

**LABOUR INCLUSIVE
BRIEFING PAPER
FOR
ROYAL COMMISSION
INTO FAMILY VIOLENCE
UNDERSTANDING
THE BARRIERS
PEOPLE
WITH
DISABILITIES
FACE
WHEN THEY EXPERIENCE
VIOLENCE**

TABLE OF CONTENTS

NO.	CONTENT	PAGE NO.
1.	Understanding what Barriers people with Disabilities Face when they experience violence	4
2.	The Commonwealth and State Evidence Acts, 1995 & 2008.	5
3.	Defamation Act 2005	11
4.	Disability Act 2006	13
5.	The Charter and Human Rights and Responsibilities Act 2006	15
6.	The Health Records Act 2001	16
7.	The Victorian Public Administrations Act 2004	19
8.	The Victorian Guardianship and Administration Act 1986	20
9.	Systems and Government Public Authorities and Statutory Bodies	23
10.	Independent Investigations into sexual and Physical Assault By Disability Service Providers	24
11.	Disability Service Providers Hunting Whistle-blowers	25
12.	Disability Direct Care Staff Undertrained and in a Un Professionalised Sector	27
13.	Conclusion	29

Understand what Barriers People with Disabilities Face when they experience Violence Summary

Research indicates that “50-90% of people with cognitive disabilities are estimated to of experienced sexual assault through their lifetime” (Crossmaker 1991). “Many people are unable to disclose due to their cognitive or communication difficulties, and too often when they do disclose they are discounted. Thus the abuse is likely to have gone on for a long while without being detected, be more severe- that is more likely to involve penetration, and less likely to be believed and acted on if it is found out”(Sobsey & Doe 1991,Nosek 1997, Brown & Craft 1992, Connelly & Keilty 2000). Barriers to disclosures operate at organisational, societal and individual levels. On an organisational level, a lack of legislation promotes a culture of “sexual assault in residential settings, namely the victim being moved rather than the perpetrator; in other words, she experienced a punitive response whereas the person committing the sexual assault was seemingly unaffected” (Victorian Ombudsman 2006). Research also shows that “offenders, both staff and resident’s, will often move from facility to facility, so that when suspicions arise in one place, they move or are moved onto other facilities”(J Blyth & L Kelly Northern Sydney Sexual Assault Service 2006).

Barriers to disclosure on a societal level relates to a lack of understanding and awareness of the vulnerabilities of people with cognitive disabilities. Societies’ perceptions of people with disabilities and the “lack of education in this area is related to wider social beliefs that people with disabilities are asexual” (Suellen Murray & Anastasia Powell - Australian Institute of family studies 2008). On an individual level, many people with cognitive disabilities who live in residential settings are dependent on the people who care for them, making it difficult to report the behaviour when there is a reliance on that carer for support.

This briefing paper will look at how Federal and State legislation, conflicts of interest, independent investigations by disability service providers, hunting down whistle-blowers and the issues with having untrained staff and an un professionalised workforce, all contribute to barriers for people with cognitive disabilities, equally accessing the justice system in the event of experiencing sexual and/or physical assault. This paper will highlight the alarming apparent lack of action on behalf of Governments and public authorities to eliminate the barriers for people with cognitive disabilities and recognise them as being entitled to live free from abuse and violence.

Recommendations for the Royal Commission into Family Violence:

- **As per the “Convention on the Rights of People with a Disability Article 4 – General obligations**
 - b. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities”.

Recommendation: Modify section 13th of the Evidence Act 2008 to include Disability Mandatory Reporting. Mandate professionals, Dr’s, nurses, social workers, psychologists, disability workers, school teachers and school principals to report any alleged concerns of abuse and violence, whether this occurs in a state funded group home, respite, education setting, mental health facility or in a private home.

Mandatory reporting must include a clause that no person who makes a report can in cure any civil or criminal action against them.
- **“Article 5 – Equality and non-discrimination**
 1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law”.

Recommendation: Modifications and adjustments are made for persons with a disability to seek equality before the law, in particular have appropriate communication aids and supports in place to assist with the process of cross examination in a court of law.
- **Disability Act 2006**

Sections: **s.5 – Principles** (c) (e), **s.52 – Guiding principles for planning**
 Planning **should-** (2) (a) be individualised;
 (b) be directed by the person with a disability;
 (i) maximise the choice and independence of the person with a disability;

s.54 – Support plans
 (1) This section applies if a person is receiving ongoing disability services.
Recommendations: Wording to be changed from should to **must** and penalties to apply if Disability service providers fail comply with legislative requirements. Support Plan are a important tool to understand the needs of an individual.
- **The Charter of Human Rights and Responsibilities Act 2006**
Recommendations: s.38 **Conduct of public authorities** requires penalties for public authorities who fail to uphold the rights of the person with a disability.
- **Guardianship & Administration Act 1986**
Recommendation: section 42H Consent of person responsible
 (1)The person responsible for a patient **may** consent to the carrying out of any medical or dental treatment, needs to include pharmaceutical medications

1) Legislative Barriers Faced for People with Disabilities when Reporting Crimes of Violence

a) **The Commonwealth and Victorian Evidence Act 1995 & 2008**

"Evidence Act 1995 & 2008

s.13 Competence -lack of capacity

(1) A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability)-
 (a) the person does not have capacity to understand a question about the fact; or
 (b) the person does not have the capacity to give an answer that can be understood to a question about the fact-
 and that capacity cannot be overcome".

How the Evidence Act 2008 Becomes a Barrier to Reporting Crime

If a person with a disability does not have capacity to give evidence there is no other legislation (legal path) in place (Federal and State) as an alternative for persons with a lack of capacity to give evidence. For example: Disability Mandatory Reporting. There is substantial evidence and research that demonstrates that people with cognitive impairments are more likely to be victims of crime i.e., sexual abuse and assaults far greater than the general population as people with disabilities who live in "care settings can become invisible members of our community. Abuse thrives in a context of secrecy, and sometimes a culture of "white or hidden violence". Many don't believe these people would be raped, and organizations fear litigation" (J Blyth & L Kelly Northern Sydney Sexual Assault Service 2006). The following examples demonstrate this very issue:

The Department of Human Services Residential Services Practice Manual 2009 2nd edition, states in the Incident Reporting writing section, **"6.4 reporting incidents, an event that has the potential to involve the relevant minister, or subject the minister to high levels of public or legal scrutiny, are incidents that are category one, sexual assault, serious injury, death and or physical assault"**.

"The Age reported on November 21, 2012,

Heinous crime against the disabled must be included in child abuse probe

Matthew Bowden, executive director of People with Disability, says substantial national and international research provides evidence that people with a disability are

over represented as victims of all forms of abuse and neglect. “Abuse and neglect against people with disability and particularly against people with cognitive impairment, often goes undetected, unreported, non-investigated, non-prosecuted and unpunished”, he says. Bowden said this over – representation has been particularly in relation to those living in supported accommodation”. (*Journalist – Sandy Guy*)

* **“Kelly Vincent – Independent MP for Dignity for Disability, 23 April 2013**

People with disabilities are between four and seven times more likely than their non-disabled peers to experience physical and/or sexual abuse in their lifetime and we have a courts and a police system that unfortunately discriminates against many of those people particularly if they have communication disability in that they are unable to verbalise evidence”.

