

Submission to the Inquiry into Abuse in Disability Services

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Introduction

The Victorian Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to make a submission to the Inquiry into Abuse in Disability Services (the Inquiry).

The Commission is an independent statutory body that has functions under the *Equal Opportunity Act 2010* (the EO Act), the *Racial and Religious Tolerance Act 2001* (the RRT Act) and the *Charter of Human Rights and Responsibilities Act 2006* (the Charter). Broadly, the EO Act makes it unlawful to treat a person unfavourably because they have a disability and applies to systems, policies and practices that are not reasonable and may disadvantage people with disabilities. This includes a failure to respond appropriately to crimes because they happen to people with disabilities. The Charter requires public authorities, including Victoria Police and the Office of Public Prosecutions (OPP), to consider and protect human rights when they make decisions.¹

The functions of the Commission include dispute resolution, providing education about human rights and equal opportunity, undertaking projects and activities aimed at eliminating discrimination and promoting human rights, conducting research, and providing legal and policy advice. In addition the Commission has a role to report to the Victorian Attorney-General on the operation of the Charter, to conduct Charter and Equal Opportunity Act interventions and, at the request of an organisation or public authorities, conduct compliance reviews.

Background

The Commission recently undertook a major research project on the experiences of people with disabilities reporting crimes perpetrated against them, including barriers to reporting and their experiences within investigative processes. *Beyond Doubt: The Experiences of People with Disabilities in Reporting Crime* ('the *Beyond Doubt* report') was released in July 2014.

The report makes specific recommendations to the Department of Health and Human Services (DHHS) about improving approaches to safeguarding and responding to crimes occurring in services, along with recommendations to Victoria Police on improving access to the Victorian justice system for people with disabilities. A full copy of the *Beyond Doubt* report is available at www.humanrightscommission@vic.gov.au and all recommendations are summarised on page 16.

¹ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 4(1)(b)(d), 38. See *Momcilovic v The Queen* [2011] HCA 34, 128.

Submission Overview

This submission briefly presents the key findings of the *Beyond Doubt* report regarding abuse in disability services, highlighting key reasons why abuse is not reported or acted upon.

The submission further makes a number of recommendations regarding actions that should be taken to firstly prevent, and then better respond, to abuse in disability services including:

- capacity building for clients
- training for disability staff
- supporting peer-led education and advocacy;
- expanding the current Disability Worker Exclusion Scheme; and
- improving complaints handling

Abuse and Neglect in Disability Services

Prevalence of crime within disability services

While there is limited data on the prevalence of crimes against people with disabilities in Victoria specifically, significant local and international research reveals that people with disabilities are more likely to be victims of crime than the general population.² The experience of crime is most severe for women, people with cognitive impairments and people with communication disabilities.³ Further, children and young people with disabilities experience abuse and neglect at higher rates than their peers who do not have a disability.⁴

Abuse and neglect reported against people with disabilities is wide-ranging in nature, “including emotional, psychological and mental abuse, sexual abuse, failure to provide basic requirements, and abusive behaviour management practices”.⁵

People with disabilities can be at a greater risk of being victims of crime in disability service settings, particularly within residential settings, given that these services are outside of the public domain. In 2010-11, three per cent of complaints to the Disability Services Commissioner (DSC) and six per cent of all complaints reported by service

² Victorian Health Promotion Foundation (VicHealth), *Preventing Violence Against Women in Australia: Research Summary* (2011) 5, 5; Stop the Violence Project, ‘Stop the Violence: Addressing Violence Against Women and Girls with Disabilities in Australia’ (Discussion Paper, National Symposium on Violence Against Women and Girls with Disabilities in Australia, 25 October 2013); Krista Jansson, ‘Domestic violence, sexual assault and stalking – 2005/06 British Crime Survey’ in Kathryn Coleman et al, *Home Office Statistical Bulletin 02/07, Homicides, Firearm Offences and Intimate Violence 2005/2006* (2007).

³ Lynne Coulson Barr, ‘Safeguarding People’s Right to be Free from Abuse: Key considerations for preventing and responding to alleged staff to client abuse in disability services’ (Occasional Paper No.1, Disability Services Commissioner, 2012) 8; Carlene Wilson and Neil Brewer, ‘The incidence of criminal victimisation of individuals with an intellectual disability’ (1992) 27(2) *Australian Psychologist*, 114–117, 115; State of Victoria, Department of Human Services, *Victoria’s action plan to address violence against women & children 2012-15* (2012) 26 <http://www.dhs.vic.gov.au/for-business-and-community/community-involvement/women-in-the-community/preventing-violence-against-women/action-plan-to-address-violence-against-women-and_children>; VicHealth, above n 5, 5.

