



Women With Disabilities Australia (WWDA)

WOMEN WITH DISABILITIES AUSTRALIA (WWDA)

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability

WWDA Response to Safeguards & Quality Issues Paper

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First Nations peoples should be aware that this publication may contain the names and words of people who have passed.

Acknowledgments

WWDA acknowledges the traditional owners of the land on which this publication was produced. We acknowledge First Nations people's deep spiritual connection to this land. We extend our respects to community members and Elders past, present and emerging.

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ABOUT WOMEN WITH DISABILITIES AUSTRALIA (WWDA)

[Women With Disabilities Australia \(WWDA\)](#) Inc is the national Disabled People's Organisation (DPO) and National Women's Alliance (NWA) for women, girls, feminine identifying and non-binary people with disability in Australia. As a DPO and an NWA, WWDA is governed, run, and staffed by and for women, girls, feminine identifying and non-binary people with disability.

WWDA uses the term 'women and girls with disability', on the understanding that this term is inclusive and supportive of, women and girls with disability along with feminine identifying and non-binary people with disability in Australia.

WWDA represents more than 2 million women and girls with disability in Australia, has affiliate organisations and networks of women with disability in most States and Territories, and is recognised nationally and internationally for our leadership in advancing the rights and freedoms of all women and girls with disability. Our organisation operates as a transnational human rights organisation - meaning that our work, and the impact of our work, extends much further than Australia. WWDA's work is grounded in a human-rights based framework which links gender and disability issues to a full range of civil, political, economic, social and cultural rights. All WWDA's work is based on co-design with and participation of our members. WWDA projects are all designed, governed, and implemented by women and girls with disability.

Disabled People's Organisations (DPOs) are recognised around the world, and in international human rights law, as self-determining organisations led by, controlled by, and constituted of, people with disability. DPOs are organisations of people with disability, as opposed to organisations which may represent people with disability. The United Nations Committee on the Rights of Persons with Disabilities has clarified that States should give priority to the views of DPOs when addressing issues related to people with disability. The Committee has further clarified that States should prioritise resources to organisations of people with disability that focus primarily on advocacy for disability rights and, adopt an enabling policy framework favourable to their establishment and sustained operation.¹

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ABBREVIATIONS

BSP	Behaviour Support Plan
CRPD	Convention on the Rights of Persons with Disabilities
CRPD Committee	Committee on the Rights of Persons with Disabilities
ICESCR	International Covenant on Economic, Social and Cultural Rights
Issues Paper	Safeguards & Quality Issues Paper
OPCAT	Optional Protocol to the Convention Against Torture
Royal Commission	Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability
UN	United Nations
WWDA	Women With Disabilities Australia (WWDA) Inc

1. RECOMMENDATIONS

WWDA prefaces our Recommendations in the recognition that, despite various legislation, policies and systems for ‘safeguarding people with disability from violence and abuse’, current laws, policies and systems have to date, had little, to no impact on addressing the epidemic that is violence and abuse of women and girls with disability in Australia. Indeed, some of these laws, policies and systems – such as those related to the NDIS Quality and Safeguarding Commission – **enable** violence through their role in regulating (rather than eliminating and prohibiting) restrictive practices and segregated and closed accommodation and other settings.

WWDA makes the following **thirty-one** broad Recommendations. Please note that the following recommendations are provided in no particular order of priority:

- 1.1 That the Royal Commission recommend that Australian Government’s reframe and rename ‘safeguarding’ in law, policy and service delivery in terms of ‘violence prevention and response’, ‘access to justice’ and ‘human rights’, in order to ensure the same non-paternalistic and non-violent approach to ensuring the safety of people with disability as applies to the general population.
- 1.2 That the Royal Commission recommend the Australian Government rename and refocus the NDIS Quality and Safeguards Commission to have an explicit violence prevention, justice and human rights focus, and broaden its scope to include people with disability who are not NDIS participants.
- 1.3 That the Royal Commission in its work and its Final Report recommendations, provide a clear, timebound framework and roadmap for full implementation of the CRPD at the domestic level, including implementation of the Concluding Observations from the CRPD Committee reviews of Australia’s CRPD compliance, and ensure that the Royal Commission Final Report (and its recommendations) do not “cherry pick” the human rights it believes people with disability are entitled to.
- 1.4 That the Royal Commission recommend the Australian Government implement the findings and recommendations from the Royal Commission’s commissioned research reports, specifically, the Research Report titled *Complaint Mechanisms: Reporting Pathways for Violence, Abuse, Neglect and Exploitation* and the Research Report titled *Restrictive Practices: A Pathway to Elimination*.
- 1.5 That the Royal Commission recommend the Australian Government invest in human rights capacity building education for people with disability, in recognition that that this is central to realising an approach to violence prevention and response that centres the agency of people with disability and resists a paternalistic approach that positions them as helpless objects at the mercy of the help of others.
- 1.6 That the Royal Commission recommend the Australian Government and State/Territory Governments address the urgent need to adequately and recurrently fund **independent** advocacy, in recognition that independent advocacy is a critical, interconnected component of progressing the human rights of people with disability and supporting Australia’s international human rights obligations.

- 1.7 That the Royal Commission recommend that the Australian Government establish an independent, statutory, national protection mechanism under specific purpose legislation, and with broad functions and powers to protect, investigate and enforce findings in relation to **all** forms of violence against people with disability, regardless of the setting in which it occurs, regardless of who perpetrates it, and regardless of when it occurred. This national protection mechanism should explicitly operate within a human rights framework, and include as a minimum, the following core functions:
- a ‘no wrong door’ complaint handling function – the ability to receive, investigate, determine, and make recommendations in relation to complaints raised.
 - the ability to initiate ‘own motion’ complaints and to undertake own motion enquiries into systemic issues.
 - the power to make recommendations to relevant respondents, including Commonwealth and State and territory governments, for remedial action.
 - the ability to conduct policy and programme reviews and audits.
 - the ability to publicly report on the outcomes of systemic enquiries and group, policy and programme reviews, or audits, including through the tabling of an Annual Report to Parliament.
 - the ability to develop and publish policy recommendations, guidelines, and standards to promote service quality improvement.
 - the ability to collect, develop and publish information, and conduct professional and public educational programs.
 - the power to enable enforcement of its recommendations, including for redress and reparation for harms perpetrated.
- 1.8 That the Royal Commission recommend that the Australian Government establish a National Redress Scheme, incorporating both individual and collective redress and reparations, and which serves an important role as both a form of transitional and transformative justice, and as an additional pathway for reporting violence, abuse, neglect and exploitation that is historical in nature.
- 1.9 That the Royal Commission recommend that the Australian Government abolish the National Disability and Neglect Hotline and re-allocate resources to the establishment of an independent, statutory national mechanism to protect, investigate and enforce findings in relation to all forms of violence against people with disability.
- 1.10 That the Royal Commission recommend that safeguards and complaints processes must be co-designed and led by people with disability, be designed and operate in a human rights framework, be culturally safe and trauma-informed, be independent, accessible and safe, and provide access to justice in process and outcome.
- 1.11 That the Royal Commission recommend the Australian Government establish a nationally consistent supported decision-making framework, that strongly and positively promotes and supports women with disability to effectively assert and exercise their legal capacity and enshrines the primacy of supported decision-making mechanisms. This framework must replace (rather than complement) substitute decision-making regimes and practices.

- 1.12 That the Royal Commission recommend the Australian Government urgently review and update the definition of ‘regulated restrictive practices’ in the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth), and used by the NDIS Quality and Safeguards Commission, to include forms of sexual and reproductive rights restraints and practices (e.g., forced contraception, forced menstrual suppression, forced abortion, forced and coerced sterilisation).
- 1.13 That the Royal Commission, in all areas of its work, and in its Final Report, explicitly recognise and conceptualise the segregation of people with disability as discrimination, that segregation is an underpinning enabler of violence, abuse, neglect and exploitation, that segregation constitutes systemic violence, abuse, neglect and exploitation; and the Disability Royal Commission must hold governments and other stakeholders to account for supporting, maintaining and funding segregated legal, justice, service, residential, educational, employment and other systems.
- 1.14 That the Royal Commission recommend the Australian Government implement the Concluding Observations from the Committee Against Torture, following its 2022 review on the sixth periodic report of Australia, particularly the Committee’s recommendation to: ‘Establish a nationally consistent legislative and policy framework for the protection of all persons with disabilities, including children, from the use of psychotropic medications, physical restraints and seclusion under the guise of “behaviour modification” and the elimination of restrictive practices against persons with disabilities, including children’.
- 1.15 That the Royal Commission recommend the Australian Government make the necessary changes to ensure that the NDIS Quality & Safeguards Commission has the power to require providers to report on mental health-related medications that are prescribed for ‘treatment’ purposes, including: Antipsychotics, Antidepressants, Anxiolytics, Hypnotics and sedatives, and Psychostimulants. This must include the NDIS Commission having the power to access information regarding a medical practitioner’s ‘purpose’ for prescribing.
- 1.16 That the Royal Commission recommend the NDIS Quality and Safeguards Commission introduce and implement a more robust system whereby all Behaviour Support Plans (BSP’s) submitted to the NDIS Quality & Safeguards Commission are properly reviewed and assessed, including clear, timebound strategies for the elimination and prohibition of restrictive practices.
- 1.17 That the Royal Commission recommend the NDIS Quality & Safeguards Commission take a much more proactive role for NDIS participants in ensuring service quality, as well as ensuring a clear role in preventing and responding to violence and facilitating access to justice within a human rights framework. This must include for e.g., well qualified and experienced NDIS Quality & Safeguards Commission officers undertaking random, unannounced ‘spot checks’ of the NDIS participants receiving NDIS services, particularly participants in group homes, and other institutional and congregate care settings and environments.
- 1.18 That the Royal Commission recommend the NDIS Quality & Safeguards Commission act to ensure that all complaints to the NDIS Quality & Safeguards Commission regarding violence, abuse, exploitation and neglect, automatically trigger the need for a ‘spot check’, whereby the participant is directly seen by, and ‘interviewed’ by qualified and experienced NDIS Quality & Safeguards Commission officers, without service providers present.

- 1.19 That the Royal Commission recommend the NDIS Quality & Safeguards Commission provide more accessible information directly to the NDIS participant, particularly those in group homes, and other institutional and congregate care settings and environments.
- 1.20 That the Royal Commission recommend that the NDIS Quality & Safeguards Commission focus on undertaking an educative role that builds the human rights and capacity of people with disability – including their capacity to access advocacy and legal services in order to make complaints, report matters to police, access victims support schemes, and bring civil legal action – not just an educative role that informs service providers of their obligations.
- 1.21 That the Royal Commission recommend that the NDIS Quality & Safeguards Commission utilise its compliance/infringement powers more regularly and make them more public, including making it easier to access ‘NDIS Provider Register - Banning Orders’.
- 1.22 That the Royal Commission recommend the NDIS Quality & Safeguards Commission make the necessary changes to address the current limitations whereby only NDIS providers can lodge ‘reportable incidents’.
- 1.23 That the Royal Commission recommend the NDIS Quality & Safeguards Commission’s regulation of restrictive practices be abolished and instead focus on a systems-wide elimination and prohibition of restrictive practices.
- 1.24 That the Royal Commission recommend the Australian Government review and reform the NDIS Information, Linkages and Capacity Building (ILC) grants program, to ensure that the scheme is only used to fund projects that themselves advance the human rights of people with disability and are delivered by services or other organisations that have a demonstrated track record of respecting and advancing human rights of people with disability and supporting their freedom from violence and access to justice.
- 1.25 That the Royal Commission recommend the Australian Government ensure that NDIS individual capacity building funding is available to programs that engage in human rights capacity building of individuals, which develop knowledge and skills on what constitutes violence and how to enforce legal rights and human rights, and which support supported decision-making, and self-advocacy and advocacy more broadly.
- 1.26 That the Royal Commission recommend that Australian and State and Territory independent National Preventive Mechanism (NPM) oversight bodies under the *Optional Protocol on the Convention Against Torture* (OPCAT), categorise group homes, residential aged care facilities (RACFs), closed mental health units, forensic disability units, hospitals, and broader residential facilities for people with disability as ‘places of detention’ under the OPCAT, and be monitored accordingly.
- 1.27 That the Royal Commission recommend that the OPCAT Australian National Preventive Mechanism (NPM) ensure the scope and function of the NPM adheres to and reflects the guidance from the Subcommittee on Prevention of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (SPT) and ensure that ‘any place in which a person is deprived of liberty (in the sense of

not being free to leave), or where it considers that a person might be being deprived of their liberty, should fall within the scope of its visiting mandate – and, in consequence, under the visiting mandate of an NPM – if it relates to a situation in which the State either exercises, or might be expected to exercise a regulatory function.’

- 1.28 That the Royal Commission must explicitly recognise restrictive practices as violence and torture that violates article 15 of the CRPD and violations of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and as part of its examination of these practices, it should:
- Approach its work on restrictive practices through a broad definition of restrictive practices that encompasses all forms of sexual and reproductive rights restraints and practices (e.g., forced contraception, forced menstrual suppression, forced abortion, forced and coerced sterilisation).
 - Examine the adequacy of the oversight function of the NDIS Quality and Safeguards Commission in relation to the elimination of all restrictive practices, and the gaps in oversight of restrictive practices for people with disability who are not NDIS participants.
 - Actively engage with the Commonwealth Ombudsman and its OPCAT Advisory Group, with the aim of discussing the evidence it has received regarding torture and ill-treatment, and to demonstrate support for the design and scope of the Australian National Preventive Mechanism (NPM) to be disability inclusive, including for the inclusion of disability settings (specific and mainstream) where people with disability are deprived of their liberty, such as segregated living arrangements.
 - Make findings and recommendations for the urgent and immediate elimination of restrictive practices, including legal reform to prohibit use of restrictive practices.
- 1.29 That, consistent with long-standing recommendations from the UN international human rights treaty monitoring bodies, the Royal Commission recommend the Australian Government commission and fund a comprehensive assessment of the situation of women and girls with disability, in order to establish a baseline of disaggregated data and information against which compliance with the UN treaties (to which Australia is a party) and national policy frameworks can be measured and monitored.
- 1.30 That the Royal Commission recommend the Australian Government withdraw its Interpretive Declarations on the United Nations Convention on the Rights of People With Disabilities (CRPD) including Article 12 [Equal recognition before the law], Article 17 [Protecting the integrity of the person] and Article 18 [Liberty of movement and nationality] and that the Australian Government review and take action to withdraw its Reservations and Interpretative Declarations to the other human rights treaties to which Australia is a party.
- 1.31 That the Royal Commission recommend Australia fully implements the recommendations from Australia’s reviews under the seven human rights treaties to which it is a party.