* **“Fairfax media 16 April 2013**

Disabled poorly treated by the law

The Australian Human Rights Commission has expressed serious concerns that people with disabilities are being treated unfairly by the legal system, citing a number of examples of alleged assaults not being prosecuted due to a lack of support for the victims. Federal Disability Commissioner Graeme Innes said an issues paper released on Monday highlighted several cases that sent a “clear signal” to perpetrators that they could abuse people with disabilities and be confident the cases were unlikely to proceed. People with disabilities often lack the support they needed to either prevent violence or provide evidence if they are a victim of crime”.

(*Journalist- Rachel Browne*)

In 2008 the Australian Federal Government signed and agreed to the Convention on the Rights of Persons with Disabilities. With becoming signatory to the Convention, the NDIS and the National Strategy are developed. The Convention’s articles highlight the obligations of Australia to address the issue of inequality for people with disabilities in accessing justice:

“Convention on the Rights of People with a Disability

Article 4 – General obligations

b. To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against persons with disabilities”.

d. To refrain from engaging in any act or practice that is inconsistent with the present Convention and to ensure that public authorities and institutions act in conformity with the present Convention”.

“Article 5 – Equality and non-discrimination

1. States Parties recognize that all persons are equal before and under the law and are entitled without any discrimination to the equal protection and equal benefit of the law”.

The **Commonwealth of Australia Constitution Act Section 116** highlights the rights of people with disabilities stating the following:

“117 Rights of residents in States

A subject of the Queen, resident in any state, shall not be subject in any other state to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State”.

Reports of abuse and violence in residential services have increased since 2008, as reported by the Office of the Public Advocate in their media release May 2013:

“Office of the Public Advocate**Media Release****31 May 2013**

In the 2012 annual report of the Department of Human Services reported 439 category one incidents of assault, including both physical and sexual assault, and the Public Advocate separately received 30 notifications alleging serious incidents”.

None of the 469 cases reported to both DHS and the OPA have resulted in any legal proceedings and or prosecutions through the courts.

*** “Herald/Sun on 9 November, 2012****Call for royal commission into DHS**

Disabled DHS clients are most likely to be attacked by DHS staff or appointed carers, with more than one such incident reported every day. VALID executive officer Kevin Stone said the number of abuse cases it handled rose sharply in the past year, but fewer were being properly investigated by DHS since it set up a four-person ethical standards unit in June. Internal memos reveal DHS has sought to bring investigations “back in house for a while” and that all misconduct matters are to be referred to the unit”. (*Journalist – Peter Mickelborough*)

In 2010, the Australian Federal Government received a two year follow up assessment for having signed up to the Convention. The UN made strong recommendations for Australia to address the issue of violence for people with disabilities as identified by Women with Disabilities Australia (WWDA) in their submission to the UN.

“Women with Disabilities Australia - Submission to the UN Analytical Study on Violence against Women with Disabilities – December 2011

In its 2010 assessment, the Concluding comments, the CEDAW Committee made very strong recommendations regarding the need for urgent action by Australian governments in relation to women with disabilities, including the need to:

* Address the abuse and violence experienced by women with disabilities living in institutions or supported accommodation”.

An Example of the Nature and Extent of Crimes against People with Disabilities with Regards to the Evidence Act 1995 & 2008

A family member has identified unexplained physical bruising all over the face, legs, arms and genital areas of their daughter, while visiting at the disability residential service. Family member reports this matter to the police. The police ask for witnesses, there is none and therefore no further action can be taken given the victim (person

with the disability) cannot verbalise (no capacity) to articulate what happen to them. The family member contacts a public authority and receives no support to further investigate the unexplained bruising. The disability service provider suggests that the person with a disability fall off the bed. The bed is always lowered to the ground and has carpet flooring. The family member refers the matter to a Disability legal service, where there have been requests made for the Disability service provider to provide Incident reports and cases notes of the alleged falls. The Disability service provider has had to re-write the incidents reports for a proper investigation to occur, as the first written incident reports included incorrect details of dates/times and what workers were rostered on shift when the bruises were first identified.

How to Work with Victoria Police and other Authorities to Break down these Barriers and provide better services to People with Disabilities with regards to the Evidence Act's 1995 & 2008

The Victorian Police have an obligation to enforce the laws that are legislated by Parliament. Under the Charter of Human Rights and Responsibilities Act 2010, the police as a public authority are obligated to ensure that their conduct is not unlawful or incompatible with a human right. The Charter highlights in **“s.8 Recognition and equality before the law (2) Every person has the right to enjoy his or her human rights without discrimination. (3) Every person is equal before the law is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination”**.

In order to comply with this legislation a person with a disability needs to be recognized as an equal person before the law. Under the Evidence Act's 1995 and 2008, under s.13 Competence- lack of capacity, the law identifies those without capacity to not be competent to give evidence about fact or about question of the fact. Therefore, without other alternatives legislated to enable witnesses (victims) to overcome their disabilities they have no equal recognition or equal protection of the law, which Victoria police can enforce. In effect, it remains difficult for Victorian police to enforce entitled equality or protection of the law as the Evidence Act prevents this from happening.

Since the Australian Federal Government's signing of the Convention in 2008, s.13 of the Commonwealth and Victorian Evidence Act 1995 and 2008 has not been modified or abolished to comply with the Convention in providing equal access for people with disabilities and provide protection from the law. Therefore, the Victorian police are obligated to continue enforcing the Evidence Act 1995 & 2008 s.13, which acts as a barrier to accessing equal protection and equality before the law, for people with a disability that do not have capacity. State legislation must be in compliance with Commonwealth statutory process, under section (106) of the Commonwealth Constitution Act, otherwise state legislation is invalid. The following articles provide examples of police not being provided with alternative laws to overcome the lack of capacity for people with disabilities to give evidence in reporting a crime:

**The Adelaide Advertiser on June 27th 2011
Disabled rape “too hard to prosecute”**

“Health and Community Services Complaints Commissioner said we have a reluctance of police forces to even take steps to do the forensics and interview people once they know the person have a serious disability or impaired capacity. The police have taken the view that because the client is impaired it wouldn’t be possible to corroborate what is alleged”. (*Journalist – Miles Kemp*)

In South Australia, there has been recognition of changes that need to occur to the Evidence Act to enable people with disabilities to access justice.

“ABC News 8 December 2011

Attorney-general John Rau says the Evidence Act is under review. His proposed changes to the Act include allowing the admission of audio-visual interviews with vulnerable witnesses and regulating how children or people with an intellectual disability are interviewed”. Rick Sarre, a professor of law and criminal justice at the University of South Australia, says “We have to do something about an **intractable situation** and a **one-size-fits-all justice system** which at the moment cannot accommodate evidence from an alleged victim who is intellectually disabled. That situation is **untenable, it needs to change**”.

The 7pm project – Channel 10

Justice elusive for those with disabilities

15th of April 2013

“Right around Australia its extremely challenging for people with little or no speech to access justice, ‘says Jai Phillips from Communication Rights Australia. “The police, the Justice system often will turn around and say “that’s a little bit challenging I don’t know what to do”.

