

Inquiry into abuse in disability services

Submission to the Family and Community Development
Committee

10 June 2015

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RECOMMENDATIONS

The Public Advocate makes the following recommendations in relation to the prevention of violence and abuse in disability settings, and its reporting and investigation. These recommendations are specific firstly to Victoria, and then to the Commonwealth Government. Recommendations 1 to 9 are drawn from the Public Advocate's submission to the Senate Standing Committee on Community Affairs Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings.

Victorian

Recommendation 1. The *Guardianship and Administration Act 1986* (Vic) should be amended to give the Public Advocate broader power to conduct investigations into 'the abuse, neglect or exploitation of people with impaired decision-making ability' as recommended by the Victorian Law Reform Commission Guardianship Final Report 2012 (recommendations 328 and 329).

Recommendation 2. The *Disability Act 2006* should be amended to require disability residential services to publicly report all statistical information about incidents and allegations of abuse and neglect, as well as the outcomes of these reports and any investigations.

Recommendation 3. The Department of Health and Human Services should adopt OPA's *Interagency Guideline for Addressing Violence, Neglect and Abuse* (IGUANA).

Recommendation 4. The Victorian Government should adopt a policy that *all* disability residential services staff working in Victoria need to be trained to a minimum Certificate IV standard.

Recommendation 5. The Victorian Government should introduce a comprehensive abuse prevention program aimed at changing workplace culture and better equipping staff in disability residential settings to identify and respond to abuse or potential abuse.

Recommendation 6. The Victorian Government should review Whistleblower protections for disability staff in disability residential settings to ensure such staff can report violence and abuse perpetrated by staff without repercussion.

Recommendation 7. The Victorian Government should provide additional funding for Community Visitors in the disability stream to enable them to visit each disability residential service four times per year, thus enabling them to exercise their legislative powers under the *Disability Act 2006* (Vic).

Recommendation 8. The Victorian Government should legislate to require police to have an Independent Third Person present when interviewing persons with cognitive impairment or mental ill health.

National

Recommendation 9. The Commonwealth Government should introduce a comprehensive abuse prevention program aimed at changing workplace culture and better equipping staff in Commonwealth disability services (e.g. advocacy and employment services) to identify and respond to abuse or potential abuse, complemented by compulsory continuous training and the development of codes of conduct for staff.

National Disability Insurance Scheme quality and safeguarding

The Public Advocate makes the following recommendations in relation to the prevention of violence and abuse in disability settings, and its reporting and investigation, within the National Disability Insurance Scheme.

Recommendations 10 to 16 are drawn from the Australian Guardianship and Administration Council submission to the *Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper* to which OPA was a lead contributor, and whose recommendations were endorsed by OPA in its own submission to that paper. The recommendations remain relevant for the purposes of this Parliamentary Inquiry.

Disability Worker Exclusion Scheme

Recommendation 10. A disability worker exclusion scheme with appropriate safeguards should be implemented that has potential application to any person who provides NDIS-funded supports. Safeguards should include the following:

- a. the scheme must be established by legislation
- b. principles of natural justice must guide its development and operation
- c. there must be appropriate appeal mechanisms for workers who object to their listing.

Complaints

Recommendation 11. The role of a national Disability Services Complaints Commissioner should be established whose jurisdiction covers complaints about NDIS-funded services. The office should be independent of the National Disability Insurance Agency and could be modelled on existing state and territory disability complaints commissioners and their equivalents. Functions should include:

- a. resolving complaints
- b. collecting data about complaints and reporting publicly
- c. identifying and reporting on systemic abuse, neglect and exploitation
- d. raising public awareness about the rights of persons with disability
- e. educating service providers about the benefits of effective complaints mechanisms.

Investigations

Recommendation 12. An independent statutory authority should be empowered to conduct investigations where there are allegations or concerns about people with disability being abused, neglected or exploited. This function could sit with the proposed national Disability Services Complaints Commissioner, or with state and territory-based statutory authorities.

Community Visitors

Recommendation 13. Community Visitors programs currently in operation should be funded to continue for a 4-year transition period from 1 July 2016.

Recommendation 14. Amendment of the *National Disability Insurance Scheme Act 2013* (Cth) will likely be required to enable existing state and territory Community Visitors programs to operate in the context of the full NDIS roll-out. Relevant state and territory legislation will also likely need amendment to enable these programs to continue to operate in an NDIS environment.

Recommendation 15. Transitional legislation at the Commonwealth level, and in those jurisdictions where Community Visitors programs exist, should specify that Community Visitors have authority to visit the accommodation settings of NDIS participants where NDIS funds are being used to provide supported accommodation services. 'Supported accommodation' services should be defined to refer to situations where the provision of accommodation is connected to the provision of personal care and support.

Recommendation 16. A national evaluation of existing Community Visitors programs should be commenced as soon as possible and be concluded by 1 July 2018. The evaluation should be guided by the principles contained in the *Convention on the Rights of Persons with Disabilities*, the National Standards for Disability Services, and the National Disability Strategy. The evaluation should identify a best-practice Community Visitors model by assessing, among other things, the extent to which Community Visitors programs:

- a. promote social inclusion and the empowerment of people with disability;
- b. identify matters of concern (including situations of violence, abuse, exploitation and neglect);
- c. provide a cost-effective means of monitoring the well-being of people in NDIS-funded accommodation settings.

The evaluation should also consider whether the evidence collected supports the development, based on the identified best-practice model, of a national Community Visitors scheme, or the development of nationally-consistent state and territory Community Visitors schemes.

