

Mr Jim Longley
Chief Executive
Ageing, Disability and Home Care
Department of Family and Community Services
Level 5, 83 Clarence Street
SYDNEY NSW 2000

Attention: The Disability Services Act Review Team
dsareview@facs.nsw.gov.au

Dear Mr Longley

NSW Ombudsman submission on the review of the *Disability Services Act 1993* (NSW)

We welcome the opportunity to comment on the review of the *Disability Services Act 1993* (DSA), to inform the development of a new disability rights and support framework in NSW.

We appreciate the challenges involved in revising the existing legislation in the context of the broader reforms to disability support under the National Disability Insurance Scheme (NDIS). Against this background, our comments are focused on key changes to the legislation that we consider are necessary to:

- facilitate the person-centred and individualised funding reforms under *Stronger Together 2*
- inform the development of the NDIS, and prepare NSW for the implementation of the scheme, and
- strengthen the safeguards for people with disability in the context of the new disability support arrangements.

Our comments have been informed by our extensive work over the past decade, including consultations with people with disability, carers, disability services and other stakeholders.

The DSA and the *Community Services (Complaints, Reviews and Monitoring) Act 1993*

In our discussions with stakeholders over the past year, we have taken the opportunity to note that 2013 marks the 20th anniversary of both the DSA and the *Community Services (Complaints, Reviews and Monitoring) Act 1993* (CS CRAMA). Given the necessary and important shift to person-centred and individualised support for people with disability, we believe that it is vital to look at reviewing CS CRAMA as well as the DSA.

The discussion paper on *Reforming NSW Disability Support* indicates that part of the intended purpose of the review of the DSA is to build ‘an integrated disability legal framework, which draws together different laws that affect people with disability into one set of laws.’ In this context, the discussion paper seeks views on whether certain parts of CS CRAMA that relate to people with disability might be better placed in the proposed disability legislation.

We appreciate the potential benefits in having an integrated disability legal framework, and note the example provided by the *Disability Act 2006* (Vic) in this regard. Ultimately, we are in favour of whichever arrangement works best to uphold the rights and improve outcomes for people with disability in NSW. However, we note that there are some practical challenges associated with seeking to relocate the parts of CS CRAMA that relate to people with disability. In particular, CS CRAMA is focused on ‘community services’, which include, but are not limited to, disability services. As a result, the parts of CS CRAMA that relate to people with disability also relate to other people receiving community services. For example:

- the scope of the Official Community Visitor scheme (Part 2) encompasses residential services providing out-of-home care to children and young people as well as accommodation for people with disability, and
- our reviewable deaths functions (Part 6) encompass children at risk of harm and children in care as well as people with disability in residential care.

While it would be a relatively simple legislative drafting exercise to excise disability services from CS CRAMA, we believe that this may represent a lost opportunity to amend CS CRAMA to better reflect core rights-based principles within a range of community service contexts, including the disability area. Furthermore, if CS CRAMA was amended in this way, then it ought to guarantee an alignment with the core values and Principles of the new Disability Act. To provide additional safeguards in this respect, CS CRAMA could be amended to make it explicit that the Principles in the new disability legislation are to be applied in relation to the exercise of relevant functions under CS CRAMA in relation to any matter affecting people with disability.

Strengthening safeguards

We welcome the opportunity that the review of the DSA presents to strengthen the safeguards available for people with disability in the new disability support system. Given our role, safeguards are a strong focus in our submission. In particular, our submission discusses the need to include legislative provisions to:

- introduce a uniform system for reporting complaints
- require complaint resolution to be based on adherence to the Principles in the new Disability Act and relevant standards
- institute a strong framework for preventing and effectively responding to abuse, serious neglect and exploitation of people with disability – including introducing a system for reporting and overseeing the handling of serious incidents; and establishing an exploitation offence

- introduce improved systems for screening people engaged to support people with disability
- regulate and effectively oversight the use of restrictive interventions, and
- enable the use of ‘independent persons’ to assist and support people with disability.

The importance of mainstream services and genuine inclusion of people with disability

The new disability legislation provides an opportunity to set up a framework for promoting the rights of, and supports for, people with disability in NSW. Consistent with the UN Convention on the Rights of Persons with Disabilities (CRPD), the National Disability Strategy, and the vision underpinning *Stronger Together 2* and the NDIS, we believe that the proposed new legislation ought to clearly provide a framework for enabling the genuine inclusion of people with disability and the removal of barriers that may hinder their full and effective participation in society on an equal basis with others.

In our view, the proposed new disability legislation has the potential to guide this State’s work, across both government and the broader community, towards ensuring that NSW fulfils its obligations under the CRPD.

The attached comments are provided for your consideration. We would be happy to discuss our comments or provide further information as necessary. If you have any questions, please contact Kathryn McKenzie, Principal Project Officer, Disability, on 9286 0984 or email kmckenzie@ombo.nsw.gov.au.

Yours sincerely



Bruce Barbour
Ombudsman

4 March 2013



Steve Kinmond
Deputy Ombudsman
Community and Disability Services Commissioner

4 March 2013

cc:

Hon Andrew Constance MP, Minister for Disability Services

Jim Moore, Director-General, Department of Family and Community Services

Disability legislation scope

It is important that the new Disability Act reflects the UN Convention on the Rights of Persons with Disabilities (CRPD), developed by people with disability themselves, and ratified by Australia in 2008. It must underpin all elements of the new disability legislation.

We note that the Commonwealth and NSW Governments have agreed to implement the full NDIS in NSW by 1 July 2018, irrespective of whether any other State or Territory signs up to the scheme, and that transition to the full scheme in NSW is scheduled to commence in 2016. Against this background, provided that the new Disability Act strongly promotes – and ‘puts flesh on’ – the principles of the CRPD, then the new Act should be able to be used to guide NSW’s input into the roll out of the NDIS.

Objects

The focus in the Objects of the current Act is on the provision of services. We agree with the view expressed in the *Reforming NSW Disability Support* discussion paper that the focus of the existing Act on funding specialist disability services does not reflect the vision set out in *Stronger Together 2*. Accordingly, we believe that the Objects should be revised to clearly reflect the shift to person-centred support, with a strong focus on individuals’ rights and responsibilities. Given that the Objects of the Act play a role in statutory interpretation,¹ it is imperative that the Objects, and not just the Principles, refer to rights and responsibilities.