⁴ Sally Robinson, ‘Enabling and Protecting: Pro-active approaches to addressing the abuse and neglect of children and young people with disability’ (Issues Paper, Children with Disability Australia, 2012) 5, 10.

⁵ Conway R.F., Bergin L. and Thornton K. (1996). Abuse and adults with intellectual disability living in residential services. Canberra: National Council on Intellectual Disability; Community Services Commission and Intellectual Disability Rights Service. (2001). Crime prevention in residential services for people with disabilities. A discussion paper. Community Services Commission and Intellectual Disability Rights Service cited in French; Philip French, Julie Dardel and Sonya Price-Kelly, ‘Rights Denied: Towards a national policy agenda about abuse, neglect, and exploitation of persons with cognitive impairment’ (Report, People with Disability Australia, 2009) for a national perspective on abuse and neglect, 20.

providers involved alleged or actual abuse by staff.⁶ DSC acknowledges that only a proportion of allegations or incidents are recorded as complaints.⁷ In 2012-2013, Community Visitors employed by Office of the Public Advocate identified 209 issues of neglect, abuse and assault, half of which occurred in disability services and one third in residential services.⁸

Barriers to reporting crime within disability services

The Commission identified a number of barriers to reporting crimes within the *Beyond Doubt* report, both with respect to people with disabilities reporting crimes themselves and service providers and carers reporting crimes on their behalf.

Barriers for people with disabilities reporting when they had been a victim of a crime included:

- Lack of awareness of rights: Lack of access to information on their own rights and the obligations of disability support staff. People may not identify particular conduct as constituting a crime, particularly when violence has been normalised in their service settings or home environment.
- Emotional toll of reporting: Feelings of shame, self-blame or fear of their family finding out can prevent people with disabilities from reporting crime. The emotional strain of re-telling their stories led some people to withdraw complaints.
- Fear of negative consequences: Fear of losing support was a common reason for people with a disability not reporting, particularly when the alleged offender provides support to them. Fear of not being believed can also be a reason for not reporting, particularly when a prior report was not taken seriously.
- Prior negative interactions with police: Some people did not report because they had experienced negative treatment from police applying their powers under the Mental Health Act.

Barriers to service providers and carers either reporting crimes against people with disabilities and/or conducting robust investigations included:

- Failure to identify abuse and neglect: Disability service staff were not always able to identify and respond to incidents of abuse and neglect.
- Failure to adhere to reporting requirements: DHHS policies and guidelines require services to report to police and record incidents,⁹ however they are not always adhered to.
- Normalisation of violence: Violence committed against clients with a disability by a staff member can be justified as 'behaviour management' and therefore not recognised as threatening behaviour or assault.
- Inadequate internal processes: Inadequate record keeping, variable interviewing skills of investigators and prioritising privacy concerns over the gathering of evidence acted as a barrier to adequate reporting. The focus of investigation tended to be determining if the allegation can be substantiated or not, thus detracting from the policy aim of minimising trauma to victims of abuse.

⁶ Coulson Barr, above n 12, 3.

⁷ Ibid.

⁸ Office of the Public Advocate, *Community Visitors Annual Report 2012-3* (2013) 4-5.

⁹ State of Victoria, Department of Human Services, *Critical Client Incident Management Instruction* (Technical update, 2014) <<http://www.dhs.vic.gov.au/funded-agency-channel/about-service-agreements/incident-reporting/human-services>>.

Prevention of Abuse and Neglect in Disability Services

Equal opportunity and human rights obligations within disability services

Obligations of service providers

The *Disability Act 2006* (Vic) regulates services provided either directly by DHHS or through funded community service organisations. The Act's principles include that people with disabilities have the right to live free from abuse, neglect or exploitation.¹⁰ Disability services must comply with the *Department of Human Services Standards*,¹¹ which include specific standards to ensure people's rights to wellbeing and safety are promoted.¹² Services must achieve and maintain accreditation against these standards and be independently reviewed.

All disability, mental health services, and Supported Residential Services (SRS) are bound by the EO Act. The EO Act applies to unfavourable treatment because of a person's disability, and to systems, policies and practices that are not reasonable and may disadvantage people with disabilities. This includes a failure to respond appropriately to crimes because they happen to people with disabilities. Service providers also have a positive duty to take proactive steps to eliminate discrimination as far as possible.¹³

Service providers have further legal obligations under the Charter to provide an abuse-free environment and to observe human rights when responding to allegations and conducting investigations. The Disability Services Commissioner, Office of the Public Advocate, the Mental Health Complaints Commissioner, and DHHS must also comply with the Charter when responding to complaints and investigating allegations.