1. Introduction

- 1.1 The Victorian Office of the Public Advocate (OPA) welcomes this opportunity to make a written submission to the Family and Community Development Committee Inquiry into Abuse in Disability Services.
- 1.1 OPA is an independent statutory body with legislative powers under the *Guardianship and Administration Act 1986* and other Victorian legislation. OPA is dedicated to upholding the rights and interests of Victorians with a cognitive impairment or mental ill health, and works to eliminate abuse, neglect and exploitation.
- 1.2 OPA provides a number of services to work towards these goals, including the provision of guardianship, investigation and advocacy services to people with cognitive impairments or mental ill health. In the last financial year, 2013-14, OPA was involved in 1519 guardianship matters, 362 investigations and 365 cases requiring advocacy.¹
- 1.3 OPA coordinates the Community Guardianship Program, the Community Visitors' Program, the Independent Third Person Program, the Supported Decision-Making Pilot Project and the Corrections Independent Support Officer Program, providing support to over 900 volunteers.
- 1.4 The Community Visitors Program is the largest of OPA's volunteer programs. Community Visitors are empowered by law to visit Victorian accommodation facilities for people with a disability or mental illness at any time, unannounced. They monitor and report on the adequacy of services provided, in the interests of residents and patients. There are 443 volunteers who visit across three streams: Disability Services, Residential Services and Mental Health. Community Visitors conducted 5079 visits during 2013-2014, 2935 of which were to 1187 Disability Service accommodation settings.²
- 1.5 OPA also plays a role in community education, the provision of advice and information and undertakes research, policy development and systemic advocacy.
- 1.6 OPA has extensive experience in reporting on and investigating violence and abuse in institutional and residential settings, stemming from the Public Advocate's statutory responsibility in this area and the reporting role of the Community Visitors.

¹ Office of the Public Advocate, *Annual Report 2013-2014* (2014) 10-20.

² Office of the Public Advocate, *Community Visitors Annual Report 2013-2014* (2014) 12.

- 1.7 Under the Guardianship and Administration Act, the Public Advocate is charged with ‘the protection of persons with a disability from abuse and exploitation and the protection of their rights’.³ The Public Advocate is also entitled to enter any premises on which an institution is situated where abuse of people with disability is suspected.⁴
- 1.8 As a result of these functions, OPA has extensive expertise in investigating and reporting on violence and abuse in a range of disability settings.
- 1.9 Evidence for this submission comes from the following OPA submissions:
- o Australian Guardianship and Administration Council submission to the Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper.
<http://www.publicadvocate.vic.gov.au/research/131/>
 - o Office of the Public Advocate submission to the Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper.
<http://www.publicadvocate.vic.gov.au/research/131/>
 - o Submission to the Senate Standing Committee on Community Affairs Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings.
<http://www.publicadvocate.vic.gov.au/research/131/>
 - o Submission to the Victorian Ombudsman’s Investigation into disability abuse reporting. (not publicly available).
 - o Submission to the Royal Commission into Family Violence. (not yet publicly available).
- 1.10 The recommendations made in this submission draw extensively from the recommendations contained in OPA’s submissions to the inquiries noted above.

³ *Guardianship and Administration Act 1986*, s15(c)(iv).

⁴ *Ibid.* s18A.

2. OPA's involvement with the NDIS

Advocate Guardian Program

- 2.1 OPA's Advocate Guardian Program has been involved with the National Disability Insurance Scheme (NDIS) through advocacy referrals from the Victorian Department of Health and Human Services (DHHS) for prospective participants living in the Barwon trial site. This includes 28 people living in shared supported accommodation, and 31 people living at Colanda Residential Services. In addition to providing advocacy services, the Public Advocate is guardian for five participants and is involved in NDIS matters by virtue of these guardianship appointments.
- 2.2 Guardianship is one of the largest components OPA's work, with over 1519 guardianship services recorded in 2013-2014. The Advocate Guardian Program provides services in guardianship, advocacy and investigation and in the course of this work, advocate guardians encounter violence and abuse.⁵ A high proportion of cases of violence and abuse, including family violence, have been found in file reviews undertaken in recent OPA research.

Community Visitors Program

- 2.3 Community Visitors are empowered by law to visit Victorian accommodation facilities for people with a disability or mental illness at any time, unannounced. They monitor and report on the adequacy of services provided, in the interests of residents and patients. OPA Community Visitors are active in the Barwon trial site. Community Visitors' representatives also meet with National Disability Insurance Agency (NDIA) staff on a quarterly basis to raise concerns identified during visits. OPA's Community Visitors Program will be discussed further in the submission in response to terms of reference IV.

⁵ Office of the Public Advocate, *Annual Report 2013-2014* (2014).

Policy, research, education and advice

- 2.4 OPA has undertaken significant policy work in regards to the NDIS. In 2014, OPA wrote a discussion paper titled ‘Guardianship and the National Disability Insurance Scheme’ that examines the interaction between state appointments of substitute decision makers (guardians) and Commonwealth appointments of plan nominees.⁶ This paper considers the need to examine less restrictive alternatives to resolving matters than by appointing guardians. It also proposes that usage of the NDIS nominee provisions needs to be closely monitored and evaluated.⁷ OPA has produced a decision-making guide in relation to current Victorian and Commonwealth laws which seeks to navigate the complexities that exist.
- 2.5 The NDIS is also relevant to the work of the Advice Service, which OPA expects will be an important source of information about informal and formal ways of assisting participants with NDIS access and plan implementation issues, in addition to providing advice about decision making. It is anticipated that this service will become increasingly important for members of the community who wish to know more about guardianship, advocacy, enduring powers of attorney and Community Visitors, and how each of these operate within the NDIS.

