



OFFICE OF THE
PUBLIC ADVOCATE

Disability Legislation Review Submission

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Executive Summary

The following is a summary of the broad issues that the Public Advocate has raised in this submission to the Disability Legislation Review.

1.3. Principles

The legislation should contain principles. Legislation must be grounded within a human rights framework.

2.1. Access to disability supports

Eligibility criteria for access to disability supports should **not** be determined purely on the basis of a medical model of disability. A social model, one which is person-centred and needs focussed, is also an appropriate way of determining eligibility for disability supports.

2.2. Individualised planning and support

An eligible person with a disability should be entitled to a needs assessment that is person-centred.

Individual planning process must be independent from service provision.

2.3. Housing and support

The Public Advocate supports the extension of tenancy rights in the same way as rooming house provisions to people who have disabilities who live in Community Residential Units (CRUs).

3.1. Monitoring and improving quality

The Victorian government has a central role to play in monitoring and improving the quality of services and supports provided to people with a disability.

The Public Advocate supports there being an independent body, which monitors the quality of the services provided.

People with disabilities should be involved in the monitoring of the quality of the services they use.

3.2. Strategic planning

There should continue to be a legislative requirement to plan for the future development of the service system.

4.2. An independent complaints mechanism

The Public Advocate believes there should be a complaints mechanism for people with disabilities. This mechanism should be independent, well-resourced, accountable, transparent and responsive.

4.3. Community Visitors

The independent advocacy role currently performed by Community Visitors should continue to be maintained in any new legislation. The role of the Community Visitors needs to be considered in the context of developing independent processes for quality monitoring of services.

4.4. Decision making and the capacity to consent

The Public Advocate does **not** support the “person responsible” mechanism being extended beyond the existing capacity to consent to medical and dental treatment.

4.4.1. Substitute financial decision making

People with disabilities have a right to manage their finances, where they are capable of managing this task. The least restrictive alternative should always be pursued with the appointment of an administrator being the most restrictive.

4.5. Practices which restrict people’s rights

Any process to restrict the rights of people through the use of restraint and seclusion must meet our obligations under the United Nations’ *Declaration on the Rights of Disabled Persons* (1975) and The United Nations’ *Declaration on the Rights of Mentally Retarded Persons* (1971).

5. Other issues

Any future legislative framework must support access to, and the viability of independent advocacy services for people with disabilities.

If the two pieces of legislation under review are replaced by one Act, then both the service system structure and budgets should reflect that change.

1. Introduction

The Public Advocate in Victoria welcomes the opportunity to make this submission to the Disability Legislation Review.

1.1. The Public Advocate

The Public Advocate in Victoria is appointed by the Governor in Council pursuant to the *Guardianship and Administration Act 1986* (Vic). The office represents the interests of people with a disability, aiming to promote their rights and dignity and to strengthen their position in society. It is a statutory office, independent of government and government services, and can highlight situations in which people with disabilities are exploited, neglected or abused.

The Public Advocate delegates his authority to his staff, who provide, advocacy, guardianship and investigation services to people with disabilities. The office also coordinates the Community Guardians Program, the Community Visitors Program, the Independent Third Person Program and the Private Guardian Support Program in Victoria. Further material on the role of the office can be provided if required by consulting the Office of the Public Advocate's (OPA's) website: www.publicadvocate.vic.gov.au.

1.2. Areas to be covered

For ease of reference, this submission follows the numbering system used in the *Review of Disability Legislation in Victoria Discussion Paper May 2003*. However, not all areas referred to in the discussion paper are discussed in this submission.

1.3. Principles of Legislation

The Public Advocate is of the view that:

1. The legislation should contain principles. Any legislation must be grounded within a human rights framework.
2. The Principles that underpin the IDPSA (1986) and the DSA (1991) must be maintained, but need some reworking to reflect more adequately the current principles and strategies of the Disability State Plan and changes in community attitudes and practices towards people with disabilities since these Acts were passed.
3. The State Plan principles should be included in any future legislation namely:
 - a. Equality
 - b. Diversity
 - c. Dignity and Self Determination (Choice)
 - d. Non-Discrimination

4. For further information, please see the appendix to this document that groups the principles from these Acts under the relevant State Plan principles as well as in relation to principles that concern rights, services, best interests and roles.
5. An additional principle reflecting the Plan's goal of non-discrimination should be included.
6. There should be a principle that states that people with disabilities be protected from abuse, exploitation and neglect.

2. REORIENTING DISABILITY SUPPORTS

2.1. Access to disability supports

In view of the fact that a threshold to determine eligibility for disability services is necessary, the Public Advocate concludes that:

1. It is of prime importance that any eligibility criteria for access to disability supports should **not** be determined purely on the basis of a medical model of disability. A social model, one which is person-centred and needs focussed, is also an appropriate way of determining eligibility for disability supports.
2. Furthermore, a medical model of service provision and need must not be privileged above a social model when setting priorities for access to services and supports.
3. Legislation should facilitate the development of policy so that people with disabilities who do not meet strict eligibility criteria can receive services that meet their needs. This would ensure that the assessment of eligibility would have as its primary focus the needs of the individual person with a disability and the services and supports that person requires.

2.2. Individualised planning and support

The Public Advocate suggests the following principles be adhered to when developing an individualised funding model:

1. An eligible person with a disability should be entitled to a needs assessment that is person-centred.
2. When needs are assessed or reviewed so far as possible, the person with a disability should be involved in the process.
3. Where appropriate, any advocates, family members and/or significant others with a demonstrated 'sufficient interest' should also be included.
4. Individual planning process must be independent from service provision.
5. Where a plan is developed or reviewed, so far as is possible, the person with a disability should be involved in the process. This recommendation is made on the proviso that a competent person with a disability can refuse to have a plan.

