Office of the Public Advocate

Submission S089
Received 21/04/2016
Family and Community Development Committee

Submission to the Parliament of Victoria Family and Community Development Committee Inquiry into Services for People with Autism Spectrum Disorder

21 April 2016

Contact: Liz Dearn
Coordinator, Policy and Research Unit
Office of the Public Advocate

Prepared by: Natalie Tomas
Senior Policy and Research Officer
Office of the Public Advocate

Office of the Public Advocate
Level 1, 204 Lygon Street, Carlton, Victoria 3053
Local call: 1300 309 337 TTY: 1300 305 612
Fax: 1300 787 510 DX 210293
www.publicadvocate.vic.gov.au

Contents

Summary of Recommendations

Independent Third Person Program - Enshrinement in legislation

Recommendation 1
The Victorian Government should amend relevant legislation to require Victoria Police to have an Independent Third Person present when interviewing all people with a cognitive impairment or mental illness.

Independent Third Person Program - Advocacy service

Recommendation 2
The Victorian Government should provide additional funding for the Independent Third Person program to enhance its capacity to provide an advocacy service for people with a cognitive impairment or mental illness who are in contact with the criminal justice system.

Disability accommodation services - Personalised accommodation options

Recommendation 3
The Victorian and Commonwealth governments should provide personalised, planned and flexible accommodation options to meet the needs of people with ASD who need to live on their own with appropriate security and high ratios (1:1) of staff support.

Disability accommodation Services - Addressing resident incompatibility

Recommendation 4
The Victorian and Commonwealth governments should provide new accommodation options to address situations where people in shared supported accommodation settings live at risk of assault and neglect due to their incompatibility with others.

Disability accommodation services - Staff training

Recommendation 5
The Victorian and Commonwealth governments should require disability support staff in shared supported accommodation to be registered and trained to a competency standard equivalent to Certificate IV in Disability Services in order to provide a competent, skilled workforce which can provide appropriate support to people with ASD and/or other disabilities who require intensive behaviour support.

Disability support services - Staff training

Recommendation 6
The Victorian and Commonwealth governments should provide flexible, personalised daytime service options to meet the needs of people with ASD who need high ratios (1:1) of staff support. Staff members should have training in working with people with ASD who have behaviours of concern to minimise the risk of self-harm and violence toward others.

Disability accommodation services - Respite accommodation

Recommendation 7
The Victorian and Commonwealth governments should provide new and permanent accommodation stock to meet the specific needs of all people who are currently living long-term in facility-based respite accommodation.

Restrictive practices in mainstream health services

Recommendation 8
The Department of Health and Human Services should ensure that health service staff receive training on how to work with people with ASD safely so that appropriate medical treatment can be provided without the need to use restraints.

Restrictive practices in schools

Recommendation 9
The Victorian Department of Education and Training should review both its guidance on responding to violent and dangerous student behaviours of concern and the relevant sections of the *Education and Training Reform Act 2007* in order to implement least restrictive, best practice initiatives in this field.

Statutory detention in disability services

Recommendation 10
The Victorian Government should amend the *Disability Act 2006* so that Supervised Treatment Orders should only be renewable for a maximum period of five years.

National Disability Insurance Scheme and accommodation

Recommendation 11
The National Disability Insurance Agency should ensure that specialised, individualised accommodation and support options for people with ASD who exhibit extreme behaviours of concern are maintained after the rollout of the NDIS from 1 July 2016.

National Disability Insurance Scheme and restrictive practices

Recommendation 12
The Victorian Government should ensure that the regulation of restrictive practices under the *Disability Act 2006* continue for a 4-year transition period from 1 July 2016.

Recommendation 13
The Victorian and Commonwealth governments, through the Council of Australian Governments, should establish a national approach to restrictive practice regulation, drawing on a best practice model identified by a national evaluation of restrictive practice usage, should be adopted and operational from July 2020.

National Disability Insurance Scheme and case management

Recommendation 14
The National Disability Insurance Agency should fund case management, when a clear need is demonstrated, as a 'reasonable and necessary' support item to monitor the quality of supports received.

2. Introduction

The Victorian Public Advocate welcomes the opportunity to make a submission to this Victorian Parliamentary Inquiry on Services for People with Autism Spectrum Disorder (ASD).

2.1. About the Office of the Public Advocate

The Governor in Council appoints the Public Advocate in Victoria pursuant to the *Guardianship and Administration Act 1986* (Vic) (the Act). The Public Advocate delegates her power to act as guardian of last resort under the Act to her staff. The Victorian Office of the Public Advocate (OPA) is an independent statutory office empowered with a broad range of functions under the Act.[1] OPA works to protect and promote the rights, interests and dignity of people with disability in Victoria.