“ABC news 26/07/2013

ABC news reported that the South Australian Parliament tabled a report which said “the justice system was failing people with intellectual disabilities. Eighteen months ago, charges against an Adelaide bus driver alleged to have sexually abused seven disabled children were dropped. The case never made it to trial because the alleged victims, aged six to 13, could not verbally testify against the man and were not considered to be reliable witnesses. The report found people with disabilities felt locked out of the justice system and the final report made eight recommendations. It suggested mandatory reporting of abuse and neglect for anyone working with people with disabilities and the appointment of a disability justice advocate, who could help a disabled person deal with legal system”

“ABC news 26/7/2013

Attorney-General John Rau said the latest report would feed into state’s disability justice plan. “Part of what will come out of this, definitely, is a proposal for amendments to the Evidence Act to enable people with disabilities to be better accommodated in the courts”

The South Australian Amendments to the Evidence Act

“The Law Society of South Australia

The Law Society’s Submission to the Attorney General’s Department

Improving the Criminal Justice System for People with Disability

29 July 2013

The first is the capacity in which a person with disability engages with the Criminal justice system – adopting the distinctions in the Discussion Paper, as an “Offender”, a **victim or a witness**. Although there is overlap, the different Capacities require different strategies.

The Society understands that for all vulnerable witnesses with disability who have **difficulty communicating**, the Government wants to find ways to minimise the number of times they have to recount their experiences.

For witnesses (including victims) of sexual or violent offences who are young children or who have an **intellectual disability**, the Society was asked to consider if it would be appropriate for evidence to be taken before the trial and in informal surroundings. Other proposals include video recordings of interviews to be allowed to be used as evidence. **What victims have said to their carer or someone else about a sexual offence** would also be allowed to be used as evidence in certain circumstances.

It is difficult to give detailed comments without a better understanding of how the proposals would work in practice. The Society considers that any proposal to amend the *Evidence Act 1929* should be carefully balanced, in order to prevent an undue interference with the principles of hearsay. Such proposals also must not fetter the ability of an accused to test the veracity and accuracy of what a victim or someone else has said.

The Government wants these cases to be prioritised and fast tracked through the system. This is a resourcing issue. If this is to occur, obviously more funding is required for the additional staffing and workload”.

In Victoria, the State Government have not made amendments to s.13 of the Evidence Act 2008, to comply with the Convention on the Rights of People with Disabilities. Instead, the Office of the Public Advocate has made recommendations to the Victorian Law Reform Commission to establish guidelines for the “Interagency Guideline for Addressing Violence, Neglect and Abuse Guidelines” (IGUANA). The IGUANA guidelines are nothing more than guidelines that have no legal powers to enable people with disabilities to testify in a court of law if they don’t have capacity. The guidelines may assist with raising the awareness of violence for people with disabilities’, however; s.13 of the Victorian Evidence Act prevents any court proceedings occurring for people with a lack of capacity to give evidence in a court of law.

House of Assembly—No 25 As laid on the table and read a first time, 6
 May 2015 HA GP 176-B OPC 163 1
 South Australia

Statutes Amendment (Vulnerable Witnesses) Bill 2015

Statutes Amendment (Vulnerable Witnesses) Bill 2015 Contents 2 HA GP 176-B OPC 163

Contents

Part 1—Preliminary

- 1 Short title
- 2 Commencement
- 3 Amendment provisions

Part 2—Amendment of *District Court Act 1991*

- 4 Amendment of section 50B—Certain trials of sexual offences to be given priority

Part 3—Amendment of *Evidence Act 1929*

- 5 Amendment of section 4—Interpretation
- 6 Amendment of section 9—Unsworn evidence
- 7 Insertion of section 12AB
 - 12AB Pre-trial special hearings
- 8 Amendment of section 13—Special arrangements for protecting witnesses from embarrassment, distress etc when giving evidence
- 9 Amendment of section 13A—Special arrangements for protecting vulnerable witnesses when giving evidence in criminal proceedings
- 10 Insertion of section 13BA
 - 13BA Admissibility of recorded evidence by certain witnesses in certain criminal proceedings
- 11 Amendment of section 13C—Court's power to make audio visual record of evidence of vulnerable witnesses in criminal proceedings
- 12 Insertion of section 14A
 - 14A Entitlement of witness to be given communication assistance in certain circumstances
- 13 Substitution of section 21
 - 21 Competence and compellability of witnesses
- 14 Amendment of section 25—Disallowance of inappropriate questions
- 15 Repeal of section 34CA
- 16 Insertion of section 34LA
 - 34LA Admissibility of evidence of out of court statements by certain alleged victims of sexual offences
- 17 Amendment of section 34M—Evidence relating to complaint in sexual cases
- 18 Amendment of section 67H—Meaning of sensitive material
- 19 Insertion of section 67HA
 - 67HA Court may give access to certain sensitive material in certain circumstances
- 20 Amendment of section 69—Order for clearing court

b) The Victorian Defamation Act 2005

"Defamation Act 2005

Qualified Privilege and Fair Comment Laws

s.29 Defences of fair report of proceedings of public concern

(1) It is a defence to the publication of defamatory matter if the defendant proves that the matter was, or was contained in, a fair report of any proceedings of public concern.

s.30 Defence of qualified privilege for provision of certain information

(1) There is a defence of qualified privilege for the publication of defamatory matter to a person (the recipient) if the defendant proves that-

(c) the conduct of the defendant in publishing that matter is reasonable in the circumstances".

How the Defamation Act 2005 Becomes a Barrier to Reporting Crime

If a person with a disability lacks capacity to give evidence, it is a defence by public authorities to use fair comment and qualified privilege laws in their report writing to discredit notifications made by family members, carers, disability workers on behalf of the person with the disability (the disclosure maybe in the form of gestures made by the person with the disability) as the notification made on behalf of the person with the disability can be interpreted by public authorities as *hearsay* or making false allegations. Therefore, it can be viewed as reasonable and as a defence in the circumstances to defame or discredit people making notifications on behalf of the person with the disability who lacks capacity.

An Example of the Nature and Extent of Crimes against People with Disabilities with Regards to the Defamation Act 2005

A family member reports to the police that their brother with a disability disclosed that a disability direct care worker touched them in their genital area (the disclosure to the family member was made in the form of hand gestures). The police have no other witnesses and rely on the disability services Management to interview staff in the group home to verify the concerns raised. The police interview the person with a disability with the disability services management present (which is a breach of policy of the disability service provider) and invites the independent third party to be present. There was no use of a Support Plan which highlighted that the person is unlikely to communicate to unfamiliar people and in unfamiliar environments. A communication assessment was conducted 5 months after the police interview, which further highlighted the person with a disability requires communication aids in order to maximise their communication and to give context and understanding to the meaning of the hand gestures. The outcome for the person with the disability was a continued exposure to the alleged perpetrator at the resident's group home, which was endorsed by public authorities as there was a belief formed that there was no evidence of

alleged sexual abuse. The public authorities provided reports, which included the notification made by the family member. The reports highlighted that the family member who made the notification “made up” the allegations as there was no evidence to support the alleged offences. The family member sought legal advice and was advised that under fair comment and qualified privilege laws, public authorities have the powers to discredit your notification as *hearsay*.

How to Work with Victoria Police and other Authorities to break down these Barriers and provide better services to People with Disabilities with regards to the Defamation Act 2005

Legislation that allows for public authorities to make a “qualified or fair comment” investigation report without proper investigation provides an opportunity to further violate vulnerable people and victimise family members and or carers who act within the best interests of the person with the disability. Victorian Police and other authorities need to avoid using these laws and conduct proper investigations if sexual and physical violence are to be investigated properly and human rights are to be upheld and supported. If Disability Mandatory Reporting legislation was in place, Victoria police would have to comply with the protection of the person that has notified, as required in the **Commonwealth Age Care Mandatory Reporting legislation** which states:

“Protection for those required to report:

Approved providers and staff who report under the compulsory reporting requirements will be protected from workplace discrimination and defamation action under the Commonwealth Age Care Act 1997”.