6. Any assessment, planning or review process must be transparent and accountable to all relevant stakeholders.
7. The person with a disability must have access to independent advocacy support as well as to an independent complaints/appeals/review mechanism.
8. Services should have clear service standards to ensure accountability and transparency. These should include processes enabling the independent review of adverse decisions and the lodging of complaints.
9. Individuals and services in receipt of funds must be accountable to ensure the money is being used appropriately.
10. A person with a disability entitled to receive particular services should have a reasonable choice of service provider and type of service regardless of their location, cultural or linguistic background or level of disability-related support need.

2.3. Housing and support

One fundamental premise of our community is that all persons are to be treated equally before the law. People who rent rooms are usually entitled to the protection of laws relating to residential tenancy and this is currently covered by the *Residential Tenancies Act (1997)* (RTA). However, by reason of section 23 of that Act certain health and residential services are currently excluded from its operation. The excluded services cover people who live in community residential units (CRUs).

The rationale for making this exclusion is a perceived need to provide special protection to residents in community residential units who may exhibit disruptive and violent behaviours as a result of their disability, which otherwise could result in their eviction if special protective measures did not exist prohibiting such evictions. This is made more complex because some of the special protective measures actually disadvantage people who live in CRUs whilst failing to ensure their protection, for example the ability to move residents from their home to another residence in order to change the “client mix”.

In the light of this experience we need a good legislative framework with minimal exceptions for people who have a disability supported by informed public policy that is flexible to meet the myriad circumstances that people encounter in CRUs.

Accordingly, the Public Advocate supports the extension of tenancy rights similar to rooming house provisions to people who have disabilities who live in CRUs.

The rooming house provisions would provide:

1. certainty for residents and CRU operators on rights and responsibilities in relation to the rented premises.
2. a clear mechanism for residents to expect:
 - a. a suitable standard of, and timely attendance to, maintenance and repairs on the property;

- b. privacy and quiet enjoyment;
 - c. greater security of tenure than residents currently experience;
 - d. formal notice of rent increases;
 - e. clarity and equity in relation to the types of costs and charges that can be charged to residents.
3. House Rules to assist in managing common areas.
 4. Access to the Residential Tenancies List, at the Victorian Civil and Administrative Tribunal, when disputes between residents and operators cannot be resolved.
 5. Equity and consistency of service across the CRU program.

It is often presumed that the tenancy rights of CRU residents and the activities of other stakeholders are always in conflict. This is not necessarily the case.

The Public Advocate supports the following policy framework:

1. Whilst the RTA sets out minimum requirements for tenants and residents in general, the development of an overarching policy framework specifically for the CRU program will ensure that the application of the RTA will not adversely impact on the day to day realities of life for CRU residents, staff and landlords. In particular the policy framework should address possible areas of conflict such as:
 2. Violence and abuse that is a result of, or exacerbated by, a person's disability;
 3. Damage to persons and property arising from such violence and abuse.
 4. The provisions in the RTA (Part 8 and Division 2 of Part 6) dealing with these matters will need to be augmented so that responses are pre-eminently ameliorative before punitive action is taken.
5. The Public Advocate envisages that this policy framework will be supported by agency agreements between the landlord and the service provider.

2.3.1. House Rules and Lease Agreements

House rules are a means by which rooming house owners can manage the common areas in a rooming house (or in this case CRU). House rules can be an extension of, but cannot contradict, the basic rights and obligations provided by the RTA. House rules can be incorporated into lease agreements, or provided separately to residents. A rooming house owner can change house rules by providing seven days written notice of the proposed change. If a resident believes that a house rule is unreasonable, they can apply to VCAT, who can declare a rule invalid.

The 'Review of Disability Legislation in Victoria, Discussion Paper, May 2003' identifies a number of key concerns that we believe will be adequately addressed through a combination of RTA, policy framework, and house rules. These include:

1. Having to give notice to enter a resident's bedroom;
2. Use of general areas;
3. Right to quiet enjoyment;

4. Damage to premises;
5. Safety of other residents and staff;
6. Changing needs of residents and moving on from a property.

Each of these issues is addressed below.

1. Access to rooms:

Section 136 of the RTA allows a rooming house owner or appointed person to enter a resident's room if:

- a. the resident agrees at the time that entry is sought;
- b. if there is an emergency and immediate entry is necessary to save life;
- c. if services are provided and it is necessary to enter to provide them, but only during the hours specified in the house rules.

In its current form, section 136 does not allow for the provision of support services as a reason to enter a resident's room. However a room can be entered with the consent of the resident and this would cover most situations. A room can also be entered to provide other services such as change of linen and cleaning during hours specified in the house rules. It is possible that there could be some legislative amendment to permit access to a person's room in accordance with the person's service plan.

2. Use of general areas

Section 121 of the RTA requires a rooming house owner to ensure that a resident has 24-hour access to their bedroom, toilet and bathroom and reasonable access to all other facilities. However some CRU residents are restrained from certain areas of the premises on occasion, as a result of their disability, in order to protect themselves and other residents. It is submitted that section 121 be made subject to the lawful exercise of restraint and seclusion by the support service.

