Office of the Public Advocate

Safeguarding the rights and interests of people with disability

Submission to Review of Disability Act 2006 (Vic)

Department of Families, Fairness and Housing

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Abbreviations

APO	Authorised Program Officer
BSP	Behaviour Support Plan
CRPD	United Nations Convention on the Rights of Persons with Disabilities
DFFH	Department of Families, Fairness and Housing
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
OPA	Office of the Public Advocate
OPCAT	United Nations Optional Protocol to the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment
OSP	Office of the Senior Practitioner
RTA	Residential Tenancies Act 1997
RTF	Residential Treatment Facility
SDA	Specialist Disability Accommodation
SFDA	Specialist Forensic Disability Accommodation
SRS	Supported Residential Services
STO	Supervised Treatment Order
VCAT	Victorian Civil and Administrative Tribunal

Recommendations

This submission responds to the Department of Families, Fairness and Housing's Review of the Disability Act 2006 Consultation Paper and makes the following 69 recommendations.

OPA recommends that the Victorian Government should:

Recommendation 1
Name the revised Disability Act the 'Disability Inclusion Act'.

Recommendation 2
Amend the Disability Act to make giving effect to the state's obligations under the Convention on the Rights of Persons with Disabilities the Act's chief purpose.

Recommendation 3
Amend the Disability Act to make its overarching objective an inclusive and equal Victoria which supports all people with disability to lead a flourishing life.

Recommendation 4
Amend the purposes of the Disability Act to include providing a human rights approach in terms of individuals, communities, government and organisations supporting people with disability to lead a flourishing life.

Recommendation 5
Amend the Disability Act to include purposes and objectives relating to the areas of disability service provision it remains responsible for, including as provider of last resort for necessary disability supports.

Recommendation 6
Amend the Disability Act to include an objective of reducing and eventually eliminating the use of restrictive practices.

Recommendation 7
Amend the principles in the Disability Act to:

- reflect the general principles in the Convention on the Rights of Persons with Disabilities
- incorporate the Australian Law Reform Commission's national decision-making principles, and
- complement the gender equality principles in the *Gender Equality Act 2020* (Vic).

Recommendation 8
Amend the Disability Act to:

- extend the application of the principles which currently apply specifically to persons with intellectual disability to all people with disability, and
- recognise the distinctive experiences and needs of people with intellectual and cognitive disability.

Recommendation 9
Amend the Disability Act to establish a Disability Inclusion Commission.

Recommendation 10
Amend the Disability Act to require the Victorian Civil and Administrative Tribunal to satisfy itself, whenever a person with disability appears at a hearing under the Disability Act without legal representation or an independent advocate, that the person does not wish to have such assistance.

Recommendation 11
Amend the Disability Act to incorporate the social model of disability described in the Convention on the Rights of Persons with Disabilities for the purposes of promoting inclusion.

Recommendation 12
Amend the Disability Act to adopt a relational definition of a 'person with disability', incorporating the following three elements:

- self-identification of a disability identity or recognition of this by others in close relationship with the person
- the person describing their functional supports needs, arising from impairments; with support from those in close relationship with the person, if needed
- acceptance and documentation of the person's support needs in collaboration with others who support the person, if this is necessary.

Recommendation 13
Amend the Disability Act to hold the Minister accountable for the effective implementation of the state disability plan and require them to report annually to Parliament against the plan.

Recommendation 14
Amend the Disability Act to incorporate a framework of duties and accountability mechanisms for those required to develop disability action plans which is modelled on the *Gender Equality Act 2020* (Vic).

Recommendation 15
Amend section 11(4) of the Disability Act to require that a significant majority of the Victorian Disability Advisory Council's membership be people with a disability.

Recommendation 16
Amend section 12(1)(a) of the Disability Act to enable the Victorian Disability Advisory Council to advise the Minister on any matter relating to disability it considers appropriate.

Recommendation 17
Ensure that any changes to the Disability Act do not make it more difficult for people with a disability to make a complaint about regulated disability services.

Recommendation 18
The Victorian Government should amend section 33 of the Disability Act to provide that the Community Visitors Board may refer a matter to:

- the Disability Worker Commissioner
- the Residential Tenancies Commissioner
- the Chief Executive Officer of the Transport Accident Commission.

Recommendation 19
Amend the Disability Act section 130(1) of the Disability Act so that a Community Visitor is entitled when visiting a disability service provider providing a residential service to take photographs to document issues identified during the visit.

Recommendation 20
Amend the Disability Act to ensure that Community Visitors are able to carry out their functions without being hindered, obstructed, intimidated, threatened or assaulted.

Recommendation 21
Amend section 35 of the Disability Act to require the Government to table a response to the Community Visitors Annual Report no later than 30 March the year after the annual report was tabled.

Recommendation 22
Amend the Disability Act to extend the scope of the Community Visitors Program to provide independent monitoring of shared supported accommodation that is not Specialist Disability Accommodation but which is funded by the National Disability Insurance Scheme.

Recommendation 23
Amend the Disability Act to ensure that residents of 'medium-term' accommodation funded by the National Disability Insurance Scheme are eligible for the protections offered by Community Visitors.

Recommendation 24
Amend the Disability Act to ensure that Transport Accident Commission properties are eligible for the protections offered by Community Visitors.

Recommendation 25
Amend the Disability Act to clarify that, where a resident has been relocated under a Notice of Temporary Relocation, the accommodation provider who issued the notice is responsible for the cost of the alternative accommodation.

Recommendation 26
Amend section 74 of the Disability Act to enable the time period under a Notice of Temporary Relocation to be extended by mutual agreement.

Recommendation 27
Amend Part 5 of the Disability Act to align the protections regarding temporary relocation and evictions with those in Part 12A of the Residential Tenancies Act, including by:

- removing 'the resident's safety or wellbeing' and 'no reason' as grounds for issuing a notice of temporary relocation under section 74 or a Notice to Vacate under section 76
- specifying that the alternative accommodation to which a person is temporarily relocated under section 74(5) must be suitable for the person
- specifying in section 76 that the termination date in a Notice to Vacate, regardless of the grounds on which the notice was issued, must be not less than 90 days after the notice date, and

- extending the timeframe for a resident to apply to Victorian Civil and Administrative Tribunal under section 82 for a review of a Notice to Vacate to 90 days.

Recommendation 28
Retain the residential rights protection framework in Part 5 of the Disability Act for all residential services that are not covered by the protections in the Residential Tenancies Act, including specialist forensic disability accommodation to the extent appropriate.

Recommendation 29
Amend the definition of 'residential service' in the Disability Act to be residential accommodation where:

- the service provides long-term or short-term accommodation and support for people with a disability. Note that accommodation may be provided by an entity that is not a disability service provider, such as a housing association or private individual
- the provision of the accommodation and support are connected and both are managed by, or on behalf of, one or more disability service providers, and
- the disability support provided therein is funded by the Secretary or the NDIA.

Recommendation 30
Amend the definition of 'disability service provider' in the Disability Act to be:

- the Secretary, or
- person or body registered on either of the Victorian or National Disability Insurance Agency register of disability service providers.

Recommendation 31
Retain Division 2 of Part 5 of the Disability Act and extend its application to residential services irrespective of 'group home' status, with some limitations for short-term residents and specialist forensic disability accommodation residents as appropriate.

Recommendation 32
Amend the Disability Act to define 'short-term resident', which sets a maximum residence period beyond which the person ceases to be considered a short-term resident for the purposes of Division 2 of Part 5.

Recommendation 33
Amend section 57 of the Disability Act to require residential statements to be provided to all residents, whether short-term or not.

Recommendation 34
Amend the Disability Act to enable residents to apply to the Victorian Civil and Administrative Tribunal for relief where a disability service provider has breached their duties under Part 5.

Recommendation 35
Amend the Disability Act to provide single framework for the use of restrictive practices, which applies to both registered National Disability Insurance Scheme providers and state disability service providers.

Recommendation 36
Amend the Disability Act to clearly articulate that the Authorised Program Officer is responsible for coordinating the authorisation process for regulated restrictive practices.

Recommendation 37
Amend the Disability Act to include an example in the new restrictive practices section that documents the order of key steps required by the authorisation framework.

Recommendation 38
Amend the Disability Act to ensure that the Authorised Program Officer's authorisation of a regulated restrictive practice applies until the authorisation is revoked, expires or a new plan is 'authorised'.

Recommendation 39
Amend the Disability Act to impose on Authorised Program Officers a requirement that, prior to authorising any restrictive practice, they are confident that the person has been provided with a clear and accessible explanation of which regulated restrictive practices are being included in their new Behaviour Support Plan and why.

Recommendation 40
Amend the Disability Act to ensure that the Authorised Program Officer carries out their duties in such a way as to ensure the will and preferences of a person subject to a regulated restrictive practice should direct, as far as practicable, decisions made for that person about those practices.

Recommendation 41
Amend the Disability Act to ensure that the will and preferences of the person in relation to their proposed regulated restrictive practices are clearly documented and have been fully considered (and submitted to the Senior Practitioner where relevant) as part of the authorisation process.

Recommendation 42
Amend the Disability Act to ensure that the Authorised Program Officer has 'responsibility for sourcing the Independent Person' as part of their authorisation role.

Recommendation 43
Amend the Disability Act to impose on Authorised Program Officers a requirement that, before the person meets with their Independent Person, the Authorised Program Officer has explained the steps required by the State authorisation process and the role of the Independent Person in that process.

Recommendation 44
Amend the Disability Act to impose on Authorised Program Officers a requirement that the notification of their approval of a regulated restrictive practice, which currently includes reference to their right to seek a review by the Victorian Civil and Administrative Tribunal, is provided in an appropriately accessible format.

Recommendation 45
Amend the Disability Act to clearly articulate the requirements for the Authorised Program Officer's notification of authorisation to both the person and the Senior Practitioner. The notification must include documentation of the person's will and preferences and how they have been considered in the authorisation process.

Recommendation 46
Amend the Disability Act to prevent the use of a regulated restrictive practice against person unless it is a last resort in response to risk of harm to the person with disability or others.

Recommendation 47
Amend the Disability to make clear that the independent person must not be the person's guardian.

Recommendation 48
Amend the Disability Act to establish a right of a person the subject of the restrictive practices to apply to the Victorian Civil and Administrative Tribunal for a review of those restrictive practices at any time.

Recommendation 49
Amend the Disability Act to enable an Independent Person to report any concerns identified in the course of their role directly to the National Disability Insurance Scheme Quality and Safeguards Commission.

Recommendation 50
Amend the Disability Act to more clearly articulate the safeguarding and explanatory aspects of the independent person role.

Recommendation 51
Amend the Disability Act to permit the independent person to report any issue of non-compliance to the Public Advocate or to the Senior Practitioner, not only when the person does not understand the proposal to use restrictive practices.

Recommendation 52
Amend the Disability Act to ensure independent persons have access to the Senior Practitioner for advice, guidance and assistance.

Recommendation 53
Amend the Disability Act to extend penalties for non-compliance with provisions regarding restrictive practice and compulsory treatment to National Disability Insurance Scheme providers operating in Victoria.

Recommendation 54
Amend the Disability Act to broaden the criteria for admission to a residential treatment facility to enable the admission of any person with a cognitive or neurological impairment, provided they meet the remaining criteria.

Recommendation 55
Retain the supervised treatment order regime in the Disability Act with enhanced safeguards.

Recommendation 56
Amend the Disability Act to extend the supervised treatment order regime to cover persons with cognitive or neurological disability (provided they meet the remaining criteria).

Recommendation 57
Not amend the Disability Act to introduce a maximum time limit on consecutive supervised treatment orders.

Recommendation 58
Amend the Disability Act to require the Victorian Civil and Administrative Tribunal, on any application for a subsequent supervised treatment order, to consider the extent to which the intended benefit to the person was achieved and the significant risk of serious harm to others was reduced under the previous order/s. This assessment must inform the Victorian Civil and Administrative Tribunal's consideration of:

- whether it can be satisfied that the proposed new supervised treatment order '*will* benefit the person and substantially reduce the significant risk of serious harm to another person' (as required by section 191(6)(c) of the Act); and
- whether the making of the proposed new supervised treatment order is a demonstrably justifiable limitation on the person's human rights (as required by section 38 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Recommendation 59
Amend the Disability Act to clarify that the Secretary is responsible for ensuring that any person subject to a supervised treatment order receives the supports they require to progress through the system as quickly as possible.

Recommendation 60
Amend the Disability Act to prevent the Victorian Civil and Administrative Tribunal from making a supervised treatment order unless satisfied that the disability service provider or registered National Disability Insurance Scheme provider, as the case requires, can implement the supervised treatment order and the treatment plan.

Recommendation 61
Amend the Disability Act to enable the Victorian Civil and Administrative Tribunal to join or request the attendance of the Secretary or their delegate at the hearing where funding or service gaps are preventing the implementation of a supervised treatment order.

Recommendation 62
Amend the Disability Act to clearly articulate the responsibilities of the Authorised Program Officer in relation to supervised treatments, including that they:

- hold a coordination role in relation to treatment plan implementation and implementation reporting, and
- are responsible for bringing funding gaps that prevent the implementation of the approved treatment plan to the attention of the Secretary or their delegate and, if they cannot be resolved, to the Victorian Civil and Administrative Tribunal.

Recommendation 63
Amend the Disability Act to:

- require an Authorised Program Officer to apply for a review of the supervised treatment order if they become aware that the approved treatment plan is not being, or is not able to be, implemented due to funding or service gaps.
- require the Senior Practitioner to apply for a review of the supervised treatment order if they have directed the Authorised Program Officer to make such an application and the Authorised Program Officer has failed to do so.

Recommendation 64
Amend the Disability Act to require Authorised Program Officers to report more frequently to the Senior Practitioner on the implementation of the supervised treatment order.

Recommendation 65
Amend the Disability Act to require Authorised Program Officers of registered National Disability Insurance Scheme providers to send copies of any reports they are required to send to the National Disability Insurance Scheme Quality and Safeguards Commission regarding the use of restrictive practices on any person subject to a supervised treatment order to the Senior Practitioner.

Recommendation 66
Amend the definition of 'benefit to the person' in the Disability Act to have three equally important elements:

- 'maximising their quality of life'
- 'maximising their opportunity for social participation'
- 'maximising the development of their capacity to engage safely with the community'.

Recommendation 67
Amend the Disability Act to insert definitions of 'treatment' and 'material change' and provide examples to guide practice.

Recommendation 68
Amend section 196 of the Disability Act to empower the Public Advocate to apply directly to the Victorian Civil and Administrative Tribunal for a review, variation or revocation of a supervised treatment order.

Recommendation 69
Amend the Disability Act to require the Senior Practitioner to file any approval for a material change to a treatment plan with the Victorian Civil and Administrative Tribunal and send copies of all parties.

1. Introduction

About the Office 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 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 functions under the *Guardianship and Administration Act 2019* (Vic) and the *Disability Act 2006* (Vic) (Disability Act), 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. Of particular note in the context of this review, as well as administering the disability services stream of the Community Visitors Program, the Public Advocate has specific safeguarding and advocacy functions under the Disability Act in relation to residential rights, restrictive practices, civil detention and compulsory treatment for people with disability.

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 2019-20, OPA was involved in 1792 guardianship matters (950 which were new), 430 investigations, and 284 cases requiring advocacy. OPA's two Disability Act officers are the largest single contributor to OPA's individual advocacy.[1]

A key function of the Public Advocate is to promote and facilitate public awareness and understanding about the *Guardianship and Administration Act 2019* (Vic), and any other legislation – including the Disability Act – affecting persons with disability or persons who may not have decision-making capacity. To do so, OPA maintains a full-service communications function including media outreach, and runs an advice service which took 12,624 calls in 2019-20. OPA also coordinates a community education program for professional and community audiences across Victoria to 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 600 volunteers across three volunteer programs: the Community Visitors Program, the Independent Third Person Program (ITP Program) and the Corrections Independent Support Officer (CISO) Program.