2. BACKGROUND

- 2.1 The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission)² was established after many years of campaigning by people with disability and our representative organisations at both the domestic and international level.³
- 2.2 Women With Disabilities Australia (WWDA) played a leading role in these advocacy efforts, and in particular, in exposing the gendered nature of violence against people with disability.
- 2.3 In 2015, our collective campaign efforts led to the establishment of the *Senate Inquiry into 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.⁴ The priority Recommendation from that Senate Inquiry was that a Royal Commission into violence against people with disability be established.⁵
- 2.4 However, it was not until 2019, following further concerted advocacy efforts that the Royal Commission was finally established by the Australian Government. The urgent need for a Royal Commission into all forms of violence against people with disability, was a key recommendation from the 2017 review of Australia’s compliance with the International Covenant on Economic, Social and Cultural Rights (ICESCR); and was also addressed at the September 2019 review of Australia’s compliance with the Convention on the Rights of Persons with Disabilities (CRPD).
- 2.5 The Terms of Reference for the Royal Commission are contained in the Commonwealth Letters Patent that were signed by the Governor General on 4 April 2019.⁶ The Terms of Reference explicitly state that:

“Australia has international obligations to take appropriate legislative, administrative and other measures to promote the human rights of people with disability, including to protect people with disability from all forms of exploitation, violence and abuse under the Convention on the Rights of Persons with Disabilities.”

- 2.6 The Terms of Reference reflect our campaign calls that the Royal Commission should have regard to ‘all forms of violence against, and abuse, neglect and exploitation of, people with disability, whatever the setting or context’.⁷
- 2.7 The Terms of Reference also reflect our calls for recognition of the intersectional dimensions of people with disability that make the experiences of violence, abuse, neglect and exploitation specific, unique and diverse:

the specific experiences of violence against, and abuse, neglect and exploitation of, people with disability are multi-layered and influenced by experiences associated with their age, sex, gender, gender identity, sexual orientation, intersex status, ethnic origin or race, including the particular situation of Aboriginal and Torres Strait Islander people and culturally and linguistically diverse people with disability.⁸

- 2.8 The intersectional analysis required by the Terms of Reference and enshrined in the CRPD, is critical to ensuring that **all** forms of violence experienced by people with disability, including women and girls with disability, in all settings and context, is identified, understood and addressed.
- 2.9 Despite our collective calls for the Terms of Reference for the Royal Commission to include provision for a **redress scheme**, this was not included. In September 2019, the Committee on the Rights of Persons with Disabilities adopted its Concluding Observations following its review of Australia’s compliance with the CRPD. The Committee expressly recommended that the Australian Government:
- ensure [adequate resources and] a **redress mechanism** for the Royal Commission.*⁹
- 2.10 To date, there has been no response from the Australian Government in response to this recommendation, and it therefore remains unclear as to whether the Australian Government will adopt this critical recommendation.
- 2.11 As noted in the Royal Commission’s *Accessibility and Inclusion Strategy*, and through research commissioned by the Royal Commission and through its Public Hearings, it is now well established and recognised internationally and domestically that women and girls with disability are ‘far more likely to experience violence and abuse than women and girls without disability, and they are less likely to report this abuse for both personal and systemic reasons’.¹⁰ CRPD General Comment No. 3 on Women with Disabilities, published by the Committee on the Rights of Persons with Disabilities (CRPD Committee) in 2016, elaborates on this fact, and draws particular attention to the structural and institutional forms of gender-based violence related to law, the state and culture that women and girls with disability not only experience, but are more at risk of.¹¹
- 2.12 Australia has received numerous recommendations over many years from the United Nations (UN) to investigate, address and remedy this situation for women and girls with disability. Very few of these recommendations have ever been implemented by successive Australian governments.

3. INTRODUCTION AND CONTEXT

- 3.1 WWDA welcomes the opportunity to make this Submission in response to the Royal Commission's *Safeguards & Quality Issues Paper* (the Issues Paper).¹² WWDA does so in the recognition that, despite various legislation, policies and systems for 'safeguarding people with disability from violence and abuse', current laws, policies and systems have to date, had little, to no impact on addressing the epidemic that is violence and abuse of women and girls with disability in Australia. Indeed, some of these laws, policies and systems – such as those related to the *NDIS Quality and Safeguarding Commission* – **enable** violence through their role in regulating (rather than eliminating and prohibiting) restrictive practices and segregated and closed accommodation and other settings.
- 3.2 Despite the epidemic of violence against people with disability in Australia, particularly women and girls with disability,¹³ there remains no specific legal, administrative or policy framework for the prevention, protection, investigation and prosecution of **all** forms of violence against all people with disability. Although Australia has a number of laws, policies, frameworks and service systems to prevent and address violence, and to advance the human rights of people with disability, many of these remain ineffective for people with disability experiencing, or at risk of experiencing violence, abuse, neglect and exploitation.
- 3.3 This Submission from WWDA focuses on providing responses to some of the key themes posed in the Issues Paper. Due to limited capacity, and the short time frame provided for responses, WWDA was unable to respond in the submission timeframe set by the Royal Commission. WWDA does however, trust that the information provided in this Submission will be of value to the work of the Royal Commission.
- 3.4 This Submission is to be read in conjunction with WWDA's other submissions to the Royal Commission, particularly its submissions on Restrictive Practices, Sexual and Reproductive rights, and Guardianship.

Challenging paternalistic responses to violence against women with disability

- 3.5 From the outset, WWDA argues that not all people with disability are inherently 'vulnerable' and in need of 'safeguarding'. More often than not, it is the denial of, or failure to uphold a person's human rights, that creates the need for 'safeguarding' and that perpetuates the stereotype of people with disability as inherently 'vulnerable' and in need of protection. Institutional models of care and service structures, segregation of disabled people, and ableist laws, systems, policies and practices are all major factors that create the need for 'safeguarding' of people with disability.
- 3.6 The UN Special Rapporteur on the Rights of Persons with Disabilities (Gerard Quinn) has made clear that 'protection' of people with disability must no longer be framed in paternalistic terms but rather should be framed in terms of 'personhood, human agency and the right of persons with disabilities to participate in and help to reshape their own societies'.¹⁴
- 3.7 Quinn has also explicitly rejected the inherent vulnerability of people with disability, stating that:

... there is no such thing as an inherently vulnerable person, but only persons with disabilities placed in vulnerable situations. ... this [is] imposed vulnerability¹⁵

3.8 Quinn has connected autonomy to personhood and to resistance of paternalism:

emphasis [in the CRPD] on personhood has massive implications for traditional power relationships and seeks to restore both the visibility of persons and their power over their own lives. Rather than conceptualizing persons with disabilities as objects to be managed or cared for, this newer framing sees persons with disabilities as full moral agents capable of directing and willing to direct their own lives. It is a useful antidote to the rampant paternalism of the past.¹⁶

3.9 In the context of the CRPD, Quinn has emphasised the importance of ‘rebalancing ... the traditional protection agenda’.¹⁷ Quinn states that while ‘[p]rotection ... is embraced by the Convention’, it ‘is now shorn of its paternalistic roots’.¹⁸ He explains that in terms of “protection” in the Convention’, we urgently need

to purge it of its legacy of paternalism, to ground it on active human agency and the participation rights of persons with disabilities and to link it with broader goals of inclusion and development. The anchor norms in this regard have to do with personhood, human agency and the right of persons with disabilities to participate in and help to reshape their own societies.¹⁹

3.10 Quinn has noted, ““protection” in the [CRPD] is part of a broader agenda of personhood, inclusion and participation: a vision of active human agency’.²⁰ Protection must not slip into paternalism, as he noted:

Protection, as such, has not gone away. It is embraced by the Convention (see art. 16, on freedom from exploitation, violence and abuse). However, it is now shorn of its paternalistic roots. In a way, it is acknowledged in the Convention that there is no such thing as an inherently vulnerable person, but only persons with disabilities placed in vulnerable situations. The need to deal with this imposed vulnerability is therefore highlighted. ... An end to impunity is also demanded in article 16. Accordingly, the historic invisibility of persons with disabilities in law enforcement is acknowledged and its reversal sought.

The Convention therefore does not eliminate the need for protection but places it on fundamentally different predicates. This has clear implications for laws and policies along the peace continuum that seem to overemphasize the medical condition of disability and downplay the moral agency of persons with disabilities, as well as the broader skein of rights into which protection should be understood.²¹

3.11 While Quinn made these comments in the context of armed conflict, his analysis is significant in explaining that preventing and responding to violence should always be in an empowering rather than paternalistic framework that centres the autonomy and other human rights of persons with disability.

3.12 In his evidence provided to the Royal Commission’s Public Hearing 31 in December 2022, [Vision for an inclusive Australia], Quinn reiterated that:

*...if we fixate on the impairment, if we develop services simply around the impairment and therefore congregate people who simply share one trait, which is the impairment, that's a recipe for disaster. **You're inviting violence, exploitation and abuse.** [emphasis added]*

....what we have to do front and centre is to accentuate the common humanity, the common subjectivity of persons with disabilities with others. And that really means restoring to people with disabilities power over their own lives, autonomous decision-making over their own lives.....and, therefore, to ground the entire Convention on a theory of personhood.²²

3.13 Therefore, WWDA argues that the terminology of ‘safeguarding’ is inherently problematic because it has **paternalistic** connotations, denies personhood, dignity and agency of people with disability. Instead, preventing and responding to violence against people with disability should be explicitly framed in terms of human rights and access to justice, and ensure equality with non-disabled people and mainstream policies and practices. Indeed, such an approach was emphasised in a recent research report commissioned by the Royal Commission titled *Complaint mechanisms: Reporting pathways for violence, abuse, neglect and exploitation.*²³

The need for human rights-based transformative solutions

3.14 WWDA asserts that the Royal Commission should, in all of its work, specifically interrogate the laws, systems, and structures that facilitate and enable violence, abuse, neglect, and exploitation to occur. Rather than simply ‘tweaking’ these laws, systems, policies and practice frameworks, the Royal Commission should identify and clearly articulate the wide-ranging **reforms** that are required to affect the ‘**social transformation**’ that is needed to ensure that all people with disability can enjoy their human rights on an equal basis as others. The Royal Commission should not simply use the CRPD as a ‘guide’ to help inform its work,²⁴ but rather, should actively ensure that the Commission’s work and recommendations stemming from it, provide a clear roadmap for genuine implementation of the CRPD.

3.15 The Chair of the Royal Commission, the Hon Ronald Sackville AO QC has stated, in a number of the Royal Commission’s reports, hearings and media releases, that:

We seek to translate the human rights recognised in the CRPD into practicable and sustainable policies and practices that will promote the right of people with disability to live free from violence, abuse, neglect and exploitation.²⁵

And that:

*The Royal Commission provides a genuine opportunity to bring about the **transformational changes** necessary to achieve a more inclusive society.²⁶*

And that:

*People want and expect real change. They want practical effect to be given to the rights-based approach and principles of inclusion expressed in the UN Convention and, indeed, in domestic legislation. Simply repeating the recommendations and proposals made by previous inquiries will not achieve that result, but there are grounds for optimism. With the active participation of people with disability and the disability community at large, the Royal Commission provides an opportunity to achieve **transformational change**.*²⁷

- 3.15 WWDA argues that this promise of **‘transformational change’** will only occur when Australian governments and other duty bearers dismantle the ableist laws, systems, policies and practices that deny people with disability their right to live free from all forms of violence, abuse, neglect and exploitation.
- 3.16 In addition to the information provided in this Submission, WWDA respectfully refers the Royal Commission to the Position Paper: *Segregation of People with Disability is Discrimination and Must End*, developed by DROs and DPOs, and formally submitted to the Royal Commission in September 2020. This Position Statement, currently endorsed by more than 65 organisations, and over 300 individuals, urges the Royal Commission to recognise that segregation of people with disability is discrimination and a breach of human rights under the CRPD. The Statement provides six urgent actions that governments must take in order to end segregation of people with disability in all settings and contexts.²⁸
- 3.17 WWDA also respectfully request that the Royal Commission consider all of WWDA’s Submissions as a suite of complementary documents that aim to advance and promote the human rights of not only women and girls with disability, but all people with disability.

4. SAFEGUARDING PEOPLE WITH DISABILITY

Addressing ableism

- 4.1 'Ableism' refers to the harmful social norms and beliefs that devalue people with disability as 'less than', as 'deficient', as 'other', as 'incapable', in need of 'regulation and surveillance,' and as 'inherently vulnerable'. Ableism underpins and perpetuates the inequality and discrimination experienced by people with disability. Ableism is a clear enabler of violence, abuse, neglect and exploitation. Ableism lies at the core of the segregation of people with disability, as well as the laws, policies and practices that enable substitute decision-making arrangements that limit disabled people's autonomy (such as guardianship, financial management and involuntary mental health systems).
- 4.2 Wide-ranging systemic failures in legislation, policies and service systems in Australia continue to facilitate conditions that give rise to violence, abuse, neglect and exploitation of people with disability. These failures are embedded within and underscored by an ableist culture which sees the promotion, support and resourcing of laws, systems, policies and practices which not only deny people with disability their most basic human rights, but which provide a legitimised gateway through which human rights violations against people with disability – including violence, abuse, neglect and exploitation - can flourish.
- 4.3 In its Final Report from the Senate Inquiry into violence against people with disability in institutions,²⁹ the Senate Community Affairs References Committee found that "violence, abuse and neglect of people with disability is both widespread and takes many forms". The Committee found that:

Throughout this inquiry, the evidence presented from people with disability, their families and advocates, showed that a root cause of violence, abuse and neglect of people with disability begins with the de-valuing of people with disability. This de-valuing permeates the attitudes of individual disability workers, service delivery organisations and most disturbingly, government systems designed to protect the rights of individuals.³⁰

- 4.4 The Royal Commission, in its Interim Report,³¹ released on 30th October 2020, clearly articulates that 'ableism frames the discrimination and exclusion experienced by people with disability.' The report identifies that:

The intersection of ableism with other forms of oppression - such as racism, sexism, ageism or homophobia - works to disempower many people with disability and can have serious and sometimes deadly implications.³²

- 4.5 Kayess and Sands,³³ in their Research Report for the Royal Commission, entitled *Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation* state:

*It has been over a decade since the adoption of the CRPD, but the disability rights movement continues to fight for the **social transformation** that is its promise. The*

*conceptualisation of disability as an individual deficit, and the normative standard of the medical model is now commonly referred to as 'ableism'. The ableist norm is generally internalised and seems benign; is often unstated and appears natural and neutral. Ableism is still **entrenched** in contemporary legal, policy and practice frameworks which continue to segregate people with disability from the general population..... and deny their autonomy through the removal of legal capacity, through compulsory financial management, compulsory mental health detention and treatment, and indefinite detention through justice diversion provisions. The evidence demonstrates that segregated and parallel systems enable exploitation, violence and abuse, and so a human rights response to this evidence requires measures to dismantle these systems and to undertake structural and systemic reforms to adhere to the CRPD.*³⁴

- 4.6 The Royal Commission must recognise and continue to articulate that ableism is a root cause of violence, abuse, neglect and exploitation against people with disability, and is fundamental to any analysis of *'safeguarding and quality services'* (and any other work being undertaken by the Royal Commission). Wide ranging structural and systemic reforms are required to dismantle the ableist laws, systems, policies and practices that limit and/or deny people with disability from realising their rights on an equal basis as others, including their rights to freedom from violence and access to justice.
- 4.7 The Royal Commission should, in all of its work, interrogate the laws, systems, and structures that facilitate and enable violence, abuse, neglect, and exploitation to occur. Rather than simply 'tweaking' these laws, systems, policies and practice frameworks, the Royal Commission should identify and clearly articulate the wide-ranging reforms that are required to effect the *social transformation* that is needed to ensure that all people with disability can enjoy their human rights on an equal basis as others. The Royal Commission should not simply be using the CRPD as a 'guide' to help inform its work, but rather, should actively ensure that the Commission's work and recommendations stemming from it, provide a clear roadmap for genuine implementation of the CRPD.
- 4.8 In examining all forms of violence, abuse, neglect and exploitation, the Royal Commission, in its public hearings, must call on relevant Government officials to appear before the Commission, in order to explain and justify why (and/or why not) the implementation of the CRPD is yet to be realised, and why legal forms of violence perpetrated against people with disability (such as substitute decision-making regimes, forced medical interventions and treatment, deprivation of liberty, indefinite detention, involuntary mental health laws etc) are still permissible in Australia. The Committee on the Rights of Persons with Disabilities, along with other treaty monitoring bodies, have long recommended that Australia undertakes the structural and systemic reforms to address these legal forms of violence, and ensure that such reforms adhere to the CRPD.

