AUSTRALIAN CROSS DISABILITY ALLIANCE

First Peoples Disability Network Australia

NEDA

pwd
people with disability

WOMEN WITH DISABILITIES AUSTRALIA (WWDA)

Submission

Senate Community Affairs References Committee

Inquiry into Violence, Abuse and Neglect against People with Disability in Institutional and Residential Settings

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THE AUSTRALIAN CROSS DISABILITY ALLIANCE

1. The Australian Cross Disability Alliance (ACDA) is a newly established alliance of national disabled people's organisations (DPOs) in Australia. The key purpose of the ACDA is to promote, protect and advance the human rights and freedoms of people with disability in Australia by working collaboratively on areas of shared interests, purposes and strategic priorities and opportunities. The ACDA was founded by, and is made up of four national cross-disability DPOs: First Peoples Disability Network Australia (FPDNA); Women With Disabilities Australia (WWDA); National Ethnic Disability Alliance (NEDA); and People with Disability Australia (PWDA). The ACDA has been funded by the Australian Government to be the recognised coordinating point between Government/s and other stakeholders, for consultation and engagement with people with disability in Australia. In forming the ACDA, its four founding member organisations recognise and value the strength of working together in a spirit of mutual respect and trust, to proactively pursue human rights outcomes for all people with disability in Australia.

   Women With Disabilities Australia (WWDA) is the national cross-disability DPO for women and girls with all types of disabilities in Australia. It operates as a transnational human rights organisation and is run by women with disabilities, for women with disabilities. WWDA's work is grounded in a human rights based framework which links gender and disability issues to a full range of civil, political, economic, social and cultural rights.

   First Peoples Disability Network Australia (FPDNA) is the national cross-disability DPO representing Aboriginal and Torres Strait Islander people with disability and their families. FPDNA utilises a range of strategies in its representative role, including through the provision of high-level advice to governments, and educating the government and non-government sectors about how to meet the unmet needs of Aboriginal and Torres Strait Islander people with disability.

   People with Disability Australia (PWDA) is the national cross-disability rights and advocacy organisation run by and for people with disability. Working within a human rights framework, PWDA represents the interests of people with all kinds of disability. Its primary membership is made up of people with disability and organisations primarily constituted by people with disability. It also has a large associate membership of other individuals and organisations committed to the disability rights movement.

   National Ethnic Disability Alliance (NEDA) is the national peak organisation representing the rights and interests of people from Culturally and Linguistically Diverse (CALD/NESB) people with disability, their families and carers throughout Australia. NEDA advocates at the federal level so that CALD/NESB people with disability can participate fully in all aspects of social, economic, political and cultural life.

The **key objectives** of the ACDA are to:

- work to advance the rights of all people with disability from all walks of Australian life, in relevant policy frameworks, strategies, partnership agreements and any other relevant initiatives;
- promote and engender a collaborative, co-operative and respectful relationship with all levels of Government in the efforts of the ACDA to advance the human rights of people with disability;
- build on and further develop networks, strategic alliances and partnerships at state/territory, national and international levels to advance human rights of people with disability;
- promote the ACDA at national and international levels as the coordinating point for engagement with the Australian DPO sector; and.
- build respect for, appreciation of, and faith in the DPO sector in Australia.

BACKGROUND TO THE SENATE INQUIRY

2. On Monday 24th November 2014, ABC TV broadcast an episode of 'Four Corners' - its flagship investigative journalism/current affairs television program. The episode was called *'In Our Care'*[1] and it *"lifted the lid on a major scandal involving one of the country's biggest disability providers."* It 'lifted the lid' on the most depraved and horrific violations perpetrated against people with disability in a government funded institution in Victoria. It 'lifted the lid' on multiple and repeated episodes of torture – including rape, sexual assaults, and other egregious forms of violence and abuse perpetrated against people with disability who were completely powerless to prevent or stop it from happening. *'In Our Care'* 'lifted the lid' on the way the 'victims' complaints were ignored, on the ways they were reprimanded and punished by staff for supposedly making up false allegations. It 'lifted the lid' on how whistle-blowers were targeted and persecuted, their warnings not acted upon. It 'lifted the lid' on the deliberate and systematic attempts by "*one of the country's biggest disability providers"* to cover up the 'scandal' and silence the victims.

3. *'In Our Care'* saw a number of the victims speak publicly for the first time about the torture they endured and its devastating and life-long effects. These 'victims' gave a human face to the epidemic of torture and ill-treatment experienced by people with disability in institutional and residential settings in Australia.

4. *'In Our Care'*, and the response to it, confirmed what people with disability and their allies had been consistently raising with Governments for years – that violence, abuse, exploitation and neglect of people with disability in Australia is pervasive and is facilitated by systemic failures in legislation, policies and service systems which are underscored by an ableist culture that enables violence against people with disability to continue unabated.

5. Within days of *'In Our Care'* being aired, more than 11,500 people from around Australia had signed a petition - started by people with disability themselves - calling on the Prime Minister of Australia to launch a national inquiry into violence and abuse of people with disability in residential and institutional settings.[2] A coalition of national organisations of and for people with disability in Australia (several of which had been campaigning for a national inquiry for years), wrote formally to the Prime Minister urging strong leadership and action to urgently establish an independent national Inquiry. The letter was endorsed by more than 105 national and state/territory based organisations across many sectors.[3] The Australian Government, however, took the view that there is no need for a national inquiry into the violence and abuse of people with disability in residential and institutional settings, as it is up to the States and Territories to deal with this issue.

6. However, on 4th December 2014, acknowledging the urgency of the issue, Australian Greens Senator Rachel Siewert placed a notice of motion to the Senate "to move on 11 February 2015 that the following matter be referred to the Community Affairs References Committee for inquiry and report by 24 June 2015:

> *'Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age-related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability'.*

7. On the 11th February 2015, people with disability and their advocates, including one of the victims who spoke out in the 'In Our Care' program, gathered on the steps of Parliament House in Canberra for a press conference to urge the Senators to vote in favour of the motion. Several hours later the motion was unanimously passed. The Terms of Reference for the Senate Inquiry are included as an Appendix to this Submission.

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[1] In Our Care was a joint Four Corners/Fairfax investigation. See: http://www.abc.net.au/4corners/stories/2014/11/24/4132812.htm
[2] See: http://www.nationaldisabilityabuseinquiry.com/
[3] See: 'National Campaign to End Violence and Abuse against People with Disability in Residential and Institutional Settings: 'Letter to the Australian Prime Minister, Hon. Tony Abbott' (January 2015)' at: http://wwda.org.au/papers/subs/subs2011/

SUMMARY AND OVERVIEW OF THIS SUBMISSION

8. People with disability in Australia represent the most detained, restrained and violated sector of our population – significantly over-represented in prisons, institutionalised and segregated within communities, locked up in schools, confined in mental health facilities, incarcerated in detention centres, and trapped within their own homes. Wide-ranging systemic failures in legislation, policies and service systems in Australia facilitate conditions that give rise to torture and ill treatment of people with disability. These failures are embedded within and underscored by an ableist culture which sees the promotion and support of laws, systems, policies and practices which not only deny people with disability their most basic human rights but which provide a legitimised gateway through which torture and ill-treatment against people with disability can flourish.

9. For more than two decades, Disabled Peoples Organisations (DPOs), civil society organisations (CSOs); the United Nations, people with disability themselves, their families, allies, friends and advocates, have appealed to successive Australian Governments to show national leadership and act urgently to address all forms of violence perpetrated against people with disability in institutional and residential settings in Australia. Despite over-whelming and mounting evidence of the epidemic that is violence against people with disability, our governments have consistently failed to act. In their apathy, indifference and inaction, they have subsequently been complicit in, and provided de facto permission for, the commission of acts impermissible under the international human rights treaties to which Australia is a party.

10. Violence against people with disability in institutional and residential settings is Australia's hidden shame. More often than not, violence perpetrated against people with disability in institutional and residential settings, constitutes torture and ill treatment as defined and recognised in international human rights law, including the treaties to which Australia is a party. Violence against people with disability in institutional and residential settings is an urgent, unaddressed national crisis, of epidemic proportions,[4] yet is excluded from national policy responses relating to violence prevention, and from national policy responses relating to advancing the human rights of people with disability. This epidemic affects some of the most vulnerable, marginalised people in our communities, with specific implications for women and children with disability, Aboriginal and Torres Strait Islander peoples with disability and people with disability from non-English speaking and culturally and linguistically diverse backgrounds.

11. The evidence of this national epidemic is extensive and compelling. It is a deeply shameful blight on our society and can no longer remain ignored and unaddressed.[5] It can no longer be dismissed by our national leaders as an issue for State and Territory governments to deal with.

12. This Submission from the ACDA is the culmination of more than two decades of people with disability and their allies campaigning and advocating for a national, independent inquiry to investigate violence and abuse against people with disability in institutional and residential settings. Although this Submission endeavours to be rigorous and comprehensive, the ACDA acknowledges at the outset, the immensity of the task at hand. It is almost impossible, in a written Submission, to do justice to the magnitude of the issue of violence against people with disability in institutional and residential settings in Australia. It is also impossible in a written Submission, to articulate the life-long pain and suffering endured by people with disability who have experienced and who continue to experience violence, abuse, exploitation and neglect in these settings.