Obligations of Victoria Police

Under the *Equal Opportunity Act*, Victoria Police:

- must not discriminate against people with disabilities when they deliver police services, including receiving reports of crime and engaging with the person in the follow-up to the report;
- have a legal obligation to make reasonable adjustments for people with disabilities when they report crimes so that they can access police services; and
- have a positive duty to take proactive steps to eliminate discrimination as far as possible.¹⁴

The Charter requires public authorities, including Victoria Police and the Office of Public Prosecutions (OPP), to consider and protect human rights when they make decisions.¹⁵ These agencies have a legal obligation to act compatibly with human rights when they set policies and procedures, handle complaints, investigate crimes, and make decisions about whether or not to lay criminal charges against a person. In making these decisions, Victoria Police and OPP have opportunities to promote the rights of people with disabilities.

¹⁰ *Disability Act 2006* (Vic) s 5(2)(b).

¹¹ *ibid* s 97(6). See State of Victoria, *Department of Human Services Standards* (29 January 2014) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/policies,-guidelines-and-legislation/departments-of-human-services-standards>>.

¹² *Ibid*, "Standard 3.5: services are provided in a safe environment for all people, free from abuse, neglect, violence and/or preventable injury."

¹³ *Equal Opportunity Act 2010* (Vic) ss 15, 44–45.

¹⁴ *Equal Opportunity Act 2010* (Vic) ss 15, 44–45.

¹⁵ *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 4(1)(b)(d), 38. See *Momcilovic v The Queen* [2011] HCA 34, 128.

Relevant Charter rights include equality before the law, which includes the right to equal protection of the law; and freedom of expression, which includes the right to receive information in appropriate formats. Human rights are part of the decision-making framework that all public authorities must apply.

The federal *Disability Discrimination Act 1992* (Cth) also makes it unlawful to discriminate against people with disabilities in the provision of a service.¹⁶ This Act applies to Victoria Police and service providers.

Safeguarding framework

A comprehensive approach to safeguarding requires a focus on preventing abuse, neglect and other crimes before they occur. A recent study found that among disability service staff surveyed an effective safeguarding practice must be underpinned by:

- building an open, ethical, and accountable organisational culture in which human rights are taken seriously and in which concerns can be discussed and confidentiality maintained;
- building the capacity of clients, carers, staff and managers to identify and respond to situations of abuse and neglect and to be aware of responsibilities;
- putting in place the necessary supports and structures to facilitate responses to abuse and neglect;
- facilitating clients' social connectedness and implementing internal and external checks and balances;
- making available the necessary resources to implement good safeguarding practices; and
- maintaining high recruitment standards.¹⁷

Drawing from this research, the *Beyond Doubt* Report outlined a comprehensive approach to safeguarding focusing on effective recruitment, training and supervision of disability service staff, in conjunction with advocacy and rights awareness raising for people with disabilities.

Capacity building for clients

Preventing restrictive procedures through communication assessments and plans

The *Beyond Doubt* Report highlighted that greater investments in communication assessments and plans may assist in preventing incidents of violence and reduce the use of unnecessary restrictive interventions. Restrictive interventions include physical, mechanical and chemical restraint, and seclusion.

Currently, out of approximately 5,000 people living in disability accommodation services, 1,850 are reported on the Department of Human Services (DHS) system (RIDS) as being subject to restrictive interventions. The Senior Practitioner – Disability advised that a significant number of people registered on RIDS have communication difficulties.¹⁸

¹⁶ *Disability Discrimination Act 1992* (Cth) s 24.

¹⁷ Disability Advocacy and Information Services, Submission No 4 to the Victorian Equal Opportunity and Human Rights Commission, *Experiences of people with disabilities reporting crime project*, 16 October 2013, 22.

¹⁸ Key informant interview, Senior Practitioner (22 November 2013).

Lack of communication assessments and supports, and poor quality Behaviour Support Plans, may create environments where violence occurs and/or remains unreported. A behaviour of concern can be in response to an oppressive or maladaptive environment, including experiences of abuse and neglect. A lack of effective means of communication can leave a person with a disability unable to express their needs and may lead to externalised behaviours of concern.