3. Quiet enjoyment/disputes

A resident or a rooming house owner can issue a breach of duty notice on the other party, if they believe that a breach of quiet enjoyment has occurred on the rented premises.

However a situation may occur where:

- a. A rooming house owner could be breached for a failure to ensure quiet enjoyment due to challenging behaviours of another resident.
- b. A resident could be breached for a failure to ensure quiet enjoyment as a result of their disability.

A policy framework needs to be developed to ensure that a resident or a rooming house owner is not unfairly discriminated against due to a resident's disability, whilst also still ensuring the rights and responsibilities of both parties are protected under the RTA. For example the policy framework and inter-agency agreement acknowledges that while a resident can be served with a breach of duty notice for interfering with the quiet enjoyment of the rented premises, if the breach of quiet enjoyment is related to the person's disability, and it is deemed that the breach could not be reasonably avoided as a consequence of their disability, the resident will not be held liable.

Further, section 208 of the RTA, which sets out when and in what manner a breach of duty notice can be served, should be amended to stipulate that a breach of duty notice cannot be served where a breach results directly from a resident's disability.

4. Damage to premises

Section 116 of the RTA requires a tenant to repair or pay for any damage that they cause to the rented premises. However, where damage could not be reasonably avoided as a consequence of an individual's disability, the resident should not be held liable for the damage. This can be addressed through the policy framework and inter-agency agreement.

Similarly the discretion to provide a notice to vacate premises under section 278 for damage would be exercised in accordance with the policy framework.

5. Safety of residents and staff

The rooming house provisions of the RTA contain significant sections specifically dealing with issues of disruption, danger and serious violence (Division 8). These sections operate to protect residents, rooming house owners and managers, and staff of the rented premises.

The policy framework should provide policy guidance for the exercise of the various discretions set out in these sections. Particular attention must be given to situations where an incident is the result of an individual's disability.

6. Moving residents from their home

Currently, residents of CRUs are able to be moved from their home, with little or no consultation with them, and no clear mechanism by which the resident can voice their opinion, desire or needs in the decision making process. Residents should participate in any decisions relating to their home.

There are situations where the medical or support needs of a resident may have changed, and the CRU is unable to meet those needs. Where this is the case, a resident should be supported to make their own decision. Where a person cannot make a decision for themselves the decision making process in relation to a change to the person's service plan could be utilised or a substitute decision maker such as a guardian could be involved if no less restrictive means of substitute decision-making can be found.

For example, in a community run rooming house a resident may discover that they have developed asthma. The resident will then decide whether they should look for alternative accommodation that will better support their changing health needs, or whether they prefer to remain where they are and try to accommodate the situation as best they can. The landlord in this situation cannot tell the resident that they must leave. It is a support issue. The same principle should apply to residents of CRUs.

The policy framework should augment the security of tenure issues set out in the legislation and should include these points:

- a. That clear mechanisms are established to ensure that resident's opinions, desires and needs drive any discussion about relocation;

- b. That “no reason” notices to vacate are prohibited from use in the CRU program.
- c. That independent grievance procedures and appeals mechanisms are established and enforceable where a CRU provider or support agency fails to comply with the policy framework.

7. Capacity

The law requires a person entering into a tenancy agreement to have legal capacity. Whilst many CRU residents will not have the capacity to sign a lease agreement this should not deter these residents from being provided with the same rights others enjoy.

Further work needs to be conducted in this area to determine the best method by which to ensure that the issue of capacity is addressed. Best practice would be the appointment of an administrator in a restricted capacity to sign tenancy agreements. The difficulty with this approach is that the appointment of an administrator is regarded as the most restrictive action that can be taken in relation to a person’s decision making. It is preferred that a less restrictive process be followed until there is some difficulty whereby an administrator is needed. At that point a limited administration order would be recommended.

One proposal is that a statutory system akin to the “person responsible” provisions for medical and dental treatment is set up to enter into the lease agreement. The Public Advocate does **not** prefer this option. The situations are not alike in one important respect. The medical and dental procedure is overseen by a professional doctor or dentist who is accountable through disciplinary and professional bodies. This would not apply with leasing agreements.

3. DEVELOPING STRONG FOUNDATIONS FOR DISABILITY SUPPORTS

3.1. Monitoring and improving quality

The Public Advocate is of the view that:

1. The Victorian government has a central role to play in monitoring and improving the quality of services and supports provided to people with a disability. This responsibility is heightened by the fact that many people with a disability are not able to advocate themselves for improvements in the quality of services.
2. Government should set the framework of principles and standards against which quality is then monitored.
3. The assessment of quality should be more than monitoring the adherence to the meeting of minimum standards or indeed ensuring that appropriate policies and procedures are in place. The monitoring of quality should consider a range of other factors including the quality of the interactions between staff and clients.

4. The provision of quality of services should be considered in the context of other factors, which affect quality. These include appropriate levels of funding to services, together with appropriately qualified and supported staff.
5. The monitoring of home based support programs should be respectful of individual privacy.