Ending segregation

- 4.9 Analysis by the Royal Commission of the issue of *Safeguards & Quality* in the context of violence, abuse, neglect and exploitation, must recognise and acknowledge that practices of **segregation** of people with disability (including women and girls with disability) – are State sanctioned practices that enable and subsequently endorse, violence, abuse, neglect, and exploitation to flourish.

Segregation of people with disability – in all its forms – must be conceptualised and understood as a violation of fundamental human rights, and as an ideology with resultant practices that contravene the CRPD and other human rights treaties to which Australia is a party.

- 4.10 Segregation of people with disability violates the human rights principles and standards of equality and non-discrimination and prevents realisation of multiple rights, including, for e.g.: the right to live independently and be included in the community; the right to inherent dignity and autonomy; the right to an adequate standard of living; the right to liberty and security, personal choice, autonomy and freedom of movement – just to name a few.³⁵
- 4.11 Many people with disability remain directly segregated by law, policy and practice frameworks that continue to establish, maintain and fund segregated settings as well as substitute decision-making arrangements that limit disabled people’s autonomy, such as guardianship, financial management and involuntary mental health systems.³⁶
- 4.12 Regrettably some of these laws, systems and practices are often promoted as ‘safeguarding mechanisms’ for people with disability, when in reality, they can often have the opposite effect. For example, as we discussed in the WWDA guardianship submission, guardianship and financial management laws are sometimes used to ‘protect’ women with disability from violence and financial exploitation. However, guardianship and financial management laws expose women with disability to violence, including because these laws enable other people to decide what happens to their bodies, lives and finances, and because substitute decisions often result in their segregation and confinement which exposes them to further violence.
- 4.13 Segregating people with disability in closed and separate settings (such as ‘special’ schools, units and classrooms; institutional accommodation settings; ‘sheltered’ employment; psychiatric facilities & forensic disability units, aged care facilities), away from public scrutiny, not only exposes and reinforces the ‘social apartheid’³⁷ experienced by people with disability, but also significantly increases the experience and risk of, violence, abuse, neglect and exploitation in their daily lives.
- 4.14 Many women and girls with disability in institutional and segregated settings have limited access to police, support services, lawyers or advocates, and are trapped within the entrenched sub-culture of violence, abuse, and neglect prevalent in these settings. Women and girls with disability experience social isolation and lack of access to learning environments; are often economically, physically and psychologically dependent on others; and are socialised or compelled to tolerate a high degree of personal indignity, mishandling, and violence, abuse, exploitation and neglect as an incident of service delivery to them.³⁸ Many women in these settings have never had access to meaningful education and information to assist them to understand human rights and legal rights, nor to understand and identify what constitutes violence.
- 4.15 The CRPD, embedded in the Terms of Reference of the Royal Commission, reflects international human rights law, which affirms that segregation and segregated facilities are a prima facie form of discrimination³⁹ and that impairment or diagnosis or disability cannot be used to justify segregation and exclusion from community life or be used to limit human rights protections for people with disability. CRPD Article 5 prohibits segregation on the basis of impairment, reflecting the established principle in international law that segregation is inherently unequal and

discriminatory.⁴⁰ Moreover, the UN Human Rights Council has recently recognised institutionalisation as a form of violence against women with disability.⁴¹

- 4.16 Segregation of people with disability, and the ableist ideologies and resultant practices that underpin segregation, has been articulated in several of the Research Papers commissioned by the Royal Commission to date, as well as in clear and definitive guidance from the human rights treaty bodies which monitor the international human rights treaties to which Australia is a party.
- 4.17 Therefore, in examining the area of *Safeguards & Quality Services*, the Royal Commission should, consistent with, and reflecting its Terms of Reference, explicitly recognise and identify that segregation of people with disability gives rise to violence and is discrimination and is in clear contravention of the CRPD and other international human rights treaties to which Australia is a party. The Royal Commission should also make clear that successive Australian Governments continue to support, maintain and fund segregation of people with disability, and that this support and endorsement must end. For example, policy frameworks such as the *Australia's Disability Strategy 2022-2032* (the main policy framework for implementation of the CRPD) must for example, include time bound transitional plans to end all forms of segregation of people with disability. The funding of institutions is a transnational human rights issue – there is a strong civil society campaign in Europe to oppose European Commission funding of new institutions and to instead fund and encourage investment in community-based services, accommodation and supports.⁴² The Royal Commission should, therefore, be clear and unequivocal in articulating that ‘improving safeguards’ and ensuring ‘quality services’, will be difficult to achieve unless governments initiate and undertake the structural and systemic reforms necessary to dismantle the laws, policies and practice frameworks that enable and foster the segregation of people with disability.
- 4.18 That the Royal Commission, in all its work (including in its Final Report), provides clear and detailed recommendations that will lead to ending the segregation of people with disability in Australia – in all settings and contexts is critical. We respectfully once again refer the Royal Commission to the [Position Statement on Segregation](#), developed by DROs and DPOs, and formally submitted to the Royal Commission in September 2020. This Position Statement details six urgent actions⁴³ that governments should undertake in order to end segregation - in all its forms - of people with disability.

Ensuring full inclusion in the community

- 4.19 One of the strongest and best ways to safeguard people with disability from violence, abuse, neglect and exploitation, is through the **full** inclusion of people with disability in their communities, which is widely acknowledged.
- 4.20 Article 19 of the CRPD [Living independently and being included in the community] recognises the equal right of people with disability to live in the community, to be fully included and to participate in community life, with choices equal to others. Article 19 is fundamentally about autonomy and individual choice and being a full participating member of the community on an equal basis with others and is central to the realisation of other human rights such as legal capacity, liberty and security, freedom of movement and freedom from violence. In practice, this means that people with disability have the same rights as everyone else to exercise ‘freedom of choice and control

over decisions affecting one's life with the maximum level of self-determination and interdependence within society'.⁴⁴

- 4.21 The UN Committee on the Rights of Persons with Disabilities (CRPD Committee) provides comprehensive guidance on interpretation and implementation of the CRPD in its General Comments. General Comment No. 5 on living independently and being included in the community outlines the CRPD Committee's guidance on article 19. General Comment No. 5 provides definitive and authoritative guidance to States parties and other duty bearers on their implementation of article 19 and fulfilling their obligations under the Convention. It concerns primarily the obligation to ensure every individual's enjoyment of the right to live independently and be included in the community, but it is also related to other provisions of the Convention.
- 4.22 The implementation of article 19 is critical to the realisation of other human rights for people with disability as it is "one of the widest ranging and most intersectional articles of the Convention and has to be considered as integral to the full implementation of the Convention." Implementation of all of the elements of article 19 is interdependent on implementation of other CRPD articles. An examination of the violence, abuse, neglect and exploitation that is experienced by people with disability in various living arrangements and other contexts, requires analysis of Australian law, policy and practice that, in a number of areas continues to prevent the right to live independently and be included in the community.
- 4.23 CRPD article 19 covers two concepts: the right to independent living and the right to be included in the community. Whereas the right to independent living refers to an individual dimension, as a right to emancipate oneself without being denied access and opportunities, the right to be included in the community entails a social dimension, i.e., the positive right to develop inclusive environments. Both concepts are central to *Safeguards & Quality Services* – individuals will have greater access to safe environments and quality supports and accommodation when they are in the community, and environments that are broadly inclusive and accessible to people with disability can reduce the presence of coercion and segregation that is designed into specific settings.

Addressing the denial of legal capacity

- 4.24 An analysis of the issue of 'safeguarding' and 'quality services,' must include addressing the issue of legal capacity. It is vital that women and girls with disability, particularly those in closed and institutional settings, are supported to build their capacity to 'safeguard' themselves, in the sense of having their choices and consent socially and legally recognised – including decisions about what happens to their bodies, lives and finances – and have access to justice to enforce their legal and human rights. In many cases, the denial of their legal capacity, prohibits this from occurring.
- 4.25 Legal capacity underpins personhood,⁴⁵ and is essential for human dignity, personal agency and free personal development. Legal capacity is essential for making everyday decisions, such as when to get up, what to wear and what to eat, as well as larger life decisions, such as where to live and with whom to live, or whether to live alone, who to have relationships and friendships with, whether to consent to medical treatment, and how to spend money and manage finances.⁴⁶ Legal capacity is also vital in work to end violence, abuse, exploitation and neglect of people with disability. As we discussed in the WWDA guardianship submission, denial of legal capacity through guardianship and financial management law itself gives rise to violence because other people are

authorised to make substitute decisions about what happens to the bodies, lives and finances of women with disability (including very intimate and personal decisions such as with whom they can socialise and whether they take contraception) and specific substitute decisions can be made that place women with disability in precarious and unsafe circumstances, such as decisions that authorise use of restrictive practices or authorise their confinement in closed and segregated settings.

- 4.26 Legal capacity is the key to accessing full and effective participation and inclusion in society and in decision-making processes and is essential to exercising choice and control over one's life. Legal capacity – the ability to hold and exercise rights - is central to equality before the law and is guaranteed in article 12 of the CRPD [Equal recognition before the law].
- 4.27 There is wide recognition that, compared to other women and to disabled men, many women with disability are denied the right to legal capacity. Women with disability's rights to control their reproductive health, including on the basis of free and informed consent, to found and maintain a family, to choose where and with whom to live, to physical and mental integrity, to own and inherit property, to control their own financial affairs - are often violated through patriarchal and out-dated systems of substituted decision-making. Many women with disability - particularly those with intellectual disability and/or psychosocial disability, and those living in segregated settings - are not afforded the right to make their own decisions because others determine that they 'lack capacity' to do so. A 'diagnosis' of intellectual disability or psychosocial disability is often assumed to equate with a lack of capacity to make decisions.⁴⁷ Such assumptions and judgements often lead to substitute decision-making processes whereby others decide on a disabled woman's behalf what is in her 'best interest'. However, substitute decision-making and 'best interest' approaches have been thoroughly criticised as fundamentally contravening the CRPD and as intrinsically value-laden.⁴⁸ In practice, the 'best interest' approach most often serves the interests of guardians, families, carers and service providers.⁴⁹ Moreover, while substitute decision-making is supposed to be a step of last resort, to be used only in the most necessary and extreme situations, our WWDA guardianship submission drew on guardianship and financial management case law to illustrate the meaningless of least restriction as a limit on the use of these laws because the availability of alternatives depends on an individual woman's existing personal, social and financial circumstances, in a context of a lack of investment in and motivation by governments and disability and aged care services to utilise supported decision-making, and the lack of powers of tribunals and boards to legally compel third parties to provide the resources and supports to enable alternatives.
- 4.28 The CRPD Committee has affirmed that a person's status as a person with a disability or the existence of an impairment, including perceived or actual deficits in "mental capacity", must never be grounds for denying legal capacity or any of the rights provided for in CRPD article 12. In relation to article 12, the Committee has repeatedly stated that States parties must

review the laws allowing for guardianship and trusteeship and take action to develop laws and policies to replace regimes of substitute decision-making by supported decision-making, which respects the person's autonomy, will and preferences".⁵⁰

- 4.29 In order for people with disability to have the opportunity to develop and express their will and preferences, they must 'have the opportunity to live independently in the community and to make choices and to control their everyday lives, on an equal basis with others'.⁵¹ The CRPD Committee

has clarified that States parties must recognise that communities are assets and partners in the process of learning what types of support are needed in the exercise of legal capacity, including raising awareness about different support options. The CRPD Committee has stated that: 'States parties must recognise the social networks and naturally occurring community support (including friends, family and schools) of persons with disabilities as key to supported decision-making.'⁵² This statement by the CRPD Committee is consistent with the CRPD's emphasis on the full inclusion and participation of persons with disabilities in the community.