Nationally consistent quality and safeguarding framework

- 2.6 OPA has been active in external discussions about the development of nationally consistent monitoring mechanisms of the NDIS. OPA led the writing of the Australian Guardianship and Administration Council (AGAC) submission to the ‘Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper’ (NDIS quality and safeguarding consultation paper) and OPA endorses the recommendations made by AGAC (some of which are included in this submission).

3. Public Advocate’s knowledge of violence and abuse

Advocate Guardian Program

- 3.1. The Advocate Guardian Program provides services across three areas: guardianship, investigation and advocacy. In the 2013-14 financial year, there were 781 new guardianship matters and a carryover of 738 matters from the previous year. There were 277 new investigations and 85 carried over from the previous year. There was a total of 365 advocacy matters.

⁶ Office of the Public Advocate (Victoria), *Guardianship and the National Disability Insurance Scheme: Discussion paper* (2014) available online at Office of the Public Advocate, *Discussion Papers*, 1 September 2014, <<http://www.publicadvocate.vic.gov.au/research/132/>>.

⁷ *Ibid.*

- 3.2. Under section 16(h) of the Guardianship and Administration Act, the Public Advocate may be asked to ‘investigate any complaint or allegation that a person is under inappropriate guardianship or is being exploited or abused or in need of guardianship’. The Advocate Guardian Program has a role in operationalising OPA’s mission to ‘uphold the rights and interests of people with a disability and work to eliminate abuse, neglect and exploitation’ and is often contacted to either advocate for, investigate concerns about or undertake guardianship for adults at risk of abuse or neglect.
- 3.3. Since 2010 the Public Advocate has required advocate guardians to formally notify her of guardianship cases concerning sexual assault or serious violence and end of life decisions. Since that time, there have been 77 notifications to the Public Advocate, 35 of these or 45% concerning sexual assault or serious abuse. Eleven of the cases concerning sexual assault or serious abuse have involved residents living in disability residential services (table 1).⁸

YEAR	Sexual assault	Abuse/assault	Other notifications	TOTAL	Disability	Aged/SRS	Other
2010-12	12	8	14	34	8	6	6
2012-13	4	1	16	21	1	1	3
2013-14	3	3	5	11	1	0	5
2014-15	3	1	7	11	1	1	2
TOTAL	22	13	42	77	11	8	16

Table 1. Advocate/Guardian notifications to Public Advocate August 2010 to January 2015

- 3.4. Notifications to the Public Advocate provide evidence of only the most extreme cases of violence and abuse that require a response from the Public Advocate. Supplementing the notification data, three internal research projects in this area reveal the widespread experience of violence, abuse and neglect for represented persons.⁹

Telephone Advice Service

- 3.5. The OPA advice service offers information and advice on a diverse range of topics affecting people with a disability. The issues raised by people contacting OPA are often complex, requiring a high level of expertise. During 2013-2014, the advice service handled 13,795 enquiries. Data is not able to be extracted on the number of these calls that relate to violence, abuse and neglect. However, a conservative estimate suggests that 10-15% of calls concern violence and abuse.

⁸ Disability residential services include accommodation managed by Disability Services and Community Service Organisations (CSOs).

⁹ <http://www.publicadvocate.vic.gov.au/research/255/>

Independent Third Person Program

- 3.6. The Independent Third Person (ITP) program is a volunteer program where volunteers are trained to support people with a cognitive disability or mental illness when they are being interviewed by police as a victim, witness or alleged offender. During 2013-14, ITPs attended 2598 police interviews of which 155 were for victims of assault, rape or sexual offences.¹⁰
- 3.7. OPA is concerned about widespread anecdotal evidence that police may not be using an ITP as stipulated in the Police Manual. A review of ITP data shows a great disparity in the use of ITPs by police across the state. OPA has consistently argued that the right of people with cognitive disability to use an independent person in police interviews should be legislatively articulated.

Community Visitors Program

- 3.8. Community Visitors have been intensively monitoring and reporting incidents relating to abuse, neglect and assault in disability residential services, residential services and mental health services since 2009-2010. A total of 880 incidents have been reported since that time (see table 2 below). Community Visitors have reported ‘troubling cases of assault by staff, serious and unexplained injuries and people living in fear of violence’.¹¹
- 3.9. The 880 incidents seen in table 2 originate from reports by Community Visitors following their regular visits to houses. The numbers are ascertained from their viewing of incident reports, incidents they witness and incidents disclosed to them by residents and staff. They are a conservative estimate of the incidence of abuse, neglect and assault in service settings as many incidents are not recorded, witnessed or disclosed.

Year	Community Visitor stream			Total
	Disability services	Residential services	Mental Health	
2009-10	55	26	10	91
2010-11	66	27	17	110
2011-12	87	69	27	183
2012-13	104	66	39	209
2013-14	147	85	55	287
TOTAL	459 (52%)	273 (31%)	148 (16%)	880

Table 2. Community Visitor reports of abuse, neglect and assaults 2009-2010 to 2013-2014 (source Community Visitor annual reports 2011-2012 and 2013-2014)

¹⁰ Office of the Public Advocate, *Annual Report 2013-14* (2014).

¹¹ Community Visitors, *Annual Report 2011-2012* (2012) 4.

Notifications from the Community Visitors program to the Public Advocate

- 3.10. Since 2010 the Public Advocate has required Community Visitors to formally notify her of cases concerning sexual assault or serious violence and other serious matters (e.g. death, unintended or unexplained injury). Serious abuse is defined as any incidence of abuse that involves police or admission to a hospital as a direct consequence. Between April 2010 and January 2015 the Public Advocate received 118 notifications from the three Community Visitors streams. Most notifications (67%) were about assault, neglect, abuse and violence (table 3).

