



**PEOPLE WITH DISABILITY
AUSTRALIA**

**A voice
of our
own**

Safeguards help marginalised people with disability

**Submission responding to the Disability Royal Commission's
Safeguards and Quality Issues Paper (Nov 2020)**

**FEBRUARY
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About PWDA

People with Disability Australia (PWDA) is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation – we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible and inclusive community, in which the human rights, belonging, contribution, potential and diversity of all people with disability are recognised, respected and celebrated with pride. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

PWDA is a NSW and national peak organisation and founding member of Disabled People's Organisations Australia (DPO Australia) along with Women with Disabilities Australia, First Peoples Disability Network Australia, and National Ethnic Disability Alliance. Disabled Peoples Organisations (DPOs) are organisations that are led by, and constituted of, people with disability.

The key purpose of DPO Australia is to promote, protect and advance the human rights and freedoms of people with disability in Australia by working collaboratively on areas of shared interests, purposes, strategic priorities and opportunities.

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Contents

About PWDA	ii
Introduction	1
List of recommendations	3
Developmental safeguards	6
Safeguards as capital	7
Personal capital	7
Knowledge capital	8
Social capital	8
Material capital	8
Capacity building	8
Reducing risk of violence, abuse, neglect and exploitation	8
Rights awareness	9
Preventative safeguards	11
Corrective safeguards	12
Complaints mechanisms	12
Awareness of complaints mechanisms	12
Accessing complaints mechanisms	13
Effectiveness	14
Lack of responsiveness and communication	15
NDIS Quality and Safeguards Commission	15
Department of Communities and Justice (New South Wales)	16
Reluctance to impose penalties on providers	16
Reliance on complaints	17
Independent inspections	18
Official community visitors	18
Optional Protocol to the Convention against Torture	19
Inclusion in the OPCAT mechanism	20

	Places of detention	20
	Priority implementation	22
Police		23
	Current measures	24
	New South Wales	25
	Queensland	25
	Tribunals and courts	26
	Independent advocacy	27
Rights		29

Introduction

People with Disability Australia (PWDA) is pleased to make this submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability's (DRC) *Safeguards and Quality Issues Paper*.

We commend the DRC for including broad concepts of safeguarding in the issues paper, ranging from capacity building to bringing matters before the courts. We also note that a separate issues paper on promoting inclusion has been released and wish to draw attention to the safeguarding role of genuine inclusion. When we, as people with disability, are included in mainstream schools, activities and work, we are seen by the general community, enabling community members to act as an informal safeguard. We hope that the safeguarding aspects of inclusion will be examined in the DRC's work in both the safeguards and quality, and promoting inclusion areas.

This submission is based on consultations with our advocates and members. PWDA is funded by the Commonwealth Department of Social Services to provide individual advocacy to people with disability in New South Wales and Queensland. Our advocates work with people on various issues, including the National Disability Insurance Scheme (NDIS), NDIS appeals, housing issues and family violence. They bring a wealth of experience in assisting clients with safeguarding matters, and our members of course bring invaluable lived-experience expertise.

Through these consultations, advocates and members identified a range of safeguarding issues and how these should be addressed. This submission examines the following key safeguarding areas:

- capacity building
- complaints mechanisms
- independent inspections
- the police
- tribunals and courts
- independent advocacy.

In addition to the above areas, our consultations revealed an overarching theme — current oversight and safeguarding mechanisms in Australia are siloed and not well coordinated.

Indeed, in 2015, the Senate Standing Committee on Community Affairs reported that:

Existing internal and external mechanisms for reporting abuse are complex and there is no national consistency in how allegations and incidents are reported. This has had the effect of both discouraging reporting meaning cases of abuse go unreported, as well as reducing the efficacy of investigations.¹

This lack of consistency and coordination is also present in broader safeguarding mechanisms, such as regulatory ‘card’ systems for working with certain groups of people, including children and people with disability.

As such, we urge the Disability Royal Commission to make the following recommendation a key feature in its final report:

Recommendation 1 – The Disability Royal Commission recommends the Australian Government takes immediate action to establish a national independent statutory body (National Body) to oversee the current disability oversight and safeguarding bodies in Australia and address systemic issues.

The National Body’s functions should include overseeing, harmonising and facilitating information sharing among existing disability oversight and safeguarding mechanisms. The National Body should also address systemic issues, including through data collection and research.

¹ Senate Standing Committees on Community Affairs, *Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings, including the Gender and Age Related Dimensions, and the Particular Situation of Aboriginal and Torres Strait Islander People with Disability, and Culturally and Linguistically Diverse People with Disability* (Report, 2015) 147.

List of recommendations

Recommendation 1 – The Disability Royal Commission recommends the Australian Government takes immediate action to establish a national independent statutory body (National Body) to oversee the current disability oversight and safeguarding bodies in Australia and address systemic issues.

Recommendation 2 – The Disability Royal Commission examines the types of capacity-building programs and services that most effectively target key risk factors for violence, abuse and neglect and exploitation of people with disability.

Recommendation 3 – The Disability Royal Commission recommend that the Australian Government increase funding and access to capacity-building programs and services that most effectively target key risk factors for violence, abuse and neglect and exploitation of people with disability.

Recommendation 4 – The Disability Royal Commission recommends the Australian Government increases funding for disability rights awareness campaigns, ensuring that they reach all cohorts of people with disability, including those living in congregate or closed settings and those who are segregated and isolated from the community.

Recommendation 5 – The Disability Royal Commission recommends the Australian Government increases funding for disability peer support networks, where people with disability can share knowledge about rights and support each other to protect these rights.

Recommendation 6 – The Disability Royal Commission should recommend complaints bodies engage in more outreach activities and establish a designated outreach team or person. Activities should particularly target people living in closed settings and people who are isolated or segregated from the community.

