach to the determination of legal incapacity—that is, a person is deemed to be either capable or not. In its report titled *Guardianship: Final Report*, the Victorian Law Reform Commission explained:

Current Victorian guardianship law draws a sharp distinction between those people who have capacity and those who do not. It does not cater for different levels of cognitive functioning. At present, guardianship law has only one response to the needs of people with impaired decision-making ability: the appointment of a substitute decision maker to make decisions on that person's behalf.³

4.8 This report found that guardianship laws relating to legal capacity need to be reformed to allow 'people to participate to the greatest extent possible in decisions that affect them'. This includes recognising that incapacity to make a decision may be decision-specific, time-specific and support-dependent:

While some people may lose some or most capacity permanently—for example, a person in the late stages of dementia—others may only temporarily lose capacity...

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- 1 Australian Law Reform Commission (Law Reform Commission), 'For your information: Australian Privacy Law and Practice' (Law Reform Commission Report No. 108), August 2008, p. 2344, http://www.alrc.gov.au/sites/default/files/pdfs/publications/108_vol3.pdf (accessed 22 October 2015). See also: *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162, 169; *L v Human Rights and Equal Opportunity Commission* (2006) 233 ALR 432.
 - 2 Victorian Law Reform Commission, 'Guardianship: Final Report', April 2012, p. 98, <http://www.lawreform.vic.gov.au/projects/guardianship-final-report> (accessed 22 October 2015).
 - 3 Victorian Law Reform Commission, 'Guardianship: Final Report', April 2012, p. 98.

Similarly, an inability to make decisions in one area—such as the management of money—does not necessarily mean that a person is unable to make other decisions about other aspects of their personal circumstances, such as decisions around health care or accommodation...

Some people who struggle to make a decision alone might be capable of making their own decision with the support of a trusted person[.]⁴

4.9 The Australian Cross Disability Alliance (Disability Alliance) has pointed to Article 12 of the United Nations (UN) Convention on the Rights of Persons with Disabilities (Disability Convention), which 'establishes that all people with disability have full legal capacity'. The Disability Alliance went on to assert:

The denial of legal capacity deprives people with disability of basic human rights, including the right to give consent to medical treatment and interventions, the right to control fertility, right to bodily integrity, the right to liberty and security and the right to access to justice. The denial of legal capacity for people with disability underpins human rights violations, such as forced medical treatment and interventions, forced sterilisation and abortion, the application of restrictive practices, indefinite detention, denial of access to justice and forced living arrangements.⁵

4.10 The inquiry has received a great deal of evidence around abuse and neglect that arises as a consequence of the loss of an individual's legal capacity. The Law Institute of Victoria said:

...the denial of legal capacity (through substitute decision-making regimes in many cases) is implicated in the existence and continuation of (at least some forms of) the violence, abuse and neglect against people with a disability that occurs in institutional settings.⁶

4.11 The Queensland Aged and Disability Advocacy Service submitted that, in their experience, abuse and neglect can be caused by substitute decision makers:

...not understanding the role of a substitute decision maker, whether it is Enduring Power of Attorney (EPOA), Guardian or Administrator (all are substitute decision makers—SDM). Lack of understanding results in unchallenged authority exercised over the person by the SDM, resulting in an abusive or exploitative relationship. For example, a common situation we encounter is when the person is in a facility and not allowed to receive visits or phone calls, or see an independent doctor. Although this behaviour contravenes the general principles of the *Guardianship and Administration Act Queensland 2000 (GAA)*, it is often condoned by residential facilities that are unaware that the decision maker is in breach of their obligations.⁷

4 Victorian Law Reform Commission, 'Guardianship: Final Report', April 2012, p. 121.

5 Australian Cross Disability Alliance, *Submission 147*, p. 44.

6 Law Institute of Victoria in: Law Council of Australia, *Submission 139*, p. 16.

7 Queensland Aged and Disability Advocacy Service, *Submission 30*, p. 2.

Committee view

4.12 At the heart of the issue of legal incapacity is the concept of decision-making for a number of reasons. First, when decision-making is removed from the hands of a person, it becomes easy for the decision-maker—whether it be parent, carer, or departmental officer—to then make decisions on behalf of that individual that may seem 'to be in their best interests' but may actually be completely counter to the wishes of that person. Second, in every situation where a person has been forced to cede their own autonomy to another, there is the opportunity for abuse of that decision-making power. Finally, when the erosion of control from people with disability is normalised it makes it easier for society to accept that even those people with disability not subject to a legal guardianship order can have their will subverted as happens with the use of restrictive practices or forced medical treatments.

Supported decision-making

4.13 As discussed above, the current approach to those deemed to be legally incapacitated or unable to make their own decisions is to provide a legal guardian who will become a substitute decision maker. This is in line with Australia's reservation regarding Article 12 of the Disability Convention which relates to equal recognition before the law:

Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards.⁸

4.14 However, the UN Committee on the Rights of Persons with Disabilities (UN Disability Committee) has published a general comment on Article 12 in relation to the use of substituted decision-making:

On the basis of the initial reports of various States parties that it has reviewed so far, the Committee observes that there is a general misunderstanding of the exact scope of the obligations of States parties under article 12 of the Convention. Indeed, there has been a general failure to understand that the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making.⁹

4.15 The UN Disability Committee went on to recommend:

States parties must holistically examine all areas of law to ensure that the right of persons with disabilities to legal capacity is not restricted on an

8 United Nations Convention on the Rights of Persons with Disabilities, *Declarations and Reservations: Australia*, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-15&chapter=4&lang=en#EndDec (accessed 13 October 2015).

9 United Nations Committee on the Rights of Persons with Disabilities, *General comment No.1 (2014)*, Eleventh Session, 31 March – 11 April 2014, p.1, **Error! Hyperlink reference not valid.** (accessed 27 October 2015).

unequal basis with others. Historically, persons with disabilities have been denied their right to legal capacity in many areas in a discriminatory manner under substitute decision-making regimes such as guardianship, conservatorship and mental health laws that permit forced treatment. These practices must be abolished in order to ensure that full legal capacity is restored to persons with disabilities on an equal basis with others.¹⁰

4.16 The Law Reform Commission in its 2014 discussion paper titled *Equality, Capacity and Disability in Commonwealth Laws* highlighted that decision-making arrangements for people with disability take many forms along a spectrum, including:

- informal arrangements—usually involving family members, friends or other supporters;
- formal pre-emptive arrangements—anticipating future loss of legal capacity through appointment of a proxy, for example in enduring powers of attorney (financial/property), enduring guardianships (lifestyle) and advance care directives (health/medical); and
- formal arrangements—where a court or tribunal appoints a private manager or guardian, or a state-appointed trustee, guardian or advocate to make decisions on an individual's behalf (guardians and administrators).¹¹

4.17 The Law Reform Commission report recommended shifting away from 'substitute decision-making' where a representative makes decisions on a person's behalf, to 'supported decision-making', where people with disability are supported to make decisions for themselves. It suggested that reform of Commonwealth, state and territory law be consistent with the following national decision-making principles to 'recognise people with disabilities as persons before the law and their right to make choices for themselves':

- **The equal right to make decisions**—all adults have an equal right to make decisions that affect their lives and to have those decisions respected;
- **Support**—persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives;
- **Will, preferences and rights**—the will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives; and
- **Safeguards**—laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.¹²

10 Committee on the Rights of Persons with Disabilities, *General comment No.1 (2014)*, Eleventh Session, 31 March – 11 April 2014, p.2.

11 Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, p. 47, <https://www.alrc.gov.au/publications/equality-capacity-disability-report-124> (accessed 21 September 2015)

4.18 In its submission, the Disability Alliance pointed out:

In September 2013 the CRPD Committee [UN Disability Committee] made a recommendation in its concluding observations to Australia that the Law Reform Commission inquiry should look at how Australian law and policy could be brought into conformity with the CRPD including in areas such as informed consent to medical treatment and access to justice.¹³

4.19 Mr David Bowen, Chief Executive Officer of the National Disability Insurance Agency, also spoke in support of the Law Reform Commission's comments on a spectrum of decision-making ability:

It is worth reflecting on the direction that that report is trying to take away from an historic divide between assessing people as either having or lacking legal capacity to one in which we recognise people's capacity to speak on their own behalf on a spectrum and that even those people who are most profoundly disabled and have limited ability to speak on their own behalf nevertheless should have their wishes and aspirations and their concerns taken into account without simply substituting somebody to make a decision for them.¹⁴

4.20 Other evidence was presented to the committee on the need to retain substitute decision-making in certain circumstances. JacksonRyan Partners submitted that there would always be some people for whom their disability meant they would be unable to participate in supported decision-making, and substitute decision-making is a necessary safety net for those people.¹⁵

4.21 The Law Council of Australia (LCA) gave moderate support to this position:

The Law Council considers that as a last resort substituted decision-making under Australian guardianship and administration laws are important elements in safeguarding against abuse and neglect. However, the Law Council considers that supported decision-making that emphasises the will and preferences of the individual should be utilised as much as possible.¹⁶

4.22 However, Dr Linda Steele of the Law Faculty, University of Wollongong told the committee:

...I think that even if we reach the decision that it is okay to still have substituted decision making there is a separate question of: are there some decisions that we should never let anyone make for someone else? That might include particular interventions in people, for example,

12 Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, p. 24.

13 Australian Cross Disability Alliance, *Submission 147*, p. 45.

14 Mr David, Chief Executive Officer, National Disability Insurance Agency, *Committee Hansard*, Melbourne, 30 June 2015, p. 38.

15 JacksonRyan Partners, *Submission 42 Attachment 12*.

16 Law Council of Australia, *Submission 139*, pp 13–14.

particular medication or particular medical procedures such as sterilisation.¹⁷

Committee view

4.23 The committee agrees with the Law Reform Commission report and its recommendations about supported decision-making. It is the committee's view that while legislative reform is clearly a necessary step to effect these reforms, more work needs to be done to investigate supported decision-making models in Australia and oversee jurisdictions to ensure that the most sustainable form of supported decision-making is implemented in Australia.

Disability specific lawful violence

4.24 The terms of reference for this inquiry provides the following definition of violence:

'violence, abuse and neglect' is broadly understood to include, but is not limited to: domestic, family and interpersonal violence; physical and sexual violence and abuse; psychological or emotional harm and abuse; constraints and restrictive practices; forced treatments and interventions; humiliation and harassment; financial abuse; violations of privacy; systemic abuse; physical and emotional neglect; passive neglect; and wilful deprivation.

4.25 What this definition does not explicitly state, and which has been made clear through evidence to the inquiry, is that many of these forms of violence are considered by the health, legal and disability service sectors to be lawful therapeutic practice:

Many of the practices would be considered crimes if committed against people without disability, or outside of institutional and residential settings. However, when "perpetrated against persons with disabilities", restrictive practices "remain invisible or are being justified" as legitimate treatment, behaviour modification or management instead of recognised as "torture or other cruel, inhuman or degrading treatment or punishment".¹⁸

4.26 Dr Steele concurred with the premise that some disability practices would, in other contexts, be considered crimes, and uses the term 'disability-specific lawful violence'. Dr Steele argued that, as well as considering the legal frameworks and practices to address and prevent violence, abuse and neglect, the committee should also consider laws which explicitly permit and legitimise violence, abuse and neglect of people with disability, generally in the medical or professional care settings, which in any other context would be considered unlawful violence. Dr Steele contended that these forms of violence include:

...constraints and restrictive practices and forced treatments and interventions which are lawfully conducted pursuant to third party consent,

17 Dr Linda Steele, Law Faculty, University of Wollongong, *Committee Hansard*, Canberra, 21 August 2015, p. 31.

18 Australian Cross Disability Alliance, *Submission 147*, pp 45–46.

court or tribunal authorisation or civil or forensic mental health legislation.¹⁹

4.27 This view was supported by the Hon Ms Kelly Vincent, a member of the South Australian Legislative Council representing the Dignity for Disability Party:

It also appears that often in the case of people with disabilities what would otherwise be recognised, quite clearly, as abuse is believed to be a natural part of the support provision.²⁰

4.28 Legal capacity to consent to treatment is a major issue within disability-specific lawful violence. Dr Steele argued that generally, non-consent is the boundary between lawful or non-lawful violence and abuse:

However, this is problematic in the context of people with disability because it is their very perceived *inability* to consent by reason of mental incapacity which has provided a legal opening to enable others to determine what can be done to their bodies. Laws relating to court or tribunal authorisation of third party consent, substituted decision making schemes and civil and forensic mental health legislation all sit within this opening.²¹

4.29 Mr Kevin Cocks, the Queensland Anti-Discrimination Commissioner, made similar statements but instead referred to 'structural violence', which he defined as:

...a form of violence wherein some social structures or social institutions may harm people by preventing them from having their basic human rights met.²²

4.30 Mr Cocks also described the devastating impacts that structural violence has on the lives of people with disability:

For me the term 'structural violence' is to act as an umbrella to encapsulate many different forms of various social and institutional failings that have real if not always immediately appreciable consequences, and often quite devastating consequences in people's lives. This is particularly true across cultures and time for people with disability. People with disability are subject to multiple and aggravated forms of human rights violations. They occur every day in every region of every state and territory in Australia. Virtually every Australian with disability encounters human rights violations at some point in their lives, and many experience it every day of their lives. In Australia it is possible for people with disability to die of starvation in specialist disability services, to have life-sustaining medical treatment denied or withdrawn in health services, to be raped or assaulted without any reasonable prospect of these crimes [being] detected, investigated or prosecuted by the legal system, and to have their children

19 Dr Linda Steele, School of Law University of Wollongong, *Submission 94*, p. 3.

20 Ms Kelly Vincent, MLC, *Committee Hansard*, Adelaide, 28 August 2015, p. 56.

21 *Submission 94*, p. 6.

22 Mr Kevin Cocks, *Committee Hansard*, Brisbane, 16 October 2015, p. 43.

removed by child protection authorities on the prejudiced assumption that disability equates to incompetent parenting.²³

Guardianship

4.31 People with an intellectual incapacity can be subject to guardianship and financial administration orders to protect their health and welfare—this is administered by tribunals and courts within each jurisdiction. In these circumstances people with an intellectual incapacity are considered to have legal incapacity to make autonomous decisions about their lifestyle, health, accommodation, work and financial affairs.

4.32 Guardianship may be sought for people who have an intellectual disability, psychiatric disability (like schizophrenia), neurological disability (like dementia), developmental disability (like autism), brain injury or physical disability that prevent that person from communicating their wishes.²⁴

4.33 Not all people with an intellectual disability have legal incapacity, nor are all people with intellectual disability unable to make any decisions about their lives. The Intellectual Disability Rights Service stated that decision-making capacity should be considered on a spectrum between full autonomy and substituted decision-making and 'in between is a scale of informal supported decision-making that varies from time to time and from decision to decision'.²⁵ Further to this, 'supported or substituted decision-making do not require a formal guardian appointed by order of a tribunal or court'.²⁶

4.34 A formal order of guardianship can be exercised by a person, a group of people, the public guardian, an adult guardian or Public Advocate.²⁷

4.35 Different jurisdictions have different frameworks for how guardianship is administered. For example, in many jurisdictions there is a public advocate but in New South Wales (NSW) there is a public guardian. Public advocates have stronger powers than public guardians. In 2010, a NSW parliamentary inquiry recommended that NSW switch to a public advocate to enhance adult protective services. For

23 Mr Kevin Cocks, Commissioner, Anti-Discrimination Commission, Queensland, *Committee Hansard*, Brisbane, 16 October 2015, p. 43.

24 Intellectual Disability Rights Service, *Guardianship and administration laws across Australia*, p. 13, http://www.idrs.org.au/pdf/Guardianship_and_administration_laws_across_Australia_by_Ben_Fogarty.pdf (accessed 7 October 2015)

25 Intellectual Disability Rights Service, *Guardianship and administration laws across Australia*, p. 2.

26 Intellectual Disability Rights Service, *Guardianship and administration laws across Australia*, p. 2.

27 Intellectual Disability Rights Service, *Guardianship and administration laws across Australia*, p. 13.

example, they could identify an adult with an intellectual disability and make an application on behalf of that person to have a guardian appointed.²⁸

4.36 In NSW, the Civil and Administrative Tribunal (NCAT) determines 'applications about adults with a decision-making disability who are incapable of making their own decisions and who may require a legally appointed substitute decision maker'. Where NCAT deems that a person is incapable of making their own decisions, it may decide to 'make a guardianship order to appoint a private guardian (family member or friend) and/or the NSW public guardian'. NCAT can also make decisions relating to consent, financial management orders, and reviewing guardianship appointments.²⁹

4.37 The submission from the Disability Alliance put forward the proposition that guardianship systems across Australian are different enough to cause confusion and difficulty in challenging guardianship orders. The Disability Alliance further contended that although there is inconsistency in how guardianship laws operate, there are key common themes in that all of them are in breach of Australia's international human rights obligations, and guardianship can itself create environments where violence, abuse and neglect occurs:

Guardianship law and mental health legislation are examples of current legislative frameworks that, by their very nature, give rise to the perpetration of torture and ill-treatment of people with disability in institutional and residential settings. State and territory guardianship and mental health laws primarily regulate the area of legal capacity and substitute decision-making in Australia. While state and territory laws in this area vary, they all breach, are inconsistent with, or fail to fulfil Australia's obligations under international human rights law, including for example Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD). These state and territory laws provide different and inconsistent tests for assessing a person's ability to exercise legal capacity, which leads to uncertainty, confusion and inappropriate application of legal principles. There is no nationally consistent legislation that outlines principles and provisions for assessing what constitutes a valid decision that should be recognised by the law. Moreover, existing legislation does not focus on measures (such as supported decision making) that would enable or support a person with disability to make decisions so that their decisions are recognised as valid before the law.³⁰

4.38 In discussing systemic issues around guardianship, the North Australian Aboriginal Justice Agency (NAAJA) presented evidence that Aboriginal and Torres Strait Islander peoples are over-represented in the adult guardianship system, with 50

28 Mr Graeme Smith, Public Guardian, Office of the Public Guardian, New South Wales Department of Justice, *Committee Hansard*, Sydney, 27 August 2015, p. 24.

29 NSW Civil and Administrative Tribunal, *Guardianship Division*, August 2015, <http://www.ncat.nsw.gov.au/Pages/guardianship/guardianship.aspx> (accessed 7 October 2015).

30 Australian Cross Disability Alliance, *Submission 147*, pp 59–60.

per cent of people subject to guardianship being Indigenous, while only representing 30 per cent of the population. NAAJA further stated:

...the number of people under guardianship in the [Northern Territory] is 8 times as many as the next number of people under guardianship in the next highest Australian jurisdiction (NSW).³¹

4.39 NAAJA contended that this creates an imperative to ensure that Aboriginal and Torres Strait Islander peoples' particular circumstances are taken into account in developing guardianship systems, particularly for the high numbers of Indigenous people living in remote communities or on traditional lands.³²

4.40 The Disability Alliance pointed to the over-representation of people living in institutions in the guardianship system:

People with disability in institutional settings are more likely to be subject to guardianship proceedings for the formal removal of their legal capacity. This facilitates and may even authorise forced interventions.³³

4.41 Of particular concern, the committee heard that existing legal frameworks do not recognise the role played by informal advocates, particularly family members, when making decisions for or on behalf of people with disability. Queensland Aged and Disability Advocacy Inc. (QADA) argued that the main systemic response to abuse is to be 'protective', through the appointment of a substitute decision maker.³⁴ The interplay between guardianship and informal advocacy is discussed in greater detail in chapter eight.

4.42 In its report on legal rights for people with disability, the Law Reform Commission recommended that the role of informal advocacy be respected. It advised that where a representative is appointed to make a decision for a person who requires decision-making support, the representative 'must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life'.³⁵

31 North Australian Aboriginal Justice Agency, *Submission 138*, p. 4.

32 North Australian Aboriginal Justice Agency, *Submission 138*, p. 4.

33 Australian Cross Disability Alliance, *Submission 147*, p. 17.

34 *Submission 30*, p. 3.

35 Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, p. 12.

Committee view

4.43 As discussed further in chapter six, the committee supports the implementation of a supported decision-making model that recognises a graduated continuum of legal capacity for people with disability. Within this model, the Law Reform Commission has recommended that the 'role of persons who provide decision-making support should be acknowledged and respected—including family members, carers or other significant people chosen to provide support'.³⁶

Misuse of guardianship by facilities

4.44 A common theme across multiple submitters, was that guardianship orders are often misused by disability service facilities or other organisations to streamline or create efficiencies in service delivery:

It is very significant, and yet we have very good guardianship legislation in Queensland that says that the voice of the person and their informal supporter should be taken into account. It often—I would say more than often—does not happen that way. In instances where a service provider does challenge that guardianship—in some cases it is a hospital. They want to move the person out, they know that there is no other accommodation arrangement, they say, 'We're going to send you to a nursing home', the person does not have a capacity issue and says, 'No, I don't want to go', but they will apply for guardianship anyway just to get them out of the hospital. And if a parent is an informal supporter then quite often if they have encountered difficulties with the service provider and there are restrictive practices involved they will feel the need to seek guardianship just to have that authority—which they should not have to do, because, even though it is not meant to strip authority and autonomy from the person, in effect that is what happens in practice. Everyone then deals with the guardian. If the service provider does not like the decisions made by the guardian they will certainly challenge their authority and seek to have them removed.³⁷

4.45 This experience was echoed by Mr Neal Lakshman of Speaking Up For You:

I had a gentleman who was in a nursing home. A social worker put in an application for a guardianship. He [the subject of the guardianship application] never knew that the hearing was on and then when he actually went the tribunal found that he had [legal] capacity. If you do not go, it is all—the other issue with some of the hearings is that of restricted practices. All the psych reports, everything, are put in by [Disability Services Queensland (DSQ)] psychs and [Occupational Therapists] and other persons. They work for DSQ and DSQ wants the person to live in the

36 Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Law Reform Commission Report 124, August 2014, p. 11, <https://www.Law Reform Commission.gov.au/publications/equality-capacity-disability-report-124> (accessed 21 August 2015).

37 Ms Michelle O'Flynn, Director, Queensland Advocacy Inc. (QAI), *Committee Hansard*, Brisbane, 16 October 2015, p. 5.

facility because they do not want them to live elsewhere because it is easier for them. So the information going into the guardianship hearing is by the same organisation or place where you are going to be living. I find that quite problematic.³⁸

4.46 Other submitters presented evidence that the guardianship system is managed in favour of the needs of service organisations, instead of the needs of people with disability or their families and advocates:

Many of our clients report that their doctor also has a professional affiliation to the facility or the SDM. This results in a violation of confidentiality toward the person with a disability. Rather than keeping the information confidential to the person with a disability, there is often a strongly perceived lack of impartiality by the treating doctor. This can result in a report that aligns with the needs of the facility or the SDM, rather than one that accurately reflects abilities of the individual with a cognitive disability, or no report being produced at all. Often our clients realize this and are reluctant to seek assessment from "their" doctor. It results in difficulties in accessing reports, as often the person in an institutional setting has difficulties accessing another doctor in the community, without attracting more challenges from the institution.

Many of our volunteer advocates spend time trying to access alternative medical reports from another independent doctor. This activity is made more difficult when the SDM is unwilling to pay for a visit or report, which is likely when the purpose of the report is to challenge their authority over the person with a disability.³⁹

4.47 In her submission, Ms Julie Phillips wrote that she believed the close working relationship with the Victorian Office of the Public Advocate (OPA) and the Victorian Department of Health and Human Services (DHHS) was 'at times to the detriment of people with disabilities':

However more importantly, the willingness of OPA to provide guardians for people with disabilities could be seen to be assisting DHHS to commonly make guardianship applications against parents, simply when the parents will not agree with something DHHS intends to do to their family member.⁴⁰

4.48 In their submission, Communication Rights Australia and the Disability Discrimination Legal Service presented similar evidence:

...a common mode of response is often a guardianship application made for the individual in an attempt to bypass parents and appoint someone who is more amenable to DHHS/contractors and their decision-making.

38 Mr Neal Lakshman, Advocacy Worker, Speaking Up For You Inc., *Committee Hansard*, Brisbane, 16 October 2015, p. 39.

39 QADA, *Submission 30*, pp 6-7.

40 Ms Julie Phillips, *Submission 131*, p 58.

Regrettably, this might often be the Office of the Public Advocate Guardianship Program.⁴¹

4.49 Moreland Community Legal Centre discussed a number of cases where guardians blocked lawyers or advocates access to individuals:

The lawyers contacted both the professional Guardian and private Administrator to seek permission to visit the woman. She was granted permission and booked an interpreter and together they visited the site. The professional Guardian separately contacted the Aged care residential accommodation provider and advised them that permission was not granted and as a result they refused entry to both lawyer and interpreter. There was no alternative but to make an application to VCAT (Victorian Civil and Administrative Tribunal) to direct the Guardian to permit a professional visit.⁴²

4.50 These examples above have been presented by submitters as a small sample of the cases of abuse of guardianship their organisations are faced with on a weekly basis.

Inappropriate decision-making

4.51 The committee has received evidence detailing exclusionary decision-making processes whereby the guardian makes decisions without involving the individual in the process. Ms Julie Phillips notes that in Victoria, guardians from the OPA 'can make decisions for people with disabilities without meeting them and in direct defiance of family wishes'. Another issue is that the DHHS will often argue for a public trustee, such as the OPA, to be appointed as a guardian even when family members are capable and willing to fulfil this function:

DHHS made a guardianship application in relation to "Jane" who has an intellectual disability and severe language disorder. The only reason for the application was that Jane's mother, Mrs Smith, would not give her permission for Jane to be placed in an inappropriate accommodation service. The track record of DHHS in relation to Jane had been one of incompetence, and inability to effectively manage challenging behaviours.

Mrs Smith has been asking for a Functional Behaviour Assessment for approximately one year.

VCAT [Victorian Civil and Administrative Tribunal] helpfully supported DHHS, as is often the case, and a Guardian from OPA was appointed. Mrs Smith was not proven to be (or accused of being) anything other than a caring mother who was attempting to uphold the rights of her daughter. Despite not being able to find any significant fault with Mrs Smith, she was not given guardianship rights, and they were awarded to OPA.⁴³

41 Communication Rights Australia and the Disability Discrimination Legal Service, *Submission 78*, p. 9.

42 Moreland Community Legal Centre, *Submission 130*, p. 3.

43 Ms Julie Phillips, *Submission 131*, pp 58–59.

4.52 Cheryl McDonnell described to the committee the interactions she had with the financial manager assigned to their daughter:

Our experience of dealing with [Terri's] case manager was that she would make decisions on Terri's behalf regardless of what Terri wanted or needed and regardless of what myself or Terri's siblings wanted for Terri.⁴⁴

4.53 Ms McDonnell described two circumstances in which Terri's guardian was unable to make appropriate choices for Terri, even with Ms McDonnell and her husband being there to advocate and help guide the guardian to what should be a sensible decision with a sensible outcome.⁴⁵

4.54 In some cases, guardians are improperly influencing decisions relating to medical treatment:

We have received two reports from members of the public concerned that the nominated carer/guardian is abusive and that their capacity to influence treating clinical teams formed part of the pattern of abuse and control (such as influencing decisions about admission or discharge and controlling access to advocates) In both cases, the consumers were male and Western Australia has no domestic violence services for male victims of domestic violence, nor domestic violence programs tailored to the needs of mental health consumers.⁴⁶

4.55 One of the more disturbing pieces of evidence is the threat of forced public guardianship as a means of enforcing silence and compliance on those families or individuals who are deemed to be 'troublemakers':

Young people with disabilities and/or their families who make complaints to disability service providers about abuse and neglect are often ignored or ridiculed. Many are categorised as troublemakers, as unnecessarily combative, or even mentally ill, for refusing to withdraw complaints about poor treatment. Some are told that if they do not withdraw their complaints, the service or government will apply or challenge for guardianship so that they can have ultimate decision-making control over the young person's life.⁴⁷

4.56 Youth Disability Advocacy Service related the story of "Jack" and how the coercive threat of guardianship was held over him and his family:

"Jack", a 17-year-old male living in a Community Residential Unit, who has autism and uses non-verbal communication, was one-of-two people allegedly sexually assaulted by a new co-resident with a well-known history of sex offending, not long after he moved in to the Unit. The families of the existing residents made multiple complaints to the service provider and to

44 Ms Cheryl McDonnell, *Submission 37*, p. 7.

45 *Submission 37*, pp 7–8.

46 Consumers of Mental Health WA, *Submission 110*, p. 17.

47 Youth Disability Advocacy Service, *Submission 88*, p. [3].

the DHHS about the inappropriate placement before the alleged assault took place, but were dismissed as over-zealous and intolerant.

"Jack's" family were not informed by the service provider about the alleged assault but from the family of the other victim, who needed medical attention for his injuries. The staff member working at the time of the alleged assault did not take steps to prevent the attacks, hiding himself in the locked staff area. He was not dismissed by the service provider despite admitting negligence "Jack's" family are lobbying to have him moved into more suitable housing but must negotiate these new arrangements with the same DHHS staff who have threatened to apply for guardianship if they persist with their complaints.⁴⁸

4.57 Another submitter wrote that guardianship relationships can become overly 'functional' in nature, and guardianship laws are mis-used to gag parents or advocates who complain:

From my experience, once a Guardianship Order is made, the person simply becomes a commodity. The 'individual' ceases to exist. That person is stripped of any human rights, freedoms or entitlements to interact within the community or maintain family relationships as they would wish. The protected person and the family and friends are also subject to legal action by the Tribunal if they publicly identify the protected person and their complaints whilst under a guardianship order –essentially a legal gag clause. This outcome was NOT the intention of the legislation of the Guardianship Act nor was it the outcome that the Principles and Guidelines of the UNCRPD intended to achieve.⁴⁹

Committee View

4.58 The loss of legal capacity has multiple flow-on consequences, one of which is the appointment of guardianship. In many cases guardianship is a positive protective measure, but in too many cases the appointment of a guardian can have a severe negative impact on people's lives:

- The guardianship process could be considered an abuse itself, particularly because of the loss of rights it entails.
- In more serious cases, guardianship could be sought in order to enact abuse or neglect:
- Evidence has shown that even well-meaning guardians can inflict abuse or neglect through lack of understanding of their role or by being risk averse.
- The fact that a vulnerable person may be prevented through guardianship arrangements from lodging a complaint is also a form of abuse. In many cases, the prevention of reporting violence, abuse and neglect leads to the indefinite perpetuation of inappropriate actions.

48 Youth Disability Advocacy Service, *Submission 88*, p. [3].

49 Name Withheld, *Submission 106*, p. 2.

4.59 It is clear that the guardianship arrangements in all jurisdictions require some reform, including improved guidelines on appropriate decision-making through to oversight of the guardians themselves.

Parental guardianship issues

4.60 Parental issues around guardianship were also raised by different submitters. Ms Marion Bright told the committee of difficulties she faced in trying to advocate for her daughter, an adult with an intellectual impairment. Ms Bright was the sole carer for her daughter, and did not obtain formal guardianship, which impaired her capacity to seek information about her daughter's case from the relevant government department:

He said: 'Oh, but this is very sensitive information. We have to protect her rights.' Hello? What rights? Then he asked if I had guardianship, and I said, 'No, I'm her mother.' He was being particularly aggressive. Let me finish. I was shaking, but I thought, 'I can't say anything, because I need this information, because I want to get justice for Lauren.' Then he said, 'Oh, where does Lauren live?' I said, 'With me,' and then his attitude changed completely and he told me, 'Oh, we get inquiries for freedom of information all the time, and it's just families wanting money because they find out that a person they've had nothing to do with has a lot of money.' That had no relevance to me. Then, before I hung up, I said to him, 'So should I look at getting guardianship?' He said, 'Oh, no; she lives with you.' I could have thrown the phone through the wall. I was already distressed.⁵⁰

4.61 The NSW Office of the Public Guardian discussed the difficulties that parents had when their children with intellectual disability reached adulthood, which triggered the loss of parental legal rights to seek information or advocate on their children's behalf without going through a formal guardianship process:

Attorneys-general across Australia have been in receipt of representations from various groups suggesting that, when a person reaches the age of 16 or 18, where their family have been their key source of support historically, there would be some sort of automatic or streamlined conversion of the parental responsibility into guardianship. I know for example that the Victorian parliament considered that issue. But to my knowledge none of the parliaments in any of the jurisdictions has actually agreed to provide some sort of automatic guardianship to families in the absence of an evaluation of the circumstances.⁵¹

4.62 Other evidence presented to the inquiry put forward the position that even well-meaning guardians can have a negative effect on a person's life, due to the different goals the guardian may have for the outcomes of decisions. Mr Robbi Williams, Chief Executive Officer of disability consultancy firm JFA Purple Orange told the committee:

50 Ms Marion Bright, *Committee Hansard*, Melbourne, 30 June 2015, p. 29.

51 Mr Graeme Smith, Public Guardian, Office of the Public Guardian, New South Wales Department of Justice, *Committee Hansard*, Sydney 27 August 2015, p. 23.

Guardians will typically operate with the notions of safety and duty of care uppermost in mind and will often have a bias towards more conservative models of support that reflect that duty of care, rather than those patterns of support that bring greater proximity to ordinary life chances. The problem with proximity to ordinary life chances is that it comes with risk. There is a risk in life. Anything that we try to undertake in life will involve a modicum of risk. It is about how we manage that risk and stack the odds in favour of success, rather than trying to avoid the presence of risk altogether.⁵²

4.63 However, strong evidence was received by the committee on the important protective role that guardianship plays, particularly for people who lack family or social supports:

This client was aged 47 and was in an aged-care facility and had an intellectual disability, no speech and a physical disability. We received the referral from a day service provider, who had the following concerns: 'On two occasions, this client arrived with dry faeces in her pubic area, which day staff observed during personal care routines.' They reported these observations in the daily communication diary between their service and the aged-care facility, but no action was taken to clean and dress the client properly. There were signs of skin deterioration in the area and a distinct lack of personal care...

...Our advocate investigated the matter and discovered that this particular young person—47, in an aged facility—had no family support network, did not have the capacity to make informed decisions, did not have a legal guardian and had been taken off the electoral roll by the aged-care facility. The care plan did not stipulate how to shower or what equipment to use during showering and dressing. The client had not received medical attention for her swallowing difficulties. She had not been provided with a half-price, multipurpose taxi program card. She did not have any support to access the community on weekends. She did not have a companion card. She had untreated rashes on her arms and legs. She had long periods of time where she had not been seen by a GP because there was no backup plan when the GP who was assigned to the nursing home was on leave. She had clothing that was communally laundered, but her items were not named. She had a bowel chart that showed long periods of time when there was no bowel movement recorded. She was being left in front of the TV while the elderly residents were being fed their evening meal.

Three of my advocates worked on this case over a period of time. We eventually addressed many of the problems by applying to the Victorian Civil and Administrative Tribunal and getting a guardianship order in favour of the Office of the Public Advocate. Unfortunately, the client passed away four months after that guardianship order was enforced by

52 Mr Robbi Williams, Chief Executive Officer, JFA Purple Orange, *Committee Hansard*, Adelaide, 28 August 2015, p. 57.

VCAT. She died from medical complications associated with the swallowing and the chest infections.⁵³

Committee view

4.64 Evidence presented to the committee shows that in many cases, parents of people with disability want to maintain a continued parental interest in the welfare of their children well into their adulthood. However, the committee has heard that what appears to be an obvious parental expectation, is in many cases not realised.

4.65 The committee sees a need for cross jurisdictional work, to develop a national system whereby parents of people with disability, who require advocacy or decision-making assistance, have that role formally acknowledged in some capacity when their children turn eighteen years of age.

Financial abuse and neglect

4.66 The committee received a number of submissions regarding financial abuse of people with disability, much of which was not relevant to the terms of reference because it did not relate to people living in institutions or residential care facilities. However, given the volume of evidence this is clearly an issue of great concern in the community.

4.67 In 2014, it was reported that staff at the Australian Capital Territory (ACT) Public Trustee had allegedly embezzled \$1.65 million from people whose assets it managed in trust, including those subject to guardianship orders.⁵⁴ This is not an isolated case, there are many other examples of public trustees or public guardians with a financial function acting improperly and abusing their positions of trust, including in South Australia⁵⁵ and the Northern Territory:

Mr G is from a remote community and around three years ago the Public Guardian [PG] was appointed as his financial manager. For the first two years of that order the PG did not take control of Mr G's finances and he continued to suffer financial exploitation. This included a well meaning non-indigenous community member unofficially assuming management of Mr G's finances - and having his Centrelink benefits deposited directly into

53 Mr Trevor Carroll, Executive Officer, Disability Justice Advocacy Inc., *Committee Hansard*, Melbourne, 30 June 2015, p. 24.

54 Michael Inman, 'Staff member sacked, second quits at ACT Public Trustee as alleged \$1.65 million fraud probed', *The Canberra Times*, 23 February 2015, <http://www.canberratimes.com.au/act-news/staff-member-sacked-second-quits-at-act-public-trustee-as-alleged-165-million-fraud-probed-20150216-13g0wy.html> (accessed 7 October 2015).

55 See: Michael Owen, 'SA Public Trustee treats clients as "inconveniences", inquiry hears', *The Adelaide Advertiser*, 16 November 2009, <http://www.adelaidenow.com.au/news/public-trustee-squandering-money/story-e6freol3-111118060617> (accessed 7 October 2015); Ms June Walker, *Submission 113d*, p. [7]; Parliament of South Australia, *Inquiry into the Office of the Public Trustee: Report of the Statutory Authorities Review Committee 51st Report*, 1 December 2009, <https://www.parliament.sa.gov.au/Committees/Pages/Committees.aspx?CTId=5&CId=303> (accessed 7 October 2015).

her personal account. At the time the PG took control of Mr G's Centrelink payments he had no money in his bank account.

The financial statements provided with Mr G's next Court review indicated that in the first 3 months under the management of the PG, Mr G had saved \$7,529.97 (after expenses for accommodation, bank fees, food and personal spending had been deducted). It is arguable that had the PG taken control of his finances when the Court ordered it to, he would have saved an estimated \$65,000 (over the two years and two months from when the adult guardianship order began to when the PG assumed control of Mr G's finances).⁵⁶

4.68 Other evidence was submitted where service delivery agencies were neglectful in their financial management of resident's monies:

Elise has lived in a group home with several other people for 10 years. She is middle aged with intellectual disability and has difficulty with communication. She receives DSP paid into her personal bank account and staff take her to the bank to withdraw her DSP which is then paid into the household working account run by the group home. Two years ago it was discovered that \$9,000 could not be accounted for by the group home. Elise needed her advocate to help her complain. The advocate sought assistance from IDRS. Initially the NGO promised financial statements but then said the matter would be investigated by its own auditors. The matter was reported to the police. Five months later there were still no accounts and the NGO refused to answer questions posed by the advocate. In the end it was a year before any accounts were provided. The police advised the advocate that so many people had access to the account that they did not have enough evidence to charge anyone. When the police asked to interview staff, they refused to be interviewed. Some of Elise's money was finally reimbursed but no account was given of how the reimbursement was calculated. The advocate believed the amount was at least \$1,500 short. No-one was charged by police. No action was taken against the service provider. The advocate suspected there were 5 other residents with similar stories.⁵⁷

4.69 Financial abuse is not limited to public trustees or organisations. The committee has been furnished with examples of individuals who ingratiate themselves into the lives of a person with disability beyond their reasonably expected service capacity. It is not uncommon for these people to abuse the trust placed in them by a person with disability:

Abuse by a SDM [substitute decision-maker] is not regarded as a crime or misdemeanor, or an unlawful activity. For example, there is no quick, effective and low cost way for a matter to be prosecuted in the lower courts to secure restitution of monies stolen by an SDM. QADA is aware of several cases of financial abuse perpetrated by EPOA's or private administrators.

56 North Australian Aboriginal Justice Agency, *Submission 138*, p. 12.

57 Intellectual Disability Rights Service, *Submission 128*, pp 5-6.

For example, a private administrator, (estranged family member) was appointed by QCAT, when the person (Tony) was in a coma. The person was expected to make a full recovery from their disability within 18mths. The person made a full cognitive recovery, but was left with severe physical deficits, resulting in their being placed, as a young person in an aged care facility.

The administrator (who was appointed for 5 years and not required to fulfil any of the usual reporting duties of administrators) took all of the person's financial assets and then did not regularly pay fees.

QCAT declared the person capable and issued enforceable directions regarding reclaiming outstanding monies.⁵⁸

Committee view

4.70 The committee notes that the number of submissions received on the abuse of people with disability in the general community, including financial abuse, shows there is a significant problem. The committee is of the view that this issue requires greater oversight and investigation.

Restrictive Practice

4.71 A key form of 'disability specific lawful violence' is the use of restrictive practices in the disability, health and education sectors as a means of preventing people—mostly with disability—from hurting themselves or others.

4.72 The Australian Department of Health defines restrictive practice as:

The use of interventions that have the effect of restricting the rights or freedom of movement of a person in order to protect them. Examples include lap belts, hand mitts, removing mobility aids such as walking frames and sedation of a person to control their behaviour.⁵⁹

4.73 The Commonwealth's *National Framework for Reducing and Eliminating the Use of Restrictive Practices* (Restrictive Practice Framework) defines restrictive practice as 'any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability, with the primary purpose of protecting the person or others from harm.' The Restrictive Practice Framework defines the various forms as:

- seclusion: the sole confinement of a person with disability;
- chemical restraint: the use of medication for the primary purpose of influencing a person's behaviour or movement;

58 Queensland Aged and Disability Advocacy Service, *Submission 30*, p. 3.

59 Australian Government Department of Health, *Decision-making tool: Supporting a restraint free environment in residential aged care*, 2012, p. 24, https://www.dss.gov.au/sites/default/files/documents/09_2014/residential_aged_care_internals_fa3-web.pdf (accessed 22 October 2015).

- mechanical restraint: the use of a device to prevent or restrict a person's movement for the primary purpose of influencing a person's behaviour;
- physical restraint: the prolonged use of physical force to subdue movement for the primary purpose of influencing a person's behaviour; and
- additional restrictive practices of:
 - Psycho-social restraints: the use of 'power-control' strategies;
 - Environmental restraints: restricting a person's free access to all parts of their environment; and
 - Consequence driven practices: the withdrawal of activities or items.⁶⁰

4.74 Restrictive practices are purported to be used in the disability, health and education sectors as a means of preventing people—mostly with disability—from hurting themselves or others. The Law Reform Commission report found that:

[T]here are concerns that such practices can also be imposed as a 'means of coercion, discipline, convenience, or retaliation by staff, family members or others providing support'. Such practices may infringe a person's human rights. As a result, there are significant concerns about the use of restrictive practices in Australia. For example, the United Nations Committee on the Rights of Persons with Disabilities (UNCRPD) has stated that it

'is concerned that persons with disabilities, particularly those with intellectual impairment or psychosocial disability, are subjected to unregulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraints and seclusion, in various environments, including schools, mental health facilities and hospitals'.⁶¹

4.75 The committee has received evidence that argued the misuse of 'restrictive practices' is viewed as a form of abuse. This evidence will be examined later in this chapter.

We would prefer not to use the sanitised language of restrictive practices, and instead call them what they are, such as bondage, drugging and being locked up. If you did that to a person who did not have a disability it would be a criminal offence.⁶²

60 Department of Social Services, *National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Services Sector*, November 2014, <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-framework-for-reducing-and-eliminating-the-use-of-restrictive-practices-in-the-disability-service-sector?HTML> (accessed 27 October 2015).

61 Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, May 2014, p. 195.

62 Ms O'Flynn, Director, Queensland Advocacy Inc., *Committee Hansard*, Brisbane, 16 October 2015, p.1.

Summary of restrictive practice across the jurisdictions

4.76 Regulation of restrictive practices 'occurs mainly at a state and territory level', with the Commonwealth attempting to provide nationally consistent guidelines through the Restrictive Practice Framework. The Restrictive Practice Framework was endorsed by the Council of Australian Governments Disability Reform Council in March 2014 and intended to reduce the instances of restrictive practices within the mental health and disability services sectors.⁶³ The education sector is not captured in the Restrictive Practice Framework. The issue of restrictive practices in schools is discussed later in this chapter.

4.77 Kim Chandler et al in their 2014 comparative analysis paper, notes that only four jurisdictions in Australia currently regulate restrictive interventions and practices—these are Victoria, Queensland, Tasmania and the Northern Territory—as opposed to providing voluntary guidelines for service providers and government agencies to adopt. This paper summarises:

The focus of these restrictive practices legislative regimes is on regulating the standard of care in disability services either provided by or funded by state government human services departments. They reflect the dual concern with ensuring safeguards and an adequate standard of care and support in government-provided services as well as ensuring service providers are protected from civil and criminal liability for the use of such practices.

These regimes therefore do not extend to the use of restrictive practices on people with intellectual impairment in hospitals and other health facilities, aged care facilities, other supported residential services (such as boarding houses) or where care is provided by family or private carers. Nor, except perhaps in the case of Tasmania where the regime applies to services provided by a disability service provider and a 'funded private person',³² would they apply to the purchase of services by people with disability from non-funded disability services. That is, if a person with disability was provided with funds for their disability, from either a state government department, or the National Disability Insurance Agency, and with those funds purchased services from a non-funded disability service, then the restrictive practices regulatory regimes would arguably not apply.⁶⁴

A summary of the different legislation, and the agencies and departments across all Australian jurisdictions can be found in Table 4.1.

63 Department of Social Services, *National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Services Sector*, November 2014, <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-framework-for-reducing-and-eliminating-the-use-of-restrictive-practices-in-the-disability-service-sector?HTML> (accessed 17 August 2015). See also: Australian Cross Disability Alliance, *Submission 147*, pp 46–47.

64 Kim Chandler, Lindy Willmott and Ben White, 'Rethinking Restrictive Practices: A Comparative Analysis', *QUT Law Review*, vol. 4, no. 2, 2014, p. 97.

Table 4.1: Summary of relevant legislation and policies relating to the use of restrictive practices in all Australian jurisdictions

Jurisdiction	Legislative/policy framework	Agencies and departments responsible
Commonwealth	<i>National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Services Sector</i>	- Social Services (Cth)
New South Wales	<i>Behaviour Support Policy</i> <i>Aggression, Seclusion and Restraint in Mental Health Facilities in NSW (June 2012)</i> <i>Guardianship Act 1987</i> <i>Children and Young Persons (Care and Protection) Act 1998 (and Regulations)</i>	- Family and Community Services - Health
Victoria	<i>Disability Act 2006</i> <i>Mental Health Act 2014</i> Victorian Chief Psychiatrists Guideline, <i>Seclusion in Approved Mental Health Services (2011)</i> <i>Restraint of Student Policy (2015)</i>	- Disability Services - Health - Education
Queensland	<i>Disability Services (Restrictive Practices) and Other Legislation Amendment Act 2014</i> <i>Mental Health Act 2000 (and Mental Health Act 2000 Resources Guide(2012))</i> <i>Policy Statement on Reducing and Where Possible Eliminating Restraint and Seclusion in Queensland Mental Health Services (2008)</i>	- Communities, Child Safety and Disability Services - Health
Western Australia	<i>Mental Health Act 1996</i> <i>Voluntary Code of Practice for the Elimination of Restrictive Practices 2014</i>	- Disability Services Commission
South Australia	<i>Mental Health Act 2009</i> <i>Disability Services Act 1993</i> <i>Guardianship and Administration Act 1993</i> <i>Children's Protection Act 1993</i> <i>Safeguarding People with Disability—Restrictive Practices Policy 2013</i>	- Health - Communities and Social Inclusion
Tasmania	<i>Disability Services Act 2011</i> <i>Mental Health Act 2013</i>	- Disability Services - Health
Northern Territory	<i>Mental Health and Related Services Act 1994</i> <i>Disability Services Act 2012</i>	- Health - Disability Services
Australian Capital Territory	<i>Mental Health (Treatment and Care) Act 1994</i> <i>Mental Health Act 2015</i>	- Health

4.78 The following section notes a number of characteristics that define the approaches used by some of the different jurisdictions.

Western Australia

4.79 In Western Australia, the Disability Services Commission (DSC) has recently updated its *Code of Practice for the Elimination of Restrictive Practices*. This voluntary code of practice 'provides the basis for the disability sector to develop operational policy and guidelines for eliminating the use of restrictive practices' and 'applies to all services provided and funded by the [DSC] for children and adults with disability'.⁶⁵ The committee notes the DSC has undertaken engagement with a wide range of stakeholders to develop 'a decision-making flowchart for challenging behaviour and restrictive practices, a greater emphasis on Positive Behaviour Support approaches including person-centred planning, and a greater focus on the role of Positive Behaviour Support Panels'.⁶⁶

4.80 However, the committee notes the voluntary nature of the code ultimately means these practices are not regulated and, as such, there is little likelihood of them being reduced or eliminated.

Queensland

4.81 In 2014, after consultations, the Queensland Government made a series of changes to the state *Disability Services Act 2006* and the *Guardianship and Administration Act 2000* in an effort to reduce or eliminate restrictive practices. The key changes are:

- emphasising the need for a positive behaviour support approach, not just where restrictive practices are required;
- introducing a principle that restrictive practices should not be used as a form of punishment and a requirement for service providers to provide a statement to adults, their families and carers about the use of restrictive practices;
- requiring disability service providers to report to the department on the use of restrictive practices.⁶⁷

65 Western Australia Disability Services Commission, *Code of Practice for the Elimination of Restrictive Practices*, November 2014, p. 1, <http://static1.1.sqspcdn.com/static/f/1546495/25715521/1417183469157/Code+of+Practice+Final+Nov+2014.pdf?token=%2B60ZC7bb7zwPk%2BOG6FC13ZVOS8%3D> (accessed 23 October 2015).

66 Western Australia Disability Services Commission, *Positive Behaviour Framework Disability Sector Update*, Edition Number 6, November 2014, p. 3, <http://www.disability.wa.gov.au/Global/Publications/For%20disability%20service%20provider%20s/Guidelines%20and%20policies/Behaviour%20Support/Sector-Update-Positive-Behaviour-Framework-November-2014.pdf> (accessed 23 October 2015).

67 Queensland Government Department of Communities, Child Safety and Disability Services, *Overview of amendments*, 19 March 2015, <https://www.communities.qld.gov.au/disability/key-projects/disability-services-act-2006/review-of-restrictive-practices-framework/overview-of-amendments> (accessed 23 October 2015).

4.82 Many of the decisions about the use restrictive practices must be approved or reviewed by the Queensland Civil and Administrative Tribunal, and in addition the Queensland Department of Communities, Child Safety and Disability Services has established the Centre of Excellence for Behaviour Support, to provide training and guidance on positive behaviour support techniques.

4.83 The committee notes its concern that the requirement for service providers to have their own restrictive practices policies has been removed from the legislation and the legislation only applies to adults.⁶⁸

Victoria

4.84 The introduction of the *Mental Health Act 2014* has led to a number of changes in how restrictive practice is used in mental health services under the previous *Mental Health Act 1986*. First, the Mental Health Act's objectives have been extended to ensure people with a mental illness are provided with care and treatment with the 'least possible restrictions on human rights and human dignity'.⁶⁹ Second, this Act also defines when a restrictive intervention may be used and who must be notified when a restrictive intervention occurs.⁷⁰

4.85 Within the Victorian Department of Health and Human Services sits the Office of Professional Practice. One of the officers within the Office of Professional Practice is the Senior Practitioner (Disability). Under section 23(2)(a) of the *Disability Act 2006*, the 'Senior Practitioner is responsible for ensuring the rights of persons who are subject to restrictive interventions and compulsory treatment are protected and that appropriate standards in relation to restrictive interventions and compulsory treatment are complied with'. Aspects of the Senior Practitioner's role are highlighted below:

- visit, talk to and inspect any disability service;
- see any person who is subject to any restrictive intervention or compulsory treatment;
- investigate, audit and monitor the use of any restrictive interventions or compulsory treatment;
- direct a disability service provider to discontinue a restrictive practice;
- evaluate and monitor the use of restrictive interventions in disability services;
- develop guidelines and standards; and

68 Queensland Government Department of Communities, Child Safety and Disability Services, *Overview of amendments*, 19 March 2015, <https://www.communities.qld.gov.au/disability/key-projects/disability-services-act-2006/review-of-restrictive-practices-framework/overview-of-amendments> (accessed 23 October 2015).

69 *Mental Health Act 2014*, s. 10(b). See also: *Mental Health Act 1986*, s.4(2)(a).

70 *Mental Health Act 2014*, s. 105–116.

- provide education and information to disability service providers.⁷¹

Australian Capital Territory

4.86 Although there is a reference in the objects of the *Mental Health (Treatment and Care) Act 1994* 'to ensure that mentally dysfunctional or mentally ill persons have the right to receive treatment, care, rehabilitation and protection in an environment that is the least restrictive and intrusive, having regard to their needs and the need to protect other persons from physical and emotional harm', the use of restrictive practices are not regulated in the ACT.⁷² An examination of the use of restrictive practices in ACT schools is conducted later in this chapter.

South Australia

4.87 Restrictive practices are not regulated in South Australia. In 2011, the Office of the Public Advocate released a voluntary policy to prevent and eliminate restrictive practices in the disability sector for use by guardians and advocates. In March of this year, a similar policy was released for the residential aged care sector.⁷³

Tasmania

4.88 In Tasmania, restrictive practices in the health and disability services sectors are regulated by the Senior Practitioner (SP) who must be informed when a restrictive practice is used. The SP has powers to investigate instances where restrictive practice is alleged to have been used and can make recommendations and even directions to a provider to use alternate options. The SP is empowered to apply financial penalties to any provider who does not reasonably follow the directives of the SP.⁷⁴

Northern Territory

4.89 The Northern Territory regulates the use of restrictive practices in the mental health and disability services sector through section 61 and 62 of the *Mental Health and Related Services Act 1994*. This legislation works from the principle that restrictive practices are only to be used when no other option is available and only with the approval of a psychiatrist or a registered senior nurse. It is an unlawful act for any other person to apply restrictive practices to any other person subject to a penalty.⁷⁵ The *Disability Services Act 2012* also makes it an offence to use restrictive intervention on a resident of a residential facility.⁷⁶

71 Victorian Department of Health and Human Services, *Office of Professional Practice*, 29 July 2015, <http://www.dhs.vic.gov.au/about-the-department/our-organisation/organisational-structure/our-groups/office-of-professional-practice> (accessed 23 October 2015).

72 *Mental Health (Treatment and Care) Act 1994*, s. 7(a).

73 South Australian Office of the Public Advocate, *Restrictive Practices*, http://www.opa.sa.gov.au/resources/restrictive_practices (accessed 23 October 2015).

74 Tasmanian Department of Health and Human Services, *Senior Practitioner*, http://www.dhhs.tas.gov.au/disability/senior_practitioner (accessed 23 October 2015).

75 *Mental Health (Treatment and Care) Act 1994*, s. 61–62.

76 *Disability Services Act 2012*, s. 41.

4.90 In NSW, guidelines govern the use of restrictive practices. For NSW declared mental health units, a NSW Health guideline states the use of physical restraint should be an option of last resort and outlines when forms of restraint may be suitable. The restraint team must include a senior nurse or medical officer and the primary carer must be notified after an incident of restraint.⁷⁷ The NSW Department of Family and Community Services, *Behaviour Support Policy*, outlines requirements for the use of restrictive practice in NSW government funded disability services. The policy states 'Ideally, behaviour support services should be provided by *Behaviour Support Practitioners* with tertiary qualifications', although this is not a mandatory requirement.⁷⁸ Guardians appointed under the *Guardianship Act 1987* (NSW) may be authorised to consent to the use of restrictive practices for people over 16 years of age.

4.91 Restrictive practices in relation to children are governed by *Children and Young Persons (Care and Protection) Act 1998* (NSW) and *Children and Young Persons (Care and Protection) Regulation 2012* (NSW).⁷⁹ A broader examination of the use of restrictive practice in NSW is considered later in this chapter, by providing a comparison between the highly regulated use of restrictive practice in a disability service context to the largely unregulated and unmonitored use of restrictive practice against children with disability in NSW schools.

77 NSW Department of Health, *Aggression, Seclusion & Restraint in Mental Health Facilities in NSW*, http://www0.health.nsw.gov.au/policies/pd/2012/pdf/PD2012_035.pdf (accessed 4 November 2015)

78 NSW Department of Family and Community Services, *Behaviour Support Policy*, https://www.adhc.nsw.gov.au/_data/assets/file/0007/228364/Behaviour_Support_Policy_Marc_h2012_updated.pdf (accessed 4 November 2015)

Committee view

4.92 The committee considers that the right to liberty is a fundamental human right. The committee is concerned with the extent to which restrictive practice is used, and is deeply concerned with the system which allows service providers to arbitrarily deprive people of their liberty.

4.93 The Committee acknowledges the development of the *National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Service Sector*. However, the committee is concerned that this implementation of this framework has stalled, and has not been consistently implemented across Australian jurisdictions, with many states and territories still relying on a voluntary code of conduct from disability service providers.

4.94 The committee notes that the implementation of the framework has stalled, and in some jurisdictions has never really begun. The committee sees a place for commonwealth legislation, should the framework not be vigorously taken up across all jurisdictions as a priority.

Restrictive practices in other settings

4.95 The committee notes that restrictive practices may also be used in institutions and residential settings outside of the disability services sector.

4.96 The committee is particularly concerned by evidence that suggests that the regulations and safeguards for restrictive practices required in the disability sector do not apply in the prison system. The Aboriginal Disability Justice Campaign recommended that correctional services in all jurisdictions adopt the *National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Service Sector*, particularly:

- independent advocacy services for people with cognitive impairments detained in prisons and subject to restrictive practices; and
- independent review and oversight of restrictive practices used in prisons.⁸⁰

4.97 Box 4.1 highlights the lack of regulation and oversight of restrictive practices for Aboriginal and Torres Strait Islander peoples with cognitive impairment in prisons in the Northern Territory and Western Australia.

80 Aboriginal Disability Justice Campaign, *Submission 159*, p. 6.

Box 4.1: Restrictive practices in prisons

The Aboriginal Disability Justice Campaign (ADJC) alleged that chemical, physical and mechanical restraints are used extensively on people with cognitive impairment in prisons in Western Australia and the Northern Territory. The ADJC estimated that approximately 150 people with cognitive impairment are detained in prisons on civil orders each year, of which approximately 30 are Aboriginal or Torres Strait Islander and 30 are 'detained indefinitely'.