Under the *Disability Act*, restrictive interventions (including mechanical restraint, chemical restraint and seclusion) can only be used in disability services with the approval and oversight by the Senior Practitioner – Disability.¹⁹ At law, if restraint is used outside strict legal parameters it will amount to assault.²⁰ The unnecessary use of restrictive interventions is also a breach of the Charter. While reasonable limitations on Charter rights are allowed, these are unlikely to meet the test in section 7(2) of the Charter when the intervention is not necessary or the least rights restrictive option available once communication supports are in place. Failure to make reasonable adjustments for people with disabilities in service delivery, including steps to facilitate communication, is a breach of the *Equal Opportunity Act 2010* (Vic).²¹

Recommendation 1: Consistent with the Charter of Human Rights and Responsibilities, and recognising that a lack of communication supports may lead to the unnecessary use of restrictive interventions, the Department of Human Services and Department of Health should ensure all service users who require a communication assessment and plan have one, and that this is implemented and monitored. To achieve this, the Victorian Government should ensure that this is resourced and priority should be given in the first instance to people subject to restrictive interventions.

Disability advocacy

The *Beyond Doubt* report revealed that lack of access to information on their own rights and on the obligations of disability support staff was a common barrier to people with disabilities reporting crime. Advocacy services provide an avenue for people with disabilities to access this information, along with providing support in gaining recognition of their rights when internal processes within services fail. This approach is consistent with the Charter and the *Convention on the Rights of Persons with Disabilities*, which promote the autonomy and capacity building of people with disabilities.

One successful example that recognises and fosters recognition of the expertise of people with disabilities is the gender and disability professional development package, delivered by Women with Disabilities Victoria, and funded as part of the Victoria's

¹⁹ *Disability Act 2006* (Vic) s 140. It may also be used in an emergency see s 147.

²⁰ See the Commission's previous research on the use of restrictive practices in education. Victorian Equal Opportunity and Human Rights Commission, *Held Back: the experiences of students with disabilities in Victorian schools* (2012) 105–124.

²¹ *Equal Opportunity Act 2010* (Vic) s 20.

Action Plan to Address Violence against Women and Children. The training, delivered to disability service workers, is co-facilitated by women with disability and includes a train-the-trainer component for ongoing delivery by women with disabilities.²²

Recommendation 2: The Department of Health and Human Services should promote prevention, rights awareness and improved response by continuing to support peer-led education, advocacy and self-advocacy by people with disabilities.

Workforce Recruitment, Screening and Registration

Expanding the current Disability Worker Exclusion Scheme

Since the release of the *Beyond Doubt* report, the Victorian Government has introduced the Disability Worker Exclusion Scheme. This current register prohibits persons who have been found to have abused, assaulted or neglected a person with a disability from working or volunteering with adults with disabilities in disability residential services by placing them on a register of unsuitable persons. This was one of a set of recommended options for workforce recruitment and screening contained within the *Beyond Doubt* report. The Commission commends the introduction of this scheme as a first step towards a comprehensive recruitment process for disability workers. Prohibiting unsuitable persons from working or volunteering in disability residential services is critical given that these services are associated with the highest risk of abuse due to their inherently private nature.

However, in focusing exclusively on residential services, the current scheme does not protect people with disabilities against abuse and neglect that may occur across the full range of services that people with disabilities access, including mental health, respite, in-home, day centre and Home and Community Care (HACC) services. The *Beyond Doubt* report recommended as a favoured option that the register of persons unsuitable to work with clients with disabilities apply across all human and health services to maximise protection to people with disabilities.

Registration Scheme for Disability Workers

The *Beyond Doubt* report also discussed the possibility of a full registration scheme that would comprehensively assess a person's suitability to work with people with disabilities. This proactive approach contrasts with exclusion schemes which exclude workers only after a finding of misconduct. However, given such a scheme would need to be extremely broad in nature for the purposes of capturing the relatively few people who do the wrong thing, a feasibility study into the appropriateness of such a measure is recommended.

Notably, the ACT is currently phasing in a full registration scheme. The ACT Explanatory Statement balanced the rights of perspective staff and volunteers of disability services against those of service users. If Victoria were to introduce a similar scheme, the same process of assessing competing rights would be required under section 7(2) of the Charter. The ACT found that the requirement for an applicant to provide the Commissioner with their criminal history, non-conviction information and

²² See Women with Disabilities Victoria, *Latest News, Media & Events* (2013) <http://www.wdv.org.au/news_events.htm>.

additional information was the least restrictive way of minimising risks for vulnerable people who access regulated activities or services.²³

Recommendation 3: The Victorian Government should expand the Disability Worker Exclusion Scheme to include all persons who have been found to have abused, assaulted or neglected a client of a disability, mental health and other service for people with disabilities. Subject to evaluation, this could be the next step toward a comprehensive registration scheme for persons delivering direct services to people with disabilities.

Responses to Abuse and Neglect in Disability Services

While all steps should be taken to prevent abuse and neglect in disability services from occurring, there is a need to respond appropriately and promptly to any allegations or suspicions of abuse that does occur. This can be addressed through effective complaint handling and staff training on reporting.

