PEOPLE WITH DISABILITY AUSTRALIA : 2010

RIGHTS DENIED:

TOWARDS A NATIONAL POLICY AGENDA ABOUT ABUSE, NEGLECT & EXPLOITATION OF PERSONS WITH COGNITIVE IMPAIRMENT

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POSTSCRIPT

Since this report was completed the following developments have occurred, which relate to the discussion and findings and recommendations set out in the report:

- The Australian Government has acceded to the Optional Protocol to the Convention on the Rights of Persons with Disabilities. The Optional Protocol came into force with respect to Australia on 20 September 2009.
- The Australian Government has declared the Convention on the Rights of Persons with Disabilities an international human rights instrument under s 47 of the Human Rights and Equal Opportunity Commission Act, 1986.
- The NSW Government has repealed the *Protected Estates Act,* 1984 and enacted in its place the NSW Trustee and Guardian Act 2009. The new Act places the onus of proof of incapacity to manage affairs on the applicant and permits the exclusion of part of an estate from management.

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FOREWORD

Research and experience tell us that most persons with cognitive impairment will experience abuse, neglect and exploitation at some points in their lives, and many will experience it every day of their lives. This is an awful reality that stains the conscience of our society.

For too long these harms have been viewed as the inevitable result of impairment or disability: the 'problem' has been situated in characteristics of the person, rather than the environment around them. This view of abuse as an immutable consequence of impairment and disability has contributed to a high level of passivity, acquiescence, pessimism, complacency and neglect from those of our social institutions charged with the responsibility of preventing, identifying, prosecuting and punishing these harms and providing support to victims.

There is also an unfortunate tendency to view abuse, neglect and exploitation of persons with disability as 'welfare' wrongs to be resolved within, or by, social service systems. While it is true that some aspects of the problem do require more than a legal response, the full trajectory of this approach detoxifies these harms and treats them as 'private' problems to be concealed rather than as public problems to be exposed.

This research seeks to reverse these dynamics. Its analytic frame is the social model of disability, in which 'disability' is viewed as the result of the interaction of persons with impairment with a barrier filled social environment. According to the social model, 'disability' is quintessentially a public problem. The social model carries the action implication of dismantling these barriers so that persons with disability can experience genuine equality with others.

In this context, the 'barriers' that must be dismantled include the negative attitudes of professionals, the structure of most specialist services - both of which act as facilitators or accelerants of harm - and the failure of the law to penetrate to many of the principal sites of human rights abuse encountered by persons with disability. The equality that is sought is the ability to live a decent life, free from abuse, neglect and exploitation.

The research method is also underpinned by a detailed analysis of applicable human rights, and in particular by the human rights enunciated in the Convention on the Rights of Persons with Disabilities. Too often the human rights dimensions of abuse, neglect and exploitation of persons with cognitive disability are ignored or recognised only in form, rather than in substance. This report highlights in powerful terms how human rights and the duties that are associated with these rights are to be applied in this area.

Some of the issues discussed in this report have been examined many times. In fact, the report tells us little that is 'new' about the incidence and dynamics of abuse, neglect and exploitation. Indeed, in this respect, perhaps the most damning insight it offers is how little most things have changed over time.

What is new and important about this report is the action plan it sets out for dealing with these harms. This action plan is detailed and ambitious. It is directed to the root cause of the problem.

I commend this report to you and invite you to join with us as we pursue implementation of its recommendations. May the change begin!

JAN DAISLEY
President
People with Disability Australia

Project Managers

This project was a joint venture between People with Disability Australia and the Disability Studies and Research Institute.

People with Disability Australia (PWD) is a national representative and advocacy organisation for persons with all types of disability.

The Disability Studies and Research Institute (DSaRI; 2002-2008) focused on disability research from a social perspective. DSaRI was re-established within the University of New South Wales as the Disability Studies and Research Centre in late 2008.

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Ms Rosemary Kayess:	Disability Studies and Research Institute
Ms Therese Sands:	People with Disability Australia
Ms Jeanette Leggo:	Law and Justice Foundation of NSW
Mr Lester Bostock:	Aboriginal Disability Network
Mr Dinesh Wadiwel:	National Ethnic Disability Alliance
Ms Rachel Merton:	Brain Injury Association
Ms Joanna Schulman:	NSW Disability Discrimination Legal Centre
Ms Nihal Danis:	NSW Mental Health Advocacy Service
Mr Michael Bleasdale:	National Disability Abuse and Neglect Hotline

Ms Maria Attard:	Sexual Assault in Disability and Aged Care Action Strategy Project
Mr Stephen Kilkeary:	Public Interest Advocacy Centre
Ms Ali Craig:	Intellectual Disability Rights Service
Ms Carol Berry:	NSW Council for Intellectual Disability

Near the end of the project, the draft findings and recommendations were discussed at an expert seminar which involved around 50 participants with expertise and interest in this area. We were honoured that the Honourable Bill Shorten, Parliamentary Secretary for Disabilities and Children's Services, Mr Graeme Innes, Australian Human Rights Commissioner and Disability Discrimination Commissioner, and Mr Geoff Mulherin, Director of the Law and Justice Foundation of NSW agreed to address this seminar and provide initial views about the draft findings and recommendations.

The seminar was designed to allow a number of key scholars and advocates to peer review of our findings and recommendations. Their insights have greatly assisted us in finalising our findings and recommendations, and their contribution is acknowledged with appreciation:

Professor Lesley Chenoweth: Professor of Social Work, Griffith University
Ms Sally Robinson: PhD Student, School of Social Work, Griffith University
Mr Dinesh Wadiwel: National Ethnic Disability Alliance
Ms Rachel Merton: Brain Injury Association
Ms Jenny Speed: Queensland Advocacy Incorporated
Ms Fiona Given: NSW Disability Discrimination Legal Centre
Ms Annie Parkinson: Women with Disabilities Australia
Mr Damian Griffis: Aboriginal Disability Network
Mr Michael Bleasdale: National Disability Abuse and Neglect Hotline

We also acknowledge Ms Sally Robinson for her initial work in developing the research proposal submitted to the Law and Justice Foundation for funding.

The authors remain responsible for any shortcomings in the research.

INTRODUCTION

1. RESEARCH DESIGN AND METHOD

1.1 This research investigated the barriers that persons with cognitive disability encounter that prevent or inhibit them from realising their human rights to freedom from abuse, neglect and exploitation, and which prevent or inhibit them from obtaining appropriate remedies for the violation of these rights.

1.2 The research method involved an extensive literature review, 25 key stakeholder interviews, which were analysed using a rich-text method, and a legal and social policy scan. The research had an 'applied' focus. It aimed to produce practice recommendations for legal and social policy reform, and to identify best practice approaches to dealing with complaints alleging abuse, neglect and exploitation of persons with cognitive impairment. The outcomes of this research are published here, and in five practice guides which have been published separately.

1.3 The research did not aim to elicit new information about the incidence or personal experience of abuse, neglect and exploitation of persons with disability. Although continuing research is this area is certainly warranted, the focus of this research was on the structural barriers that prevent persons with cognitive impairment from attaining their human right to freedom from abuse, neglect and exploitation.

1.4 We first interrogated the human rights framework that would provide the framework for the analysis. This not only involved the identification of the human rights relevant to the research, but also a detailed examination of the scope and content of these rights, and the state obligations that apply with respect to their implementation. The findings and recommendations arising from this research are presented within this human rights framework.

1.5 The research method was underpinned by the social model of disability, or perhaps more accurately, a social relations approach to disability. The social model interprets 'disability' as the result of the interaction of persons with impairment with barriers in the social environment. 'Barriers' is a broad concept that includes all sources of impediment. The social model locates the 'problem' of disability in the environment and not in the individual. Its action implication is environmental change.

1.6 This research is limited to persons with cognitive impairment. For the purpose of this study the term 'cognitive impairment' includes persons with congenital intellectual impairment, acquired and organic brain injury, and psychiatric

disorders, whether or not the person has other impairments, and whether or not cognitive impairment is the primary impairment. It (arbitrarily) excluded persons with dementia and neurological conditions. However, consistent with the social model, this research does not dwell on the characteristics of impairment, nor does it seek to explain abuse, neglect and exploitation in terms of impairment. One consequence of this is that many of the findings and recommendations we have made will be broadly relevant across impairment groups, and indeed to other categories of 'vulnerable' adults.

1.7 Our research was structured around 10 'focal points': incidence; prevention; deterrence; detection; reporting; investigation; prosecution; remedies; punishment; and, treatment and support services.

1.8 Investigation of each focal point generated a voluminous quantity of information and suggested many possible directions. For practical purposes, we have had to apply a limiting device to ensure that the research could be completed within the constraints of its budget and time allocation. Consequently, our research findings and recommendations have been formulated following a 'gap analysis' of the legal and social policy scan, informed by the literature review and key informant interviews. Briefly, this has involved the identification of the current legal and social policy status in each focal point and the postulating of the optimal (or goal) state for that focal point. Those areas that disclosed the greatest 'gap' between the current and goal state were selected for detailed attention.

1.9 At the outset, we adopted working definitions for abuse, neglect and exploitation, which were derived from Commonwealth policy in this area. They are set out in Appendix 1 of this report. These definitions are currently used by the National Disability Abuse and Neglect Hotline. Although these definitions, themselves, were not a major focus of inquiry in this research, it did become apparent in the course of our work that revision of some definitions was desirable to provide greater conceptual clarity. These issues have been taken up with the Hotline and the Australian Department of Families, Housing, Community Services and Indigenous Affairs.

1.10 This project was undertaken broadly according to an action-research method conducted as a partnership between a research institution and a disability rights organisation. Action-research pursues action and research outcomes together. Our particular approach has involved a cyclic method where initial ideas are formulated, revisited and progressively refined as information and knowledge emerges. Critical reflection (including peer review) has occurred in each cycle. The research was highly participatory engaging directly with key

stakeholder groups in several different ways, and it has included a significant qualitative research component. At the conclusion of the project the research findings and recommendations will provide the basis for systemic advocacy by People with Disability Australia.

2. HUMAN RIGHTS FRAMEWORK

2.1 This research is directed to ascertaining the barriers that persons with cognitive impairment encounter to attaining their human rights to freedom from abuse, neglect and exploitation. It has therefore been necessary to first identify the human rights, and human rights standards, that relate to this objective.

2.2 Australia is a party to seven of the current nine so-called 'core' United Nations human rights treaties. They are:

- The International Covenant on Civil and Political Rights (ICCPR)
- The International Covenant on Economic, Social and Cultural Rights (ICESCR)
- The International Convention on the Elimination of All Forms of Racial Discrimination (CERD)
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
- The Convention on the Rights of the Child (CRC)
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)
- The Convention on the Rights of Persons with Disabilities (CRPD)

2.3 Each of these treaties is of equal status, and each is universal within its purview. Consequently, the human rights and related obligations and standards they enunciate must be read as a whole, rather than as alternatives. This principle has very important implications for the interpretation and implementation of the CRPD. In brief, the CRPD must not be used as the 'only' source of human rights of persons with cognitive impairment. Other sources of rights and standards must also be recognised where they are applicable.

2.4 From the point of view of this research key human rights and related standards need to be drawn from:

- ICCPR: which incorporates the requirement that parties ensure that any persons whose rights are violated have access to an effective remedy;

- CEDAW : with respect to the multiple and aggravated forms of human rights violation experienced by women and girls with cognitive impairment;
- CERD: with respect to the multiple and aggravated forms of human rights violation experienced on the ground of race; and
- CAT: which elaborates human rights and their related standards with respect to freedom from torture and cruel, inhuman and degrading treatment or punishment.

2.5 Additionally, although of lesser and non-binding status, the United Nations Declaration on the Rights of Indigenous Persons is relevant source of human rights and related standards for this research. It is the first international human rights instrument to explicitly recognise and enunciate the rights of indigenous persons. In April 2009 the Australian Government issued a formal statement of support for this declaration.

2.6 Nevertheless, the CRPD is obviously now the principal, and initial, source of human rights for persons with cognitive impairment. The CRPD was adopted by the United Nations General Assembly in December 2006 and entered into force at the international level on 3 May 2008. Australia ratified the CRPD on 17 July 2008 and it entered into force with respect to Australia 30 days later on 16 August 2008.

2.7 The CRPD comprises a Preamble and 50 Articles, at least 30 of which have substantive human rights content. Appendix 2 contains a short summary of each substantive article.

2.8 Articles 1 and 2 of the CRPD are interpretive provisions. Article 1 sets out the general purpose of the CRPD, and describes the class of persons to whom the CRPD applies. Article 2 defines key terms used throughout the text. From the point of view of this research it is important to note the following points in relation to articles 1 and 2:

- The category of persons protected by the CRPD is described as including persons with long-term physical, mental, intellectual or sensory impairments. In other words, the protected class is an open rather than closed category. It certainly includes persons with any form of cognitive impairment.
- 'Disability' is understood according to the social model; that is, it is understood as the result of persons with impairment attempting to interact with environmental barriers. These 'barriers' are viewed as

hindering the full and effective participation of persons with disability in society on an equal basis with others.

- 'Discrimination on the basis of disability' is defined as including the denial of reasonable accommodation.

2.9 Articles 3 to 9 of the CRPD elaborate 7 general obligations. These articles set out overarching or crosscutting principles and measures to be applied in all aspects of the implementation of the CRPD. They contain legally binding obligations and also assist in clarifying the scope and content of the specific obligations. They include articles that establish general principles for the interpretation of the CRPD, an article that sets out in detail state obligations with respect to the implementation of the CRPD and articles that require recognition of gender and age related dimensions of human rights violations.

2.10 Articles 10 to 30 are specific obligations and set out, mostly in some detail, the specific human rights and fundamental freedoms recognised by the convention. Broadly speaking, Articles 10 to 23 and Article 29 are based in civil and political rights, while articles 24 to 28 and Article 30 are based in economic, social and cultural rights. With respect to this research a number of these articles are particularly relevant. They are:

- Article 10: Right to life
- Article 12: Equal recognition before the law
- Article 13: Access to justice
- Article 14: Liberty and security of the person
- Article 15: Freedom from torture or cruel, inhuman or degrading treatment or punishment
- Article 16: Freedom from exploitation, violence and abuse
- Article 17: Protecting the integrity of the person
- Article 18: Liberty of movement and nationality
- Article 19: Living independently and being included in the community

We shall discuss the requirements and implications of these, and some other rights, in detail later in the report.

2.11 Articles 31 to 40 set out national and international implementation and monitoring requirements. From the point of view of this research it is relevant to note the following obligations:

- Article 31 requires parties to collect appropriate information, including statistical and research data, to enable them to formulate and implement policies to give effect to CRPD rights;

- Article 33 requires parties to establish or designate focal points and coordination mechanisms within government to facilitate implementation of the CRPD within and across sectors and layers of government; and
- Article 33 also requires parties to establish or designate independent mechanisms to promote, protect and monitor implementation of the CRPD.

2.12 The CRPD has a dynamic rather than linear structure. In order to ascertain the scope and content of a specific obligation it is necessary to read that obligation in association with the general obligations. In some instances it is also necessary to read a specific obligation in association with another specific obligation. This is not only because of the general principle that all human rights are indivisible, interdependent and inter-related, but also because the CRPD has a number of specific organising principles embedded within it. We shall discuss the implications of some of these organising principles later in this report.

2.13 According to international law, parties to a convention such as the CRPD solemnly undertake general obligations to 'recognise,' 'respect,' 'protect,' and 'fulfil' the human rights set out in that convention. The scope and content of these obligations is set out in some detail in Article 4 of the CRPD.

2.14 By way of summary, the obligation to 'recognise' human rights entails concerted action at the domestic level to:

- Enact laws and develop policies and programmes to give full effect to human rights;
- Amend or repeal laws and policies, and abandon programmes and practices, that violate human rights; and
- Systematically take human rights into account in all legislative and administrative action.

2.15 The obligation to 'respect' human rights requires parties to refrain from engaging in any act or practice that violates, or is inconsistent with, human rights and ensure that all public authorities and institutions act in conformity with these rights.

2.16 The obligation to 'protect' human rights requires parties to take action to prevent non-state actors from violating or acting inconsistently with human rights. With respect to the human rights of persons with disability specifically, this includes the obligation to take all appropriate measures to eliminate

discrimination on the basis of disability by any person, organisation or private enterprise.

2.17 The obligation to 'fulfil' human rights requires parties to take positive action to ensure the full realisation of human rights by every person. With respect to the human rights of persons with disability this includes the obligation to:

- Undertake research and development of universally designed goods, services, equipment and facilities, and in relation to new technologies;
- provide accessible information to persons with disability about assistive devices and services;
- Promote the training of professionals and staff working with persons with disability in relation to human rights; and
- Closely consult with persons with disability in relation to all action to implement the CRPD, and in relation to all other issues impacting on persons with disability.

2.18 Under international law there are different standards of obligation associated with civil and political rights, and economic, social and cultural rights. Civil and political rights are 'immediately realisable' which means, essentially, that parties must ensure that these rights are recognised, respected, protected, and fulfilled immediately upon entry into the treaty. Economic, social and cultural rights are 'progressively realisable.' The standard of progressive realisation does not require parties to immediately recognise, respect, protect and fulfil these rights upon entry into the obligation. They must instead work towards the fulfilment of these rights as quickly as possible, using the maximum resources at their disposal.

2.19 With few exceptions, the human rights that relate to freedom from abuse, neglect and exploitation relied upon in this research are civil and political rights subject to the standard of immediate realisation. One key implication of this is that if it can be shown that any of these rights is not fulfilled for persons with disability in the Australian context, Australia stands in violation of the right, or at the least is acting inconsistently with these rights. Urgent action would therefore be required to remedy this situation.

2.20 Under international law, parties to treaties undertake to ensure that the terms of the treaty are applied in all parts of federal states. This is a general obligation set down in Article 4 of the CRPD, and it is also a requirement of the Vienna Convention on the Law of Treaties to which Australia is also a party. In the Australian context this means that although it is Commonwealth Government that enters into the treaty on behalf of the nation, the provisions

of the treaty are binding not only upon the Commonwealth Government, but also upon each State and Territory Government. This point is of particular significance in this research because many of the issues we have identified for action fall within areas of State responsibility.

LEARNING FROM THE LITERATURE

1. OVERVIEW

1.1 In the first stage of the project we undertook an extensive literature review in relation to abuse, neglect and exploitation of persons with cognitive impairment. The purpose of this literature review was to establish the reported incidence and dynamics of abuse, neglect and exploitation, and the reported barriers to persons with cognitive impairment realising their right to freedom from such harm. The relevant literature was analysed and reported against the sub-headings set out below. In this section of the report we provide a brief overview of what we learnt from the literature review. A full bibliography of the literature we reviewed is included at Appendix 4.

2. INCIDENCE AND DYNAMICS

2.1 There is no publicly reported systematic data collection in relation to abuse, neglect and exploitation of persons with cognitive impairment in Australia. Estimates of the incidence of abuse, neglect and exploitation of persons with cognitive impairment in the Australian context are therefore substantially based on international comparative data and local small scale qualitative studies.

2.2 Estimates of the incidence of abuse, neglect and exploitation of persons with disability vary very widely. Studies are also difficult to compare due to the differences in the population groups and research methods adopted. However all studies report a high to very high incidence of abuse, neglect and exploitation.

2.3 Most reported research has focused on the higher incidence of sexual abuse of persons with cognitive impairment than for the general population. There is very limited or no reported incidence-related research on other forms of abuse, neglect or exploitation.

2.4 Various international and national studies report that between 50-99% of persons with intellectual and psychosocial impairment are subject to sexual assault at some point in their lifetime. These reports generally arise from relatively small-scale qualitative research projects that are difficult to compare (Valenti-Hein and Schwatz 1995; Kvam 2000; Groce 2005; Carmody 1990; Firsten 1991; Hard 1986; McCarthy 1996; Muccigrosso 1991; Mulder 1996; Sobsey and Doe 1991; French 2007; Camilleri 2003; Frohmader 2007).

2.5 Most studies focus on sexual abuse of women and girls with cognitive impairment. However, there appears to also be a high incidence of sexual

assault of men and boys with cognitive impairment (Brown, Stein and Turk 1995). Sexual violence against men and boys with cognitive impairment may be under-acknowledged (French 2007).

2.6 Violence against children with disability across the world is reported to occur at annual rates at least 1.7 times greater than their peers without disability (American Academy of Pediatrics 2001; Groce 2005). Children with disability are highly likely to be sexually abused before turning 18: one study reported that up to 68% of girls and 30% of boys are likely to experience sexual abuse (The Roeher Institute 1992; Community Services Commission and Intellectual Disability Rights Service 2001; Stromsness 1993; Finkelhor 1979; Connelly and Keilty 2000).

2.7 Persons with cognitive impairment are three times more likely than others to experience violent or severe sexual offences. Sexual offences against persons with cognitive impairment are also three times more likely to involve penetration (Wilson and Brewer 1992; Nosek 1997).

2.8 Sexual assaults against persons with cognitive impairment are more likely to be of a repeated or continuing nature than sexual assaults generally (Nosek 1997).

2.9 Persons with cognitive impairment, including children, are between one-and-a-half and three times more likely to be victims of (other) assault than other people of the same age and gender (Sobsey and Varnhagen 1989; Sobsey 1994; Wilson 1990; Community Services Commission and Intellectual Disability Rights Service 2001; American Academy of Pediatrics 2001; Groce 2005).

2.10 Seventy-five per cent of reported elder abuse cases involve the abuse of an older person with cognitive impairment (Boldy et al 2002; Black 2008).

2.11 Persons with cognitive disability are often subject to a 'cycle of violence.' Impairment is sometimes a consequence of previous violence, and disability resulting from this impairment is a greater risk factor for future violence (Sobsey 1994).

2.12 Violence against persons with cognitive impairment is reported to be particularly associated with institutional and other congregate supported living environments, including group homes (Sobsey 1994; Chenoweth 1993 ; Conway et al 1996; Connelly and Keilty: 2000; Community Services Commission and Intellectual Disability Rights Service 2001; the Disability Council of NSW 2003; Lievore 2005; Firsten 1991; Jacobsen and Richardson 1987; Marchetti and McCartney 1990; Sobsey and Doe 1991; French 2007). Institutions are characterised by an extreme power imbalance between staff and residents.

Staff have access to residents' personal space, their body, and have the potential to control every aspect of their lives, including their sexuality, how and when they sleep, eat, wash, communicate, exercise, and rest (Chenoweth 1997; Sobsey 1994; McFarlane 1994; Shakespeare 1996; Calderbank 2000).

2.13 This may be a consequence of overcrowding and a lack of private space for residents which results in invasive behaviours and a culture of abuse between residents. This culture of abuse is self-sustaining – new entrants observe and learn, then perpetrate the same abuse (Bandura et al 1963; Sobsey 1994).

2.14 In some institutional settings for persons with cognitive impairment children are accommodated, and share other space, with adults, and in some cases adults with cognitive impairment help care for children with cognitive impairment (Groce 2005). Persons with similar support needs (for example, those with behaviours of concern) may be accommodated together, rather than those with complimentary support needs (French 2007). These and similar practices increase the risk of abuse (Sobsey 1994; Wilson and Brewer 1992; Community Services Commission and Intellectual Disability Rights Service 2001).

2.15 Persons with cognitive impairment who live in institutions receive few visits from family and friends, and most institutions receive little genuine oversight and monitoring from government, public health officials, the public, the press or the police (Sobsey 1994; Groce 2005). Residents of institutions also typically have little access to independent advocacy. Abuse, neglect or exploitation is therefore more likely to go undetected, and if it is detected, it is less likely to be acted upon (Community Services Commission and Intellectual Disability Rights Service 2001; White, Holland et al 2003; French 2007).

2.16 Institutional services tend to show little interest in, or exposure to new ideas about best practice. They typically cancel professional development sessions, fail to implement programs, cancel appointments, and demonstrate reluctance to accept criticism (Martin 1984; Wardhaugh and Wilding 1993; Cambridge 1999; White, Holland et al 2003).

2.17 Many institutional environments are impoverished. There may be rationing of essential items, such as bed clothes, toiletries, and recreational materials. There may be a lack of engagement of residents in constructive activity, resulting in their boredom, challenging behaviour and in troubled relationships between residents (Wardhaugh and Wilding 1993; Buckingham City Council 1998; White, Holland et al 2003).

2.18 Work in institutional environments may be very demanding upon staff. It may also be poorly paid and lack social status. Institutions typically find it difficult to attract, recruit and retain staff and consequently are forced to hire untrained, inexperienced and less preferred staff (Groce 2005; French 2007).

2.19 Staffing arrangements in institutional settings are typically acutely hierarchical. Direct support staff may feel very powerless regarding the organisation, its management and administration. Their power over residents is used to balance those dynamics and allow them to establish some control (White, Holland et al 2003). Institutional reform is often difficult because of their hierarchical nature. The influence of direct staff on procedures is extremely limited. Administrators tend to be quite removed from the realities of the lives of residents and the practices of their staff (Sobsey 1994).

2.20 Authoritarian management styles in disability services are reported to promote oppressive and abusive cultures among staff (Buckingham City Council 1998; White, Holland et al 2003).

2.21 Recruitment processes are often hurried and background checks upon staff are not conducted. In most jurisdictions there is no register of perpetrators of abuse against persons with disability in care. Consequently, it is relatively easy for perpetrators to move from one place of employment to another when they are discovered or dismissed (Groce 2005). There has been a movement of perpetrators from services for children (which do now have background police checks in a number of jurisdictions) to services for vulnerable adults, including those for persons with cognitive impairment (Lievore 2005; Blyth 2002).

2.22 Understaffing is a major problem in many institutional settings and in disability services more generally. There are typically vacant positions, high levels of sick leave, rapid staff turnover. This means that staff typically work long hours and sometimes consecutive shifts which increases the risk of fatigue, stress and the potential for abusive practices (Martin 1984; Sundram 1984; Furey 1989; Wardhaugh and Wilding 1993; Sobsey 1994; ARC/NAPSAC 1996; Buckingham City Council 1998; Local Government Ombudsman 2001; White, Holland et al 2003).

2.23 Negative attitudes towards persons with cognitive impairment are emphasised in institutional settings. Stigma associated with disability is intensified, and there is a high degree of dehumanisation of residents. This culture has a dis-inhibiting effect on staff increasing the likelihood that they will engage in coercive, physically and emotionally abusive behaviour (Goffman 1963;

Wolfensberger 1975; Sobsey 1994; Martin 1984; Fury 1989; Sobsey and Mansell 1990; Wardhaugh and Wilding 1993; McCarthy and Thompson 1996; Allen and Harris 2000; White, Holland et al 2003).

2.24 More than twenty different types of abuse and neglect are reported to be experienced by persons with cognitive impairment accommodated in supported living environments. One study reported that physical abuse constitutes 35% of the total, emotional, psychological and mental abuse 15% of the total, sexual abuse 14% of the total; failure to provide basic requirements 10% of the total; and abusive behaviour management practices 10% of the total (Conway et al 1996; Community Services Commission and Intellectual Disability Rights Service 2001).

2.25 The perpetrators of abuse against persons with disability are reported to be most commonly service providers, other service users and visitors (Community Services Commission and Intellectual Disability Rights Service 2001; Goodfellow and Camilleri 2003; Human Rights Watch 2005; Groce 2005; Turk and Brown 1993; Beail and Warden 1995; Brown et al 1995; McCathy and Thomson 1997; Bruder and Kroese 2005).

2.26 Sexual offenders are reported as most likely to be male, and to be repeat offenders. Studies also suggest that persons with disability are most likely to be harmed by someone who is known to them (Furey 1994; Sobsey 1994; Chenoweth 1997; Goodfellow and Camilleri 2003; Turk and Brown 1993; Beil and Warden 1995; Brown et al 1995; McCarthy and Thomson 1997; Bruder and Kroese 2005).

2.27 Much of the published literature on abuse against persons with disability focuses on personal characteristics and attributes as the primary risk factors. The personal risk factors reported include: dis-inhibition; craving for affection; ready compliance with authority; inability to judge the motivation of others; the absence of social skills necessary to distinguish appropriate from exploitative behaviour; feelings of helplessness and powerlessness; low self esteem; lack of assertiveness; inability to defend oneself or obtain assistance; and, impulsivity (Stromness 1993; Roeher Institute 1992 ; Department for Women 1995 ; Hayes 1993; Community Services Commission and Intellectual Disability Rights Service 2001; Frohmader 2007; Lumley and Miltenberger 1997; Watson 1984; Sobsey 1988; Sobsey and Mansell 1990; Sobsey and Varnhagen 1989; Bruder and Kroese 2005).

2.28 However, a number of writers argue that personal vulnerability is a social construct (Tyiska 2001; Lievore 2005). It is argued that while victim traits may be associated with a risk of abuse, they must not be interpreted in a way that implies that the victim is partially or wholly responsible for the harms perpetrated upon them, in terms of the encouraging, provoking or facilitating these harms. The confusion between the cause of crime and its associated factors leads to a 'blame the victim' approach to these crimes, instead of locating the responsibility for abuse with the perpetrators (Sobsey 1994; Hoog 2003; Fromader 2007).

2.29 A number of writers highlight overprotection from carers as a key risk factor for harms against persons with cognitive impairment. Persons with cognitive impairment are typically infantilised, and excluded from making decisions about their own lives. Women with cognitive impairment are not taught survival tools necessary to avoid potentially dangerous situations (Chenoweth 1994; French 2007). They may be deprived of sex education and restricted from sexual interaction. Consequently, they may then experience difficulties in discriminating between appropriate and inappropriate exploitative behaviour in others (Chenoweth 1997; Sobsey and Varnhagen 1989; Bruder and Kroese 2005; French 2007). Similarly, carers are attributed with teaching compliance, which renders persons with cognitive impairment likely to obey an abuser and gives the abuser even more control over the person (Sobsey 2004).

2.30 Most perpetrators of abuse, neglect and exploitation of persons with cognitive impairment are persons close to them, including those in informal caring relationships. Abusive informal carer relationships are very difficult for persons with cognitive impairment to escape from. It is also very difficult for persons with cognitive impairment to complain about abuse, neglect and exploitation experienced in informal care relationships as the carer is typically present and controls most aspects of the person's movement and contact with the outside world (Goodfellow and Camilleri 2003; Sherry 2003; Blyth 2002; Lievore 2005; Frohmader 2007).

2.31 Informal carers such as parents, spouses, and other family members are commonly thought by society to be good people, devoted to the care of their relative with cognitive impairment. Society honours their compassion and devotion while ignoring the destructive behaviour of some of them. Service providers, law enforcement agencies and the public are therefore less likely to believe that abuse, neglect or exploitation occurs in such relationships, or are more likely to 'tolerate' such conduct because of the esteem in which they hold

the carer for the 'burden' they carry (Glasser 1978; Sobsey 1994; Goodfellow and Camilleri 2003; Sherry 2003; Blyth 2002; Lievore 2005; Fromader 2007; French 2007).

2.32 Persons with cognitive impairment are subject to destructive stereotypes which make them more vulnerable to abuse, neglect and exploitation. Women with cognitive impairment are socially constructed as being of little worth, invisible, and less than human, which makes them increasingly vulnerable to violence (Chenoweth 1997). They are subject to stereotypes that construct them as asexual, genderless, and eternally child-like. Alternatively, they may be constructed as sexually voracious, or insensate. They may be portrayed as sexually repulsive, and as incapable of partnership and motherhood. Such assumptions reduce perpetrators inhibition against abuse and increase societal tolerance of it. The impact on the individual may be to compel them to accept and maintain unhealthy, exploitative relationships as the only relationships they could ever have (Chenoweth 1997; French 2007).