The Objectives of the *Disability Act 2006* (Vic) provide a useful starting point for consideration of potential amendments to the NSW legislation. In particular, we commend those particular Objectives in the Victorian legislation that move beyond a narrow focus on specialist disability services to:

- advance the inclusion and participation in the community of persons with a disability,² and
- promote a strategic whole of government approach in supporting the needs and aspirations of persons with a disability.³

Consistent with *Stronger Together 2*, the NDIS and the National Disability Strategy, the new Disability Act should aim to facilitate provision and coordination of support across specialist and mainstream sectors. Importantly, the Objects of the Act should indicate how the legislation will reflect and action the CRPD, which is necessarily focused on whole of life rights rather than specialist disability support.

In this regard, we note that the discussion paper recognises that current thinking ‘focuses on the importance of the whole of government (and not just those departments or agencies that are responsible for disability services and funding) and of the community having roles and responsibilities for enabling people with disability to be included and take part in the life of the community in the same ways as others.’⁴ We support the argument for the revised

¹ *Interpretation Act 1987* (NSW), s33

² *Disability Act 2006* (Vic), s4(a)

³ *Disability Act 2006* (Vic), s4(b)

⁴ NSW Government (January 2013) *Reforming NSW Disability Support* discussion paper, p17

legislation to ‘look beyond funding, providing and regulating specialist disability services to consider the issues facing people with disability more broadly’.⁵

We note that Victoria has an additional safeguard against human rights abuses – the *Charter of Rights and Responsibilities Act 2006* (Vic). There are numerous examples of people with disability in Victoria benefiting from the Charter to gain access to supports and to exercise their human rights.⁶ The absence of a similar Charter in NSW heightens the need for rights to be central to the Objects and purpose of the new Act, and for the proposed legislation to directly acknowledge the need for safeguards (and related systems) for preventing, and responding to, abuse, neglect and the exploitation of people with disability, consistent with this State’s obligations under the CRPD.

Principles

Overall, the Principles in the DSA are positive and largely person-centred. To strengthen the legislation in the context of the disability sector reforms, we consider that the Principles should be amended to:

- include the right of people with disability to exercise control over their own lives⁷
- remove the reference to ‘protection’ in the Principle at Schedule 1(1)(i), and make it consistent with the relevant Principle in the proposed NDIS legislation: ‘People with disability have the same right as other members of Australian society to respect for their worth and dignity and to live free from abuse, neglect and exploitation’⁸
- strengthen the Principles relating to decision-making so that it is clear that people with disability have the right to make decisions and, when necessary, be supported to enable them to do so,⁹ and
- strengthen the Principle relating to the right to pursue a grievance to include the right of people with disability to adequate support to enable the pursuit of their grievances.¹⁰

Defining ‘disability’

The scope of the ‘target group’ of the current DSA is reasonable, and is broadly consistent with the NDIS. However, our work has found that problems have arisen as a result of subsequent policy interpretation of the target group. In particular, we note that:

⁵ *Ibid.*

⁶ See, for example, Human Rights Law Centre (2012) *Victoria’s Charter of Human Rights and Responsibilities in Action: Case studies from the first five years of operation*. In addition, the Victorian Supreme Court recently found that the conduct of a disability support worker in dragging a person with an intellectual disability across a carpeted hallway constituted ‘cruel, inhuman or degrading treatment’ contrary to section 10(b) of the Charter. That conduct, together with the worker’s failure to report the incident, amounted to ‘serious misconduct’ under the *Public Administration Act 2004* (Vic) and justified termination of his employment. (Davies v State of Victoria [2012] VSC 343 (15 August 2012). See case by the Human Rights Law Centre: <http://www.hrlc.org.au/davies-v-state-of-victoria-2012-vsc-343-15-august-2012>).

⁷ For example, *Disability Act 2006* (Vic), s5(d)

⁸ National Disability Insurance Scheme Bill 2012, s4(6)

⁹ For example, National Disability Insurance Scheme Bill 2012, s4(8); and *Disability Act 2006* (Vic), s5(e)

¹⁰ For example, *Disability Services Act 1991* (ACT), Schedule 1(7) and Schedule 1(8)

- while people with a disability arising from a psychiatric impairment (including people in mental health facilities) are included in the target group of the DSA, they have largely been excluded from specialist disability services due (at least in part) to a policy exclusion¹¹
- ADHC has focused the provision of its own services on people who meet a strict definition of intellectual disability, and
- people with disability that do not fit neatly into the impairment types listed in the DSA – including people with acquired brain injury, autism spectrum disorders, and behavioural disorders – have often had difficulty accessing specialist disability supports.

Consistent with our view that the new disability legislation should extend beyond the provision of specialist disability services, we consider that the definition of disability should be broad, and largely reflect the CRPD.¹²

Safeguards and review of decisions

It will be important to ensure that a range of effective safeguards are available for people with disability in the new support arrangements that will be provided under *Stronger Together 2* and the NDIS. According to their individual needs and circumstances, people with disability ought to be able to access informal and formal safeguards, which complement, and do not restrict, their right to control their own lives.

Safeguards relating to restrictive interventions

Irrespective of the broader disability sector reforms, our work points to the need for the DSA to be amended to introduce legislative requirements relating to the use of restrictive interventions.¹³

In particular, our reviews of the deaths of people with disability in care have highlighted systemic problems with the use, and regulation, of restrictive practices across residential services. For example, our reviews of deaths between 2003 and 2009 identified failures to follow policy in relation to the use of antipsychotic medication for some people in disability services, and the frequent use of antipsychotic medication as a primary behaviour management strategy. We found that:

- 29 people in disability services had been prescribed antipsychotic medication without a clearly documented reason for it, such as treatment for mental illness or behaviour management, and
- 14 people in disability services on antipsychotic medication had challenging behaviour and no mental illness, but did not have a behaviour support plan.¹⁴

¹¹ This issue was highlighted in our special report to Parliament, *Denial of rights: the need to improve accommodation and support for people with psychiatric disability* (November 2012).