OPA provides a number of services to work towards these goals, including advocacy, investigation and guardianship services for people with cognitive impairments (including people with ASD) or mental illness. In 2014-15, OPA was involved in 1,511 guardianship matters, 438 investigations and 381 cases requiring advocacy.[2]

OPA coordinates a number of volunteer programs: the Community Guardian Program, the Community Visitors Program, and the Independent Third Person Program. OPA provides support to over 900 volunteers. OPA Community Visitors Program volunteers receive training to visit, report and monitor the adequacy of disability residential services, supported residential services, and mental health facilities. Independent Third Person (ITP) Program volunteers provide volunteers to attend police interviews where the alleged offender, victim or witness have a cognitive impairment or mental illness. The ITP's role is to ensure that the person being interviewed understand their rights and can communicate sufficiently to be interviewed.
In the first six months of this financial year (2015-16), the ITP Program identified 84 people with ASD who were supported by ITPs. The actual number of people with ASD may in fact be higher than this figure, as it only includes people who the Victoria Police have identified as having ASD.[3]

2.2. OPA's involvement with people with Autism Spectrum Disorder

OPA is involved in a variety of ways with people with ASD through its guardianship, advocacy, Community Visitor and ITP functions. In a previous submission on the development of the Autism State Plan (2007), OPA has noted that people with ASD can face extreme difficulty in accessing services because they often fail to meet strict diagnostic criteria to access the services they need. These assessments often do not take into account the range of complex needs that exist across the ASD spectrum.[4]

2.3. About this submission

This submission will focus on terms of reference B and C of the Inquiry.

2.3.1. Term of Reference B

The availability and adequacy of services provided by Commonwealth, State and local governments across health, education, disability, housing, sport and employment services.
OPA's experience as a guardian, advocate and the support provided by the Community Visitors and by ITPs for people with disability across Victoria has provided the organisation with a wealth of knowledge about the adequacy of available services.

---

[1] *Guardianship and Administration Act 1986* (Vic.), part 3.
[2] Office of the Public Advocate (2015a). *Annual Report 2014-2015*. Melbourne: Office of the Public Advocate, pp.12, 16, 19.
[3] This figure is derived from internal OPA ITP data.
[4] Office of the Public Advocate (2007). *Submission to the Autism State Plan Consultation Paper*. Melbourne: Office of the Public Advocate, pp.4-5.

OPA's comments will focus on the availability and adequacy of services for people with ASD in the disability sector and in some mainstream health services.

OPA does not deal with guardianship matters relating to children but OPA can act as an advocate for children. In this context, OPA will comment on the restraint of children with ASD in schools.

2.3.2. Term of Reference C

The adequacy of services to be provided under the National Disability Insurance Scheme (NDIS).

OPA plays a role in the Victorian NDIS trial site through both the Community Visitors Program and the Advocate Guardian Program. OPA was advocate for around 50 participants involved with the NDIS trial, including 30 residents in the Colanda institution at Colac and 20 participants in shared supported accommodation in the Barwon region.

3. Issues for Discussion

The key issues this submission will address are:

1. Disability accommodation and support services
2. Restrictive practices in mainstream services
3. Supervised Treatment Orders under the *Disability Act 2006*
4. Service provision under the NDIS

3.1. Disability accommodation and support services

Many people with ASD do not receive the support they need to live rich, fulfilling lives. OPA's experience is that the disability service system often does not deal well with people with ASD who have a range of complex needs. The result is service gaps, which can place people with ASD who may have behaviours of concern at risk of harming themselves or others. For a small number of people with ASD, their behaviours of concern could mean they risk criminal sanctions.

3.1.1. Disability accommodation

A lack of suitable accommodation for people with ASD with complex needs that is flexible enough to adapt to changing circumstances, is a key example of a major service gap that has not yet been addressed. OPA has been concerned for several years about the lack of appropriate accommodation for people with disability who have complex needs and require intensive staff support. In 2012, for example, the Community Visitors annual report noted that some long-term residents of Plenty Residential Services (PRS) had been moved out of their housing in order to allow a group of people with behaviours of concern, who had proven challenging to the disability system, to be placed at PRS. Therefore, the Community Visitors considered that PRS had become ''accommodation of last resort' for some people with complex needs and personalities who have challenged the system elsewhere. [5]

Case Study 1

A resident with autism was accommodated in a house at PRS late in 2009.The two existing residents at that time were required to be moved urgently to accommodate him. This followed a decision by a court to have this man removed from prison, as he had been found unfit to plead in court. Very high staff levels were required to support this man as a result of his very restricted situation in prison and severe disengagement from staff. The back-up duress alarm system was also a requirement.

[5] Office of the Public Advocate (2012). *Community Visitors Annual Report 2011-12*. Melbourne: Office of the Public Advocate, p. 81.

In January 2012, Community Visitors noticed a new house being built on the edge of the PRS site. Information was that this was for this resident. He now lives alone in this house with a reduced level of staff support from PRS as a transition situation towards, hopefully in the future, being able to move back into the community.

Source: Community Visitors Annual Report 2011-2012, p.82

OPA advocates for the closure of all congregate-care facilities (institutions) in Victoria for people with a disability.[6] The case studies described below, taken from the Community Visitors' notifications of abuse to the Public Advocate,[7] highlight the high risk of harm, which can occur when people with ASD with extreme behaviours of concern are placed in accommodation that is inappropriate for their needs.