Recommendation 7 – The Disability Royal Commission recommends all disability complaints mechanisms undergo an independent accessibility evaluation, designed and carried out by, or in consultation with, people with disability and our representative organisations.

Recommendation 8 – The Disability Royal Commission should inquire into the reasons for unresponsiveness and delays in complaints mechanisms, particularly in urgent matters where a person with disability is experiencing violence, and consider whether any funding, operational, legislative or policy amendments should be made to ensure greater responsiveness and reduce delays.

Recommendation 9 – The Disability Royal Commission examines the outcomes produced by various disability complaints bodies, and whether these have an adequate deterrent effect.

Recommendation 10 – The Disability Royal Commission investigates the efficacy of disability complaints systems and holds a DRC public hearing about people’s experiences with them before recommending what needs to change to ensure these complaints bodies do not take a lenient approach.

Recommendation 11 – The Disability Royal Commission examines whether complaints bodies are treating cases of violence, abuse, neglect and exploitation as regulatory breaches rather than criminal matters they should refer to police where appropriate.

Recommendation 12 – The Disability Royal Commission examines why complaints bodies are not carrying out investigations without being prompted by third parties, or own-motion investigations, and whether this function would best be subsumed by the National Body that People with Disability Australia recommends be established.

Recommendation 13 – The Disability Royal Commission examines the effectiveness of community visitor schemes in all Australian jurisdictions and whether improvements should be made to some or all of the schemes to ensure they are operating as an effective safeguard.

Recommendation 14 – The Disability Royal Commission recommends the Australian Government adopts a broad definition of places of detention that encompasses aged care and disability group homes when implementing the Optional Protocol to the Convention against Torture (OPCAT).

Recommendation 15 – The Disability Royal Commission recommends the Australian Government reconsiders whether the challenges posed by the deprivation of people’s liberty is truly more acute in places such as prisons as opposed to aged care and group homes and ensure that presumptions about acuteness of risk are based on data rather than inclinations.

Recommendation 16 – The Disability Royal Commission considers the role of the National Body in the context of implementing OPCAT. The DRC should consider whether:

- the National Body should become a designated National Preventative Mechanism (NPM) under OPCAT
- the National Body should take on an advisory role to the NPM coordinator
- the National Body should take on an advisory role to the NPMs.

Recommendation 17 – The Disability Royal Commission recommends police receive appropriate disability awareness training to assist them identify people with disability and understand how their disability and trauma might affect the way they present to police. They should also receive guidance in how to connect people with disability to appropriate procedures and supports. Training should also cover intersectional issues, such as awareness of cultural and gender issues.

Recommendation 18 – The Disability Royal Commission explores why police forces have resisted implementing disability awareness training for decades.

Recommendation 19 – The Disability Royal Commission examines the violence police have inflicted on people with disability.

Recommendation 20 – The Disability Royal Commission recommends a broader range of people with disability are provided access to trained interviewers and funded specialist support people when wanting to report matters to the police.

Recommendation 21 – The Disability Royal Commission conducts evaluations of the accessibility of state, territory and federal tribunals and courts for people with disability, with a focus on their compliance with articles 9, 13 and 16 of the Convention on the Rights of Persons with Disabilities. The evaluations should be designed and carried out by or in consultation with people with disability and our representative organisations.

Recommendation 22 – The Disability Royal Commission urges Australian governments to increase funding for independent advocacy for people with disability.

Developmental safeguards

Developmental safeguards are what Michael Kendrick describes as safeguards designed to produce socially desirable conditions to ensure people with a disability are included, protected and supported in achieving a valued status in the community.² These safeguards also help people develop their supports through family and intentional relationship-building.³

Developmental safeguarding is described with various language, depending on your perspective.

Capacity building or capability approaches are two ways to describe developmental safeguarding, and they involve helping people build up their capacity to ensure they are safe.

A focus on capabilities and capacities tends to be a focus of disability or social services agencies, but the terms are less frequently used by advocates and people focused on the human rights of people with disability.

It's important to remember that whatever the terminology is used, individuals with disability who experience violence, abuse, neglect and exploitation are not to blame. Instead, we as a community must walk what is unfortunately a fine line between presuming competence and ensuring the disability sector actually stops its people from abusing people with disability, and making sure staff and contractors working in systems do their jobs.

Developmental safeguarding is wider than capacity building and can include other things, like: ensuring we have accessible communities; making sure the National Disability Strategy is being implemented; and having people around who will notice if people with disability are missing or hurt, or if something is wrong.

The National Disability Insurance Scheme is one way we can take a developmental safeguarding approach, with activities such as:

- providing participants information for decision-making
- building participants capability
- strengthening natural supports.

² Kendrick 2005, *Self Direction in Services and the Emerging Safeguarding and Advocacy Challenges that May Arise* in M Walker, K Fulton and B Bonyhady 2013, [A Personalised Approach to Safeguards in the NDIS](https://www.centreforwelfarereform.org/uploads/attachment/385/a-personalised-approach-to-safeguards-in-the-ndis.pdf), Centre for Welfare Reform, March.

³ Ibid.

More broadly, developmental safeguard activities can include:

- funding more peer support groups
- harmonising community and/or official visitors and/or elders, such as in Tasmanian visitors programs
- education and access to information about rights, sex and healthy relationships
- equitable access to education, employment and training
- community neighbourhood schemes
- accessible housing (both for housing and for neighbourliness)
- access to community via a fully enacted National Disability Strategy
- funding for circles of support, supported decision-making and communication rights
- change in systems – such as a self-assessment checklist for person with disability, or their family or supporters to assess their level of marginalisation and likelihood of being abused, and mechanisms to ensure safety at a point-of-review
- ensuring a person with disability is always at their planning meeting and in control – the current National Disability Insurance Agency plan for independent assessments goes against this principle by having a separate meeting without the person whose plan it is
- self-advocacy skills available
- removing systemic barriers around Centrelink’s Disability Support Pension to ensure economic safety
- self-directed support
- choice and control over your funding and using it
- service models that support individualised approaches
- accessible services, including dentistry and health
- access to accurate diagnoses, especially for people with co-occurring disability or co-morbidities – see preventable death reports.