4.30 CRPD Article 12 requires a shift from substitute decision-making systems and practices based on the 'best interests' principle to supported decision-making principles, standards and frameworks based on the rights, will and preferences of the individual with disability. Despite the necessity for a shift, Australia continues to maintain that the CRPD '*allows for fully supported or substituted decision-making where necessary, as a last resort and subject to safeguards*'.⁵³ The government grounds its position in the Interpretative Declaration⁵⁴ that Australia made at the time of ratification of the CRPD in 2008. This position has been maintained over the past 13 years, despite the fact that there has been consistent jurisprudence from the CRPD Committee that formal and informal substitute-decision-making mechanisms are not compliant with the CRPD, and that these mechanisms must be replaced with fully supported-decision making mechanisms.⁵⁵

4.31 Following its two reviews of Australia in 2013 and 2019, the CRPD Committee recommended the withdrawal of the Interpretative Declaration on article 12 and the replacement of substitute decision-making with supported decision-making.⁵⁶ During its 2019 review of Australia, the CRPD Committee noted that it

*'regretted the continued denial of decision-making capacity to persons with disabilities, which... affected all other areas of life and led to the ongoing practices of forced institutionalisation..., involuntary medical treatments including forced sterilisation and surgery...'*⁵⁷

4.32 Through CRPD General Comment 3 [Women with Disabilities],⁵⁸ published in 2016, the CRPD Committee has clarified that:

*All women with disabilities must be able to exercise their legal capacity by taking their own decisions, with support when desired, with regard to medical and/or therapeutic treatment, including by taking their own decisions on retaining their fertility and reproductive autonomy, exercising their right to choose the number and spacing of children, consenting and accepting a statement of fatherhood and exercising their right to establish relationships. Restricting or removing legal capacity can facilitate forced interventions, such as sterilisation, abortion, contraception, female genital mutilation, surgery or treatment performed on intersex children without their informed consent and forced detention in institutions.*⁵⁹

4.33 CRPD General Comment 3 reaffirms that forced interventions such as forced sterilisation and forced contraception, can result in "*sexual violence without the consequence of pregnancy, especially for women with psychosocial or intellectual disabilities, women in psychiatric or other institutions and women in custody.*" It affirms the critical importance of legal capacity of women with disability being recognised on an equal basis as others, and that women with disability have a

right to found and maintain a family and be provided with any required assistance to raise their children.⁶⁰

- 4.34 For many women with disability, the denial of their legal capacity – often wrongly based on harmful gender and/or disability stereotypes and concepts such as incapacity and inability – can result in mothers with disability being significantly overrepresented in child protection and/or family court proceedings where they disproportionately lose contact with, and custody of their children. A common impact of violence perpetrated against women with disability (particularly domestic and family violence and sexual assault) is the removal of their children by authorities on the basis of the mother’s disability. Women with disability often remain in abusive relationships and fail to report the violence due to the likelihood of losing their children. In Australia, children of people with disability are subject to removal from their parents by authorities at a rate up to ten times higher than other parents. In many circumstances, children are removed pre-emptively solely on the basis of the parent’s disability (most often the mother), despite there being no evidence of any neglect, abuse and/or parental incompetence.⁶¹ Evidence demonstrates that parents with disability are no more likely to maltreat or neglect children than non-disabled parents. In addition, women with intellectual disability who are parents, are scrutinised by health and welfare workers and held to higher standards than those that are applied to non-disabled women who are parents. The evidence used to judge potential for parental inadequacy is often based on unfair and invalid assessment procedures that are often carried out in unsupportive environments.⁶²
- 4.35 In 2014, the Australian Law Reform Commission (ALRC) provided its final report from its *Inquiry into Barriers to Equal Recognition before the Law and Legal Capacity for People with Disability*.⁶³ It made 55 recommendations for reform, with its key recommendation focused on the establishment of National Decision-Making Principles and Guidelines to guide reform of Commonwealth, State and Territory laws and legal frameworks. Following its 2019 review, the CRPD Committee recommended that Australia implement a ‘nationally consistent supported decision-making framework’ as highlighted by the ALRC. Nearly eight years later, the Australian Government has still not provided its response to the ALRC Report or implemented the CRPD Committee recommendation.
- 4.36 For people with disability to be able to make meaningful choices in their lives, including where to live and with whom to live, and for the free development, autonomy and agency of the person, Australia must meet its obligations under CRPD article 12 and replace substitute decision-making with supported decision-making that respects the rights, will and preferences of all people with disability. It is simply unreasonable and unethical for successive Australian governments to continue to “cherry pick” the human rights it believes people with disability are entitled to.
- 4.37 Introducing supported decision-making is the kind of transformational change that the Royal Commission has committed to recommending. As highlighted earlier in this Submission, the Chair of the Royal Commission the Hon Ronald Sackville AO QC, has stated that the Royal Commission is intended to achieve ‘**transformational change**’ and will, amongst other things

‘translate the human rights recognised in the CRPD into practicable and sustainable policies and practices that will promote the right of people with disability to live free from violence, abuse, neglect and exploitation.’⁶⁴

- 4.38 To give effect to this ‘transformational change’ and to ‘*translate the human rights recognised in the CRPD into practicable and sustainable policies and practices*’, it is incumbent on the Royal Commission to acknowledge the urgent need for, and recommend, that Australia withdraw its Interpretative Declarations to the CRPD.⁶⁵ These Interpretative Declarations, which include allowing for substituted decision-making and compulsory medical treatment, have been found to be hindering Australia’s ability to comply with the CRPD and are being used as a justification to deny people with disability their human rights. The DRC should require, in its public hearings, relevant Government officials to appear before the Commission, in order to explain and justify why (and/or why not) the Interpretative Declarations to the CRPD have not been withdrawn, and whether (or not) there is any plan or intent from the Australian Government to withdraw these Interpretative Declarations.
- 4.39 WWDA believes that rather than focusing on how to ‘improve the quality of services’ and ‘safeguarding’, of and for people with disability, the Royal Commission should be asking, and seeking responses to: **“What is the system we need to create that enables and supports people with disability to make their own decisions?”** and **“What is the system we need to create that enables people with disability to enforce their legal and human rights, and holds to account those who perpetrate or benefit from violence against people with disability?”**

Human rights capacity building as a critical safeguard

- 4.40 Violence against people with disability is normalised, trivialised and routinised. Thus, people with disability might not necessarily know what constitutes violence, when their legal or human rights have been violated, that they are entitled to live free from violence and how to access support and redress when they experience violence. Therefore, human rights capacity building is a necessary safeguard to ensure that people with disability understand their rights and how to enforce them. Indeed, Royal Commission’s Research Report titled *Complaint Mechanisms: Reporting Pathways for Violence, Abuse, Neglect and Exploitation*⁶⁶ found from an analysis of lived experiences of people with disability that ‘a lack of awareness of rights or what constitutes criminal violence’⁶⁷ and of the right to make complaints are barriers to people with disability making complaints about violence, abuse, neglect, and exploitation. Human rights capacity building is central to realising an approach to violence prevention and response that centres the agency of people with disability and resists a paternalistic approach that positions them as helpless objects at the mercy of the help of others, as explained by the UN Special Rapporteur on the Rights of Persons with Disabilities (see Section 3).
- 4.41 On 21 April 2010, the then Australian Attorney-General, the Hon Robert McClelland MP, launched Australia’s Human Rights Framework. Under this framework, the Australian Government provided funding to support non-government organisations to prepare and deliver human rights education programs to the Australian community. This included ensuring people with disability were provided with accessible information and support about what constitutes violence, abuse, neglect and exploitation, and how to make complaints. The widespread experiences of discrimination, segregation, violence, abuse, neglect and exploitation of people with disability in Australia demonstrates that such education continues to be necessary, in order to build capacity of people with disability and their representative organisations to enforce their legal and human rights. WWDA is unaware of any similar funding program from the Attorney-General’s Department since 2010.

4.42 NDIS Information, Linkages and Capacity Building (ILC) grants ILC scheme is another means of developing capacity of people with disability and their representative organisations to enforce their legal and human rights. The ILC scheme is focused on promoting collaboration and partnership with local communities and mainstream and universal services to create greater inclusivity and accessibility of people with disability. Arguably, this scheme should be delivered in a human rights framework, and not fund projects that undermine inclusion and accessibility through discrimination, segregation and violence. However, some of these ILC grants are being awarded to disability services that provide accommodation, employment and other services that are segregated, and which might also use restrictive practices and confinement in relation to some of its clients. In order to prevent a situation where ILC grants are themselves financially fuelling and socially legitimating the undermining of the human rights, service quality and safety of people with disability, the scheme must only be used to fund projects that themselves advance the human rights of people with disability and are delivered by services or other organisations that have a demonstrated track record of respecting and advancing human rights of people with disability and supporting their freedom from violence and access to justice. In particular, ILC grants should not be given to services that are involved in substitute decision-making and instead, should fund projects that develop capacity for self-advocacy, noting that the NDIS itself has stated in its ILC Policy Framework that: *'There is an opportunity through ILC for the NDIS to support people with disability to lead peer support and promote self-advocacy amongst peers, to support individuals in their capacity to effectively exercise choice and control'*. In a similar vein, NDIS individual capacity building funding should be available to programs that engage in human rights capacity building of individuals and develop knowledge and skills on what constitutes violence and how to enforce legal rights and human rights, and that support supported decision-making, and self-advocacy and advocacy more broadly.

Fostering and strengthening informal and natural relationships

4.43 There is wide acknowledgement that one of the strongest and best ways to safeguard people with disability from violence, abuse, neglect and exploitation, is through the building, strengthening and sustaining of informal and natural relationships.

4.44 'Informal relationships' refers to individuals' relationships that are freely given and not provided by or through a service. Informal relationships include an individual's natural relationships, informal advocates and community connections. People paid or reimbursed for their involvement with the individual, and unpaid volunteers provided through a service, are not considered to constitute 'informal relationships.'

4.45 'Natural relationships' often refer to an individual's friends, family, partners etc who:

- are committed to be part of an individual's life on a long-term basis
- know the individual well
- have regular contact with the individual
- are trusted by the individual
- desire the best possible outcomes for the individual.

- 4.46 People who are involved in an individual's life because of their love and enduring commitment to the individual can often be the most effective, comprehensive, and enduring safeguard. The ongoing, involved and trusted nature of these relationships enables a deeper understanding of individuals' strengths, will and preferences, decisions, choices, aspirations, communication modes and support needs than is possible with safeguarding options involving more formal, limited or superficial contact. Natural relationships can also increase opportunities for the 'witnessing' activity of safeguarding.
- 4.47 The CRPD Committee has made clear that for people with disability, being included in the community facilitates the 'social networks and naturally occurring community support' that is an important mechanism in 'safeguarding' of anyone – not just people with disability. An individual's community connections, particularly when they form a regular part of a person's life, can be enriching and contribute to their sense of belonging in the community. Community connections also provide the potential to develop into more committed friendships and trusted relationships.
- 4.48 The Hon. Alan Robertson SC, in his final report into 'the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020'⁶⁸ identified that one 'mechanism' that which could have been a critical safeguard for the late Ms Smith, would have been *'the interest of neighbours or other members of the community or of friends and relations'*.⁶⁹ This was consistent with the South Australian Safeguarding Task Force in its Final Report (regarding the death of Ms Smith) delivered on 31 July 2020, whereby the Taskforce stated: *'The best safeguard for any potentially vulnerable individual is to have a number of people in their lives, who make sure the person is not left to their own devices when things go wrong.'*⁷⁰
- 4.49 Segregation of people with disability throughout their lives in the contexts of education, accommodation, transport, employment and recreation and the use of substitute decision-making impedes people with disability from making choices about the friends they make and the networks and communities they are part of, thus denying to them the important safeguard of informal and natural relationships.

Independent advocacy as a critical safeguard

- 4.50 Independent advocacy - including individual, systemic and self-advocacy – plays a critical role in advancing the rights of people with disability. Independent advocacy is also a critical safeguarding mechanism for many people with disability – particularly those in closed settings and institutional environments; those who are denied legal capacity; and those with no informal and/or natural relationships. It is vital that all governments understand that they have a responsibility to adequately fund and support disability advocacy.
- 4.51 Considering the role of advocacy in relation to violence, abuse, exploitation and neglect against people with disability, the Interim Report of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability,⁷¹ released on 30th October 2020, states:

'We have heard from many advocacy and representative organisations that increased advocacy is a key measure to address violence, abuse, neglect and exploitation and would lead to a more inclusive society. We have also heard that there is a lack of advocacy services, including for First Nations people with

disability and people with complex needs, and that existing advocacy services are under-funded.'

4.52 It is vital that the importance of 'independent' advocacy is understood in the context of 'safeguarding' people with disability and ensuring 'quality services' – including disability specific services and mainstream services. This means understanding, respecting and valuing that:

- independent advocacy is a critical, interconnected component of progressing the human rights of people with disability and supporting Australia's international human rights obligations.
- independence from service systems and disability support agencies is critical to ensuring that advocacy support is free from conflicts of interest and always puts the rights, will and preference of people with disability at the forefront.
- independent advocacy remains critically under resourced for it to achieve its objectives and the desired human rights outcomes for all people with disability in Australia.
- in the changing disability service landscape advocates are often the only constant independent support for many people with disability.
- advocacy agencies are being increasingly called upon for assistance from people with disability, families, government and service providers. The impact and value of this role should not be underestimated nor taken for granted.
- NDIS participants and people with disability not eligible for the NDIS must have equal access to independent advocacy supports.
- advocacy support that is owned and managed by Aboriginal and Torres Strait Islander peoples and communities should be developed and resourced.
- investment, funding and resourcing for representation and independent advocacy needs to be available from both Commonwealth and State and Territory Governments.
- advocacy support must be gendered and address the specific needs and rights of women and girls with disability.

4.53 The way that independent advocacy is currently funded in Australia is problematic in respect of working effectively as a safeguarding mechanism. For example, independent advocacy is funded and implemented as a mechanism to 'resolve specific issues.' Once the specific issue is 'resolved', the 'case' is closed. There is no system of advocacy for people with disability whereby independent advocates can 'visit' the person on a regular and continuous basis.

Case Example

A woman with intellectual disability (a NDIS participant) lives in a house owned by her large service provider organisation. She currently lives alone. Her support workers are provided by the same service provider organisation, and she has one to one support 24 hrs a day. She currently has a 'team' of around 15-20 different support workers, many of whom are new to the service and to the woman. The support workers work in rostered shifts. Only one support worker is rostered on for each shift. The woman has no family and virtually no informal supports. The woman has an extensive history of sexual violence and abuse, including violence

*perpetrated in the past by support workers. Her only friend requests that an independent advocate be sourced to 'visit' the woman on a monthly basis –as a way of checking in on her, to see if she has any concerns, and also to enable a person who is completely **independent** of the service provider organisation, to be able to act as an independent safeguard. The request is denied by the NDIS Support Coordinator on the grounds that independent advocates cannot provide such a service, and that the only way an independent advocate could be accessed for the woman, is if the woman 'contacts' an advocacy service herself in relation to a particular 'issue.' It would then be lodged as a 'case' and once the 'case' was resolved, the 'case' would be closed. The woman has not been provided with any information about the role of independent advocacy and would need support to 'contact' an advocacy service. There is no Community Visitor scheme in the jurisdiction where the woman resides. This case example illustrates a serious 'gap' in the structure and operation of independent advocacy in Australia.*

- 4.54 In its 2019 review of Australia's compliance with the CRPD, the Committee expressed its concerns at the lack of sustainably, adequately resourced *continuous*, individual and independent advocacy programmes, and recommended that Australia:

*'Ensure that all persons with disability have access to continuous, sustainable and adequately resourced individual and independent advocacy programmes, particularly outside the NDIS.'*⁷²

NDIS Quality & Safeguards Commission

- 4.55 The NDIS Quality and Safeguards Commission is an independent national government agency established to improve the quality and safety of NDIS supports and services. It became operational on 1 July 2018, and, as of December 2020, now operates in all states and territories. The Commission has a number of functions,⁷³ including but not limited to:

- registers and regulates NDIS providers and oversees provider quality
- monitors compliance with the NDIS Practice Standards and NDIS Code of Conduct
- responds to concerns, complaints and reportable incidents
- monitors the use of restrictive practices and educates providers and participants about behaviour support strategies
- works with states and territories to design and implement nationally consistent NDIS worker screening

- 4.56 The NDIS Quality and Safeguards Commission is clearly an important safeguarding mechanism, and in some respects, is still evolving. However, the NDIS Quality and Safeguards Commission only 'covers' people with disability who directly access NDIS services and supports – meaning, in practice, the Commission's mandate covers less than 10% of the population of people with disability in Australia. In this context, the Commission does not, and cannot, provide comprehensive protection against all forms of violence, abuse and neglect for all people with disability across a broad range of service systems and situations.