13. This Submission includes as a accompanying document, a large number of personal stories and testimonies from people with disability, all of which have been de-identified for confidentiality purposes. These stories and testimonies are critical in illustrating the stark reality of violence in the

[4] For example, figures from the Victorian Office of the Public Advocate (OPA) show that between 2006-2011, police examined more than 1000 cases of alleged abuse involving people with severe disabilities living in state residential care or private homes in Victoria - including 282 allegations of assault, 320 of rape, and six alleged abductions or kidnapping. See: 'Law failing to protect disabled in state care'; *The Age Newspaper*, April 24, 2011. Accessed online October 2011 at: http://www.theage.com.au/victoria/law-failing-to-protect-disabled-in-state-care-20110423-1dse1.html

[5] See: 'National Campaign to End Violence and Abuse against People with Disability in Residential and Institutional Settings: 'Letter to the Australian Prime Minister, Hon. Tony Abbott' (January 2015)' at: http://wwda.org.au/papers/subs/subs2011/

lives of people with disability in institutional and residential settings, and in demonstrating that this violence cannot be dismissed as belonging to one institution, or one 'type' of institutional setting, or the fault of one 'bad apple'. These stories and testimonies provide the human reality of the information provided in the body of this Submission. The ACDA trusts that readers will take the time to read each and every one of these personal stories and testimonies from people with disability, as this Submission has also endeavoured to provide a vehicle for people with disability to have their stories and experiences heard, documented and validated.

14. Whilst the ACDA welcomes this Senate Inquiry, we also recognise the inherent barriers for people with disability in being able to provide direct evidence to the Senate Committee conducting this Inquiry. Many people with disability in institutional and residential settings do not have the necessary supports, the relevant information or the extensive process that is required to facilitate and support them in coming forward to provide evidence directly to the Senate Committee. It must also be acknowledged that in many cases, it may not be in the best interest of institutions to be actively encouraging and supporting people with disability to share their experiences of violations of their human rights in the institutions and settings in which they reside, are incarcerated or in which they receive services.

15. This Submission uses certain terminology that we wish to explain at the outset. Firstly, for the purposes of this Submission, the ACDA adopts the broad definitions outlined in the Inquiry Terms of Reference when referring to 'institutional and residential settings' and 'violence, abuse and neglect'. These are:

> **'institutional and residential settings'** - is broadly defined to include the types of institutions that people with disability often experience, including, but not restricted to: residential institutions; boarding houses; group homes; workplaces; respite care services; day centres; recreation programs; mental health facilities; hostels; supported accommodation; prisons; schools; out-of-home care; special schools; boarding schools; school buses; hospitals; juvenile justice facilities; disability services; and aged care facilities.
>
> **'violence, abuse and neglect'** - is broadly understood to include, but is not limited to: domestic, family and interpersonal violence; physical and sexual violence and abuse; psychological or emotional harm and abuse; constraints and restrictive practices; forced treatments and interventions; humiliation and harassment; financial abuse; violations of privacy; systemic abuse; physical and emotional neglect; passive neglect; and wilful deprivation.

16. This Submission also refers to, and uses the terms 'torture and ill treatment'. These terms are used in this Submission consistent with the internationally recognised definitions and understandings of 'torture, cruel, inhuman or degrading treatment or punishment' as articulated in international human rights law, including the international human rights treaties to which Australia is a party.[6]

17. At least four essential elements are reflected in the definition of torture provided in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT):[7] 1) an act inflicting severe pain or suffering, whether physical or mental; 2) the element of intent; 3) the specific purpose; and 4) the involvement of a State official, at least by acquiescence. Acts falling short of this definition may constitute cruel, inhuman or degrading treatment or punishment (also referred to as 'ill-treatment') under article 16 of the Convention.

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[6] A State's obligation to prevent torture applies not only to public officials, such as law enforcement agents, but also to doctors, health-care professionals and social workers, including those working in private hospitals, other institutions and detention centres. As underlined by the Committee against Torture, the prohibition of torture must be enforced in all types of institutions and States must exercise due diligence to prevent, investigate, prosecute and punish violations by non-State officials or private actors. See for eg: Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, UN Doc. CAT/C/GC/2; See also: Méndez, Juan. E, (2013) *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, UN General Assembly; UN.Doc A/HRC/22/53.

[7] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).

18. The element of 'intent' in article 1 of CAT Is "effectively implied where a person has been discriminated against on the basis of disability" including when discrimination against people with disability may be perceived as based on "good intentions".[8]

19. The Committee against Torture interprets State obligations to prevent torture as indivisible, interrelated, and interdependent with the obligation to prevent cruel, inhuman, or degrading treatment or punishment (ill-treatment) because *"conditions that give rise to ill-treatment frequently facilitate torture"*.[9]

20. The Committee against Torture has established that *"each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm."* As underlined by the Committee against Torture, the prohibition of torture must be enforced in <u>all</u> types of institutions and States must exercise due diligence to prevent, investigate, prosecute and punish violations by non-State officials or private actors.[10]

21. The word 'victim/s' is used in various places throughout this Submission. Where this Submission uses the word 'victims' it does so in the context of, and consistent with international human rights law, which makes it clear that:

> *'victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law.'*[11]

22. This Submission to the 'Senate Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings' is structured in a number of sections.

23. **Section One** examines 'disability' and 'intersectionality' in a human rights framework, highlighting that the way in which disability is understood has significant implications for recognising, and responding to violence against people with disability in institutional and residential settings. In so doing, it demonstrates that despite Australia's international human rights obligations, people with disability in Australia are not regarded or treated as subjects of human rights law on an equal basis as others. Rather, people with disability continue to be subject to the effects of an ableist society and ableist practices that denigrate, devalue, oppress and limit their potential and their rights. These ableist practices, which continue to pervade many of our state institutions, see people with disability continue to be isolated and segregated in institutions, not deemed to be worthy of such basic human needs as love, intimacy, identity, dignity, choice and freedom.

24. This section also examines the concept of 'intersectionality' in recognition that intersectional discrimination is critical to not only understanding 'disability' but necessary in order to fully understand and appreciate the human rights violations that people with disability experience. Intersectional discrimination has unique and specific impacts on people with disability and in many cases, may lead to different or to another degree of discrimination or to new forms of discrimination not yet acknowledged by law, policy or in research. People with disability, including those in

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[8] Manfred Nowak, Special Rapporteur, *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 63rd session, UN Doc A/63/175 (28 July 2008) para 49.

[9] The Committee against Torture has established that *"each State party should prohibit, prevent and redress torture and ill-treatment in all contexts of custody or control, for example, in prisons, hospitals, schools, institutions that engage in the care of children, the aged, the mentally ill or disabled, in military service, and other institutions as well as contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm."* See: Méndez, Juan. E, (2013), OpCit.

[10] Committee Against Torture (CAT), *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, UN Doc. CAT/C/GC/2;

[11] United Nations General Assembly (2006) *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*. UN Doc. A/RES/60/147. See also: Office of the United Nations High Commissioner for Human Rights and the International Bar Association (2003) *Human Rights In The Administration Of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*. Professional Training Series No. 9; OHCHR, Geneva.

institutional and residential settings, experience intersectional discrimination that often has aggravating or compounding effects, yet in the Australian context, this is not recognised or adequately addressed in legislation and policy frameworks to prevent violence and to advance the human rights of people with disability.

25. **Section Two** provides an analysis of conceptualising 'violence against people with disability' in a human rights framework, in recognition that the lack of a clear conceptual understanding and legal recognition of violence against people with disability in Australian legislation, policy, and service frameworks perpetuates the systemic violence experienced by people with disability in institutional and residential settings. This section demonstrates for example, that regardless of setting or context, violence against people with disability in Australia continues to be conceptualised, downplayed and 'detoxified' as 'abuse' or 'neglect' or 'service incidents,' or 'administrative infringements' or a 'workplace issue to be addressed' - rather than viewed as 'violence' or crimes. This widespread tendency to downplay and re-frame violence as 'abuse' or as a 'service incident' results in denying people with disability the legal protections and justice extended to other people.

26. This section clarifies that a human rights approach to conceptualising violence against people with disability – mandated through Australia's international human rights obligations - underscores the interdependence and indivisibility of civil, political, economic, social and cultural rights. It situates violence against people with disability on a continuum that spans interpersonal and structural violence; acknowledges the structural aspects and factors of discrimination, which includes structural and institutional inequalities; and analyses social and/or economic hierarchies between women and men and also among women. In so doing, it explicitly interrogates the places where violence against people with disability coincides with intersecting forms of discrimination and their attendant inequalities.