Safeguards as capital

To return our focus to people and their capacities, the following attributes are all developmental safeguards:

Personal capital

Personal capital can include self-esteem, confidence, cognitive and intuitive capacity, the ability to self-advocate and be present, and inner strength and resilience.

Knowledge capital

Knowledge capital includes skills, and general or specialist knowledge, and the ability to access information from people, the internet and the community, and act on this information.

Social capital

Social capital includes relationships, family support, friends and community connections.

Material capital

Material capital includes income, material goods, one's own home and community resources, such as libraries, beaches and parks.

Capacity building

PWDA would like to look at capacity building in detail. Before we examine formal safeguarding mechanisms, we will look at how to increase people with disability's capacity to defend their own rights. The following two key categories of capacity building will be examined:

- Capacity building to reduce the risk of people with disability being exposed to violence, abuse, neglect and exploitation in the first place
- Capacity building to increase people with disability's rights-awareness

1. Reducing risk of violence, abuse, neglect and exploitation

While violence, abuse, neglect and exploitation against people with disability is not their fault, a number of things result in an increased risk of them occurring.⁴ These factors include, for example, people with disability being socially isolated, highly dependent on others, or in segregated settings such as residential care or sheltered employment, and lacking in self-protection skills.⁵

It is important that we examine the perpetrators of this violence and abuse, and also work on preventative solutions. Among the reforms that should be sought, we believe funding

⁴ Queensland Government, *Risk Factors* (Web Page, 2020) <https://www.communities.qld.gov.au/disability-connect-queensland/preventing-responding-abuse-neglect-exploitation/identifying-abuse-neglect-exploitation/risk-factors>.

⁵ Ibid.

should be directed to programs and services that target key risk factors. This would involve progressing programs that facilitate social inclusion, independence in daily living, independent housing, mainstream employment and self-protection skills, among other program efforts.

We recommend:

Recommendation 2 – The Disability Royal Commission examines the types of capacity-building programs and services that most effectively target key risk factors for violence, abuse and neglect and exploitation of people with disability.

Recommendation 3 – The Disability Royal Commission recommend that the Australian Government increase funding and access to capacity-building programs and services that most effectively target key risk factors for violence, abuse and neglect and exploitation of people with disability.

2. Rights awareness

According to the United Nations Human Rights Council, a lack of awareness and information about the rights of people with disability can leave people more exposed to abuse and exploitation.⁶ It is also a major barrier to people making a complaint or asserting their rights in other ways.⁷

Article 8 of the United Nations *Convention on the Rights of People with Disabilities* (CPRD) requires the Government to ‘immediately’ adopt disability rights awareness measures that are ‘effective’.⁸

PWDA and its individual and systemic advocates encourage people to understand their rights and know how to realise them.

Unfortunately, our advocates report that people with disability generally have low levels of rights awareness. As such, the Australian Government is failing to adopt ‘effective’ rights awareness measures.

⁶ Human Rights Council, *Report of the Office of the United Nations High Commissioner for Human Rights: Awareness-raising Under Article 8 of the Convention on the Rights of Persons with Disabilities*, 43rd sess, Agenda Items 2 and 3, UN Doc A/HRC/43/27 (17 December 2019) (*Human Rights Council Report*) 3[8].

⁷ *Ibid* 9[41].

⁸ *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 2515 UNTS 3 (entered into force 3 May 2008) (*CPRD*) art 8.

That said, the government, through its National Disability Advocacy Program (NDAP) funding, is helping people realise these rights and understand how to realise them, by funding PWDA and its advocates to help educate people in their rights.

PWDA is further boosting its focus on this advocacy effort, by drafting new individual advocacy practice guidelines to help advocates assist people in understanding how they can realise their rights.

Article 21 of the CPRD's right to access information includes the right to 'know, seek and receive information about all human rights and fundamental freedoms', according to the United Nations Human Rights Council.⁹

When Australia does not provide people with disability with sufficient information to know about their rights, the nation is breaching this right to information.

To ensure Australia's compliance with the CRPD and make sure people with disability are informed of their rights, PWDA has the following recommendations:

Recommendation 4 – The Disability Royal Commission recommends the Australian Government increases funding for disability rights awareness campaigns, ensuring that they reach all cohorts of people with disability, including those living in congregate or closed settings and those who are segregated and isolated from community.

Recommendation 5 – The Disability Royal Commission recommends the Australian Government increases funding for disability peer support networks, where people with disability can share knowledge about rights and support each other to protect these rights

⁹ *Human Rights Council Report*, UN Doc A/HRC/43/27 (n 4) 9[41].

Preventative safeguards

Preventative safeguards are safeguards which are based around making sure there are mechanisms in place to prevent abuse at home.

These preventative safeguards are focused on service design and cultures to prevent abuse and neglect, and actively address risks for individuals.

Preventative safeguards include:

- making sure restrictive practices legislation and guidelines are appropriate, with any suggested changes
- harmonising community and/or official visitors and/or elders visitor programs as opt-in for people in residential settings, if that is proposed
- police-checks pricing is appropriate and promoted to self-managers and people with disability who employ their own staff
- Interjurisdictional arrangements between police and other systems, including out-of-home care and child protection – to understand the importance of this, see the Willow Dunn murder
- overseas interjurisdictional arrangements – for example, it is important to understand some countries such as Ireland and India do not have systems from which we can acquire a police record
- changes to banking systems so that people can have capacity assumed and have their own accounts with safeguards to protect them against financial exploitation¹⁰
- an accessible NDIS Quality and Safeguards system that works for people with disability, not providers
- audits of group homes by service users
- disability access and inclusion plans.