4.57 The NDIS Quality and Safeguards Commission was established as an agency to *'improve the quality and safety of NDIS supports and services'* rather than *'transform'* these supports and services to adhere to and reflect the CRPD is important, despite the fact that the objects of the *National Disability Insurance Scheme Act 2013* (Cth) extend to giving effect to Australia's obligations under the CRPD and other international human rights instruments.⁷⁴ The absence of human rights as a driving force for the NDIS Quality and Safeguards Commission means that its work on quality and safety can actually sustain human rights violations and violence against people with disability. For example, there remain lawful forms of *'violence'* against people with disability – which breach the CRPD – yet these forms of violence are not dealt with by the Commission. Examples include forced sterilisation; forced contraception; forced abortion; involuntary mental health laws; and substitute-decision making regimes. We argued in WWDA's Restrictive Practices Submission that these forms of *'lawful violence'* constitute *'restrictive practices'*. The lack of remit or mandate to monitor, investigate and reform these forms of *'legal violence'* is a deeply concerning dimension of the NDIS Quality and Safeguards Commission. Indeed, there are no clear pathways for individuals to access justice, legal advice, psychological support and redress when they are subject to NDIS reportable incidents, including unauthorised restrictive practices and sexual assault. For example, in the media reporting of the 1,032,064 reports of unauthorised restrictive practices during 2020-21,⁷⁵ there was no indication of any police investigations, criminal prosecutions or civil litigation (including class actions) in response to this mass harm, nor to support individuals to access support as victims of crime or civil remedies. The regulation – rather than elimination and prohibition – of restrictive practices in the NDIS is particularly concerning given that, in its recent concluding observations on the sixth periodic report of Australia, the Committee Against Torture recommended that Australia:

*'Establish a nationally consistent legislative and policy framework for the protection of all persons with disabilities, including children, from the use of psychotropic medications, physical restraints and seclusion under the guise of "behaviour modification" and the elimination of restrictive practices against persons with disabilities, including children.'*⁷⁶

4.58 The NDIS Quality and Safeguards Commission does not have a mandate to address individual or systemic issues outside of the NDIS. This means that the majority of people with disability, as well as NDIS participants (when interacting with other service systems), only have protection through existing regulatory and policy frameworks that have to a large extent been shown to provide inadequate protection for people with disability from violence, abuse, exploitation and neglect.⁷⁷

4.59 The NDIS Quality and Safeguards Commission does not regulate or have any oversight of the NDIA or the medical/health system. This particular limitation in the NDIS Quality and Safeguards Commission's role is particularly problematic in the relation to *'authorised and unauthorised restrictive practices'*, including chemical restraint. For example, just because chemical restraints or psychotropic medications are prescribed by a medical practitioner to a person with disability, does not automatically mean that the intervention is for medical treatment and thus not a restrictive practice or that the intervention is somehow *'appropriate'*. There are many people with disability who are prescribed large numbers of psychotropic and other *'sedating'* medications by treating medical professionals, in a routine manner and sometimes for years and decades. As discussed at the Royal Commission Public Hearing 6 [on Psychotropic medication, behaviour support and behaviours of concern], the key factor in determining that the prescribing of psychotropic medications for NDIS participants is *'not a restrictive practice'* is where the medications are

prescribed for 'treatment of an underlying condition', rather than for management of a person's 'behaviour'. This division is problematic, as it means in practice, that as long as a treating doctor provides an acceptable 'diagnosis', then the prescribing of psychotropic medications may rarely be questioned or interrogated.

- 4.60 The NDIS Quality & Safeguards Commission Senior Practitioner, has clarified that the NDIS Quality & Safeguards Commission 'does not regulate medical practitioners or their prescribing practices'.⁷⁸ He has also clarified that under the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) and the Provider Registration and Practice Standard Rules, the NDIS Commission does not have the power to require providers to report on medication that is prescribed for *treatment* purposes, as this use is outside of the definition of chemical restraint.⁷⁹ The NDIS Commission Senior Practitioner has clarified that the Commission 'does not, therefore, hold any data or analysis about medication used for the purposes of treatment'. In addition, the *National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018* (Cth) do not state how the prescribing medical practitioner's purpose for prescribing the medication should be determined.
- 4.61 The NDIS Quality & Safeguards Commission should have the power to require providers to report on mental health-related medications that are prescribed for '*treatment*' purposes, including: Antipsychotics, Antidepressants, Anxiolytics, Hypnotics and sedatives, and Psychostimulants. The NDIS Commission should also have the power to access information regarding a medical practitioner's 'purpose' for prescribing. This would enable a more comprehensive system, whereby the 'purpose' of prescribing of psychotropic and medications could be questioned or interrogated. It could also help in identifying practices of polypharmacy, and the need for reviews of these types of medications.

Case Example

A 45-year-old woman with disability (NDIS participant) who lives in a group home has been prescribed psychotropic medications since the age of 5. Most of these medications have remained the same over 40 years, although some variants have been prescribed by 'public health community-based psychiatrists' since 2014. In 2016, the woman is prescribed an additional 'anti-depressant drug' by a visiting community-based psychiatrist, who has never seen her before, and relies solely on information provided by the group home support workers (without even seeing the participant). Two weeks after the addition of an additional 'anti-depressant drug' prescribed by the visiting community psychiatrist, the woman begins displaying symptoms of Tardive Dyskinesia which is noticed by her friend. The friend requests to view the woman's Drug Chart and sees that the new 'additional anti-depressant drug' is contraindicated for use with one of her existing psychotropic medications. Despite the woman's friend repeatedly requesting the service provider seek urgent medical attention for the participant, it takes more than 6 weeks for a visiting community-based psychiatrist to assess the woman. The diagnosis of Tardive Dyskinesia is confirmed by the psychiatrist, the 'additional anti-depressant drug' is ceased and the participant is prescribed a medication to counter the effects of the Tardive Dyskinesia. Prior to, and during the six weeks it took for the participant to be assessed, she is repeatedly 'punished' by her support workers for 'wetting herself', 'pacing', and 'chewing her tongue'. These are known

symptoms of Tardive Dyskinesia, yet it wasn't until the woman's friend intervened and insisted that her friend be seen by a specialist, that the condition was confirmed and treated.

- 4.62 As reported by the Australian Commission on Safety and Quality in Health Care,⁸⁰ in 2016-17, there were 2,908,555 Pharmaceutical Benefits Scheme (PBS) prescriptions dispensed for antipsychotic medicines to people aged 18–64 years, representing an Australian rate of 19,420 prescriptions dispensed per 100,000 people aged 18–64 years. There is no readily available public information as to how many of these prescriptions were issued to people with disability and/or NDIS participants.
- 4.63 The Australian Institute of Health and Welfare (AIHW), in its 2022 report 'Mental health services in Australia',⁸¹ identified that 4.5 million people received mental health-related prescriptions in 2020-21.⁸² Of the 42.7 million mental health-related medications (subsidised and under co-payment) provided in 2020-21, the majority (84.7%) were prescribed by general practitioners (GPs), with another 7.5% prescribed by psychiatrists and 4.9% by non-psychiatrist specialists.⁸³
- 4.64 The AIHW also reported that the majority of subsidised and under co-payment mental health-related prescriptions were for Antidepressants (73.1% or 31.2 million) in 2020-21, followed by Antipsychotics (10.1%), Anxiolytics (7.6%), Psychostimulants, agents used for ADHD and nootropics (4.7%), and Hypnotics and sedatives (4.4%). Among the categories of medications, the majority of prescriptions were issued by general practitioners (GPs), except for Psychostimulants, agents used for ADHD and nootropics.⁸⁴
- 4.65 This data raises several issues in relation to the prescribing of antipsychotics and similar classes of drugs, to people with disability. It is widely acknowledged that General Practitioners may not have the requisite knowledge, skills and/or time to understand the specific and unique issues for people with disability – yet the majority of prescriptions for antipsychotics and other similar drugs in Australia, are prescribed by General Practitioners. People with disability have reported being taken to their GP by their paid carer/support worker and/or family member and being excluded from discussions regarding the prescribing of antipsychotics and other similar medications. In addition, people with disability report that their prescribing GPs rarely question the information provided to them (about the person with disability) by families, support workers and others.
- 4.66 The NDIS Quality & Safeguards Commission Senior Practitioner, has recently stated that *'the use of chemical restraint is a concern that needs to be dealt with primarily at the level of the medical practitioner and prescribing practices.'*⁸⁵ He further stated: *'The NDIS Commissioner has initiated work with relevant agencies that have a safety and quality role in relation to medical and clinical practice to try to find a way forward to address this national concern...'*⁸⁶ Whilst these comments by the NDIS Quality & Safeguards Commission Senior Practitioner are important, they also raise a number of issues:
- The NDIS Quality & Safeguards Commission has no power to ensure that 'relevant agencies that have a safety and quality role in relation to medical and clinical practice' work together to eliminate chemical restraint of NDIS participants.
 - The NDIS Quality & Safeguards Commission has a mandate to 'reduce and eliminate restrictive practices'. At this point, it appears that the Commission 'regulates' restrictive practices, rather than 'eliminates them'. In order to 'eliminate' restrictive practices,

particularly chemical restraint, the NDIS Commission should have some powers to access information regarding a medical practitioner's 'purpose' for prescribing chemical restraints, including where they are used for 'treatment purposes'.

- The NDIS Quality & Safeguards Commission has no mandate or role in approving whether a particular restrictive practice should or should not be in place. This seems at odds with the Commission's function to 'improve the quality and safety of NDIS supports and services', including 'reducing and eliminating restrictive practices'.

4.67 One of the key mechanisms for the NDIS Quality & Safeguards Commission in relation to regulating and 'reducing' restrictive practices of NDIS participants (including chemical restraints) is through the required development of Behaviour Support Plans (BSP). According to the NDIS Quality & Safeguards Commission, 'to date, the NDIS Commission's priority has been to educate providers and to bring them into compliance with the Restrictive Practices and Behaviour Support Rules so that uses of restrictive practices are authorised, and participants have behaviour support plans'.⁸⁷

4.68 It appears that the NDIS Quality & Safeguards Commission does not assess each BSP that is lodged with the Commission, but rather undertakes 'audits' of randomly selected BSP's. In 2020, the Senior Practitioner reported that a 'sample of 100 comprehensive Behaviour Support Plans lodged after 1 July 2019 were randomly selected for quality assessment'. The results of the audit, found, amongst other things that:

- Two in five BSPs (40 percent) did not contain a strategy to fade-out the use of restrictive practices.
- There was evidence that a participant and/or a guardian, advocate, family member or other support person had been consulted in the development of the BSP in only 10 percent of the plans reviewed.
- Approximately half of the BSPs did not contain an implementation strategy.
- One third of BSPs did not contain a review schedule.
- A number of BSPs demonstrated a lack of practitioner understanding of the principles of positive behaviour support, and some plans included derogatory language and punitive measures.⁸⁸

4.69 The results of the NDIS Quality & Safeguards Commission audit of BSPs are concerning and would indicate the need for a more robust system whereby each new BSP submitted to the NDIS Quality & Safeguards Commission should be properly assessed. In response to the results of the 'audit' of 100 sample BSP's, the NDIS Quality & Safeguards Commission identifies that 'there is a need to build the capability of specialist behaviour support providers and NDIS behaviour support practitioners. The NDIS Quality & Safeguards Commission also states that it 'will undertake periodic quality assessments of behaviour support plans on a rolling basis'.⁸⁹ Whilst these strategies are clearly critical, they do not negate the need for a stronger system of assessing the quality of BSPs and, ultimately, the elimination and prohibition of restrictive practices.

Case Example

A disabled woman (NDIS participant) is 'automatically' transitioned to the NDIS in January 2019. Neither she, her family or friends, are invited to participate in the development of her first NDIS Plan, which is approved by the NDIS in September 2019. A Behaviour Support Plan is required to be developed for the woman, given

that she is subject to restrictive practices (including environmental and chemical). A 'provisional psychologist' is contracted a year later (Sept 2020) by the woman's Support Coordinator, to develop the Behaviour Support Plan, which includes the requirement for completing a 'Functional behaviour assessment'. The 'provisional psychologist' completes and lodges an 'Interim Behaviour Support Plan' for the woman (including a Functional behaviour assessment) without ever meeting, visiting or speaking with the participant. Although the participant has an intellectual disability, she is verbal and has decision-making capacity with some support. She is charged over \$13,000 (from her NDIS funds) for the Interim Behaviour Support Plan, including over \$2,000 for 'travel' by the 'provisional psychologist' – despite the fact that the 'provisional psychologist' conducted no travel (as the particular jurisdiction was in COVID lockdown at the time).

- 4.70 People with disability and their advocates have reported difficulties with the current process for lodging complaints with the NDIS Quality & Safeguards Commission. If complaints are lodged by phone, the complaint is firstly 'taken' by the NDIS Quality & Safeguards Commission's call centre staff, and then 'transferred' to the particular Complaints Officer/s in the jurisdiction from where the complainant is calling from. On many occasions, the Complaints Officer may be unavailable and so a call back function is offered. The call back function is problematic for some people with disability, who may only have a small window of opportunity to make that 'call' and may not be safe to have a 'call back'. There can also be long delays from the time a complaint is lodged over the phone via the call centre, to the time when a Complaints Officer is available. The online Complaints Form⁹⁰ is limiting, as it is a standard template that has a character limit, meaning that to provide the level of information that constitutes the complaint is difficult. In addition, the online complaints form does not allow for the uploading of supporting information, such as photos, videos and other documentation.
- 4.71 Anybody lodging a complaint to the NDIS Quality & Safeguards Commission over the phone, should have their complaint recorded immediately, rather than having to wait for a 'call back' from the NDIS Quality & Safeguards Commission to take their complaint. If a complaint is made to the NDIS Quality & Safeguards Commission over the phone and has to be 'transferred' to a complaints officer in a particular State/Territory, there should be a process of 'warm referral' or 'warm transfer' so that the person lodging the complaint does not have to tell their story over again.
- 4.72 The NDIS Quality & Safeguards Commission should work with the NDIA and people with disability and their representative organisations, to develop a NDIA risk assessment process for identifying and responding to violence and abuse against people with disability, and on the development of pathways to safety for NDIS participants escaping violence.
- 4.73 Also noteworthy, between 1 July 2018 and 30 June 2020, the NDIS Quality & Safeguards Commission received 1,519 complaints that were deemed to be 'out-of-scope.'⁹¹ The NDIS Quality & Safeguards Commission states that: 'Where the NDIS Commission receives a complaint that is out-of-scope, all reasonable attempts are made to direct the complainant to the most appropriate agency or body who may be able to assist with their concerns'. That 1,519 complaints were received by the NDIS Quality & Safeguards Commission between 1 July 2018 and 30 June 2020 is problematic – but there is no information as to whether, and or if, these 'out-of-scope' were ever received or addressed by 'the most appropriate agency or body'. DPOs have repeatedly argued for

a national safeguarding mechanism that has a 'no wrong door approach'. DPOs have argued that even if the NDIS Commission receives a complaint that it 'out of scope', the onus should rest with the Commission to take these complaints, and wherever possible, provide 'warm transfers' to the relevant agency or body. People with disability have consistently reported their frustration and distress at having to 'tell their story' multiple times to different agencies. Although WWDA understands that the NDIS Quality & Safeguards Commission does, where possible, provide 'warm transfers' in relation to 'out-of-scope' complaints, there is no mechanism or system to ascertain whether in fact these complaints were acted upon, nor what the outcome was.

