Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight – June 2015

Communication Rights Australia

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Organisational Background:

Communication Rights Australia ("Communication Rights"), is a human rights information and advocacy organisation which works in partnership with people with disabilities, in particular those who have communication or speech difficulties. People request our service when they experience a breach of their rights or discrimination, and feel isolated and excluded from any redress. Our services are designed to break down barriers and remove discrimination through:

- Individual and systemic advocacy, advice and referral when the system has broken down;
- Information on human rights, entitlements, and the right to communicate;
- Community education and outreach on how to ensure the protection of communication rights.

We represent a range of people on a continuum from severe speech and communication difficulties, such as Autism Spectrum Disorder; acquired brain injury; illness (such as Motor Neurone Disease, stroke, mental health, physical and sensory impairment, intellectual disability); through to children whose capacity to communicate impacts on correctly and consistently sending their message (such as Apraxia). People approach us when their ability to communicate their message is impacting on their ability to access their human rights and hence are experiencing a significant deterioration in their quality of life.

Communication Rights uses the UN Convention on the Rights of People with Disabilities ("the Convention"), Victorian Charter of Human Rights and Responsibilities Act 2006 ("the Charter"), disability discrimination legislation and government policies to ensure people can enjoy their rights. Our activities promote change and facilitate inclusion into community activities.
Response to Victorian Ombudsman Report – Phase 1:

On behalf of people with communication or speech difficulties and their families we would like to commend the Victorian Ombudsman for its most perceptive Phase 1 response on the effectiveness of the existing statutory bodies charged with the oversight of the protection of people with disabilities from abuse. The inadequacies of the current situation have been challenging and frustrating for many people with disabilities and their advocates attempting to redress the inadequacies of this system.

The current complex landscape is a barrier to fairness for many people, particularly those who have communication or speech difficulties and have little or no access to online services. It is impossible for them to directly access these statutory bodies, established to protect their rights, without the support and assistance of an advocate.

Isolated, marginalised and for many without a means to easily communicate, individuals wait for an advocate to appear, or for a worker who has the commitment and time, to access an advocate on their behalf.

The lack of real assurance that statutory bodies provide to ensuring the rights of people in abusive situations are fully protected has been documented within advocacy files over many years.

The landscape is littered with many reports on the inadequacies of the current statutory bodies and their ability to adequately protect people with disabilities from abuse. It is hoped that this report does not become yet another one of these documents.

To assist in our response we have attached Communication Rights’ response to the National Disability Insurance Scheme (NDIS) Quality and Safeguard Framework and we request that the Victorian Ombudsman takes into account the recommendations forthwith.

As part of the Victorian Ombudsman’s reform agenda there are two recommendations:

Recommendation 1:

a. the Victorian Government either establish, or transfer responsibility to an existing agency, for a single independent oversight body, containing the elements in Appendix 4 (see page 102).
This body could become part of, inform, or eventually be replaced by a national quality framework which ensures Victorians with disability are not provided with less protection under a national scheme.

b. that the Victorian Parliament Family and Community Development Committee further examine the logistics of a single independent oversight body, as it considers interim measures to strengthen the disability system prior to the introduction of the NDIS.

Recommendation 2

The findings of this investigation support an increase in the funding for advocacy, which should be informed by a comprehensive assessment of the need. This is particularly critical in the transition to the NDIS. I recommend the government:

a. undertake a comprehensive assessment of the advocacy needs of people with disability

b. transfer sufficient funding provision from DHHS, and responsibility for administering advocacy services, to the Office of the Public Advocate, including:

(i). ensuring access to advocates to assist people with allegations of abuse, and to support them through the process

(ii). providing oversight for advocacy services to ensure consistency and best practice.

In response we make the following comments:

In regard to Recommendation One Communication Rights’ membership would see great value in establishing an independent oversight body that has the elements outlined in Appendix 4 of the Victorian Ombudsman’s report, Phase 1, June 2015.

This body would then, as recommended in (1 a), inform or be replaced by a national quality framework that would ensure the protection of all Victorians including those who have communication or speech difficulties. It is essential within this process that the Victorian community’s protection is not diminished in any manner, but equal to or greater than those of others within Australia.
Further we agree that the Victorian Parliament Family and Community Development Committee instigate measures to strengthen the disability sector prior to the introduction to full roll out of the NDIS.

If there is a decision to transfer the proposed powers of an oversight body to an existing organisation, we would recommend that transfer be made to the Ombudsman. It is our view that the Ombudsman presents the most professional and least conflicted statutory authority in Victoria currently, to perform this role.

In regard to Recommendation Two we support the need for increased funding for independent advocacy and the completion of a comprehensive assessment of the need for advocacy. We would like to emphasise the urgent need to include in the assessment process those who have communication or speech difficulties, being some of the most marginalised and vulnerable members of our community.

We agree that advocacy responsibility and administration should not sit within DHHS but equally we do not support the transfer to the Office of the Public Advocate ("OPA"). OPA’s model of advocacy is sometimes in conflict with that of a person with disability and the independent advocate who is supporting the individual. This can be quiet distressing for people with disabilities and their families.

Although OPA has power to investigate it also has a Guardianship and Administration responsibility and regularly provides direction under ‘the best interest of a person with disability’ rather than what the individual may request, or what is their human right.

Independent advocates are required to take direction from the individual and support them to make decisions on their own behalf using a human rights framework, including the right to take risks. When Communication Rights is confronted by a non-instructional advocacy (NIA) case all attempts are made to identify the individual’s likes and dislikes. We have developed an evidence based practice to address their concerns which takes all measures to protect the rights of the individual at all times. The core focus of NIA is reasonableness and independence. Its legitimacy is based on the advocate’s skills in completing a holistic assessment through an evidenced based practice and human rights ( the Convention and the Charter)we believe that such an assessment is a powerful tool in representing the rights of people who otherwise may not receive advocacy.
Independent advocates do consult with OPA and at times work collaboratively for the client, but often we find ourselves standing with the individual who wishes to remain independent and rejects being subjected to Guardianship or Administration Orders.