Case Study 2

One Disability Accommodation Service house run by the Department of Health and Human Services (DHHS) was the subject of two notifications and repeated advocacy by the Community Visitors Program. In August 2014, Community Visitors noted numerous assaults (throwing, kicking and punching) initiated by a young man with autism towards his older co-residents (50 years plus) as well as to staff. Community Visitors also noted poor practices relating to the completion and filing of incident reports and the absence of documented behaviour strategies and staff training to respond adequately to behaviours of concern.

DHHS acknowledged that, in the period January to December 2014, there had been 28 incident reports submitted that related to physical assaults and occasions where the younger resident had attempted to pull down the pants of the older residents. Despite this, the department concluded that they had 'no evidence to substantiate the concern regarding resident compatibility'.

In May 2015, Community Visitors reported another 12 incidents in the same house involving assaults to co-residents since January and expressed their ongoing concern about the serious emotional and physical risk to the older residents at the house.

At a meeting in June 2015, DHHS advised Community Visitors that the younger resident had been placed on the Disability Support Register for alternative accommodation but no suitable vacancies were currently available. DHHS also advised that they had been trying to engage a behavioural expert to work with staff in the management of behaviours at the house, but there was a long wait for this specialist assistance.

Source: Community Visitors Annual Report 2014-2015, p.9.

As the above case study illustrates, OPA is concerned that DHHS has not engaged in long-term planning and resourcing to ensure that there are suitable new accommodation options available for people with ASD as they transition into young adulthood. Younger people with ASD who exhibit behaviours of concern may require intensive behaviour support and well-trained staff who can meet their complex needs. Case study 3 provides another example of what can occur when a young person with ASD is inappropriately placed.

[6] Office of the Public Advocate (2013). 'Position statement: Congregate-care facilities (institutions) for people with a disability'. http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/social-inclusion/institutions/323-opa-position-statement-congregate-care-facilities-institutions-for-people-with-a-disability Accessed 16/3/2016.

[7] Since 2010, the Public Advocate has required all program areas within OPA, including Community Visitors, to notify her of all matters concerning sexual assault or serious abuse and unexplained injury.

Case study 3

A lack of specialist accommodation options for people with autism resulted in several clients with ASD all being placed in a respite house run by a community services organisation (CSO). Two sexual assaults and two attempted sexual assaults of a non-verbal resident by a co-resident allegedly occurred at this CSO house, where both residents were living for an extended period.

After the first couple of incidents, alarms were put on doors and instructions were issued to staff that the alleged offender was to be kept in sight at all times. The police, Department of Health and Human Services (DHHS), Office of Professional Practice and the parents of the victim were contacted by the service. The distressed parents of the victim sought help from the Minister and numerous agencies, including OPA.

Community Visitors discussed their concerns with DHHS at Local Connections liaison meetings. In the final incident, it appears the alleged offender sexually assaulted the victim in a bathroom. It appears from incident reports written at the time, that the residents may have been left unsupervised when the only staff member on duty at the time had locked himself in the office and called the police, because the alleged offender had threatened the staff member with a weapon. The alleged offender was moved to hotel accommodation and then a 'contingency house'. The matter is subject to police investigation. The mother of the victim told the Community Visitors Coordinator, 'the scars will never heal'.

Source: Community Visitors Annual Report 2014-2015, p.84.

The alleged offender did not have the assistance of an ITP at the police interview, and had had contact with Victoria Police on previous occasions. An ITP must be present during Victoria Police interviews where the alleged offender, victim or witness may have a cognitive impairment or mental illness.[8]. However, there is no current legislative requirement for the attendance of an OPA trained ITP at all police interviews for people with a cognitive impairment or mental illness. The repeat presentations of this alleged offender with ASD, requires an early intervention approach to eliminate or at least reduce his contact with the criminal justice system. OPA's experience is that an ITP needs to attend all Victoria Police interviews involving all people with a cognitive impairment and mental illness. The ITP Program should have sufficient funding to follow up repeat presenters in an effort to break the cycle of crime.

Independent Third Person Program - Enshrinement in legislation

Recommendation 1
The Victorian Government should amend relevant legislation to require Victoria Police to have an Independent Third Person present when interviewing all people with a cognitive impairment or mental illness.

Independent Third Person Program - Advocacy service

Recommendation 2
The Victorian Government should provide additional funding for the Independent Third Person program to enhance its capacity to provide an advocacy service for people with a cognitive impairment or mental illness who are in contact with the criminal justice system.

[8] Victoria Police, *Victoria Police Manual – Procedures and Guidelines, Independent third persons*, p.4 [para 3.2].

Case study 2 and case study 3 discussed above, highlight the fact that shared supported accommodation cannot be the only option for people with ASD. For some people with ASD, a more intense level of supervised support is required which may involve the person living on their own with high levels of staff support, either for a period or permanently.

Case study 4, below, highlights the positive benefits for one person with ASD of living alone with intensive staff support:

Case study 4

B is a young man with autism, who has demanding and, at times, intimidating behaviours of concern and complex care needs. Prior to having OPA appointed as guardian for accommodation, healthcare and access to services, B's accommodation, healthcare and access to and engagement with services were unstable.