¹² Article 1 of the CRPD states that persons with disabilities ‘include those who have long-term physical, mental, intellectual or sensory impairments which in interaction with various barriers may hinder their full and effective participation in society on an equal basis with others.’

¹³ Encompassing both restrictive and restricted practices.

We provided this information in our September 2011 report to Parliament on reviewable disability deaths, and recommended that ADHC:

- take steps to identify the individuals in its accommodation services receiving antipsychotic medication, and ensure that policy requirements are being met, and
- provide advice to us on how it intends to monitor funded disability accommodation services to ascertain their compliance with the policy requirements.

Our monitoring of ADHC's progress in implementing our recommendations has underscored the need for requirements in this area to have legislative force. The quality assurance system used by ADHC to monitor compliance in its own services has limited scope in relation to restrictive interventions and behaviour support requirements. It does not, for example, identify people who receive regular antipsychotic medication for behaviour management purposes without a Behaviour Support Plan. There is no overarching system or regulatory regime to ensure that the use of restrictive interventions in relation to people with disability in care both upholds their rights and meets relevant requirements.

In relation to the issues we have reported regarding the use of chemical restraint, we do not believe that adequate consideration has been given to date to either the seriousness of the matter or its potential reach. Our reviews indicate that, for some people with disability in care, psychotropic medication is the only behaviour support strategy being used. It is concerning that ADHC's *Behaviour Support* policy does not appear to have been consistently applied, and there has not been action taken to examine current practice across the sector. Importantly, our reviews continue to identify concerns regarding the use of restrictive practices and the provision of behaviour support, particularly for people with complex needs.

We consider that there is a need to introduce legislative requirements relating to the use of restrictive interventions to increase accountability and transparency, and to ensure that the rights of people with disability are upheld. Overall, we support the framework and requirements outlined in the *Disability Act 2006* (Vic), including the provisions concerning:

- the functions and responsibilities of the Office of the Senior Practitioner, including to:
 - visit and inspect any premises where disability services are being provided, see any person, and obtain information from services
 - authorise, investigate, audit and monitor the use of restrictive interventions
 - direct a service to discontinue or alter a practice, procedure or treatment to a person with disability
 - publicly report on the use of restrictive interventions, and
 - develop guidelines and standards, and provide education, training, information and advice on restrictive interventions and on the rights of people subject to such interventions
- sanctions for breaches of the legislation

¹⁴ NSW Ombudsman (September 2011) *Report of Reviewable Deaths in 2008 & 2009, Volume 2: Deaths of people with disabilities in care*, pp21-22.

- provision for external merits review of decisions to use restrictive interventions, and
- the involvement of an independent person to explain the intended restrictive intervention, its use and the person's rights; and to identify and report where the person does not understand the 'what and why' of the restrictive interventions, and where the legislative requirements are not being met.

Service safeguards: regulating quality and safety

We support risk-based regulation of the disability sector, and agree with the view expressed by stakeholders in the *Living Life My Way* consultations that community-based supports and activities should not be regulated to the extent that it impacts on choice and innovation. We support the view that 'a person centred system should allow a person with disability to purchase supports and services from a range of providers, with quality one consideration among others in the exercise of informed choice.'¹⁵

Standards

We consider that the new legislation should provide for the Minister to determine standards to be met by specialist disability services and, consistent with Victorian disability legislation, provide for:

- the specification of performance measures
- quality assurance processes, including monitoring performance, and
- action to be taken where a provider has breached, or failed to comply with, standards or other specified requirements.

We broadly support inclusion in the Act of a similar provision to that in the Victorian legislation that gives the Minister the right to 'specify standards in respect of the provision of disability services including with respect to –

- a) service delivery;
- b) support plans;
- c) complaints management; and
- d) information management and privacy and confidentiality.'¹⁶

Sanctions

We note that the *Disability Act 2006* (Vic) includes a range of sanctions relevant to safeguarding rights, including the prevention of financial abuse. Relevant sanctions include penalties for:

- disability service providers who do not reasonably render assistance or give full and true answers to the Senior Practitioner in the exercise of duties, function and powers (s27)
- interfering with residents' tenancy rights in residential services (s62), and not giving receipt for payments for residential charges (s69)

¹⁵ NSW Government (May-August 2012) *Living Life My Way: Outcomes of statewide consultations*, p39.

¹⁶ *Disability Act 2006* (Vic), s97(2)

- mismanagement of a client’s finances (s93)
- non-compliance with standards and performance measures (s99)
- failing to have an internal complaints system (s104)
- not reporting to the Disability Services Commissioner within the prescribed timeframe on how the service has responded to complaints (s119)
- penalising a person for making a complaint (s126)
- preventing community visitors from exercising their functions (ss130-132)
- the use of restrictive interventions without proper approval (s134) or to applying restraint or seclusion except as prescribed in the Act (s149), and
- detaining a person with intellectual disability otherwise than in accordance with the compulsory treatment provisions in the Act (s150A).

While, ultimately, people with disability will have the ability to leave services that do not meet their needs, we consider that it will be important for the legislation to also include sanctions against specialist disability services where critical requirements and rights are breached.

Exploitation offence

The discussion paper asks an important question as to what role, if any, disability legislation should play to minimise the risk of harm to people with disability who choose mainstream providers or providers who are not monitored or regulated.

We recommend consideration of a provision to be included in the Disability Act that creates an offence for exploiting people with disability. This would serve as a ‘safety net’ for all service delivery arrangements, including those which will fall outside the safeguards proposed for specialist disability services.¹⁷ The inclusion of an exploitation offence appears to align with the views of stakeholders in the *Living Life My Way* consultations, regarding the need for enhanced accountability and prevention of exploitation of people with disability under individualised funding arrangements. It would also complement existing legislative safeguards.

Currently, it is an offence under the *Crimes Act 1900* for a person responsible for the care of a person with a cognitive impairment to sexually exploit that person.¹⁸ In addition, serious physical disability and cognitive impairment are aggravating circumstances for the offences of aggravated sexual assault, aggravated indecent assault, and aggravated acts of

¹⁷ In consultation on the UK’s ‘No Secrets’ policy regarding safeguarding of vulnerable adults, the need for ‘financial safeguarding’ was identified, particularly in relation to individualised disability support funding. It was reported that opportunistic financial abuse was common, and that there were instances of ‘grooming’ vulnerable people for friendship and then exploiting them. See Department of Health (2009) *Safeguarding Adults: Report on the consultation on the review of ‘No Secrets’*.