Year	Notification type			Total
	Sexual assault	Assault, neglect, abuse, violence	Other (e.g. death, unintended or unexplained injury)	
2010-11	7	11	2	20
2011-12	3	19	8	30
2012-13	3	15	4	22
2013-14	3	21	3	27
2014-15	6	13	0	19
TOTAL	22 (19%)	79 (67%)	17 (14%)	118

Table 3. Community Visitor notifications to Public Advocate 2010-2011 to 2013-2014 x notification type

- 3.11. Most notifications (74%) to the Public Advocate from the Community Visitors Program area concern clients in disability residential services as table 4 shows.¹²

Year	Service type			Total
	Disability residential services	Mental health services	Residential services	
2010-11	13	6	1	20
2011-12	21	4	5	30
2012-13	17	3	2	22
2013-14	20	7	0	27
2014-15	16	0	3	19
TOTAL	87 (74%)	20(17%)	11 (9%)	118

Table 4. Community Visitor notifications to Public Advocate 2010-2011 to 2013-2014 x service type

¹² Visits by Community Visitors to Disability Services in 2013-14 made up only 58% of visits by Community Visitors; visits to mental health services made up 25% and visits to residential services made up 17%.

- 3.12. Of the 87 notifications relating to disability residential services received by the Public Advocate, serious violence (resident to resident) is the highest category. Serious violence (staff to resident) is the second highest category (table 5).

Issue	Number
Violence - resident to resident	31
Violence - staff to resident	18
Unexplained injuries	9
Sexual assault - resident to resident	8
Inadequate care	8
Sexual assault - staff to resident	5
Other	8
Total	87

Table 5. Notifications received by the Public Advocate on issues concerning sexual assault or serious abuse for people living in disability residential services (1 July 2010-2011 January 2015)

- 3.13. OPA’s analysis of the notification data shows that there are three main factors contributing to violence and abuse:
- o the group home environment;
 - o workforce issues and;
 - o cultural issues.
- 3.14. Crucially, deficiencies in reporting and investigation compound the problem, with failures in service responses, police responses, DHHS responses and health service responses leaving victims of violence and abuse at further risk and unsupported.
- 3.15. OPA has used the analysis of notifications received by the Public Advocate and relevant case studies in our submissions to the Ombudsman’s investigation into disability abuse reporting, the Senate Inquiry into violence, abuse and neglect and in the Royal Commission into Family Violence. Our findings from the analysis of the data and case studies are relied on in this current submission, although no case studies are included.

4. Addressing the Terms of Reference

- 4.1. This submission will address three of the terms of reference outlined by the inquiry:
- I. Workforce recruitment, screening, induction, training and supervision;
 - III. Systems for handling complaints; and
 - IV. the impact of current systemic safeguards on the rights and protections of people accessing disability services.

Term of reference I. Workforce

Workforce recruitment, screening, induction, training and supervision

- 4.2. The analysis of Community Visitors' notifications to the Public Advocate reveals a range of workforce issues at play in cases of violence and abuse of people in disability residential settings. These range from staff screening, training and supervision to organisational leadership. In disability residential settings, where incompatible residents with high needs are often co-located, good leadership and the capacity of the workforce to identify and respond to incidents when they arise are both critical.
- 4.3. Community Visitors report a failure of the workforce to respond to complex behaviours and a subsequent failure of management to respond appropriately; sometimes until a notification from the Public Advocate has been received and the issue has been investigated. Critically, the failure of services to provide specialist training, support and monitoring for staff compounds the problem of the co-location of incompatible residents with high needs.
- 4.4. Community Visitors are alert to cases of sexual assault of residents perpetrated by other residents. Residents who have a known history of sexual assault towards other residents can be placed in group home settings without sufficient management of the risk of assault to other residents. Where Behaviour Support Plans outline risk management strategies to prevent abuse, these procedures may not be followed. The failure of management to ensure supervision of the potential perpetrator and workforce issues such as inadequate staffing levels and the use of poorly briefed casual staff in high risk situations are contributing factors to incidents occurring.
- 4.5. The failure in investigation and related disciplinary action by services in response to abusive incidents perpetrated by staff is a crucial issue. The (DHHS) *Residential services practice manual 3rd edition* does not specify what action must be taken during an investigation of staff to resident violence. Notwithstanding, the analysis suggests that many cases fall well short of normative procedural expectations, with staff failing to be stood aside allowing continued contact with the complainant.
- 4.6. Bullying and abuse of residents appears embedded in the culture of some services where there is an implicit acceptance of behaviours that cause harm and a reluctance to name this as violence. The culture may also include bullying of staff, intended to discourage reporting. Some staff who report incidents of staff to resident abuse fear losing their jobs. Anonymous reporting causes delays and makes investigation of alleged incidents by Community Visitors difficult.

- 4.7. Some workers in residential services require no minimum level of training. A Community Visitor recently observed applications being sought in Geelong for people at the classification level DDSO1 to work in DHHS houses including sleepovers, active nights and weekend shifts. The only qualifications required were level 2 first aid, CPR certificate, Working With Children Check and drivers licence.¹³
- 4.8. Poorly trained staff are unlikely to have a sophisticated understanding of disability and complex behaviours and may be unable to manage people with complex needs or to recognise and report actions that put residents at risk. Strong leadership and continuous professional development, supervision and support on the ground by more highly trained and experienced staff is needed to support less experienced staff to better understand and to learn appropriate communication, support and behavioural management strategies.
- 4.9. Staffing shortages often result in minimally trained, casual and inexperienced staff working night shifts unsupervised with vulnerable residents. The vulnerability of non-verbal female residents receiving care from casual male staff, who may be working unsupervised and unmonitored, places female residents at risk. Community Visitors report concerns where allegations of potential harm were minimised or not taken seriously by management. Given the high incidence of violence experienced by women with disabilities and the vulnerability of non-verbal residents in relation to reporting abuse, this is an unacceptable risk.
- 4.10. The lack of supervision and monitoring enables acts of violence to be perpetrated because their actions are unseen. Some forms of abuse may not show in physical evidence. Often the abuse is verbal or emotional so will not be obvious or not included in an incident report or recorded in the non-critical incident log. Community Visitors will therefore not view a record of the incident.