The ADJC noted that unlike the disability sector, where restrictive practices are regulated by legislation consistent with Australia's international human rights obligations:

[t]here is no reference to these principles, safeguards or human rights obligations in the use of restraint and seclusion on people with cognitive impairments detained under Corrective Services legislation in either Western Australia or the Northern Territory.

The ADJC highlighted that the lack of regulation on restrictive practices in prisons means that people with a cognitive impairment detained in prison 'are at a disadvantage to those who would be subject to restrictive interventions in forensic disability setting in terms of process, safeguards, review mechanisms and access to advocacy and oversight'.

The ADJC provided two case study examples that demonstrate the unregulated use of restrictive practices on people with cognitive impairment.

Mr M – Northern Territory

Mr M is an Aboriginal man with severe intellectual disability and foetal alcohol spectrum disorder who has been detained in a Northern Territory correctional facility since 2007. According to the ADJC, the facility has used a number of restraints in response to Mr M's 'behaviours of concern', including 'being forcibly removed from his cell by correctional staff, belted into a restraint chair and injected with a tranquiliser until he was sedated' for between 30 minutes and two hours at a time. The ADJC alleged that between 2012 and 2013, this restraint has been used between 13 and 15 times, despite the Office of the Public Guardian and the Office of Disability refusing to consent to or support the intervention. The ADJC further alleged that over this period, Mr M was 'chemically restrained by the use of PRN medication that is prescribed by a forensic mental health psychiatrist 40 out of the 52 weeks of the year'.

Ms F – Western Australia/Northern Territory

Ms F is an Aboriginal woman with foetal alcohol spectrum disorder from Alice Springs who was detained for twenty months in a Western Australian correction facility for traffic offences after being found unfit to plead. Ms F was returned to the Northern Territory in June 2014 following intervention from the ADJC and has since been detained four times for various offences. The ADJC alleged that during the last period of detention, Ms F was restrained and placed in solitary confinement after being extremely agitated following a meeting with the Office of the Public Guardian where she was given inaccurate advice about the date of her release. The ADJC noted that the facility has refused to confirm how long Ms F was held in solitary confinement.

Source: Aboriginal Disability Justice Campaign, *Submission 159*, pp 1–6.

Committee view

4.98 The committee is deeply concerned that people with cognitive impairment and intellectual disability in the prison system are not subject to the same protections and safeguards regarding restrictive practice as those in the disability services sector. This highlights the inappropriateness of detaining people with disability in facilities which are not specifically for the purpose of delivery of therapeutic services.

4.99 The committee considers that the principles of the *National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Service Sector* should apply to all institutions where people with disability are accommodated, particularly prisons.

Restrictive practices in schools

4.100 Currently there is a wide range of restrictive practices used in schools, ostensibly for student discipline. Evidence to the committee indicates the conflation of disability and behaviour management within the school environment often results in the adhoc and non-consensual use of restrictive practices such as exclusion, seclusion and restraint. The Law Reform Commission explains:

Restrictive practices involve the use of interventions and practices that have the effect of restricting the rights or freedom of movement of a person with disability. These primarily include restraint (chemical, mechanical, social or physical) and seclusion. People with disability who display 'challenging behaviour' or 'behaviours of concern' may be subjected to restrictive practices in a variety of contexts, including: supported accommodation and group homes; residential aged care facilities; mental health facilities; hospitals; prisons; and schools.⁸¹

4.101 A recent case in the ACT involving a ten-year old boy diagnosed with autism being placed in a cage as a 'withdrawal space' has highlighted these practices as being out of step with community values and expectations if used inappropriately.⁸² This case raises questions as to the adequacy of frameworks at a federal, state and territory level that guide and inform schools—teachers and principals—on acceptable use of restrictive practices. This case study is examined below in Box 4.2.

81 Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws (DP 81): Restrictive Practices*, <http://www.alrc.gov.au/publications/8-restrictive-practices/restrictive-practices-australia> (accessed 17 August 2015).

82 Matthew Doran, 'Use of cage for boy with autism at Canberra school prompts call for national education standard', *ABC News Online*, 3 April 2015, <http://www.abc.net.au/news/2015-04-03/experts-slam-need-to-cage-boy-wth-autism-at-canberra-school/6369470> (accessed 17 August 2015).

Box 4.2: School child restrained in cage at an ACT school

In April 2015, it was reported that a ten year old child with autism had been placed in a purpose built cage structure in an ACT primary school as a means of managing the behaviour of the child. This withdrawal space had been constructed to provide an area for the child to 'calm down' in. An investigation found that the space was visible from the classroom and had been described to fellow classmates and the child as a 'sanctuary'. Responsibility for the incident was attributed solely to the school's principal.

Although the investigation was keen to highlight the 'high expectations on all teachers, principals and officers of the directorate [ACT Directorate of Education and Training]', and that 'specialist expertise' is available for the teachers and principals to access, it also found that:

- Officers within the Directorate may not have provided adequate support to manage the escalating circumstances within the school.
- The first officers to be notified of the structure did not act on this advice and referred the complainant to another part of the Directorate. There is no record of a further contact from the complainant.
- Officers within the Directorate did not meet Directorate or public expectations by acting with sufficient urgency or alarm when provided with information about the structure.

The investigation's public report did not detail the existence or adequacy of directorate policy or practice for school children with disability—despite this being included in the investigation's scope. Despite the directorate seeking to attribute all of the blame to the principal, the directorate's first response as outlined above demonstrates a lack of support from the directorate to the school on these issues. The report also failed to examine the school and the directorate's response and interactions with the child, the family and the broader school community during the aftermath until five months after the incident had been brought to the attention of the directorate.

In May 2015 the ACT Government established an Expert Panel on Students with Complex Needs and Challenging Behaviour to review policies and procedures. The Expert Panel's report, released on 18 November 2015, made a series of recommendations to reform the ACT school system including an urgent review of funding for students with special needs, training for teachers and aides and greater support for principals.

Sources: Emma Macdonald and Georgina Connery, 'Child reportedly contained in cage-like structure at ACT primary school, *The Canberra Times*, 3 April 2015, <http://www.canberratimes.com.au/act-news/child-reportedly-contained-in-cagelike-structure-at-act-primary-school-20150402-1mdj0b.html> (accessed 18 September 2015).

ACT Directorate of Education and Training, *Investigation into an Inappropriate Structure Report Handout*, http://www.det.act.gov.au/_data/assets/pdf_file/0006/770208/150908-Inappropriate-Structure-Handout.pdf (accessed 18 September 2015).

ACT Directorate of Education and Training, *Expert Panel: Students with Complex Needs and Challenging Behaviour*, http://www.det.act.gov.au/school_education/complex-needs (accessed 19 November 2015).

4.102 The ACT example is not an isolated case. During the course of this inquiry, the Victorian Government has implemented a review into restrictive practices at two schools for people with disability—Monash Special Development School (SDS) and Bendigo SDS. This investigation will examine allegations of restraining children with straps and locking children in cupboards and cages.⁸³

4.103 In her submission, Ms Julie Phillips describes the 'variety of spaces [used] to seclude children with disabilities, including a locked cupboard, a disused school room used for junk, outdoor pens, and designated seclusion rooms'. Other spaces, such as 'outdoor pens, similar to those used to keep cattle or sheep in a small area are employed'. The worst example is the 'Safe Room' found at the Bendigo SDS 'which is approximately the size of a disabled toilet, has wooden walls which cannot be seen through, and two bolts for locking on the outside'.⁸⁴ A recent image of what is termed a 'Safe Room' can be seen below in image 4.1, whilst a purpose built enclosure visible to fellow classmates from the playground can be seen below in image 4.2.

83 Henrietta Cook, 'Allegations of students in cage-like structures triggers investigation', *The Age*, 22 September 2015, <http://www.theage.com.au/victoria/allegations-of-students-in-cagelike-structures-triggers-investigation-20150921-gjrnd8.html> (accessed 23 September 2015). See also: Richard Baines, 'Claims 11yo girl with autism left isolated, unsupervised at Tasmanian school', *ABC News Online*, 27 September 2015, <http://www.abc.net.au/news/2015-09-26/claims-autistic-child-left-unsupervised-at-tasmanian-school/6807292> (accessed 29 September 2015).

84 Ms Julie Phillips, *Submission 131*, p. 11. See also: Victorian Equal Opportunity and Human Rights Commission, *Held back: The experiences of students with disabilities in Victorian schools*, September 2012, <http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/reports/item/184-held-back-the-experiences-of-students-with-disabilities-in-victorian-schools-sep-2012> (accessed 21 September 2015). See also: *Submission 131b*, *Submission 131c*, *Submission 131e*.

Image 4.1: A "safe room" in use at a Victorian public school at time of submission to inquiry



Source: Ms Julie Phillips, Submission 131c.

Image 4.2: A fenced seclusion area visible from the school playground



Source: Ms Julie Phillips, Submission 131c.

4.104 The committee has received evidence from Children with Disability which describes examples of restrictive practices on children in schools and the impact this has had on them. Some of these examples are described in Box 4.3.

Box 4.3: Lived experience of restrictive practices on children and young people with disability in the Australian education system

(I only) recently stopped my son's special school using a time out chair in a separate room - (the) chair (was) bolted to the floor and my son belted in – Parent.

The school I went to would (hold) down students for not doing their work. Surely there are better strategies than that – Student.

(My son) was 18 months old when he was excluded from day care. They had no interest at all in assisting him. I only found out after leaving from a staff member, that he was left restrained in a high chair for long periods of time – Parent.

(My son) is currently being sedated to attend school. The school says he is doing well. His doctors say he is suffering a huge amount of emotional distress due to his education – Parent.

My son was tied down with rope to a chair...while in childcare because he wouldn't sit and listen to story time – Parent.

As an acceptable strategy to safeguard a student from hitting his head, school personnel tied a student to his chair for all class lessons and then tied him to a pillow on the floor during other activities – Parent.

My son was locked in a broom closet at high school...and we were asked to pay for the window that he broke... (and) the school did not think that it was wrong. I pulled him out very quickly! – Parent.

(At my son's school there) was a huge cage in the middle of school, the school was padlocked once kids were in and parents were not allowed to be involved in their education. I cried every day I dropped him there – Parent.

My son was made to do his one on one work in a storeroom cupboard, no windows, shelves stocked high with supplies...how depressing! – Parent.

My son had a 'containment area' built for him when he was in Prep... horrific! – Parent.

(My son) was humiliated in his last school, he was stuck between two flag poles (in) rain, hail or shine and was told by the teacher if he leaves that spot he will be expelled. He was put on parade as a naughty child and when I rang this teacher he told me "what is your problem, I stick my head out the window to make sure he's ok, he's not thirsty or needs to go toilet" – Parent.

Source: Children with Disability, Submission 144.

4.105 An example of a behaviour management plan from a Victorian school was provided to the committee. This pro-forma document has a number of key sections relating to behaviour management left blank, including the student's communication preference/receptive language, interests, and behaviour triggers. A disturbing instruction can be found written under 'Strategies to eliminate or mitigate the risk':

If all else fails, give [Name withheld] a choice between doing X or going to the 'safe room' [Name withheld] will usually respond. **Make him verbalise what he will do.**

If [Name withheld's] behaviour deteriorates and he doesn't respond, there's no point talking, just get him to the 'safe room' for time out. 2 [sic] able staff are required to escort him to the 'safe room'.⁸⁵

4.106 At the Sydney public hearing, Julie Phillips described 'restrictive practices' as:

I do not like the term 'restrictive practices', because it is a euphemism for what is often simply assault, false imprisonment and abuse. On occasion they are restrictive practices. But I feel very strongly about restraint and seclusion being used when they are not a last resort, and most of the time—despite the policies and procedures saying they can only be used as a last resort—they are not. In fact, out of all the cases that I have worked with I have never seen any restrictive practices used as a last resort.⁸⁶

4.107 Ms Therese Sands of Disability Alliance shared her thought on 'restrictive practice' policy in the educational context:

I think [restrictive practice] is particularly prevalent in schools, whereas in many other systems there is either some form of regulation or maybe an attempt at regulation in policies and procedures—maybe there are senior practitioners et cetera. In the school system there is absolutely no oversight or regulation, and often it is up to school principals, the schoolteacher and specific approaches and cultures within schools.⁸⁷

4.108 At a broad level, the absence of policy and guidance from state and territory education departments perpetuate this cycle of abuse. In some cases, principals and teachers working at the coal-face do not know how to manage behaviours of concern (a combination of lack of training and experience); and even if they do, there is insufficient funding to put in place positive behaviour change programs:

In terms of the schools, the policies and procedures around the country are very similar in that they are vague and broad and are open to interpretation—so open they are fairly meaningless. I have picked some out. New South Wales, for example, says that you cannot use physical restraint if there is a risk of injury to staff, but you can use physical restraint on a child for a threat to departmental property. In Queensland they can put physical restraint into a student's individual plan. That is not at all

85 Ms Julie Phillips, *Submission 131f*.

86 Ms Julie Phillips, *Committee Hansard*, Sydney, 27 August 2015, p. 54.

87 Ms Therese Sands, Co-Chief Executive Officer, People with Disability Australia; Australian Cross Disability Alliance, *Committee Hansard*, Sydney, 27 August 2015, p. 38.

acceptable in any sort of disability service, because it means you are intending to use it repeatedly and that is not the way that physical restraint is meant to be used. Western Australia is similar except that you can use restraint to maintain order or re-establish order. Anyone could say that they were maintaining order to excuse the fact that they had used such practices. Such practices are also used in regard to property damage.

What is missing in all of these policies and procedures and sometimes in educational regulations is compulsory training, comprehensive behaviour assessments—which Dr Anderson can talk more about—positive behaviour plans, any intensive psychological support that might be required, any evidence based approach to the problems that have arisen and proactive approaches. All of these policies and procedures are about reacting to challenging behaviours.⁸⁸

4.109 It is not clear to the committee whether any of the state and territory education departments have any fully developed enforceable policy guidance on restrictive practices. While the Restrictive Practice Framework applies to most disability services and agencies, there is a notable absence of regulation of restrictive practice used on children and young adults with disability in schools or other educational facilities.⁸⁹

4.110 During the course of this inquiry, the Victorian Government announced the appointment of a Principal Practice Leader (Education). This position reports to the Senior Practitioner (Disability) within the Office of Professional Practice (Department of Health and Human Services). The Principal Practice Leader (Education) will:

[V]isit and work with government schools throughout Victoria to gain an understanding of current processes and staff knowledge and provide advice related to best practice approaches and processes for supporting and responding to students with challenging behaviours, including least restrictive practices.

The Principal Practice Leader will work with the Department to identify improvements that could be made to professional learning and training, and current legislation, policies and guidelines under the direction and guidance of the Senior Practitioner (Disability).⁹⁰

4.111 Some submitters were not convinced that the Principal Practice Leader (Education) will be the panacea to many of the problems experienced within the education system. Ms Julie Phillips notes that without legislative amendments that transfer the regulation of restrictive practices in Victorian schools to the Office of the Senior Practitioner within the Department of Health and Human Services, the appointment is 'akin to a project worker gathering information and providing advice'.⁹¹

88 Ms Julie Phillips, *Committee Hansard*, Sydney, 27 August 2015, p. 54.

89 This is also noted by Ms Julie Phillips in evidence at the Sydney hearing.

90 Victorian Department of Education and Training, *Principal Practice Leader (Education)*, 3 September 2015, <http://www.education.vic.gov.au/about/departments/Pages/seniorpractitioner.aspx> (accessed 30 September 2015).

91 Ms Julie Phillips, *Submission 131ss*, pp 3–4.

4.112 The Victorian Government has also announced a new 'Restraint of Student' policy which describes when restrictive practices such as restraint and seclusion practices may be used. This policy notes that physical restraint and seclusion may only be used 'when it is immediately required to protect the safety of the student or any other person'.⁹² Importantly, these policies contain a range of compulsory actions that must be undertaken in the event that restrictive practices are utilised. These include immediately reporting the incident to the school principal and a student's parents or guardians. A range of supports must be provided to the student and their parents or guardians. A detailed written record with prescribed information must be completed and uploaded to the Education department's administrative system.⁹³

4.113 The committee acknowledges the Victorian Government's first steps towards reform in this difficult area, but notes a number of concerns with the initial approach taken. Ostensibly, restrictive practices are ruled out, however, it is not clear what type of strategies—funding and support—will be provided in its stead.

New South Wales—a case study

4.114 A key issue raised by witnesses to the inquiry, is the gap in the regulatory frameworks on restrictive practice, which prohibits or regulates certain practices in one service setting, while allowing it in another service setting.

4.115 The following section has taken the jurisdiction of NSW as a sample study, to highlight how restrictive practice is regulated within the NSW education system as compared to the policy framework in other NSW state government departments and agencies. It is worth noting that the regulation of restrictive practices in NSW schools does not appear to have the same level of rigorous regulation. In some cases, schools may be using 'seclusion' as a time out technique, which is banned for children in other service provider contexts.

92 Seclusion is 'the involuntary confinement of a student alone in a room or area which the student is physically prevented from leaving'. The policy notes that seclusion is different to the concept of timeout which is a separate behavioural management tool.

93 Victorian Department of Education and Training, *School Policy and Advisory Guide: Restraint of Student*, 6 October 2015, <http://www.education.vic.gov.au/school/principals/spag/governance/pages/restraint.aspx> (accessed 12 October 2015).

Box 4.4: New South Wales—a case study

In NSW, each school must prepare a discipline policy which outlines 'how discipline is implemented in the school...to inform and guide students, staff and parents about the aims, underlying philosophy, strategies and responsibilities for student discipline'. This policy must be reviewed every three years. The NSW Department of Education and Training (NSW DET) provides a range of policy guidance and support materials including that a discipline policy must be consistent with the *Disability Discrimination Act 1992* and the *Disability Standards for Education 2005*.¹

However, in many of these documents, there is no detailed discussion of children with disability. This approach appears to then flow into the discipline policies themselves with a number of current discipline policies for NSW public schools available online.¹ In most of the policies viewed, people with disability were not mentioned.

There are a range of NSW government documents that are used to provide guidance around restraint and seclusion of minors with disability.

Guidelines for the Use of Time-out Strategies including Dedicated Time-out Rooms

The NSW DET provides guidelines on the use of time-out as part of a broader disciplinary strategy. The NSW DET explains:

*Time-out strategies are included by some schools in their school discipline policies for use when a student is behaving inappropriately and temporary separation from that particular environment may assist in supporting the student to demonstrate appropriate behaviour.*¹

Although this document is quite comprehensive—outlining when time-out is suitable and how it should be approached, communicated and documented—it only addresses the issue of children with disability once:

*A small number of students who have very complex needs may require specific, personalised learning and support when more general time-out procedures are not appropriate. These interventions, including any on-going use of a dedicated time-out room, may only be implemented if developed, monitored and reviewed by a case management team, consented to by the parents and approved by the principal. The case management team may include the student, parents or carers, school and local Department of Education staff, health professionals and staff from other agencies or government departments.*¹

*Sources: NSW Department of Education and Communities, *Student Discipline in Government Schools: Support Materials*, 2006; Lambton High School Welfare Discipline Policy; NSW Department of Education and Communities, *Guidelines for the Use of Time-out Strategies Including Dedicated Time-out Rooms*, 2011.*

4.116 In contrast, it is interesting to compare the regulatory environment that governs other NSW government departments. The NSW Department of Health guidance note, *Aggression, Seclusion and Restraint in Mental Health Facilities in NSW*, relates to mental health facilities. There a number of principles for those aged under 18 years of age that are transferable to the education domain:

The consumer's primary carer (as defined by NSW Mental Health Act 2007, Section 71) will be informed of any incident involving restraint/seclusion as soon as is reasonably possible after the event. They

will be told the reason why this intervention was used, the period of time it was applied and any consequences of the intervention...

Family/carers of children and young people (under 18 years) involved in episodes of seclusion or restraint should be contacted as soon as possible regardless of the time of the event...

For anyone under 18 years of age, the parents or guardian will be notified unless there are particular reasons this would be not in the child or young person's best interests.⁹⁴

4.117 This guidance note is also quite explicit in describing all of the requirements of an individual who is deemed to require restraint. This level of detail is absent from all educational policy directives.

4.118 Another document that contains a number of useful principles in this area is the former NSW Department of Family and Community Services *Behaviour Support: Policy and Practice Manual*.⁹⁵

4.119 This manual was developed by the Office of the Senior Practitioner, which was established to provide guidance on behaviour support and intervention services delivered by NSW funded ageing, disability and homecare services. The manual:

has been designed to provide a contemporary, practical resource for the development of high quality and consistent support and intervention practices which adhere to relevant departmental policy and procedures and legislative standards...

is targeted to assist Behaviour Support Practitioners drawn from a range of professional backgrounds and who undertake their work in diverse contexts. It will assist them to interact in inclusive, consultative and collaborative ways through the use of accessible, evidence-based support formats and practice approaches...

Importantly, the manual provides guidelines to safeguard the rights of the individual Service User and promotes the use of person-centred positive behaviour support practices. It recognises that all behaviour occurs within a context and that meaningful, longitudinal behaviour change relies not only on maintenance of appropriate supports for the Service User, but also on refinement of the wider support system built around the individual.⁹⁶

94 NSW Department of Health, *Policy Directive: Aggression, Seclusion and Restraint in Mental Health facilities in NSW*, June 2012, http://www0.health.nsw.gov.au/policies/pd/2012/pdf/PD2012_035.pdf (accessed 2 October 2015).

95 NSW Department of Family and Community Services, *Behaviour Support: Policy and Practice Manual. Guidelines for the provision of behaviour support services for people with an intellectual disability. Part 1: Policy and Practice*, January 2009. https://www.adhc.nsw.gov.au/_data/assets/file/0003/228360/341_Behaviour_Support_Policy_and_Practice_Manual_Part_1_web.pdf (accessed 2 October 2015).

96 NSW Department of Family and Community Services, *Behaviour Support: Policy and Practice Manual. Guidelines for the provision of behaviour support services for people with an intellectual disability. Part 1: Policy and Practice*, January 2009.

4.120 Importantly, this policy applies to adults, children and young people with intellectual disabilities and spells out how restricted practices are to be employed on children and young people.¹

4.121 There are a number of standards that this policy complies with including:

- NSW Out-of-Home Care Standards (NSW Office of the Children's Guardian);
- Living in the Community: Putting Children First (July 2002);
- The Children's Standards in Action (2004);
- Individual Planning for Children and Young People Living in Out-of-Home Placements: Policy and Procedures (May 2007);
- Memorandum of Understanding between the Department of Community Services and the NSW Department of Ageing, Disability and Home Care on Children and Young Persons with a Disability, and;
- NSW Interagency Guidelines for Child Protection Intervention (DoCS 2006).⁹⁷

4.122 The manual is intended to be implemented in conjunction with the Behaviour Support Policy, last updated in March 2012. The two policy documents outline that restrictive practices, except in exceptional emergencies, should be used only in the context of a Behaviour Support Plan developed by a behaviour support specialist. The policy explicitly differentiates between Exclusionary Time Out and Seclusion. Exclusionary Time Out removes a person from one setting to another for a period of time under supervision. It must be part of an overall planned strategy, time-limited, contingent on behaviour change and must be supervised at all times. Seclusion is the isolation of a person in a setting by themselves and must be monitored at all times. Seclusion in a disability service setting is banned for anyone under 18 years of age under all circumstances.

Transparency and behaviour modification

4.123 On another level, parents of children with disability have very limited rights to be involved in how their children are taught and treated at school. One submitter notes that parents 'do not have the right to':

- refuse restrictive practices;
- be told about restrictive practices used on their child in schools;
- attend Student Support Group meetings;
- agree with or have input into Individual Education Plans;
- agree with or have input into a Behaviour Plan;

97 NSW Department of Family and Community Services, *Behaviour Support: Policy and Practice Manual. Guidelines for the provision of behaviour support services for people with an intellectual disability. Part 1: Policy and Practice*, January 2009.

- request the intervention of psychologists or other experts who have the ability to address challenging behaviours;
- insist that their child has a formal language assessment;
- insist that their child has a formal communication method and that staff must be trained in that method;
- insist that staffing levels must be adequate to support their child;
- in some schools, enter the school buildings; and
- insist that their child has assistance from anyone with a particular qualification or training (for example integration aides are commonly hired in response to individual funding received, and such aides require no qualifications regardless of how complex the child's disabilities are).⁹⁸

4.124 Ultimately, 'restrictive practices' punish certain types of behaviour rather than rewarding or encouraging positive behaviour. The committee heard that often, 'bad' behaviour is actually a response to the environment and support (or lack thereof) that a child is provided with at school. Dr Angelika Anderson explained the complex link between disability, environment and challenging behaviours:

Children with disabilities, or individuals with disabilities, are at risk for developing behaviours of concern because they often have skill deficits, especially those individuals who have impairments in social communication. They are not able to signal their needs and wants, and often challenging behaviour has a communicative function. That finally is the only thing that works for them. That means that automatically children with autism, but also other populations, such as migrant populations for whom English is a second language or who do not have the same cultural background or have not been brought up with and are not very familiar with the behavioural expectations in schools, are at higher risk.⁹⁹

4.125 The Disability Alliance agreed and went further, stating that 'these behaviours can be viewed as a form of resistance or protest to maladaptive environments; and should be viewed as legitimate responses to problematic environments and situations. Changing services, systems and environments should be the starting point for changing behaviour, rather than changing the person'.¹⁰⁰

4.126 The Disability Alliance also noted the role that 'restrictive behaviours' play in enabling and normalising other forms of violence, by 'desensitising both staff and people with disability, undermining their ability to recognise violence, to view it as unacceptable and respond to it as a crime'.

4.127 Families Australia noted that 'policies and safeguards to protect children and young people in respite, at school and being transported to and from school are

98 Communication Rights Australia, *Submission 78*, p. 10.

99 Dr Angelika Anderson, *Committee Hansard*, Sydney, 17 August 2015, p. 59.

100 Australian Cross Disability Alliance, *Submission 147*, pp 45–46.

critical.¹⁰¹ In its submission, the LCA highlighted a report on the experiences of children with disabilities in Victorian schools which found:

In many of these cases appropriate understanding of triggers of behaviour and the best ways to de-escalate a child experiencing heightened behaviours, by adequately trained staff, would vastly reduce the need for use of seclusion and restraint techniques...

Improved policies and procedures in this area, and supervision and implementation of them are urgently required. Appropriate recruitment, training and a change in culture of many schools would dramatically reduce the need for these strategies to be used.¹⁰²

4.128 The Law Reform Commission in its Final Report entitled *Equality, Capacity and Disability in Commonwealth Laws* made the following recommendation in relation to restrictive practices:

The Australian Government and the Council of Australian Governments should develop a national approach to the regulation of restrictive practices in sectors other than disability services, such as aged care and health care.¹⁰³

4.129 A major concern to the committee is that educational opportunities and outcomes for children with disability are lost as a result of these practices.¹⁰⁴ The need to encourage and support all Australian children to participate in their education in a meaningful way highlights the critical importance of support rather than punitive measures. As one submitter noted:

The effect [of restrictive practices] on the children is obvious to any observer. The children themselves have become worse in their behaviour. While doing the [Applied Behavioural Analysis] ABA behaviour therapy with me they were in a support unit in a general public school and had never been sent home. While their behaviour needed addressing they were capable of handling small incidents. The first time [Name withheld] was too uncontrollable and sent home from school was only weeks after the JIRT [Joint Investigation Response Team] involvement as they refused to address the risk issues I was pointing out to them. Now no public school in the area will accept the children and they are forced to go to a special school. [Name withheld] missed out on full time schooling for months while waiting for a place...

What is worse is the children's behaviours and health have also deteriorated. [Name withheld] is overweight as we have not been able to

101 Families Australia, *Submission 3*, p. [3].

102 Law Council of Australia, *Submission 139*, p. 7.

103 Recommendation 8–2 in Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws: Final Report*, Law Reform Commission Report 124, August 2014, p. 19, https://www.alrc.gov.au/sites/default/files/pdfs/publications/alrc_124_whole_pdf_file.pdf (accessed 23 September 2015).

104 Youth Disability Advocacy Service, *Submission 88*.

concentrate on his welfare with the Systems Abuse that occurred. [Name withheld] behaviour has declined and he is now self-harming (biting himself) and pulls at others. There (sic) behaviour has become so bad that I cannot take them to the activities I used to attend.¹⁰⁵

Committee view (restrictive practice in education)

4.130 The committee notes the previously described examples clearly do not meet community expectations and standards when it comes to how children—abled or with disability—are treated at an Australian school in 2015, which begs the question—why does it still happen?

4.131 The committee is greatly concerned with what appears to be systemic problems within the education system that are leading to many of the inappropriate practices described in this section. Many of the systemic problems that lead to the use of restrictive practices actually reinforce an attitude that facilitates the mistreatment of children with disability because they are viewed as different.

4.132 The committee notes that the Queensland Department of Education has a Standard Operating Procedure for the treatment and use of horses and ponies in schools, but no policy for the use of restrictive practices on Queensland schoolchildren.

4.133 There needs to be a national approach with regard to regulation. It is not clear to the committee why the education system sits aside from the standards expected of other mainstream services such as health and disability services that support people with disability.

4.134 It is the committee's strong view that the *National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Service Sector* should be extended and apply to educational facilities. It is also the committee's view that states and territories need to establish and implement enforceable policies and guidance for school teachers and principals that eliminates the use of 'restrictive practices'.

4.135 It is also deeply concerning that not only are parents not allowed to refuse the use of 'restrictive practices' or be involved in the decision-making process, but they are not even made aware of the use of such policies. It is the committee's view that transparency around these processes is the first step in moving to eliminate the use of restrictive practices against children..

4.136 It is the committee's view that proven positive behavioural management tools such as Applied Behavioural Analysis need to take the place of restrictive practices and need to be properly funded and professionally supported.

105 Mr Michael Hart, *Submission 79*, p. 23. See also: Autism Behavioural Intervention Association, http://www.abia.net.au/applied_behavioural_analysis (accessed 16 September 2015). The Association notes that 'research has shown that at least 15–20 hours of intensive therapy per week is needed to produce long-term benefits'.

Concluding committee view

4.137 One of the main areas of concern for the committee relates to the black and white approach to legal incapacity. As the law currently stands, if a person is deemed to lack legal capacity, then a legal guardian becomes a substitute decision-maker. The committee supports a move towards supported decision-making as being more appropriate in many circumstances, and considers it is time to curtail the use of substitute decision-making..

4.138 The committee agrees with the premise that the concept of legal incapacity is more subtle and complex than the current absolutist approach. The committee sees that legislative reform is required to accommodate a spectrum of decision-making, to ensure that where a person requires support to make certain decisions, such as substantial financial decisions, they do not lose the right to make *all* decisions, such as where they live or who may visit them.

4.139 The committee notes the volume of evidence which shows that no single jurisdiction has created a guardianship system that is either free of abuse or neglect, or has appropriate oversight to ascertain that abuse or neglect is not occurring at far higher rates than is currently known. Clearly a national project to establish best-practice across the states and territories is of critical need.

4.140 The committee is highly disturbed at the evidence presented of restrictive practice. Clearly, in many cases what is deemed to be a necessary therapeutic or personal safety intervention is in fact, assault and unlawful deprivation of liberty.

4.141 The committee was distressed to be presented with all too many harrowing accounts of small children suffering at the hands of the very people who should be educating them. It is hard to understand how strapping a child to furniture, or locking them alone in a room to scream themselves into exhaustion could be seen as a justifiable behavioural intervention. This is without doubt a national shame.

4.142 As a matter of urgency, the Restrictive Practice Framework must be implemented as an enforceable, reviewable instrument for all schools, government and private, and there must be independent oversight of its implementation in schools.

Chapter 5

Reporting and investigating

5.1 This chapter addresses the following terms of reference:

(d) the responses to violence, abuse and neglect against people with disability, as well as to whistleblowers, by every organisational level of institutions and residential settings, including governance, risk management and reporting practices;

(e) the different legal, regulatory, policy, governance and data collection frameworks and practices across the Commonwealth, states and territories to address and prevent violence, abuse and neglect against people with disability; and

(h) what should be done to eliminate barriers for responding to violence, abuse and neglect perpetrated against people with disability in institutional and residential settings, including addressing failures in, and barriers to, reporting, investigating and responding to allegations and incidents of violence and abuse.

5.2 This chapter examines the efficacy of reporting and investigating mechanisms for allegations and incidents of violence, abuse and neglect, including:

- internal reporting mechanisms by disability support organisations; and
- external reporting mechanisms to independent bodies.

5.3 Overwhelmingly, the committee heard that Australia's existing legal and policy frameworks are inadequate, overly complex and do not provide adequate protection to people with disability in residential and institutional settings. A number of submissions highlighted that there are no clear or nationally consistent mechanisms for reporting abuse, neglect or violence and recommended the introduction of national, independent reporting mechanisms.¹

5.4 The inadequacy of the current approach means that there is no accurate data on the actual level of violence, neglect and abuse being perpetrated on people with disability.

Reporting allegations of abuse, violence and neglect

International obligations

5.5 Under Article 16 of the United Nations (UN) Convention on the Rights of Persons with Disabilities (Disability Convention), Australia is obliged to ensure that people with disability are not subject to any forms of exploitation, violence or abuse.²

1 See, for example: Australian Cross Disability Alliance, *Submission 147*, pp 12–13; Office of the Anti-Discrimination Commissioner, Tasmania, *Submission 40*, p. 12; Office of the Public Advocate, Queensland, *Submission 73*, p. 16.

2 United Nations Convention on the Rights of Persons with Disabilities, Article 16, <http://www.un.org/disabilities/convention/conventionfull.shtml> (accessed 21 August 2015).

5.6 In its concluding observations on Australia's first report on the Disability Convention, the UN Committee on the Rights of Persons with Disabilities (UN Disability Committee) expressed particular concern about reports of high rates of violence against women and girls living in institutional settings, and recommended an urgent investigation.³

5.7 To complement the UN Disability Committee's report, the Australian Human Rights Commission argued that this inquiry should give consideration to the 2012 *Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (Civil Society Report), prepared by Australian disability support organisations.⁴ The report highlighted that in Australia:

...there is no specific legal, administrative or policy framework for the protection, investigation and prosecution of exploitation, violence and abuse of people with disability.⁵

5.8 In regard to Article 16 of the Disability Convention, the Civil Society Report recommended that Australia should establish 'an independent, statutory, national protection mechanism that has broad functions and powers to protect, investigate and enforce findings related to situations of exploitation' and a 'national coordinated strategic framework for the prevention of exploitation, violence and abuse experienced by men, women, girls and boys with disability'.⁶

Internal reporting mechanisms

5.9 For the purposes of this report, internal reporting is defined as the reporting of incidents within the service provider, and also the reporting of incidents as required to the government funding body.

5.10 In most jurisdictions, there is a policy requirement for funded disability service providers to report 'serious' or 'critical' incidents to the relevant department providing the funding for investigation and response. Serious or critical incidents are events that threaten the safety of people or property. A serious or critical incident could be:

- the death of, or serious injury to, a resident;
- allegations of, or actual, sexual or physical assault of a resident; or

3 United Nations Committee on the Rights of Persons with Disabilities, *Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, 4 October 2013, p. 6. See: Attorney-General's Department, Convention on the rights of persons with disabilities, <http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/UnitedNationsConventionontherightsofpersonswithdisabilities.aspx> (accessed 24 September 2015).

4 Australian Human Rights Commission, *Submission 57*, p. 1.

5 Disability Representative, Advocacy, Legal and Human Rights Organisations (DRALHRO), *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities*, August 2012, p. 102, <http://www.pwd.org.au/issues/crpd-civil-society-shadow-report-group.html> (accessed 24 September 2015).

6 DRALHRO, *Disability Rights Now*, p. 25.

- significant damage to property or serious injury to another person by a resident.⁷

5.11 Serious incidents may be reported to disability service providers by people with disability and their families, or by staff and carers. In many cases, the service provider is responsible for identifying and reporting incidents, and deciding how the response is to be managed.

5.12 Table 5.1 outlines the different requirements across jurisdictions for reporting critical or serious incidents.⁸

7 National Disability Insurance Scheme (NDIS), Proposal for National Disability Insurance Scheme Quality and Safeguarding framework: Consultation paper, pp 23–24.

8 See: Ombudsman NSW, Disability reportable incidents, <https://www.ombo.nsw.gov.au/what-we-do/our-work/community-and-disability-services/part-3c-reportable-incidents>; Department of Human Services, Victoria, Critical client incident reporting, <http://www.dhs.vic.gov.au/funded-agency-channel/about-service-agreements/incident-reporting/human-services>; Department of Communities, Child Safety and Disability Services, Critical Incident Policy, <https://www.communities.qld.gov.au/resources/disability/publication/critical-incident-policy-dsq-2008.pdf>; Disability Services Commission WA, Serious Incident Reporting, <http://www.disability.wa.gov.au/disability-service-providers-/for-disability-service-providers/contracts2/serious-incident-reporting-/>; Department for Communities and Social Inclusion, South Australia, Disability SA – policies and guidelines, <http://www.dcsi.sa.gov.au/services/disability-sa/disability-sa-policies-and-guidelines>; Department of Health and Human Services, Tasmania, Quality and Safety Standards Framework, https://www.dhhs.tas.gov.au/about_the_department/business/community_sector_relations_unit/quality_and_safety; Disability Services Regulation 2014 (ACT), <http://www.legislation.act.gov.au/sl/2014-12/default.asp>; NT Department of Health, http://www.health.nt.gov.au/Publications/Aged_and_Disability_Publications/index.aspx (all accessed 24 September 2015).

Table 5.1: Reporting requirements of serious or critical incidents for funded disability service providers

Jurisdiction	Legislative/policy requirement	Responsibility to report	Agency to report to
NSW	Legislation – <i>Ombudsman Act 1974</i> , Part 3C	Funded service providers Department of Families and Communities	NSW Ombudsman
Victoria	Policy – Responding to allegations of physical or sexual assault	Funded service providers	Department of Health and Human Services Police
Queensland	Policy – Critical Incident Reporting Procedures	Funded service providers	Department of Communities, Child Safety and Disability Services
WA	Policy – Serious Incident Reporting	Funded service providers	Disability Services Commission
SA	Policy – Managing Critical Client Incidents Policy	Funded service providers	Department for Communities and Social Inclusion Police
Tasmania	Policy – Serious Incident Policy / Preventing and Responding to Abuse in Services Policy	Funded service providers	Department of Health and Human Services
NT	Policy – Disability Service Standards	No formal requirement to report Mandatory reporting for children under 18 only	Department of Children and Families Police
ACT	Regulation – Disability Services Regulation 2014, Section 10	Funded specialist disability service providers	Director-General, Community Services Directorate

Source: Refer to footnote 8.

Efficacy of internal reporting processes

5.13 As outlined in Table 5.1, in all jurisdictions but New South Wales (NSW), the process for reporting violence, abuse and neglect is defined by government disability-related policy. These policies differ across jurisdictions, including how 'serious' or 'critical' incidents are defined, and how they should be responded to. Submitters and witnesses highlighted that existing policies are not effective in ensuring that 'serious' or 'critical' incidents are adequately reported and investigated.⁹

5.14 Some disability service providers have internal processes to report and respond to incidents of abuse and neglect. For example, the Endeavour Foundation submitted that it has implemented strategies to develop a zero tolerance culture for abuse, neglect and exploitation, including utilising an External Advisory Committee for the Prevention and Response to Abuse Neglect and Exploitation and training all staff in human rights and abuse recognition.¹⁰

5.15 However, evidence to the committee suggested that in many cases, allegations of serious or critical incidents are not consistently reported. The Tasmanian Anti-Discrimination Commissioner submitted that, while service providers are required to notify the relevant department within two working days of being notified of an allegation of abuse:

...complaints made to my office would suggest that not all incidents are reported. Nor is there a clear understanding about the procedures adopted by residential or other accommodation service providers about the mechanisms for investigating such complaints.¹¹

5.16 Evidence was presented to the inquiry that there is a problem with funding bodies investigating the organisations they fund, due to the inherent conflict of interest:

At the moment there is also too much of a conflict in funding bodies investigating who they are funding. The organisations have too much invested, and obviously there is often a direct conflict of interest there in terms of who is independent and who can look at a situation and make a judgement based on probabilities rather than a criminal threshold as to whether or not something has occurred, then perhaps being able to compel a support agency to respond in a more appropriate way.¹²

5.17 This view was echoed by Speaking Up For You. Mr Neal Lakshman, Advocacy Worker, told the committee:

9 This issue was raised by both lived experience submitters as well as organisations such as Women with Disabilities Australia, Australian Cross Disability Alliance, *Committee Hansard*, Sydney 27 August 2015, p.50 and NSW Ombudsman, Submission 29, p. 22.

10 Endeavour Foundation, *Submission 27*, p. 10.

11 Office of the Anti-Discrimination Commissioner, Tasmania, *Submission 40*, p. 13.

12 Ms Leona Berry, Manager, WWILD Sexual Violence Prevention Association, *Committee Hansard*, Brisbane, 16 October 2015, p. 18.

I guess the issue is that Disability Services is investigating itself at the moment. We may have a complaint against a DSQ [Disability Services Queensland] officer, and then six months later he might be in the complaints unit, so it can be quite difficult.¹³

5.18 Where incidents are reported, there may be differences in the way they are handled. The Victorian Disability Services Commissioner noted that, since August 2012, it has reviewed 888 'category one' incident reports relating to allegations of staff-to-client assault and unexplained injury made to the relevant government department and community service organisations. The reviews highlighted that there is a 'lack of focus on people's outcomes and safeguarding people's rights during investigations' and a 'lack of clarity and shared understanding' of the definition of 'assault' and 'poor quality of care'.¹⁴

5.19 One suggested cause for the lack of reporting is the perceived 'conflict of interest' of internal self-reporting. The Australian Cross Disability Alliance (Disability Alliance), representing national disability support organisations, suggested that the current system of having funded disability service providers reporting to funding agencies:

...presents an inherent conflict of interest, and has been found to be a major problem in the reporting (and non-reporting) of violence against people with disability in institutional and residential settings. There is now indisputable evidence to demonstrate that the 'covering up' of complaints, 'serious/critical' and other 'incidents', is rampant at all levels of the system—at the direct service delivery level, at management and governance levels, and at 'funding agency' levels, including large Government Departments.¹⁵

5.20 Some submitters suggested that the governance of institutions and residential facilities did not foster a culture of identifying and reporting incidents and allegations of abuse. Queensland Advocacy Incorporated suggested:

There are significant problems marring the efficacy of the governance, risk management and reporting practices of institutions providing care for people with disability. This flows, to a large degree, from the predominant culture of institutions, which are traditionally hierarchically structured, paternalistic and lack transparency and accountability.¹⁶

5.21 Witnesses suggested some institutions are reluctant to report incidents and allegations of abuse due to possible negative publicity. Ms Heidi Egarter, a disability support worker with the Health and Community Services Union, told the committee of concerns about:

13 Mr Neal Lakshman, Advocacy Worker, Speaking Up For You Inc., *Committee Hansard*, Brisbane, 16 October 2015, p. 37.

14 Disability Services Commissioner, Victoria, *Submission 86*, p. 8.

15 Australian Cross Disability Alliance, *Submission 147*, p. 65.

16 Queensland Advocacy Incorporated, *Submission 43*, p. [8].

...the tardiness and reluctance to act on allegations of abuse by non-government agencies in particular. There appears to be a culture of suppressing information that could lead to negative publicity. I believe this is endemic and perpetuated throughout the management structure.¹⁷

5.22 The committee was particularly concerned by evidence that suggested in some cases allegations of abuse and neglect are not reported at all and are dealt with internally by disability service providers. The Disability Alliance criticised the use of the terms 'serious' and 'critical' incidents to describe 'what is understood and recognised in the broader community as violence, rape, sexual and physical assault, grievous bodily harm, domestic violence, gender-based violence etc', noting that this may lead to incidents not being reported appropriately. Under existing frameworks, these crimes are not reported to police, but treated as internal service incidents:

The reframing of violence, abuse and neglect, including crimes are often reframed by terminology such as 'abuse' or 'service incidents'. This creates a greater potential for such 'incidents' to go undetected, unreported, and not investigated or prosecuted because they are more likely to be dealt with administratively within the service setting.¹⁸

5.23 Evidence presented to the inquiry noted that where allegations were not followed up appropriately, that can create culture which actually fosters abuse and neglect:

When abuse is ignored, or when people report abuse and it is ignored or not properly heeded, that again signals to the person that their issue is not important to somebody, that they are alone and that this kind of practice is acceptable, understandable and even common practice.¹⁹

5.24 The committee notes that the proposed National Disability Insurance Scheme (NDIS) quality and safeguarding framework consultation paper acknowledged the 'need to decide how serious incidents will be handled'. The consultation paper noted that '[i]ncidents involving allegations of assault, theft or any other crime must of course always be reported to the police'. Possible options for reporting serious incidents canvassed in the consultation paper included:

- requiring that all providers have effective internal systems in place to deal with serious incidents; or
- requiring that registered providers report serious incidents to the National Disability Insurance Agency (NDIA) or an independent oversight body.²⁰

17 Ms Heidi Egarter, Member, Health and Community Services Union, *Committee Hansard*, 27 August 2015, p. 10.

18 Australian Cross Disability Alliance, *Submission 147*, p. 56.

19 Ms O'Flynn, Director, Queensland Advocacy Inc., *Committee Hansard*, Brisbane, 16 October 2015, p. 2.

20 NDIS, *Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*, February 2015, pp 23–24.

Responses to internal whistleblowers

5.25 The committee is concerned by evidence of negative workplace responses to whistleblowers who seek to report allegations and incidents of abuse, violence and neglect. The Disability Alliance submitted:

...the widespread problem of 'whistleblowers' being bullied, harassed, persecuted, intimidated, deployed to other positions, and sacked, when reporting (or attempting to report) violence against people with disability in institutional and residential settings—is yet another serious dimension in the complaints processes and mechanisms, and remains an un-addressed, systemic issue nationwide.²¹

5.26 One submitter expressed concern that:

Many complaints are often ignored or not investigated because other staff who are witnesses to the abuse are too scared to speak up because they know whistleblowers are hounded out of the system.²²

5.27 During its inquiry, the committee heard from whistleblowers about their experience attempting to report allegations and incidents of violence and abuse to internal and external bodies (see Box 5.1 and 5.2). The committee notes that many witnesses asked to provide evidence in camera or as name withheld, citing concerns about repercussions. The committee believes this is indicative of an environment that inhibits whistleblowers, and highlights the bravery of those who spoke out publicly.

Box 5.1: Whistleblowers – Ms Julie Sullivan

For the past 20 years, Ms Julie Sullivan has spoken out against abuse against people with disability that she witnessed while working at a government run community residential unit for people with disability in Victoria during the 1980s and 1990s. During this time, Ms Sullivan witnessed abuse and violence perpetrated by staff members against residents, including assault and financial abuse. Ms Sullivan submitted that staff who refused to follow instructions to 'hit or restrain clients' were victimised and bullied by supervisors and management. In 1989, Ms Sullivan reported the abuse to community visitors administered by the Office of the Public Advocate.

Following the reporting of abuse, Ms Sullivan submitted that the department initiated an investigation into the allegations. However, Ms Sullivan asserted that the allegations were not adequately investigated:

What ensued was an absolute travesty...Only those of us who had spoken to the CVs [community visitors] were called to the Regional Office for the 'inquiry.' No other staff including [name removed] were questioned. No documentation or records were taken from Walpole by management. Not one DHS [Department of Human Services] person from management came to the CRU [community residential unit] or to even check on the clients whose awful abuses we had described. No directive came from management to have the clients medically checked.

21 Australian Cross Disability Alliance, *Submission 147*, p. 65.

22 Name withheld, *Submission 60*, p. 5.

Box 5.1 (continued)

After we had given our evidence (which was transcribed, but never given to us later as promised) we waited for an outcome or some contact from management. Approximately 7 weeks later we were informed by [redacted], Regional Manager, that "Allegations have been made but it was found there was not a case to answer".

Ms Sullivan submitted that her experience as a whistleblower and the experience of attempting to speak out against allegations of abuse took a significant personal toll:

I have diagnosed PTSD [Post Traumatic Stress Disorder], clinical depression and other anxiety conditions. I also have adrenal fatigue, which I have been told occurs when a person has endured a prolonged period of circumstances which trigger ongoing "fight or flight" hormonal responses. Adrenal fatigue has numerous and varied symptoms too lengthy to go into. I have become reclusive, distrustful of others. I have lost my organisational and coping skills.

Source: Ms Julie Sullivan, *Submission 157*, p. [16].

5.28 In April 2015, as part of an investigation by journalists Mr Richard Baker and Mr Nick McKenzie, government documents obtained by Ms Sullivan indicated that the serious concerns raised by the Office of the Public Advocate had been 'silenced', by the panel of inquiry established to investigate:

The panel substantiated the most explosive allegations, including the unlawful use of restraints and soap suppositories, and expressed "very serious concerns over programs and potential risk for residents".

Yet it failed to interview everyone connected with the house and quickly began laying a bureaucratic dead-hand over events, telling [the then Community Services Minister Peter] Spyker that no staff had been negligent and only "programmatic issues" had been identified.

Leaked files include one memo written by a public servant who seems more concerned with bad publicity than the bad treatment of residents: "Recommendations of the panel are designed to ensure that initiatives are already being undertaken to minimise any adverse comment and present a positive response to the matter".

Senior bureaucrats also moved to silence the Office of the Public Advocate, with the panel of inquiry advising ministers that: "The role of the Community Visitors in this matter is of grave concern in as much as they have clearly moved into areas in which they appear to have no jurisdiction nor should they seek to have jurisdiction".²³

5.29 Ms Sullivan submitted that her continued attempts to have the abuse investigated have not been supported by government:

23 Richard Baker & Nick McKenzie, 'Disabled were abused in house of horrors and governments covered it up', *The Age*, 11 April 2015, <http://www.theage.com.au/victoria/disabled-were-abused-in-house-of-horrors-and-governments-covered-it-up-20150408-1mgq13> (accessed 20 October 2015).

The official stance...was that all claims had been investigated and there was no evidence to substantiate. In reality, very little investigation of our claims took place. The terms of the inquiry had been so narrow and only limited to four of the lesser abuses.²⁴

Box 5.2: Whistleblowers – Ms Karen Burgess

Ms Karen Burgess was a front-line disability services manager specialising in people with 'behaviours of concern' and 'complex behaviours'. At one time, Ms Burgess was a site manager at a disability day centre in Melbourne. Ms Burgess raised serious concerns about a large wooden box that was erected in 2014 to restrain people with autism, which management considered to be a 'desensitising box' intended to be used as a calming device. Ms Burgess ordered the box to be dismantled once she started working at the facility. Soon after, Ms Burgess was dismissed from her position.

Ms Burgess provided evidence to the inquiry on the toll taken on whistleblowers:

There are many staff that find themselves in this position and end up leaving the industry because they cannot handle the types of situations they are confronted with. There is a lot of pressure that comes to bear on people who are like me, who speak up and out against the type of abuse that is happening in these institutions.

...

There was another staff member at [organisation name withheld] who was fired, two weeks after my termination, because of also raising practice issues and concerns. She is no longer making complaints because of the pressure that came to bear on her, but there was a second staff member who was also fired in this period because she was making direct complaints about concerns at this site.

Ms Burgess noted that there are already many laws in place to protect people with disability, but these are not being followed. However, Ms Burgess recommended that there be an independent body with the powers of investigation leading to prosecution.

Source: Nick Toscano, Beau Donnelly, 'Wooden box built to calm autistic students and day centre', *The Age*, 4 October 2015 and Ms Karen Burgess, *Committee Hansard*, Brisbane, 16 October 2015.

5.30 A number of submitters highlighted the need for greater support and nationally consistent legal protection for whistleblowers who speak out against abuse, violence and neglect.²⁵ For example, United Voice recommended:

Nationally consistent whistle blower legislation must be introduced to support and encourage workers to speak up without fear of being persecuted or targeted by their employers where a report is made in good faith.²⁶

24 Ms Julie Sullivan, *Submission 157*, p. [16].

25 See: Name withheld, *Submission 106*, p. 16.

26 United Voice, *Submission 17*, p. 5.

Committee view

5.31 It is clear from the range of evidence presented to this inquiry from multiple submitters in different jurisdictions across Australia, that no single state or territory has yet devised an acceptable system of disability service complaints reporting.

5.32 Many of these processes allow organisations to self-determine whether an incident requires reporting outside the workplace, leading to a clear conflict of interest.

5.33 The sheer number of whistleblowers who came forward to this inquiry shows that internal reporting requirements are either not being followed, or do not go far enough to protect people with disability from violence, abuse and neglect.

External reporting mechanisms

5.34 In addition to the internal reporting mechanisms that are managed by disability service providers, there are a number of external mechanisms at the Commonwealth, state or territory level for investigating allegations of violence, abuse and neglect against people with disability. Table 5.2 outlines the different mechanisms available in each jurisdiction.²⁷

27 See: NSW Government, *Submission 66*, pp 2–4.

Table 5.2: External complaints, investigation/dispute resolution bodies for people with disability

Jurisdiction	Agency	Role
Commonwealth	National Disability Abuse and Neglect Hotline	Referral service for all allegations of abuse or neglect
	Complaints Resolution and Referral Service	Referral service for complaints about Australian Government funded disability employment and advocacy services
NSW	Ombudsman	Investigates incidents of abuse or neglect of people with disability supported accommodation, monitor service providers and review the deaths of certain persons.
	Official Visitors	Visit disability accommodation and may report allegations of abuse or neglect.
	Child Protection Helpline	Referral service for allegations of abuse or neglect of children
Victoria	Ombudsman	Investigates complaints about public agencies and may investigate individual allegations in state-run facilities (may investigate funded providers on a case-by-case basis).
	Senior Practitioner (Disability)	Responsible for protecting the rights of people subject to restrictive interventions and compulsory treatment, and to ensure that the relevant standards are met.
	Disability Services Commissioner	Resolves complaints raised by or on behalf of people who receive disability services.
	Community Visitors	Visits accommodation facilities and inquire into various matters relating to service delivery, including whether the rights of people with disability are being upheld.
Queensland	Office of the Queensland Ombudsman	Investigates complaints about actions and decisions of public agencies.
	Office of the Public Guardian	Investigates allegations of abuse against adults with impaired capacity and children. Administers community visitor scheme vulnerable adults in disability accommodation and children and young people in out-of-home care.
WA	Ombudsman Western Australia	Investigates complaints about actions and decisions of public agencies.

	Health and Disability Services Complaints Office	Investigates complaints about health or disability service providers.
	Council of Official Visitors (mental health)	Visits individuals receiving treatment in mental health facilities and inspects hospitals and psychiatric hostels.
SA	Ombudsman	Investigates complaints about actions and decisions of public agencies.
	Community Visitor Scheme	Visits and inspects disability accommodation and supported residential facilities.
	Health and Community Services Complaints Commissioner	Investigate and resolve complaints about health and community services, including disability service providers.
Tasmania	Ombudsman	Investigates complaints about actions and decisions of public agencies.
	Health Complaints Commissioner	Resolve complaints about health services
	Anti-Discrimination Commissioner	Resolves complaints of discrimination, provides policy advice and support to government, promotes awareness of rights and obligation and offers training and education.
NT	Community Visitors (mental health)	Visits people receiving mental health treatment and resolves complaints.
	Health and Community Services Complaints Commissioner	Resolves complaints about health, disability and aged care services.
ACT	Public Advocate	Advocacy services for people with disability and mental health conditions, including monitoring of services for adults with disability.
	Official Visitors	Visits disability accommodation and supported accommodation to detect and prevent systemic dysfunction.
	Disability and Community Services Commissioner	Resolves complaints about the provision of services for people with disability and/or their carers

Source: NDIS, *Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*, February 2015, Table 2.

5.35 As Table 5.2 highlights, the responsibilities and powers of external agencies vary significantly across jurisdictions. A number of submissions highlighted how the complexity of multiple reporting mechanisms affects the ability of people with disability to report allegations of abuse. The Commonwealth Ombudsman submitted:

...responsibility for each of these functions varies significantly across states and territories, and some oversight bodies have greater powers and resources than others to deliver timely and effective support to people with disability. This creates a risk that people affected by violence, abuse or neglect (or others who may wish to report it) may have difficulty identifying which of the many options is the most appropriate in their circumstances, or may receive quite different levels of support or protection depending on where they live.²⁸

5.36 For example, the Victorian Disability Services Commissioner highlighted that misconceptions about its role were common and that it did not have the powers some members of the community assumed:

We are aware some members of the community appear to be under the impression that we have the power to conduct a general investigation into the performance of service providers. In fact, our power to conduct an investigation relates specifically to determining whether or not a complaint is justified, particularly where we believe that the complaint is not suitable for conciliation or an attempt to conciliate the complaint has failed and further action is required.²⁹

5.37 The committee also heard concerns about the efficacy of existing external complaints mechanisms. The Disability Alliance submitted:

...these mechanisms have been found to have limited effect in investigating, responding to, and preventing violence against people with disability across the range of settings and spaces where such violence occurs.³⁰

5.38 In particular, the committee heard concerns about the Commonwealth's National Abuse and Neglect Hotline (Hotline)³¹. The Department of Social Services (DSS) noted that between July 2012 and December 2014, 891 cases of abuse were reported through the Hotline, mainly systemic, psychological and physical abuse, and physical neglect.³² The Civil Society Report asserted that the Hotline 'is a

28 Commonwealth Ombudsman, *Submission 117*, p. 5.

29 Disability Services Commissioner, Victoria, *Submission 86*, pp 4–5.

30 Australian Cross Disability Alliance, *Submission 147*, p. 65.

31 The hotline is for complaints relating to abuse and neglect of people with disability in Commonwealth, State and Territory funded disability services. It is not a complaints resolution service, but instead refers complaints to the relevant State or Territory complaints handling service, or bodies such as various Ombudsman, Anti-Discrimination Boards and the Complaints Resolution and Referral Service.