B now lives in a Department of Health and Human Services (DHHS) independent unit, with 24 hour care. OPA's view is that B's accommodation is stable and that the staff members who are providing care and support to him are attuned to B's specific needs. While B continues to have complex needs, OPA's view is that there has been noticeable improvement in B's engagement with his carers and other service providers in the community.

Source: Guardianship case study 2014.

Disability Accommodation Services - Personalised accommodation options

Recommendation 3
The Victorian and Commonwealth governments should provide personalised, planned and flexible accommodation options to meet the needs of people with ASD who need to live on their own with appropriate security and high ratios (1:1) of staff support.

Disability Accommodation Services - Addressing Resident Incompatibility

Recommendation 4
The Victorian and Commonwealth governments should provide new accommodation options to address situations where people in shared supported accommodation settings live at risk of assault and neglect due to their incompatibility with others.

Disability Accommodation Services- Staff Training

Recommendation 5
The Victorian and Commonwealth governments should require disability support staff in shared supported accommodation to be registered and trained to a competency standard equivalent to Certificate IV in Disability Services in order to provide a competent, skilled workforce which can provide appropriate support to people with ASD and/or other disabilities who require intensive behaviour support.

3.1.2. Disability support services

As guardian for people with ASD with complex needs, OPA sometimes finds that the existing disability support system, including day programs and respite services, are unable to deal with people with severe autism who exhibit behaviours of concern, such as violent behaviour and exhibiting sexually inappropriate behaviours. This means that some people with severe behaviours of concern are excluded from disability support services, including day placements and respite services.

Where services are provided, the arrangements can break down because a higher level of support is required than can be provided to sustain the arrangements. These issues are highlighted in case study 5, below.

Case Study 5

OPA has been guardian for C for more than three years. At the time OPA became involved, C was living at home with his family, including a younger sister. During consultation with C's family members, the guardian found out that the younger sister sometimes assaulted C, who retaliated physically against her. C's family also described times when C's enthusiasm when hugging family members very tightly put them at risk of injury. C's mother stated that she did not believe that C was being intentionally aggressive towards his sister but she had some concerns as she and the sister are of much smaller stature than C. An application was made at this time to the Disability Support Register (DSR) for shared supported accommodation for C. His family wished him to access shared supported accommodation eventually, with respite immediately, but C has previously been excluded from respite as he does not sleep at night.

Disability support funding was provided for C to attend day placement full-time and for several hours of recreational support at the weekend. This package of support was designed to ensure that C was away from his family for long periods and that he was not away from home without support, due to concerns for his safety and the safety of his family members. C was excluded from his day placement and his weekend recreational support when C began placing staff members in headlocks and refusing to release them.

C was placed on the DSR. In the meantime, the guardian found another disability support service to provide day placement and respite for C. This placement is some distance from his family home. The mother wishes C to return home or reside closer to home. The OPA guardian did not think that a return home was possible, because of the safety concerns. C continued to wake during the night at his respite service and required two active staff members at all times. C did appear to settle but his behaviours of concern returned. C began engaging in self-harming behaviours similar to those that were present when he resided in the family home. C still lives in a respite service, while waiting for more appropriate accommodation. The OPA guardian is still in place to make decisions about C's accommodation and any services he needs to use.

Source: Guardianship case study 2015.

This case study highlights the gaps that exist in service provision for people with ASD who have extreme behaviours of concern. Threats to family members and staff limit accommodation and service options for the person. There are also no daytime support services available for C because of the intensive support C requires. This lack of meaningful activities for C during the day may exacerbate C's behaviours of concern. It is unlikely that shared supported accommodation would meet C's needs.

In C's case, respite is being inappropriately used as a long-term accommodation option as there is nowhere for C to be accommodated. OPA's experience is that C's situation is not unusual. The Community Visitors have highlighted the inappropriateness of respite being used as long–term accommodation. In its 2012-13 annual report, the Community Visitors pointed to the fact that 'there are many young men with autism and complex behaviours [in respite] [… who] are unlikely to return home, and are unsuitable for vacancies that become available in existing group homes'.[9] The impact of people with ASD residing in long-term respite means that there is less facility-based respite for families available.[10]

[9] Office of the Public Advocate (2013a). *Community Visitors Annual Report 2012-13*. Melbourne: Office of the Public Advocate, p. 16.
[10] Ibid.

Disability support services - Staff training

Recommendation 6
The Victorian and Commonwealth governments should provide flexible, personalised daytime service options to meet the needs of people with ASD who need high ratios (1:1) of staff support. Staff members should have training in working with people with ASD who have behaviours of concern to minimise the risk of self-harm and violence toward others.

Disability Accommodation Services - Respite Accommodation

Recommendation 7
The Victorian and Commonwealth governments should new and permanent accommodation stock to meet the specific needs of all people who are currently living long-term in facility-based respite accommodation.

3.2. Restrictive practices in mainstream services

This submission has argued that there are significant service gaps for people with ASD who have complex needs and exhibit behaviours of concern within the disability support system. When the person with ASD needs services and support from mainstream community facilities these difficulties are often exacerbated. A lack of understanding of how to support people with ASD with complex needs in mainstream services can result in the person with ASD being subject to restrictive practices because of fears for the safety of staff, bystanders and/or the person with ASD. Often these decisions are made without appropriate statutory oversight.