The South Australian Disability Mandatory Reporting Bill 2010 highlights this area:

“6- Protection from liability for voluntary or mandatory notification

A person who (whether voluntary or pursuant to a requirement of this Act) notifies the department of a suspicion that a person has been or is being abused or neglected, or provides any information to the Department in respect of such a notification- (b) insofar as he or she has acted in good faith, in inures no civil or criminal liability in respect of the notification or the provision of the information”.

Legislation to protect people who notify on behalf of people with a lack of capacity due to their disability, needs to include abolishing fair comment and qualified privilege laws in the Defamation Act 2005. The IGUANA guidelines state in section D, **“Protect whistle-blowers** - Ensure that any person who reports an instance of violence, neglect or abuse is not thereby subject to adverse consequences” (Victorian Office of the Public Advocate 2013).

These guidelines are powerless and are not legally binding, particularly when the legislation empowers public authorities to consequent whistle-blowers, with the fair comment and qualified privilege laws.

c) The Victorian Disability Act 2006

“Disability Act 2006

s.5 – Principles

(1) Persons with a disability have the same rights and responsibilities as other members of the community and **should** be empowered to exercise those rights and responsibilities.

(3) Disability services **should-**

(c) maximise the choice and independence of persons with a disability

(e) enable persons with a disability to access services as part of their local community and foster collaboration, coordination and integration with other local services;

(4) If a restriction on the rights or opportunities of a person with a disability is necessary, the option chosen **should** be the option which is the least restrictive of the person as is possible in the circumstances”.

s.52 – Guiding principles for planning

Planning **should-**

(2) (a) be individualised;

(b) be directed by the person with a disability;

(i) maximise the choice and independence of the person with a disability;

s.54 – Support plans

(1) This section applies if a person is receiving ongoing disability services.

s.58 - Duties of disability service provider providing residential services

(1) A disability service provider providing residential services **must-**

(a) take reasonable measures to ensure that residents are treated with dignity and respect.

How the Disability Act 2006 Becomes a Barrier to Reporting Crime

The principles of the Disability Act 2006 outlines human rights and to exercise control over one’s life and the least restrictive option to be chosen in the best interests of the person with a disability. If a disability service provider does not comply with the Act, there are no penalty units for a breach of human rights under this section.

Health Care planning and Support Plans, highlight the person’s abilities, communication needs and support needs. Disability services are not penalised if they do not complete a Support & Health Care Plan every three years as per requirement under the Act. Support plan documents can assist in reporting of a crime in knowing how to engage with the person with a disability to make a disclosure or the supports required to assist that person to enable them to report a crime. For example: Ensure that the person has their communication diary to assist in using words with pictures.

Residential Statements in s.58 of the Act, highlights that disability service providers are to ensure that residents are treated with dignity and respect. No penalty units for a breach by the disability service provider if they do not comply with the Residential Statement s.58 (1) and ensuring that documents like support plans are completed as per requirements of the Act.

Minimal or no documentation completed as required under the Disability Act 2006 limits the person with a disability to demonstrate their capabilities and supports required in order to report crime.

The Department of Human Services **Residential Services Practice Manual 3rd Edition**, August 2012, highlights the importance of service providers to implement an updated Health Care Plan and Support Plan to meet the needs of the person with the disability living in residential care.

An Example of the Nature and Extent of Crimes against People with Disabilities with Regards to the Disability Act 2006

A family member was excluded from attending a police interview with her daughter regarding an alleged offence of sexual abuse at a disability service. The family member has no capacity under the Evidence Act 2008 s.13 to understand the questions put to her or provide answers that would be considered fact. However, the family member is in tune with her daughter's non-verbal communication skills. The daughter uses gestures to communicate to others, which is only recognised by those who are familiar to the person. The disability service provider had not completed a Support Plan for seven years and therefore, there was no documentation of what abilities or communication supports the person required in order for people unfamiliar to this person could use to effectively interview this person regarding an alleged crime. This meant that the person with a disability was not able to communicate any gestures expressing experiences they might have occurred at the disability service, as the police were not provided with a support plan that should have articulated what the gestures indicated for that person. The disability service provider was not penalised and no further action was taken against the service provider for the restriction placed on the person with the disability in minimising their opportunity communicate what happened.

Minister for Disability Services Mary Wooldridge made recommendations in an inquiry before being elected in 2010, which stated the following:

How to Work with Victoria Police and other Authorities to break down these Barriers and provide better services to People with Disabilities under the Disability Act 2006

There has been minimal funding put into training the Victorian Police and other public authorities to understand the Disability Act and how to administer the Act. Under the **Disability Act 2006, "s.218 Power to bring proceedings (1) The Secretary or a member of the police force may bring proceedings for an offence under this Act"**. Many families have reported through UVPD that they have

experienced making complaints to the Victorian police regarding concerns about their family member with a disability in care about alleged crime, with no outcomes as police have no understanding of the Disability Act. A lack of awareness on behalf of the Victorian Police force in understanding their obligations to administer the Act prevents people with disabilities in accessing equal justice.

d) The Victorian Charter of Human Rights and Responsibilities Act 2006

“Charter of Human Rights and Responsibilities Act 2006

“s.8 Recognition and equality before the law

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy his or her human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination and has the right to equal and effective protection against discrimination.

s.38 Conduct of public authorities

- (1) Subject to this section, it is unlawful for a public authority to act in a way that is incompatible with a human right or, in making a decision to a relevant human right.
- (2) Subsection (1) does not apply if, as a result of a statutory provision or a provision made by or under an Act of the Commonwealth or otherwise under law, the public authority could not reasonably have acted differently or made a different decision”.

How the Charter of Human Rights and Responsibilities Act 2006

Becomes a Barrier to Reporting Crime

The Evidence Act and fair comment and qualified privilege laws empowers public authorities to act in a way that is incompatible with a human right as the Evidence Act provides no provision for people who do not have capacity to report an alleged crime via another alternative, for example: Disability Mandatory Reporting. This limits people with disabilities to have equal recognition as a person before the law and to enjoy his or her human rights without discrimination.

It is suggested that it would be difficult for a Government to legislate penalties for public authorities for not complying with s.38 (1), when public authorities have to comply with s.13 of the Evidence Act. The Evidence Act and Charter of Human Rights contravene each other, even though s.38 (2) makes provision for not complying.

How to Work with Victoria Police and other Authorities to break down these Barriers and provide better services to People with Disabilities with regards to the Charter of Human Rights and Responsibilities Act 2006

The Victorian police and other public authorities are restricted by s.38 (2) of the Charter and the Evidence Act 2008 s.13. In order to uphold the rights of people with disabilities, Government legislation is required to change to provide people with a disability with another legal alternative that overcomes their lack of capacity to be credible witnesses in the event of an alleged crime. However, Victorian Police and other public authorities can be more effective in the services they provide by ensuring that they support and encourage s.15 of the Charter, which is to encourage freedom of speech in a format that is chosen by the person. Therefore, the least restrictive option can be utilised.

e) The Victorian Health Records Act 2001

Health records Act 2001

“3 Principle 3-Data Quality

3.1 An organisation **must** take steps that are reasonable in the circumstances to make sure that, having regard to the purpose for which the information is to be used, the health information it collects, uses, holds or discloses is accurate, complete, up to date and relevant to its functions or activities”.