¹⁰ https://www.magistratescourt.tas.gov.au/_data/assets/pdf_file/0018/440280/Mackozdi,-Janet-Lois-latest-version.pdf

Corrective safeguards

Corrective safeguards include a suite of safeguards that involve the corrective services or criminal justice system.

These corrective safeguards include:

- police as you've included above
- courts and justice – see Australian Human Rights Commission reports
- litigation
- disability commissioners and health and disability services complaints office (HaDSCO) agencies
- anti-discrimination laws that work – this would involve changes to the *Disability Discrimination Act 1992* to allow it to be used by people with disability to increase their access to the community
- consumer law – made more accessible, using accessible language
- complaints procedures.

Complaints mechanisms

People with disability who are aware of their rights still face barriers when seeking to protect them through making a complaint. These people can include people living in institutional settings, where even if they can access their rights, are prohibited from enforcing them. They can also include people with impaired cognitive functioning, who are unable to understand what their rights are, or how to enforce them.

The barriers people experience can be affected by:

- awareness of complaints mechanisms
- access to complaints mechanisms
- the effectiveness of complaints mechanisms.

1. Awareness of complaints mechanisms

Once a person knows their rights have been breached and wants to make a complaint, they must know where to go. Our advocates report that people with disability and advocates themselves do not have a good understanding of existing complaints bodies, including their different roles and powers.

Indeed, Australia has a vast and complex system of disability complaints mechanisms. In 2018, the Australian Human Rights Commission identified a total of 38 mechanisms that

deal with complaints about violence, abuse and neglect of people with disability.¹¹ These mechanisms are specific to the provision of specialist disability services, and further mechanisms exist for complaints about mainstream services used by people with disability.¹²

To address the confusion and lack of knowledge regarding complaints bodies, each complaint body should ensure that it provides effective outreach activities for people with disability. Outreach activities may include, for example, attending in-person events, holding community information sessions, providing education and information sessions in-person and through community webinars and speaking on community radio stations.

We acknowledge and commend bodies who are already undertaking outreach activities, such as the NDIS Quality and Safeguards Commission.¹³ However, these efforts need to be expanded and must reach people with disability living in closed settings and who are not well connected to the community.

We therefore urge:

Recommendation 6 – The Disability Royal Commission should recommend complaints bodies engage in more outreach activities and establish a designated outreach team or person. Activities should particularly target people living in closed settings and people who are isolated or segregated from the community.

2. Accessing complaints mechanisms

People with disability who have identified an appropriate complaint body still face barriers to making a complaint.

Our advocates report that many complaints bodies do not provide information in easy-read format or plain language. Further, their websites are often difficult to navigate and many do not have a chat function where a person can quickly ask a question about lodging a complaint. These barriers are particularly problematic for people with disability who need to access help quickly and quietly, for example, those who are living in a group home with a perpetrator of violence, abuse, neglect and exploitation.

Another barrier to making a complaint is that complaint bodies appear overly formalistic and intimidating. They generally do not offer support to people making complaints and the only real help available is to seek the assistance of an independent advocate or support

¹¹ Australian Human Rights Commission, *A Future without Violence* (Report, 2018) 96–101.

¹² *Ibid* 96.

¹³ NDIS Quality and Safeguards Commission, *Annual Report 2019-2020* (Annual Report, 2020) 15.

person. This can deter people with disability from making a complaint when they do not have access to an independent advocate or other support person, or where their support person is in fact the perpetrator. Indeed, one of our members stated:

We are often told that we have to make a complaint to our perpetrators, who are the only support we have.

Our advocates also reported that people with disability who communicate in a way the bodies deem 'unacceptable' are often cut off from complaints bodies. This is a common experience of people with psychosocial disability and First Nations People. One of our advocates reported:

The minute they behave in a way that [the complaint body] deems unacceptable ... it always gets weaponised against them and things like complaints can suddenly become very ignored because that person is either crazy or very abusive, which isn't the case, they've just been pushed too far, or they just communicate differently to what those bodies expect.

Where people who have been cut off from complaints bodies take their matter to an anti-discrimination body, they are often told that they need to make a formal complaint to the original body first. Complaints bodies generally don't provide information about how to make a formal complaint. As such, people who have been cut off from accessing complaints bodies often find it difficult to find recourse and have their complaint dealt with.

To address these access issues, we urge:

Recommendation 7 – The Disability Royal Commission recommends all disability complaints mechanisms undergo an independent accessibility evaluation, designed and carried out by, or in consultation with, people with disability and our representative organisations.

3. Effectiveness

Once a person with disability has accessed a complaints mechanism, it is crucial that they receive an adequate response and outcome. Our advocates and members reported three key issues with complaint mechanism effectiveness:

- a lack of responsiveness and communication
- a reluctance to impose penalties on providers
- reliance on complaints, rather than own-motion investigations.

Lack of responsiveness and communication

Our advocates and members have consistently reported that complaint mechanisms tend to lack responsiveness and communication. One member reported that:

Disabled people are not involved in complaints processes and not kept informed – services treat [abuse] as though it is an administrative breach or a regulatory breach, rather than a case of violence, abuse and neglect.

NDIS Quality and Safeguards Commission

Our advocates and members reported particular dissatisfaction with the NDIS Quality and Safeguards Commission (the Commission). Where advocates have lodged a complaint to the Commission, sometimes they receive a response and other times they only receive a generic response and no closure on the complaint.

Advocates often don't know if any action was taken on the complaint. One advocate stated:

I've supported people to lodge 8–10 complaints [to the Commission] and you never know if it was even investigated, looked into, useful, etc.

This problem with the Commission's lack of responsiveness is illustrated in the following de-identified case study:

A PWDA advocacy client lodged a range of complaints about their group home over a period of approximately three years. Complaints were first sent to the group home's internal complaints mechanism and then to the Commission. The client never received an outcome from the Commission. This particular client managed to move out of the group home without the Commission's assistance, but there are other people who are stuck living in the home. Our advocate worry that the Commission will fail to assist those people, leaving them in an unsatisfactory living situation.