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 consumers 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. A total of 400 Community Visitors visit across three streams: disability services, supported residential services (SRS), and mental health services. In 2019-20, Community Visitors made 4142 statutory visits, including to sites of criminal and civil detention.

[1] Office of the Public Advocate, *Annual Report 2018-19* (Report, 2019).

About this submission

OPA welcomes the opportunity to contribute to the Department of Families, Fairness and Housing's (DFFH) review of the Disability Act.

The review is an important opportunity to reconsider the Disability Act in light of the National Disability Insurance Scheme (NDIS) roll out, that has significantly changed the landscape of Victorian state provided disability services. OPA considers this an opportunity to create a contemporary Act that enlivens transformative equality as envisaged by the United Nations' Convention of the Rights of Persons with Disabilities (CRPD).

OPA has responded to the specific questions posed in the review consultation paper. OPA's submission focusses on topics and issues where OPA has particular responsibilities and practice wisdom, informed by work done across the office. In particular, OPA's response draws on the expertise and work of our Disability Act Officers and Community Visitors.

While OPA has confined its formal recommendations in this submission to legislative amendments to the Disability Act, OPA notes that legislation is only as effective as the mechanisms to support its implementation in practice. To that end, OPA encourages the Victorian Government to ensure the amendments to the Disability Act are supported by comprehensive regulations, policies, practice guidance, education, advocacy and resourcing necessary to realise the important reform agenda which the new Disability Act is intended to achieve. People with disability should be closely involved in these implementation support activities and help co-design any resources.

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 most 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. Objectives and principles

Question 1: What objectives should the Disability Act have?

The establishment of the NDIS has both simultaneously broadened and narrowed the scope of the Disability Act. OPA considers that the new Disability Act should be reframed and become the legislative instrument by which the Victorian Government fulfils its obligations under the CRPD. This is discussed further under Question 2.

Incorporating a clearly stated, overarching objective in the Disability Act will also help shift current approaches. OPA considers that the new Disability Act's overarching objective should promote the community inclusion, human rights, equality and dignity of **all** Victorians with disability, regardless of their eligibility for the NDIS or not, or their age, carer status, citizenship status, culturally and linguistically diverse background, gender, or gender identity, Indigenous status, marital status, physical characteristics, pregnancy, race, religion or any other irrelevant status.

Ableism is widespread and creates a significant barrier to inclusion for people with disability. It is perpetuated by viewing disability through a medical-model lens rather than a capability-based approach. The approach OPA takes and recommends for challenging exclusionary beliefs and assumptions is informed by the capability-based approach to flourishing human life, developed by Amartya Sen and Martha Nussbaum.[2]

In this framework, a flourishing life has the following elements:

- **affiliation:**
  - **being able to live with and toward others:** recognising and showing concern for others; engaging in social interaction; being able to imagine the situation of another.
  - **Having the social basis for self-respect and non-humiliation:** being treated as a dignified being whose worth is equal to that of others – this entails provisions of non-discrimination on the basis of race, sex, sexual orientation, ethnicity, caste, religion, national origin and species.
- **bodily health:** having good health, including reproductive health; being adequately nourished; having adequate shelter.
- **bodily integrity:** being able to move freely from place to place; being secure against violent assault, including sexual assault and domestic violence; having opportunities for sexual satisfaction and choice over contraception and reproduction.
- **control over environment:**
  - **material:** being able to hold property (both land and movable goods); having property rights on an equal basis with others; having the right to seek employment on an equal basis with others; having freedom from unwarranted search and seizure; having meaningful work where you can exercise practical reason and your human potential; having meaningful relationships and mutual recognition with other workers.
  - **political:** being able to participate effectively in political decisions that govern life; having the right of political participation; protections of free speech and association.
  - **emotions:** have attachments to things and people outside of yourself; generally, to love, grieve, experience longing, gratitude, and justified anger; not having your

[2] Amartya Sen, *Development as Freedom*, (Random House, 1995); Patricia McGrath Morris, 'The Capabilities Perspective: A Framework for Social Justice' (2002) 83(4) *Families in Society: The Journal of Contemporary Social Services* 365-373.

emotional development hindered by fear and anxiety; supporting forms of human association that are crucial to a person's emotional development.

- **life:** living a normal human life span; not dying prematurely or having life reduced to a life not worth living.
- **other species:** being able to live with concern for and in relation to animals, plants, and the world of nature.
- **play:** being able to laugh, to play, to enjoy recreational activities.
- **practical reason:** being able to form a conception of the good and to engage in critical reflection about the planning of one's life.
- **senses, imagination and thought:** being able to use the senses; to be able to imagine, think, and reason broadly, informed and cultivated by an adequate education, including literacy and basic mathematical and scientific training; being able to use imagination and thought in connection with wide ranging experiences, including religious, literary, musical, and other works and events; being able to use your mind in ways protected by guarantees of freedom of expression, including political and artistic speech, and freedom of religion; having pleasurable experiences and being able to avoid non-beneficial pain.

In Victoria, many of these capabilities for a flourishing life already have formal recognition through the *Charter of Human Rights and Responsibilities Act 2006* (Vic) and other legislation.

OPA sees the elements of a flourishing life as a helpful guide for developing inclusionary human rights-based approaches. A human rights approach begins by recognising people with disability as rights bearers, both moral and legal. Uppermost is respect for the dignity of people with disability. As was recently stated by the Australian Human Rights Commission, international human rights treaties offer the most widely accepted framework for protecting individual dignity and promoting the flourishing of communities.[3] The CRPD states what must be done to provide dignity for all people with disability.

These further elements of a human-rights approach can also be continued or translated into the objectives of the next Disability Act. This expansion can guide the ways that individuals, communities and organisations respond to people with disability, in ways that are also consistent with the CRPD.

The new Disability Act can provide the legislative basis for this process of implementing and evaluating progress towards supporting and resourcing people with disability to lead a flourishing life. This is a natural progression from the ambition of the previous state disability plan, 'Absolutely everyone.'[4]

Recommendation 1
The Victorian Government should name the revised Disability Act the 'Disability Inclusion Act'.

Recommendation 2
The Victorian Government should amend the Disability Act to make giving effect to the state's obligations under the Convention on the Rights of Persons with Disabilities the Act's chief purpose.

[3] Australian Human Rights Commission, *Human rights and technology* (Discussion Paper, 2019) 31.
[4] Victorian Government, *Absolutely Everyone: State disability plan 2017 – 2020* (Report, December 2016).

Recommendation 3
The Victorian Government should amend the Disability Act to make its overarching objective an inclusive and equal Victoria which supports all people with disability to lead a flourishing life.

Recommendation 4
The Victorian Government should amend the purposes of the Disability Act to include providing a human rights approach in terms of individuals, communities, government and organisations supporting people with disability to lead a flourishing life.

Beyond the overarching objective and associated purposes, the Disability Act should include a further set of purposes and objectives relating to those residual areas of disability service provision that the Victorian Government has not ceded to the Australian Government and/or remains responsible for. To help clarify ambiguities regarding responsibilities of the Australian Government and the Victorian Government at the NDIS interface, the Disability Act (or at least subordinate rules) should identify the supports the Victorian Government is responsible for providing for people with disability in areas such as education, health, housing, transport, general community services, the criminal justice system and forensic disability services.

The Disability Act should also establish the Victorian Government's responsibility as provider of last resort for necessary disability supports where the NDIS market fails.

Recommendation 5
The Victorian Government should amend the Disability Act to include purposes and objectives relating to the areas of disability service provision it remains responsible for, including as provider of last resort for necessary disability supports.

Finally, the Disability Act should incorporate a series of objectives that promote and protect human rights specifically in relation to the use of restrictive practices and compulsory treatment. The frameworks under the Disability Act to authorise these rights-restricting practices against people with disability sit somewhat uncomfortably alongside the overarching objectives relating to inclusion and the domestic implementation of the CRPD.

Accordingly, among other matters, OPA considers that the Disability Act should include as an objective the progressive reduction and eventual elimination of the use of restrictive practices. OPA notes that comprehensive planning, resourcing, staff training and appropriate physical environments will be necessary to achieve this goal.

This proposed objective is consistent with the recent recommendations of the Royal Commission in Victoria's Mental Health System, which the Victorian Government has accepted, regarding the reduction and elimination of seclusion and restraint in mental health service delivery.[5]

[5] Royal Commission into Victoria's Mental Health System (Final Report, February 2021) vol 5, 281, recommendation 54.

Recommendation 6
The Victorian Government should amend the Disability Act to include an objective of reducing and eventually eliminating the use of restrictive practices.

Question 2: How could the Act support the UN Convention?

Government bodies are required to take appropriate measures to implement the rights recognised in Art 4 the CRPD.[6] The Disability Act can be the vehicle for this process in Victoria (see Recommendation 2 above).

To achieve this, the Disability Act will need to provide a strengthened focus on whole of-government consistency and compliance with the high-level objectives and purposes of the Act. Ultimately, further regulation under the Disability Act will be required because embracing a human rights approach will demand some significant changes to laws, policies and practices.

At the policy level, a human rights approach can be understood as providing a platform for:

- accountability measures for state actors with responsibilities
- building community capacity, including promotion of respect for human rights in the non-government sector and the community
- ensuring non-discrimination and equity
- measures that provide the capacity for influencing government decisions
- participatory approaches
- responding to the specific and individual needs of people with disability
- specifying obligations of other bodies with responsibilities.

OPA proposes the above elements should be integrated into the Act to give people and organisations a point of reference for ensuring their practices are advancing the human rights of people with disability consistently with the CRPD.

The Disability Act can also support the CRPD by directly referencing key provisions (including the principles – see Question 3 below) and adopting key terms and definitions.

Question 3: How could we improve the principles in the Act?

The principles of the Disability Act will provide a platform for enacting human rights and supporting the Act's objectives (discussed above).

[6] Convention on the Rights of Persons with Disabilities, GA Res 106, UN GAOR, 61st sess, UN Doc A/RES/61/106 (13 December 2006), art 4.

The Disability Act should contain principles that reflect the general principles set out in the CRPD.[7] It should incorporate the Australian Law Reform Commission's national decision-making principles.[8]

In developing these principles, it would be helpful to review and, where applicable, adopt parallel principles to the gender equality principles set out in s 6 of the *Gender Equality Act 2020* (Vic).

It should also contain principles specific to the particular functions and activities governed by the Act. For example, there should be a specific set of principles regarding compulsory treatment.

Recommendation 7
The Victorian Government should amend the principles in the Disability Act to:

- **reflect the general principles in the Convention on the Rights of Persons with Disabilities**
- **incorporate the Australian Law Reform Commission's national decision-making principles, and**
- **complement the gender equality principles in the *Gender Equality Act 2020* (Vic).**

Principles applying to people with intellectual and cognitive disability

People with intellectual and other cognitive disabilities have different experiences to people with physical and sensory disabilities. They also have unique needs that other members of the larger group of all people with disability do not share. Developing policies on the basis that all people with disability have the same needs, and which fail to differentiate and account for the specific needs of people with intellectual and cognitive disability, is unhelpful to them. These issues have been explored by Professor Chris Bigby in her recent article on 'dedifferentiated' policy.[9]

If the Disability Act fails to explicitly recognise the specific needs of people with intellectual and cognitive disability, it may thwart progress towards the objectives of the Act, to the ultimate detriment of people with intellectual and cognitive disability themselves. This is because mainstream and disability services often fail to make the adjustments necessary to respond to their distinctive needs (or those of the different sub-groups of this population), and so they cannot deliver the appropriate skilled support that would enable the person to lead a flourishing life. Particular issues that may not be effectively addressed include communication, decision-making support, engagement in meaningful activities, social relationships, and skill development.

Having made this point, OPA considers that the specific principles currently set out in s 6(1) of the Disability Act[10] that apply 'specifically in respect of persons with an intellectual disability' are, in

[7] Ibid, art 3.
[8] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (Report No 124, August 2014) 24 [1.4].
[9] Christine Bigby, 'Dedifferentiation and people with intellectual disabilities in the Australian National Disability Insurance Scheme: Bringing research, politics and policy together' (2020) 45(4) *Journal of Intellectual & Developmental Disability* 309-319.
[10] These principles are that 'persons with an intellectual disability have a capacity for physical, social, emotional and intellectual development [and…] have the right to opportunities to develop and maintain skills and to participate in activities that enable them to achieve valued roles in the community' and that 'services for persons with an intellectual disability should be designed and provided in a manner that ensures developmental opportunities exist to enable the realisation of their individual capacities [and…] designed and provided in a manner that ensures that a particular disability service provider cannot exercise control over all

fact, equally applicable and appropriate for all people with disability. These should accordingly be elevated to the general principles.

Recommendation 8
The Victorian Government should amend the Disability Act to:

- **extend the application of the principles which currently apply specifically to persons with intellectual disability to all people with disability, and**
- **recognise the distinctive experiences and needs of people with intellectual and cognitive disability.**

Question 4: What mechanisms do we need to support the principles in the Act?

The principles in a piece of legislation reflect the values within the community that the Parliament intends an Act to promote through adopting a particular course of action to address a particular issue or problem or to enable certain programs or actions to take place. To support those principles and achieve the objectives, Acts should outline how the Minister or Victorian Government officials are to be held accountable for putting the principles into practice.

The current Disability Act contains many important mechanisms that need to be maintained and strengthened. These include provisions relating to:

- disability action plans
- state disability plan
- the Victorian Disability Advisory Council.

Consideration should be given to strengthening each of these different mechanisms (see '4. Inclusion' below). However, the biggest improvement can be made by better connecting and aligning these separate mechanisms and bodies.

Here, OPA presents one possible approach for improving alignment and enhancing the functions of these various mechanisms to help achieve the objectives of the Disability Act. Under this proposal, the new legislative mandate provided by the new Disability Act, coupled with revamped administrative scaffolding (principally through the proposed new Disability Inclusion Commission) will provide an impetus for reform and provide greater accountability and effectiveness.

Proposed Disability Inclusion Commission

The present Office for Disability lacks resources and independence to properly carry out its critical, whole-of-government coordination role. Overhanging the staff and functions of the Office

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or most aspects of the life of a person with an intellectual disability': *Disability Act 2006* (Vic) ss 6(1)(a)-(b), (e)-(f).

for Disability are an array of administrative arrangements and responsibilities that do not sufficiently support a reform agenda.

A key source of authority, influence and guidance for the Office for Disability is the Inter-Departmental Committee on Disability. This committee has a critical role in ensuring whole-of-government accountability and coordination. While it has been a useful mechanism, it lacks the authority, commitment and status that a significant reform agenda requires.

OPA proposes that the Office for Disability be reconstituted as a Disability Inclusion Commission. This would be an administrative unit, independent of day-to-day departmental operations. This new Commission would be administratively structured somewhat like the Mental Health Reform Victoria body and the Commission for Gender Equality in the Public Sector and be led by a Disability Inclusion Commissioner.

Reconstituting the present Office for Disability in this way will give it increased access to government support outside the constraints of a shared departmental allocation. It will also decrease the administrative burden associated with being a minor element inside a large department. This freedom from some departmental hindrances will allow the new Commission to be more agile and nimble. It will be able to develop its own culture and focus on its change agent role. Accountability for this discrete function will be increased because there will be an opportunity for direct scrutiny of it functions by the responsible minister, Parliament and the disability community.

The functions of the new Disability Inclusion Commission could include:

- forming partnerships to research and develop best-practice approaches to:
    - disability inclusion
    - reasonable adjustments and universal design
    - State disability plan development and monitoring
- disability action plan promotion and compliance
- Victorian Disability Advisory Committee
- National Disability Agreement
- Victorian Disability Advocacy Program
- grants programs for disability-led groups, representative bodies and disability pride measures.

The critical role which the Inter-departmental Committee on Disability performs could be strengthened through its reconstitution as a Board, having oversight of the Disability Inclusion Commission. The Disability Inclusion Commission Board would have a membership of the Disability Inclusion Portfolio holders reporting to the secretaries of key departments. These key departments are those with ministers responsible for education and training, health and community services, justice, premier and cabinet, transport, and treasury and finance. In addition, the

Board could invite the participation of the Corrections Commissioner, Equal Opportunity and Human Rights Commissioner, Police Commissioner and the Public Advocate.