The use of physical and chemical restraints occurs in a variety of settings, including but not limited to, hospitals, schools and residential settings. OPA has serious concerns about the inappropriate use of restrictive interventions including mechanical and physical restraint, seclusion and chemical restraint on people with cognitive impairments and mental illness. Restrictive interventions are defined as:

> The deliberate or unconscious use of coercive power to restrain or limit an individual's freedom of action or movement, through a range of different mechanisms. The mechanisms used to restrict an individual can be chemical, environmental, mechanical or physical in nature.[11]

3.2.1. Mainstream health services

The use of restrictive interventions on a person is a severe restriction of their human right to freedom of movement and humane treatment when deprived of liberty.[12] In gazetted mental health services in Victoria, a restrictive intervention may only be used to prevent imminent and serious harm to the person or another person and only after all reasonable and less restrictive options have been tried or considered and according to the provisions outlined in the *Mental Health Act 2014*.

[11] Office of the Public Advocate (2011). 'Position statement: Restrictive interventions'. Melbourne: Office of the Public Advocate. http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/mental-health/mental-health-facilities-research/300-opa-position-statement-restrictive-interventions-1 accessed 24/2/2016.

[12] *Charter of Human Rights and Responsibilities Act 2006* (Vic.) s.12 (freedom of movement), s.22 humane treatment when deprived of liberty.http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt8.nsf/DDE300B846EED9C7CA257616000A3571/A24E411E2284842FCA257D07000520DD/$FILE/06-43a013.docx

It is worth noting that the issues highlighted in the aforementioned case study provide further evidence supporting OPA's view that the availability of trained staff to provide 1:1 support to some people with ASD who exhibit behaviours of concern increases the quality of life of the person with disability and reduces the risk of harm to others. (See recommendations 3 and 6 above).

See case study 6 below.

Case Study 6

The Public Advocate received a notification from the Community Visitors Program, with concerns regarding a patient at a hospital being mechanically restrained (shackled) to his bed, without an apparent legal authority to do so. OPA queried the treating team about the legal authority under which it was utilising restraint (both physically and chemically). The hospital advised that D's parents had consented to the hospital staff's request to shackle D and, further, the hospital relied on its obligation to provide emergency treatment and to provide necessary treatment under the common law doctrine of necessity. D was not being treated as a compulsory patient under the authority of the Mental Health Act.

D is a young man with severe autism. He was admitted to the hospital after suffering injuries from a fall from a height. Once his acute medical treatment was completed, he was transferred to a specialist sub-acute setting for rehabilitation and discharge planning. After assaulting a nurse, he was transferred back to the hospital, which is where the use of physical and chemical restraints began. On his subsequent transfer to another sub-acute unit, these restraints continued for 24 hours a day. He remains in this unit as an inpatient. Following OPA's advocacy, D is now unshackled for a few hours a day.

After D's fall and admission to hospital, in discussion with the treating team, his parents advised that they were no longer able to support him to reside with them.

D is someone who has always enjoyed movement, being a frequent 'pacer' inside and outside the home, and he has always enjoyed being outside. His parents and his Behavioural Intervention Support Team (BIST) worker report he is someone who likes attention and to be engaged and stimulated.

While D engaged previously in challenging behaviours in the community, his behaviours mostly subsided with 1:1 support at his day placement. However, when that service moved away from the 1:1 model, D's behaviour deteriorated and he assaulted someone.

D's BIST worker is of a strong view that staff can be educated and supported to care for and manage D 1:1. She does not believe D's restraints are warranted and in fact, believes that they are likely to increase his agitation. His parents and the BIST worker have offered to educate hospital staff on how to support him so that he does not have to be restrained at all. When D has worked with a carer with expertise in autism, he has been able to be unshackled for a period without incident. Initially staff refused as they were scared of D, but very recently, the hospital agreed for staff to receive training to work safely with D.

Efforts to provide physiotherapy and occupational therapy that meets D's needs is progressing, but is dependent on the up-skilling of hospital staff, D's father and the 1:1 carers.

D is ready for discharge but there is no suitable accommodation for him. DHHS has recognised that D is as an urgent priority for accommodation but suitable accommodation may take some months to source. This means that D is likely to remain shackled to his bed for most of the day until suitable accommodation is found for him.

Source: Notification to the Public Advocate 2015.

Restrictive practices in mainstream health services

Recommendation 8
The Department of Health and Human Services should ensure that health service staff receive training on how to work with people with ASD safely so that appropriate medical treatment can be provided without the need to use restraints.