27. **Section Three** examines Australia's international human rights obligations in relation to preventing and addressing all forms of violence against people with disability, including and particularly, those in institutional and residential settings. Australia is a party to seven core international human rights treaties, all of which create obligations to prevent and address violence against people with disability. As a party to these treaties, Australia has chosen to be bound by the treaty requirements, and has an international legal obligation to implement the treaty provisions through its laws and policies. However, as this Section demonstrates there remains an absolute disjuncture between these obligations and commitments and their integration into domestic law, policy, strategies and frameworks. In highlighting this disjuncture, this section includes the most recent reviews of Australia by the international human rights treaty monitoring bodies, including the strong and often 'urgent' recommendations made by these bodies to Australia in relation to preventing and addressing all forms of violence experienced by people with disability.

28. Importantly, this section demonstrates how the international human rights normative framework provides the framework to delineate the respective obligations and responsibilities of governments and other duty-bearers to comprehensively prevent, address, and provide redress for all forms of violence experienced by people with disability, particularly those in institutional and residential settings.

29. This section unequivocally demonstrates that the right to redress and transitional justice to people with disability who have experienced torture and ill-treatment, particularly in institutional and residential settings, is critical and urgent.

30. **Section Four** looks at the scope and prevalence of violence against people with disability, including those in institutional and residential settings. The picture that emerges from this section is scandalous and horrific, and demonstrates that more often than not, violence perpetrated against people with disability in institutional and residential settings, constitutes torture and ill-treatment as defined and recognised in international human rights law, including the treaties to which Australia is a party.

31. The section compiles available statistical data on the scope and prevalence of violence against people with disability across and within the settings in which they experience, and are at risk of multiple and intersecting forms of violence. Broad incidence and prevalence data is provided, and in recognition of the specific implications for women and children with disability, Aboriginal and Torres Strait Islander peoples with disability and people with disability from culturally and linguistically diverse backgrounds, the section also provides available incidence and prevalence data for these cohorts. In so doing, it demonstrates the clear over-representation of these groups in the available data and statistics. The particular egregious forms of violence perpetrated against Aboriginal people with disability, women and girls with intellectual disability, refugees and asylum seekers with disability, and children with disability in out of home care settings, is reprehensible.

32. What makes this section even more disturbing, is the widely recognised fact that there is a lack of national statistical evidence on the scope and prevalence violence against people with disability across and within the vast array of 'settings' and 'places' in which they live, occupy, and/or experience. Furthermore, the limited data that is available does not give the true picture of the level of risk and prevalence of violence, due to many factors. These include for example, the substantial barriers experienced by people with disability to reporting violence perpetrated against them; the 'closed' nature of institutional and residential settings; the fact that violence against people with disability is often 'hidden'. An additional and critical factor in the lack and limitation of data is the fact that various forms of violence against people with disability are legitimised through and made permissible by a number of current laws, systems, policies and practices.

33. **Section Five** of this Submission examines and analyses key human rights violations integral to violence against people with disability. The experience of violence, abuse and neglect for people with disability in institutional and residential settings is underpinned by interconnecting and multidimensional violations of a range of human rights. Human rights are interdependent, indivisible and inter-related, and must be addressed in totality for their realisation. This section examines critical human rights that must be upheld in order to eliminate violence, abuse and neglect against people with disability in institutions and residential settings – equal recognition before the law; liberty and security of the person; freedom from torture and ill-treatment; protecting the integrity of the person; access to justice. This section demonstrates that violations of these human rights are pervasive in Australia, yet many remain unidentified as human rights violations and some have been addressed in a piecemeal and ad hoc way. In addition, this section demonstrates that understanding these human rights violations within a torture and ill-treatment framework would ensure that these critical human rights are comprehensively understood and addressed in order to eliminate all forms of violence, abuse and neglect against people with disability in institutional and residential settings.

34. **Section Six** of this Submission scrutinises and provides an analysis of the Australian legislative, policy and service system landscape in the context of violence prevention and the advancement of the rights of people with disability. In looking at issues in legislation, the Submission highlights failures in current domestic and family violence legislation and disability specific legislation (such as the NDIS Act 2013, Disability Discrimination acts; and disability services legislation). Importantly, legislative frameworks - such as guardianship law and mental health legislation are also examined, demonstrating that by their very nature, they give rise to, and facilitate, the perpetration of torture and ill treatment of people with disability in institutional and residential settings.

35. The critical importance of comprehensive, inclusive and coherent human rights-based legislation as fundamental for an effective and coordinated response to preventing and addressing violence against people with disability, including those in institutional and residential settings, is also examined. The *'Istanbul Convention'*, developed by the Council of Europe, is canvassed as model that Australia could consider in developing best practice national human rights-based legislation to prevent and address all forms of violence against women, including women with disability.

36. Key policy frameworks and responses that should provide protection to people with disability experiencing or at risk of experiencing violence, are also considered in this section. These frameworks include for example: the *National Disability Strategy 2010-2020* (NDS), the *National*

Plan to Reduce Violence Against Women and their Children 2010-2022 (the National Plan), the *National Framework for Protecting Australia's Children 2009-2020*; and the current development of the *National Disability Insurance Scheme Quality and Safeguarding Framework*. These frameworks, including at the level of their operationalisation, have found to be ineffective in preventing and addressing violence against people with disability in institutional and residential settings. They have also been found to contribute to violence against people with disability being further hidden and/or obscured.

37. Although there are a variety of complaints mechanisms throughout Australia that can be used to report violence against people with disability in some institutional and residential settings, these mechanisms have been found to have limited effect in investigating, responding to, and preventing violence against people with disability across the range of settings and spaces where such violence occurs. This section examines a number of these complaints mechanisms, including for example: Ombudsmans, Disability Commissioners, Public Advocates, Community Visitor Schemes, and the National Disability Abuse and Neglect Hotline – promoted by the Australian Government as one of its main initiatives to prevent and address violence against people with disability, including those in institutional and residential settings.

38. In relation to complaints mechanisms, of great concern is the notification and data collection requirements which currently differ substantially between jurisdictions. Similarly, mechanisms such as Ombudsman, Disability Commissioners and Public Advocates all have significant limitations, due to a range of factors, including for example, different mandates, different roles and responsibilities, limited capacity to investigate and impose sanctions, and lack of own-motion powers to investigate.

39. Of particular concern is the fact that regardless of which complaint mechanism is used (if at all) to report violence against people with disability in institutional and residential settings (particularly funded disability services), an inherent conflict of interest exists – in that ultimately, the government body that funds the service is responsible for investigating the complaint. There is now indisputable evidence to demonstrate that the 'covering up' of complaints, 'serious/critical' and other 'incidents', is rampant at all levels of the system – at the direct service delivery level, at management and governance levels, and at 'funding agency' levels, including large Government Departments. For many years, DPOs and advocates have highlighted these failings and argued that Australia urgently requires an independent statutory national protection authority with specific purpose legislation to address and respond to all forms of violence against people with disability, regardless of the setting in which it occurs and regardless of who perpetrates it.

40. This section of the Submission also provides a brief overview and analysis of the limitations in data collection, demonstrating not only the substantial gaps in the evidence base, but the lack of any comprehensive mechanism which captures the prevalence, extent, nature, causes and impact of violence against people with disability in the range of settings in which they reside, are incarcerated or receive support services.

41. **Key Recommendations** are made in the following section.

KEY RECOMMENDATIONS

42. Based on the compelling and indisputable evidence in this Submission, its accompanying document of personal stories and testimonies from people with disability, and decades of advocacy by and on behalf of people with disability, the Australian Cross Disability Alliance (ACDA) offers the following key recommendations as critical to not only prevent and address torture and ill-treatment against people with disability in institutional and residential settings, but to ensure that all people with disability, regardless of their circumstances, can realise their right to live free from all forms of violence, abuse, exploitation and neglect. The Australian Cross Disability Alliance (ACDA) **recommends** that:

42.1. Consistent with immediate obligations under the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and recognising the critical and urgent right to redress and to transitional justice for people with disability who have experienced torture and ill-treatment in institutional and residential settings, the Australian Government act to **establish a Royal Commission** into all forms of violence against people with disability in institutional and residential settings.

42.2. The Australian Government establishes and enacts a comprehensive, national, **judicially enforceable Human Rights Act** that fully incorporates its international human rights obligations into domestic law.

42.3. Australian Governments establish and enact a comprehensive, **national, legislative framework** to prevent, criminalise and provide redress for all acts of torture and ill-treatment in all jurisdictions.

42.4. The Australian Government urgently **ratify and ensure domestic implementation of the Optional Protocol to the Convention against Torture** (OPCAT) and the establishment of an independent national preventive mechanism to monitor places of detention, including where people with disability are detained, such as prisons, disability justice centres and mental health facilities.

42.5. Australia fully **implements the recommendations** from Australia's reviews under the human rights treaties to which it is a party. In recognising Australia's immediate obligations under the Convention Against Torture (CAT) and the Convention on the Rights of Persons with Disabilities (CRPD), all recommendations stemming from the 2014 Review of Australia under CAT and the 2013 Review of Australia under the CRPD, must be implemented as an immediate priority.