3.1.1 Assessing and reviewing quality

1. There should be a range of quality assessment mechanisms, which target different aspects of service provision and are factored into the funding arrangements with agencies. These mechanisms could consider a range of factors including:
 - a. Seeking feedback from people with a disability
 - b. Monitoring the quality of staff and client interactions.
 - c. Adherence to minimum standards.
 - d. Having relevant policies and practices in place.
2. The mechanisms used should be sufficiently diverse and comprehensive so as to capture the range of views and perspectives of different stakeholders. Each of these groups offer an important perspective on the quality of service provided. An example of this would be the role of the community visitors in representing the views and wishes of people with a disability.
3. The creation of Disability Service Standards in 1997 by the Department of Human Services was an important step towards improving the quality of services. Given the need for these standards to be modified over time in order to reflect changes in service delivery and indeed the expectations of consumers it is recommended that these standards should not be placed in the legislation. Rather the legislation should provide an obligation to develop these standards and monitor performance against them.
4. The content of these standards should be consistent with the principles of the legislation and promote a service system that seeks to meet the needs of the individual. These standards should also reflect the principles, goals and strategies of the State Plan.
5. The legislation should also specify the penalties that can be imposed if these standards are not adhered to.
6. The mechanisms for monitoring performance against these standards should not be detailed in the legislation as these may need to vary over time.

3.1.2. Quality monitoring

1. Whilst the obligation to develop and maintain a high quality service system should rest with government, the Public Advocate supports there being an independent body that monitors the quality of the services provided. Independence in this context means independent of service provision or the funding of services. This independence is important for the following reasons:

- a. As a provider of services it is important that the government is not seen to be monitoring the performance of its own services in addition to non-government services.
 - b. Where it is decided that a service does not meet the standards required and has failed in its attempts to do so the decision to de-fund can be a difficult one if this increases obligations upon the government to find alternative services for those displaced by the closure of the service. This can make it difficult for government to make the decision to close a service.
2. There needs to be an obligation upon government to act upon the recommendations of this independent monitoring agency. If this obligation does not exist the independent monitoring can become meaningless.
 3. The quality monitoring should not be undertaken by any agency funded by the Department of Human Services to provide those services.
 4. Consideration will need to be given to what legislative powers the independent monitoring agency has to enter services and review information held on client files.
 5. Service providers will need to comply with this quality monitoring as part of the condition of being funded. This could be contained in service agreements.
 6. This agency would complement but be separate from the current role performed by community visitors. There should be regular communication and liaison between the independent monitoring agency and community visitors.
 7. The reports of this quality monitoring agency should be publicly available.
 8. Any monitoring of standards should occur in a broader context, which recognises the importance of management, staffing quality and funding levels on the services. The quality monitoring process needs to be able to recommend changes in these areas if the quality of service provision is to improve.
 9. The mechanisms used to monitor quality must consider the service from the perspective of the person with the disability if they are to focus on areas, which directly or indirectly benefit the person with the disability.

3.1.3. Provider Approval Program

1. Whether a Provider Approval Program is used or indeed other mechanisms to determine quality, there is still a need to identify certain standards for providing services, and sanctions for failure to meet these standards. The primary concern with a provider approval process is the extent to which this can assess the quality of the interactions and support offered by staff. Such a process would appear more conducive to ensuring that appropriate policies and practices are in place. This adherence to certain standards on paper may not transfer to the actual care provided in practice.
2. If a Provider Approval Program were to be considered, it would need to be clearly linked to a range of other factors to assess quality, including the regular visits of the Community

Visitors. It would also need to be one of a number of strategies. These other strategies would include reviewing the workforce requirements of the sector in order to meet these standards. The budgetary implications of providing such a workforce would also need to be addressed by the Department of Human Services in its funding of services.

3.2. Strategic planning

1. Principles

- a. The principles outlined in the legislation, combined with the guiding principles, goals and objectives contained in the State Plan should guide the planning process.
- b. The adherence to these goals should ensure that services are accessible, flexible and responsive to individual needs. As part of this the service should promote the meaningful involvement of consumers in the ongoing planning and development of the service to ensure that it continues to respond to the needs of the individuals.

(Please refer to the earlier section on principles).

2. Strategic planning in legislation

- a. There should continue to be a legislative requirement to plan for the future development of the service system. This provides greater transparency and accountability of the service system to people with a disability and the Victorian community.
- b. The State Plan should have a broader focus across the whole of government.
- c. The State Plan should be developed every six (6) years with an implementation plan developed every three (3) years. Therefore the life of each State Plan would see two implementation plans.
- d. There should also be annual action plans, which summarise the priority areas for that year, consistent with the State Plan and implementation plans.

3. Improving planning

- a. Given the regional structure of the services provided by the Department of Human Services, each region should produce an implementation plan every three (3) years. Utilising the structure of the State Plan this would provide detailed regional responses to each of the areas outlined in the State Plan.
- b. In addition to this each region should also be able to provide an annual action plan to indicate what they intend to do in relation to meeting the objectives outlined in the three year implementation plan.
- c. These plans should be public documents against which the performance of regions and the Department of Human Services centrally can be regularly monitored. This reporting could occur to Parliament.

- d. Consideration should be given to requiring Disability Action Plans to be developed by all state government departments. This would broaden the focus of the State Plan to areas beyond Disability services, as well as improving the responsiveness of these agencies to the needs of people with a disability.

4. PROMOTING AND PROTECTING PEOPLE'S RIGHTS

4.1. The Disability Advisory Council of Victoria

The Public Advocate does not wish to comment on this section.

4.2. An independent complaints mechanism

The Public Advocate agrees that there is a need for a complaints mechanism for people with disabilities. The creation of an independent complaints mechanism that may lead to improvements in service quality and associated quality of life. A properly resourced and empowered complaints mechanism demonstrates a commitment to accountable, transparent and responsive service delivery. This is important generally, and for people with disabilities who may be particularly vulnerable.