¹³ Workers at the DDSO1Q level require Certificate IV in Disability Work or the Advanced Certificate in Residential and Community Services or equivalent.

- 4.11. While there are a range of pre-employment checks required by service providers in accordance with policies including the *Disability services employment safety screening compliance policy*, the *Service agreement information kit for funded organisations*, the *Safety screening policy (DHHS)* and the *Police records check policy*, this is clearly insufficient to screen out potential perpetrators. Community Visitors surveyed several services and found that police checks were only done pre-employment and argue that they should be undertaken more regularly.¹⁴ Neither can screening be regarded as a substitute to day-to-day supervision of staff and the development of a culture of respect and accountability. OPA undertakes police checks of Community Visitors every three years prior to their reappointment.
- 4.12. During consultation for this submission, a long term Community Visitor told of a repeat offender who was the subject of a police investigation for alleged verbal and physical abuse of disability residents ten years ago. She has seen him ‘disappear and pop up time and time again’ in positions from area manager to working in administration in both Community Services Organisations and Disability Services. He has since been accused of alleged verbal, financial and physical abuse but is still working in the sector. Many cases have been reported in the media in the past four years. For example, in February this year, *The Herald Sun* reported that a disability services staff member had been charged with 19 attacks of residents in four facilities.¹⁵
- 4.13. Training and minimum qualifications of staff should be mandatory, in addition to system-wide requirements that fall under the NDIS provider registration elements of a national framework. Workplace culture is a central determinant of the way staff treat people with disability. Workplace culture inevitably affects the way staff report and respond to allegations of abuse, neglect and exploitation within their own workplace.
- 4.14. No one system can ensure fully that staff are safe to work with people with disability. It is critical, therefore, that robust requirements are implemented in order to protect persons with disability from violence, abuse, neglect and exploitation.

¹⁵ The Herald Sun, 2 February 2015 ‘Human Services Department Support Worker Charged with Abusing Disabled Men’.

- 4.15. Echoing the recommendation contained in the AGAC submission to the NDIS quality and safeguarding consultation paper, OPA is, for now, in favour of creating a disability worker exclusion scheme with appropriate safeguards inbuilt.¹⁶ Careful consideration will be needed in determining the criteria that would result in a worker's name appearing on an exclusion list. See recommendation 10.

Term of reference III. Complaints

Systems for handling complaints

Complaints

- 4.16. The current Victorian system for handling complaints in disability services centres around the Office of the Disability Services Commissioner (DSC).
- 4.17. The DSC was established under the *Disability Act 2006* which provides it with a broad range of functions, including: to investigate complaints relating to disability services; review and identify the causes of complaints and to suggest ways of removing and minimising those causes; conciliate where a complaint has been made in relation to a disability service provider; take steps to publish and make available in an accessible manner details of complaints procedures; provide education and information about complaints relating to disability services; provide training about the prevention and resolution of complaints relating to disability services.¹⁷
- 4.18. As evidenced by the recent interest of both the Victorian Ombudsman and the Senate Standing Committee on Community Affairs in its inquiry into violence, abuse and neglect against people with disability in institutional and residential settings, the reporting and investigation of violence, abuse and neglect in disability residential settings is inadequate and unsatisfactory. As discussed in OPA's submissions to these inquiries, and referred to earlier in this submission, there are a variety of causal factors contributing to incidents of abuse and violence.
- 4.19. In the context of systems for handling complaints, one factor contributing to poor reporting or insufficient investigation and response, is that many people with disability, particularly those with higher support needs, continue to lead precarious lives.¹⁸

¹⁶ OPA notes that a disability worker exclusion scheme has been in operation in Victoria since 2014. The scheme requires disability service providers to conduct an additional pre-employment check under the scheme, prior to making an offer of employment. Department of Health and Human Services, *Disability Worker Exclusion Scheme* <<http://www.dhs.vic.gov.au/about-the-department/plans,-programs-and-projects/projects-and-initiatives/disability-services/disability-worker-exclusion-scheme>> accessed 9 June 2015.

¹⁷ *Disability Act 2006* (Vic) div 3. See in particular s 16.

¹⁸ See, for example, Office of the Public Advocate (Victoria), *Inquiry into the social inclusion of Victorians with a disability Submission to the Parliament of Victoria, Family and Community Development Committee* (2014) 7.

- 4.20. Historical and practical reasons lie behind this position:
- o there is often a power imbalance between providers and people with disability
 - o people with disability may often live stressful lives and with a lack of accessible information it can be difficult to plan ahead and make informed decisions
 - o people with disability often have no family or appropriate informal supports in their life, or may only have paid supporters
 - o people with cognitive impairment may have a diminished capacity to make informed decisions.¹⁹
- 4.21. Within a system of handling complaints, a challenge exists when it comes to providing accessible processes by which people with cognitive impairment or mental ill health can complain about the provision of services to them and be encouraged to do so. Many participants will require support to make a complaint.
- 4.22. The DSC's *It's ok to complain* core message and associated accessible information is an important element of Victoria's complaints system. Further work could be done to identify how best to encourage people with cognitive impairment and mental ill health to make complaints and seek and receive support to make those complaints where needed.²⁰ It is important for marginalised people to be encouraged to be their own advocates in complaining about service provision. It is equally important for those marginalised people to have access to independent advocacy to assist them to navigate a system for handling complaints.²¹
- 4.23. On this point, building personal support networks, consisting of people the person trusts who may be able to assist them to make a complaint, takes time and dedication. For those people with cognitive impairment who are socially isolated, with little or no informal supports, the process of establishing relationships of trust is even more complex.
- 4.24. With the transition to a nationally consistent quality and safeguarding framework upon full roll-out of the NDIS, there is a need for strong advocacy in this area given the consumer driven environment of the NDIS.