¹⁸ Under s66F(3) of the *Crimes Act 1900*, it is an offence for any person to have sexual intercourse with a person with cognitive impairment with the intention of taking advantage of that person’s cognitive impairment.

indecenty.¹⁹ Cognitive impairment is also an aggravating circumstance for the offence of causing sexual servitude.²⁰

In relation to an exploitation offence in the Disability Act, we suggest the following:

It is an offence for a person to engage in unconscionable conduct in relation to selling or supplying, or agreeing to sell or supply, goods or services to a person with a cognitive impairment [as defined in section 61H(1A) of the *Crimes Act 1900*].²¹

Prohibition of ‘unconscionable conduct’ operates in equity to prevent one party in a transaction taking advantage of the ‘special disadvantage’ of the other party, where that disadvantage seriously affects his or her ability to enter into a transaction in his or her own best interests. It arises where the other party knows, or ought to know, of the existence of that condition or circumstance and of its effect on the innocent party.²² A prohibition on unconscionable conduct is also found in Australian Consumer Law.²³

Additional safeguards for vulnerable people

Improving safeguards to prevent and effectively respond to abuse, serious neglect and exploitation

The development and implementation of a reporting and oversight system for serious incidents involving people with disability is required by the CRPD (including Articles 12, 14, 15 and 16). This includes obligations on States Parties to:

- ‘take all appropriate measures to prevent all forms of exploitation, violence and abuse’²⁴ (and, in order to prevent such abuse, shall ensure that, among other things, ‘all facilities and programmes designed to serve persons with disability are effectively monitored by independent authorities’²⁵), and
- ‘put in place effective legislation and policies ... to ensure that instances of exploitation, violence and abuse against persons with disabilities are identified, investigated and, where appropriate, prosecuted.’²⁶

We believe that the development of legislation and systems to enable a genuinely person-centred approach to supports must include examination of the existing systems for preventing and responding to abuse, serious neglect and exploitation. This fact was recognised in Minister Constance’s media statement of September 2012 in response to

¹⁹ Sections 61J, 61M, and 61O of the *Crimes Act 1900* respectively.

²⁰ *Crimes Act 1900*, s80D.

²¹ Section 61H(1A) states that a person has a ‘cognitive impairment’ if they have: an intellectual disability; a developmental disorder (including an autism spectrum disorder), a neurological disorder, dementia, a severe mental illness, or a brain injury that results in the person requiring supervision or social habilitation in connection with daily life activities.

²² *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447.

²³ Schedule 2 of the *Competition and Consumer Act 2010*, s21, provides that: (1) A person must not, in trade or commerce, in connection with: (a) the supply or possible supply of goods or services to a person (other than a listed public company)... engage in conduct that is, in all the circumstances, unconscionable.

²⁴ United Nations *Convention on the Rights of Persons with Disabilities*, Article 16(2)

²⁵ *Ibid.*, Article 16(3)

²⁶ *Ibid.*, Article 16(5)

allegations of abuse in Victoria, in which he announced that he had asked the ADHC Chief Executive to consult with our office ‘over the adequacy of background checks and the procedures to investigate allegations of sexual and physical abuse of people with disability by carers in NSW’.²⁷

The Minister also acknowledged the comments of Graeme Innes, the Australian Human Rights Commission’s Disability Discrimination Commissioner, who ‘has called for a national approach on this issue, particularly in light of the soon to be implemented National Disability Insurance Scheme.’²⁸

The need to address this issue of introducing a robust system for identifying, and responding to, serious abuse and neglect has been acknowledged for some time. For example, in the NSW Law Reform Commission’s (LRC) 1999 review of the DSA, ‘concern was expressed in submissions and during consultations that the DSA does not adequately protect people with a disability who are at serious risk of harm.’²⁹ In its submission, the Community Services Commission stated that ‘[f]or adults with disabilities in particular, there is an absence of an appropriate framework for protection from abuse.’³⁰

The LRC reported that several submissions had argued that ‘there should be a legislative framework for reporting, and responding to, abuse of people with a disability’.³¹ The LRC’s recommendations included that relevant agencies³² should develop protocols for handling incidents where a person with a disability is assaulted, abused or neglected or at serious risk of harm.

The LRC’s view was that the protocols should provide for, *inter alia*, the reporting of serious incidents³³ to the (then) Ageing and Disability Department and the (then) Community Services Commission; and investigation of the incident by ADD or the CSC.³⁴

Our work indicates that there continues to be a need for a comprehensive framework for preventing, identifying and effectively responding to serious incidents involving people with disability. Consistent with the requirements in the CRPD and the current disability reform agenda, the current review of the DSA provides us with the ideal opportunity to address this issue.

We have consistently expressed the view that considerable work is required across the disability sector to prevent, and effectively respond to, incidents of abuse, serious neglect

²⁷ Andrew Constance MP, *Statement on Abuse Allegations*, 13 September 2012

²⁸ *Ibid.*

²⁹ NSW Law Reform Commission (1999) *Report 91 – Review of the Disability Services Act 1993 (NSW)*, section 9.9

³⁰ *Ibid.*

³¹ *Ibid.*, section 9.10

³² Relevant agencies at the time comprised the Ageing and Disability Department, the Police, the Community Services Commission, and the Department of Community Services.

³³ Including when a person with a disability using a service is assaulted, abused or neglected, or at serious risk of harm while using a service, regardless of whether the perpetrator is a staff member or another service user.

³⁴ NSW Law Reform Commission (1999) *Report 91 – Review of the Disability Services Act 1993 (NSW)*, sections 9.12, 9.13, and recommendation 37.

and the exploitation of people with disability. In March 2012, we wrote to the Director-General of FACS, noting the need, in the context of the disability reforms, to establish a system for reporting serious incidents in disability services – including allegations of serious abuse, assaults and neglect, and other critical incidents. We also advised that such matters ought to be subject to active oversight.

