Office of the Public Advocate

Safeguarding the rights and interests of people with disability

Submission to the
State Disability Plan 2021–2024

Consultation paper

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Abbreviations

CEO	Chief Executive Officer
COAG	Council of Australian Governments
Convention	United Nations Convention on the Rights of Persons with Disabilities
DHHS	Department of Health and Human Services
OPA	Office of the Public Advocate (Vic)
NDIS	National Disability Insurance Scheme
VCAT	Victorian Civil and Administrative Tribunal

Recommendations

Recommendation 1
The next state plan should adopt a relational definition of disability with 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.

Medical evidence would not be mandatory, where there was no dispute that the person experienced functional barriers due to impairment. This process acknowledges that individuals with disability have support needs and are the author of their life.

Recommendation 2
The next state disability plan should describe a human rights approach in terms of individuals, communities, government and organisations supporting people with disability to lead a flourishing life.

Recommendation 3
The vision of the next state disability plan should be an inclusive Victoria, which resources people with disability to lead a flourishing life.

Recommendation 4
The next state disability plan should include a new outcome which relates to the opportunity for sexual satisfaction and reproductive control.

Recommendation 5
The next state disability plan should include a new outcome which relates to recognition and pride, in the fairness and safety domain.

Recommendation 6
The next state disability plan should include a new outcome which relates to personal control and autonomy, in the fairness and safety domain. This outcome will specify that people with disability have control over their environment and receive the support they need to make their own decisions.

Recommendation 7
The next state disability plan should mandate and outline a timetable for all Victorian government activities, policies, and programs to achieve universal design and remove discriminatory attitudes from government decision-making and administrative processes.

Recommendation 8
The next state disability plan should include a state government commitment to consider and implement all recommendations of the Royal Commission into Violence, Abuse Neglect and Exploitation of People with Disability, which have the support of organisations representing and controlled by people with disability.

Recommendation 9
The next state disability plan should contain a commitment to strengthening the legislated arrangements for disability inclusion, including enhancements to the Office for Disability, Disability Action Plans, State Disability Plan and the Victorian Disability Advisory Committee.

Recommendation 10
The next state disability plan should outline that the revised Disability Act will continue to support the safeguarding role of Community Visitors and recognise the role of the Public Advocate in supporting the human rights of people with disability through the provision of safeguarding mechanisms, advocacy and other programs and services.

Recommendation 11
The Victorian Government should seek to amend the *Residential Tenancies Act 1997* (Vic) to require SDA providers to offer SDA residency agreements as the default agreement to (prospective) residents in all SDA properties.

Recommendation 12
The Victorian Government should expand funding for independent legal and non-legal advice and advocacy to help people with disability to navigate and access the justice system.

Recommendation 13
The Victorian Government should ensure that outreach and advocacy supports are available to assist people with disability who have been victims of crimes to bring claims before the Victims of Crime Assistance Tribunal.

Recommendation 14
The Victorian Government should fund mandatory disability awareness training for all staff in the family violence sector. The training should be developed in consultation with people with disability.

Recommendation 15
The Victorian Government should fund mandatory disability awareness training for all justice staff to enable them to fulfil their obligations under the UN Convention on the Rights of Persons with Disabilities. The training should be developed in consultation with people with disability.

Recommendation 16
The Victorian Government should fund the continuation of the Communication Intermediaries Pilot Program to allow sufficient time for an outcomes review to be completed. If it proves successful, the program should continue and expand to:

- be available at all proceedings in all courts and tribunals
- be available for victims and alleged perpetrators.

Recommendation 17
The Victorian Government should legislate the Independent Third Person Program. The legislative provisions should include:

- a requirement for an ITP be present when police interview a person with an apparent cognitive impairment or mental illness

    - irrespective of age
    - whether they are an alleged offender, victim, or witness
- a penalty to be imposed when the requirement for an ITP is not complied with – e.g. evidence from an interview may be inadmissible if the procedure was not compliant with the ITP requirement
- a requirement for the ITP program to be adequately resourced to meet its legislated functions, based on proper modelling of demand.

Recommendation 18
The next state disability plan should outline a timetable for the design and implementation of a deprivation of liberty authorisation and regulation framework, consistent with the recommendations of the Public Advocate.