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

- a 'no wrong door' complaint handling function – the ability to receive, investigate, determine, and make recommendations in relation to complaints raised;
- the ability to initiate 'own motion' complaints and to undertake own motion enquiries into systemic issues;
- the power to make recommendations to relevant respondents, including Commonwealth and State and territory governments, for remedial action;
- the ability to conduct policy and programme reviews and 'audits';
- the ability to publicly report on the outcomes of systemic enquiries and group, policy and programme reviews, or audits, including through the tabling of an Annual Report to Parliament;

- the ability to develop and publish policy recommendations, guidelines, and standards to promote service quality improvement;
- the ability to collect, develop and publish information, and conduct professional and public educational programs;
- the power to enable enforcement of its recommendations, including for redress and reparation for harms perpetrated.

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

42.8. The Australian Government **withdraw its Interpretative Declarations** on CRPD Article 12 [Equal recognition before the law], Article 17 [Protecting the integrity of the person] and Article 18 [Liberty of movement and nationality].

42.9. The Australian Government review and take action to **withdraw its Reservations and Interpretative Declarations** to the other human rights treaties to which Australia is a party.

42.10. The Australian Government and State and Territory Governments **strengthen anti-discrimination laws** to explicitly recognise and address intersectional discrimination, including its aggravating and compounding effects, and to guarantee the protection from discrimination on the grounds of disability that explicitly covers all persons with disability.

42.11. The Australian Government and State and Territory Governments **modify, repeal or nullify any law or policy,** and counteract any practice or custom, which has the purpose or effect of denying or diminishing recognition of any person as a person before the law, or of denying or diminishing any person's ability to exercise legal capacity; enact laws that recognise the right of all people in all situations to recognition before the law; that creates a presumption of legal capacity for all people, and which expressly extends to those circumstances where support may be required for a person to exercise legal capacity; and enshrine the primacy of supported decision-making mechanisms in the exercise of legal capacity.

42.12. Australia should establish a **nationally consistent supported decision-making framework** that strongly and positively promotes and supports people to effectively assert and exercise their legal capacity and enshrines the primacy of supported decision-making mechanisms.

42.13. The Australian Government and State and Territory Governments move to **eliminate all forms of forced treatment and restrictive practices** on and against all people with disability. To commence this work, and in consultation with people with disability, the Australian Government conduct a comprehensive audit of laws, policies and administrative arrangements underpinning forced treatment and restrictive practices with a view to: introducing reforms to eliminate laws and practices that relate to forced treatment and restrictive practices that inherently breach human rights.

42.14. Australia establishes a CRPD and CAT compliant **nationally consistent legislative and administrative framework** for the protection of people with disability from behaviour modification and restrictive practices that constitute torture and ill-treatment, including the prohibition of and criminal sanctions for these practices.

42.15. The **National Disability Strategy (NDS)**, including its Implementation Plans, be adequately funded, and prioritise and provide specific, targeted measures to advance the human rights of women with disability, children and young people with disability, Aboriginal and Torres Strait Islander people with disability, and people with disability from non-English speaking and culturally and linguistically diverse backgrounds. In addition:

- the Council of Australian Governments (COAG) NDS reporting and review processes, ensure that all relevant legislation, policy, implementation frameworks and strategies to address violence are inclusive of and responsive to people with disability, and address all forms of violence experienced by people with disability, particularly gendered-disability violence.
- the Australian Government establish an over-arching mechanism to drive and co-ordinate the implementation of the NDS, ensuring that people with disability are consulted about, and represented on any mechanism developed.
- the NDS, including its Implementation Plans should include and contain concrete actions to address the Concluding Observations and Recommendations contained in the most recent reviews of Australia under the human rights treaties to which it is a party.
- The NDS including its Implementation Plans include clear lines of accountability and key performance indicators against which it can be assessed.

42.16 Recognising the gendered nature of violence, the disproportionate, multiple and intersecting forms of violence experienced by women and girls with disability, and the lack of legislative, policy and service responses to prevent and address violence against women and girls with disability, the Australian Government **develop national legislation,** modelled on the *Istanbul Convention*, to prevent and address all forms of violence against women.

42.17. The **National Plan to Reduce Violence Against Women and their Children 2010-2022** be amended to ensure inclusion of all women and their children, including those with disability, regardless of setting, and fully encompass all forms of gendered-disability violence. In addition, the National Plan should be amended to reflect Australia's international human rights obligations under the treaties to which Australia is a party, and be operationalised in a comprehensive human rights framework.

42.18. Consistent with the recommendations from the United Nations treaty monitoring bodies and special procedures for over a decade, and in recognition of forced sterilisation as a gross and egregious form of torture and ill-treatment, the Australian Government **enact national uniform legislation prohibiting the use of sterilisation** of girls and boys with disability, and the sterilisation of adults with disability in the absence of their prior, fully informed and free consent.

42.19. The **National Framework for Protecting Australia's Children 2009-2020** develop a Priority Area specifically addressing children with disability, in all settings in which they may experience, or be at risk of, violence, abuse and neglect, paying particular attention to the implications for girls with disability, Aboriginal and Torres Strait Islander children with disability, and children with disability from non-English speaking and culturally and linguistically diverse backgrounds.

42.20. In consultation with children and young people with disability, their representative organisations, and Disabled Peoples Organisations (DPOs), the Australian Government develop and implement a comprehensive, **national Child Rights Action Plan** to realise *all* the rights within human rights treaties and declarations, in particular the Convention on the Rights of the Child (CRC), the Convention on the Rights of Persons with Disabilities (CRPD), the Convention on the Elimination of all forms of Racial Discrimination (CERD) and the Declaration on the Rights of Indigenous Persons.

42.21. The Australian Government act urgently to address violence against children with disability (particularly sexual violence) in **out-of-home care settings**, with an immediate focus on residential care, family group homes and home based care including foster care.

42.22. The **National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework** be developed in a comprehensive human rights framework that gives effect to Australia's obligations under the human rights treaties to which it is a party, with priority

focus on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and the Convention on the Rights of Persons with Disabilities (CRPD).

42.23. The Australian Government establish uniform national legislation, in line with international human rights law, to facilitate due legal process to **end indefinite detention** of people with disability without conviction.

42.24 The Australian Government act urgently to end the unwarranted use of prisons and mental health facilities for the management of **unconvicted persons with disability**, particularly, and as a priority, Aboriginal and Torres Strait Islander people with disability. This should be accompanied by the establishment of culturally relevant administrative and disability support frameworks that enable unconvicted people with disability to receive genuine community based treatment, rehabilitation and support in the community.

42.25 Australia should develop and implement a range of age, gender and culture specific **diversionary programs and mechanisms** and community based sentencing options that are integrated with individualised disability support packages and social support programs to prevent people with disability coming into contact with the criminal justice system.

42.26. All Australian jurisdictions, in partnership with people with disability develop and implement **Disability Justice Strategies** that identify and address barriers to justice for people with disability and that are in line with the recommendations from the Australian Human Rights Commission's report, *Equal Before the Law: Towards Disability Justice Strategies*.

42.27. The Australian Government develop and implement a **nationally consistent program** that provides support (including urgent support) for people with disability involved in the criminal justice system, regardless of whether the person is a victim, witness or defendant. Such a program could be modelled on the NSW Intellectual Disability Rights Service (IDRS) 'Criminal Justice Support Network' and Victoria's Independent Third Person (ITP) Program, but extended to include all people with disability and professionally trained support persons.

42.28. The Australian Government **repeal legal provisions** that establish and permit mandatory detention for asylum seekers; enact legislation that ensures that any detention only occurs where strictly necessary, for the shortest time possible and as a last resort, that ceases immigration detention of children and their families, that ensures regular, periodic, judicial review of a person's detention, and that ensures that detainees have adequate supports and safeguards, including disability supports, aids, assistive technology, physical and mental health services, interpreters and communication facilities.

42.29. As an urgent and immediate priority, the Australian Government develop and implement a national, time bound strategy and framework for the **closure of all residential institutions** for people with disability, including those operated by non-government and private sectors, and allocates and provides the necessary resources for people with disability to move to genuine community based housing and individualised support options that will support inclusion and participation in the general community.

42.30. The Australian Government develop a comprehensive national, disaggregated **data collection strategy and framework** to capture the prevalence, extent, nature, causes and impact of all forms of violence against people with disability in the range of settings in which they reside, are incarcerated or receive support services.

SECTION 1: DISABILITY & INTERSECTIONALITY IN A HUMAN RIGHTS FRAMEWORK

43. The ways in which disability is understood has implications for recognising, and responding to violence against people with disability in institutional and residential settings.

