



Office of the Public Advocate

Safeguarding the rights and interests of people with disability



Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

Response to Employment Issues Paper

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Abbreviations

ABI	Acquired Brain Injury
ABS	Australian Bureau of Statistics
CISO	Corrections Independent Support Officers
DAP	Disability Action Plan
DDA	<i>Disability Discrimination Act (1992) (Cth)</i>
Disability Act	<i>Disability Act 2006 (Vic)</i>
Guardianship and Administration Act	<i>Guardianship and Administration Act 2019 (Vic)</i>
ITP	Independent Third Person
OPA	Office of the Public Advocate
NDIS	National Disability Insurance Scheme
SDAC	Survey on Disability, Ageing and Carers
VCAT	Victorian Civil and Administrative Tribunal

Recommendations

Recommendation 1

The Australian Government should promote to both the public and private sectors the greater use of 'special measures' provisions within the *Disability Discrimination Act (1992)* (Cth) as an effective measure to increase the employment of people with disability, particularly people with cognitive disability.

Recommendation 2

The Australian Government should include a commitment in its *National Disability Strategy 2021-2030*, to develop a National Disability Employment Strategy. This strategy should be developed together with people with disability and their representative organisations.

1. About the Public Advocate

The Office of the Public Advocate (OPA) is a Victorian statutory office, independent of government and government services that works to safeguard the rights and interests and dignity of people with disability. The Public Advocate is appointed by the Governor in Council and is answerable to the Victorian State Parliament.

The Public Advocate has seven functions under the *Guardianship and Administration Act 2019* (Vic) (Guardianship and Administration Act),¹ all of which relate to promoting the independence and human rights of people with disability and protecting people with disability from abuse, neglect and exploitation.

To this end, OPA provides a range of critical services for people with cognitive impairment or mental illness, including guardianship, advocacy, and investigation services. In 2018-19, OPA was involved in 1,823 guardianship matters (978 which were new), 404 investigations, and 258 cases requiring advocacy.² Forty-nine per cent of OPA's new guardianship clients were over the age of 65 and more than half (58 per cent) of OPA eligible guardianship clients were National Disability Insurance Scheme (NDIS) participants.³

OPA can be appointed a guardian by the Victorian Civil and Administrative Tribunal (VCAT) to make decisions about a person's employment, but these orders are rare compared to the much larger number of orders VCAT appoints the Public Advocate to as guardian for accommodation or access to services. Internal data, for example, from January 2009 (the earliest available data) until March 2020 (the latest available data) indicates that 47 out of 10,158 matters related to employment. This is slightly less than one-half of one per cent of all guardianship matters for that period of time. For the same period, access to services decisions made up 6,909 matters or just over 68 per cent and accommodation decisions accounted for 8,610 matters or almost 85 per cent of guardianship matters.⁴ However, the advent of the NDIS has increased the percentage of clients who are of working age.

OPA's two Disability Act officers assist the Office to fulfil its advocacy and safeguarding roles in relation to tenancy rights of people living in disability residential services, including Specialist Disability Accommodation. The officers also provide individual advocacy in relation to safeguard protections involving civil detention and compulsory treatment contained within the *Disability Act 2006* (Vic) (Disability Act). These officers' interventions remain the largest single contributor to OPA's individual advocacy.⁵

A key function of the Public Advocate is to promote and facilitate public awareness and understanding about the Guardianship and Administration Act and any other legislation affecting persons with disability or persons who may not have decision-making capacity. To do so, OPA runs a telephone advice service, which answered 13,644 calls in 2018-19. OPA also coordinates a community education program for professional and community audiences across Victoria to

¹ *Guardianship and Administration Act 2019* (Vic) s 15. This act came into operation on March 1, 2020 and replaces the 1986 act of the same name.

² Office of the Public Advocate (Vic.) *Annual Report 2018-19*, (Office of the Public Advocate, 2019) 9. < <https://www.publicadvocate.vic.gov.au/resources/annual-reports/opa-annual-reports>>.

³ Office of the Public Advocate (Vic) internal program data.

⁴ The percentages do not add up to 100 per cent as guardianship orders can have more than one power listed in them.

⁵ Office of the Public Advocate (Vic) *Annual Report 2018-19*.

engage on a range of topics such as the role of OPA, guardianship and administration, and enduring powers of attorney.