Recommendation 19
The Victorian Government should use the next state disability plan as a platform for the publication of human rights principles and guidelines for Corrections and other mainstream interface systems that build upon the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

1. Introduction

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.

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

OPA conducts investigations under the *Victorian Civil and Administrative Act 1998* (Vic) to assist the Victorian Civil and Administrative Tribunal (VCAT) in determining guardianship applications.

The Public Advocate also has a decision-making role under the *Medical Treatment Planning and Decisions Act 2016* (Vic). The medical treatment decisions team responds to requests for the Public Advocate to make decisions and in 2018-19, the team responded to 466 applications for a medical treatment decision.

Under the *Guardianship and Administration Act 2019* (Vic), OPA is required to promote and facilitate informed public awareness and understanding about substitute decision-making laws and any other legislation affecting persons with disability.[3] Last financial year, OPA's telephone advice service answered 13,644 calls, of which 17 per cent related to medical consent, medical treatment, advance care planning, and end of life issues. OPA coordinates a community education program for professional and community audiences across Victoria to engage on a range of topics including the role of OPA, guardianship and administration, enduring powers of attorney, and medical decision-making.

OPA is supported by more than 700 volunteers across four volunteer programs, including the Community Visitors Program, Community Guardian Program, Independent Third Person Program and Corrections Independent Support Officer Program.

Community Visitors are empowered by law to make announced or unannounced visits to Victorian accommodation facilities for people with disability or mental illness. They monitor and report on the adequacy of services provided in the interests of residents and patients. They ensure that the human rights of residents or patients are being upheld and that residents are not subject to abuse, neglect or exploitation. In their annual report, Community Visitors report to the Victorian Parliament on the quality and safety of the services they visit.

There are more than 400 Community Visitors who visit across three streams: disability services, supported residential services, and mental health services. In 2018-19, Community Visitors made 5,527 statutory visits across all three streams.[4]

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[1] Office of the Public Advocate (Vic). *Annual report 2018-19*, 9.

[2] Office of the Public Advocate (Vic) internal program data

[3] The *Guardianship and Administration Act 2019* (Vic) commenced on 1 March 2020, replacing the 1986 Act.

[4] Office of the Public Advocate (Vic). *Community Visitors Annual report 2018-19*.

2. Purpose

The purpose of this submission is to respond to the *Consultation paper for state disability plan 2021-2024*, published by the Department of Health and Human Services (DHHS) in November 2019.

3. Six key topic areas

3.1. Topic one: improving how we describe disability and disability inclusion in the next state plan

3.1.1. How should we set out a description of disability and a human rights approach in the next state disability plan?

OPA supports having a contemporary definition of disability, noting that the understanding of disability has evolved over time.[5]

In this section, we propose a method for defining disability and a connected human rights approach.

OPA believes the definition of disability should be broad, without weakening the meaning of the term so that it still provides a focus for the measures demanded by the United Nations *Convention on the Rights of Persons with Disabilities.* It remains necessary to move away from the medical model. There is an over-dependence on medical diagnosis and explanation to identify disability and regulate entry to measures 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. 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 disability service and NDIS access 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'.[6]

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. 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.[7]

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[5] Julia Korolkova and Alexandria Anthony, 2016, *The United Nations Convention on the Rights of Persons with Disabilities and the right to support*, Melbourne Law School.

[6] NDIS, 2019 <https://www.ndis.gov.au/applying-access-ndis/how-apply/information-gps-and-health-professionals>.

[7] Department of Social Services, 2020 <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>.

To help shift attitudes, it is necessary to formally adopt a relational approach to defining disability, rather than the frequent list-based approaches.[8] 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. The latter should not occur 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 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 off their disability identity by the person, or recognition of this identity by others in close relationship with the person. 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.

Recommendation 1
The next state disability plan should adopt a relational definition of disability with 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.**

Medical evidence would not be mandatory, where there was no dispute that the person experienced functional barriers due to impairment. This process acknowledges that individuals with disability have support needs and are the author of their life.