How the Health Records Act 2001 Becomes a Barrier to Reporting Crime

Disability Service providers are required to collect and hold accurate, complete and up to date information that it holds about a person with a disability who resides in group homes, however, there is no penalty units applied if this requirement is not fulfilled. People with disabilities experience higher rates of health related issues than any other group in our community. Therefore, accurate and up to date information is vital in understanding the person’s needs and barriers to reporting alleged crime. Inaccurate record keeping leads to an alleged crime not been reported, covered up or even potentially going undetected. As demonstrated in these following articles:

“The Age reported on March 3, 2011

Disabled abuse: official cover-up referred to police

In the report tabled in Parliament, the Ombudsman found that acting Manager of Disability accommodation services Monica White “fabricated the preliminary assessment report”, which recommended no further action be taken, and also the record of a phone call. Mr Brouwer found DHS carers at a residential home in Clayton dragged the profoundly disabled man down a carpeted hallway, inflicting second-degree carpet burns on his back. Mr Brouwer found two women did not seek medical treatment for the man for more than 24 hours and tried to cover up their actions by suggesting the man’s injuries were self-inflicted”.

(Journalists- Michelle Griffin and Megan Levy)

“The Age reported on March 4, 2011**Cover-up of abuse stuns disability sector**

The Ombudsman’s report found that district manager Monica White provided his investigators with a “falsified” preliminary incident report. This is particularly concerning as the resident cannot speak for himself. The resident has cerebral palsy, epilepsy and can communicate only through gestures”. (*Journalist- Michelle Griffin*)

“The Age reported on July 16, 2012**Abuse by carers “covered up”**

Department whistle-blowers have accused managers of trying to conceal the extent of recent alleged abuse log information, altering staff diaries notes. Staff claims they have been pressured not to send emails about abuse cases and delete existing emails. The department was criticised by Ombudsman George Brouwer last year for its handling of alleged abuse of disabled people. In a report to Parliament, Mr Brouwer said a senior public servant fabricated evidence to cover up an assault on an intellectually disabled man”. (*Journalists- Richard Baker and Nick McKenzie*)

“The Age reported on July 17, 2012**Heavily bruised, and in state care**

Department insiders accused public servants of failing to properly log reports of adverse incidents and pressuring staff into deleting emails in a bid to cover up the extent of alleged sexual and other assaults”.

(*Journalists- Richard Baker and Nick McKenzie*)

“The Age reported on September 20, 2013**Department goes in pursuit of whistle-blowers**

The department have been accused by staff of burying the findings of a report on a senior manager’s handling of the alleged sexual abuse of a male disabled adult by his carer last year”. (*Journalists- Richard Baker and Nick McKenzie*)

An Example of the Nature and Extent of Crimes against People with Disabilities with regards to the Health Records Act 2001

A 39 year old woman with an intellectual disability, experiences a mental health issue, obsessive compulsive disorder. The symptoms of this women’s obsessive compulsive disorder includes irrational fear of being out of her daily routine. The young woman becomes distressed when she is not able to attend her day placement. The disability service provider decided to keep this woman home from day placement for a public authority investigator to visit the home and ask questions regarding the alleged assaults. The worker raises the concern with the investigator that the women is already confused with her day and without the investigator referring to the woman’s Support Plan and Health Records to verify issues for consideration, the investigator conducts his interview without the recommended communication aids and without consideration for the person’s mental health issues. The outcome of the interview is that the woman did not disclose any information about the alleged offences and the investigator came to the conclusion that a family member who notified regarding having witnessed the disclosure by the woman had no substance. The family member makes a formal complaint to the investigator for not referring to the health

information to conduct an accurate interview. The disability service provider explains that the health information was unavailable at the time due to a restructure of the system and a change- over of staff.

“The Age on April 13, 2013

Poor record-keeping holds back pursuits of justice

Incompetent record keeping is depriving thousands of Victorians of life-changing information, but the Department of Human Services has “a profound conflict of interest” because fixing the problem would allow a rush of lawsuits. Some 90 per cent of DHS are not properly managed and the increasing amount of electronic data is making the problem worse. Debbie Prout of the Records and Information Management Professionals of Australasia said by law the department had to ensure records were accessible and discoverable, but the more it did the higher chance of lawsuits would be. She said she was concerned that records pertaining to abuse would be destroyed. Ombudsman and Auditor-General’s reports showed that record-keeping compliance breaches were “prolific, recurring and have high risk implications. The penalties for destruction are woeful”. (*Journalist- Barney Swartz*)

How to Work with Victoria Police and other Authorities to break down these Barriers and provide better services to People with Disabilities with regards to the Health Records Act 2001

The Victorian Police can request health information in the event that there is an investigation into alleged crime committed against a person with a disability. In order for Victorian police to break down barriers for people with disabilities, access to accurate and up to date health information is imperative. If the current system continues to have no accountability with no penalty units for non-compliance with keeping accurate and up to date files than people with disabilities will be prevented from maximising their chances of accessing any forms of justice and or feeling safe into the future.

f) The Victorian Public Administrations Act 2004

“Public Administrations Act 2004

s.7 Public sector values

(1) The following are the public sector values-

- (a) Public officials **should** demonstrate responsiveness
- (b) Public officials **should** demonstrate integrity
- (c) Public officials **should** demonstrate impartiality
- (d) Public officials **should** demonstrate accountability
- (e) Public officials **should** demonstrate respect
- (f) Public officials **should** demonstrate leadership
- (g) Public officials **should** demonstrate human rights

(4) Nothing in subsection (1)-

- (a) creates in any person any legal right or gives raise to any civil cause of action;”.

How the Public Administration Act 2004 Becomes a Barrier to Reporting Crime

The Public Administrations Act does not provide people with a disability or their families a system that is professional and accountable for their actions. In legal terms, should means that it is not an obligation to demonstrate accountability, respect or integrity or comply with any of the public sector values. The legislation does not require any honesty, openness or transparency in their dealings with the community or people with disabilities residing in disability services. No obligation to be open and comply with the Public Administrations Act, allows for incidents of alleged sexual assault, indecent assault and causing serious injury to go unreported.

The Public Sector Standards Commissioner produced a policy for public sector employees in 2007.

“Code of Conduct for Victorian public sector employees serves the Government of the day and provides the same high standard of advice regardless of the party in power. Public sector employees do not withhold relevant information from the Government”.

Examples of the Nature and Extent of Crimes against People with Disabilities with regards to the Public Administrations Act 2004

1:

A disability direct care worker reports that on shift the acting house supervisor she was working with at the disability service decides to access the scissors from the staff room and take them to the resident’s bedrooms while changing them into their daily clothes. The house supervisor removes two of the resident’s pubic hairs from their genital areas and when the hair removal is noticed by other staff days later this matter is eventually reported. The disability service provider moves the house supervisor to another group home without any further actions taken. No documentation recorded of the incident, no police notification made, and no family informed of incident.

2:

A family member received a friend request on her face book account (on a weekend) from a senior disability services manager after the family visited a Disability Advocacy service raising concerns regarding alleged sexual abuse of their loved one in a disability service. The visit to the advocacy service identified that the person with a disability had not had a Support Plan completed for up to a period of 4 years and had excluded the family from being involved in the planning process. Several meetings and fifteen letters sent to the disability service provider provided no accountability of the public official for their inappropriate conduct. The family member who received the face book friend request expressed concern to the disability service provider about being bullied by the senior manager for wanting to access community service support for their loved one who continued to express distress about living at the disability service with the alleged offender continuing to work at the premises. No disciplinary action has been taken against this disability service manager for her inappropriate face book friend request. Instead, family member has

been excluded from communicating and attending meetings with the service provider on the grounds that they are not a direct blood relative.