2.33 Perpetrators of sexual abuse against persons with cognitive impairment are attracted by vulnerability and availability, rather than by physical attributes of potential victims (Blyth 2002; Lievore 2005; French 2007)).

2.34 Perpetrators are attracted to work in environments where they will have access to persons with cognitive impairment (Chenoweth 1997; Groce 2005). An American study found that 11% of all those working as teachers' aides, transportation staff or school janitorial staff in programs for children with disability had previous criminal records, many related to child abuse, including child sexual abuse (Groce 2005).

2.35 The invisibility of women with disability and their marginalisation within both the mainstream women's movement and the disability rights movement is also viewed as increasing the susceptibility of women with cognitive impairment to violence. It does so by creating an impenetrable silence around the issues which results in a lack of structural action to prevent, reduce, and address violence against women with disability (Chenoweth 1993, Lloyd 1992, Morris 1991, Thomson 1994; Chenoweth 1997).

2.36 Persons with cognitive impairment are typically structurally excluded from the workplace and therefore are more likely to experience poverty and economic dependence. They are consequently more likely to live and socialise in environments that may be characterised by a high incidence of crimes, the presence of persons with anti-social behaviours and high social needs, and

which lack adequate urban infrastructure (for example, lighting and policing), which intensifies social problems (French 2007). Also, because of their lack of economic independence, they might remain in violent relationships for their survival (Carlson 1997; Mosher et al 2004; Nosek et al 2001; Fromader 2007).

2.37 Negative cultural beliefs may also result in the abuse, neglect and exploitation of persons with cognitive impairment from particular cultural backgrounds. Impairment may be culturally associated with a curse upon the person, or their parents. It may be thought to be the result of an incestuous relationship engaged in by the mother or a sin committed in a previous incarnation. There is also a traditional belief in some cultures that sex with a virgin cures sexually transmitted diseases including HIV/AIDS. This may result in the specific targeting of persons with cognitive impairment (Groce and Trasi 2004; Groce 2005).

2.38 Persons with cognitive impairment frequently experience vilification and other forms of verbal abuse (Sherry 2003). Sherry refers to such conduct as 'hate crime,' as 'the violence of bigotry, and as 'cellophane crimes – people walk right through them, look right through them, and never know they are there.' Persons with cognitive impairment are also frequently the subject of jokes and teasing which sometimes cause distress and humiliation. Jokes and teasing may be antecedents of, or associated with staff bullying, as well as being a mask for staff frustration or aggression (Martin 1984; Manthorpe and Stanley 1999; White, Holland et al 2003).

2.39 There is sometimes a stark contrast between policy in relation to abuse, neglect and exploitation, and actual practice. Administrators may make strong and apparently sincere statements against abuse while at the same time being unwilling to confront it. They may also punish those staff that report abuse to reduce the number of complaints they need to deal with (Sobsey 1994).

Defining Abuse, Neglect and Exploitation

2.40 **Abuse** is defined by the Australian Government as 'the violation of an individual's human or legal rights by the act or actions of another person or persons'[1]. Six types of abuse are recognised: physical abuse; sexual abuse; psychological or emotional abuse; constraints and restrictive practices; legal or civic abuse; and, systemic abuse.

[1] 'Abuse' and its six types have been defined by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). All definitions have been endorsed by the National Disability Abuse and Neglect Hotline, fully funded by the Australian Government through FaHCSIA: www.disabilityhotline.org/abuse.html (accessed 19/08/09)

2.41 **Physical abuse** is defined to mean 'any non-accidental physical injury or injuries to a child or adult including the infliction of pain of any sort or causing bruises, fractures, burns, electric shock, or any unpleasant sensation.'

2.42 It has also been argued that the administration of poisonous substances or inappropriate drugs is physical abuse (Frohmader 2007). Persons with disability may also be subjected to physical abuse during invasive medical examinations, which may also undermine their sense of ownership of their own bodies (Shakespeare 1996; Calderbank 2000).

2.43 **Sexual abuse** is defined to mean 'any sexual contact between an adult and child 16 years of age and younger, or any sexual activity with an adult who is unable to understand, has not given consent, is threatened, coerced or forced to engage in sexual behaviour.'

2.44 Some commentators argue for a broader understanding of sexual abuse. It is suggested that sexual abuse involving sexual contact includes intercourse, fondling, forced masturbation or any roughness with intimate body parts. It is suggested that sexual abuse not involving any contact can consist of being forced to view pornography, being watched while undressing, being left naked or exposed, and having the offender expose their genitals (Stromness 1993; Frohmader 2007).

2.45 Control of reproductive capacity such as forced or involuntary sterilisation, forced or coerced abortion, and menstrual suppression are also defined as forms of sexual violence (Chenoweth 1997; Frohmader 2007; Groce 2005).

2.46 **Psychological or emotional abuse** is defined to mean 'verbal assaults, threats of maltreatment, harassment, humiliation, or intimidation, and failure to interact with a person or to acknowledge that person's existence. This may also include denying cultural or religious needs and preferences.'

2.47 Frohmader has suggested an alternative definition: 'the infliction of anguish, pain, or distress through verbal or non-verbal acts and/or behaviour which results in harm to a person's self concept and mental well-being.' This includes acts such as withdrawal of affection, physical isolation, denial of disability, ignoring requests for assistance and violations of privacy (Frohmader 2007).

2.48 **Restraints and restrictive practices** are defined to mean 'restraining or isolating of a child or adult for reasons other than medical necessity or the absence of a less restrictive alternative to prevent self-harm. This may include the use of chemical or physical means or the denial of basic human rights or choices such

as religious freedom, freedom of association, access to property or resources, or freedom of movement.'

2.49 Several commentators have noted the importance of defining chemical restraint as a restrictive practice. Medications are sometimes used as chemical restraints in order to keep persons with cognitive impairment sedated. They may be used as an alternative to active engagement of the person in activities or to suppress challenging behaviours that would otherwise arise for environmental reasons (for example, challenging behaviours that would arise due to overcrowding) (Groce 2005).

2.50 It has also been suggested that financial management practices ought to be recognised as a restrictive practice. One study highlighted the difficulties some persons with cognitive impairment experience in attempting to negotiate with the Protective Commissioner to gain access to their money (Karras, McCarron 2006).

2.51 Other studies have argued that practices that deny persons with cognitive impairment the ability to experience a sexual life or their sexuality ought be considered restrictive practices (McFarlane 1994; Calderbank 2000).

2.52 **Legal or civic abuse** is defined to mean 'the denial of access to justice or legal systems that are available to other citizens.'

2.53 A number of studies have reported the difficulties that persons with cognitive impairment face in obtaining access to legal information, advice and representation to deal with a wide range of problems including proceedings under the Mental Health Act 2007; guardianship and estate management issues; disability discrimination; consumer protection issues; and, domestic and personal violence (Karras, McCarron et al 2006).

2.54 **Systemic abuse** is defined to mean 'the failure to recognise, provide or attempt to provide adequate or appropriate services, including services that are appropriate to that person's age, gender, culture, needs or preferences.

2.55 A number of commentators have also referred to stereotyping as systemic abuse. For example, the fact that many adults with intellectual impairment continue to be stereotyped as children or child-like means that they are not given the opportunity to grow up, take on new roles that give them adult status and value in their families, with friends, or in the wider community (Queensland Advocacy Incorporated and Forbes 2001).

2.56 **Neglect** is defined by the Australian Government to mean 'a failure to provide the necessary care, aid or guidance to dependent adults or children by those responsible for their care'[2]. Four types of neglect are recognised: physical neglect; passive neglect; wilful deprivation; and, emotional neglect.

2.57 **Physical neglect** is defined to mean 'the failure to provide adequate food, shelter, clothing, protection, supervision and medical and dental care, or to place persons at undue risk through unsafe environments or practices.'

2.58 **Passive neglect** is defined to mean 'a caregiver's failure to provide or wilful withholding of the necessities of life including food, clothing, shelter or medical care.'

2.59 **Wilful deprivation** is defined to mean 'wilfully denying a person who, because of age, health or disability requires medication or medical care, shelter, food, therapeutic devices or other physical assistance – thereby exposing that person to the risk of physical mental or emotional harm.'

2.60 **Emotional neglect** is defined to mean 'the failure to provide the nurturance or stimulation needed for the social, intellectual and emotional growth or well being of an adult or child.'

2.61 The existing definitions of neglect may not adequately recognise the failure to provide necessary mental health services. For example, one commentator has highlighted the over-representation of Aboriginal persons with mental illness in the criminal justice system, and the relationship of untreated mental illness to death in custody (Bostock 2004).

2.62 Another study has highlighted the emotional and physical deprivation that persons with cognitive impairment experience in some institutional settings as a result of inadequate staffing, poor staffing practices and lack of funding, which leads directly to avoidable suffering and death (Groce 2005).

2.63 The NSW Ombudsman's reviews of the deaths of persons with disability in care have highlighted a lack of effective systems to identify and manage risks to life, and a lack of appropriate first aid training for staff as leading to avoidable deaths (NSW Ombudsman 2007).

[2] 'Neglect' and its four types have been defined by the Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA). All definitions have been endorsed by the National Disability Abuse and Neglect Hotline, fully funded by the Australian Government through FaHCSIA: http://www.disabilityhotline.org/abuse.html (accessed 19/08/09)

2.64 The Australian Government defines exploitation as 'the improper use of another person or the improper use of, or withholding of, another person's assets and resources.' Four types of exploitation are recognised: financial exploitation; sexual exploitation; servitude; and, organ harvesting.

2.65 **Financial exploitation** is defined to mean 'the improper use of another person's assets or the use or with-holding of, another person's assets and resources.'

2.66 **Sexual exploitation** is defined to mean 'forcing a person to perform sexual acts for others, or to feature in a pornographic image, whether or not for compensation.'

2.67 A number of studies have highlighted the risk that children and adults with cognitive impairment will be targeted for sex slavery or prostitution because they are more likely to comply with the direction of abusers and are less likely to be able to call for help (Groce 2005).

2.68 **Servitude** is defined to mean 'forcing a person to perform labour for others, without lawful excuse. This includes 'begging' from others.

2.69 International studies report that children with cognitive impairment are sometimes forced into street begging by their own families, and may be subject to physical abuse in order to make them appear more pathetic and worthy of charity (Groce 2005).

2.70 An Australian study provides some case history examples of persons with cognitive impairment being induced to steal for others (French 2007).

2.71 **Organ harvesting** is defined to mean 'the removal of organs from the body of a living person for the benefit of another person.'

Critique of the abuse, neglect and exploitation paradigm

2.72 A number of commentators are critical of the use of the terms abuse, neglect and exploitation to describe conduct that amounts to violence, assault, theft, etc. It is suggested that the use of an alternative language in relation to crimes against persons with cognitive impairment tends to minimise and detoxify these harms, and reflects the failure to recognise these harms for what they are (Sorensen 1997; Frohmader 2007; Sobsey 1994; Sherry 2003).

3. REPORTING

3.1 Crimes against persons with cognitive impairments are likely not to be reported to the police or other authorities, especially when the victims are living in institutional and other service settings (Community Services Commission and Intellectual Disability Rights Service 2001; Powers, Mooney and Nunno 1990; Sobsey 1994; Frohmader 2007). One study reported that 40% of crimes against persons with mild and moderate developmental disability, and 71% of crimes against persons with more severe developmental disability went unreported to the police (Wilson and Brewer 1992; Sobsey 1994).

3.2 Crimes against persons with cognitive impairments are significantly under-reported due to the inability of both victims and those around them to recognise evidence of abuse (Chenoweth 1997; Furey and Neisen 1994; Community Services Commission and Intellectual Disability Rights Service 2001; White, Holland et al 2003; Lievore 2005; Wilson and Brewer 1992; Frohmader 2007).

3.3 Sexual abuse of persons with cognitive impairment is poorly detected and reported due to the lack of education provided to persons with cognitive impairment about sexuality, relationships and sexual rights, and because to the lack of training provided to disability support workers in relation to recognising signs of sexual abuse (Goodfellow and Camilleri 2003; Lievore 2005; Rousso 2003; Frohmader 2007).

3.4 It has been suggested that persons with psychosocial impairment tend to have low levels of participation in education and therefore lack knowledge about legal issues and the legal system, and may not recognise that their problem has a legal element to it (Karras, McCarron et al 2006).

3.5 In the case of hate crimes, investigative officers might share the bias of the perpetrator because of a lack of awareness of disability issues. They might therefore not recognise the discriminatory aspect of an incident, and thus underestimate the significance of the crime (Sherry 2003).

3.6 The view of abuse, neglect and exploitation of persons with cognitive impairment as being inevitable and unavoidable results in a tendency not to report this conduct when it occurs. For example, women with cognitive impairment may be thought not to suffer from sexual abuse when it occurs 'because they are used to it' (McCarthy and Thompson 1996; Calderbank 2000). Abuse between residents in supported accommodation may be considered the

'inevitable consequence of group living' (ARC/NAPSAC 1996; McCarthy and Thompson 1996; Manthorpe and Stanley 1999; White, Holland et al 2003).

3.7 Persons with cognitive impairment may be socialised in a way that leads them to expect and accept a certain level of personal indignity, mishandling, violence and neglect as a feature of service delivery to them. They may become desensitised or resigned to such conduct (French 2007). In more extreme cases, they may come to believe that abuse, neglect and exploitation is 'deserved' because of their impairment, the 'burden' they represent to others, and their lack of social value (Hendey and Pascalls 1998; Calderbank 2000; French 2007)

3.8 The level of dependence of persons with cognitive impairment on their carers and service providers limits their willingness to disclose abuse, neglect and exploitation. They may fear that their support services will be withdrawn or suspended and that no appropriate alternative support services will be available. For example, a person with cognitive impairment may fear that if they complain about an informal carer they may be forced to live in institutional accommodation or become homeless. Additionally, persons with cognitive impairment may fear retribution from service providers if they report abuse, involving further physical and psychological abuse (Hendey and Pascalls 1998; Calderbank 2000; Fromader 2007; French 2007). Persons with cognitive impairment may elect not to report abuse, neglect and exploitation because they believe that things will get worse if they do so (Hendey and Pascalls 1998; Calderbank 2000; French 2007).

3.9 Children with cognitive impairment may be reluctant to disclose mistreatment because they fear losing attention or affection from the people they depend upon (Groce 2005).

3.10 Persons with cognitive impairment who live in accommodation in the licensed and unlicensed boarding house sectors tend to be especially fearful of reprisals should they report abuse, neglect and exploitation. One reason for this is that these facilities afford residents very limited tenancy protection, including no protection against arbitrary eviction (Karras, McCarron et al 2006).

3.11 Women with cognitive impairment may also fail to report abuse, neglect and exploitation because they fear that they may lose parenting responsibility for their children if police and child protection authorities become involved in the matter (Goodfellow and Camilleri 2003; Chappell 2003, DisAbled Women's Network 1992, Cockram 2003, Frantz et al 2006, Tyiska 2001; Frohmader 2007).

3.12 Women with cognitive impairment are also much more likely not to report abuse, and remain in an abusive relationship, because they fear retribution from their partners if they do otherwise (DisAbled Women's Network 1992; Frohmader 2007).

3.13 Persons with cognitive impairments tend not to report abuse, neglect and exploitation because of shame and embarrassment. They may fear humiliation and blame if the incident is disclosed. They may also fear the stress that may be associated with the investigation and prosecution process (Goodfellow and Camilleri 2003; Groce 2005; Lievore 2005; Frohmader 2007).

3.14 The fear of not being believed also discourages persons with cognitive impairment from reporting incidents of abuse, neglect and exploitation. Persons with disability may be stereotyped as not credible, liars, attention seeking, and as likely to exaggerate (Calderbank 2000; Goodfellow and Camilleri 2003; Groce 2005; Milberger et al 2003; Frohmader 2007). The stigma attached to impairment and disability, by itself, may lead persons with cognitive impairment to conclude that it is futile to lodge complaints or to report incidents of abuse, neglect and exploitation (Sherry 2003).

3.15 Persons with cognitive impairment may not disclose abuse that occurs in residential and other settings because they fear that if they do so, they may lose control of the situation. For example, many disability services have policies that require such incidents to be reported to the police or other authorities irrespective of the views of the victim. This dis-empowers the victim by making it impossible for them to choose the best option for them to resolve the situation (Calderbank 2000; Goodfellow and Camilleri 2003; Lievore 2005).

3.16 Residential schools and other institutions across the world often don't have any mechanisms for children, parents, teachers or caregivers to complain about victimisation. This situation is even more problematic when officials associated with the institution hold guardianship over residents. This involves a critical conflict of interest because the guardian can prevent scrutiny of its own conduct (Groce 2005).

3.17 One investigation report found that in an acute mental health facility in Tasmania neither management nor staff had any actual understanding of the procedures to be applied in the reporting, investigation and resolution of incidents, complaints and concerns (Office of the Health Complaints Commissioner 2005; Frohmader 2007). Another study was very critical of the

lack of training provided to disability service support staff in relation to abuse reporting policy and procedures (Goodfellow and Camilleri 2003).

3.18 Staff who report suspected abuse are vulnerable to retaliation from the abusers and their employers. They may lose employment, or be allocated less favourable working conditions (for example, night shifts or overtime might be withdrawn) (White, Holland et al 2003).

3.19 Workers may also experience frustration in facing the same silence and inaction that faces the people they chose to support. As a result they may choose to give up, or acquiesce in the system (Chenoweth 1997).

3.20 Persons with cognitive impairment living in supported accommodation are more likely to report abuse, neglect and exploitation to disability support workers than they are to report such conduct to the police or any other external agency. Disability support workers tend to want to deal with matters internally in order to protect the reputation of the organisation, its funding, and to avoid increased scrutiny. This reflects or may lead to a culture of cover-up (Chenoweth 1997; Goodfellow and Camilleri 2003; French 2007). They may also believe it is futile to report such matters to the police because the police won't do anything (Goodfellow and Camilleri 2003).

3.21 Disability support staff, even where they report sexual abuse, may be slow at doing so. They may seek to conduct an initial internal investigation, or seek the approval of a senior staff member before contacting police. This may result in the loss of important forensic evidence necessary for successful prosecution (Goodfellow and Camilleri 2003).

3.22 Some services attempt to suppress the reality of abuse and violence in the lives of their service users through a series of evasive and stalling tactics, such as not returning calls, using time delays, transferring the case from one section to another, and using legal arguments to delay or ignore matters (Chenoweth 1997).

4. INVESTIGATION

4.1 Several commentators report that persons with cognitive impairment are generally not believed by police officers when complaining about abuse, neglect and exploitation. Police may stigmatise and stereotype persons with cognitive impairments as having wild imaginations, fantasies, hallucinations, and as being easily confused, untruthful, unstable, vindictive and promiscuous. Persons with psychosocial impairments are particularly stigmatised and stereotyped as being

mad, unpredictable and dangerous. Police may also view persons with cognitive impairment as unattractive, and therefore, unlikely to be the target of sexual attacks. Such beliefs tend to result in police failing to investigate complaints made by, or in relation to, victims with cognitive impairment, or in their failure to conduct robust investigations (Connelly and Keilty 2000; Community Services Commission and Intellectual Disability Rights Service 2001; Queensland Advocacy Incorporated and Forbes 2001; Groce 2005; Lievore 2005; Chenoweth 1993; French 2007).

4.2 One study observed that because persons with cognitive impairments are often involved in a number of legal actions in order to obtain their human rights, they are commonly labelled as vexatious or unreasonable complainants or litigants. This may also impact negatively on the likelihood that complaints will be investigated (The Disability Council of NSW 2003).

4.3 A number of commentators observe that police tend to adopt stereotypical negative views about the ability of persons with cognitive impairment to provide cogent, consistent and credible evidence in court. On this basis they may conclude that there is no point investigating a crime, as any outcome of such an investigation is very unlikely to proceed to the prosecution stage. In fact, many persons with cognitive impairment are capable of giving evidence in court, and the likelihood of them doing so increases significantly if appropriate supports and adjustments are made. It is difficult to ascertain how many complaints from, or in relation to, persons with cognitive impairment police receive and fail to act on as there is no requirement for police to make a record of complaints and their response in most cases. Police are required to record their decision not to take a statement or investigate a complaint of sexual assault but many police appear to be unaware of this obligation and fail to do so (Connelly and Keilty 2000; Goodfellow and Camilleri 2003; Groce 2005).

4.4 It has been suggested that police officers generally tend to avoid investigation of complaints related to the victimisation of persons with cognitive impairment for a range of reasons which include:

- They may believe the offence is less grave when the suspect also has a cognitive impairment;
- They may believe there is no point investigating complaints where the suspect also has cognitive impairment as the matter would never proceed to prosecution, and in any event, it is more important to divert the suspect from the criminal justice system;

- They may believe that an investigation would cause unnecessary trauma for the victim, particularly in view of the fact that the case is unlikely to proceed to prosecution;
- They may believe that their intervention is futile since there are no appropriate alternatives to the victim's current living arrangements.
- They may believe that the investigation of such complaints will be long and time-consuming.
- They may feel personally uncomfortable and inadequate in the presence of persons with cognitive impairment and seek to disengage from them.
- They may believe that issues concerning persons with cognitive disability are best dealt with by the social service system, as police don't have the necessary expertise. (Sobsey 1994; Connelly and Keilty 2000; French 2007).

4.5 The failure of prosecutions of offences committed against persons with cognitive impairment – even if these prosecutions are based on a poor investigation and are not appropriately conducted and resourced – gives rise to a self-fulfilling prophecy. The view that the prosecution of harms against persons with cognitive impairment will inevitably fail and are futile is reinforced (Connelly and Keilty 2000).

4.6 Police officers often fail to identify complainants with cognitive impairment. They therefore fail to ensure that appropriate supports are provided and adjustments are made when taking a statement and conducting an investigation. There is a lack of police guidelines and procedures in this area. The inability of police officers to identify complainants with cognitive impairment may heavily and negatively influence the way that person is treated within the criminal justice system (Goodfellow and Camilleri 2003; Lievore 2005; Connelly and Keilty 2000; Queensland Advocacy Incorporated and Forbes 2001).

4.7 Key strategies for conducting successful interviews with persons with cognitive impairment include the use of open and general questions, non-suggestive prompting, narrative description of events with few interruptions, the use of pictures as prompts, and the video recording of interviews for use in court. Video recording is particularly important as it captures gestures, body language and facial expressions used by the person to provide evidence as well as speech. The ability of the person to rely upon an 'independent third person' or 'support person' to assist in ensuring they understand police questions, and to provide emotional support is also a key adjustment to the investigation process required

by many persons with cognitive impairment. However, research and practice in relation to strategies such as these tends to be concentrated on persons with cognitive impairment with low support needs. There has been very limited focus on the adjustments required by persons with cognitive impairment who have high support needs (Glidden and Mar 1978; Clare and Gudjonsson 1993; Dent 1986; Fisher and Geiselman 1992; Connelly and Keilty 2000; Goodfellow and Camilleri 2003).

5. PROSECUTION

5.1 The adversarial nature of the justice system disadvantages persons with cognitive impairment. One reason for this is that it fails to acknowledge the underlying power imbalances that prevent persons with cognitive disability from participating on an equal basis with others in the dispute resolution process (The Disability Council of NSW 2003).

5.2 'Support persons' may play an important role in improving access to justice for persons with cognitive impairment. Support persons can help explain the legal process to the person, who the various 'players' are and their role, and what will be required of the person. They may also assist in ensuring that the person understands communications with them in the lead up to and during the court process, and also provide emotional support and encouragement to the person so that they can persevere as a witness and minimise the trauma associated with the experience (Goodfellow and Camilleri 2003; Queensland Advocacy and Forbes 2001; The Disability Council of NSW 2003). However, the justice system often fails to understand the crucial role played by support persons and others (such as non-legal advocates and interpreters) in promoting access to justice for persons with cognitive impairment (The Disability Council of NSW 2003; Karras, McCarron et al 2006).

5.3 The techniques of cross-examination in the in-court process are designed to undermine the evidence of an opposing witness. Persons with cognitive impairment are particularly disadvantaged by such techniques. They may be easily intimidated and confused in cross-examination by the defence counsel as an apparently angry or aggressive authority figure, and give responses to questions that they think will please the authority figure. The may be confused by complex and unfamiliar words, long sentences, and leading and suggestive questions. They may also be unable to tolerate long periods of cross-examination without a break and may become tired, irritable, and confused. The challenges faced by persons with cognitive disability in giving evidence in court may be deliberately exploited by defence counsel to discredit them as

witnesses and undermine the prosecution case. Persons with cognitive impairment may also find the process of giving evidence extremely humiliating and traumatic for these reasons (Queensland Advocacy Incorporated and Forbes 2001; The Disability Council of NSW 2003; Goodfellow and Camilleri 2003).

5.4 For the reasons outlined above, it has been suggested that judicial officers need to be much more interventionist in the cross-examination of witnesses with cognitive impairment than they would otherwise be to ensure that questioning is appropriate given their communication needs, and that there are other adjustments to the legal process, such as permitting the presence of a support person and taking regular breaks in the course of taking evidence (Goodfellow and Camilleri 2003; Karras, McCarron et al 2006). However, adjustments of this nature are likely to be viewed as providing the prosecution and the witness with an unfair advantage over the accused and their defence (The Disability Council of NSW 2003; Karras, McCarron et al 2006).

5.5 Delays in investigation and prosecution are particularly disadvantageous to persons with cognitive impairment as they may have greater difficulty in remembering relevant facts, and experience greater frustration from the delay in 'resolving' the situation (The Disability Council of NSW 2003; Goodfellow and Camilleri 2003).

5.6 The physical environment of the court may also present as a major barrier to justice for persons with cognitive impairment. For example, the level of noise outside (and even inside) the court, the chaotic activity (particularly in Magistrates Courts), and fluorescent lighting may cause anxiety, distress and discomfort for persons with psycho-social impairments (Goodfellow and Camilleri 2003; Karras, McCarron et al. 2006).

6. ACCESS TO LEGAL SERVICES

6.1 Most persons with cognitive impairment have a pension or benefit as their primary source of income. They are, consequently, unable to afford commercial legal services if they encounter a legal problem (The Disability Council of NSW 2003; Karras, McCarron et al 2006).

6.2 Free or affordable legal services are subject to high unmet demand, and many are not accessible to persons with cognitive impairment. The situation is especially acute in rural, remote and regional areas where it may be necessary to travel long distances in order to obtain legal advice and representation (The Disability Council of NSW 2003; Karras, McCarron et al 2006).

6.3 Persons with cognitive impairment seeking legal assistance frequently encounter a referral roundabout, where they are passed from one service that is unable to assist to another. In some cases the person does not act on the referral information because they assume that contact will be futile, and in any event, they don't want to have to tell their story over and over. Even within a single agency, a person with cognitive impairment may be passed from officer to officer and have to repeat their story multiple times. This interrupted gathering of information may compromise the lawyer's knowledge of the matter and cause the person with cognitive impairment confusion and frustration (Karras, McCarron et al 2006).

6.4 In many cases, there is very poor communication between persons with cognitive impairment and legal service providers, and poor referral and case-management (Sobsey 1994; The Disability Council of NSW 2003; French 2007). Generally, legal services do not seem prepared to invest the time and resources necessary to deal with the legal problems of persons with disability (French 2007).

6.5 Access to legal information, including about legal service providers, is generally not available in Easy-English or other accessible formats (Goodfellow and Camilleri 2003).

6.6 Some persons with cognitive impairment are not readily identified, and fail or refuse to disclose their impairment and disability to legal service providers. This may adversely impact on their eligibility to receive free or affordable legal assistance, as service access measures for persons with disability are therefore not activated. It also means that legal service providers are very unlikely to make the impairment and disability related adjustments required by the person. Identification of persons with cognitive impairment and disability is a particularly problematic issue for Aboriginal and Torres Strait Islanders, and persons from culturally and linguistically diverse backgrounds, as impairment and disability may not be understood in the same way as it is in the dominant culture (Karrass, McCarron et al 2006).

6.7 Some persons with cognitive impairment may have had very negative experience of lawyers and consequently may be very reluctant to seek assistance from them (Karrass, McCarron et al 2006).

6.8 Non-legal, social services tend to be the first point of call for persons with cognitive impairment who are experiencing legal problems. However, these services may lack the resources, knowledge and expertise to appropriately

support persons with legal problems. These agencies need access to legal advice and information, and to develop partnerships with legal service providers, in order to better identify legal issues and refer clients with legal problems to an appropriate source of support (Karrass, McCarron et al 2006).

6.9 The symptoms of mental illness, and the side effects of medication, may prevent persons with psycho-social impairments from effectively conveying information, or from understanding information provided to them. This is exacerbated for persons with cognitive impairment from culturally and linguistically diverse and indigenous backgrounds (Karras, McCarron et al 2006).

7. TREATMENT AND SUPPORT SERVICES

7.1 'Treatment' for victims of crime needs to be broadly understood, as it does not refer to the cure of some pathological condition. Instead, it generally includes counselling, education, refuges, shelters, crisis services, emergency housing or any support designed to help victims recover from their traumatic experience (Sobsey 1994).

7.2 Although there is limited research on the issue, the available evidence suggests that persons with cognitive impairment experience the same impacts of crime as other victims (Sobsey and Doe 1991; Sobsey 1994). However, these impacts might be more difficult to identify because they tend to be expressed differently and may be misinterpreted as an element of the person's impairment or disability rather than as a result of the harm they have experienced (Blyth 2002; Carmody 1990; Lievore 2005).

7.3 Some of the impacts of abuse, neglect and exploitation on persons with cognitive impairment are: further vulnerability and re-victimisation; clinical depression; post-traumatic stress; and, somatic disorders (Sobsey 1994; Stromness 1993). Victims of child sexual abuse may experience ongoing fear, anxiety, depression, anger, low self-esteem, social isolation, and inability to trust in relationships, and express this in inappropriate and self-destructive behaviours, including through substance abuse and sexual maladjustment (Finkelhor and Browne 1985; Sobsey 1994).

7.4 Victims of hate crimes might be even more psychologically affected than those who experience non-bias crimes (Herek et al 1997; Herek et al 1999; Sherry 2003).

7.5 There is a lack of trained professionals able to provide appropriate counselling and psychotherapy to persons with cognitive impairment (Stromness 1993;

Sobsey 1994). The assumption that persons with cognitive impairment are insensate or less sensate inhibits access to these treatment services (Sobsey 1994). This is also the case for children with cognitive impairment who have been victims of abuse or neglect (Graziano and Mills 1992; Sobsey 1994).

7.6 Persons with cognitive impairment are often viewed as incapable of benefiting from counselling and psychotherapy because of their impairment and disability (Monfils and Menolascino 1984; Sobsey 1994). Prevention program designers also tend to assume that persons with cognitive impairment, particularly those with high support needs, would not be able to understand and absorb the contents of such programs (Bruder and Kroese 2005).

7.7 Treatment services may also view persons with cognitive impairment as being too hard, or too time-consuming, too work with. They may take the view that they are not funded to work with persons with cognitive impairment (Cockram 2003; Frohmader 2007).

7.8 There is an acute lack of support options for women with cognitive impairment seeking to escape violence, and to rebuild their lives after doing so. Women with disability may experience discrimination from the support services they seek help from, and thus may be prevented from escaping violence (Frohmader 2007).

7.9 Treatment and support services sometimes fail to understand the multiple and aggravated disadvantage that results from the intersection of gender, disability and abuse (Frohmader 2007). The situation is further intensified for persons from culturally and linguistically diverse and indigenous backgrounds (Frohmader 2007; Atkinson et al 2003; Bennet 1997; Human Rights & Equal Opportunity Commission 2006).