OPA supports including a description of a general human-rights approach, that is complementary to the disability definition proposed above. A human-rights approach begins by recognising people with disability as rights bearers, both moral and legal. Uppermost is

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[8] An example of a list-based approach is the disability definition used in the *Guardianship and Administration Act 2019:* disability in relation to a person, means neurological impairment, intellectual impairment, mental disorder, brain injury, physical disability or dementia.

respect for the dignity of people with disability. As was recently stated by the Australian Human Rights Commission, International human rights law offers the most widely accepted framework for protecting individual dignity and promoting the flourishing of communities.[9] The United Nations *Convention on the Rights of Persons with Disabilities* states what must be done to provide dignity for all people with disability.

In Victoria, we also enjoy the enactment of some internationally recognised civil and political rights through the *Charter of Human Rights and Responsibilities Act 2006* (Vic).[10]

What a human-rights approach means in practice needs to be stated as simply as possible. Ultimately, these approaches need to backed-up by regulation, as they do demand some significant changes to policies and practices. This will give people and organisations a point of reference for ensuring their practices are advancing the human rights of people with disability.

A human-rights approach affirms the inherent worth of every individual and promotes and protects rights. A human rights approach provides real equal opportunity, effective participation and full inclusion in society. It also involves creating a culture, both broadly in society and within organisations, that fosters a human-rights-approach mindset. Culture is the product of our values and our actions, including the words we use.

A human-rights approach:

- sees impairment as an expected dimension of human experience and diversity
- recognises that the vast majority of challenges experienced by people with disability are a result of disabling systems and environments
- challenges attitudes and environments that harm the dignity of people with disability
- requires people with disability to be resourced and supported to have the capabilities to lead a dignifying and flourishing life.

At the government policy level of the state disability plan, 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. [11]

These elements of a human-rights platform that should be provided by the state disability plan are further developed below.

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[9] Australian Human Rights Commission, 2019. *Human rights and technology discussion paper.* p.31

[10] Charter of Human Rights and Responsibilities Act 2006 < http://www5.austlii.edu.au/au/legis/vic/consol_act/cohrara2006433/>

[11] Australian Human Rights Commission, 2019 Human rights and technology discussion paper, pp.29-31, which draws on the UN Guiding Principles on Business and Human Rights

A fully developed human-rights approach can be further informed by the capability-based approach to flourishing human life developed by Amartya Sen and Martha Nussbaum.[12]

In this framework, a flourishing life has these 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 ourselves. Generally, to love, grieve, experience longing, gratitude, and justified anger. Not having one's 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

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[12] Nussbaum, M.C. (2006) *Frontiers of justice: disability, nationality, species membership*.
Sen, A (2009) *The idea of justice*

- **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 one's 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.[13]

Many of these capabilities for a flourishing life already have formal recognition through the Charter of Human Rights and Responsibilities Act and other legislation. These further elements of a human-rights approach can also be continued or translated into the next state disability plan. This expansion can guide the ways that individuals, communities and organisations respond to people with disability, in ways that are also consistent with the Convention on the Rights of Persons with Disabilities.

The next state disability plan can be the roadmap for this process of implementing and evaluating progress towards resourcing people with disability to lead a flourishing life. This is a natural progression from the ambition of the current state disability plan, *Absolutely everyone.*

Recommendation 2
The next state disability plan should describe a human rights approach in terms of individuals, communities, government and organisations supporting people with disability to lead a flourishing life.

Recommendation 3
The vision of the next state disability plan should be an inclusive Victoria, which resources people with disability to lead a flourishing life.

3.1.2. Are there other statements you'd like the next plan to say about what disability is, what it means to you, and how Victoria needs to do its work to be more inclusive?

The Office of the Public Advocate remains concerned that people with complex and challenging support needs are not seeing the benefits of recent reforms and initiatives (in particular, the NDIS) to the same extent as other people with disability.[14] While NDIS access and delivery is largely a matter for the Commonwealth, the next state disability plan must continue to emphasise that inclusion and a human-rights approach is for all people with disability, without exception.

3.2. Topic two: finding better ways to include people with disability in making the next state plan

3.2.1. What are other groups that we need to reach out to?

People in closed environments, including people with disability living in Supported Residential Services.

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[13] Babin, C. (n.d.) *Disability Rights, Dr. Martha Nussbaum's 10 capabilities*
[14] Office of the Public Advocate, (2018). *The illusion of 'choice and control'*

3.2.3 What are some of the things we can do to let people know that we have taken their advice seriously and have brought it into the development process?