How to Work with Victoria Police and other authorities to break down barriers and provide better services to people with disabilities with regards to the Public Administration Act 2004

The Public Administrations Act states that Victorian Police should, but are not legally obligated to comply with the Act. If Victorian police are not obligated to conduct their work in a manner that is in compliance with the Public Administrations Act and if there are no penalty units for any breaches, in effect this creates a culture within the police force to disregard human rights. The Government needs to change the Act to require public authorities like the Victorian police to comply with the legislation of integrity, accountability, respect and human rights and apply penalty units for any breaches and make promises for a civil cause of action, if the code of conduct is not adhered to.

g) The Victorian Guardianship and Administration Act 1986

“Guardianship and Administrations Act 1986

s.37 Persons responsible

(1) In this Part, *person responsible*, in relation to a patient and in relation to a proposed medical research procedure or proposed medical or dental treatment, means the first person listed below who is responsible for the patient and who, in the circumstances, is reasonably available and willing and able to make a decision under this Part-

(b) a person appointed by the Tribunal to make decisions in relation to the proposed procedure or treatment;

(h) the patients nearest relative within the meaning of paragraphs (a) to (g) of the definition of *nearest relative* in section 3”.

“42H Consent of person responsible

(1)The person responsible for a patient **may** consent to the carrying out of any medical or dental treatment”.

How the Guardianship and Administration Act 1986 Becomes a Barrier to Reporting Crime

Disability service providers can visit the doctor without informing Person’s Responsible, and make requests for medication changes. Under the Guardianship and Administration Act 1986, a medical practitioner may proceed with the administration of a pharmaceutical drug without substitute consent from the persons responsible. While a medical practitioner may proceed with the administration of a pharmaceutical without the consent of a person responsible, the Office of the Public Advocate would

be recommending that the practitioner should communicate with relevant parties and attempt to achieve consensus regarding the best treatment options for the person with the disability.

Given there is no legal requirement to gain consent from the person responsible, this leaves open the option for service providers to medicate a person with a disability to “**silence them**” when they are signalling distress, which is an inhuman form of treatment and a loop hole for disability service providers to use if they want to cover up sexual assault or any other forms of violence perpetrated against the person with the disability. If a person with a disability is *silenced* with medications this creates a massive barrier to reporting sexual assault or any other of form serious injury caused by indecent assault.

“The Age reported on July 16, 2012

Abuse by carers “covered up”

The Department of Human Services recorded 112 cases of alleged staff-to-client abuse in 2011-12 in government and community management housing for the disabled across Melbourne. Many of the alleged abuse cases are serious with molestation, withholding food, inappropriate use of sedatives, verbal and physical assault detailed in internal reports”. (*Journalists- Richard Baker and Nick McKenzie*)

An Example of the Nature and Extent of Crimes against People with Disabilities with regards to the Guardianship and Administration Act 1986

A 53 year old woman with an intellectual disability residing in a disability service starts to experience episodes of uncontrollable crying and expresses distress when family or friends are leaving after visiting her. The disability service provider had a good relationship with the family in keeping them up to date with any medication changes or gaining consent for medical treatment for example: changes to medications. Three months after the disability service provider visited the Doctor, regarding the ongoing crying episodes, the person with a disability is put on medication which minimised the crying and as observed by family the effects were, drooling at the mouth and falling asleep at the dinner table on family visits. It took for the family to question the change in behaviour for the disability service provider to inform the family that the Doctor changed the medication several months ago, after the disability service provider raised concerns about depression and ongoing crying episodes. The family questioned the disability service provider why they were not informed about the Dr’s appointment and were not provided with a handover of the medications changes. The disability service provider discussed that this was an oversight and that consent is not required under the Act for medication changes. Months later a worker from the disability service provider anonymously informed the family that a staff member is sexually abusing their loved one and not to inform management that this information has been passed on because he has been bullied at work for raising these concerns of abuse with staff.

How to Work with Victoria Police and other Authorities to break down these Barriers and provide better Services to People with Disabilities with regards to the Guardianship and Administration Act 2004

The Guardianship and Administration Act requires changes specifically detailing that consent for medication changes is required by the person responsible. The Act currently requires Doctors to gain the consent from persons responsible for medical or dental treatment; however, not for the administration of a pharmaceutical drug. The legislation allows for open slather by medical practioners and disability service providers to make medication changes without any accountability and or monitoring.

Even though, **Section 42 of the Guardianship and Administration Act 1986**, states that:

“a person must not-

(b) represent to a registered practitioner that he or she is authorised to give such consent-

Knowing that he or she is not authorised to give such consent or without reasonable grounds for believing that he or she is authorised to give such consent”.

Persons Responsible has limited powers to consent and over sea all medication treatments, therefore the decisions made by service providers and or Medical practitioners can go unquestioned and under the radar.

2) Systems and Government

a) Conflicts of Interests

1) Public Authorities & Statutory Bodies

Public authorities and statutory bodies provide many services to the community. The Department of Human Services, the Office of the Public Advocate, the Victorian Police, the Disability Services Commissioner and non-Government disability service providers all come under the umbrella of providing services to the community. Many non-government organisations have an independent appointed board of management and are funded by public money, for example Yooralla, E.W Tipping, Valid and Community Health Services. Many services that receive public funding sign up to a funding agreement that sets out the terms and conditions of receiving public funds. These conditions include how the public funds are to be spent and accounted for. Many services fear criticizing the Government in the media regarding public issues, in fear of losing future funding. Governments also have an interest in maintaining control over public services via providing funding as they too have the fear of attracting legal and public scrutiny in the event of an category one incident occurring.

The Age in September 2012, Mc Grath Nicol is the investigatory firm that has been hired by the Department of Human Services to hunt down whistle-blowers:

“Department goes in pursuit of whistle-blowers on 20 September 2012

The Victorian government is spending thousands behind hunting whistle-blowers behind leaks about abuse of disabled people in state care, and alleged cover-ups. The Department of Human Services has engaged forensic investigatory firm McGrath Nicol, to trace the source of leaks to *The Age* this year”.

(Journalists-Richard Baker and Nick Mckenzie)

2) “Independent” Investigations into Sexual and Physical Assault by Disability Service Providers

Many families’ have reported that their experiences of so called independent investigations have been flawed with conflicts of interest and the investigations were not independent at all. Several families have reported that this became very evident when they received correspondence via their lawyers. One family reported that one correspondence via their lawyer from the independent investigator stated in a letter **“I have been instructed by the Department of Human Services to finalise the review on the information that they have instructed me to obtain”**.

When a person with a disability discloses that they have experienced an alleged sexual abuse and or physical violence at a residential group home, this triggers the department’s critical incident reporting process. The disability service as per policy and procedure, will generally employ an external **“independent specialist investigator”**. The investigator receives their instructions from the disability service provider as to what they can and cannot investigate.

The Department of Human Services have an internal policy of reporting and to provide copies of incident reports to the Disability Services Commissioner, **“In line with departments policy, the Office of the Disability Services Commissioner will receive a copy of the incident of disclosure of sexual abuse by the person with the disability”**. If a family chooses to make a complaint regarding alleged sexual/physical abuse in residential accommodation to the DSC and consents to reconciliation with the service provider, the **Disability Act 2006 states that:**

“s.117 (7) Evidence of anything said or admitted during the conciliation process is not admissible in proceedings before a court or tribunal”. This prevention of using information admitted during reconciliation is a legal barrier and can only further disadvantage people with disabilities in limiting their access to justice.