As an advocacy group with over 30 years’ experience of being involved in supporting individuals who have been abused, we believe we are well placed to comment on these experiences.

In summary, while DHHS is in a position of conflict of interest in relation to funding disability advocacy agencies, we believe that OPA are in the same position.

To ensure that advocates can act without fear or favour, a body without conflict must administer funding.

In relation to Recommendation 2 b (ii) we agree that there is a need to ensure that advocacy organisations work consistently and use best practice approaches in their work. Again, this cannot be OPA due to the fact that they advocate in an entirely different manner to independent advocacy agencies, and present a conflict of interest to the independent advocacy sector and people with disabilities.

We believe that the best placed organisation for this role is the peak body for independent advocacy organisations - Disability Advocacy Victoria. It already has a membership of most of the independent advocacy organisation within Victoria and its membership has a wide range of learnings around best practice advocacy.

We are also mindful that there are a number of advocacy agencies that receive funding through other sources than State Government. While this presents difficulties in ensuring consistent advocacy approaches, it is a reality that must be worked around in the best interests of people with disabilities in the advocacy sector.
Submission:
Proposal for a National Disability Insurance scheme Quality and Safeguarding Framework

Department of Social Services
12 May 2015

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1. **Overarching Key Element of framework –**

What is not clear within the framework is the broader role of government, both state and federal, once the rollout of the NDIS has occurred. Consideration should be given as to *their* duty of care towards participants of the Scheme and the use of public monies. It will not be sufficient for the responsibility of meeting the individual needs of people with disabilities to only lie with the NDIS. It will not be acceptable for governments to see the NDIA as the sole provider of support services.

Although human rights seem to be underpinning the NDIS it appears to be missing from the Quality and Safeguard Framework. Human rights needs to be strongly articulated in all parts of the framework, influencing both practice and complaints mechanisms to ensure those rights are the overarching determinant in decision making for participants.

**Recommendation 1:** Human rights have a stronger presence within the Quality and Safeguard Framework.

1. **Supporting Individual Capacity**

When developing and facilitating the capacity of individuals it should not be assumed that they:

- have an understanding of their rights;
- have the capacity to independently exercise their rights; and
- have established natural safeguards (eg family, other support) that provide them support when required.

An independent information/advocacy service needs to be readily available to assist individuals with decision making. This may include opportunities to discuss issues of concern, consider options available, and support for final decision making processes. These services need to be independent of service provision as well as the NDIA, and be independently block funded. Each individual requesting support needs to be provided with capacity building skills tailored to their requirements. It may take time for an individual to develop such skills, and this should not be restricted by any compulsory adherence to a funding formula.

To support an individual with capacity building, information and supports need to be:

- accessible and in different formats;
- available at a range of venues;
- provided by an independent third party;
- provided via the communication method used by the individual;
• free from influence;
• provided via individual one-to-one sessions when required.

The Framework assumes that people have internet/telephone access but this is not always the case. Less than 50% of people with communication or speech difficulties have access to online services\(^1\).

An outreach component is essential for isolated members of the community. For genuine engagement of isolated and vulnerable individuals, time, effort and understanding need to be provided initially in order to ensure effective support. This is particularly the case for people with complex communication needs, who will either need Communication Support Workers to be involved in information and support services, or workers trained in such communications support directly.

The *one hour planning* meeting provided by NDIS is insufficient for some individuals with complex communication needs/disabilities to be able to receive, question and consider all the information necessary to make an informed decision. Individuals who have complex communication needs may use a communication method that relies on spelling words out letter by letter. All individuals are different. A 'one size fits all' approach is not going to be effective.

For those providing services to people with communication or speech difficulties there must be training of those staff in the participant’s method of communication. It is important to keep in mind that one cannot work effectively with a person unless they can communicate with them.

Going back one step, before one can effectively meet the communication needs of people with disabilities, one has to ensure that all persons have been provided with communication. It is highly probable that a percentage of people contacting the NDIS for services will not have ever been provided with a communication method. This, then, will be the highest priority, as it is self-evident that one cannot provide information, ask to receive information or discuss the merits of services, if one cannot communicate.

In cases such as these, it is the NDIA who will need to take on the responsibility of ensuring that individuals have a communication method.

| Recommendation 2: Independent Information/advocacy Services be funded to support individuals in their capacity building program. |
| Recommendation 3: Information provision needs to be accessible, available and meet all individual needs. It is imperative that services that do not rely only on access to technology are available. |

\(^1\) Owen, J; Lamb, K; Smith, G; Telecommunication Needs of People with Communication/Speech Difficulties, Deakin University (1998).
Recommendation 4: Community outreach is provided to engage isolated and vulnerable individuals.

Recommendation 5: Ensure capacity building services are not time-limited in order to ensure that people with complex disabilities are provided with equal access to this service.

Recommendation 6: Provision should be made and planned for, to support individuals who require high levels of support and staff with a higher level of skill and scrutiny.

Recommendation 7: The NDIA make communication assessments and the provision of a communication method a priority for individuals who have no communication.

2. NDIA Provider Registration

It is essential that under the framework no NDIA registered provider discriminates when providing services for ‘more complex needs’ individuals, where higher levels of scrutiny and skills are required. The monitoring body must be mindful that there be no indirect or direct discrimination against individuals who require:

- staff to have a higher level of skill and scrutiny;
- Communications Support Workers/Interpreters;
- longer and/or more appointments.

A Code of Practice may be sufficient for people working in house maintenance or gardening, but anyone having direct contact with vulnerable clients requires a ‘vulnerable persons check’.

Given the high rates of neglect, abuse and exploitation of people with disabilities in the disability service sector, an external quality evaluation is necessary, which is focussed on receiving feedback directly from clients not chosen by providers.