7.10 Persons with cognitive impairment may encounter difficulties in understanding and applying abuse prevention information and education for the following reasons:

- The curriculum for such programs tends to focus on the development of abstract knowledge that is capable of being generalised across various domains. Persons with cognitive impairment do not learn best by this method. They require very concrete information and direction in relation to specific issues (Stromness 1993; Singer 1996; Lumley et al 1998; Andrews 1996; Mazzucchelli 2001; Miltenberger et

al 1999; Long and Homes 2001, Lee et al 2001; Bruder and Kroese 2005).

- Most abuse prevention programs designed for persons with cognitive impairment are for persons with mild to moderate cognitive impairment. They are usually too complex to be utilised for persons with moderate to high support needs (Khemka 2000; Long and Homes 2001; Bruder and Kroese 2005).
- Many prevention programs are not tailored to the needs of participants according to their age, environment and abilities, etc (Sobsey 1994).

7.11 Prevention programs conducted in isolation from structural issues that produce the vulnerability and powerlessness of persons with cognitive impairment are futile. Worse than this, they tend to portray the victim as the source of the problem, rather than the environment in which they live or work, etc (Sobsey 1994; French 2007).

7.12 Focusing on individual knowledge and skill development without changing environmental facilitators or accelerants of abuse, neglect and exploitation may render persons with cognitive impairment more vulnerable to such harm, and this harm may be intensified as a result, as abusers may be provoked by new assertiveness skills, etc (Sobsey 1994; Connelly and Keilty 2000; Community Services Commission and Intellectual Disability Rights Service 2001).

7.13 Sexuality education for persons with cognitive impairment has been criticised as over-emphasising the biological dimension and as failing to incorporate the emotional dimension. Consequently, students might come to understand sexuality as only a physical and not an emotional experience. If they are sexually assaulted they might equate the physical experience with what they have been taught, and not be able to describe or validate the emotional feelings associated with the experience. In this way, such an approach may increase rather than decrease vulnerability of victims (Sobsey 1994).

8. PREVENTION

8.1 Persons with cognitive impairment often lack knowledge and understanding of their rights and of what constitutes abuse (Community Services Commission and Intellectual Disability Rights Service 2001; Lievore 2005). In particular, they may have limited knowledge about sexuality and sexual rights. They are therefore less likely to understand terms describing types of sexual assault, including ‘incest’ and ‘rape’ and to know what to do if they encounter situations of

unwanted touching. They are also more likely to believe that someone other than themselves should decide if they should have sex (McCabe et al 1994; Community Services Commission and Intellectual Disability Rights Service 2001).

8.2 Due to these factors, abuse prevention should be focused upon information, education and training for persons with disability (Frohmader 2007). Prevention programs should provide information and teach skills in the following areas:

- Assertiveness, self-esteem, self-image, and self-confidence (Sgroi 1989; Stromness 1993; Sobsey 1994; Brown 1994; Bruder and Kroese 2005; French 2007);
- Sexuality and normative sexual behaviour (Sobsey 1994; French 2007);
- Advocacy and human, legal and service user rights (Sobsey 1994; French 2007);
- Communication and social skills (Sobsey 1994; Sobsey and Mansell 1990; McCarthy and Thompson 1996; Roeher Institute 1992; Community Services Commission and Intellectual Disability Rights Service 2001; French 2007);
- Recognition of a potentially dangerous situation and avoiding it (Sobsey 1994);
- Protective and defensive behaviours, and escaping from an abuser (Sobsey 1994; Sobsey and Mansell 1990; McCarthy and Thompson, Roeher Institute 1992; Community Services Commission and Intellectual Disability Rights Service; French 2007);
- Assistance seeking, event reporting, and complaint procedures (Sobsey 1994; French 2007).

8.3 Training and education programs need to be provided to staff working with persons with disability to change beliefs, attitudes and practices in relation to abuse and neglect of persons with cognitive impairments. This ought to focus on the following:

- Dispelling myths, misconceptions, and prejudice that result in the failure to characterise offensive conduct towards persons with disability as crime (French 2007);
- Identification of persons with cognitive impairment who may be particularly exposed to offensive conduct (French 2007);
- Recognition of the various sources of risk (French 2007);

- Identification of abuse (Brown 1994; Bruder and Kroese 2005; French 2007);
- Reporting obligations and avenues of complaint (Brown 1994; Bruder and Kroese 2005; French 2007).

8.4 The following measures have been identified as necessary to improve professional and staff practices in relation to persons with cognitive impairment and abuse, neglect and exploitation:

- Improving education and training for professions that have contact or impact on persons with disability (for example, social policy, law, medicine, social work, education etc) by making sure that professional education includes a significant disability dimension (French 2007);
- Sensitisation of social service and law enforcement personnel to the incidence and characteristics of crimes against persons with cognitive impairment, and to the cultural and institutional barriers to access to justice for persons with disability (French 2007);
- Providing staff with knowledge and skills in relation to the prevention of challenging behaviour, and appropriate responses to it, and in relation to coping with feelings of stress and anger in the workplace (Sundram 1984; Rusch et al 1986; Marchetti and McCartney 1990, Sobsey and Mansell 1990; Wardhaugh and Wilding 1993; Sobsey 1994; ARC/NAPSAC 1996; Harris et al 1996; Churchill and Livingstone 1997, Clare and Carson 1997; Flynn and Brown 1997; Buckinghamshire County Council 1998; Brown 1999; Cambridge 1999; Sinason 1999; Allen and Harris 2000; White, Holland et al 2005).
- Developing a positive and trusting relationship between staff or carers and persons with disability, encouraging staff and carers to ask persons with disability on a regular basis if something or someone has upset them (Marland and Malcom 1993; Bruder and Kroese 2005).

8.5 Other abuse prevention measures that have been identified in the literature include:

- Improving background checking and screening procedures for staff and caregivers coming into contact with vulnerable adults (Sobsey 1994; Sherry 2003; Brown 1994; Bruder and Kroese 2005; French 2007);
- Developing a culture of accountability as well as clear and comprehensive codes of ethics and good practice for staff in relation

to personal and intimate care, behaviour modification, sexuality and personal relationships; administration of medication; handling of money and property; risk assessment and management (Sundram 1984; Cullen 1992; Wardhaugh and Wilding 1993; Sobsey 1994; Cambridge 1999; White, Holland et al 2003; Brown 1994; Bruder and Kroese 2005; French 2007);

- Eliminating aversive behaviour management practices, such as electric shock treatment; seclusion; physical restraint; and chemical restraint, to the fullest extent possible (French 2007);
- Developing job satisfaction and pleasant working conditions in a way that values the function of caregivers within disability services (Martin 1984; White, Holland et al 2003);
- Requiring managers to undertake random, unannounced checks to ensure effective monitoring and supervision (Sundram 1984; Furrey 1989; Cullen 1992; Cambridge 1999; White, Holland et al 2003).

8.6 Many commentators refer to environmental factors as facilitators or accelerants of abuse, neglect and exploitation of persons with cognitive impairment. Key prevention strategies related to the environment include:

- The elimination of closed models of specialist service support for persons with disability, such as residential institutions or single organisations that provide all or most services for a group of persons with disability (Sherry 2003; French 2007);
- Reflecting on the design of accommodation in order to provide individual privacy and safety. Resident groupings should be based upon complimentary characteristics (Sobsey 1994; ARC/NAPSAC 1996, Flynn and Brown 1997; White, Holland et al 2003; French 2007);
- Avoiding the location of supported accommodation and other services for persons with disability in marginal residential and industrial areas which increase the exposure of persons with disability to crime (French 2007);
- Aiming at the application of the inter-related and overlapping concepts of normalisation, integration, inclusion, and deinstitutionalisation (people living in natural environments are less exposed to abuse and more likely to be taught appropriate skills and behaviour (Sobsey 1994);
- Ensuring that persons with cognitive impairment receive timely, sufficient and affordable social support including, as required, domestic assistance, personal care, aids, appliances and equipment,

supported accommodation and home modifications, respite care, etc. that will avoid relationship stress (French 2007);

- Enabling persons with cognitive impairments and their associates to recruit and manage their own staff and to select their support staff where these staff members are to be employed by others (French 2007).

8.7 Other prevention strategies proposed in the literature reviewed for this project include:

- Enhancing the availability and accessibility of advocacy services for persons with cognitive impairment (French 2007);
- Enhancing the accessibility of domestic violence services (including refuges and short-term housing) for persons with cognitive impairment (Sherry 2003; Frohmader 2007);
- Ensuring that persons with disability are included in abuse prevention and response measures as advisors and implementers (Sobsey 1994);
- The development of comprehensive whistle-blower legislation and policy that will effectively protect persons with cognitive impairment and their associates from retaliation for exposing abusive, neglectful or exploitative practices (French 2007).

Legal and social policy scan

1. OVERVIEW

1.1 In the initial stages of the project we also undertook a scan of legislation, institutional arrangements, and social policy to ascertain current responses to the risk of, and actual occurrence of, abuse, neglect and exploitation of persons with disability. This included a review of both Commonwealth and NSW legislation and policy relevant to this area.

1.2 This scan examined the following:

- The degree to which human rights relating to freedom from abuse, neglect and exploitation are recognised and implemented in Australian law and institutional arrangements;
- The degree to which harms more likely to be, or uniquely, experienced by persons with cognitive impairment are addressed in Australian law and policy;
- The degree to which Australian law and policy relating to abuse, neglect and exploitation provides reasonable adjustment, and contains positive measures, to address abuse, neglect and exploitation of persons with cognitive impairment.

1.3 A further objective of this scan was to identify any existing or potential initiatives which have the potential to accommodate the findings and recommendations made in this report. In this sense, the scan also had a strategic dimension to it.

1.4 A summary of this scan is set out in appendix 3. This summary is pitched at a relatively high degree of generality. More specific discussion of problematic areas identified is set out in our findings and recommendations.

Key informant views

1. Overview

1.1 A major element of our research was a series of structured interviews with 25 key informants, which were analysed using 'rich-text' method. The informants were drawn from a range of relevant backgrounds, including from disability representative groups, advocacy organisations, government agencies, service providers and academic experts. Informants were interviewed on a confidential basis.

1.2 In this section, we present a thematic summary of the views expressed by informants. It is important to note that the object of these interviews was to obtain each informant's perspective on a range of issues, and that informants came from a wide range of backgrounds. We have not sought to verify any of the claims made, nor have we sought to include only the most common views. For this reason, we have summarized informant feedback at a high degree of generality, and refrained from referring to any particular agency (though of course informants did refer to specific agencies in many instances.)

2. The Making of Vulnerability

Denial of autonomy and powerlessness

2.1 Some informants expressed the view that a key barrier that persons with cognitive impairment encounter that prevents or inhibits realisation of their right to freedom from abuse, neglect, and exploitation is the denial of personal autonomy and power. The following points were made:

- Persons with cognitive impairments are often under the control of partners, family members, professional carers and service providers. Unpaid and paid carers and service providers often have the power to dispose of, and can take advantage of, the person's body and assets.
- Persons with cognitive impairment lack the power to escape from those persons who control them. There are likely to be no real alternatives to their current situation.
- Domestic violence generally includes a number of embedded forms of abuse, neglect and exploitation such as physical violence, emotional abuse, social isolation, financial control, etc. Domestic violence is basically gendered and women with cognitive impairments are likely to be victims of male oppression.

- Financial exploitation of persons with cognitive impairment is a common issue. There are few measures available to support persons with cognitive impairment to manage their own financial affairs and to protect them from exploitation. A financial management order under the Protected Estates Act is possible but is often disproportionate to the person's needs, disempowering, and stigmatic.
- Parents, family members, and unpaid carers often fail to allow a person with cognitive impairment to develop positive self-esteem, independent life skills, and an independent lifestyle. A range of social factors contribute to this including overprotection, shame and fierce independence from government and services. This attitude is a form of abuse in itself since it contributes to the person's limited opportunities for socialisation, living options and developmental growth. A person's lack of self-esteem and lack of independent life skills may also expose them to abuse, neglect and exploitation.
- Persons with cognitive impairment are often viewed as 'second-rate' citizens, and because they are not viewed as being 'like' other people, there is less inhibition associated with causing them harm.

Specialist services are often facilitators of abuse, neglect and exploitation

2.2 Some informants expressed the view that specialist services create serious barriers to persons with cognitive impairment realising their right to freedom from abuse, neglect and exploitation. It was suggested:

- Many persons with cognitive impairment living in specialist services have a poor quality of life. This is particularly the case for persons who live in large residential centres. There is often a background culture of undignified and uncomfortable physical handling, poor communication, and polarised power relations between residents and staff. This acts as a facilitator or enabler of more serious abuse, and at times, makes it difficult for persons within the environment to perceive even serious abuse and neglect when it does occur.
- Specialist accommodation and other support services often group people together in ways that facilitate abuse: examples include: residents with high behavioural support needs may be grouped together; unrelated adults may be crowded together in a confined living space; and, there may be a large number of active residents supported by very few staff.

- There is a culture of staff to resident bullying and mistreatment in many specialist services, particularly residential institutions and boarding houses.
- Many specialist services place a high reliance upon restrictive practices to control residents and manage their personalities and behaviours. In many cases, these restrictive practices could be avoided through better service design and through better support practices.
- Policies and procedures intended to protect persons with cognitive impairment from the abusive use of restrictive practices are often not implemented, or are not properly implemented.
- Many large and other specialist accommodation services operate on a 'nursing' model which fosters a culture of control and passivity of residents. The emphasis is on basic physical care and control of residents, rather than on the development of skills for greater independence and participation in community life. The high reliance upon agency nursing staff to fill vacant shifts on rosters exacerbates this dynamic. Other informants referred to this type of culture as a 'baby-sitting' culture.
- It is very difficult to attract and retain suitable staff in specialist services. There is an inappropriate reliance upon less preferred staff and agency staff to fill positions. This creates a very high turnover of staff and great difficulties in monitoring staff practice. From the resident's perspective, they may interact with many strangers over the course of their day or a week.
- There is a lack of background screening of staff, including police checks of criminal background. As a result serial offenders are able to move from one disability or aged care service to another with easy access to vulnerable adults.
- Many disability services are understaffed to meet resident support needs. This results in a high degree of neglect of residents, and in an unlikelihood that abuse, neglect and exploitation will be detected or prevented. Staff, for example, may simply lack capacity to provide appropriate stimulation and engagement with residents or to intervene in situations of resident on resident violence.
- Managerial staff in specialist services often fail to provide the leadership and direction that other staff require to create a more positive culture for residents. They may emphasise the minimisation of staffing and costs, and fail to act to reconfigure residential

environments that do not work for particular residents, instituting restrictive practices instead. Residents are often forced to fit into environments that are convenient from a cost and management perspective.

- Managerial staff were also criticised for their perceived failure to act on systemic problems in disability services. For example, it was noted that a particular oversight agency has repeatedly been critical of the failure of disability services to ensure that sufficient staff have basic first aid training. However, the situation has not been sufficiently addressed, and consequently, residents of disability accommodation services still die from avoidable causes, such as choking.
- Persons with cognitive impairment may have no or little contact with anyone other than fellow residents and staff. If an incident occurs, staff may be the only ones that the person with cognitive impairment can confide in, or seek assistance from to address and remedy the problem. Residents may perceive staff as more likely to side with other staff. Staff may also seek to resolve the problem 'internally' rather than risk intervention by 'outsiders.'
- It is very difficult to detect, investigate and prosecute abuse, neglect and exploitation in closed settings because there are typically no independent witnesses of acts or omissions causing harm, and internal witnesses may be too scared to raise concerns, or cooperate in an investigation. Internal witnesses may also be part of the problem, either directly, or more indirectly as participants in the negative service culture.

Lack of opportunity for personal development

2.3 It was suggested that a major barrier to the realisation of the right to freedom from abuse, neglect and exploitation experienced by persons with cognitive impairment is their lack of access to personal development programs aimed at building self-esteem, and positive self-concept, protective behaviours, knowledge of human rights, and knowledge of avenues of support. The following points were made:

- If a person with cognitive impairment feels worthless they will rarely act on violence against them – a person has to feel 'worth' something in order to assert themselves.
- Persons with cognitive impairment receive very little, if any, systematic education and training in relation to issues such as

sexuality and relationships; protective behaviours; human, legal and service user rights; or about support services that may be able to assist them.

- In fact, access to this sort of education and training for persons with cognitive impairment may be actively resisted by family members and service providers.
- If such training is provided, it tends to be ad hoc and is not sustained over time.
- Persons with cognitive impairment – particularly women and girls – are not socialised to expect loving, sexual relationships. Parents and service providers are typically motivated to 'protect' persons with cognitive impairment from intimate relationships with others. In fact, this increases the vulnerability of persons with cognitive impairment to predatory and exploitative relationships as it is difficult for them to imagine an alternative type of relationship.

Failure to prevent abuse and neglect

2.4 Several informants were critical of efforts to prevent abuse, neglect and exploitation of persons with cognitive impairment. It was suggested that the lack of a prevention focus was one of the most significant barriers to freedom from abuse, neglect and exploitation for persons with cognitive impairment. The following key issues were raised:

- There is a lack of emphasis on the selection and modification of environments to ensure that they are as safe as possible for persons with cognitive impairment. As already noted above, it was repeatedly suggested that the configuration of residential services often presents very significant risks of abuse. Support services should be reconfigured so as to minimise or avoid these risks.
- Residential support staff may lack pro-activity towards the potential for, or actual evidence of, harm against residents. They may wait until a situation of crisis develops before intervening in a situation or calling for help.
- There is great reluctance on the part of government and funding bodies to cease funding agencies or services that have a very poor record of prevention or dealing with abuse, neglect and exploitation. The typical response is to seek a commitment to policy change, or to remove a victim, rather than to require fundamental change to the agency or service configuration to create a safe environment.

- Very little professional development is provided to disability service professionals in relation to the prevention, recognition and response to abuse, neglect and exploitation of persons with cognitive impairment. This problem is particularly acute in the licensed residential service (boarding house) sector.

3. COMPLAINING ABOUT ABUSE, NEGLECT AND EXPLOITATION

Institutional capability

3.1 Informants noted that the functions and powers of complaint mechanisms varied very widely. While some complaint mechanisms had substantial compulsory powers to compel respondents to cooperate in the resolution of complaints, and the ability to conduct investigations and make findings, others had few powers. Some complaint mechanisms were viewed as lacking credibility because they had no compulsory power.

3.2 However, it was suggested that the culture of complaint handling bodies was also important – those with an activist, human rights oriented culture could sometimes achieve more than complaint handling bodies with stronger powers, but without this culture.

3.3 There was, generally, a significant degree of cynicism expressed about the functioning of particular complaint handling mechanisms. It was suggested that making complaints to these bodies did not usually make any real difference to the problems facing the person, and the process and outcomes of complaint investigations sometimes just entrenched the problem.

3.4 A number of informants criticised complaint investigations for being superficial and service improvement oriented rather than person-centred.

3.5 It was also noted by a number of informants that community and health service complaint-handling mechanisms may not be required, or otherwise fail, to apply human rights standards in the handling of complaints. The standards against which complaints are assessed are typically more general administrative criteria (such as the reasonableness of particular conduct, its compliance with relevant policy etc). Directly relevant human rights standards may be directly ignored in a complaint investigation.

3.6 The emphasis on 'local resolution' of complaints, where these complaints involved allegations of abuse, neglect and exploitation of persons with cognitive impairment was subject to strong criticism by a number of informants. It was

suggested that this tended to result in the minimisation of the harm experienced by the person, and in superficial remedial measures that often failed to protect the person from further harm.

Policy adequacy and compliance

3.7 Some informants were critical of the policies of disability service agencies in relation to abuse, neglect and exploitation. Feedback reflected the following themes:

- There is wide variation in the quality of written policy across agencies – some agencies have relatively well developed policies, whereas other agencies may have very limited policies;
- There is wide variation in the forms of abuse, neglect and exploitation recognised at a policy level. A number of participants felt that there is a general lack of emphasis on the recognition and response to psychological and emotional abuse.
- Even agencies that have relatively good policy in relation to abuse, neglect and exploitation may not effectively operationalise this policy at the service level. Staff actually may have limited knowledge of the policy, and fail to act in accordance with it.
- In particular, there is wide variation in the quality of complaint handling by those designated as responsible for dealing with complaints. These staff may receive little or no professional education and training in relation to complaint handling, and little supervision, support or monitoring.
- Some agencies tend to take a narrow view of their responsibilities in relation to the recognition and reporting of abuse, neglect and exploitation of persons with cognitive impairment. For example, policies and procedures may only relate to situations where abuse, neglect and exploitation results from service related conduct, rather than the conduct of others outside the service (such as family members). No action, or insufficient action, may be taken in relation to abusive, neglectful or exploitative conduct by others.

Protection against retribution

3.8 A variety of views were expressed about the adequacy of the protection of complainants from retribution for making a complaint. Most informants indicated that the potential for, or the fear of, retribution by service providers

and others was a key barrier to persons with cognitive impairment making complaints. It was suggested that persons with cognitive impairment and their associates often feared that a needed service on which they greatly depend would be withdrawn or that there would be physical retaliation by a staff member subject to a complaint. Facing what they perceive as a lack of options, service users might then become accustomed to inappropriate or abusive service provision.

3.9 Some informants thought that the potential for retribution was over-stated as most disability services are now accustomed to receiving and dealing with complaints as an ordinary incident of service delivery. Some respondents also pointed out that there are strong protections against retribution contained in both health care and community service complaints legislation.

3.10 A number of informants expressed concern about the lack of protection for staff who make public interest disclosures of abuse, neglect and exploitation of persons with cognitive impairment. It was noted that while NSW has enacted a law to provide some protection to whistleblowers this only applies to State Government employees and not to staff of non-government disability and mental health services. It was reported that staff often feared that they would lose their jobs, get 'bad' rosters, or have their hours of worked reduced if they disclosed abuse, neglect and exploitation.

Poor accessibility of complaint mechanisms

3.11 Some informants argued that complaint handling bodies sometimes adopt intake procedures for complaints that are inaccessible, or poorly accessible, to persons with cognitive impairment. Examples of inaccessible, or poorly accessible, intake procedures cited included telephone intake systems with automated selection menus; centralised telephone intake systems; and, intake systems that required the complainant to complete a form. It was suggested that many persons with cognitive impairment required direct live assistance in order to make a complaint effectively. Centralised agencies which have no regional outlets or contact points are problematic and limit accessibility.

3.12 A number of informants suggested that complaint handling bodies sometimes fail to effectively promote their roles and functions to persons with cognitive impairment. It was suggested that information is frequently not available in accessible formats, and that there is limited direct outreach to persons with cognitive impairment in service promotional activities.

3.13 Informants were also critical of the reliance placed by most complaint handling bodies on writing as the means of receiving a complaint, of eliciting further information in the course of the assessment of a complaint or its investigation, and in communicating the outcomes of the complaint. It was noted that many persons with cognitive impairment are unable to effectively communicate in writing, and struggled with discursive processes.

3.14 Several informants suggested that complaint-handling bodies generally do not have intake procedures that detect and flag when a person making a complaint has a cognitive impairment. Consequently, they fail to recognise that the person may require reasonable adjustments to the complaint handling process in order to effectively participate.

3.15 Informants were critical of the over-reliance placed by funding bodies and complaint mechanisms on disability service providers to inform persons with cognitive impairments of complaint mechanisms, and encourage and support them to use these mechanisms. It was suggested that disability service providers had a conflict of interest in performing this role. It was argued that there needed to be much greater emphasis on complaint mechanisms communicating directly with disability service users through outreach. It was noted that this was especially important in the licensed residential service (boarding house) sector, where it was suggested that reliance upon proprietors and managers to inform residents of complaint mechanisms was particularly misplaced.

Lack of a structural or systemic response

3.16 A number of informants were critical of the failure of relevant complaint handling agencies to collect and publish data in relation to abuse, neglect and exploitation of persons with cognitive impairment.

3.17 Informants were also critical of the lack of interagency coordination in relation to the handling of allegations of abuse, neglect and exploitation of persons with cognitive impairment. It was suggested that there is a great deal of 'buck-passing' between responsible agencies, particularly with respect to children with cognitive impairment.

4. LEGAL RESPONSES TO ABUSE, NEGLECT AND EXPLOITATION

'Welfarisation' of harm

4.1 A number of informants expressed concern about what they referred to as the 'welfarisation' of harms against persons with cognitive impairment. It was suggested that the language of 'abuse and neglect' had a tendency to reframe and detoxify criminal conduct. For example, it was suggested that resident on resident violence in residential settings is rarely characterised as domestic violence and rarely are domestic violence related interventions deployed to deal with this sort of harm. Disability services were criticised for their perceived failure to engage with domestic violence services in this respect, or to acknowledge and support the victim. It was suggested that the typical response was to move the victim rather than the perpetrator, which tended to compound the trauma and discomfort experienced by the victim.

4.2 It was also suggested that resident on resident assaults in specialist disability services are typically reframed and detoxified as 'challenging behaviour' and the response tends to be one of 'call for a psychologist' and adopt behaviour management strategies rather than involve police and protect the victim.

4.3 Informants suggested that there is a high degree of acceptance of abuse, neglect and exploitation as an inevitable consequence of cognitive impairment. There is a tendency to think that such crimes are unavoidable, and this leads to a level of passivity and acquiescence by some service providers, some police and others.

4.4 It was suggested that some police tend to deny their responsibility for the investigation of crimes involving persons with cognitive impairment. There is a tendency for some police to view these harms as 'minor' and not worthy of their attention and resources. There is also a related tendency for some police to view these as matters that disability service providers should sort out. It was also noted that some police sometimes do not view themselves as having the 'expertise' necessary to investigate crimes against persons with cognitive impairment (as compared with disability service providers, for example).

4.5 Some informants suggested that persons with cognitive impairment and their families are far less likely to go to police with an allegation of abuse, neglect or exploitation, than they would to a social service agency. This is because they too tend to view these issues as welfare matters, and even if they don't, they lack confidence in the criminal justice system's capability to provide an appropriate

response. Social service complaint mechanisms may be viewed as more likely to deliver an outcome that is relevant to the person.

4.6 Additionally, it was suggested that 'social welfare' agencies and complaint mechanisms are less formal than criminal justice agencies and this is likely to be more appealing to persons with cognitive impairment and their associates. It was also observed that 'social welfare' complaint mechanisms did not require satisfaction of the criminal standard of proof, and could sometimes generate action to resolve a situation where police would not. They were also perceived as providing the victim with more control over the process as they initiate and respond to it, as distinct from what was perceived to occur if police took control of the matter.

4.7 A number of informants perceived criminal justice interventions as far more likely to result in further trauma for a victim of assault (particularly sexual assault). This is because the inquiry focuses on the victim providing evidence, and the testing of this evidence through cross-examination. The (alleged) perpetrator is not required to give evidence.

4.8 Informants expressed concern that the criminal law does not effectively recognise some of the specific types of harm more likely to be experienced by persons with cognitive impairment; for example, the unlawful use of restrictive practices such as physical, mechanical, and chemical restraint, and seclusion. While these harms could, in theory, be prosecuted as assaults or as false imprisonment, in reality, they are not characterised or pursued in this way.

4.9 Informants noted that persons with cognitive impairment are subject to subtle forms of emotional and psychological abuse, and to degrading physical treatment (rough handling, intimate exposure to strangers etc) that is systemic in character. As it is so much a part of day-to-day experience it is difficult for persons with cognitive impairment and their associates to characterise this as abuse and neglect, or to feel it is their right to seek redress.

Investigation of complaints

4.10 Informants reported that it is sometimes very difficult to persuade police to act on complaints of harm against persons with cognitive impairment. This is because police sometimes find it difficult and uncomfortable communicating with a person with cognitive impairment, they may believe that persons with cognitive impairment are unreliable and prone to 'making up stories', or that victims are contributors or have incited the assault. Police may also view the

investigation of crimes against persons with cognitive impairment as futile on the basis that their evidence 'will not stand up in court' and convictions are therefore very difficult to secure.

4.11 Informants reported that police often do not identify that a victim or witness has a cognitive impairment, even where they present police with a card identifying that this is the case. Police consequently fail to make adjustments to their communication and interviewing techniques to accommodate this. It was suggested that police could improve their capacity to identify persons with cognitive impairment who require reasonable adjustments, however, when such training is offered, there is generally a poor participation rate, and the practice of most officers does not change afterwards.

4.12 An informant noted that despite recent changes to domestic violence legislation that now makes it possible for a person with cognitive impairment to obtain an apprehended violence order against another person living in a supported residential environment, some police still fail to act on such complaints. They fail to recognise that assaults perpetrated by a resident in such an environment should be dealt with as domestic violence.

4.13 An informant advised that police do not have any specific policies or procedures for dealing with complaints made by victims with cognitive impairment. There is a protocol which requires police to refer persons with cognitive impairment to the Criminal Justice Support Network, but it was suggested that this typically does not occur.

Prosecution of complaints

4.14 Informants suggested that persons with cognitive impairment only rarely obtain effective legal representation to address harms against them. In many cases they may not be aware of their legal rights, or of their ability to take action to protect their rights. They may not know where to obtain legal assistance, and have difficulty completing the relevant application process. They may also find dealing with lawyers difficult and therefore avoid them.

4.15 Informants also suggested that lawyers often fail to recognise when a client has a cognitive impairment, and therefore fail to provide reasonable adjustments required by the person. This flows over into the in-court process. If the person's lawyer fails to ask the court to make necessary adjustments to accommodate a person with cognitive impairment, the court is unlikely to do so.

4.16 It was suggested that lawyers may find it difficult and uncomfortable communicating with persons with cognitive impairment, and therefore tend to avoid providing them with legal help. It was also suggested that many lawyers have stereotyped negative views about the capacity of persons with cognitive impairment to give evidence and therefore recommend against action being taken to gain redress for harms.

4.17 A number of informants suggested that a principal barrier to the successful prosecution of harms against persons with cognitive impairment is the adversarial system. Due to the nature of their impairment and disability, persons with cognitive impairment may be easily confused in cross-examination by defence counsel and their evidence undermined. The person may also feel humiliated and degraded as a result of their cross-examination. Although courts now have substantial discretion and capacity to accommodate vulnerable witnesses, which includes the ability to regulate questioning so as to reduce the potential for confusion, they are rarely asked to do so. In any event, the ability to cross-examine is viewed as a fundamental element of the right to a fair trial so courts tend to be reluctant to interfere.

4.18 Informants suggested that, in addition to the impact of cross-examination, many persons with cognitive impairment found the in-court experience quite overwhelming, intimidating and even frightening. Even the prospect of having to go to court was sometimes enough for a person to decide not to proceed with a complaint.

4.19 Some informants noted that local courts are high demand environments, and from the point of view of persons with cognitive impairment, may be chaotic and confusing. In this environment there is very little capacity to provide the extra time and accommodations required by persons with cognitive impairment in order for them to obtain effective access to justice. Even in the superior courts there is an emphasis on the expeditious conduct of matters that can sometimes impede on the ability of a person with cognitive impairment to effectively participate in the legal process.

4.20 It was noted that there is very little education and training available to lawyers in relation to work with persons with cognitive impairment. It is therefore difficult for them to develop the skills in communication and interviewing necessary to work effectively with persons with cognitive impairment. Lawyers also may be unaware of the other adjustments to the legal process that persons with cognitive impairment may require, and therefore fail to provide these, or request them from the court.

4.21 It was also noted the judicial officers may have access to little education and training in relation to persons with cognitive impairment and their needs for adjustments to the legal process. Consequently, they may be unaware of the need to make accommodations, such as moderating cross-examination, taking breaks in the course of evidence, and allowing the presence of a support person. It was also suggested that judicial officers may hold stereotyped negative views about persons with cognitive impairment in relation to their ability to give reliable evidence that adversely impact on access to justice.