The reconstituted Victorian Disability Advisory Council (discussed at Questions 18-20 below) would also nominate representatives to the Board.

Recommendation 9
The Victorian Government should amend the Disability Act to establish a Disability Inclusion Commission.

Question 5: How could the Act support disability advocacy?

OPA considers that advocacy, both legal and non-legal, is critically important to support people with disability to exercise their rights and ensure their interests, rights and wellbeing are protected.

Many of OPA's safeguarding functions under the Disability Act involve specialised advocacy on behalf of the individuals affected. OPA notes that it has not received ongoing funding to provide such advocacy under the Disability Act. Ongoing funding is critical to ensure OPA can continue to fulfil its intended safeguarding functions for all Victorians with disability affected by processes and interventions under the Disability Act.

In terms of legislative reform, the Disability Act can acknowledge and support disability advocacy by establishing a right to independent disability advocacy.

A range of situations under the Disability Act may give rise to the need for independent advice and advocacy. In particular, these include the (proposed) relocation or eviction of a person from their accommodation and the (proposed) use of restrictive practices or compulsory treatment against them. People with disability may not understand or know how to exercise their rights in these circumstances. They also may not know who to contact for independent advice or how to go about it, especially if they are living in a restrictive setting. The Disability Act could support disability advocacy by requiring the person initiating any of the above-mentioned (proposed) actions against them to connect them with an independent disability advocacy service.

This proposed recommendation is consistent with the recent recommendation of the Royal Commission in Victoria's Mental Health System, which the Victorian Government has accepted, to include a legislative provision in the new Mental Health and Wellbeing Act enabling an opt-out model of access to non-legal advocacy for consumers who are subject to or at risk of compulsory treatment.[11]

Under the Disability Act, a person with disability may initiate a variety of proceedings at the Victorian Civil and Administrative Tribunal (VCAT) and they may be brought before VCAT in proceedings initiated by others, including an application for a Supervised Treatment Order (STO). While it is relatively common for people to have legal representation in some types of these hearings, this is not consistently the case. Where a person with disability is not assisted by a lawyer or disability advocate, it can make it exceedingly difficult for them to follow the proceedings,

[11] Royal Commission into Victoria's Mental Health System (Final Report, February 2021) vol 5, 283, recommendation 56.

advance their position and protect their rights. VCAT should therefore be hesitant to proceed in those circumstances.

Before proceeding with act hearing under the Disability, OPA considers that VCAT should be required to make enquiries with the person to determine if they are aware of the availability legal and non-legal advocacy and whether they would like such assistance. If the person would like such assistance, VCAT should adjourn the proceeding and ensure the person is provided with appropriate referral information.

Recommendation 10
The Victorian Government should amend the Disability Act to require the Victorian Civil and Administrative Tribunal to satisfy itself, whenever a person with disability appears at a hearing under the Disability Act without legal representation or an independent advocate, that the person does not wish to have such assistance.

4. Definitions

Questions 6-7: Defining disability, including for the purposes of inclusion

Understandings of disability have evolved over time[12] and vary significantly between contexts and cultures. OPA recognises that different definitions of 'disability' may be appropriate and necessary in different contexts, depending on the purpose for which it is being used.

For the purposes of promoting inclusion, OPA considers that the description of 'disability' set out in the CRPD, which recognises the role which societal barriers play in exacerbating disability, provides a strong foundation:[13]

> *Persons with disabilities include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.*

Recommendation 11
The Victorian Government should amend the Disability Act to incorporate the social model of disability described in the Convention on the Rights of Persons with Disabilities for the purposes of promoting inclusion.

In relation to defining or identifying whether an individual person is a person with disability, OPA proposes a contemporary method that fits with a human rights approach.

[12] Julia Korolkova and Alexandria Anthony 'The United Nations Convention on the Rights of Persons with Disabilities and the right to support' (Report, Melbourne Law School, The University of Melbourne, 2016).
[13] Convention on the Rights of Persons with Disabilities, GA Res 106, UN GAOR, 61st sess, UN Doc A/RES/61/106 (13 December 2006), art 1.

OPA believes that any definition of disability for this purpose should be broad, though without weakening the meaning of the term so that it still provides a focus for the measures demanded by the CRPD. It is necessary to move away from the medical model which continues to dominate and gatekeep entry/access to both interventions and supports for people with disability.

Although the experience of disability has near universal features for all humans, the sustained lived experience of disability and its systematic devaluation is not universal. People without disability may gain substantial insights into the disability experience. This can be through episodes and relationships in a person's life, without giving rise to a disability identity. However, a disability identity comes only from the (changing) long-term experience of living with impairment (which also may be episodic or fluctuating) and the barriers and experiences encountered in life as a result. This experience gives rise to a disability identity (self-generated or ascribed) as one facet of an individual's complex and evolving identity.

The appropriate shift to determining access to reasonable adjustments and services based on functional need is being undermined by attitudes and outmoded practices. This is occurring because of the perceived need for 'paperwork' evidence from medical practitioners providing a diagnosis to 'demonstrate they have a permanent disability that affects their everyday life'.[14]

Work needs to be done to shift the understanding of disability so that all Victorians, including service workforces, move towards seeing that authority lies in the experience of the person with disability themselves. As was found in the Tune Review of the NDIS Act, people with disability are still not being recognised as the biggest expert on their disability, contrary to the rhetoric on choice and control.[15]

To help shift attitudes, it is necessary to formally adopt a relational approach to defining disability, rather than the frequent list-based approaches.[16] At its simplest, a person with disability is a person who identifies as having a disability. Some people with disability will be consistently identified by others in a close relationship with them as having a disability. Such identification by others should not become determinative where the person has the capacity to adopt or refuse this identity themself. This is the approach that most people already take in everyday life. This should be mirrored in policy.

For some people with disability, their disability identity and support needs will need to be documented. They will want or need this to occur for the purposes of access to reasonable adjustments or formal supports. Such an approach, for formalised recognition, could be straightforward, involving a combination of three elements:

- The first element is either self-identification of their disability identity by the person, or recognition of this identity by others in close relationship with the person.

[14] National Disability Insurance Agency, 'Information for GPs and health professionals'*, Applying to access the NDIS: How to apply* (Web Page, 25 October 2021) <https://www.ndis.gov.au/applying-access-ndis/how-apply/information-gps-and-health-professionals>.
[15] Department of Social Services, 'NDIS Legislative Reforms: 2019 review of the NDIS Act and the new NDIS Participant Service Guarantee' *Disability and Carers* (Web page, 25 October 2021) <https://www.dss.gov.au/disability-and-carers-programs-services-for-people-with-disability-national-disability-insurance-scheme/2019-review-of-the-ndis-act-and-the-new-ndis-participant-service-guarantee>.
[16] An example of a list-based approach is the definition of 'disability' used in s 3(1) of the *Guardianship and Administration Act 2019* (Vic): 'disability, in relation to a person, means neurological impairment, intellectual impairment, mental disorder, brain injury, physical disability or dementia'.

- The second element involves the person (or their supporter) describing their functional supports needs, resulting from impairment.

- The third element is acceptance and documentation of the person's described support needs by those having a support relationship with the person.

The documentation of functional support needs could be self-administered using a recognised system, or a collaborative process with people bringing an expertise desired or needed by the person. This approach could utilise existing standardised disability-identification systems and checklists, while remaining open to future developments.

By itself, engaging in this documentation process would not result in formal certification, but the results of the process would be documented and registered when and where required. Doctors or allied health professionals may be of assistance in this process, but their involvement would not be mandatory for the simple process of recognising a person as living with disability and having functional support needs, especially where there is no dispute that the person experiences functional barriers due to impairment. This process acknowledges that individuals with disability have support needs and are the author of their life.

Recommendation 12
The Victorian Government should amend the Disability Act to adopt a relational definition of a 'person with disability', incorporating the following three elements:

- **self-identification of a disability identity or recognition of this by others in close relationship with the person**

- **the person describing their functional supports needs, arising from impairments; with support from those in close relationship with the person, if needed**

- **acceptance and documentation of the person's support needs in collaboration with others who support the person, if this is necessary.**

Question 8: What other terms could we define in the Disability Act? For what purpose?

As discussed in various Questions below, OPA recommends including, or refining existing, definitions for the following terms in the Disability Act:

- 'Residential service' – see Question 27

- 'Disability service provider' – see Question 27

- 'Short-term resident'– see Question 27

- 'Benefit to the person' – see Question 33

- 'Treatment' – see Question 33

- 'Material change' – see Question 33

5. Inclusion

As discussed at Question 4 above, the Disability Act should enhance the linkages between the various mechanisms which aim to promote inclusion.

Questions 9-12: State disability plan

The state disability plan should focus on fostering inclusion, equality and flourishing lives for all Victorians with disability, to support the Victorian Government to meet its obligations under the CRPD, as well as its obligations under Australian and Victorian human rights law.

The state disability plan should have a data and performance evaluation framework that is robust and publicly available.

The Disability Act's provisions could strengthen the state disability plan by requiring that the Minister responsible for the plan be held accountable for its effective implementation across the Victorian Government. The effectiveness of the state disability plan should be reported on in the Victorian Parliament. This report should report both successes and failures and plans for remediation.

In addition, the Victorian Government should be required to produce a disability budget report to be tabled annually in Parliament, which demonstrates how the Victorian Budget has benefitted (or not) Victorians with disability. This 'disability budget' should provide a 'whole of government' perspective and be linked to the state disability plan.

The evaluation of senior officials' performances who are responsible for the implementation of all or some parts of the plan should be linked to their overall performance evaluation and its outcomes.

Recommendation 13
The Victorian Government should amend the Disability Act to hold the Minister accountable for the effective implementation of the state disability plan and require them to report annually to Parliament against the plan.

Questions 13-17: Disability action plans

The Victorian Government is responsible for both promoting universal design and working towards changing discriminatory community attitudes in all activities, policies and programs. This requirement, and monitoring of progress, needs to be mandated and enacted through revamped disability action plan requirements binding on all state authorities.

Disability action plans have been an administrative approach to removing barriers and improving access for a generation. This approach has provided many improvements. However, despite the long-standing remit of anti-discrimination legislation, significant access barriers in mainstream services remain. Some of these remaining barriers are attitudinal; some relate to the perceived need for additional resources to make the necessary adjustments to deliver full inclusion. As a

result, disability action plans can be lifeless or exceedingly modest in aspiration. There are also no sanctions for failing to produce one. The mechanism needs new life breathed into it.

OPA considers that the *Gender Equality Act 2020* (Vic) provides a modern, robust model for developing actions plans which addresses many of the current issues with disability action plans.

Under the *Gender Equality Act 2020* (Vic), defined entities[17] are subject to a range of clearly defined duties, which compel thoughtful action towards meaningful progress, as well as provide enhanced oversight and accountability. Importantly, the Act compels a focus not just on gender but on intersectional characteristics which may significantly impact on experiences of inclusion and equality and may require more targeted actions to address.

The legislative duties placed on defined entitles under the *Gender Equality Act 2020* (Vic) include that they must:

- 'in developing policies and programs and in delivering services that are to be provided to the public, or have a direct and significant impact on the public, consider and promote gender equality and take necessary and proportionate action towards achieving gender equality'[18]

- 'undertake a gender impact assessment when developing or reviewing any policy of, or program or service provided by, the entity that has a direct and significant impact on the public'[19]

- 'make reasonable and material progress in relation to the workplace gender equality indicators'[20]

- 'make reasonable and material progress towards meeting prescribed gender equality targets',[21] and

- 'prepare progress reports and submit them to the Gender Equality Commissioner to be published'.[22]

The Disability Act should adopt a similar framework of duties and obligations to the *Gender Equality Act 2020* (Vic), to give more substance to, and better accountability for disability action plans in order to drive meaningful change across Victoria. It is important that the focus is not just on equality and inclusion in the workplace but also in services delivered and interactions with community members more broadly.

This approach would be further strengthened by a requirement for all state authorities to have a disability inclusion portfolio holder who reports directly to the CEO or Secretary, or to their senior Human Resources nominee. The disability inclusion portfolio holder would be responsible for monitoring and reporting on the agreed performance measures under the disability action plan.

[17] 'Defined entities' includes public service bodies and public entities, among other things: *Gender Equality Act 2020* (Vic) s 5(1).
[18] *Gender Equality Act 2020* (Vic) s 7.
[19] Ibid s 9(1).
[20] Ibid s 16(1).
[21] Ibid s 18(1).
[22] Ibid ss 19-20.

Just as the gender equality agenda and the oversight of gender equality action plans is supported by a Gender Equality Commissioner, the disability inclusion agenda and oversight of disability action plans should be supported by a Disability Inclusion Commissioner, as OPA proposed under Question 4 above.

Recommendation 14
The Victorian Government should amend the Disability Act to incorporate a framework of duties and accountability mechanisms for those required to develop disability action plans which is modelled on the *Gender Equality Act 2020* (Vic).

Questions 18-20: Victorian Disability Advisory Council

Under the present Disability Act, the Victorian Disability Advisory Council has an advisory role to the Minister for Disability. This role has given the Council the opportunity to influence government directions and policy. The Council has limited resources to undertake its role. The power and influence of the Council rests on the individual members' personal commitment and the Minister's willingness to listen to and implement their advice.

The focus of the Council should be on promoting inclusion, equality and flourishing lives for all Victorians with disability.

The Council's role and functions could be improved by granting it authority to advise the Minister on any matter relating to disability it considers appropriate.

The Council's role in promoting 'nothing about us without us' could be strengthened through granting it an advisory role to the proposed Disability Inclusion Commissioner (see Question 4 above), including nomination rights for a representative on the Disability Inclusion Commission Board. The Commissioner's position description would include consulting with the Council and supporting the Council to directly consult with Victorians with disability and their representative organisations.

A significant majority – at least 80 per cent – of the Council's membership should be people with direct lived experience of disability. It should also include more people with a cognitive disability than it does currently (who should receive the supports required to participate).

Recommendation 15
The Victorian Government should amend section 11(4) of the Disability Act to require that a significant majority of the Victorian Disability Advisory Council's membership be people with a disability.

Recommendation 16
The Victorian Government should amend section 12(1)(a) of the Disability Act to enable the Victorian Disability Advisory Council to advise the Minister on any matter relating to disability it considers appropriate.

6. Community visitors

Question 21: What should the role and powers of community visitors be within the changed NDIS service environment?

The strength of the Community Visitor Program lies in the fact that Community Visitors are independent, volunteers and report directly to Parliament. To that end, the following essential features of the role and powers of Community Visitors should continue within the changed NDIS service environment. In Victoria, Community Visitors:

- are Governor-in-Council appointments, and are therefore independent of government
- provide an annual report to Parliament, with recommendations for sector change/improvement
- are volunteers
- advocate for people with disability who may have no one else to support them or any other person to advocate on their behalf
- have a human rights safeguard focus
- are an early warning system for the community
- highlight what is occurring in practice, and whether or not policy and practice manuals are being utilised
- highlight where the system fails and advocate for systemic change
- have the authority to access incident reports (see s 130 of the Disability Act) and report back to the Community Visitors Program any matters of concern, all of which are recorded
- escalate more serious issues through the Community Visitors Board and the Public Advocate
- report publicly on serious incidents of violence, abuse and neglect of people with disability in disability services, residential services and mental health facilities
- are people who want to learn about disability and provide a link to the community for people with disability.

The national Community Visitor Schemes Review (CV Review)[23] recognised the contributions of Community Visitors and recommended their continuation at full scheme. The report made recommendations as to matters that should be agreed between the NDIS Commission and states and territories to support Community Visitors schemes' interface with the NDIS Commission.

[23] Department of Social Services for the Disability Reform Council, Council of Australian Governments, *Community Visitor Schemes Review* (Confidential Final Report, December 2018).

These included, among other recommendations, the authority of Community Visitors to enter the premises of NDIS providers, discussed further in Section 6, *Residential rights*, below.