When we refer throughout this document to “vulnerable persons check” we recommend that the suggestions made to the Royal Commission into Institutional Responses to Child Sexual Abuse be adopted as set out below:

“The pre-employment screening practices other than criminal background checks (often referred to as sources of ‘soft information’ in the literature) that evaluation authors identified as necessary components of a comprehensive pre-employment screening procedure included (in order of most frequently to least frequently mentioned):

a) Scoping Review: Pre-employment screening practices that aim to prevent child sexual abuse

2 Scoping Review: Evaluations of pre-employment screening practices for child-related work that aim to prevent child sexual abuse” February 2015
b) Conducting thorough reference checks (for example, those obtained directly from previous employers by asking direct questions about any concerns regarding the applicant’s suitability to work with children)

c) Holding employment interviews that focus on determining the applicant’s suitability to work with children (such as value-based interviewing; for more information, see Erooga, 2009)

d) Checking suspected or substantiated child abuse against other sources of information, such as child-abuse registries, children’s court decisions or disciplinary body proceedings

e) Critically examining an applicant’s employment history and/or written application (to identify gaps in their employment history and thus clarify their cause, or to explain ambiguous responses to direct questions about criminal history)

f) Verifying the applicant’s identity using methods such as photo-based documents or fingerprinting

g) Verifying the applicant’s education or qualifications (in order to determine if they are qualified to undertake child-related work).”

We endorse Option 4.

Recommendation 8: The highest level of scrutiny is required for staff working with people who are vulnerable and marginalised. A ‘vulnerable person’s check’ (see above) needs to be developed nationally, and mandatory.

Recommendation 9: A national registration program needs to be established to audit services.

Recommendation 10: An independent external evaluation monitoring body is required.

3. Ensuring staff are safe to work with participants

For staff working with people who are vulnerable and marginalised it is essential that the highest level of scrutiny is administered. This requires a national registration and ‘vulnerable person’s check’ (see above). Each staff member should be responsible to keep their own registration current and not be reliant on service providers to maintain their records. Registration should be required every year, ensuring that such checks are not imposing a financial hardship on the worker or the service provider. These checks should also include international criminal records checks for overseas workers, and the establishment of an ‘exclusion list’ for those not to be employed.

Casual staff need to also maintain their registration.
Service providers need to sign onto the National Disability Standards and Quality Frameworks with at least two external auditors involved in their registration and accreditation. For those providers whose staff are not in direct contact with vulnerable individuals, a lower level of registration could be negotiated. Given the high rates of neglect, abuse and exploitation of people with disabilities in the disability service sector the external audit must be focussed on receiving feedback directly from clients not chosen by providers.

Any proposed national registration body needs to be mindful of those participants who wish to employ family members and the potential risk attached. Some form of monitoring needs to occur to ensure there is no abuse. This is particularly the case for vulnerable and marginalised clients.

Participants should have access to independent advocacy services to assist them with staff complaints. Not all people have the skills or confidence to access complaints processes independently.

All service providers should be providing services with staff that have the highest level of clearance possible in order that individuals who are vulnerable can have the access to the same variety of service providers as other people with disabilities.

**We endorse Options button 3 & 4**

| Recommendation 11: Staff must be responsible for their own registration. |
| Recommendation 12: Self-managed participants need to have staff registered to ensure no abuse and appropriate levels of training. |
| Recommendation 13. A national registration program needs to be established to register, monitor and remove inappropriate staff. |

**4. Handling complaints**

Most registered service providers will have a documented complaints handling process. To date the experience of some people with communication or speech difficulties is that these processes have structural barriers, as they rely on telephone, online systems or having a requirement to negotiate with a person who may not understand their method of communication. It is often not possible for people with complex disabilities to access someone who understands their method of communication to make a complaint. Many people require support from an independent advocate to make a complaint to service providers for a range of reasons, including fear of retribution, communication barriers, inaccessible complaint systems and/or not having the confidence to independently lodge a complaint.
If the complaints process leads to an individual making a legal complaint, that individual needs to be able to provide clear direction to a lawyer. If a person’s communication method is not clearly understood by the legal representative, s/he will not accept the individuals’ instructions. They then act ‘in the best interest’ which may be contrary to the wishes of the person.

There is a need for an independent communication support system or ‘Intermediaries’, as found in United Kingdom\(^3\). This will allow an individual to access professionals trained in a variety of communication methods, and therefore allow them to have a voice. While not necessarily the responsibility of the NDIS, such issues need to be resolved in order that all people with disabilities can access complaints systems and make decisions.

A national and independent complaint body is required to investigate and take action on behalf of the participant. A consistent method of dealing with any complaint including the provision of support for individuals during the process is essential. Advocacy agencies could be funded to take on this role.

The complaint body should have the right to inspect records and fully investigate a complaint with the right to call for any relevant information. A streamlined documented process needs to be developed, published and followed thus allowing all parties to have an understanding and clear expectations of the process.

The complaint body should not be a mediation body. Mediation can be entered into as part of an overall process, but not directed by the complaints handling body.

Information gathered by Community Visitors can also provide important information to inform investigations, remembering that Community Visitors do not take complaints.

Independent advocates are best placed to support individuals to make complaints as they already have a relationship with the community and a good understanding of consumer and disability rights. For people with communication or speech difficulties, advocacy services require expertise in alternative and augmentative forms of communication to assist individuals to participate. There must be a requirement for complaints body to allocate the time, skills and resources to liaise with individuals with complex disabilities when necessary.

To provide a contemporaneous example, the existing Disability Services Commissioner in Victoria has been not provided people with disabilities with an effective complaints mechanism, and has caused significant dissatisfaction for individuals and advocates attempting to address complaints with service providers. The complaints about the ODSC from advocates include:

- complex complaints registration process;

\(^3\) http://www.theadvocatesgateway.org/intermediaries
• not disability friendly in terms of access to the office;
• it does not investigate complaints despite having the power to do so;
• when an advocate is involved ODSC staff relied too heavily on the advocate to facilitate the process;
• little understanding of complex cases;
• the limitation on only providing mediation services.

Recommendation 14: Establish an 'Independent Communication Support' system that gives people with communication/speech difficulties the same rights as those who are Deaf and can currently access Auslan interpreters.

Recommendation 15: A national complaints handling body needs to be independent of government, NDIA and the service system.

Recommendation 16: Access to independent advocacy services to be made available for people with complex communication needs/disabilities to ensure access to complaints processes.

Recommendation 17: The complaints handling body is required to have the powers to investigate and direct.