3.2.2. Inappropriate use of restraints and seclusion in schools

The *Education and Training Reform Act 2007* (Vic.) and its attendant regulations provide the legislative basis for the policies and practices used in Victorian government schools to respond to violent and dangerous student behaviours. Regulation 15 states that:

> A member of staff of a government school may take any reasonable action that is immediately required to restrain a student of the school from acts or behaviour dangerous to the member of staff, the student, or any other person.[13]

The Department of Education and Training school policy (department school policy) on student restraint defines physical restraint and when it can be used as:

> The use of physical force to prevent, restrict or subdue movement of a student's body or part of their body. Physical restraint should only be used when it is immediately required to protect the safety of the student or any other person.[14]

The department defines seclusion as:

> The involuntary confinement of a student alone in a room or area from which the student is physically prevented from leaving. This includes situations where a door is locked as well as where the door is blocked by other objects or held closed by staff.[15]

Seclusion can be used to:

> restrain a student from violent or dangerous behaviours by secluding them in an area where such action is immediately required to protect the safety of the student or any other person.[16]

OPA is of the view that restraining and secluding children with disability in schools is a breach of the Victorian Charter of Human Rights and Responsibilities Act 2006 and a breach of a number of United Nations conventions relating to torture, the rights of the child, and the rights of persons with disabilities to which the Australian Government is a signatory.[17]

---

[13] *Education and Training Reform Regulations 2007* (Vic.), Regulation 15. http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/ltobjst8.nsf/DDE300B846EED9C7CA257616000A3571/82377AFDBDAF4BADCA257C4D007A36AD/$FILE/07-61sra004%20authorised.pdf

[14] Victorian Department of Education and Training 'school policy advisory guide: restraint of student' http://www.education.vic.gov.au/school/principals/spag/governance/Pages/restraint.aspx accessed 10/3/2016.

[15] Ibid.

[16] Ibid.

[17] Office of the Public Advocate (2013b). 'Position statement' Restrictive interventions in educational settings' , p.1. http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/disability/restrictive-interventions/276-restrictive-interventions-in-educational-settings-1 accessed 6/3/2016.

OPA's position on restrictive interventions in educational settings is that:

> The rights of students and teachers would be better protected by establishing a system of reporting and monitoring that ensures independent oversight. Accompanied by independent and transparent data and analysis, continuous quality improvement mechanisms could be put in place to support schools to manage challenging behaviour while protecting the rights and dignity of children in their care.[18]

The recent appointment of a dedicated practitioner from within the Office for Professional Practice, Disability to the Victorian Department of Education and Training to work with schools on developing best practice in this area is a welcome development. In light of this appointment, OPA would like to see both the guidance on responding to violent and dangerous student behaviours of concern and the relevant sections of the Education and Training Reform Act reviewed.

Restrictive practices in schools

Recommendation 9
The Victorian Department of Education and Training should review both its guidance on responding to student behaviours of concern and the relevant sections of the *Education and Training Reform Act 2007* in order to implement least restrictive, best practice initiatives in this field.

3.3. Supervised Treatment Orders under the *Disability Act 2006*

The *Disability Act 2006* (Disability Act) Part 8 provides an integrated statutory framework for the compulsory detention and treatment of persons with an intellectual disability who present as a significant risk of serious harm to others. The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (CMIA) outlines procedures for dealing with people who are unfit to stand trial or found not guilty due to mental impairment.

OPA does not have a formal notification role under the CMIA as with the Disability Act but OPA has not been made aware of anyone with a diagnosis of ASD who has been detained under the criminal system of compulsory detention and treatment.

When an application is made to the Victorian Civil and Administrative Tribunal (VCAT) for a supervised treatment order (STO), the Public Advocate is informed and will apply to become a party to the VCAT hearing. OPA then acts as an independent advocate at the hearing to ensure the person's rights are safeguarded and that the person's best interests are promoted and protected.

Approximately 65 people have been subject to STOs since 2007 when the Disability Act came into force. Out of that group, seven have had a diagnosis of ASD. As of April 2016, five people with ASD are subject to an STO.[19] The maximum length of an order is 12 months and the order will expire unless an application is made to continue the order for another 12 months. VCAT will then hold a hearing to ascertain if the order should continue.[20]

OPA believes that STOs bring a significant level of transparency and fairness to the detention and compulsory treatment of people with intellectual disability in Victoria.[21]

---

[18] Ibid, p.4.
[19] This figure is based on internal OPA data.
[20] *Disability Act* 2006 (Vic.) Division 5 outlines the provisions relating to STO process. http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/ltobjst9.nsf/DDE300B846EED9C7CA257616000A3571/B8BAC20D7B0CC31ACA257EB3001FD0BC/$FILE/06-23a020.docx#_Toc428532184
[21] Office of the Public Advocate (2010) 'Position statement Supervised Treatment Orders'.

In OPA's view, the effectiveness of the STO regime is largely due to the matrix of elements of the regime:

- The process that leads to the development of a treatment plan, which includes the engagement of skilled professionals, the scrutiny of the Senior Practitioner who must approve the plan, and VCAT who must make the STO having regard to the plan.
- The external bodies involved in regulating and scrutinising the use of STOs (VCAT, the Senior Practitioner, and OPA) are obliged to ensure that the rights, dignity and best interests of the person with the intellectual disability are protected. The Public Advocate also has the power to apply to VCAT for an order directing the authorised program officer to make an application for an STO. This would occur where the Public Advocate believes that a person is being detained to prevent a significant risk of serious harm to others and an application for an STO has not been made.
- Victoria Legal Aid's specialist advocacy for persons proposed for or subject to detention.