In August 2012, we submitted to the Chief Executive of ADHC a more detailed proposal for a system for reporting and overseeing the handling of serious incidents involving people with disability. Our proposal was informed by current adult safeguarding systems in Australia, and by international comparisons with Canada, the United Kingdom and the United States. As part of developing our proposal, we also consulted with a range of local peak disability service delivery and advocacy agencies.

In our proposal, we noted that the purpose of developing a system for the reporting of serious incidents and overseeing agency handling of such incidents is twofold: to ensure that responses to serious incidents are timely and appropriately managed within a rights-based framework; and to identify systemic issues for the prevention of serious incidents.

In terms of the potential target group, we observed that there is considerable consistency across jurisdictions in relation to those adults with disability who are considered to be vulnerable. In relation to serious incident reporting systems, vulnerable adults with disability are generally deemed to be those who meet two requirements:

- they have been abused or neglected, or are at risk of abuse or neglect, or
- they lack capacity as a result of their disability to safeguard their own rights, seek assistance, complain and/or care for themselves.

Our proposal focused on ‘serious incidents’, which we have defined as:³⁵

- any alleged sexual offences or sexual misconduct committed against, with, or in the presence of, a relevant person
- any alleged staff-to-person³⁶ physical assaults (other than reasonable force used for the purposes of managing the care of the person, or that is trivial or negligible in the circumstances)
- any alleged client-to-client physical assaults, which:
 - result in a serious injury (such as fractures, deep cuts, burns, extensive bruising or concussion)
 - involve the use of a dangerous weapon, or
 - cumulatively form a pattern of serious abuse
- any alleged serious neglect or ill-treatment of a person, and
- any alleged fraud³⁷ committed against a person by a staff member.

³⁵ Our proposal regarding a definition for ‘serious incidents’ broadly aligns with the definition of ‘reportable conduct’ under Part 3A of the *Ombudsman Act 1974*.

³⁶ While our proposal uses the term ‘staff’, there will be a need to broaden the reach over time to include those who provide support to ‘vulnerable’ people with disability.

We indicated that the proposed scheme would need to impose on relevant individuals a requirement to report a 'serious incident' in circumstances where they know (or ought reasonably to suspect) that such an incident may have occurred.

In our view, independent oversight of such a system is critical, and should include:

- obligations to report to an oversight agency such incidents within a specified timeframe
- independent assessment of reports that are notified
- monitoring services' investigation of, and response to, these incidents
- the capacity for the oversight agency to directly investigate the serious incident and/or an agency's response to the incident, and
- the capacity for the oversight agency to 'keep under scrutiny' the systems for responding to serious incidents and the factors that give rise to such incidents.

This 'system scrutiny work' should include a range of activities: such as developing an agreement with police in relation to the specific support that they guarantee to provide to people with disability in relation to serious abuse cases; and ongoing work with the disability community and services in promoting substantial improvements in cross-agency practice in relation to this challenging area.

Workforce safeguards

Related to the need for an effective system for identifying and responding to serious abuse and neglect, is the need for adequate employment screening procedures.

Screening

We have previously highlighted the need for improved and consistent probity screening practices across the health and human services sectors,³⁸ and have welcomed FACS' subsequent introduction of baseline requirements in funding agreements.

In response to the Minister's media statement in September 2012 regarding preventing abuse and the adequacy of background checks, our proposal to the Chief Executive of ADHC outlined three possible options for improved systems for screening people engaged to support people with disability. The three options range from a basic screening model through to a comprehensive clearance and bar system:

Level 1: Basic model

- **Criminal record check:** Statutory and/or contractual obligations would require disability services to conduct a criminal record check of a prospective disability service worker.³⁹ If a legislative regime was adopted, there would be the potential to:

³⁷ The definition of fraud could generally align with the definition of financial abuse in ADHC's *Abuse and Neglect* policy. However, it will be important to ensure that reportable 'fraud' covers any criminal behaviour that concerns the mismanagement or theft of a client's property or assets.

³⁸ NSW Ombudsman (December 2010) *Improving probity standards for funded organisations*, special report to Parliament.

1. list certain offences that prohibit a person from being 'engaged' by disability services, and
 2. list other offences as 'trigger offences',⁴⁰ which would require a risk assessment relating to whether a person is suitable to be engaged by a disability service (and, if so, the risk management strategies that would need to be put in place).⁴¹
- **Referee check:** Obligations regarding referee checks would be developed for the disability sector. Checking requirements would relate to new employees and certain volunteers.⁴²

Level 2: Basic model plus

- **External oversight:** In addition to the basic model described above, an external oversight body would maintain a database of individuals who have been the subject of relevant employment proceedings.⁴³ At the point of employment, disability service agencies could be required to conduct checks of prospective disability support workers with the external oversight body as part of the employment screening requirements.⁴⁴

Level 3: Clearance and bar model

- **Clearance and bar model:** This model would seek to replicate all of the core screening components of the proposed Working With Children Check system that are outlined in the *Child Protection (Working With Children) Act 2012*. In addition, employees would also be required to meet the referee checking and reference obligations described in Level 1.

We support the introduction, via legislative provision, of the more comprehensive clearance and bar model. This model is largely consistent with the probity checking arrangements in

³⁹ Compliance with criminal record check obligations would be a condition of authorisation/licensing. While this model provides for criminal record checking at the point of employment only, we note that the *Boarding Houses Act 2012* provides for rescreening of staff members every three years (section 84(4)). Consideration could be given to enacting similar rescreening provisions for disability support workers.

⁴⁰ In addition to trigger offences, certain findings arising from 'relevant employment proceedings' could also trigger a risk assessment. Also, either an independent oversight body or the employing agency could refer an individual for a risk assessment.

⁴¹ Furthermore, either through legislation or contractual obligations, relevant service providers would be required to comply with relevant risk assessment guidelines.

⁴² Compliance with referee checking obligations would also be a condition of authorisation/licensing. In relation to board members and volunteers, some general guidance on the issue is set out on pages 18 and 19 of our December 2010 special report to Parliament, *Improving probity standards for funded organisations*.