5. Monitoring and Oversight

A national system with monitoring and oversight for the operation of the Scheme is essential. The body should be independent of the NDIA, the government disability Department, and of service providers. It should have the capacity to collect data, respond to market failure, and identify trends/gaps for future planning of the scheme.

Recommendation 18: The complaints handling body should also collect data, and identify trends and gaps within the service system.

6. Safeguards for self-managing participants

For those who choose to self-manage their packages it is essential that their staff have some form of registration, as packages are it is public money. There have been a number of cases where families have decided to assist their young adult to manage their package only to find that the individual has been disadvantaged by this
structure. There always needs to be checks and balances to protect the rights of the individual and public money.

Guardians who make the decision on behalf of their family members need to have some understanding as to the potential areas of risk for their family members if they employ people outside the system. A Code of Conduct may not necessarily work unless it is monitored.

Recommendation 19: Self-managed participants require a risk management strategy.

7. Reducing and eliminating use of restrictive practices

If participants display challenging behaviour the least restrictive practice must be the response. Challenging behaviours must be addressed through evidence-based psychological interventions. A national regulator needs to be established that works subject to the National Framework For Reducing the Use of Restrictive Practices in the Disability Sector. All restrictive practices should be mandatorily reported to this body.

A Positive Behaviour Plan must be developed based on a Functional Behaviour Assessment performed by a professional with qualifications in behaviour analysis. A compulsory process similar to that required by Department of Health and Human Services in Victoria in its dealings with people with disabilities pursuant to the Disability Act 2006 through the Office of Professional Practice in Victoria needs to be established. Staff working with people with disabilities who display challenging behaviours must receive appropriate guidance and training to competently deal with such behaviours without the need for restrictive practices. Currently, the abuse of people with disabilities in care is so widespread that a National Senate Inquiry is currently on foot. This indicates that current service provision is flawed.

Our strong position is that to subject people with disabilities to restraint and seclusion, (practices which can and have caused injury and death), when evidence based psychological interventions based on behaviour analysis can be used in preference to such interventions, is abuse.

No family member or guardian should be making decisions about whether restrictive practices can be used against a person with disabilities, as they do not have any
qualifications in behaviours to make such a judgement. An independent regulator must determine such things. A Code of Practice is completely inadequate to protect people with disabilities from restrictive practices.

The only instance where a service provider should resort to a restrictive practice is in an unplanned emergency situation. Such a situation could only be deemed to be the first time an individual demonstrated a challenging behaviour.

All Positive Behaviour Plans need to be registered and monitored by an external body to ensure the appropriate expertise is being applied.

While the system to regulate restrictive practices in Victoria can be used as a starting point, it is important to look at the current failings of that system in order to build a superior national system.

- The Office of Professional Practice is not fully independent as it sits within the Department Of Health And Human Services.
- Positive Behaviour Plans do not need to be developed from a Functional Behaviour Assessment, and any staff member, despite having no qualifications in Behaviour Analysis, can undertake a behaviour assessment and develop a Positive Behaviour Plan.
- It can only be inferred, due to the quality of Positive Behaviour Plans being collected by the Office of Professional Practice, that there is no real monitoring and evaluation of the quality of such plans.
- Currently, the Office of Professional Practice does not regulate seclusion.

The above has resulted in ineffective behavioural strategies, the continuation of challenging behaviours, ineffective monitoring and evaluation, and a misunderstanding about what constitutes best practice assessment and data collection. It is recommended that independent behaviour teams be responsible for Functional Behaviour Assessments and Positive Behaviour Plans. Service providers have a conflict of interest in the development of such plans.

It is particularly unhelpful when the NDIS propose rewarding service providers who are using restrictive practices. While ostensibly, “Development of behaviour support plans that temporarily use restrictive practices, with intention to minimise use of these practices”, 4 we are concerned that such a higher hourly rate will serve as an inducement to use restrictive practices, and reward incompetence. Instead, funding should be put in place for independent behaviour support services.

We endorse Option 4.

4'Support Clusters Definitions and Pricing for Victoria’ 19 December 2014  Item 11 004 p46
Recommendation 20: All service providers who use restrictive practices against people with disabilities must comply with the National Framework for Reducing the Use of Restrictive Practices in the Disability Service Sector, and be audited for doing so.

Recommendation 21: A completely independent body led by senior staff who have the highest level of recognised expertise in behaviour analysis/restrictive practices regulate restrictive practices and register all Positive Behaviour Plans after careful scrutiny.

Recommendation 22: Each service provider needs to develop policies and practices that are compliant with the National Framework to Reduce the Use of Restrictive Practices.

Recommendation 23: There should be no loading incentive to use restrictive practices.
Submission:

Senate Community Affairs Reference Committee
May 2015

Inquiry into Violence, Abuse and Neglect against People with Disabilities in Institutional and Residential Settings

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INTRODUCTION

Communication Rights Australia ("Communication Rights") is a specialist human rights advocacy and information organisation funded to provide advice, support and information to people with disabilities giving priority to those who experience communication or speech difficulties.

There are 1.1 million Australians who have a communication disability and Communication Rights Australia is the only funded agency working within this community supporting individuals to access their rights, including the right to communicate.

Communication Rights works in all institutional and residential contexts that have been defined broadly within the Senate Inquiry including group homes, workplaces, respite and day services, recreation programs, mental health facilities, hostels, supported accommodation, prisons and juvenile justice centres, schools (including school buses), out-of-home-care, hospitals, age care facilities and disability services.

The Disability Discrimination Legal Service (DDLS) is a community legal centre that specialises in disability discrimination legal matters. DDLS provides free legal advice in several areas including information, referral, advice, casework assistance, community legal education, and policy and law reform. The long term goals of the DDLS include the elimination of discrimination on the basis of disability, equal treatment before the law for people with a disability, and to generally promote equality for those with a disability.

Violence, abuse and neglect ("abuse") of people with disabilities has been occurring in a wide range of settings for decades without sufficient attention from State and Commonwealth governments, and with inadequate responses from those charged with ensuring that reports of such abuse are handled efficiently, effectively, and with competence.