Case study 7, below, outlines how STOs have improved the quality of life of one man with ASD:

Case Study 7

E has a formal diagnosis of autism, intellectual disability and episodic depression.
He has consistently been subject to a STO and compulsory treatment plans on an annual basis since July 2007. E's supports, living arrangements and use of restrictive interventions have been refined through successive reviews by VCAT of his treatment plan. This has caused his accommodation and support arrangements to become more individualised.

E is described as an introvert by nature and lives in a self-contained unit annexed to a group home with high monitoring and supervision through a 24-hour staffing roster. He can only access the community with staff supports. E has regular contact with his family and he has formed strong and trusting bonds with particular support staff. With this support, he can tolerate and enjoy many activities and environments. However, at times, E can also demonstrate high levels of arousal, anxiety and distress with marked deterioration in his tolerance and functioning. When this situation occurs, there is very high risk that he could assault someone if specific positive behavioural support strategies are not used appropriately.

E's detailed treatment plan informs treatment goals focused on his sensory processing and communication, mental health, emotional regulation and physical health. In addition, there is a focus on engagement with daily living skills, leisure and community activities. E's risk to others is variable and it can be managed effectively. His treatment plan emphasises the importance of maintaining E's routine and maintaining the stability of his support team.

Source: Legal Unit case study 2015

While OPA supports the civil detention regime described above because of the therapeutic benefits it can provide to the person concerned, it does have a concern that this form of detention could become a *de facto* form of indefinite detention. OPA believes that each STO should only be able to be renewed annually for a maximum period of five years.[22]

Supervised Treatment Orders under the *Disability Act 2006*

Recommendation 10
The Victorian Government should amend the *Disability Act 2006* so that Supervised Treatment Orders should only be renewable for a maximum period of five years.

[22] 'Position statement: Supervised Treatment Orders' (2010). http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/disability/supervised-treatment-orders/282-opa-position-statement-supervised-treatment-orders accessed 30/3/16

3.4. Service provision under the NDIS

Apart from OPA's involvement in the NDIS trial site discussed in section 2.3.2, above, OPA has made a number of submissions to consultations, inquiries and reviews concerning various aspects of the proposed development of the NDIS since 2010.[23] OPA supports the development and implementation of the NDIS. The NDIS is a significant shift in the way people with permanent and significant disability can access reasonable and necessary care and support in order to achieve their goals and aspirations. It is intended to signal an important advancement in the exercise of rights, choice and control for people with disability.

3.4.1. The maintenance of specialised services

Nevertheless, OPA does have concerns about whether the NDIS will meet the needs of people with ASD, particularly those people who exhibit behaviours of concern. For example, E's case (see case study 7 above), highlights three key questions that OPA has about the capacity of the NDIS to meet the needs of all people with ASD, as well as other people with disability with complex needs.

1. As the current state government ceases to have a role in the management and delivery of disability accommodation services as the NDIS rolls out across Victoria, are there suitable non-government providers available to continue to resource intensive and individualised support arrangements like those that E has?
2. Will the NDIS provide adequate funding to maintain someone like E's quality of life and to enhance his life?
3. Will the transition to NDIS provide adequate and enhanced clinical oversight and safeguard the rights and protections that E currently has under the statutory civil detention regime of the Disability Act?

National Disability Insurance Scheme and accommodation

Recommendation 11
The National Disability Insurance Agency should ensure that specialised, individualised accommodation and support options for people with ASD who exhibit behaviours of concern are maintained after the rollout of the NDIS from 1 July 2016.

National Disability Insurance Scheme and restrictive practices

Recommendation 12
The Victorian Government should ensure that the regulation of restrictive practices under the *Disability Act 2006* should continue for a 4-year transition period from 1 July 2016.

[23] These various submissions are available at: http://www.publicadvocate.vic.gov.au/advocacy-research/ndis accessed 11/3/2016.

Recommendation 13

The Victorian and Commonwealth governments, through the Council of Australian Governments, should establish a national approach to restrictive practice regulation, drawing on a best practice model identified by a national evaluation of restrictive practice usage, should be adopted and operational from July 2020.[24]

3.4.2. The issue of case management

In Victoria, people with ASD who have an Individual Support Plan (ISP) funded by DHHS can be funded for case management. It is unclear whether people with ASD, who currently receive or require case management to coordinate and monitor the range and quality of supports they need, would receive case management funding under the NDIS. The NDIS only funds items deemed 'reasonable and necessary'.

The item most closely related to case management in the NDIA's description of available supports is: 'assistance in coordinating or managing life stages, transitions and supports'.[26] People with ASD, who have very complex needs, would usually require this higher intensity support item. However, monitoring of the implementation and quality of the supports received is not explicitly covered in the description of this item. This means that people with ASD and their families or carers could be denied a 'reasonable and necessary' support. This gap in services could mean that the person with ASD does not receive the appropriate quality or type of services needed.