As stated above, the capacity to influence government is part of the platform for a human-rights approach. The legitimacy of the state disability plan rests on this platform.

Providing feedback on what people and groups said and recommended through the consultation process and how this influenced the plan will be an important step. The early publishing of all submissions and records of consultations (with consent) could be part of this process.

A possible approach could be the formation of an editorial committee for the state disability plan drafting process with membership drawn from:

- Victorian Disability Advisory Committee
- Victorian Public Service Interdepartmental Committee on Disability
- Victorian Public Service Enablers Network
- external representatives through an invited expression of interest process, sent to advocacy organisations and other representative bodies.

3.2.4 What codesign approaches do you think would be good for the next state plan?

The editorial committee, as described above could form one part of the codesign approach.

3.3. Topic three: strengthening the state disability plan outcomes framework

3.3.1. What do you think about a new outcome around people's intimate lives?

Bodily integrity, as described in the capabilities framework above, is being supported to have the capability for:

> 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.[15]

The current outcomes framework has outcomes related to being able to move freely and community safety. Having a new outcome related to the opportunity to have sexual satisfaction is consistent with a human-rights framework founded on supporting people with disability to lead a flourishing life.

Recommendation 4
The next state disability plan should include a new outcome which relates to the opportunity for sexual satisfaction and reproductive control.

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[15] Babin, C. (n.d.) *Disability Rights, Dr. Martha Nussbaum's 10 capabilities*

3.3.2. What do you think about a new outcome around recognition and pride?

OPA supports having a new outcome related to recognition and pride, as these strongly relate to the affiliation described above, and in particular for monitoring the ‘social basis for self-respect and non-humiliation’.

Recommendation 5
The next state disability plan should include a new outcome which relates to recognition and pride, in the fairness and safety domain.

3.3.3. Are there any other changes to the outcomes framework that you think will be important for the next state disability plan?

OPA notes that the present outcomes framework includes respect. There is a good correspondence between the capabilities framework described above and the present outcomes framework with its measures and indicators. This can be further strengthened by the addition of another new outcome in the fairness and safety domain. This outcome will relate to personal control and autonomy and further relate to the capabilities framework above.

Recommendation 6
The next state disability plan should include a new outcome which relates to personal control and autonomy, in the fairness and safety domain. This outcome will specify that people with disability have control over their environment and receive the support they need to make their own decisions.

3.4. Topic four: introducing overarching approaches to strengthen government commitments under the new plan

3.4.1. What do you think about including community attitudes and universal design as guiding approaches in the new plan?

The status of a guiding approach as an element of the next state disability plan is not clear. As the consultation paper notes, these two concepts are key priorities of *Absolutely everyone*. Universal design needs to be universal state government policy for all programs and operations.

The provisions of the General Obligations (Article 4) of the United Nations Convention on the Rights of Persons with Disabilities require government bodies to take appropriate measures for the implementation of the rights recognised in the Convention. This includes action to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against people with disability. These obligations require that government bodies consider the protection and promotion of the human rights of people with disability in all policies and programs.

Community attitudes are held by community members and embedded in laws, regulations, customs and practices. The lack of inclusion due to the non-provision of universal design constitutes discrimination against people with disability.

Both providing universal design and working towards changing discriminatory community attitudes are the responsibility of the state government in all activities, policies and programs. This requirement and monitoring of progress needs to be a mandated requirement, enacted through revamped and legislated disability action plan requirements upon all state authorities. This issue is returned to again in the response to Topic 6 below.

Because of the importance of changing entrenched attitudes and customs, it is also important that the next state disability plan influence and strengthen the National Disability Strategy. This can be done by revamping the administrative scaffolding that underpins the state disability plan, as discussed below.

Recommendation 7
The next state disability plan mandate should outline a timetable for all Victorian government activities, policies, and programs to achieve universal design and remove discriminatory attitudes from government decision-making and administrative processes.

3.4.2. Are there important things that Victoria needs to do through the next state disability plan that are not reflected under Community attitudes and Universal design? What are they?