OPA is supported by more than 700 volunteers across four volunteer programs: The Community Visitors Program, the Community Guardianship Program, the Independent Third Person Program (ITP Program) and the Corrections Independent Support Officer (CISO) Program. The ITP Program is a 24/7, state-wide volunteer service operating in all police stations in Victoria. ITPs assist persons with cognitive impairment when making formal statements to Victoria Police. In 2018-19, ITPs attended a total of 3,222 interviews. CISOs are experienced ITPs who support prisoners who have an intellectual disability at Governor's disciplinary hearings at Victorian prisons and/or remand centres. In 2018-19, CISOs were invited to attend 299 hearings, assisting 164 clients.

Community Visitors are independent volunteers empowered by law to visit Victorian accommodation facilities for people with disability or mental illness. They monitor and report on the adequacy of services provided in the interests of residents and patients. They ensure that the human rights of residents or patients are being upheld and that they are not subject to abuse, neglect, or exploitation. In their annual report, Community Visitors relate their observations on the quality and safety of the services they visit and make recommendations to the Victorian State Government. More than 400 Community Visitors visit across three streams: disability services, supported residential services and mental health services. In 2018-19, Community Visitors made 5,527 statutory visits.⁶

2. About This Submission

This submission will address Question eight of the Employment Issues Paper. It will discuss:

- Ideas for improving employment participation for people with disability
- Examples of good practice.

2.1. OPA's Engagement with the Royal Commission

OPA welcomes the continued opportunity to contribute to this Royal Commission. The Public Advocate and two Community Visitors appeared as witnesses before the Royal Commission at its December 2019 hearings in Melbourne to speak about violence in group homes. In November 2019, OPA released a report, *"I'm too scared to come out of my room"*, that was submitted to the Royal Commission in response to the Group Homes Issues Paper. In March 2020, OPA contributed a written submission to the Issues Paper on Health Care for People with Cognitive Disability. In May 2020, OPA made a written submission in response to the Issues Paper on The Criminal Justice System. In July 2020, OPA made a submission to the Emergency Planning and Response Issues Paper in August 2020, OPA made a written submission to the Rights and Attitudes Issues Paper and in September 2020, OPA made a submission in response to the Restrictive Practices Issues Paper. OPA is also preparing to respond to further requests for information from the Royal Commission, including The Experience of First Nations People with Disability in Australia Issues Paper. OPA thanks the Royal Commission for allowing it to make a submission relating to employment sometime after the original submission date in August.

⁶ Office of the Public Advocate (Vic), *Community Visitors Annual Report 2018-19*.

2.2. A Human Rights Approach

This submission applies a human rights approach that:

- holds that all people with disability have the right to enjoy equality of opportunity and to effectively participate in, and be fully included in, society
- recognises that the vast majority of challenges experienced by people with disability are a result of disabling systems and environments, rather than being due to an inherent 'lack' in the individual
- considers impairment as an expected dimension of human diversity
- seeks for people with disability to be supported and resourced to have the capabilities to lead a dignifying and flourishing life.

3. Increasing Employment Participation for People with Disability

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has noted the following in its Rights and Attitudes Issues Paper:

Research suggests limited contact between people with disability and the wider community can contribute to a lack of understanding of disability. Negative attitudes can cause a social distance between people with disability and the wider community driven by stigma.

The paper then goes on to say that: "Negative attitudes appear to be based in misunderstandings of people with disability and limited contact".⁷

The implications of this statement highlight the importance of addressing the under-representation of people with disability in Australia's workforce. As well as the direct benefits to the person achieved through employment, there is a broader opportunity for people without disability who are the person's colleagues. One of the best ways to challenge negative attitudes is through increased interaction, especially in the highly valued domain of paid employment. This means mainstream employment is a critically important domain for promoting the inclusion and human rights of people with disability.

OPA sees the elements of a flourishing life as a guide for developing inclusionary human-rights based approaches. A human rights approach that enables people with disability to have a flourishing life means that people with disability have the right to:

- seek employment on an equal basis with others
- have meaningful work
- have meaningful relationships and mutual recognition with other workers.⁸

⁷ Royal Commission into Violence, Abuse, Neglect and Exploitation *Issues Paper- Rights and Attitudes* (Royal Commission, 2020) 3-4.

<<https://disability.royalcommission.gov.au/publications/rights-and-attitudes>>

⁸ Martha C. Nussbaum, *Frontiers of justice: disability, nationality, species membership* (Belknap Press of Harvard University Press 2006) 77-78.; Amartya Sen, *The Idea of justice* (Belknap Press of Harvard University Press, 2009).