1. Access to an independent complaints mechanism

- a. Complaints may be raised by a person with a disability or any other person or organisation on behalf of a person with a disability. The complainant should have 'sufficient interest' in the matter to establish their basis for making the complaint or for raising the systemic issues.
- b. A nexus would exist between the reactive and proactive roles of the mechanism, via established referral processes.
- c. There would be no costs attached to the lodging of a complaint.
- d. The mechanism would retain the right to not accept a complaint or refer it to another body.
- e. Complaints could be handled by the mechanism where these had proved unresolvable at the local level, where they had been referred for investigation /and or resolution by the responsible Minister or other nominated authority or where they contained an element of urgency, seriousness or other persuasive factors.

2.. Principles

The following principles should inform the development of a disability complaints mechanism:

- a. The complaints mechanism should be completely independent from any bodies that fund disability services, given the obvious and potential conflict of interest,

particularly in relation to the Department of Human Services. The mechanism should also not be attached administratively to the Department of Human Services.

- b. The siting of the complaints mechanism should reflect a separation between the fields of disability and health, given the unacceptable potential for ‘disability’ to be ‘medicalised’ and for health concerns to dominate a complaints agenda.
- c. The mechanism should embody a strong justice and/or human rights orientation.
- d. If the mechanism is to be co-located with another organisation, that organisation should be robust and viable with adequate infrastructure.
- e. The mechanism should understand the culture of disability and employ staff with relevant skills in terms of this culture.
- f. The mechanism should encourage complaints to be dealt with, in the first instance, at the local organisational level.

The mechanism should recognise that agreed quality service standards may preclude most complaints and should therefore encourage, at the local level:

- a. the setting and monitoring of standards.
- b. the establishment of local complaint resolution mechanisms.
- c. the availability of sanctions where standards are not satisfactory.
- d. education and training of agency staff and management.
- e. advice to people with disabilities on their rights and entitlements.

3. Design of the complaints mechanism

- a. The mechanism should embrace reactive (individual complaint work) and proactive (preventative systemic work) roles in relation to complaints.
- b. In its reactive role, the mechanism should hear and determine complaints, in an impartial and unbiased manner. In so doing, it should have a mix of determinative and recommendatory powers. Recommendatory powers may be useful in circumstances where a decision has particular political, administrative or resource implications, or impacts on policy and procedures in a manner that is likely to be complex. A comparative example in this vein is contained in sections 125 & 126 of the *Equal Opportunity Act 1995*, which outlines procedures in relation to “special complaints”. These are complaints in which the resolution “may have significant social, economic or financial effects on the community or a section of the community” The mechanism may refer matters requiring attention to the appropriate authority.
- c. In its proactive role, the mechanism would focus on a range of systemic issues, including the monitoring and reviewing of service quality and the improvement of

infrastructure for people with disabilities. Management practices, the allocation of resources, case management issues and compliance with best practice could all potentially be areas of interest and activity for the mechanism in its proactive role. It should also have a power/responsibility to report to a Minister or Parliamentary Committee regularly.

- d. For both the reactive and proactive roles, the mechanism would need wide authority to undertake investigations, require the production of documents, call witnesses, visit work sites and isolate systemic issues.
- e. The mechanism would have a capacity to initiate individual and systemic investigations.

4.3. Community Visitors

The independent advocacy role currently performed by Community Visitors should continue to be maintained in any new legislation. The role of the Community Visitors needs to be considered in the context of developing independent processes for quality monitoring of services. In particular:

1. Community Visitors, together with other key stakeholders should be consulted in relation to the standards developed for services.
2. Community Visitors should be aware of these standards and consider them in relation to their own reporting.
3. There should be regular open communication between Community Visitors and the quality monitoring agency.
4. The Community Visitors should have access to reports generated by the quality monitoring agency. This may be included under the current provision of the *Intellectually Disabled Persons' Services Act 1986* as "documents required to be kept". This could be detailed in policy.
5. The quality monitoring agency should also have access to community visitors reports in order to help inform their own process of quality monitoring.
6. This relationship between the Community Visitors program and the independent quality monitoring agency should be open and transparent. Community Visitors would continue to seek to resolve issues at a local level as they currently do in bringing issues to the attention of service providers when they are noticed.
7. In relation to the possible creation of a complaints mechanism depending upon the nature of the complaint, it may assist the complaints body to view the relevant Community Visitors report. It may also benefit the complaints body to hear from the community visitor. This would be separate from the process used by Community Visitors to raise and address issues of concern with the service provider.

8. In the provider approval and re-accreditation process the agency concerned may benefit from viewing the Community Visitors reports, together with reports generated by the quality monitoring agency.

4.4. Decision-making and the capacity to consent

The Public Advocate is of the view in relation to substitute decision makers that:

1. It is important to understand the current operation of the "person responsible" role as a substitute decision maker. In the context of medical or dental treatment, the person responsible is assisted in his/her decision-making by a medical or dental expert. The expert gives specialist advice usually around a preferred treatment model. There is limited room for conflict in these circumstances between the person responsible and the patient so defined.
2. The current regime of person responsible involves a registered practitioner making an assessment of whether the individual is competent at the time to make the particular decision, recognising that decision-making capacity can fluctuate and that some decisions are more complex than others, requiring a different level of competence. This is an integral element of the current substitute decision-making model. It is difficult to determine who would/should make the assessment of competence if the person responsible were extended to other decision-making domains, like accommodation. There is a risk that the person responsible may make an over-protective assessment or a blanket assessment that covers all types of decisions regardless of their level of complexity? If this were the case, it would not be in the best interests of a person with a disability.
3. The person responsible mechanism currently lacks transparency and accountability. There is no register of persons responsible.
4. The quality of decision-making by the person responsible has not been evaluated. It is unclear whether this substitute decision-making produces a better outcome for a person with a disability or is simply more expedient and less costly than, say, the appointment of a guardian for medical treatment decisions. No applied research has been undertaken of the effects of, and outcomes from, the model in practice.
5. If the role was to be extended, it should focus on areas of decision-making where there is more limited possibility for conflict between the person responsible and the person with a disability. In OPA's experience, potential conflict areas may include accommodation decisions and decisions relating to access to persons. Less conflict-ridden arenas may include participation in services, such as a BIST program, or the involvement of a case manager in the life of a person with a disability.
6. Should the existing model be varied if extended? An example may include a mechanism whereby the person with a disability can object to the legislated person responsible, in essence a form of appeal against the person designated in the hierarchy.

7. What systems should be put in place if there is no person responsible for substitute decision-making, recognising the limitations, for example, with the current operation of section 42K of the Act for medical and dental treatment?
8. We know from our experience at OPA, large numbers of informal decision-making arrangements continue to operate effectively for people with a disability. Should these be formalised in the absence of a more accountable/more thoroughly evaluated person responsible process? OPA's view is 'no'.
9. Given the lack of clarity which surrounds the effectiveness of the current role, the person responsible mechanism should not be extended to other decision-making domains for persons with a disability at this stage. This is not to endorse the existing informal arrangements for decision-making, which may well have no legal basis, accountability or formal checks and balances, but rather to emphasise the need for any legislated substitute decision-making regime to be carefully evaluated to ensure that it operates in the best interests of a person with a disability.

4.4.1. Substitute financial decision making

The Public Advocate is of the view that:

1. People with disabilities have a right to manage their finances, where they are capable of managing this task.
2. The least restrictive alternative should always be pursued with the appointment of an administrator being the most restrictive. This position is informed by recognition that the appointment of an administrator removes the right of individuals to make their own decisions about their finances.
3. Informal arrangements such as a joint bank authorisation and/or an "Authority for nominated person" arrangement with Centrelink may be considered acceptable as a less restrictive way of responding to the needs of the person with the disability.
4. In pursuing least restrictive options, it is recognised that these may not always ensure accountability. In balance with this the Public Advocate also acknowledges that the person with a disability has the right to the financial protection afforded by administration where this proves necessary.

4.5. Practices which restrict people's rights

The Public Advocate is of the view that:

The United Nations "Declaration on the Rights of Disabled Person" (1975) recognises that there may be instances where it is necessary to place restrictions on a person's rights.

Paragraph 4 notes:

Disabled persons have the same civil and political rights as other human beings: paragraph 7 of the Declaration on the Rights of Mentally Retarded Persons applies to any possible limitation or suppression of those rights for mentally disabled persons

Paragraph 7 of the “Declaration on the Rights of Mentally Retarded Persons” (1971) states:

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Whenever mentally retarded persons are unable, because of the severity of their handicap, to exercise all their rights in a meaningful way or it should become necessary to restrict or deny some of all of these rights, the procedure used for that restriction or denial of rights must contain proper legal safeguards against every form of abuse. This procedure must be based on an evaluation of the social capability of the mentally retarded person by qualified experts and must be subject to periodic review and to the rights of appeal to higher authorities.

The current process under the IDPSA does not satisfy these criteria. Any process to restrict the rights of people through the use of restraint and seclusion must meet our obligations under this Declaration.

4.5.1. Restraint and seclusion

1. The Public Advocate considers that it is necessary that the legislation includes definitions of restraint and seclusion.
2. In the light of changing needs and developments in our understanding of restrictive practices and human rights it would be sensible to include in the definitions capacity for prescribing (by regulation) certain activities as restraint and seclusion as well as retaining definitions of these activities.

1. Monitoring, investigation and review

- a. Monitoring is necessary on an ongoing basis. The monitoring body must also have power to initiate action when it is concerned about the exercise of restraint and seclusion.
- b. In accordance with our commitments under the United Nations Declarations there must be a plan which is approved and pursuant to which restrictive procedures comply. The plan must be reviewed regularly with the person who is the subject of the plan, their advocate and with qualified experts. There must be appeal mechanisms and provisions enabling review at any time (akin to reviews about involuntary status under the *Mental Health Act* (1986)).

2. Authorisation

- a. The United Nations requirement noted above is that there be a process with proper legal safeguards against every form of abuse.
- b. It is anticipated that each person will have a services plan. If that plan includes restraint and seclusion then that aspect of the plan will require authorisation from a statutory body so empowered.
- c. As the actual provision of restraint and seclusion is implemented by a service provider, the authority for each instance must be local. Who can implement the plan should be set out in the plan. The circumstances leading up to and involving

the exercise of restraint and seclusion must be carefully noted. Reports including this material should be furnished to the monitoring agency. There should be inspection of services to ensure that restraint and seclusion provisions are not abused.

The following should be found in legislation:

1. Definitions;
2. A need to obtain authorisation for a plan that includes restraint and seclusion;
3. Minimum requirements required in any plan, eg: restrictive activity; timelines for review, local authorization, reporting, persons consulted, process for ameliorating behaviours that result in restraint and seclusion;
4. Standards for care of persons during periods of restraint and seclusion;
5. Maximum timelines for review;
6. Reporting;
7. Consequences for breaching by service providers of the plan and the Act.