4.74 From WWDA's experience, whilst recognising that the NDIS Quality & Safeguards Commission is still evolving, there are a number of areas where the role and work of the Commission could be strengthened. These include:

- The NDIS Quality & Safeguards Commission should take a much more proactive role for NDIS participants in ensuring service quality, as well as ensuring a clear role in preventing and responding to violence and facilitating access to justice within a human rights framework. Such a role needs to include for e.g., well qualified and experienced NDIS Quality & Safeguards Commission officers undertaking random, unannounced 'spot checks' of the experiences of NDIS participants receiving NDIS services, particularly participants in group homes, and other institutional and congregate care settings and environments.
- All complaints to the NDIS Quality & Safeguards Commission regarding violence, abuse, exploitation and neglect, should automatically trigger the need for a 'spot check', whereby the participant is directly seen by, and 'interviewed' by qualified and experienced NDIS Quality & Safeguards Commission officers, without service providers present. The NDIS Quality & Safeguards Commission should engage directly with the NDIS participant (and their advocate/friend of choice) in undertaking spot checks, and not just deal directly with the service provider.
- The NDIS Quality & Safeguards Commission should provide more accessible information directly to the NDIS participant, particularly those in group homes, and other institutional and congregate care settings and environments. The NDIS Quality & Safeguards Commission must understand and acknowledge that many people with disability in these types of settings and environments, do not have access to the Internet, and are often denied access to information due to the 'gatekeeping' behaviour of service providers, some of which can be the perpetrator of violence, abuse, exploitation and neglect of people with disability.
- The NDIS Quality & Safeguards Commission should focus on undertaking an educative role that builds the human rights and capacity of people with disability – including their capacity to access advocacy and legal services in order to make complaints, report matters to police, access victims support schemes, and bring civil legal action – not just an educative role that informs service providers of their obligations.
- The NDIS Quality & Safeguards Commission should utilise its compliance/infringement powers more regularly and make them more public. This would help people with disability to have confidence that the NDIS Quality & Safeguards Commission prioritises them, rather

than service providers. The 'NDIS Provider Register - Banning Orders' should be made more public and easier to locate on the Commission's website.

OPCAT National Preventative Mechanism

4.75 The NDIS Commissioner must engage in processes that are underway to give effect to Australia's commitment to ratify the Optional Protocol to the Convention Against Torture (OPCAT) in order to ensure that people with disability are included in the mechanisms that need to be established following ratification. In particular, the NDIS Commissioner must be engaged in the establishment of an independent national preventive mechanism to monitor places of detention, potentially including disability residential settings, to ensure people with disability are not subjected to violence and other mistreatment. Such involvement would also more fully respond to the recommendation from the Committee on the Rights of Persons with Disabilities to end restrictive practices, 'including by establishing an independent national preventative mechanism to monitor places of detention' for people with disability.⁹²

Complaint mechanisms

4.76 Current complaint laws, practices and policy frameworks are piecemeal, ad-hoc, lack consistency and are completely confusing to the average person. The Royal Commission's Research Report titled *Complaint Mechanisms: Reporting Pathways for Violence, Abuse, Neglect and Exploitation*⁹³ demonstrates the complex and fragmented ways that jurisdictions deal with safeguarding of people with disability through complaint mechanisms.

4.77 The *Complaint Mechanisms* report analysed lived experiences of people with disability in relation to complaint mechanisms. The report found that people with disability had poor experiences of complaint processes, including 'disrespectful treatment where complainants are labelled as 'being difficult'; poor processes such as unsatisfactory communication and examples of complaints that are never resolved; and unacceptable examples of failed complaint procedures, including examples of complainants being forced to have continued interaction with their perpetrators, especially in closed settings'.⁹⁴ The *Complaint Mechanisms* report also found that people with disability can experience problems in the outcome of complaints, including the absence of a tangible outcome, dissatisfaction with the outcome, a perpetrator being moved on but continues to work with people with disability, and outcomes adverse and even harmful to the complainant.⁹⁵ Moreover, additional to the problems people experienced in engaging with complaint mechanisms, the *Complaint Mechanisms* report also found that some people with disability might not be able to engage with complaint mechanisms in the first place, including for such reasons as: 'experiencing threats from perpetrators which prevent complaints; fears associated with the outcomes of complaints; negative past experiences of complaint making; poor accessibility of complaint mechanisms; and a lack of awareness of rights or what constitutes criminal violence'.⁹⁶

4.78 A particularly concerning finding of the *Complaint Mechanisms* report was that the process of making a complaint or the outcome of a complaint could be harmful to people with disability. The harmfulness of complaint mechanisms shows how people with disability can be exposed to harm through safeguarding. For example, the *Complaint Mechanisms* report says in relation to adverse outcomes:

Adverse outcomes included experiencing forms of punishment after making a complaint, having to withdraw from services because complaints weren't addressed, and experiencing health problems as a result of complaints being unsatisfactorily resolved.⁹⁷

4.79 Key findings of the *Complaint Mechanisms* report are:

- Complaint mechanisms are ill-equipped to respond to the structural violence experienced by people with disability.
- Many complaint mechanisms are not independent, including because they have regulatory oversight and complaint functions, or they are not separate to the organisation funding or delivering the services in which violence takes place.
- There is a lack of information about existing complaint mechanisms and lack of accessible processes for making complaints.
- The relationship between complaint mechanisms and responses to violence through police and courts.

4.80 The *Complaint Mechanisms* report recommends an independent complaint mechanism specifically for responding to violence, abuse, neglect, and exploitation, stating:

While improvements to existing mechanisms are possible, there remains a need for an independent complaint mechanism to respond to violence, abuse, neglect and exploitation, with strong perceived independence, neutrality, transparency, trustworthiness, effectiveness and capacity to support and recognise the voice of complainants. At present, this independent, dedicated, pathway for reporting violence, abuse, neglect and exploitation experienced by people with disability does not appear available within the existing terrain of relevant Australian complaint mechanisms.⁹⁸

4.81 The *Complaint Mechanisms* report also recommends the introduction of a National Redress Scheme, which we discuss below.

Redress for violence, abuse, neglect and exploitation

4.82 Redress is an essential dimension of ensuring quality services and 'safeguarding' against violence. Individual redress (such as monetary payment, counselling, and financial, legal and social support) can provide individuals with validation and recognition of their experiences (both of the violence itself and any subsequent failed or harmful complaint processes) and support for individual healing and restoration. Collective redress (such as law reform, public education, memorialisation, and truth-telling) can provide communities with opportunities for social repair and processes to learn from the past as a basis for transforming law and practice to prevent repetition of harm.⁹⁹ The financial and reputational impacts on services of individual and collective redress can provide impetus for services improving their quality and ceasing further perpetration of violence.

- 4.83 Redress is also an essential dimension of ensuring quality services and ‘safeguarding’ against violence in order to deliver equal access to justice for people with disability, noting the availability of court remedies for the general community and the availability of specialised redress schemes for other groups who have been subjected to systematic harm. Failure to provide redress encourages violence against people with disability because this failure affirms the inequality of people with disability and the permissibility of violence, because people with disability are subject to a lower standard (or no) justice which sends the message that no one will be punished when violence occurs.
- 4.84 The *Complaint Mechanisms* report recommends the introduction of a National Redress Scheme, stating:

Much violence, abuse, neglect and exploitation is historical in nature, including violence, abuse, neglect and exploitation that is supported by legally and socially authorised forms of segregation, institutionalisation and society wide discrimination. There is a pressing need for governments and society to acknowledge the role of historical injustices committed against people with disability in creating the conditions for current mass scale violence. In this context, a National Redress Scheme would serve an important role as both a form of transitional and transformative justice, and as an additional pathway for reporting violence, abuse, neglect and exploitation that is historical in nature.¹⁰⁰

5. RESPONSE TO ISSUES PAPER

Question 1

What are the best ways to safeguard people with disability who may be at risk of violence, abuse, neglect and exploitation both when they use services and in other areas of their lives?

5.1 In Section 4 we identified the following ways to 'safeguard' people with disability:

- Reframe 'safeguarding' in a human rights context as 'preventing and responding to violence' and 'access to justice'.
- Address ableism.
- End segregation and institutionalisation.
- Ensure full inclusion in the community.
- Address denial of legal capacity, including through introducing supported decision-making and the national supported decision-making framework and abolishing substitute decision-making.
- Fund and resource human rights capacity building.
- Foster and strengthen informal and natural relationships.
- Fund and resource independent advocacy.
- Implement a National Preventive Mechanism that extends to all places of detention in which people with disability are confined.
- Implement an independent complaint mechanism to respond to violence, abuse, neglect and exploitation.
- Implement individual and collective redress for people with disability.

5.2 Strategies to prevent and respond to violence against people with disability should not be restricted to people with disability who are NDIS participants and must be available to all people with disability irrespective of the service systems with which they interact.

5.3 Strategies to prevent and respond to violence against people with disability must be developed in a human rights context including advancing the agency, autonomy and equality of people with disability, and resist paternalistic and ableist approaches.

5.4 Strategies to prevent and respond to violence against people with disability must extend to *all* violence against people with disability, including violence which is legally or socially authorised. In particular, strategies must extend to use of restrictive practices, institutionalisation, and forced sterilisation, forced contraception, and forced menstrual suppression.

5.5 Strategies must go beyond cultural and attitudinal change and staff training – there must be transformative change that ensures zero tolerance for all forms of violence against people with disability and justice, accountability and redress for violence.

Question 2

How can quality services help to prevent violence, abuse, neglect and exploitation of people with disability? What are the features of those quality services?

- 5.6 Quality services must be delivered in a human rights context including advancing the agency, autonomy and equality of people with disability, and resist paternalistic and ableist approaches to service provision (see Sections 3 and 4).
- 5.7 Quality services must not engage in violence which is legally or socially authorised, including use of restrictive practices, institutionalisation, and forced sterilisation, forced contraception, and forced menstrual suppression (see Sections 4).
- 5.8 Quality services must include people with disability on their governance structures and as employees at all levels. Quality services must be regularly assessed through accreditation programs run by people with disability.
- 5.9 Quality services must not provide services that involve segregation and institutionalisation (see Section 4). Quality services must pay all people with disability engaged in labour in their services (including through Australian Disability Enterprises and day programs) full wages, rather than sub-minimum supported wages or unpaid 'volunteer' work.
- 5.10 Quality services must be subjected to full processes of accountability when violence occurs, including being subjected to all financial and reputational impacts, and being required to participate in individual and collective redress processes (see Section 4).
- 5.11 Quality services must not subject people with disability to harm or the threat of harm if they seek to make complaints or reports in relation to violence in their services (see Section 4). Quality services must not impede people with disability having access to independent advocacy nor to making reports to police and complaints bodies and seeking support and compensation through victims' support schemes, the courts and other available avenues.

Question 3

How could safeguarding laws, practices, or policy frameworks (including the NDIS Quality and Safeguarding Framework) be improved to better prevent, reduce and respond to violence, abuse, neglect and exploitation of people with disability? We are particularly interested in Australian and international examples of good practice.

- 5.12 Improvements in existing safeguarding laws, practices and policy frameworks can only go so far in preventing, reducing and responding violence, abuse, neglect and exploitation when they themselves contribute to the harm that people with disability experience. Ultimately, there are some key aspects of existing safeguarding laws, practices and policy frameworks that need to be abolished. For example, the NDIS Quality and Safeguards Commission's regulation of restrictive practices needs to be abolished with a focus on a systems-wide elimination and prohibition of restrictive practices and substitute decision-making regimes such as guardianship law and financial management law need to be abolished with a shift to supported decision-making and implementation of the national supported decision-making framework (see Section 4).

- 5.13 Existing safeguarding laws, practices and policy frameworks can be improved by implementing the ACDA recommendations in the submission to the Senate Community Affairs References Committee inquiry into violence, abuse, and neglect against people with disability in institutional and residential settings, the six priorities in the DPO Australia Position Statement on ending segregation, the recommendations of the CRPD Committee in its second and third periodic reports on Australia, and the disability-related recommendations of the CAT Committee in its sixth periodic report on Australia.
- 5.14 Existing safeguarding laws, practices and policy frameworks can be improved by broadening the focus of the OPCAT National Preventive Mechanism to extend to all places of detention in which people with disability are confined and strengthening the interface between the OPCAT National Preventive Mechanism and the NDIS Quality and Safeguards Commission (see Section 4).
- 5.15 Existing safeguarding laws, practices and policy frameworks can be improved by reframing them in international human rights. They can also be improved by enhancing processes to hold service providers accountable for violence and provide access to redress for people with disability, and ensuring safe, independent, accessible, and inclusive pathways to making complaints, reporting violence to police, and accessing justice (see Section 4).
- 5.16 Existing safeguarding laws, practices and policy frameworks can be improved by (as recommended in the ACDA submission to the Senate Community Affairs References Committee inquiry into violence, abuse, and neglect against people with disability in institutional and residential settings) the Australian Government establishing an over-arching mechanism to drive and co-ordinate the implementation of the Australian Disability Strategy, ensuring that people with disability are consulted about, and represented on any mechanism developed.
- 5.3.5 Existing safeguarding laws, practices and policy frameworks can be improved by introducing a mandate to perform regular proactive inspections of services with a view to preventing violence, abuse, neglect and exploitation of people with disability.
- 5.17 Existing safeguarding laws, practices and policy frameworks can be improved by ending siloing of policy frameworks. As recommended in the ACDA submission to the Senate Community Affairs References Committee inquiry into violence, abuse, and neglect against people with disability in institutional and residential settings, the Australian Government must:

[take] immediate action to establish an independent, statutory, national protection mechanism under specific purpose legislation, and with broad functions and powers to protect, investigate and enforce findings in relation to all forms of violence against people with disability, regardless of the setting in which it occurs and regardless of who perpetrates it. This national protection mechanism should explicitly operate within a human rights framework, and include as a minimum, the following core functions:

- *a ‘no wrong door’ complaint handling function – the ability to receive, investigate, determine, and make recommendations in relation to complaints raised.*

- *the ability to initiate ‘own motion’ complaints and to undertake own motion enquiries into systemic issues.*
- *the power to make recommendations to relevant respondents, including Commonwealth and State and territory governments, for remedial action.*
- *the ability to conduct policy and programme reviews and ‘audits’.*
- *the ability to publicly report on the outcomes of systemic enquiries and group, policy and programme reviews, or audits, including through the tabling of an Annual Report to Parliament.*
- *the ability to develop and publish policy recommendations, guidelines, and standards to promote service quality improvement.*
- *the ability to collect, develop and publish information, and conduct professional and public educational programs.*
- *the power to enable enforcement of its recommendations, including for redress and reparation for harms perpetrated.*

And,

The National Disability and Neglect Hotline be abolished, and resources re-allocated to the establishment of an independent, statutory national mechanism to protect, investigate and enforce findings in relation to all forms of violence against people with disability.¹⁰¹

Question 4

What can be done to uphold independence, choice and control for people with disability when implementing safeguards against violence, abuse, neglect and exploitation?