Professional development of justice agency personnel

4.22 It was suggested that professional development of justice agency personnel to build their capacity to work effectively with persons with cognitive impairment in the legal process was critical. However, it was suggested that such education and training opportunities were very limited, attendance at them was optional, and they tended to be poorly attended when offered. In fact, it was suggested that the typical attendees at these sessions were those already motivated and skilled in this area, rather than those who genuinely needed to develop their knowledge and skills.

5. TREATMENT AND SUPPORT SERVICES

5.1 A number of informants considered it essential for persons with cognitive impairment to have access to a support person during police interviews. It was suggested that support persons are able to ensure that appropriate communication techniques are employed and that other necessary adjustments are made; for example, taking regular breaks in the process. It was also noted that support persons can provide the person with cognitive impairment with emotional support, and their presence usually means that police take the matter more seriously.

5.2 It was also suggested that support persons are also essential to assist persons with cognitive impairment during the in-court process. They are able to provide emotional support to the person increasing the likelihood that they will be able to effectively participate in the legal process. It was suggested that support persons can assist in ensuring that person with cognitive impairment understand the law and the legal process. This includes explaining legal procedures and ensuring that the person understands what is said to them in court.

5.3 In spite of the strongly perceived need, a number of informants suggested that most persons with cognitive impairment did not have access to a support person

during the in-court process. It was noted that the potential sources of such support are very limited, and usually can only be tapped if someone in the process (such as the solicitor or non-legal advocate) is aware of this need, and is capable of acting to secure it. This is rarely the case.

5.4 Individual advocacy was repeatedly cited by informants as a crucial support for persons with cognitive impairment who are at risk of, or who have been subject to, abuse, neglect and exploitation. However, it was noted that these services, where they do exist, are subject to high unmet demand, have long waiting lists, carry very high case loads and that they are not available in every region of the State. It was also noted that few of the existing services supported persons with psycho-social impairment, and there is very limited access to culturally specific services for persons from culturally and linguistically diverse or indigenous backgrounds.

5.5 It was also suggested that in many cases persons with cognitive impairment were unaware of the availability of individual advocacy assistance, and would be unable to access such support unless they are assisted to do so. However, many disability service providers were perceived as unlikely to encourage or assist service users to obtain such support, as it may result in greater difficulties 'managing' challenging situations.

5.6 Individual advocacy was viewed as essential to the detection and reporting of abuse, neglect and exploitation and to ensuring that complaint mechanisms and police and others act on such reports. It was also viewed as essential support to ensure that persons with cognitive impairment are able to effectively communicate with complaint mechanisms, lawyers and police, and to ensure that they obtained access to treatment and support services and victims compensation (where eligible).

6. DIVERSITY ISSUES

6.1 A number of informants suggested that persons with cognitive impairment from culturally and linguistically diverse and Aboriginal backgrounds experience very distinct, additional and structural, forms of abuse and neglect to that experienced by others. It was suggested that in many cases such abuse and neglect is, or is tantamount to, institutionalised racism.

6.2 It was noted that culturally and linguistically diverse and Aboriginal persons with cognitive impairment tended to be structurally excluded from the disability support system. It was noted that their service utilisation rates are much lower

than their general population incidence, and this low utilisation rate is exacerbated by the higher incidence of impairment and disability in many CALD and Aboriginal communities. Several reasons were cited for these low utilisation rates including, the lack of culturally specific services, the lack of culturally specific staff, the lack of culturally competent service delivery practices, the failure to effectively promote access to services within these communities, and the stigma attached to disability in some communities that prevent families to seek support in trying to keep a low profile.

6.3 It was noted that abuse, neglect and exploitation of persons with cognitive impairment is particularly widespread in Aboriginal communities, including unintentional neglect due to lack of resources and the low prioritisation of care within the community. Aboriginal women with cognitive impairment are particularly susceptible to domestic violence from men for social reasons related to the history of dispossession of Aboriginal people in Australia. However, there is typically a failure to intervene in these situations, either at all, or in culturally appropriate ways. For example, it was noted that discussion of abuse, neglect and exploitation is taboo in some communities. It could therefore only be effectively addressed by experts in Aboriginal culture using culturally appropriate methods and practices. It was suggested that indigenous leaders need to be supported to take leadership and control in these situations, but there is very little emphasis on this approach.

6.4 A number of informants suggested that persons with cognitive impairment from culturally and linguistically diverse and Aboriginal communities experienced aggravated disadvantage in the legal process due to the intersection of racial and disability discrimination. It was suggested that they were particularly susceptible to being discredited as witnesses during cross-examination because of language and cultural barriers as well as because of difficulties with memory, concentration, and assertiveness.

6.5 It was also suggested that Aborigines with cognitive impairment were particularly susceptible to racial discrimination in addition to disability discrimination from police. This manifested in the failure of police to intervene to prevent, investigate or prosecute violence in Aboriginal communities, and in the tendency for police to disbelieve or regard as unreliable Aboriginal persons who came to them with complaints.

6.6 Informants were particularly critical of what they perceived as the failure of complaint mechanisms to promote their services within culturally and linguistically diverse and Aboriginal communities. It was suggested that

information about complaint mechanisms may not be available in community languages or culturally sensitive formats, and even if it was, it would only rarely be available in formats that were also accessible to persons with cognitive impairment (for example, in Easy-read and pictorial formats).

6.7 It was suggested that centralised, telephone based resolution mechanisms were particularly inappropriate for persons with cognitive impairment from culturally and linguistically diverse or Aboriginal backgrounds. Apart from other accessibility issues (such as lack of independent access to a telephone and an inability to communicate in writing in English), it was suggested that persons from particular cultural backgrounds would be unlikely to proceed with a complaint unless they are able to communicate directly, and develop a personal rapport with and trust of, the complaint-handler. It was also suggested that outreach was often essential to provide the complaint handler with background cultural and family information that may be essential to the formulation of an appropriate resolution of the problem.

6.8 It was suggested that steps towards providing culturally appropriate services included: providing translated information that is sensitive to cultural conceptualisations and terminologies of disability-related terms; being aware/informed of the specific power dynamics within particular communities (for example, related to age, gender or social status); being aware/informed of the kinship systems and role of extended families within particular communities; being aware/informed of the impact of religion and history of ethnic groups on people and their relations to others and systems.

FINDINGS AND RECOMMENDATIONS

1. OVERVIEW

1.1 In this section we set out our major findings and recommendations from this research. As we have already noted in our introduction, this research raised many issues, and it has not been possible to do justice to all of these issues. We have therefore concentrated our attention on a number of areas where it seemed to us that the 'gap' between the current and a desirable state of affairs is greatest, from a human rights perspective.

1.2 Our findings and recommendations are clustered into five themes:

- Priorities for criminal law reform;
- Priorities for civil law and institutional reform;
- Disability service system reform and capacity building priorities;
- Justice agency reform and capacity building priorities; and
- Improving complaint handling practice.

2. PRIORITIES FOR CRIMINAL LAW REFORM

This project has considered the issues from a NSW perspective, although this has included consideration of how international and Commonwealth law impacts on persons resident in NSW. Although we have attempted to adopt a national perspective on the issues wherever possible, we have not examined the laws, policies and programs of other State and Territories. This has particular significance for our recommendations for criminal law reform, which are addressed to issues in the NSW criminal law jurisdiction only.

Nevertheless, we believe the issues we raise and the recommendations we make are potentially equally relevant in other jurisdictions. For this reason we recommend that these recommendations be taken up by the Australian Standing Committee of Attorneys-General for consideration in the development of the Australian Model Criminal Code.

2.1 ASSAULT & GRIEVOUS BODILY HARM

Finding:

The criminal law in relation to assault and grievous bodily harm in NSW does not effectively protect persons with cognitive impairment from:

- assault and grievous bodily harm generally; or

- specific types of assault and grievous bodily harm that are more likely to be, or are uniquely, experienced by persons with cognitive impairments.

Commentary:

Section 59 of the *Crimes Act* 1900 (NSW) (Assault occasioning actual bodily harm) makes it an offence to assault any person causing actual bodily harm. This offence carries a penalty of five years imprisonment. Section 61 of the *Crimes Act* 1900 (NSW) (Common assault prosecuted by indictment) makes it an offence to assault any person even if such an assault does not occasion actual bodily harm. This offence carries a penalty of two years imprisonment. Section 33 of the *Crimes Act* 1900 (Wounding or grievous bodily harm with intent) makes it an offence to wound any person or to cause grievous bodily harm to any person with intent to cause grievous bodily harm. This offence carries a penalty of 25 years imprisonment. Section 35 of the *Crimes Act* 1900 (Reckless grievous bodily harm or wounding) makes it an offence for a person to recklessly cause grievous bodily harm to any person or to recklessly wound any person. These offences carry a maximum penalty of 10 and seven years imprisonment respectively. If these offences are committed in company with others they carry a maximum penalty of 14 and 10 years imprisonment respectively.

Part 3, Division 10 of the *Crimes Act* 1900 deals with sexual offences, and these offences recognise certain aggravating circumstances which increase the offender's culpability for the offence, and carry a higher maximum penalty. One of the aggravating factors specified in Divisions 10 and 10A (sections 61J, 61O and 80C) are circumstances where the alleged victim has a cognitive impairment. 'Cognitive impairment' is defined in s 61H of the Act to mean 'an intellectual disability, or a developmental disorder (including an autistic spectrum disorder) or a neurological disorder, or dementia, or a severe mental illness, or a brain injury, that results in the person requiring supervision or social habilitation in connection with daily life activities.'

However, the *Crimes Act* does not specify aggravating circumstances in relation to the offences of assault and grievous bodily harm. There does not appear to be any principled reason for accepting that cognitive impairment ought to be an aggravating factor with respect to sexual offences but not other assault. Persons with cognitive impairment are more likely to experience assault, and to experience intensified harm from such assaults, for the same reasons this is true for sexual assault (they are more likely to be victims as a result of predation or abuse of power or support relationships, are less likely to be able to avoid or resist assault, and are more likely to suffer physical and psychological harm).

Recommendation:
It is recommended that those provisions of the *Crimes Act* 1900 that deal with assault and grievous bodily harm be amended to include as aggravating factors for such offences circumstances where the alleged victim has a cognitive impairment.

Of additional concern is the unlikelihood of the assault provisions of the *Crimes Act* 1900 successfully supporting a charge and prosecution in relation to particular forms of assault and bodily harm more likely to be, or uniquely, experienced by persons with cognitive disability. These harms include the unlawful use of pain or serious discomfort and restraint to modify or control behaviour. Although such conduct could be charged under these provisions in theory, experience demonstrates that there is little prospect of this occurring in fact. 'Interventions' of this type, even if unlawful, tend to be viewed by key stakeholders (including police, disability and mental health professionals, service providers, regulatory bodies, and family members) as clinical or welfare matters. Consequently, the criminal law relating to assault is rarely, if ever, invoked or applied.

As we note elsewhere in this report, these practices are, to a limited extent, regulated pursuant to the *Guardianship Act* 1987, the *Disability Services Act* 1993 and the *Children and Young Persons (Care and Protection) Act* 1998. However, neither the *Guardianship Act* nor the *Disability Services Act* explicitly deals with restrictive practices or their permissible and impermissible use, and the *Children and Young Persons (Care and Protection) Act* 1998 does so only to a limited extent. None of these Acts creates any offence, or indeed any other substantive penalty or personal remedy, in relation to the unlawful use of restrictive practices. In our view, it is therefore necessary for these specific types of harm to be explicitly identified as offences under the criminal law.

Recommendation:
It is recommended that the *Crimes Act* 1900 (NSW) be amended to include specific offences relating to the unlawful use of restrictive practices. Such offences might be formulated in the following terms:

It is an offence for any person to unlawfully:

- *cause pain or serious discomfort to another person; or*
- *restrain another person whether by physical, chemical, mechanical or other means.*
- *for the purpose of modifying their behaviour, or for any other purpose.*

It is recommended that this offence carry a maximum penalty of two years imprisonment.

It is an offence for any person to unlawfully:

- *cause pain or serious discomfort to another person; or*
- *restrain another person whether by physical, chemical, mechanical or other means.*
- *for the purpose of modifying their behaviour, or for any other purpose, in circumstances where such conduct causes actual bodily harm.*

It is recommended that this offence carry a maximum penalty of five years imprisonment.

2.2 UNLAWFUL DEPRIVATION OF LIBERTY

Finding:
The criminal law relating to false imprisonment in NSW does not effectively protect persons with cognitive disability from unlawful detention, including seclusion, exclusionary time out, and related practices.

Commentary:
In NSW, the criminal offence of false or unlawful imprisonment is governed by the common law. The common law offence involves the intentional or reckless restraint of a person's freedom of movement from a particular place.

Persons with cognitive disability are subject to multiple forms of deprivation of liberty, many of which are performed without lawful authority. This includes confinement to residential and other facilities, restriction on movement within residential and other facilities, as well as practices such as seclusion and exclusionary time out (confinement and isolation) that may be instituted for behaviour modification, control or treatment purposes.

There may be particular circumstances where deprivation of the liberty of a person with cognitive impairment is legally and ethically defensive to prevent that person from causing harm to self or others. However, deprivation of liberty is otherwise a violation of a fundamental human right. It is therefore critical for the dignity and equality of persons with cognitive impairment, and the integrity of disability and mental health service systems, that any such restrictions are explicitly authorised by law, according and subject to human rights guarantees. We discuss this issue further elsewhere in this report.

Although the types of deprivation of liberty, typically, or uniquely, experienced by persons with cognitive impairment could provide the basis for a common law criminal prosecution in theory, experience demonstrates that there is little prospect of this occurring in fact. Conduct of this type, even if unlawful, tends to be viewed by key stakeholders (including police, disability and mental health professionals, service providers, regulatory bodies, and family members) as clinical or welfare matters. Consequently, the criminal law relating to deprivation of liberty is rarely, if ever, invoked and applied with respect to persons with cognitive impairment.

As we note elsewhere in this report, these practices are, to a limited extent, regulated pursuant to the *Guardianship Act* 1987, the *Disability Services Act* 1993 and the *Children and Young Persons (Care and Protection) Act* 1998. However, neither the *Guardianship Act* nor the *Disability Services Act* explicitly deals with restrictive practices or their permissible and impermissible use, and the *Children and Young Persons (Care and Protection) Act* does so only to a limited extent. None of these Acts creates any offence, or indeed any other substantive penalty or personal remedy, in relation to the unlawful use of restrictive practices. In our view, it is therefore necessary for these specific types of harm to be explicitly identified as offences under the criminal law.

Recommendation:
It is recommended that the *Crimes Act* 1900 (NSW) be amended to include the specific (statutory) offence of deprivation of liberty. To ensure that such an offence penetrates to the lived experience of persons with cognitive impairment, it ought to be framed in the following terms:

> *It is an offence for any person to wilfully or recklessly deprive another person of liberty without lawful excuse.*
>
> *In this section,*
>
> *'deprivation of liberty' includes any practice that has the purpose or effect of confining a person to a particular place and or otherwise restricting his or her freedom of movement. A person may be deprived of liberty against his or her will, or by inducing the person to falsely believe it is necessary for him or her to comply with restrictions on his or her liberty. Deprivation of liberty may occur without the victim's knowledge and/or comprehension.*
>
> *'lawful excuse' means either:*
>
> *'action taken in an emergency to prevent serious harm to the person or to another person or persons'*

'action that is authorised by a Court or Tribunal'

It is recommended that this offence carry a maximum penalty of seven years imprisonment.

2.3 Criminal Negligence

Finding:
The law in relation to criminal negligence in NSW does not effectively protect persons with cognitive impairment from conduct that represents a reckless disregard for a duty to meet basic human and survival related needs.

Commentary:
Persons with cognitive impairment are often subject to neglect of their basic human and survival related needs, including the need for adequate food, shelter, clothing, health care and personal safety. In a number of well documented instances, this neglect has occurred in disability and mental health service settings.

Of particular concern is the frequent failure of persons in authority in disability and mental health services to effectively intervene to protect the safety and well-being of those persons with cognitive disability to whom they have a duty of care. For example, they may persistently fail to effectively act to prevent staff-to-resident and resident-to-resident violence.

Section 44 of the *Crimes Act* 1900 (NSW) (Not providing a wife or servant with food etc) makes it an offence for a person who is 'legally liable to provide for any wife, apprentice, or servant or any insane person with necessary food, clothing, or lodging, [to] wilfully and without lawful excuse refuse[] or neglect[] to provide the same, so that, in any such case, his or her life is endangered, or his or her health becomes or is likely to be seriously injured.' This offence carries a maximum penalty of five years imprisonment.

The section has little contemporary relevance. The reference to 'insane' persons was probably originally intended to apply to all persons with cognitive disability, but it is clearly no longer appropriate to interpret the reference in this way. The use of the word 'insane' is also anachronistic and offensive to persons with psycho-social impairments.

Recommendation:
It is recommended that the current version of s44 is repealed and replaced with an offence that provides vulnerable persons, including persons with cognitive disability,

with adequate protection against criminal negligence. A new offence ought to be framed in the following terms:

> *s44 Criminal neglect of duty of care*
> *It is an offence for any person who has a duty to any other person either:*
> *. to ensure their basic needs are met , or*
> *. to arrange for their basic needs to be met,*
> *to wilfully or recklessly fail to fulfil this duty.*
>
> *In this section 'basic needs' includes adequate nutrition, clothing, shelter, health, safety, aids and appliances, communication and emotional and psychological well-being.*

It is recommended that this offence carry a maximum penalty of five years imprisonment.

2.4 Administration of poisons and other noxious substances

Finding:
The criminal law in NSW does not effectively protect persons with cognitive impairment from the administration of noxious substances, including in particular, the administration of medications in toxic combinations.

Commentary:
Section 39 of the *Crimes Act* 1900 makes it an offence for a person to wilfully or recklessly administer to another person, or cause that person to take, any poison, intoxicating substance or other destructive or noxious thing where this endangers the life or inflicts grievous bodily harm, on the other person. This offence carries a maximum penalty of 10 years imprisonment. Section 41 of the *Crimes Act* 1900 makes it an offence for any person to wilfully administer to another person, or cause another person to take, any poison, intoxicating substance or other destructive of noxious thing which causes distress or pain to another person. This offence carries a maximum penalty of 5 years imprisonment.

Persons with cognitive disability are particularly susceptible to the administration of medication for unlawful non-therapeutic purposes, and in noxious combinations. With respect to the noxious combination of medications, such medications are likely to be, at least technically, 'poisons' within the meaning of these sections but the individual dosage rates for each medication will typically not exceed a 'therapeutic' level. However, the combined administration of a number of medications at

individually therapeutic levels may present dangerous health and psychological risks, and cause actual bodily harm. The sections do not appear to be capable of being activated by a noxious combination of substances.

Section 41, the lesser offence, also requires the offender to have intention to cause pain or distress, which would preclude prosecution in circumstances where there was not intention, but reckless indifference to the effect of such substances on the victim. The 'grievous bodily harm' element in section 39 may also not easily admit particular harms experienced by persons with cognitive disability as a result of the administration of non-therapeutic medication or noxious polypharmacy, including loss of cognitive and physical function. In our view, these gaps and shortcomings in the law warrant law reform.

Recommendation:
It is recommended that the *Crimes Act* 1900 be amended to include a specific offence relating to the use of poisons and noxious substances for unlawful non-therapeutic purposes, and in poisonous or noxious combinations. Such an offence might be formulated in the following terms:

> *It is an offence for any person to wilfully or recklessly administer, or cause to be administered to another person, any poisonous or noxious substance, or any combination of poisonous or noxious substances:*
>
> . *for an unlawful non-therapeutic purpose; or*
>
> . *without lawful excuse, to cause distress or pain to that other person; or*
>
> . *which endangers the life of, or inflicts grievous bodily harm on that other person.*
>
> *For the purpose of this section:*
>
> *'Poison' or 'noxious substance' includes any medication, whether or not prescribed for the person, and whether or not administered as prescribed.*
>
> *'Grievous bodily harm' includes a serious loss of either cognitive or physical function, or both cognitive and physical function.*

It is recommended that this offence carry a maximum penalty of 10 years imprisonment.

2.5 NON-THERAPEUTIC STERILISATION OF PERSONS WITH COGNITIVE IMPAIRMENT

Finding:

The criminal law in NSW does not sufficiently protect children and adults with cognitive disability from non-therapeutic sterilisation.

Commentary:

Non-therapeutic sterilisation of persons with cognitive disability is a particularly egregious form of human rights abuse, and one that impacts particularly on girls and women with disability. Comprehensive law reform is required to provide effective guarantees against such abuse. In this section, we deal with only one such guarantee – the criminal proscription of non-therapeutic sterilisation under NSW law.

Under the *Guardianship Act* 1987 sterilisation and related procedures are 'special medical treatment.' Only the person directly affected or the Guardianship Tribunal itself may consent to a special medical treatment. Consequently, if the affected person has a cognitive impairment that impacts significantly on their ability to provide informed consent to such a procedure, the authority of the Guardianship Tribunal must be obtained before the procedure can be performed. If a person performs a special medical treatment without consent, they may be guilty of an offence under section 35 of the *Guardianship Act*. This offence carries a maximum penalty of seven years imprisonment. The *Guardianship Act* applies only in relation to young persons and adults over 16 years of age.

However, the NSW Guardianship Tribunal also has jurisdiction in relation to special medical treatments, including sterilisation and related procedures, under the *Children and Young Persons (Care and Protection) Act* 1998 (NSW). In this jurisdiction, only the Tribunal may consent to a special medical treatment. This jurisdiction applies to all children and young persons under the age of 16 years, whether or not they have a decision-making disability. A person must not perform a special medical treatment without the consent of the Tribunal. Should they do so, they may be guilty of an offence under the Act which carries a maximum penalty of seven years imprisonment.

While the *Guardianship Act* and the *Children and Young Persons (Care and Protection) Act* 1998, in effect, regulate and provide a degree of protection from non-therapeutic sterilisation for all children and young people and adults with decision-making disability, neither makes non-therapeutic sterilisation explicitly unlawful.

Additionally, both the offence under the *Guardianship Act* and that under the *Children and Young Persons (Care and Protection) Act* apply to persons who 'carry out' special medical treatments without appropriate authorisation. In practice, this means the

medical practitioner who performs the procedure. The offence does not apply to persons who procure this procedure (for example, parents and others exercising parental responsibility, carers and service providers) or, apparently, to others who assist in, or aid and abet, the procedure: for example, nursing staff who assist in the procedure; health administrators who claim payments from health insurers for such procedures; insurers who make payments in relation to such procedures; and disability professionals and service providers who may be involved in seeking such a procedure, or become aware that such a procedure is intended but fail to intervene to prevent it.

It is widely claimed that the existing criminal offences have been ineffective in eliminating non-therapeutic sterilisation of persons with cognitive disability. These claims are supported both by anecdotal reports of disregard for these offences among medical practitioners, and health insurance statistics which continue to report a significant number of insurance claims for such procedures. The offences may operate as more effective deterrents if they were not so narrowly drawn. If they were to apply to those who procure, assist, aid and abet these crimes it would be more difficult for those willing to perform such procedures unlawfully to conceal, or secure others' silent acquiescence in the offence.

It is also widely reported that one effect of the criminal proscription of non-therapeutic sterilisation in the *Guardianship* and *Children and Young Persons (Care and Protection) Acts* has been the evasion of NSW law by seeking performance of the procedure in other jurisdictions (both within Australia and in other countries (sometimes referred to as 'forum shopping'). It is suggested that some disability and medical professionals actually recommend this to persons seeking to procure sterilisation, and even advise them where to go, and how to go about it. Currently, there is no criminal penalty associated with procuring a special medical procedure in another jurisdiction, or in aiding or abetting another person to do so.

Recommendation:
It is recommended that the *Crimes Act* 1900 be amended to include a new offence in relation to the performance of non-therapeutic sterilisation of a child under the age of 18 years or of an adult with a cognitive disability. Such a provision ought also to make it an offence to procure, or seek to procure, such a procedure, and to assist or aid and abet in such a procedure. The offence might be drafted in the following terms:

> *It is an offence for any person to perform, or assist in, a procedure that results in the sterilisation of a child under the age of 18 years, or an adult with cognitive impairment where that procedure does not have a therapeutic purpose.*

It is an offence for any person to procure, or seek to procure, a procedure that results in the sterilisation of a child under the age of 18 years, or an adult with cognitive impairment where that procedure does not have a therapeutic purpose.

It is an offence for any person to aid and abet in a procedure that results in the sterilisation of a child under the age of 18 years, or an adult with cognitive impairment where that procedure does not have a therapeutic purpose.

In this section

'sterilisation' means 'sterilisation, vasectomy or tubal occlusion.'

'therapeutic purpose' means treatment necessary for a recognised medical condition, where that treatment is a recognised as appropriate according to contemporary medical practice.

It is recommended that the primary offence carry a maximum penalty of seven years imprisonment and that the supplementary offences carry a maximum penalty of five years imprisonment.

2.6 TORTURE AND CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Finding:

The criminal law in NSW does not provide persons with cognitive impairment with effective protection from torture or cruel, inhuman or degrading treatment or punishment.

Commentary:

Persons with cognitive impairment are frequently subject to treatment that may constitute torture, or cruel, inhuman or degrading treatment. Examples of such treatment include persistent and severe violence and abuse, psychological abuse, long-term neglect of basic human needs, painful and degrading behaviour modification techniques, and the denial of reasonable accommodation for impairment and disability related needs (for example, refusal or failure to provide interpreter services for a person who is deaf and in prison). In many instances such treatment occurs in publicly provided or funded disability and mental health service settings, and it occurs on a discriminatory basis: that is, it occurs because the person has cognitive impairment. Such conduct therefore has the potential to satisfy the narrow definition of torture, (acts causing severe pain and suffering intentionally inflicted upon a person

for any reason based on discrimination at the instigation of, or with the consent or acquiesce of a public official), let alone the requirements for recognition of such conduct as cruel, inhuman and degrading.

In spite of the fact that freedom from torture and cruel, inhuman and degrading treatment is one of the most fundamental of all human rights, and that Australia is party to a number of human rights treaties that seek to guarantee this right, and explicitly require this guarantee to be enacted in domestic law, torture and cruel, inhuman and degrading treatment is not proscribed in the *Crimes Act* 1900, nor is it a criminal offence in NSW at common law.

The *Crimes (Torture) Act* 1988 (Cth) does proscribe torture in particular circumstances, but that Act has a very narrow remit, only applying to acts committed outside Australia, and only to acts constituting torture as narrowly defined, rather than to cruel, inhuman and degrading treatment more generally. It is completely ineffective in protecting persons with cognitive impairment in Australia from torture or cruel, inhuman or degrading treatment.

Recommendation:
It is recommended that the *Crimes Act* 1900 be amended to include a specific offence proscribing torture and cruel, inhuman or degrading treatment. Such an offence might be formulated in the following terms:

> *It is an offence for any person, acting at the instigation, or with the consent or acquiescence of, a public official or other person acting in a public capacity, to:*
>
> . *torture another person; or*
>
> . *cause another person to suffer cruel, inhuman or degrading treatment;*
>
> *for the purpose of:*
>
> . *obtaining from that person or another person information or a confession; or*
>
> . *punishing that person for an act he or she or a third person has committed or is suspected of having committed; or*
>
> . *intimidating or coercing that person or a third person; or*
>
> *for any reason based on discrimination of any kind.*

In this section:

'torture' means 'severe physical or mental pain or suffering.' 'Torture' does not include pain or suffering arising from, inherent in or incidental to lawful sanctions.

'for any reason based on discrimination' includes discrimination on the ground of disability;

'discrimination on the ground of disability:'

. *includes the failure to provide reasonable accommodation;*

. *if an act is done for two or more reasons, and one of the reasons is the disability of a person (whether or not it is the dominant or substantial reason for doing the act) then the act is taken to be done for that reason.*

'reasonable accommodation' means necessary and appropriate modifications and adjustments not imposing an unjustifiable hardship, where needed in a particular case to ensure that persons with disability are able to enjoy or exercise all human rights and fundamental freedoms on an equal basis with others.

It is recommended that this offence carry a maximum penalty of 25 years imprisonment.

It is further recommended that an equivalent offence be enacted into Commonwealth law.

2.7 VILIFICATION

Finding:
The criminal law in NSW does not provide persons with cognitive impairment with effective protection from serious vilification on the ground of disability.

Commentary:
Persons with disability are frequently subject to 'hate speech' or vilification;' that is, public speech that intends to incite severe hatred of, serious contempt for, or severe ridicule of, persons with cognitive impairment or groups of persons with cognitive impairment. In particular instances, this hate speech is so severe that it seeks to, or has the effect of, inciting violence towards persons with cognitive impairment. This hate speech may cause severe psychological harm, and effectively deprive the person of their right to live in the community on equal terms with others. Severe episodes of hate speech have, for example, been associated with the establishment of supported

housing options in neighbourhoods. In many cases, these developments did not proceed as a result, and the persons that were intended to benefit from them have been forced to continue to live in institutions, in circumstances of great family stress, or in crisis accommodation, until appropriate alternatives could be planned and implemented.

Vilification of persons on the basis of race, homosexuality, HIV/AIDS status, and transgender status is prohibited under the *Anti-Discrimination Act* 1977 (NSW). Two offences are proscribed in each case, a civil offence, and a criminal offence for vilification that involves threats of physical harm towards persons or their property or incitement of others to threaten such harm. However, a person may not be prosecuted for the criminal offence unless the Attorney-General has consented to the prosecution. In practice this political element in the prosecution has meant that very few prosecutions have proceeded.

The *Anti-Discrimination Act* provides persons with cognitive impairment with no protection from vilification. There is no principled basis upon which protection from vilification ought to be accorded to the groups noted above, but not to persons with cognitive impairment. Indeed, both historically and currently persons with cognitive disability have been and remain subject to much more pervasive and severe forms of vilification than perhaps any other group in the community.

Recommendation:
It is recommended that the *Crimes Act* 1900 or the *Anti-Discrimination Act* 1977 ought to be amended to include the offence of Serious Vilification on the Ground of Impairment or Disability. However, due to the particular character of hate speech directed at persons with disability, and the likelihood that political interests will be affected by its prosecution, we strongly recommend against the Attorney-General or any other politician being required to consent to such a prosecution. The offence ought to be drafted in the following terms:

> *It is an offence for any person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person on the ground of that person's impairment or disability, or a group of persons on the basis that the members of the group have impairment or disability by means which include:*
>
> . *threatening physical harm towards, or towards any property of, the person or group of persons; or*
>
> . *inciting others to threaten physical harm towards, or towards any property of, any property of, the person or group of persons.*

It is recommended that this offence carry a maximum penalty of 10 penalty units or six months imprisonment or both in the case of an individual, and 100 penalty units in the case of a corporation.

It is further recommended that an equivalent offence be enacted into Commonwealth law.

2.8 Financial abuse, neglect and exploitation

Finding:
The criminal law in NSW does not provide persons with cognitive impairment with sufficient protection from financial abuse, neglect and exploitation.

Commentary:
The evidence suggests that persons with cognitive impairment are much more likely to be subject to financial abuse, neglect and exploitation than other members of the community. The perpetrators of these harms may be family members, carers, service providers and others in close personal relationship with the person, statutory and commercial agents that provide estate management and other financial services, as well as strangers. Part 4 of the *Crimes Act* 1900 proscribes an extensive array of property offences. Unlike Part 3, Division 10 of the Act (sexual offences) property offences do not specify a victim's cognitive impairment as an aggravating circumstance that increases the offender's culpability for the offence, and the applicable maximum penalty. In our view it is desirable that it should do so.