This lack of responsiveness and communication is also problematic because it discourages people from making complaints. Indeed, our advocates report that clients feel defeated by the NDIS complaints processes. Often people with disability don't make complaints about the NDIS because they think there will be delays and no outcome. Many people are traumatised from going through arduous NDIS complaints processes in the past and are reluctant to re-engage with them.

Department of Communities and Justice (New South Wales)

One of our advocates has had many cases where the Department of Communities and Justice (DCJ) New South Wales has been unresponsive, even in urgent matters.

The advocate provided an example of a current case where their client is experiencing domestic violence. The advocate has been liaising with the NSW Department of Communities and Justice for months to try to get the person relocated to safety. However, the case has been open for months, with the occasional response that it is at the top of the priority list, but no other specific information or action. Our advocate stated that:

Just trying to contact a manager or getting them to talk to you, the communication is so poor you can't seem to go anywhere. You're constantly fighting a battle of trying to bring it to their attention ... every day this person is at more risk, what are they waiting for? Something extremely serious to happen before they do something? Well it's too late then.

Advocates are frustrated by a situation where besides DCJ's internal complaints mechanisms – which are often ineffective – there is nowhere advocates can take these complaints, even when they involve matters of violence.

To address complaint bodies' lack of responsiveness and communication, we urge:

Recommendation 8 – The Disability Royal Commission should inquire into the reasons for unresponsiveness and delays in complaints mechanisms, particularly in urgent matters where a person with disability is experiencing violence, and consider whether any funding, operational, legislative or policy amendments should be made to ensure greater responsiveness and reduce delays.

Reluctance to impose penalties on providers

Our members and advocates reported that complaints mechanisms bodies often believe providers over people with disability. Providers are given the benefit of the doubt and it appears the Commission is more concerned with protecting the providers' right to continue business over the person with disability's safety and wellbeing.

One of our members complained to the Commission about a large and well-known provider in relation to restrictive practices. As soon as the Commission heard the name of that provider, they dismissed the member, stating that the organisation 'would know what it's doing'.

Further, oversight bodies, including the Commission, are often very reluctant to deliver strong measures, such as deregistration. Often, only a reprimand or warning is issued. This does not give providers substantial consequences for their actions and does not provide a deterrent effect for the provider in question or other providers.

We recommend:

Recommendation 9 – The Disability Royal Commission examines the outcomes produced by various complaints bodies, and whether these have adequate deterrent effect.

Recommendation 10 – The Disability Royal Commission investigates the efficacy of disability complaints systems and holds a DRC public hearing about people’s experiences with them before recommending what needs to change to ensure these complaints bodies do not take a lenient approach.

Recommendation 11 – The Disability Royal Commission examines whether complaints bodies are treating cases of violence, abuse, neglect and exploitation as regulatory breaches rather than criminal matters they should refer to police where appropriate.

Reliance on complaints

Our advocates reported that complaints bodies are overly reliant on complaints and do not carry out enough own-motion investigations of public administration. Given accessibility problems, relying on receiving complaints before investigating is a serious problem. Complaints bodies should not assume that violence, abuse, neglect and exploitation are not occurring just because complaints have not been made.

We recommend:

Recommendation 12 – The Disability Royal Commission examines why complaints bodies are not carrying out investigations without being prompted by third parties, or own-motion investigations, and whether this function would best be subsumed by the National Body that People with Disability Australia recommends be established.

Independent inspections

Independent inspections of group homes and other closed settings are a crucial safeguard, as people living in these environments can find it particularly difficult to access complaints mechanisms. Indeed, one of our members noted that:

People need to go into the community, especially segregated settings like group homes. They are the people most often abused but least often heard from.

Official community visitors

We support the current official and community visitor programs and believe these should be continued. However, based on our advocates' many decades of experience, these programs need to be improved to be an effective safeguard.

The feedback we received from advocates and members was specifically in relation to the New South Wales Official Community Visitor (OCV) scheme. Our advocates highlighted that visits are often announced beforehand, continuing a longstanding practice started more than two decades ago. One advocate reported that:

[The] community visitor scheme was checking in semi-regularly on a group home that a client was living in ... they were providing dates to the home about when the community visitor was going to be popping in ... There needs to be unexpected audits and check-ins where people can't prepare for it.

Our advocates also said that when they have made reports to the OCV scheme, the OCV provides vague responses that does not usually confirm what steps will be taken to address the report.

To address these issues, we recommend:

Recommendation 13 – The Disability Royal Commission examines the effectiveness of community visitor schemes in all Australian jurisdictions and whether improvements should be made to some or all of the schemes to ensure they are operating as an effective safeguard.

Optional Protocol to the Convention against Torture

Another promising independent inspection mechanism has recently arisen through Australia's ratification of the Optional Protocol to the Convention against Torture (OPCAT).

OPCAT requires signatory country–states to establish a system whereby independent bodies, known as National Preventative Mechanisms (NPMs) conduct regular visits to places of detention.¹⁴ States must also accept visits from the United Nations Subcommittee on the Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (UN Subcommittee).¹⁵

Unlike complaints mechanisms, OPCAT focuses on the establishment of a proactive system of NPM visits to prevent violations happening, rather than responding once they have occurred.¹⁶ By conducting visits, NPMs will be able to look at risk factors and systemic problems and make recommendations to address root causes of torture and other mistreatment.¹⁷

Australia ratified OPCAT in 2017 but elected to postpone its NPM obligations for up to three years.¹⁸ Australia has, however, indicated it will adopt a federated model of NPMs by January 2022.¹⁹ The federated model will consist of a network of federal, state and territory oversight bodies, facilitated by the Office of the Commonwealth Ombudsman as NPM coordinator (which will also be the NPM for federal places of detention).²⁰

The Australian Government is yet to answer many questions about how the OPCAT will work. At the time of writing, it is still unclear what progress the Government has made to designate NPM bodies, including the role of existing oversight bodies as NPMs and whether new oversight bodies will be created as NPMs.²¹ Most relevant to this submission, it is unclear which places of detention will be included in the mechanism.