The next state disability plan needs to continue to provide a strengthened focus on whole-of-government consistency and compliance with the high-level objectives or approaches of the plan. For example, the Department of Education and Training is still constructing segregated settings for school-age children. This has then been reported as an achievement under *Absolutely everyone*, despite this being counter to the intent of the Inclusive-communities pillar and Key Priority 4 Inclusive Schools.

This and other examples highlight how the existing loose whole-of government coordination is not delivering the expected results. This issue indicates that the next state disability plan should address how coordination and monitoring will be undertaken and strengthened.

3.5. Topic five: strengthening the NDIS and mainstream interface

3.5.1. Where are the gaps between NDIS and mainstream services?

There are significant gaps between the NDIS and mainstream services. OPA has extensive experience with the continuing gaps between the NDIS and mainstream service sectors, including health and justice. In this section, we focus on the extensive gaps in relation to the NDIS and hospitals.[16]

OPA and the Community Visitors observe that mainstream health services are often ill-equipped to support clients with cognitive impairment, particularly when patients present with behaviours that seem difficult to manage. Discriminatory attitudes held by health sector workers lead to inequities in service delivery and, ultimately, poor health outcomes.

By way of its guardianship functions, OPA encounters disputes between the NDIS and the health care systems to determine which is responsible for supporting people with disability who are in hospital, and in which way. The *Council of Australian Governments Principles to determine the responsibilities of the NDIS and other service systems* (COAG Principles) provide direction on the funding responsibilities of each system.

One of the COAG Principles in relation to the health system specifies that:

> Any funding in a person's [NDIS] package would continue for supports for people with complex communication needs or challenging behaviours while accessing health services, including hospitals and inpatient facilities.[17]

In recent years, the NDIA has become more flexible in allowing NDIS-funded supports to be provided in hospital settings, a welcome development. It also helps that familiarity with the scheme has improved, as it is becoming increasingly common for individuals with cognitive impairment to have an NDIS plan in place on entering hospital.

In line with the COAG Principles, NDIS-funded services can and are provided for NDIS participants who are in a hospital setting. The first of six high-level and general COAG Principles for the health system states:

> Commonwealth and State and Territory health systems have a commitment to improve health outcomes for all Australians by providing access to quality health services based on their needs consistent with the requirements of the National Healthcare Agreement and other national agreements and in line with reasonable adjustment requirements (as required under the Commonwealth Disability Discrimination Act or similar legislation in jurisdictions).[18]

Despite this principle, OPA continues to see people with cognitive disability being denied safe and comprehensive health care because they exhibit challenging behaviours. In the new NDIS environment, some hospitals have become overly reliant on NDIS-funded services, which can mask entrenched discriminatory beliefs.

The belief that people with disability should receive specialist care in separate establishments or services continues to permeate hospital staff, management, and the system as a whole. That the NDIS can support some patients while they are undergoing

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[16] OPA's forthcoming submission in response to the Royal Commission's Criminal Justice System Issues Paper further explores the complex NDIS and criminal justice system (including the civil justice system) interface.

[17] Council of Australian Governments *COAG Principles to determine the responsibilities of the NDIS and other service systems* (November 2015).

[18] Ibid

medical treatment does not absolve health services from their obligation to make reasonable adjustments to provide universally accessible and safe services.

It highlights the need for the next state disability plan to mandate a strengthened approach to promoting inclusion.

A major roadblock is the difficulty in achieving a consensus on funding responsibilities. In the NDIS context, the Applied Principles of the COAG Principles determine the responsibilities of each system in providing supports at key interfaces.

In Victoria, funding for services at the disability justice interface is split between the National Disability Insurance Agency and the DHHS justice services for people with intellectual disability. Unclear delineations often become the subject of complex funding disputes between the two entities, leading to inefficiencies and delays for participants.

By way of example, the Applied Principles identify that the following services provided in non-custodial settings are the funding responsibility of the NDIS:

> supports that address behaviours of concern and reduce the risk of offending and re-offending such as social, communication and self-regulation skills, where these are additional to the needs of the general population and are required due to the impact of the person's impairment/s on their functional capacity and are additional to reasonable adjustment[19]

OPA's view is that much, if not all, of the content of the clinical services provided to people under the civil detention regimes that apply clearly fall into the category of reasonable and necessary NDIS supports. However, the following example shows the difficulty of applying the principles to concrete funding decisions:

The treatment plan of one participant subject to civil detention specifies the goals of his clinical treatment as helping the client 'manage the challenges of living with others', developing 'healthy and adaptive relationship skills' and increasing their ability to 'self-manage behaviours' – all of which speak to both disability-related needs as well as reducing risks of reoffending.