32 DSS, *Submission 104*, p. 6.

relatively weak safeguard for people with disability as it operates without any legislative base and therefore has no statutory functions, powers and immunities'.³³

5.39 The Hotline is also limited by the agencies to which it can refer complaints. Due to inconsistencies in the responsibilities of independent oversight bodies, some callers are referred back to the agency responsible for the alleged incident or allegation. Ms Samantha Connor told the committee of the importance of a national independent mechanism to address all forms of abuse reported to the Hotline:

...not all types of abuse, when you take it to the national disability abuse hotline, are covered by the hotline. For example, if it is a government organisation you are told to take that back to the government organisation, and they will investigate themselves through their existing processes. I think that asking government to investigate itself is a horrible idea and that there should be independent investigation...Having the argument for an independent statutory body looking down on the whole country and all of those issues and having very, very clear sanctions and very clear guidelines: I think we need to have some national legislation to make sure that happens.³⁴

5.40 The committee heard there was a particular need to support and educate people with disability about what constitutes abuse. Families Australia recommended the development and implementation of 'targeted respectful relationships programmes', highlighting:

Access to targeted respectful relationship programmes for children and young people with disability and their families to support them to understand and promote healthy and respectful relationships and to recognise and report abuse and neglect is also essential.³⁵

5.41 A number of witnesses and submitters highlighted that even where reporting mechanisms might be available, many people with disability and their families may be reluctant to report abuse due to fear of retribution from the service provider. Ms Sharon Richards, from Advocare in WA, told the committee:

...most of the time things are not addressed, because of the fear of retribution in the facility. An older person who is already in a facility is in a more vulnerable position. We have had numerous phone calls from people who are moving their family from one facility to another rather than actually putting in a formal complaint, because it is so hard to deal with and the system does not lend itself in a supportive manner to the families.³⁶

33 DRALHRO, *Disability Rights Now*, p. 102.

34 Ms Samantha Connor, Researcher, People with Disability WA, *Committee Hansard*, Perth, 10 April 2015, p. 34.

35 Families Australia, *Submission 3*, p. [3].

36 Ms Sharon Richards, Acting CEO, Advocare, *Committee Hansard*, Perth, 10 April 2015, p. 2.

Case study – New South Wales Ombudsman

5.42 The committee heard that NSW has recently implemented a unique approach to the reporting of serious incidents. In 2014, the NSW Government introduced the disability reportable incidents scheme, the only legislated scheme in Australia for the mandatory reporting and independent oversight of serious incidents involving people with disability in supported accommodation (see Box 5.3).³⁷

Box 5.3: NSW Ombudsman disability reportable incidents scheme

On 3 December 2014, the *Disability Inclusion Act 2014* (NSW) came into effect, including amendments to the *Ombudsman Act 1974* (NSW) to introduce the disability reportable incidents scheme (scheme) for reporting and oversight of the handling of serious incidents, including abuse and neglect, involving people with disability in supported group accommodation.

The scheme requires that within 30 days of becoming aware of a reportable allegation or reportable conviction, the Secretary of the Department of Family and Community Services (FACS), or head of a funded provider, must give the NSW Ombudsman notice of the allegation and/or conviction.

Under the scheme, the Ombudsman is required to:

- receive and assess notifications concerning reportable allegations or convictions;
- scrutinise agency systems for preventing reportable incidents, and for handling and responding to allegations of reportable incidents;
- monitor and oversight agency investigations of reportable incidents;
- respond to complaints about inappropriate handling of any reportable allegation or conviction;
- conduct direct investigations concerning reportable allegations or convictions, or any inappropriate handling of, or response to, a reportable incident or conviction;
- conduct audits and education and training activities to improve the understanding of, and responses to, reportable incidents; and
- report on trends and issues in connection with reportable incident matters.

Between the introduction of the scheme and 25 August 2015, 437 matters were reported. The reported matters included:

- 55 per cent (240) involving allegations of employee to client matters;
- 34 per cent (148) involving allegations of client to client matters;
- 10 per cent involving allegations relating to unexplained serious injury; and
- one per cent involving allegations of breaches to an apprehended violence order (AVO).

Source: NSW Ombudsman, *Submission 29*, pp 2–10; Mr Steve Kinmond, Community and Disability Services Commissioner and Deputy Ombudsman, *Committee Hansard*, 27 August 2015, pp 16–17.

5.43 To complement the scheme, the NSW Ombudsman has also established a Best Practice Working Group made up of disability leaders and subject-matter experts to provide advice and support on sector-wide improvement and cultural change. The working group is currently examining a range of issues including:

37 NSW Ombudsman, *Submission 29*, p. 2.

...staff screening and recruitment practices, the related need for a workable information exchange regime, the availability of and access to relevant commissions and expert advisers, assessing the capacity of individuals to consent to sexual activity, support for victims with disability and, where relevant, their family members and the criminal justice response to people with intellectual disability.³⁸

5.44 The Deputy Ombudsman, Mr Steve Kinmond, estimated that the notification of abuse and neglect matters via the mandatory reportable incidents scheme was over 10 times the number of matters that were received via the existing complaints system.³⁹ Mr Kinmond told the committee that of the 437 matters reported through the scheme since its introduction in December 2014, there had been seven charges made already, a number of which 'would not have been laid were it not for the fact that we were involved'.⁴⁰ Mr Kinmond noted:

...we expect that [number of finalised matters] will climb substantially in the near future. But the fundamental test I have for my staff—at this point in time in terms of the matters that we have before us—is whether there are adequate steps being taken to protect not only the identified victim for the purposes of the matter that we are looking at but also other people who may be at risk. So the timeliness of our response to matters pertaining to protection will be my early focus. And of course over time with those numbers we then start to look at and track very closely whether what is coming in the door is matched by what is being finalised. Otherwise, it becomes unsustainable.⁴¹

Case study – Victorian Ombudsman's investigation

5.45 In December 2014, the Victorian Ombudsman launched an investigation into the capacity and capability of the oversight systems for disability services, prompted by revelations in the media and concerns in the sector.⁴² Phase 1 of the Ombudsman's final report examining the effectiveness of statutory oversight identified serious issues limiting the effectiveness of existing oversight mechanisms:

...despite areas of good practice, oversight arrangements in Victoria are fragmented, complicated and confusing, even to those who work in the field. As a result there is a lack of ownership of the problem and little clarity about who is responsible for what. In some areas there are overlapping responsibilities between agencies and no clear understanding of

38 Mr Steve Kinmond, Community and Disability Services Commissioner and Deputy Ombudsman, NSW Ombudsman, *Committee Hansard*, Sydney, 27 August 2015, p. 17.

39 Mr Steve Kinmond, *Committee Hansard*, Sydney, 27 August 2015, p. 16.

40 Mr Steve Kinmond, *Committee Hansard*, Sydney, 27 August 2015, p. 19.

41 Mr Steve Kinmond, *Committee Hansard*, Sydney, 27 August 2015, p. 20.

42 Phase 2 of the report will examine incident reporting and management in more detail. Victorian Ombudsman, *Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight*, June 2015, p. 4, **Error! Hyperlink reference not valid.** (accessed 24 September 2015).

the boundaries. In others there are legislative barriers to sharing information or jurisdictional gaps. Thus problems are regularly raised—including by many well-meaning players in the system—but rarely fixed.⁴³

5.46 The Ombudsman's report found that the response to an allegation of abuse of a person with disability in Victoria:

...is not determined by the nature of the abuse or the vulnerability of the victim; instead, it is determined by the institutional arrangements governing the service within which the abuse occurred or which agency took the complaint. Thus the focus of the response is not on the individual but the process.⁴⁴

5.47 Similarly, the Victorian Parliament's Family and Community Development Committee interim report on its inquiry into abuse in disability services noted:

...while there are sophisticated policies and processes in place in Victoria for complaint handling and responding to disclosures or allegations of abuse in disability services, the pathways for making complaints and reporting abuse or neglect are complicated and often confusing. In particular...there is confusion between the policies and processes for handling and escalating complaints, and for the management of reportable incidents.⁴⁵

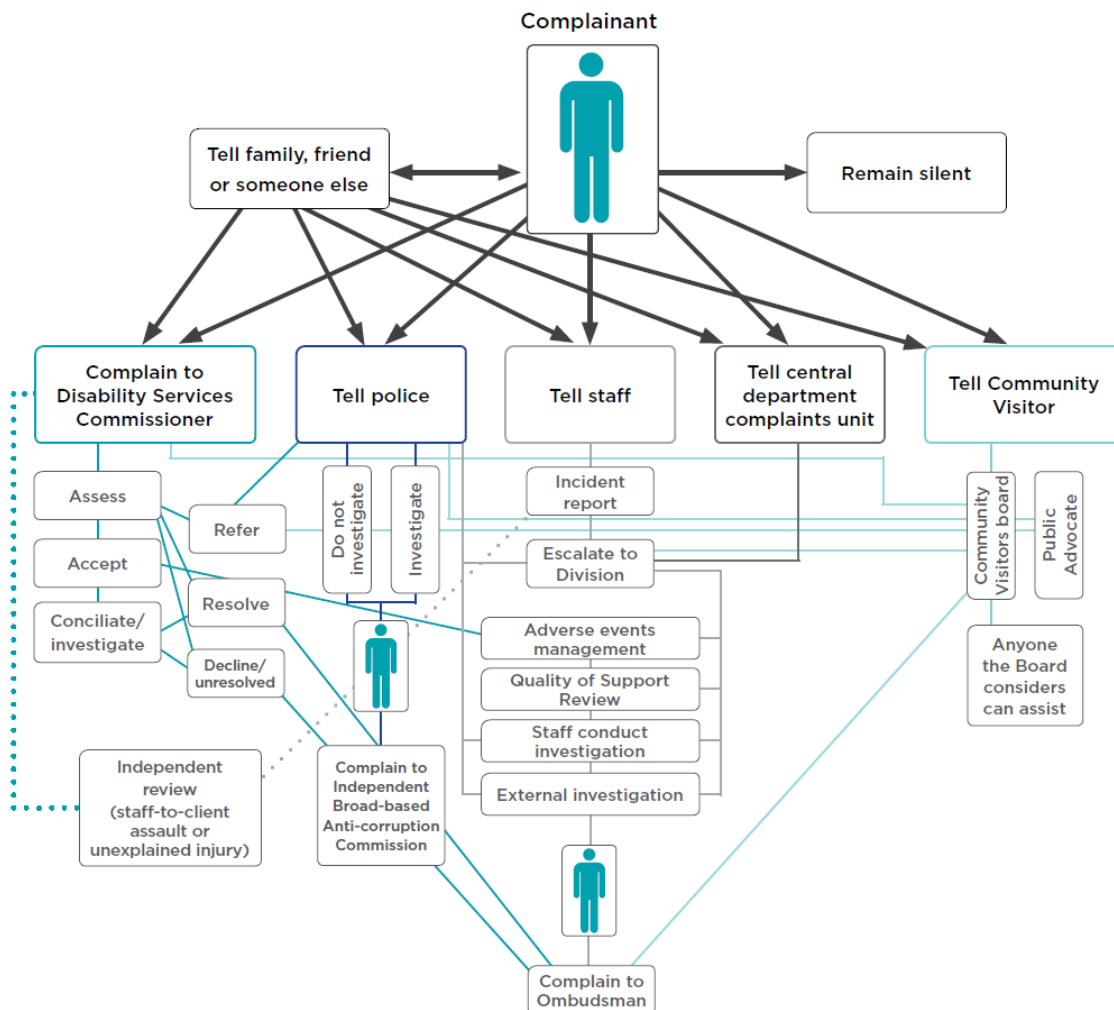
5.48 The complexity of the available reporting pathways for complaints in Victoria is highlighted in Figure 5.1, taken from the Ombudsman's report.

43 Victorian Ombudsman, *Reporting and investigation of allegations of abuse*, p. 4.

44 Victorian Ombudsman, *Reporting and investigation of allegations of abuse*, p. 8.

45 Parliament of Victoria, Family and Community Development Committee, *Inquiry into Abuse in Disability Services – Interim Report*, 2015, p. xxiv, <http://www.parliament.vic.gov.au/fcdc/article/1854> (accessed 24 September 2015).

Figure 5.1: Disability Act complaint pathways in Victoria



Source: Victorian Ombudsman, *Reporting and investigation of allegations of abuse*, Figure 1, p. 19.

5.49 The Ombudsman's report identified further inconsistencies in the way different allegations of abuse are managed, such as:

- serious incidents in SRS [supported residential services] are not subject to DHHS [Department of Health and Human Services] incident reporting or review procedures, despite this being a routine response for services operated by the department or providers funded by the department;
- incident reports concerning allegations of assault are provided to the DSC [Disability Services Commissioner] if the perpetrator is an employee of DHHS or a funded provider but not if they are a fellow resident, or if the incident occurred in an SRS;
- some funded providers follow the Public Advocate's guidelines for responding to incidents of violence, neglect and abuse while SRS, other providers or DHHS operated services do not; and

- Community Visitors can inspect SRS or accommodation provided by DHHS or CSOs [community service organisations], but not day services or TAC [Transport Accident Commission] accommodation.⁴⁶

5.50 Other issues identified by the Ombudsman included:

- no single source of information or common framework in the disability sector to guide the reporting of abuse;
- no independent review of all serious incidents;
- lack of consistent approach to investigating serious misconduct by funded providers;
- constraints on some parts of the system from sharing information;
- limited appreciation of the importance of the role of advocates, 'manifest in its modest funding, as well as an inherent conflict in advocacy services being funded by the department upon whom the recipients of the service rely'; and
- tension between the roles of the department [DHHS], 'particularly its dual functions as both funder/provider of services and regulator'.⁴⁷

5.51 The Ombudsman made two key recommendations to address the lack of consistent mandatory reporting, complex oversight arrangements, gaps in oversight and lack of advocacy services:

- establish, or transfer responsibility to an existing agency, for a single independent statutory oversight body to incorporate mandatory reporting, assessment and advocacy, community visitors, senior practitioner and disability worker exclusion scheme; and
- undertake a comprehensive assessment of the advocacy needs of people with disability and transfer sufficient funding and responsibility to the Office of the Public Advocate.⁴⁸

5.52 The recommendations of the Ombudsman's report were supported by a number of submitters and witnesses in Victoria. Mr David Craig, Project Coordinator from the Victorian Advocacy League for Individuals with a Disability (VALID) told the committee:

VALID supports the Ombudsman's recommendations for an independent investigative agency that can bring a measure of coherence, consistency and vigour to keeping people with intellectual disabilities safe.⁴⁹

46 Victorian Ombudsman, *Reporting and investigation of allegations of abuse*, p. 8, <https://www.ombudsman.vic.gov.au/Investigations/Investigation-into-disability-abuse-reporting> [accessed 25 September 2015].

47 Victorian Ombudsman, *Reporting and investigation of allegations of abuse*, p. 8.

48 Victorian Ombudsman, *Reporting and investigation of allegations of abuse*, p. 91.

49 Mr David Craig, *Committee Hansard*, Melbourne, 30 June 2015, p. 44.

5.53 The committee also heard support for the Ombudsman's recommendations across jurisdictions. For example, in Queensland, the Office of the Public Guardian noted:

An independent complaints mechanism separate from funding and service provision is a critical element of any protective framework to guard against and prosecute cases of violence, abuse and neglect.⁵⁰

5.54 However, some witnesses criticised the Ombudsman's report for not taking a 'hard-hitting approach' towards perpetrators of abuse and violence. JacksonRyan Partners, a Victorian disability consultancy, was critical that the Ombudsman:

...failed to make findings detailing how those responsible for safeguarding and those responsible for services should more aggressively deal with those who commit abuse, neglect and violence...it is not systems and process that perpetrate abuse, neglect and violence—it is people.⁵¹

5.55 Going beyond critiques of existing state and territory based complaints bodies, the committee heard strong support for national, independent oversight mechanisms to identify and respond to allegations and incidents of abuse, violence and neglect. The Queensland Office of the Public Advocate (OPA) submitted:

Integral to an effective system is the existence of independent entities with strong investigative powers to handle complaints; these entities should be removed from the service provider, or department or agency funding the service.

Without such independent oversight and investigative powers there is a danger that cultures of violence, abuse and neglect go unchallenged. Apart from the service provider itself, even the department or agency responsible for funding the service also has a vested interest. For this reason there must be an independent statutory authority that can conduct investigations into serious, systemic and/or unresolved allegations of violence, abuse and neglect.

The independent entity or body should have powers to receive, resolve and investigate complaints; request information and conduct investigations both in response to complaints and of its own volition; report on the outcomes of investigations and make recommendations and/or directions to regulatory bodies concerning funding and registration of the service provider subject to the complaint.⁵²

5.56 The committee notes that the proposed quality and safeguarding framework consultation paper discusses the role of external oversight under the NDIS:

A key issue for the scheme is whether there is also a case for establishing a body with an independent oversight function to provide an additional level of assurance for the NDIS. Such a body would provide a leadership role

50 Office of the Public Guardian Queensland, *Submission 18*, p. 10.

51 JacksonRyan, *Submission 42j*, p. 2.

52 Office of the Public Advocate, Queensland, *Submission 73*, p. 16.

across the NDIS to ensure that registered organisations hear and respond to complaints and other feedback in positive ways.⁵³

5.57 The role of the NDIS in establishing a national monitoring and reporting framework is discussed in greater detail in chapter nine.

Community visitor programs

5.58 One effective external mechanism identified by the Victorian Ombudsman was the volunteer Community Visitors program in Victoria. The Ombudsman noted that program provides:

...an important protection at a minimal cost, and actively foster[s] the social inclusion of people with disability in the community.⁵⁴

5.59 Across all jurisdictions, the roles and responsibilities of community visitor schemes differ widely. Some jurisdictions have community visitor programs responsible for inspecting residential facilities for people with disability. Other jurisdictions have community visitors for mental health services only. The different roles of community visitor programs across jurisdictions are outlined in Table 5.3 below.⁵⁵

53 NDIS, *Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*, February 2015, p. 25.

54 Victorian Ombudsman, *Reporting and investigation of allegations of abuse*, p. 7.

55 See: NSW Ombudsman, Official Community Visitors, <https://www.ombo.nsw.gov.au/what-we-do/coordinating-responsibilities/official-community-visitors>; Office of the Public Advocate Victoria, *Community Visitors*, <http://www.publicadvocate.vic.gov.au/our-services/community-visitors>; Queensland Office of the Public Guardian, *Community Visitors*, <http://publicguardian.qld.gov.au/adult-guardian/adult-community-visitors>; WA Council of Official Visitors, <http://coov.org/>; South Australian Government, *Community Visitor Scheme*, <https://www.sa.gov.au/topics/citizens-and-your-rights/feedback-and-complaints/community-visitor-scheme>; Tasmanian Government, Official Visitor Programs, <http://officialvisitors.tas.gov.au/home>; Public Trustee for the ACT, ACT Official Visitor Scheme, <http://www.publictrustee.act.gov.au/visitor-scheme>; NT Community Visitor Program, <http://www.cvp.nt.gov.au/index.html> (all accessed 24 August 2015).

Table 5.3: Community visitor programs by jurisdiction

Jurisdiction	Agency	Visited sites	Capacity	Appointment
NSW	NSW Ombudsman	<ul style="list-style-type: none"> • Disability accommodation • Assisted boarding houses 	Part-time	Minister for Disability Services
Victoria	Office of the Public Advocate	<ul style="list-style-type: none"> • Disability accommodation • Supported residential facilities • Mental health facilities 	Volunteer	Governor in Council
Queensland	Office of the Public Guardian	<ul style="list-style-type: none"> • Disability accommodation • Mental health services • Private hostels 	Casual	Office of the Public Guardian
WA	Council of Official Visitors (established by WA Parliament)	<ul style="list-style-type: none"> • Mental health services and hospitals • Psychiatric hostels 	Sessional (paid sitting fees and expenses)	Council of Official Visitors
SA	Community Visitor Scheme	<ul style="list-style-type: none"> • Hospital emergency departments/acute mental health units • Disability accommodation • Supported residential facilities 	Trained volunteer	Governor
Tasmania	Office of the Ombudsman and Health Complaints Commissioner	<ul style="list-style-type: none"> • Mental health facilities • Prisons and corrections facilities 	Volunteer	Principal Official Visitor
NT	Community Visitor Program	<ul style="list-style-type: none"> • Mental health services and hospitals 	Sessional	
ACT	Public Trustee for the ACT	<ul style="list-style-type: none"> • Disability accommodation • Mental health facilities • Detention and correction facilities • Therapeutic protection places 	Part-time	Attorney-General

Source: Refer to footnote 54.

5.60 The committee heard from the administrators of a number of community visitor schemes across jurisdictions.⁵⁶ In Victoria, the OPA noted that between 2009-10 and 2013-14, 880 incidents have been reported by community visitors, including 'troubling cases of assault by staff, serious and unexplained injuries and people living in fear of violence'.⁵⁷

5.61 Submitters highlighted the benefits of community visitor schemes in identifying incidents of abuse, violence and neglect.⁵⁸ The South Australian Community Visitor Scheme suggested the implementation of community visitor programs in all jurisdictions across all institutions:

...we think it is vital that there be Community or Official Visitor programs to all institutions and residential facilities as an important means to detect violence, abuse and neglect of people with a disability, including those with a mental illness. Evidence from almost four years of operating also suggests that our Community Visitors build trusting relationships with not only service users but also staff who disclose many issues of concern relating to the care and treatment of vulnerable individuals.⁵⁹

5.62 Similarly the Queensland OPA submitted that community visitors should have greater powers to investigate and refer complaints:

The Community Visitor Programs, or a similar inspectorate should operate as an inquisitorial process in terms of identifying, investigating and resolving complaints. These informal processes can be of great benefit particularly to people with impaired capacity who may have difficulty making complaints. However, they can and should have a role in referring complaints to external, independent complaints bodies.⁶⁰

5.63 However, Ms Susan Salthouse, an Official Visitor for Disability in the Australian Capital Territory, told the committee that the scheme is limited in providing ongoing support to vulnerable and isolated people:

Official visitors provide that additional safeguard but what we can ascertain on a visit of about one hour, every six to nine months, is not foolproof. There are levels of vulnerability with increased isolation from the community.⁶¹

5.64 A number of witnesses expressed concern that reports made by community visitors, particularly to government departments, don't necessarily result in positive

56 See: Office of the Public Guardian, Queensland, *Submission 18*, p. 6; South Australian Community Visitor Scheme, *Submission 16*, p. 2; Ms Susan Salthouse, Official Visitor for Disability in the ACT, ACT Government Official Visitor Scheme, *Committee Hansard*, Canberra, 21 August 2015, pp 27–28.

57 OPA Victoria, *Submission 64*, p. 4.

58 ACT Human Rights Commission, *Submission 114*, p. 2; SACVS, *Submission 16*, p. 1.

59 South Australian Community Visitor Scheme, *Submission 16*, p. 1.

60 OPA, Queensland, *Submission 73*, p. 18.

61 Ms Susan Salthouse, *Committee Hansard*, Canberra, 21 August 2015, p. 28.

change. The Victorian OPA noted that its community visitors report long delays in responses from departments to reports of abuse. In one case cited by the Victorian OPA:

Community Visitors have been reporting serious and significant issues at this house including staff abuse and misconduct since 2012 and, despite a service review by an external consultant, they report there were no significant improvements to the environment by the end of 2014.⁶²

5.65 Ms Pauline Williams from Action for More Independence and Dignity in Accommodation highlighted that although facilities are regularly visited, and issues regularly reported, issues are not resolved:

...in investigating all of the monitoring of the supported residential services that has gone on, it has been clear that, time after time, they have been non-compliant. In some cases, visiting has happened monthly for 34 months and they have still been non-compliant on issues like medication dispensing, food quality, emergency services and safety procedures. If time and time again, over many years, noncompliance is shown by a sector, why is it still allowed to function? Why is it still licensed, registered and supported by governments?⁶³

5.66 Similarly, the Intellectual Disability Rights Service told the committee feedback from its consultations found that people who had contacted community visitors were frustrated with the outcomes:

While one caller was happy with action taken when a matter was raised with the community visitor program of the Ombudsman, 3 other callers raised their frustration with the long delays and process involved in investigation. Two callers did not feel the Ombudsman had sufficient power to achieve solutions to problems of neglect.⁶⁴

5.67 Ms Sandra Guy, the parent of a Yooralla client in Victoria, expressed frustration that reports made by community visitors may not result in action, and that community visitors do not engage with the families of people with disability to advise on the progress of reports:

The problem is that I cannot tell you how many times I have called the community visitors in relation to the concerns at my son's house, which have been going on now for six long years, and what happens is that they might go to my son's house but you have no idea what went on. They might lodge a report with the department and that is as far as it goes—end of story. What you do not see is any change...They refuse to talk to families, and we do not know what happened when they went or what was in the

62 OPA Victoria, *Submission 64*, p. 21.

63 Ms Pauline Williams, Housing Rights Co-ordinator, Action for More Independence and Dignity in Accommodation, *Committee Hansard*, Melbourne, 30 June 2015, p. 52.

64 Intellectual Disability Rights Service, *Submission 128a*, p. 7.

report. It appears to go nowhere, because there is no change, despite these claims.⁶⁵

5.68 Another concern was that the voluntary basis of the scheme in most jurisdictions reduced the capacity of visitors to provide support to families. Ms Colleen Pearce, the Victorian Public Advocate, told the committee:

The programs simply do not have the capacity to be in contact with parents. Where parents are at a facility on the day when the community visitors visit, they will talk to parents. But there is a lack of the capacity of volunteers to follow up and provide information, giving out personal telephone numbers—we are talking about 450 volunteers...We are lucky if our volunteers get reimbursed for out-of-pocket expenses.⁶⁶

5.69 Some submitters suggested that existing community visitor schemes continue under the NDIS. The Victorian OPA recommended:

...the Community Visitors Program continue to be funded during the NDIS transition period and, secondly, that existing state and territory community visitor programs continue to have a mandate to operate in the context of the full rollout.⁶⁷

5.70 Other submitters suggested that the NDIS quality and safeguarding framework should include a community visitor scheme.⁶⁸ The Queensland OPA recommended that the NDIS framework should include:

...independent safeguarding mechanisms such as the Community Visitor Program that can cast an independent eye over service arrangements and that have the potential to seek out issues of concern for people with disability, rather than requiring people with disability to independently navigate formal complaints management systems.⁶⁹

Mandatory reporting

5.71 A number of submitters and witnesses supported the introduction of an independent, mandatory reporting process, such as the NSW scheme, in ensuring incidents are adequately reported and investigated.⁷⁰ The Law Council of Australia recommended in relation to elder abuse:

...that now is the time for Government to conduct a review of mandatory reporting requirements and to strike an appropriate balance between

65 Ms Sandra Guy, *Committee Hansard*, Melbourne, 30 June 2015, p. 15.

66 Ms Colleen Pearce, *Committee Hansard*, Melbourne, 30 June 2015, p. 36.

67 Ms Colleen Pearce, *Committee Hansard*, Melbourne, 30 June 2015, p. 33.

68 See: United Voice, *Submission 17*, p. 6; Disability and Community Services Commissioner, ACT, *Submission 114*, p. 9.

69 OPA Queensland, *Submission 73*, p. 23.

70 See: Disability Justice Advocacy, *Submission 14*, p. 5; Name withheld, *Submission 60*, p. 4; Advocacy Tasmania Inc, *Submission 97*, p. 8; NSW Council for Intellectual Disability, *Submission 103a*, p. 5; Commonwealth Ombudsman, *Submission 117*, p. 7.

safeguarding against elder abuse and ensuring the regulatory burden on aged care facilities are minimised.⁷¹

5.72 The Hon Kelly Vincent MLC, a member of the South Australian Legislative Council representing the Dignity for Disability Party, told the committee she strongly supports a mandatory reporting scheme. Ms Vincent noted that legislation she has introduced into the South Australian Parliament to introduce a mandatory scheme has not been supported by that Government:

The government is not amenable to it because it believes that (a) it is better to have safeguarding mechanisms against abuse and (b) the existing child mandatory reporting scheme is overburdened and basically broken so it would be almost inefficient to implement another. My rebuttal to that would be we certainly never said that it was either mandatory reporting or safeguarding...The other point I would make in rebuttal to the government's argument is, in terms of the child mandatory reporting mechanism already being broken and therefore it not be worth doing anything else, if I break a window in my house, I do not go through the house and break all the other windows so that they match; I fix the window. I think perhaps rather than saying the system is broken so we cannot do anything else, we could perhaps look at fixing the system.⁷²

5.73 The South Australian OPA emphasised that mandatory reporting is not sufficient, and supported instead a system of 'mandatory response':

...that provides clear duties for all providers when they become aware of a risk of abuse, or actual abuse. These duties may include immediate action to keep a person safe, working with other sectors (e.g. the police, or social work services), and a clear strategy of escalation and reporting.⁷³

A national approach to reporting abuse

5.74 A number of submitters and witnesses recommended the establishment of a national, independent, statutory body with powers to investigate and respond to allegations of violence, abuse and violence against people with disability in all settings. The committee heard support for such a body from a range of stakeholders including public advocates and guardians, peak bodies, advocacy groups and families.⁷⁴

5.75 For example, Mr Damian Griffis, representing the First Peoples Disability Network Australia as part of the Disability Alliance, told the committee:

71 Law Council of Australia, *Submission 139*, p. 22.

72 The Hon Kelly Vincent MLC, *Committee Hansard*, Adelaide, 28 August 2015, p. 62.

73 Office of the Public Advocate, South Australia, *Submission 13*, p. 2.

74 See, for example: Health Services Union, *Submission 69*, p. 5; Disability Clothesline, *Submission 68*, p. [840]; Advocacy for Disability, *Submission 83*, p. 33; Intellectual Disability Rights Service, *Submission 128*, p. [5]; Ms Julie Phillips, *Submission 131*, p. 65; Dr Sherene Devanesen, CEO, Yooralla, *Committee Hansard*, Melbourne, 30 June 2015, p. 3.

I think the answer is pretty simple. An independent statutory body is the answer. That is something that has been articulated by advocates for a long time, and I think its time is well overdue. That is a critical part of the picture. One of the problems with the National Disability Abuse and Neglect Hotline is its lack of enforceability. It is just a reporting mechanism, really. So I think that is a critical part of the puzzle, and I think its time is well and truly here—in fact, it is long overdue.⁷⁵

5.76 There were numerous proposals for the specific form such a body could take. For example, the Disability Alliance recommended that a national body should have the following functions:

- a 'no wrong door' complaint handling function—the ability to receive, investigate, determine, and make recommendations in relation to complaints raised;
- the ability to initiate 'own motion' complaints and to undertake own motion enquiries into systemic issues;
- the power to make recommendations to relevant respondents, including Commonwealth and State and territory governments, for remedial action;
- the ability to conduct policy and programme reviews and 'audits';
- the ability to publicly report on the outcomes of systemic enquiries and group, policy and programme reviews, or audits, including through the tabling of an Annual Report to Parliament; the ability to develop and publish policy recommendations, guidelines, and standards to promote service quality improvement;
- the ability to collect, develop and publish information, and conduct professional and public educational programs; and
- the power to enable enforcement of its recommendations, including for redress and reparation for harms perpetrated.⁷⁶

5.77 Some submissions also suggested that a national body should also have oversight of restrictive practices. Children with Disability Australia recommended:

...the creation of a national body charged with monitoring and reporting the use of restrictive practices, with the explicit aim of ensuring restraint and seclusion is recognised as abuse and its use is reduced.⁷⁷

5.78 The committee notes that oversight mechanisms are being considered by the NDIA as part of its consultation paper on the proposed NDIS quality and safeguarding framework. This proposed approach will be examined in chapter nine.⁷⁸

75 Mr Damian Griffis, *Committee Hansard*, 27 August 2015, p. 46.

76 Australian Cross Disability Alliance, *Submission 147*, pp 12–13.

77 Children with Disability Australia, *Submission 144*, p. 43.

78 NDIS, Proposal for National Disability Insurance Scheme Quality and Safeguarding framework: Consultation paper, pp 23–24.

National safeguarding systems

5.79 Some submitters suggested adopting a system-wide approach to safeguarding against abuse and violence against all vulnerable people, based on models in the United Kingdom and Scotland. These models implement safeguards across the health, social welfare and justice sectors to protect all 'at-risk' adults, including those with disability.⁷⁹ This includes early intervention approaches to identifying and reporting incidents and allegations of abuse, violence and neglect (see Boxes 5.4 and 5.5).

Box 5.4: Scotland—Adult Support and Protection

Under the *Adult Support and Protection (Scotland) Act 2007*, Scottish local councils and a range of public bodies are required to work together to support and protect adults who are unable to safeguard themselves, their property and their rights.

The Act defines adults at risk as people aged 16 years or over who meet all three of the following criteria:

- are unable to safeguard themselves, their property (their home, the things they own), their rights or other interests;
- are at risk of harm; and
- because they are affected by disability, mental disorder, illness or physical or mental infirmity, are more vulnerable to being harmed than others who are not so affected.

The Act introduced measures to identify and protect individuals who fall into the category of adults at risk. These measures include:

- requiring councils to make the necessary enquiries and investigations to see if action is needed to stop or prevent harm happening;
- requiring specific organisations to cooperate with councils and each other about adult protection investigations;
- the introduction of a range of protection orders including assessment orders, removal orders and banning orders; and
- a legislative framework for the establishment of local multi-agency Adult Protection Committees across Scotland.

The Act places a duty on councils to make enquiries about an individual's well-being, property or financial affairs where the council knows or believes that the person is an adult at risk and that it may need to intervene to protect him or her from being harmed. It authorises council officers to:

- carry out visits;
- conduct interviews;
- be accompanied by a doctor or nurse to carry out a medical examination in private; and
- require health, financial or other records to be produced in respect of the adult at risk.

The council can also apply for a protection order if they think the adult is at risk of, or is being seriously harmed.

Source: Scottish Government, *Adult Support and Protection*, <http://www.gov.scot/Topics/Health/Support-Social-Care/Adult-Support-Protection>; Scottish Government, *Act Against Harm*, <http://www.actagainstharm.org/> (accessed 23 September 2015).

79 See: Office of the Public Advocate, SA, *Submission 13*, p. 2; OPA Queensland, *Submission 73*, p. 20.

Box 5.5: Care Act 2014 (UK)

In April 2015, the *Care Act 2014* came into effect in the United Kingdom. The Act introduced guidance on safeguarding vulnerable adults from abuse to replace the 'No Secrets' guidance introduced in 2000.

According to the guidance, 'safeguarding' means:

...protecting an adult's right to live in safety, free from abuse and neglect. It is about people and organisations working together to prevent and stop both the risks and experience of abuse or neglect, while at the same time making sure that the adult's wellbeing is promoted including, where appropriate, having regard to their views, wishes, feelings and beliefs in deciding on any action. This must recognise that adults sometimes have complex interpersonal relationships and may be ambivalent, unclear or unrealistic about their personal circumstances.

The Act introduces mandatory reporting requirements that require local authorities to:

- make enquiries, or cause others to do so, if it believes an adult is experiencing, or is at risk of, abuse or neglect. An enquiry should establish whether any action needs to be taken to prevent or stop abuse or neglect, and if so, by whom;
- set up a Safeguarding Adults Board;
- arrange, where appropriate, for an independent advocate to represent and support an adult who is the subject of a safeguarding enquiry or Safeguarding Adult Review where the adult has 'substantial difficulty' in being involved in the process and where there is no other suitable person to represent and support them; and
- co-operate with each of its relevant partners in order to protect the adult. In their turn each relevant partner must also co-operate with the local authority.

The safeguarding approach is underpinned by the following principles:

- Empowerment – People being supported and encouraged to make their own decisions and informed consent.
- Prevention – It is better to take action before harm occurs.
- Proportionality – The least intrusive response appropriate to the risk presented.
- Protection – Support and representation for those in greatest need.
- Partnership – Local solutions through services working with their communities.
- Communities have a part to play in preventing, detecting and reporting neglect and abuse.
- Accountability – Accountability and transparency in delivering safeguarding.

Source: UK Government, *Care Act 2014: Statutory guidance for implementation*, Chapter 14: Safeguarding, <https://www.gov.uk/government/publications/care-act-2014-statutory-guidance-for-implementation> (accessed 23 September 2015).

5.80 The South Australian OPA noted the principles of its report on rights-based protection for older people, *Closing the Gaps*, could be applied to people with disability.⁸⁰ The report found the current legal framework in South Australia:

...provides protective frameworks for serious cases of abuse and for those who are particularly vulnerable due to mental illness or incapacity, but it does not provide a framework for less intrusive methods of intervention, or early intervention, and at a time when serious abuse or neglect could be avoided. In these respects, the current legal system is not preventative in nature and fails to provide an incremental approach to intervention that recognises degrees of vulnerability falling short of complete incapacity.⁸¹

Concluding committee view

5.81 The evidence presented to this inquiry shows that existing internal and external mechanisms for reporting abuse are complex and there is no national consistency in how allegations and incidents are reported. This has had the effect of both discouraging reporting meaning cases of abuse go unreported, as well as reducing the efficacy of investigations.

5.82 The committee acknowledges the findings of the 2015 Victorian Ombudsman's report and evidence from inquiry witnesses that existing mechanisms are not effective in reporting and responding to allegations and incidents of violence, abuse and neglect.

5.83 After reviewing oversight mechanisms across Australia, the committee recognises the important role played by community visitor schemes. However, for these schemes to be effective, most require better funding to improve training, increased numbers of visits, increased capacity to communicate with families, and to be granted the authority to report and investigate allegations and incidents.

5.84 The committee recognises that a clear and consistent recommendation was made by many submitters and witnesses, including government agencies, that there is a need for a single, independent oversight body for all entities and individuals providing services to people with disability, with appropriate whistleblower protections.

5.85 In establishing such a national body, the committee recognises the value of the NSW Ombudsman disability reportable incidents scheme. The committee particularly notes the strength of this system is based on the mandatory reporting requirements.

80 Office of the Public Advocate, SA, *Submission 13*, p. 2.

81 Office of the Public Advocate and the University of South Australia, 'Closing the Gaps: Enhancing South Australia's Response to the Abuse of Vulnerable Older People,' October 2011, *Submission 13, Attachment 1*, p. 23.

Chapter 6

Access to justice

6.1 This chapter examines the experience of engaging with the criminal justice system for people with disability. It highlights that people with disability experience significant barriers to engaging with the criminal justice system, including reporting to police and participating in investigations and court proceedings.

6.2 Building on recent reports by the Australian Human Rights Commission (Human Rights Commission) and the Australian Law Reform Commission (Law Reform Commission), this chapter examines a series of measures put forward by witnesses, that seek to ensure Australia meets its international obligations to improve access to justice for people with disability and its moral obligation to protect people with disability from violence, abuse and neglect.

Access to justice

6.3 The committee heard that people with disability are particularly disadvantaged in seeking access to justice and are not adequately supported by existing legal systems.¹ A number of submissions recommended legislative and system reforms in the justice system to provide better support for people with disability.²

6.4 The committee notes two recent national inquiries by the Law Reform Commission and the Human Rights Commission into the issue of access to justice for people with disability. These inquiries have identified significant barriers for people with disability in reporting crime, and made a series of recommendations to improve Australia's criminal justice system. These issues are discussed later in this chapter.

International obligations

6.5 Under Article 13 of the Convention on the Rights of Persons with Disabilities (Disability Convention), Australia is obliged to:

...ensure effective access to justice for persons with disabilities on an equal basis with others, including through the provision of procedural and age-appropriate accommodations, in order to facilitate their effective role as direct and indirect participants, including as witnesses, in all legal proceedings, including at investigative and other preliminary stages.³

1 See: QAI, *Submission 43*, p. [7].

2 OPA Queensland, *Submission 73*, pp 20-21. Some of the organisations which echoed this view include: Communication Rights Australia and the Disability Discrimination Legal Service, *Submission 78*; NSW Council for Intellectual Disability, *Submission 103*; Deakin University, *Submission 109*; Law Council of Australia, *Submission 139*.

3 United Nations Convention on the Rights of Persons with Disabilities (Disability Convention), Article 13, <http://www.un.org/disabilities/convention/conventionfull.shtml> (accessed 21 August 2015).

6.6 This includes promoting 'appropriate training for those working in the field of administration of justice, including police and prison staff'.⁴

6.7 The 2012 *Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities* (Civil Society Report) noted that people with disability experience significant barriers in participating in Australian legal systems 'with many finding access to justice too difficult, hostile or ineffectual'.⁵ The report made a series of recommendations to improve access to justice for people with disability, including:

- incorporating compulsory modules on working with people with disability into training programs for police, prison officers, lawyers, judicial officers and court staff;
- developing comprehensive, gender and culture specific social support programs and systems to identify and prevent the circumstances that contribute to children and young people with disability coming into contact or entering the juvenile justice system; and
- implementing a range of gender and culture specific diversionary programs and mechanisms and community-based sentencing options that are integrated with flexible disability support packages and social support programs to prevent adults with disability coming into contact or entering the criminal justice system.⁶

6.8 In its concluding observations on the initial report of Australia, the United Nations Committee on the Convention on the Rights of Persons with Disabilities (UN Disability Committee) expressed concern about access to justice for people with disability, particularly:

...the lack of training for judicial officers, legal practitioners and court staff on ensuring access to justice for persons with disabilities, as well as lack of guidance on how to access justice for persons with disabilities.⁷

6.9 The UN Disability Committee recommended a number of measures to improve access to justice for people with disability, including:

- that state and territory legislation and policy be amended to incorporate standard and compulsory modules on working with persons with disabilities

4 Disability Convention, Article 13.

5 Disability Representative, Advocacy, Legal and Human Rights Organisations, *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities*, August 2012, p. 74, <http://www.pwd.org.au/issues/crpd-civil-society-shadow-report-group.html> (accessed 24 September 2015).

6 *Disability Rights Now*, p. 82.

7 United Nations Committee on the Rights of Persons with Disabilities (UN Disability Committee), *Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session (2–13 September 2013)*, 4 October 2013, p. 4. See: Attorney-General's Department, Convention on the rights of persons with disabilities, <http://www.ag.gov.au/RightsAndProtections/HumanRights/Pages/UnitedNationsConventionontherightsofpersonswithdisabilities.aspx> (accessed 24 September 2015).

into training programs for police, prison officers, lawyers, judicial officers and court staff;

- that persons with disability are provided equal substantive and procedural guarantees as others in the context of criminal proceedings to ensure that no diversion programs are implemented that transfer individuals to mental health services rather than providing such services on the basis of the individual's free and informed consent; and
- that all persons with disabilities who are accused of crimes and are currently detained in jails and institutions without a trial are promptly allowed to defend themselves against criminal charges and are provided with required support and accommodation to facilitate their effective participation.⁸

Barriers and challenges

Barriers to access to justice

6.10 In February 2014, the Human Rights Commission's report, *Equal Before the Law: Towards Disability Justice Strategies*, found that access to justice for people with disability is a 'significant issue in every jurisdiction in Australia', particularly for people with multiple support needs.⁹ The report identified the following key barriers to access to justice for people with disability:

- community support, programs and assistance to prevent violence and disadvantage and address a range of health and social risk factors may not be available to some people with disabilities;
- people with disabilities do not receive the support, adjustments or aids they need to access protections, to begin or defend criminal matters, or to participate in criminal justice processes;
- negative attitudes and assumptions about people with disabilities often result in people with disabilities being viewed as unreliable, not credible or not capable of giving evidence, making legal decisions or participating in legal proceedings;
- specialist support, accommodation and programs may not be provided to people with disabilities when they are considered unable to understand or respond to criminal charges made against them ('unfit to plead'); and
- support, adjustments and aids may not be provided to prisoners with disabilities so that they can meet basic human needs and participate in prison life.¹⁰

8 UN Disability Committee, *Concluding observations*, 2013, pp 4–5.

9 Australian Human Rights Commission (Human Rights Commission), *Equal Before the Law: Towards Disability Justice Strategies*, February 2014, p. 1, <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law> (accessed 24 August 2015).

10 Human Rights Commission, *Equal Before the Law*, p. 8.

6.11 Similar barriers were identified by the Law Reform Commission in its August 2014 report on equal recognition and legal capacity for people with disability under Commonwealth legal frameworks, *Equality, Capacity and Disability in Commonwealth Laws*.¹¹ The Law Reform Commission report identified the following barriers for people with disability:

- communication barriers;
- difficulties accessing the necessary support, adjustments or aids to participate in the justice system;
- issues associated with giving instructions to legal representatives and capacity to participate in litigation;
- the costs associated with legal representation; and
- misconceptions and stereotypes about the reliability and credibility of people with disability as witnesses.¹²

6.12 In 2014 the Productivity Commission's (PC) inquiry into Australia's civil justice system, *Access to Justice Arrangements*, highlighted widespread concerns that Australia's civil justice system is 'too slow, too expensive and too adversarial'. The report highlighted that '[d]isadvantaged Australians are more susceptible to, and less equipped to deal with, legal disputes' and that '[g]overnments have a role in assisting these individuals'.¹³

6.13 The PC's inquiry found that the 'complexities of the civil justice system may be particularly challenging to navigate for people experiencing disadvantage and for some people with disabilities'.¹⁴ The PC noted that particular groups require specific assistance to develop legal capacity, including the homeless, people with disability and Aboriginal and Torres Strait Islander people:

People with disabilities find many aspects of the civil justice system, and the mainstream services offered, difficult to access. Even where mainstream services have attempted to cater for people with disabilities, these services may still be inaccessible.¹⁵

11 See: Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Law Reform Commission Report 124, August 2014, **Error! Hyperlink reference not valid.** (accessed 21 August 2015).

12 Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, p. 192.

13 Productivity Commission, *Access to Justice Arrangements: Productivity Commission Inquiry Report*, volume 1, no. 72, 5 September 2014, p. 2, <http://www.pc.gov.au/inquiries/completed/access-justice/report> (accessed 21 October 2015).

14 Productivity Commission, *Access to Justice Arrangements*, p. 133.

15 Productivity Commission, *Access to Justice Arrangements*, Box 5.1, p. 154.

6.14 Barriers to access to justice were also highlighted by a number of submitters to this inquiry.¹⁶ Dr Jessica Cadwallader, representing People with Disability Australia as part of the Australian Cross Disability Alliance (Disability Alliance), told the committee that eliminating these barriers is integral to ensuring crimes against people with disability are prosecuted:

Without actually making access to justice for people with disability a responsibility of the justice system, you will not get people with disability able to come forward and give reports, have those reports taken and have them taken seriously, investigated and recommended for prosecution. Without those kinds of pathways through the justice system, you wind up with administrative responses often being the primary response to what is, in fact, a crime...Unless access to justice is addressed across Australia for all people with disability, then you are not going to see the kinds of change within the service system that you need. Unless there are actual criminal responses to violence against people with disability, you are not going to see the level of deterrence that exists for the rest of the community. We know that perpetrators will target those who they can get away with targeting and, unless access to justice is addressed across the board, that will remain the case.¹⁷

6.15 The committee heard that Aboriginal and Torres Strait Islander peoples with disability experience particular barriers to access to justice. The Human Rights Commission highlighted the significant barriers to accessing advocacy and legal services, especially in regional and remote areas, noting:

For Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds with disabilities access to culturally competent services with disability expertise, and Aboriginal legal services, was even harder.¹⁸

6.16 Both the Human Rights Commission and the Law Reform Commission recommended strategies to overcome barriers to access to justice. These strategies are examined further in this chapter.

Barriers to reporting to police

6.17 A number of submitters and witnesses highlighted the challenges faced by people with disability when seeking to report allegations or incidents directly to

16 See: Anti-Discrimination Commissioner, Tasmania, *Submission 40*, pp 19–20; Women with Disabilities Victoria, *Submission 53*, pp 46–47; Women with Disabilities Victoria, *Submission 53*, pp 46–47; Northcott, *Submission 58*, p. 6; Queensland OPA, *Submission 73*, pp 20–21; Advocacy for Inclusion, *Submission 83*, pp 30–31; Disability Services Commissioner Victoria, *Submission 86*, pp 22–23; Dr Linda Steele, *Submission 94*, p. [4]; p. 20.

17 Dr Jessica Cadwallader, Advocacy Project Manager, Violence Prevention, People with Disability Australia; Australian Cross Disability Alliance (Disability Alliance), *Committee Hansard*, Sydney, 27 August 2015, p. 50.

18 Human Rights Commission, *Equal Before the Law*, p. 20.

police. These submitters highlighted that due to these barriers, crimes are often not reported.

6.18 Some submitters cited a 2012 report on the National Survey on Abuse of People with Disabilities in the United States that found nearly half of victims with disabilities did not report abuse to authorities. For those who reported abuse, nearly 54 per cent said that nothing happened and in fewer than 10 per cent of reported cases was the perpetrator arrested.¹⁹ It is telling that submitters quoted overseas reports, but were unable to cite relevant Australian studies. The lack of reliable Australian statistical data has been discussed previously in chapter three.

6.19 A 2014 report by Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *Beyond Doubt*, on the experiences of people with disabilities reporting crime highlighted that level of crime experienced by people with disability in Victoria and across Australia is 'substantial...in spite of – and sometimes the result of – systems that are designed to provide support and protection'.²⁰ It found that the under-representation of people with disability in the available recorded victims of crime data indicates that cases are either not reported, not making it through the justice system or that disability has not been identified.²¹

6.20 The *Beyond Doubt* report found that people with disability face significant and complex barriers when reporting crime to police, including:

- lack of access to information about how to identify and report a crime;
- feelings of shame and embarrassment;
- fear of retribution from the alleged perpetrator;
- lack of support for people with communication needs;
- fear of consequences for victims by families and carers; and
- fear of not being believed or seem as lacking credibility when reporting a crime to police.²²

6.21 The *Beyond Doubt* report made a series of recommendations for the Victoria Police, Office of the Public Advocate, courts, Departments of Justice and Health and Human Services that aim to:

19 Quoted in: Queensland Advocacy Incorporated, *Submission 43*, p. [7]. See: Nora J Baladerian, Thomas Coleman and Jim Stream, *Abuse of People with Disabilities – Victims and their families speak out: a Report on the 2012 National Survey on Abuse of People with Disabilities*, Disability and Abuse Project, 2013, <http://disability-abuse.com/survey/media-release.htm> (accessed 25 September 2015).

20 Victorian Equal Opportunity and Human Rights Commission (VEOHRC), *Beyond doubt: the experiences of people with disabilities report crime – Research Findings*, July 2014, p. 6, <http://www.humanrightscommission.vic.gov.au/index.php/our-projects-a-initiatives/experiences-of-people-with-disability-reporting-crime> (accessed 24 September 2015).

21 VEOHRC, *Beyond doubt*, p. 7.

22 VEOHRC, *Beyond doubt*, pp 8–9.

...establish clear processes for support and referral and to build community and organisational partnerships to assist Victoria Police to increase capability, to understand the expectations about making reasonable adjustments and to do its job more effectively.²³

6.22 Evidence to the committee, including the Victorian Ombudsman's 2015 report, suggests that that it is not clear how these recommendations have been incorporated into internal police mechanisms in Victoria or other jurisdictions. Submitters and witnesses highlighted that people with disability continue to experience challenges in reporting to police.

6.23 The committee heard that in some cases, police treat reports of violence from people with disability differently if they are perceived to be 'cared for' in an institution or residential setting. The Disability Alliance highlighted that:

Police often treat reports of violence, abuse and neglect experienced by people with disability differently to people without disability. This is particularly the case where there is a perception that the person with disability is already being 'cared' for in an institutional or residential setting, even when the violence, abuse and neglect has been reported as occurring in that facility. There is an assumption that the facility deals with people with disability and that it is not a police matter. In many cases, people with disability are returned back to these facilities, and these incidences remain 'hidden' and unacknowledged.²⁴

6.24 Where incidents are reported, the committee heard that people with disability are not supported by police to seek further investigation or conviction in relation to reports of violence, abuse or neglect. In many cases, witnesses with disability and the evidence they provide are not perceived as 'credible'. Disability Alliance provided the committee with evidence from over 70 victims of abuse, violence or neglect, many of who attempted to report to the police. In most cases, these investigations did not proceed due to a perceived lack of evidence or credibility of witnesses with disability (see Box 6.1 and Box 6.2).

23 VEOHRC, *Beyond doubt*, p. 15.

24 Disability Alliance, *Submission 147*, p. 56.

Box 6.1: Experience of reporting to police

Christine, a 39 year-old woman with intellectual disability, was repeatedly raped and bashed in one week by several different men...Christine was too scared to tell the [residential facility] worker what had happened to her because she thought she would 'get into trouble'. Two days later, the woman disclosed the rapes to her friend who helped her report the rapes to the police. Three of the five police initially involved in interviewing her and taking her statement, asked her friend if the woman might be 'making it up'. The detectives investigating the case admitted that, although there was now clear evidence that the rapes occurred, there was 'little likelihood' of a conviction due to the fact that the woman 'has an intellectual disability'.

Frances was physically beaten by a group of young girls at a regional TAFE [Technical and Further Education] institute. The violent attack was captured on CCTV[closed-circuit television] footage. The local police advised Frances not to pursue charges because she was 'mentally retarded' and there would be 'no chance of any conviction' against the perpetrators.

Peta has intellectual disability and lives in supported accommodation. She was raped by a support worker. The police were notified, and although believing Peta's evidence, they felt that they wouldn't be able to obtain a conviction against the support worker because Peta's testimony would be deemed unreliable by the court. Consequently, the police didn't pursue the investigation. The support worker is still working for the same organisation, but at a different facility.

Source: Australian Cross Disability Alliance, Supplementary Submission 147, pp 2–7.

Box 6.2: Experience of reporting to police – Ms Kobie Hicks

Ms Kobie Hicks, who has an intellectual disability, told the committee of her experience reporting incidents of sexual abuse to police:

I reported a sexual abuse that happened to me when I was a child. It was happening, from what I can remember, from grade four right up until I was 19. The police were saying there was no evidence, but I can give a description of the house, what I was wearing. I found that the police did not help me very much. They did not want to listen to me...They wrote everything in the report, but they asked the person who did it to me and that is when they turned and said that there was no evidence...They said, 'The case is closed. There is no evidence. Don't bother.' That is how I was spoken to by a police officer. They were not going to go any further, so 'drop it'. There is no point.

Ms Hicks recommended to the committee greater support for people with disability when dealing with police and the justice system:

I think the police should give them a bit more time or ask them to get someone in to help them, with making a statement, like an advocate. They should look into it a lot more. Someone reporting a rape or crime—or verbal abuse, like I did when I was a child; no-one looked into it. They just left me in there. They should open up a case and keep an eye on the child or adult, whatever it comes down to. I do think the police should ask for someone from a service provider to help them all, another member of the family or something.

Source: Ms Kobie Hicks, Committee Hansard, Sydney, 27 August 2015, p. 51.

6.25 The committee heard that in some cases, people with disability are able to access vulnerable witness support services. For example, in Queensland, children and

people with 'impairment of the mind' have access to a recorded interview undertaken by specially trained police officers and with a support person under section 93A of the *Evidence Act 1977*.²⁵ Ms Leona Berrie, manager of Working Alongside People with Intellectual and Learning Disabilities – Sexual Violence Prevention Association (WWILD) explained how the process is meant to work in practice, noting that she has not yet seen a victim progress to the court stage:

If it is a sexual offence, a female police officer is offered as a matter of course and/or an appointment is made for when a female officer can be made available. At this point, you might raise issues of disability, capacity and any particular issues of cognitive capacity or intellectual disability. On this basis, a 93A, as it is called in Queensland, or a recorded interview, is offered without any further proof of the person's disability.

This type of interview is similar to interviews with child witnesses and is conducted by people who are trained in that area, and then a support person is also made available or offered to the person—somebody suitable who they may wish to be there. The interview is conducted, and it is done in a safe and respectful way that avoids unnecessary re-traumatisation, and, perhaps, from there an investigation is conducted.

There may be little evidence to proceed—and, if that is the case, this is communicated to the client in a sensitive way by the police themselves and not left to others to pass this information on—or the matter is investigated and charges are laid. Charges are laid and sent to the DPP, and they agree to prosecute the case without extensive psychological testing to assess witness credibility. The person pleads guilty and the trial is avoided, in the ideal set of circumstances; or a trial is set and special witness provisions are put in place to avoid traumatising the victim further through that process. Special witness provisions are agreed to easily and readily without extensive psychological assessment being required. The perpetrator is found guilty and sent to jail for the appropriate amount of time. That is when things go well.²⁶

6.26 Other jurisdictions offer similar support programs for 'vulnerable witnesses', including people with disability. For example, the New South Wales (NSW) Office of the Director of Public Prosecutions (ODPP) may refer vulnerable adult witnesses, including people with disability, to the Witness Assistance Service (WAS). Under the WAS Early Referral and Case Management Best Practice Protocol, prosecution witnesses with a disability are referred to the WAS at the 'earliest opportunity'. The WAS aims to 'minimise stress and potential re-traumatisation' and 'enable witnesses to give their evidence to the best of their ability. Services provided by WAS include:

- Information about rights, entitlements, the legal process and services available;

25 See: *Evidence Act 1977* (Queensland), section 93A.

26 Ms Leona Berrie, Manager, Working Alongside People with Intellectual and Learning Disabilities – Sexual Violence Prevention Association (WWILD), *Committee Hansard*, Brisbane, 16 October 2015, p. 15.

- Assessment and case management planning, including referral for ongoing counselling and other support services and liaison with prosecutors;
- Preparation and coordination of court support, including crisis counselling and support in relation to the impact of the legal process.²⁷

6.27 Similarly, the South Australian ODPP noted that it provides WAS to ensure that all witnesses of crime and their immediate family have access to information and support services, and are aware of their rights and responsibilities when dealing with the criminal justice system.²⁸ South Australia has recently developed a further set of guidelines, *Supporting vulnerable witnesses in the giving of evidence: guidelines for securing best evidence*, as part of their *Disability Justice Plan 2014–2017* (Justice Plan) (see below). The new guidelines 'aim to make the criminal justice system more accessible and responsive to the needs of people with disability'.²⁹

6.28 More commonly, however, the committee heard that there were limited supports available for people with disability, particularly for people who require communication assistance. In some cases, people with a physical disability who require communication assistance may be subjected to psychological testing to determine their capacity to provide evidence, even though they have no psychological impairment (see Box 6.3).