However, some legislative provisions are out of date, and there are legislative gaps in respect of the appointment and protection of Community Visitors.

Complaints

The Community Visitors Program exists within a multi-system approach to safeguarding the rights of people with disability in Victoria. The integrity of the entire safeguarding framework is dependent upon the effectiveness of the various parts.

The role of Community Visitors is to observe and report and, if unable to resolve issues with the relevant disability service, to refer issues to safeguarding agencies who are empowered to take action. The impact of the work of the Community Visitors is to that extent dependent on effective relationships with other agencies within the multi-agency system.

Similarly, the impact of the work of agencies such as the Disability Services Commission (DSC) is dependent on the receipt of referrals from the Community Visitor program. For example, during the 2019-20 financial year, OPA made 63 abuse and neglect referrals to the Disability Services Commissioner in respect of former Department of Health and Human Services disability homes. Unlike the NDIS Quality and Safeguards Commission, the DSC accepts low, medium and high-risk referrals and can take a broader view than the National regulator is able to. In this way, the DSC works with Community Visitors to enliven their safeguarding role, to bring about meaningful change for people with disabilities.

OPA is concerned that the mooted removal of the provisions concerning the Disability Services Commissioner from the Disability Act will impact the integrity of the system as a whole. It will be critical to ensure that the current functions and powers of the Disability Services Commissioner are vested somewhere, preferably independent of the regulator. The changes to the legislation must not result in any increased difficulty for people with a disability to make complaints.

To that end, the Government should ensure that:

- any reconstituted complaints body is a statutory body independent of government, and
- the legislation establishing it has sufficient information sharing provisions to enable effective information sharing with OPA, Community Visitors and other agencies in the system.

Recommendation 17
The Victorian Government should ensure that any changes to the Disability Act do not make it more difficult for people with a disability to make a complaint about regulated disability services.

Referrals

Without limiting the discretion of the Community Visitors Board to refer a matter to any other person, the Community Visitors Board may refer a matter reported by a Community Visitor to one or more of a number of listed people whom the Board considers appropriate to deal with the matter. It is critical that there is rigor to the referral powers, including appropriate information sharing provisions, to ensure that the rights of the person with disability are upheld.

The current list in the Disability Act is incomplete as a result of the changed funding and regulatory environment. Key regulatory bodies not currently included in s 33 include the newly established Victorian Disability Worker Commissioner, appointed in October 2019, and the Residential Tenancies Commissioner.

OPA is also currently in negotiation with the Transport Accident Commission (TAC) for Community Visitors to visit TAC housing. These discussions are continuing. However, any agreement for Community Visitors to visit TAC houses would need to be funded, and would require amendment to the Disability Act as currently only half of the TAC houses are gazetted.

As a result, s 33 of the Disability Act should be amended to reflect the changed environment by explicitly stating that the Community Visitors Board may refer a matter to the following people:

- the Disability Worker Commissioner
- the Residential Tenancies Commissioner
- the Chief Executive Officer of the Transport Accident Commission.

Recommendation 18
The Victorian Government should amend section 33 of the Disability Act to provide that the Community Visitors Board may refer a matter to:

- **the Disability Worker Commissioner**
- **the Residential Tenancies Commissioner**
- **the Chief Executive Officer of the Transport Accident Commission.**

Powers

Whilst Community Visitors are empowered to enter and inspect premises, see residents, make inquiries and inspect certain documents, there is no express reference in the legislation to taking photographs.

On occasion, disability service providers dispute the veracity of a report by a Community Visitor and allege that the reported incident or issue did not occur. It would helpful for Community Visitors to take photographs in these and other relevant circumstances to document issues identified during a visit. The inclusion of photographs with the subsequent report would avoid these disputes and provide additional relevant information where required. However, Community Visitors have been challenged about their authority to take photographs, usually in the context of a dispute over a report.

Clarity about this issue would support Community Visitors to undertake their important safeguarding role.

Recommendation 19
The Victorian Government should amend section 130(1) of the Disability Act so that a Community Visitor is entitled when visiting a disability service provider providing a residential service to take photographs to document issues identified during the visit.

Protection of Community Visitors

Despite being authorised by law to undertake their role, Community Visitors have, on occasion, been hindered in the execution of their role or even verbally harassed for executing their functions. When these instances have been referred to DFFH, the Department has declined to take any action.

OPA considers that there should be provisions in the Disability Act to deter this type of behaviour to protect Community Visitors. The *Social Services Regulation Act 2021* (Vic), for example, introduces offences in relation to hindering or obstructing,[24] and intimidating, threatening and assaulting an authorised officer or independent investigator.[25]

Some protection exists in the current legislation but only in respect of authorised officers. Section 212 of the Disability Act provides that it is an offence to hinder or obstruct an authorised officer, and this conduct attracts a penalty of 60 penalty units. The legislation should, similarly, provide protection for Community Visitors undertaking their legislative functions, and extend this protection to instances where Community Visitors are intimidated, threatened or assaulted.

Recommendation 20
The Victorian Government should amend the Disability Act to ensure that Community Visitors are able to carry out their functions without being hindered, obstructed, intimidated, threatened or assaulted.

Annual reports

The Government's response to Community Visitors annual reports is often received after the following year's annual report has been tabled. The Community Visitors Board is required to, no later than the following 30 September, submit an annual report on the activities of the Community Visitors during the financial year to the Minister. The report must then be tabled before Parliament "before the expiration of the fourteenth sitting day" after the report has been received by the Minister. The State Government is not required in the legislation to table a response to the report.

Whilst the State Government does ultimately respond to the Community Visitor annual reports, the response is often received after the following year's annual report has been tabled. Consequently, the recommendations in the following report are drafted without the benefit of incorporating the State Government's response to the previous year's recommendations.

Recommendation 21

[24] *Social Services Regulation Act 2021* (Vic) s 133.
[25] Ibid s 134.

The Victorian Government should amend section 35 of the Disability Act to require the Government to table a response to the Community Visitors Annual Report no later than 31 March the year after the annual report was tabled.

Question 22: How could the Disability Act support community visitors to know about places they can visit?

OPA notes, and discusses further in the section on Residential Rights below, that there are cohorts of people living in supported accommodation settings who currently hold residential rights (to different degrees according to the law they fall to) and there are also people in qualitatively similar settings who do not. Many people who require assistance with the tasks of daily living, and do not independently own or rent their home, are now receiving NDIS-funded services in accommodation settings where they have no clear residential rights nor access to Community Visitor safeguards.

Recommendation 22
The Victorian Government should should amend the Disability Act to extend the scope of the Community Visitors Program to provide independent monitoring of shared supported accommodation that is not Specialist Disability Accommodation but which is funded by the National Disability Insurance Scheme.

One approach would be to amend the definition of 'residential service' in s 3 of the Disability Act to ensure that these cohorts come within the scope of the definition and, consequently, the protections that apply to residential services including access to Community Visitors. OPA has proposed an amended definition in response to Question 27 below.

OPA posits that, while the NDIS has thrown many spanners in the old Victorian system of residential rights protections for people with disability, an early framing of some of the key characteristics of a residential service under the Disability Act retains value.[26]

The Department of Human Services (as it was known then) published a Residential Services - Information Sheet to support the implementation of the Disability Act. The document includes as its key criteria:

- "Provides long term or short term accommodation and support for people with a disability
- The provision of the accommodation and support are connected and both are *managed* by, or on behalf of, a disability service provider. The accommodation may be *provided* by an entity that is not a disability service provider, such as a housing association.
- The support is funded by the Secretary
- The process of admission is determined by the Secretary"[27]

The second point holds primary importance, as it recognises that in all settings where the provision of accommodation and support to people with disability are connected, that people's human rights are at risk. This risk stems from a power imbalance between service provider and resident (as often the resident has no other accommodation options available to them), which often results in problems in settings with more than one resident being resolved to the benefit or convenience of

[26] Department of Human Services, Residential Services – Information Sheet (undated).
[27] Ibid.

the service provider. In addition to those elements, many of the cohort who live in these settings also have a cognitive impairment and insufficient access to supported decision-makers, informal or independent advocates.

The third point needs expanding to reflect the NDIS context, to cover State and Commonwealth disability services funded support. The fourth point no longer holds value – it would exclude most people with disability who would otherwise meet the first two points (and three with appropriate revision). Further, the definition of Disability Support Provider would need to be revised to incorporate DFFH and NDIS funding sources (and the TAC if Recommendation 24 is adopted).

OPA recommends that a new, expanded definition of 'residential services' be enacted (see Recommendation 29 below in Residential Services) to enable Community Visitor oversight and much needed residential rights protections to be delivered to this cohort. This more inclusive definition encompasses the new 'accommodation and support' settings that have appeared in response to NDIS's new funding streams (see examples in Question 26). OPA would also like to see Community Visitor oversight extended to NDIS-funded medium-term supported accommodation, not just short-term and SDA-enrolled dwellings. To ensure this, the Disability Act should make clear the rights of residents of NDIS-funded 'medium-term' accommodation settings to have the oversight protections offered by Community Visitors. One way of achieving this is to specify the maximum length of stay for a resident to be considered 'short-term' (see Recommendation 32 below).

An alternative, which would not grant such residents sufficient residential rights protections but would at least enable them to access Community Visitors, is to amend s 30A to specify Community Visitors' right to visit NDIS-funded 'medium-term' accommodation settings.

Recommendation 23
The Victorian Government should amend the Disability Act to ensure that residents of 'medium-term' accommodation funded by the National Disability Insurance Scheme are eligible for the protections offered by Community Visitors.

Finally, as discussed above in response to Question 21, OPA and its Community Visitor Program have had extensive dialogue with the TAC in relation to extending the protections provided by Community Visitors to people living in TAC owned and operated facilities. The TAC is keen to have Community Visitors attend their houses. Currently Community Visitors do not have the right to visit TAC houses.

Recommendation 24
The Victorian Government should amend the Disability Act to ensure that Transport Accident Commission properties are eligible for the protections offered by Community Visitors.

Funding

The Community Visitors Program is currently struggling to providing safeguarding to eligible residents in new-build Specialist Disability Accommodation (SDA) properties. Technically, people

living in an SDA with a residency agreement may be visited by a Community Visitor at any time[28] to enable them to carry out their safeguarding functions, and those with a Residential Tenancy Agreement can request a visit from a Community Visitor. However, in practice, OPA's Community Visitors Program has not received the necessary additional funding (nor advice about all the dwellings that are now eligible for visits) to fully undertake their safeguarding role.

The Victorian Government should ensure that all residential rights protections enshrined under the Disability Act and the *Residential Tenancies Act 1997* (Vic) (RTF) for people with disability are adequately funded. Without this, the safeguards are meaningless. To this end, OPA should be funded to enable safe visits (including occupational health and safety assessments of new properties) and to visit and administer a greater number of properties.

Notification to Community Visitors

Defining 'residential services' broadly (or other reforms to ensure that the Community Visitors Program provide independent monitoring of NDIS-funded, non-SDA shared supported accommodation) will ensure that Community Visitors are able to visit residents in a broad range of settings that currently operate outside the regulatory framework. The definition (or other reforms) should be broad enough to ensure that the regulatory framework is sufficiently flexible to apply to innovative models that may continue to emerge in the NDIS environment. However, the regulatory framework falls down if Community Visitors are not aware of all visitable places within the scope of the framework.

DFFH should ensure that the Community Visitors Program is informed of all State-provided accommodation that meets the 'residential services' definition, as well as all gazetted properties, on a quarterly basis, and is funded to visit those services and properties.

Similarly, it is important for Community Visitors to know the names of the residents in the visitable places in order to ensure that the program can follow up the wellbeing of these individual residents as well as when they move from one visitable place to another. OPA also recommends that the numbering of rooms in SDA properties be standardized to facilitate Community Visitor safeguards.

Consumer Affairs Victoria should take carriage of the register, develop policy and commit to providing the names, addressed and room numbers of people residing in SDA on a Supported Disability Accommodation Residency Agreement to safeguarding agencies when they come on to the register.

Question 23: What principles should apply to the role of community visitors when conducting visits?

The Victorian Government is bound by the CRPD and the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

The CRPD heralded in a shift from viewing people with disabilities as in need of protection, to a framework in which people with disabilities are holders of rights, who are capable of, and have the

[28] Consumer Affairs Victoria, 'Community Visitors to SDA' *Specialist Disability Accommodation (SDA): For SDA residents* (Web page, 25 October 2021) <https://www.consumer.vic.gov.au/housing/specialist-disability-accommodation/for-residents/community-visitors-to-sda-residents>.

right, to assert those rights. Article 12, in particular requires State Parties to take appropriate measures to provide persons with disabilities access to the support they may require in exercising their legal capacity, and to ensure that any safeguarding measures respect the rights, will and preferences of the person. The Disability Act is also founded on similar principles regarding the right of people with disability to participate in decisions concerning their lives, and to be supported to do so.[29] In particular, persons with a disability have the same rights as other members of the community to, amongst other things, exercise control over their own lives, and participate actively in the decisions that affect their lives and have information and be supported, wherever necessary to enable this to occur.[30] Similarly, "the NDIS promotes a contemporary understanding of disability equality, underpinned by the UN Convention".[31]

As noted in the CV Review, "[t]he powers of Community Visitors to enter all visitable homes without invitation and to access all areas, including personal files and records could be perceived as running counter to this' and that '[t]his needs to be balanced with the ongoing work on capacity building which aims to assist people to learn how to exercise choice and control and to speak up when they are unhappy."[32]

However, people with disability also have the right to "live free from abuse, neglect or exploitation" and "realise their individual capacity for physical, social, emotional and intellectual development".[33] As also noted in the CV Review, "[t]here are people with disability who may not recognise what is happening to them as abuse or neglect, or who don't know how to speak out"[34] and that both people with disabilities and their families may fear retaliation if they speak out.[35] Community Visitors play a critical safeguarding role in these circumstances. The legislation must strike an appropriate balance between the autonomy and protection of the rights of residents of visitable residences.

OPA proposes that principles, aligned to other Victorian legislation such as the *Guardianship and Administration Act* and the *Powers of Attorney Act*, apply to Community Visitors when exercising their functions under the legislation. These should include that:

- Residents are assumed to have capacity unless there is evidence to the contrary
- The will and preferences of the resident must be respected
- Residents have the right to decline engagement with a Community Visitor
- The need to protect the resident from abuse or neglect must be balanced with respect for the resident's right to make their own decisions
- Dignity of risk must be observed.

[29] *Disability Act 2006* (Vic) s 5.
[30] Ibid ss 5(2)(d)–(e).
[31] Department of Social Services for the Disability Reform Council, Council of Australian Governments, *Community Visitor Schemes Review* (Confidential Final Report, December 2018) 44.
[32] Ibid 44.
[33] *Disability Act 2006* (Vic) ss 5(2)(b)–(c).
[34] Department of Social Services for the Disability Reform Council, Council of Australian Governments, *Community Visitor Schemes Review* (Confidential Final Report, December 2018) 44.
[35] Ibid 44.

7. Residential rights

Question 24: How could we improve residential rights protections in group homes?

As noted in the consultation paper, the 'group homes' referred to in this question are supported accommodation settings that both fulfil the Disability Act's definition of a 'residential service' and have been 'gazetted' as such.[36]

While OPA considers that group home residents generally have well-protected residential rights under Part 5 (including Division 2) of the current Disability Act, OPA has identified a few opportunities for improvement.

The first is to clarify who is liable for the cost of alternative accommodation where a resident is relocated under a Notice of Temporary Relocation, to avoid the situation of a resident having to pay two lots of accommodation fees. There is currently some uncertainty regarding who is liable for what costs. OPA believes the accommodation provider should bear the cost of the temporary accommodation to which they have relocated the resident, while the resident continues to pay rent on their ongoing accommodation.

Recommendation 25
The Victorian Government should amend the Disability Act to clarify that, where a resident has been relocated under a Notice of Temporary Relocation, the accommodation provider who issued the notice is responsible for the cost of the alternative accommodation.