3. Security residents

The Public Advocate is aware of the work of the Victorian Law Reform Commission (VLRC) in relation to detention of people who have an intellectual disability. OPA looks forward to the release of the VLRC report and its considerations on this matter.

4.6. Reviewable decisions

Please refer to the section dealing with an independent complaints mechanism and other references to reviews in this submission.

4.7. Privacy and information management

The Public Advocate does not wish to comment on this section.

5. Other Issues

The Public Advocate wishes to raise the following issues not directly referred to in the discussion paper that are relevant to the legislative review.

1. The crucial issue of independent advocacy is not directly considered in the discussion paper, save for a brief reference to it in the existing IDPSA principles. Any future legislative framework must support access to, and the viability of independent advocacy services for people with disabilities.
2. If the two pieces of legislation under review are replaced by one Act, then both the service system structure and budgets should reflect that change.

APPENDIX

Comparison between the principles in the IDPSA and the DSA

Summary	IDPSA	DSA
1. RIGHT TO SERVICES	(a) intellectually disabled persons have the same right as other members of the community to services which support a reasonable quality of life;	(d) persons with disabilities have the same right as other members of Australian society to services which will support their attaining a reasonable quality of life;
2. RIGHT TO DEVELOP & AUTONOMY	(b) every intellectually disabled person has a capacity for physical, social, emotional and intellectual development and a right to individualized educational and developmental opportunities and is entitled to exercise maximum control over every aspect of his or her life;	(c) persons with disabilities have the same rights as other members of Australian society to realise their individual capacities for physical, social, emotional and intellectual development;
3. PERSONAL WELFARE PARAMOUNT	(c) the welfare of an intellectually disabled person is the first and paramount consideration;	
4. NEEDS MET EMULATING NORMS VALUED IN THE COMMUNITY	(d) the needs of intellectually disabled persons are best met when the conditions of their everyday life are the same as, or as close as possible to, norms and patterns which are valued in the general community;	
5. PROMOTION OF INCLUSION	(e) services should promote maximum physical and social integration through the participation of intellectually disabled persons in the life of the community;	
6. ACCESS TO GENERIC SERVICES	(f) services generally available to all members of the community should be adapted to ensure access by intellectually disabled persons and specialized supplementary services should be provided to the extent required to meet individual needs;	
7. SERVICES TO BE LOCAL	(g) services to intellectually disabled persons should be provided in such a manner that an individual need not move out of his or her local community or travel inordinately long distances to receive the services needed;	

8. SERVICES TO MEET INDIVIDUAL NEEDS	(h) services to intellectually disabled persons should be sufficiently flexible in structure and organization to meet the varying needs of intellectually disabled persons in developing towards independence and to maximize the choices open to them;	
9. NO MONOPOLY OF SERVICE DELIVERY	(i) it is in the best interests of intellectually disabled persons and their families that no single organization providing services to intellectually disabled persons exercise control over all or most aspects of an individual's life;	
10. STATE ROLE IN PLANNING SERVICES	(j) it is the responsibility of the State of Victoria to plan, fund, ensure the provision of and evaluate services to intellectually disabled persons according to the principles stated herein;	
11. ROLE OF NON-GOVERNMENT SERVICES	(k) it is in the interests of intellectually disabled persons and their families for non-government organizations providing services to intellectually disabled persons to continue to play a significant role in direct service delivery;	
12. ROLE OF STATE TO ENSURE RIGHTS AND QUALITY OF SERVICES	(l) the State of Victoria must ensure that government and non-government organizations providing services to intellectually disabled persons are accountable for the extent to which the rights of intellectually disabled persons are advanced and service quality assured;	
13. PWD ROLE IN PLANNING OF SERVICES	(m) intellectually disabled persons have a legitimate and major role to play in planning and evaluating services;	(e) persons with disabilities have the same right as other members of Australian society to participate in decisions which affect their lives;
14. RESTRICTION ON RIGHTS	(n) when some restriction on the rights or opportunities of an intellectually disabled person is necessary, the means chosen should be the least restrictive of the	(f) persons with disabilities receiving services have the same right as other members of Australian society to receive those services in a

	available alternatives having regard to all the circumstances;	manner which results in the least restriction of their rights and opportunities;
15. ROLE OF FAMILIES	(o) the families of intellectually disabled persons have an important role to play in supporting, and encouraging the development of, a family member with an intellectual disability.	
16. RIGHT TO DIGNITY		(a) persons with disabilities are individuals who have the inherent right to respect for their human worth and dignity;
17. HUMAN RIGHTS		(b) persons with disabilities, whatever the origin, nature, type and degree of disability, have the same basic human rights as other members of Australian society;
18. RIGHT TO COMPLAIN		(g) persons with disabilities have the same right of pursuit of any grievance in relation to services as have other members of Australian society.

Comparison within the framework of the State Disability Plan and in the areas of *Rights, Services, Best Interests* and *Roles*.