Box 6.3: Experience of reporting to police – Ms Jules Anderson

Ms Jules Anderson, a former resident at Yooralla, told the committee of the experience of reporting incidents of abuse by staff to the police. As Ms Anderson has cerebral palsy, she was required to undergo a psychological assessment to determine whether she had the intellectual capacity to give evidence:

It was a very foreign environment, and I was scared. I thought a lot of it was to do with the fact that, having a disability, a lot of it I struggled with, having to go into such detail and things. I did not know why I had to go to a special ... psychologist for assessment. I would not lie about a thing like that. I still did have to go through that, which was humiliating, to say the least.

Ms Anderson's support person told the committee:

Jules questioned why she had to go through that process when she is quite capable of making decisions for herself and on behalf of herself.

Source: Miss Jules Anderson, Committee in camera Hansard, Melbourne, 30 June 2015, pp 12-13.

6.29 Evidence to the committee suggested that the experience of reporting to police is commonly characterised by a lack of appropriate support, and that these supports are not systematically available. Ms Berrie from WWILD outlined the more common response from police in responding to allegations of sexual abuse from women with disability:

27 NSW ODPP, *Submission 82*, pp 2–3.

28 South Australian ODPP, *Submission 136*, p. 1.

29 South Australian ODPP, *Submission 136*, p. 2.

A police officer—usually a male—may refuse to make an appointment time and encourage you to just come down and, even though someone of the same sex should be offered to take the statement according to interagency guidelines around responding to a report of sexual assault, a female detective is not made available. The VoC [victim of crime] worker may then request a female detective and the worker is told by the officer perhaps something along the lines that they have been in the force for 20 years and there is nothing that they could be told that has not been heard before or that would shock them and that they are going to need to get used to telling the story to men because there will be a lot of men involved if it goes to trial. A support person is not offered or, if it is suggested, it is discouraged or denied blanketly when requested.

At this point, you may also raise issues of intellectual disability or cognitive capacity, and at this stage somebody, a detective or an officer, may state that they would require proof of this disability before agreeing to record the interview. When we raise that we are concerned about somebody's capacity, we may be told something completely inappropriate around people being old enough to know—as in one instance, with one officer saying to us, 'She's old enough to know that people shouldn't touch her boobies.' Parents are asked if they are sure they want to report it, because, 'There isn't much in this.' So there is that discouraging that happens before you have even had the interview.³⁰

6.30 Ms Berrie noted that another common situation is that disability is not recognised at the point of contact and the person is not offered any support, resulting in a 'poorly examined written statement' being taken:

...once it has been done badly there seems to be little going back. If it was just taken in the first instance and a really bad job has been done of it, no-one then seems to offer a retaking of a statement. That seems to be the end of the road and it is pretty hard to push beyond that.

In the instance where an interview is not conducted, the victim may make a decision not to go ahead in making a formal statement, which is understandable considering the discouragement they might have had up to that point. The message is clear: it is not a crime worth reporting; it is too complicated; it probably did not happen; consent is straightforward; if it did happen, a person probably consented; it is too hard to investigate and, even if we did, we would not find anything, and, even if we did find something, it has zero chance of getting a conviction. If the interview is conducted and the 93A interview has not been granted, they are likely to be interviewed by someone who does not have the training to interview a vulnerable witness, the person's communication needs are not taken into account and a less-than-optimum statement is taken from the witness.

The police may, after this point, still decide to investigate and they may speak to the accused person. The accused person denies it. The police tell the family member, the VoC [victim of crime] worker, the person

30 Ms Leona Berrie, Manager, WWILD, *Committee Hansard*, Brisbane, 16 October 2015, p. 16.

supporting their son or daughter or the person with a disability things like, 'I got a good vibe off the person we interviewed and he seemed really concerned; his version doesn't seem to match your version,' and so on and so forth. So no genuine attempts to investigate, and the accused person's version of events being held up as the true account.

From that point, often what happens is the police may still say that there is not enough evidence, and that may be the case, or they may say, based on the belief of this contradicting account by the accused person, that the case is unfounded, which is more to say that it did not happen. The significance of that is that then people do not have the ability to seek financial resources, say, from Victims Assist Queensland, because they are making a decision based on probabilities and if the police are saying not just that there is not enough evidence but that it did not happen...³¹

Committee view

6.31 Evidence presented to the inquiry shows that people with disability experience significant barriers in seeking access to justice, particularly Aboriginal and Torres Strait Islander peoples and people from culturally and linguistically diverse communities. These barriers include challenges in reporting abuse, violence and neglect to police, which is likely to result in crimes going unreported or not adequately investigated.

6.32 The committee is concerned that the currently available supports for vulnerable witnesses are under-utilised and that people with disability are discouraged from reporting crimes, or subjected to discriminatory tests to prove their legal capacity.

6.33 The committee is concerned that there are not enough supports for people with disability seeking to access justice.

6.34 The committee recognises recommendations of VEOHRC report highlighting the importance of training and support for police in assisting people with disability, and suggests these recommendations should be considered nationally.

Strategies to address barriers

Access to justice strategies

6.35 To address the barriers people with disability face in seeking access to justice, the Human Rights Commission report, *Equal Before the Law*, recommended that each jurisdiction should develop 'holistic, over-arching' disability justice strategies that focus on the following outcomes:

- safety of people with disabilities and freedom from violence;
- effective access to justice for people with disabilities;
- non-discrimination;

31 Ms Leona Berrie, Manager, WWILD, *Committee Hansard*, Brisbane, 16 October 2015, p. 16.

- respect for inherent dignity and individual autonomy including the freedom to make one's own decisions; and
- full and effective participation and inclusion in the community.³²

6.36 The Human Rights Commission report emphasised that strategies should address the following core set of principles:

- Appropriate communications – Communication is essential to personal autonomy and decision-making. Securing effective and appropriate communication as a right should be the cornerstone of any Disability Justice Strategy.
- Early intervention and diversion – Early intervention and wherever possible diversion into appropriate programs can both enhance the lives of people with disabilities and support the interests of justice.
- Increased service capacity – Increased service capacity and support should be appropriately resourced.
- Effective training – Effective training should address the rights of people with disabilities and prevention of and appropriate responses to violence and abuse, including gender-based violence.
- Enhanced accountability and monitoring – People with disabilities, including children with disabilities, are consulted and actively involved as equal partners in the development, implementation and monitoring of policies, programs and legislation to improve access to justice.
- Better policies and frameworks – Specific measures to address the intersection of disability and gender should be adopted in legislation, policies and programs to achieve appropriate understanding and responses by service providers.³³

6.37 The report highlighted that the Justice Plan in South Australia is a best practice example of the disability justice strategies and urged all jurisdictions to:

...consult with South Australia and to learn from experiences there. If we coordinate, inform and monitor in a planned manner barriers will be removed faster and gaps bridged sooner. The services we have will be improved and new and better ones developed. The human rights of people with disabilities will be better respected, their standard of living will improve and the criminal justice system will become less of a presence in their lives.³⁴

Case study – South Australia – Disability Justice Plan

6.38 The South Australian Government is currently progressing wide-ranging reforms to its justice system. The Justice Plan was launched in 2014 and aims to make

32 Human Rights Commission, *Equal Before the Law*, p. 6.

33 Human Rights Commission, *Equal Before the Law*, p. 7.

34 Human Rights Commission, *Equal Before the Law*, p. 17.

the criminal justice system more accessible and responsive to the needs of people with disability.³⁵ During his second reading speech on the Statutes Amendment (Vulnerable Witnesses) Bill 2015 (the Bill), the South Australian Attorney-General, the Hon. John Rau, noted the Bill was developed in close consultation with the disability sector. Mr Rau noted the South Australian government had committed \$3.246 million over four years to implement the Justice Plan.³⁶

6.39 The development of the Justice Plan was a recommendation by the former Social Inclusion Board's report: *Strong Voices: A Blueprint to Enhance Life and Claim the Rights of People with Disability in South Australia (2012–2020)*.³⁷ The Social Inclusion Board undertook an extensive two-year consultation process which 'identified a need for reform to better identify and respond to the needs of people with disability in the criminal justice system, whether they are a victim, witness or a person accused of a crime'.³⁸

6.40 The Justice Plan has four key aims:

- uphold, protect and promote the rights of people with disability;
- support vulnerable victims and witnesses in the giving of evidence;
- support people with disability accused or convicted of a crime; and
- continuously monitor and improve performance.³⁹

6.41 A number of key priority actions under the Justice Plan were introduced in the Bill 2015. The Bill was passed by the South Australian Parliament on 2 July 2015 and incorporates major changes to the *Evidence Act 1929*, which aims to ensure that people with disability, whether as victims, witnesses, suspects or defendants, are better served by the justice system.⁴⁰

6.42 According to the South Australian Attorney-General's Department, the key changes are to:

35 South Australian Attorney-General's Department, *Disability Justice Plan 2014–2017*, <http://www.agd.sa.gov.au/initiatives/disability-justice-plan> (accessed 20 August 2015).

36 The Hon. John Rau, *House of Assembly Hansard*, 6 May 2015, p. 1036, <http://hansardpublic.parliament.sa.gov.au/Pages/HansardResult.aspx#/docid/HANSARD-11-19527> (accessed 20 August 2015).

37 See: Department for Communities and Social Inclusion, *Strong Voices*, <http://www.dcsi.sa.gov.au/services/disability-sa/disability-sa-publications/plans-and-reports/strong-voices> (accessed 21 August 2015).

38 *Disability Justice Plan 2014–2017*, p. 2.

39 *Disability Justice Plan 2014–2017*, p. 4.

40 South Australian Attorney-General's Department, *Statutes Amendment (Vulnerable Witnesses) Bill 2015*, <http://www.agd.sa.gov.au/initiatives/disability-justice-plan/statutes-amendment-vulnerable-witnesses-bill-2015> (accessed 20 August 2015).

- provide victims, witnesses or defendants with complex communication needs a general entitlement to have a communication assistant present for any contact with the criminal justice system;
- minimise the number of times vulnerable witnesses have to recount their experiences by providing alternative measures for their evidence to be presented to the court, including the use of pre-recorded evidence and investigative interviews at trial;
- tackle the misconception that disability denotes 'unreliability';
- enhance the supports available for vulnerable victims, witnesses and defendants, both in and out of court;
- allow the evidence of vulnerable witnesses to be taken in informal surroundings; and
- extend the priority listing of sexual assault trials to those where the complainant has a disability that adversely affects their capacity to give evidence.⁴¹

6.43 Representatives from the South Australian Attorney-General's Department told the committee that the Justice Plan has strong support from people with disability and is being implemented in close consultation with the community:

The plan is being implemented in close consultation with people with lived experience, so we are directly involving them and hearing their feedback in terms of driving the plan forward through whatever consultative or governance mechanisms are in place. I sit here with cautious optimism, but certainly we are grateful that there has been very wide support for the plan, bearing in mind that it will take four years in some instances to have full evidence of what outcomes have been achieved over those four years. I am a believer that significant change has occurred and significant further change will occur. But ultimately what has been at the heart of this, apart from receiving some outstanding expert advice, is direct engagement of people with the lived experience.⁴²

6.44 A significant aspect of the Justice Plan includes assisting police to better identify and respond to the needs of people with disability. Representatives from the South Australian Police highlighted the importance of specialised training for police officers in assisting people with disability, and expressed support for the new specialist training programs that will be introduced under the Justice Plan:

You need ongoing training. You need refresher training. You need constant assessments and feedback so you do not fall back into bad habits. It is always continual learning. I think that is what we are hoping for with this

41 South Australian Attorney-General's Department, *Statutes Amendment (Vulnerable Witnesses) Bill 2015*, <http://www.agd.sa.gov.au/initiatives/disability-justice-plan/statutes-amendment-vulnerable-witnesses-bill-2015> (accessed 20 August 2015).

42 Mr Greg Weir, Executive Director, Strategy and Reform, South Australian Attorney-General's Department, *Committee Hansard*, Adelaide, 28 August 2015, p. 35.

specialist training. There is not a lot of research in interviewing people who are nonverbal; but, hopefully, working with the training provider, we can come up with recognised techniques.⁴³

6.45 Ms Kelly Vincent, a South Australian Member of Parliament who was instrumental in driving these reforms, pointed out to the committee that 'legislation alone will not make all the difference and there remain significant social barriers to overcome and end violence against people with disabilities.'⁴⁴

6.46 Ms Vincent went on to describe a range of other issues that must be addressed as a whole of issue move to end violence against people with disabilities, including:

- accessible information on personal safety;
- support for people with disability from services that assist people in leaving situations of violence;
- accessibility of transport to improve independence;
- neglect from mainstream health services; and
- economic disadvantage.

6.47 Support for a national implementation of similar justice strategies was recommended by a few different submitters.⁴⁵

Committee view

6.48 The committee recognises the need for sector wide reforms, as proposed by the Human Rights Commission, to improve the ability of police and the justice system to identify and respond to allegations of abuse, and support people with disabilities in reporting and investigating.

6.49 The committee commends the positive work undertaken in South Australia as part of the Justice Plan as an excellent step towards ensuring people with disability are able to engage more effectively with the criminal justice system

6.50 The committee believes there is a critical need for these reforms to be considered nationally, drawing from evidence-based research on the needs of people with disability.

Supported-decision making

6.51 Another key aspect to improving access to justice is providing assistance to increase the legal capacity of people with disability to provide evidence.

43 Sergeant Susan Lock, Investigations Supervisor, Special Crimes Investigation Branch, Victim Management Section, South Australia Police, *Committee Hansard*, Adelaide, 28 August 2015, p. 47.

44 Ms Kelly Vincent MP, *Committee Hansard*, Adelaide, 28 August 2015, pp 57-58.

45 See JFA Purple Orange, *Submission 12*, p. 30; Australian Lawyers for Human Rights, *Submission 99*, p.10; and Children with Disability Australia (CDA), *Submission 144*, p. 41.

6.52 The Law Reform Commission report, *Equality, Capacity and Disability in Commonwealth Laws* investigated the issue of legal incapacity and how it impacted on a person's access to justice, particularly around their deemed capacity to provide evidence in criminal matters.

6.53 The key recommendation of that report was the implementation of a Commonwealth supported decision-making model based on the role of 'supporters' and 'representatives', including that the existing tests of a person's capacity to exercise their legal rights or participate in the legal process be reformed, consistent with the national decision-making principles.⁴⁶ The Law Reform Commission highlighted that these legal reforms need to be accompanied by appropriate support services for people with disability:

Legal reform is likely to have limited practical impact if people do not have access to the support necessary to enable them to participate in legal processes.⁴⁷

6.54 Some of the Law Reform Commission's key recommendations to improve participation by people with disability in the legal process at the Commonwealth level include:

- providing for witnesses who need support to have a support person present while giving evidence;
- providing for witnesses who need support to provide evidence in a way that enables them to understand questions and communicate answers; and
- providing guidance for judicial officers on how courts can support people with disability to give evidence.⁴⁸

6.55 The recommendations of the Law Reform Commission report were supported by the UN Disability Committee, which recommended in its 2013 concluding observations that:

- the current inquiry process be effectively used to take immediate steps to replace substitute decision-making with supported decision-making and provides a wide range of measures which respect the person's autonomy, will and preferences; and
- provide training, in consultation and cooperation with persons with disabilities and their representative organizations, at the national, regional and local levels for all actors, including civil servants, judges, and social workers, on the recognition of the legal capacity of persons with disabilities and on the

46 Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, pp 13–14, p. 192.

47 Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, p. 194.

48 Human Rights Commission, *Equality, Capacity and Disability in Commonwealth Laws*, pp 17–19.

primacy of supported decision-making mechanisms in the exercise of legal capacity.⁴⁹

Registered intermediaries

6.56 One aspect of a supported decision-making model includes the use of intermediaries, such as those used in the United Kingdom (UK). Ms Mary Woodward, who worked as a Registered Intermediary in the UK between 2009 and 2011, recommended the introduction of a similar program in Australia, noting that evaluations of the UK program:

...have been overwhelmingly positive, with a number of reported emerging benefits, including the potential to assist in bringing offenders to justice; increase access to justice; contribute to cost savings; assist in identifying witness needs; and inform appropriate interviewing and questioning techniques.⁵⁰

6.57 In England and Wales, vulnerable witnesses may be assisted to give evidence in criminal proceedings by registered intermediaries (see Box 6.4). In 2013, Northern Ireland piloted a registered intermediary scheme to assist vulnerable victims, witnesses, suspects and defendants with significant communication deficits. The pilot was extended through 2015 following an evaluation of the pilot in November 2014.⁵¹

Box 6.4: United Kingdom – Registered intermediaries

The UK *Youth Justice and Criminal Evidence Act 1999* allows for a range of special measures for cases involving vulnerable and intimidated witnesses to give their best evidence in court, including the use of an intermediary. In 2004, the UK government piloted the Witness Intermediary Scheme (WIS). In 2008, the WIS was implemented nationally and is available across England and Wales.

The role of the registered intermediary is to facilitate:

...two-way communication between the witness and any other participants in the criminal justice process to ensure that communication with the witness is as complete, coherent and accurate as possible. This includes communication at meetings between the witness and the police and/or the Crown Prosecution Service (CPS), in the ABE [Achieving Best Evidence] interview, during any identification procedures and during the trial process. It may also include communication at meetings between a defence witness or a defendant and the defence solicitor.

An intermediary appointed through the WIS must be a professional who has been recruited, selected and accredited by the Ministry of Justice and registered on the WIS national database. Intermediaries are impartial and neutral and are obliged to serve the court.

49 UN Disability Committee, *Concluding observations*, 2013, p. 4.

50 Ms Mary Woodward, *Submission 36*, p. [5].

51 Department of Justice, Northern Ireland, Registered Intermediary Scheme, <http://www.dojni.gov.uk/registered-intermediary-schemes> (accessed 17 September 2015).

Box 6.4 (continued)

The functions of Registered Intermediaries in the criminal justice system may include:

- the police officer or CPS lawyer in the case identifies that the witness might benefit from the assistance of a Registered Intermediary;
- the police officer or CPS lawyer contact the WIS Matching Service run by the National Policing Improvement Agency (NPIA) which identifies and contacts a Registered Intermediary with the necessary skill sets available to conduct the work;
- the Registered Intermediary conducts the assessment and provide the interviewing police officer with a preliminary report to enable planning for the ABE interview and is present in order to advise and assist with communication if required;
- prior to trial the Registered Intermediary may attend the witness on their court familiarisation visit and will inform the Witness Service of any relevant matters regarding the witness's care and well-being;
- before the witness gives evidence the Registered Intermediary must be involved in a 'ground rules' hearing with the trial judge and advocates to agree all the matters regarding the witness giving evidence with the Registered Intermediary's assistance;
- Registered Intermediaries assist during the giving of evidence, usually sitting alongside the witness as they give evidence from the TV link room at the court. The extent to which they intervene during the evidence of the witness depends on the witness and also the extent to which the Ground Rules are followed; and
- Registered Intermediaries have also been asked to assist in matters which are ancillary to the trial, namely, to help a witness who is giving a victim impact statement (either by video or a written statement) and to help in the explanation to a witness about the outcome of the case.

Section 104 of the *Coroners and Justice Act 2009* (not yet implemented) will allow for certain vulnerable accused to give oral evidence at trial with the assistance of an intermediary.

Source: United Kingdom Ministry of Justice, *The Registered Intermediary Procedural Guidance Material*, February 2012, pp 3-13, http://www.cps.gov.uk/publications/docs/ri_procedural_guidancemanual_2012.pdf (accessed 17 September 2015).

6.58 Ms Woodward told the committee of one example where she had assisted a person with communication difficulties during a trial:

I was called in at the pretrial stage to facilitate the communication with a 45-year-old lady who had borderline personality disorder and post traumatic stress disorder. At the time, she was sectioned under the Mental Health Act in a secure psychiatric hospital due to significant risks of self-harm and suicide. She disclosed, alongside her sibling, historical sexual abuse by her father. She had already given five videoed police interviews by the time I was called in, and they were used as her evidence-in-chief. The Crown Prosecution Service...were concerned that her significant mental health difficulties would prevent her from being able to participate in the trial proceedings...they knew how an intermediary could help facilitate the communication of someone with significant mental health difficulties...I conducted an assessment of her communication and found that she was superficially a very articulate lady. She did have some difficulties processing more complex language but, as her mental health deteriorated, so did her communication skills—to the extent that when it got

really bad she would just completely shut down. Obviously, if that were to happen during questioning she would not be able to continue. I advised the court on the impact of her mental health on communication and told them about some strategies that might be adopted to enable her to give evidence. The judge agreed to all my recommendations and, with my assistance, she was cross-examined via video link from her hospital; she was not safe to leave the hospital. Largely as a result of her evidence, the defendant was convicted of 22 out of 23 counts and sentenced to 14 years in prison. At sentencing, the judge commended everyone who had enabled her to give evidence, including me as the intermediary.⁵²

6.59 The committee notes that an intermediary role, called a 'communication assistant', will be introduced in South Australia as part of the Justice Plan. Ms Woodward raised concern that the proposed model of support in South Australia was voluntary:

While I love to think that we are all altruistic, I have a lot of experience in this and I would not do that role for free. It carries a lot of responsibility and it is high stakes and high pressure. I do worry about whether they would be recruiting to that role people with the right motivation, expertise and experience.⁵³

6.60 Dr Stephen Brock from the South Australian Attorney-General's Department told the committee the South Australian government was still refining the 'communication assistant' role:

At this point in time we are still working through and still refining it. We will also be looking at further refining it with our partner from the NGO sector, once that has been identified...The communication assistance scheme is one component of the broader Disability Justice Plan, and we will be working closely with the implementation of the specialist training.⁵⁴

Committee view

6.61 The committee supports the recommendations made by the Law Reform Commission on the importance of introducing supported-decision making models.

6.62 The committee recognises the need for reforms to the criminal justice system that give agency to people with disability to enable them to speak for themselves, and for their evidence to be considered and acted upon.

Needs of specific groups

Women and girls

6.63 The committee was particularly concerned by evidence that shows that women with disability experience particularly high rates of violence, including family

52 Ms Mary Woodward, *Committee Hansard*, Sydney, 27 August 2015, pp 31–32.

53 Ms Mary Woodward, *Committee Hansard*, Sydney, 27 August 2015, p. 34.

54 Dr Stephen Brock, Senior Policy Officer, Strategy and Reform Division, Attorney-General's Department South Australia, *Committee Hansard*, Adelaide, 28 August 2015, p. 39.

and domestic violence. In its concluding observations, the UN Disability Committee expressed particular concern about reports of 'high rates of violence perpetrated against women and girls living in institutions and other segregated settings'. The UN Disability Committee recommended that Australia:

...orders investigation, without delay, into situations of violence, exploitation and abuse experienced by women and girls with disabilities in institutional settings, and to take appropriate measures on the findings.⁵⁵

6.64 Evidence to the committee shows that domestic and family violence occurs both outside and within institutions and residential settings. The Disability Alliance highlighted that legislation aimed at addressing violence against women offers little protection for people with disability in residential settings:

It is generally understood in the context of 'domestic', 'spousal', 'intimate partner' or 'family' violence, and this conceptualisation is reflected in most domestic and family violence legislation in Australia. However, domestic and family violence legislation differs across States and Territories - providing different levels of protection and definitions of what constitutes 'domestic violence' and/or 'family violence' and what constitutes a 'domestic relationship'. Some broader definitions include residential settings, such as group homes and institutions, where people with disability often live and interact domestically with co-residents, support workers, service managers, visitors and a range of other staff. However, even where there are broader definitions, domestic and family violence legislation is rarely utilised, largely because violence perpetrated against people with disability in institutional and residential settings is not characterised as domestic/family violence and rarely are domestic violence related interventions deployed to deal with this type of violence. Where narrower definitions apply, which is the case in most domestic and family violence legislation, people with disability in institutional and residential settings are completely excluded from these protections.⁵⁶

6.65 Dr Jessica Cadwallader from the Disability Alliance told the committee:

...often legislation will wind up being used in ways that imply that if violence occurs in a disability service that perhaps police do not need to respond in quite the same way or the services do not need to be brought in. The referral pathways do not necessarily map together in ways that ensure that people with disability have access to the same kinds of supports as anyone else.⁵⁷

6.66 The Human Rights Commission urged the committee to consider the outcome report of the Stop the Violence Project's (STVP) 2013 national symposium on violence against women and girls with disability funded by the Australian

55 UNCRPD, *Concluding observations*, 2013, p. 6.

56 Disability Alliance, *Submission 147*, p. 59.

57 Dr Jessica Cadwallader, *Committee Hansard*, Sydney, 27 August 2015, p. 41.

Government under the *National Plan to Reduce Violence against Women and their Children 2010-2022* (National Plan).⁵⁸

6.67 The STVP outcome report noted that women and girls with disability experience violence at 'higher rates, more frequently, for longer, in more ways, and by more perpetrators'.⁵⁹ For women with disability in institutions, the President of Women with Disabilities Australia, Ms Karin Swift, noted:

Women and girls with disabilities who live in institutions experience, and are at significant risk of violence. For many, violence is a day to day reality of their lives and frequently involves sustained and multiple episodes. Yet violence perpetrated against women and girls with disabilities in institutions is rarely characterised as domestic violence and rarely are domestic violence related interventions deployed to deal with this type of violence.⁶⁰

6.68 The STVP outcome report recommended a range of strategies to address violence against women and girls with disability, including strengthening justice and legal workforce training to recognise and support disclosure and redress of incidents of violence, particularly family and domestic violence, and improving access to justice for women and girls with disability experiencing or at risk of violence.⁶¹

6.69 However, the Disability Alliance was critical that the STVP was 'limited in scope':

...as its contracted focus was on building the evidence base to reform service provision for women with disability who are experiencing or at risk of violence. The STVP was unable to 'address the myriad issues and complexities inherent in the multiple forms of violence perpetrated against women with disabilities'.⁶²

6.70 A number of witnesses and submitters highlighted the need for improved access for people with disability to a range of mainstream family violence support services. For example, under existing domestic violence legislation in most states and territories (except NSW) does not recognise residential facilities for people with disability as places that domestic violence may occur. Ms Christina Ryan, General Manager at Advocacy for Inclusion, told the committee that in most states and territories:

...you cannot actually stick your hand up and say, 'I've got violence happening in my home that needs to be responded to.' There is no way that you can access the services that are appropriate to getting outcomes through that. We struggle enormously with that barrier. There are some real

58 Human Rights Commission, *Submission 57*, pp 2–3.

59 Stop the Violence Project, *Report of the Proceedings and Outcomes*, National Symposium on Violence against Women and Girls with Disability, 25 October 2013, p. 13, <http://www.stvp.org.au/National-Symposium.htm> (accessed 24 September 2015).

60 STVP, *Report of the Proceedings and Outcomes*, p. 14.

61 STVP, *Report of the Proceedings and Outcomes*, p. 26.

62 Disability Alliance, *Submission 127*, p. 63.

solutions that we could find. In fact, in New South Wales, where these households are recognised under the domestic violence legislation, they are able to change some of those outcomes. It also has raised enormous awareness around the fact that this is violence, naming it. People do not see that it is a form of violence. They do not get that it is abuse.⁶³

6.71 The committee heard that under the National Plan, the Australian Government is undertaking a series of initiatives to address family violence for people with disability. The Department of Social Services submitted that the second action plan (2013-2016) of the National Plan:

...has a strong focus on better understanding and responding to people's diverse experiences of violence, including for people with disability. It also includes initiatives to help better identify, support and respond to women with disability experiencing, or at risk of, family and domestic violence and sexual assault.⁶⁴

6.72 However, a number of submitters argued that the National Plan is not integrated with the National Disability Strategy and does not adequately address family violence for people with disability in residential settings. WWILD submitted that within the National Plan:

...there is little emphasis on girls with disabilities, it focuses only on traditional notions of domestic/family violence and sexual assault (in the context of intimate partner relationships only), and fails to address the many other forms of violence perpetrated against women and girls with disabilities, such as violence in institutions and residential settings. These forms of violence fall 'outside' the scope of the National Plan.⁶⁵

6.73 Likewise, the Disability Alliance submitted that the National Plan:

...has significant limitations in addressing and preventing violence against women and girls with disability in institutional and residential settings. It focuses on traditional notions of domestic/family violence (ie: intimate partner/spousal violence) and sexual assault, and has little emphasis on girls with disability. It fails to address the many forms of violence perpetrated against women and girls with disability (such as sexual and reproductive rights violations; restrictive practices; forced treatment; seclusion and restraint; deprivation of liberty) and the many settings and spaces in which violence against women and girls with disability occurs (such as institutions, service settings, out-of-home care). These forms of violence and settings currently fall 'outside' the scope of the National Plan.⁶⁶

6.74 Ms Carolyn Frohmader, representing Women with Disability on the Disability Alliance, highlighted the problem of 'policy siloing':

63 Ms Christina Ryan, General Manager, Advocacy for Inclusion, *Committee Hansard*, Canberra, 21 August 2015, p. 12.

64 Department of Social Services, *Submission 104*, p. 23.

65 WWILD, *Submission 127*, p. [11].

66 Disability Alliance, *Submission 127*, p. 63.

The National Disability Strategy is not connected to the national violence plan...we have a national framework to prevent violence against women, which does not deal well with disability, does not include particular settings and has a focus on intimate partner violence. We have a national child protection framework that is actually about child protection. So we have this policy siloing where, yes, we know these things but this one is not connected to this one is not connected to this one. And it is just incredibly problematic.⁶⁷

6.75 Submitters suggested that the National Plan should be better integrated with the National Disability Strategy and directly address violence against women and girls in institutions. WWILD recommended that the second action plan on the National Plan include specific focus on 'the violence perpetrated against women and girls with disabilities, such as violence in institutions and residential settings'.⁶⁸

Committee view

6.76 Evidence to the inquiry shows a need for the integration of domestic violence programs with disability services to ensure people with disability have access to the same supports.

6.77 The committee believes the National Plan should include specific actions to address violence against women and girls in residential settings, including ensuring access to mainstream services and specialist disability services.

Children and young people

6.78 The committee heard that children and young people experience particular barriers and challenges in reporting to police and seeking access to justice.

6.79 The Human Rights Commission urged the committee to consider the interim report of the Royal Commission into Institutional Responses to Child Sexual Abuse which noted that:

...children with disability are more vulnerable to sexual abuse than children without disability, and that vulnerability to violence may be increased when disability intersects with other attributes, for example, Aboriginal and Torres Strait Islander children with disability.⁶⁹

6.80 The interim report noted that children with disability are more likely to have experienced repeated incidents of sexual abuse by the time they are 18 years of age. Vulnerability to abuse is compounded due to children with disability being segregated to varying degrees from the mainstream community, having special communication

67 Ms Carolyn Frohmader, Executive Director, Women with Disabilities Australia; Disability Alliance, *Committee Hansard*, Sydney, 27 August 2015, p. 44.

68 WWILD, *Submission 127*, p. [13].

69 Human Rights Commission, *Submission 57*, p. 3.

needs and receiving inadequate education about sex, inappropriate touching and abuse.⁷⁰

6.81 Children with Disability Australia (CDA), a national representative organisation for children with disability representing 5000 members, highlighted that children with disability are three times more likely to be abused than their peers, and those with communication difficulties and high behaviour support needs have a heightened risk of abuse.⁷¹ CDA submitted that children and their families experience particular barriers when reporting violence and abuse:

It has been reported to CDA on numerous occasions that when children, young people and families make complaints regarding abuse, service providers and institutions become extremely defensive and adversarial. For example, families have reported feeling attacked and ostracised by schools for making complaints about their children's experiences. In some instances, schools have taken out intervention orders against parents, which appears to be a way of avoiding accountability about issues of concern.⁷²

6.82 As with all people with disability, violence and abuse against children and young people is often not identified as a crime, particularly when perpetrated by care providers such as schools. CDA submitted that:

In these cases, abuse may be seen as an incident that can be addressed within an organisation, rather than making appropriate referral to police. In addition, police often do not recognise abuse experienced by children and young people with disability as a crime. An example reported to CDA involved a four year old being trapped under a chair by his Principal at school. The boy's mother went to the police after the school refused to recognise what had occurred, however the police refused to take her statement.⁷³

6.83 The Disability Alliance provided a number of case studies of children and young people with disability who experienced significant challenges in reporting incidents of abuse to police (see Box 6.5).

70 Royal Commission into Institutional Responses to Child Sexual Abuse, *Interim Report, Volume 1*, 30 June 2014, pp 112–113, <http://www.childabuseroyalcommission.gov.au/about-us/our-reports> (accessed 24 September 2015).

71 CDA, *Submission 144*, p. 5.

72 *Submission 144*, p. 30.

73 *Submission 144*, p. 30.

Box 6.5: Case study – Children and young people with disability

Rose is eight, has limited mobility and limited verbal communication. She suffered a broken hip at an after school hours care program...Rose eventually named the staff member who was responsible for her injury, and she was interviewed by the police. However, her mother was not allowed to act as her support person, as the police deemed that she would be able to interpret too much of Rose's unspoken communication, and this would be inadmissible as evidence. Instead, an independent advocate accompanied Rose during the police interview.

The interview was a very stressful process for Rose. She spoke to the police through Assistive and Alternative Communication. Rose was unable to disclose any details about the nature or origin of her injury during the interview. The advocate suggested that a different form of questioning, such as using more contextual questions concerning Rose's injuries, be attempted, but the police deemed that all communication strategies had been exhausted. The police stated that Rose, her communication methods and her story were not reliable enough to take the investigation further. They claimed that her interview would not be admissible in a court of law, and ceased investigating the issue.

Source: Australian Cross Disability Alliance, Supplementary Submission 147, p. 12.

6.84 CDA highlighted that children and young people experience particular barriers to access to justice, including:

...a lack of protection services for people with disability, the failure of the justice system to provide support and adjustments to assist people with disability participating in the system and discriminatory attitudes that position people with disability as incapable of making reliable statements.⁷⁴

6.85 In particular, CDA expressed concern that:

...police have been unwilling to take a statement from a child either based on the assumptions of capacity regarding making a statement or because there is no communication support available if required...The perpetuation of the stereotype that people with disability make 'poor witnesses' inhibits prosecution of crimes against children with disability. The curtailed opportunity to demonstrate credibility as a witness in a court of law further perpetuates this view.⁷⁵

6.86 In its submission, the Commissioner for Children and Young People Western Australia (CCYPWA) highlighted the need to develop child-safe principles for organisations to 'promote a culture where the safety, wellbeing and participation of children and young people are reflected in policies and day-to-day practices', and implement child-friendly complaints processes. The CCYPWA noted that a child-friendly complaints process 'is a vital component of a complaints system and should be carefully considered when designing the broader system for handling complaints'.⁷⁶

6.87 The committee notes concerns that the *National Framework for Protecting Australia's Children 2009-2020* (Child Protection Framework) does not adequately

74 CDA, *Submission 144*, p. 40.

75 *Submission 144*, pp 40–41.

76 Commissioner for Children and Young People Western Australia, *Submission 32*, pp [2–4].

address responding to violence against children and young people with disability. The Department of Social Services submitted that the Child Protection Framework 'is an ambitious, long-term approach to ensuring the safety and wellbeing of Australia's children, and aims to deliver a substantial and sustained reduction in levels of child abuse and neglect over time'.⁷⁷

6.88 The Disability Alliance argued that the Child Protection Framework:

...contains very limited reference to disability...Essentially, this means that the only appearance that children with disability make in the National Framework for Protecting Australia's Children is where their disability is treated as a cause of the violence and abuse they experience: a clear case of blaming the victim. Although the research priorities under the Framework include disaggregating by disability, much of the research has excluded those settings where children with disability are overrepresented and where violence is endemic, including for example, out of home care run by disability service providers, psychiatric facilities and hospitals.⁷⁸

6.89 Similarly, CDA submitted that the Child Protection Framework contains 'minimal considerations of the specific vulnerabilities children with disability have to experiencing abuse and neglect':

Often, the safety and wellbeing of children with disability is positioned as being the responsibility of the disability sector, rather than included and embedded in mainstream children's policy and services. As a result, children with disability are often excluded from policy considerations and the segregation of services remains unchallenged. By continually leaving children with disability out of policy considerations and reform, there can be minimal impact on day to day experiences of abuse.⁷⁹

6.90 The Disability Alliance and CDA recommended that the Child Protection Framework include particular targets and measures to prevent the abuse of children and young people with disability.⁸⁰ Families Australia recommended that the inquiry focus on the particular issues faced by children and people with disability aged 0 to 25 years of age, and that consideration be given to including a 'national priority aimed at achieving better outcomes for children and young people with disability from relevant national frameworks and strategies'.⁸¹

77 Department of Social Services, *Submission 104*, p. 23.

78 Disability Alliance, *Submission 147*, pp 63–64.

79 CDA, *Submission 144*, p. 36.

80 See: CDA, *Submission 144*, p. 36; Disability Alliance, *Submission 147*, p. 14.

81 Families Australia, *Submission 3*, p. [2–3].

Committee view

6.91 The committee is disturbed by evidence to the inquiry which shows that barriers to access to justice are particularly acute for children. The committee considers that the Child Protection Framework must be amended to capture the specific needs of children with disability

6.92 The committee stresses that any reforms to the criminal justice system (including legal support services and evidence legislation) and police training must take into special consideration the needs of children and young people.

Aboriginal and Torres Strait Islander people with disability

6.93 The committee was particularly concerned by evidence highlighting the challenges Aboriginal and Torres Strait Islander peoples with disability face in engaging with the criminal justice system.

6.94 The North Australian Aboriginal Justice Agency (NAAJA) submitted that Aboriginal and Torres Strait Islander peoples with disability, particularly in remote areas, do not have access to appropriate disability support services. NAAJA argued that the lack of services amounts to 'systemic neglect' and contributes to a high vulnerability to violence and abuse:

It is NAAJA's consistent experience that an absence of supports for Aboriginal people with disability, such as access to mental health services or supported accommodation for people with cognitive impairment, leads to a range of serious problems. These include neglect, exploitation and violence towards people with disability and it also means that people are removed from their home community, losing the support of family and culture. It also leads to increased contact with the criminal justice system - often through their own violent conduct - and child protection system.⁸²

6.95 In particular, NAAJA highlighted that in the Northern Territory, Aboriginal and Torres Strait Islander peoples with disability are significantly overrepresented in the criminal justice, child protection and adult guardianship systems. NAAJA noted that the lack of support services available to Aboriginal and Torres Strait Islander peoples in the criminal justice system contributes to high levels of incarceration:

NAAJA is often called upon to represent people with mental illnesses and cognitive impairments who have committed serious violent acts after a long history of escalating offending while their underlying cognitive/intellectual/mental health issues have gone unaddressed. It is often the case that the family and community of the person have found themselves unable to cope with the support needs of the person.

Where people with cognitive impairment and mental illness find themselves before the courts for criminal matters, the absence of supports also often leads to their incarceration. This is because the person may be considered to be a danger to community safety without support and/or supervision in their community. This can see people remanded in custody and then subject to

82 NAAJA, *Submission 138*, p. 5.

custodial supervision under the NT Criminal Code. In the absence of a forensic mental health facility in the NT, custodial supervision means imprisonment in a maximum security prison.

Transition to community from prison is also made more difficult by the lack of support services in the community. Once a person 'goes in', they are likely to face significant challenges 'getting out' because reducing the risk of their release requires options for supervision and support that are simply not available to Aboriginal people in the NT, particularly in remote communities.⁸³

6.96 The Disability Alliance provided case study examples of Aboriginal people with disability who experienced incarceration due to the lack of available support services (see Box 6.5).

Box 6.6: Case study – Aboriginal and Torres Strait Islander people with disability

Dave is a young Aboriginal man with intellectual disability. He was found 'unfit to plead' in a criminal matter. He was indefinitely detained in a maximum security prison. Dave does not have access to the intensive rehabilitation programs he needs to address the causes of his offending behaviour.

He is often isolated in his cell for approximately 16 hours a day, and frequently shackled during periods he is outside his cell. In response to repeated banging of his head causing bleeding, prison officers strap him to a chair and inject him with tranquilizers until he is unconscious. This has happened on numerous occasions.

The government corrections department responded to complaints by stating that it has a 'duty of care' to prevent the man from hurting himself, and that the prison is not equipped to manage people with cognitive impairment.

Source: Australian Cross Disability Alliance, *Supplementary Submission 147*, p. 4.

6.97 Citing a report by the Aboriginal Disability Justice Campaign, the Disability Alliance highlighted that Aboriginal and Torres Strait Islander peoples account for one third of the 150 people detained under mental impairment legislation around Australia. Further, an estimated 50 Aboriginal and Torres Strait Islander people are currently detained indefinitely in prisons and psychiatric units.⁸⁴

6.98 The issue of the incarceration of Aboriginal and Torres Strait Islander peoples with disability was highlighted by the UN Disability Committee which specifically recommended that Australia:

Ends the unwarranted use of prisons for the management of unconvicted persons with disabilities, focusing on Aboriginal and Torres Strait Islander persons with disabilities, by establishing legislative, administrative and support frameworks that comply with the Convention.⁸⁵

83 NAAJA, *Submission 138*, pp 5–6.

84 Disability Alliance, *Submission 147*, p. 39.

85 UN Disability Committee, *Concluding observations*, 2013, p. 5.

6.99 Mr Damian Griffis, representing First Peoples Disability Network Australia on the Disability Alliance, told the committee that for Aboriginal and Torres Strait Islander peoples with disability, there are a lack of early intervention supports available to prevent adverse interactions with the criminal justice system:

The way we see it is on a spectrum of experience, if you like. On one hand there is the soft discrimination of low expectations, and at the other end we have the institutional racism. Experience sort of sits in there somewhere. In a disability context, we talk about this syndrome we call the 'bad black kid' syndrome. There is a kid in the back of the classroom acting up. They might be very frustrating in the classroom. They get suspended and expelled. And then they might end up hanging around the local shops. The police start telling them to move on. They end up having interactions with the juvenile justice system. And it turns out they have a disability of some kind.

This is a very common experience for us. They may have hearing impairment or vision impairment; they may come from a home where they do not sleep a lot, for example. We would frame that clearly as neglect on the part of the education system, which is not properly recognising their needs. We think that is a major issue for a lot of our young people. The lack of early intervention and specialist supports around their disability is a very significant consequence which can lead to a trajectory which we see quite regularly of interactions with criminal justice and a journey which takes them in a particular direction, when there is a very clear opportunity early on to make an intervention and provide appropriate support.⁸⁶

6.100 Mr Griffis highlighted that in remote communities the police are the only real service providers in town and not equipped to provide disability specific support:

If you live in regional or remote Australia—or even if you live beyond the Blue Mountains here in New South Wales—your first interaction is going to be with a police officer. If you have a mental health episode and you are not going particularly well, you usually end up in the back of a paddy wagon. In some parts of our country, as you know, the police are really the service provider in town—and this is not necessarily to run down the police force either, because that is not what they are supposed to be doing. Then you see this trajectory of: go before a magistrate maybe, and the magistrate might not be particularly attuned to your mental health needs, for example. Then you are on this trajectory of indefinite detention.⁸⁷

6.101 Mr Griffis noted that the provision of appropriate services could prevent the incarceration of unconvicted Aboriginal and Torres Strait Islander peoples with disability:

86 Mr Damian Griffis, CEO, First Peoples Disability Network Australia; Disability Alliance, *Committee Hansard*, Sydney, 27 August 2015, p. 39.

87 Mr Damian Griffis, *Committee Hansard*, Sydney, 27 August 2015, p. 47.

...if you can start addressing disability more appropriately, there is an opportunity here to reduce the Aboriginal prison population by 10 to 20 per cent in Australia.⁸⁸

6.102 The committee heard that another specific challenge is identifying disability in Aboriginal and Torres Strait Islander communities, particularly Foetal Alcohol Spectrum Disorder. NAAJA noted that:

There is no comparable word in many Aboriginal languages to 'disability'. This adds a significant barrier in identifying the numbers of Indigenous Australians with a disability or combating any disadvantage suffered as a result of a disability.⁸⁹

6.103 To address this issue, the Law Council of Australia recommended:

...that all governments invest in methods to ensure the detection and treatment of hearing impairment, FASD [Foetal Alcohol Spectrum Disorder] and other disabilities which can potentially lead to adverse outcomes in the criminal justice system, particularly for Indigenous Australians.⁹⁰

Committee view

6.104 The committee is deeply concerned about the challenges Aboriginal and Torres Strait Islander peoples with disability experience in engaging with the criminal justice system, particularly the use of prisons as accommodation.

6.105 The committee recognises the need for specific services for Aboriginal and Torres Strait Islander communities, particularly in remote regions, to divert people with disability from the criminal justice system to disability specific support services.

6.106 The committee recognises the need for better identification of disability, including hearing and vision impairment, in Aboriginal and Torres Strait Islander communities to ensure people with disability are referred to the appropriate services.

Indefinite detention

6.107 The issue of the indefinite detention of people with disability was raised as an issue with the committee, particularly when people with a mental health or cognitive disability intersect with the criminal justice system. The Disability Alliance outlined the process by which people with a mental health condition or cognitive impairment who have been charged with an offence and found not fit to stand trial or not guilty by reason of their disability, are then detained indefinitely, sometimes within the prison environment itself:

All Australian jurisdictions have in place legislation that addresses a defendant within the criminal justice system and their fitness to stand trial.

88 Mr Damian Griffis, *Committee Hansard*, Sydney, 27 August 2015, p. 51.

89 NAAJA, *Submission 138*, p. 6.

90 Law Council of Australia, *Submission 139*, p. 22.

These justice diversion provisions are applied when people with cognitive or psychosocial disability are deemed 'unfit' to stand trial. An unfitness test may arise as an issue before or during the trial process. These justice diversion provisions have resulted in people with disability being detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, and for periods that may significantly exceed the maximum period of custodial sentence for the offence.⁹¹

6.108 The Human Rights Commission expressed concern with the negative consequences this has for vulnerable people:

The Commission is also concerned that the practice of indefinite incarceration in prison, if not considered to be a form of violence, exposes people with disability to violence in an institutional setting. This practice is particularly experienced by Aboriginal and Torres Strait Islander people with cognitive impairment and was reported on by the Social Justice Commissioner in his 2012 Social Justice Report.⁹²

6.109 NAAJA provided evidence to the committee about the over-representation of Aboriginal people in the Northern Territory criminal justice system, pointing out that many of those people had a long history of escalation of behaviour while their underlying cognitive impairment or mental health issues went untreated.⁹³ The Disability Alliance has also provided evidence that Aboriginal and Torres Strait Islander peoples are disproportionately affected by this form of arbitrary detention.⁹⁴

6.110 The UN Disability Committee has made comment on the practice of indefinite detention after a finding of 'unfitness' and found in relation to the Disability Convention that:

The Committee has established that declarations of unfitness to stand trial or incapacity to be found criminally responsible in criminal justice systems and the detention of persons based on those declarations, are contrary to article 14 of the Convention since it deprives the person of his or her right to due process and safeguards that are applicable to every defendant.⁹⁵

Committee view

6.111 The indefinite detention of people with disability is an issue of serious concern to the committee. This is made more serious by the sometimes arbitrary nature of such detention without appropriate periodic review, and where that detention occurs in a criminal justice facility.

91 Disability Alliance, *Submission 147*, p. 47.

92 Australian Human Rights Commission, *Submission 57*, p. 4.

93 NAAJA, *Submission 138*, pp. 5-6.

94 Disability Alliance, *Submission 147*, p. 47.

95 UN Disability Committee, *Guidelines on article 15 of the Convention on the Rights of Persons with Disabilities*, September 2015.

6.112 The committee is of the view that if a person is detained in indefinite detention, then there is an obligation on the part of the state to provide therapeutic treatment in a facility not attached to the criminal justice system. To do any less would result in the state imposing criminal justice punishment on people as a direct result of them having a disability.

Concluding committee view

6.113 The committee notes that it is not clear whether recommendations made by the UN Disability Committee on improving access to justice for people with disability have been implemented across jurisdictions. The evidence we have received would suggest they haven't or if they have they are inadequate to effect change.

6.114 This would indicate that Australia is not fulfilling its international human rights obligations in relation to providing access to justice.

6.115 The committee is deeply concerned by the evidence presented to this inquiry which shows that people with disability who are victims of crime, face significant barriers to having those crimes appropriately reported, investigated and prosecuted.

6.116 The committee is further concerned that problems with access to justice for people with disability is not an unknown issue to the Australian Government. Multiple reports have highlighted the critical need for reform to Australia's legal systems. These reports, discussed earlier in this chapter, include the 2012 Civil Society report to the UN Disability Committee, the 2013 UN Disability Committee observations on Australia's implementation of the Disability Convention, the 2014 Human Rights Commission report and the 2014 Law Reform Commission report.

6.117 Of particular concern to the committee, is the apparent lack of impetus to implement the recommendations of those expert reports on access to justice, which range from core legislative reform through to improved training for police and judicial officers and diversionary programs for people with disability.

6.118 Given the wide terms of reference for this inquiry, the committee was unable to investigate all aspects of the multi-faceted issue of barriers to access to justice for people with disability. However, the evidence gathered by this inquiry clearly shows that this is a widespread problem. More clearly understanding the specific barriers in each jurisdiction is a fundamental step to reducing the prevalence of violence, abuse and neglect of people with disability.

Chapter 7

Advocacy

7.1 This chapter examines the role and challenges of disability advocacy in preventing and responding to violence, abuse and neglect against people with disability.¹

7.2 This chapter highlights the importance of formal, informal and self-advocacy models of advocacy, in assisting people with disability to identify, report and respond to incidents of violence, abuse and neglect.

7.3 The Victorian Advocacy League for Individuals with Disability Inc. (VALID), defines the roles of advocacy as to:

- address discrimination
- empower individuals through information, support & knowledge of their rights
- for community education
- increase the quality of life of individuals and their families
- make services accountable
- address inequity of service provision.²

7.4 VALID further defines the types of advocacy as:

- **Individual Advocacy:** to seek a solution with and for people with disabilities to their particular problems or needs, so as to enhance their rights and dignity.
- **Systemic Advocacy:** to influence the 'system' (e.g. the policies and procedures of agencies/governments) to change in response to people with disabilities and their families/carers needs.
- **Self Advocacy:** is about people with disabilities/ families & carers, speaking up for themselves. Self-Advocacy services assist consumers to develop or maintain the personal skills and self-confidence necessary to enable them to represent their own interests in the community.
- **Citizen Advocacy:** Citizen Advocacy services recruit and support individual volunteers from the community to assist i) persons with disabilities, or ii) the families of, and other persons who provide care for and assistance to, people with disabilities to represent their interests in day to day life and the community.

1 See: Terms of reference (g).

2 Ms Christine Scott, *Advocacy*, <http://www.valid.org.au/advocacy.htm> (accessed 9 November 2015).

- **Group Advocacy:** Group advocacy services facilitate community organisations to represent the interests of groups of persons with disabilities and/or their families/carers.

7.5 As noted above, the committee has also considered the delivery of formal advocacy services, that is services specifically funded to deliver one or more of these advocacy models for people with disability to enable them to 'participate in the decision making processes that safeguard and advance their human rights'.³ A key form of funding is the National Disability Advocacy Framework (Advocacy Framework).

National Disability Advocacy Framework

7.6 In 2008, Australian, state and territory disability ministers endorsed the Advocacy Framework. The Advocacy Framework sets out principles to guide the provision of advocacy services with people with disability to achieve the long-term goal that:

People with disability have access to effective disability advocacy that promotes, protects and ensures their full and equal enjoyment of all human rights enabling full community participation.⁴

7.7 In June 2015, the Department of Social Services (DSS) launched a review of the Advocacy Framework in anticipation of the full roll out of the National Disability Insurance Scheme (NDIS). DSS sought submissions addressing the principles, outcomes and outputs of the Advocacy Framework and any changes required.⁵ The committee notes that the outcomes of this consultation process had not been published prior to the conclusion of this inquiry.

National Disability Advocacy Program

7.8 The Australian Government provides funding to disability advocacy services across all advocacy models at the state and local government level through the National Disability Advocacy Program (Advocacy Program). The Advocacy Program aims to provide people with disability 'access to effective disability advocacy that promotes, protects and ensures their full and equal enjoyment of all human rights enabling community participation'.⁶

7.9 DSS submitted that the Advocacy Program:

3 DSS, *National Disability Advocacy Framework*, p. 2, <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/national-disability-advocacy-program/national-disability-advocacy-framework> (accessed 22 October 2015).

4 DSS, *National Disability Advocacy Framework*, p. 3.

5 See: DSS, *Discussion paper: review of the National Disability Advocacy Framework*, June 2015, <https://engage.dss.gov.au/ndaf-2/> (accessed 22 October 2015).

6 Department of Social Services, *National Disability Advocacy Program*, <https://www.dss.gov.au/our-responsibilities/disability-and-carers/program-services/for-people-with-disability/national-disability-advocacy-program-ndap> (accessed 22 October 2015).

...funds agencies to provide advocacy that works to uphold the rights and interests of people with all types of disabilities, by addressing instances of discrimination, abuse and neglect. This can be on a one-to-one basis, with families, by addressing legal aspects or through systemic advocacy.⁷

7.10 In 2014-15, DSS will provide around \$16.5 million under the Advocacy Program to 59 organisations across Australia, DSS noted that the Australian Government, with the states and territories, are currently reviewing the Advocacy Program to determine 'the elements of advocacy that will be funded by the NDIS and how it will align with services delivered under the Advocacy Program.'⁸

7.11 In its submission to the review of the Advocacy Framework, the Australian Cross (Disability Alliance) Disability Alliance noted that the Advocacy Program is 'strengthened' by including all models of advocacy. However, the Disability Alliance highlighted that the Advocacy Program is 'critically under resourced' and urged 'significant investment to all Advocacy Program models of advocacy' to deliver equitable access and representation of issues and to match the increased demand for advocacy anticipated under the NDIS.⁹

7.12 The committee also heard concerns about the financial impact of compliance measures imposed on advocacy organisations funded under the Advocacy Program. For example, Advocacy for Inclusion recommended removing the Advocacy Program 'compliance burdens':

We have an extremely onerous compliance system of external annual audits. We are forced to spend thousands of dollars each year from our unindexed funding on auditors, which for Advocacy for Inclusion equated to 6 weeks' [sic] pay for a front line Individual Advocate this year. However, there is no funding support to keep up with the increasing demand for disability advocacy at this time of great change and reform. This is a significant barrier to efficient and effective use of advocacy funding to promote the rights of some of the most marginalised members of the community.¹⁰

7.13 The Disability Advocacy Network Australia (DANA) criticised recent data released by DSS on the Advocacy Program that indicates that only three per cent of issues managed by advocacy services were related to abuse. DANA suggested this figure is 'much too low' and indicates that advocacy services funded under the Advocacy Program are not reaching the most vulnerable:

...it does not give you the full picture. It only touches on the people who manage to get through that process, and that will mainly be people who are

7 DSS, *Submission 104*, p. 27.

8 *Submission 104*, p. 27.

9 Australian Cross Disability Alliance, *Submission to the Review of the National Disability Advocacy Framework*, 31 July 2015, pp 2–3, answer to question on notice, 27 August 2015 (received 8 September 2015).

10 Advocacy for Inclusion, *Submission 83*, p. 32.

more articulate, who have more support and who have strong families who will help them. It will not be the people who are the most vulnerable.¹¹

Australian Government funded advocacy services

7.14 The Australian Government also provides funding directly to advocacy peak bodies to provide systemic advocacy services. In February 2015, DSS announced direct funding for five advocacy organisations:

- People with Disability Australia;
- Children with Disability Australia;
- First Peoples Disability Network;
- National Ethnic Disability Alliance; and
- Women with Disabilities Australia.

7.15 DSS submitted that these organisations have been funded to:

...work independently on behalf of their members, and collaborate on national and common issues as the National Cross-Disability Alliance (the Alliance), focusing on improving the lives of all people with disability. The Alliance will provide the Government with practical advice to help improve policies and legislation impacting people with disability across Australia.¹²

7.16 At the 2015 Budget Estimates, DSS clarified the relationship between the Disability Alliance and the Advocacy Program, noting that data on systemic advocacy issues collected by the Advocacy Program is shared with the Disability Alliance 'to further support the Alliance in contributing to government policies and reforms impacting people with disability, their families and carers'.¹³

7.17 The committee notes that its previous inquiry into the 2014 DSS tendering process heard concerns about the channelling of advocacy funding into national peak bodies, and the impact on smaller, specialised advocacy services, many of which were defunded. Some advocacy organisations that lost funding as a result of the tendering process 'expressed concern about what they perceived as the government's diminished regard for their role'.¹⁴ The inquiry recommended:

11 Ms Mary Mallett, Chief Executive Officer, Disability Advocacy Network Australia (DANA), *Committee Hansard*, Canberra, 21 August 2015, p. 10.

12 DSS, *Submission 104*, p. 27.

13 Answers to Questions on Notice, Social Services Portfolio, Budget Estimates 2015-16, 4-5 June 2015, Question SQ15-000663 (received 22 June 2015), http://www.aph.gov.au/Parliamentary_Business/Senate_Estimates/claccte/estimates/bud1516/Social%20Services/index (accessed 27 October 2015).

14 Senate Community Affairs References Committee, *Impact on service quality, efficiency and sustainability of recent Commonwealth community service tendering processes by the Department of Social Services*, Final Report, September 2015, p. 40.