¹⁹ OPA has written a variety of submissions examining this notion. See, for example, Office of the Public Advocate (Victoria), *Inquiry into the social inclusion of Victorians with a disability Submission to the Parliament of Victoria, Family and Community Development Committee* (2014) 7.

²⁰ Disability Services Commissioner (Victoria), *Making a complaint to the Disability Services Commissioner: Information Sheet Plain English*, June 2013, <http://www.odsc.vic.gov.au/public/editor_images/InfoSheets1_%20PEng_WEB_MakingComplaint.pdf>.

²¹ See broadly John Chesterman, 2014. 'Modernising adult protection in an age of choice', *Australian Journal of Public Administration*, vol. 73, pp. 517-524.

- 4.25. The consumer choice philosophy that underpins the NDIS presents challenges for people with cognitive impairments and mental ill health who have difficulty making decisions. These difficulties should not be underestimated.
- 4.26. It is critical to have a complaints system that is independent from providers of supports. OPA supports the establishment of an independent statutory complaints office independent of the NDIA. Possible models include existing state and territory disability services commissioners and their equivalents. This independent office could sit within the Commonwealth Ombudsman's office, or it could be a stand-alone office. OPA refers here to the recommendation contained in the AGAC submission to the NDIS quality and safeguarding consultation paper, endorsed in OPA's own submission to that same paper, and included as recommendation 11 in this submission.

Investigations

- 4.27. Market based protection mechanisms (including complaints and survey-based monitoring) do not apply in the same way to the provision of services to people with significant cognitive impairments.²² Systems for protecting vulnerable people cannot rely solely on user-complaints mechanisms. There is an increasing need for an authority to investigate situations of concern because there are an increasingly diverse array of settings in which disability services are being, and will be provided.
- 4.28. OPA has endorsed in earlier submissions that an authority nationally or in each state and territory should be empowered to conduct investigations into situations of concern, where there are allegations or concerns about the abuse, neglect or exploitation of people with disability. This could be a function for the guardian of last resort; for example, OPA has published significantly on this possibility, and the Victorian Law Reform Commission in its review of Victoria's guardianship laws proposed this reform.²³ Alternatively, an investigatory role could be a function of the national Disability Services Complaints Commissioner. See recommendation 12.

²² Ibid.

²³ See, for example, Victorian Law Reform Commission, *Guardianship: Final report*, Report No 17 (2012); Office of the Public Advocate, *Submission to the Victorian Law Reform Commission Guardianship: Consultation Paper* (2011).

Term of reference IV. Safeguards

The impact of current systemic safeguards on the rights and protections of people accessing disability services

- 4.29. The vulnerability of some people with disability requires government to play a role in promoting safe high-quality disability services.²⁴ With a view to informing the Victorian Government's position on appropriate safeguards for the NDIS, OPA advocates for the transition to a quality and safeguarding framework that is guided by a human rights approach to protection and service delivery.
- 4.30. OPA has been active in discussions about the development of nationally consistent monitoring mechanisms of the NDIS on a number of program levels. OPA led the writing of the Australian Guardianship and Administration Council (AGAC) submission to the NDIS quality and safeguarding consultation paper, and OPA also made an independent submission to that paper. Both submissions can be accessed on OPA's website.²⁵
- 4.31. It is important to design systems which recognise the vulnerabilities of some people with disability and tailor measures accordingly. It is equally important to acknowledge that application of a consumer choice model creates difficulties for people with cognitive impairment.²⁶
- 4.32. The principles guiding the development of a quality and safeguarding framework include: protection from violence, abuse, neglect and exploitation; choice and control; complaints resolution and; reduction and elimination of the use of restrictive practices.

Protection from violence, abuse and neglect

- 4.33. People accessing services through the NDIS have the right to live free from abuse, neglect and exploitation. AGAC submission to the NDIS quality and safeguarding consultation paper proposed that protection from violence, abuse, neglect and exploitation should be a guiding principle of the NDIS quality and safeguarding framework.²⁷

²⁴ The Productivity Commission broadly notes this in its *Inquiry into Disability Care and Support* (2013) Report No 54, Vol 1, 493. The Productivity Commission's final inquiry report recommended the creation of a national disability insurance scheme that provides insurance cover for all Australians in the event of significant disability. Funding of the scheme should be a core function of government (just like Medicare): at 2.

²⁵ Office of the Public Advocate, *Submissions* <<http://www.publicadvocate.vic.gov.au/research/131/>> accessed 9 June 2015.

²⁶ Also discussed earlier in relation to systems for handling complaints. For more discussion on this point see broadly Australian Guardianship and Administration Council, *Submission in relation to Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper* (2015): Office of the Public Advocate, *Submissions* <<http://www.publicadvocate.vic.gov.au/research/131/>> accessed 9 June 2015.

²⁷ Australian Guardianship and Administration Council, *Submission in relation to Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper* (2015) 13.

Existing Victorian quality assurance and safeguards framework

4.34. In the disability sector, the objective of regulation should be to improve service delivery and practice in terms of human rights. OPA is concerned that with the full roll-out of the NDIS, the legislative frameworks as contained in Victoria's current system of protections will not longer apply in the same way.