Our second recommendation is to enable the maximum time period under a Notice of Temporary Relocation to be extended by agreement. Currently, a Notice of Temporary Relocation operates for a maximum of 90 days.[37] In OPA's experience, 90 days is not always enough time to adequately explore and set in place options for resolution. For example, if the basis of the Notice for Temporary Relocation is the person's behaviour, the person's Support Coordinator may need to apply for the development of a Behaviour Support Plan (BSP). This often requires a review of the person's NDIS plan to be conducted and an agreement by the National Disability Insurance Agency (NDIA) to fund it, as a BSP must be developed by a behaviour support practitioner. Other solutions to address the issues may also require additional NDIS funding. These processes can take more than 90 days and are beyond the resident and their service providers' control. OPA has seen people evicted from their group home at the expiry of the current 90 notice period notwithstanding there was still a real possibility that the issues giving rise to the notice could have been resolved if they had more time.

OPA has also observed how the 90 day maximum timeframe deters some service providers from even attempting to resolve complex issues that contributed to issuing of the Notice to Vacate because they doubt they will be able to resolve them in that timeframe. Conversely, OPA has seen some people returned to their group home before the issues have been fully resolved, in order to

[36] Defined in *Disability Act 2006 (Vic)* s 3(1) with reference to s 64.
[37] *Disability Act 2006* (Vic) s 74(2)(b).

comply with the 90 day limit. A premature return can result in further issues and incidents, which may give rise to additional notices.

OPA believes there is a need for great flexibility with this timeframe, although the residential service provider should not be able to unilaterally extend the time. Where the person may not be able to personally consent to an extension of the notice period, OPA should be notified.

Recommendation 26
The Victorian Government should amend section 74 of the Disability Act to enable the time period under a Notice of Temporary Relocation to be extended by mutual agreement.

For consistency, OPA recommends that the Victorian Government also incorporate the above two recommendations into Part 12A of the RTA (although in respect of the first one, DFFH may need to consider the NDIA policy on SDA funding in circumstances where an SDA resident is temporarily relocated).

OPA has also identified a number of discrepancies between the rights protections regarding temporary relocation and eviction processes for group home residents in Part 5 Division 2 of the Disability Act and the protections for SDA residents in Part 12A of the RTA. OPA believes it would be less confusing and more equitable to align these two frameworks, and that the better protections in Part 12A of the RTA should be available under Part 5 of the Disability Act.

Recommendation 27
The Victorian Government should amend Part 5 of the Disability Act to align the protections regarding temporary relocation and evictions with those in Part 12A of the Residential Tenancies Act, including by:

- **removing 'the resident's safety or wellbeing' and 'no reason' as grounds for issuing a notice of temporary relocation under section 74 or a Notice to Vacate under section 76**
- **specifying that the alternative accommodation to which a person is temporarily relocated under section 74(5) must be suitable for the person**
- **specifying in section 76 that the termination date in a Notice to Vacate, regardless of the grounds on which the notice was issued, must be not less than 90 days after the notice date, and**
- **extending the timeframe for a resident to apply to VCAT under section 82 for a review of a Notice to Vacate to 90 days.**

Question 25: What should specific rules in the Disability Act for specialist forensic disability accommodation include?

As noted in the 'Residential Rights - Further background' section of the consultation paper, Specialist Forensic Disability Accommodation (SFDA) largely, but not, in OPA's experience, exclusively, provides residential services to people on a variety of court dispositions. OPA notes that SFDA is not currently defined. The term is used to cover an amorphous assortment of accommodation arrangements of varying legal status. These include Residential Treatment Facilities (RTFs), which are currently excluded from the Part 5 residential rights protections, as well as some properties that have been gazetted as 'group homes'.

Given the heterogeneity of SFDA properties, OPA considers it would be difficult and possibly impractical to define specific rules for SFDA as a distinct class of accommodation. In general, OPA considers that residents in SFDA, other than those in RTFs,[38] should have the benefit of the protections set out in Part 5 of the Disability Act, except to the extent they are necessarily limited by the conditions or requirements of any legal order they are subject to.

At the end of Question 27 below, OPA sets out a number of recommendations to adapt the existing Disability Act residential rights framework to the current service context, which will cover residents in SFDA.

Question 26: Are there any other types of emerging or existing residential services that may require the safeguards under the Disability Act?

Through its work, OPA has become aware of a wide range of existing and emerging residential services that, despite sharing many practical characteristics with gazetted group homes and SDA, appear to fall outside the residential rights protections of both the Disability Act and the RTA due to peculiarities in their residency and tenure arrangements. Residents who fall into this regulatory gap are also not eligible for safeguarding under OPA's Community Visitor Program.

Over the last two years, OPA has noted multiple examples of residential rights gaps and confusion, as well as suspected financial exploitation in some of these matters. Interestingly, many of these matters have come to OPA's attention via non-standard routes, including accommodation services submitting residential notices to OPA in accordance with an Act they are not actually covered by, or NDIS-funded Support Coordinators or social workers expressing concern to OPA's advice service. OPA's Community Visitors, who are often very well connected to their local community, have also been a good source of intelligence in regards to new services that appear to provide disability support services to residents but do not actually meet criteria for inclusion under the Disability Act, Part 12A of the RTA or the *Supported Residential Services (Private Proprietors) Act 2010* (Vic) (SRS Act). OPA Advocate Guardians have also brought many new and unusual residential agreements to the attention of OPA's Legal Unit, who have found it difficult to determine the true legal status of many of these agreements.

The specifics of these scenarios where OPA believes the residents involved are not eligible for clear residential rights protections are diverse: shared and individually occupied properties, different demographic characteristics, various property types, various forms of residential agreement (some even purporting to comply in part with the RTA Residential Rental Agreement). However, it is clear that all these forms of supported accommodation have arisen from the increased availability of disability services funding to private providers via people's NDIS plans.

OPA, the Residential Tenancies Commissioner and Victoria Legal Aid wrote jointly to the Minister for Disability to raise these issues on 27 April 2021.

[38] RTFs are currently excluded from coverage per *Disability Act 2006* (Vic) Part 5.

Through some brief examples, OPA describes below two broad contexts where regulatory gaps have arisen that remain unaddressed:

- long-term supported accommodation, and
- (former) SRS residents.

They both involve examples where people are in receipt of in-home disability services (OPA assumes funded at least in-part by the NDIA) but that fall into regulatory grey areas for different reasons. To protect the privacy of the residents involved, these examples are written to highlight the key characteristics of the matters that currently exclude them from access to statutory tenure protections.

OPA highlights some limitations in residential rights protections for people in short- and medium-term accommodation arrangements under Question 27 below.

Long-term supported accommodation

Case A

The resident lives alone and has in place a standard format RTA Residential Rental Agreement, signed by their administrator. The agreement is with the same service provider who is also providing the resident with NDIS-funded disability supports that involve assistance with tasks of daily living. OPA understands that, despite the resident holding what looks like a valid rental agreement that would provide tenure protections under the RTA, there is reason to believe that these protections would not apply. This is because of the strong likelihood that the setting would fall under the definition of a 'health or residential service'.[39] If so, the resident would be excluded from protection under the RTA or in accord with their written rental agreement.[40]

Cases B and C

Two people in very similar situations, apart from the fact that one lives alone and other lives with three co-residents, are residing in properties owned or leased by their disability support provider. This means, in both cases, their accommodation provider is the same entity as their disability service provider (responsible for in-home assistance with tasks of daily living). In both cases, the in-home disability support is funded by the NDIA under each resident's NDIS plan.[41]

As in the example above, these residents would be excluded form protections under the RTA on the grounds that they fall within the 'health or residential service' exclusion. OPA understands that, under current legal frameworks, these residents would either be considered residents of

[39] A 'health or residential service' includes '(e) premises where accommodation is provided by a service agency for the purpose of delivering support services by that agency to a client of that agency': *Residential Tenancies Act 1997* (Vic) s 3(1).
[40] *Residential Tenancies Act 1997* (Vic) s 23.
[41] As a side note, sometimes a person's NDIS plan packages together the supports the person requires at home under the term 'Supported Independent Living' (SIL) and other times they include funding for 'assistance with daily living' in the person's core supports budget. The terms used in the plan relate to NDIA administrative processes, not to the type or quality of supports funded. Hence a 'SIL' house or a 'core supports' house are qualitatively equivalent in terms of the services being provided.

unregistered SRSs or perhaps holding a common law contractual licence in regard to their accommodation (which does not provide tenure protection).

Case D

This example concerns one person who lives alone in a property that has been leased by an accommodation provider. The accommodation provider appears to have some form of collaboration agreement with a specific registered NDIS disability service provider (who provides in-home and perhaps other disability supports). This assumption is based on the wording of the residential rental agreement currently in place. While the agreement followed the standard form from s 26 of the RTA, it included additional conditions such as, 'for the entire period this Residential Tenancy Agreement is in force, it is conditional upon the Tenant obtaining direct support services … from [the third party provider of disability support services at the premises]'. Of course, the accommodation provider could actually be the disability service provider with a different business name.

As the accommodation and support provider appear to be separate entities, this arrangement may not fall within the definition of a 'health or residential service' and so may not be excluded from the general RTA protections. Regardless, the explicit clause compelling the resident to accept the specific disability support provider of the accommodation provider's choosing suggests that the NDIA's stated aspirations of promoting participant choice through deliberate separation of accommodation and daily living supports would not be achieved here.

Even where they have correctly formulated s 26 residential rental agreements in place, a further potential legal barrier to the application of RTA protections to residents in situations such as those described above is whether they would meet the test of 'exclusive possession'.

(Former) SRS residents

As well as disability residential services, OPA's Community Visitors Program visits registered SRS. Community Visitors are volunteers and often well-connected in their local communities. Through the Community Visitor Program, and also sometimes via concerns raised with OPA's advice service, OPA has become aware of a number of examples of disability support services targeting SRS residents in order to get access to their NDIS plan funding.

OPA has brought these concerns regarding the suspected exploitation of SRS residents for their NDIS plan funding by disreputable providers to the attention of DFFH, to the NDIS Quality and Safeguards Commission and, more recently, to the media.[42]

These concerns fall into a number of broad categories:

- Disability service providers 'poaching' SRS residents and setting them up in private properties in order to provide them with funded NDIS supports. OPA's concern with this is that these settings are completely unregulated so the former SRS residents fall off the safeguards map, without even Community Visitors to ask questions about whether they are actually getting the services they are paying for.

[42] Jewel Topsfield and Royce Millar, 'How Denise Morgan escaped Melbourne's House of Horrors' *The Age* (Melbourne, 27 September 2021).

- SRS proprietors setting up businesses for the purposes of providing NDIS supports to their existing residents, for example extra supports like showering (which used to be covered by SRS fees) or community access supports (which might end up being a group trip on the bus with other SRS residents, rather than a participant-centred individual outing).
- SRS proprietors refusing to accept new residents without first determining that they will be appointed to provide at least some of the services set out in the resident's NDIS plan.

OPA notes that SRSs are currently regulated under their own Act,[43] which provides SRS residents with comparatively minimal residential rights. These examples collectively demonstrate the need for stronger oversight, safeguards and policy development in relation to SRS providers who are also NDIS providers. For the purposes of this Disability Act review, the scenarios that are most relevant concern people who move out of SRSs into residential arrangements that likely mirror those of Cases B and C, and perhaps D above, which are all characterised by an implicit or explicitly-stated relationship between the resident's accommodation provider and disability service provider.

Question 27: What options should we consider to address new types of long-term supported disability accommodation in which 'around the clock' support is provided and that do not meet the requirements for residential rights protections under Part 12A of the Residential Tenancies Act 1997 (Vic)?

The examples provided in response to the question above demonstrate how some types of supported accommodation settings fall into a regulatory gap with limited or non-existent residential rights protections. Most but not all of these are indeed 'new', NDIS-funded (in some way) types of supported disability accommodation and include:

- properties head-leased by the disability support provider for the purposes of providing the resident with disability supports
- properties owned by a disability support provider, with residence offered on the basis that the person will use that provider as their day-to-day disability support provider
- accommodation owned and provided to the resident by an accommodation provider who has some form of agreement (verbal or otherwise) with a particular disability support provider and makes the provision of accommodation contingent on the resident's use of that one disability support provider.

These may or may not be accurately characterised as settings providing 'around the clock' support. OPA notes that few NDIS plans provide for 'around the clock' (24/7) supports. The types of 'new' supported accommodation settings are generally developed around people with high support needs, who receive multiple hours a day of support with the tasks of daily living. Indeed, being able to access the person's NDIS funding to provide that support is what makes it attractive for non-SDA providers to offer accommodation to individuals or small numbers of co-residents. OPA does not consider the term 'around the clock support' to be helpful in thinking about supported accommodation options for people with disability.

[43] *Supported Residential Services (Private Proprietors) Act 2010* (Vic).

Instead, OPA considers it important to focus on the characteristic shared by all of the above examples, which is the inter-relatedness of the accommodation provider with the core supports provider (which provides support for tasks of daily living). It is this feature that adds a significant level of vulnerability to a person in that situation and creates a need for clear residential rights and independent safeguarding.

OPA considers this review an excellent opportunity to extend the residential rights protections in Part 5 of the Disability Act to people with disability in 'new' and other assorted supported accommodation arrangements who are not currently eligible for the protections available to residents of residential services,[44] group home residents,[45] SDA residents with an SDA residency agreement[46] or people in an enrolled SDA dwelling with a Residential Rental Agreement.[47]

OPA recognises that some parts of Part 5 may need to be adapted for people in SFDA.

OPA notes an alternative reform option would be to amend the RTA to provide coverage for this currently unprotected cohort. If this option is considered, it would be critical not to treat these assorted supported disability residential arrangements like a standard residential tenancy arrangement – they demand greater protection and oversight. OPA also considers it would likely be more technically complex to capture the full range of residency and tenure arrangements described in the examples above within the RTA compared to the Disability Act.[48]

Recommendation 28
The Victorian Government should retain the residential rights protection framework in Part 5 of the Disability Act for all residential services that are not covered by the protections in the Residential Tenancies Act, including specialist forensic disability accommodation to the extent appropriate.

In order to capture the range of currently unprotected accommodation arrangements, the definitions of 'residential service' and 'disability service provider' in the Disability Act will need to be expanded.

Building on the discussions at Questions 22 and 26 above, OPA proposes that 'residential service' should be defined as residential accommodation where:

- the service provides long-term or short-term accommodation and support for people with a disability
- the provision of the accommodation and support are connected and both are managed by, or on behalf of, one or more disability service providers (who is registered as such by either DFFH or the NDIA), and
- the disability support provided is funded by the Secretary or the NDIA.

[44] *Disability Act 2006* (Vic) Part 5 Div 1.
[45] Ibid Part 5 Div 1 and 2.
[46] *Residential Tenancies Act 1997* (Vic) Part 12A.
[47] Ibid Part 2.
[48] Among other things, the RTA's definition of a 'health or residential service' and the question of 'exclusive possession' would need to be addressed. While the definition of 'health or residential service' has been removed as a legal barrier for protection of SDA residents with valid agreements, the same is not currently true for NDIS participants living in new supported accommodation arrangements.

This definition would cover short- and long-term accommodation (as the current definition does). The accommodation itself may be provided by an entity that is not a disability service provider, such as a housing association or private individual.

People residing in SDA enrolled dwellings on a short- or medium-term basis would also fall within this definition. OPA notes they would not be excluded from Part 5 by the operation of s 56(5) (which excludes 'SDA residents residing in SDA enrolled dwellings') because they are not 'SDA residents'.[49] This is important because these residents currently have no protection under either the RTA or Part 5 of the Disability Act due to the existing, limited definitions. As the following example shows, this can pose significant problems for residents:

- The property is an SDA enrolled dwelling but the current residents are residing at the property on a 'short' or 'medium' term basis.
- There is serious concern about resident compatibility, which impacts on quiet enjoyment of the property by one of the residents.
- The SDA provider appears to have entered into some sort of agreement with the 'supports with daily living' provider of two of the residents, which has impacted on the ability of the third resident to choose a different NDIS-funded 'supports with daily living' provider.
- The SDA was ostensibly built for one specific resident, with their support needs in mind. However, as a 'short-term' resident (likely waiting for the paperwork on their SDA residency agreement), they had no residential rights around selection of co-residents and so are now wondering if they need to find alternative accommodation with more compatible co-residents.