In this way, clinical supports provided to people who present offending behaviours simultaneously support the development of pro-social, communication and self-regulation skills. These supports help reduce their risk of offending and should be funded by the NDIA. Yet, the NDIA has on multiple occasions in OPA's experience refused its funding responsibility.

The Applied Principles do not reflect the inherent and human complexity of the needs of some people with disability, nor does the policy recognise that a clear demarcation of such needs, serviced by different service systems, may not be possible or desirable.

OPA has previously recommended that the Council of Australian Governments Disability Reform Council review the Principles to Determine the Responsibilities of the NDIS and Other Service Systems to ensure they provide clear guidance to resolve interface questions.

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[19] ibid

3.5.2. How do we ensure mainstream services are inclusive of all people with disability?

The situation in hospitals is an acute example of the problem of persistent exclusionary attitudes that are prevalent in different sectors of the community to a greater or lesser extent.

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

The Royal Commission into Violence, Abuse Neglect and Exploitation of People with Disability is currently underway. Its terms of reference include the following:

> what should be done to promote a more inclusive society that supports the independence of people with disability and their right to live free from violence, abuse, neglect and exploitation.

The submissions to the Royal Commission will be wide-ranging and its inquiries should result in far-reaching recommendations. The Royal Commission's final report is to be provided by April 2022. The interim report is due to be released in October 2020.[20]

The next state disability plan should be as informed and robust as is possible. The current consultative process for the development of the next state disability plan should be supplemented by the findings of the Royal Commission.

Recommendation 8
The next state disability plan should include a state government commitment to consider and implement all recommendations of the Royal Commission into Violence, Abuse Neglect and Exploitation of People with Disability, which have the support of organisations representing and controlled by people with disability.

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[20] Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, 2019.

3.6. Topic six: strengthening disability inclusion under the Disability Act 2006

3.6.1. What are the most important things that a review of the Disability Act 2006 should consider? What are the biggest improvements we can make?

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

- disability action plans
- state disability plan
- Office for Disability
- Victorian Disability Advisory Committee

Consideration should be given to how best strengthen these different mechanisms through the review of the Disability Act. The biggest improvement can be made by better connecting and aligning these separate mechanisms and bodies. Better alignment and enhanced functions should lead to increased accountability and effectiveness.

Disability action plans

As stated above, disability action plans in their present form have led to many improvements in access to governmental goods and services. They continue to have a role. The issue with disability action plans is that they can be lifeless or exceedingly modest in aspiration. The mechanism needs new life breathed into it.

The most effective way to promote reinvigorated disability action plans will come through the application of positive and negative sanctions. The state disability plan outcomes framework is developing a valid and reliable data set using measures and indicators that can be used to track progress. These indicators and measures are providing performance benchmarks for Victoria as a whole. Some will be able to be used as performance benchmarks at the departmental and organisational level.

Work can be done on this approach so that organisations are required to adopt meaningful performance targets that are consistent with the state disability action plan outcomes framework.

Organisations can then be held accountable for their performance against the agreed measures. This approach may require an enhanced coordination and overseeing role, which is currently undertaken by the Office for Disability. Well performing organisations could be recognised and rewarded. Under performing organisations could be held up to scrutiny.

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

State disability plan

The state disability plan needs to mandate the transition to the enhanced arrangements that are discussed in this section. The requirement for a state disability plan itself would be re-mandated through the Act that replaces the present Disability Act.

Office for Disability

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

The review of the Disability Act should consider how these administrative arrangements can be strengthened.

Victorian Disability Advisory Committee

Under the present Act, the committee has an advisory role to the minister for disability. This role has given the committee the opportunity to influence government directions and policy. The committee has sparse resources to undertake its role. The power and influence of the committee rests on the individual member's personal commitment and the minister's willingness to listen to and implement their advice.

The committee's role in promoting 'nothing about us without us' should be refreshed and strengthened, by giving the committee greater visibility and status. The committee should also be resourced to directly consult with Victorians with disability and their representative organisations.