...that advocacy support be considered a vital component of community services in future funding arrangements and is given appropriate weighting in funding assessments.¹⁵

National Aged Care Advocacy Program

7.18 In addition to disability specific advocacy, the Australian Government also funds the National Aged Care Advocacy Program (NACAP) to provide 'free, confidential advocacy support and information to consumers or potential consumers of Australian Government subsidised Home Care Packages and residential aged care services'.¹⁶

7.19 There are nine community-based NACAP organisations operating nationally: one in each state and territory and two in the Northern Territory. DSS submitted that in 2013-14, services under the NACAP undertook more than 3 400 advocacy cases, handled more than 4 400 general enquiries, and provided over 1 400 face-to-face education sessions. NACAP organisations also received an additional 20 per cent in funding to June 2015 to 'meet an identified unmet demand for advocacy services, particularly in rural and regional areas of Australia'.¹⁷

7.20 DSS submitted that the Australian Government is currently undertaking a review of Commonwealth aged care advocacy services to inform the government on how individual advocacy services can best support aged care consumers to:

- effectively interact with the aged care system;
- better transition between service types; and
- be empowered to apply informed decision making and actively exercise choice.¹⁸

State and territory funded advocacy

7.21 In addition to Australian Government funding, states and territories also provide funding to advocacy organisations for particular advocacy services. The Productivity Commission (PC) reports that in 2013-14 across jurisdictions, Australian, state and territory governments spent \$66.3 million on advocacy, information and alternative forms of communication. This includes:

- advocacy services to enable people with disability to increase their control over their lives by representing their interests and views in the community;
- information services to assist people with disability, their carers, families and related professionals accessing information about disabilities, specific and

15 See: Recommendation 7, *Impact on service quality, efficiency and sustainability of recent Commonwealth community service tendering processes*, p. x.

16 DSS, *Submission 104*, p. 28.

17 DSS, *Submission 104*, p. 28.

18 DSS did not indicate the timeframe for this review to be completed. DSS, *Submission 104*, p. 28.

mainstream services and equipment; and promote the development of community awareness; and

- alternative forms of communication for people who are, by reason of their disability, unable to access information provided in standard formats.¹⁹

7.22 According to the PC, expenditure on advocacy services represents approximately one per cent of the \$7.0 billion spent by Australian, state and territory governments on disability services in 2013-14.²⁰ The total expenditure on advocacy services for 2013-14 across jurisdictions is outlined in Table 7.1.

Table 7.1: Real government direct service delivery expenditure on advocacy, information and print disability services, 2013-14 (\$'000)

Year	NSW	VIC	QLD	WA	SA	TAS	ACT	NT	C'th	Total
2013-14	11 461	8 867	14 869	6 456	1 721	2 481	1 237	429	18 753	66 274

Source: Productivity Commission, *Report on Government Services 2015*, Table 14A.10.

7.23 As Table 7.1 highlights, the level of funding for advocacy services differs across jurisdictions. For example, according to the Victorian Ombudsman's report, the Victorian Department of Health and Human Services funds 24 advocacy organisations and two resource units. In 2013-14, the Victorian Government spent \$4.8 million on advocacy, including \$1.59 million for individual advocacy.²¹

Importance of formal advocacy

7.24 Overwhelmingly, submitters and witnesses highlighted the critical role of independent advocacy in the quality and safeguarding framework for people with disability to assist in identifying, reporting and responding to incidents of violence abuse and neglect.²² Ms Mary Mallett, Chief Executive Officer (CEO) of DANA, told the committee that advocacy is the:

...crucial, critically important part of the whole process of protecting, safeguarding and helping people with disability who are being abused or have been abused to make a complaint or work their way through the system and in the first place to protect people against some of the things that happen.²³

19 Productivity Commission (PC), *Report on Government Services 2015*, Chapter 14, p. 14.6.

20 PC, *Report on Government Services 2015*, Table 14A.10.

21 Victorian Ombudsman, *Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight*, June 2015, p. 21, <https://www.ombudsman.vic.gov.au/Investigations/Investigation-into-disability-abuse-reporting> (accessed 24 September 2015).

22 See: IDRS, *Submission 128*, p. [4].

23 Ms Mary Mallett, *Committee Hansard*, Canberra, 21 August 2015, p. 9.

7.25 Evidence to the committee highlighted that people with disability who do not have 'natural support networks' or access to independent advocacy services, particularly those with intellectual disability or communication support needs, are more vulnerable to violence, abuse and neglect. Ms Christina Ryan, General Manager of Advocacy for Inclusion told the committee:

One of the things we know is that about half of the people we have worked with over time do not have natural support networks, so the expectation that some nice family member who is handy will step in is wrong. The expectation that there is access to an advocate is clearly wrong...We know that. We knock back two people for every one we can assist. We also know that people cannot rely on something falling out of the sky that is going to save them. Most people just end up in these decades-long situations that are simply unacceptable. That is just how it is. That is the life of people.²⁴

7.26 Witnesses suggested that advocates play an important role in assisting people with disability access the available complaints processes to identify and report abuse. Ms Michelle O'Flynn, Director of Queensland Advocacy Incorporated (QAI) told the committee:

A complaints process, no matter how robust or stringent, cannot possibly factor in all of the needs that the person has, and it is not going to be something that a person who is intimidated and living in fear is able to reach out for unless there is a way that they can seek assistance from someone is trusted and removed from that setting. A lot of victims are not going to feel that they can access a complaints mechanism. It trivialises the notion of abuse as a mere complaint about service delivery. How can they do that? Who will speak up for them and who can they turn to? We think that one of the things that can help those people is access to advocacy. But where do they get that? Unless they actually have a relationship with an advocate, that is not going to happen.²⁵

7.27 The committee heard many individual examples of how independent advocates have assisted people with disability in reporting and preventing abuse. Boxes 7.1 and 7.2 highlight just two case studies that highlight the important role of advocacy services in assisting people with disability.

24 Ms Christina Ryan, *Committee Hansard*, Canberra, 21 August 2015, p. 10.

25 Ms Michelle O'Flynn, *Committee Hansard*, Brisbane, 16 October 2015, p. 2.

Box 7.1: Role of advocates – Sienna's story

Ms Mary Mallett, CEO of DANA, shared the following case study with the committee that highlighted the importance of advocacy services in assisting people with disability to identify and report abuse:

Sienna lives in a regional town in Australia. She is 31; she is a young woman with autism who lives in a group home at a significant distance from her family. Sienna has what the staff call 'behaviours' when she is unsure and frustrated about things and when she is not receiving appropriate support. When the staff are busy or Sienna is having 'behaviours', they send her outside and put her in the van. The staff and the rest of the residents are inside cooking tea, having tea or whatever is happening, but Sienna is sent outside to sit in the driveway in the van. She is not locked in, but that is immaterial. She is told not to come out and so she sits there until she is told she can come out. The other residents are encouraged to do exactly the same thing, so that the staff have empowered the other residents to tell Sienna to go and sit in the van. They tell her this is the consequence of her 'behaviours'.

Sienna accepted this for a while, and it had been going on for quite a long time before the advocate got involved. She knew it was not okay, but she did not know what to do about it. She contacted the advocate after one particularly cold and rainy evening when she had been scared while sitting in the van in the dark, the cold and the rain. It scared her enough that she finally thought that she needed to do something about it. She made an appointment to see the advocate. The interesting thing about this is that Sienna is a young woman who attends the self-advocacy group—there happens to be one in that town—and so she already knew the advocate. If she did not know the advocate already, it is very unlikely that she would ever have made the move to do this. Even knowing the advocate—already having the contact—it still took her a long time to do something about it.

The advocate informs Sienna of her rights; they talk about the difference between consequences and punishment and about restrictive practices. When she asked Sienna what she wanted to do, she clearly stated that she wanted to complain but was afraid. She asked the advocate to make the complaint and act on her behalf. This was a complaint to the service provider; it was not outside of that. The advocate went to the services practice development coordinator, who immediately spoke with the staff and the residents. The other residents confirmed this was happening. She told everyone the practice must stop immediately. The advocate highlighted the need for the relevant resource team from the department in that area to be involved. They had staff training about restrictive practices and some specialised training for staff in effectively supporting Sienna. These were all acted upon and the situation is now resolved. There is a regular schedule for Sienna to report to that organisation's practice coordinator. So Sienna's life is currently okay.

Source: Ms Mary Mallett, Committee Hansard, Canberra, 21 August 2015, p. 11.

7.28 Box 7.2 highlights that advocates are particularly important for elderly people with disability with limited family supports.

Box 7.2: Role of advocates – Katrina's story

Mrs Sonia di Mezza, Deputy CEO of the ACT Disability, Aged and Carer Advocacy Service shared the following case study with the committee that highlighted the importance of advocates in assisting people with disability to report abuse:

I bring to your attention the case of a former client of mine, Katrina. She was a frail old woman in her 90s who suffered from some mobility issues and who lived in a residential aged care facility. One day Katrina went to the kitchen area of the facility to make herself a cup of coffee. While she was there, a carer approached her, shoved her in a corner and touched her in the genital region. He mocked her and dared her to complain, saying that no one would believe her and that he would be back to give her more. Katrina was shocked and devastated by this. She was afraid to go anywhere in the facility and became depressed. She told friends and family members about the incident, but they encouraged her to forget about it and not to take the matter further. One friend, who disagreed with this approach, encouraged her to contact ADACAS [ACT Disability, Aged and Carer Advocacy Service]. I helped my client to make a complaint to the management, as well as to the Aged Care Complaints Scheme. The police were informed about the situation, but they would not progress the matter further due to lack of evidence. Because she was frail, elderly, had poor eyesight and had some cognitive impairment, she was not considered to be a strong witness, and there were no other witnesses to this abuse. While all of this was happening, the carer resigned from the facility. The perpetrator managed to avoid any prosecution and potentially had the possibility of working with other vulnerable people and potentially abusing them. My client has passed away and sadly cannot talk about this incident with you. She was adamant while she lived that she wanted the abuse she had suffered to be talked about and addressed.

Source: Mrs Sonia di Mezza, *Committee Hansard, Canberra*, 21 August 2015, pp 33–34.

7.29 The Intellectual Disability Rights Service, an advocacy organisation in NSW, submitted that '[p]eople who have been victims of abuse and who have no family involvement should have access to an advocate or guardian external to the service to support them and advocate on their behalf'.²⁶

Challenges for formal advocacy

7.30 Despite the importance of independent advocacy, the committee heard there are number of challenges facing the delivery of advocacy services including:

- funding;
- independence; and
- access to institutions and residential settings.

Funding

7.31 According to the evidence, the key challenge for advocacy services is the available level of funding. A number of submitters noted that disability advocacy is

26 Intellectual Disability Rights Service, *Submission 128a*, p. 5.

'severely underfunded, unable to meet current demand, with the demand expected to at least double with the NDIS'.²⁷

7.32 As a result of the lack of funding, the committee heard that advocacy services are often limited to providing reactive services responding to abuse, and do not have capacity to assist in ongoing preventative support. VALID submitted that:

Because of the limited supply of independent advocacy, individual advocacy, including VALID's, has tended to become focused on reacting to situations of crisis or high need, and has become less available to people who need advocacy support in their day-to-day lives...without the long-term, low-level form of advocacy support, many issues that might have been easily resolved at an early stage tend to escalate and become major issues demanding our crisis advocacy response.²⁸

7.33 The lack of funding also results in many people with disability being turned away, or placed on long waiting lists for assistance. Ms Mallett told the committee:

A person who rang for advocacy in Sydney recently was told the waiting list was a year. In actual fact most advocacy organisations do not keep waiting lists, because they cannot; there is no point. If somebody is in a crisis, you either can help them or you cannot. But what is the point of putting them on a waiting list? What the organisations do is juggle: people who have a critically urgent immediate issue leapfrog in over the top of everybody else, because they have to get assistance. That is what happens.²⁹

7.34 Witnesses suggested that the lack of funding for advocacy reflects a lack of value placed on these services, including other capacity building services aimed at preventing abuse and neglect. Ms Taryn Harvey, CEO of Development Disability WA told the committee:

I think the organisations that provide advocacy can help in providing a range of other mechanisms. I do not think that advocacy is the only thing; communication is another thing. But I think if we started to value advocacy it would be a sign that we are starting to value the other things that are effective in preventing these situations and in capacity building.³⁰

7.35 Evidence to the committee supports the findings of the Victorian Ombudsman's 2015 report into reporting and investigating of allegations of abuse which found that:

...there is a critical role for advocates to assist people with disability; however, there is limited appreciation of the importance of this role, manifest in its modest funding, as well as an inherent conflict in advocacy

27 Advocacy for Inclusion, *Submission 83*, p. 31.

28 Victorian Advocacy League for Individuals with Disability Inc. (VALID), *Submission 149*, p. 7.

29 Ms Mary Mallett, CEO, DANA, *Committee Hansard*, Canberra, 21 August 2015, p. 10.

30 Ms Taryn Harvey, *Committee Hansard*, Perth, 10 April 2015, p. 38.

services being funded by the department upon whom the recipients of the service rely.³¹

7.36 The committee notes the Victorian Ombudsman's recommendation for an increase in funding for advocacy services informed by a comprehensive assessment of the advocacy needs of people with disability.³²

Independence

7.37 Submitters and witnesses emphasised that for advocacy services to be effective, they must be independent from the disability service organisations that may be perpetuating the abuse or neglect.³³ Mrs Silvana Gant from Adelaide People First told the committee:

...it is absolutely vital that people in institutional settings get access to real independent values driven advocacy support. That is not advocacy that is provided by the service; it is absolutely separate from it. It needs to be values driven. It needs to state very clearly what the advocacy stands for and believes in. It needs to have a sense of purpose and direction. There has to be a clear understanding of what advocacy is, because advocacy gets confused with service provision, support work, mediation and counselling.³⁴

7.38 Adelaide People First recommended that the following definition of independent advocacy be included in the Advocacy Framework:

To establish independence, an organisation or group needs to have advocacy as its core activity and not to be a provider of any services, especially the following: employment, accommodation support, personal care support, independent living support, respite, vocational training, brokerage, mediation, case management.

Advocacy for people with disabilities must be conducted by organisations or groups which are able to demonstrate independence from all actual, potential or perceived conflicting interests. Independence cannot be indicated by the separation of services from advocacy within an organisation or group.³⁵

7.39 Similarly, JFA Purple Orange, a social policy agency for people with disability in South Australia, highlighted the need for 'more proactive independent form of advocacy' particularly for people with intellectual disability.³⁶

31 Victorian Ombudsman, *Reporting and investigation of allegations of abuse*, p. 8.

32 Victorian Ombudsman, *Reporting and investigation of allegations of abuse*, p. 91.

33 See: Ms Mary Mallett, CEO, DANA, *Committee Hansard*, Canberra, 21 August 2015, pp 11–12.

34 Mrs Silvana Gant, President and Convenor, Adelaide People First, *Committee Hansard*, Adelaide, 28 August 2015, p. 10.

35 Adelaide People First, *Submission 116*, p. 17.

36 JFA Purple Orange, *Submission 12*, p. 24.

7.40 Evidence to the committee supported the findings of the Victorian Ombudsman's report into reporting and investigating allegations of abuse that found:

Advocacy services, and the funding of advocacy, should be independent of all agencies involved in funding, regulating, or providing services to ensure they can be truly fearless when standing up for the vulnerable.³⁷

Access to institutions and residential settings

7.41 Another significant challenge for advocacy services is having regular access to institutions and residential settings to assist people with disability in identifying and reporting abuse. JFA Purple Orange submitted that one of the main challenges of formal advocacy includes 'difficulties accessing service settings to observe what is occurring on a day to day basis'.³⁸ Similarly, Advocacy Tasmania noted that:

The benefits of advocacy within residential and institutional settings require advocates to have access to, and a presence within, these settings. This depends upon receiving sufficient funding to employ visible and effective advocates, who are able to act and respond promptly to abuse and neglect.³⁹

7.42 The committee heard that the structure of current reporting mechanisms that rely on individuals raising complaints present barriers to people with disability if they do not have access to advocacy services or other supports. Ms Taryn Harvey, CEO, Developmental Disability WA told the committee:

I think the current processes we have in place, where the onus is on the individual to raise complaints—and we also see where members of the workforce also want to raise issues of concern that they have—is that we do not have the kind of structures in place that can support people to make complaints successfully. When you have an individual who is feeling vulnerable and their family is feeling vulnerable, it is very difficult to raise a complaint of this significance within a service provider without support. If you are someone who does not have the kind of informal support...then that becomes more challenging again. Obviously there are the issues around how we are responding to those complaints from a justice point of view. We know that there are significant barriers to victims with disability of violence, abuse and neglect having recourse to the kinds of processes that the rest of us would take for granted.⁴⁰

37 Victorian Ombudsman, *Reporting and investigation of allegations of abuse*, p. 9.

38 JFA Purple Orange, *Submission 12*, p. 23.

39 Advocacy Tasmania Incorporated, *Submission 97*, p. 7.

40 Ms Taryn Harvey, CEO, Developmental Disability WA, *Committee Hansard*, Perth, 10 April 2015, p. 29.

Committee view

7.43 The committee recognises the crucial role that formal advocates play in assisting people with disability to identify and report violence, abuse and neglect.

7.44 The committee supports the view of many submitters that advocacy services must be independent of disability service providers and must have regular access to institutions and residential facilities.

7.45 The committee acknowledges that funding for formal advocacy services is provided at the state, territory and Commonwealth level and that these funding programs are currently under review.

7.46 However, the committee acknowledges that evidence from people with disability and advocacy service providers indicates that advocacy is underfunded and undervalued. The committee considers that advocacy services are vital to ensuring people with disability have access to supports to assist them to identify and report abuse.

Self-advocacy

7.47 The committee heard that self-advocacy is one of the most important forms of advocacy, whereby people with disability are provided with information about their rights and assisted to identify and report incidents of abuse and neglect.⁴¹ Ms Sonia di Mezza, Deputy CEO of the ACT Disability, Aged and Carer Advocacy Service told the committee that self-advocacy is 'just as important' as individual advocacy:

We find, with the spectrum of clients we have, that some people cannot communicate what they want and really need an advocate to help them. At the other end of the spectrum, other people are extremely articulate and we just stand next to them while they say what is wrong and what they want. There is a whole range. It is very important that we recognise that we need both self-advocacy and independent advocacy per se, and we need more funding for that. There is definitely not enough, I understand. There seems to be very much a push, in general, away from the word 'advocacy'. I am fearful that perhaps the support that is needed in this area is becoming more and more narrow. Both areas definitely need to be covered.⁴²

Role of self-advocacy

7.48 The committee heard that self-advocacy plays an important role in teaching people with disability about their rights. Ms Christina Ryan from Advocacy for Inclusion told the committee that in many cases, people with disability do not feel they have the same rights as everyone else:

41 See: National Disability Services, *Submission 111*, p. [7]; Working Alongside People with Intellectual and Learning Disabilities – Sexual Violence Prevention Association, *Submission 127*, p. [12]; Sally Bailey, *Submission 65*, p. 8; Action for More Independence in Disability Accommodation, *Submission 89*, p. 18; Leadership Plus, *Submission 95*, p. 2.

42 Ms Sonia di Mezza, *Committee Hansard*, Canberra, 21 August 2015, pp 35–36.

One of the most wrenching things for me—because we do the training for people in self-advocacy and human rights—is when people ask us: 'Do I have the same rights as other people?' They know they are cut off from the world and they know they are shut off. What they also know is that everybody else has rights and they do not. Every time we talk about delaying things, every time we do not respond, every time we do not have enough advocacy funding and every time the national plan to reduce violence against women does not actually do much for women with disabilities, we are reminding people with disabilities that we do not have the same rights. We do not matter. It is as simple as that.⁴³

7.49 Self-advocacy may also play an important role in assisting people with disability to identify abuse and inappropriate behaviour. Ms Michelle Moss, Project Manager from the Queenslanders with Disability Network told the committee:

I think there is some really important work that needs to be done about how we ensure that people with disabilities can understand that what is happening to them is not okay, and the support and education that needs to happen so that people do have a language and people do have a frame of reference, because historically we know that that has not been recognised and given to people. They do have the right to an education about sexual and intimate relationships.⁴⁴

7.50 In particular, witnesses highlighted the need for education for women and girls with disability about domestic or family violence. Ms Margie Charlesworth, Convenor of Women with Disabilities in South Australia told the committee:

It was somewhat startling to realise that there are many women with disabilities who do not always recognise or understand that they have been or continue to be victims of domestic violence and abuse. In the early stages of hosting these workshops, women were hesitant to attend them alone. They needed to bring someone with them who represented safety. I remember one young woman who did not contribute much. It was only when I read her feedback form that I realised how much these workshops meant to those who participated in them. Her comment was simply: 'I never knew that what I was experiencing was violence and that it was wrong.'⁴⁵

Availability of self-advocacy

7.51 Submitters and witnesses suggested that across jurisdictions, the availability of self-advocacy services is limited. Ms Aine Healy from the NSW Council for Disability told the committee:

The availability of self-advocacy for people is very limited. Victoria has some good networks and Tasmania has as well for people with intellectual disability. There are only one or two groups in New South Wales, so it is

43 Ms Christina Ryan, General Manager, Advocacy for Inclusion, *Committee Hansard*, Canberra, 21 August 2015, p. 10.

44 Ms Michelle Moss, *Committee Hansard*, Brisbane, 16 October 2015, p. 10.

45 Ms Margie Charlesworth, *Committee Hansard*, Adelaide, 28 August 2015, p. 13.

funded in a very ad hoc way across Australia. Again, that affects people's ability to speak up.⁴⁶

7.52 A survey conducted by DANA of disability advocates to provide to DSS on the proposed quality and safeguarding framework, indicated that many people with disability do not have access to self-advocacy training and programs:

Time and time again, what the advocates are telling us and what they see is that people do not complain—for many reasons. In the first place, they do not know their rights. They do not know they have a right to complain, and one of the few groups who educate people with disability about what their rights are is advocacy organisations...That really important arm of advocacy, which is self-advocacy by and for people with disability themselves, almost does not exist. It is done off the side of the desk mainly. Advocacy in general is badly funded; self-advocacy has nothing really.⁴⁷

Government funded self-advocacy

7.53 A number of witnesses highlighted that the model of self-advocacy funding in Victoria provides a possible best practice model for other jurisdictions. In 2007, the Victorian Government funded the establishment of the Self Advocacy Resource Unit (SARU) (see Box 7.3).⁴⁸ Women With Disability Victoria submitted that the SARU model:

...has demonstrated the power of supporting self- advocacy. SARU support a range of groups which are run by, for example, people with Acquired Brain Injury, people with intellectual disabilities, and people with intellectual disabilities who have lost their children through child protection. Members of these groups work together, setting goals, running forums, sharing information, meeting with government representatives, and making change.⁴⁹

46 Ms Aine Healy, Executive Director, Advocacy, NSW Council for Intellectual Disability, *Committee Hansard*, Sydney, 27 August 2015, p. 5.

47 Ms Mary Mallett, CEO, DANA, *Committee Hansard*, Canberra, 21 August 2015, p. 9.

48 Department of Human Services, 'Disability advocacy organisations', <http://www.dhs.vic.gov.au/for-service-providers/disability/protecting-rights/disability-advocacy/disability-advocacy-organisations> (accessed 28 October 2015). A similar support network is provided in Tasmania through the Speak Out Association of Tasmania, an advocacy service and membership organisation for people with disability. See: Speak Out Advocacy, <http://www.speakoutadvocacy.org/> (accessed 29 October 2015).

49 Women with Disability Victoria, *Submission 53*, p. 41.

Box 7.3: Victoria - Self Advocacy Resource Unit

The SARU was established in 2007 and is funded by the Victorian Department of Human Services. The role of the SARU is to 'resource and support self advocacy groups run by and for people with intellectual disabilities', including people with high communication support needs.

In its submission to the review of the National Disability Advocacy Framework, the SARU noted that its key functions are to:

- strengthen and build the capacity of existing self-advocacy groups;
- support the establishment of new groups;
- promote Network Development;
- develop resources materials to support self-advocacy; and
- describe and improve advisor practice.

The submission suggested that the SARU model has 'proven highly successful in reinvigorating self-advocacy across Victoria' and increasing the number of self-advocacy groups, including two state-wide networks.

According to SARU, a 2012 evaluation of the model found it was 'a highly efficient and effective means of supporting groups to develop and grow'. The SARU also enables self-advocacy groups to be linked with local advocacy services.

Source: Self Advocacy Resource Unit, Submission to the Department of Social Services Review of the National Disability Advocacy Framework, July 2015, <https://engage.dss.gov.au/ndaf-2/public-submissions/> (accessed 28 October 2015).

7.54 Ms Mary Mallett told the committee that the SARU is one of the key reasons self-advocacy is more prominent in Victoria than other jurisdictions:

It happens relatively well in Victoria because the Victorian government fund a small self-advocacy resource unit. It is the only one in the country and it makes a big difference in Victoria. It is one of the reasons self-advocacy exists much stronger there than anywhere else and almost not in the rest of the country.⁵⁰

Disability service provider funded self-advocacy

7.55 A number of disability service providers noted that they provide some form of self-advocacy training for people with disability.⁵¹ For example, Optia, a disability service provider in Tasmania, noted it works with a government funded self-advocacy organisation, Speak Out Advocacy, to deliver self-advocacy training:

Optia has partnered with Speak Out Advocacy to deliver a self-advocacy program, Road to Success, designed to increase confidence and self-determination of clients. The program includes a number of workshops run by an advocate and a peer (self-advocate) and covers topics including self-expression, self-confidence, self-determination, self-reliance, self-

50 Ms Mary Mallett, CEO, DANA, *Committee Hansard*, Canberra, 21 August 2015, p. 14.

51 See: Northcott, *Submission 58*, p. 2; Optia, *Submission 19*, p. 5; Endeavour Foundation, *Submission 27*, p. 8.

development and self-esteem. This program, piloted in 2013-14, is being expanded across the whole organisation this year (2015).⁵²

7.56 Similarly, the Endeavour Foundation, a disability service provider in Queensland, submitted that it has established a 'Community and Advocacy Support Unit' to support self-advocacy and leadership development. This includes a peer education service to provide information about the NDIS for people with intellectual disability, funded by the NDIS Practical Design Fund:

Self-empowerment and leadership development were integral parts of the program for the peer educators and the improved confidence of the individuals involved in the project was remarkable. The peer educator model used for this project has now been taken up by Queenslanders with Disability, a prominent network of people with a disability, who with initial support from the Community and Advocacy Support Unit and Queensland State Government funding, have continued to make these workshops available for Queenslanders with an intellectual disability.⁵³

7.57 In Victoria, Professor Jeffrey Chan told the committee that Yooralla has also implemented a self-advocacy program called the 'Life Skills Speaking Up' program:

The program, consistent with the latest literature, has four modules. It is about self-protected behaviours and understanding your rights and how to exercise your rights. It has a module on how to speak up if you feel that you can identify abuse. Fourthly, there is a module on how to make a complaint.

The program was delivered to more than 200 individuals with varying levels of cognitive impairment, including those who use the augmented communication device that you have referred to. One of the things that we have learned after delivering to more than 200 participants is that a group of them decided that they wanted to meet and to continue to meet and they formed their own self-advocacy group called the YES group—which is Your Enquiries Solved. That group is chaired by two people with intellectual disability, and my team supports them. They go out and meet on a regular basis. We intend to roll out that program consistently across the organisation.⁵⁴

7.58 However, some submitters raised concerns about self-advocacy programs run by disability service providers. Adelaide People First, an advocacy organisation in South Australia expressed particular concerns that these programs are:

...institutionalised, tokenistic "self advocacy" programmes or committees and/ or so call "independent advocates" where the service provider controls people's access to information, peer support and real independent, advocacy support.⁵⁵

52 Optia, *Submission 19*, p. 5.

53 Endeavour Foundation, *Submission 27*, p. 8.

54 Adjunct Professor Jeffrey Chan, Chief Practitioner, Yooralla, *Committee Hansard*, Melbourne, 30 June 2015, p. 7.

55 Adelaide People First, *Submission 116*, p. 12.

7.59 Adelaide People First evolved from Self Advocacy for Intellectually Disadvantaged People SA Inc. (SAID), a self-advocacy group established by a disability service provider in South Australia in the 1980s. Adelaide People First submitted that their past experience indicates that self-advocacy programs run by disability service providers 'fails to address the power imbalance between people with lived experience of intellectual disability and institutionalised disability service providers controlling our lives':⁵⁶

Our lived experience at SAID Inc., was one of being labelled, having low expectations and institutionalised thinking applied to us individually and collectively. We had our access to information controlled by the disability service providers and the Co-ordinator without disability within SAID Inc. We were segregated and isolated from people or organisations the disability service system and Co-ordinator without disability didn't want us having contact with and congregated or grouped together and treated all the same. This exposed us to abuse, discrimination, intimidation, victimisation, sexual harassment and exploitation.⁵⁷

Access to self-advocacy

7.60 Where self-advocacy programs are available, the committee heard particular concerns from advocacy organisations that people with disability are prevented from accessing their services, often by disability service providers. Ms Christina Ryan, General Manager of Advocacy for Inclusion told the committee:

People told us quite clearly that they are being prevented from participating in the activities that they choose to participate in. Somebody wants to participate; they want to come to a course that we are running or the self-advocacy group on a regular basis, and it is just made impossible for them to be there. Something always turns up, or they do not get their mail. A good half of people do not get their own mail despite the fact that providers will deny that until they are blue in the face—including government providers, which is very disappointing.⁵⁸

7.61 Ms Mallett suggested that disability service providers deliberately limit access to self-advocacy services:

Services who do not give the person the letter inviting them to the self-advocacy group meeting because they do not want to know that it is on. They make sure that the van is being used for something else that night so that they cannot get people to the meeting. There are many ways a service can do this.⁵⁹

56 Ms Silvana Gant, President and Convenor, Adelaide People First, *Committee Hansard*, Adelaide, 28 August 2015, p. 8.

57 Adelaide People First, *Submission 116*, p. 13.

58 Ms Christina Ryan, *Committee Hansard*, Canberra, 21 August 2015, p. 14.

59 Ms Mary Mallett, *Committee Hansard*, Canberra, 21 August 2015, p. 14.

7.62 Ms Ryan noted that by preventing people with disability accessing self-advocacy training, service providers and guardians are perpetuating a form of abuse:

There are some vicious perpetrators out there; let us acknowledge that. We know that. We have heard some appalling stories. But there are also people who are incredibly controlling and protective to the point of smothering people with the very, very best of intentions. What they are doing is perpetuating a form of abuse which would not be acceptable to any other member of the community. It is a very difficult space in that regard. We simply have to provide opportunities for people with disabilities to articulate independently. We often find this with advocacy, when we are able to sit down with a person. We are doing one-on-one training at the moment around self-advocacy and preplanning with people in group houses. About half the people we are currently working with are not allowed to just sit down with our training staff. They have to have their guardian or their support worker or their family member sit alongside them just to make sure.

Senator McLUCAS: Just to make sure of what?

Ms Ryan: Exactly! Good point. We know from working with people individually over the years through individual advocacy that they often say stuff to us that they would never say in another space if the person was present. It is a bit like teenagers talking when their parents are there. You are not going to say all these things. You need to be able to say something. You want to test drive it. Often it is because the person does not want to upset the people that care about them. They do not want to say, 'All of this hard work you've gone to to get me into this house that I hate living in; I would rather do something else. I do not want to be saying that. It's upsetting.' So they do not say it. But the reality is that they are forced into an environment they do not like.⁶⁰

Committee view

7.63 The committee recognises that self-advocacy services play a vital role in providing people with disability with support and training about how to identify and report abuse. In particular, self-advocacy services provide education about human rights and appropriate behaviour that are integral in assisting people with disability to understand what abuse is and how it can be stopped.

7.64 The committee acknowledges that the Victorian model for funding dedicated self-advocacy services provides a good example for other jurisdictions.

7.65 The committee is deeply concerned by evidence that suggests that the availability of self-advocacy services is limited across jurisdictions. The committee is particularly concerned by evidence that suggests people with disability are actively prevented from accessing self-advocacy services. The committee considers that all

60 Ms Christina Ryan, General Manager, Advocacy for Inclusion, *Committee Hansard*, Canberra, 21 August 2015, p. 13.

people with disability in institutions and residential settings should have access to independent self-advocacy training and services.

Informal Advocacy

7.66 'Informal advocacy' refers to individual advocacy for people with disability undertaken on a voluntary basis, usually undertaken by a family member or friend.⁶¹ Submitters and witnesses highlighted the important role informal advocates have in assisting people with disability to report incidents of abuse and neglect. JFA Purple Orange submitted that:

Many people living with disability only have people in their lives who are paid to be there; potentially it could be these people who are perpetrating the violence or abuse. Without an informal network of support around that person it is highly unlikely that their voice will be heard.⁶²

Formal recognition of informal advocacy

7.67 The committee heard strong support for increased recognition of the role of informal advocates in the decision-making process for people with disability. Ms Sue Ash AO, CEO of UnitingCare West noted that while formal advocates work within legally designated frameworks such as the guardianship system, there is no similar framework recognising and regulating informal advocates:

...the issue for many people is that the formal systems have safeguards and quality frameworks. What I think we need to advocate for and try to establish is that, alongside of that, we have a community education process where families and others learn about not just their rights but what it means to keep a safe environment, particularly for some of those groups of people who I think are emerging groups.⁶³

7.68 Evidence from family members and other informal advocates suggested that the lack of formal recognition of their role means they are powerless to challenge or influence decisions made by disability service providers. Ms Cheryl McDonnell detailed a range of ways in which her expertise in caring for her daughter was disregarded by the service organisation, and she was not able to provide care instructions:

Mother as advocate lauded for being such a good advocate for her daughter, then treated as if she is a trouble maker, stupid, or crazy. Written care plan provided by family was ignored by staff. One staff member refused to read it as it was not written by a nurse. The care plan was written by Terri's mother following [years] of

61 DSS, 'Research of the Models of Advocacy Funded under the National Disability Advocacy Program', <https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/research-of-the-models-of-advocacy-funded-under-the-national-disability-advocacy-program> (accessed 30 October 2015).

62 JFA Purple Orange, *Submission 12*, p. 25.

63 Ms Sue Ash AO, *Committee Hansard*, Perth, 10 April 2015, p. 8.

consultations with educators, health and rehabilitation experts. Verbal instructions as given by Terri's mother were ignored.⁶⁴

7.69 Ms Julie Pianto, who alleged that her son experienced abuse in a supported residential facility managed by the EW Tipping Foundation in Victoria, told the committee that parents who advocate for their children are 'demonised' by disability organisations:

...one other insidious form of abuse inflicted by these organisations is that parents advocating for their loved ones are demonised, lied about and generally labelled as being difficult, argumentative or worse.⁶⁵

Informal advocacy in guardianship decisions

7.70 A key concern raised by multiple submitters, is how the lack of a legally recognised or defined role affects the capacity of informal advocates to participate meaningfully in the guardianship process. As discussed in Chapter 4, the committee heard concerns that legal guardians do not always act in the best interests of the person with disability when making decisions on their behalf. In some concerning cases, disability service providers may apply or threaten to apply for guardianship for clients due to disagreements with family members about care or treatment.

7.71 Evidence to the committee suggested that in Queensland, informal advocates, particularly family members, are often excluded from participating in the process to determine guardianship for people with disability. QAI submitted:

Bureaucratic processes...exclude informal advocates and family members from guardianship status (by which they can formally participate and have a voice in proceedings affecting a person with disability). In particular, in guardianship proceedings before the Queensland Civil and Administrative Tribunal, service providers are often successful in arguing for the formal removal of a person's familial or supportive network from the guardianship role.⁶⁶

7.72 The committee heard many examples of cases where informal advocates were excluded from the guardianship process. For example, Ms Sharon Richards, acting CEO of Advocare, a human rights and advocacy organisation in Western Australia, told the committee of one example where guardianship for a woman with cognitive impairment was transferred from her children to the service provider due to disagreements over medication:

...[she] liked to remove her clothes from her wardrobe, fold them and leave them on her bed. The facility responded to this by having locks put on the wardrobe. She became agitated, and her behaviour became more difficult to manage. The facility wanted to sedate her to reduce the agitation, but her family wanted them to investigate alternative methods. They were reluctant. When an accommodation or agreement could not be made, the institution

64 Ms Cheryl McDonnell, *Submission 37*, p.2.

65 Ms Julie Pianto, *Committee Hansard*, Canberra, 21 August 2015, p. 16.

66 QAI, *Submission 43*, p. 21

went to the state administrative tribunal, and the family were removed as guardians and a public guardian appointed. The woman now resides in a mental health facility. According to her family, her capacity to deal with anything is very reduced and she is being heavily medicated. At no time did the facility actually try any alternative methods to deal with this lady's behaviour.⁶⁷

7.73 Ms Richards further noted that in this case, the evidence provided to support the guardianship application on medical grounds was not provided by a medical practitioner, and yet the application was still supported:

We were all completely astonished that that guardianship was removed from the family because the family were incredibly supportive and really behind their mother and looking after her. For it to be turned over and the woman to be medicated—we were shocked. We believe that one of the things that actually happened—although we were not at the hearing, we had teleconferenced in—was that a person who was represented as an expert gave evidence that the lady had had a psychotic episode. In actual fact, it turned out the person who had said this was a cert III care worker off the floor. It was not a doctor, so the evidence or the information that was given really was not appropriate.⁶⁸

7.74 Witnesses suggested that there should be alternative options for families and disability service providers to deal with decision-making and disputes, rather than applying for formal guardianship. Professor Richard Bruggemann, the Disability Senior Practitioner in South Australia (appearing in a private capacity), told the committee:

I was always of the view that you do not go to the guardianship board if you can avoid it. When you have got a fight with mum and the organisation, fix the fight but do not go to the guardianship board. You will create enmity. I can remember one guy engineered to go away with his girlfriend on a trip and mum found out about it. He was going on trip to Cairns but he did not tell his mum that this young lady was going to Cairns. They did quite a good job of organising this. Then one of the staff members innocently said, 'I hope they have a nice time when they're away,' and mother exploded: 'This tart who wants his money!' and blah, blah, blah. One [of] my workers said, 'He's got a right to go. We should go to the guardianship board.' And his mum said, 'If he goes, he can live somewhere else.' We did not have anywhere else for him to live, and it was a good relationship. So you do not go to the guardianship board. You fix that up. You say to the mother, 'What are you scared about? How do we deal with that? How do we support you? What are the things he could do that you feel comfortable about? Okay, let's do that and see, when that works, what the next step is.' We often race to guardianship, when I think that there are other options. That is about the best advice I can give you. All I know is that it is difficult.⁶⁹

67 *Advocare, Committee Hansard*, 10 April 2015, p. 1.

68 *Advocare, Committee Hansard*, 10 April 2015, p. 5.

69 Professor Richard Bruggemann, *Committee Hansard*, Adelaide, 28 August 2015, p. 30.

7.75 In cases where guardianship is transferred away from family members, the committee heard that informal advocates have limited recourse to continue to advocate for the best interests of the person with disability. Where they attempt to do so, service providers may use the lack of formal legal authority to limit the informal advocate's access to the person with disability. Representatives from Speaking Up For You, an advocacy service in Queensland, told the committee:

Families reported that when they made a complaint to the service provider they were discredited and in some cases were denied access to the family member. In some cases the service provider made application to QCAT [Queensland Civil and Administrative Tribunal] and their family member was replaced by a public guardian. SUFY [Speaking Up For You] wrote to the director-general of Disability Services about the complaints and we did not receive a reply from him. We met with the public guardian about the complaints raised by the family. The public guardian was aware of the service; however, he said that he could not investigate the concerns we raised unless there was a person residing at the respite facility at the time of our complaint, and there was not.⁷⁰

7.76 Witnesses and submitters supported formal recognition of informal advocates in the guardianship process. QAI suggested:

QAI acknowledges the significant value of informal supports for a person with a disability and calls for informal supporters to be accorded greater respect and status, as well as formal recognition within bureaucratic guardianship processes.⁷¹

7.77 However, evidence to the committee also emphasised that the views of informal advocates should only be recognised where they are acting in the interests of the person with disability. For example, Professor Richard Bruggemann told the committee of one example where a person with disability was denied medical treatment by his family:

Are parents the ideal guardians? In many instances. Usually. But there was a guy who lived at Strathmont Centre. He had testicular cancer; aged 42; highly treatable; nine out of 10 people survive. We took him to the doctor. The doctor suggested a course of treatment. We went to the family and said, 'Here is what the doctor would like to do'. And the family said, 'No, he has had a good run. Let him die'. And we went to the guardianship board, and miscued—because what we should have gone there for was not to have the treatment approved but to change the guardian. We went to the district court to appeal it, and they appointed the public advocate as the guardian. He then approved the course of treatment. We wrecked our relationship with the family. They would not speak to us. There was almost a fight on the lift. And then the guy died. He was one of the one in 10.⁷²

70 Ms Dianne Toohey, Coordinator, Speaking Up For You Inc., *Committee Hansard*, Brisbane, 16 October 2015, pp 34–35.

71 QAI, *Submission 43*, p. [21].

72 Professor Richard Bruggemann, *Committee Hansard*, Adelaide, 28 August 2015, p. 30.

7.78 Similarly, the Tasmanian Government noted examples where guardianship was transferred from families to ensure the wishes of the person with disability may be met:

A 93 year old man with dementia was deprived of contact with his female companion of many years when an aged care facility acted on instructions from the man's family who did not approve of the friendship (but contrary to the resident's wishes). When a guardian was appointed and contact was resumed, the pair had been separated for 12 months.⁷³

Guardianship: transitioning to adulthood

7.79 The committee heard concerns about the role of families in the decision-making process for people with disability under guardianship orders once they turn 18 years old. Ms Mary-Lou Carter of Our Voice Australia described the situation that many parents faced:

When our children turn 18, we as their parents have absolutely no authority whatsoever-no legal standing. I was told that in no uncertain terms in black and white by Robert McClelland when he was the Attorney-General back in 2008. I wrote to him specifically with that question. 'Do I have any legal authority?' He told me no. It makes families so anxious, particularly as their children approach that magical majority.⁷⁴

7.80 Submitters and witnesses expressed concern that to retain the legal capacity to seek information and direct care for children with disability, families have to apply through a tribunal or court for guardianship of their children once they turn 18 years old. Witnesses from Our Voice Australia told the committee:

There has to be an easier way than going to the guardianship tribunal and having complete strangers judge us on whether we are capable and looking to the best interest of our children. It is just appalling to be in that situation.⁷⁵

7.81 The NSW Public Guardian told the committee that some jurisdictions have considered options for streamlining the guardianship process when a child with disability turns 18, but the issue remains unresolved:

Attorneys-general across Australia have been in receipt of representations from various groups suggesting that, when a person reaches the age of 16 or 18, where their family have been their key source of support historically, there would be some sort of automatic or streamlined conversion of the parental responsibility into guardianship. I know for example that the

73 Tasmanian Government, *Submission 74*, p. 24.

74 Ms Mary-Lou Carter, Secretary, Our Voice Australia, *Committee in-camera Hansard*, Sydney, 27 August 2015, p. 4.

75 Our Voice Australia, *Committee in-camera Hansard*, 27 August 2015, p. 4.

Victorian parliament considered that issue. But to my knowledge none of the parliaments in any of the jurisdictions has actually agreed.⁷⁶

Aboriginal and Torres Strait Islander people with disability

7.82 As discussed in Chapter 4, The North Australian Aboriginal Justice Agency (NAAJA) highlighted that in the Northern Territory, Aboriginal and Torres Strait Islander peoples are significantly overrepresented in the number of people on adult guardianship orders, with 50 per cent of people subject to guardianship orders identifying as Aboriginal.⁷⁷ NAAJA noted that the number of people under guardianship in the NT is eight times more than the next highest jurisdiction (NSW).⁷⁸

7.83 NAAJA expressed concern that:

Intellectually disabled Aboriginal people in remote communities are particularly vulnerable to abuse and neglect because of a lack of services and support. There is a critical lack of disability services for Aboriginal people in remote communities and a lack of support and education for families and community members to assist them to care for disabled family members.⁷⁹

7.84 NAAJA provided the committee with case study examples that highlight that Aboriginal people under guardianship orders are not adequately protected and require specialist advocacy support (see Box 7.4).

76 Mr Graeme Smith, Public Guardian, NSW Office of the Public Guardian, *Committee Hansard*, 27 August 2015, p. 23.

77 NAAJA, *Submission 138*, p. 4.

78 *Submission 138*, p. 9.

79 *Submission 138*, p. 9.

Box 7.4: Case study – adult guardianship for Aboriginal and Torres Strait Islander people

Ms M has an intellectual disability, multiple medical conditions and comes from a remote community. Following a recent medical procedure, she is required to take medication once a day for the rest of her life. She cannot return to her home community because she does not have the capacity to monitor her own medication intake and the clinic there does not have the resources to provide this service. She has no family and nowhere to live outside her community and has to stay in hospitals as there is no suitable supported accommodation.

NAAJA noted that Ms M did not have capacity to give consent to the procedure and was not provided a support person or interpreter. The Office of the Public Guardian (OPG) has been appointed her guardian to make decisions about where she lives and her day to day medical care. However, NAAJA noted that OPG 'does not have the resources to act as an advocate' and was unable to assist Ms M during a recent medical procedure:

...on her own in the hospital, without an advocate or caseworker, she was neglected and vulnerable. At one point when she left the hospital to be with her partner it was assumed she was out drinking (she does not drink) and this led to a misunderstanding that she was refusing treatment and 'non compliant'. At another point she was almost discharged back to a smaller hospital without having the operation required. Ms M has had this operation but is still in hospital waiting for a placement in supported accommodation.

Ms N was the subject of a report by the NT Health and Community Services Complaints Commissioner in February 2014. NAAJA noted that the Public Guardian and two family members had been appointed as Ms N's guardian and there had been 'clear and consistent warnings about the neglect, physical and sexual abuse and ongoing suffering of Ms N that various government agencies had not acted upon'.

The Commissioner found that the Public Guardian, the Department of Health and other health service providers (such as the local clinic) were aware that Ms N was vulnerable and unable to care for herself. It was also evident that her family was not coping with her high care needs and was not getting the support they needed. The Commissioner found that all services involved in Ms N's care and daily life 'failed to protect her, to ensure her safety, and to promote her wellbeing, her dignity and her place in the community'.

Source: NAAJA, Submission 138, p. 10–12.

7.85 Ms Pip Martin, Managing Solicitor from NAAJA, told the committee of the importance of advocacy services for people under guardianship orders:

...the lack of coordinated service provision for people who have intellectual disability means that we see people who are falling through the cracks. People who are even under the management of the Public Guardian are not individually case managed, so certain problems arise. We would recommend individual disability advocates to case manage people who are under the Public Guardian.⁸⁰

7.86 NAAJA expressed concern that in the Northern Territory:

80 Ms Philippa Martin, Managing Solicitor, Civil Law Section, NAAJA, *Committee Hansard*, Brisbane, 16 October 2015, p. 21.

...even when the Public Guardian is appointed there is no guarantee that a person is protected from financial or physical abuse. There is a clear need for an independent disability advocate for each person under guardianship and without such an advocate, there is a risk of that person suffering neglect and abuse.⁸¹

Committee view

7.87 The committee affirms the view that the focus for all policy and practice must be centred on the person with a disability. The committee also recognises the vital role played by informal advocates, including families, in safeguarding people with disability against violence abuse and neglect.

7.88 Evidence to the committee highlighted concerns that informal advocates are not recognised under most existing legal frameworks, particularly in relation to guardianship decisions. Further evidence to the committee suggests the views of informal advocates are often overridden by those of disability service providers.

7.89 The committee recognises the need for greater legal recognition of the important role informal advocates can perform in the decision-making process for people with disability. The committee considers that there should be mechanisms in place to allow informal advocates to assist people with disability, particularly those with intellectual disability and cognitive impairment, to raise allegations of violence, abuse and neglect.

7.90 As discussed in Chapter 4, the committee is deeply concerned by evidence that suggests that disability service providers may use guardianship orders to circumvent the advice of informal advocates. The committee does not think it appropriate that service delivery organisations can also hold the threat of guardianship orders over their clients.

7.91 The committee emphasises its support for the establishment of a supported decision-making model for people with disability that recognises the role of informal advocates. The committee considers this model is integral to safeguarding people with disability against violence, abuse and neglect.

7.92 The committee also recognises that informal advocates are not recognised in the decision-making process for adults with disability. The committee supports streamlining this process to enable family members to have a recognised role in decision-making, without having to apply for formal guardianship, consistent with a supported decision-making model.

7.93 The committee is particularly concerned by evidence that Aboriginal and Torres Strait Islander peoples are over-represented in the adult guardian system, which leads to them not getting individualised support. The committee considers that special consideration must be given to how to provide individual case management support for Aboriginal and Torres Strait Islander people with disability.

81 NAAJA, *Submission 138*, p. 11.

Advocacy under the NDIS

7.94 The committee heard strong support for increased funding for all models of advocacy during and after the transition to the NDIS. Advocacy for Inclusion submitted that:

People with disabilities need long-term support to build self-advocacy skills, and they also need independent individual advocacy support in the highly likely instance that regardless of their self-advocacy skills, other people continue to exert power over the person's life.⁸²

7.95 Specific advocacy support for engaging with the NDIS on individual support packages is discussed in detail in Chapter 9.

Advocacy funding

7.96 In February 2015, the Australian Government, together with states and territories, launched a consultation process for the Information, Linkages and Capacity Building (ILC) policy for the NDIS (formerly known as 'tier 2'). The ILC is:

...a key component of the NDIS insurance model and will contribute to the sustainability of the NDIS by building the capacity of the community, people with disability, their families and carers which in turn will reduce the need for funding of supports for people with disability through Individual Funded Packages.⁸³

7.97 In April 2015, the Council of Australian Governments' Disability Reform Council considered the findings of the consultation process and agreed that in relation to advocacy, the NDIS would fund:

- decision supports;
- safeguard supports; and
- capacity-building for participants, including support to approach and interact with disability supports and access mainstream services.⁸⁴

7.98 The Disability Reform Council agreed that systemic advocacy and legal review and representation would be funded outside the NDIS. DSS noted that this is consistent with the 2011 PC Inquiry Report into *Disability Care and Support*, which recommended that advocacy be funded and provided outside the NDIS:

Systemic advocacy pushes for broad policy and social change, while individual advocacy promotes the interests of particular individuals by acting on their behalf to resolve specific issues. These functions should lie

82 Advocacy for Inclusion, *Submission 83*, p. 33.

83 National Disability Insurance Scheme (NDIS), *Draft Framework for Information, Linkages and Capacity Building*, Consultation on Information, Linkages and Capacity Building, <http://www.ndis.gov.au/consult-info-link-capacity-building> (accessed 23 October 2015).

84 See: Council of Australian Governments, Disability Reform Council, *Communiqué 24 April 2015*, <https://www.dss.gov.au/our-responsibilities/disability-and-carers/programmes-services/government-international/disability-reform-council> (accessed 22 October 2015).

outside the NDIS, reflecting the potential conflict of interest that would arise were the NDIS to fund advocacy bodies whose role was to challenge the disability system overseen by the NDIS.⁸⁵

7.99 The resultant ILC Framework published in August 2015, acknowledges that the NDIS 'has an important role to play in providing decision-making supports and building individual capacity for people to advocate for themselves (self-advocacy)'.⁸⁶

7.100 DSS submitted that the Commonwealth government together with states and territories is 'working through the elements of advocacy that will be funded by the NDIS and how it will align with services delivered under NDAP [Advocacy Program]'.⁸⁷

Transition to NDIS

7.101 A number of submitters and witnesses highlighted that funding for advocacy services was not included in the draft NDIS Quality and Safeguarding Framework discussion paper.⁸⁸ These submitters and witnesses strongly recommended that advocacy be considered central to the safeguarding framework for the NDIS. Ms Colleen Pearce, the Victorian Public Advocate, told the committee that funding for advocacy should be central to the NDIS safeguarding framework:

My recommendation is for the Commonwealth government to commit to funding an advocacy program as a crucial NDIS safeguard. Such programs and funding should remain separate from any of the funding provided to the NDIS participants.⁸⁹

7.102 Ms Aine Healy noted that the NSW Council for Disability's recent consultations for DSS on the proposed quality and safeguarding framework found that:

...people said that having the opportunity to come together and talk about what is available and what is not and about practising your skills, being able to speak up, learning from other people et cetera would be really, really useful—having resources to do that stuff. But it is not available in an ongoing fashion. People said they would like to be able to build a relationship with a trusted organisation in one regional area. People told us: 'I like that I can drop in and out of that advocacy service. I haven't needed to use them for a few years, but when something comes up I know I can go in there, and I know I can do that.' Definitely some sort of block funding

85 See: PC, *Disability Care and Support*, Inquiry Report no. 54, vol. 1, 10 August 2011, p. 26, <http://www.pc.gov.au/inquiries/completed/disability-support> (accessed 22 October 2015).

86 NDIS, *A Framework for Information, Linkages and Capacity Building*, Information, Linkages and Capacity Building, <http://www.ndis.gov.au/ilc-policy> (accessed 22 October 2015).

87 The Department has not indicated a timeframe for this work to be completed. *Submission 104*, p. 27.

88 See: NDIS Quality and Safeguarding Framework, <https://engage.dss.gov.au/ndis-qsf/> (accessed 2 November 2015).

89 Ms Colleen Pearce, *Committee Hansard*, Melbourne, 30 June 2015, p. 33.

would be useful so that people can provide a basis for systemic work and for individual work as needed, because you are not always going to be able to pick when you might need individual advocacy.⁹⁰

7.103 The committee notes many of the submissions to the NDIS Quality and Safeguarding Framework highlighted the absence of independent advocacy services. For example, Women with Disability Australia and People With Disability Australia's submission to the framework noted:

The proposed framework does not focus on the critical role of DPOs [Disabled Peoples Organisations], independent advocacy or disability support organisations (DSOs) in ensuring quality and safeguarding for people with disability. Yet, NDIS participants as well as those who are not NDIS eligible will need increasing support to navigate and adapt to the new service environment; government will still need consultation mechanisms to develop and implement effective policy; and independent voices will be needed to ensure that the market for disability supports grows in a way which promotes human rights.⁹¹

7.104 Women with Disability Australia and People with Disability Australia recommended that:

DPOs, independent advocacy and DSOs should continue to be block funded and receive increased recognition that they remain fundamental to quality and safeguarding for people with disability.⁹²

7.105 Evidence to the committee supported the findings of the Victorian Ombudsman's report that 'the role of advocacy will need to be strengthened further with the introduction of the NDIS'. The Victorian Ombudsman noted:

It is not viable for advocacy to take a secondary position in the safeguards framework. I consider advocacy to be key in a framework for Victorian people with disability who have no prospect of becoming empowered consumers and have no family or friends to voice their best interests.⁹³

7.106 Some submitters recommended the introduction of an advocacy program independent of the NDIS, to ensure that advocacy services are adequately funded. For example, VALID in Victoria recommended an independent program to fund systemic and individual advocacy:

VALID believes there is a need for a strong and robust independent advocacy program that provides various forms of advocacy including

90 Ms Aine Healy, Executive Director, Advocacy, NSW Council for Intellectual Disability, *Committee Hansard*, Sydney, 27 August 2015, p. 5.

91 Women with Disabilities Australia and People with Disability Australia, *Submission to NDIS Quality and Safeguarding Framework*, p. 15, <https://engage.dss.gov.au/ndis-qsf-submissions/1435277763/> (accessed 2 November 2015).

92 Women with Disabilities Australia and People with Disability Australia, *Submission to NDIS Quality and Safeguarding Framework*, p. 18, <https://engage.dss.gov.au/ndis-qsf-submissions/1435277763/> (accessed 2 November 2015).

93 Victorian Ombudsman, *Reporting and investigation of allegations of abuse*, pp 89–88.

responsive as well as proactive strategies for identifying and addressing systemic abuse and neglect. Funding is also needed for individual and systemic forms of advocacy. This program needs to be funded to match demand from both a population growth perspective and a program demand perspective as the NDIS expands supports to a larger number of people with disabilities. Severe underfunding of independent advocacy can lead to cases of abuse and neglect going unaddressed as advocacy organisations build waiting lists for support. I think even in the transfer of some of the state advocacy funding to the NDIA there is a risk of losing some of the advocacy funding that is already in the system.⁹⁴

7.107 Submitters also highlighted the need to ensure self-advocacy services are adequately funded under the NDIS.⁹⁵

Concluding Committee view

7.108 The committee recognises the significance of formal advocacy, self-advocacy and informal advocacy services in assisting people with disability to identify and report violence, abuse and neglect.

7.109 Evidence to the committee suggests that there is a strong support for increased funding for formal advocacy services and self-advocacy training, and greater recognition of the important role played by informal advocates particularly under the NDIS.

7.110 The committee recognises the need for continued funding for all forms of advocacy during and after the transition to the NDIS. The committee supports the recommendation of the Victorian Ombudsman that funding for advocacy services should be increased, based on a fulsome assessment of the need across jurisdictions. The committee considers that this recommendation should be central to the Australian Government's current review of the Advocacy Program.

7.111 The committee considers that advocacy must be central to the quality and safeguarding framework for the NDIS. The committee considers that an independent advocacy program that funds all forms of advocacy services, such as the Advocacy Program, should continue under the NDIS.

7.112 While acknowledging the Australian Government is reviewing all aspects of advocacy funding, including the Advocacy Framework and the Advocacy Program, the committee is concerned by the current lack of detail on which advocacy services will be funded under the NDIS. In particular, it is not clear how systemic advocacy, which falls outside the NDIS framework, will be funded.

94 Mr David Craig, Project Coordinator, VALID, *Committee Hansard*, Melbourne, 30 June 2015, p. 44.

95 See: NSW Council for Intellectual Disability, *Submission 103 Attachment 1*, p. 14.

Chapter 8

Risk factors and causes

8.1 One of the key terms of reference for this inquiry is to identify the systemic workforce issues that contribute to violence, abuse and neglect of people with disability.¹ However, the evidence presented to the inquiry showed that the causes of violence and abuse go far beyond systemic workforce issues and includes cultural attitudes towards disability:

The APS [Australian Psychological Society] approach to understanding the issue is that there are two key elements. One is about malicious intent and the other is about ignorance and the culture within institutional and residential settings, with the higher use of restrictive practices in Australia than in the [United Kingdom].²

8.2 While there was some evidence presented to this inquiry on the issue of predatory abusers, most submitters focused on sector-wide systemic workforce issues that increased the risk of abuse from carers who simply responded negatively to various factors in the workplace or with the nature of the work. Other evidence has focussed on the culture or practices of individual workplaces which can also increase the risk of violence, abuse or neglect of people with disability:

Data from notifications to my office shows that there are three main factors contributing to violence: firstly, the group home environment, where we see inappropriate placements and, particularly, a lack of alternative accommodation; secondly, workforce issues such as lack of training, insufficient staff, high numbers of casualised staff and a lack of leadership; and, thirdly, cultural issues, particularly tacit acceptance and normalisation of violence and bullying.³

8.3 Broadly, the evidence presented to the inquiry from a range of organisations and individuals suggests the key common causes of violence abuse and neglect are:

- systemic issues—jurisdiction-wide systemic issues that can increase likelihood of abuse or neglect;
- cultural attitudes of de-valuing people with disability;
- individual worker issues—predatory workers, neglectful workers and skills-deficit abuse; and

1 *Terms of Reference (j)*: identifying the systemic workforce issues contributing to the violence, abuse and neglect of people with disability and how these can be addressed.