This inquiry is the most significant attempt made by government to elicit information from people with disabilities and those that work with and around them around issues of abuse.

Communication Rights Australia and the Disability Discrimination Legal Service have concerns, however, that the Senate have not considered probably what is required to ensure that people with disabilities who are the most vulnerable, are enabled to provide information to the Community Affairs Reference Committee ("the Committee").

While there are those people with disabilities who are able to easily access the information about the inquiry, and are capable of independently contacting the Committee and making their views known, many will not have received information on the inquiry by the due date, and will not have received the support required to provide information.
The very reasons that people with disabilities are subjected to abuse are the same reasons that people with disabilities may miss out on contributing to this inquiry. Those reasons include isolation, the inability to communicate without significant assistance, fear of retribution and the control of information being provided to them.
EXECUTIVE SUMMARY

The abuse of people with disabilities is widespread. Of most concern is the fact that much of the abuse is at the hands of staff working for government departments, and that the organisations that encourage abuse by failing to fulfil their statutory or moral obligations to vigorously pursue reports of abuse.

Many of the institutions that are set out in the Terms of Reference, such as accommodation facilities, disability service providers, schools and special schools, are either government itself, or have service agreements with government.

It is clear that the Senate accept that the abuse of people disabilities across Australia is an issue of such significance that it warrants an Inquiry. This submission supports this conclusion, but also looks at why this abuse exists, and why it is not exposed. Some of the reasons include:

- Australia’s failure to comply with its international obligations as they apply to people with disabilities
- The lack of appropriate supports available to people with communication or speech difficulties, and cognitive disabilities, when they want to make a complaint. The ability to access independent advocacy is difficult for people who are isolated, marginalised or vulnerable.
- A means to communicate their complaint (a functional communication device that people within their environment can use and support)
- Access to independent supports to enable people to report abuse
- A lack of counselling and victim support
- Lack of research on how to best support vulnerable, isolated and marginalised individuals
- The failed practices and conflicts of interest of bodies established to investigate and prevent abuse
- The insufficient numbers of independent disability advocacy organisations and the inadequate funding of such organisations
- The failure by government to address systemic issues linked with abuse
- The failure by government to require best practice approaches to working with people with disabilities
- Workforce issues contributing to abuse
- Challenges arising under both the NDIS Capacity Building and Quality and Safeguard Frameworks to ensure there is environmental supports for people who are isolated, marginalised and vulnerable
- Absence of a National Framework that covers all institutions as set out in the Terms of Reference. Although this may be addressed under the NDIS Quality and Safeguard Framework.
- Police and lawyers requiring to take statements from the individual but not being prepared to use the person’s method of communication.
RESPONSE TO TERMS OF REFERENCE

F. AUSTRALIA’S FAILURE TO COMPLY WITH ITS INTERNATIONAL OBLIGATIONS AS THEY APPLY TO PEOPLE WITH DISABILITIES

Since 1st July, 2014 Communication Rights has recorded its representation of individuals who have experience 198 incidents of human rights infringements within the Victorian community. These include infringements regarding:

- the right to freedom of expression, opinion and access to information;
- the right to live independently and be included in the community;
- the right to respect for physical and mental integrity;
- the right to be protected from torture and cruel, inhuman or degrading treatment;
- the right to be trained in, and use, augmentative and assistive communication;
- the right to be provided with communication support workers/sign language interpreters;
- the right to live a life free of discrimination;
- the right of access to justice, education and health services.

These infringements are documented as the major areas of concern causing significant distress to people with disabilities.

DDLS receives, in addition to complaints of discrimination, complaints of abuse, neglect and restrictive practices from people with disabilities. Many of these complaints do not fall under discrimination legislation, and people are referred to statutory authorities such as the ombudsman, or disability advocacy agencies.

Such complaints fall under numerous international human rights conventions to which Australia is a signatory, and for which shadow reports are regularly prepared, articulating numerous failures to comply.

By failing to comply with international conventions, the Australian Government:

- role models an attitude towards people with disabilities which suggests that they are not equal members of the community; and
- continues to fail in his obligations to established infrastructure and systemic frameworks that will ameliorate risk for people with disabilities.

We understand that state governments, through the Commonwealth, have clear obligations under international conventions, however in the Victorian context, it is the
State Government itself that is responsible for most human rights breaches. Below are listed only a few examples of how the State of Victoria is breaching its obligations.

The Department of Health and Human Services (“DHHS”) is the largest direct service provider/contractor in relation to services for people with disabilities.

In 2012, the Victorian Equal Opportunity in Human Rights Commission (“VEOHRC”) released a report entitled *Desperate Measures: Relinquishment of Children with a Disability in the State Care*. The report highlighted, amongst other things, the one of the reasons children and young adults are relinquished into state care, is due to a lack of support from the state itself. This support comes through DHHS. The relinquishment of children and young adults places them in state care (either contracted or directly provided). It has become very clear that the levels of abuse in state care prevent a risk to all people with disabilities.

Three years later, very little has changed in terms of the levels of support provided to families caring for people disabilities, and in fact there has been an increase in complaints in relation to the amount of Individual Support Packages through DHHS.

In the same year, VEOHRC released a report entitled *Held Back: the experiences of students with disabilities in Victorian schools*. Chapter 10 highlights abuses of students with disabilities in schools through restraint and seclusion, and clearly sets out the breaches of domestic and international law that are raised by such abuses. Despite recommendations by VEOHRC on what needs to be done to protect children in schools from these practices, the Department Of Education and Training have not acted. Both VEOHRC and the Office of the Public Advocate have recommended that the Department Of Education and Training prohibit the seclusion of students with disabilities — VEOHRC in the aforementioned report and the Office of the Public Advocate through a position paper. The Department Of Education and Training have not prohibited seclusion.

The Department Of Education and Training continue not to alter its Restraint Policy in response to recommendations from VEOHRC. These are simply a few of the many examples of Australia through it states not complying with its international obligations.

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3 ‘Held Back’ p 124
4 ‘Restrictive Interventions in School Settings’ March 2013
5 ‘Held Back’ p 124
H. BARRIERS TO REPORTING VIOLENCE AND ABUSE.