4.35. OPA wishes to draw attention to Schedule B: Bilateral Agreement for NDIS Launch between the Commonwealth Government and the Victorian Government:

The existing Victorian quality assurance and safeguards framework as set out in Appendix C will apply in the Barwon launch site as it applies to the relevant new and existing funded client support programs for the launch subject to further development of and transition to a nationally consistent risk-based quality assurance approach in the longer term that does not diminish Victoria's existing quality assurance system and safeguards.²⁸

4.36. Appendix C to Schedule B of the bilateral agreement includes references to the *Disability Act 2006*, the *Guardianship and Administration Act 1986*, the *Supported Residential Services (Private Proprietors) Act 2010*, the *Mental Health Act 2014* and the *Charter of Human Rights and Responsibilities Act 2006*, among other legislation, as part of the existing quality assurance and safeguards framework for people with a disability in Victoria.²⁹

4.37. In relation to the impact of current systemic safeguards on the rights and protections of people accessing disability services, we present the following information as evidence of current systemic safeguards.

4.38. It is critical that the protection of people with disability from violence, abuse, neglect and exploitation is a guiding principle of the NDIS quality and safeguarding framework. OPA considers this a crucial human rights safeguard that must inform the development of the framework.

The Office of the Public Advocate as a systemic safeguard

4.39. OPA's submission to the NDIS quality and safeguarding consultation paper discussed the role of the office in the protection of persons with disability from abuse and exploitation. OPA considers it important to recall that within the context of this Parliamentary inquiry.

²⁸ Schedule B: Bilateral Agreement for NDIS Launch between the Commonwealth and Victoria (2012) para 15.k. See also Appendix C.

²⁹ Ibid pp 11-13.

4.40. Under the Guardianship and Administration Act, the Public Advocate has a function to arrange, coordinate and promote public awareness and understanding by the dissemination of information with respect to the protection of persons with disability from abuse and exploitation and the protection of their rights.³⁰ At the request of the Victorian Civil and Administrative Tribunal (VCAT), the Public Advocate can investigate any complaint or allegation that a person is under inappropriate guardianship, or is being exploited or abused or is in need of guardianship. The Public Advocate also holds specific powers of entry and inspection where abuse of people with disability is suspected.³¹

Disability Act 2006

4.41. In Victoria, the Disability Act is a critical piece of legislation within a suite of legislation and policy operating in the area of disability broadly.³² It is particularly unclear how the Disability Act will apply to service providers registered under the *National Disability Insurance Scheme Act 2013* (Cth) after full roll-out of the scheme.

Convention on the Rights of Persons with Disabilities

4.42. The *Convention on the Rights of Persons with Disabilities* (Convention) is the most comprehensive international human rights statement on the rights of people with disability. As a party to the Convention, Australia is obliged to implement its provisions in domestic law.³³

4.43. Article 16(1) of the Convention places an obligation on Australia 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.³⁴

30 *Guardianship and Administration Act 1986* (Vic) 15(c)(iv). In 2013, OPA produced the *Interagency Guideline for Addressing Violence, Neglect and Abuse* (IGUANA), a good practice guideline for organisations, staff members and volunteers working with adults who are at risk of violence, neglect and abuse. IGUANA was developed in collaboration with a range of statutory agencies and service providers in the disability, mental health, sexual assault and family violence sectors in Victoria following forums in 2012 and 2013. Many of these organisations signed up, committing to integrate IGUANA into their responses to violence, neglect and abuse. OPA is keen to ensure all providers of NDIS supports endorse IGUANA and implement it in their practices. Amendments may need to be made pending development of a nationally consistent system for handling complaints: Office of the Public Advocate (Victoria), *Interagency Guideline for Addressing Violence, Neglect and Abuse* (2013) available online at Office of the Public Advocate, *IGUANA guideline*, 29 August 2013 < <http://www.publicadvocate.vic.gov.au/file/file/Publications/IGUANA%20guideline%20FINAL.pdf>> accessed 20 April 2015.

31 *Guardianship and Administration Act 1986* (Vic) s18A(1), 18A(5).

32 As discussed earlier, this includes the *Guardianship and Administration Act 1986* (Vic) and the *Charter of Human Rights and Responsibilities Act 2005* (Vic). Victoria has explicit legislative protections that prescribe how and when restrictive interventions can be used in mental health facilities under the *Mental Health Act 2014* (Vic).

33 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331, art 26 (entered into force 27 January 1980): 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith'.

34 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 16(1).

4.44. Furthermore article 16(3) places an obligation on Australia:

In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.³⁵

4.45. It is crucial that the principles contained in the Convention inform the development of the NDIS quality and safeguarding framework, and that the framework reflects those principles. OPA strongly suggests that the Convention inform the Victorian Government's position on appropriate quality and safeguards for the NDIS.

Charter of Human Rights and Responsibilities Act 2006 (Vic)

4.46. The *Charter of Human Rights and Responsibilities Act 2006* (Vic) (Charter) establishes a legislative framework for the protection and promotion of human rights in Victoria. The Charter establishes a human rights discourse and outlines the basic rights, freedoms and responsibilities of all Victorians.

4.47. Under the Charter, any limitation on human rights by law must take into account the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means reasonably available to achieve the purpose that the limitation seeks to achieve.³⁶

4.48. The Charter requires public authorities, such as OPA and other Victorian state and local government departments and agencies, and people delivering services on behalf of government, to act consistently with the human rights outlined in the Charter.³⁷ It is not clear whether the provisions of the Charter will continue to apply to people delivering services on behalf of the federal government upon full implementation of the NDIS.