2 Ms Helen Killmier, Australian Psychological Society, *Committee Hansard*, Melbourne, 30 June 2015, p. 31.

3 Ms Colleen Pearce, Public Advocate, Office of the Public Advocate, Victoria, *Committee Hansard*, Melbourne, 30 June 2015, p. 32.

- individual workplaces—facility practices which can increase likelihood of abuse or neglect.

Systemic issues

8.4 A range of systemic issues that exacerbate or cause violence, abuse or neglect of people with disability were raised with the committee. These included:

- the institutional nature of disability service provision;
- low pay levels of the workforce;
- lack of appropriate pre-employment and ongoing individual worker regulation; and
- current systems of accreditation of service providers.

Institutions

8.5 Evidence was presented to the inquiry that the very nature and model of service delivery—institutions and congregate housing models—created sites where violence, abuse and neglect were almost inevitable outcomes.

Institutions can at times create a culture of power over people who are vulnerable, typically, and who do not have an opportunity for choice.⁴

...

We know from our lived experience and from research we have conducted that congregated or institutionalised models of service increase the risk of abuse, neglect, discrimination and violence. This happens by making people powerless through increased dependence upon human services for basic life needs and decreased meaningful connection to family, friends and community. This institutionalised practice also has the effect of reducing or denying people with lived experience of intellectual disability socially valued roles within family, community and the broader Australian society. We are also deeply concerned about people with lived experience of intellectual disability in institutions being denied access to real independent values-driven advocacy support as well as peer support.⁵

...

JFA Purple Orange's experience highlights that institutionalised residential settings may increase the chances of people being abused because they make people invisible to the community...What makes these services institutional is their practice, where vulnerable people receive services largely away from the eyes of the community, and where the main people in their lives are paid to be there. Violence, abuse and neglect in such settings are difficult to detect, report, investigate and prosecute.⁶

4 Ms Leanne Pearman, Member, Bolshy Divas, *Committee Hansard*, Perth, 10 April 2015, p. 19.

5 Ms Silvana Gant, President and Convenor, Adelaide People First, *Committee Hansard*, Adelaide, 28 August 2015, p. 8.

6 JFA Purple Orange, *Submission 12*, pp. 17-18.

8.6 Service delivery organisations achieve obvious 'economies of scale' by developing congregate housing models where a number of people with disability can reside and/or receive services from the one location, sharing resources and staff. Another significant factor increasing institutional or congregate service delivery settings is the lack of appropriate private or public housing options for people with disability, who might otherwise be able to live semi-independently with carer visits.⁷

Inappropriate placements

8.7 An issue that was raised repeatedly throughout the inquiry was the issue of placements of incompatible residents caused by organisations seeking to streamline services to reduce costs.

We know of several situations where support services bring together two or three individuals who they happen to provide support for and they bring their hours together and have them do an activity where the three of them would not ordinarily get together, would not have anything to do with one another. It suits the service to pull the support hours together so that it works for the support worker. That is what they do—and it should not happen that way. People should not have to be brought together in those circumstances.⁸

[T]here should be no reason for anyone ever trying to seek an intervention order against someone in the same residence. If it is a [Department of Health and Human Services (Victoria)] property, they should be ensuring that people who are actually a danger to each other are not together. They should be ensuring that it is a safe place for the people who live there, and they should be working out what it is that is causing these events to occur. There should never be instances—and there are many—where we have to provide support to somebody to get an intervention order against somebody they live with, because they have no choice but to live there.⁹

8.8 Other submitters pointed to the lack of accommodation options so that people who were not compatible were not required to live together.¹⁰

[The Victorian Advocacy League for Individuals with a Disability (VALID)] also believes that severe underfunding by governments and underinvestment in appropriate housing creates a context where many individuals are required to live in group accommodation with other residents who make their lives unsafe, miserable and intolerable. That this

7 This issue was raised by a number of organisations and individuals, including National Disability Services, Endeavour Foundation, Summer Foundation, Public Advocate of Victoria, Communication Rights Australia, Disability Discrimination Legal Service, among many others.

8 Ms Silvana Gant, *Committee Hansard*, Adelaide, 28 August 2015, p. 12.

9 Ms Naomi Anderson, Casework Lawyer, Villamanta Disability Rights Legal Service Inc., *Committee Hansard*, Melbourne, 30 June 2015, p. 28.

10 Ms Margot Morris, Principal Solicitor, Intellectual Disability Rights Service, *Committee Hansard*, Sydney, 27 August 2015, p. 2.

is tolerated as an acceptable solution to accommodation and support is a form of systemic abuse that would not be acceptable to any other citizens.¹¹

Schools as institutions

8.9 Chapters three and four investigate the treatment of children with disability in schools in detail. What is clear is that the 'mainstreaming' of disability education, where children with disability are integrated into standard public schools, has in some cases resulted in those children losing the specialised staff who are able to recognise and appropriately respond to the needs of children with disability. The outcome for some children has been catastrophic and there are clearly systemic causes that must be addressed:

In the school system there is absolutely no oversight or regulation, and often it is up to school principals, the schoolteacher and specific approaches and cultures within schools. Obviously it underpins a whole area in education where there is a complete lack of training and support for the inclusion of children with disability in schools and what that means.¹²

There is a long list of reasons why that should not happen and there are alternatives that would make it unnecessary to use restraint or seclusion, but the schools are ill resourced or inadequately advised or trained to deal with these matters appropriately...Another issue in relation to schools is there is no independent complaints body, so it is impossible for anyone to get anywhere if they have an issue of that sort in relation to what is happening to their family member, their child, in school. We would recommend that an independent complaints body is urgently required for schools and special schools issues.¹³

Low pay rates

I cannot count the number of people I know who work in the industry who have been clearly good at their jobs but have said, 'I have to leave; I cannot afford to keep doing this.' So they have gone into nursing or they have gone to train to be a paramedic. That is a profound waste. We should not be so undervaluing the services that are provided by good support staff.¹⁴

8.10 Many witnesses cited negative impacts to service delivery of having a low-paid workforce. Of particular concern was that the levels of pay contributed to a transient workforce, exacerbating training issues in an industry where so much of the required skills are gained through years of on-the-job training:

A lot of clients I work with are non-verbal. You understand, after you have been living with them for months and then years, that the blink of an eye

11 Mr David Craig, Project Coordinator, Victorian Advocacy League for Individuals with Disability (VALID), *Committee Hansard*, Melbourne, 30 June 2015, p. 44.

12 Ms Therese Sands, Co-Chief Executive Officer, People with Disability Australia, *Committee Hansard*, Sydney, 27 August 2015, p. 36.

13 Ms Deidre Griffiths, Principal Solicitor and Executive Officer, Villamanta Disability Rights Legal Service Inc., *Committee Hansard*, Melbourne, 30 June 2015, p. 25.

14 Ms Rayna Lamb, Coordinator, Women With Disabilities WA Inc., *Committee Hansard*, Perth, 10 April 2015, p. 21.

means something, the twist of a head means something, and the look on a face means something. This cannot be done with people who come here and do the job to fill in time while they are at university, or to fill in time while they are doing other things in their lives. It is okay if they are there with other people, but, if they are there on their own with these people, so many things can go wrong and people can get unintentionally hurt. It is not through malicious damage, it is just ignorance—and we cannot have that. People have to be trained. They have to have understanding.¹⁵

8.11 The transient nature of parts of the workforce was seen to have impacts on the quality of services being delivered, as outlined above, but also on the emotional and psychological well-being of the people being cared for. Multiple witnesses and submitters raised the issue that it is distressing for any person, regardless of disability, to have relative strangers undertaking what are often highly intimate forms of personal care. For people with an intellectual or mental health disability, the disruption to routine can be emotionally traumatising. For these people, their quite normal response to such stimuli is often viewed as 'behaviour of concern' from the carer or service provider, leading to further neglect or abuse in the form of behaviour modification through discipline, restraint or seclusion:

In my experience the majority of the violence and abuse comes from staff attitudes and behaviour, and aggressive patient behaviour is often the result of self defense, against unwanted/unwarranted drugging and the physical violence of electroshock, the rudeness, verbal and emotional aggression, unnecessary use of force and avoidance of any therapeutic contact by staff, as a general and expected way of behaving in the institutional setting.¹⁶

8.12 Discussion of the issue of low wages went beyond simply stating that low wages will result in individual good workers leaving the sector to pursue other employment options, but also highlighted the lack of funding for career development and training, which creates a further sector-wide push factor that encourages a drain on the workforce:

A chronically underfunded service system with poor safeguards will always—and this is the experience in other countries—turn good people into bad carers, because they are unable—through their training, through their development and through their support—to produce the outcomes that people require.¹⁷

Workforce regulation

8.13 Recent media attention on cases of abuse and sexual assault in disability facilities has highlighted the problem of predatory behaviour, whereby abusers choose to work in sectors where they have access to vulnerable people and where the work itself includes a level of physical intimacy that can be exploited for abuse. Evidence has been presented to this inquiry by multiple witnesses that the lack of

15 Mr John Bone, Delegate, United Voice WA, *Committee Hansard*, Perth, 10 April 2015, p. 42.

16 Ms Deidre Oliver, former psychiatric nurse, *Submission 151*, p. 6.

17 Mr Lloyd Williams, National President, Health Services Union, *Committee Hansard*, Sydney, 27 August 2015, p. 9.

sector-wide workforce regulation in the disability services industry has exacerbated the ability of predatory abusers to enter and remain in the disability workforce:

As institutions where children are freely accessible attract paedophiles, institutions where vulnerable, powerless people are to be found, especially when that powerlessness is supported by the most disenfranchising legislation in the land, will attract people who have a need or desire to exercise power. In both situations the outcome will be abuse.¹⁸

8.14 There was a great deal of evidence presented to the inquiry on the benefits of a systemic approach to the regulation of the disability service workforce. This ranged from improving pre-employment screening systems, through to possible registration schemes that would include requirements for ongoing professional development.

8.15 A common problem discussed by many submitters was the issue of workforce pre-employment screening. Ms Sue Ash, Chief Executive Officer of UnitingCare West told the committee:

...our experience at UnitingCare West is that, if you join up your knowledge of the child protection system, the disability system and the aged-care system, there is a line of principles through all of that which are critical to ensuring that the person who is involved in a community service system has the same protections—appropriate, but the same protections—against harm, abuse and neglect at any age and stage, rather than segmenting people with three different systems—or more, to be honest.¹⁹

8.16 UnitingCare West went on to propose that instead of having employment screening that differs by industry, there should instead be a vulnerable persons check that would cover anyone who works with vulnerable people from a range of categories.²⁰

8.17 Mr Lloyd Williams, National President of the Health Services Union pointed out that working with vulnerable people checks should not be viewed as an holistic solution, as they are exclusion schemes which require a person to engage in violence, abuse or neglect before being 'excluded' as an appropriate disability services worker.²¹

8.18 This view was echoed by United Voices for People with Disabilities:

I know the exclusion list was introduced and touted as one of the big things here in Victoria by the previous government as an outcome. It is an after-the-fact solution or outcome. It means somebody has to have actually suffered in the process generally, unless someone knows something about that person. If they do not go through and it is not recorded or there is some

18 Ms Deidre Oliver, former psychiatric nurse, *Submission 151*, p. 6.

19 Ms Sue Ash, Chief Executive Officer, UnitingCare West, *Committee Hansard*, Perth, 10 April 2015, p. 8.

20 Ms Sue Ash, *Committee Hansard*, Perth, 10 April 2015, p. 9.

21 Mr Lloyd Williams, *Committee Hansard*, Sydney, 27 August 2015, p. 12.

process that identifies that they are a threat, a risk or whatever, they do not get on that register.²²

8.19 The reportable incident scheme in New South Wales (NSW), discussed in greater detail in chapter five, includes provisions for an expanded pre-employment screening process that goes far beyond a simple criminal records check, but also reviews any employment related incidents by workers. The scheme has been suggested for replicating nationally for the disability workforce:

[T]he New South Wales system has criminal record checks but also feeds into the screening system the results of our reportable conduct area in the child related employment sphere. And we are talking about substantial numbers of matters. That forms part of the consideration by the children's guardian as to whether somebody should work in child related employment. I can see no reason to not have a national system in place for the reporting of serious incidents, and as a part of the screening system there should be a combination of criminal record checks, information that one might receive from professional associations.²³

8.20 The Health Services Union went further to propose a 'step-up' accreditation scheme, which could act more as a preventative measure, by requiring base level qualifications and requirements for ongoing professional development. Then if an incident occurred, the exclusion provision could be utilised to withdraw someone's accreditation:

From the workforce point of view, we argue that there needs to be a proper risk based accreditation scheme, which does not say that all people have to be accredited at the same level. But the higher the risk of the individual and the higher the vulnerability of an individual, the higher the accreditation standard should be for the person who is going to be working with that individual, including base level qualification and ongoing professional development and understanding of human rights, understanding and being able to identify the signs of abuse and how to deal with those and how to empower someone's life.²⁴

8.21 This is in line with other proposals made to the inquiry, to professionalise the workforce through worker registration schemes with higher levels of training required for working with different needs levels, as well as ongoing professional development.²⁵

22 Peter Cross, President, United Voices for People with Disabilities, *Committee Hansard*, Melbourne, 30 June 2015, p. 47.

23 Mr Steve Kinmond, Community and Disability Services Commissioner and NSW Deputy Ombudsman, *Committee Hansard*, Sydney, 27 August 2015, p. 21.

24 Mr Lloyd Williams, *Committee Hansard*, Sydney, 27 August 2015, p. 12.

25 Similar proposals to expand pre-employment screening into a registration system with differing levels of qualifications and requirements for continuing professional development were proposed by other organisations, including Voices for People with Disabilities, Optia Inc, and NSW Council for Intellectual Disability.

8.22 Evidence presented by the Department of Social Services (DSS) at the Canberra hearing indicated this was an option being considered by DSS in the development of a national quality and safeguards framework for the National Disability Insurance Scheme (NDIS).²⁶

8.23 DSS also cited the *Working with Children Checks Report*²⁷ released on 17 August 2015 by the Royal Commission into Institutional Responses to Child Sexual Abuse. This report proposed minimum standards which should be incorporated into all worker checks, as well as suggesting a deadline on state and territory governments to implement the standards. The report further recommends that the Australian Government should facilitate a national model of working with children checks, improve the intersection of these checks with CrimTrac and make international records more accessible.

8.24 DSS cited this approach as addressing the issue of 'how you would arrive at an arrangement where there are common national standards, to a point where you can get recognition across jurisdictions'.²⁸

8.25 Some submitters called for an overhaul of the entire disability workforce, to professionalise the sector. The Health Services Union told the committee:

Our fourth recommendation is that the government must commit to professionalising the disability sector by implementing a national risk based registration and accreditation system which requires mandated minimum qualifications and ongoing professional development for certain job roles.²⁹

...

There is no requirement for disability workers to be registered, unlike childcare workers and even unlike crowd-control people who work in hotels and casinos. It beggars belief that to be a crowd controller you must have a minimum qualification and you are registered, but to be a disability support worker you do not need any of these things: just a simple police check will suffice.³⁰

8.26 A number of submitters presented evidence that while there may be a need for additional regulation, a key problem was that existing regulation was not being adequately enforced:

26 Mr Bruce Smith, Branch Manager, National Disability Insurance Scheme, Department of Social Services, *Committee Hansard*, Canberra, 21 August 2015, p. 4.

27 Royal Commission into Institutional Responses to Child Sexual Abuse, *Working with Children Checks Report*, 17 August 2015, pp. 6-8, <http://www.childabuseroyalcommission.gov.au/getattachment/e1550ad2-6159-49cd-9f24-f668e8cc1b0d/Working-With-Children-Checks-Report> (accessed 29 September 2015).

28 Mr Bruce Smith, *Committee Hansard*, Canberra, 21 August 2015, p. 4.

29 Ms Tammy Munro, Lead Organiser, Tasmanian Branch, Health and Community Services Union, *Committee Hansard*, Sydney, 27 August 2015, p. 9.

30 Mr Lloyd Williams, *Committee Hansard*, Sydney, 27 August 2015, p. 8.

We also get a system that has so many rules and regulations to ostensibly protect us and then it ignores those rules and regulations. We do not need any more rules and regulations. We need to follow the ones that exist.³¹

...

It has been our experience that while improvements have occurred, some service providers continue to ignore, discourage or treat allegations of abuse and neglect without due weight.³²

...

An individual advocate repeatedly requested that the service provider send her documents outlining the authorisation for the use of this restrictive practice, but these requests were constantly ignored. It was eventually discovered that the service did not take the issue to the restrictive practices panel, which makes the use of the buckle guard and protective screen a criminal offence.³³

Committee view

8.27 The committee supports the view of many witnesses to this inquiry, that institutional and congregate care models of service delivery are themselves major factors in the prevalence of violence, abuse and neglect of people with disability. There is a clear need for increased funding to address the lack of housing options available to people with disability.

8.28 There are many factors that combine to create a regulatory vacuum in which disability workers operate. This also extends to the quality of disability service delivery at an organisational level.

8.29 Of serious concern to the committee is the lack of workforce regulation that can not only identify and remove predatory or abusive workers, but is also capable of driving an overall improvement in professional standards to address issues of neglect.

Cultural attitudes

8.30 There were broader sector-wide issues raised by submitters as being drivers of violence, abuse and neglect, which went beyond the regulation of disability service delivery. Of particular note were cultural attitudes that devalue people with disability and disability-specific violence—violence that is purported to be an act of disability care.

8.31 Cultural attitudes of devaluing people with disability were cited by many submitters and witnesses as being a major driver of violence, abuse and neglect of people with disability.

8.32 Mrs Joan Broughan noted in her submission:

31 Ms Rayna Lamb, *Committee Hansard*, Perth, 10 April 2015, p. 21.

32 Advocacy Tasmania Inc. *Submission 97*, p. 4.

33 Australian Cross Disability Alliance, *Supplementary Submission 147*, p. 19.

I find it indicative of society's values and attitudes when 3 Greyhound trainers are banned for life and a national inquiry into the sport ensues for cruelty to animals and in the instance of cruelty to people with a disability agencies continue to operate and workers implicated in the non-reporting of abuse continue to work.³⁴

8.33 The issue of devaluing people with disability was put forward by submitters as being a cause of violence and abuse on multiple levels. When individuals devalue people with disability, they are more likely to engage in violence and neglect towards those people. Devaluing people with disability at a cultural level, contributes to institutional barriers to the elimination of violence, abuse or neglect:

At a core level, issues related to violence against people with disability, particularly institutional and legal barriers to recognition of this violence, are related to the cultural devaluation of disability and the extent to which as a society we view people with disability as worthy of inclusion in our communities and, at a very base level, worthy of recognition as human beings and worthy of life.³⁵

8.34 Some submitters questioned an approach to reducing violence, abuse and neglect that focused on the 'vulnerability' of people with disability, without recognising that vulnerability itself is not a cause of abuse:

But we are still talking about national vulnerable persons cards and black lists and other ideas that would impact on the choice and control of people with disability as though those ideas would be a silver bullet that will solve rape, abuse, neglect and murder and as though our vulnerability is the problem rather than a culture that fosters violence, neglect and abuse.³⁶

...

One of the most profound ways that people with disabilities are left vulnerable has nothing to do with our disabilities. Our disabilities do not inherently make us vulnerable. Attitudes towards us, and the value that is placed upon us by society is what makes us vulnerable.³⁷

...

[A]longside making recommendations directed towards reforming specific laws and institutional practices, the Senate Committee should consider making recommendations for contesting and shifting cultural ideas around disability at a fundamental level.³⁸

8.35 Ms Rayna Lamb, Coordinator of Women with Disabilities WA stated that the culture in which people with disability are raised, often does not provide people with

34 Mrs Joan Broughan, *Submission 4*, p. 1.

35 Dr Linda Steele, School of Law University of Wollongong, *Submission 94*, p. 1.

36 Ms Samantha Connor, Researcher, People with Disability WA, *Committee Hansard*, Perth, 10 April 2015, p. 32.

37 Ms Rayna Lamb, *Committee Hansard*, Perth, 10 April 2015, p. 20.

38 *Submission 94*, p. 2.

disability with the skills to advocate on their own behalf, and in some cases to even recognise the abuse or violence perpetrated against them:

A lot of us, particularly people with disabilities who were born in our disabilities, were actually not brought up to stand up for ourselves, so that is what it makes it harder in dealing with potentially abusive or neglectful caregivers.³⁹

8.36 A solution put forward by multiple submitters was that training to reduce the prevalence of violence, abuse and neglect should not only be provided to the potential perpetrators of such actions (carers) but should also improve the skills of people with disability to identify and respond to incidents.

[R]esidents must be trained about what behaviour from paid carers and other residents is okay and what is not, and about what action to take if something is not okay.⁴⁰

[T]he language used in reference to people with disability is often itself inappropriate and as well as constituting abuse, it can reinforce negative stereotypes and act as a barrier to a more inclusive and supportive approach. Mindsets and preconceptions about people with disability and their behaviour can also significantly affect the way in which people with disability are treated. This has been a common problem in the disability services.⁴¹

8.37 Evidence to this inquiry has also discussed a tendency for people with disability to be 'infantilised' by those who wish to protect them from harm. The Hon Ms Kelly Vincent, a member of the South Australian Legislative Council representing the Dignity for Disability Party, argued that this form of overprotection can often have the opposite effect, in that people with disability are 'protected' from acquiring appropriate skills and knowledge they could use to protect themselves from harm, or to report harm when it occurs:

I remain very concerned, for example, about the lack of accessible information about personal safety, including in sexual and romantic relationships, for people with disabilities. Anecdotally, through my professional work and based on my personal experience, it seems to me that people with disabilities are often infantilised and therefore denied access to information and experiences about things such as personal safety in relationships and sex that many of our peers take for granted. I greatly believe in the need for accessible supports and information about these topics for this reason.⁴²

8.38 Deakin University agreed, citing the *Living Safer Sexual Lives: Respectful Relationships* program as an effective violence and abuse prevention program that enables people with disability to recognise what their rights and expectations should

39 Ms Rayna Lamb, *Committee Hansard*, Perth, 10 April 2015, p. 23.

40 Ms Margot Morris, *Committee Hansard*, Sydney, 27 August 2015, p. 2.

41 Queensland Advocacy Incorporated, *Submission 43*, p. 3.

42 Ms Kelly Vincent, *Committee Hansard*, Adelaide, 28 August 2015, p. 56.

be with regard to sexual and physical violence and abuse. This program has also helped people with disability who have experienced abuse or violence to engage with mainstream services such as law enforcement to assert these rights when they are infringed.⁴³

8.39 Other submitters made similar arguments. Mr David Craig from VALID cited the impact of infantilising people with disability can be 'protecting' people from life-learning experiences that are otherwise taken for granted by the non-disabled community:

Finally, it is important that governments endeavour to take abuse and neglect of people with disabilities seriously but in this process not create regulatory prisons for people who have disabilities and have the adverse effect of limiting the kinds of freedoms and liberty that are taken for granted by all citizens. The dignity of risk and living a life with normal ups and downs has been a victim of obsessive commitment to risk-averse management of disability supports. Prevention of abuse and neglect should not become a reason for neglecting the human right to pursue an ordinary life as set out under the United Nations Convention on the Rights of Persons with Disabilities.⁴⁴

8.40 Another serious issue raised by multiple submitters is the culture of an 'expectation of violence.' The NSW Disability Network Forum (DNF) submitted that in the disability sector there is an expectation of violence perpetrated by people with disability, which then justified a response which would itself be deemed as violent if done in a non-clinical setting:

DNF members have observed a culture of expected violence existing in both institutions and residential homes, cloaked as "challenging behaviors". It is common for people with disability in these settings to be labeled as violent, and both witness and be the victim of violence.⁴⁵

Committee view

8.41 Cultural attitudes are hard to shift and will take a long-term concerted effort from all stakeholders, with a lead role taken by government. What is clearly a necessary and achievable first step is to drive a cultural change within the disability service sector by ensuring rights-based training for all disability workers.

8.42 However, the most important cultural shift should be driven by people with disability themselves. This can be achieved through rights-based, self-advocacy training that informs all people with disability about their human rights, their legal rights and their value as members of the Australian community no matter where they live. A mobilised and informed community of people with disability, able to speak and act on their own behalf as much as possible, is clearly a key part of providing comprehensive protection against acts of violence, abuse and neglect.

43 Deakin University, *Submission 109*, p. 8.

44 Mr David Craig, *Committee Hansard*, Melbourne, 30 June 2015, p. 44.

45 NSW Disability Network Forum, *Submission 55*, p. 11.

Individual worker issues

8.43 Evidence presented to this inquiry shows there are a diverse range of issues that can increase the chances of individual workers engaging in neglectful or abusive work practices. Identified key causes include a lack of training to develop necessary disability-specific skills and a lack of values based training, combined with low wages that drive down skill levels on an industry-wide basis. The issue of predatory workers was seen by submitters as a significant problem. Proposed solutions, including systemic worker and workplace regulation, are discussed later in this chapter in the section on systemic issues.

Lack of training

8.44 Evidence was presented to the inquiry from a range of sources, which indicated that a key cause of abuse and neglect was a lack of training provided to carers. This ranged from vocational disability-carer training, to training provided by facilities on the needs of specific individuals to be cared for at that location. Ms Sharon Richards, Acting Chief Executive Officer of Advocare, told the committee that training is a key component of reducing incidents of abuse and neglect:

...if you have staff who are better trained and more stable, they will recognise behaviours and deal with them before they actually get out of hand.⁴⁶

Entry-level training

8.45 The issue of what is an appropriate level of vocational training for disability service workers was one where there was not a broad consensus view among witnesses. Some argued the key need was to improve the level of disability-specific skills provided in certificate-level training, while others argued that it was more important to provide values-based training to ensure the rights of people with disability are recognised.

8.46 Ms Rayna Lamb highlighted the difficulties she experienced in finding staff who recognised her as the employer and would defer to her as the decision-maker:

If someone has a certificate IV in disability, it just means that they were able to parrot the right stuff to get that piece of paper. It does not mean they have the right attitudes. You cannot teach respect. You can learn respect, but you cannot sit in a classroom and run down a checklist. I do not need someone with a cert IV. I need someone who will do what they are told, who will understand that this is my house and this is my life and that they are not there to patronise me; they are there to work for me, and I am their employer.⁴⁷

46 Ms Sharon Richards, Acting Chief Executive Officer, Advocare, *Committee Hansard*, Perth, 10 April 2015, p. 3.

47 Ms Rayna Lamb, *Committee Hansard*, Perth, 10 April 2015, p. 22.

8.47 This view was echoed by the Keely family, who discussed the importance of being able to hire the right 'fit' for a role that involved highly personal care without being limited to the training certification level that a person held.⁴⁸

8.48 The issue of values-based training was raised by other witnesses as an important protective mechanism to identify and respond to incidents of abuse, and to improve overall service delivery:

Quality support services require workers who have necessary skills to recognise indicators of abuse, know how to appropriately respond to suspected malpractice and are supported and encouraged to raise concerns without fear of being persecuted or targeted by their employer.⁴⁹

8.49 This view was echoed by the South Australian Principal Community Visitor, who proposed 'protective behaviour training for staff and especially residents who should also receive a statement of rights about what they should expect from a residential service that complies with service standards.'⁵⁰

8.50 United Voice WA, a union representing the disability sector workforce, raised concerns that under the expected workforce expansion from the NDIS 'it is essential that systemic workforce issues, particularly attraction and retention issues, are adequately addressed to ensure that the provision of quality support services remains sustainable into the future.' This issue of NDIS impacts on workforce expansion is discussed in greater detail in chapter nine.⁵¹

Ongoing professional development

8.51 Many witnesses argued for the need for ongoing professional development and training to ensure that after entering the disability workforce, individual carers were required to maintain up-to-date skills and knowledge. United Voice WA recommended that ongoing professional training should include education to recognise and respond to indicators of violence, abuse and neglect 'acknowledging that a stable and quality workforce of professionally trained, qualified and dedicated workers is a vital safeguard for people with disability from abuse, violence and neglect'.⁵² The issue of ongoing professional development is discussed in greater detail later in this chapter, in conjunction with discussion of a possible registration scheme for disability service workers.

Facility training

8.52 Witnesses' discussion of appropriate training was not limited to the issue of individuals gaining the vocational skills and knowledge required to enter the

48 Ms Gina Keely and Mr Ben Keely, *Committee in-camera Hansard*, Perth, 10 April 2015.

49 Ms Kelly Shay, Assistant Secretary, United Voice WA, *Committee Hansard*, 10 April 2015, p. 40. This issue was also raised by Aine Healy, Executive Director, Advocacy, New South Wales Council for Intellectual Disability, *Committee Hansard*, Sydney, 27 August 2015, p. 6.

50 South Australian Community Visitor Scheme, *Submission 16*, p. 5.

51 Ms Kelly Shay, *Committee Hansard*, Perth, 10 April 2015, p. 40.

52 Ms Wanita McDade, Delegate, United Voice WA, *Committee Hansard*, Perth, 10 April 2015, p. 41.

workforce. The issue of facility-specific training was also raised by many witnesses and submitters as a key factor that can contribute to abuse and neglect. Evidence presented to the inquiry highlighted the importance of service providers acting proactively to understand the needs of the people they provide services to, in order to better target the training provided to staff.

8.53 Ms Sue Ash described a research project her organisation conducted, that showed 70 per cent of its clients self-identified as having mental health issues, even though only 30 per cent of UnitingCare services were specific to people with mental health conditions:

The implications for us were that we up-ended our staff training. We now have compulsory mental health training for all of our staff because it is about equipping people to be able to work with people safely. We do occupational safety and health training as well, but that was coming out of understanding the needs and the situation of our clients and then equipping our staff to be able to work that way.⁵³

8.54 The danger that this kind of high quality facility-provided training may no longer being accessible for individual carers under the NDIS was raised by United Voice WA:

They [service providers] are saying that, with the use of the NDIS, the individualised funding model, they will move away from the training that they currently provide. Some of our major providers actually provide some good training—not cert III and cert IV level, which they do not mandate, but some very good on-the-job training which is specific to the clients they mostly care for. They provide things such as 'buddyships' and other things which are part of their union collective agreements to ensure that there is a greater level of training for staff, especially for new staff as they come into the field. We have been told that will cease to exist. As soon as they can possibly stop running it, they will stop running it.⁵⁴

8.55 Other witnesses discussed the variable quality of facility-specific training given to incoming carers, pointing to an over-reliance on individual service provider organisations to ensure that each carer had adequate intake training:

My own experience as a support worker has varied completely, including not being able to work with clients until I have done training in giving medication, behaviour management et cetera, and being buddied up until that was done, and that was quite comprehensive...I have also been put into situations where I have not been briefed on working with the clients and I have had a five-minute changeover and been expected to work with people. So there are massive variances.⁵⁵

53 Ms Sue Ash, *Committee Hansard*, Perth, 10 April 2015, p. 10.

54 Ms Kelly Shay, *Committee Hansard*, Perth, 10 April 2015, p. 45.

55 Ms Aine Healy, Executive Director, Advocacy, New South Wales Council for Intellectual Disability, *Committee Hansard*, Sydney, 27 August 2015, p. 6. The issue of workers being 'thrown in the deep end' was echoed by many other submitters. See *Submissions 1, 9, 17, 22, 42, 69, 70, and 150*.

8.56 This experience of staff being 'thrown in the deep end' by facilities was repeated by other witnesses:

I was asked by an employment agency to work a sleepover shift for a community services organisation housing five men with intellectual disability, mental health issues and severe behaviours of concern. I clearly specified that I was not confident working with people with behaviours of concern and was told, 'You will be okay. Just read their files and don't do anything outside of their routine.'...As staff were leaving, they told me not to leave my sleepover room until the morning staff member arrived because, if I did so, I would be in danger of being raped or assaulted. I felt very vulnerable and afraid, and I was very concerned for the welfare of the residents that I would not be able to assist if a problem arose during the night. I read the clients' files with the sleepover room door locked, feeling very uneasy. All but one resident had severe behaviours of concern which had resulted in the past in injuries against staff and fellow residents.⁵⁶

...

In Tasmania I have worked in disability for 10 years now and I have received a certain amount of training but I have to work with lots of staff who are not trained at all. They get a tiny bit of training. We were even sent into the houses where there was a staff member on who had probably just done a buddy shift and then they were expected to train the other buddy that had just come on and then look after clients, and I am talking about clients with high needs and challenging behaviours.⁵⁷

8.57 Other submitters emphasised the need for facility-level training to include rights-based training, and not simply focus on disability service delivery:

Once selected, it is important that staff be given training in relation to the client's rights in relation to freedom from abuse, including the right to respect, dignity, choice and control, and how to recognise and report abuse. The effect of this training should be evaluated by consulting with residents and their families (where appropriate) and observing staff interaction with residents.⁵⁸

Committee view

8.58 It is clear from evidence presented to the inquiry that there is a diverse range of factors that can impact on the quality of care provided by individual disability service workers. Accordingly, while there is no single solution, it is clear that improving vocational and workplace training—both of which should include skills-based and rights-based elements—would significantly reduce the levels of

56 Ms Heidi Egarter, Member, Health and Community Services Union, *Committee Hansard*, Sydney, 27 August 2015, p. 9.

57 Mr Paul Steele, Delegate, Health and Community Services Union, *Committee Hansard*, Sydney, 27 August 2015, p. 9.

58 NSW Disability Network Forum, *Submission 55*, p. 12.

violence, abuse and neglect of people with disability in institutional and residential care settings.

Individual workplace issues

8.59 Evidence presented to the inquiry showed that issues specific to individual workplaces and organisations had an enormous impact on whether individual workers went on to commit acts of violence, abuse or neglect. These workplace issues included chronic understaffing, a high use of casual staff, lack of gender-appropriate practice, as well as inappropriate risk-management and workplace culture leading to a suppression of reporting incidents or potential abusers not being removed from workplaces:

At an organisational level, with individuals who work with people who have disability, staff are crucial to reducing the incidence of restrictive practice. High workloads, staff mental health and staff suffering from burnout are associated with high rates and use of restrictive practice, and the stigma about people with disability and the perception that restraint is necessary due to diagnosis. Better supervision and management support can lead to use of least restrictive practice, if not no restrictive practice. Support for better self-care by staff is critical. Supervision of staff is critical.⁵⁹

Understaffed

8.60 The issue of staffing levels was raised by a number of submitters to the inquiry, who presented evidence that staffing levels can lead to neglect through lack of appropriate resources, or violence and abuse through worker frustration and stress. Advocare told the inquiry that low staffing levels can lead to neglect through a lack of time to provide appropriate monitoring. Ms Sharon Richards said:

Or at night time, if you only have one staff member on in a house or in a cottage, consequently, this woman was crawling around on a floor for basically the whole night and banging and bruising into things because nobody had actually gone to check on her. But, again, if you only have one person, they may be busy with somebody else.⁶⁰

8.61 Advocare also discussed the impact that inadequate staffing levels can have on the level of frustration in staff, increasing the chances of abuse. Advocare identified a case where a woman was alleged to have bruising caused by being struck repeatedly on the head with a buzzer:

Again, without wanting to excuse the behaviour, if the person is ringing the buzzer continually through the night, there is only you on and there is nothing you can do for them or do not believe there is anything you can do for them, there will be a frustration level put in there.⁶¹

59 Ms Helen Killmier, *Committee Hansard*, Melbourne, 30 June 2015, p. 31.

60 Ms Sharon Richards, *Committee Hansard*, Perth, 10 April 2015, p. 2.

61 Ms Sharon Richards, *Committee Hansard*, Perth, 10 April 2015, pp 2-3.

8.62 Ms Julie Pianto, a parent advocate, provided extensive evidence to the inquiry around staffing shortages in her son's residential care facility which resulted in sub-standard care which put his life at risk:

...I also think that it was unacceptable that I was told that staffing shortages were unavoidable and that was one of the reasons why Christopher was put at risk. I think, from my business life—when I was able to work—that managing that situation is part of what your responsibilities are, to make sure that people are not put at risk.⁶²

Cost reduction

8.63 Witnesses pointed to the desire of commercial disability service operators to run cost-effective services in order to maximise profits. This often meant that individualised needs were neglected by the service provider, unless they could streamline such services through co-location in order to reduce unit costs.

8.64 Ms Lamb pointed out cost-saving measures taken by facilities that resulted in impacts such as residents being forced to eat and sleep at inappropriate times, and losing basic decision-making power:

Managers and staff of organisations, nursing homes and institutions would never tolerate having to go to bed a six o'clock in the evening. They would never tolerate being told what time they can get out of bed. They would never tolerate not having control over what they eat and when they eat. Yet we still have to live like this. This is what leaves us vulnerable—the fact that our control has been taken away from us.⁶³

8.65 Evidence from service providers did not specifically address the issue of whether seeking cost-reductions in service delivery created greater potential for abuse or neglect. However, the committee received evidence from service providers that they followed a 'client centred approach':

We support the rights of all clients to make informed decisions and choices, without interference, about how they live their life.⁶⁴

...

Endeavour Foundation has a detailed decision making policy and procedure developed by the Community and Advocacy Support Unit to assist staff members in services to understand and the importance of decision making in a person centred approach to service delivery.⁶⁵

...

62 Ms Julie Pianto, *Committee Hansard*, Canberra, 21 August 2015, p. 19.

63 Ms Rayna Lamb, *Committee Hansard*, Perth, 10 April 2015, p. 20.

64 Optia Inc., *Submission 19*, p. 3.

65 Endeavour Foundation, *Submission 27*, p. 9.

[W]e work closely with our clients, and their families, to understand individual needs, preferences and goals and deliver our services in a way that allows individuals to achieve what they want to achieve.⁶⁶

8.66 The committee notes that such an approach would place the needs of clients at the centre of all decision-making. However, evidence submitted to the inquiry showed that in many cases this approach is not being adhered to, leading to instances of neglect.

Casual staff

8.67 Many submitters pointed to the reliance on casual staff to fill permanent positions. This had multiple negative impacts, not least that many casual staff were not given proper induction training for the individuals they were caring for. In some cases, this had a devastating effect on the quality of care provided:

Staff often have little choice about the situations they find themselves in, when it comes to casual employment especially. This poses a grave danger to the vulnerable people whom we work with and places staff at risk also. At times, a service may have residents with high care needs and staff with minimal or no training beyond basic induction. Induction is often three to five days of very intense information, and staff report absorbing little to no information from that session. I am aware of a young lady with a severe intellectual disability who was attended to by two casual workers at a high staff turnover facility. Instead of hoisting her, they carried her, one holding her legs and the other at the shoulders. Due to her rigidity and her condition, this resulted in both femurs being completely broken. This horrific scenario, I believe, could have been avoided through better education and a better staffing match.⁶⁷

8.68 The issue of the use of casual staff was also raised by a parent of a Yooralla resident, who claimed the use of casual staff was both dangerous and caused emotional distress to residents:

On many occasions two barely trained agency/casual staff who had never worked at the house before were on shift together with six adults with extremely complex support needs, including one resident with the complexities of being fed with a Percutaneous Endoscopic Gastrostomy (PEG) feeding tube. The high levels of anxiety to residents of being constantly confronted by complete strangers was evident. Given the constant strangers in the house we families were additionally extremely concerned about abuse and neglect.⁶⁸

8.69 Box 8.1 highlights the tragic consequences that systemic staffing problems and reliance on casual staff can have on people with disability with specific needs, and the importance of ensuring that staff are familiar with the needs of individual clients.

66 E.W. Tipping Foundation, *response to Submission 9*, p. 1.

67 Ms Heidi Egarter, *Committee Hansard*, Sydney, 27 August 2015, p. 10.30

68 Ms Sandra Guy, *Submission 70*, p. 3.

Box 8.1: Case study – Ms Stephanie June Fry

In August 2011, Ms Stephanie June Fry, a resident at an ACT government-run disability group home, choked to death when casual staff failed to heed warnings about her specific needs.

According to a *Canberra Times* investigation in November 2015, on the day of Ms Fry's death, the group home supervisor was absent and three casual workers from labour-hire firms were on duty. Ms Fry's file contained clear warnings that she required supervision while eating, that if she 'gets the chance she will gorge until she chokes and dies' and was not to be given bread. The new staff did not heed these warnings or complete a handover checklist to ensure they read the file. Ms Fry was found choking in the bathroom on sandwiches she had eaten while unsupervised. She was rushed to hospital but later died.

According to the *Canberra Times*, Ms Fry's family had previously warned the ACT government about the home's high staff turnover, noting that it was 'causing communication breakdowns and distress to Ms Fry'.

A spokesperson for the Community Service Directorate noted:

Ms Fry's death is not indicative of systemic failings but does represent a grave error for which we apologise... We have made significant changes to the way we ensure staff have the information they need to properly support people with disability in group homes.

However, the *Canberra Times* suggested that Ms Fry's death was due to the same systemic failings identified by the 2001 inquiry into the disability sector by former ACT Supreme Court Justice John Gallop which included 'high staff turnover, inadequate worker induction processes, and a reliance on unsupervised casual staff unfamiliar with residents' needs'. Despite the inquiry and consequent reforms, a number of former disability support workers suggested that the staffing problems highlighted by Ms Fry's death still exist.

Source: Christopher Knaus, 'Systemic failings saw disabled woman choke to death after staff miss warnings', *Canberra Times*, 18 November 2015, <http://www.canberratimes.com.au/act-news/systemic-failings-saw-disabled-woman-choke-to-death-after-staff-miss-warnings-20151007-gk3bml.html> (accessed 19 November 2015).

8.70 Evidence presented to the inquiry indicated that the casualisation of the disability workforce, and the likelihood it will increase under the NDIS, is a key contributor to abuse and neglect of people with disability. In discussing the rollout of the NDIS, Dr Ken Baker, Chief Executive of National Disability Services, told the inquiry:

There is also a risk, I think, that the casualisation of the workforce will increase—and we know that there is an association between high workforce turnover, in the context of workforce shortages, and the prevalence of abuse and neglect.⁶⁹

⁶⁹ Dr Ken Baker, Chief Executive, National Disability Services, *Committee Hansard*, Canberra, 21 August 2015, p. 21.

Gender-based abuse and neglect

8.71 A lack of workplace policies and practices to address the targeting of women with disability by perpetrators, has been raised by submitters as increasing the risk that these women will experience violence, abuse or neglect in institutions or residential care settings:

Women and girls with disabilities living in institutional settings are also more socially isolated than those living in the community, and experience greater challenges in communicating and protecting themselves owing to their impairments. Therefore, the opportunities for abusers to take advantage of those to whom they provide assistance for daily care (such as showering, toileting, dressing etc) and transportation are considerably raised.⁷⁰

8.72 The issue of gender appropriate staff was raised by witnesses citing a number of cases. Ms Samantha Connor discussed a case where a family request that a 12 year old girl not be showered by male carers was dismissed by the service provider as a breach of internal policy:

On one occasion Abbie's sister came to the house and discovered a male support worker with his hand under the doona which Abbie was sitting under. Abbie was wearing only a crop top and had no underwear on. Abbie was not able to give evidence to the police and continued being showered and dressed by male caregivers. After this incident, no staff were changed or stood down. Her parents were told that it was DSC [Disability Services Commission] policy that men can shower girls and the only thing they could do was go in as a family and stand over her whilst a male support worker showered her. So, from the age of 12 to 15, she was showered by men. The ratio was something like two women to six men who were staffing the accommodation.⁷¹

8.73 The family later suspected the young girl of being sexually abused by male carers, but she was unable to provide sufficient evidence to the police due to her communication difficulties.⁷²

8.74 Ms Marion Bright, a parent advocate, outlined a similar situation, where the inappropriate use of male staff for young female residents for overnight shifts increased the risk of sexual abuse through creating opportunities for predators:

Regarding the system, [Department of Human Services (DHS)] are culpable. So are Melbacc. They left her there alone overnight with a male agent. When I watched the Yooralla scandal and exposé in December, I was devastated. I thought, 'You bastards, DHS! You knew about leaving vulnerable clients alone overnight with male carers, and you've done that to my daughter. How dare you!'⁷³

70 Women with Disabilities Victoria, *Submission 53*, p. 21.

71 *Committee Hansard*, Perth, 10 April 2015, p. 32.

72 Ms Samantha Connor, *Committee Hansard*, Perth, 10 April 2015, p. 32.

73 Ms Marion Bright, *Committee Hansard*, Melbourne, 30 June 2015, p. 29.

8.75 Evidence presented to this inquiry of gender-based issues also offered examples of organisational exploitation of female residents.

We also know of women with disabilities who have no choice but to live in congregate living situations where privacy consists of pin-up boards to give privacy in bedrooms. Other women are being showered by male support workers in male bathrooms because it is convenient for the support worker to do the person at that particular time. Other supported residential facilities have sex rosters. These rosters are designed to help manage the behaviour of male residents. It is also a method women use to barter for things such as money, cigarettes and even food, because most of the limited welfare payments have been taken as rent and associated costs.⁷⁴

...

JFA Purple Orange has been told of emotionally abusive situations in some institutional settings arising from lack of privacy. For example, some settings have no doors on bathrooms, and some women have no choice about being showered in men's bathrooms as staff do not have the time to wait until the women's bathroom is available.⁷⁵

Workplace culture

8.76 The issue of workplace culture being a leading factor in creating environments of potential abuse was discussed by a number of submitters. Ms Carolyn Frohmader, Executive Director of Women with Disabilities Australia, pointed out the disconnect between the purported culture presented by service delivery organisations, and her experience of the service standards provided by those organisations:

One of the difficulties I have had in reading some of the submissions to this inquiry, is that the content of the submissions from some service providers simply does not reconcile with what I see and what I know happens in those services.⁷⁶

8.77 The committee believes it is important to note that every service provider organisation who submitted evidence to the inquiry discussed the protective culture they have developed to reduce incidents of violence, abuse and neglect, through training and support for their workforce and through self-advocacy training and support for facility residents to recognise and report such incidents:

We are invested in removing barriers to inclusion for all people with disability. This includes barriers to speaking out and barriers to justice.

Northcott⁷⁷

74 Ms Margie Charlesworth, Convenor, Women with Disabilities South Australia, *Committee Hansard*, Adelaide, 28 August 2015, p. 13.

75 JFA Purple Orange, *Submission 12*, p. 19.

76 Ms Carolyn Frohmader, Executive Director, Women with Disabilities Australia, *Committee Hansard*, Sydney, 27 August 2015, p. 40.

77 Ms Hilary Smith, Business Development and Partnerships Coordinator, Northcott, *Committee Hansard*, 27 August 2015, p. 26.

Yooralla engaged additional expertise to help lead and maintain a rights based service culture that would empower clients to be self-directing, with the ability to advocate for themselves to the maximum extent possible.

Yooralla⁷⁸

We also recognise clients might need support to speak out about issues. That is why we encourage the development of self-advocacy, access to independent advocates and operate our client voice program.

Optia Inc.⁷⁹

8.78 However, despite many organisations discussing the importance of 'self-advocacy' and 'self-empowerment' of people with disability, the committee is disappointed to note that most of these organisations did not appear to proactively promote the opportunity to make a submission to this inquiry to their staff or clients, nor did they appear to offer support to their client base to make submissions.⁸⁰ It is telling that organisations drafted submissions from the perspective of facility managers, and no organisation invited to speak at an inquiry hearing brought with them either lived experience witnesses to speak on their own behalf, or any members of the residents' self-advocacy groups facilitated by service delivery organisations.

8.79 Similar to the evidence provided by Ms Frohmader, Ms Silvana Gant, President and Convenor of Adelaide People First told the committee that her advocacy group experienced instances where statements on service standards made by organisations did not match up with the services actually delivered:

Services are really good at using language to make it look like they do what they do not actually do. Our group has heard language like 'person centred thinking' or 'person centred planning' for most of the last three decades—it was individualised service planning before it was person centred planning. We do not see any evidence that particularly medium to large disability service providers are actually doing that. The main reason for that is that they are still continuing to provide congregated models of service across all aspects of life. It is not just where people live; it is where they work, what they do with their free time, and it is across the lifespan from childhood through to the grave effectively.⁸¹

8.80 In assessing the disparity between statements of positive corporate culture versus evidence of corporate practice on the ground, the committee notes the statements made by Yooralla regarding the past incidents of sexual assault and abuse suffered by Yooralla residents:

On behalf of Yooralla, I apologise sincerely for the occasions of abuse that occurred within our organisation. We are very sorry and deeply regret what occurred. We are sorry for the impact that these incidents have had and are

78 Yooralla, *Submission 146*, pp 2-3.

79 Optia Inc. *Submission 19*, p. 1.

80 With the exception of Northcott, which did encourage people to whom they provide services to make submissions to the inquiry.

81 Ms Silvana Gant, *Committee Hansard*, Adelaide, 28 August 2015, p. 10.

having on the lives of the victims, their families and the members of the community.⁸²

8.81 However, the committee notes the evidence of Ms Jules Anderson, the Yooralla resident who was repeatedly sexually assaulted and abused by a Yooralla care worker who has since been charged and found guilty of the assaults. Ms Anderson told the inquiry she has repeatedly asked to be moved from the room in which the assaults occurred, with no agreement from Yooralla to do so. Ms Anderson has described her very deep distress at being forced to remain living in the bedroom where she was repeatedly raped, and has also discussed the post-investigation culture of Yooralla management:

I went to a finance meeting about rent going up and whatever. The fact is they do not care about us. When I went there, there was the manager of our house and a person further up. He did not even introduce himself to me, and that was my first meeting with any of the new management. And they want us to give them a second chance. It is as little as that. I had to say, 'And you are? And you are?' and he still would not say. In the end, he said, 'I'm [REDACTED],' but he had plenty of chances to say something, and I walked out of that meeting in tears because I could not believe how little respect or response I got. And yet I have heard so many different things about this. I went in there with an open mind. Like I am today, I was feeling a bit like, 'Am I really here? Am I really going to do this?' And that was the response I got. Nothing. He knew my name before I knew his.⁸³

Reporting failures

8.82 A longer discussion of systemic improvements to reporting frameworks can be found in chapter five. However, evidence presented to this inquiry showed there is a widespread problem with organisation-level incident reporting, caused by a lack of adequate training and reporting procedures, and in some cases by organisations actively discouraging incident reporting. The workplace culture whereby incidents are not appropriately reported and followed up, itself creates a situation where even more abuse can occur:

It is significant that some organisations have operating rules that require reporting to management instead of informing police of a criminal or suspected criminal act or a matter of neglect or abuse. This allows organisations to inhibit the actions of concerned staff in reporting matters to the authorities and to hide mistreatment of illegal activity to protect the organisation, quietly moving any dangerous workers who then abuse people in other services.⁸⁴

8.83 Multiple submitters presented evidence that when they reported incidents to the service delivery organisation, they were discouraged from making reports by being told they were the only ones who were complaining:

82 Dr Sherene Devanesen, Chief Executive Officer, Yooralla, *Committee Hansard*, Melbourne, 30 June 2015, p. 1.

83 Ms Jules Anderson, *Committee in-camera Hansard*, Melbourne, 30 June 2015, p. 17.

84 Mr Milton Keynes, *Submission 6*, p. 2.

When I made complaints to the centre about anything I was always made to feel and sometimes told that I was the only parent who had a problem with the centre. During a meeting with management that included many parents I discovered that this was not true and many of the things I had complained about had been complained about by most if not all of the other parents, caregivers and guardians.⁸⁵

8.84 Other evidence highlighted a workplace culture focused on hiding, rather than dealing with incidents of violence, abuse or neglect:

I have known of workers who have stood up in advocacy of clients who have disabilities. They have been pretty much told, by their management, 'We're just going to shove that underneath the rug. We're not going to do anything about it.' When they stand up for a person with a disability, they get victimised. It is inexcusable.⁸⁶

8.85 This issue has also been highlighted in research conducted by the Intellectual Disability Rights Service, which surveyed the experiences of people with disability, their family members and friends, disability service staff, independent disability advocates and others:

Key lessons that we learnt regarding disability workers were (1) workers must have adequate expert support when they are working with residents who have challenging behaviours; (2) workers need better training to recognise and respond to indicators that a person with disability may be experiencing abuse; (3) there must be protection for whistleblowers; and (4) management must support front-line staff in finding solutions to abusive situations.⁸⁷

Abusers not removed

8.86 Many family members and advocates presented evidence to the inquiry of situations where they alerted organisations of 'red-flag' behaviours of individual workers. Where those warning signs were ignored, those staff members went on to abuse or neglect the people they were caring for.

8.87 In many cases present to this inquiry, workers were simply moved to another facility to care for other vulnerable residents:

Upon investigation, Client IJ had been frequently sworn at using offensive language by one particular support worker as well as being pushed and shoved and told she was useless and ought to be put out of her misery. We devised a communication aid for the client who communicated these complaints to us by blinking. As a result we lodged a complaint with management but the only action taken was to transfer the worker to another Group Home.⁸⁸

...

85 Ms Cheryl McDonnell, *Submission 37*, p. 12.

86 Ms Wanita McDade, *Committee Hansard*, Perth, 10 April 2015, p. 42.

87 Ms Margot Morris, *Committee Hansard*, Melbourne, 27 August 2015, p. 2.

88 Disability Justice Advocacy Inc., *Submission 14*, p. 4.

Staff accused of abuse were often left in their positions or moved to another part of the service.⁸⁹

8.88 Children with Disability Australia noted that in many cases, organisations justified their lack of action to address systemic issues on the basis they had solved the problem by moving the abuser from the location:

Frequently, organisations appeal to the notion that abuse has only occurred due to the presence of malicious individuals within the organisation. This is often referred to as the 'bad apples' argument. It is suggested that because the offending individual has been removed or disciplined, no further action is required. This deflects focus away from the systemic factors that contribute to abuse occurring, including poor governance, a lack of managerial accountability and a discriminatory organisational culture.⁹⁰

Risk management

8.89 A key issue discussed by multiple witnesses, is unintended negative consequences resulting from organisations adopting an overly conservative risk management approach to reducing the potential numbers of reportable incidents. Evidence presented to the inquiry suggests that this approach can have the inverse effect of increasing the chances of abuse or neglect, through the denial of opportunity for positive experience. Professor Richard Bruggeman, a disability expert who is also the South Australian Disability Senior Practitioner, submitted that the bias of organisations is to prevent things they can be sued for, and 'duty of care' is often regularly referenced as a reason to prevent learning due to its inherent risks. Professor Bruggeman further submitted that the current system of regulation and accreditation exacerbates this approach, as it focuses on ensuring bad things do not happen, but does not enforce good outcomes such as developmental opportunity and personal sovereignty.⁹¹

8.90 The Villamanta Disability Rights service contended that risk management undertaken by organisations does not acknowledge the very real fact that abusive predators and neglectful staff are a fact of life and will continue to occur, and organisations must be appropriately vigilant to that risk:

What does risk management do? It contemplates and acknowledges the potential critical event, and that is one very clear issue that we confront here: every single time an event of abuse or violence et cetera is raised, there is the disbelief, the shock, the horror. We cannot operate from a place where we do not expect it to happen...

In this instance, where we are talking about abuse perpetuated by people, not natural disasters or mechanical failures, the presence of a robust plan that is visible, consistent and known actually provides a deterrent. If everybody is working together and everybody knows how the situation

89 Intellectual Disability Rights Service, *Submission 128 Attachment 1*, p. 3.

90 Children with Disability Australia, *Submission 144*, p. 22.

91 Professor Richard Bruggeman, *Submission 7*.

will be handled there is actually a deterrent to that kind of behaviour simply because you know what the protective mechanisms are.⁹²

8.91 The Endeavour Foundation submitted that another cultural reason that organisations respond inappropriately to abuse is the level of discomfort it can create:

It must also be noted that for an organisation to speak of abuse so openly is uncomfortable. It is uncomfortable for managers, staff, volunteers and Board Directors to acknowledge that allegations of abuse occur in the organisation of which they are a part.⁹³

8.92 Professor Bruggeman outlined to the inquiry that the 'risk-management' approaches by facilities to control the behaviour of residents actually exacerbated behaviours and led to further instances of abuse:

At the top we have our seclusion, physical restraint, chemical restraint and mechanical restraint—locking up, tying up or drugging people—and at the bottom I have these things which I have called organisational restraint, whereby individuals' wishes, goals and interests are not fulfilled—and often not even sought—due to roster restrictions, work allocations, risk aversion, management decisions, smooth running of households, management staff's lack of training and development, and old-fashioned lack of interest. My theory is: get rid of that stuff at the bottom and we will reduce the stuff at the top. I have to say that, if I were in a group home and I were bored senseless every day and I could not make any decisions and I did not have any language to communicate and tell people how cruel, nasty and bastard-like they were being, I would be lashing out too, and then of course I would get zapped with some drugs or sent into my room. The same thing occurs with abuse. At the bottom we have that lack of interest, and of course that flows through to those more obvious types of abuse that we are more aware of.⁹⁴

8.93 Ms Cheryl McDonnell echoed the view that a lack of opportunity was itself a form of neglect, and made an eloquent submission to the inquiry which detailed her advocacy with care providers to her daughter over the past five years. In particular, Ms McDonnell wrote of the rights that people with disability have, just like anyone else, to live fulfilling lives:

It is my belief that Terri has a right to continue learning new skills, developing to her full potential. She is not a burden to be carried, nor is she broken in need of fixing, nor is she to be pitied. She is indeed a whole human being with a full and interesting life. She has a developing skill set, an ability to continue learning, that with the right support and assistance she can expand and grow her skills, abilities and her understanding as she moves through the world and through life.⁹⁵

92 Ms Naomi Anderson, *Committee Hansard*, Melbourne, 30 June 2015, pp. 27-28.

93 Endeavour Foundation, *Submission 27*, p. 6.

94 Professor Richard Bruggeman, *Committee Hansard*, Adelaide, 28 August 2015, p. 31.

95 Ms Cheryl McDonnell, *Submission 37*, p. 10.

8.94 Mr David Bowen, Chief Executive of the National Disability Insurance Agency, suggested that this issue could be addressed by changing the accreditation schemes for disability service providers to require measurable positive outcomes for individuals:

...I also think there has been quite a significant failure of the regulatory systems that exist. Part of it is because of the way accreditation systems have been structured around service delivery...The nature of those accreditation systems also is that they are predominantly—in fact, overwhelmingly—focused upon process measures. To get accreditation, which usually involves some follow-up audit, it is an audit of service providers' processes with very little focus on the outcome for the individual and hardly ever any inquiry of the person who is at the centre of this, the person for whom these accreditation systems are set up. There is very little opportunity for them ever to have any input or for their feedback to be taken into account in that audit and accreditation processes.