Recommendation:
It is recommended that Part 4 of the *Crimes Act* 1900 be amended to include in relation to all robbery, larceny, fraud, and fraudulent misappropriation offences circumstances in which the victim is a person with a cognitive impairment.

Two forms of financial abuse and neglect more likely to be, or uniquely, experienced by persons with cognitive impairment is neglect of their assets, and the failure to apply these assets for the benefit of the person, by persons under a duty of care. In some cases this may be because a family member seeks to preserve the value of an estate with a view to the estate's inheritance by another family member. In other cases it may be because a statutory official (such as the Protective Commissioner) fails to ensure assets are protected from waste or are utilised for the benefit of the person. In our view, conduct of this nature, where it has a seriously detrimental impact on a person with cognitive disability, including by way of lost chance at life, should be proscribed as an offence under the *Crimes Act* 1900.

Recommendation:

It is recommended that the *Crimes Act* 1900 be amended to include a new offence against property that proscribes conduct by a duty bearer that results in the serious neglect of the estate of a person with cognitive impairment, or which represents a serious failure to use that person's property for their benefit. This offence might be framed in the following terms:

> *It is an offence for any person who has a duty to:*
>
> . *protect the estate of another person; and/or*
>
> . *ensure that the estate of another person is used for that other person's benefit;*
>
> *to either wilfully, or recklessly, fail to fulfil this duty, where such conduct results in serious detriment to that other person.*
>
> *In this section:*
>
> *'person' means a natural person and other legal persons, including a statutory or other corporation*
>
> *'detriment' includes loss of chance.*

It is recommended that this offence carry a maximum penalty of two years imprisonment or 100 penalty points, or both, for an individual, or 500 penalty points in the case of a corporation.

3. PRIORITIES FOR CIVIL LAW AND INSTITUTIONAL REFORM

3.1 INCORPORATING THE HUMAN RIGHTS OF PERSONS WITH DISABILITY INTO AUSTRALIAN LAW

Finding:

The human rights of persons with disability enunciated by the United Nations Convention on the Rights of Persons with Disabilities – including those that relate to freedom from abuse, neglect and exploitation - are not comprehensively incorporated into Australian domestic law. Even where particular rights are incorporated, either in part or in full, these rights may not be associated with an effective personal remedy.

Commentary:

The United Nations Convention on the Rights of Persons with Disabilities is binding upon the Australian Government in its relationship with the international community. However, the act of ratification of an international treaty, such as the CRPD, does not result in that treaty's incorporation into Australian domestic law. Separate legislative

action is required to incorporate the treaty. To date, such action hasn't been taken. While some elements of the CRPD may already be reflected in Australian domestic laws either in part or in full, many elements are not, including many elements of the CRPD that relate to freedom from abuse, neglect and exploitation.

Contrary to common understanding, the Australian Human Rights Commission actually has a relatively narrow jurisdiction with respect to human rights. Leaving aside the jurisdiction conferred in AHRC under Commonwealth anti-discrimination law, the Commission's power to monitor Australia's compliance with international human rights treaties is limited to those international instruments scheduled to, or declared under s 47, of the *Human Rights and Equal Opportunity Commission Act* (HREOCA). These instruments do not currently include the CRPD or the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. Two United Nations' earlier declarations on the rights of persons with disability are scheduled to the Act, but these declarations are quite outdated and can no longer be relied upon as an accurate enunciation of the human rights of persons with disability.

Declaring the CRPD an international human rights instrument under s 47 of HREOCA would empower the AHRC to monitor Australia's compliance with the CRPD, including those of its provisions that relate to freedom from abuse, neglect and exploitation of persons with disability. It would also empower the AHRC to receive, investigate and conciliate complaints that allege violations of CRPD rights, including those that relate to abuse, neglect and exploitation. However, if such complaints can't be resolved by conciliation, the AHRC has very limited capacity to remedy any violation disclosed by the complaint. In such a case, the AHRC is limited to making recommendations for the remedy of the violation to the Commonwealth Parliament through the Attorney General.

Declaration of the CRPD under s 47 of HREOA would also empower the AHRC to conduct enquiries into systemic violations of human rights. However, again, the AHRC is limited to providing recommendations to Parliament through the Attorney General for the remedy of any human right violations it identifies. It has no power to enforce its recommendations.

It should also be noted that the AHRC's complaint function in its general human rights jurisdiction is limited to acts done on behalf of the Commonwealth or under a Commonwealth enactment. It does not extend to acts done by or on behalf of State or Territory Governments, or under State or Territory enactments, nor does it apply to non-state actors.

In summary, declaration of the CRPD under s 47 of the HREOCA would have an important, but still limited, impact. We regard it as a necessary immediate step, but as insufficient to properly incorporate CRPD rights into Australian law.

The Australian Government has recently appointed an independent Committee to conduct a national consultation to examine existing levels of protection for human rights in Australia and options for increasing such protection. One option for increasing protection that is being examined is a statutory Charter of Rights (the Government has ruled out consideration of a Constitutionally-entrenched Charter of Rights).

In our view a Charter of Rights is the preferred mechanism for incorporation of the CRPD into Australian domestic law. However, to be effective in protecting the human rights of persons with disability (and indeed other persons) the Charter must apply not only to Commonwealth Judicial and Executive Government but also to all State and Territory Judicial and Executive Governments. It must also apply to non-state actors, in particular, but not only, those that perform public functions. Additionally, at a minimum, such a Charter would need to incorporate the following operational mechanisms:

- Individuals and classes of persons ought to be able to make complaints about the violation of the human rights recognised in the Charter, and such complaints ought to be capable of determination and enforcement of remedies;
- The Charter ought to provide specific remedies for human rights violations. This ought to include prerogative remedies such as the power to make a declaration as to the lawfulness of particular conduct, the power to prohibit particular conduct, and the power to order the performance of a particular duty. Remedies ought also include restitution and damages. The Charter ought also to provide injunctive relief pending the final outcome of a complaint;
- The AHRC ought to be provided with jurisdiction to conduct own motion inquiries into grave or systemic human rights violations, and have the power to report directly to Federal Parliament on the outcomes of any such inquiries;
- The AHRC ought to be provided with jurisdiction to make own motion complaints about human rights violations, and such complaints ought to be capable of determination and enforcement of remedy.

The later two operational mechanisms are particularly important for the protection of persons with cognitive impairment, including those who may be subject to abuse, neglect and exploitation, because of the great difficulties many persons in this group would experience in attempting to prosecute a complaint, even if they had support to do so.

Additionally, it is essential that any complaint remedies available under a Charter of Rights are capable of being effectively exercised on behalf of persons with cognitive impairment who may be unable to act on these rights due to their impairment and disability. Essential access-to-justice features that ought to be incorporated into the Charter include:

- Broad standing provisions for complaint and enforcement action, that would enable representative groups to initiate action in the public interest;
- A capacity to bring 'class-actions' in relation to any human right violation;
- A capacity for an 'associate' (for example, a family member, friend or advocate) to complain of a human right violation to which a person with disability is subject;
- Explicit provision for the appointment of a legal proxy (for example, legal next friend) for a person with cognitive impairment who is unable to pursue a remedy or enforcement action personally due to impairment or disability;
- Designation of human rights complaints, and related remedial and enforcement action, a 'costs-free' jurisdiction; that is, complaints ought not face the possibility of an adverse-costs order should they seek to vindicate a human right through legal action, and fail.

Recommendation:

It is recommended that the Australian Government take immediate steps to incorporate the CRPD into Australian law. As a first step this ought to include the immediate declaration of the CRPD as an international instrument under s 47 of the HREOCA. Additionally, it is essential that CRPD rights are directly incorporated into Australian law through the mechanism of a national Charter of Rights. Any such Charter must apply to State and non-state actors and all layers of government. Among its operational mechanisms, any such Charter ought to include a comprehensive complaints jurisdiction that is accessible and responsive to persons with cognitive disability, and which provides effective remedies for human right violations.

3.2 COMMONWEALTH DISABILITY SERVICE COMPLAINT MECHANISMS

Finding:

The strategic and operational framework for the handling of complaints about Commonwealth funded disability services is inadequate.

Commentary:

The Commonwealth has established a Complaint Resolution and Referral Service (CRRS) to deal with consumer complaints about Commonwealth funded disability employment and advocacy services. The strategic operational framework for this service is the Commonwealth's Quality Strategy for disability services. The regulatory basis for the Quality Strategy is provided by the National Disability Service Standards that have been formulated pursuant to the *Disability Services Act* 1986 (Cth). These standards include a consumer complaint handling standard and a standard that deals with protection of consumers from abuse, neglect and exploitation. All Commonwealth funded services must comply with these standards as a pre-condition to the receipt of Commonwealth Government funding.

Essentially, the Quality Strategy is a systemic quality assurance and continuous quality improvement mechanism designed to maintain and progressively improve service quality over time. Under the Quality Strategy, all Commonwealth funded disability services must undergo periodic independent audits for compliance against the National Disability Service Standards. Evidence that an agency has failed to comply with a Disability Service Standard may ultimately result in the loss of accreditation and therefore government funding. Information arising out of consumer complaints dealt with by the CRRS, or the failure to comply with the complaint handling Standard itself (for example, by failing to cooperate with the CRRS), may be provided to the Audit teams by the Commonwealth for their consideration.

The CRRS is characterised as a 'complaint resolution and referral service.' The primary emphasis is on 'local resolution' of complaints, utilising complaint referral, negotiation and mediation techniques. Although the CRRS does investigate complaint allegations in some instances, it is limited to making recommendations to the service provider and the Commonwealth, essentially, only in relation to service improvement strategies.

There is no explicit legislative basis for the operation of the CRRS. It consequently has no explicit functions or powers (including no compulsory powers) and no immunities. No specific substantive or procedural rights are conferred upon complainants, and no duties are explicitly imposed on service providers (other than the duty to generally comply with the complaint handling Standard). The CRRS cannot provide

complainants with substantive or injunctive relief should a service provider fail to act upon its recommendations.

The CRRS does not have any systemic investigation, inquiry or review powers, and is unable to initiate action at its own motion. Nor does it have any independent public reporting power.

As the CRRS operates at the discretion of the Executive it is also susceptible to Executive intervention. Additionally, while the CRRS' operation by a non-government disability rights organisation has distinct advantages in terms of its accessibility and responsiveness to persons with disability, this also exposes the CRRS to claims of structural and actual bias which can inappropriately undermine its handling of consumer complaints.

The CRRS is therefore a relatively weak safeguard of the human, legal and service user rights of persons with cognitive impairment who utilise Commonwealth funded disability services.

Recommendation:
It is therefore recommended that the Commonwealth take immediate action to re-establish the CRRS under specific purpose legislation as an independent 'watchdog' agency. The legislation under which this agency is established ought to explicitly recognise the human rights of persons with disability, and require the agency to apply these rights in the performance of its functions. It ought also require the agency to recognise and address the multiple and aggravated forms of human rights violation and disadvantage that results from the intersection of impairment and disability with another characteristic including racial, cultural or linguistic minority status, indigenous status, gender and age. It ought to be invested with royal commission equivalent compulsory powers, and have at least the following functions:

- A complaint handling function – the ability to receive, investigate, determine, and make recommendations in relation to, complaints raised by consumers of Commonwealth provided or funded disability services and their associates;
- The ability to initiate 'own motion' complaints;
- The ability to conduct reviews of the circumstances of a consumer or group of consumers of Commonwealth provided or funded disability services. This ought to include the power to make recommendations to relevant respondents, including the Commonwealth, for remedial action;

- The ability to conduct policy and programme reviews and 'audits.' This also ought to include the power to make recommendations to relevant respondents, including the Commonwealth, for remedial action;
- The ability to undertake own motion enquiries into systemic issues impacting on consumers of Commonwealth provided or funded disability services. This ought to explicitly include power to investigate conduct of the Commonwealth and its agents in relation to the provision or funding of disability services;
- The ability to publicly report on the outcomes of systemic enquiries and group, policy and programme reviews, or audits;
- 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 programmes.

Additionally, it is essential that the legislative scheme establishing the agency also provide for the enforcement of its recommendations, at least with respect to individuals, and personal remedies for harms perpetrated. In practice, this would probably require the matter to be referred to the Federal Court. Remedies ought to include prerogative remedies such as the power to make a declaration as to the lawfulness of particular conduct, the power to prohibit particular conduct, and the power to order the performance of a particular duty. Remedies ought also to include restitution and damages. The legislation ought also to provide for injunctive relief pending the final outcome of a complaint. The Federal Court's jurisdiction to provide injunctive and substantial relief ought to be 'costs-free.'

3.3 Dealing with abuse, neglect and exploitation

Finding:

Current arrangements for the detection, reporting, investigation and prosecution of abuse, neglect and exploitation of adults with cognitive impairment in Australia are inadequate.

Commentary:

There is no specific legal and institutional framework for the investigation and prosecution of abuse, neglect and exploitation of 'vulnerable' adults in Australia. This is in spite of the fact that the evidence overwhelmingly demonstrates that mainstream

law and institutional arrangements persistently and grievously fail to protect persons with cognitive impairment from harm. The successful detection, investigation and prosecution of abuse, neglect and exploitation of persons with cognitive impairment requires, in many instances, a particular value-base, expertise, and practice that is simply not present, or capable of being generated, in mainstream law enforcement agencies.

Although well-conducted investigations can overcome some of the problems that lead to the failure of prosecutions of crimes against persons with cognitive impairment, in many cases there will be inherent difficulties in meeting the evidentiary standards necessary to secure convictions. Additionally, conviction of offenders may not be possible or appropriate for other reasons (for example, where the offender also has a significant cognitive impairment). Prosecution and conviction also may not be a sufficient response to the person's exposure to harm (for example, the person may remain exposed to predation in the same environment). Prosecution of harms against vulnerable adults, including those with cognitive impairment, is therefore a necessary, but sometimes insufficient, response to the harms to which they are exposed. Other remedies will sometimes also be required.

The Commonwealth has established a National Disability Abuse and Neglect Hotline (the Hotline) in an effort to improve the accessibility and responsiveness of relevant complaint- handling and investigation agencies with responsibilities in this area. The Hotline operates as a notification and referral mechanism. Its primary target group are persons with disability who use Commonwealth or State or Territory provided or funded disability services, but in practice it receives and refers any notifications of abuse, neglect and exploitation that relate to persons with disability. Notifiers and the persons subject to notification, may also be linked to other sources of support, including independent individual advocacy support. The Hotline also undertakes relatively systematic education and training for disability service providers aimed at abuse, neglect and exploitation prevention.

The Hotline also operates without any legislative base and therefore has no statutory functions, powers and immunities. It has no power to investigate a notification of abuse, neglect or exploitation, no power to compel any other agency to do so, and no power to formally review the action taken, or not taken, by another agency. No substantive or procedural rights are conferred upon complainants, and no duties are explicitly imposed on service providers (other than the duty to generally comply with the abuse, neglect and exploitation Standard). The Hotline cannot provide complainants with substantive or injunctive relief should a service provider fail to act upon its recommendations.

The Hotline does not have any systemic investigation, inquiry or review powers, and is unable to initiate action at its own motion. Nor does it have any independent public reporting power.

It is, consequently, a relatively weak safeguard against abuse, neglect and exploitation of adults with cognitive impairment.

Recommendation:
It is recommended that the Commonwealth take immediate action to re-establish and reframe the Hotline as an independent, statutory, National protection mechanism for vulnerable adults.

The legislation under which this agency is established ought to impose a mandatory duty to report abuse, neglect and exploitation to the adult protection agency. This duty ought to apply to the disability professionals and service providers, as well as to some other professional groups, such as doctors, estate management and guardianship services.

The legislation ought to explicitly recognise the human rights of persons with disability, and require the agency to apply these rights in the performance of its functions. It ought also to require the agency to recognise and address the multiple and aggravated forms of human rights violation and disadvantage that results from the intersection of impairment and disability with another characteristic including racial, cultural or linguistic minority status, indigenous status, gender and age. It ought to be invested with royal commission equivalent compulsory powers, and have at least the following functions and powers:

- The receipt and investigation of notifications and complaints relating to abuse, neglect and exploitation of 'vulnerable' adults, including persons with cognitive impairment. This jurisdiction ought to operate 'at large' and not be confined to allegations arising from the disability services. For example, the agency must also have the capacity to deal with allegations of abuse, neglect and exploitation in family and carer relationships, and in the private sector (including boarding houses);
- Power to remove, or order the removal of a vulnerable adult from a situation of unreasonable risk;
- Power to make compulsory 'requests' for emergency and ongoing assistance from relevant Commonwealth, State and Territory Government agencies to ensure the safety of the person (for example, the provision of supported housing, or the reconfiguration of existing supported housing that exposes the person to harm);

- A framework for joint work between the agency and police and prosecution services;
- The ability to initiate 'own motion' complaints;
- The ability to conduct reviews of the circumstances of a vulnerable adult or group of vulnerable adults. This ought to include the power to make recommendations to relevant respondents, including the Commonwealth and State and Territory Governments, for remedial action;
- The ability to conduct policy and programme reviews and 'audits.' This also ought to include the power to make recommendations to relevant respondents, including the Commonwealth and State and Territory Governments, for remedial action;
- The ability to undertake own motion enquiries into systemic issues relating to abuse, neglect and exploitation;
- The ability to publicly report on the outcomes of systemic enquiries and group, policy and programme reviews, or audits;
- 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 programmes;
- The obligation to collect and publicly report data relating to abuse, neglect and exploitation of vulnerable adults.

3.4 NSW DISABILITY SERVICE COMPLAINT MECHANISMS

Finding:
Legal and institutional arrangements for dealing with complaints about NSW provided, funded and licensed services for persons with cognitive impairments are inadequate.

Commentary:
The principal legislation providing for service user complaints about specialist disability services that are provided, funded, or licensed by the NSW Government is the *Community Services (Complaints, Reviews and Monitoring) Act*, 1993. This legislation was originally administered by an independent Community Services Commission, but is now administered by the NSW Ombudsman.

These legal and institutional arrangements have a number of important strengths, among them a wide range of complaint, review and monitoring functions, and compulsory powers conferred by the legislation, and the status of the Ombudsman's office.

However, there are also a number of key structural weaknesses in these arrangements. From the point of view of this research, key weaknesses in the legislation include:

- Its failure to extend to community-based services for persons with psycho-social impairments or brain-injury funded by the Minister for Health;
- The failure of the legislation to explicitly incorporate the human rights of persons with disability, and require the application of human rights standards in the course of complaint handling;
- The failure of the legislation to explicitly require the Ombudsman to recognise and address the multiple and aggravated forms of human rights violation and disadvantage that results from the intersection of impairment and disability with another characteristic including racial, cultural or linguistic minority status, indigenous status, gender and age;
- The failure of the legislation to provide personal remedies;
- The failure of the legislation to explicitly require and authorise the Ombudsman to scrutinise the conduct of Ministers of the Crown in addition to Government Departments and non-government agencies. This is a very significant shortcoming with respect to disability services in NSW, where many functions under the *Disability Services* Act 1993 (NSW) are reposed in the Minister directly, and where the Minister is the direct provider of many disability services).

Additionally, there are a number of cultural problems associated with the administration of this legislation by the NSW Ombudsman as compared with the former Community Services Commission. The principal cultural problems are:

- The former Community Services Commission took an 'activist' approach to its jurisdiction. In the period of its operation it frequently undertook enquires into systemic issues, published policy recommendations and acted as an agent and catalyst for change. This activist culture has not successfully been transferred into the NSW Ombudsman's Office.
- Although the Community Services Commission appears to have had inferior formal functions and powers to those of the NSW Ombudsman under the *Community Services (Complaints, Reviews and Monitoring) Act,* 1993, its activist and public approach to the exercise of these functions and powers nevertheless initiated and secured significant structural change in many areas.

- In spite of its clearer functions and stronger powers, the NSW Ombudsman has not been able to achieve the same level of structural reform within the disability service sector in NSW. In his own annual and other periodic reports, and in the few special purpose reports that the Ombudsman has published, the Ombudsman himself persistently laments that his recommendations are frequently ignored altogether, or are given inadequate attention and priority by relevant agencies.
- In essence, and culturally, the Ombudsman performs a public integrity function. Its' role is to safeguard and stimulate progressive improvement in the quality of public administration, and protect against malfeasance. Although independent of Government, it is nevertheless therefore culturally 'interior' to Government. This is not a culture suited to the vindication of individual rights. Indeed, from the perspective of the complainant, it tends to privilege public administration over the rights of individuals (particularly in the absence of any personal remedy);
- Consistent with its public integrity function, the Ombudsman is principally concerned with the processes of Government (and in its disability services jurisdiction, those of non-government organisations). This tends to result in a preoccupation with policy adequacy and compliance. This can be problematic in the disability services area because much disability policy is 'non-performative'; that is, actual practice does not match, either sufficiently or at all, policy intentions and requirements. Complaint, review and monitoring methods that over-emphasise procedural compliance, and under-emphasis or ignore substantive compliance, therefore risk regulatory failure;
- The implementation of the *Community Services (Complaints, Reviews and Monitoring)* Act 1993 tends to be driven by its jurisdiction in relation to child protection and children and young persons in compulsory care. For example, the legislation was recently amended to require the Ombudsman to publicly report only every second year on its review of child deaths. The rationale for this amendment was the multiple oversight mechanisms operating in this area. However, this amendment also altered the Ombudsman's public reporting obligations in relation to the deaths of persons with disability in care. This amendment was apparently unintentional and was not preceded

by any inquiry or consultation process in relation to its impact on persons with disability.

Recommendation:

It is recommended that the *Community Services (Complaints, Reviews and Monitoring) Act* 1993 is amended so as to achieve the following:

- Provide jurisdiction in relation to community based services for persons with psycho-social impairment and brain injury provided or funded by the Minister for Health;
- Incorporate substantial recognition of the human rights of persons with disability, and require human rights standard to be applied in the exercise of all functions and powers under the legislation;
- Incorporate explicit recognition of, and a duty to address, the multiple and aggravated forms of human rights violation and disadvantage that results from the intersection of impairment and disability with another characteristic including racial, cultural or linguistic minority status, indigenous status, gender and age;
- The provision of personal remedies. These remedies ought to include prerogative remedies such as the power to make a declaration as to the lawfulness of particular conduct, the power to prohibit particular conduct, and the power to order the performance of a particular duty. Remedies ought also to include restitution and damages. The legislation ought also to provide injunctive relief pending the final outcome of a complaint;
- Explicit power to scrutinise the conduct of Ministers of the Crown in addition to Government Departments and non-government agencies.

Additionally, it is recommended that responsibility for the administration of the *Community Services (Complaints, Reviews and Monitoring) Act* 1993 be re-situated in an independent, specialist watchdog agency capable of developing and implementing an activist, human rights oriented approach to its jurisdiction.

3.5 Regulation of disability services in New South Wales

Finding:

Regulation of disability services in New South Wales does not comply with legislated requirements aimed at protecting the human, legal and service user rights of persons with disability, including the right to freedom from abuse, neglect and exploitation.

Commentary:

The *Disability Services Act* 1993 (NSW) provides the framework for the provision, funding and regulation of disability services by the New South Wales Government. It purports to mandate a 'rights-based approach' to the funding of disability services, and to service delivery more generally, by reposing very detailed duties in the Minister administering the Act to recognise and apply certain human rights related standards in all decisions to provide and fund disability services. The Act also confers rights of appeal on service recipients and their associates against decisions to provide or fund disability services where such conduct fails to comply with these standards.

Additionally, the Act requires the Minister to conduct regular periodic reviews of all provided and funded services to ensure their compliance with these standards, and such compliance is a precondition to the continuing provision or funding of these services.

In practice, these provisions of the Act are ignored by the Minister and the Department of Ageing, Disability and Home Care. Arrangements for the provision and funding of disability services do not comply at all, or only partly comply, with the explicit terms of the Act. Consumer appeal rights are articulated with the performance of particular duties under the Act. However, as these duties are not performed, it is usually impossible for service users to exercise their rights of appeal. Moreover, whereas the *Disability Services Act* 1993 (NSW) envisages a 'public' process of funding allocation, capable of providing notice to affected persons of the decisions that impact on their lives, in fact information about these allocation decisions and processes in not made publicly available, and in practice, is very difficult or impossible to obtain. These failures to observe the explicit requirements of the Act have the effect, and in some instances the purpose, of depriving persons with disability of their rights to appeal against poor quality disability services provided or funded by the New South Wales Government.

The Department of Ageing, Disability and Home Care has, relatively recently, established a so-called 'Integrated Monitoring Framework' for disability services. This Framework purports to be a quality assurance and continuous quality improvement mechanism. However, the framework has a number of very serious limitations, including the following:

- It is not comprehensively or sufficiently based on the explicit requirements of the *Disability Services Act* 1993 in terms of the recognition and fulfilment of service user rights, including those relating to freedom from abuse, neglect and exploitation. Even where

it does deal with aspects of these requirements, it does not penetrate to the full beneficial effect of those requirements;

- It relies on self-assessment and 'independent' assessment by the Department's regional staff.
- Self assessment is an essential, but insufficient, safeguard of service quality that will tend to work best in good quality services that are self-reflective, self-critical and engaged in positive ways with service users and their representatives. It will have far less impact on poor quality services that are unable or unwilling to accurately reflect on their weaknesses or plan for improvement.
- 'Independent' assessment by Department's regional staff is also a relatively weak mechanism for ensuring quality compliance and quality improvement. In many instances, the Department itself will be the service provider, and both the assessor and the service provider are part of a single regional accountability structure. This creates a severe conflict of interest, and disincentive to finding significant weaknesses in service quality that might embarrass the Department or require significant allocation of resources;
- Even where the Department is assessing a non-government organisation, it is also ultimately responsible for the funding of that organisation. This also creates a disincentive to finding significant weaknesses in service quality that would require resources to address.
- Only service providers may challenge the outcome of the Department's assessment process; service users have no right to do so.

Recommendation:

It is recommended that the *Disability Services Act* 1993 is amended to establish an independent quality assurance agency for disability services. This agency would have the following functions:

- Initial and periodic accreditation of disability services against the requirements of the Act – no organisation (whether Government or non-government) ought to be entitled to provide disability services unless accredited);
- Systematic periodic review of disability services funded under the Act according to the requirements of the Act;

- Specific purpose reviews of services of concern (those organisations subject to significant adverse incidents and complaints, or otherwise providing poor quality services);
- Approval of quality improvement action plans for under-performing services;
- Suspension or withdrawal of accreditation from services that fail to meet required standards;
- Provision of notice to service users, their associates and the public about disability service funding decisions, and their rights of appeal in relation to such decisions;
- Providing 'first tier' review of disputed funding decisions;
- Development and publication of quality assurance and service quality improvement resources;
- Development and delivery of education and training for professionals, service providers, service users and their associates in relation to quality assurance and service quality improvement.

It is further recommended that decisions to accredit, maintain the accreditation of, or refusals to accredit disability services be reviewable by the Administrative Decisions Tribunal. Service users and others with a genuine concern in such decisions ought to be able to initiate such reviews.

3.6 Licensed residential centres

Finding:

The regulation of licensed residential centres for persons with disability (commercial boarding houses accommodating persons with disability) does not sufficiently protect persons with disability from abuse, neglect and exploitation.

Commentary:

The evidence overwhelmingly demonstrates that persons with cognitive impairment are particularly vulnerable to abuse, neglect and exploitation in the licensed residential centre sector.

In our view, unfunded commercial services that operate on the basis of fees levied against pension income are incapable of providing appropriate services for persons with significant support needs related to cognitive impairment and disability. This population group ought to be appropriately supported within the funded service sector. Additionally, licensed residential centres operate on the basis of an institutional model of service delivery. For reasons already outlined such institutional models are strongly associated with abuse, neglect and exploitation of persons with disability.

Although reforms to the licensed residential service sector over the past ten years have sought to relocate persons with high support needs from this sector, and avoid new placements, the evidence suggests that there is still a significant population of persons with high support needs accommodated in this sector, and new placements continue to occur. Renewed and strengthened efforts are required to avoid this. The recommendation presented below should be read subject to this more general policy position.

The licensed residential centre sector in New South Wales is regulated under the *Youth and Community Services Act* 1973. This Act provides only for the imposition of minimum standards in relation to service quality which take effect as conditions upon the operator's license. Most DADHC service standard related policies do not apply to the licensed residential centre sector, as they do to direct and funded services.

Additionally, the Act is, in at least some respects, a weak source of power for the imposition these conditions. There is a view within the industry and Government that some, if not all conditions, cannot be enforced under the Act (or at least that a Superior Court would overturn an enforcement decision based on these conditions). As a result the Department of Ageing, Disability and Home Care tends not to press these conditions. Additionally, a typical result of the attempt to enforce higher standards upon proprietors is the proprietor deciding to leave the industry, effectively rendering residents homeless. In these circumstances, the Department of Ageing, Disability and Home Care becomes responsible for reaccommodating residents, most of whom will typically require transfer to the funded services sector. This also creates a significant disincentive to the enforcement of licensing standards.

Residents of licensed residential centres are 'mere' licensees and therefore have few tenancy and other rights. Moreover, they have no standing in relation to licensing decisions taken under the *Youth and Community Services Act* 1973.

Recommendation:
It is recommended that the *Youth and Community Services Act* 1973 is amended to provide explicit and comprehensive powers for the regulation of the licensed residential centre sector. Such an amendment ought to provide for such regulation to be articulated against a service user charter of rights equivalent to that provided in Schedule 1 of the *Disability Services Act* 1993. This charter should emphasise the right to freedom from abuse, neglect and exploitation. The legislation ought to also provide for service users and others with a genuine concern to appeal to the Administrative Decisions Tribunal against licensing decisions that they believe fail to meet legislative requirements.

The legislation ought to also designate an independent quality assurance agency for licensed residential centres (in practice, this ought to be the same agency as that recommended in relation to disability services). This agency would have the following functions with respect to these services:

- Initial and periodic accreditation of operators against the requirements of the Act – a proprietor ought not to be entitled to operate a licensed residential centre unless accreditation is obtained and maintained;
- Systematic periodic review of licensed residential centres according to the requirements of the Act;
- Specific purpose reviews of centres of concern (those centres subject to significant adverse incidents and complaints, or otherwise providing poor quality services);
- Approval of quality improvement action plans for under-performing centres;
- Suspension or withdrawal of accreditation from operators that fail to meet required standards;
- Provision of notice to service users, their associates and the public about licensing decisions, and their rights of appeal in relation to such decisions;
- Providing 'first tier' review of disputed licensing decisions;
- Development and publication of quality assurance and service quality improvement resources;
- Development and delivery of education and training for professionals, service providers, service users and their associates in relation to quality assurance and service quality improvement.

Additionally, we view it as essential that all DADHC service standard related policies apply to the licensed residential centre sector on the same basis that they do for direct and funded services.

3.7 Community services for persons with psycho-social impairment and brain injury

Finding:

The legislative basis for the provision and funding of community based services for persons with psycho-social impairment and brain-injury by the Minister for Health is inadequate to protect the human, legal and service user rights of persons with psycho-social impairment and brain-injury, including their right to freedom from abuse, neglect and exploitation.

Commentary:

Funding for the provision of community based services for persons with psycho-social impairment and brain-injury is allocated under general health legislation through general non-government funding programmes. At a programmatic level, NSW Health has developed various general and specific purpose policy guidelines against which such funding is administered. However, these policy arrangements do not, on the whole, articulate and guarantee the human rights of service users.