44. Australia's international human rights obligations require that conceptualising and defining 'disability' must reflect the rights based understanding of disability[12] and focus on the prohibition of discrimination and the promotion of equality, rather than on the categorisation of various disabilities based on impairments.[13]

45. Despite Australia's international human rights obligations, and the strong global movement to recognising people with disability as subjects of human rights law on an equal basis, in the Australian context, people with disability are still subject to the effects of ableism - the practices and dominant attitudes in society that denigrate, devalue, oppress and limit the potential and rights of people with disability.[14] The influence of ableism is poorly recognised in Australia, but is a term used to capture the way that the construction of social systems with able-bodied people as the norm results in the systemic, structural, intersecting and individual forms of discrimination against and exclusion of people with disability. People with disability, by virtue of the exceptional status of falling away from this norm, are often treated as less than fully human.[15]

46. These ableist practices, which continue to pervade many of our state institutions, see people with disability continue to be isolated and segregated in institutions, not deemed to be worthy of such basic human needs as love, intimacy, identity, dignity, choice and freedom. [16] Ableism contributes to profound and intersecting discrimination experienced by people with disability in Australia, evidenced for example, in the following ways:[17]

- Social welfare policies that demonise or blame people with disability, often leading to further poverty and lack of financial independence;
- Stereotypes and myths, reinforced through media that marginalise people with disability by constructing disability as child-like, burdensome, tragic, dangerous, incapable, extraordinary, sexless, genderless or hypersexual;
- The legacy of eugenic policies and practices that promote or fail to prevent forced treatment (such as forced sterilisation and forced use of chemical or other restraints);
- Policy responses and strategies that assume the experience and impact of disability is homogenous and static, rather than diverse and variable over time and context;
- Consultative policy processes that presume ablebodiedness and in doing so, exclude a range of voices and lived experiences;
- Historical and cultural myths about people with disability that function to limit meaningful participation opportunities, decision-making, and representation;
- Structures, institutions and practices that fail to account for the intersectional, multiple and fluid nature of people's identities and experiences;
- Employment structures, policies and institutions that do not account for the diversity of peoples bodies and experiences;
- Educational institutions and policies that privilege particular ways of learning and teaching which exclude a range of bodies and identities;
- Ableist immigration policies;

[12] As enshrined in the CRPD. A paradigm shift, from the traditional medical and charity based welfare model of disability, to today's rights based model, rightly identifies people with disability as subjects of human rights law on an equal basis. It recognises that disability is an issue of diversity, the same as race or gender, and, places the responsibility on society and governments for ensuring that political, legal, social, and physical environments guarantee the exercise of civil, cultural, economic, political and social rights by all persons with disability.

[13] Dowse, L., Soldatic, K., Didi, A., Frohmader, C. and van Toorn, G. (2013) *Stop the Violence: Addressing Violence Against Women and Girls with Disabilities in Australia. Background Paper.* Hobart: Women with Disabilities Australia (WWDA).

[14] See: http://www.stopableism.org/what.asp

[15] Campbell, F.K. (2011) 'Stalking Ableism: using Disability to Expose 'Abled' Narcissism', in Goodley, D., Hughes, B. & Davis, L. (eds). *Disability and Social Theory: New Developments and Directions*, Bashingstoke: Palgrave Macmillan.

[16] In Frohmader, C (2013) *'Dehumanised: The Forced Sterilisation of Women and Girls with Disabilities in Australia'* - WWDA Submission to the Senate Inquiry into the involuntary or coerced sterilisation of people with disabilities in Australia; ISBN: 978-0-9876035-0-0.

[17] WWDA (2015) *Draft Paper for the National Framework to Prevent Violence Against Women and their Children* (forthcoming).

- Ongoing institutionalisation of people with intellectual disability;
- Built environments and public spaces that fail to account for the diversity of people's bodies;
- Lack of research data and research interest into the prevalence, extent, nature, causes and impact of violence against people with disability in the range of settings in which they reside or receive support services;
- Unequal distribution of power and resources and institutional, cultural and individual support for (or weak sanctions against) gender inequality;
- Adherence to rigidly defined gender roles expressed institutionally, culturally, organisationally and individually that privilege a myth of ablebodiedness;
- Policy conceptualisations and responses to violence against women that do not account for the disproportionate, multiple and intersecting forms of violence that women and girls with disability experience and the spaces in which that violence occurs;
- Lack of awareness and understanding of the extent, nature, incidence, and impact of gendered disability violence at the individual, community, service provider, and criminal justice system levels.

UNDERSTANDING INTERSECTIONALITY

47. People with disability, including (and especially) those in institutional and residential settings, are particularly subject to the effects of ableism, and experience intersectional discrimination that often has aggravating or compounding effects.[18]

48. 'Intersectional discrimination' means that several forms of discrimination based on various layers of identity, social position, and experiences, may intersect and produce new forms of discrimination that are unique and cannot be correctly understood by simply describing them as 'double' or 'triple' or even 'multiple' discrimination. Intersectionality recognises that human beings are not only men, women, intersex or transgender, they also have ethnic, indigenous, cultural and/or religious backgrounds, they may have an impairment or not and have other layers of identity, social positions and experiences, such as age, marital status, sexual orientation, gender identity, language, health status, place of residence, immigration status, economic status or social situation.[19]

49. Understanding intersectional discrimination is critical to conceptualising disability and the human rights violations people with disability experience. For example, women and girls with disability are more likely to be subjected to forced interventions which infringe their reproductive rights (such as forced sterilisation) than women without disabilities and men with disabilities. People with disability in institutional settings are more likely to be subject to guardianship proceedings for the formal removal of their legal capacity. This facilitates and may even authorise forced interventions. Aboriginal people with disability are more likely to be subject to indefinite detention than non-Aboriginal people with disability and people without disability. These human rights violations are perpetrated on account of the interaction and intersection of various layers of identity, social position, and experiences. The resulting myriad of violations of rights in these examples include the right to non-discrimination, freedom from torture and ill-treatment, protection of personal integrity, right to legal capacity, protection from violence, abuse and exploitation, right to family, right to health, to living independently and being included in the community, and access to justice.[20]

50. Intersectional discrimination has unique and specific impact on people with disability and requires particular consideration and remedying. In many cases, intersectional discrimination may lead to different or to another degree of discrimination or to new forms of discrimination not yet acknowledged by law, policy or in research.[21]

[18] Committee on the Rights of Persons with Disabilities (22 May 2015) *General comment on Article 6: Women with disabilities.* Draft prepared by the Committee; UN Doc. No. CRPD/C/14/R.1.
[19] Ibid.
[20] Ibid.
[21] Ibid.

51. Most States do not recognise or adequately address intersectional discrimination and its aggravating or compounding effects. Often equality and anti-discrimination laws and provisions categorise identity and require each protected characteristic to be dealt with in isolation. Such an approach is divorced from human experience and fails to protect human dignity. In some jurisdictions, victims of discrimination can only bring a complaint of discrimination with respect to one ground because intersectional discrimination is not provided for in the law. In addition, where a remedy can be sought and obtained with respect to one aspect of the multidimensional discrimination, this fails to recognise the heightened disadvantage experienced by the victim, and the corresponding heightened damage caused, and cannot adequately provide redress nor restore their individual dignity. However, when intersectional discrimination is recognised in the law and infuses the determination of liability, it is more likely that it will also figure in the pronouncement of remedies.[22]

[22] Ibid.

SECTION 2: VIOLENCE AGAINST PEOPLE WITH DISABILITY IN A HUMAN RIGHTS FRAMEWORK

52. Regardless of setting or context, violence against people with disability in Australia continues to be conceptualised, downplayed and 'detoxified' as 'abuse' or 'neglect' or 'service incidents,' or 'administrative infringements' or a 'workplace issue to be addressed'[23] - rather than viewed as 'violence' or crimes.[24] This is particularly the case in institutional and residential settings - including group homes, boarding houses, mental health facilities, schools and prisons - where violence perpetrated against people with disability is rarely recognised or understood as 'violence', and more often than not, is deliberately minimised, trivialised, ignored, dismissed, excused, covered up, or normalised.

53. Terms such as 'abuse' are often used in an effort to acknowledge that a power dynamic may be part of an assault. This detoxifies assault. It also exacerbates the existing tendency to infantilise adults with disability, because in a criminal context, 'abuse' is primarily used in relation to children. Similarly, the use of terms such as 'neglect' to describe the withdrawal of, or failure to provide, life-sustaining supports is also problematic. It can make situations where the intention is to cause death, appear 'less violent', and this often affects prosecution. It also affirms the narrative found in both media and criminal prosecutions that people with disability constitute such 'burdens' on their carers that this 'burden' mitigates the crime.[25] 'Neglect' of children is a specific criminal offence, but its use in relation to adults can again be infantilising.

54. People with disability who live, occupy, and/or experience institutional, residential and service settings are regularly deprived of the information, education and skills to recognise and address violence, and are often taught and 'rewarded' for, unquestioning compliance. They often do not recognise the violence perpetrated against them as a crime and are unaware of how to seek help and support. Even if they are able to disclose, they are unlikely to be believed, and are often actively prevented from seeking help and support.[26] In such settings, criminal behaviours are simply normalised.