- 5.18 Independence, choice and control for people with disability can be upheld through introducing supported decision-making and the national supported decision-making framework and abolishing substitute decision-making (see Section 4). As long as people with disability are denied their legal capacity, they are unable to enjoy independence, choice and control and can be legally subjected to non-consensual interventions in their bodies, lives and finances. In our submission to the Royal Commission on guardianship, we explained how substitute decision-making enables violence.
- 5.19 Independence, choice and control for people with disability can be upheld through funding and resourcing human rights capacity building (see Section 4). As long as people with disability are denied the knowledge and skills to advocate for their human rights and access justice, accountability and redress in response to violence, services will be sent the implicit message that they can carry on perpetrating violence with impunity.
- 5.20 Independence, choice and control for people with disability can be upheld through implement an independent complaint mechanism to respond to violence, abuse, neglect and exploitation and implement individual and collective redress for people with disability (see Section 4). As long as complaint mechanisms lack independence and are unsafe and inaccessible, people with disability will be unable to access support and redress in the aftermath of violence and services will be left unaccountable and free of the financial and reputational impacts of their wrongdoing.

- 5.21 Independence, choice and control for people with disability can be upheld through full implementation of article 19 of the CRPD on independent living (see Section 4). The CRPD Committee provides comprehensive guidance on interpretation and implementation of article 19 through its General Comment No. 5 on living independently and being included in the community and its recent guidelines on deinstitutionalization. As long as people with disability are provided services that involve segregation and institutionalisation and denial of choice and control in the supports and accommodation they receive, they will continue to be subjected to circumstances that are coercive, oppressive and unsafe.

Question 5

What challenges are presented by the different safeguarding approaches used across Australian jurisdictions and across different types of services?

- 5.22 Guardianship and financial management are used across Australian jurisdictions and across different types of services. Guardianship and financial management are often put forward as legitimate safeguarding mechanisms for people with disability. The emphasis placed on guardianship and financial management is premised on assumptions that Public Guardians and Public Trustees have the knowledge, skills and commitment to support people with disability, and that tribunals and boards that oversee guardianship and financial management orders provide oversight to guardianship and financial management. However, as we discussed at length in our submission to the Royal Commission, guardianship and financial management do not operate within a human rights model and framework and are not consistent with CRPD.
- 5.23 While the National Standards of Public Guardianship are directed towards ensuring some consistency in the standard of service across jurisdictions, they are still problematic. For example, these standards specify that guardianship staff making legal decisions ‘will endeavour to meet in person or use audiovisual technology to have direct contact with the represented person at least once a year’.¹⁰² A meeting, potentially not even face-to-face, once a year is not sufficient opportunity to develop a deep knowledge and understanding of a person’s circumstances and develop a strong connection with the person, to then be consenting to such significant interventions in their bodies related to such personal and intimate matters as menstruation, reproduction and sexuality. The lack of ongoing contact, engagement with, and consideration for the lives of people with disability under public guardianship can exacerbate the dominance that is inherent to guardianship and financial management.

Question 6

What role does, or should, independent monitoring and oversight play in safeguarding the right of people with disability to live free from violence, abuse, neglect and exploitation? Should the NDIS Quality and Safeguards Commission be taking a more active role in ensuring service providers are adhering to the appropriate standards, particularly during the pandemic crisis?

- 5.24 Independent monitoring and oversight is central to ‘safeguarding’ the right of people with disability to live free from violence, abuse, neglect and exploitation. However, monitoring and oversight

must be genuinely independent. Existing safeguarding laws, practices and policy frameworks can be improved by broadening the focus of the OPCAT National Preventive Mechanism to extend to all places of detention in which people with disability are confined and strengthening the interface between the OPCAT National Preventive Mechanism and the NDIS Quality and Safeguards Commission (see Section 4).

- 5.25 Independent monitoring and oversight should also extend to greater data collection on violence against people with disability, including gender disaggregated data. In our submissions to the Royal Commission on sexual and reproductive rights and guardianship we discussed the dearth of gender disaggregated data on violence against women with disability.
- 5.26 NDIS Quality and Safeguards Commission must take a more active role in ensuring service providers are adhering to the appropriate standards, particularly in relation to reportable incidents. For example, the NDIS Quality and Safeguards Commission should take more serious action against service providers which will cause financial and reputational impacts on service providers, and ensure it is engaging police when reportable incidents involve criminal conduct. Moreover, at the moment, only NDIS service providers can lodge 'reportable incidents'. This limit on who can lodge undermines the possibility of this safeguarding mechanism being independent because other people cannot lodge reportable incidents, including people with disability who experience violence and their advocates and supporters, or others who witness this harm.

Question 7

What safeguards are required for people who may need additional support, such as people who do not have informal supports like families or other advocates, people who face communication barriers, and people with high support needs?

- 5.27 Free independent advocacy is vital for people who may need additional support (see Section 4). Independent advocacy includes individual advocacy, systemic advocacy, self-advocacy, and legal advocacy. Service providers must not obstruct or prevent independent advocates (including legal advocates) from providing advocacy to people with disability in their services.
- 5.28 Human rights capacity building is also vital for people who may need additional support (see Section 4). Service providers must not obstruct or prevent delivery of human rights capacity building to people with disability in their services.
- 5.29 As we discussed in our submission to the Royal Commission on guardianship, people who do not have informal supports like families or other advocates should not be penalised by having their legal capacity removed from them through appointment of guardians and financial managers. Similarly, people who need additional support should not be subject to restrictive practices to keep them 'safe'.
- 5.30 A greater focus on fostering and strengthening informal and natural relationships will serve as a 'safeguard' for people who do not have informal supports like families or other advocates (see Section 4).

Question 8

How can informal safeguards be strengthened to prevent or reduce violence, abuse, neglect and exploitation of people with disability? What are the ways in which people with disability develop personal capacity to safeguard at different stages of their lives and as circumstances change? Are there systems in place to support this capacity development?

- 5.31 Informal safeguards can be strengthened to prevent or reduce violence, abuse, neglect and exploitation of people with disability through free independent advocacy (including legal advocacy) (see Section 4), human rights capacity building is also vital for people who may need additional support (see Section 4), and fostering and strengthening informal and natural relationships (see Section 4).
- 5.32 Supported decision-making must be introduced, and guardianship and financial management laws must be abolished (see Section 4) and services must be desegregated and deinstitutionalised (see Section 4). Guardianship and financial management law and institutional and segregated services enable violence against people with disability (as we discussed in our submission to the Royal Commission on guardianship) and they undermine the possibility for people with disability to develop their personal capacity to 'safeguard' in the sense of asserting their legal and human rights and communicating and having legally and socially recognised their own decisions about what happens to their bodies, lives and finances.

Question 9

What barriers do people with disability face when making a complaint and what will help address these barriers? We are interested in hearing about complaints processes across a range of services and areas of life.

- 5.33 Current complaint laws, practices and policy frameworks are piecemeal, ad-hoc, lack consistency and are completely confusing to the average person (see Section 4). There are multiple barriers to people with disability making complaints, including being positioned as difficult, inaccessible or non-existent information about complaint processes, lack of awareness about what constitutes violence, their right to make a complaint and seek justice, accountability and redress for violence, and of complaint processes, gatekeeping by service providers, threats by perpetrators, and previous bad experiences of complaint processes.
- 5.34 An 'independent, statutory, national protection mechanism under specific purpose legislation, and with broad functions and powers to protect, investigate and enforce findings in relation to all forms of violence against people with disability',¹⁰³ an 'independent complaint mechanism to respond to violence, abuse, neglect and exploitation, with strong perceived independence, neutrality, transparency, trustworthiness, effectiveness and capacity to support and recognise the voice of complainants',¹⁰⁴ and individual and collective redress, including a 'National Redress Scheme'¹⁰⁵ will help to address the barriers to people with disability making a complaint.

Question 10

How can safeguards and complaints processes be improved to better meet the needs of First Nations people, women, culturally and linguistically diverse people, LGBTIQ+ people, and/or children and young people with disability?

- 5.35 Safeguards and complaints processes must be co-designed and led by people with disability, be designed and operate in a human rights framework, be culturally safe and trauma-informed, be independent, accessible and safe, and provide access to justice in process and outcome.¹⁰⁶

Endnotes

- ¹ Committee on the Rights of Persons with Disabilities, *General Comment No. 7 on the Participation of Persons with Disabilities, Including Children with Disabilities, through Their Representative Organizations, in the Implementing and Monitoring of the Convention*, UN Doc CRPD/GC/7 (9 November 2018).
- ² [Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability](#).
- ³ See for e.g. Disabled People's Organisations Australia (DPO Australia) ['Ending Violence'](#). See also: Disabled People's Organisations Australia (2017) [Civil Society Statement to the Australian Government Calling for a Royal Commission into Violence, Abuse and Neglect of People with Disability](#). Sydney: DPO Australia.
- ⁴ Senate Community Affairs References Committee (Feb 2015) [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.
- ⁵ Senate Community Affairs References Committee (Nov 2015) [Final Report: 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.
- ⁶ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, [Terms of Reference](#).
- ⁷ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, [Terms of Reference](#), paragraph (e).
- ⁸ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, [Terms of Reference](#), paragraph (g).
- ⁹ Committee on the Rights of Persons with Disabilities (2019) [Concluding observations on the combined second and third periodic reports of Australia](#), adopted by the Committee at its 511th meeting (20 September 2019) of the 22nd session; UN Doc. CRPD/C/AUS/CO/2-3.
- ¹⁰ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, [Accessibility and Inclusion Strategy](#), page 5.
- ¹¹ Such as forced sterilisation, forced abortion, forced contraception, denial of legal capacity, forced treatment, restrictive practices, seclusion, restraint, indefinite detention, and forced and coerced marriage.
- ¹² Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2020) [Issues Paper: Employment](#).
- ¹³ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (March 2021) [Research Report: Nature and extent of violence, abuse, neglect and exploitation against people with disability in Australia](#).
- ¹⁴ Gerard Quinn, [Report of the Special Rapporteur on the Rights of Persons with Disabilities](#), UN Doc A/76/146 (19 July 2021) page 20.
- ¹⁵ Gerard Quinn, [Report of the Special Rapporteur on the Rights of Persons with Disabilities](#), UN Doc A/76/146 (19 July 2021) page 6.
- ¹⁶ Gerard Quinn, [Report of the Special Rapporteur on the Rights of Persons with Disabilities](#), UN Doc A/76/146 (19 July 2021) page 7.
- ¹⁷ Gerard Quinn, [Report of the Special Rapporteur on the Rights of Persons with Disabilities](#), UN Doc A/76/146 (19 July 2021) page 6.
- ¹⁸ Gerard Quinn, [Report of the Special Rapporteur on the Rights of Persons with Disabilities](#), UN Doc A/76/146 (19 July 2021) page 6.
- ¹⁹ Gerard Quinn, [Report of the Special Rapporteur on the Rights of Persons with Disabilities](#), UN Doc A/76/146 (19 July 2021) page 20.
- ²⁰ Gerard Quinn, [Report of the Special Rapporteur on the Rights of Persons with Disabilities](#), UN Doc A/76/146 (19 July 2021) page 9.
- ²¹ Gerard Quinn, [Report of the Special Rapporteur on the Rights of Persons with Disabilities](#), UN Doc A/76/146 (19 July 2021) pages 16–17.
- ²² Gerard Quinn, Transcript of evidence provided to the Disability Royal Commission Public Hearing 31 [Vision for an Inclusive Australia] 12 December 2022; available at: <https://disability.royalcommission.gov.au/publications/transcript-day-1-public-hearing-31-brisbane>
- ²³ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2022) [Research Report: Complaint mechanisms: Reporting pathways for violence, abuse, neglect and exploitation](#).
- ²⁴ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (October 2020) [Interim Report](#), pages 10-11.
- ²⁵ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (October 2020) [Interim Report](#), page xi.
- ²⁶ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (December 2019) [First Progress Report](#), page 1.
- ²⁷ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (16 September 2019) [Hearing 1, Day 1](#).

See also: Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (October 2020) [Interim Report](#), page xi: ‘we seek to translate the human rights recognised in the CRPD into practicable and sustainable policies and practices that will promote the right of people with disability to live free from violence, abuse, neglect and exploitation.’

See also: Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (October 2020) [Interim Report](#), page xii:

‘We seek to transform community attitudes and bring about changes to policies and practices that have exposed people with disability to violence, abuse, neglect and exploitation and that denied them ‘full and effective participation and inclusion in society’. Only then will Australia fully achieve the goal of a more inclusive society that supports the independence of people with disability and their right to live free from violence, abuse, neglect and exploitation.’

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (December 2019) [First Progress Report](#), page 1:

‘With the active participation of individual people with disability, advocates, and the disability community, the Royal Commission provides a genuine opportunity to bring about the transformational changes necessary to achieve a more inclusive society. Such a society must unstintingly recognise the dignity, autonomy, equality and freedom of choice of people with disability.’

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, [Accessibility and Inclusion Strategy](#), page 1:

‘People with disability, their families, supporters and advocates have fought long and hard to have the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (the Royal Commission) established.

They rightly see the Royal Commission as offering a genuine opportunity to achieve transformational change. If this opportunity is to be realised the Australian community will need to recognise and accept that all people with disability are entitled, in the words of Article 1 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD), to: “the full and equal enjoyment of all human rights and fundamental freedoms ... and to promise respect for their inherent dignity.”

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (16 September 2019) [Hearing 1, Day 1](#):

‘The UN Convention sets out the fundamental human rights of people with disability, including civil and political rights, economic, social and cultural rights. It provides criteria against which to assess Australia’s treatment of people with disability, and it sets standards which can be implemented – or better still, actually implemented – to ensure that people with disability live free from violence, abuse, neglect and exploitation.’

Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (16 September 2019) [Hearing 1, Day 1](#):

‘People want and expect real change. They want practical effect to be given to the rights-based approach and principles of inclusion expressed in the UN Convention and, indeed, in domestic legislation. Simply repeating the recommendations and proposals made by previous inquiries will not achieve that result, but there are grounds for optimism. With the active participation of people with disability and the disability community at large, the Royal Commission provides an opportunity to achieve transformational change.’