Rights

Principle of equality		
Right	IDPSA	DSA
1. Right to services	(a) intellectually disabled persons have the same right as other members of the community to services which support a reasonable quality of life;	(d) persons with disabilities have the same right as other members of Australian society to services which will support their attaining a reasonable quality of life;
17. HUMAN RIGHTS		(b) persons with disabilities, whatever the origin, nature, type and degree of disability, have the same basic human rights as other members of Australian society;
18. RIGHT TO COMPLAIN		(g) persons with disabilities have the same right of pursuit of any grievance in relation to services as have other members of Australian society.
Principle of dignity and self-determination		
2. RIGHT TO DEVELOP & AUTONOMY	(b) every intellectually disabled person has a capacity for physical, social, emotional and intellectual development and a right to individualized educational and developmental opportunities and is entitled to exercise maximum control over every aspect of his or her life;	(c) persons with disabilities have the same rights as other members of Australian society to realise their individual capacities for physical, social, emotional and intellectual development;
2. RIGHT TO DEVELOP & AUTONOMY	(b) every intellectually disabled person is entitled to exercise maximum control over every aspect of his or her life;	(e) persons with disabilities have the same right as other members of Australian society to participate in decisions which affect their lives;
13. PWD ROLE IN PLANNING OF SERVICES	(m) intellectually disabled persons have a legitimate and major role to play in planning and evaluating services;	
14. RESTRICTION ON RIGHTS	(n) when some restriction on the rights or opportunities of an intellectually disabled person is necessary, the means chosen should be the least restrictive of the available alternatives having regard to all the circumstances;	(f) persons with disabilities receiving services have the same right as other members of Australian society to receive those services in a manner which results in the least restriction of their rights and opportunities;
16 RIGHT TO DIGNITY		(a) persons with disabilities are individuals who have the

		inherent right to respect for their human worth and dignity;
Principle of non-discrimination		
Principle of diversity		

Services

Principle of equality		
PRINCIPLE	IDPSA	DSA
1. RIGHT TO SERVICES	(a) intellectually disabled persons have the same right as other members of the community to services which support a reasonable quality of life;	(d) persons with disabilities have the same right as other members of Australian society to services which will support their attaining a reasonable quality of life;
6. ACCESS TO GENERIC SERVICES	(f) services generally available to all members of the community should be adapted to ensure access by intellectually disabled persons and specialized supplementary services should be provided to the extent required to meet individual needs;	
8. SERVICES TO MEET INDIVIDUAL NEEDS	(h) services to intellectually disabled persons should be sufficiently flexible in structure and organization to meet the varying needs of intellectually disabled persons in developing towards independence and to maximize the choices open to them;	
Principle of dignity and self-determination		
7. SERVICES TO BE LOCAL	(g) services to intellectually disabled persons should be provided in such a manner that an individual need not move out of his or her local community or travel inordinately long distances to receive the services needed;	
8. SERVICES TO MEET INDIVIDUAL NEEDS	(h) services to intellectually disabled persons should be sufficiently flexible in structure and organization to meet the varying needs of intellectually disabled persons in developing towards independence and to maximize the choices open to them;	
Principle of non-discrimination		
Principle of diversity		
5. PROMOTION OF INCLUSION	(e) services should promote maximum physical and social integration through the participation of intellectually disabled persons in the life of the community;	
Other		
9. NO MONOPOLY OF SERVICE DELIVERY	(i) it is in the best interests of intellectually disabled persons and their families that no single organization providing services to intellectually disabled persons exercise control over all or most aspects of an	

	individual's life;	
10. STATE ROLE IN PLANNING SERVICES	(j) it is the responsibility of the State of Victoria to plan, fund, ensure the provision of and evaluate services to intellectually disabled persons according to the principles stated herein;	

Best interests of people who have a disability

Principle of equality		
	IDPSA	DSA
4. NEEDS MET EMULATING NORMS VALUED IN THE COMMUNITY	(d) the needs of intellectually disabled persons are best met when the conditions of their everyday life are the same as, or as close as possible to, norms and patterns which are valued in the general community;	
Principle of dignity and self determination		
3. PERSONAL WELFARE PARAMOUNT	(c) the welfare of an intellectually disabled person is the first and paramount consideration;	
9. NO MONOPOLY OF SERVICE DELIVERY	(i) it is in the best interests of intellectually disabled persons and their families that no single organization providing services to intellectually disabled persons exercise control over all or most aspects of an individual's life;	
13. PWD ROLE IN PLANNING OF SERVICES	(m) intellectually disabled persons have a legitimate and major role to play in planning and evaluating services;	(e) persons with disabilities have the same right as other members of Australian society to participate in decisions which affect their lives;
Principle of non-discrimination		
Principle of diversity		
11. ROLE OF NON-GOVERNMENT SERVICES	(k) it is in the interests of intellectually disabled persons and their families for non-government organizations providing services to intellectually disabled persons to continue to play a significant role in direct service delivery;	

Roles

Principle of equality		
Principle of dignity and self determination		
	IDPSA	DSA
13. PWD ROLE IN PLANNING OF SERVICES	(m) intellectually disabled persons have a legitimate and major role to play in planning and evaluating services;	(e) persons with disabilities have the same right as other members of Australian society to participate in decisions which affect their lives;
Principle of non-discrimination		
Principle of diversity		
11. ROLE OF NON-GOVERNMENT SERVICES	(k) it is in the interests of intellectually disabled persons and their families for non-government organizations providing services to intellectually disabled persons to continue to play a significant role in direct service delivery;	
Other		
10. STATE ROLE IN PLANNING SERVICES	(j) it is the responsibility of the State of Victoria to plan, fund, ensure the provision of and evaluate services to intellectually disabled persons according to the principles stated herein;	
12. ROLE OF STATE TO ENSURE RIGHTS AND QUALITY OF SERVICES	(l) the State of Victoria must ensure that government and non-government organizations providing services to intellectually disabled persons are accountable for the extent to which the rights of intellectually disabled persons are advanced and service quality assured.	