My very strong suggestion for quality and safeguards is to move away from those service provider accreditation systems to a risk based one around the individuals.⁹⁶

Board-level responsibility

8.95 The issue of vesting responsibility for the safety and well-being of disability service recipients was raised in different hearings. At the first hearing in Perth, Ms Connor quoted Mr Alan Blackwood from the Young People in Nursing Homes Alliance, who cited occupational health and safety (OHS) systems which place responsibility for workplace safety with boards and management, with civil and criminal sanctions for breaches of OHS duty of up to \$600,000 in fines or five years' imprisonment for serious breaches as leading to changes of behaviour of directors and companies:

It is telling that, like all company directors in Australia, board directors and senior officers of disability organisations have legislated liability for breaches of financial, corporate and OHS regulations, but face no comparable liability or established sanctions for serious breaches in their duty of care to clients. This is what we need to fix.⁹⁷

8.96 This idea was also raised during subsequent hearings, and in other submissions. Mr Milton Keynes proposed that it should be an offence for an organisation 'to instruct staff to not notify authorities, or otherwise prevent them from doing so, and a further offence to take to take action against staff for making a notification'.⁹⁸

8.97 Professor Bruggeman suggested such a scheme to enforce duty of care could be expanded to include where positive outcomes were not achieved:

96 Mr David Bowen, Chief Executive Officer, National Disability Insurance Agency, *Committee Hansard*, Melbourne, 30 June 2015, pp. 38-39.

97 *Committee Hansard*, Perth, 10 April 2015, p. 33.

98 *Submission 6*, p. 2.

If you live in a group home and the staff are negligent and you have your leg broken, you can sue them. If you live in a group home and the staff are negligent in that they never give you skills and in 10 years time you have no skills when you might have been doing your own cooking and your own cleaning and your own ironing and perhaps living in your own flat, they do not get sued for that.⁹⁹

Concluding committee view

8.98 The committee is very concerned that evidence presented to this inquiry shows that too often approaches taken by organisations in response to instances of abuse or neglect do not adequately address the incident. Some responses could be considered a further abuse of the victim, while others can significantly increase the chances of such incidents recurring.

8.99 It is hard to imagine that any other industry which intimately touches the lives of so many Australians would be allowed to operate with such a dearth of appropriate risk-management to protect and enhance the lives of vulnerable people.

8.100 While individual organisations have the ultimate responsibility to select and institute practices to eliminate harm, there is evidence to the committee that suggests a need for systemic or legislative responses which provide sanctions against organisations which do not appropriately live up to that responsibility.

99 *Committee Hansard*, Adelaide, 28 August 2015, p. 32.

Chapter 9

National Disability Insurance Scheme

9.1 This chapter examines various challenges and opportunities presented by the rollout of the National Disability Insurance Scheme (NDIS), to reduce violence, abuse and neglect of people with disability¹.

9.2 Witnesses generally welcomed changes to the disability sector arising from implementation of the NDIS.² Many saw the scheme as an opportunity to identify long-standing concerns and implement nationally consistent standards and practices that better support the human rights of people with disability—such as the right to be free from exploitation, violence and abuse (Article 16 of the Convention on the Rights of Persons with Disabilities).

9.3 In addition to recognising the opportunities afforded by the NDIS, witnesses observed that some elements of the scheme do not assist with the elimination of violence, abuse and neglect in residential and institutional disability settings.

9.4 Chapter 9 discusses some of the key issues including:

- NDIS coverage;
- self-directed disability support;
- unit pricing; and
- the Australian Council of Governments' Disability Reform Council consultation paper on a quality and safeguarding framework.

NDIS coverage

9.5 The NDIS was launched in July 2013 and will be rolled out nationally over a three-year period (2016–2019), except in Western Australia which has not yet signed up to the scheme.³ The NDIS will replace existing disability service systems with a

1 *Terms of Reference (l)*: the challenges that arise from moving towards an individualised funding arrangement, like the National Disability Insurance Scheme, including the capacity of service providers to identify, respond to and prevent instances of violence, abuse and neglect against people with disability; and *Terms of Reference (m)*: what elements are required in a national quality framework that can safeguard people with disability from violence, abuse and neglect in institutional and residential settings.

2 For example: Dr Louise Roufeil, Executive Manager, Professional Practice, Australian Psychological Society, *Committee Hansard*, Melbourne, 30 June 2015, p. 32.

3 Western Australia is currently trialling the National Disability Insurance Scheme (NDIS) My Way model in the Lower South West and Cockburn–Kwinana areas and the NDIS in the Perth Hills area: <http://disability.wa.gov.au/wa-ndis-my-way/wa-ndis-my-way/>, accessed 30 September 2015; <http://www.ndis.gov.au/about-us/our-sites/wa>, accessed 9 November 2015.

uniform framework, for those people with disability who qualify as participants (an estimated 460,000 people).⁴

9.6 People with disability who wish to participate in the NDIS must first meet certain access requirements. During the trial period (July 2013–June 2016), the requirements relate to residency within a trial site, age and status as an Australian resident, and entail a disability or early intervention requirement.⁵ After the scheme has been rolled out within a jurisdiction, all people with disability within that state or territory will be covered by the NDIS, subject to similar criteria.⁶

9.7 People with disability who do not qualify as participants in the NDIS will continue to receive supports and services from existing Commonwealth, state and territory-based disability service systems and intersecting systems (such as the aged care system).⁷

No coverage for non-participants and no coverage in some areas

9.8 In this context, the committee received evidence expressing concern with the current focus on the NDIS to the exclusion of non-scheme participants, whose supports might be adversely affected by the roll out. Ms Therese Sands, Co-Chief Executive Officer of People with Disability Australia and Australian Cross Disability Alliance (Disability Alliance) member, said:

We have...been very concerned about jurisdictions such as New South Wales that have wanted to hand over all of their funding to the Commonwealth. We have been raising issues around what that means for people who have not got an NDIS package and what their plan is for the rest of the across-government service provision...we are very aware that we need to be progressing them to come to some agreement or commitment—a recommitment and a refocus on the NDS [National Disability Strategy] and...some kind of mechanism that will drive that. Otherwise, there will be significant issues for people who will completely fall through the gaps. They may have already been falling through the gaps in the broken service system we had before, but we will now see people falling through different

4 Senator the Hon Mitch Fifield and the Hon Malcolm Turnbull MP, Prime Minister, '*Delivering the National Disability Insurance Scheme*', joint media release, 16 September 2015, <http://www.formerministers.dss.gov.au/15426/delivering-the-national-disability-insurance-scheme/>, accessed 30 September 2015.

5 The NDIS Access checklist is available online at <http://www.ndis.gov.au/ndis-access-checklist>, accessed 29 October 2015

6 For the New South Wales example: see NDIS, *What is the National Disability Insurance Scheme, Information about the NDIS, what it does and how to access it*, factsheet, 25 August 2015, <http://www.ndis.gov.au/sites/default/files/documents/our-sites/NDIS-NSW-roll-out-Participant-pack.pdf>, accessed 29 October 2015.

7 Existing disability service systems will also provide for people with disability who qualify as participants in the NDIS but whose individual plan has not yet commenced.

kinds of gaps because there is no disability support mechanism for them...This is an opportunity to change that[.]⁸

9.9 The First Peoples Disability Network Australia spoke about the situation of people with disability in regional and remote Australia, suggesting that the NDIS approach is too narrow when a broader approach—such as through the National Disability Strategy (NDS)—is warranted:

From an Aboriginal perspective, this is a really critical issue. We talk about the need for a whole-of-community response to disability, particularly in regional and remote Australia. There is a real risk that it is going to be framed as an NDIS-only response. You could well have a situation where the National Disability Insurance Agency may work quite well with Aboriginal people, but the National Disability Insurance Scheme will not create accessible footpaths in Wadeye or create an accessible environment where someone can travel 500 metres down the road in their wheelchair to get into the general store. Unless we have a process where everyone gets an opportunity to say what is needed in the community, it is not going to work...It does not necessarily mean that it has to be a service system response either...If you look at the way disability is responded to in developing countries where there is no government mechanism, there are ways in which people come together and support people with disability perfectly well...We think we have an opportunity here to make a really substantial difference in Aboriginal Australia...there is a very real risk that all the eggs are in the NDIS basket, as everyone keeps saying, and that is why we have to revisit or reinvigorate the National Disability Strategy.⁹

9.10 Witnesses—such as Ms Christina Ryan, General Manager of Advocacy for Inclusion—highlighted that, even for scheme participants, the NDIS does not address all the needs of people with disability. Ms Ryan identified housing as a critical and specific example:

The NDIS gives us a significant opportunity to change [segregated and institutional environments], but, as we know, it is actually specifically prevented from providing housing solutions for people. So, the one glimmer of hope for people with disabilities in this country today—the NDIS—is actually not the solution...People are still being forced to cohabit with people who are being violent towards them. People are still being forced to live in arrangements that they are telling us they really do not want to be in or that they are frightened of. We have to change this.¹⁰

8 Ms Therese Sands, Co-Chief Executive Officer, People with Disability Australia, *Committee Hansard*, Sydney, 27 August 2015, p. 44.

9 Mr Damian Griffis, Chief Executive Officer, First Peoples Disability Network Australia, *Committee Hansard*, Sydney, 27 August 2015, pp 44–45.

10 Ms Christina Ryan, General Manager, Advocacy for Inclusion, *Committee Hansard*, Canberra, 21 August 2015, p. 8. Also see: Mr David Craig, Project Coordinator, Victorian Advocacy League for Individuals with Disabilities, *Committee Hansard*, Melbourne, 30 June 2015, p. 49; Ms Therese Sands, Co-Chief Executive Officer of People with Disability Australia and Australian Cross Disability Alliance, *Committee Hansard*, Sydney, 27 August 2015, p. 44.

Committee view

9.11 The committee acknowledges that the NDIS is an evolving program, which provides a timely opportunity to address long-standing issues in the disability sector for people participating in the scheme. The committee is concerned however, that the NDIS does not address the critical area of accommodation, which is the setting in which violence, abuse and neglect is most likely to occur. The committee considers that this matter requires further attention.

Self-directed disability support

9.12 In August 2011, the Productivity Commission published its report titled *Disability Care and Support*.¹¹ The report recommended the creation of the NDIS and the incorporation of self-directed disability support as a core feature of the scheme. The Australian Government accepted this recommendation and in March 2013 the *National Disability Insurance Scheme Act 2013* (NDIS Act) was enacted.¹²

Preparation for self-directed disability support

9.13 The United Nations Committee on the Rights of Persons with Disabilities commended the introduction of a national scheme for self-directed disability support.¹³ However, advocacy bodies questioned whether people with disability have been adequately prepared to assume the role provided for in the NDIS.

9.14 The Chief Executive Officer of the National Disability Insurance Agency (NDIA), Mr David Bowen, told the committee that the NDIS strikes 'a reasonably good balance in making sure that supportive voices are heard but that the plan reflects the desires of the person and not what someone else thinks is best for them'. Further:

We recognise that there are people with extremely profound disabilities who, as a result of that, have limited communication and for whom the type and duration of their engagement requires a highly specialised approach to planning. So in some cases we have outsourced that or purchased it in as an additional resource...The majority of people in our scheme with intellectual disability can, with appropriate support, express their own wishes and desires, and I am strongly opposed to having, under the guise of supported decision making, in effect substituted decision making coming back into play. So the training for our planners is very much around—to the extent that it is possible, and in most cases it is—it being the voice of the person

11 Productivity Commission, *Disability Care and Support*, Report No. 54, Canberra, 31 July 2011, <http://www.pc.gov.au/inquiries/completed/disability-support/report>, accessed 30 September 2015.

12 Part 2 of Chapter 3 of the *National Disability Insurance Scheme Act 2013* focuses on self-direction through the creation and management of participants' plans.

13 Committee on the Rights of Persons with Disabilities, *Concluding Observations Australia*, UN Doc. CRPD/C/AUS/CO/1, 2013, p. 1, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CRPD%2fC%2fAUS%2fCO%2f1&Lang=en, accessed 30 September 2015.

and their goals and aspirations that come through in the plan. We spend a lot of time with our own staff in training on this.¹⁴

9.15 Advocacy for Inclusion expressed the view that people with disability have not been adequately prepared to take charge of their plans but this is an important precursor to being able to articulate a need for a safer and more caring living environment:

We need people to be prepared for their planning. This has been just left by the wayside. All the resources have gone into preparing service providers—because the poor, delicate things need a lot of help to get ready—but people with disabilities have not been getting much of that. They need to be got ready as well. They need to be given an opportunity to outline how they would run their lives if they had an opportunity to do so—removing the controls, removing the barriers that they have to getting out there. People need to be given the opportunity to say, 'I'm not comfortable with X person or with the way this person is looking after me'.¹⁵

9.16 Ms Ryan specifically noted that, in the Australian Capital Territory trial site, the NDIA has facilitated the opportunity for a person with disability to meet with a planner without a guardian, support worker or family member alongside:

We know from working with people individually over the years through individual advocacy that they often say stuff to us that they would never say in another space if the person was present. It is a bit like teenagers talking when their parents are there. You are not going to say all these things. You need to be able to say something. You want to test drive it. Often it is because the person does not want to upset the people that care about them. They do not want to say, 'All of this hard work you've gone to to get me into this house that I hate living in; I would rather do something else. I do not want to be saying that. It's upsetting.' So they do not say it. But the reality is that they are forced into an environment they do not like. The planning process for the NDIS has to create that opportunity... They are doing that quite well locally; they need to do it better.¹⁶

9.17 Victoria's Public Advocate, Ms Colleen Pearce, highlighted as a main concern the particular situation of people with cognitive impairment:

...the people most marginalised through the NDIS process are people with an intellectual disability and associated communication impairment, living in an institution or group home setting, who do not have family support or

14 Mr David Bowen, Chief Executive Officer of NDIA, *Committee Hansard*, Melbourne, 30 June 2015, p. 41.

15 Ms Christina Ryan, *Committee Hansard*, Canberra, 21 August 2015, p. 13. Also see: Ms Mary Mallett, Chief Executive Officer, Disability Advocacy Network Australia, *Committee Hansard*, Canberra, 21 August 2015, p. 14, who suggested that the NDIA provide funding to facilitate self-advocacy preplanning.

16 Ms Christina Ryan, *Committee Hansard*, Canberra, 21 August 2015, p. 13.

independent advocacy. They may have little capacity to become more confident and skilled consumers in the NDIS market-driven philosophy.¹⁷

9.18 Ms Pearce argued that such people will never become empowered consumers.¹⁸ Dr Louise Roufeil from the Australian Psychological Society agreed that the NDIS does not satisfactorily address that issue as:

It is beyond the capacity of the average planners to be making those sorts of judgements about capacity. If it was someone in a court of law, the degree of assessment that would occur to make those decisions would be considerable, but we do not do the same for people with a disability.¹⁹

9.19 Professor Richard Bruggemann, the Disability Senior Practitioner in South Australia (appearing in a private capacity), added that participants are likely to require more than one session with a planner in order to produce their individualised plans:

What about the guy who has never made a decision in his life? This is not going to take one session; it might take 10 sessions over six months, and some teasing out of the things that he really likes doing. If we do not do that, in my view, he is being abused, systemically, by us not taking the time to find out what is important to him.

I think that in Australia we have a great opportunity, with the NDS and the NDIS, to do things much better. In the past, we have had our rhetoric about what we say is important and what we even think is going to happen, but when you drill down you often find that the lives of many people with disabilities are empty and boring, and they are dependent on other people. And we can do much better than that.²⁰

9.20 Another witness—Mr Robbi Williams from JFA Purple Orange—commented that it will take time for participants to become comfortable with self-advocacy. For that reason, and because of ingrained attitudes in the disability sector, the NDIS will not eliminate or reduce the risk of violence, abuse and neglect in institutional and residential settings:

It will not. There are a couple of reasons why it will not. First of all, it is going to take a while for people living with a disability and their families to move into the potency of having choice and control, because we have spent the last 1,000 years training people not to have that and they are not going to just get that overnight. We have seen it in other jurisdictions. It takes time for the momentum to build for people to take hold of the opportunities that they will have, having genuine jurisdiction over the supports that they can have in their lives.

17 Ms Colleen Pearce, Office of the Public Advocate, Victoria, *Committee Hansard*, Melbourne, 30 June 2015, p. 33.

18 Ms Colleen Pearce, *Committee Hansard*, Melbourne, 30 June 2015, p. 33.

19 Dr Louise Roufeil, *Committee Hansard*, Melbourne, 30 June 2015, p. 35.

20 Professor Richard Bruggemann, *Committee Hansard*, Adelaide, 28 August 2015, pp 26–27.

The other reason is that there are plenty of forces keen on maintaining the status quo. It is quite unsettling the paradigm shift that is required. If you are used to running services in a particular way and you have to retool those services to genuinely respond to the imperatives of people having choice and control to people having valued participation in community life and the economy, that is a fundamental change to the way services should ply their business, and I think it is really scary for the vast majority of them.²¹

9.21 Professor Bruggemann also cautioned against vested interests and argued that, rather than enabling independence and participation, there is a 'propensity in the NDIS for dependency making':

Consider the man who has just got his \$50,000-a-year package to help him do things. Instead of going to an organisation that has a background in working with people with disabilities, was probably developed by families 30 years ago and has had an ethos of doing this, one of the new providers, who is in this business because there is a way of making money—'\$26 billion; I've got to have a bit of that'—sees this guy. There are two options for the way in which he might be supported. The first way is that you actually give him some support to learn new skills so that he can do his own cooking, that he can do these things, and he has got some system in place so that he does not have to have somebody stay in the house overnight. He has a phone; he knows how to use it. The next time he does his plan, it is going to cost \$15,000 a year to support him because he is now more independent. Would you say: 'Heavens above, that's \$35,000 of income we're going to lose. Why don't we just keep doing what we've always done: keep him dependent'? I think there are some things we have to look at within the NDIS.²²

Committee view

9.22 It is concerning that evidence suggests that in the implementation of the NDIS, the primary focus to date appears to have been on preparing providers, rather than the people the scheme is intended to benefit. This does not appear to be consistent with the central feature of NDIS—self-directed disability care.

9.23 Based on the evidence presented, the committee considers that more effort and resources need to be invested in supporting participants—in both the short and long term—particularly those participants with intellectual impairment who might require additional support.

9.24 Providing NDIS participants—and more broadly, all people with disability—with the knowledge, skills and confidence to identify and articulate goals and needs enables those people to recognise and safeguard against violence, abuse or neglect in their living environment (also see chapter 7).

21 Mr Robbi Williams, Chief Executive Officer, JFA Purple Orange *Committee Hansard*, Adelaide, 28 August 2015, p. 55.

22 Professor Richard Bruggemann, *Committee Hansard*, Adelaide, 28 August 2015, p. 26.

Unit pricing

9.25 Chapter 8 discussed evidence presented to the committee of existing disability workforce issues that can cause or exacerbate the risk of violence, abuse and neglect of people with disability. Another issue featured in the evidence was how unit pricing affects quality and safeguards provided by people who work in the sector. Providers and unions contended that the unit pricing calculated and set by the NDIA will not ensure the provision of quality service and mitigate against the risk of violence, abuse and neglect in residential and institutional settings.

Unit pricing arrangements

9.26 The NDIS Act states that a funded support must represent 'value for money in that the costs of the support are reasonable, relative to both the benefits achieved and the cost of alternative support'.²³ According to the NDIA, the prices for supports have been structured to reflect this statutory requirement and:

...reflect prices in comparable schemes in trial site areas and work jointly undertaken by NDS and NDIA to establish an efficient price for personal care and community access.²⁴

Interaction of unit pricing arrangements with disability workforce issues

9.27 Although the NDIA has recently reviewed unit pricing arrangements for the NDIS, witnesses indicated that there is still significant discord between remuneration in the disability care sector and the quality and safeguards that should be incorporated into the scheme.

9.28 Mr Lloyd Williams from the Health Services Union and the Health and Community Services Union (Victorian Branch) stated that there is a critical link between quality and safety, which is not—but should be—factored into the unit pricing:

...the full marketised fundamentals of the NDIS system are wrong...funding around quality, funding around safeguards, and funding for service providers around delivering ongoing professional development for their staff should be built into the pricing. These things all cost money. Quality costs money. Paying disability support workers decent wages and conditions so that working in disability is a career of choice—and not just flooded by people who want to move through the system—is important. Currently the funding is solely based on the absolute minimum employment

23 Paragraph 34(1)(c) of the *National Disability Insurance Scheme Act 2013*.

24 National Disability Insurance Scheme website, *Pricing and Payment*, <http://www.ndis.gov.au/providers/pricing-and-payment>, accessed 2 November 2015. The unit pricing arrangements were recently reviewed, with effect from 1 August 2015: NDIS website, *Pricing and catalogue changes from 1 August 2015*, <http://www.ndis.gov.au/providers/pricing-and-payment/pricing-changes-2015>, accessed 9 November 2015.

standards. So there is no capacity for career structures that advance people. Everything is set at the lowest common denominator.²⁵

9.29 At the Melbourne hearing, UnitingCare lifeAssist illustrated the disparity in unit pricing under the NDIS and mental health services. Ms Helen Killmier, Executive Manager, Disability Solutions, contended that the critical issue of funding needs to be resolved based on what is the appropriate level of care for people with disability:

...organisations do not have enough dollars to do what they need to do. If you look at a basic unit of cost under the pricing schedule for the NDIS and at a basic unit of cost under the mental health re-commissioned services, it is not quite double, but it is close to double. So your basic unit of cost to work with someone with a disability is almost half that required to work with someone who has a mental health issue. Having spoken a lot to people in the mental health environment, and me being in the disability environment, the sorts of interventions required, the sorts of skills of practitioners required, are not vastly different in [mental health]. There are some obvious differences, but there is a huge salary discrepancy. Really, we are asking disability support workers, who are amongst the lowest paid people in our society, to care for people who can have some of the most chronic and the most complex behaviour support needs.²⁶

9.30 The Tasmanian Branch of the Health and Community Services Union called on the NDIA to review the adequacy of unit pricing, to ensure that it provides a guaranteed and ongoing supply of high-quality, trained and skilled disability support workers.²⁷ Across the country, the United Voice WA emphasised that 'retaining good quality workers is key to exposing and overcoming abuse and neglect in the sector' and 'it is essential that the paid workforce be acknowledged as a vital part of the solution'.²⁸

9.31 Another provider —Northcott—echoed these concerns and acknowledged that the future provision of quality training and support for staff is uncertain in the context of unit pricing. Its representative, Ms Hilary Smith, said:

I expect the current picture may not be what the eventual picture is going to be for the affordability or otherwise of training. Our position would be that, if we were looking at something that stays pretty much static from now, then, yes, training is going to be increasingly difficult to provide as services become increasingly flexible as funding for those services becomes increasingly fragmented.²⁹

25 Mr Lloyd Williams, National President, Health Services Union, *Committee Hansard*, Sydney, 27 August 2015, p. 13.

26 Ms Helen Killmier, Executive Manager, Disability Solutions, UnitingCare lifeAssist, *Committee Hansard*, Melbourne, 30 June 2015, p. 31.

27 Ms Tammy Munro, Lead Organiser, *Committee Hansard*, Sydney, 27 August 2015, p. 9.

28 Ms Kelly Shay, Assistant Secretary, *Committee Hansard*, Perth, 10 April 2015, p. 40.

29 Business Development and Partnerships Coordinator, *Committee Hansard*, Sydney, 27 August 2015, p. 29.

9.32 In response to these concerns, the NDIA informed the committee that, while most people tend to focus on the base unit price, this does not reflect the large variety of prices paid under the NDIS for disability services:

People tend to look at the dominant one, which is the per hour cost for personal care on Monday to Friday, and they extrapolate from that. We pay different rates for therapists, for example, compared to day care workers. We will pay additional loadings where higher levels of skill are required...As to whether that is at a level that will attract workers into the industry, we base that on the current award rates that operate for the majority of the sector. And the area where the efficiency and price can be gained is not by cutting the salary of frontline staff but by the organisations becoming more efficient in terms of labour utilisation, reducing the span of control, cutting out some of the unnecessary multiple layers of supervisors and managers in the industry and chopping their corporate overheads. There is certainly not any focus on trying to reduce the remuneration of workers. We accept the award rates as being a reasonable starting point.³⁰

9.33 In August 2013, the then Australian Government announced that it would establish 'a forum of disability sector and workforce experts to help ensure the disability workforce is ready for the full implementation of DisabilityCare Australia [now the NDIS] by 2019'. The Hon Jenny Macklin MP, then Minister for Disability Reform stated:

The Forum will identify the training and skill requirements of the disability workforce under DisabilityCare and provide advice on recruiting and retaining workers, as well as how to meet the needs of specific groups and communities.³¹

9.34 Although established, the Disability Workforce National Consultative Forum had not met by January 2014, when the Government described the proposal as 'rushed'.³²

Committee view

9.35 Economic realities are an important consideration in the creation of a sustainable NDIS. However, providers and unions have raised concerns that the current pricing does not appear to allow for, or ensure, the quality and safeguards that would result from a well-paid and well-trained disability care workforce. This should be investigated.

30 Mr David Bowen, *Committee Hansard*, Melbourne, 30 June 2015, p. 40.

31 The Hon. Jenny Macklin MP, Minister for Disability Reform, and Ms Amanda Rishworth, Parliamentary Secretary for Disabilities and Carers, 'Expert Forum to Advise on DisabilityCare Australia Workforce', joint campaign media release, 9 August 2013, p. 1.

32 V Edwards, 'Coalition defends delay to 'rushed' disability forum', *The Australian*, 20 January 2014, p. 3.

9.36 The committee agrees that workforce issues are integral to combatting violence, abuse and neglect in disability care settings. The committee does not think it possible to improve disability care and support without addressing these issues, which are long-standing and likely to be exacerbated with the predicted expansion of the workforce under the NDIS.

9.37 The committee considers that the valuable work of the Productivity Commission (reported in *Disability Care and Support*) would be complemented by a review of the challenges facing the disability care workforce and the formulation of options to ensure the provision of a high quality disability care workforce now and into the future.

Consultation paper on a quality and safeguarding framework

9.38 In February 2015, the Disability Reform Council released a consultation paper describing the options that have been developed for the NDIS quality and safeguarding framework.³³ The consultation paper canvassed a range of key issues—such as provider registration, complaints handling systems, employment screening, self-managed plans and restrictive practices.

9.39 During the consultation period (which finished in April 2015), the Department of Social Services (DSS) received over 200 submissions, held public forums in capital cities and regional centres, and facilitated targeted workshops with hard-to-reach groups (for example, Aboriginal and Torres Strait Islander peoples with disability). DSS is currently focussed on the preparation of a Regulation Impact Statement for Council of Australian Governments' consideration in late 2015 or early 2016.³⁴

9.40 In the inquiry, the three-year transition period to the NDIS (2016–2019) was noted. The architecture for this transition is high-level bilateral agreements with each jurisdiction (New South Wales and Victoria now being in place), followed by detailed implementation plans.³⁵

9.41 DSS officers noted that the implementation arrangements will encompass the issue of roles and responsibilities, which will require some time to negotiate and design:

Some things might actually be a single national function; other things might be federated and nationally consistent. But, in terms of the overall

33 NDIS Senior Officials Working Group, *Consultation Paper: Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*, Disability Reform Council, February 2015, <https://engage.dss.gov.au/wp-content/uploads/2015/01/Proposal-for-an-NDIS-Quality-and-Safeguarding-framework-7.pdf>, accessed 27 October 2015.

The objectives of the quality and safeguarding framework are to advance the rights of people with disabilities and minimise the risk to harm, while maximising the choice and control they have over their lives: p. 11.

34 Department of Social Services, *Submission 104*, p. 30.

35 Mrs McDevitt, Department of Social Services (DSS), *Committee Hansard*, Canberra, 21 August 2015, p. 4.

framework, it will encompass a range of things that actually go to what will remain in almost any scenario—state functions, such as guardianship responsibilities, justice responsibilities. To talk about 'absolutely uniform'...would not be realistic. It is probably a shading along a continuum.³⁶

Benefits of a national safeguarding framework

9.42 The Victorian Parliament's Family and Community Development Committee and the Victorian Ombudsman have recently inquired into disability-related matters.³⁷ Both of those inquiries noted that the national roll-out of the NDIS presents an opportunity to consider safeguarding mechanisms that protect the rights and dignity of people with disability. For example, the Family and Community Development Committee reported:

It is a chance to look beyond the boundaries of what is currently in place in various states and territories and to consider what would be the most effective and appropriate quality and safeguarding system for service providers in Australia operating in the context of the NDIS.

It also provides an opportunity to learn from the strengths and weaknesses of existing systems, while considering an entirely new framework with relevant functions and adequate powers.³⁸

9.43 In submissions and evidence, the committee heard that there is considerable support for national consistency in high quality and strong safeguards for all people with disability at risk of violence, abuse and neglect.³⁹ The committee also heard various concerns—for example, regarding the delay in implementation of a new quality and safeguards framework and that framework's ability to effect change.

36 Mr Bruce Smith, Branch Manager, National Disability Insurance Scheme, DSS, Canberra, 21 August 2015, p. 4. Also see: Mrs McDevitt, DSS, Canberra, 21 August 2015, p. 4.

37 Parliament of Victoria, Family and Community Development Committee, *Inquiry into Abuse in Disability Services*, August 2015, http://www.parliament.vic.gov.au/images/stories/committees/fcdc/inquiries/58th/Abuse_in_disability_services/FCDC_58-01_Interim_Report_-_Abuse_in_Disability_Services.pdf, accessed 2 November 2015.

Victorian Ombudsman, *Reporting and investigation of allegations of abuse in the disability sectors: Phase 1—the effectiveness of statutory oversight*, June 2015, <https://www.ombudsman.vic.gov.au/Investigations/Investigation-into-disability-abuse-reporting>, accessed 2 November 2015.

38 Parliament of Victoria, Family and Community Development Committee, *Inquiry into Abuse in Disability Services*, August 2015, p. xviii.

Also see: Victorian Ombudsman, *Reporting and investigation of allegations of abuse in the disability sectors: Phase 1—the effectiveness of statutory oversight*, June 2015. The Victorian Ombudsman endorsed the good practices operating in Victoria (such as the role of Community Visitors) and cautioned against a national framework that reduces existing safeguards in Victoria: paras 20–21 and 549.

39 For example: Professor Richard Bruggemann, *Committee Hansard*, Adelaide, 28 August 2015, p. 24.

9.44 A representative from the Australian Psychological Society gave evidence that, in the trial sites, the risk of violence, abuse and neglect is increasing as providers attempt to manage behavioural issues without high-level behaviour management support (due to the closure of state-based disability services):

...our feedback from our members at the trial sites raises enormous concerns that what is happening at the moment is potentially going to make things worse in terms of the possibility for violence and abuse towards people with a disability...the delay in implementing some sort of quality framework that is sufficient is of concern. The quality framework that was released offered a number of options, from a very low level to a very high level. I would hope that the higher level that we supported is able to be funded...but it would obviously require significant investment to put that in place. Certainly the stories we are hearing from members, particularly in the Newcastle site, would suggest that the quicker that happens the better.⁴⁰

9.45 Several submitters spoke about the various frameworks and mechanisms that already exist to safeguard people with disability from violence, abuse and neglect. Yet, it was argued, these complex and inter-related arrangements are not effective for all people with disability.

9.46 Ms Carolyn Frohmader, Executive Director of Women with Disabilities Australia and member of the Disability Alliance, raised the issue of 'policy siloing', where policy and national frameworks are related but not connected:

...we talked in our submission about the National Disability Strategy. Then over here we have the National Plan to Reduce Violence against Women and their Children. Then we have the National Framework for Protecting Australia's Children. The National Disability Strategy is not connected to the national violence plan. The national violence plan is only focused on intimate partner violence, and does not include institutional settings. The way the National Disability Strategy addresses violence against people with disabilities is to say 'make sure we implement the national plan to prevent violence against women'...We have a national child protection framework that is actually about child protection. So we have this policy siloing where, yes, we know these things but this one is not connected to this one is not connected to this one. And it is just incredibly problematic.⁴¹

9.47 In addition, Ms Frohmader told the committee that People with Disabilities Australia has been 'very vocal about our concerns of a national scheme bringing in eight or nine schemes into one', particularly where the one scheme does not cover all people with disabilities:

40 Dr Louise Roufeil, *Committee Hansard*, Melbourne, 30 June 2015, p. 34. Also see: Mr Peter Cross, President, United Voices for People with Disabilities, *Committee Hansard*, Melbourne, 30 June 2015, p. 45, who queried whether improvement in safeguards and protections will be delayed until full roll out of the NDIS.

41 *Committee Hansard*, Sydney, 27 August 2015, p. 40.

There are so many people who are not going to be eligible—who will not be covered. So we argued: why can't we have a national statutory protection with the NDIS safeguards framework as a component of it? Why do we have to have one for that, one for that and one for that? The idea that somehow the quality safeguards framework is going to address this issue of violence against people with disability across all forms of institutional and residential settings is a nonsense. It just will not happen. Right from the early days we were arguing that it needed to be much broader than that. If you are going to bring nine schemes into one national scheme, why not think about that a bit more logically so that anybody with a disability—regardless of their setting and regardless of whether they are an NDIS recipient, and most of them will not be—can have the same protections.⁴²

9.48 Advocacy for Inclusion also commented on existing mechanisms that target violence and abuse. However, Ms Ryan indicated that the inability of people with disability in institutional and residential settings to access these systems should be rectified without the need for separate disability structures and systems:

At what point can we start to recognise that people with disability should have the right to use the same mechanisms that everybody else is using? That is actually quite rare in this country. It does not happen...the domestic violence legislation, for example, in every state and territory except New South Wales does not cover these living circumstances, so you cannot actually stick your hand up and say, 'I've got violence happening in my home that needs to be responded to.' There is no way that you can access the services that are appropriate to getting outcomes through that. We struggle enormously with that barrier. There are some real solutions that we could find. In fact, in New South Wales, where these households are recognised under the domestic violence legislation, they are able to change some of those outcomes. It also has raised enormous awareness around the fact that this is violence, naming it. People do not see that it is a form of violence. They do not get that it is abuse. The course that we are currently developing for women to be safe, to recognise violence, to understand it and be able to access paths out of it has been put together by a reference group of self-advocates of women with disabilities. They get violence, but the term 'abuse' was so vague and so opaque that it was really hard to understand what it meant.⁴³

9.49 Another provider—UnitingCare West—told the committee that a quality and safeguarding system is often good for formal service providers but does not take into account the fact that there are also informal service providers:

The disability system is predicated on having an interface of informal providers and formal providers...[F]or vulnerable people with disabilities in particular, we need to make sure that the whole system, not just the formal provider system, is built around safe principles and safe processes.⁴⁴

42 *Committee Hansard*, Sydney, 27 August 2015, p. 45.

43 *Committee Hansard*, Canberra, 21 August 2015, p. 12.

44 Ms Sue Ash AO, Chief Executive Officer, *Committee Hansard*, Perth, 10 April 2015, p. 7.

Committee view

9.50 The committee notes the evidence of the Australian Psychological Society regarding increasing levels of violence, abuse and neglect, as provider supports are withdrawn in the transition to the NDIS. This is highly concerning and the committee urges all jurisdictions to take all necessary steps to immediately identify and manage any such incidences.

9.51 The committee is also extremely concerned that, nationwide, domestic violence legislation (with one exception) does not recognise the circumstances of people with disability living in residential and institutional settings. The committee considers that this situation should be rectified without delay.

9.52 The committee heard that there is support for a national protective framework for all people with disability at risk of violence, abuse and neglect regardless of their living arrangements. The committee heard also that current safeguarding frameworks (see chapters five and eight) can be inaccessible, making it difficult for people with disability to obtain redress, particularly without assistance from family, friends and independent advocates. This should not be the case.

9.53 People with disability are valued members of our community and are entitled to access any and all protections provided for the benefit of the wider Australian community.

9.54 Consistent with this view, the committee considers that a single overarching safeguarding framework, working in collaboration with existing Commonwealth, state and territory based systems, would be extremely beneficial. Such a framework should apply nationally to all people with disability and provide identifiable, accessible, consistent and strong mechanisms for eliminating violence, abuse and neglect in residential and institutional settings.

Complaints handling within the NDIS quality and safeguarding framework

9.55 As indicated earlier in this chapter, there are five key elements proposed for the NDIS quality and safeguarding framework.⁴⁵ Some of these elements were discussed throughout the inquiry but not in connection with the NDIS or the proposed framework. This section of the report focuses on the key element of the framework on which advocates and people with disability commented—that is, complaints handling systems.

Outline of the complaints handling considerations

9.56 The *Consultation Paper: Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework* stated that an effective and nationally consistent complaints mechanism could be a key safeguard under the NDIS. That paper presented the following three options for consideration:

45 The five key elements are: provider registration; complaints handling systems; employment screening; self-managed plans; and restrictive practices.

- Option 1: Self-regulation—providers would develop and operate their own complaints management and feedback systems;
- Option 2: Internal and external complaints handling requirements—NDIS registration conditions would prescribe a set of minimum standards for provider level complaints handling, with an independent complaints review process (possibly an industry-initiated complaints body, professional board or contracted third party); and
- Option 3: Independent statutory complaints function—NDIS registration conditions would require providers to demonstrate effective internal complaints handling processes, with a formal external complaints body (either a complaints office within the NDIA or a separate complaints body).⁴⁶

Need for an independent body with enforcement powers

9.57 The concept of an independent body with investigative and oversight functions resonated strongly with advocacy bodies and people with disability.⁴⁷ As one witness explained, 'you cannot expect the abusers to police themselves'.⁴⁸

9.58 The Disability Alliance captured the common argument that existing complaints mechanisms across the board are ad hoc and largely ineffective in investigating, responding to, and preventing violence against people with disability across a range of settings, and reform would have to be applied to both the emerging NDIS sector, as well as existing disability service sectors:

Australia urgently requires an independent statutory national protection authority with specific purpose legislation to address and respond to all forms of violence against people with disability, regardless of the setting in which it occurs and regardless of who perpetrates it.⁴⁹

9.59 Ms Kim Chandler, the Acting Public Advocate for Queensland, gave evidence that, in that jurisdiction, the Office of the Public Guardian is 'probably the closest equivalent' to an independent body with investigative and oversight functions. However, it does not cover all people living in disability residential services, who must have recourse to the relevant body (for example, the Health Ombudsman for complaints regarding physical health provision):

46 NDIS Senior Officials Working Group, *Consultation Paper: Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*, Disability Reform Council, February 2015, pp 52–55.

47 For example, NSW Disability Network Forum, *Submission 55*, p. 9. .

48 Ms Rayna Lamb, Coordinator, Women With Disabilities WA Inc., *Committee Hansard*, Perth, 10 April 2015, p. 21. Also see: Ms Samantha Connor, *Committee Hansard*, Perth, 10 April 2015, p. 34.

49 *Submission 47*, p. 69. Also see: Ms Karen Williams, Guardianship Coordinator, Queensland Aged and Disability Advocacy, *Committee Hansard*, Brisbane, 16 October 2015, p. 36; Ms Kim Chandler, Acting Public Advocate, The Public Advocate, Queensland, *Committee Hansard*, Brisbane, 16 October 2015, p. 27, who commented similarly and endorsed the continuation of the inspectorate or external visitor programs.

At the moment it is very disparate and it is difficult for anyone to work out where to go or for anyone to take particular responsibility for that issue... one independent body with ombudsman-type powers would be very beneficial.⁵⁰

9.60 The New South Wales Council for Intellectual Disability indicated one feature that it would particularly like to see is an independent complaints body and a person with lived experience involved in the process:

Independence is vital and that it is well resourced and has a good culture around disability. We know that if agencies get merged with other agencies sometimes the culture changes and they become much more legalistic and do not understand perhaps the lived experience of people as well. In New South Wales the guardianship tribunal has a community member who must have experience with disability.⁵¹

9.61 In its evidence, DSS informed the committee that respondents to the consultation paper had similarly supported an independent complaints mechanism with enforcement powers:

There was general support for a higher level of regulation across a number of areas, including complaints. People wanted a complaints system that is independent of providers—providers should have their own complaints arrangements but there should be one sitting beyond that. The general feeling also was that it should sit outside the agency and should have a range of powers to be able to follow up complaints.⁵²

Committee view

9.62 The committee agrees with the Disability Alliance that existing complaints mechanisms are ad hoc and largely ineffective (also see chapters three, five and six). The NDIS quality and safeguarding framework proposes some options to address these issues, by creating an effective and nationally consistent complaints mechanism for scheme participants.

9.63 Evidence to the inquiry, and the Disability Reform Council, overwhelmingly supported the establishment of an independent body with enforceable investigative and oversight functions. The committee suggests that it would be imprudent to create one such system for NDIS participants and another for non-participants, which would unnecessarily complicate complaints handling mechanisms. The committee therefore considers that the functions of an independent complaints body should include investigation of complaints made by participants in the NDIS. The committee also notes the need for such a complaints body to be established in consultation with people with lived experience of violence, abuse and neglect.

50 *Committee Hansard*, Brisbane, 16 October 2015, p. 29.

51 *Committee Hansard*, Sydney, 27 August 2015, p. 6.

52 Mr Bruce Smith, *Committee Hansard*, Canberra, 21 August 2015, p. 5.

Advocacy, quality and safeguarding in the NDIS

9.64 As noted in chapter 7, one strong theme to emerge from the evidence was the critical role of independent advocacy in the quality and safeguarding framework for people with disability. The committee heard from a range of people and organisations that the need for such advocacy will increase with the roll out of the NDIS and that this need has not been identified and considered in the consultation paper.

9.65 In its response to that consultation, the Disability Alliance stated that advocacy agencies are not equipped to meet the increasing demand arising from the introduction of the NDIS (especially in rural, regional and remote areas, for Aboriginal and Torres Strait Islander peoples with disability, and people with disability from culturally and linguistically diverse and non-English speaking backgrounds). The Disability Alliance elaborated on the role that advocates now perform:

NDIS participants seek assistance to find information about the NDIS; to understand the opportunities and challenges of the new system; develop their plans; receive decision making supports; liaise with the NDIA, and existing and potential service providers; choose between services and supports; manage their plan; employ support workers; and navigate complaint handling processes. Independent advocates play a key role in assisting with these issues, but to do so requires the acquisition of new and constantly changing knowledge and expertise in myriad areas, on top of providing advocacy support to people with disability who are not eligible for the NDIS or whose advocacy requirements are outside of the parameters of the NDIS' remit.⁵³

9.66 Evidence from the Intellectual Disability Rights Service illustrated one person's activities as an advocate for scheme participants, in the process highlighting why resource constraints inhibit the ability of advocacy organisations to help all the people who contact them for assistance:

One of [the] coordinators of our Criminal Justice Support Network who is based in the Hunter region, Ken Clift, has been assisting some of the Criminal Justice Support Network clients with their transition into the NDIS. He has assisted them from the point at which they are having their eligibility for the scheme determined. He has been assisting them with preparation for meetings with planners, so going through all the preplanning materials that are sent to people as they are about to enter the NDIS. He has attended planning meetings with the client. And, before that,

53 Australian Cross Disability Alliance, *Submission to Department of Social Services, Review of the National Disability Advocacy Framework*, 31 July 2015, p. 4, https://engage.dss.gov.au/wp-content/uploads/2015/08/PDF-ACDA_DSS_NDAF_Discussion_FINAL-310715-311.pdf, accessed 7 October 2015. The alliance emphasised that scheme participants' access to advocacy should not be prioritised over other people with disabilities' access to advocacy. Also see: Ms Aine Healy, Executive Director, Advocacy, New South Wales Council for Intellectual Disability, *Committee Hansard*, Sydney, 27 August 2015, p. 5; Ms Mary Mallett, Chief Executive Officer, Disability Advocacy Network Australia, *Committee Hansard*, Canberra, 21 August 2015, pp 14–15.

he has assisted clients to think about how they might want their life to be under the NDIS. His existing knowledge and familiarity with the client and their circumstances have really been of benefit in that exercise because it can be very hard for some clients with intellectual disability, who may think in very concrete terms, to develop abstract ideas initially about what they would really like in their life or to think in practical terms about what sorts of supports they really need. He assists in helping clients to think about that and then to be able to express their needs in a planning meeting and then in working through with the client after a package is settled—working out what service providers might be appropriate for the client, assisting a client perhaps with interviewing service providers and finally, basically, getting the package and the way it is going to work sorted out. Mr Clift's estimate is that that process takes about 21 hours of advocate time, which would be spread perhaps over weeks or months, depending on the particular client situation and what has to be worked through. There is then the whole separate issue of monitoring how a package is working for a client, how their service supports are working for them, after a system is set up.⁵⁴

9.67 The Commonwealth Ombudsman holds the view that 'it would be preferable to ensure that people with disability have access to advocacy as and when they need it'. Further:

...people with disability are likely to need particular support in engaging with the NDIS. This is especially the case given it is a new scheme trialled in limited sites and the fact that—in order to gain the most benefit—people with disability are encouraged to think more about how the disability supports they wish to receive relate to their goals, rather than simply what they 'need'.⁵⁵

9.68 The New South Wales Council for Intellectual Disability informed the committee that, where available, advocacy has resulted in better plans and packages for scheme participants.⁵⁶ In contrast, the Commonwealth Ombudsman observed:

...others entering the scheme without the benefit of advocacy may not receive the most beneficial plan. This may be simply because they do not fully appreciate the range of choices that are available to them including the opportunity to think about goals (rather than only needs), or feel unable to clearly articulate the types and amounts of supports they should be entitled to access.

There are a number of avenues through which Government is seeking to inform current and prospective NDIS participants about their options for

54 Ms Margot Morris, Principal Solicitor, *Committee Hansard*, Sydney, 27 August 2015, pp 4–5.

55 Commonwealth Ombudsman, *Submission to Department of Social Services, NDIS Quality and Safeguarding Framework Consultation*, 24 July 2015, p. 2, http://www.ombudsman.gov.au/files/Submission_to_NDAF_review_July2015.pdf, accessed 7 October 2015. Also see: Dr Ken Baker, Chief Executive, National Disability Services, *Committee Hansard*, Canberra, 21 August 2015, p. 24, who agreed that people with disability should have access to advocacy if and when support is required.

56 Ms Aine Healy, *Committee Hansard*, Sydney, 27 August 2015, p. 4.

support. However, we suggest that advocacy must form a central and significant part of that information and support framework...a strong advocacy programme, which amongst other things, assists people with complaints and provides feedback on systemic issues, should form part of the quality and safeguarding framework for the national roll out of the NDIS.⁵⁷

9.69 The committee also heard concerns regarding a suggestion that there will be no need for independent advocacy once the NDIS is rolled out. At public hearings, witnesses rejected the view that the NDIS will be a panacea for all matters affecting people with disability.

9.70 Ms Kelly Vincent MLA contended that there is a need for ongoing grassroots level advocacy for people with disability, as the NDIS will have no involvement in many of the day-to-day challenges experienced by people with disability:

...the NDIS was never meant to do things like make transport accessible, make the education accessible, improve access to footpaths and businesses and so on...there will be significant need for ongoing grassroots level advocacy about those basic day-to-day things...I would hate to see it continue to be a situation where we wait for people to start saying well, actually the NDIS is not going to help me with access to public transport, education, whatever it may be and then all of a sudden we say, 'Oh, of course we failed to give advocacy around that.' I think there will be significant need in order to properly meet the real needs of people with disability to have that ongoing grassroots level advocacy.⁵⁸

9.71 The Villamanta Disability Rights Legal Service Inc. agreed:

There seem to be some thoughts among some circles that once the National Disability Insurance Scheme is up and running we will not need any independent disability advocacy, because all the problems will be solved. Well, let me tell you, I think about a quarter of the issues that Villamanta Disability Rights Legal Service works on are to do with things the National Disability Insurance Scheme might address and solve eventually, and the other three-quarters will continue to be major problems for people with a disability indefinitely into the future, and there will still be a big need for independent disability advocacy.⁵⁹

9.72 In addition, the Public Advocate Queensland and Development Disability WA emphasised the need to support people with disability to navigate and interact with the disability service system, including through the capacity building provided by independent advocacy organisations.

57 Commonwealth Ombudsman, *Submission to Department of Social Services, NDIS Quality and Safeguarding Framework Consultation*, 24 July 2015, pp 2–3.

58 Ms Kelly Vincent, MLA South Australian Parliament, *Committee Hansard*, Adelaide, 28 August 2015, p. 61.s

59 Ms Deidre Griffiths, Principal Solicitor and Executive Officer, *Committee Hansard*, Melbourne, 30 June 2015, p. 26.

9.73 Ms Taryn Harvey, Chief Executive Officer of Development Disability WA, emphasised the need to prioritise and empower individuals and their families:

We never talk first about what we can do for people on the ground to help them raise the issues that concern them...let us actually invest in the kinds of mechanisms that will help people navigate the complaints process and support people's communication. They are the things that are standing in the way. When things do happen, families need to have somewhere clear that they can go to so that every time they are having that conversation with someone in the system, they feel supported...You can put whatever new standards and procedures in place, but the fundamental issue about people not feeling like they can take that challenge on is not going to change until we start investing in supporting people.⁶⁰

9.74 Ms Chandler from the Office of the Public Advocate Queensland said:

Given that the vast majority of people who are participants in the NDIS at present—I think around 89 per cent—have some sort of intellectual or cognitive disability, this means that, according [to] the Convention on the Rights of Persons with Disabilities, reasonable accommodations need to be made to ensure they have appropriate communication, personal and decision-making supports not only to exercise choice and control but to express their dissatisfaction. Without...strong oversight and support and advocacy, quality standards for services, while they are important, really will not be sufficient...such an approach should be complemented by a strong social inclusion agenda for people with disability, a more just system that is more responsive to people with disability, and a zero tolerance approach to abuse, neglect and exploitation.⁶¹

60 *Committee Hansard*, Perth, 10 April 2015, pp 36–37. Also see: Ms Mary Mallett, Chief Executive Officer, Disability Advocacy Network Australia, *Committee Hansard*, Canberra, 21 August 2015, p. 9.

61 Acting Public Advocate, *Committee Hansard*, Brisbane, 16 October 2015, p. 28.

Concluding committee view

9.75 Independent advocacy is critical to promoting quality and safeguards for all people with disability (see chapter seven). The committee is extremely concerned however that NDIS participants—about 460,000 people with disability—may not be adequately prepared for their role in the scheme and may not have access to support from advocates. Advocacy support could assist in the identification of circumstances of violence, abuse and neglect, and result in individualised plans that reduce the risk or incidence of such assaults.

9.76 While not every person with disability will choose to access independent advocacy, the committee concurs with the Commonwealth Ombudsman that the option must be readily available. The NDIS quality and safeguarding framework does not appear to address these concerns with bare mention of independent advocacy and no acknowledgement of advocates' role in quality and safeguarding processes. The committee considers that the quality and safeguarding framework should be explicitly linked to the National Disability Advocacy Framework, as discussed in chapter seven, in recognition of advocacy's important role in reducing violence against, and abuse and neglect of, people with disability.

Chapter 10

Recommendations

10.1 The committee has received evidence of the failure of current systems to deliver safe services to people with disability in the first instance, and a failure to appropriately respond to occurrences of violence, abuse or neglect of people with disability as a secondary measure.

10.2 The committee received evidence of some excellent initiatives and programs which seek to improve both service delivery and protective mechanisms. Some of these programs are having significant positive impacts. However, when viewed as a national sector response, these programs and initiatives are ad hoc, localised, and often underfunded.

10.3 It is clear to the committee that a coordinated, well-resourced national response is required to address the issue of widespread violence, abuse and neglect of people with disability.

Headline recommendations

10.4 The committee has received hundreds of individual recommendations from expert organisations, advocates, supporters and most importantly from people with disability themselves. In analysing these recommendations, a very consistent message was heard about the need for four headline approaches to tackle violence, abuse and neglect:

- **A Royal Commission:** to conduct a more thorough investigation of instances of violence, abuse and neglect of people with disability, including investigative powers and funded and empowered to visit institutions.
- **A national disability complaints mechanism:** Establishment of an independent, statutory, national protection mechanism that has broad functions and powers to protect, investigate and enforce findings in relation to violence, abuse and neglect of people with disability, including investigating systemic issues.
- **National workforce and workplace regulation:** to address systemic workforce and workplace issues that increase the prevalence of violence, abuse and neglect, with a focus on training and working in close collaboration with, or as part of, the new national watchdog organisation.
- **Access to justice:** to ensure a 'just' approach to justice is achieved in all jurisdictions by improving systemic barriers to justice for people with disability, including legal capacity, supported decision-making, guardianship and the indefinite detention of people with disability.

10.5 Recommendations to address these and further issues will be outlined in this chapter, with a view to giving full effect to the wealth of experience and expertise embodied in the evidence provided to the inquiry.

A Royal Commission

10.6 It has been a challenging task for this inquiry to adequately capture the full scale of violence, abuse and neglect of people with disability and the toll this has had on individuals and their families.

10.7 Evidence to the inquiry clearly demonstrates that this is happening around Australia and that the cases reported to the Committee are not isolated instances. However, given the lack of reliable data, the committee considers this issue is likely to be far greater in prevalence than this inquiry has been able to determine.

10.8 Many submitters to the inquiry have called for a Royal Commission to address these issues. The committee is aware that calls for a Royal Commission are often made when people feel strongly and seek greater recognition for a particular issue. The committee recognises the full import of such a step and believes in this instance such calls are justified.

10.9 In the case of violence, abuse and neglect of people with disability, the committee notes that nature of disability (requiring communications or transport support to present evidence) combined with the closed nature of institutions, means that the most vulnerable people and those most likely to have been abused, may not have been able to contact the inquiry. Advocates expressed concern that many potential witnesses were not able to access the support they required to be able to participate in the inquiry. The committee is also highly conscious of the criminal nature of many of the allegations brought before it, through both confidential and public evidence. The committee is therefore of the view that only a Royal Commission with investigative powers, funded and empowered to visit institutions, could properly conduct an inquiry, and give full weight to the seriousness of this issue.

Recommendation 1

10.10 The committee recommends that a Royal Commission into violence, abuse and neglect of people with disability be called, with terms of reference to be determined in consultation with people with disability, their families and supporters, and disability organisations.

National disability complaints mechanism

10.11 Much of the lived experience evidence presented to this inquiry focused on the responses to reports on violence, abuse and neglect, more so than the instances of abuse themselves. From the range of evidence received, it is clear to the committee from the range of evidence, that the reporting and investigating frameworks across all jurisdictions fail to adequately respond to individual cases, and through this failure, do not provide an appropriate secondary protection measure to reduce future acts of violence, abuse or neglect.

10.12 The two key problems with the existing system raised by most submitters, is that the lack of an enforceable complaints resolution body exacerbates an environment of abuse, and the lack of consistency across jurisdictions creates confusion and

reduces overall numbers of reporting of individual instances of violence, abuse or neglect.

10.13 Evidence to this inquiry indicated that a key problem with the current state and territory based complaints reporting and investigation systems, is that they generally approach their complaints handling functions as a dispute resolution process. While this is an appropriate mechanism to address low-level service complaints, it is an inadequate and inappropriate response to complaints of violence and abuse, many of which are crimes. Many submitters saw an ongoing need to retain the existing state and territory level complaints handling mechanisms to handle service level dispute resolution, but wanted a new national watchdog with increased powers.

10.14 Submitters provided a wealth of ideas to create a national system for reporting and investigating instances of violence, abuse and neglect. The key recommendations for such a system include:

- incorporating elements of the NSW disability reportable incidents scheme, particularly mandatory reporting of incidents linked to an excluded worker register;
- a 'no wrong door' complaints handling function;
- it must cover all disability workers, organisations and people with disability, without being restricted to National Disability Insurance Scheme (NDIS) participants;
- its functions to be broader than individual complaints handling mechanism: must have powers to undertake own motion inquiries and investigations into individual cases, organisations and systemic issues of concern;
- should work in collaboration with existing state based disability complaints mechanisms, and work toward increasing national consistency between jurisdictions;
- should include a role in developing linkages between different service delivery types and oversight mechanisms to reduce the current 'siloed' approach;
- as a matter of urgency, develop a national vulnerable persons worker scheme to include pre-employment screening and ongoing monitoring through a national excluded worker scheme linked to the mandatory incident reporting scheme; and
- the establishment of a national, independent, statutory protection watchdog that has broad functions and powers to protect, investigate and enforce findings related to situations of violence, abuse and neglect.

10.15 From the range of evidence presented to this inquiry, the committee believes there is an urgent need to take action to establish a national protective mechanism to respond to individual cases, but also to address systemic issues that contribute to increasing the prevalence of violence, abuse and neglect of people with disability.

Recommendation 2

10.16 The committee recommends the Australian Government consider the establishment of a national system for reporting and investigating and eliminating violence, abuse and neglect of people with a disability, which should, at a minimum:

- **be required to work in collaboration with existing state and territory oversight mechanisms;**
- **cover all disability workers, organisations and people with disability, without being restricted to NDIS participants;**
- **include a mandatory incident reporting scheme; and**
- **include a national worker registration scheme with pre-employment screening and an excluded worker register.**

10.17 These elements are best implemented through the establishment of a national, independent, statutory protection watchdog that has broad functions and powers to protect, investigate and enforce findings related to situations of violence, abuse and neglect of people with disability.