Case Study 8

F has diagnoses of autism and Attention Deficit Hyperactivity Disorder, and has no verbal communication. F is well supported by one-to-one care by staff trained in assisting with his behaviour and facilitating his communication. However, this care and support is expensive.

In order for F to have trained support staff most days of the week, F's mother undertook to case manage his ISP to reduce the administration costs. However, F's mother is getting older and is feeling the strain of doing this work. She considers that she will soon not have the capacity to provide case management. F's mother does not know how she can maintain current levels of support services for F, if she has to pay for case management.

There is a question whether, under the NDIS, F would be an entitled to case management or, if not, whether the case coordinator would perform the role currently undertaken by F's mother.

Source: Legal Unit case study 2015.

[24] Office of the Public Advocate (2015c). *Submission in Relation to Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper.* Melbourne: Office of the Public Advocate, pp.14-17 http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/ndis/ndis-safeguards/336-opa-submission-proposal-for-a-national-disability-insurance-scheme-quality-and-safeguarding-framework-consultation-paper-1 Accessed 6/4/2016.

[25] Office of the Public Advocate (2015c). *Submission in Relation to Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper.* Melbourne: Office of the Public Advocate, pp.14-17 http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/ndis/ndis-safeguards/336-opa-submission-proposal-for-a-national-disability-insurance-scheme-quality-and-safeguarding-framework-consultation-paper-1 Accessed 6/4/2016.

[26] National Disability Insurance Agency (2015), *Support Clusters Definitions and Pricing for Victoria*, Melbourne: NDIA, pp.11-12. http://www.ndis.gov.au/2015-vic-support-cluster accessed 10/3/16.

National Disability Insurance Scheme and case management
Recommendation 14

The National Disability Insurance Agency should fund case management, when a clear need is demonstrated, as a 'reasonable and necessary' support item to monitor the quality of supports received.

4. References

Charter of Human Rights and Responsibilities Act 2006 (Vic.)
http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/LTObjSt8.nsf/DDE300B846EED9C7CA257616000A3571/A24E411E2284842FCA257D07000520DD/$FILE/06-43a013.docx

Disability Act 2006 (Vic.)
http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/ltobjst9.nsf/DDE300B846EED9C7CA257616000A3571/B8BAC20D7B0CC31ACA257EB3001FD0BC/$FILE/06-23a020.docx#_Toc428532184

Education and Training Reform Regulations 2007 (Vic.)*, Regulation 15.*
http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/LTObject_Store/ltobjst8.nsf/DDE300B846EED9C7CA257616000A3571/82377AFDBDAF4BADCA257C4D007A36AD/$FILE/07-61sra004%20authorised.pdf

Guardianship and Administration Act 1986 (Vic).
http://www.legislation.vic.gov.au/domino/Web_Notes/LDMS/LTObject_Store/ltobjst9.nsf/DDE300B846EED9C7CA257616000A3571/6A482EA004A4B3C8CA257EB30020D3C8/$FILE/86-58a083.docx

National Disability Insurance Agency (2015). *Support Clusters Definitions and Pricing for Victoria*, Geelong: NDIA. http://www.ndis.gov.au/2015-vic-support-cluster

http://www.ndis.gov.au

Office of the Public Advocate (2007). *Submission to the Autism State Plan Consultation Paper*. Melbourne: Office of the Public Advocate.

Office of the Public Advocate (2010). 'Position statement: Supervised Treatment Orders'.
http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/disability/supervised-treatment-orders/282-opa-position-statement-supervised-treatment-orders

Office of the Public Advocate (2010-). 'NDIS submissions'.
http://www.publicadvocate.vic.gov.au/advocacy-research/ndis

Office of the Public Advocate (2011). 'Position statement: Restrictive interventions'. Melbourne: Office of the Public Advocate.
http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/mental-health/mental-health-facilities-research/300-opa-position-statement-restrictive-interventions-1

Office of the Public Advocate (2012). *Community Visitors Annual Report 2011-12*. Melbourne: Office of the Public Advocate.

Office of the Public Advocate (2013a). *Community Visitors Annual Report 2012-13*. Melbourne: Office of the Public Advocate.

Office of the Public Advocate (2013b). 'Position statement: Restrictive interventions in educational settings'.
http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/disability/restrictive-interventions/276-restrictive-interventions-in-educational-settings-1

Office of the Public Advocate (2015a). *Annual Report 2014-2015*. Melbourne: Office of the Public Advocate.

Office of the Public Advocate (2015b). *Community Visitors Annual Report 2014-2015*. Melbourne: Office of the Public Advocate

Office of the Public Advocate (2015c). *Submission in Relation to Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper.* Melbourne: Office of the Public Advocate.
http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/ndis/ndis-safeguards/336-opa-submission-proposal-for-a-national-disability-insurance-scheme-quality-and-safeguarding-framework-consultation-paper-1
Victoria Police, *Victoria Police Manual – Procedures and Guidelines, Independent third persons*.

Victorian Department of Education and Training (2015). 'school policy advisory guide: restraint of student'.
http://www.education.vic.gov.au/school/principals/spag/governance/Pages/restraint.aspx