Recommendation 9
The next state disability plan should contain a commitment to strengthening the legislated arrangements for disability inclusion, including enhancements to the Office for Disability, Disability Action Plans, State Disability Plan and the Victorian Disability Advisory Committee.

3.6.2. How should the Act ensure that Victoria can fulfil its role in promoting the inclusion, participation and rights of people with disability?

Aspects of this role relating to inclusion and participation would become the central mission of the enhanced arrangements discussed above. This would include enhancements to the role of the Office for Disability and the Victorian Disability Advisory Committee.

The revised Disability Act should also continue to support the critical and irreplaceable safeguarding role of the Community Visitors. The revised Act should also acknowledge the role of the Office of the Public Advocate in supporting the human rights of people with disability through the provision of safeguarding mechanisms, advocacy and other programs and services.

Recommendation 10
The next state disability plan should outline that the revised Disability Act will continue to support the safeguarding role of Community Visitors and recognise the role of Public Advocate in supporting the human rights of people with disability through the provision of safeguarding mechanisms, advocacy and other programs and services.

3.6.3. How does the Act need to change to reflect Victoria's role in delivering disability services after implementation of the NDIS?

The revised Disability Act will need to focus on measures for inclusion. There are still important issues relating to the residual role of the state government. Many relevant recommendations relating to Victoria's role in delivering supports to people with disability after the implementation of the NDIS have been made in the recent OPA publication*, I'm too scared to come out of my room.*[21] That report serves as OPA's submission to the Royal Commission's Group Homes Issues Paper. Some have been further refined in OPA's submission to the Royal Commission's Criminal Justice System Issues Paper.

The next seven recommendations were made in those submissions. Some of these recommendations are also relevant to the next discussion paper question relating to necessary changes to the justice system.

Recommendation 11
The Victorian Government should seek to amend the Residential Tenancies Act 1997 (Vic) to require SDA providers to offer SDA residency agreements as the default agreement to (prospective) residents in all SDA properties.

Recommendation 12
The Victorian Government should expand funding for independent legal and non-legal advice and advocacy to help people with disability to navigate and access the justice system.

Recommendation 13
The Victorian Government should ensure that outreach and advocacy supports are available to assist people with disability who have been victims of crimes to bring claims before the Victims of Crime Assistance Tribunal.

Recommendation 14
The Victorian Government should fund mandatory disability awareness training for all staff in the family violence sector. The training should be developed in consultation with people with disability.

Recommendation 15
The Victorian Government should fund mandatory disability awareness training for all justice staff to enable them to fulfil their obligations under the UN *Convention on the Rights of Persons with Disabilities*. The training should be developed in consultation with people with disability.

Recommendation 16
The Victorian Government should fund the continuation of the Communication Intermediaries Pilot Program to allow sufficient time for an outcomes review to be completed. If it proves successful, the program should continue and expand to:

- **be available at all proceedings in all courts and tribunals**
- **be available for victims and alleged perpetrators.**

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[21] Office of the Public Advocate, 2019. "I'm too scared to come out of my room'': Preventing and responding to violence and abuse between co-residents in group homes. Carlton

Recommendation 17
The Victorian Government should legislate the Independent Third Person Program. The legislative provisions should include:

- **a requirement for an ITP be present when police interview a person with an apparent cognitive impairment or mental illness**
    - **irrespective of age**
    - **whether they are an alleged offender, victim, or witness**
- **a penalty to be imposed when the requirement for an ITP is not complied with – e.g. evidence from an interview may be inadmissible if the procedure was not compliant with the ITP requirement**
- **a requirement for the ITP program to be adequately resourced to meet its legislated functions, based on proper modelling of demand.**

3.6.4. How should the Act reflect, protect, or enhance human rights? What changes are needed to ensure the human rights of people with disability are protected in relation to compulsory treatment, the justice system, and restrictive practices?

The revised Disability Act needs to reflect and promote the human rights approach described in this submission. Measures to promote and protect human rights in relation to compulsory treatment and restrictive measures should also sit in this legislation.

The justice system should be treated as one of the government sectors that needs to implement substantial reasonable adjustments and universal design measures. The justice sector and other significant sectors, such as the health sector, especially hospitals, should receive significant advice, guidance and support though the enhanced inclusion measures discussed above.