55. This widespread tendency to downplay and re-frame violence as 'abuse' or as a 'service incident' results in denying people with disability the legal protections and justice extended to other people. Pervasive discriminatory and ableist attitudes within police culture and the criminal justice system (including the tendency to blame the victim; refusal to investigate allegations of violence; treating crimes of violence as a 'service incidents'; failing to make reasonable adjustments; assuming that a prosecution will not succeed because the court may think the person lacks credibility; along with negative or paternalistic stereotypes of people with disability), all contribute to the pervasive and extensive violence perpetrated against people with disability in institutional and residential settings.[27]

56. The lack of a clear conceptual understanding and legal recognition of violence against people with disability in legislation, policy, and service frameworks results in no or low priority being given to the issue within service environments, including in institutional and residential settings.[28] This renders Governments complicit in the ongoing, entrenched sub-culture of violence prevalent in such

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[23] French, P., Dardel, J., & Price-Kelly, S. (2010) *Rights denied: Towards a national policy agenda about abuse, neglect and exploitation of persons with cognitive impairment*, People with Disability Australia, Sydney.

[24] Sorensen, D. (1997) 'The Invisible Victims', *IMPACT*, 10 (1997), 4–7; Frohmader, C., (2007) *'Forgotten Sisters - A global review of violence against women with disabilities'*, WWDA Resource Manual on Violence Against Women With Disabilities, WWDA, Tasmania, Australia; Sobsey, R. (1994) *'Violence and Abuse in the Lives of People with Disabilities: The End of Silent Acceptance?'* Baltimore: Paul H Brookes Publishing Co; Sherry, M. (2003) *'Don't Ask, Tell or Respond: Silent Acceptance of Disability Hate Crimes'*, http://wwda.org.au/wp-content/uploads/2013/12/marksherry2.pdf

[25] Sullivan, C. (2015) *'Not Just Language: An analysis of discursive constructions of disability in sentencing remarks'*, Honours Thesis Sydney Law School, University of Sydney. See, for example, Clarke, T., (2014) 'Husband Jailed Over Starvation Death' in *The West Australian*, August 14. Available online at: https://au.news.yahoo.com/thewest/wa/a/24716889/husband-jailed-over-starvation-death/

[26] Frohmader, C. (2011) OpCit.

[27] Frohmader, C., Dowse, L., and Didi, A. (2015) *'Preventing Violence against Women and Girls with Disabilities: Integrating A Human Rights Perspective'*. Women With Disabilities Australia (WWDA), Hobart, Tasmania. ISBN: 978-0-9585268-4-5. Frohmader, C. (2011) *Submission to the Preparation Phase of the UN Analytical Study on Violence against Women and Girls with Disabilities,* (A/HRC/RES/17/11). Prepared for Women With Disabilities Australia (WWDA). Frohmader, C. & Cadwallader, J. (2014) *Joint Submission from National Cross-Disability Disabled People's Organisations (DPO's) to the Senate Standing Committee on Finance and Public Administration 'Inquiry into Domestic Violence in Australia'.* Available at: http://wwda.org.au/wp-content/uploads/2013/12/Final_Draft_DPO_Sub_DV_Senate2014.pdf

[28] Frohmader, C., Dowse, L., and Didi, A., (2015) *'Preventing Violence against Women and Girls with Disabilities: Integrating A Human Rights Perspective'* Women with Disabilities Australia, ISBN: 978-0-9585268-4-5.

settings,[29] which in turn, serves to perpetuate the systemic violence experienced by people with disability in institutional and residential settings. In also means in effect, that for people with disability – particularly those in institutional and residential settings - their experiences of violence are not properly recognised across the legal and service systems, they are given less protection than their counterparts who do not have disability, and the likelihood of them benefiting from integrated and coordinated responses, including prevention, is substantially compromised.[30]

57. Causes, interventions and prevention strategies to address and prevent violence are contingent upon the validity of definitions available. Such definitions set the scope for who is covered by violence prevention legislation and crimes legislation and under what circumstances. They also provide the benchmark for translation into relevant policy frameworks, policies and service responses. Inclusive, consistent, and comprehensive definitions and conceptual understandings of 'violence' - which include the full variety of violent acts experienced by people with disability, in the full range of settings and relationships experienced by people with disability –- are critical to ensure the safety of people with disability.[31]

58. Ableism and intersectional discrimination provide a breeding ground for tolerance of violence against people with disability – particularly those in institutional and residential settings. To date, conceptual understandings of violence against people with disability have "failed to provide a comprehensive understanding of how various forms of discrimination, beyond a male/female gender binary, contextualise, exacerbate, and correlate to high levels of violence" against people with disability.[32]

59. A human rights approach to conceptualising violence against people with disability – mandated through Australia's international human rights obligations - underscores the interdependence and indivisibility of civil, political, economic, social and cultural rights. It situates violence against people with disability on a continuum that spans interpersonal and structural violence; acknowledges the structural aspects and factors of discrimination, which includes structural and institutional inequalities; and analyses social and/or economic hierarchies between women and men and also among women. In so doing, it explicitly interrogates the places where violence against people with disability coincides with intersecting forms of discrimination and their attendant inequalities.[33] A human rights approach therefore, specifically acknowledges that people with disability experience significant intersecting forms of discrimination and this is no different when they become victims of violence, including its gender-based dimensions.[34] These intersecting forms of discrimination cannot be 'disconnected' from each other when endeavouring to prevent and address violence against people with disability.

60. Embedding a human rights perspective into conceptualising violence against people with disability is therefore critical in any and all efforts to preventing and addressing such violence. This requires broadening the current way of thinking about how we frame what violence against people with disability encompasses. In the case of women with disability, for example, it requires understanding that gender-based violence is not only violence directed against a woman because she is a woman, but is also violence that affects women, including 'sub-groups' of women, disproportionately.[35]

61. Conceptualising violence against people with disability in a human rights context means recognising that people with disability are at greater risk of experiencing violence, in all its forms. It means recognising that, irrespective of a disabled person's place of residence, or setting in which they live, occupy or experience, they experience and are at greater risk of violence directed against them, and also experience and are at greater risk of forms of violence that affect them disproportionately.

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[29] SafePlace Institute (2000) *Stop the Violence, Break the Silence Training Guide & Resource Kit.* Austin, Texas.
[30] Frohmader, C. & Cadwallader, J. (2014) OpCit.
[31] Ibid. See also: Frohmader, C., (2007) *'Forgotten Sisters - A global review of violence against women with disabilities',* WWDA Resource Manual on Violence Against Women With Disabilities, WWDA, Tasmania, Australia.
[32] Manjoo, R. (2011) *Report of the Special Rapporteur on violence against women, its causes and consequences.* United Nations General Assembly, UN Doc No. A/HRC/17/26
[33] Ibid.
[34] Council of Europe (2013) *Council of Europe Convention on preventing and combating violence against women and domestic violence: Explanatory report.*
[35] Ibid.

62. Therefore, before we can 'prevent' and or 'address' violence against people with disability in institutional and residential settings, we must be clear about what it is. Violence against people with disability:[36]

- can often constitute torture or ill-treatment – particularly when it occurs in institutional or residential settings, including for example, through practices such as: forced or coerced sterilisation, forced contraception, forced or coerced psychiatric interventions and other forced treatments; indefinite detention; sexual violence, and restraint.

- is a gross violation of human rights;

- is a form of disability discrimination, a form of gender-based discrimination, and often occurs within, and as a result of, intersectional forms of discrimination;

- encompasses gendered disability violence, which is violence directed against a woman because she is a woman and which is shaped by the disability context. This violence affects women with disability disproportionately as individuals and as a group;

- includes all acts of violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to people with disability, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;

- includes all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit/setting or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim; and/or irrespective of the nature of the relationship between victim and perpetrator;

- is inclusive of those acts of violence which are more unique to people with disability – particularly women and girls - and that often occur in the context of, or as a result of, the settings in which they live, occupy, and/or experience and/or the relationships they experience within these settings, including for eg: violations of privacy, denial of control over bodily integrity; forced isolation and denial of social contact; denial of the right to decision-making; denial of provision of essential care.

- is embedded within and underscored by an ableist culture which sees the promotion and support of laws, systems, policies and practices which provide a legitimised gateway through which torture and ill-treatment against people with disability can flourish.

[36] In Frohmader, C., Dowse, L., and Didi, A., (2015) OpCit.

SECTION 3: AUSTRALIA'S INTERNATIONAL HUMAN RIGHTS OBLIGATIONS TO PREVENT AND ADDRESS VIOLENCE AGAINST PEOPLE WITH DISABILITY

63. Australia is a founding member of the United Nations (UN) and has been an active participant in UN institutions for more than 65 years. Successive Australian Governments, including the current Abbott Government, have articulated Australia's *'enduring commitment to human rights',*[37] including meeting its obligations under the human rights treaties to which Australia is a party, and ensuring that Australia remains a *'leading proponent of the consistent and comprehensive implementation of the Universal Declaration of Human Rights'*[38], which Australia helped to draft in the late 1940's.[39]

64. Australia is a party to seven core international human rights treaties, all of which create obligations to provide protections against torture or cruel, inhuman or degrading treatment or punishment (ill-treatment); and all forms of violence – regardless of where it occurs, and regardless of who perpetrates it. The seven treaties are:

- Convention on the Rights of Persons with Disabilities ([2008] ATS[40] 12);
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ([1989] ATS 21);
- International Covenant on Civil and Political Rights ([1980] ATS 23);
- International Covenant on Economic, Social and Cultural Rights ([1976] ATS 5);
- Convention on the Rights of the Child ([1991] ATS 4);
- Convention on the Elimination of All Forms of Discrimination Against Women ([1983] ATS 9);
- International Convention on the Elimination of All Forms of Racial Discrimination ([1975] ATS 40).