Recommendation 29
The Victorian Government should amend the definition of 'residential service' in the Disability Act to be residential accommodation where:

- **the service provides long-term or short-term accommodation and support for people with a disability. Note that accommodation may be provided by an entity that is not a disability service provider, such as a housing association or private individual**
- **the provision of the accommodation and support are connected and both are managed by, or on behalf of, one or more disability service providers, and**
- **the disability support provided therein is funded by the Secretary or the NDIA.**

To ensure the definition of 'residential service' proposed above captures the range of currently unprotected accommodation arrangements, the definition of 'disability service provider' will also need to be amended to recognise that the provider may be registered with the State or through the NDIA.

Recommendation 30
The Victorian Government should amend the definition of 'disability service provider' in the Disability Act to be:

- **the Secretary, or**

[49] A person must have an SDA residential agreement to be an SDA resident.

- **person or body registered on either of the Victorian or National Disability Insurance Agency register of disability service providers.**

Even when existing group homes have all transitioned to the RTA, OPA considers that Division 2 of Part 5, as amended by OPA's recommendations under Question 24 above, should remain in the Disability Act. Subject to the points below, these protections should be extended to residents of all accommodation arrangements that meet the proposed definition of 'residential service' above. As the examples show, there is nothing qualitatively different between many of residential services and group homes, so people in these residential services should be able to have equivalent residential rights protections as group home residents. Of course, this does not mean that they can never be relocated or evicted. However, an appropriate process would need to be followed.

In making this recommendation, OPA recognises it is not necessary or appropriate to extend the Part 5 Division 2 protections regarding temporary relocation and eviction to people in short-term accommodation arrangements. OPA also recognises that some parts may need to be adapted for people in SFDA. However, OPA considers they should still have the benefit of the preliminary provisions in Part 5 Division 2 regarding residential charges.

In OPA's view, the exclusion of short-term residents from some Part 5 Division 2 protections should be subject to the following exception. Through its work, OPA sees many situations where people enter accommodation on an initially 'short-term' basis but, for various reasons, may remain there for a long period of time. Such residents should be entitled to stronger protection of their residency than those in truly short-term arrangements. OPA therefore recommends that the Disability Act define a maximum period of residence, beyond which a person is no longer considered to be a short-term resident.

Recommendation 31
The Victorian Government should retain Division 2 of Part 5 of the Disability Act and extend its application to residential services irrespective of 'group home' status, with some limitations for short-term residents and specialist forensic disability accommodation residents as appropriate.

Recommendation 32
The Victorian Government should amend the Disability Act to define 'short-term resident', which sets a maximum residence period beyond which the person ceases to be considered a short-term resident for the purposes of Division 2 of Part 5.

Currently, people residing in a service on a short-term basis for the purposes of respite are excluded from receiving a residential statement.[50] OPA considers that all residents should receive a residential statement when they commence their residency, regardless of whether it is a short-term arrangement or not.

Recommendation 33
The Victorian Government should amend section 57 of the Disability Act to require residential statements to be provided to all residents, whether short-term or not.

Finally, OPA notes that Part 5 places a range of duties on disability service providers, intended to protect residents' security and enjoyment of their residency.[51] The Disability Act also sets out a

[50] *Disability Act 2006* (Vic) s 57(1A).
[51] Ibid s 58.

range of offences regarding interference with residency rights.[52] However, OPA understands that these penalty provisions are rarely, if ever, used. To help give effect to the intent of these provisions and protect people's rights, OPA believes that residents should have a right to apply to VCAT for relief where a disability service provider breaches their duties under this Part.

Recommendation 34
The Victorian Government should amend the Disability Act to enable residents to apply to the Victorian Civil and Administrative Tribunal for relief where a disability service provider has breached their duties under Part 5.

8. Restrictive practices

Question 28: How could the authorisation model be more consistent?

There are currently two parallel authorisation processes for restrictive practices in the Disability Act: Part 6B applies to registered NDIS providers and Part 7 applies to state disability service providers.

Through its work, including the Independent Person Project (discussed further below), OPA has observed confusion among providers regarding the processes and their obligations set out in these Parts. Importantly, confusion results in reduced compliance with the requirements under the Act. This can mean that people with disability miss out on important safeguards. It would be simpler for all parties if there were a single, consistent framework for authorisation and use of restrictive practices in Victoria.

Recommendation 35
The Victorian Government should amend the Disability Act to provide single framework for the use of restrictive practices, which applies to both registered National Disability Insurance Scheme providers and state disability service providers.

Question 29: How could we strengthen the authorisation model?

OPA see six major problems with the current authorisation framework for regulated restrictive practices, namely a lack of clarity about:

- how the use of restrictive practice will address or assist the person's behaviour
- why the restrictive practice is in proportion to the potential negative consequence or risk of harm
- how the restrictive practice is least restrictive of the person as is possible in the circumstances
- how the restrictive practice is a last resort

[52] Ibid s 62.

- how the use of restrictive practice can be reduced or eliminated, and
- how the Victorian system of authorisation operates.

OPA considers that the authorisation model could be strengthened in a number of ways. Amendments should be made to ensure that:

- the legislation is easy to follow
- the human rights of the person subject to regulated restrictive practices are more clearly articulated by the framework
- regulated restrictive practices are only authorised as a last resort
- guardians are not allowed to play the role of Independent Person.

Ease of use

In merging Parts 6B and 7 of the Disability Act, there is an opportunity for the State to help ensure that the regulatory framework for authorising regulated restrictive practices is both clearer and logically consistent.

The framework governing the use of regulated restrictive practices includes six key aspects:

- Legal Authorisation
- Clinical Oversight and Approval
- Independent Support
- Review and Appeal
- Breaches of the Legislation
- Special Authorisation

With regard to ensuring the legislation is easier to follow, OPA considers that the sections could be more clearly ordered to reflect what would ideally happen to safeguard rights under the framework. In the NDIS space, the first elements of a solid authorisation process generally sit with the Commonwealth:

1. The registered NDIS provider is registered to provide behaviour support, and
2. A Behaviour Support Practitioner develops the BSP for the person.

NDIS rules apply to these steps.[53]

[53] *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth).

In Victoria, once the Behaviour Support Practitioner has developed a plan for a person that includes regulated restrictive practices, the process for the authorisation of that plan for the individual (and the opportunity for review) should happen in the following order:

1. The BSP is sent to the Authorised Program Officer (APO) of the registered NDIS provider.

2. The APO authorises the use of regulated restrictive practices but only if (a) an independent person has explained the regulated restrictive practices to the person and (b) if the regulated restrictive practices include seclusion, physical or mechanical restraint, these are approved by the Senior Practitioner.

3. When Step 2 is complete, the APO must give a notice to the person advising that the regulated restrictive practices will commence in 2 days.

4. The person has 28 days from the receipt of that notice to apply to VCAT to appeal either the APO's authorisation and/or the Senior Practitioner's approval of seclusion, physical or mechanical restraint.

The BSP is time limited. This means that the authorisation process would need to repeat, from scratch, and be completed, before the expiry of the authorised plan to ensure the person is lawfully subject to regulated restrictive practices. All of this would be more likely to occur in a timely fashion where the APO's central role in the process is more clearly specified.

Recommendation 36
The Victorian Government should amend the Disability Act to clearly articulate that the Authorised Program Officer is responsible for coordinating the authorisation process for regulated restrictive practices.

Implementing this recommendation would strengthen the framework by helping ensure that the key steps on the authorisation timeline occur in a timely fashion and do not leave people with expired plans or subject to unlawful restrictive practices.

Recommendation 37
The Victorian Government should amend the Disability Act to include an example in the new restrictive practices section that documents the order of key steps required by the authorisation framework.

In OPA's experience and work with APOs, the authorisation framework has a significant flaw in relation to the expiry of the APO's authorisation of a regulated restrictive practice.[54] Section 132ZR (Authorisation for use of regulated restrictive practices on NDIS participants with NDIS Behaviour Support Plans) has the following clause in relation to when an authorisation ceases to be 'in force':

> *(2) An authorisation given under this section is in force until—*
>
> *(a) the authorisation is revoked; or*
>
> *(b) if the NDIS participant's NDIS behaviour support plan is reviewed and, in consequence of the review, **a new plan is developed**; or*

[54] *Disability Act 2006* (Vic) s 132ZR(2). Note that this provision applies to NDIS participants under Part 6B.

(c) the NDIS participant's NDIS behaviour support plan expires—

whichever happens soonest. [emphasis added]

The problem with (b) in this section is that a new plan may be 'developed' without yet having been 'authorised'. Hence, in the ordinary course of events in which a new BSP that includes regulated restrictive practices is developed to replace an expiring BSP, the operation of Part 6B means that a person is likely being subject to unauthorised restrictive practices each time this occurs, for the period of time between the new plan being 'developed' and 'approved'. For example, K has a current authorised BSP that includes regulated restrictive practices. Then, in preparation for the expiry of the current BSP, the Behaviour Support Practitioner sends a new BSP to K's APO. At this point, s 132ZR(2)(b) has been satisfied and so the authorised current plan is no longer in force. However, neither have steps 2 and 3 above been satisfied. The APO has not yet been able to undertake the required steps necessary to authorise the new plan. In this current, and common, scenario, the authorisation for K's regulated restrictive practices is rescinded prior to the completion of the new plan's authorisation process, yet K likely remains subject to restrictive practices in the interim.

Recommendation 38
The Victorian Government should amend the Disability Act to ensure that the Authorised Program Officer's authorisation of a regulated restrictive practice applies until the authorisation is revoked, expires or a new plan is 'authorised'.

Human rights

The human rights protections for persons subject to the regulated restrictive practices authorisation regime could be strengthened in at least two further ways. While the BSP process is regulated under NDIS rules, and technically requires the Behaviour Support Practitioner to consult with the person and their family and other key supports during the process,[55] they must also:

…provide details of the intention to include a regulated restrictive practice in the behaviour support plan, in an appropriately accessible format, to:

(a) the person with disability subject to the plan; and

(b) the person with disability's family, carers, guardian or other relevant person.[56]

In practice, OPA knows that this does not always happen in an adequate way.

Given that the State has an authorisation process, OPA suggests that the APO is given a specific role in relation to three human rights protective elements that are not yet present in the framework:

1. The APO should be required to ensure that the person has been given a clear and accessible explanation of the proposed restrictive practices.

[55] *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) rr 20(3)(d)-(e).
[56] Ibid r 20(4).

2. The State authorisation process should ensure that the will and preferences of the person in relation to the proposed regulated restrictive practices are sought, considered and documented.
3. The APO should be required to explain the State's authorisation process to the person, including the role of the independent person (before they meet them) and their right to seek a review of the authorisation and use of regulated restrictive practices by VCAT.

These elements would all assist the State to better meet its obligations to people with disability under both the Charter and under the CRPD. These changes all promote the role and centrality of the person to the process, including by embedding a proper consideration of their will and preference into the authorisation process and ensuring all authorising parties (the APO and the Senior Practitioner) are able to fully consider the options available with the persons wishes at front of mind. Of course, will and preference could not be ascertained without the person first knowing what their BSP included and why and, importantly, that the APO is sure the person has been apprised of their right of review.

In practice, the first new requirement imposed on the APO – to ensure that the person understands (as far as is possible) **what** regulated restrictive practices are being proposed and **why** they are being proposed – could be achieved by using the materials developed by the Behaviour Support Practitioner in order to meet their own practice requirements (see quoted rule above).[57] Where these have not been developed or provided to the person, the onus would then fall to the APO to have the conversation themselves. Adding this requirement also strengthens the authorisation framework by requiring the APO to understand the 'what' and the 'why' themselves, so as to be able to explain them to the person. This aligns with the existing requirements under the Disability Act that the APO must be satisfied that any regulated restrictive practice they authorise are necessary to prevent harm to themselves or another person, are 'least restrictive' under the circumstances and are not applied for longer than necessary.[58]

Recommendation 39
The Victorian Government should amend the Disability Act to impose on Authorised Program Officers a requirement that, prior to authorising any restrictive practice, they are confident that the person has been provided with a clear and accessible explanation of which regulated restrictive practices are being included in their new Behaviour Support Plan and why.

Another way in which the authorisation process could be made more protective of the person's human rights is through the explicit inclusion of consideration of the person's will and preferences in relation to the proposed regulated restrictive practices. Specifically, the person's will and preferences need to be sought and considered and that the consideration and resulting outcomes for the approved restrictive practices are clearly documented.

The APO could fulfil this new requirement by working in conjunction with the person's support team or by having that conversation with the person themselves. The general principles in the *Guardianship and Administration Act 2019* (Vic) provide guidance on how the Disability Act could promote consideration of these issues:

[57] Ibid r 20(4).
[58] For example, *Disability Act 2006* (Vic) s 132ZR(1)(a) & s 132ZR(1)(b).

(1) A person exercising a power, carrying out a function or performing a duty under this Act must have regard to the following principles—

(a) a person with a disability who requires support to make decisions should be provided with practicable and appropriate support to enable the person, as far as practicable in the circumstances—

(i) to make and participate in decisions affecting the person; and

(ii) **to express the person's will and preferences**; and

(iii) to develop the person's decision-making capacity;

(b) the will and preferences of a person with a disability should direct, as far as practicable, decisions made for that person;

(c) powers, functions and duties under this Act should be exercised, carried out and performed in a way which is the least restrictive of the ability of a person with a disability to decide and act as is possible in the circumstances… [emphasis added][59]

Alternatively, a similar duty could be imposed specifically on the APO in relation to their authorisation role. For the authorisation process to be human rights compliant, it is crucial that the person authorising the regulated restrictive practices understands and has appropriately considered the implications of the person's will and preferences on the proposal. Documentation of this consideration would also greatly assist the other safeguarding arms of the framework to play their roles better (for example, the Senior Practitioner and the Independent Person).

Recommendation 40
The Victorian Government should amend the Disability Act to ensure that the Authorised Program Officer carries out their duties in such a way as to ensure the will and preferences of a person subject to a regulated restrictive practice should direct, as far as practicable, decisions made for that person about those practices.

Recommendation 41
The Victorian Government should amend the Disability Act to ensure that the will and preferences of the person in relation to their proposed regulated restrictive practices are clearly documented and have been fully considered (and submitted to the Senior Practitioner where relevant) as part of the authorisation process.

Recommendation 42
The Victorian Government should amend the Disability Act to ensure that the Authorised Program Officer has 'responsibility for sourcing the Independent Person' as part of their authorisation role.

Ensuring the person subject to regulated restrictive practices is fully apprised of the State's authorisation process, including the role played by the Independent Person and the opportunity for review at VCAT, would significantly strengthen the present framework. While mention of the

[59] *Guardianship and Administration Act 2019* (Vic) s 8.

person's right of appeal to VCAT is currently a requirement under s 132ZU(3) of the Disability Act, OPA considers that this notification must be provided in an 'appropriately accessible format'.[60]

Recommendation 43
The Victorian Government should amend the Disability Act to impose on Authorised Program Officers a requirement that, before the person meets with their Independent Person, the Authorised Program Officer has explained the steps required by the State authorisation process and the role of the Independent Person in that process.

Recommendation 44
The Victorian Government should amend the Disability Act to impose on Authorised Program Officers a requirement that the notification of their approval of a regulated restrictive practice, which currently includes reference to their right to seek a review by the Victorian Civil and Administrative Tribunal, is provided in an appropriately accessible format.

For the purpose of clarity, OPA contends that a standalone section on the APO's notification of authorisation would be extremely helpful. It would further strengthen the human rights protections contained in the framework if this section included a requirement to document the person's will and preferences in relation to the proposed restrictive practices, and how they have been factored into the decision to authorise those practices.