²⁸ Available at: <https://dpoa.org.au/endsegregation/>

²⁹ Senate Community Affairs References Committee (November 2015) [Final Report: ‘Violence, abuse and neglect against people with disability in institutional and residential settings.](#)

³⁰ Senate Community Affairs References Committee (November 2015) [Final Report: ‘Violence, abuse and neglect against people with disability in institutional and residential settings,](#) page xxvi.

³¹ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (October 2020) [Interim Report](#).

³² Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (October 2020) [Interim Report](#), page 351.

³³ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2020) [Research Report: Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation.](#)

³⁴ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2020) [Research Report: Convention on the Rights of Persons with Disabilities: Shining a light on Social Transformation,](#) page 9.

³⁵ Women with Disabilities Australia (August 2020) [Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: WWDA Response to Employment Issues Paper.](#)

³⁶ Women with Disabilities Australia (WWDA), First Peoples Disability Network (FPDN), Children and Young People with Disability Australia (CYDA), Inclusion Australia, Disability Advocacy Network Australia (DANA), Australian Federation of Disability Organisations (AFDO), People with Disability Australia (PWDA), National Ethnic Disability Alliance (NEDA) (September 2020) [Position Statement: Segregation of people with disability is discrimination and must end.](#)

³⁷ Gerard Goggin and Christopher Newell (2005) *Disability in Australia – Exposing a Social Apartheid* (University of New South Wales Press).

³⁸ Women With Disabilities Australia (2007) [Forgotten Sisters - A Global Review of Violence against Women with Disabilities.](#) WWDA Resource Manual on Violence Against Women With Disabilities. Hobart, Tasmania: Women With Disabilities Australia.

³⁹ Prof. Gerard Quinn, Prof. Grainne de Búrca, Prof. Lisa Waddington, Prof. Mark Bell, Prof. Anna Lawson, Prof. Michael Stein, Prof. Titti Mattsson and Prof. Luke Clements, '[Segregation and segregated facilities as a prima facie form of discrimination. The Impermissibility of using the ESIF to invest monies in long term care residential institutions for persons with disabilities](#)' (Legal Memo, 17 March 2018).

⁴⁰ Committee on Economic, Social and Cultural Rights (CESCR), [General Comment No. 5: Persons with Disabilities](#), 9 December 1994, E/1995/22, UN Doc E/1995/22. [Brown v. Board of Education of Topeka](#), 347 U.S. 483 (1954); [Olmstead v L.C.](#) 527 U.S. 581 (1999).

⁴¹ The UN Human Rights Council has stated that 'forced institutionalization is a form of violence that deprives women and girls of liberty on the basis of disability and that in such situations they face an increased risk of further violations and abuses, including physical, psychological and sexual and gender-based violence': Human Rights Council (13 July 2021) [Accelerating efforts to eliminate all forms of violence against women and girls: preventing and responding to all forms of violence against women and girls with disabilities](#), Resolution 47/15.

⁴² See, e.g., European Disability Forum (19 July 2021) [Stop EU funding of new institutions for people with disabilities in Poland, EEG says](#).

⁴³ Women with Disabilities Australia (WWDA), First Peoples Disability Network (FPDN), Children and Young People with Disability Australia (CYDA), Inclusion Australia, Disability Advocacy Network Australia (DANA), Australian Federation of Disability Organisations (AFDO), People with Disability Australia (PWDA), National Ethnic Disability Alliance (NEDA) (September 2020) [Position Statement: Segregation of people with disability is discrimination and must end](#), pages 12-13.

The six urgent actions are:

1. In line with the CRPD and the general comments from the CRPD Committee, ensure that the human rights model of disability and the principle and standard of equality and non-discrimination underpin the development, implementation and review of law, policy and practice frameworks, including by providing training and guidance to policy makers and legislators at all levels of government and within all portfolio areas, to law reform bodies, to the Parliamentary Joint Committee on Human Rights and to the National Disability Insurance Agency (NDIA), the NDIS Commission and the Royal Commission.
2. In all areas of its work, the Royal Commission must explicitly recognise and conceptualise the segregation of people with disability as discrimination, that segregation is an underpinning enabler of violence, abuse, neglect and exploitation, that segregation constitutes systemic neglect and exploitation; and the Royal Commission must hold governments and other stakeholders to account for supporting, maintaining and funding segregated systems.
3. In line with the CRPD and the general comments from the CRPD Committee, and in close consultation and active participation of people with disability through their representative organisations, Australia should review and amend existing law, policy and practice frameworks for potential or actual support and/or funding of the segregation of people with disability or limitations on their autonomy, including mental health laws and systems, guardianship laws and systems, the NDS, the NDIS Act, NDIS policy and practice and NDIS Commission policy and practice.
4. In line with the CRPD and other international human rights treaties to which Australia is a party, and in close consultation and active participation of people with disability through their representative organisations, Australia should recognise the legacy of inequality and discrimination, including the segregation of people with disability, by reviewing and acting to eliminate this segregation, including by developing and implementing:
 - a national, time bound Disability Employment Strategy aimed at the transition of workers with disability from segregated employment to open, inclusive and accessible forms of employment and that ensures equal remuneration for work of equal value; that incorporates recommendations from previous employment inquiries, such as the Willing to Work Inquiry;⁴³ and that contains targeted gender, age and culturally specific measures to increase workforce participation and address structural barriers.
 - a national, time bound Deinstitutionalisation and Disability Housing Strategy aimed at closing institutional living arrangements for people with disability; preventing the building of new institutional living arrangements, including the building of new group homes through NDIS Specialist Disability Accommodation (SDA); repurposing existing group homes into genuine community-based housing options; providing resources to increase the supply and range of accessible social and public housing stock; and amending the National Construction Code to mandate minimum universal accessible housing design standards for all new and extensively modified housing.
 - a national, time bound Action Plan for Inclusive Education aimed at establishing a nationally consistent legislative and policy framework that fully complies with the CRPD; that adopts a definition of inclusive education consistent with general comment No.4; that reverses the increasing rate of segregated education; that redirects resources to an inclusive education system; that recognises the denial of reasonable adjustment as unlawful discrimination; that contains measurable actions and accountability mechanisms for transition from segregated education to inclusive education; and that prohibits the use of restrictive practices in schools.
5. In line with the recommendations made to Australia since 2013 by the CRPD Committee and the general comment on article 12, Equal recognition before the law,⁴³ Australia needs to accept that formal and informal substitute decision-making mechanisms are not compliant with the CRPD and that these mechanisms must be replaced with fully supported decision-making mechanisms. To this end, Australia should withdraw its interpretative declaration⁴³ on article 12 that maintains that the CRPD allows supported or substituted decision-making,⁴³ and implement a nationally consistent supported decision-making framework.
6. The National Disability Research Partnership (NDRP) must ensure that the development of a national disability research agenda is strongly underpinned by the CRPD, including explicit recognition of segregation as a form of discrimination and substitute decision-making as a denial of individual autonomy; and provide a comprehensive agenda that is not limited to existing service system improvement.

⁴⁴ Committee on the Rights of Persons with Disabilities, [General comment No. 5 \(2017\) on living independently and being included in the community](#), UN Doc No: CRPD/C/GC/5, page 2.

⁴⁵ Gerard Quinn, [Personhood & Legal Capacity Perspectives on the Paradigm Shift of Article 12 CRPD](#) (Concept Paper for the Harvard Law School Project on Disability Conference), Cambridge, 20 February 2010) 5.

⁴⁶ Women With Disabilities Australia (July 2020) [Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: WWDA Response to Group Homes Issues Paper](#).

⁴⁷ Women With Disabilities Australia (WWDA) '[WWDA Position Statement 2: The Right to Decision-Making](#)'. WWDA, September 2016, Hobart, Tasmania. ISBN: 978-0-9585268-7-6.

⁴⁸ Women With Disabilities Australia (WWDA) '[WWDA Position Statement 2: The Right to Decision-Making](#)'. WWDA, September 2016, Hobart, Tasmania. ISBN: 978-0-9585268-7-6.

⁴⁹ Women With Disabilities Australia (WWDA) '[WWDA Position Statement 2: The Right to Decision-Making](#)'. WWDA, September 2016, Hobart, Tasmania. ISBN: 978-0-9585268-7-6.

⁵⁰ Committee on the Rights of Persons with Disabilities, [General comment No. 1 \(2014\) Article 12: Equal recognition before the law](#), UN Doc No. CRPD/C/GC/1.

⁵¹ Committee on the Rights of Persons with Disabilities, [General comment No. 1 \(2014\) Article 12: Equal recognition before the law](#), UN Doc No. CRPD/C/GC/1, para 44.

⁵² Committee on the Rights of Persons with Disabilities, [General comment No. 1 \(2014\) Article 12: Equal recognition before the law](#), UN Doc No. CRPD/C/GC/1, para 44.

⁵³ Committee on the Rights of Persons with Disabilities, [Combined second and third periodic reports submitted by Australia under article 35 of the Convention, due in 2018](#) (5 February 2019) UN Doc No. CRPD/C/AUS/2-3, para. 15(a).

⁵⁴ An interpretative declaration is a unilateral statement made by a State Party to clarify how a specific article or articles is interpreted by that State Party at a given time.

⁵⁵ See for example, the concluding observations made by the CRPD Committee since 2010 following numerous periodic reviews of States Parties; Committee on the Rights of Persons with Disabilities, General comment No. 1 (2014) [General comment No. 1 \(2014\) Article 12: Equal recognition before the law](#), UN Doc No. CRPD/C/GC/1; Committee on the Rights of Persons with Disabilities, [General comment No. 5 \(2017\) on living independently and being included in the community](#), UN Doc No: CRPD/C/GC/5, para 48.

⁵⁶ Committee on the Rights of Persons with Disabilities, [Concluding observations on the initial report of Australia, adopted by the Committee at its tenth session](#) (2-13 September 2013), UN Doc No. CRPD/C/AUS/CO/1 (21 October 2013) paras 9 and 25; Committee on the Rights of Persons with Disabilities, [Combined second and third periodic reports submitted by Australia under article 35 of the Convention, due in 2018](#) (5 February 2019) UN Doc No. CRPD/C/AUS/2-3, paras 6(b), 24(a) and 24(b).

⁵⁷ Committee on the Rights of Persons with Disabilities (13 September 2019) '[Committee Experts Express Concerns about the Slow Progress in the Implementation of the Convention](#)'.

⁵⁸ Committee on the Rights of Persons with Disabilities, [General comment No. 3 \(2016\) on women and girls with disabilities](#), UN Doc No. CRPD/C/GC/3.

⁵⁹ Committee on the Rights of Persons with Disabilities, [General comment No. 3 \(2016\) on women and girls with disabilities](#), UN Doc No. CRPD/C/GC/3, para 44.

⁶⁰ Committee on the Rights of Persons with Disabilities, [General comment No. 3 \(2016\) on women and girls with disabilities](#), UN Doc No. CRPD/C/GC/3, para 45.

⁶¹ See: Women With Disabilities Australia (WWDA) '[WWDA Position Statement 4: Sexual and Reproductive Rights](#)'. WWDA, September 2016, Hobart, Tasmania. ISBN: 978-0-9585269-6-8.

⁶² See: Women With Disabilities Australia (WWDA) '[WWDA Position Statement 4: Sexual and Reproductive Rights](#)'. WWDA, September 2016, Hobart, Tasmania. ISBN: 978-0-9585269-6-8.

⁶³ Australian Law Reform Commission (2014) [Equality, Capacity and Disability in Commonwealth Laws](#), ALRC Report 124.

⁶⁴ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (October 2020) [Interim Report](#), page xi.

⁶⁵ Australia's [Interpretative Declarations](#) are:

'Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;

Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;

Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria.'

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- ⁶⁶ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2022) [Research Report: Complaint mechanisms: Reporting pathways for violence, abuse, neglect and exploitation](#).
- ⁶⁷ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2022) [Research Report: Complaint mechanisms: Reporting pathways for violence, abuse, neglect and exploitation](#), page 118, see generally pages 135-139.
- ⁶⁸ Hon Alan Roberston (13 August 2020) [Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020 Report to the Commissioner of the NDIS Quality and Safeguards Commission](#), page 79.
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- ⁷⁰ Kelly Vincent and David Caudrey (31 July 2020), [Safeguarding Taskforce: Report](#), page 22.
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- ⁷² Committee on the Rights of Persons with Disabilities (2019) [Concluding observations on the combined second and third periodic reports of Australia](#), adopted by the Committee at its 511th meeting (20 September 2019) of the 22nd session; UN Doc. CRPD/C/AUS/CO/2-3.
- ⁷³ National Disability Insurance Scheme, [The role of the NDIS Quality & Safeguards Commission](#).
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- ⁷⁷ DPOA (July 2017) [Submission: Senate Community Affairs Legislation Committee, National Disability Insurance Scheme Amendment \(Quality and Safeguards Commission and Other Measures\) Bill 2017](#).
- ⁷⁸ [Witness Statement of Dr Jeffrey Chan](#), Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (4 September 2020) para 71.
- ⁷⁹ The distinction between medication for the purposes of treatment and medication for the purposes of influencing behaviour arises from the definition of chemical restraint. The Restrictive Practices and Behaviour Support Rules define chemical restraint as: 'the use of medication or chemical substance for the primary purpose of influencing a person's' behaviour. It does not include the use of medication prescribed by a medical practitioner for the treatment of, or to enable treatment of, a diagnosed mental disorder, a physical illness or a physical condition.'
- ⁸⁰ Australian Commission on Safety and Quality in Health Care, [5.4 Antipsychotic medicines dispensing, 18–64 years](#).
- ⁸¹ Australian Institute of Health and Welfare (2022) [Mental health services in Australia](#).
- ⁸² Australian Institute of Health and Welfare (2022) [Mental health services in Australia](#).
- ⁸³ Australian Institute of Health and Welfare (2022) Mental health services in Australia: [Mental health-related prescriptions](#).
- ⁸⁴ Australian Institute of Health and Welfare (2022) Mental health services in Australia: [Mental health-related prescriptions](#).
- ⁸⁵ [Witness Statement of Dr Jeffrey Chan](#), Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (4 September 2020) para 71.
- ⁸⁶ [Witness Statement of Dr Jeffrey Chan](#), Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (4 September 2020) para 71.
- ⁸⁷ [Witness Statement of Dr Jeffrey Chan](#), Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (4 September 2020) para 154.
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- ⁹⁶ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2022) [Research Report: Complaint mechanisms: Reporting pathways for violence, abuse, neglect and exploitation](#), page 118, see generally pages 117-146.
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- ⁹⁸ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (2022) [Research Report: Complaint mechanisms: Reporting pathways for violence, abuse, neglect and exploitation](#), page 4.
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- ¹⁰¹ Senate Community Affairs References Committee (Feb 2015) [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, para 42.6.
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