65. As a party to these treaties, Australia has chosen to be bound by the treaty requirements, and has an international legal obligation to implement the treaty provisions through its laws and policies.

66. Together, these seven international human rights treaties, their optional protocols, and the General Comments and recommendations adopted by the bodies monitoring their implementation, provides the framework to delineate the respective obligations and responsibilities of governments and other duty-bearers to comprehensively prevent, address, and provide redress for all forms of violence experienced by people with disability, particularly those in institutional and residential settings. Critically, implementation of these Conventions is not mutually exclusive. They must be viewed and implemented as, complementary mechanisms through which to create a holistic framework of rights protection and response to torture, ill treatment, violence, segregation and discriminatory practices as they relate to people with disability.[41]

67. Significantly, torture and ill-treatment of people with disability, including violence, abuse, exploitation and neglect are frequently subject to commentary in the various concluding observations and recommendations from United Nations (UN) treaty bodies and the Human Rights Council following assessment of Australia's human rights performance;[42] in General Comments on specific human rights issues from UN treaty bodies;[43] and from independent human rights experts with UN mandates to report and advise on human rights.[44]

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[37] Australian Government, Department of Foreign Affairs and Trade; *Australia and the United Nations: Human rights and gender equality.* Accessed on line April 2014 at: http://www.dfat.gov.au/un/

[38] Australian Government, Department of Foreign Affairs and Trade; *Human Rights and Gender Equality;* Accessed on line April 2014 at: http://www.dfat.gov.au/un/human-rights-and-gender-equality.html

[39] The *Universal Declaration of Human Rights* was adopted by the UN General Assembly on 10 December 1948. See: http://www.dfat.gov.au/un/ See also: Australian Government (2012) *Draft 5th Report by Australia on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* For the period 1 January 2008 to 30 June 2012; Attorney-General's Department, Canberra.

[40] Refers to 'Australian Treaty Series'. See for eg: http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/

[41] The UN Special Rapporteur on Torture has emphasised this: *"it is necessary to highlight additional measures needed to prevent torture and ill-treatment against people with disabilities, by synthesizing standards and coordinating actions in line with the CRPD"*. See: A/HRC/22/53 Juan E. Mendez, para, 62.

[42] See e.g., UN document CRPD/C/AUS/CO/1; Human Rights Council, *Report of the Working Group on the Universal Periodic Review*, Australia, 17th sess, UN Doc A/HRC/17/10 UPR 2010 (March 2011)[86.93].

[43] See e.g., Committee on the Rights of Persons with Disabilities, *General Comment No.1 – Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014).

[44] See e.g., Special Rapporteur on Violence against Women, its Causes and Consequences, *Report of the Special Rapporteur on violence against women, its causes and consequences*, 67th session, UN Doc A/67/227 (3 August 2012).

68. This section focuses on the most recent reviews of Australia by UN human rights treaty bodies (including the Human Rights Council) and the recommendations made by these bodies to Australia – several of which the UN have deemed "urgent". These reviews demonstrate that there are specific international concerns regarding Australia's ongoing failure to meet its human rights obligations under the treaties to which it is a party, particularly Australia's failure to comprehensively protect and respond to all forms of violence, abuse and neglect experienced by people with disability.

CONVENTION ON THE RIGHTS OF PERSONS WITH DISABILITIES (CRPD)

69. The Convention on the Rights of Persons with Disabilities (CRPD)[45] was ratified by Australia on 17 July 2008 and it entered into force for Australia on 16 August 2008. The CRPD contains provisions regarding violence, abuse and neglect, particularly in 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]; and Article 17 [Protecting the integrity of the person].

70. In 2013, Australia's performance in relation to the CRPD was reviewed for the first time by the Committee on the Rights of Persons with Disabilities (the CRPD Committee). The CRPD Committee's Concluding Observations[46] from the review highlight a number of concerns and recommendations relevant to the issue of violence against people with disability in residential and institutional settings:

71. In relation to Article 6 [Women with disabilities], the Committee noted with concern the high incidence of violence against women with disability, and recommended:

> *"a more comprehensive consideration of women with disabilities in public programmes and policies on the prevention of gender-based violence, particularly so as to ensure access for women with disabilities to an effective, integrated response system."*[47]

72. In relation to Article 7 [Children with disabilities], the CRPD Committee commented that in spite of the *National Framework for Protecting Australia's Children 2009-2020*,[48] there is no comprehensive national human rights framework for children, including children with disability. It recommended that Australia increase:

> *"efforts to promote and protect the rights of children with disabilities, by incorporating the Convention into legislation, policies, programmes, service standards, operational procedures and compliance frameworks that apply to children and young people in general."*[49]

73. In relation to Article 14 [Liberty and security of the person], the CRPD Committee highlighted three concerns. Firstly, the CRPD Committee expressed concern that people with disability "who are deemed unfit to stand trial" can be indefinitely detained in prisons or mental health facilities "without being convicted of a crime and for periods that can significantly exceed the maximum period of custodial sentience for the offence".[50] The CRPD Committee recommended to Australia to urgently:

> *"End the unwarranted use of prisons for the management of unconvicted persons with disabilities, focusing on Aboriginal and Torres Strait Islander persons with*

[45] *Convention on the Rights of Persons with Disabilities* opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008).
[46] CRPD/C/AUS/CO/1.
[47] CRPD/C/AUS/CO/1, para 17
[48] Council of Australian Governments (2009) *'Protecting Children is Everyone's Business: National Framework for Protecting Australia's Children 2009-2010'*, Commonwealth of Australia. Available at: https://www.dss.gov.au/our-responsibilities/families-and-children/publications-articles/protecting-children-is-everyones-business
[49] CRPD/C/AUS/CO/1, para 19
[50] CRPD/C/AUS/CO/1, para 31

disabilities, by establishing legislative, administrative and support frameworks that comply with the Convention."[51]

74. Secondly, the CRPD Committee also expressed concern regarding the overrepresentation of people with disability, in particular women, children, Aboriginal and Torres Strait Islander people with disability in the prison and juvenile justice systems.[52] It recommended Australia to urgently:

> *"Establish mandatory guidelines and practice to ensure that persons with disabilities in the criminal justice system are provided with appropriate support and accommodation."*

75. Thirdly, the CRPD Committee was concerned that Australian law allows for people with disability to be subjected to medical interventions without consent. The CRPD Committee recommended that Australia:

> *"repeal all legislation that authorises medical intervention without the free and informed consent of the persons with disabilities concerned, committal of individuals to detention in mental health facilities, or imposition of compulsory treatment, either in institutions or in the community, by means of Community Treatment Orders."*[53]

76. Article 15 of the CRPD incorporates many of the rights and protections outlined in the *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment* (CAT). In relation to this article, the CRPD Committee raised concerns that people with disability, particularly those with intellectual or psychosocial disability are subjected to restrictive practices such as chemical, mechanical and physical restraints in a range of settings. The CRPD Committee recommended that Australia:

> *"take immediate steps to end such practices, including by establishing an independent national preventive mechanism to monitor places of detention - such as mental health facilities, special schools, hospitals, disability justice centres and prisons -, in order to ensure that persons with disabilities, including psychosocial disabilities, are not subjected to intrusive medical interventions."*[54]

77. In relation to Article 16 [Freedom from exploitation, violence and abuse], the CRPD Committee expressed concerns about the "high rates of violence perpetrated against women and girls living in institutions and other segregated settings,"[55] and recommended that Australia:

> *"investigate without delay the situations of violence, exploitation and abuse experienced by women and girls with disabilities in institutional settings, and that it take appropriate measures on the findings."*[56]

78. Article 17 [Protecting the integrity of the person], the CRPD Committee expressed its deep concern that the recommendations from the report of the *Senate Inquiry into the Involuntary or Coerced Sterilisation of Persons with Disabilities*[57] would allow the continuation of forced sterilisation.[58] It also noted that Australia had failed to implement the recommendations to prohibit forced sterilisation that were made by the CRPD Committee on the Rights of the Child[59], the Working Group on the Universal Periodic Review[60] and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment.[61] The CRPD Committee recommended that Australia:

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[51] CRPD/C/AUS/CO/1, para 32(a)
[52] CRPD/C/AUS/CO/1, para 31
[53] CRPD/C/AUS/CO/1, para 34
[54] CRPD/C/AUS/CO/1, par. 36
[55] CRPD/C/AUS/CO/1, para 37
[56] CRPD/C/AUS/CO/1, para 38
[57] The Senate Community Affairs References Committee (2013), *'Involuntary or coerced sterilisation of people with disabilities in Australia'*, Commonwealth of Australia, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/First_Report
[58] CRPD/C/AUS/CO/1, para 39
[59] CRC/C/15/ADD.268; and CRC/C/AUS/CO/4.
[60] UN Doc. A/HRC/17/10.
[61] UN Doc. A/HRC/22/53.