The Department of Human Services has an internal policy that clearly outlines that DHS employees are not to attend police interviews as this is a conflict of interest. Families have reported that disability service providers have had senior management present at the police interviews, while their family member with a disability has been interviewed by police, regarding issues of alleged sexual and physical assaults at a disability group home.

Families who request for copies of independent investigation reports (via F.O.I) consistently get rejected on the grounds that they are either not entitled to receive this information or for one family, the service provider stated:

“The documents that you have requested (if they exist) would contain personal affairs information. I also understand that you did not take part in the review that led to the above mentioned report, therefore you have no authorisation to receive any documentation that may exist”.

This family did take part in the review at the cost of a \$6000 legal bill.

As highlighted earlier, the term “independent” means that there is no influence or control. Dictating who, how, when and what can be investigated demonstrates absolutely no independent investigation. This method of controlling and influencing the information that is investigated creates a barrier to justice for people with a disability as no government wants to be legally or publicly scrutinized.

3) Disability Service Providers Hunting Whistle-blowers

The disability service sector has experienced a long history of mistreating and bullying direct care workers and family members who have notified on behalf of the person with a disability that there has been alleged sexual and or physical violence in a disability residential setting. ‘Wilson and Brewer (1992) found that between 40 and 70% of crimes go unreported, and that sexual assault in particular is least likely to be reported to police’. Direct care workers who identify or witness other staff committing a crime of sexual and physical abuse against a person with an intellectual disability are not supported or encouraged to report the alleged crime. ‘A service culture of secrecy and hidden violence’ (Sexual Assault in Disability and Aged Care Action Strategy, 2007) prevents workers from reporting on behalf of people with a disability.

An Example of Cover-up and Demonising of Direct Care Staff who Whistle-blow

A direct care staff member at a disability service provider allegedly took inappropriate photos of residents whilst in the shower and getting dressed for their day placement. The direct care staff member was promoted to a senior position in the organisation because he assured the disability service provider that he would not post the photos on the web. This promoted role had the responsibility of overseeing the care provided to a large number of residents with disabilities. The direct care worker was eventually stood down for unknown reasons three years later. The disability service provider did not inform the police at the time of the inappropriate photos being taken. Workers had complained about the conduct of this worker, however, they were either stood down or moved to other group homes for speaking up.

The following article highlights the serious issues facing workers and the culture of cover up in the disability service sector:

“The Age reported on November 11 2012

Heinous crime against the disabled must be included in child abuse probe

Current systems of reporting, investigating and dealing with allegations of abuse are inadequate and flawed and do not encourage people to come forward. For example, VALID had recent experiences with potential whistle-blowers who refused to proceed because their anonymity could not be assured and who had justifiable fears for their own security”. (*Journalist- Sandy Guy*)

Without question, these examples demonstrate that there is a strong identified need for Commonwealth Disability Mandatory Reporting, to protect whistle-blowers in the disability sector.

Australia has legislated Aged care Mandatory reporting, to protect workers who report concerns of alleged assaults.

**“The Commonwealth Age Care Amendment (Security and Protection) Act 2007
Section 96-8**

Protection for reporting reportable assaults

Disclosures qualifying for protection

- (1) A disclosure of information by a person (the discloser) qualifies for protection under this section if:
- (e) the discloser makes the disclosure in good faith

Immunities for disclosure

- (2) If a person makes a disclosure that qualifies for protection under this section:
- (a) The person is not subjected to any civil or criminal liability for making the disclosure”.

4) Disability Direct Care Staff Undertrained and in a Un Professionalised Sector

The Disability sector has had a long history of employing individuals with minimal qualifications to support the care needs of some of the most vulnerable people in our community. Individuals can apply to become direct care workers with minimal qualifications and experience.

a) The **Department of Human Services** web site provides several examples of positions descriptions for DDSO (Disability Development and Support Officer). The position descriptions detail the following:

*** Accountabilities**

- 1) Directly support client wellbeing, preparation for meals, personal care, based on support plan goals.
- 2) Provide information and report through standard methods, including recording charts and completing routine tasks utilising departmental systems including software applications.
- (7) Administer medication under general instruction and in line with protocol and policies.

(8) Keep accurate and complete records of your work activities in accordance with legislative requirements and the department's records, information security and privacy policies and requirements.

*** Knowledge and skills:**

(4) Policy skills: understands the purpose of policies, uses operational policies to guide their work.

*** Desirable qualifications:**

10) A current Level 2 First Aid Certificate and current Victorian drivers Licence are required.

*** Specialist expertise:**

12) Ability to advocate on behalf of people with a disability and a good understanding of the principles of the Disability Act 2006 and the State Disability Plan would be expected".

Note: If a successful candidate, DHS require a current police check, working with Children's check and medical assessment.

b) The Yooralla web site provides examples of positions descriptions for:

"Disability/Individualised Support Worker

*** Offering high quality support services for people with disability**

*** Our Values**

We leave no stone unturned

*** Quality Assurance**

Become Familiar with and follow Yooralla's quality policies, procedures and management instructions.

*** Accountabilities**

Implementation of person centred plan and their client Support plan

Ensuring that clients are at all times accorded privacy and confidentiality.

*** Practical Support**

Transferring/hosting

Meal preparation

Meal assistance

Medication Administration

*** Administration, documentation and reporting**

Participating in the development of Support Plans & Behavioural Plans

Following shift handover procedures

Reporting incidents, injuries, near misses and hazards

*** Mandatory Requirements**

A current police check

First Aid certificate

Working with children's check

Medical assessment

Drivers licence".

c) E.W. Tipping Foundation

Direct Support Worker

*** Key Selection criteria (essential)**

Excellent planning and organisational abilities

First Aid Certificate Level 2

Current drivers licence

Police check

*** Provide Support Services**

Follow organisational guidelines, strategies and procedures provided for undertaking this role.

Communication

Keep personal records and documentation up to date

*** Quality**

Demonstrated knowledge of the relevant standards pertaining to the service and the philosophy and requirements of the standards.

Ensures work practices and service delivery reflect the recommendations of the current quality improvement plan”.

Direct care workers are required to perform duties within the scope of their employment that involves a skill level and awareness of:

- Statutory process
- Medication administration
- Hoisting
- Meal preparation
- Record keeping & complying with disability standards.

Yet, the role of a direct care worker does not require any prior or formal training and or qualifications in these areas before the commencement of their employment.

Due to lack of professionalism and adequately trained staff, the disability sector has no independent professional association/body to monitor the standards of the workforce. Therefore, there is no external monitoring and accountability, unlike the nursing profession which has an established “Nursing and Midwifery” board.