¹⁴ *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 4 February 2003, 2375 UNTS 237 (entered into force 22 June 2006) ('OPCAT').

¹⁵ OPCAT (n 11) art 4(1).

¹⁶ Association for the Prevention of Torture and the Inter-American Institute of Human Rights, *Optional Protocol to the UN Convention against Torture: Implementation Manual* (Manual, 2010) ('*Implementation Manual*') 12.

¹⁷ *Ibid* 12–13.

¹⁸ Australian Government, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21* (Report, 2020) [40].

¹⁹ Australian Human Rights Commission, *Implementing OPCAT in Australia* (Report, 2020) ('*Implementing OPCAT*') 11.

²⁰ *Ibid* 23.

²¹ See Senator Lidia Thorpe, Question on Notice 2941 to the Minister Representing the Attorney-General on 4 February 2021.

Inclusion in the OPCAT mechanism

It is crucial that disability group homes and aged care homes are included in the OPCAT mechanism. The Disability Royal Commission and Royal Commission into Aged Care Quality and Safety have revealed that violence and abuse often occur in these settings. While not exclusively for people with disability, almost 88 per cent of people living in aged care homes have a physical disability and 73 per cent have a psychosocial disability.²² As such, aged care homes are just as relevant to people with disability as disability group homes.

Unfortunately, the government has not clarified whether disability group homes will be included in the OPCAT mechanism and has specifically indicated that aged care homes will be excluded.²³ The Government has stated that aged care homes will be excluded because they do not fit within the OPCAT Article 4 definition of 'places of detention'.²⁴

Places of detention

We believe that both disability group homes and aged care homes fit the OPCAT Article 4 definition of 'places of detention' and should therefore be included in the OPCAT mechanism.

Article 4(1) of OPCAT stipulates that States must allow visits from NPMs and the UN Subcommittee to 'places of detention', which are defined as:

Any place under [the State's] jurisdiction and control where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority or at its instigation or with its consent or acquiescence'.²⁵

Australian disability group homes and aged care homes are under Australia's 'jurisdiction and control' because they are located on Australian territory.²⁶ People with disability living in disability group homes and aged care homes can be deprived of their liberty through the use of restrictive practices. Restrictive practices, such as physical and chemical restraint, may prevent the person from leaving their bed, bedroom or home.²⁷

When restrictive practices are authorised by State and Territory governments, they occur with the government's 'consent'. Where the government is aware of unauthorised restrictive practices, but does not take appropriate steps to prevent or address their use, the restrictive practices occur with the government's acquiescence.²⁸ Therefore, disability

²² Australian Bureau of Statistics, *A Profile of People Living in Residential Aged Care in Australia* (Information Sheet, 2018).

²³ *Implementing OPCAT* (n 16) 43.

²⁴ *ibid.*

²⁵ OPCAT (n 11) art 4(1).

²⁶ Association for the Prevention of Torture, *Establishment and Designation of National Preventative Mechanisms* (Guide, 2006) 19–20.

²⁷ *Implementing OPCAT* (n 16) 42.

²⁸ *Implementation Manual* (n 13) 53.

group homes and aged care homes meet the definition of ‘places of detention’ set out in Article 4(1).

The Australian Government has not provided details about why it considers that aged care homes do not meet the Article 4 definition of ‘places of detention’. However, there has been some international debate about the appropriate construction of Article 4(2) of OPCAT and whether it excludes places such as aged care and disability group homes.²⁹

Article 4(2) of OPCAT defines ‘deprivation of liberty as’:

Any form of detention or imprisonment or the placement of a person in a public or private custodial setting which that person is not permitted to leave at will by order of any judicial, administrative or other authority.

As such, Article 4(2) specifies that to be ‘deprived of their liberty’, the person must not be permitted to leave at will ‘by *order* of any judicial, administrative or other authority [emphasis added]’.³⁰ Unlike Article 4(1), it does not mention the deprivation occurring with the mere consent or acquiescence of the Government.

This raises the question of the overall interpretation of Article 4 and whether it should be given a broad interpretation (where detention can occur through the Government’s consent or acquiescence) or a narrow interpretation (where detention can only occur through a Government order).

To ascertain the correct interpretation of Article 4, it is necessary to turn to the Vienna Convention on the Law of Treaties (VCLT). According to Article 31(1) of the VCLT:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.³¹

Article 31(3) sets out several matters that must be taken into account together with the context of the treaty, including any ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.’³²

When Article 4(2) is interpreted in good faith and in its context, it cannot be read to directly contradict what is set out in Article 4(1), as this would largely render Article 4(1) obsolete. In addition, subsequent practice in the application of the treaty has involved NPMs visiting

²⁹ See University of Bristol Human Rights Implementation Centre, ‘Deprivation of Liberty’ as per Article 4 of OPCAT: The Scope’ (Web Page, October 2011) (*Deprivation of Liberty*) <<http://www.bris.ac.uk/media-library/sites/law/migrated/documents/deprivationofliberty.pdf>>.

³⁰ OPCAT (n 11) art 4(2).

³¹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 31(1).

³² *Ibid* art 31(3).

places such as care homes and social welfare institutions.³³ Further, States have not objected when the UN subcommittee visits such places, indicating an acceptance of the broader interpretation of Article 4.³⁴ As such, it is clear that the broad interpretation of Article 4 applies, and that disability group homes and aged care homes must be considered ‘places of detention’.

To ensure Australia is compliant with its international obligations, we therefore recommend that:

Recommendation 14 – The Disability Royal Commission recommends the Australian Government adopts a broad definition of places of detention that encompasses aged care and disability group homes when implementing the Optional Protocol to the Convention against Torture (OPCAT).effective safeguard.