Recommendation 45
The Victorian Government should amend the Disability Act to clearly articulate the requirements for the Authorised Program Officer's notification of authorisation to both the person and the Senior Practitioner. The notification must include documentation of the person's will and preferences and how they have been considered in the authorisation process.

Although it is articulated in the NDIS Rules,[61] the requirement that a regulated restrictive practice 'be used only as a last resort in response to risk of harm to the person with disability or others, and after the provider has explored and applied evidence based, person-centred and proactive strategies' is not currently articulated in the State authorisation framework. This is a significant oversight. OPA recommends that this oversight be addressed in the new, merged part governing the authorisation process for regulated restrictive practices.

Recommendation 46
The Victorian Government should amend the Disability Act to prevent the use of a regulated restrictive practice against person unless it is a last resort in response to risk of harm to the person with disability or others.

The Independent Person should not be the person's guardian

[60] See similar provision in *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) r 20(4).
[61] *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) r 21(3)(c).

OPA Guardians have been asked by Behaviour Support Practitioners to consent to the use of restrictive practices. While some jurisdictions allow guardians to provide consent to restrictive practices in BSPs, Victoria is not such a jurisdiction.

Behaviour support practitioners have also asked guardians to perform the independent person role where the guardian has no powers from VCAT to perform the role and may also have been involved in the development of the BSP.

In addition, a close reading of s 132ZS(5) indicates that the person's guardian would be excluded from undertaking the role of the Independent Person on the grounds that the Behaviour Support Practitioner is required to consult with the person's guardian during the development and review of the person's BSP.[62]

OPA contends that the use of a guardian to perform the safeguarding role of an Independent Person is inappropriate and should be explicitly excluded from this role, for example, by inclusion in the list provided in s 132ZS(5).

Recommendation 47
The Victorian Government should amend the Disability to make clear that the independent person must not be the person's guardian.

Other suggested amendments

Currently, a person subject to regulated restrictive practices has 28 days following the initial provision of the APO's authorisation notice to seek review of that authorisation at VCAT.[63] OPA considers that there is no reason to confine the person's right to seek review of the regulated restrictive practice arrangements to that initial 28 day period.

Recommendation 48
The Victorian Government should amend the Disability Act to establish a right of a person the subject of the restrictive practices to apply to the Victorian Civil and Administrative Tribunal for a review of those restrictive practices at any time.

OPA's experience with the authorisation framework indicates that it would be beneficial to enable an Independent Person to report concerns about the proposed use of regulated restrictive practices on an NDIS participant directly to the NDIS Quality and Safeguards Commissioner.

Recommendation 49
The Victorian Government should amend the Disability Act to enable an Independent Person to report any concerns identified in the course of their role directly to the National Disability Insurance Scheme Quality and Safeguards Commission.

[62] Ibid r 20(3)(e).
[63] *Disability Act 2006* (Vic) s 132ZW.

Question 30: How could we improve the role of the independent person?

The Independent Person role is an important and underutilised safeguard under the Act.

In 2020, DFFH funded OPA to undertake the Independent Person Pilot Project. The report of that project outlines known issues in practice and identifies opportunities to strengthen the independent person role.

Based on that report, OPA recommends the role of the independent person should be continued. OPA considers it essential that the independent person is familiar with the legal requirements regarding justification and use of restrictive practices in order to perform the role effectively. However, OPA does not think it would be necessary to have trained professionals perform the role. OPA considers that the independent person role could be carried out by trained volunteers, similar to OPA's Community Visitors Program, Community Guardianship, Independent Third Persons and Corrections Independent Support Officers programs.

OPA makes the following recommendations for amendments to the Disability Act to support the effective operation of the independent person role. The report provides the explanation for these recommendations, as well as a number of important, non-legislative recommendations that should be considered in future.

Recommendation 50
The Victorian Government should amend the Disability Act to more clearly articulate the safeguarding and explanatory aspects of the independent person role.

Recommendation 51
The Victorian Government should amend the Disability Act to permit the independent person to report any issue of non-compliance to the Public Advocate or to the Senior Practitioner, not only when the person does not understand the proposal to use restrictive practices.

Recommendation 52
The Victorian Government should amend the Disability Act to ensure independent persons have access to the Senior Practitioner for advice, guidance and assistance.

Question 31: Should the Act include penalties for NDIS providers who do not follow the requirements?

There are currently penalty provisions in the Disability Act for disability service providers regarding restrictive practices[64] and compulsory treatment.[65] However, these penalty provisions do not extend to NDIS providers operating in Victoria.

OPA considers that any service provider operating in Victoria should comply with Victorian law. OPA recommends the existing penalties for disability service providers should be extended to NDIS providers operating Victoria in regard to both restrictive practices and compulsory treatment.

[64] Ibid ss 134, 139–149.
[65] Ibid ss 150A, 185, 190(2), 201(c), 201G.

These penalty provisions should stand in addition to any penalties or consequences through the NDIS Quality and Safeguards Commission, such as deregistration.

OPA notes that financial penalties should be proportionate to both the gravity of the breach and the size of the organisation. For example, a small provider may be deterred from committing future breaches after receiving a fine whereas a very large provider may consider the same penalty 'the cost of doing business' and budget for losses due to regulatory non-compliance. A large provider may require a significantly higher penalty to achieve successful deterrence.

Recommendation 53
The Victorian Government should amend the Disability Act to extend penalties for non-compliance with provisions regarding restrictive practice and compulsory treatment to NDIS providers operating in Victoria.

9. Compulsory treatment

Question 32. Should the criteria for admission to a residential treatment facility for compulsory treatment be reconsidered to cover people who do not meet the current criteria in the Disability Act?

OPA recommends that the criteria for admission to an RTF for compulsory treatment be broadened to enable the admission of any person with a cognitive or neurological disability, rather than only intellectual disability, provided they meet the remaining criteria in s 152(1) of the Disability Act. This broader criterion would include conditions like acquired brain injury, autism and Huntington's disease.

Being admitted to an RTF under one of the orders specified in s 152(2)(a)-(d)[66] is typically a pathway out of prison. Currently, the pathways out of prison are often blocked for people with a cognitive or neurological disability (other than an intellectual disability) who require disability-related treatment to manage a serious risk of violence, even if they are eligible for or subject to one of these orders. This is because they are not currently eligible for admission to an RTF because of their disability type, and there are very few if any alternative, equivalent settings in the community to which they can be released.

OPA has witnessed the trauma and harm experienced by many of its clients stuck in this position, detained sometimes for many years in a prison that is ill-equipped to meet their disability-related needs or reduce the risks they pose. OPA has previously provided information to the Victorian Ombudsman regarding this issue, who included a story of one of OPA's clients in her report exploring the imprisonment of persons who have been found unfit to be tried.[67] As a more recent example, OPA is guardian for a man with an acquired brain injury who was placed on a custodial supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic). This order detained him indefinitely in prison, simply because his disability type meant he was not

[66] A residential treatment order under the *Sentencing Act 1991* (Vic), a parole order under the *Corrections Act 1986* (Vic), a custodial supervision order under the *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), or an order transferring the person from prison under s 166 *Disability Act 2006* (Vic).
[67] Victorian Ombudsman, *Investigation into the imprisonment of a woman found unfit to stand trial* (Report, October 2018) 50-52.

eligible for admission to an RTF. Despite strenuous advocacy and efforts by a range of parties, he spent six years in prison, with limited opportunity for therapeutic engagement and support, until he was finally able to released recently. This proposed reform would provide people like this man with a potential pathway out.

In order to be admitted to an RTF, the Secretary would still need to be satisfied that the treatment facility could provide suitable treatment for the person,[68] that all less restrictive options have been tried or are considered unsuitable,[69] and that their admission is appropriate in the circumstances.[70] These provisions provide an important filter to prevent a person being inappropriately admitted to an RTF under the proposed broader criteria if suitable treatment could not be provided to them, and also minimise any possible net-widening effects.

OPA accepts that, in the short-term, this proposed reform may not assist many people as there are currently very few RTF beds available in Victoria, none that are available to women, and all (necessarily) currently specialise in treating people with intellectual disability. However, OPA hopes that, with this reform, the RTFs would broaden their treatment capabilities to meet individual needs and that, when resources permit, the government will invest in further small-scale RTFs (as well as step-down and less restrictive settings) to better meet the needs of this small but complex cohort who have long been overlooked for too long.

To give greater practical effect to this reform, OPA also suggests that the criteria for the making of:

- a residential treatment order under s 82AA of the *Sentencing Act 1991* (Vic) and
- an order transferring a person out of prison under s 166 of the Act

should be amended, to enable any person with a cognitive or neurological disability, rather than only intellectual disability, to be the subject of such an order (and therefore admitted to an RTF).

Recommendation 54
The Victorian Government should amend the Disability Act to broaden the criteria for admission to a residential treatment facility to enable the admission of any person with a cognitive or neurological impairment, provided they meet the remaining criteria.

Question 33. Should supervised treatment orders continue to be an option for people who have previously displayed a pattern of violent or dangerous behaviour, and where there is a significant risk of serious harm to another person?

OPA recommends that STOs should continue to be an option for people who have previously displayed a pattern of violent or dangerous behaviour and where there is a significant risk of serious harm to another person, provided the regime's safeguards are strengthened. OPA's recommendations for enhanced safeguards are set out below.

[68] *Disability Act 2006* (Vic) s 152(1)(d).
[69] Ibid s 152(1)(c).
[70] Ibid s 152(3).

In OPA's experience, STOs play an important role in supporting the small number of people with intellectual disability, who present a significant risk of serious harm to others and who will not or cannot consent to necessary treatment, to work towards addressing their risk with specialised treatment and supports. In doing so, the STO helps them increase their opportunities for social participation and enhances their quality of life.[71]

Importantly, the STO regime provides transparency and independent legal and clinical oversight to these practices, and also requires VCAT to be satisfied in each case that the limitations on human rights are justifiable.

OPA also notes that the availability of an STO (as a civil detention order) can help divert a person from prison, both in the short-term (where pending charges may be withdrawn, or a non-custodial sentence may be imposed, if the prosecutor or court is satisfied the STO will address the concerns) and in the longer-term by reducing the likelihood of future offending.

If the STO regime were revoked, OPA is concerned that Victoria would risk a return to the situation prior to the establishment of the regime in 2007 – well-documented in previous reports[72] – whereby people with disability who were considered to pose a significant risk were subject to significant restrictions behind closed doors in the community, with unclear or no legal authorisation, and with limited or no clinical or independent oversight. While the Disability Act and, more recently, the NDIS Act have established frameworks for approving and monitoring restrictive practices that fall short of detention, these are less stringent and lack many of the rights protections and safeguards of the STO regime. Concerningly, as noted above, OPA regularly witnesses significant confusion and variable levels of compliance by service providers with these less-stringent requirements, and intended safeguards like the independent person are not currently effective. By transparently regulating these highly restrictive practices that are perhaps likely to occur in some form in practice regardless, the STO regime enables better scrutiny and protection of the human rights of those subject to those restrictions in our imperfect, real-world context. In OPA's view, the rationale advanced by the Victorian Law Reform Committee for the establishment of the STO regime[73] remains valid.

A secondary concern is that, if service providers were not able to obtain the authority of an STO to detain a person to ensure compliance with treatment and prevent a significant risk of serious harm to others, some service providers would withdraw their services from the person altogether due to occupational health and safety concerns or other business risks. OPA regularly sees this occurring for people who are not subject to STOs because, unlike when the State was responsible for providing disability services, private service providers operating in the NDIS market are under no obligation to (continue to) provide services to an NDIS participant. As OPA has previously reported,[74] if a person with complex support needs is unable to engage service providers willing to assist them, they will be left in an extremely vulnerable position.

Recommendation 55

[71] The criterion in s 191(6)(c) of the Act requires that the proposed treatment will be of 'benefit to the person', which is defined in these terms in s 3 of the Act.
[72] Frank Vincent, *Report of review panel appointed to consider the operation of Disability Services, Statewide Forensic Service* (Report, 2001); Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care Final Report* (Report, 2003).
[73] Victorian Law Reform Commission, *People with Intellectual Disabilities at Risk: A Legal Framework for Compulsory Care Final Report* (Report, 2003).
[74] Office of the Public Advocate, *The Illusion of Choice and Control: the difficulties for people with complex and challenging support needs to obtain adequate supports under the NDIS* (Report, September 2018).

The Victorian Government should retain the supervised treatment order regime in the Disability Act with enhanced safeguards.

Scope of the STO regime

Consistent with our previous recommendations, OPA supports the extension of the STO regime to cover persons with cognitive or neurological disability (provided they meet the remaining criteria, and subject to the enhanced safeguards discussed below).

Through its work, OPA believes there is a small but important cohort of people with cognitive or neurological disability who would benefit from an STO. These people are currently experiencing the risks identified above, including inadequate oversight of restrictions imposed on them, inadequate or tenuous supports due to service provider withdrawal and/or cycling in and out of prison. As above, OPA believes that the targeted use of STOs can improve people's quality of life and better protect their human rights.

OPA notes that the Victorian Law Reform Commission also recommended extending the STO regime to cover people with acquired brain injuries in 2012.[75]

Recommendation 56
The Victorian Government should amend the Disability Act to extend the supervised treatment order regime to cover persons with cognitive or neurological disability (provided they meet the remaining criteria).

In relation to the issues referred to in the consultation report regarding the 'residential service' criteria for an STO posing a problem in practice, OPA notes that the amended definition of 'residential service' proposed in Recommendation 29 above would address this.

Should there be a time limit on STOs?

OPA believes that, if:

- rigorous scrutiny is applied to ensure that there is cogent evidence on which VCAT can be satisfied that each of the statutory criteria continues to apply;[76] and

[75] Victorian Law Reform Commission, *Guardianship: Final Report 24*, (Report, 2012), recommendation 415, lxxii. For the VLRC's rationale, see chapter 23 of that report.
[76] Including that the person continues to present a significant risk of serious harm to others that cannot be substantially reduced using less restrictive means and that the proposed treatment will benefit the person and substantially reduce that risk, per *Disability Act 2006* (Vic) s 191(6).

- VCAT has given proper consideration to the person's relevant human rights and not acted incompatibly with those rights,[77]

then it is justifiable for the person to be placed under a further STO. Accordingly, subject to the enhanced safeguards discussed below, OPA does not support the introduction of a maximum time limit on how long a person can be subject to consecutive STOs under the Act.

OPA notes there is no time limit on how long a person with mental illness may be detained for compulsory treatment under an inpatient treatment order under the *Mental Health Act 2014* (Vic). The duration of detention for compulsory treatment in that context similarly depends on the person continuing to meet the relevant criteria and the application of appropriate safeguards.

OPA suspects that, if a maximum time limit on consecutive STOs was introduced into the Act, then practical workarounds would be likely to occur. For example, if a person was released from an STO because they had reached the maximum time limit, the service provider (or another service provider) could apply for a new STO a short time later if they held concerns that the substantive criteria continued to be met. Such workarounds would undermine the intent of the reform but be difficult to stop in practice.

OPA notes that the case of *MOT* currently before the Supreme Court may impact on how applications for successive STO are appropriately dealt with under the legislation.

Recommendation 57
The Victorian Government should not amend the Disability Act to introduce a maximum time limit on consecutive supervised treatment orders.

OPA recognises that an absence of a maximum time limit on successive STOs risks *de facto* indefinite detention. To address this risk and ensure the person's rights are upheld, VCAT should be expressly required to consider the extent to which the intended benefit to the person was achieved and the significant risk of serious harm to others was reduced under the previous order/s. This assessment must then inform VCAT's consideration of:

- whether it can be satisfied that the proposed new STO '*will* benefit the person and substantially reduce the significant risk of serious harm to another person' (as required by s 191(6)(c) of the Act); and
- whether the making of the proposed new STO is a demonstrably justifiable limitation on the person's human rights (as required by s 38 of the Charter).