What follows below briefly describes the state of play for people with disability and their participation in the workforce. The next section describes some best practice strategies to increase that participation, including the participation of people with cognitive disability.

3.1. Employment and People with Cognitive Disability

The Employment Issues paper uses the data from the Australian Bureau of Statistics (ABS) Survey on Disability, Ageing and Carers (SDAC) 2018 to illustrate the high levels of employment disadvantage that people with disability experience.⁹ From the early 1990s the labour market participation rate of people with disabilities, which was starting from a low base, fell while the corresponding participation rate of people without disabilities rose.¹⁰ The ABS SDAC 2018 indicates that people with disability of working age (15-64) have a labour force participation rate of 53 per cent compared to 84 per cent of people without disability.¹¹ This rate of labour force participation has remained steady since 2015 for people with disability but the labour force participation rate of people without disability has increased to 84 per cent from 83 per cent.¹² The data trend also indicates that the more severe the level of disability and the higher the level of school or employment restriction, the lower the level of employment will be. In 2018, only 27 per cent of people with a severe or profound disability were participating in the workforce compared to 53 per cent of people with mild or moderate disability.¹³ People with profound and severe disability are most likely the client group from whom OPA clients under 65 years are drawn. OPA clients generally do not participate in open employment.

These low rates of employment for people with disability, as the data indicates, have remained stagnant for decades while the employment rates of people without disability have risen. This lack of improvement suggests that the low rates of disability employment is due to structural factors that do not shift despite more positive advances in attitudes over time, which are a positive but are too small to cause significant increases in workforce participation.

This means that any initiatives need to move beyond a commitment to treating everyone equally and fairly (formal equality) because equal treatment does not necessarily lead to equality of outcomes for people who are already socially and economically disadvantaged as is the experience of people with disability. Therefore, in this situation, to ensure a greater equity of outcomes, it is appropriate to adopt an approach called substantive equality sometimes referred to as 'affirmative action' or 'special measures', to increase the employment participation of people with disability, including people with cognitive disability.

⁹ Royal Commission into Violence, Abuse, Exploitation and Neglect, *Issues Paper: Employment* (The Royal Commission 2020) 3.

¹⁰ Human Rights and Equal Opportunity Commission, " Issues Paper 1: Employment and Disability - The Statistics." in *National Inquiry into Employment and Disability*. (HREOC, 2005). , <<https://humanrights.gov.au/our-work/national-inquiry-employment-and-disability-issues-paper-1>>

¹¹ Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings 2018* <<https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/2018#disability>>

¹² Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia 2018: Disability and the Labour Force* Table 2.3. This table has data from all SDAC surveys from 2009 until 2018. The data trend is the same regardless of the survey year. < <https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release#data-download>>

¹³ Ibid. <<https://www.abs.gov.au/articles/disability-and-labour-force#highcharts-data-table-2>>

These provisions are available in the *Disability Discrimination Act (1992) (Cth) (DDA)* and can be used by both the public and private sectors to increase the participation of people with disability in the workforce, including people with cognitive impairment.¹⁴ The Australian Government should promote greater use of these measures within both the public and private sectors to encourage the employment of people with all types of disability of working age. The ability to develop Disability Action Plans (DAP) exists under both Federal and state legislation and is a useful tool for improving employment participation particularly if special measures' provisions are used to increase the employment of under-represented groups of people with disability. The ability to require organisations to report publicly on their DAP and its progress is also a useful monitoring and accountability tool.

The Australian Government needs to lead by example by including in its next National Disability Strategy— whose position paper is currently open for consultation— a commitment to develop a National Disability Employment Strategy in close consultation with people with disability and their representative organisations. A useful model of such a strategy is the Victorian Public Service's disability employment action plan, entitled *Getting to Work*. It is an ambitious plan that uses both employment targets and targeted positions for people with disability to fulfil its goals amongst other actions.¹⁵

Recommendation 1

The Australian Government should promote to both the public and private sectors the greater use of 'special measures' provisions within the *Disability Discrimination Act (1992) (Cth)* as an effective measure to increase the employment of people with disability, particularly people with cognitive disability.

Recommendation 2

The Australian Government should include a commitment in its *National Disability Strategy 2021-2030*, to develop a National Disability Employment Strategy. This strategy should be developed together with people with disability and their representative organisations.