Different states and territories have different legislation around OPCAT, making a national approach more important.

Priority implementation

In addition to ensuring that group and aged care homes are covered by the OPCAT mechanism, we must ensure they receive priority implementation. The Australian Government has suggested an incremental approach to implementing OPCAT, where NPMs prioritise ‘primary places of detention’.³⁵ Primary places of detention include, for example, prisons, immigration detention facilities and closed forensic disability facilities.³⁶ However, they do not include disability group and aged care homes.³⁷

The Federal Government considers that the ‘challenges posed by the deprivation of peoples’ liberty [are] at their most acute’ in the primary places of detention.³⁸ Given that the Government has recently instigated royal commissions into both aged care and disability, we query whether the challenges faced by those in places such as prisons are truly more acute than those faced by those in group and aged care homes.

³³ *Deprivation of Liberty* (n 27).

³⁴ *Ibid.*

³⁵ Commonwealth Ombudsman, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT)* (Report, 2019) 8.

³⁶ *Ibid* 8-9.

³⁷ *Ibid.*

³⁸ *Implementing OPCAT* (n 16) 43.

As such, we recommend that:

Recommendation 15 – The Disability Royal Commission recommends the Australian Government reconsiders whether the challenges posed by the deprivation of people’s liberty is truly more acute in places such as prisons as opposed to aged care and group homes and ensure that presumptions about acuteness of risk are based on data rather than inclinations.

We also recommend that:

Recommendation 16 – The Disability Royal Commission considers the role of the National Body in the context of implementing OPCAT. The DRC should consider whether:

1. the National Body should become a designated National Preventative Mechanism (NPM) under OPCAT
2. the National Body should take on an advisory role to the NPM coordinator
3. the National Body should take on an advisory role to the NPMs.

Police

To ensure our rights are upheld, it is fundamental that we can report violence to the police.

An environment open to people with disability reporting violence to the police involves both trust and awareness.

Unfortunately, many people with disability have experienced violence at the hand of police officers. Some advocacy reports estimate about half of people shot by police have psychosocial disability. The loss of lives, such as Courtney Topic who was shot dead, continues to dismay people with disability and leads to a lack of confidence in the police force.

Training for police in how to identify people with disability, and how to de-escalate and respect people with disability is vital to reducing concerning statistics that track the negative experiences of people with disability with police.

Article 13(2) of the CPRD requires that States promote appropriate training for police to ensure access to justice for people with disability.³⁹ Unfortunately, our advocates have reported that the police force generally has poor disability awareness.

³⁹ CPRD (n 6) art 13(2).

People with disability are often not trusted or believed by police, when reporting matters to officers.

This may be particularly the case for people with disability who speak to the police when they have been traumatised. The trauma may cause them to not recall facts in a consistent manner or not communicate facts effectively. Instead of recognising the effect of trauma on the person's ability to report the matter, police can often view the person as lacking credibility.

People with psychosocial disability are also commonly not believed by police. Police often fail to recognise that psychosocial disability is also a disability. People with psychosocial disability are also often treated as criminals, rather than victims, especially if they behave aggressively. Our advocates report that people with psychosocial disability are often turned away when they try to report violence to the police.

These issues are illustrated in the following de-identified case study:

A PWDA advocacy client with a mild acquired brain injury, mental health issues and history of traumatic abuse had been imprisoned and assaulted by her ex-partner. The client had to go to the hospital emergency department. In the meantime, the perpetrator went to the police and told them that the client was 'crazy' and delusional. The client went straight from the hospital to the police but did not recall facts. The police were dissecting her story and telling her it was inconsistent. Instead of recognising that the client was a person with disability who had been abused they went with the assumption that she was delusional. This was even in the face of obvious evidence of injury and no alternative explanation as to how it happened. The client has since connected to a social worker who helped her draft a statement and obtain an interim Domestic Violence Order. The client intends to press charges against the perpetrator.

Current measures

We acknowledge that many jurisdictions have measures in place to address the needs of people with disability when reporting to police. However, these measures are clearly insufficient, given the consistent reports from our advocates that people with disability are being dismissed by the police.

Our advocates work in New South Wales and Queensland, so our discussion will be limited to the processes available in these states.

New South Wales

In NSW, the Intellectual Disability Rights Service provides people with a cognitive impairment free support to report a crime.⁴⁰ However, this free service is not available for people with other disability types. This is particularly problematic for people who don't have family or friends to support them. One advocate reported:

It can be very distressing to go to a police station and be questioned, especially if you don't have a support person with you and it's hard to access a support person. There is funding for people with [a cognitive] disability to have a support person but if the person has no one in their life and doesn't have a [cognitive] disability, there's not a lot of services out there that will go into a police station and talk with that person.

Queensland

The Queensland Police's *Operational Procedures Manual* states that when an officer intends to interview a person with a disability, the officer should take special action to account for the disability.⁴¹ This may include, for example, obtaining the assistance of an independent person and arranging interpreters.⁴²

In the case of a person with an intellectual impairment, a special interview can be conducted to obtain a statement, which can be used as evidence in chief.⁴³

This is commonly known as a 'Section 93A Statement'. Section 93A Statement interviews are conducted by a suitably qualified officer.⁴⁴

One advocate reported that the Section 93A Statement measures are positive, however, there are issues in adequate identification of people eligible for the measure. The following de-identified case study illustrates the barriers to making a Section 93A Statement:

A PWDA advocacy client with an acquired brain injury was assaulted by her partner. The police officer who took her statement did not know she had an acquired brain injury and viewed her as suspicious and 'cagey'. The client gave her statement but did not understand what was happening. After the statement was made, our advocate spoke to the police to arrange a Section 93A interview. It took three weeks of our advocate constantly calling the police to have the interview confirmed. If our advocate had not stepped in to help the client liaise with the police and seek a Section 93A statement it would not have happened, and the client would have felt frustrated and confused.