Complaint Handling

DHHS policies and guidelines require services to report to police and record incidents. In addition to requirements under the Disability Act and the *Department of Human Services Standards*, monitoring and review processes are also contained in the *Departmental Policy and Funding Plan (2012-2015)*.²⁴ This also sets out a range of key policies and procedures that disability services must adhere to, including the:

- *Critical Client Incident Management Instruction– Technical update 2014*²⁵
- *Responding to Allegations of Physical or Sexual Assault Departmental Instruction 2005*²⁶
- *Residential Services Practice Manual 2013*.²⁷

Despite the existence of such policies and procedures, research findings in *Beyond Doubt* indicated that the required reporting process were not consistently followed. Crimes against people with disabilities are often incorrectly classified in incident reporting. This means that service investigations are not always initiated when they should be.

²³ Explanatory Memorandum, *Disability Services (Disability Service Providers) Amendment Bill 2014* (ACT).

²⁴ Chapter 7 of the *Departmental Policy and Funding Plan (2012-2015)* relates to disability services. State of Victoria, Department of Human Services, *Departmental Policy and Funding Plan (2012-2015)*, above n 672. In addition the Department of Human Services and Department of Health Monitoring Framework applies risk management principles to assist with early identification of risk. See <<http://www.dhs.vic.gov.au/facs/bdb/fmu/service-agreement/4.departmental-policies-procedures-and-initiatives/4.10-monitoring-framework>>.

²⁵ State of Victoria, Department of Human Services, *Critical Client Incident Management Instruction* (Technical update 2014) <<http://www.dhs.vic.gov.au/funded-agency-channel/about-service-agreements/incident-reporting/human-services>>.

²⁶ State of Victoria, Department of Human Services, *Responding to allegations of physical or sexual assault Departmental Instruction* (2005) <<http://www.dhs.vic.gov.au/funded-agency-channel/about-service-agreements/incident-reporting/human-services>>.

²⁷ State of Victoria, Department of Human Services, *Residential Services Practice Manual* (2013) <<http://www.dhs.vic.gov.au/about-the-department/documents-and-resources/reports-publications/residential-services-practice-manual>>.

Recommendation 4: The Department of Health and Human Services and Victoria Police enhance local arrangements such as Standard Operating Procedures to provide for stronger minimum standards around response times, communication on progress and status of matters. These should be reflected in associated protocols with DHHS and in practice directions to service staff.

Recommendation 5: The Department of Health and Human Services issue comprehensive practice guidelines on when and how to report to police, navigating the criminal justice system, service and referral pathways, empowering victims to make choices about the process, appeal and review options and minimum standards for conducting service investigations.

Training for disability service staff

Disability service staff play a critical role in identifying abuse and neglect in service settings given that some people with disabilities might not have the skills or capacity to make a complaint or engage in complaint making.

The introduction of the *Interagency guideline for addressing violence, neglect and abuse* (IGUANA guideline) is an important step in recognising abuse and reporting crime.²⁸ However, the research findings of *Beyond Doubt* consistently revealed that disability services need dedicated training on reporting crime and police processes, and support to do so. Further, a recent survey of disability workers revealed that 30 per cent of direct care staff disagreed with the statement that they would be able to identify and respond to allegations or incidents of abuse or neglect.²⁹ There can be confusion from services about whether an incident has to meet the criminal threshold of assault in determining whether a matter should be reported to police, even where incident reporting instructions require this.³⁰ Staff also need to know how quickly they need to report, and need to understand what will happen when they do report.

Building workforce capability must focus on treating crimes as crimes, and ensuring that services act when reports of abuse or violence are reported or witnessed - regardless of whether police pursue an investigation. At all times, the safety of the victim must be prioritised.

Recommendation 6: The Department of Health and Human Services should deliver training for departmental and funded services staff on preventing, recognising, responding to and reporting violence, abuse and family violence, including focused efforts to support management to strengthen supervision and recruitment processes.

²⁸ Office of the Public Advocate, *IGUANA: Background and discussion paper*, above n 692, 9. See key informant interview, Communication Rights Australia (31 July 2013).

²⁹ Goetz Ottmann et al, 'Safeguarding Children and Adults with Disabilities in Disability Services: A Delphi Study' (Report, Uniting Care Community Options/Deakin University Research Partnership, May 2014), 5–6.

³⁰ For example, Disability Advocacy and Information Service, Submission No 4 to Victorian Equal Opportunity and Human Rights Commission, *Experiences of people with disabilities reporting crime project*, 16 October 2013, 13.



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