What follows is a discussion of the approach used to promote the employment of people with a disability at OPA.¹⁶

3.2. The OPA Disability Action Plan: Some Best Practice Strategies

Like other Victorian public sector bodies, OPA has a DAP developed in accordance with the requirements of section 38 of the *Disability Act 2006 (Vic)*.¹⁷ The DAP must cover four main areas. These are:

- a) reducing barriers to persons with a disability accessing goods, services and facilities;

¹⁴ *Disability Discrimination Act 1992 (Cth)* s. 45 (Special Measures).

<<https://www.legislation.gov.au/Details/C2018C00125/>>

¹⁵ Victorian Government, *Getting to Work: Victorian Public Sector Disability Employment Action Plan 2018–2025*. (Victorian Public Sector Commission, 2018) <<https://vpssc.vic.gov.au/resources/disability-employment-action-plan/>>

¹⁶ As a human rights organisation, OPA also recognises that some people can experience multiple disadvantages based on their disability, race, gender, age, indigenous status, class, ethnic background or LGBTIQ+ status.

¹⁷ The OPA Disability Action Plan is available in pdf, MS Word, Plain English and Easy English formats.

<<https://www.publicadvocate.vic.gov.au/resources/strategic-plans/650-disability-action-plan-dap-2019-2022>>

- b) reducing barriers to persons with a disability obtaining and maintaining employment;
- c) promoting inclusion and participation in the community of persons with a disability;
- d) achieving tangible changes in attitudes and practices which discriminate against persons with a disability.¹⁸

The current OPA DAP covers the period 2019-2022 and forms part of a suite of OPA diversity plans (Gender Equity Plan, Koori Inclusion Action Plan, Cultural Diversity Plan and LGBTIQ Inclusion Plan). All five plans cover the period 2019-2022 and all of them contain four areas of action: systemic inclusion, data improvement, employment and economic participation and community education and partnerships.¹⁹ The same structure for each plan enables intersections between each plan to be recognised and addressed whenever practicable.

The plans are developed, monitored and promoted by a plan committee, which is made up of interested OPA staff. The chairs of the plan committee meet as a diversity advisory group to deal with cross-sectional issues. This structure ensures that disability issues are at the forefront when broader diversity plans are discussed and that diversity and inclusion is seen to be core business across OPA. It also ensures that disability issues in the DAP are viewed through a diversity lens which forces the intersections between disability and other disadvantage into sharper focus so that any issues can be addressed.

3.2.1. DAP Strategies that Promote Substantive Equality in Employment

This section outlines the OPA DAP processes that are used to increase the chances that a person with a disability is employed when a vacancy arises.

Scope

- Apply this policy to all volunteers, paid staff and students or interns with disability who work at the organisation.

Advertising

- Advertise widely, including through disability employment services, disability advocacy groups as well as through standard advertising channels
- Ensure accessible formats are used (usually MS Word) or when appropriate to the position, Easy or Plain English
- Promote organisation's welcoming of all applicants and include reference to reasonable adjustments in interviews and in workplace policies in advertisements
- If using 'special measures' provisions for a position:
 - make this fact clear and follow appropriate processes
 - use alternative formats or alternative ways of submitting applications (e.g. make a video application instead of writing a letter)
 - target advertising to organisations that can promote your job only to the people you want to apply.

¹⁸ *Disability Act (Vic.)* s. 38 (i).

¹⁹ These plans are available at <<https://www.publicadvocate.vic.gov.au/resources/strategic-plans>>

Selection Processes

- Ensure all applicants with disability who advise in their application that they have a disability (and who meet the selection criteria for a position at a minimum level) are offered an interview. Minimum level means that the applicant(s) score is at least 50 per cent of the maximum allowable score. For example, if there are five key selection criteria each scored out of ten then a minimum level for interview is 25. This person can be included as an additional person if other people who applied have higher scores
- If the position is designated as a 'special measures' position, then applicants can be ranked according to suitability for interview and only those with higher scores need be interviewed. If the number of applicants for the position are very few, then ranking of applicants may not need to occur. This is a decision for the interview panel to make depending on the circumstances
- Ensure reasonable adjustments are provided at the interview to the person if requested by the person with disability
- Offer feedback to all interviewees who indicate they have a disability regardless of whether or not they were interviewed.

Monitoring

- Check with the position's identified job contact if any applicants identified as having a disability and if this process was followed, but do not ask the contact to identify the applicant in any way. If the process was not followed, educate and inform them of the appropriate process to use on the next occasion.

Retention

- Ensure reasonable adjustments and flexible work practices are available and their availability is promoted and supported for all employees who require them.

Promotion

- This policy applies to all positions within the organisation.