A means to communicate complaints of abuse

One of the major barriers to accessing an individual’s right to complain is to have a functional mean to communicate. Communication Rights receives many of our referrals from concerned citizens (staff, family, and friends) who witness the abuse of individuals and are concerned that the individuals are unable to either communicate their concerns or take action against the offending person. Many of these individuals are already vulnerable and marginalised as they have no functional means to communicate or have regular contact with people able to support them to take action.

The ability to communicate affects the most fundamental aspects of a person’s life. Education, socialisation, decision-making, safety, employment and personal relationships are unattainable or difficult if one cannot communicate. The most basic human rights as set out in legislation such as the Convention on the Rights of the Child, Convention on the Rights of Persons with Disabilities, and International Covenant on Civil and Political Rights uphold a person’s rights to communicate.

The right of an individual to communicate through augmentative and alternative means is not a priority for many services including DHHS. When Communication Rights have requested communication assessments for individuals we are advised that there is a 6 month waiting list or there is no funding for such an assessment. DHHS demonstrates no obligation to provide this basic right to people under their care.

One would assume that all students would be given a means to communicate as part of ensuring they can participate and have access to their education, but both Communication Rights and DDLS have received reports that particularly for children with moderate to severe disabilities, and those who are deaf, this is not the case.

Many students within Special Schools and Special Development Schools have no functional means to communicate and hence no means to communicate a complaint. While this also occurs in mainstream schools, special schools are less likely to provide individualised programs as they have staff ratios of approximately 2 staff to 8 children, and therefore there is less opportunity for individual assistance. In addition, special schools tend to provide “group” therapies through their practitioners, and there is a dearth of best practice communication plans in place for students with communication needs.

There seems to be no base line requirement within the education sector for those who attend schools or day programs to have a communication assessment and a means to communicate. Further if a child does have a means to communicate, there are no obligations for schools to ensure the appropriate equipment is provided, staff
are trained in the use of that equipment, and the equipment is consistently used, other than that student’s rights under discrimination legislation.

People with disabilities should not have to litigate to communicate.

In the human service sector, most residential care is provided to adults with intellectual disability and it is assumed that their communication has been solidified at the school level. Neither accommodation nor adult day programs prioritize communication and no longer have therapy on site.

Overall there is a right to communicate but no right to a means to communicate for many people who have communication or speech difficulties within Australia and as result their capacity to complain about mistreatment, abuse and neglect is restricted.

Case study:

A man who has severe cerebral palsy with no speech was physically assaulted by his 1:1 support worker whilst out in the community. The support worker put the wheelchair brakes on and hit the man on the head on multiple occasions, then shunted the man’s chair backwards afterwards.

Reports were made by the witness to transport police, and the support workers’ agency was notified of the incident. The agency asked the man’s aged parents if they wanted anything done about it or if they wanted an advocate. The parents said they didn’t want anything done as they didn’t want to lose the support hours as it was respite for them. They didn’t want for any action to be taken despite the assault.

The man was not asked by the agency or his parents if he wanted an advocate or to make a statement to the police, nor was he consulted about any of the decisions or given any opportunity to choose what he wanted.

Lack of appropriate supports available to people with communication or speech difficulties when they want to make a complaint

Every quality service has a complaint process but if an individual has no means to communicate or access to the support to make a complaint then the process is redundant.

Too often family members are fearful of making a complaint on behalf of their child or adult son/daughter because they fear retribution. For those who make it to the doors of Communication Rights for advocacy and information we hear stories of parents and individuals being bullied, labelled as trouble makers and their access to services restricted. These are not one off experiences but experienced by parents from kindergartens through schools and onto day programs.
Case study:

A young girl, Judy, who has autism and ADHD is attending a mainstream primary school but spends her time isolated in an office setting with a teacher’s aide who has no formal training. Judy is only allowed to attend school until lunch because of her behaviour. If she attempts to return to school after lunch, her parents are called to collect her. There are times she becomes overwhelmed while at school and attempts to leave the school grounds without permission. On these occasions the school calls the police instead of taking the professional agreed action of calling an ambulance to accommodate her disability needs.

The level of discrimination and lack of inclusion has caused diagnosed long term and permanent medical illnesses to both Judy and her mother.

Parents have tried to negotiate with the school but have been labelled as ‘trouble makers’, while staff have been told not to communicate directly with them as all communication must go through the school Principal.

The school does not follow Judy’s Behaviour Management Plan and has had no training in her method of communication resulting in communication breakdown between the student, parents and the school.

• **Access to independent support that will facilitate their concerns**

There are 270,000 people within Victoria who have a communication or speech difficulty. Communication Rights conservatively estimate that 25% of those would want to access independent advocacy sometime in their life. Communication Rights is funded for 2.5 EFT staff which includes 1 advocate across Victoria and there is no other similar service anywhere else in Australia. Our research and experience confirms the generalist advocacy sector do not have the skills or training to support individuals with communication or speech difficulties and regularly refer clients to Communication Rights for assistance.

It is the most empowered individual who seek support to exercise their rights. For those who are not mobile within the community or are reliant on a staff member or family to make contact with an advocate when things go wrong are left in abusive and potentially unlawful situations.

Case study:

A non-verbal lady who lives in a DHHS CRU had expressed to her friend she was unhappy and afraid at home. She was denied the right to therapy and trial of a
functional communication device along with the necessary equipment to enable the trial to take place.

Communication Rights advocated on behalf of the lady, lodging a complaint to the Office of the Disability Service Commissioner (ODSC) in regard to the denial of access to therapy and the opportunity to explore a functional means to communicate. After 8 months of advocating on behalf of the lady, working with the ODSC and liaising with DHHS, ODSC closed the case with the lady’s concerns only partially resolved. As result she became further isolated when she didn’t receive the therapy she requested which resulted in her depression and health deterioration.

The ODSC were once again approached by our advocate to ensure DHHS adhered to the ‘partial agreement’. The ODSC tried to reply to the additional complaint but were unsuccessful negotiating with DHHS. ODSC closed the case because it could not be conciliated.