Recommendation:

It is recommended that specific legislation is enacted for the provision and funding of services for persons with psycho-social impairment and brain-injury by the Minister and Department of Health. This legislation ought to be broadly equivalent to the *Disability Services Act* 1993 (NSW). In particular legislation ought to provide for the following:

- A comprehensive statement of the human, legal and service user rights or service users;
- Articulation of funding allocation and service regulation with these rights;
- Appeal rights for service users and others with a genuine interest against funding decisions.

Additionally, it is recommended that this legislation designates an independent quality assurance agency in relation to these services which would have all of the powers outlined at 2.6 of this report. Again, it is recommended that decisions to accredit, maintain the accreditation of, or refusals to accredit disability services be reviewable by the Administrative Decisions Tribunal. Service users and others with a genuine concern in such decisions ought to be able to initiate such reviews.

3.8 Regulation of restrictive practices

Finding:

The regulation of restrictive practices in NSW (including in relation to procedures that cause physical pain and discomfort, deprivation of liberty (seclusion and exclusionary time out), other forms of physical, chemical, mechanical and psychological restraint, deprivation of property (including response cost), and humiliation and punishment (including over-correction) is inadequate to protect persons with cognitive impairment from abuse and neglect.

Commentary:

Currently, there is no legislation or regulation in NSW that explicitly regulates the use of restrictive practices used on persons with cognitive impairment for the purpose of behaviour modification. This is in spite of the fact that the evidence is overwhelming

that both the 'lawful' and 'unlawful' use of restrictive practices is a primary and very egregious source of abuse and neglect of persons with cognitive impairment. In the disability services context, to the extent that interventions of this type are regulated, this regulation occurs pursuant to the *Guardianship Act* 1987 (NSW) and the *Disability Services Act* 1993 (NSW). However, neither Act deals explicitly with restrictive practices or their permissible and impermissible uses.

In the mental health context, the *Mental Health Act* 1998 deals with involuntary treatment of persons with acute mental illness (including detention and compulsory treatment), but it does not deal at all with other restrictive practices used in acute mental health settings, or with the use of restrictive practices in community based settings (other than compulsory administration of medication through Community Treatment Orders).

The Department of Ageing, Disability and Home Care has adopted a comprehensive policy position on restrictive practices that applies to some, but not all, elements of the disability service system. Particular forms of restrictive practices are prohibited under this policy, and the use of other restrictive practices is limited. The Department has also established on a discretionary basis a 'Senior Practitioner' whose role it is to monitor the use of restrictive practices.

The Department of Ageing, Disability and Home Care's approach to the regulation of restrictive practices takes as its starting point the proposition that the use of restrictive practices constitutes an assault upon the person unless there is consent to these practices. Where the person is a child, a parent, guardian or other person with parental responsibility may consent to such practices. Where the person is an adult and he or she is unable to consent due to a decision-making disability, this consent must be provided by a guardian appointed by the Guardianship Tribunal who has been provided with a restrictive practices function.

The Guardianship Tribunal purports to regulate restrictive practices performed on persons with decision-making disability on the basis that consent to such practices is a function of a guardian who 'stands in the shoes' of the person. Although the *Guardianship Act* 1987 permits the making of plenary guardianship orders, such orders are rarely, if ever, made. Consequently, restrictive practices are designated as an element of the 'limited' functions of the guardian. If a restrictive practices function is not explicitly granted, then there is no valid consent authorising such practices.

It will be obvious that this approach to the regulation of restrictive practices does not explicitly engage the larger question as to whether a restrictive practice ought to be

permissible, even if the person, or a duly appointed guardian, would be willing to consent to it.

Additionally, these protections, such as they are, obviously do not apply to persons who do not have a decision-making disability sufficient to activate the guardianship jurisdiction.

In the funded services sector, they are also far less effective with respect to persons with brain injury and long-term (non-acute) psychosocial impairments because the Department of Health has not formulated policies regulating the use of restrictive practices in these settings. It ought also to be noted that the Department of Ageing, Disability and Home Care's policy in relation to restrictive practices does not apply to licensed accommodation services (boarding houses).

Recommendation:
It is recommended that specific NSW legislation is enacted to regulate the use of restrictive practices on children and adults with cognitive impairment. This legislation ought to apply in all situations (that is, in situations of informal support (such as a family context), in the specialist mental health, brain injury and disability service systems (including acute mental health services), and in the commercial disability service sector (in particular, licensed residential centres). The legislation ought to provide that certain restrictive practices are entirely prohibited. These ought to include the following practices:

- Practices that are experimental;
- Practices that cause pain or discomfort;
- Practices that are cruel, inhuman, degrading, or humiliating;
- Practices that result in emotional or psychological deprivation or other harm;
- Physical restraint; and
- Seclusion.

The legislation ought to provide that all forms of restrictive practice not prohibited must be subject to explicit approval, monitoring and review arrangements. Moreover the legislation ought to require that any use of restrictive practices must comply with human rights related standards and be for the purpose of fulfilling a human rights related goal. Under the legislation evidence that a restrictive practice has been used contrary to a direction of the Senior Practitioner ought to be designated prima facie proof that the practice is unlawful for the purpose of civil and criminal proceedings.

It is further recommended that an independent, statutory office of Senior Practitioner is established to regulate the use of restrictive practices in NSW. The Senior

Practitioner ought to have the explicit role of protecting and promoting the human rights of persons with cognitive impairment subject to, or at risk of, restrictive practices. The Office ought to have at least the power to:

- Declare a restrictive practice prohibited (both at large and in relation to a specific individual);
- Authorise, or refuse to authorise, a restrictive practice (both at large and in relation to a specific individual);
- Impose mandatory conditions on the use of restrictive practices (both at large and in relation to a specific individual);
- Give compulsory directions to service providers in relation to the use of restrictive practices;
- Enter any premises upon reasonable notice, interview any personnel, and examine and copy any document about or relating to the use, or suspected use, of a restrictive practice.

Additionally, the Senior Practitioner ought to have the following functions:

- Developing standards and guidelines in relation to the use of restrictive practices;
- Developing and delivering professional education in relation to restrictive practices and positive alternatives to restrictive practices;
- Research and development in relation to restrictive practices, and in particular, to positive alternatives to the use of restrictive practices;
- Evaluating and monitoring the use of restrictive practices;
- Developing policy recommendations to government and other relevant bodies about any matter relating to the use of restrictive practices;
- Publication of comprehensive periodic reports detailing the type and incidence of restrictive practices used in NSW.

3.9 Public Guardian

Finding:

The Public Guardian is an important potential and actual safeguard of the human rights of persons with cognitive impairment, including their right to freedom from abuse, neglect and exploitation. However, the legislation and institutional arrangements for the Office do not provide it with a sufficient human rights related mandate, an appropriate level of resources, or sufficient independence for it to fulfil this role to an acceptable level. Additionally, the Public Guardian has no mandate for public advocacy in relation to systemic issues impacting on persons under guardianship, or at risk of being brought under guardianship.

Commentary:

The Office of the Public Guardian is established under Part 7 of the *Guardianship Act* 1987 (NSW). That Act does not provide any over-arching human rights related mandate for the operation of the Public Guardian, or in relation to its responsibilities to persons under public guardianship.

Although the Public Guardian is administratively organised within the Attorney-General's Department, under s 80 of the *Guardianship Act*, the Public Guardian reports to the Minister administering the *Guardianship Act*; that is; the Minister for Ageing and Disability Services. The Minister for Ageing and Disability Services is also the Minister responsible for the provision, funding, licensing and regulation of disability services in NSW. This can, and has, led to tensions and pressures in the exercise of the Public Guardian's functions in respect of persons in relation to whom the Minister for Ageing and Disability Services is in some other way responsible (particularly those living in large residential centres, and those living in licensed residential centres, for example). In these situations, the Public Guardian has sometimes been placed under pressure to accede to Government policy directions that may be contrary to the human rights of persons with cognitive impairment, including their right to freedom from abuse, neglect and exploitation (for example, to accept placement in a large residential centre or licensed residential centre). Even though the Public Guardian does not always explicitly accede to such requests, over time such pressure appears to have had a pacifying effect.

The Public Guardian's workload continues to grow significantly on an annual basis, as the number of persons subject to Public Guardianship increases. The level of resources available to the Public Guardian to perform its functions has not kept pace with this increased workload. Currently, it is not possible for the Public Guardian to allocate all persons under its guardianship to a specific officer, and it may take some weeks and even months for new clients to be allocated to a specific officer. This is in spite of the fact that, in some cases, these clients will have very pressing human rights related concerns to be dealt with. Moreover, on the basis of its current level of resources, the Public Guardian is only able to guarantee that each of its clients will receive one personal visit on an annual basis. This is obviously an inadequate basis upon which to monitor the circumstances of the person, and to protect their right to freedom from abuse, neglect and exploitation.

Under the *Guardianship Act* 1987 the appointment of the Public Guardian is intended to be an action of last resort. The legislation expects that if less restrictive (and less stigmatising) action can be taken to resolve the underlying problem that has led to a guardianship application, then that action ought to be attempted before a

guardianship order is sought. In some other jurisdictions, the Office of the Public Advocate is able to intervene prior to, or instead of, a guardianship order being made to attempt to resolve such underlying issues.

Additionally, because the Public Guardian is responsible as guardian to so many persons, the Office is able to develop an almost unique insight into the systemic problems that impact across particular population group. It is inefficient and often ineffective for these issues to be pursued on an individual basis. In order to achieve necessary reform, it will often be appropriate or necessary for the Public Guardian to undertake systemic action to have these matters addressed within government. However, the Public Guardian currently has no explicit power to do so.

Recommendation:
It is recommended that the Office of the Public Guardian is re-established under specific legislation within the Attorney-General's portfolio. The legislation should stipulate that the Public Guardian reports directly (and only) to the Attorney-General.

The legislation ought to explicitly incorporate recognition of the human rights of persons with disability and stipulate that, in addition to any other function that may be granted to the Public Guardian under a guardianship order, the Public Guardian has a duty to respect, protect, and fulfil the human rights of persons with disability who are subject to guardianship. Related to this, the legislation ought to provide an explicit power (and impose a corresponding duty upon) the Public Guardian to take all steps necessary or desirable to secure the human, legal and service user rights of persons subject to guardianship, including, but not limited to, initiating complaints and legal action on behalf of the person.

Additionally, it is recommended that this legislation provides for a public advocacy function for the Public Guardian to prevent persons with disability being placed under guardianship unnecessarily (where their real need is for advocacy assistance to resolve an underlying problem), and to ensure that structural problems identified in the provision of guardianship services can be properly identified to government for action. In this respect the Public Guardian ought to be provided with an independent power to report to Parliament in relation to systemic issues impacting upon persons under guardianship.

It is further recommended that a new funding methodology be established for the Public Guardian which will ensure that the level of its resources keeps pace with the growth in the number of persons under guardianship. This methodology ought to incorporate key service benchmarks which would include at a minimum:

- Immediate allocation of a person brought under public guardianship to a guardianship officer;
- Initial personal visit by a guardianship officer within 14 days of appointment;
- Recurrent personal visits by a guardianship officer on at least a three-monthly basis for the duration of the guardianship order;
- Active participation by the guardianship officer in all planning and decision making arising from the functions reposed in the Public Guardian by the Guardianship Tribunal.

3.10 Protected Estates Act and the Office of the Protective Commissioner

Finding:

Current legislative and institutional arrangements for the management of the estates of persons with decision-making disability violate the fundamental human rights of persons with disability, and fail to provide adequate protection of persons with disability from financial exploitation and neglect.

Commentary:

The *Protected Estates Act* 1983 (NSW) is in urgent need of modernisation. Key provisions of the Act explicitly violate Article 12 of the Convention on the Rights of Persons with Disabilities. Among other things, the CRPD requires that any supported decision-making arrangement is subject to the principle of the least restrictive alternative. The *Protected Estates Act* 1983 does not permit the tailoring of orders according to the principle of the least restrictive alternative. Financial management orders are perpetual (unless terminated or revoked), rather than time-limited. They also must cover the whole of the person's estate, rather than, for example, just a particular asset in relation to which the person's requires assistance. The Act only permits the appointment of the Protective Commissioner as estate manager, rather than also providing for the appointment of a person in close relationship with the person (for example, a spouse, family member, guardian or friend). The Act also imposes a reverse onus of proof that requires the person to prove that he or she is capable of managing his or her estate, rather than requiring the applicant to prove he or she is not.

Government funding arrangements for the Office of the Protective Commissioner are also very problematic. The Office is substantially funded by fees and charges levied upon the estates of persons under estate management. Until recently, there was a high level of cross subsidisation of service costs. Fees charged to high wealth clients substantially funded service delivery to low wealth clients. Although the NSW Government has recently addressed this problem in part by capping fees payable by

high wealth clients at more reasonable levels, this fee structure is still not based on actual service delivery costs (for example, linked to particular service provided or transactions managed on behalf of the client).

Of further concern is the current lack of clarity about how services to low wealth clients will now be funded. Under the previous cross subsidisation arrangements, services to low wealth clients were constrained by the quantum of fees that could be levied upon high wealth clients. This effectively prevented the institution of more individualised estate management services for low wealth clients. In 2003, the NSW Government provided substantial public funding to meet the service delivery costs to low wealth clients. This was associated with an expectation of significantly improved service delivery to this group. However, that funding has been progressively withdrawn. In 2009 the Independent Pricing and Regulatory Tribunal recommended that public funding be immediately re-instated, but the Government has failed to respond to this recommendation.

Currently, the Office of the Protective Commissioner does not provide person-centred management of client estates or, in most cases, individual financial plans related to their lifestyle priorities. Estate managers typically have no, or very limited, personal contact with those persons whose estates they manage. In these circumstances it is virtually impossible for estate managers to personally identify financial exploitation and neglect. If no-one else does so, this exploitation and neglect is likely to continue undetected.

Moreover, due to the volume of estates managed, the turnover in estate management staff, and the lack of individual financial planning and monitoring tools employed by the Protective Commissioner, it is not unusual for estates to drift without active management for the benefit of the person. The negative attitudes of some estate management staff to the lifestyle needs and aspirations of their clients may also compound this neglect. (For example, a person with significant financial reserves may be left accommodated in a poor quality boarding house because it is assumed that this is sufficient to meet the person's needs).

Recommendations:

It is recommended that the *Protected Estates* Act undergoes fundamental amendment to give effect to the human rights of persons with disability, including those enunciated in Article 12 of the Convention on the Rights of Persons with Disabilities. Key amendments required include:

- Providing that financial management orders must be tailored to the specific needs and circumstances of the person and be formulated according to the principle of the least restrictive alternative. In

particular, financial management orders must be time-limited, capable of application to a particular asset or benefit, but not other assets or benefits, and automatically subject to regular periodic review;

- An applicant for a financial management order must bear the onus to prove that the person is not capable of managing their estate (or part of it) and that such an order is necessary and desirable to protect the person's estate (or part of it);
- A suitable person other than the Protective Commissioner ought to be capable of being appointed the person's financial nominee (this might be a family member, friend, or guardian);
- A transparent, transaction-based structure for the levying of client fees and charges;
- A requirement that the Office of the Protective Commissioner provides person-centred financial services to persons under estate management. This ought to include a requirement that every person under estate management has an individual financial plan that is linked to their lifestyle needs and aspirations.

3.11 Vilification

Finding:
Anti-Discrimination law in NSW does not provide persons with cognitive impairment with effective protection from vilification on the ground of disability.

Commentary:
Persons with cognitive impairment are frequently subject to 'hate speech' or vilification. The nature and effect of this harm has been discussed earlier in this report in relation to priorities for criminal law reform. Current anti-discrimination law recognises that not all acts of vilification are sufficiently serious to warrant a criminal penalty. The Anti-Discrimination Act therefore also proscribes a civil offence for less serious conduct of this nature. In our view, it would be appropriate for the proscription of disability vilification to adopt an equivalent structure.

Recommendation:
It is recommended that the *Anti-Discrimination Act* 1977 ought to be amended to include the offence of vilification on the Ground of Impairment or Disability. The scope of this offence, and the remedies available, ought to be equivalent to those available with respect to other groups protected against vilification under the Act.

It is further recommended that an equivalent offence be enacted into Commonwealth law.

3.12 Protection against arbitrary eviction

Finding:

Persons with cognitive impairment and their associates often will not make complaints about violations of their human, legal and service user rights because they fear that detrimental action will be taken against them if they do so. One of the most prevalent fears that persons with cognitive disability and their associates have is arbitrary eviction from their housing and support service.

Commentary:

Currently, most residents of specialist disability accommodation services, and licensed accommodation services, are 'mere' licensees. They therefore have no real protection from arbitrary eviction.

Recommendation:

It is recommended that the *Residential Tenancies Act* 1987 is amended to provide persons with disability who live in either funded or licensed supported accommodation with protection from arbitrary eviction. The legislation ought to deem as 'arbitrary' any action taken to evict a person because they make, or propose to make, a complaint to any person or body about the quality of the housing and support service; or because they exercise, or propose to exercise, any right of appeal they have in relation to the accommodation and support service.

3.13 Representative payee

Finding:

Australian social security legislation does not provide adequate protection for persons with cognitive impairment against financial exploitation of their social security entitlements by nominees.

Commentary:

Under Australian social security legislation, Centrelink may pay a person's social security entitlement to another person or corporate body to manage on their behalf where it makes an assessment that the person is incapable of managing the entitlement personally due to impairment or disability. The 'nominee' may be a family member, or person in authority in a nursing home, licensed residential centre, or disability service, for example.

Nominees are subject to very little, if any, initial investigation by Centrelink, and to virtually no ongoing monitoring by Centrelink to prevent financial exploitation of the social security recipient. In most instances, the nominee is not subject to State or Territory protected estates legislation, and there is consequently no protection against exploitation from this source. It is reported that there are many instances in which nominees fail to apply the person's social security entitlement for their benefit, and/or misappropriate it for their own use.

Recommendation:
It is recommended that the social security legislation is amended to provide that the Secretary may only pay a social security entitlement to an eligible person directly, or to a person or corporation appointed to manage that person's estate under State or Territory protected estates legislation.

3.14 National Abuse and Neglect Prevention Strategy

Finding:
There is no national coordinated strategic framework for the prevention of abuse, neglect and exploitation of persons with disability.

Commentary:
Australia lacks a national coordinated strategic framework for the prevention and remedy of abuse, neglect and exploitation of persons with cognitive impairment. Such a framework would have an important role in raising awareness about abuse, neglect and exploitation, and in coordinating actions across government departments, between layers of government, and between governments and the community to address these harms.

The contents of such a plan should address the findings and recommendations set out in this report. The Strategy ought to be progressive; that is, it ought to be renewable every three years. It ought to be supported by an advisory council constituted by persons with disability and their associates with expertise in relation to the prevention and remedy of abuse, neglect and exploitation of persons with cognitive impairment.

A key element of the Strategy ought to be a National Abuse and Neglect Prevention Grants Program that would provide grants to community organisations to undertake projects aimed at building capacity to prevent abuse, neglect and exploitation, and ensure appropriate responses to it when it does occur.

Recommendations:

It is recommended that the Australian Government adopt a progressive National Abuse and Neglect Prevention Strategy. This Strategy ought to be renewable every three years and be overseen by an expert advisory council.

It is also recommended that the Australian Government establish a National Abuse and Neglect Prevention Grants Program. This program ought to provide grants to community organisations to build the capacity of the community to prevent abuse, neglect and exploitation, and ensure appropriate responses to it when it does occur.

4. DISABILITY SERVICE SYSTEM REFORM AND CAPACITY-BUILDING PRIORITIES

4.1 CONGREGATE RESIDENTIAL CENTRES

Finding:

The evidence overwhelmingly demonstrates a strong association between large residential centres that congregate, segregate and isolate persons with cognitive impairment together, and the abuse, neglect and exploitation of persons with cognitive impairment.

Commentary:

There is a strong association between institutionalisation and violence. Residents of institutions are susceptible to violence from institution staff and other residents. The evidence also demonstrates that it is very difficult to detect, investigate and prosecute violence perpetrated in closed settings.

Recommendation:

It is critical to the realisation of the human right of persons with cognitive impairment to freedom from abuse, neglect, and exploitation (and many other human rights) that all 'congregate care' facilities accommodating persons with cognitive impairment are closed.

4.2 INDIVIDUALISED FUNDING AND SUPPORTS

Finding:

There is a strong positive association between individualised housing and support arrangements over which persons with disability and their close associates are able to exercise control and effective protection from abuse, neglect and exploitation.

Commentary

Housing and support options that enable persons with cognitive impairment, with the support of family members and others if necessary, to effectively exercise control over

where they will live, who they will live with, and who will be employed to provide necessary supports, provide very effective protection from abuse, neglect and exploitation. In part, this is because these options maximise relationship continuity and participation by the persons informal support network, and because they are situated in an open environment that exposes the person circumstances to the ordinary concern and scrutiny of others. Should there be abuse, neglect, or exploitation, or the risk of it, it is more likely to be detected and acted upon. Additionally, service 'models' of this type are more capable of attracting value-oriented staff that are committed to the rights empowerment of the individual.

Article 19 of the Convention on the Rights of Persons with Disabilities specifically mandates housing and support options that provide for the full inclusion and participation of persons with disability in the community, and that provide them with effective choice over their place of residence and where and with whom they will live.

Recommendation:
It is recommended that housing and support programmes for persons with cognitive are based on individualised funding and support arrangements that ensure the inclusion of persons with cognitive impairment in the community and enable them to effective choose their place of residence, and where and with whom they shall live.

4.3 Escaping service system-based violence

Finding:
Many persons with cognitive impairment currently live in environments (institutions, group homes, boarding houses, etc) where they are exposed to abuse, neglect and exploitation. In many cases, they are unable to escape violence because of their reliance upon housing and social supports that are only available through that setting.

Commentary:
Many persons with cognitive impairment rely upon housing and social support services to meet their basic needs. Mostly, this support is only available in rigid service models that are 'block' funded or operated from a for profit basis such as in the licensed residential centre sector. Due to the relative absence of other options, and the acute unmet demand for housing and support, many people are effectively trapped in abusive environments.

Recommendation:
It is recommended that the Commonwealth and State and Territory Governments collaborate to establish a national funding scheme that will fund the reconfiguration of housing and support options that expose persons with cognitive impairment to

abuse, neglect and exploitation. Funding might be used to provide one person with an individualised housing and support option that will allow them to escape from an environment in which they are exposed to abuse, or it might be used to reconfigure a service model in its entirety (for example, to devolve a group home environment in favour of an individualised housing and support option for each resident).

4.4 Access to individual and systemic advocacy

Finding:

Access to effective individual and systemic advocacy is crucial for persons with cognitive impairment to resist and overcome abuse, neglect and exploitation. However, in many areas of NSW, and indeed Australia, there is no, or very limited, availability of such supports. There is very heavy unmet demand for individual advocacy even in areas where services exist. Indigenous persons with disability and persons with disability from culturally and linguistically diverse backgrounds are particularly disadvantaged.

Although not advocacy per se, similar observations may be made in relation to the availability of trained support persons who are able to assist persons with disability in police interviews and in the in-court process.

Commentary:

Individual and systemic advocacy provides persons with cognitive disability with protection from abuse, neglect and exploitation in a number of critical ways. Systemic advocacy is essential to identify and promote action to eliminate the structural determinants or accelerants of abuse, neglect and exploitation. Individual advocacy is essential for the detection of abuse, neglect and exploitation, and to assist persons with cognitive disability pursue available remedies and escape violence.

Access to trained support persons is also essential for access to justice for persons with cognitive impairment. Support persons provide essential emotional and practical support, and assist in ensuring that the legal process is adjusted in appropriate ways to meet the needs of persons with cognitive impairment.

Recommendation:

It is recommended that the Commonwealth and State and Territory Governments collaborate to fund the establishment of individual advocacy services in every region of Australia where they do not presently exist. Additional services ought to be funded in areas of high unmet demand.

These services must provide equitable access for persons from indigenous and culturally and linguistically diverse backgrounds. This ought to include culturally

specific services, the situation designated workers from indigenous and culturally and linguistically diverse backgrounds within mainstream services where appropriate, and the imposition of a requirement that all individual advocacy services adopt culturally sensitive and competent service delivery practices. It is also recommended that the Commonwealth and State and Territory Governments collaborate to ensure the funding and support of a network of systemic advocacy services for persons with disability. This network ought to ensure effective coverage of all regions across Australia, and all population groups.

It is further recommended that appropriate advocacy agencies are funded to co-ordinate projects that will ensure that persons with disability have access to appropriately trained support persons to assist them in their interactions with police and the legal system.

4.5 Building personal resilience

Finding:
There is no systematic approach to building the personal resilience of persons with cognitive impairment to abuse, neglect and exploitation.

Commentary:
A key element of a primary prevention approach to the elimination of abuse, neglect and exploitation are strategies that assist persons with cognitive impairment to build their personal resilience. Key measures include:

- Normative sex and personal relationship education
- Programs that develop self-esteem, self-image, and self confidence
- Development of communication skills and the provision of assistive communication technologies, including in particular, alternative and augmentative communication systems and technologies for persons who have limited speech;
- Programs that develop personal advocacy and assertiveness skills;
- Effective education about human, legal and service user rights, as well as information about avenues of complaint and support when these rights are not recognised and respected;
- Effective education in protective and defensive behaviours.

Recommendation:
It is recommended that the Commonwealth and State and Territory Governments, either in collaboration, or individually, establish a detailed strategy and an associated funding program to build the resilience of persons with cognitive impairment (and others) to abuse, neglect and exploitation.

4.6 Professional development for disability professionals

Finding:

Professional development programs for disability professionals working with persons with cognitive impairment are highly variable in scope and quality. In many situations staff do not receive adequate professional development in the prevention, detection, and reporting of abuse, neglect and exploitation.

Commentary:

There are no sectorial standards or benchmarks for professional development for disability professionals.

Recommendation:

It is recommended that the Commonwealth and State and Territory Governments acting either in collaboration or individually, establish and fund a detailed professional development strategy for all disability professionals. A mandatory curriculum component in this strategy ought to be the prevention, detection and reporting of abuse, neglect and exploitation.

4.7 Accessibility of crisis accommodation services

Finding:

The evidence suggests that persons with cognitive impairment are frequently excluded from crisis accommodation services either because of explicit entry eligibility criteria that deny access to persons with cognitive impairment, or because the premises in which these services are provided are physically inaccessible. In other cases, crisis accommodation services may refuse or fail to provide the reasonable adjustments persons with cognitive impairment require in order to obtain effective access to their services.

Commentary:

If persons with cognitive impairment are to escape from abuse, neglect and exploitation, crisis accommodation services must be accessible to them. However, the evidence suggests that these services are typically not accessible. Eligibility criteria may deny or restrict entry to persons with cognitive impairment, premises may be physically inaccessible, and information about these services and how to access them may not be available in an accessible format.

Recommendation:

It is recommended that the Commonwealth and State and Territory Governments, either in collaboration, or individually, require, as a condition of government funding, that all crisis accommodation services:

- Ensure that persons with cognitive impairment are eligible for services;
- Provide reasonable accommodation of the impairment and disability related needs of persons with cognitive impairment; and
- Are delivered in premises that are fully accessible to persons with mobility difficulties;
- Provide professional development for staff about effective service delivery to persons with cognitive impairment escaping violence.

5. JUSTICE AGENCY REFORM AND CAPACITY BUILDING PRIORITIES

5.1 INTERAGENCY COORDINATION

Finding:

There is no structural coordination mechanism for ensuring effective human service and justice cross-agency action on abuse, neglect and exploitation of persons with cognitive impairment.

Commentary:

The prevention, detection, reporting, investigation, and prosecution of abuse, neglect and exploitation of persons with cognitive impairment requires effective cross-agency action. The evidence suggests that cross-agency coordination in this area is often very poor and reflects confused roles and responsibilities.

Recommendation:

It is recommended that the NSW Government develop and implement interagency guidelines for the prevention, detection, reporting, investigation, and prosecution of abuse, neglect, and exploitation of persons with disability. These guidelines ought to establish clear roles and responsibilities, and communication and co-ordination mechanism between agencies.

5.2 JUSTICE AGENCY STAFF PROFESSIONAL DEVELOPMENT

Finding:

Justice agency staff receive limited professional development to equip them to provide competent services to persons with cognitive impairment who are victims of abuse, neglect and exploitation.

Commentary:

The evidence suggests that justice agency personnel typically lack the attitudes, insight, knowledge, and specific skills required to provide effective services to persons with cognitive impairment who are victims of abuse, neglect and exploitation. Professional development programs offered to justice agency personnel place very

little, if any, emphasis on topic areas relating to abuse, neglect and exploitation of persons with cognitive impairment.

Recommendation:
It is recommended that the NSW Police Force, the NSW Legal Aid Commission, and the NSW Department of Public Prosecutions each develop comprehensive professional development programmes for their staff on effective service delivery to persons with disability. A key element of this education ought to be effective service delivery to persons with cognitive impairment who are victims of abuse, neglect and exploitation. Specific topic areas ought to include:

- Challenging myths and stereotypes commonly attached to persons with cognitive impairment;
- Communication techniques;
- Best practice interviewing techniques for matters involving persons with cognitive impairments;
- Best practice investigation techniques for matters involving persons with cognitive impairments;
- Modification of the legal process to accommodate the needs of persons with cognitive impairment, including the use of alternative technologies.

5.3 JUDICIAL EDUCATION

Finding:
There is very limited judicial education in relation to access to justice for persons with cognitive impairment, including in relation to those who appear before the courts as witnesses (victims) of crime.

Commentary:
In order to obtain access to justice, persons with cognitive impairment who are victims of crime require appropriate modifications to the legal process to ensure that their needs are met. Judicial officers have a critical role in the management of the legal process to ensure its accessibility and responsiveness to the needs of persons with cognitive impairment. It is therefore essential that they are knowledgeable about and skilled in the application of necessary adjustments to the in-court process. It is also important for judicial officers, themselves, to be free of the common myths and stereotypes that diminish or deny access to justice for persons with cognitive impairment.

Recommendation:
It is recommended that the Australian Judicial College develop and deliver a range of educational programmes for judicial officers in relation to access to justice for persons with cognitive impairment. These programmes should deal with at least the following topic areas:

- Myths and stereotypes that diminish access to justice for persons with cognitive impairment;
- Modifying the legal process to accommodate the needs of persons with cognitive impairment;
- Best practice communication techniques and modes of communication used by persons with cognitive impairment;
- Best practice techniques for obtaining court-room evidence from persons with disability;
- Instructing the jury in relation to evidence provided by a person with cognitive impairment.

5.4 Specialist Police expertise

Finding:
There is a lack of specialist expertise within the NSW Police Force in relation to the investigation of abuse, neglect and exploitation of persons with cognitive impairment.

Commentary:
There is no functional unit within NSW Police with the responsibility to promote best practice policing in relation to persons with disability. The absence of a specialist capacity inhibits the development of specific disciplinary knowledge and expertise, and results in the dissipation of the expertise that individual officers may have across broader Policing functions.

Recommendation:
It is recommended that a specialist function is established within NSW Police in relation to disability and policing issues. This function ought to have a central policy, programme development and coordination role, as well as a decentralised service delivery role. The central function would include the following responsibilities:

- strategic policy and programme development in relation to persons with disability and policing issues;
- High-level interagency coordination – including joint service planning, relationship management and problem solving (with the prosecution

service, disability and mental health service systems, sexual assault services etc);

- Coordination and development of specialist police officers;
- Development of best practice guidelines for police in relation to disability and policing issues;

The service delivery function would comprise police specialists who are expert in working with persons with disability. They would:

- Provide consultancy support to front-line police in relation to disability and policing issues. This would include providing specialist referral information; mentoring in interview techniques; advice about working with support persons; assistance in the development of investigation plans; and, liaison with prosecutors etc
- In complex or particularly challenging cases, or in situations of limited policing capacity, undertake investigations, or components of them (for example, key interviews with victims).