3.2.2. Employing People with Cognitive Disability: An OPA Case Study

What follows is a description of two projects at OPA that employed or are employing people with cognitive disability. It involves working in partnership with a self-advocacy organisation run by people with cognitive disability. These projects were and are co-designed with Reinforce Inc, a self-advocacy organisation founded and run by people with intellectual disability.

The first small project entitled 'The right of people to make your own medical decisions' was completed in 2019. It happened because in 2018, OPA staff attended Reinforce Inc's annual general meeting. One of the OPA staff was the guest speaker and spoke to the group about their right to make their own medical decisions. Reinforce Inc. members began to tell OPA staff many examples of how medical staff were not supporting them to make their own medical decisions, indicating that they were often ignored and sidelined when they sought additional information and support from medical professionals to help them make their own decisions. OPA and Reinforce Inc. applied for some external funding from the Victorian Law Foundation to develop a pamphlet for medical professionals highlighting both positive and negative experiences. A person with intellectual disability was employed to conduct the interviews with the assistance of a support worker to recruit, interview and type up the interviews. It was a small project and three people were

interviewed. Two people had an intellectual disability and one person had an Acquired Brain Injury (ABI). To thank and compensate the interviewees for their time, they were provided with gift vouchers. An Easy Read version of the pamphlet was also developed for people with intellectual disability. Copies of the pamphlet are distributed to members of the medical profession who attend OPA's community education sessions. These are available in hardcopy at the sessions to facilitate re-distribution of multiple copies to other medical colleagues. But online versions are also available.²⁰

The second project built on that project and is entitled 'Healthy Discussions'. This larger project is funded for two years by a Mainstream Capacity Building Grant of the National Disability Insurance Agency. The project aims to support health professionals throughout Victoria (particularly health professionals in the public sector) and those training to be health professionals, to improve their communication with, and understanding of, people with disability who have specific communication needs.

By using a supported decision-making lens, the project activities will highlight that in Victoria everyone with capacity to do so has the right to make their own decisions about their health and, to the extent possible, people should be provided with the support they need to make these decisions.

The project will also highlight that small but effective initiatives by health professionals can go a long way in supporting people with disability to ensure they are at the centre of decisions about their own health.

'Healthy Discussions' uses a best-practice model of people with disability being involved in the design and delivery of the project in a paid capacity. The heart of the Healthy Discussions project is the voice of people with disability. People with lived experience of intellectual disability, ABI and Autism Spectrum Disorder are integral to the project, including as members of the project steering committee. As part of the project, OPA will also employ two people who have lived experience of intellectual disability, ABI or neurological impairment (such as autism) and who have experience as self-advocates. Narratives of lived experience will be a feature of the project. It will showcase the skills and abilities of the project workers with lived experience of intellectual disability, ABI or neurological impairment. Tertiary-educated students with disability will also benefit from employment opportunities with this project because a student with disability undertaking university studies will provide administrative support during a paid internship through the 'Stepping into' program run by the Australian Network on Disability.²¹ Employing people with disability is a key component of the project because research shows that positive contact with people with disability changes attitudes.²²

As part of the Healthy Discussions project, OPA will engage with:

- self-advocacy organisations run for and by people with disability to let these organisations know about the project and to hear from these organisations

²⁰ <<https://www.publicadvocate.vic.gov.au/resources/fact-sheets/medical-decisions/644-the-right-of-people-to-make-their-own-medical-decisions>>

²¹ More information about this program can be found at <<https://www.and.org.au/pages/stepping-into...-programs.html>>

²² Melanie Randle and Samantha Reiss, *Changing community attitudes toward greater inclusion of people with Disabilities* (Department of Family Services (NSW), 2016) <<https://www.facs.nsw.gov.au/data/assets/file/0008/372608/Rapid-Review-V3-interactive.pdf>>

- representatives from health organisations, networks and peak bodies, and organisations providing education and information to current or future health professionals. At the heart of this engagement will be the voice of people with lived experience of intellectual disability, developmental disability and ABI.

Furthermore, the project will:

- establish a Practice Showcase Network for organisations undertaking similar initiatives to share lessons that can improve the inclusiveness and accessibility of health services
- deliver education webinars and presentations to health professionals and future health professionals, including in rural or regional locations.

The sessions will:

- develop short video scenarios highlighting the lived experiences of people with disability. These videos will be used in education presentations, will appear on the OPA website and will be promoted in the OPA Updates electronic newsletter.