• Lack of research available and data collection on vulnerable and marginalised members

Speech Pathology Australia believes their research underestimates the exact number of individuals in Australian with communication or speech. Communication and speech difficulties are frequently cited secondary to other impairments/disabilities. For example, an individual with a progressive neurological condition may be considered as having a “long term health condition” as their primary disability. However, that individual may also experience communication or speech difficulties which impact on their daily living experiences. An individual with movement and mobility difficulties may also be considered to have “restriction in physical activities, etc.” as their primary disability. They, too, may have communication or speech difficulties which greatly impact on their activities and lifestyle.

Speech Pathology Australia has completed some research in the area of demographics but as yet there is very limited understanding as to how speech loss impacts on the individual exercising their rights and their required supports for inclusion. Further we need a greater appreciation on how having no functional means to communicate impacts on the individual’s socialisation, isolation, marginalisation and vulnerability in a range of settings.

Communication Rights has collected data on the human rights infringements experienced by people since 2008 but again it only represents those who are most empowered that make it to our service. It is therefore essential for more research on how to plan, support and include people with communication or speech difficulties into mainstream community especially under the NDIS.
• **Practices of bodies established to investigate and prevent violence**

Within Victoria there are a number of bodies established to accept complaints from people with disabilities yet the adequacies and response rate, from our experience, appear to be random and inconsistent.

Department of Health and Human Services holds some responsibility to support individuals to make complaints, yet from our experiences, during advocacy cases DHHS staff regularly blocks access to a means of communication for an individual to complain either due to incompetence, lack of funding or refusal to allow training of staff in a person’s method of communication. This is a failure of their obligations under their own policies and human rights legislation.

Incident reporting (IR) of abuse to DHHS is not actioned or responded to urgently unless there is an external body lobbying for action. Despite DHHS having a fully documented process for these cases advocates have found that the machinery of government operates very slowly leaving individuals who have been a victim of a crime fearful as to their future and safety.

Client to client abuse is another problem area complicated by the shortage of available housing leaving services loath to move or separate clients. For people who have no functional means to communicate they are left fearful in their own home. Advocates in these situations will attempt to take out a Personal Safety Invention Order to pressure DHHS to respond to safety needs of the individual. This is not a satisfactory method of response because the courts may not approve the Order which then put the individual back into the unsafe environment.

Without the ability to speak on your own behalf individuals cannot give direction to legal representatives who are then loath to take the case forward. Magistrates and Judges are unwilling to hear directly from advocates when they feel an individual cannot communicate with the system independently.

Communication Rights Australia has set up a scheme of Independent Communication Supports for people with communication or speech difficulties similar to that enjoyed by people who are Deaf (Auslan interpreters). Unfortunately independent communication support is not a recognised funded service and is reliant on the goodwill of individuals to work in this role.

The United Kingdom has developed a scheme of ‘Intermediaries’ in the criminal justice system to support the communication of vulnerable witnesses and defendants. South Australia acknowledges this need through their Justice Action Plan and ‘Supporting Vulnerable Witnesses in the Giving of Evidence’ but there is no consistent ‘Right to Supports’ across all jurisdictions in each state.

Equal Before the Law: Towards Disability Justice Strategies was published by the Australian Human Rights Commission in 2014 acknowledges the inequity of people with disabilities when dealing with the Justice system. ‘Access to justice in the
criminal justice system for people with disabilities who need communication supports or who have complex and multiple support needs is a significant problem in every jurisdiction in Australia. Whether a person with disability is the victim of a crime, accused of a crime or a witness, they are at an increased risk of being disrespected and disbelieved and of not enjoying equality before the law.

Disability Services Commission was established to respond to complaints about Victorian disability services including disability services provided by the Department of Health and Human Services. It is a statutory body that provides a free and confidential service. Our feedback from the advocacy sector and our own experience suggests that it has many problems. Complaints need to be made online, in certain formats or enquires by phone which is problematic for those who have communication or speech difficulties (who do not use the phone system and 60% have no online access). In our experience there is no/little face-to-face contact and a process leaving the service inaccessible for some people. The criteria they use to investigate or not is not clear and the advocacy sector has reported difficulties when relying on them to assist to solve complaints.

When a crime against a person with communication or speech difficulties is reported to the Police the first concern is how they are going to officially report the crime. Police are wary of being seen to influence an individual’s statement if the victim has no easy to understand method of communication. In addition they become concerned that if the person who has been alleged to have committed the crime is charged, how the system sees the victim’s statement. In our experience police will only take statements from individuals with communication or speech difficulties under the pressure from advocates. Regularly advocates report that once the police leave there is very little follow up until the advocate again pressures the police for action.

Case study:

Sean a 25 year old man has no speech and was physically abused by his primary carer in his residence. The following day Sean reported the abuse to his day centre staff but when the staff lodged an incident report to DHHS his primary carer stopped him accessing the Community Centre that he normally attends 5 days a week. When the advocate contacted Sean at home we were told that he had been instructed by his carer to avoid all contact with the day centre and was told he could not return that he had to stay at home alone.

Despite the Community Centre lodging a Category 1 incident report to DHHS and reporting the abuse to the police, DHHS made no contact with the Centre and took no action to support Sean in any way. The advocate and Centre attempted to negotiate with his carer but contacted DHHS when Sean failed to return to his placement the following day and weeks preceding. DHHS still took no action.
Our advocate lodged two complaints with the ODSC regarding the lack of response by DHHS to the abuse and a second complaint that Sean had no functional means to communicate to make a complaint to the police.

- The second complaint was open for over 1 year and the ODSC closed it when an Action Plan was developed by DHHS to complete an assessment. DHHS did not abide by the agreement as Sean did not receive a communication assessment.

- The ODSC were informed the agreement was not adhered to and there was no further action being taken to resolve the breaches of Sean’s right to communicate and to receive services.

After 2.5 years ODSC has taken no action to support Sean to access to a functional communication so that he can access the justice system. The case continues.