6. IMPROVING COMPLAINT HANDLING PRACTICE

6.1 LOCAL RESOLUTION OF COMPLAINTS

Finding:

Most if not all of the complaint handling agencies whose practice was reviewed in the course of this research place primary emphasis on the local resolution of complaints; that is, the resolution of complaints as close as possible to their source by those directly responsible. While this approach will be appropriate in many instances, it is unlikely to be appropriate where the complaint involves an allegation of abuse, neglect and exploitation.

Commentary:

Policies that emphasise the local resolution of complaints aim to achieve a number of valid goals (for example, improved responsiveness of services to consumer concerns and the repair and maintenance of relationships between the service and consumer). However, this approach will not usually be appropriate where the complaint involves allegations of abuse, neglect and exploitation. This is because it will not typically be appropriate that the matter is resolved at an internal level. Other agencies will usually need to be involved in the investigation.

Moreover, the person who is at the centre of the allegations may require immediate protection and removal from the environment. Local resolution in these

circumstances may have the (unintended) effect of detoxifying the complaint, insulating the offending conduct from appropriate external scrutiny, and reinforcing the status quo.

Recommendation:
It is recommended that all complaint handling agencies that emphasise local resolution of complaints develop clear guidelines and ethics to govern local resolution practice. These guidelines and ethics ought to make it clear that local resolution is inappropriate in most circumstances where a complaint involves allegations of abuse, neglect or exploitation of a person with cognitive impairment.

6.2 Complaint handling timeframes

Finding:
A number, though not all, of the complaint handling bodies reviewed in the course of this research take considerable time to assess and deal with complaints. Such delays seriously disadvantage many persons with cognitive impairment.

Commentary:
Many persons with cognitive impairment will have greater difficulty remembering a particular state of affairs than other members of the community. It is therefore essential that complaints raised by persons with cognitive impairment are assessed and determined immediately so that the person has the capacity to accurately recall and report key facts.

Recommendation:
It is recommended that all complaint handling agencies develop clear guidelines for the assessment and determination of complaints raised by, or involving, persons with cognitive impairment that provide for their immediate assessment and determination.

6.3 Accessible information about complaint-handing bodies and the complaints process

Finding:
A number of complaint handling bodies reviewed in the course of this research do not provide Easy English and Pictorial information about their services that is capable of being understood by persons with cognitive impairment who have limited literacy. With respect to those agencies that do provide information about their services in these formats, not all of the material is of adequate quality.

Commentary:
If persons with cognitive impairment are to have effective access to complaint-handling bodies, these agencies must provide accessible information about their

services. In particular, information must be made available in Easy English and Pictorial formats suitable for persons with limited literacy.

Recommendation:
It is recommended that all complaint handling agencies develop information about their services and the complaints process in Easy English and Pictorial formats capable of being understood by persons with low literacy. To ensure that materials of this type are of good quality, they ought to be developed and tested in close consultation with relevant user groups.

6.4 Emphasis on writing

Finding:
A number, though not all, of the complaint handling bodies reviewed in the course of this research either formally require, or tend to require in practice, complaints and prosecuted in writing. This seriously disadvantages many persons with cognitive impairment who are unable to effectively communicate in writing.

Commentary:
Complaint mechanisms that require a complaint process to be initiated in writing and for subsequent information or comments to be submitted in writing are inaccessible to many persons with cognitive impairment. Even in those circumstances where the relevant legislation does not stipulate that complaints have to be in writing, as a matter of practice agencies tend to rely on, and privilege, written narratives.

In part this results from the fact that most agencies do not have well developed policies and guidelines for the intake, assessment, and investigation of complaints lodged by, or involving, persons who have cognitive impairment. In these circumstances it is not immediately obvious to intake and complaint handling staff what alternative modalities are available and required.

Recommendation:
It is recommended that all complaint handling bodies develop guidelines for staff in relation to the intake and handling of complaints that are not lodged in writing. These guidelines ought to outline the alternatives to writing and best practice approaches to detailing complaints and related evidence where the complainant is unable to communicate in writing.

6.5 COMMUNICATION AND INTERVIEWING TECHNIQUES

Finding:

Complaint handling bodies, generally speaking, have limited knowledge and expertise in relation to the interviewing techniques that are necessary to obtain effective evidence from a person with cognitive impairment. They may also have limited knowledge and experience of the alternative modes of communication utilised by persons with cognitive impairment. These shortcomings seriously disadvantage persons with cognitive impairment.

Commentary:

Many complaint processes that rely upon key evidence from persons with cognitive impairment fail because evidence from the person has not been obtained in a competent manner. The interviewer may inappropriately (and inadvertently) lead the witness, misunderstand non-verbal communication, and fail to provide accommodation of the person's impairment and disability related needs in the course of the interview.

Typically, complaint handling staff will have limited knowledge and experience in alternative modes of communication utilised by some persons with cognitive impairment and therefore be unable to effectively communicate with the person.

Particular complaint resolution techniques – such as mediation, conciliation, negotiation etc – are discursive processes that are very difficult for persons with cognitive impairment to effectively participate in.

Recommendations:

It is recommended that all complaint handling bodies develop clear guidelines, and provide comprehensive professional development for their staff, in relation to best practice interviewing techniques for persons with cognitive impairment. In particular, these guidelines ought to provide clear direction for the management of discursive processes.

It is recommended that all complaint handling bodies provide professional development for their staff in relation to effective communication techniques for persons with cognitive impairment, and in relation to the modes of communication utilised by persons with cognitive impairment.

6.6 CENTRALISED TELEPHONE INTAKE SYSTEMS

Finding:

Most of the complaint handling bodies reviewed in the course of this research rely principally, on telephone or TTY based centralised intake systems. Centralised, telephone intake systems are poorly accessible to many persons with cognitive impairment.

Commentary:

Centralised, telephone intake systems are poorly accessible to persons with cognitive impairment for a wide variety of reasons. For example, they may not have ready access to a telephone; they may not have private access to a telephone; they may rely upon communication equipment that does not have a telephone interface; or they may be suspicious or anxious about talking to strangers over the phone.

There are distinct additional cultural disadvantages associated with centralised telephone intake systems; for example, remote indigenous communities may not provide access to a functioning telephone, and for persons from culturally and linguistically diverse backgrounds, it may be very difficult to communicate using an interpreter over the phone, particularly where this involves sensitive personal information.

Recommendation:

It is recommended that all complaint handling bodies, in addition to their centralised intake systems, provide systematic outreach to target population groups. Outreach activities ought to give priority to population groups least likely to be able to use a centralised telephone intake system. This would include persons with cognitive impairment living in closed environments, those living in remote communities, and those from indigenous and culturally and linguistically diverse backgrounds.

APPENDIX 1: DEFINITIONS OF ABUSE, NEGLECT AND EXPLOITATION

Abuse: Is the violation of an individual's human or legal rights by the act or actions of another person or persons.

Types of abuse include (but are not limited to):

Physical abuse: Any non-accidental physical injury or injuries to a child or adult. This includes inflicting pain of any sort or causing bruises, fractures, burns, electric shock, or any unpleasant sensation.

Sexual abuse: Any sexual contact between an adult and child 16 years or age and younger; or any sexual activity with an adult who is unable to understand, has not given consent, is threatened, coerced or forced to engage in sexual behaviour.

Psychological or emotional abuse: Verbal assaults, threats or maltreatment, harassment, humiliation or intimidation, or failure to interact with a person or to acknowledge that person's existence. This may also include denying cultural or religious needs and preferences.

Restraints and restrictive practices: Restraining or isolating a child or adult for reasons other than medical necessity or the absence of a less restrictive alternative to prevent self-harm. This may include the use of chemical or physical means or the denial of basic human rights or choices such as religious freedom, freedom of association, access to property or resources or freedom of movement.

Legal of civil abuse: Denial of access to justice or legal systems that are available to other citizens.

Systemic abuse: Failure to recognise, provide or attempt to provide adequate or appropriate services, including services that are appropriate to that person's age, gender, culture, needs or preferences.

Exploitation: Is the improper use of another person or the improper use of, or withholding of, another person's assets and resources.

Types of exploitation include (but are not limited to):

Financial exploitation: The improper use of another person's assets or the use or withholding of another person's resources.

Sexual exploitation: Forcing a person to perform sexual acts for others, or to feature in a pornographic image, whether or not for compensation.

Servitude: Forcing a person to perform labour for others, without lawful excuse. This includes forced 'begging' from others.

Neglect: Is the failure to provide the necessary care, aid or guidance to dependent adults or children by those responsible for their care.

Types of neglect include (but are not limited to):

Physical neglect: Failure to provide adequate food, shelter, clothing, protection, supervision and medical and dental care, or to place persons at undue risk through unsafe environments or practices.

Passive neglect: A caregiver's failure to provide or wilful withholding of the necessities of life including food, clothing, shelter or medical care.

Wilful deprivation: Wilfully denying a person who, because of age, health or disability, requires medication or medical care, shelter, food, therapeutic devices or other physical assistance – thereby exposing that person to risk of physical, mental or emotional harm

Emotional neglect: The failure to provide the nurturance or stimulation needed for the social, intellectual and emotional growth or well-being of an adult or child.

APPENDIX 2: SUMMARY OF CRPD SUBSTANTIVE ARTICLES

***CRPD* Elements**	**Summary/Description of provisions**
Article 1: Purpose	Describes the purpose of the *CRPD*, which is the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disability; outlines the three levels of State obligation which is to *promote, protect and ensure* these rights; describes the class of persons to whom the *CRPD* applies, which is 'all' persons with disability, and conceptualises 'disability' according to the social model as the product of the interaction of persons with impairment with barriers that hinder their full and effective participation in society.
Article 2: Definitions	Explains the meaning of the following terms that are used in more than one place in the *CRPD*: 'language'; 'communication'; 'discrimination on the basis of disability'; 'reasonable accommodation'; and 'universal design'.
Article 3: General principles	Describes eight fundamental principles to be applied in all aspects of the implementation of the *CRPD*: • respect for inherent dignity, individual autonomy, including the freedom to make one's own choices, and independence of persons • non-discrimination • full and effective participation and inclusion in society • respect for difference and acceptance of persons with disability as part of human diversity and humanity • equality of opportunity • accessibility • equality between men and women, and • respect for the evolving capacities of children with disability and respect for the right of children with disability to preserve their identity.
Article 4: General obligations	Describes the broad-based actions that State Parties must take to comply with the *CRPD* both on becoming a Party, and over the longer term. They include: • the adoption of all appropriate legislative, administrative and other measures for implementation of CRPD rights, • Abolishing or amending laws and policies, and eliminating practices and customs that are incompatible with CRPD rights, and • taking the human rights of persons with disability into account in all policies and programmes These responsibilities apply to all the human rights and fundamental freedoms recognised by the *CRPD*.

CRPD Elements	Summary/Description of provisions
Article 5: Equality and non-discrimination	Guarantees that persons with disability are equal before the law and that they are entitled to equal protection of the law; prohibits discrimination on the ground of disability and requires States to ensure effective protection against such discrimination; requires States to ensure the provision of reasonable accommodation; excepts positive measures from the prohibition on discrimination. Again, these obligations apply to all other human rights and fundamental freedoms recognised by the *CRPD*.
Article 6: Women with disabilities	Requires States to recognise that women with disability are subject to multiple and aggravated forms of human rights violation; requires States to take specific positive measures to ensure that their human rights and fundamental freedoms are realised. Again, these obligations apply to all other human rights and fundamental freedoms recognised by the *CRPD*.
Article 7: Children with disabilities	Requires States to ensure that children with disability enjoy all human rights and fundamental freedoms on an equal basis to other children; requires States to ensure that in all actions concerning children with disability, the best interests of the child are a primary consideration; requires States to recognise the evolving capacity and right of children with disability to express their views on matters that affect them.
Article 8: Awareness raising	Requires States to foster respect for the rights and dignity of persons with disability, combat stereotypes, prejudice and harmful practices affecting persons with disability and promote awareness of the capability and contribution of persons with disability.
Article 9: Accessibility	Requires States to ensure that the physical environment, transportation systems, information and communications systems, and other public facilities and services are accessible to all persons with disability on an equal basis with others.
Article 10: Right to life	Requires States to recognise that every human being has an inherent right to life; requires States to take all necessary measures to ensure persons with disability enjoy this right on an equal basis with others.
Article 11: Situations of risk and humanitarian emergencies	Requires States to take all necessary measures to ensure the protection and safety of persons with disability in situations of risk, including situations of armed conflict, humanitarian emergencies, and natural disasters.

CRPD Elements	Summary/Description of provisions
Article 12: Equal recognition before the law	Requires States to recognise that persons with disability have legal personality; requires States to take appropriate measures, if needed, to ensure persons with disability can exercise legal capacity; requires any such arrangements to be subject to effective safeguards to prevent abuse.
Article 13: Access to justice	Requires States to ensure effective access to justice for persons with disability; requires appropriate procedural and age-related adjustments to the legal process and training for those involved in the administration of justice; applies to persons with disability in all aspects of their interaction with the justice system.
Article 14: Liberty and security of the person	Requires States to ensure that persons with disability are not unlawfully or arbitrarily deprived of their liberty; requires States to ensure the personal safety of persons with disability; provides that disability shall in no case justify a deprivation of liberty.
Article 15: Freedom from torture or cruel, inhuman or degrading treatment or punishment	Requires States to ensure that persons with disability are not subject to torture or to cruel, inhuman or degrading treatment or punishment; requires States to ensure that persons with disability are not subject to medical or scientific experimentation without their consent.
Article 16: Freedom from exploitation, violence and abuse	Requires States to ensure that persons with disability are not subject to any form of exploitation, violence or abuse; requires States to protect women, children and older persons with disability from gender and age aggravated exploitation, violence and abuse; requires States to institute measures to ensure the detection, investigation and prosecution of exploitation, abuse and neglect of persons with disability and to promote the physical and psychological recovery and social reintegration of victims.
Article 17: Protecting the integrity of the person	Requires States to ensure respect for the physical and mental integrity of persons with disability.

CRPD Elements	Summary/Description of provisions
Article 18: Liberty of movement and nationality	Requires States to ensure that persons with disability have liberty of movement and the freedom to choose their residence and nationality on an equal basis with others.
Article 19: Living independently and being included in the community	Requires States to recognise that persons with disability have a right to live in the community, with choices equal to others; requires states to ensure that persons with disability have access to specialist and generic services necessary to support living and inclusion in the community, and to prevent their isolation or segregation from the community.
Article 20: Personal mobility	Requires States to take effective measures to ensure that persons with disability enjoy the greatest possible personal mobility and independence; requires States to ensure that mobility aids, devices, assistive technologies and forms of live assistance and intermediaries necessary for personal mobility are of good quality and are available at an affordable cost.
Article 21: Freedom of expression and opinion, and access to information	Requires States to ensure that persons with disability can exercise the right to freedom of expression and opinion including by providing public information in accessible formats and via appropriate technologies, and by accepting or facilitating the use of sign languages, Braille and other augmentative and alternative communication.
Article 22: Respect for privacy	Requires States to ensure that persons with disability are not subject to arbitrary or unlawful interference with their privacy, or to unlawful attacks on their reputation.
Article 23: Respect for home and the family	Requires States to eliminate discrimination against persons with disability in all matters relating to marriage, family, parenthood and relationships; requires States to ensure that children with disability grow up in a family environment, and that children or parents with disability are not arbitrarily or unnecessarily separated.

CRPD Elements	Summary/Description of provisions
Article 24: Education	Requires States to recognise the right of persons with disability to inclusive education and life-long learning that will enable them to realise their potential; requires States to institute effective measures to ensure that persons with disability are able to realise this right, including through the provision of reasonable accommodation; individualised support; and facilitating the learning of Braille, sign language and other means and formats for communication.
Article 25: Health	Requires States to recognise that persons with disability have the right to the highest attainable standard of health; requires states to ensure that persons with disability have access to the full range of generic health care services and programs, as well as to any necessary specialised health services; requires States to ensure that medical treatment is only provided to persons with disability where there is free and informed consent; requires States to prohibit discrimination on the ground of disability in the provision of health and life insurance.
Article 26: Habilitation and rehabilitation	Requires States to take effective measures to enable persons with disability to attain and maintain maximum independence; full physical, mental, social and vocational ability; and, full inclusion and participation in all aspects of life; requires States to promote appropriate initial and ongoing training for staff of habilitation and rehabilitation services; requires States to promote the availability and use of assistive devices and technologies for habilitation and rehabilitation.
Article 27: Work and employment	Requires States to recognise the right of persons with disability to work in freely chosen or accepted employment in a labour market and work environment that is open, accessible and inclusive; requires States to safeguard and promote realisation of this right by measures such as prohibiting discrimination on the ground of disability in all aspects of employment; ensuring access to general technical and vocational education; providing assistance with job seeking, career development, and business development; and, by employing persons with disability in the public sector. Requires States to ensure persons with disability are able to exercise their trade union rights. Requires States to ensure that persons with disability are not held in slavery or servitude, and are protected from forced and compulsory labour.

CRPD Elements	Summary/Description of provisions
Article 28: Adequate standard of living and social protection	Requires States to recognise the right of persons with disability to an adequate standard of living for themselves and for their families, including adequate food, clothing and housing; requires States to recognise the right of persons with disability and their families to continuous improvement of living conditions and to social protection.
Article 29: Participation in political and public life	Requires states to guarantee political rights to persons with disability and to ensure that these rights are enjoyed on an equal basis with others. These rights include the right of participation in political and public life; the right to vote by secret ballot; the right to participate in non-government organisations concerned with public and political life; and, the right to form and join representative organisations of persons with disability.
Article 30: Participation in cultural life, recreation, leisure and sport	Requires States to take effective measures to ensure that persons with disability are able to access cultural materials in accessible formats; enjoy access to television, film, theatre and other cultural activities; develop and utilise their creative, artistic and intellectual potential; enjoy recognition and support of their specific cultural and linguistic identity; and, are able to participate in recreational, leisure and sporting activities on an equal basis with others.
Article 31: Statistics and data collection	Requires States to collect statistical and research data that will enable them to formulate, implement, monitor and evaluate policies and programs to give effect to the *CRPD*. Data collection must be subject to human rights and other ethical safeguards.
Article 32: International cooperation:	Requires States to recognise the importance of, and support, international cooperation by governments, international and regional organisations, and civil society in efforts to implement the *CRPD*.
Article 33: National implementation and monitoring:	Requires States to designate focal points and co-ordination mechanisms within government to facilitate cross-sectoral *CRPD* implementation. Requires states to designate or establish independent monitoring mechanisms to oversee implementation of the *CRPD*.

APPENDIX 3: LEGAL, INSTITUTIONAL AND SOCIAL POLICY SCAN

1. Human rights law and policy

1.1 Australia is a party to seven of the nine 'core' United Nations human rights treaties, including the CRPD. These treaties are binding upon Australia in its relationship with the international community. In other words, Australia has accepted a solemn responsibility to give effect to these treaty obligations within Australia, and is accountable to the international community, through the mechanism of the United Nations Treaty Bodies, for the fulfilment of that responsibility.

1.2 Australia is a party to the Optional Protocols to the ICCPR and CEDAW. Australia has also recently signed the Optional Protocol to CAT. The Australian Government is currently deliberating on the question of accession to the Optional Protocol to the CRPD. An Optional Protocol to ICESCR was adopted by the United Nations General Assembly in December 2008, but has not yet opened for signature.

1.3 Each of the Optional Protocols for ICCPR, CEDAW, CRPD and ICESCR provide for an individual communications procedure that allow persons to raise complaints with the Treaty Body about alleged violations of their human rights, provided they have first exhausted reasonably available domestic remedies. If this complaint is admitted and is upheld by the Treaty Body, it will result in recommendations to the Australian Government to remedy the violation. These recommendations have solemn persuasive status, but are not directly enforceable.

1.4 Complaints alleging violation of ICCPR and CEDAW rights related to freedom from abuse, neglect and exploitation of persons with cognitive impairment may currently be raised with the relevant Treaty Bodies. However, as far as we have been able to ascertain, no communications of this specific nature have in fact been made.

1.5 With very limited exceptions, ratification or accession to an international treaty does not result in the terms of that treaty being incorporated into Australian law. For this to occur, (assuming the obligation is not already part of Australian law) the (or an) Australian Parliament must enact domestic legislation to give effect to the treaty obligation.

1.6 To date there has been limited direct incorporation of human rights treaty obligations into Australia law, and the relative 'strength' of those provisions that have been incorporated varies widely.

1.7 Substantial (but not all) elements of CERD and CEDAW have been enacted into Australian law in the *Racial Discrimination Act* 1975 (Cth) (RDA) and the *Sex Discrimination Act* 1984 (Cth) (SDA) and at the NSW level, in the *Anti-Discrimination Act* 1977 (NSW) (ADA). The *Disability Discrimination Act* 1992 (Cth) (DDA) predates the CRPD, but it nevertheless also incorporates some elements of that treaty. As the nomenclature implies, this legislation is focused on the elimination of discrimination against protected classes. This prohibition relates to specified areas of life (rather than to all areas), and there are some exceptions to those areas specified. With respect to the CRPD in particular, it is important to note that the treaty obligations go significantly beyond the prevention of discrimination against the protected class.

1.8 In relation to abuse, neglect and exploitation of persons with cognitive impairment it is relevant to note that this legislation makes discrimination unlawful in the provision of goods and services. "Services" would include many activities performed by public authorities and others providing public services that relate to the prevention, detection, reporting, investigation, and prosecution of harms against persons with cognitive impairment.

1.9 The legislation also makes it unlawful to discriminate against the protected class in areas such as education and employment. It is conceivable that a claim in relation to abuse, neglect and exploitation might be pursued and dealt with as constituting discrimination in these areas, however, generally speaking, as we note elsewhere in this report, there are strong policy reasons why this should not occur.

1.10 The SDA and the ADA make sexual harassment unlawful. The DDA also makes discrimination involving harassment unlawful. Additionally, the SDA, RDA, DDA and ADA each make it unlawful for a person to victimize another person who is seeking to assert their rights under these Acts. There would be circumstances where these provisions may be relevant to a response to the abuse, neglect or exploitation of a person with cognitive impairment.

1.11 The ADA makes it unlawful to vilify persons on the grounds of homosexuality, HIV/AIDS or transgender status. These provisions may be relevant where a person with cognitive impairment also falls into one of these categories, but not otherwise.

1.12 The prohibition on discrimination and related conduct set out in these instruments may be 'enforced' by complaints to either the Australian Human Rights Commission (AHRC) in the case of the RDA, SDA and DDA, or to the NSW Anti-Discrimination Board (ADB) in the case of the ADA. Each agency has the function and power to investigate and conciliate such complaints. If the complaint cannot be resolved by the AHRC through conciliation it is terminated and separate enforcement proceedings may be commenced in the Federal Court of Australia. If the ADB cannot resolve a complaint through conciliation the matter may be referred to the NSW Administrative Decisions Tribunal for determination.

1.13 The DDA also contains a number of other important functions potentially relevant to abuse, neglect and exploitation of persons with cognitive impairment. These include the power to develop Disability Standards and a facility to encourage the development and dissemination of voluntary disability Action Plans.

1.14 To date two Disability Standards have been formulated under the DDA: the *Disability Standards for Accessible Public Transport* (2002) and the *Disability Standards for Education* (2005). The *Disability Standards for Education* include standards relating to harassment and victimization, however, the *Disability Standards for Accessible Public Transport* do not. Disability Standards are 'enforceable' through complaints to the AHRC or Federal Court of Australia.

1.15 Section 61 of the DDA sets out the broad content to be included in voluntary Action Plans. In reality, these plans include a wide range of subject matter, and they vary very significantly in scope, content and quality. Some plans include commitments relevant to abuse, neglect and exploitation of persons with cognitive impairment, others do not. The AHRC has no specific powers in relation to Action Plans – except the power to sell them – and these Action Plans cannot be enforced. The DDA imposes no positive obligation on any agency to develop an Action Plan.

1.16 Australia's human rights treaty obligations are also, to a more limited extent, incorporated into Australian law through the *Human Rights and Equal Opportunity Commission Act 1984* (Cth) (HREOCA). That Act defines 'human rights' in an exclusive way to mean the human rights set out in the instruments appended as scheduled to that Act, or that are declared as international instruments under s 47 of the Act. The following instruments are currently either scheduled or declared under the Act:

- Convention concerning Discrimination in respect of Employment and Occupation (scheduled)
- International Covenant on Civil and Political Rights (scheduled)
- Declaration on the Rights of the Child (scheduled)
- Declaration on the Rights of Mentally Retarded Persons (scheduled)
- Declaration on the Rights of Disabled Persons (scheduled)
- International Labour Organisation Discrimination (Employment) Convention ILO111 (declared)
- Convention on the Rights of the Child (declared)
- Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief (declared)

Each of these instruments contains provisions that will in some circumstances relate to abuse, neglect and exploitation of persons with cognitive impairment.

1.17 It is notable that the CRPD is not scheduled or declared under HREOCA. The AHRC therefore currently has no power to conduct inquiries or receive complaints that rely exclusively upon its provisions. Although the AHRC could conduct inquiries and receive complaints that rely upon either the Declaration on the Rights of Mentally Retarded Persons, or the Declaration on the Rights of Disabled Persons – both of which do set out rights to freedom from abuse, neglect and exploitation – these instruments are now outmoded in some respects and their recognition of human rights is not as comprehensive as that of the CRPD, including in relation to abuse, neglect and exploitation.

1.18 It is also notable that CAT is not scheduled or declared under HREOCA. The AHRC's power to conduct inquiries or receive complaints that allege torture or other cruel, inhuman or degrading treatment or punishment is therefore limited to reliance upon the more limited exposition of this right in the ICCPR.

1.19 While we are on the subject, it ought to also be noted that CAT is incorporated into Australian law only to the most limited extent. The *Crimes (Torture) Act* 1998 (Cth) does proscribe torture (only), but it only applies to acts committed outside Australia.

1.20 Under HREOCA, the Australian Human Right Commission has the responsibility to promote the human rights set out in these instruments within Australian society. To this end it has public information and education functions. It may also conduct public inquiries relying on the human rights set out in these instruments and deal with complaints alleging their violations. However, if such complaints cannot be conciliated, neither the AHRC nor any other body has the

power to judicially determine the matter or enforce a remedy. The most that the AHRC may do is to refer the matter to the Australian Attorney General who may raise the matter in Parliament. Any further response would require action by Executive Government.

1.21 Commonwealth non-discrimination and human rights legislation is principally administered by the AHRC. The AHRC is situated with the portfolio of the Australian Attorney-General. It has relative independence from executive government, including the power to conduct own motion inquiries and report directly to Parliament, and it has a clear human rights mandate. Its constitution and functioning complies with the United Nation's *Paris Principles Relating to the Status of National Human Rights Institutions.*

1.22 The NSW *Anti-Discrimination Act* is administered by the ADB, which is situated within the NSW Attorney-General's portfolio. In addition to its complaint handling jurisdiction the ADB has a range of more general functions which broadly include public information and education, policy and law reform, and the power to conduct inquiries and research. The ADB has a degree of independence from executive government. Although some sections of the Act refer to 'human rights,' the ADB's overall mandate is focused on non-discrimination and specific protected population groups.

1.23 As far as we were able to ascertain, neither the AHRC nor the ADB have any specific policy or procedures concerning the handling of complaints raised by persons with cognitive impairment. Nor has either agency undertaken any recent specific education, policy or law reform initiatives, inquiries or research in relation to abuse, neglect and exploitation of persons with cognitive impairment.

1.24 The Australian government does not currently have any single high-level strategic policy or action plan in relation to human rights.

1.25 At the time this research was undertaken, the Australian Government has appointed a Consultation Committee to consult with the Australian community about the need for a National Charter of Rights. Such a Charter would, potentially, incorporate human rights into Australian law. Although the Committee's brief is not limited to any particular category of rights, or statutory model, at the time of writing most public debate has centred on the desirability of incorporating civil and political rights into such a Charter. There has been very limited debate about the incorporation of economic, social and cultural rights, and virtually no debate about the incorporation of the thematic

conventions, such as the CRPD. The implementation and enforcement mechanisms that would be associated with any such Charter, if any, are also subject to significant debate.

2. National Disability Strategy

2.1 At the time this research was being undertaken, the Commonwealth Government had recently completed a national consultation process as part of the development of a National Disability Strategy. Although it is not entirely clear from the public information available, it would appear that the National Disability Strategy is proposed as a cross-agency and intergovernmental strategy that will, in part, seek to implement aspects of the CRPD.

3. Disability services law and policy

National Disability Agreement

3.1 Funding for specialist services for persons with disability in Australia is regulated by the *Disability Services Act 1986* (Cth) (DSA (Cth)) and its state and territory counterparts (in NSW, the *Disability Services Act 1993* (NSW) (DSA (NSW)). Broadly speaking, the underlying policy of this legislation is to use public funding to require the development and delivery of disability services that will enable persons with disability to live and participate in the community with as much independence as possible. The effectiveness of this legislation in fulfilling this policy objective and its relationship to abuse, neglect and exploitation of persons with disability is discussed in detail in our findings and recommendations.

3.2 Historically, the provision and funding of disability services in Australia occurred at both the Commonwealth and State and Territory levels in an ad hoc way. Both tiers of government provided or funded the same service types and these services were subject to different regulatory arrangements. These arrangements were rationalized in 1991 under the First Commonwealth State Disability Agreement (now the National Disability Agreement). Under this agreement, the Commonwealth assumed responsibility for employment and community-based rehabilitation services, and the States and Territories assumed responsibility for accommodation, respite, day program, therapy and other services. Some services, such as disability advocacy, remained a shared responsibility. Through the mechanism of the National Disability Agreement (and its predecessors) Australian governments pursue a range of common policy and programmatic objectives.

3.3 Originally, the Commonwealth State Disability Agreement required all States and Territories to enact legislation complementary to the DSA (Cth), and to formulate Standards for the provision of services equivalent to the then Commonwealth Disability Service Standards.

3.4 The current National Disability Agreement entered into force on 1 January 2009 and runs for 5 years. The Agreement specifies 10 priority areas for reform. One of those areas specified is the development of a National Disability Quality Framework with a National Quality Assurance system for disability services by mid 2010. No specific initiative is proposed in relation to abuse, neglect and exploitation of persons with cognitive impairment.

National Disability Service Standards

3.5 Under the DSA (Cth) all disability services must comply with twelve qualitative Disability Service Standards formulated by the Minister under section 5A of the Act.

3.6 Disability Service Standard 7 deals with complaints and disputes. It requires service providers to ensure that each service recipient is encouraged to raise, and have resolved without fear of retribution, any complaints or disputes he or she may have regarding the service provider or the service. There are three performance criteria associated with the Standard. The service provider must encourage the raising of complaints by service recipients regarding any areas of dissatisfaction with the service provider; the service recipient must have no fear of retribution in raising complaints; and, the service provider must facilitate the resolution of complaints or disputes by service recipients regarding the service provider and the service.

3.7 Disability Service Standard 12 deals with the protection of human rights and freedom from abuse. It requires service providers to prevent abuse and neglect and uphold the legal and human rights of service recipients. There are two performance requirements associated with this Standard: the service provider must take all practical and appropriate steps to prevent abuse and neglect of its service recipients; and, the service provider must uphold the legal and human rights of its service recipients.

3.8 Compliance with Standard 12 and other standards is monitored according to the provisions of a Quality Strategy. This involves an annual self-assessment and periodic audits by independent auditors. Failure to maintain compliance with these Standards may result in the loss of eligibility for Commonwealth funding.