⁴³ Relevant employment proceedings might include those circumstances where **significant** adverse findings have been made in relation to matters that have been: reported under the proposed serious incidents reporting system; listed on the CCYP register; referred by the HCCC to a Professional Standards Committee or Tribunal; or matters where the HCCC has imposed a sanction (for example, a public notice, reprimand or prohibition order).

⁴⁴ We noted that consideration should be given to whether an information sharing provision equivalent to Chapter 16A of the *Children and Young Persons (Care and Protection) Act 1998* is needed to support whichever screening model is adopted.

place in the ACT and Queensland under the *Working With Vulnerable People (Background Checking) Act 2011* (ACT), and the *Disability Services Act 2006* (Qld).

The screening systems in place in the ACT and Queensland appear to offer the degree of flexibility that is likely to be needed under individualised funding arrangements in NSW and the NDIS. In both legislated schemes, individuals seeking to support people with disability must undergo background screening in order to hold a card that approves them to be engaged to provide support in the sector for three years. To maximise the flexibility of the new disability system (in which an individual may support a number of different people with disability) we support the introduction of a similar scheme in NSW.

However, consistent with the right of people with disability to exercise control over their own lives, we would have significant concerns about any system that did not allow for people with disability to seek limited work or ‘engagement’ exemptions for those individuals who are barred, in circumstances where the person with disability demonstrates that the granting of the exemption would serve to promote (and not prejudice) their rights.

Official Community Visitors

The Official Community Visitor (OCV) scheme plays an important role in relation to children and young people and people with disability living in residential care, including:

- informing the Minister and the Ombudsman on matters affecting the welfare, interests and conditions of persons using visitable services
- encouraging the promotion of the legal and human rights of persons using visitable services, including the right to complain
- considering matters raised by persons using visitable services, staff, and people having a genuine concern for the welfare, interests and conditions of persons using visitable services
- providing information to persons using visitable services regarding the advocacy services available to help them, and assisting them to obtain such services, and
- facilitating the early and speedy resolution of grievances and matters of concern by referring such matters to either the service provider or to other appropriate bodies.⁴⁵

It is critical that the OCV scheme continues in relation to people in residential care. The value of the Visitors, and their important role in achieving improved outcomes for people in visitable services, is consistently highlighted in the work of our office (including in our special report to Parliament on the need for reform of the boarding house sector).⁴⁶

We note that legislation relating to the operation of Community Visitor schemes in Victoria and Queensland includes penalties against services that obstruct, or otherwise fail to assist, Visitors in exercising their functions. It is timely to again consider whether a similar offence provision would serve to improve the current operation of the OCV scheme in NSW. In this

⁴⁵ *Community Services (Complaints, Reviews and Monitoring) Regulation 2004*, section 4.

⁴⁶ NSW Ombudsman (August 2011) *More than board and lodging: the need for boarding house reform*, special report to Parliament.

regard, we note that Visitors continue to report problems in gaining access to all relevant records relating to individuals in some visitable services.

Potential scope of the OCV scheme

The discussion paper seeks views on whether the OCV scheme should apply just to 'visitable services' as currently defined, and, if not, how the scope of the scheme might be expanded. We note that submissions to the Law Reform Commission's 1999 review of the (then) *Community Services (Complaints, Appeals and Monitoring) Act 1993* indicated support for expansion of the jurisdiction of the OCV scheme to include people with disability living in 'some of the more flexible arrangements for supported accommodation, such as those people living in private or rented accommodation who receive significant support, or those living in accommodation which is provided by a service provider but leased in the name of the resident.'⁴⁷

There was also some support for the jurisdiction to extend to, *inter alia*, children and young people and people with disability not living in visitable services who directly request access to a Visitor. The LRC's view at that time was that the jurisdiction should not be extended, because the focus of Visitor Schemes in other contexts is on monitoring publicly-funded services, and on those in the full-time care of the services visited.

At the present time, we consider that the focus of the OCV scheme should continue to be on people living in the care of disability services, given their relative vulnerability. However, we do believe that there would be merit in committing to ongoing dialogue between relevant stakeholders regarding the scope for expanding the OCV scheme to potentially include other kinds of care arrangements that will emerge under the reform agenda.⁴⁸ For example, people living in private accommodation and receiving full-time disability support; and people in private living arrangements that may expose them to high levels of risk.

In adopting this view, we are acutely aware of the need to ensure that any adjustments to the scheme are made following a more informed understanding of the new disability support landscape and, most importantly, after extensive input from members of the disability community.

Certain supported accommodation provided or funded by Health

In addition to supported accommodation provided or funded by FACS, some people with disability which arises from a mental illness live in supported accommodation that is operated or funded by Health. At this time, these people do not have access to OCVs (or, indeed, to other aspects of CS CRAMA, such as the complaints system).

⁴⁷ Law Reform Commission (1999) *Report 90 – Review of the Community Services (Complaints, Appeals and Monitoring) Act 1993 (NSW)*, section 4.53.

⁴⁸ We note that the Victorian Community Visitors Disability Board expressed concern in its 2010/11 Annual Report that Visitors were unable to visit people on Individual Support Packages. The Board noted that, while visiting people with individualised funding in private homes had never been within the ambit of the Community Visitor's role, work was needed to clarify the status of situations where people live together independently with 'pooled' packages.

As noted in our November 2012 special report to Parliament, the support needs of the people with disability living in FACS and Health supported accommodation are often similar, and many of the service providers are the same.⁴⁹ Consistent with the intended inclusion in the NDIS of people with psychosocial disability and certain mental health services (such as disability-related supported accommodation), we consider that there would be merit in extending the OCV scheme to include these services as ‘visitable’.⁵⁰

Independent persons

On a related note, it appears to us that there is likely to be an important and increasing role for ‘independent persons’ more generally in the new disability system, particularly where the person with disability does not have an informal support network, or where there are higher levels of vulnerability and/or risk involved.

In the shift to individualised funding and support arrangements, there would be merit in considering the use of independent persons who could:

1. Visit people with disability in the community, where the planning process identifies this need.⁵¹ The role of the independent person in such situations may include talking with the person about their living and support arrangements; assisting the person to understand and exercise their rights and options; supporting the person to resolve grievances or matters of concern; and alerting authorised agencies where the person requires formal assistance.⁵²
2. Discuss proposed restrictive interventions (and the person’s rights) with the person with disability who is directly affected, and report where the person does not understand or legislative requirements are not being met.⁵³
3. Assist/support decision-making with people with disability – particularly where the person does not have an informal support network.