National workforce and workplace regulation

10.18 Much of the evidence presented to this inquiry discussed the need to establish a watchdog to address the issue of individual predatory workers. However, a significant body of evidence discussed broader workforce issues that contribute to the prevalence of violence, abuse or neglect caused through issues such as poor training, workplace cultures, workplace frustration and inappropriate staffing levels.

10.19 The range of evidence put to the committee indicated a need to address issues to do with individual workers, but also to address workforce and workplace issues that can contribute to instances of violence, abuse and neglect.

10.20 A key recommendation put forward by multiple submitters was around the need for improved training and accreditation for individual workers. There was a uniform view from witnesses that the approach to training should be nationally consistent, and must contain mandatory rights-based training to ensure all workers have the core competency skills to recognise and report abuse and violence, and understand their obligation to report. The committee also recognises the need for increased funding to ensure this training is delivered not only to incoming disability workers, but also to be rolled out as a mandatory requirement for existing workers.

10.21 A national approach to training could include the establishment of a central agency or body with a function to ensure national consistency in training through a training program accreditation scheme. The committee believes this could work much like the functions performed by bodies such as the Australian Medical Council or the Australian Psychology Accreditation Council.

10.22 A recommendation of great interest to the committee, was to take an approach to 'professionalise' the workforce through a national disability worker registration

scheme, with requirements for ongoing professional development. Such a registration scheme could accommodate another recommendation made by multiple witnesses, which is the need for a tiered approach to training and registration, which recognises the need for increased training to provide services to people with increased needs or vulnerabilities.

10.23 Analysis of the body of individual lived experience evidence has enabled the committee to form a clear picture of the compelling need for stricter regulation of workplaces as a mechanism to address violence, abuse and neglect.

10.24 The committee supports the view that existing service delivery accreditation schemes should be strengthened to impose stricter requirements for facility and client specific induction for new carers as well as a mandatory reporting requirement tied to ongoing accreditation.

10.25 A recommendation made to the inquiry which the committee believes is an area worthy of further thought, is the consideration of a scheme that imposes service standard requirements on management and board members, similar to the obligations imposed by various occupational health and safety schemes.

Recommendation 3

10.26 The committee recommends the Australian Government establish a scheme to ensure national consistency in disability worker training, to include the elements of:

- **mandatory rights based training to develop core competency skills in recognising and reporting violence, abuse and neglect of people with disability;**
- **review of current training and qualification levels to be conducted in collaboration with people with disability and the disability sector, with a view to increasing requirements;**
- **increased levels of training requirements to work with people with disability who have greater needs or vulnerabilities; and**
- **consideration of the need for an independent training program accreditation agency or body to oversee the scheme.**

Recommendation 4

10.27 The committee recommends the Australian Government consider establishing a disability worker registration scheme, to include the elements of:

- **nationally consistent pre-employment screening;**
- **an excluded worker registration scheme, tied to a mandatory incident reporting scheme;**
- **yearly worker registration scheme, with requirements for national criminal checks every five years;**
- **requirements for ongoing professional development; and**

- a step-up system of registration, which requires increased training and skills to work with people with disability who have increased needs or vulnerabilities.

10.28 The registration worker scheme will be best overseen by the national disability watchdog.

Recommendation 5

10.29 The committee recommends the Australian Government consider establishing a national approach to modify state and territory and Commonwealth service delivery accreditation programs, to:

- ensure national consistency in service delivery accreditation programs;
- impose stronger requirements for facility and client specific induction training for carers;
- impose a mandatory incident reporting requirement tied to ongoing accreditation; and
- consider a scheme to impose service delivery standard requirements on management and boards, similar to occupational health and safety schemes.

10.30 The changes to accreditation schemes will be best overseen by the national disability watchdog.

Access to justice

10.31 The committee is disturbed at the evidence presented which highlights the lack of progress to improve access to justice for people with disability. Previous expert inquiries by the Law Reform Commission, the Human Rights Commission and the Productivity Commission have made detailed recommendations on how to address this issue.

Recommendation 6

10.32 The committee recommends the Australian Government work with state and territory governments on the implementation of initiatives to improve access to justice for people with disability contained in the reports by the Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, the Human Rights Commission, *Equal Before the Law* and Productivity Commission, *Access to Justice Arrangements*, with particular focus on:

- better intervention and support services;
- expanded Community Visitor's schemes;
- improved witness support services to people with disabilities;

- **creation of an assessment protocol that assists police, courts, and correctional institutions in identifying people with disabilities. Where identified, a trained officer will provide support;**
- **transparent, effective and culturally appropriate complaints handling procedures;**
- **training for police, lawyers and others in justice in needs of people with disability; and**
- **where a person who has been found unfit to plead is to be held in detention, demonstrate that all reasonable steps have been taken to avoid this outcome, and that person must be held in a place of therapeutic service delivery.¹**

Recommendation 7

10.33 The committee also recommends that each state and territory implement a Disability Justice Plan.

Recommendation 8

10.34 The committee believes that there is a need for further investigation of access to justice issues, with a focus on:

- **national implementation of the South Australian model to ensure people with disability are able to provide evidence;**
- **the implementation requirements for supported decision-making;**
- **investigating the potential for the UK system of registered intermediaries;**
- **the access to justice needs of specific groups such as women, children, culturally and linguistically diverse communities and Aboriginal and, Torres Strait Islander peoples; and**
- **the indefinite detention of people with cognitive impairment or psychiatric disabilities.**

Other recommendations

State and Territory reporting and investigating

10.35 As discussed in the recommendation for a national disability watchdog, a key problem in the existing systems of disability sector oversight is the conflation of investigation mechanisms with dispute resolution processes. Evidence presented to the inquiry showed that many such complaints processes are not enforceable, and are

¹ The full list of recommendations can be found in Appendix 3.

more appropriate for service delivery dispute resolution rather than reporting and investigation of alleged criminal behaviour.

10.36 Evidence to this inquiry indicated that agencies which engage in dispute resolution tend to have an ongoing working relationship with service delivery organisations, which is appropriate to the mediation and resolution of low-level service faults, but is a clear conflict of interest in the investigations of serious misconduct, service contract breaches or allegations of violence or abuse.

10.37 Evidence also suggested a 'siloed' approach to complaints handling, which made it confusing for individuals to know where to lodge complaints.

Recommendation 9

10.38 The committee recommends the Australian Government work with state and territory governments on a nationally consistent approach to existing state and territory disability oversight mechanisms, to include;

- **a clear distinction between dispute resolution and complaints investigation processes;**
- **a requirement that service delivery organisations should not report to funding agencies due to the conflict of interest;**
- **the principle that immediate action be taken on allegations of abuse to ensure the individual's safety;**
- **increased funding for community visitor schemes, with consideration these schemes be professionalised in all jurisdictions and with a mandatory reporting requirement for suspected violence, abuse or neglect; and**
- **greater crossover in oversight and complaints mechanisms between aged care and disability and recognising that over 7000 young people with disability live in aged care facilities, ensure that disability service standards are applicable.**

10.39 A nationally consistent approach to disability oversight mechanisms is best overseen by the national disability watchdog.

The right to self-determination

10.40 Evidence presented to this inquiry has led the committee to believe that a change in culture needs to occur from the top down, including funding bodies, oversight mechanisms, service delivery organisations and advocates, to acknowledge that people with disability have a fundamental right to self-determination. This right encompasses a wide range of decision-making, from the right to individual legal capacity, the right to make day to day living decisions and the right to take risks when seeking positive life experiences.

Recommendation 10

10.41 The committee recommends that the Australian Government consider driving a nationally consistent move away from substitute decision-making towards supported decision-making models.

10.42 The issue of where determining what constitutes legal incapacity, as well as the flow-on effect of loss of legal capacity, has been the subject of recent expert inquiries and reports. There is no need for this inquiry to re-tread over well-travelled ground. There is simply a need for the recommendations of those expert reports to be implemented as a matter of priority.

10.43 The committee agrees with the premise that the concept of legal incapacity is more subtle and complex than the current absolutist approach. Legislative reform may be required to ensure that where a person requires support to make certain decisions, such as substantial financial decisions, they do not lose the right to make *all* decisions, such as where they live or who may visit them.

Recommendation 11

10.44 The committee recommends that the Australian Government work with state and territory governments to consider implementing the recommendations of the Australian Law Reform Commission report *Equality, Capacity and Disability in Commonwealth Laws*, in relation to legal capacity and supported decision-making.²

Recommendation 12

10.45 The committee recommends the Australian Government work with state and territory governments to create national consistency in the administration of guardianship laws to ensure:

- **public advocate and guardianship functions are separate to ensure independent oversight;**
- **mandatory training on supported decision-making for guardians;**
- **a requirement for guardianship to achieve positive outcomes, not just avoiding risk of negative outcomes;**
- **the ability to have nuanced guardianship/decision-making frameworks – to ensure the legal ability of parents to advocate on behalf of adult children without having to establish legal incapacity;**
- **that service delivery organisations or accommodation providers are never given guardianship;**

2 The full recommendations of this report are included in Appendix three.

- **automatic increased oversight where service delivery organisations or accommodation providers recommend families lose guardianship; and**
- **that Aboriginal and Torres Strait Islander peoples' particular circumstances are taken into account in developing guardianship systems.**

10.46 The committee further acknowledges the issues raised around enforced 'therapeutic' treatment of people with disability, and recognises that in many instances these are cases of 'disability specific lawful violence'. The committee believes that policy and practice in the disability sector must remain cognizant of the deprivation of fundamental rights that many disability interventions entail, to ensure this is done to the minimum necessary.

The right to risk

10.47 Evidence to this inquiry has shown that another overarching problem with the approach to disability service delivery is the culture of risk management being based on avoiding risk, rather than appropriately managing risk. The committee agrees with the proposition put forward by witnesses that the tendency of service delivery organisations to disregard the requirement to seek positive outcomes and life experiences for people with disability, is itself a form of abuse or neglect. The committee notes that evidence shows this is often caused by service delivery organisations being overly focused on avoiding negative outcomes, often at the cost to individual people with disability being able to live fulfilling lives.

Recommendation 13

10.48 The committee recommends state and territory and Commonwealth service delivery accreditation programs should be modified to impose additional requirements for positive life outcomes for individual people with disability, rather than a singular focus on the avoidance of negative outcomes. The committee recommends this work is best overseen by the national disability watchdog.

Counselling and support services

10.49 The committee received a great deal of lived experience evidence from witnesses. As part of this evidence, a clear picture emerged of the lack of appropriate recovery support and counselling services available to people with disability. In cases presented to this inquiry, people with disability were denied the services of mainstream counselling services, purely on the basis of service providers being unable to meet the needs of people with disability.

Recommendation 14

10.50 The committee recommends all levels of government provide increased funding for support and counselling services. This should be to create specialist disability counselling services where required, as well as to mainstream organisations so they may meet the needs of people with disability.

Advocacy

10.51 The committee acknowledges the vital role that formal and informal advocacy plays in addressing violence, abuse and neglect of people with disability. However, the advocacy sector urgently needs greater assistance from all levels of government to continue in this role.

Recommendation 15

10.52 The committee recommends all levels of government acknowledge the vital role that formal and informal advocacy plays in addressing violence, abuse and neglect of people with disability, by considering:

- increased training for people with disability to recognise violence, abuse and neglect so they can self-report;
- government service contracts to include provisions to enforce access to facilities for advocates, requirement for self-advocacy programs;
- further consideration of the Victorian Self Advocacy Resource Unit, with a view to roll out across other states and territories;
- funded advocacy programs to include training for informal advocates;
- States and Territories not to reduce advocacy funding with the rollout of the NDIS.

Recommendation 16

10.53 The committee recommends the National Disability Advocacy Program implement the following recommendations:

- significant investment to National Disability Advocacy Program funded advocates, to deliver equitable access and representation of issues and to match the increased demand for advocacy anticipated under the NDIS;
- undertake a review to ensure delivered advocacy is appropriately spread across service types and complaint types, to ensure the most vulnerable are receiving advocacy;
- increase funding for self-advocacy programs;
- ensure that current model of funding peak bodies does not inadvertently result in the closure of smaller specialist or local advocacy organisations.
- Improved coordination between the National Disability Advocacy Program and the National Aged Care Advocacy Program.

National Disability Insurance Scheme

10.54 The committee acknowledges that with the roll out of the NDIS, there will be a significant shift to individualised funding arrangements, which could have some inadvertent negative consequences. There is a need for a watchful eye during implementation, and an approach that will embrace the need for change should unforeseen problems arise.

Recommendation 17

10.55 The committee recommends of the Government consider the following when rolling out the National Disability Insurance Scheme (NDIS):

- **an urgent roll out of capacity-building and advocacy support for individuals undertaking negotiations for self-directed disability support;**
- **increased training for NDIS planners around intellectual impairment and guidelines on when to require decision-making support;**
- **further investigation of whether the current NDIS unit pricing will have an impact on incidents of violence, abuse or neglect.**
- **NDIS quality and safeguarding framework must ensure a zero-tolerance approach to restrictive practice, and be tied to the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*; and**
- **amendment of the *Quality and Safeguarding Framework* to include advocacy as a key component to reduce and address incidents of violence, abuse and neglect.**

Restrictive practice

10.56 Evidence presented to this inquiry has raised serious concerns that restrictive practices are often imposed as a means of coercion, discipline, convenience, or retaliation by staff, family members or others providing support. In some jurisdictions there is minimal regulation of practice in government run facilities, with only self-regulation in the non-government sector.

10.57 The committee is greatly concerned with what appears to be systemic problems within the education system that are leading to many of the inappropriate practices described in this section. Many of the systemic problems that lead to the use of restrictive practices actually reinforces an attitude that facilitates the mistreatment of children with disability because they are viewed as different.

Recommendation 18

10.58 The committee recommends the Australian Government work with state and territory governments to implement a national zero-tolerance approach to eliminate restrictive practice in all service delivery contexts. This would entail:

- **ensuring the national framework is properly implemented across all jurisdictions, as a mandatory, reviewable and enforceable scheme, with**

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- oversight by a qualified senior practitioner and with a mandatory element of positive behaviour support;
 - a scheme that is not limited to the disability sector, but applies to all places where restrictive practice is used against people with disability; and
 - imposing requirements for the use of positive behaviour management tools. These policies and guidelines would be guided by the following principles:
 - Policies and advice need to be available to the general public and linked in with behaviour and discipline policy.
 - The preferred substitution of positive behavioural management tools such as Applied Behavioural Analysis for 'restrictive practices'.

Recommendation 19

10.59 The committee believes that the use of restrictive practice against children must be eliminated as a national priority. The committee recommends the Australian Government work with state and territory governments to implement a zero-tolerance approach to restrictive practice in a schools context, which should include:

- the principle that restrictive practice must not form a part of a behaviour management plan;
- written behaviour management plans must be agreed to by the student, their parents, the school and a Principal Practice Leader or Senior Practitioner (or similar position) within the state education department;
- that parents must be notified should there be an instance of emergency restrictive practice being used;
- specialist support be made available by the state education department to guide and support teachers, students and families through the understanding and implementation of these new policies; and
- a compulsory unit of training should be developed and delivered to all principals, teachers and teachers' aides to ensure that these new policies are clearly understood and implemented. This training should be made available to interested students and families.

Housing options

10.60 A consistent message was presented to the inquiry, that broad systemic and cultural issues are key causes of violence, abuse and neglect of people with disability.

10.61 Evidence to the inquiry indicated that where people with disabilities live and the cultures of the organisations which provide services, in particular residential services, are significant factors that impact on risk of violence, abuse and neglect.

Recommendation 20

10.62 The committee recommends the Australian Government work with state and territory governments to consider the principle that there should be no enforced shared accommodation for people with disability.

Recommendation 21

10.63 The committee encourages increased resources for public and social housing for people with disability, including models where people with disability may choose to cohabitate with other people with a disability or abled people. The goal being to achieve a move away from institutions and forced congregate housing models.

Recommendation 22

10.64 The committee recommends all accommodation and service delivery funding agreements should have a mandatory gender-sensitivity requirement, particularly that people with disability must have a choice as to the gender of who provides intimate forms of care.

Schools

10.65 The committee was deeply concerned with the range of evidence presented on the treatment of children with disability in schools. While this is primarily a state and territory based issue, there is a clear need for Commonwealth involvement due to the serious breaches of children's rights under the Convention on the Rights on the Child and the Convention on the Rights of Persons with Disabilities.

Recommendation 23

10.66 The committee recommends the Australian Government work in collaboration with the states and territories to address the needs of children and young people with disability in schools to:

- establish a national program to address bullying of students with disability;
- ensure that schools are adequately funded to provide for the needs of students with disability, and ensure schools must spend this funding on those students, not merge it into the mainstream budget;
- ensure adequate funding for improved disability school transport, with a maximum school transport time limit to limit the travel time of students with a disability;
- develop a national requirement that schools may not exclude students with disability from school activities, purely on the basis of the student's disability; and
- ensure that all disability oversight systems must include schools.

Recognition of disability in protective policy

10.67 The committee heard a range of evidence that the specific needs of people with disability are often missing from mainstream protective policy and mechanisms, or the needs of specific cohorts are missing from disability-specific policy.

Recommendation 24

10.68 The committee recommends that the Australian Government consider amending the following protective policies to include the specific needs of people with disability, to ensure that people with disability are afforded the full range of rights protections that are available to people without disability:

- **the *National Disability Strategy* must be updated to refer to the specific needs of children and young people, must address violence, abuse or neglect of people with disability and should be linked to domestic violence frameworks;**
- **the *National Plan to Reduce Violence against Women and their Children* must be updated to include institutional and disability accommodation settings;**
- **the *National Framework for Protecting Australia's Children* must be updated to address the specific needs of children with disability, and**
- **in order to put effect to these frameworks, there must be increased funding to support women with disability escaping domestic violence.**

Data

10.69 Evidence given to this inquiry shows that there is a paucity of reliable statistical data around the prevalence of violence, abuse and neglect of people with disability, and the success of existing reporting and investigating frameworks.

10.70 There is overwhelming anecdotal evidence of violence, abuse and neglect of people with disability, which indicates a need to formally recognise and quantify this problem. Nationally consistent data on this issue is an essential element to guide policy development that will help eliminate violence, abuse and neglect against people with disabilities.

10.71 There also appears to be definitional issues around how incidents are categorised which impacts how incidents of abuse are reported. A project to set national guidelines to define violence, abuse and neglect would give clarity to reporters and investigators of abuse.

10.72 It is the committee's position that where data exists, it should be made available, albeit in a way that takes into consideration any personal identifiers. It is also the committee's position that where there is an absence of data, that it should be a priority for that data to be collected so that the quantum of violence, abuse and neglect against people with disability can be fully understood.

10.73 The committee also considers that further thought be given to the Human Rights Commission's recommendation for further research to validate a link between institutional and residential settings and intentional self-harm and suicidal behaviour.

Recommendation 25

10.74 The committee recommends that the Australian Bureau of Statistics ensures all of its surveys are inclusive of people with disability. The committee further recommends that the Australian Government commits additional funding to ensure the triennial survey of Disability, Ageing and Carers and the Personal Safety Survey include the collection of data on the prevalence of violence, abuse and neglect against people with disability. This data should include the following information:

- age;
- gender;
- type of disability;
- place of residence;
- cultural background; and
- whether the violence, abuse and neglect has been reported to an authority.

10.75 The committee further recommends this data to be used to address violence and abuse in future National Disability Strategy implementation plans.

Recommendation 26

10.76 The committee recommends that the National Disability Strategy Progress Report should include specific data on Aboriginal and Torres Strait Islander peoples with disability.

Recommendation 27

10.77 The committee recommends that the Department of Social Services publish data relating to the National Disability Abuse and Neglect Hotline on its website every six months. This data should include the following information:

- age;
- gender;
- cultural background;
- type of disability;
- number of complaints;
- number of complaints resolved;
- timeliness of resolution; and
- systemic trends in relation to abuse and neglect.

Recommendation 28

10.78 The committee recommends that the Australian Institute of Health and Welfare's annual report *Child Protection in Australia* should disaggregate data on the basis of disability.

Recommendation 29

10.79 The committee recommends that finalisation of the Child Protection National Minimum Data Sets should be prioritised as this additional data will be a useful addition to policy makers and service providers in this area.

*International Human Rights***Recommendation 30**

10.80 The committee recommends the Commonwealth review the reports of the United Nations Committee on the Rights of Persons with Disabilities, with a view to giving effect to recommendations that would improve Australia's adherence to the human rights obligations that have been voluntarily undertaken.

Senator Rachel Siewert

Chair

Additional Comments—Coalition Senators

1.1 Coalition Senators recommend that a judicial inquiry be considered into violence, abuse and neglect of people with a disability.

1.2 Coalition Senators acknowledge the complexities of living with a disability, and note the good work of the committee in pursuing this inquiry. Coalition Senators further acknowledge and thank the many organisations and individuals who made submissions and presented evidence in hearings so that a full and wide-ranging inquiry could take place.

1.3 Coalition Senators are open to further and deeper investigation into this crucial matter.

Senator Zed Seselja

Senator Joanna Lindgren

APPENDIX 1

Submissions and additional information received by the Committee

Submissions

- 1** Lifestyle in Supported Accommodation (LISA) Inc
- 2** Confidential
- 3** Families Australia
- 4** Ms Joan Broughan
- 5** Mrs Stella Ha (plus two attachments)
- 6** Mr Milton Keynes
- 7** Professor Richard Bruggemann
- 8** Mr Bill Kinnaird
- 9** Ms Julie Pianto
Response from E.W. Tipping Foundation
- 10** Confidential
- 11** Confidential
- 12** JFA Purple Orange
- 13** Office of the Public Advocate South Australia (plus an attachment)
- 14** Disability Justice Advocacy Inc
- 15** Confidential
- 16** South Australian Community Visitor Scheme
- 17** United Voice
- 18** Office of the Public Guardian Queensland
- 19** Optia Inc
- 20** Confidential
- 21** ACT Government
- 22** Confidential

- 23 Name Withheld (plus two attachments)
- 24 Ms Anna Lorcan
- 25 Villamanta Disability Rights Legal Service Inc (plus an attachment)
Response from Council
Response from Victoria Police
- 26 Southern Cross University Centre for Children and Young People (plus an attachment)
- 27 Endeavour Foundation
- 28 Name Withheld (plus a supplementary submission)
Response from NSW Government Department of Education and Communities
- 29 NSW Ombudsman
- 30 Queensland Aged and Disability Advocacy
- 31 Confidential
- 32 Commissioner for Children and Young People Western Australia
- 33 Confidential
- 34 Ms Fiona Given (plus an attachment)
- 35 Dr Melissa O'Donnell
- 36 Ms Mary Woodward
- 37 Mrs Cheryl McDonnell (plus an attachment)
- 38 Summer Foundation
- 39 Federation of Ethnic Communities' Councils of Australia
- 40 Office of the Anti-Discrimination Commissioner Tasmania
- 41 Australian Psychological Society (plus an attachment)
- 42 JacksonRyan Partners (plus thirteen attachments)
- 43 Queensland Advocacy Incorporated
- 44 Federation of Community Legal Centres Victoria
- 45 Catholic Women's League Australia
- 46 Confidential

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- 47 South Australian Government
- 48 Centre for Evidence-Based Safeguarding of Children with Disabilities (plus an attachment)
- 49 Confidential
- 50 Mr Michael Kilgariff
- 51 Name Withheld
- 52 Queenslanders with Disability Network
- 53 Women with Disabilities Victoria (plus two attachments)
- 54 Name Withheld
- 55 NSW Disability Network Forum
- 56 Name Withheld
- 57 Australian Human Rights Commission
- 58 Northcott
- 59 Confidential
- 60 Name Withheld
- 61 Name Withheld
- 62 Gippsland Community Legal Service
- 63 Western Australian Department of Health
- 64 Office of the Public Advocate Victoria
- 65 Ms Sally Bailey
- 66 NSW Government
- 67 Name Withheld
- 68 Disability Clothesline
- 69 Health Services Union
- 70 Ms Sandra Guy (plus six attachments)
Response from Office of the Public Advocate Victoria
Response from Yooralla
- 71 Ms Sharon Hope
Response from Tasmanian Department of Health and Human Services

- 72 Confidential
- 73 Public Advocate (Queensland)
- 74 Tasmanian Government
- 75 Mrs Lindee Chiverton
- 76 Mr Andrew Kayton
- 77 People with Disability Australia Incorporated
- 78 Disability Discrimination Legal Service and Communication Rights
Australia
Response from Victorian Department of Education and Training
Response from Victorian Department of Health and Human Services
- 79 Mr Michael Hart (plus two attachments)
Response from NSW Ombudsman
Response from NSW Police Force
Response from NSW Family and Community Services
- 80 Capricorn Community Development Association Inc. (plus an
attachment)
- 81 Confidential
- 82 Office of the Director of Public Prosecutions (NSW)
- 83 Advocacy for Inclusion
- 84 Australian Institute of Health and Welfare
- 85 Name Withheld
- 86 Disability Services Commissioner (plus three attachments)
- 87 Moreland Community Legal Centre
- 88 Youth Disability Advocacy Service
Response from Victorian Department of Health and Human Services
- 89 Action for More Independence and Dignity in Accommodation
- 90 Mr William Booth
- 91 Lindsay Grundy (plus four attachments and two supplementary
submissions)
- 92 Ms Priscilla Lorne

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- 93** Mr James Condren (plus an attachment)
Response from Maurice Cooper
- 94** Dr Linda Steele
- 95** Leadership Plus (plus a supplementary submission)
- 96** Ms Alix Goodwin (plus an attachment)
- 97** Advocacy Tasmania Inc.
- 98** Ms Eva Moran
- 99** Australian Lawyers for Human Rights
- 100** Ms Catherine McKenzie
- 101** Confidential
- 102** Scope (Vic) Ltd
- 103** NSW Council for Intellectual Disability (NSW CID) (plus an attachment)
- 104** Department of Social Services
- 105** Confidential
- 106** Name Withheld
Response from the NSW Trustee and Guardian, and the Public Guardian
- 107** Speech Pathology Australia
- 108** STAR Victoria Inc
- 109** Deakin University
- 110** Consumers of Mental Health WA
- 111** National Disability Services (NDS)
- 112** Confidential
- 113** Sunshine Coast Citizen Advocacy
- 114** ACT Human Rights Commission
- 115** Ms Joyce Langmaid

- 116** Adelaide People First (plus an attachment)
Response from Minda Inc
Response from DACSSA
- 117** Commonwealth Ombudsman
- 118** Confidential
- 119** Name Withheld
- 120** Tunstall Healthcare
- 121** Confidential
- 122** NSW Gay and Lesbian Rights Lobby (plus an attachment)
- 123** Confidential
- 124** Ms Sue Armstrong
- 125** Confidential
- 126** Wesley Mission Victoria
- 127** WWILD Sexual Violence Prevention Association
- 128** Intellectual Disability Rights Service (plus an attachment)
- 129** Mr Christopher and Mrs Vicki Morris
- 130** Moreland Community Legal Centre Inc.
- 131** Ms Julie Phillips (plus an attachment and three supplementary submissions)
Response to submission from Victorian Ombudsman
Response to submission from Victorian Disability Services Commission
Response to submission from Victorian Public Advocate
Response to submission from Victorian Department of Education and Training
Response from Julie Phillips to Victorian Department of Education and Training
Response to supplementary submission from Victorian Department of Education and Training
- 132** Confidential
- 133** ACT Disability, Aged and Carer Advocacy Service
- 134** Alzheimer's Australia

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- 135 Family Planning Victoria
- 136 Office of the Director of Public Prosecutions (SA)
- 137 Australia's National Research Organisation for Women's Safety
- 138 North Australian Aboriginal Justice Agency
- 139 Law Council of Australia (plus an attachment)
- 140 Confidential
- 141 Ms Linda McGough
Response from Spine and Limb Foundation
- 142 National LGBTI Health Alliance
- 143 Confidential
- 144 Children with Disability Australia (plus an attachment)
- 145 Name Withheld (plus an attachment)
- 146 Yooralla (plus an attachment)
- 147 Australian Cross Disability Alliance (plus a supplementary submission)
- 148 Confidential
- 149 VALID
- 150 Mr Steve Jenkins (plus an attachment)
- 151 Ms Deirdre Oliver
- 152 Ms Alison Youssef
- 153 Mr Peter Marshall
- 154 Confidential
- 155 Confidential
- 156 Confidential
- 157 Ms Julie Sullivan
Response from Victorian Office of the Public Advocate
Response from Victorian Disability Services Commissioner
Response from Victorian Ombudsman
- 158 Ms Gai Fitzgerald
- 159 Aboriginal Disability Justice Campaign

160 WA Disability Abuse Inquiry

161 Confidential

Additional Information

1 Royal Commisison transcript of Ombudsman evidence

2 Adelaide People First Vision Statement

3 Adelaide People First Values Statement

4 Adelaide People First newsletter June 2014

5 Adelaide People First newsletter December 2014

6 Adelaide People First state election bulletin

7 Adelaide People First federal election bulletin

8 Adelaide People First federal election bulletin 2013

9 NSW CID additional evidence from hearing

10 NSW CID Supporting Inclusion Flier

11 NSW CID 2014 Identifying good group homes

12 NSW CID 2015 Every Moment A4 Flyer

13 NSW CID 2015 Mediating participation

14 NSW CID 2015 She's been involved

15 NSW CID Positive Behaviour Support and Active Support

16 Minda 2015

17 Minda - an introduction to personal power

18 Minda - quotes from self advocates

19 Yooralla response to comments made by other parties at hearing on 30 June 2015

20 Yooralla - staying safe in taxis

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- 21 We Can Work with the Right Support, Position Statement by Inclusion Australia, from Professor Richard Bruggemann, received 22 September 2015
 - 22 Guardianship information, from Professor Richard Bruggemann, received 22 September 2015
 - 23 Funded Organisation Service Review - Yooralla report, from Yooralla, received 30 September 2015
 - 24 Disability Service Plan 2014-2016, from Queensland Department of Justice and Attorney-General, received 12 October 2015
 - 25 DJAG Disability Service Plan 2014-16, Year one progress report, from Queensland Department of Justice and Attorney-General, received 12 October 2015
 - 26 Disabled Justice report, May 2007, from Queensland Advocacy Incorporated, received 16 October 2015
 - 27 dis-Abled Justice report, May 2015, from Queensland Advocacy Incorporated, received 16 October 2015
 - 28 Position Statement, from Queensland Advocacy Incorporated, received 16 October 2015
 - 29 Shining light on a closed system through an examination of forensic disability orders for persons with an intellectual or cognitive disability report, October 2015, from Queensland Advocacy Incorporated, received 16 October 2015
 - 30 Position statement on the Forensic Disability Service, from Queensland Advocacy Incorporated, received 16 October 2015
 - 31 Human Rights Indicators for People with Disability, from Queensland Advocacy Incorporated, received 16 October 2015
 - 32 Opening Doors to Life, Position paper, from Queensland Advocacy Incorporated, received 16 October 2015
 - 33 Legislation and Life, September 2003, from Queensland Advocacy Incorporated, received 16 October 2015
 - 34 University of NSW Review of Disability Services Queensland referral processes to private residential addresses, April 2005, from Queensland Advocacy Incorporated, received 16 October 2015
 - 35 Extracts from various Community Visitors' Reports, from Victorian Office of the Public Advocate, received 2 November 2015

Answers to Questions on Notice

- 1** Answers to Questions taken on Notice during 30 June public hearing, received from Yooralla, 24 July 2015
- 2** Answers to Questions taken on Notice during 30 June public hearing, received from National Disability Insurance Agency, 27 July 2015
- 3** Answers to Questions taken on Notice during 21 August public hearing, received from Department of Social Services, 3 September 2015
- 4** Answers to Questions taken on Notice during 27 August public hearing, received from NSW Ombudsman, 7 September 2015
- 5** Answers to Questions taken on Notice during 27 August public hearing, received from Australian Cross Disability Alliance, 8 September 2015
- 6** Answers to Questions taken on Notice during 27 August public hearing, received from Australian Cross Disability Alliance, 8 September 2015
- 7** Answers to Questions taken on Notice during 28 August public hearing, received from SA Police, 9 September 2015
- 8** Answers to Questions taken on Notice during 28 August public hearing, received from Linda McGough, 10 September 2015
- 9** Answers to Questions taken on Notice during 28 August public hearing, received from South Australian Community Visitor Scheme, 16 September 2015
- 10** Answers to Questions taken on Notice during 16 October public hearing, received from Office of the Public Guardian Queensland, 27 October 2015
- 11** Answers to written Questions on Notice, received from Richard Bruggemann, 5 November 2015
- 12** Answers to written Questions on Notice, received from NSW Department of Education, 6 November 2015
- 13** Answers to written Questions on Notice, received from Queensland Office of the Director-General, 9 November 2015
- 14** Answers to written Questions on Notice, received from Tasmanian Department of Health and Human Services, 9 November 2015
- 15** Answers to written Questions on Notice, received from WA Disability Services Commission, 10 November 2015

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- 16 Answers to written Questions on Notice, received from Australian Bureau of Statistics, 11 November 2015
 - 17 Answers to written Questions on Notice, received from Victorian Department of Education and Training, 23 November 2015
 - 18 Answers to written Questions on Notice, received from Australian Institute of Health and Welfare, 23 November 2015

Correspondence

- 1 Correspondence clarifying evidence given at Melbourne public hearing on 30 June, from Villamanta Disability Rights Legal Service Inc., received 22 July 2015
- 2 Correspondence clarifying evidence given at Brisbane public hearing on 16 October, from Anti-Discrimination Commission Queensland, received 30 October 2015

Tabled Documents

- 1 Opening statement, tabled by Mrs Carmen Pratts-Hincks, at Perth public hearing 10 April 2015
- 2 Disability service standards document from the Disability abuse hotline, tabled by Mr Robert Ellis, at Perth public hearing 10 April 2015
- 3 Opening statement, tabled by Yooralla, at Melbourne public hearing 30 June 2015
- 4 Various Yooralla documents, tabled by Yooralla, at Melbourne public hearing 30 June 2015
- 5 Book: I've Been Good So Far, tabled by Mrs Joan Reid, at Melbourne public hearing 30 June 2015
- 6 DVD: Hidden Lives, tabled by Ms Jane Rosengrave, at Melbourne public hearing 30 June 2015

- 7** Advocacy Kit: Housing, Know Your Rights, AMIDA 2009, tabled by Ms Pauline Williams, at Melbourne public hearing 30 June 2015
- 8** CD: My house my home, my rights in CRUs, tabled by Ms Pauline Williams, at Melbourne public hearing 30 June 2015
- 9** NSW Ombudsman, Disability Reportable Incidents Scheme, tabled by NSW Ombudsman, at Sydney public hearing 27 August 2015
- 10** Community Visitor Scheme, Visit and Inspection Prompt - Disability, tabled by South Australian Community Visitor Scheme, at Adelaide public hearing 28 August 2015
- 11** Position statement regarding the use of restrictive practices on people with disability, tabled by Queensland Advocacy Inc, at Brisbane public hearing 16 October 2015
- 12** Conclusions on the Use of Restrictive Practices for People with an Intellectual or Cognitive Impairment, tabled by Queensland Advocacy Inc, at Brisbane public hearing 16 October 2015
- 13** Submission to the Young People in Aged Care inquiry, tabled by Queensland Advocacy Inc, at Brisbane public hearing 16 October 2015
- 14** Additional information paper, tabled by Queensland Advocacy Inc, at Brisbane public hearing 16 October 2015

APPENDIX 2

Public hearings

Friday, 10 April 2015

Legislative Council Committee Office, Perth

Witnesses

Advocare

RICHARDS, Ms Sharon Joan, Acting Chief Executive Officer

UnitingCare West

ASH, Ms Sue, AO, Chief Executive Officer

Bolshy Divas

CONNOR, Ms Samantha Jayne, Member

GREEN, Ms Peta, Member

ISCEL, Ms Nihal, Member

ISCEL, Ms Zel, Member

PEARMAN, Ms Leanne, Member

SOFTLY, Ms Jackie, Member

Women With Disabilities WA Inc.

LAMB, Ms Rayna Antoinette, Coordinator

CONNOR, Ms Samantha Jayne, Private capacity

PRATTS-HINCKS, Mrs Carmen, Private capacity

ELLIS, Mr Robert, Private capacity

Developmental Disability WA

HARVEY, Ms Taryn, Chief Executive Officer

United Voice

BONE, Mr John, Delegate

McDADE, Ms Wanita, Delegate

SHAY, Ms Kelly, Assistant Secretary, WA Branch

Tuesday, 30 June 2015

Monash Conference Centre, Melbourne

Witnesses

Yooralla

DEVANESEN, Dr Sherene, Chief Executive Officer
CHAN, Adjunct Professor Jeffrey, Chief Practitioner

GUY, Ms Sandra Robyn (Sandy), Private capacity

JacksonRyan Partners

JACKSON, Mr Max, Partner
RYAN, Ms Margaret, Partner

ROSENGRAVE, Ms Jane, Private capacity

Disability Justice Advocacy Inc.

CARROLL, Mr Trevor, Executive Officer

Villamanta Disability Rights Legal Service Inc.

GRIFFITHS, Ms Deidre Joan Fyfe, Principal Solicitor and Executive Officer
ANDERSON, Ms Naomi, Casework Lawyer

BRIGHT, Ms Marion, Private capacity

Australian Psychological Society

ROUFEIL, Dr Louise, Executive Manager, Professional Practice
KILLMIER, Ms Helen, Executive Manager, Disability Solutions, UnitingCare
lifeAssist

Office of the Public Advocate, Victoria

PEARCE, Ms Colleen, Public Advocate
DEARN, Liz, Senior Policy and Research Officer

National Disability Insurance Agency

BOWEN, Mr David, Chief Executive Officer

United Voices for People with Disabilities

CROSS, Mr Peter Alan, President

Victorian Advocacy League for Individuals with Disabilities

CRAIG, Mr David, Project Coordinator

Action for More Independence and Dignity in Accommodation

WILLIAMS, Ms Pauline, Housing Rights Co-ordinator

Friday, 21 August 2015

Parliament House, Canberra

Witnesses**Department of Social Services**

CHRISTIAN, Mr James, PSM, Group Manager, Disability Employment and Carers

McDEVITT, Mrs Helen, Group Manager, National Disability Insurance Scheme

PEARSON, Mr Warren, AM, Branch Manager, Disability and Employment Sector Reform

SMITH, Mr Bruce, Branch Manager, National Disability Insurance Scheme

Disability Advocacy Network Australia

MALLETT, Ms Mary, Chief Executive Officer

Advocacy for Inclusion

RYAN, Ms Christina, General Manager

READ, Ms Ellen, Policy Officer

Woman A, Private capacity**Man A, Private capacity****PIANTO, Ms Julie, Private capacity****HEENAN, Mr Christopher, Private capacity****National Disability Services**

BAKER, Dr Ken, Chief Executive

BANNISTER, Mr James, Senior Sector Development Officer

ACT Government Official Visitor Scheme

HARGREAVES, Mrs Narelle, OAM, Official Visitor for Disability in the ACT

SALTHOUSE, Ms Susan Margaret, Official Visitor for Disability in the ACT

STEELE, Dr Linda Roslyn, Private capacity

ACT Disability, Aged and Carer Advocacy Service

DI MEZZA, Mrs Sonia, Deputy Chief Executive Officer

Thursday, 27 August 2015

Stamford Plaza Hotel, Sydney Airport

Witnesses

New South Wales Council for Intellectual Disability

HEALY, Ms Aine, Executive Director, Advocacy

Intellectual Disability Rights Service

MORRIS, Ms Margot, Principal Solicitor

Health and Community Services Union

WILLIAMS, Mr Lloyd, National President; and State Secretary, Victorian Branch

EGARTER, Ms Heidi, Member

MUNRO, Ms Tammy, Lead Organiser, Tasmanian Branch

STEELE, Mr Paul, Delegate

Woman A, Private capacity

GIVEN, Ms Fiona, Private capacity

Office of the Public Guardian, New South Wales Department of Justice

HASTINGS, Mr Theo, Assistant Director Operations

SMITH, Mr Graeme, Public Guardian

NSW Ombudsman

HOLTON, Mr Anthony, Director, Disability Reportable Incidents Division

KINMOND, Mr Steve, Community and Disability Services Commissioner; and
Deputy Ombudsman

McKENZIE, Ms Kathryn, Director, Disability

Northcott

NUSCO, Mr Jeramy, Behaviour Support Coordinator and Practitioner

SMITH, Ms Hilary, Business Development and Partnerships Coordinator

WOODWARD, Ms Mary, Private capacity

Australian Cross Disability Alliance

CADWALLADER, Dr Jessica, Advocacy Project Manager, Violence Prevention, People with Disability Australia

FLANAGAN, Ms Jane, Senior Research and Policy Officer, National Ethnic Disability Alliance

FROHMADER, Ms Carolyn, Executive Director, Women with Disabilities Australia

GRIFFIS, Mr Damian, Chief Executive Officer, First Peoples Disability Network Australia

SANDS, Ms Therese, Co-Chief Executive Officer, People with Disability Australia

WWILD Sexual Violence Prevention Service

BERRIE, Ms Leona, Manager

HICKS, Ms Kobie, Private capacity

ANDERSON, Dr Angelika, Private capacity

PHILLIPS, Ms Julie, Private capacity

Friday, 28 August 2015

Hotel Grand Chancellor Adelaide on Hindley, Adelaide

Witnesses

McGOUGH, Ms Linda, Private capacity

Adelaide People First

GANT, Mrs Silvana, President and Convenor

Woman A, Private capacity

TAYLOR, Ms Jacqueline, Coordinator, Counselling Services, Victim Support Service

Women With Disabilities South Australia

CHARLESWORTH, Ms Margie, Convenor

South Australian Community Visitor Scheme

ALDERDICE, Mr John, Office Manager

BRUGGEMANN, Professor Richard, Private capacity**Attorney-General's Department South Australia**

BROCK, Dr Stephen, Senior Policy Officer, Policy and Research, Strategy and Reform Division

PLATER, Dr David, Senior Legal Officer, Legislative Services

WEIR, Mr Greg, Executive Director, Strategy and Reform

South Australia Police

LOCK, Sergeant Susan, Investigations Supervisor, Special Crimes Investigation Branch, Victim Management Section

PETERS, Detective Inspector Charmaine, Operations, Special Crimes Investigation Branch

WIESZYK, Detective Superintendent Mark, Acting Officer in Charge, Serious Crime Coordination Branch

JFA Purple Orange

WILLIAMS, Mr Robbi, Chief Executive Officer

Dignity for Disability

VINCENT, Ms Kelly Leah, MLC, South Australian Parliament

Friday, 16 October 2015

Adina Apartment Hotel, Brisbane

Witnesses**Queensland Advocacy Inc.**

O'FLYNN, Ms Michelle, Director

PHILLIPS, Dr Emma Louise, Systems Advocate

Queenslanders with Disability Network

MOSS, Ms Michelle, Project Manager

WWILD Sexual Violence Prevention Association

BARRETT, Ms Jane, Victim of Crime Support Worker

BERRIE, Ms Leona Grace, Manager

North Australian Aboriginal Justice Agency

MARTIN, Ms Philippa, Managing Solicitor, Civil Law Section

Office of the Public Guardian

DUFFY, Ms Julia Pauline, Acting Public Guardian

Public Advocate Queensland

CHANDLER, Ms Kim, Acting Public Advocate

Speaking Up For You Inc.

LAKSHMAN, Mr Neal, Advocacy Worker

TOOHEY, Ms Dianne, Coordinator

Queensland Aged and Disability Advocacy

WILLIAMS, Ms Karen Jane, Guardianship Coordinator

Queensland Anti-Discrimination Commission

COCKS, Mr Kevin, Commissioner

BURGESS, Ms Karen, Private capacity

SULLIVAN, Ms Julie Anne, Private capacity

APPENDIX 3

Summary of key recommendations from previous reports

Australian Law Reform Commission

Equality, Capacity and Disability in Commonwealth Laws, 2014

Recommendations¹

3. National Decision-Making Principles

Recommendation 3–1 Reform of Commonwealth, state and territory laws and legal frameworks concerning individual decision-making should be guided by the National Decision-Making Principles and Guidelines (see Recommendations 3–2 to 3–4) to ensure that:

- supported decision-making is encouraged;
- representative decision-makers are appointed only as a last resort; and
- the will, preferences and rights of persons direct decisions that affect their lives.

Principle 1: The equal right to make decisions

All adults have an equal right to make decisions that affect their lives and to have those decisions respected.

Principle 2: Support

Persons who require support in decision-making must be provided with access to the support necessary for them to make, communicate and participate in decisions that affect their lives.

Principle 3: Will, preferences and rights

The will, preferences and rights of persons who may require decision-making support must direct decisions that affect their lives.

Principle 4: Safeguards

Laws and legal frameworks must contain appropriate and effective safeguards in relation to interventions for persons who may require decision-making support, including to prevent abuse and undue influence.

1 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Final Report, ALRC Report 124, August 2014, pp 11–21, <https://www.alrc.gov.au/publications/equality-capacity-disability-report-124> (accessed 20 November 2015).

Recommendation 3–2 Support Guidelines**(1) General**

- (a) Persons who require decision-making support should be supported to participate in and contribute to all aspects of life.
- (b) Persons who require decision-making support should be supported in making decisions.
- (c) The role of persons who provide decision-making support should be acknowledged and respected—including family members, carers or other significant people chosen to provide support.
- (d) Persons who require decision-making support may choose not to be supported.

(2) Assessing support needs

In assessing what support is required in decision-making, the following must be considered:

- (a) All adults must be presumed to have ability to make decisions that affect their lives.
- (b) A person must not be assumed to lack decision-making ability on the basis of having a disability.
- (c) A person's decision-making ability must be considered in the context of available supports.
- (d) A person's decision-making ability is to be assessed, not the outcome of the decision they want to make.
- (e) A person's decision-making ability will depend on the kind of decisions to be made.
- (f) A person's decision-making ability may evolve or fluctuate over time.

Recommendation 3–3 Will, Preferences and Rights Guidelines**(1) Supported decision-making**

- (a) In assisting a person who requires decision-making support to make decisions, a person chosen by them as supporter must:
 - (i) support the person to express their will and preferences; and
 - (ii) assist the person to develop their own decision-making ability.
- (b) In communicating will and preferences, a person is entitled to:
 - (i) communicate by any means that enable them to be understood; and
 - (ii) have their cultural and linguistic circumstances recognised and respected.

(2) *Representative decision-making*

Where a representative is appointed to make decisions for a person who requires decision-making support:

- (a) The person's will and preferences must be given effect.
- (b) Where the person's current will and preferences cannot be determined, the representative must give effect to what the person would likely want, based on all the information available, including by consulting with family members, carers and other significant people in their life.
- (c) If it is not possible to determine what the person would likely want, the representative must act to promote and uphold the person's human rights and act in the way least restrictive of those rights.
- (d) A representative may override the person's will and preferences only where necessary to prevent harm.

Recommendation 3–4 *Safeguards Guidelines*

(1) *General*

Safeguards should ensure that interventions for persons who require decision-making support are:

- (a) the least restrictive of the person's human rights;
- (b) subject to appeal; and
- (c) subject to regular, independent and impartial monitoring and review.

(2) *Support in decision-making*

- (a) Support in decision-making must be free of conflict of interest and undue influence.
- (b) Any appointment of a representative decision-maker should be:
 - (i) a last resort and not an alternative to appropriate support;
 - (ii) limited in scope, proportionate, and apply for the shortest time possible; and
 - (iii) subject to review.

4. Supported Decision-Making in Commonwealth Laws

Recommendation 4–1 A Commonwealth decision-making model that encourages supported decision-making should be introduced into relevant Commonwealth laws and legal frameworks in a form consistent with the National Decision-Making Principles and Recommendations 4–2 to 4–9.

Recommendation 4–3 Relevant Commonwealth laws and legal frameworks should include the concept of a supporter and reflect the National Decision-Making Principles in providing that:

- (a) a person who requires decision-making support should be able to choose to be assisted by a supporter, and to cease being supported at any time;

- (b) where a supporter is chosen, ultimate decision-making authority remains with the person who requires decision-making support; and
- (c) supported decisions should be recognised as the decisions of the person who required decision-making support.

Recommendation 4–6 Relevant Commonwealth legislation should include the concept of a representative and provide for representative arrangements to be established that reflect the National Decision-Making Principles.

Recommendation 4–10 The Australian and state and territory governments should develop mechanisms for sharing information about appointments of supporters and representatives, including to avoid duplication of appointments and to facilitate review and monitoring.

5. The National Disability Insurance Scheme

Recommendation 5–1 The objects and principles in the *National Disability Insurance Scheme Act 2013* (Cth) should be amended to ensure consistency with the National Decision-Making Principles.

Recommendation 5–2 The *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules should be amended to include provisions dealing with supporters consistent with the Commonwealth decision-making model.

Recommendation 5–3 The *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules should be amended to include provisions dealing with representatives consistent with the Commonwealth decision-making model.

7. Access to Justice

Recommendation 7–1 and 7–3 The *Crimes Act 1914* (Cth) should be amended to provide that a person cannot stand trial if the person cannot be supported to:

- (a) understand the information relevant to the decisions that they will have to make in the course of the proceedings;
- (b) retain that information to the extent necessary to make decisions in the course of the proceedings;
- (c) use or weigh that information as part of the process of making decisions; or
- (d) communicate the decisions in some way.

Recommendation 7–2 State and territory laws governing the consequences of a determination that a person is ineligible to stand trial should provide for:

- (a) limits on the period of detention that can be imposed; and
- (b) regular periodic review of detention orders.

Recommendation 7–7 The *Evidence Act 1995* (Cth) should be amended to provide that a person is not 'competent to give evidence about a fact' if the person cannot be supported to:

- (a) understand a question about the fact; or

(b) give an answer that can be understood to a question about the fact.

Recommendation 7–11 Federal courts should develop bench books to provide judicial officers with guidance about how courts may support persons with disability in giving evidence.

8. Restrictive Practices

Recommendation 8–1 The Australian Government and the Council of Australian Governments should take the National Decision-Making Principles into account in developing the national quality and safeguards system, which will regulate restrictive practices in the context of the National Disability Insurance Scheme.

Recommendation 8–2 The Australian Government and the Council of Australian Governments should develop a national approach to the regulation of restrictive practices in sectors other than disability services, such as aged care and health care.

10. Review of State and Territory Legislation

Recommendation 10–1 State and territory governments should review laws and legal frameworks concerning individual decision-making to ensure they are consistent with the National Decision-Making Principles and the Commonwealth decision-making model. In conducting such a review, regard should also be given to:

- (a) interaction with any supporter and representative schemes under Commonwealth legislation;
- (b) consistency between jurisdictions, including in terminology;
- (c) maximising cross-jurisdictional recognition of arrangements; and
- (d) mechanisms for consistent and national data collection.

Any review should include, but not be limited to, laws with respect to guardianship and administration; consent to medical treatment; mental health; and disability services.

Australian Human Rights Commission

Equal Before the Law: Towards Disability Justice Strategies, 2014

Actions²

Disability Justice Strategies

The Australian Human Rights Commission (Commission) considers that each jurisdiction in Australia requires an holistic, coordinated response to the issues raised in this report through a Disability Justice Strategy.

The Commission considers that any Disability Justice Strategy should address a core set of principles and include certain fundamental actions. These are set out in the following six action areas.

4.1 Appropriate communications

Action 4.1.1 Include formal recognition of the requirement to ascertain the need for an interpreter service, communication support worker or hearing assistance when dealing with Aboriginal and Torres Strait Islander people.

Action 4.1.2 Provide access to an appropriate independent communication support worker and interpreter regardless of place of residence or geographical location.

Action 4.1.3 Align terms and conditions of bail, bonds and restraining orders to a person's abilities and capacity to comply.

Action 4.1.4 Communicate bail decisions in a format and mode appropriate to the person with disability.

Action 4.1.5 Provide support to remind a person of bail conditions and support compliance.

4.2 Early intervention and diversion

Action 4.2.1 Make available via an e-referral program information that assists police and courts with appropriate diversion and early intervention.

Action 4.2.2 Make the e-referral program state- or territory-wide and link it to registered local, state and national support service agencies.

Action 4.2.3 Use e-referral programs to provide timely interventions that stream Aboriginal and Torres Strait Islander children with disability to the support services that they need.

4.3 Increased service capacity and support

Action 4.3.1 Design intervention and support services that are:

- age-, gender- and disability-sensitive;

2 Australian Human Rights Commission, *Equal Before the Law: Towards Disability Justice Strategies*, February 2014, pp 31–38, <https://www.humanrights.gov.au/our-work/disability-rights/publications/equal-law> (accessed 20 November 2015).

- appropriate for people with disabilities who have communication impairment or complex support needs; and
- culturally appropriate to the needs of women, children, Aboriginal and Torres Strait Islander people and people from culturally and linguistically diverse backgrounds with disabilities.

Action 4.3.2 Expand Community Visitor's schemes to include a broader range of settings and apply to all people with disabilities.

Action 4.3.3 Provide access to advocacy and legal services with disability expertise regardless of place of residence or geographical location.

Action 4.3.4 Provide during interviews a sexual assault counsellor, disability support advocate or specialist disability lawyer to support adults and children with disabilities who have been sexually assaulted or experienced violence.

Action 4.3.5 Provide to people with disabilities who are lawfully deprived of their liberty the support, adjustments and aids they need to meet basic human needs and participate in custodial life.

Action 4.3.6 Establish as a matter of urgency a national Aboriginal and Torres Strait Island disability individual advocacy program.

Action 4.3.7 Create an assessment protocol that assists police, courts, and correctional institutions in identifying people with disabilities in order to determine:

- the necessity for Independent Communication Support Workers, and Disability Advocate / Support Person;
- the appropriate supports and services to exercise their legal capacity and enhance health, social and welfare outcomes; and
- the requirement for procedural and age-appropriate accommodations to ensure effective access to justice.

Action 4.3.8 Provide pre-court conferencing for children and young people with disabilities.

Action 4.3.9 Provide witness support services to people with disabilities,

Action 4.3.10 Aboriginal and Torres Strait Islander people with disabilities are provided with culturally secure assessment, supports and services that promote full and effective participation in society and a life with dignity.

Action 4.3.11 Adopt individual case management for prisoners/detainees with disability, including through prison in-reach services provided by community organisations, to provide education and support (pre- and post-release) to assist re-integration into the community and reduce offending behaviour.

Action 4.3.12 Make available quiet rooms for people with disabilities to wait, meet or for break times in court.

Action 4.3.13 Sentencing for unpaid fines should involve the exercise of discretion, taking into account the high incidence of poverty among people with disabilities.

4.4 Effective training

Action 4.4.1 Develop and deliver staff training that:

- improves responses and attitudes of staff
- addresses the impact of intersectional experiences of disability, gender and violence.
- emphasises the rights of people with disabilities to make their own decisions, with support if necessary, and that those decisions deserve respect.

Action 4.4.2 Provide to people with a disability, their families and carers appropriate education and information, in a culturally competent manner, so they are confident in using the service system and can acquire the 'inside knowledge' that makes a system work.

4.5 Enhanced accountability and monitoring

Action 4.5.1 Ensure people with disabilities are represented on relevant governance and advisory boards.

Action 4.5.2 Include transparent, effective and culturally appropriate complaints handling procedures.

Action 4.5.3 Implement a transparent independent mechanism to monitor the use of restraint and seclusion of people with disabilities in all settings, with a view to recording and minimising the use of these practices. When the circumstances justify the use of restraint and seclusion safeguards must in place and reported.

4.6 Better policy and frameworks

Action 4.6.1 At every stage of the criminal justice system, recognise the importance of providing procedural and age-appropriate accommodations to people with disabilities.

Action 4.6.2 Recognise that failure to provide necessary accommodations to a person with disabilities can create a legitimate mitigating circumstance that a court should consider.

Action 4.6.3 Where a person who has been found unfit to plead is to be held in detention, demonstrate that all reasonable steps have been taken to avoid this outcome.

Action 4.6.4 Require chief executives of relevant agencies to report every 2 years to the Premier and the Premier's Disability Advisory Council in relation to access to justice for people with disabilities in the criminal justice system.

Action 4.6.5 All criminal justice agencies monitor and evaluate:

- participation rates by people with disabilities as victims of crime, witnesses, accused, defendants, offenders and jurors in all parts of the justice system
- provision of adjustments and supports on critical indicators including age, sex, gender, disability, race, type of violence.

Productivity Commission***Access to Justice Arrangements, 2014******Recommendations – Chapter 5: Understanding and navigating the system***³

Recommendation 5.1

Legal Assistance Forums should establish Community Legal Education Collaboration Funds (CLECFs) in their jurisdictions to ensure that high quality legal education resources for jurisdictional and Commonwealth matters are developed and maintained. Funding for community legal education should be allocated to projects where the forum has identified significant need. A database of community legal education projects should be used to share community legal education, identify community legal education that may be out of date and minimise duplication. Mechanisms to ensure coordination between CLECFs on matters of Commonwealth law should be put in place.

Recommendation 5.3

To support the identification and assistance of disadvantaged people with complex legal needs:

- legal health checks that are developed for priority disadvantaged groups should be funded through the proposed Community Legal Education Collaboration Funds. The resulting material should be shared amongst providers. Legal Assistance Forums should coordinate this activity to avoid duplication between jurisdictions and maintain the currency of the health checks.
- legal assistance and relevant non-legal service providers should be encouraged to coordinate their services in order to provide more outreach and holistic services where appropriate and need is greatest.
- the proposed Community Legal Education Collaboration Funds should assess the most effective way to support the legal education of non-legal community workers. Training materials should be shared among legal assistance providers and between jurisdictions.

Legal Assistance Forums should regularly reassess the mix of these services in order to promote efficient service delivery by adapting to changing needs.

3 Productivity Commission, 'Chapter 5: Understanding and navigating the system,' *Access to Justice Arrangements*, Productivity Commission Inquiry Report no. 72, volume 1, 5 September 2014, pp 149–185, <http://www.pc.gov.au/inquiries/completed/access-justice/report> (accessed 21 October 2015).