The Age reported on 25 September 2013

“Austin Hospital nurse struck off over sex with patient

A nurse has been reprimanded and suspended after embarking on a sexual relationship with a psychiatric patient from the hospital he worked at and taking her prescription drugs. After a fight, fuelled by his drinking and consumption of prescription drugs, police took out an intervention order on the nurse. Police notified the Nursing and Midwifery Board of Australia, who decided to take action. V.C.A.T affirmed the board’s suspension and banned the nurse from applying for his registration again for 12 months”. (*Journalist- Adrian Lowe*)

“The Sydney Morning Herald reported on 27 September 2013

Nurse made aged patients “beg and suck his thumb”

A male nurse made an elderly dementia patient get down all fours and beg him for cigarettes, and forced a 99-year-old female patient to suck his thumb. The Nursing and Midwifery Tribunal of NSW found the nurse who went to work in an aged care home in NSW, guilty of professional misconduct and recommended his registration be cancelled. In interviews with police, the nurse said: “I just thought it was funny”. On two occasions, the nurse had been seen with his hands down the pants of an 82-year-old man. The tribunal found the allegation proven. The Tribunal concluded that

the nurse had breached the competency standards for registered nurses and code of ethics for nurses in Australia". (*Journalist-Heath Aston*)

Conclusion

In conclusion, people with cognitive disabilities face barriers when reporting crime about violence. Barriers to reporting sexual and physical assaults operate on an individual, organisational and societal level. Current legislation such as the Federal and Victorian Evidence Act's 1995 and 2008, act as a barrier for people with disabilities who do not have capacity to be cross examined and answer questions of fact. The Australian Federal and the Victorian State Governments have not modified or abolished the Evidence Act's as required under the Convention on the Rights of People with a Disability. A lack of modifications to existing laws has prevented people with disabilities who lack capacity to access justice and have equal protection of the law. As highlighted, a one size fits all legal system is discriminatory and not sustainable. If people with disabilities are to participate fully in Australian society, the practice and conduct of public authorities needs to change. This requires legislation to be modified in order for public authorities to have a consistent approach in their practice.

Governments fear legal scrutiny and therefore set up systems and services that form a protection barrier for the establishment to avoid being publicly scrutinised, however, in the process place vulnerable people with disabilities at risk of being exposed to sexual and physical violence. The disability sector has a culture of cover-up and victimising direct care workers and family members who make notifications on behalf of people who lack capacity to notify on behalf of them. The disability sector has a long history of protecting alleged offenders by moving them from one place to another, keeping them on the move as soon as there is concern's raised regarding their conduct. Australia requires Disability Mandatory Reporting to be legislated on a Commonwealth level and eliminate conflicts of interest on the boards of management, which impact on the lives of people with disabilities.

The South Australian Government has made recommendations to make amendments to their state Evidence Act and introduce Mandatory Reporting. Unless, the Federal and all State governments follow suite, people with disabilities who do not have capacity to access the justice system will continue to be subjected to high levels of violence perpetrated against them due to a lack of action on behalf of governments and giving perpetrators the permission to violate people with disabilities without any legal repercussions. The disability sector has an untrained and unprofessionalised work force that provides no protection for the clients they service. This current predicament is un-sustainable and untenable given the high levels of reported cases of staff to client sexual and physical assault. Unless the Government invests in improving the standards of care by introducing mandatory training for workers in the disability sector, the level of care to the most vulnerable members of our community will remain at a very low standard.

References

Age Care Amendment (Security and Protection) Act 2007

Australian Constitution Act, 1900, pg:43

Australian Government, Department of Health and Aging, “Compulsory Reporting”, 2007.

Aston, H. (27 September, 2013). The Sydney Morning Herald. “Nurse made aged patients “beg and suck his thumb”.

Blyth, J; & Kelly, L. (2006). “Sexual Assault of People in Aged Care Settings: Towards a better Understanding and Response”, 1-6.

Baker, R; & McKenzie, N. *The Age* (20 September, 2012). “Department goes in pursuit of whistle-blowers. Abuse in care “hushed up”.

Browne, R; Fair Fax Media Network. (23 April, 2013). “Disabled poorly treated by the law”.

Baker, R; & Mckenzie, N. *The Age* (17 July, 2012). “Heavily brusied, and in state care”.

Clark, H; & Fileborn, B. (2011) “ACSSA wrap. Australian centre for the study of sexual assault”, 7-11.

Cook, H. *The Age* (12 October, 2012). “Abuse, assault and neglect on the rise in disability housing report shows”.

Channel 10; The Project (15 April, 2013). ”Justice elusive for those with disabilities”.

Department of Human Services, (12 March, 2013). “Call for new members for the Disability Services Board, closes 25 March 2013”.

Department of Human Services, (12 March, 2013). “Expression of Interest Guidelines DSC Board Committee”.

Department of Human Services, (September 2013), “Disability Development and Support Officer”, position description.

Department of Human Services, 2009 and 2012 edition, “Residential Services Manual”.

E.W.Tipping Foundation, (September 2013), “Direct Support Worker”, position description.

Fitzsimmons, H. ABC news, Lateline (13 September, 2012). “Disability advocates allege epidemic of abuse in care”.

- Flatley, C. *The Age* (4 September 2009). “Carer guilty of assaulting disabled kids”.
- Frohman, C. (2011). “Women with Disabilities Australia. Submission to the UN, Analytical Study on Violence against Women with Disabilities”, 7-8.
- Griffin, M. *The Age* (4 March, 2011). “Cover-up of abuse stuns disability sector”.
- Griffin, M & Levy, M. (3 March, 2011). “Disabled abuse: official ‘cover-up’ referred to police”.
- Guy, Sandy. *The Age* (21 November, 2012). “Heinous crime against the disabled must be included in child abuse probe”.
- Harbour, K & Payton, G; “Heinemann Australian Dictionary”, 2nd Edition.
- Haxton, N. ABC news. (21 December, 2011). “Abuse charges dropped against bus driver”.
- Haxton, N. ABC news. (8 December 2011). “Bus driver may escape child sex charges”.
- Haxton, N. ABC news (23 April 2013). “Human Rights Commission starts national talks on lack of justice for disabled”.
- Kemp, M. (27 June, 2011). *The Advertiser*. “Disabled rape “too hard to prosecute”.
- Lowe, A. (25 September 2013). *The Age*. “Austin Hospital nurse struck off over sex with patient”.
- Linked in Profiles Australia.com
- Malik, S. *Herald Sun* (31 May, 2013). “Abuse rising, Vic disability watchdog says”.
- McKenzie, N. *The Age* (28 January, 2011). “Damning report on abuse”.
- Mickelborough. P. *Herald/Sun* (9 November 2012) “Call for royal commission into DHS”.
- Murray, S; & Powell, A. (2008). “Sexual assault and adults with a disability. Enabling recognition, disclosure and a just response”, 3-10.
- Office of the Public Advocate (2013). “Interagency Guideline for Addressing Violence, Neglect and Abuse”.
- Parliament of Victoria, Family and Community Development Committee. *Inquiry into Supported Accommodation for Victorians with a Disability and/or Mental illness*, December 2009.

The Law Society of South Australia. The Laws Society's Submission to the Attorney Generals Department. Improving the Criminal Justice System for People with Disability, July 2013.

Tomazin, F. *The Age* (24 April 2011). "Law failing to protect disabled in state care".

Victorian Law Today.com, State Government legislation:

Charter of Human Rights and Responsibilities Act 2006

Defamation Act 2005

Disability Act 2005

Evidence Act 2008

Guardianship and Administration Act 1986

Health records Act 2001

Public Administrations Act 2004

Commonwealth Evidence Act 1995

Wilson and Brewer (1992) "Sexual Assault in Disability and Aged Care Action Strategy – 2007".

Winter, C. ABC news (26 July, 2013). 'Parliamentary inquiry demands changes to better support disabled people dealing with the legal system'.

Yooralla, (September 2013), "Disability/Individualised Support Worker", position description.

Zwartz, B. *The Age* (11 April, 2013). "Poor record-keeping holds back pursuits of justice".