⁴⁹ NSW Ombudsman (November 2012) *Denial of rights: the need to improve accommodation and support for people with psychiatric disability*, special report to Parliament.

⁵⁰ Any adjustments to the OCV scheme or the reach of the CS CRAMA complaints jurisdiction relating to the mental health sector should only be undertaken after consultation with the NSW Mental Health Commissioner.

⁵¹ The need may be identified by the person or the funding agency. Depending on the person and their circumstances, the need for the involvement of an independent person may arise (for example) from risks associated with the employment of family members; the nature of the support the person requires; and/or the absence of an informal support network.

⁵² This may include matters involving abuse, neglect or exploitation; where the person requires help to connect with mainstream services (such as through Ability Links); and where the person’s plan and allocation of funds warrants review.

⁵³ As noted on page 8 of our submission, the *Disability Act 2006* (Vic) provides for independent persons to perform this function in relation to behaviour management plans and restrictive interventions. On a separate but related note, the Intellectual Disability Rights Service in NSW coordinates independent persons under its Criminal Justice Support Network to support people with intellectual disability at police stations and at court. These support people, *inter alia*, assist the person to understand their rights and exercise their options, alert police if the person does not understand questions, organise legal advice from the CJSN while in police custody, help the person to understand and remember the legal advice, and help organise referrals or follow-up support at court if required. Division 3 of the *Law Enforcement (Powers and Responsibilities) Regulation 2005* provides for support persons to assist detained ‘vulnerable persons’ (including persons who have ‘impaired intellectual functioning’ or ‘impaired physical functioning’).

In progressing new disability support arrangements in NSW and nationally, it is worth considering the role of independent persons, and how this support and oversight may best be managed to ensure that people with disability have maximum choice and control; that their rights are being upheld; and support is provided where required. It is for these reasons we consider that, either at this time or in the near future, there would be merit in considering whether this State ought to have in place legislative recognition (and a related practice framework) that provides for the use of independent persons.

Complaints

Introduction of a uniform system for reporting complaints

Over the last 12 months, we have strongly advocated for the establishment of a uniform complaints reporting system for the disability sector. As part of our statutory role under CS CRAMA to review community and disability services' complaints handling systems, we have identified the need to improve sector-wide practice in complaint handling and associated systems for managing complaints.

Effective complaint practices 'at the coal-face' are essential to a person-centred service system. They involve a recognition – and, if need be, the facilitation – of a person's right to be heard; a commitment to seeking and respecting each individual's views about how they are being treated; and associated practices that ought to guarantee a decent response to concerns that are raised. Our discussions with the disability sector regarding the complaints system have been driven by the need to promote these principles.

In recent discussions on this issue, we have referred to the Victorian complaints reporting system for disability services as a useful model for adoption in NSW. Under the *Disability Act 2006* (Vic), disability service providers, including contracted and funded providers, must provide an annual report to the Disability Services Commissioner, 'including information about the number and type of complaints and the outcome of the complaints.'⁵⁴

We are pleased to note the discussions that have occurred between FACS and the Victorian Disability Services Commissioner to explore adoption of the complaints reporting system in NSW. We welcome the recent advice from the Commissioner and ADHC that all legal obstacles relating to Victoria's intellectual property rights to the IT system have now been resolved. Importantly, given the need to think nationally because of the NDIS, we understand that Western Australia has also commenced discussions with Victoria on the use of their system.

We need to guarantee that people with disability have the same rights as the rest of the community to not only make complaints, but to also receive a quality response. The adoption of a high quality and consistent disability complaints system in NSW would enable the disability sector to take great strides in achieving compliance with both national and international complaints standards. While the Victorian complaints reporting system would not, in and of itself, guarantee a high quality complaints response, it would provide a

⁵⁴ *Disability Act 2006* (Vic), s105 and s106B. A significant benefit of the Victorian complaints reporting system is that it enables sophisticated local and centralised trend reporting (and related analysis), without disclosing to the central oversight agency any personal information about individual clients or complainants.

platform for driving whole-of-sector complaint practices towards ‘best practice’ (particularly if it was accompanied by the development of related standards and associated training).

In our view, legislative backing for a high quality, consistent complaints system that principally operates at the service level to address concerns in a timely, informal and responsive manner would complement a person-centred approach to support. While there will always be the need for independent oversight of such a system, this should not be at the expense of promoting the critical importance of the client/ service provider relationship in the area of complaints (as with other areas of practice).

In this regard, we believe that an independent oversight body is *only* needed when:

- it either fills (or is best placed to identify) a gap in the service system
- is otherwise (often by virtue of its independence) able to ‘add value’ in protecting and promoting the fundamental human rights of citizens, or
- it can otherwise ‘add value’ by identifying and recommending important systems improvements, particularly in relation to areas fundamental to citizens’ rights.

Consistent with these principles, we believe an independent oversight body’s role in complaints should generally be to report on whether the overall complaints system is genuinely person-centred and committed to resolving individuals’ grievances. An oversight body should only get involved in individual cases when necessary (this will often involve ‘hard cases’; where an independent perspective is critical; and/or where the risks are high, such as with matters involving serious incidents).

Other legislative provisions to strengthen safeguards relating to complaints

It is important to note that the principles outlined in section 3(2) of CS CRAMA (and noted on p36 of the discussion paper) apply to any service provider covered by that legislation, and apply irrespective of whether a complaint is made to our office or directly to the service.

However, the legislative requirements relating to complaints under Part 4 of CS CRAMA apply only in relation to complaints that are made to our office. The shift to person-centred and individualised funding arrangements as part of the disability sector reforms necessitates a strong focus on local resolution of complaints, underpinned by clear legislative requirements.

Regardless of the portability of the funding, both the person with disability and the support provider(s) will have a vested interest in making the support arrangement work, wherever possible. In this context, local resolution of issues and complaints are likely to become increasingly important.