⁴⁰ IDRS, 'Justice Advocacy Service' (Web Page) <https://idrs.org.au/what-we-do/justice-support>.

⁴¹ Queensland Police, *Operational Procedures Manual* (Manual, 2021) ('*Operational Procedures Manual*') [6.3.3].

⁴² *Ibid.*

⁴³ *Evidence Act 1977* (QLD) s 93A.

⁴⁴ *Operational Procedures Manual* (n 44) ch 7.

It is clearly unsatisfactory that people with disability are being dismissed by the police when reporting violence and that they are not receiving appropriate support to report crimes.

To address these issues, we urge:

Recommendation 17 – The Disability Royal Commission recommends police receive appropriate disability awareness training to assist them identify people with disability and understand how their disability and trauma might affect the way they present to police. They should also receive guidance in how to connect people with disability to appropriate procedures and supports. Training should also cover intersectional issues, such as awareness of cultural and gender issues

Recommendation 18 – The Disability Royal Commission explores why police forces have resisted implementing disability awareness training for decades.

Recommendation 19 – The Disability Royal Commission examines the violence police have inflicted on people with disability.

Recommendation 20 – The Disability Royal Commission recommends a broader range of people with disability are provided access to trained interviewers and funded specialist support people when wanting to report matters to the police.

Tribunals and courts

In addition to issues with reporting matters to the police, our advocates also reported issues with accessing tribunals and courts.

Article 13 of the CPRD obliges States to ensure that people with disability have access to justice on an equal basis to others.⁴⁵ This includes through providing procedural and age-appropriate accommodations in all legal proceedings.⁴⁶ Article 13 also obliges States to promote appropriate training for those who work in the field of administration of justice to help ensure effective access to justice for people with disabilities.⁴⁷

Our advocates reported that while the Administrative Appeals Tribunal is making good progress in providing procedural accommodations, Australia's courts are lacking in this regard. For example, one advocate attended an online court case where no one introduced themselves, meaning that for a person with blindness, it was not clear who was

⁴⁵ CPRD (n 6) art 13(1).

⁴⁶ Ibid

⁴⁷ Ibid art 13(2).

talking. The advocate also reported that in another case they had written to the court numerous times requesting procedural accommodations but received no response.

Our advocates report that in civil matters, it is difficult for plaintiffs to get support, particularly where they are not eligible for intellectual disability rights services support from IDRS. Defendants are more likely to receive support in civil matters.

We urge:

Recommendation 21 – The Disability Royal Commission conducts evaluations of the accessibility of state, territory and federal tribunals and courts for people with disability, with a focus on their compliance with articles 9, 13 and 16 of the Convention on the Rights of Persons with Disabilities. The evaluations should be designed and carried out by or in consultation with people with disability and our representative organisations.

Independent advocacy

Independent advocates play a crucial role in safeguarding, as they can facilitate people with disability's engagement with all the above-mentioned safeguarding measures – capacity building, complaints mechanisms, independent inspections, the police, tribunals and the courts. Independent advocacy is particularly important for people with no support networks, who have complex needs and those living in closed environments.

The Government must ensure adequate funding of independent advocacy. As highlighted by the Australian Human Rights Commission:

A lack of individual advocacy services may result in people with disability being deprived of an advocate who is independent of service providers and the NDIA to promote and protect their rights and may limit people's ability to identify and raise issues of violence abuse and neglect, as well as meaningfully participate in any quality, safeguarding and oversight processes.⁴⁸

Our members reported that there is currently a long waiting time to access independent advocacy services. One member reported that 'you need to be in crisis before advocates will act, because of the amount of waiting time'. If independent advocates are to play a role in capacity building and preventing violence, abuse, neglect and exploitation, they must be accessible before people with disability are in crisis.

⁴⁸ Australian Human Rights Commission, *A Future without Violence* (Report, 2018) 54.

Our advocates also reported that they are often not recognised or included by Government bodies and oversight mechanisms, such as the NDIA and official community visitor schemes.

It is PWDA's experience that when the Official Community Visitor scheme in NSW was transitioned from the NSW Ombudsman to the NSW Ageing and Disability Commission (ADC), the legislation referred to OCVs liaising with advocates where required. In the time since, a senior advocate could not recall any example of where an OCV had liaised with a PWDA advocate. This is the situation, even though we have had multiple conversations with the ADC about the benefits of OCVs and disability advocates working together to address resident concerns.

One advocate noted that 'the NDIA is notorious for ignoring advocates' and will often bypass advocates and speak to participants directly. The NDIA will sometimes provide incorrect advice, such as telling participants to not ask for a particular support or service because they won't get it. This is problematic because when the request and refusal are not formally made the refusal cannot be appealed. Where advocates are included in these conversations, they can intervene to help people with disability protect their rights.

For independent advocacy to be effective it must be properly funded and properly recognised by government bodies.

As such, we recommend:

Recommendation 22 – The Disability Royal Commission urges Australian governments to increase funding for independent advocacy for people with disability.

Rights

People with disability have human rights, in addition to the right to be free from torture.

These human rights are laid out on the CRPD and include articles 15–17 and their rights to:

- freedom from torture or cruel, inhuman or degrading treatment or punishment
- freedom from exploitation, violence and abuse
- protecting the integrity of the person

Safeguarding is an important concept to understand, but it must be understood in context. People with disability are not vulnerable, per se. Instead, they are marginalised, and a rights-based approach to safeguarding involves addressing the problems that lie outside us.



**PEOPLE WITH DISABILITY
AUSTRALIA**

For individual advocacy support contact the **Wayfinder Hub** between 9 am and 5 pm (AEST/AEDT) Monday to Friday via phone (toll free) on **1800 843 929** or via email at info@wayfinderhub.com.au.

Submission contact: Amanda Ellis, Senior Policy Officer: AmandaE@pwd.org.au

**A voice of
our own**