4.49. OPA would be very concerned if the Charter did not have application in the area of disability service provision. Consideration must be given to how the Charter might apply within an NDIS environment. OPA strongly suggests the Charter inform the Victorian Government's position on appropriate quality and safeguards for the NDIS.

³⁵ Ibid art 16(3).

³⁶ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 7(2).

³⁷ Victorian Equal Opportunities and Human Rights Commission, *Victoria's Charter of Human Rights and Responsibilities* <<http://www.humanrightscommission.vic.gov.au/index.php/the-charter>> accessed 24 April 2015.

Community Visitors programs across Australia

- 4.50. OPA asks the Parliamentary Committee to advocate for the inclusion of a Community Visitors program within the new NDIS quality and safeguarding framework, and for the strengths of the Victoria model to inform the Victorian Government's position on appropriate quality and safeguards for the NDIS.
- 4.51. In order to identify the best way in which Community Visitors programs can protect and promote the rights of participants within the NDIS, OPA proposes an evaluation of Community Visitors programs between jurisdictions and any relevant models operating internationally is needed.
- 4.52. For the purposes of guiding the evaluation of existing Community Visitors programs, OPA takes this opportunity, as we did in our submission to the NDIS quality and safeguarding consultation paper, to highlight the strengths of the Victorian model. We preface this with a reference to the position expressed by the Productivity Commission in its *Inquiry into Disability Care and Support Report*:

Official Community Visitors should play an important role in promoting the rights of, and overseeing the welfare of, the most vulnerable people in the disability system (and be introduced in jurisdictions where they do not already exist).³⁸

In doing so it is desirable to replicate features of the Victorian model, including the publication of annual reports and the use of volunteers.³⁹

OPA Community Visitors within the National Disability Insurance Scheme

- 4.53. Currently, OPA Community Visitors are active in the Barwon trial site. Community Visitors' representatives also meet with NDIS staff on a quarterly basis to raise concerns identified during visits. With the transition to full roll-out of the scheme OPA is concerned that Community Visitors will no longer be able to visit the settings they currently visit. The greater use of in-home care and services provided in a private provider setting present challenges to the monitoring role of Community Visitors.
- 4.54. In the 2013-2014 Community Visitors Annual Report, the Public Advocate, who is Chair of the Community Visitors Combined Board, raised concerns in relation to the implementation of the NDIS and the transition to a nationally consistent quality and safeguarding framework.

³⁸ Productivity Commission, *Inquiry into Disability Care and Support* (2011) Report No 54, Vol 1, 52.

³⁹ Ibid 509.

- 4.55. These concerns remain relevant to this submission and OPA suggest these concerns inform the Victorian Government's position on appropriate quality and safeguards for the NDIS:

The [Community Visitors] Program remains concerned about the impact of the full rollout on volunteers' ability to visit accommodation facilities. Volunteers are apprehensive that their powers under current state legislative arrangements to enter disability services, supported residential services and mental health facilities may not continue to apply in the same way when the NDIS is fully implemented. In addition, it is expected new private accommodation providers will enter the sector. OPA worries that such providers may not possess the necessary skill base and experience required to provide an appropriate level of care to a person with a cognitive impairment or mental illness, and Community Visitors' ability to visit such accommodation settings into the future remains unclear.⁴⁰

- 4.56. OPA directs the Parliamentary Committee to the position expressed by the Productivity Commission in its own valuation of community visitors programs:

Community visitors are a well targeted way of monitoring groups with particular vulnerability who receive care and support in situations where poor practices or outcomes are more likely to go undetected. The capacity for random inspection strengthens industry wide incentives to comply with service standards as well as other laws and regulations. As such, these schemes should be implemented in states where they do not currently exist under the appropriate state and territory statutory bodies, potentially with funding assistance from the NDIS.⁴¹

- 4.57. The legislative frameworks for the various Community Visitors streams in Victoria face a regulatory change with the development and implementation of national consistency.⁴² Legislative reform will be required to ensure their important role is maintained and built upon. The Victorian Government must maintain a strong advocacy position in relation to the importance of Community Visitors Programs in protecting and promoting the rights of persons with disability.

- 4.58. OPA believes that there is overwhelming evidence of the need to have regulation in this sector, and that Community Visitors are one mechanism to help achieve this within the NDIS quality and safeguarding framework.

40 Office of the Public Advocate, *Community Visitors Annual Report 2013-2014* (2014) 8.

41 Productivity Commission, *Inquiry into Disability Care and Support* (2011) Report No 54, Vol 1, 509.

42 Currently the Office of the Public Advocate coordinates and supports three streams of community visitors under three different pieces of legislation; *Disability Act 2006* (Vic); *Mental Health Act 2014* (Vic); *Supported Residential Services (Private Proprietors) Act 2010* (Vic). National consistency will affect the three streams of Community Visitors in Victoria. It is not clear the extent to which any amendment to the *Mental Health Act 2014* (Vic) or *Supported Residential Services (Private Proprietors) Act 2010* (Vic) will be required.

- 4.59. OPA takes this opportunity to reaffirm the crucial role Community Visitors play in reporting and monitoring the incidence of violence, abuse and neglect in disability services, residential services and mental health facilities. Community Visitors should continue to perform this role after full implementation of the NDIS.
- 4.60. Currently, Community Visitors Programs exist in various formats across Australia. OPA contribution led to the development of recommendations contained in the AGAC submission to the NDIS quality and safeguarding consultation paper, and we wish to reiterate the AGAC recommendations with a view to inform the Victorian Government's position on appropriate quality and safeguards for the NDIS (see recommendations 13-16 above).