We also note the feedback of stakeholders in the *Living Life My Way* consultations regarding the importance of complaints mechanisms in a customer service context, and ‘the need to make clear to customers how complaints are handled and addressed. This might be through

a guarantee of service or an online complaints process, which requires the provider to account for how complaints are handled directly to their customers.⁵⁵

Given the critical importance of responding to the disability community's concerns, we believe that relevant complaint legislation should include provisions:

- enabling the Minister (or the oversight body) to publish complaint handling guidelines or standards that are consistent with the Principles of the Act, the CRPD and the Australian/NZ Standard,⁵⁶ and
- requiring the resolution of complaints based on adherence to the Principles in the new Disability Act and relevant standards (including the Australian/NZ Standard on Complaints Handling, and the Minister's published guidelines/ standards).⁵⁷

Review of decisions

In addition to complaints and appeals processes, it is important that the legislation provides adequate recourse for people with disability to seek independent review of key decisions, when needed. In our view, any significant decision in the Act should be reviewable.

The discussion paper outlines the kinds of decisions that could be open to review, including those relating to:

- individual plans and the approval (or not) of individual plans
- eligibility for individual funding packages
- refusing to approve funding certain kinds of services under individual funding packages, and
- decisions relating to mismanaging individual funds or failing to comply with accountability or reporting requirements that may affect the right to continue to receive funding.

We support the legislation making these types of decisions reviewable. Consistent with disability legislation in other Australian jurisdictions and the NDIS, reviewable decisions under the revised DSA could also include those relating to:

- review of individual plans
- the use of restrictive interventions, and
- approval (or not) of a person or entity as a registered provider of supports.

⁵⁵ NSW Government (May-August 2012) *Living Life My Way: Outcomes of statewide consultations*, p11.

⁵⁶ We note that, under the *National Disability Strategy NSW Implementation Plan 2012-2014*, our office has the lead responsibility for developing and distributing resources for government agencies to improve access to complaint handling in relation to people with disability.

⁵⁷ At least initially, the requirements should apply to specialist disability services. However, in our view, the requirements should have broader application over time and encompass any service, organisation, or individual who receives funds under the new Disability Act; all public sector agencies; and broader complaints and consumer protection mechanisms. Part of the role of the oversight agency would include keeping under scrutiny agencies' compliance with the legislative requirements, and directly overseeing serious matters.

Finally, it would also be useful to make a provision in the legislation for another person, in appropriate circumstances, to request a review on a person's behalf.

Community and participation

Disability Action Plans

The review of the DSA provides a valuable opportunity to improve the effectiveness of Disability Action Plans as mechanisms for ensuring that government services are accessible. We welcome the information in the National Disability Strategy NSW Implementation Plan that new Disability Action Plan guidelines will be released in 2013 that 'will provide a more effective approach to disability action planning that will result in cultural and systemic change.'⁵⁸

To improve the effectiveness of the Plans, and outcomes for people with disability, consideration should be given to amending the legislation to provide greater clarity as to what the Plans must address. In this regard, we support the Disability Action Plan provisions in the *Disability Act 2006* (Vic), which require public sector bodies to ensure that a Plan is prepared for the purpose of:

- a) reducing barriers to persons with a disability accessing goods, services and facilities
- b) reducing barriers to persons with a disability obtaining and maintaining employment
- c) promoting inclusion and participation in the community of persons with a disability, and
- d) achieving tangible changes in attitudes and practices which discriminate against persons with a disability.⁵⁹

We believe that there is merit in considering whether the legislation should also:

- ensure that disability action planning requirements apply to all state and local government agencies
- require that Disability Action Plans reflect (and put into practice) agencies' obligations under the CRPD, associated actions under the National Disability Strategy, and the Principles of the revised Act
- provide for the Minister for Disability Services to issue disability action planning guidelines, with which agencies must comply, and
- specify the nature of the reporting and monitoring obligations.

Implementation of the Plans, and the reporting and monitoring obligations associated with disability action planning, will be crucial. In this regard, consideration should be given to strengthening the legislation to require that:

- Disability Action Plans must be approved by a designated monitoring body, and

⁵⁸ NSW Government (2012) *National Disability Strategy NSW Implementation Plan 2012-2014*; p15.

⁵⁹ *Disability Act 2006* (Vic), s38.

- each agency must provide detailed annual public reports of its progress in implementing the plan.

In relation to public reporting, we support the view of the Law Reform Commission that it is 'important that the annual reports outline not only the organisations' positive achievements in implementing their section 9 plans, but the areas in which the plans have not been implemented or in which the organisations have experienced problems.'⁶⁰

In terms of our proposal for a monitoring body, we believe that its role should be to promote agencies' compliance with disability action planning requirements under the Act; to provide advice on, and approve, Disability Action Plans; and to monitor and publicly report on whole-of-government progress. To align with the monitoring arrangements for the NSW plan for the National Disability Strategy, consideration should be given to the potential role(s) of FACS and the Disability Council of NSW in this regard.

Disability Council of NSW

In addition to monitoring the implementation of Government policy, the Disability Council plays an important role in providing critical advice to the Government on issues affecting people with disability and their families – directly from people with disability.

Given the review of the DSA, it is timely to consider whether legislative changes could be made to strengthen and support the role of the Disability Council. For example, to support the work of the Council in monitoring implementation of the National Disability Strategy, it would be useful for the Council to have specific powers to require agencies to provide information and respond to requests for advice on matters relating to the development and implementation of their Disability Action Plans.

We note that, amongst other things, the functions of the Victorian Disability Advisory Council include to:

- provide advice to the Minister on whole-of-government policy directions and strategic planning and the implementation of initiatives for persons with a disability;
- provide advice to the Minister on the barriers to full inclusion and participation in the community of persons with a disability and the strategies for the removal of those barriers; and
- monitor the implementation of strategies for promoting inclusion and participation in the community of persons with a disability and for removing barriers to inclusion and participation.⁶¹

The wording and scope of the above functions appear to align with the National Disability Strategy and disability action planning. We believe that, at this time of review of disability legislation, it would be appropriate to align the *Community Welfare Act 1987* with these functions.

⁶⁰ Law Reform Commission (1999) *Report 91 – Review of the Disability Services Act 1993 (NSW)*; s4.36

⁶¹ *Disability Act 2006 (Vic)*, s12.