National Disability Abuse and Neglect Hotline & Complaint Resolution and Referral Service

3.9 As key elements of its Quality Strategy for disability services, the Commonwealth has established the National Disability Abuse and Neglect Hotline and the Complaint Resolution and Referral Service. The operation of these services is contracted to a non-government agency. These services are discussed in detail in our findings and recommendations.

Police checks for Commonwealth funded services

3.10 The Department of Families, Housing Community Services, Indigenous Affairs (FaHCSIA) is primarily responsible for the administration of the DSA (Cth) and for entering into service agreements with non-government organizations for the provision of Commonwealth funded disability services. A standard element of these agreements is a requirement that service providers conduct police checks on all staff they propose to employ to conduct the service.

NSW Disability Services Act

3.11 As noted above, according to the terms of the first Commonwealth State Disability Agreement, the NSW Government was required to enact legislation complementary to the DSA (Cth) and to formulate Disability Standards for the regulation of disability services that were equivalent to (or better than) the then Commonwealth Standards.

3.12 The terms of the DSA (NSW) are considerably stronger in form and substance than its Commonwealth counterpart. Broadly speaking, this is achieved through the enactment of a charter of service user rights (designated 'principles' and 'applications of principles' as a schedule to the Act, and by reposing a series of duties in the Minister administering the Act to ensure these rights are complied with in all funding and monitoring action taken under the Act.

3.13 The 'principles' assert that persons with disability have the same basic human rights as other members of Australian society, and the rights needed to ensure that their specific needs are met. This includes the right to live in and be a part of the community the right to pursue grievances in relation to services without fear of the services being discontinued or recrimination from service providers and the right to protection from abuse, neglect and exploitation.

3.14 The DSA (NSW) also provides for service users and others with a genuine concern in the subject matter of a funding decision made under the Act to seek independent review of that decision by the Community Services Division of the Administrative Decisions Tribunal. However, for reasons we explain in our

findings and recommendations these provisions have become substantially inoperative.

NSW Disability Service Standards

3.15 The NSW Standards for Disability Services were formulated and adopted in 1993. There are 10 Standards which are made binding upon service providers through funding agreements. The NSW Disability Service Standards have policy status only; that is, they are not incorporated into any regulatory instrument.

3.16 NSW Disability Service Standard 10 deals with protection of human rights and freedom from abuse. It is constituted by three 'minimum standards' and three 'enhanced standards.' The minimum standards require service providers to develop and implement policies and procedures relating to the prevention of sexual, physical and emotional abuse and procedures for reporting and responding to abuse. The minimum standards also require services to ensure that service users fully participate in the establishment and review of these procedures. The enhanced standards require service providers to ensure that all staff have adequate training in presentation reporting and supporting service users in relation to abuse. They also require the service provider to utilize external agencies to provide training and information to staff and service users about self-protective behaviours, and to ensure that service users have adequate training and information so that they may access the Standard 10 procedures.

NSW disability service policies relevant to abuse, neglect and exploitation

3.17 Pursuant to its regulatory role, the NSW Department of Ageing, Disability and Home Care (DADHC) has formulated a range of policies which are made binding upon service providers funded under the DSA (NSW) through funding agreements. A number of these policies are relevant to abuse, neglect and exploitation of persons with cognitive impairment. They include 'Abuse and Neglect Policy and Procedures' (May 2007); 'Feedback and complaint handling: Principles and guidelines (May 2005); and, a 'Behaviour Support Policy and Practice Manual' (January 2009).

Restrictive practices – disability services

3.18 Currently, there is no legislation or regulation in NSW that explicitly regulates the use of restrictive practices used on persons with cognitive impairment for the purpose of behaviour modification. In the disability services context, to the extent that interventions of this type are regulated, this regulation occurs pursuant to the *Guardianship Act* 1987 (NSW) and the *Disability Services Act*

1993 (NSW). However, neither Act deals explicitly with restrictive practices or their permissible and impermissible uses.

3.19 DADHC has adopted a comprehensive policy position on restrictive practices that applies to some, but not all, elements of the disability service system (Behaviour Support Policy and Practice Manual, January 2009). Particular forms of restrictive practices are prohibited under this policy, and the use of other restrictive practices is limited. The Department has also established on a discretionary basis a 'Senior Practitioner' whose role it is to monitor the use of restrictive practices.

3.20 DADHC's approach to the regulation of restrictive practices takes as its starting point the proposition that the use of restrictive practices constitutes an assault upon the person unless there is consent to these practices. Where the person is a child, a parent, guardian or other person with parental responsibility may consent to such practices. Where the person is an adult and he or she is unable to consent due to a decision-making disability, this consent must be provided by a guardian appointed by the Guardianship Tribunal who has been provided with a restrictive practices function.

3.21 The Guardianship Tribunal purports to regulate restrictive practices performed on persons with decision-making disability on the basis that consent to such practices is a function of a guardian who 'stands in the shoes' of the person. Although the *Guardianship Act* 1987 permits the making of plenary guardianship orders, such orders are rarely, if ever, made. Consequently, restrictive practices are designated as an element of the 'limited' functions of the guardian. If a restrictive practices function is not explicitly granted, then there is no valid consent authorising such practices. We discuss the limitations to this approach in detail in our findings and recommendations.

Integrated Monitoring System

3.22 In 2005 DADHC introduced an 'Integrated Monitoring System' to promote quality assurance and continuous quality improvement in disability and Home and Community Care Services. Monitoring occurs on the basis of self-assessment and service reviews conducted by DADHC regional staff. The monitoring framework is structured around three service elements (Organisational Capacity; Providing Services and Programs; and Capacity Building) which are supported by 7 performance domains. None of these domains explicitly refers either to complaint handling or to abuse, neglect and exploitation. It is not clear from the published material what role the Disability Service Standards or the HACC Standards have in the monitoring process.

4. Home and Community Care law and policy

4.1 The Home and Community Care Program (HACC) is a joint Commonwealth and State and Territory funding program administered under the *Home and Community Care Act* 1985 (Cth) and 'Home and Community Care Review Agreements' between the Commonwealth and each State and Territory. The HACC program provides a range of community support services (for example, personal care, home modifications, community transport) to prevent the premature institutionalization of younger persons with disability and older persons. The current 5 year Review Agreements commenced on 1 July 2007. Services funded under the HACC Agreements must comply with seven service standards. Standard 6 relates to complaints and disputes. Services are required to ensure that each consumer has access to fair and equitable procedures for dealing with complaints and disputes.

4.2 The HACC program is currently undergoing significant reform following a major review of the program in 2002-03. The objectives of this reform include the introduction of consistent service fees and an appeals system in relation to service fees. However, there does not appear to be any specific programmatic initiative related to abuse, neglect and exploitation of persons with cognitive impairment.

4.3 The largest provider of HACC services in NSW is the Home Care Service of NSW, which is a statutory corporation operated by DADHC. DADHC's Abuse and Neglect Policy and Procedures' (May 2007) and its 'Feedback and complaint handling: Principles and guidelines' (May 2005) apply to the Home Care Service of NSW.

5. Licensed Residential Centers – law and policy

5.1 DADHC is also the agency responsible for the regulation of licensed residential centres for persons with disability (or commercial boarding houses) under the *Youth and Community Services Act* 1973.

5.2 Under the Act and its Regulation the Proprietor and Manager are required to comply with certain licensing 'conditions.' These conditions are set out in a Notice of License Conditions issued to proprietors in association with the grant or renewal of a license. There are two classes of license conditions; 'A' and 'B' respectively. The 'A' licenses are licenses granted prior to 1993, and the 'B' licenses relate to licenses grant from 1993. The essential difference is that the 'B' licenses impose conditions restricting the number of persons that may be

accommodated in one bedroom to two persons, and provide for additional communal space.

5.3 Both classes of license conditions require proprietors to ensure minimum conditions for the safety and well-being of residents and include obligations in relation to the suitability of staff and not to abuse or neglect residents. There are significant shortcomings in the regulation of licensed residential centres which we discuss further in our findings and recommendations.

6. COMMUNITY SERVICES – COMPLAINTS, REVIEWS AND MONITORING

Official Community Visitors

6.1 Official Community Visitors are appointed by the Minister for Community Services under the Community Services (Complaints, Reviews and Monitoring) Act 1993 (NSW) on the recommendation of the NSW Ombudsman.

6.2 Under the Act, the functions of Official Community Visitors include the inspection of visitable services, conferring alone with any person who is resident or employed at a visitable service, and the provision of advice to the Minister, service provider and Ombudsman about any matters relating to the services provided by the visitable services.

6.3 Further functions are prescribed under the Community Services (Complaints, Reviews and Monitoring) Regulation 2004 (NSW). Notably, these additional functions include encouraging the promotion of the legal and human rights of persons using visitable services, including about the right to complain, providing persons using visitable services with information about advocacy services that may be available to help them, and facilitating, 'wherever it is reasonable and practicable to do so,' the early and speedy resolution of grievances or matters of concern affecting persons using visitable services.

6.4 Under the Act, visitable services are defined to mean 'an accommodation service provided by the Department of Community Services or DADHC or by a funded agency where a person using the service is in the full-time care of the service provider. Residential centres for handicapped persons (commercial boarding houses) are also visitable services. The Act provides that other services may also be prescribed as visitable services by regulation, however, none have been so prescribed.

***Community Services (Complaints, Reviews and Monitoring Act 1993* (NSW)**

6.5 The *Community Services (Complaints, Reviews and Monitoring Act)* 1993 (NSW) (CSCRMA) also establishes a system of oversight of community services provided by NSW Government agencies and by non-government funded and licensed services. This legislation was originally administered by a Community Services Commission, but is now administered by the NSW Ombudsman.

6.6 Under the legislation, the NSW Ombudsman is reposed with a wide range of functions which include: promoting the development of standards for the delivery of community services; educating service providers, clients and others about those standards; monitoring and reviewing the delivery of community services; conducting inquiries into matters affecting service providers or persons receiving, or eligible to receive, community services; dealing with complaints about community services; reviewing the circumstances of persons in care; and, reviewing the causes and patterns of deaths of persons in care to identify ways in which those deaths could be prevented or reduced.

6.7. Under the legislation, the Ombudsman is invested with a wide range of compulsory powers to support each of these functions. However, discuss some limitations associated with the Ombudsman's administration of this legislation in our findings and recommendations.

7. MENTAL HEALTH LAW AND POLICY

National Mental Health Strategy

7.1 The National Mental Health Strategy is an Agreement between Australian governments, originally formulated in 1992, to work together to improve policy and programmes for persons with psycho-social impairment and their families. The Strategy has four broad objectives including 'assurance of the right of persons with mental illness.'

7.2 The Strategy includes the National Mental Health Policy, the National Mental Health Plan, the Mental Health Statement of Rights and Responsibilities and the Australian Health Care Agreements.

National Mental Health Plan

7.3 Australian Governments have collaborated to formulate periodic National Mental Health Plans since 1992. The purpose of these plans is to stimulate and coordinate intra and inter governmental action to meet the needs of persons with psycho-social impairment in Australia.

7.4 At the time this research was conducted, Australian Governments were in the process of formulating the 4th National Mental Health Plan which was proposed to take effect from 1 July 2009. In February 2009 a discussion paper had been released by the 4th National Mental Health Plan Working Group as a basis for community consultation about the Plan.

7.5 The discussion paper suggests an intention that the 4th Plan will have as one priority area the development of standards and a quality assurance framework for non-clinical community based mental health services. The paper does not otherwise refer to abuse, neglect and exploitation of persons with psycho-social impairment.

National Mental Health Policy

7.6 In 2008 Australian Governments adopted a new National Mental Health Policy to provide a framework and direction for the development of services for persons with psycho-social impairment in Australia. This policy includes a commitment to recognition and respect of the human rights (and responsibilities) of persons with psycho-social impairment, and a commitment to establishing quality assurance systems for mental health services. The Policy does not refer directly to abuse, neglect and exploitation.

Mental Health Statement of Rights and Responsibilities

7.7 In 1991, in association with the first National Mental Health Strategy, Australian Health Ministers approved a 'Mental Health Statement of Rights and Responsibilities' to guide mental health service delivery across all jurisdictions. Among other things, this Statement includes commitments to ensuring that service users have access to an effective complaints mechanism and access to advocacy support. The Statement does not refer to abuse, neglect and exploitation.

NSW Centre for Mental Health

7.8 The NSW Centre for Mental Health is responsible for developing, managing and coordinating NSW Health Department policy in relation to mental health services. This includes the implementation and monitoring of strategies under the National Mental Health Strategy, as well as State based mental health policy and programmes.

Compulsory treatment of persons with psychosocial impairment

7.9 The *Mental Health Act* 2007 (NSW) (MHA) governs compulsory treatment of persons with acute mental illness in NSW. It does so by establishing a framework for compulsory admission, detention and treatment in acute mental

health services, and for compulsory treatment in the community on the basis of 'community treatment plans.' The Act also establishes a system of procedural safeguards in relation to compulsory treatment which are reposed in the Mental Health Review Tribunal (MHRT).

7.10 The MHA prohibits certain forms of 'treatment' on the basis that these treatments are dangerous or abusive. Those treatments are: deep sleep therapy; insulin coma therapy; and, psychosurgery. Other treatments may also be prohibited by regulation, but no other treatment has been prohibited to date. Contravention of this section carries a maximum penalty of 50 penalty units (a fine of $5,500.00).

7.11 Electro-Convulsive Therapy (ECT) is also regulated under the MHA. Essentially, the Act permits its use on either a voluntary or compulsory basis, but requires a series of procedural safeguards to be adhered to. The MHRT must approve the administration of ECT on compulsory basis. Contravention of these provisions carries a maximum penalty of 50 penalty units (a fine of $5,500.00).

7.12 ECT is the only treatment, per se, to be regulated by the MHA. Otherwise the scheme of the Act is to establish, subject to procedural safeguards, if compulsory treatment is justified or not. Broadly speaking the MHRT must be satisfied that the treatment proposed is the least restrictive available consistent with safe and effective care of the person.

7.13 If the MHRT determines that compulsory treatment is not justified, the person may only receive treatment to which he or she consents. If the MHRT determines that compulsory is justified, it is up to the treatment team to determine the form of treatment to be provided. The MHRT cannot review the medications to be administered, how these medications are to be administered, or any other restrictive practices (such as seclusion, exclusionary time out, physical restraint, mechanical restraint etc) that may be administered in the course of the compulsory treatment.

Community-based services funded by NSW Health

7.14 The NSW Government funds non-government organisations to provide community based accommodation and other support services for persons with psycho-social impairment. In some cases these services are delivered in partnership with other Government agencies, particular the Department of Housing. Funding for these services is allocated by Area Health Services under the *Health Services Act* 1997 (NSW).

7.15 The *Health Services Act* 1997 (NSW) is broad enabling legislation. It does not provide any quality assurance framework for the delivery of community based support services, nor does it confer any rights on the recipients of these services.

7.16 The NSW Department of Health has formulated Operational Guidelines for its Non-Government Organisation Grant Program (2005). In essence, the Guidelines inform Area Health Services of the policy and programmatic criteria that must be met before grants may be given and according to which grants must be monitored. Under these Guidelines Area Health Services must ensure that funded services have a service user complaint policy in place.

7.17 The Guidelines also stipulate with respect services provided by persons with psycho-social impairment that these services must conform to the requirements of the DSA (NSW) within twelve months of being funded. However, it is not clear how such conformity is assessed or by whom.

Official Visitors

7.18 Official Visitors are appointed by the NSW Minister for Health under Chapter 5, Part 3 of the *Mental Health Act* 2007 (NSW). The Act provides for the appointment of a Principal Official Visitor as well as other Official Visitors.

7.19 The role of Official Visitors is to inspect declared mental health facilities, act as an advocate for patients detained in these facilities, and promote the resolution of issues raised by the patient or their primary carer. An Official Visitor may also refer matters raising any significant public mental health issues or patient care or treatment issues to the Principal Official Visitor or any other appropriate person of body. The Principal Official Visitor may also raise such matters with the Minister for Health.

Health Care Complaints Commission

7.20 The Health Care Complaints Commission is established under the *Health Care Complaints Act 1993* (NSW). The role of the Commission is to receive and assess complaints relating to health service providers in NSW; resolve or assist in the resolution of complaints; investigate serious complaints that raise questions of public health and safety; and prosecute serious complaints. The Commission has jurisdiction in relation to psychiatrists, psychologists, nurses and others providing health services in the mental health system.

7.21 Prosecution of serious complaints may lead to a finding of unsatisfactory professional condition by a Health Registration Board, the imposition of

conditions upon the health practitioner's practice, or cancellation of the health practitioner's registration and entitlement to practice.

Health Conciliation Registry

7.22 The Health Conciliation Registry is also established under the *Health Care Complaints Act* 1993 (NSW). Conciliation is a voluntary process which in an independent mediator facilitates a meeting between the parties and attempts to assist them to agree on ways to resolve the complaint.

7.23 The Health Care Complaints Commission may refer a complaint for conciliation where the complaint is assessed and found to result from a breakdown of communication between the parties; where insufficient information was provided to the complainant; where an inadequate explanation was given for a poor outcome or adverse event; where the complainant is seeking an improvement in the quality of the particular health service; and where the complainant is seeking a refund or financial compensation as an outcome.

8. CHILD PROTECTION AND CHILDREN'S SERVICES

Children at risk of harm

8.1 The *Children and Young Persons (Care and Protection) Act* 1999 (NSW) establishes the system of child protection that operates in NSW. It provides for the reporting of children who are at risk of harm to the NSW Department of Community Services. Certain categories of professionals – those that work in health care, welfare, education, children's services, residential services or law enforcement – such reporting is mandatory. These reports are subject to assessment and investigation and may lead to compulsory inventions with the family aimed at the reduction or elimination of harm, or to the removal of the child and their placement in out of home care, subject to orders of the Children's Court. The Act also provides that young persons and family members may request assistance from the Department of Community Services.

Children's Guardian

8.2 The *Children and Young Persons (Care and Protection) Act* 1999 (NSW) also regulates the compulsory and voluntary out of home care system for children and young persons in NSW. This function is reposed in a Children's Guardian which is also established under the Act.

9. CRIMINAL LAW AND POLICY

Model Criminal Code

9.1 The Model Criminal Code is a project sponsored by the Australian Standing Committees of Attorney's General. It aims to assist jurisdictions to harmonise their law and to develop appropriate criminal law responses to common and emerging challenges. This work is carried out by the Model Criminal Law Officer's Committee with the support of the Australian Attorney-General's Department. Chapter 3 of the Code deals with theft, fraud and related offences, and Chapter 5 deals with offences against the person.

Crime prevention

9.2 There is currently no national crime prevention strategy.

9.3 The Commonwealth Attorney-General's Department conducts a National Community Crime Prevention Programme (NCCPP). The NCCPP is a grants programme that provides funds to community groups to prevent or reduce crime and anti-social behaviour, improve community safety and security and reduce fear of crime. The programme does not appear to incorporate any measure related to the abuse, neglect and exploitation of persons with cognitive impairment.

9.4 There is currently no NSW crime prevention strategy. The NSW Attorney-General's Department incorporates a Crime Prevention Division which is responsible for a wide range of crime prevention initiatives. However, none of these initiatives relate to abuse, neglect and exploitation of persons with cognitive impairment.

***Crimes Act* 1900 (NSW)**

9.5 The *Crimes Act* 1900 (NSW) proscribes a range of offences relevant to the abuse, neglect and exploitation of persons with disability. Part 3 of the Act proscribes a series of offences against the person, including homicide and related offences, acts causing bodily harm, assault, and sexual assault and other sexual offences. Part 4 of the Act proscribes a range of offences against property including robbery, larceny, embezzlement, and fraud.

9.6 We discuss in some detail the strengths and limitations of the *Crimes Act* 1900 for the deterrence and punishment of crimes against persons with cognitive impairment in our findings and recommendations.

9.7 The *Crimes (Domestic and Personal Violence) Act* 2007 proscribes both 'domestic' and 'personal' violence. The Act provides for the Court to issue an apprehended violence order, which imposes prohibitions and restrictions upon a defendant who presents a risk of harm to a person in need of protection. Such restrictions may include prohibiting or restricting approaches by the defendant to the protected person and prohibiting access by the defendant to particular premises.

9.8 The Act applies to persons who have a domestic relationship, which is defined to include circumstances where the person in need of protection is living or has lived in the same household as the defendant, where the person in need of protection is living or has lived as a long-term resident in the same residential facility as the defendant; and where the person in need of protection has or has had a relationship involving his or her dependence on the ongoing paid or unpaid care of the other person.

***Crimes (Sentencing Procedure) Act* 1999**

9.9 Section 21A of the *Crimes (Sentencing Procedure) Act* 1999 (NSW) sets out a range of factors that may be taken into account by a Court in sentencing as either aggravating or mitigating the culpability of an offender. The presence of aggravating factors may result in a harsher penalty being prescribed within the penalty range for the offence.

9.10 Among the aggravating factors that may be taken into account are the following:

- The offence was motivated by hatred for or prejudice against a group of people to which the offender believed the victim belonged (including persons with a particular disability);
- The offender abused a position of trust or authority in relation to the victim; and
- The victim was vulnerable (including because of disability).

NSW Attorney-General's Department – flexible service delivery

9.11 The NSW Attorney-General's Department is responsible for the administration of the State's superior and local courts and some tribunals. This includes responsibility for the employment and management of administrative staff in NSW Courts.

9.12 The Department has a Disability Strategic Plan in place which aims to make its services more accessible and responsive to persons with disability, including persons with cognitive impairment.

9.13 A key element of the Department's strategic approach is 'Flexible Service Delivery' which aims to ensure that all the Department's frontline staff have the knowledge and skills necessary to make appropriate adjustments for persons with disability.

Additionally, the Department has produced a video, brochures and other materials explaining the legal process and advertising the availability of adjustments and other assistance for persons with disability. A number of these resources specifically target persons with cognitive impairment.

Victim's services

9.14 The *Victims Rights Act* 1996 (NSW) establishes a Charter of victims rights, a Victims of Crime Bureau and a Victims Advisory Board. The *Victims Support and Rehabilitation Act* 1996 (NSW) establishes a counselling scheme and a compensation scheme for victims of crime. Persons with cognitive impairment who are victims of crime are eligible for assistance to obtain appropriate counselling and for victim's compensation on an equal basis with others.

9.15 The *Charter of Victims Right*'s establishes standards for the treatment of victims and it applies to all NSW Government agencies. The Charter includes the right to be treated with courtesy, compassion and respect; the right to information about and access to welfare, health and counselling services; the right to privacy and protection; and the right to information about the criminal justice system. The Charter is available in a pictorial easy-English format.

9.16 The Victim's of Crime Bureau has developed a *Charter of Victims Rights Resource Kit* for NSW government agencies to assist them to fulfil their obligations under the Charter. This Kit includes a range of advice relating to reasonable accommodation of the needs of persons with cognitive (and other) impairments who are victims of crime.

Evidence Acts

9.17 The *Evidence Act* 1995 (NSW) and its Commonwealth counterpart sets out the rules governing the competence and compellability of witnesses and for the examination, cross-examination, and re-examination of witnesses.

9.18 Section 14 of the Act provides that a person is not compellable to give evidence on a particular matter if the court is satisfied that substantial cost or delay would be incurred in ensuring that the person would have the capacity to understand a question or to give an answer that can be understood.

9.19 Section 29 of the Act provides that a party to a proceeding may question a witness in any way the party thinks fit, except as required by the Act itself. However, the section also provides that a court may, on its own motion or on the application of the party that called the witness, direct that the witness give evidence wholly or partly in narrative form. Such a direction may include directions about the way in which evidence is to be given in that form.

***Criminal Procedure Act* 1986 (NSW)**

9.20 The *Criminal Procedure Act* 1986 (NSW) sets out the requirements for the conduct of criminal proceedings and includes provisions relating to the giving of evidence.

9.21 In 2008 the Act was amended to include a number of new provisions in relation to the giving of evidence by persons with cognitive impairment. These amendments include the ability of a person with cognitive impairment to use an electronically recorded statement as their evidence in chief; the ability of a person with cognitive impairment to receive the assistance of a support person during the legal and in-court process; the right to give evidence via closed-circuit television, or behind a screen.

NSW Police Force

9.22 The NSW Police Force is responsible for the detection and investigation of criminal activity in NSW, and it is also responsible for the prosecution of non-indictable offences.

9.23 In the course of this research we were unable to identify any specific strategies for the detection and investigation of crimes against persons with cognitive impairment, or policies and procedures relating to the investigation of such crimes that are specific to the NSW Police Force (the NSW Interagency Guidelines referred to above do apply, however,).

9.24 The NSW Police Force is a 'public authority' within the meaning of s9 of the *Disability Services Act* 1993 (NSW). Under that section, all NSW public authorities must prepare and implement a plan to ensure that their services are accessible and responsive to persons with disability, and further a set of principles and applications of principles related to the service user rights of persons with disability.

9.25 The NSW Police Force developed a Disability Action Plan for the period 2004-2006, and it also had in place a Disability Policy Statement for the same period.

However, both initiatives have now expired and have not yet been replaced. The NSW Police Force has, however, established a Disability Advisory Council.

NSW Department of Public Prosecutions

9.26 The NSW Department of Public Prosecutions (DPP) is the agency responsible for the prosecution of indictable offences in the NSW Supreme Court or District Court of NSW (violence against persons with cognitive impairment would generally be prosecuted as an indictable offence).

9.27 The DPP has prepared Prosecution Guidelines that set out its policies relating to the conduct of proceedings and to the exercise of various prosecutorial discretions. The Guidelines include a section dealing with Child Witnesses and Vulnerable Adult Witnesses including persons with cognitive impairment. The Guidelines require Vulnerable Adult Witnesses to be referred to the DPP's Witness Assistance Service for advice about communication requirements. The Guidelines also suggest that Vulnerable Adult Witnesses should generally be assisted to give evidence via closed circuit television.

9.28 The DPP conducts a Witness Assistance Service to assist witnesses through the provision of information about the legal process; referral for counselling and other support; support to prepare for and attend court; and, support to prepare a Victims Impact Statement and debrief the in-court experience after a court attendance. A specialist service is available for persons with disability.

9.29 The DPP is also 'public authority' within the meaning of s9 of the *Disability Services Act* 1993 (NSW), and therefore must prepare and implement a plan to ensure that their services are accessible and responsive to persons with disability. The DPP's first plan was developed and released in 2008. Among the strategies it proposes is a staff training initiative.

NSW Legal Aid Commission

9.30 The NSW Legal Aid Commission provides legal aid and other legal services to socially and economically disadvantaged people. It provides free legal advice and minor legal assistance, and legal representation subject (in most cases) to a merit and means test. The Commission may act for persons with cognitive impairment seeking a domestic or personal violence order.

9.31 The Commission also operates the Mental Health Advocacy Service which provides legal advice and representation for persons subject to proceedings under the *Mental Health Act* 2007 (NSW). Such representation is subject to a merit test.

9.32 The Commission has in place a special fund to support human rights related litigation. A number of test cases involving the human rights of persons with cognitive impairment have been approved for grants of aid from this fund.

9.33 The Commission is also a 'public authority' within the meaning of s9 of the *Disability Services Act* 1993 (NSW), and therefore must prepare and implement a plan to ensure that their services are accessible and responsive to persons with disability. The Commission developed a Disability Action Plan for the period 2003-2006. It also has in place a Disability Policy dated to 2003, which among other things, makes a commitment to the training of staff in disability awareness.

10. Treatment and Support Services

National Disability Advocacy Program

10.1 The Australian Government funds individual and systemic advocacy services for persons with disability under its National Disability Advocacy Program (NDAP). These services assist persons with disability to assert their human, legal and service user rights. NDAP remains a relatively small funding program. It is subject to significant unmet demand and there are substantial gaps in its coverage both on a population and geographic basis.

Disability Discrimination Legal Centre

10.2 The Australian and NSW Governments jointly fund the NSW Disability Discrimination Legal Centre to assist persons with disability understand and assert their rights under Commonwealth and State non-discrimination legislation in the area of disability.

Community Legal Centres

10.3 The Australian and NSW Governments jointly fund a number of general and specialist Community Legal Centres. These centres provide legal information, advice and representation to socially and economically disadvantaged individuals. This includes the Domestic Violence Advocacy Service which is a specialised legal service for women experiencing domestic violence.

Sexual Assault Services

10.4 NSW Health operates sexual assault services at a number of health outlets in each Health region. These services provide medical treatment, counselling, and referral services for victims of sexual assault.

NSW Rape Crisis Centre

10.5 The NSW Rape Crisis Centre is a twenty-four hour telephone and on-line crisis support and referral service for anyone in NSW who has experienced sexual violence. The Centre is a non-government organisation funded by NSW Health.

NSW Domestic Violence Line

10.6 The NSW Domestic Violence line is a state-wide free-call number that operates 24 hours a day seven days a week operated by the NSW Department of Community Services. It provides telephone counselling, information and referrals for people who are experiencing domestic violence.

Crisis Accommodation Services

10.7 The Commonwealth and the State fund a number of crisis accommodation services for people fleeing violence under the National Affordable Housing Agreement. This includes Women's Refuges, Youth Refuges and Homeless Persons Shelters.

National Plan to Reduce Violence Against Women

10.8 In April 2009, the Australian Government released a National Plan to Reduce Violence Against Women: Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021. Time for Action sets out a very ambitious plan for the prevention of violence against women, and for the provision of treatment and support services for women who have been victims of violence. It sets out a range of actions that could, potentially, be very relevant to the prevention of violence against women with disability.

10.9 Time for Action specifically recognises that women with disability experience higher rates of violence to that experienced by other women. It is also notable that among the high priority actions it proposes is an audit of crisis accommodation services to ensure their accessibility for all women.

11. OTHER MATTERS

Whistleblower protection

11.1 There is currently no Commonwealth legislation protecting public interest disclosures of corrupt or improper conduct. However, the current government has a policy commitment to introduce such legislation.

11.2 In NSW, the *Protected Disclosures Act* 1994 (PDA) provides a degree of protection for public officials. However, it is limited in scope, only applying to

'public officials' (therefore not covering publicly funded non-governmental entities). Additionally, while the PDA provides some protection against reprisals, it does not provide whistleblowers with immunities from criminal or civil prosecution or remedies for detrimental action causing loss.

Social Security Nominee System

11.3 Under Australian social security legislation it is possible for the Secretary to arrange for a social security payment to be paid to a 'nominee' on behalf of the beneficiary. Such arrangements are often put in place where the beneficiary is a person with a cognitive impairment who is perceived as unable to manage the benefit personally. Centrelink has very little policy governing the appointment of a nominee, and virtually no procedures for avoiding or responding to abuse of the arrangement.

Substitute financial management

11.4 Both the *Protected Estates Act* 1983 (NSW) and the *Guardianship Act* 1987 (NSW) provide for the appointment of substitute financial managers for persons who are found by the Supreme Court, the Mental Health Review Tribunal or the Guardianship Tribunal to be incapable of managing their financial affairs.

11.5 This legislation may provide an important source of protection of a person with cognitive impairment from exploitation. However, in a number of respects the legislation is incompatible with human rights standards. These issues are discussed in detail in our Findings and Recommendations.

Special medical treatment

11.6 Sterilisation and related procedures are regulated under the *Guardianship Act* 1987 (NSW) in relation to adults with decision-making disability, and under the *Children and Young Persons (Care and Protection Act)* 1998 (NSW) in relation to children and young persons. Both Acts provide, in effect, that the Guardianship Tribunal must consent to such procedures. The adequacy of these arrangements are discussed in detail in our findings and recommendations.

APPENDIX 4: BIBLIOGRAPHY

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