Many people with cognitive disabilities, mental illness and/or age-related disabilities are admitted to, and reside in, places like group homes, hospitals and aged care facilities where they are subject to very high levels of supervision and restrictions on their liberty. While some people are clearly unhappy with the restrictions, others who may appear to be complying with, or acquiescing to them may not be giving full, free and informed consent.

One form of specialist supports that is available to some people with disability who have a history of offending behaviours is through compulsory treatment under the *Disability Act 2006* (Vic). The Supervised Treatment Order (STO) regime set out in the Disability Act aims to bring greater fairness and scrutiny to decisions affecting the personal liberties of people with intellectual disability.

In Victoria, the *Disability Act 2006* (Vic) sets out a legal framework for the civil detention and compulsory treatment of people with intellectual disabilities who are found to pose a significant risk of serious harm to others. The legislation requires that the person with an intellectual disability derives a ‘benefit’ from being placed on a supervised treatment order (STO), and that the levels of restrictions on the person’s life be incrementally reduced over time.

The use of restrictive practices significantly infringes on a person’s human and legal rights and their use should be justified and authorised in each instance. Despite this, our legislative framework is complex and fragmented. If any safeguards concerning the use of restrictive practices exist at all, these are tied to the setting where the restrictive practice is administered. The current complex arrangements include:

- In Victorian government schools, there is the *Fifteen Principles* framework, derived from teacher and principal's common law duty-of-care responsibilities and various other legal requirements [22]
- In Victorian disability services, either the *Disability Act 2006* (Vic) or the *National Disability Insurance Scheme Act 2013* (Cth) applies, depending on the service's funding source
- In hospitals, no legislated safeguards apply but the common-law doctrine of necessity can be used in an emergency. Health practitioners have no obligation to report the circumstances in which they use restrictive practices or for how long.
- In Victorian mental health services, the *Mental Health Act 2014* (Vic) applies
- In aged care services, the *Aged Care Act 1997* (Cth) applies.

Health practitioners may work in a multitude of settings. They must adjust their practice framework as they transition from one part of the sector to another, including different authorisation and reporting requirements. The lack of an overarching framework surrounding the use of restrictive practices with no clear and consistent criteria, standards or processes to govern them. This lack of clarity, in combination with varying requirements across different laws, results in restrictive practices being used in an inconsistent, unpredictable, and sometimes arbitrary ways. This means that many restrictive practices will be unlawful. OPA holds serious concerns that restrictive practices being prescribed and administered by health practitioners can go unchecked, when there is this likelihood of unlawful behaviour.

Alternatives to restrictive practices should always be sought when delivering supports to people with disability, and this is true across all social care and school settings. Person-centred supports should be designed in a way that promotes wellbeing, and safety, thus avoiding the need for restrictions on a person's liberty. Solutions are needed that encourage upskilling of staff, moving away from medical and institutional models of care, and strategies for creating services that enhance and promote human rights.

There is a real need to regulate the use of restrictive practices and other types of deprivation of liberty in social care settings and other state responsibilities areas such as schools. OPA's publication, *Designing a deprivation of liberty authorisation and regulation framework*, sets out the issues for establishing such a framework.[23]

The next state disability plan should specifically focus on the need for the human rights of all people with disability to be recognised and supported in interface mainstream service systems including education, health, corrections and justice.

Recommendation 18

The next state disability plan should outline a timetable for the design and implementation of a deprivation of liberty authorisation and regulation framework, consistent with the recommendations of the Public Advocate.

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[22] Department of Education and Training, 2019 Fifteen Principles Restraint and seclusion

[23] Office of the Public Advocate, 2017, Designing a deprivation of liberty authorisation and regulation framework

Recommendation 19

The Victorian Government should use the next state disability plan as a platform for the publication of human rights principles and guidelines for Corrections and other mainstream interface systems that build upon the *Charter of Human Rights and Responsibilities Act 2006*.

3.6.5. Are there any specific groups of people that it is important we speak to during the review? Are there particular issues that we need to talk to them about?

The Public Advocate and the Community Visitors would be pleased to offer any further assistance or information that may be required during the development of the next state disability plan.

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