- **Role of advocates**

The role of an advocate at Communication Rights Australia is to facilitate and remove the barriers within the community so that the individual requesting advocacy can exercise their rights. This may involve advocating for an individual to have a method of communication so they can make a complaint. The role of the advocate is to ensure the system respects the right of the individual despite the challenges with communication.

Areas covered are extensive from funding, access to justice, education, health, housing and being included within the community. There are a range of tools the advocate uses to ensure the individual’s voice is heard in situations which has been developed over the 30 years the service has existed.

**Case study:**

*Two men with profound disabilities, including physical, vision and hearing impairments and no speech (extremely marginalised and extremely vulnerable), had been living together in the state’s care all of their life and currently in a DHHS community residential unit (CRU) where they had been long standing victims of violence and abuse by a co-resident. The co-resident was attacking the men physically, scratching until they bled, intimidation, punching, and the men were left to try to protect themselves.*

*Despite the family members and friends of the residence reporting this to the DHHS accommodation staff, DHHS staff and management being aware of this, community visitors frequenting the house, the actions of the co-resident and the house dynamics*
were considered normal by all staff - the violence and abuse was not reported and very minimal notes were taken, and incident reports made were not actioned upon.

The advocate took out an Intervention Order to protect the two clients and immediately DHHS moved the offending client to another residence.

• Best practice strategies to protect

There is a strong prima facie argument that the vulnerability of people with little or no speech to public and private abuse, including to vilification, is immense because of both the lack of communication which these individuals have (i.e. so many of them simply cannot tell us) and also because of the widespread systemic failure to implement the right to communicate for many of the ones who do have or could have a means communication.

A best practice strategy to protect an individual who has a communication or speech difficulty to access their right to complain is through an independent advocacy. The advocate will be trained to listen to the person, help identify the issues they want addressed, provide information about options for addressing the issues and assist a person to represent their views and wishes to others.

An advocate is independent when they are free to be on the side of a person or people with disabilities. An advocate is not independent and will have conflicting loyalties when they are employed by a service provider or by government.

In order for Communication Rights to effectively demonstrate to stakeholders the value they are delivering to the people they represent, we are working with Monash University to develop a robust reporting framework that allows the impact of our work to be mapped and presented. To achieve this goal a combination of assessment tools are being trialed to quantify measurement of Communication Rights’ impact on its clients, in terms of value added and from a Government expenditure savings’ perspective.

It is essential for any best practice strategy to have the work assessed for areas of improvement by the individuals they are representing and demonstrated value added to the funding body.

• Workforce issues contributing

The lack of understanding of human rights impacts on the ability of the workforce to understand that all individuals have rights regardless of disability. The pressures of resource constraints impacts on the ability of staff to think outside the box as to how to support an individual access their rights.

Attitudes of staff still remains a huge barrier for people who have no functional means to communicate accessing their rights.

• Challenges arising under the NDIS
One of the major challenges we find under the NDIS is the total lack of understanding of the needs of people with communication or speech difficulties. Systems have been designed for those who have speech or have the skills to access online services not people who are marginalised and vulnerable.

Access to information should be accessible and available where the person operates. People do not seek out information they are not aware exists. There is no street access to NDIS for those people who require face-to-face contact to gain information. People with communication or speech difficulties do not necessarily have a means to access online services.

A requirement for capacity building of the individual under the NDIA should have targeted response to ensure equity of access to the required information and supports so all people who are eligible can access the process.

Information on services available can be empowering but it needs to be accessible on many levels - format, venue, and how it is imparted to the individual. People need to access information in a range of different ways and through different mediums. The ILC Framework needs to consider how to cater for the way people receive and process information. Consideration should be given to the most vulnerable and marginalised and what means/methods of accessing information they require to avoid them being locked out. It cannot be web base only as many clients do not have internet access, dexterity skills or capacity to use the web. Equally individuals may be living with elderly parents who do not access. Building the bridge to the communities prior to capacity building needs to be achieved. This is a time and resource intensive exercise but history has shown programs will be underutilised if the appropriate ground work is not completed prior to implementation.

People must be ready for the information that will be imparted to them or the message may be lost. Families have busy lives and dealing with a range of issues other than support their young person with disabilities so information needs to be framed and provided in a timely manner.

- National framework for safeguarding.

Although there are some excellent aspects of safeguards within the report there is a major concern if the complaints process adopts a similar mechanism as that of the Disability Services Commissioner.

As yet the National framework has little operational detail which makes comment on the framework a little premature.

- Recommendations

Recommendation1:
All government departments and service providers meet their statutory obligation by pursuing reports of abuse of people with disabilities within their services.

Recommendation 2:

All people with disabilities have a functional means to communicate their concern to an independent body.

Recommendation 3:

People who are vulnerable, marginalised and isolated be provided with the supports to access independent advocacy organisations to assist them in protection of their rights.

Recommendation 4:

An independent communication support or intermediary service be established to support people with communication and speech difficulties have an independent process to give evidence.

Recommendation 5:

Counselling services for victims of crime be trained to work with people who have communication or speech difficulties.

Recommendation 6:

Resources are allocated to research best practice strategies to protect the rights of people who are vulnerable, marginalised and isolated.

Recommendation 7:

Governments to commit to ensuring the rights of people with disabilities by ensuring complaints handling processes are independent of service provision and government influence.

Recommendation 8:

Governments commit to the adequate funding of independent advocacy organisation and community capacity building programs to assist individuals who are isolated, marginalised and vulnerable.

Recommendation 9:

A national registration be established to register, monitor staff who have undertaken the highest level of scrutiny and now able to work with vulnerable and marginalised people. It should also include international criminal checks when necessary.

Recommendation 10:
That widespread adoption of the South Australian Attorney-General’s Department Guidelines of ‘Supporting vulnerable witnesses in the giving of evidence’ is adopted throughout Australia as best practice.

Abbreviations

i Speech Pathology Australia
ii Attorney-General’s Department South Australia – Disability Justice Plan 2014 -2016
iii Attorney-General Department, An Initiative of the Disability Justice Plan 2014 -2016
iv Equal before the law -TOWARDS DISABILITY JUSTICE STRATEGIES FEBRUARY 2014, Human Rights Commission