Recommendation 58
The Victorian Government should amend the Disability Act to require the Victorian Civil and Administrative Tribunal, on any application for a subsequent supervised treatment order, to consider the extent to which the intended benefit to the person was achieved and the significant risk of serious harm to others was reduced under the previous order/s. This assessment must inform the Victorian Civil and Administrative Tribunal's consideration of:

[77] As required by the obligation placed on VCAT by s 38(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

- **whether it can be satisfied that the proposed new supervised treatment order '*will* benefit the person and substantially reduce the significant risk of serious harm to another person' (as required by section 191(6)(c) of the Act); and**
- **whether the making of the proposed new supervised treatment order is a demonstrably justifiable limitation on the person's human rights (as required by section 38 of the Charter).**

Ensuring the human rights compatible operation of the STO regime in an NDIS world

Before outlining some more specific recommendations for enhanced safeguards, OPA will briefly discuss the impact of the rollout of the NDIS on the practical operation of the STO regime and shed light on a deeply concerning issue that OPA increasingly sees through its work. OPA believes this poses a risk to the continued justifiability of the STO regime and therefore needs to be addressed.

When the STO regime commenced in 2007, the Victorian Government, through the Department of Human Services, was the sole funder and regulator of disability services. It also provided a range of disability accommodation, case management and support services. While the Act has never explicitly placed accountability on the State for STO outcomes, it made APOs, who apply for the orders, responsible for implementing them. When the regime commenced, APOs were almost exclusively State government officers.

With the introduction and rollout of the NDIS, the Victorian Government has withdrawn from its traditional roles as funder and service provider. People subject to STOs are now increasingly living in accommodation and receiving services that are funded by the NDIS. The APOs who apply for and implement the STOs are now employed in the private or community sector. They have no power or control in relation to the funding of services necessary to implement the treatment plan and, unlike State-employed APOs, are unable to escalate concerns about funding or service gaps up the chain of command to someone with power to address it. An APO's ability to implement the treatment plan approved by VCAT is therefore entirely dependent on external parties – principally the NDIA and sometime the Victorian Government – agreeing to and continuing to fund the necessary supports.

STOs used to operate as a 'ticket' that guaranteed priority access to services. However, OPA staff, APOs and Support Coordinators have all noted that the existence of an STO can sometimes create additional hurdles to accessing NDIS funding for their client. This appears to be because of an ongoing jurisdictional funding dispute regarding the relative responsibilities of the NDIS and the State at the interface of the justice system.[78] While STOs are civil rather than criminal orders, the NDIA sometimes takes the view that certain supports requested on behalf of a person who is subject to an STO reflect offending- or justice-related needs rather than disability support needs, and so refuse to fund them on the basis of the justice interface principles.[79] These contested, unfunded supports can be vital to helping a person build their pro-social life skills and participate safely in the community.

[78] The Disability Royal Commission's *Public Hearing 15: People with cognitive disability and the criminal justice system: NDIS interface* continued the Commission's investigation of this issue in mid-August 2021.
[79] Council of Australian Governments, *Principles to Determine the Responsibilities of the NDIS and Other Service Systems* (27 November 2015) 21.

Relatedly, OPA is aware of many people subject to STOs who are not receiving (funding for) the supports they need to participate in their 'step down' plan. The step down plan is a series of carefully planned and increasingly less restrictive community access activities, designed to enable the person to progressively increase their community access while ensuring community safety. The person must successfully meet the requirements of each step down level before progressing to the next level (for instance, the person may initially be closely supervised by one or even two people, then the person will be 'shadowed' and then just subject to spot checks). The step down plan is a crucial plank of the STO because, as well as increasing the person's community participation and quality of life, it is how the person demonstrates they no longer need to be detained under an STO. If there is insufficient or no funding to cover the people necessary to supervise, shadow and conduct spot checks, then the step down activities cannot occur and the person cannot progress. Not only does this mean the person misses out on participating in activities in the community, it can significantly and unnecessarily prolong their detention under (successive) STOs. OPA has seen STO implementation plans for some clients citing 'lack of funds' in relation to failure to progress step-downs, where the necessary supports have gone unfunded for years.

In proposing the STO regime, the VLRC noted that the provision of 'benefits to the person' (as promised in each treatment plan) is the 'primary justification' for restricting a person's liberty and is what prevents this preventative civil detention regime from being merely punitive in nature.[80] The human rights justifiability of the STO regime therefore hinges on the delivery of these benefits to the person. However, the consequence of these changes associated with the introduction of the NDIS is that OPA regularly sees people subject to STOs who are not receiving the full range of supports outlined in their approved treatment plans. Their progress stalls, and they may languish under the STO indefinitely. The APO, the Senior Practitioner and VCAT have no powers in these circumstances to materialise the funding necessary for these supports, especially as neither the State nor the NDIA are party to the matter. This systemic failure to ensure that STOs are implemented in practice as intended risks undermining the justifiability of the STO regime altogether.

The State's role

OPA encourages the Victorian Government to continue efforts with the NDIA and the Australian Government to clarify the relative funding responsibilities at the interface of the NDIS and justice system, and specifically ensure all support needs of the STO cohort are accounted for.

OPA notes that the STO regime is a state-sanctioned preventative detention and compulsory treatment regime with a very finely balanced human rights justification. Accordingly, regardless of ongoing negotiations with the Australian Government, OPA believes that the Victorian Government has a responsibility to ensure that the STO regime is implemented consistently with its human rights goals and delivers the intended benefits to each person subject to it. This includes ensuring they receive (by funding if necessary) all supports required to progress through the system as quickly as possible, so they are not detained any longer than necessary.

Recommendation 59

[80] Victorian Law Reform Commission, *People with intellectual disabilities at risk: a legal framework for compulsory care report* (Report, 2003) 51.

The Victorian Government should amend the Disability Act to clarify that the Secretary is responsible for ensuring that any person subject to a supervised treatment order receives the supports they require to progress through the system as quickly as possible.

VCAT's role

As well as the State taking greater responsibility, OPA has identified other legislative amendments that would help reduce the risk of people languishing on STOs where their treatment plans cannot be fulfilled due to funding or service gaps.

VCAT has a significant role to play in assessing whether the treatment plan is capable of being implemented in practice prior to making an STO. Where VCAT decides to vary a treatment plan, the Disability Act requires VCAT to be satisfied that the service provider can implement the varied treatment plan prior to making the STO (with that varied treatment plan).[81] OPA believes these provisions should be expanded and elevated to the status of a criterion in section 191(6) of the Act, so that VCAT must satisfy itself that every treatment plan coming before it can be implemented before making an STO, regardless of whether the plan was varied. This would help ensure the intended benefits to the person are realised in practice.

OPA notes the *Mental Health Act 2014* (Vic) contains an equivalent provision in its criteria for compulsory treatment: 'The… treatment [that has been found to be necessary] *will be provided* to the person'[82] if the person is made subject to an order.

Recommendation 60
The Victorian Government should amend the Disability Act to prevent the Victorian Civil and Administrative Tribunal from making a supervised treatment order unless satisfied that the disability service provider or registered National Disability Insurance Scheme provider, as the case requires, can implement the supervised treatment order and the treatment plan.

In OPA's view, far greater scrutiny needs to be applied where a person is subject to an STO (or an STO application) and funding is not available to deliver the supports that have been clinically recommended and set out in the approved treatment plan and that would enable the person to safely work towards transition to the community. This is because the intended benefits to the person are less likely to be realised and the limitations on their human rights are less likely to be justifiable. This is why Recommendation 58 above is so important in respect of any subsequent application.

If VCAT determines that part of the proposed treatment cannot be implemented due to intractable funding or service gaps, it should have the power to request the Secretary or their delegate to attend the hearing to explain this. Ultimately, however, if the funding and service gaps remain, then VCAT must proceed to consider whether the more limited STO treatment plan (excluding the undeliverable supports) would be compatible with the person's human rights before proceeding to make (or confirm) the STO.

Recommendation 61

[81] *Disability Act 2006* (Vic) ss 193(2), 196(7), 196(9).
[82] *Mental Health Act 2014* (Vic) s 5(c) (emphasis added).

The Victorian Government should amend the Disability Act to enable the Victorian Civil and Administrative Tribunal to join or request the attendance of the Secretary or their delegate at the hearing where funding or service gaps are preventing the implementation of a supervised treatment order.

Authorised program officers' role

Being most aware of what is happening on the ground, APOs also have a responsibility to ensure that people do not languish on STOs where their treatment plan cannot be fully implemented. Given APOs now typically work in the private or community sector, OPA believes it would be helpful to clarify and confirm their responsibilities in relation to STOs.

Recommendation 62
The Victorian Government should amend the Disability Act to clearly articulate the responsibilities of the Authorised Program Officer in relation to supervised treatments, including that they:

- **hold a coordination role in relation to treatment plan implementation and implementation reporting, and**
- **are responsible for bringing funding gaps that prevent the implementation of the approved treatment plan to the attention of the Secretary or their delegate and, if they cannot be resolved, to the Victorian Civil and Administrative Tribunal.**

If funding or service gaps arise during the operation of an STO and/or it becomes apparent that an approved plan will no longer be able to be implemented as intended, the APO should be required to apply for a review[83] to bring the issue to VCAT's attention. The issue can then be explored and the STO can be confirmed, varied or revoked as appropriate.

If the Senior Practitioner believes the approved treatment plan is not being implemented or is not able to be implemented as intended, he should direct the APO to apply to VCAT for a review. If the APO fails to do this, the Senior Practitioner should initiate the review himself.

Recommendation 63
The Victorian Government should amend the Disability Act to

- **require an Authorised Program Officer to apply for a review of the supervised treatment order if they become aware that the approved treatment plan is not being, or is not able to be, implemented due to funding or service gaps.**
- **require the Senior Practitioner to apply for a review of the supervised treatment order if they have directed the Authorised Program Officer to make such an application and the Authorised Program Officer has failed to do so.**

APOs are required to report to the Senior Practitioner on the implementation of the STO at intervals set by the Senior Practitioner, not exceeding six months.[84] In OPA's experience, it is rare for the Senior Practitioner to direct more frequent reports. OPA believes it would better safeguard

[83] *Disability Act 2006* (Vic) s 196(1).
[84] Ibid s 195(2).

people's rights if implementation reporting was required to occur more frequently, so that any issues can be detected and responded to more promptly.

The APOs of registered NDIS providers are required to report on the use of any restrictive practices to the NDIS Quality and Safeguards Commission. To help improve accountability, OPA believes that, whenever an APO is required to send reports on restrictive practices regarding persons subject to an STO to the NDIS Quality and Safeguards Commissioner, they should also be required to send copies of those reports to the Senior Practitioner.

Recommendation 64
The Victorian Government should amend the Disability Act to require Authorised Program Officers to report more frequently to the Senior Practitioner on the implementation of the supervised treatment order.

Recommendation 65
The Victorian Government should amend the Disability Act to require Authorised Program Officers of registered National Disability Insurance Scheme providers to send copies of any reports they are required to send to the National Disability Insurance Scheme Quality and Safeguards Commission regarding the use of restrictive practices on any person subject to a supervised treatment order to the Senior Practitioner.

Additional safeguards and legislative improvements

In addition to making registered NDIS providers equally liable for penalties under the Disability Act for non-compliance with compulsory treatment provisions (see Question 31 above), OPA has identified the following opportunities to improve the operation of the compulsory treatment regime and strengthen its safeguards.

Better definitions of key terms

The current definition of 'benefit to the person' in the Disability Act has two prongs: maximising quality of life and increasing opportunity for social participation. OPA is supportive of these two aspects, although suggests that the 'increased' opportunity for social participation under this definition could be strengthened to 'maximised' opportunity. This change of focus from 'increase' to 'maximise' would help ensure that any improvement on historically insufficient funding for community access supports would not automatically satisfy the STO 'benefit' criteria.

The human rights 'balance' of the STO regime is premised on the idea that 'benefit' of the compulsory treatment provided to the person would make up for the curtailment of their human rights associated with the STO. Ideally, the 'benefit' of the compulsory treatment would result in demonstrable progress towards fewer restrictions and lower levels of supervision, and eventually obviate the need for preventative detention. Under the current definition of benefit, there is no clear reference to the implicit goal of compulsory treatment: to maximise the development of the person's capacity to engage safely with the community. By adding this additional arm to the definition of 'benefit to the person', the regime and its parties can better identify the ways in which the treatment plan is promoting (or failing to promote) this particular critical function.

Recommendation 66

The Victorian Government should amend the definition of 'benefit to the person' in the Disability Act to have three equally important elements:

- **'maximising their quality of life'**
- **'maximising their opportunity for social participation'**
- **'maximising the development of their capacity to engage safely with the community'.**

Despite being a central concept and key aspect of the justifiability of the STO regime, the term 'treatment' is not defined in the Disability Act. OPA believes that definitions of 'treatment' and also 'material change' should be inserted into the Disability Act. While it may be difficult to comprehensively define these terms, it would assist all parties if the non-exhaustive definitions were accompanied by examples to guide practice, as disagreements regarding the interpretation and application of the terms do currently occur.

Recommendation 67
The Victorian Government should amend the Disability Act to insert definitions of 'treatment' and 'material change' and provide examples to guide practice.

Strengthening the Public Advocate's safeguarding role

Through the work of its Disability Act Officers and Community Visitors (described in the Introduction to this submission), OPA plays an important safeguarding role in relation to people subject to STOs. By visiting and speaking directly with them, OPA sometimes becomes aware of information that it believes should be brought to VCAT's attention but which has not been raised by any other party. For example, OPA sometimes becomes aware of changes that have been made to a person's treatment plan to increase the level of supervision or restriction, which OPA believes are material changes, but which have not been the subject of a material change application at VCAT.[85]

While OPA has a number of powers under the Disability Act in relation to STOs, there are also some gaps. If OPA believes an STO matter should be brought before VCAT for review, variation or revocation, it currently needs to ask the Senior Practitioner to make an application.[86] Only if the Senior Practitioner declines to do so is OPA's power enlivened.[87] OPA's independent safeguarding role would be strengthened if it were empowered to apply directly to VCAT.

Recommendation 68
The Victorian Government should amend section 196 of the Disability Act to empower the Public Advocate to apply directly to the Victorian Civil and Administrative Tribunal for a review, variation or revocation of a supervised treatment order.

Currently, if the Senior Practitioner approves a material change to a treatment plan, he must notify the person subject to the STO in writing of the change[88] but is not required to advise VCAT, the

[85] If an APO seeks to make a 'material change' relating to an increase in the level of supervision or restriction in the person's treatment plan, they are required to apply to VCAT for a variation of the plan, per *Disability Act 2006* (Vic) s 195(4)(b), (5A)(b).
[86] *Disability Act 2006* (Vic) s 196(3).
[87] Ibid s 196(4).
[88] Ibid s 195(6).

Public Advocate or any other parties of the change. For transparency, OPA believes these material change approvals should be filed with VCAT and copies sent to all parties.

Recommendation 69
The Victorian Government should amend the Disability Act to require the Senior Practitioner to file any approval for a material change to a treatment plan with the Victorian Civil and Administrative Tribunal and send copies of all parties.

10. Forensic disability services and sentencing

Questions 34-35

OPA is concerned by the continued over-representation of people with disability in the criminal justice system. Through its work, OPA sees how such people often fall between the cracks of the various service systems that are meant to support them, which sometimes results in avoidable and unduly lengthy periods of time in custody.[89] The proliferation of new roles and services that may now be involved in a person's life since the rollout of the NDIS, combined with inconsistent information sharing between services and the court and the cessation of case management have all contributed to this problem.

It is essential that people with disability do not remain in prison simply because of a lack of appropriate support. OPA would like to see improved access to disability services in custody as well as more effective arrangements to support transition out of custody at the earliest opportunity.

[89] Office of the Public Advocate, *The Illusion of Choice and Control: the difficulties for people with complex and challenging support needs to obtain adequate supports under the NDIS* (Report, September 2018); Office of the Public Advocate, *Submission to Disability Royal Commission in response to Criminal Justice Issues Paper* (31 March 2020).