> *"adopt uniform national legislation prohibiting the sterilisation of boys and girls with disabilities, and adults with disabilities, in the absence of their prior, fully informed and free consent."*[62]

79. These concerns and recommendations of the CRPD Committee address some of the more egregious forms of violence, abuse and neglect experienced by people with disability – gender-based violence, violence against children, forced medical interventions and treatment, restrictive practices and forced sterilisation; as well as specific circumstances that give rise to violence, abuse and neglect, such as indefinite detention and over representation in prisons and juvenile justice.

80. However, human rights are indivisible, interdependent and interrelated: the deprivation of one right adversely impacts other rights; and the realisation of one right facilitates improvement of other rights.[63] In this respect, the CRPD Committee made a number of recommendations that address the multiple and intersecting human rights violations that give rise to, and facilitate violence, abuse and neglect. Addressing these human rights violations are critical to comprehensively protect and respond to all forms of violence, abuse and neglect experienced by people with disability in institutional and residential settings:

81. In relation to the general principles and obligations of the CRPD, the CRPD Committee expressed concern that Australia has not brought its domestic legislation into line with the CRPD despite adopting the *National Disability Strategy*.[64] Further, the CRPD Committee was concerned that Australia, when it ratified the CRPD had made interpretative declarations[65] on articles 12 [Equal recognition before the law]; 17, [Protecting the integrity of the person]; and 18, [Liberty of movement and nationality*].* [66] During the review process, the CRPD Committee repeatedly expressed concern[67] that the interpretative declarations were reinforcing and maintaining breaches of human rights in legislation, policy and practice and inhibiting necessary reform for CRPD compliance in relation to substitute decision making (Article 12), forced medical treatment (Article 17) and the health requirements of the *Migration Act 1958* (Cth) (Article 18). The interpretative declarations exacerbate human rights violations, including in relation to violence, abuse and neglect.[68] The CRPD Committee recommended that Australia:

> *"incorporate all rights under the Convention into domestic law and that it review its interpretative declarations on articles12, 17 and 18 with a view to withdrawing them".*[69]

82. In relation to Article 5 [Equality and non-discrimination] the Committee expressed concern that the scope of protected rights and grounds of discrimination in the Disability Discrimination Act (DDA) 1992 is narrower than under the Convention and does not provide the same level of legal protection to all persons with disabilities. The Committee recommended that Australia:

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[62] CRPD/C/AUS/CO/1, para 40
[63] Office of the High Commissioner for Human Rights, *What are Human Rights?* http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx
[64] Council of Australian Governments, National Disability Strategy (2011) Commonwealth of Australia, https://www.dss.gov.au/sites/default/files/documents/05_2012/national_disability_strategy_2010_2020.pdf
[65] *'Interpretative Declarations'* are formal statements a country can make to express how it intends to 'interpret' or 'understand' a particular treaty article.
[66] Australia's interpretative declarations to the CRPD are as follows: ***Article 12:*** *"Australia recognises that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;* ***Article 17:*** *Australia recognises that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;* ***Article 18:*** *Australia recognises the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria."*
[67] Reports from members of the CRPD Parallel Report Group 10th session delegation to the review of Australia by the Committee on the Rights of Persons with Disabilities, September 2013.
[68] For example, based on Australia's interpretative declaration in respect of Article 12, the *Report of the Senate Inquiry into Involuntary or Coerced Sterilisation of People with Disabilities in Australia* recommends that where a person with disability does not have 'capacity' for consent, substitute decision-making laws and procedures may permit sterilisation of persons with disability (para 4.45). This is not consistent with international human rights law that views forced sterilisation as a form of violence to be prohibited, or with CRPD article 12 which requires substitute decision-making regimes to be replaced by supported decision-making ones.
[69] CRPD/C/AUS/CO/1

> *"…strengthen anti-discrimination laws to address intersectional discrimination and to guarantee the protection from discrimination on the grounds of disability to explicitly cover all persons with disabilities including children, indigenous people, women and girls, hearing impaired, deaf, and people with psychosocial disabilities."*[70]

83. CRPD Article 12 [Equal recognition before the law], is a fundamental principle of human rights protection and critical to achieving and exercising other human rights.[71] It affirms that people with disability have legal capacity on the same basis as others. This requires laws, policy and practice that deny legal capacity to be abolished. Breaches of Article 12 are embedded in Australian law, policy and practice, including estate management, guardianship and mental health laws, and this underpins forms of violence, abuse and neglect, such as forced medical treatments and interventions, forced sterilisation and restrictive practices to be perpetrated against people with disability.

84. The CRPD Committee expressed concerns that substitute decision-making systems could be maintained despite the Australian Law Reform Commission's (ALRC) inquiry into barriers to equal recognition before the law and legal capacity for people with disability,[72] and made two recommendations:

> *"…take immediate steps to replace substitute decision-making with supported decision-making and…provide a wide range of measures which respect a person's autonomy, will and preferences and are in full conformity with article 12 of the Convention, including with respect to a person's right, in his or her own capacity, to give and withdraw informed consent for medical treatment, to access justice, to vote, to marry and to work";*[73]

> *"…provide training, in consultation and cooperation with persons with disabilities and their representative organisations, at the national, regional and local levels for all actors, including civil servants, judges and social workers, on recognition of the legal capacity of persons with disabilities and on the primacy of supported decision-making mechanisms in the exercise of legal capacity."*[74]

85. Article 13 [Access to Justice] highlights the importance of ensuring procedural adjustments are made to the legal process to facilitate the effective participation of people with disability in the justice system, whether as victims, witnesses, litigants or defendants. Barriers to justice for people with disability deny or limit the legal protections and redress mechanisms available to others. The CRPD Committee noted its concern about the lack of guidance on access to justice for people with disability. It was also concerned that the varying justice systems in states and territories did not uniformly allow "access to sign language interpreters or the use of Augmentative and Alternative Modes of Communication". The CRPD Committee recommended to Australia that:

> *"standard and compulsory modules on working with persons with disabilities be incorporated into training programmes for police officers, prison staff, lawyers, the judiciary and court personnel…[and] that legislation and policy across the states and territories be amended to ensure access to justice for persons with disabilities."*[75]

86. The CRPD Committee also made recommendations with regard to Article 13 that intersect with the rights contained in Article 12,[76] and that highlight the tensions within law that are intended to protect people with disability, such as 'unfitness to plead' provisions, and intended to ensure a fair trail, such as rules of evidence. These tensions result in perverse outcomes for people with disability, such as

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[70] CRPD/C/AUS/CO/1, paras 14, 15.
[71] Committee on the Rights of Persons with Disabilities, *General comment No.1 (2014) - Article 12: Equal recognition before the law*, 11th sess, UN doc CRPD/C/GC/1 (19 May 2014) para 1
[72] The former Attorney-General, the Hon. Mark Dreyfus QC, MP referred the inquiry to the ALRC on 23 July 2013, just prior to the CRPD Committee's review of Australia in September 2013.
[73] CRPD/C/AUS/CO/1, para 25
[74] CRPD/C/AUS/CO/1, para 26
[75] CRPD/C/AUS/CO/1, para 28
[76] CRPD/C/AUS/CO/1, para 29-30

being indefinitely detained in prisons and psychiatric facilities and subject to forced medical treatments and restrictive practices; or being denied the right to give evidence as a victim or witness of crime in criminal or civil proceedings.

87. Article 19 [Living independently and being included in the community], applies the rights of liberty and security of the person (article 14) and the rights of freedom of movement (article 18) to "one of the most pervasive human rights abuses experienced by persons with disability; their segregation and isolation from the community in institutional environments".[77] People with disability are often obliged or compelled to live in residential institutions and other accommodation facilities in order to receive essential support services. Article 19 requires people with disability to receive the essential supports they need to live in housing that enables independence, autonomy, participation and inclusion in the community, and to be free from violence, abuse and neglect. The CRPD Committee expressed concern that despite policies to close large residential centres in Australia, *"new initiatives replicate institutional living arrangements, and many person with disabilities are still obliged to live in residential institutions in order the receive disability support."*[78] The CRPD Committee recommended that Australia:

> *"…develop and implement a national framework for the closure of residential institutions and to allocate the resources necessary for support services that would enable persons with disabilities to live in their communities. The Committee recommends that the State party take immediate action to ensure that persons with disabilities have a free choice as to where and with whom they want to live, and that they are eligible to receive the necessary support regardless of their place of residence..."*[79]

CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN AND DEGRADING TREATMENT OR PUNISHMENT (CAT)

88. Since the adoption of the CRPD, the UN has investigated and reported on the application of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)[80] to the specific situations of people with disability.[81] Breaches of the CRPD, including the denial of reasonable accommodation, provide evidence that discrimination has taken place for the purposes of satisfying the requirement to establish torture in Article 1 of CAT; and cruel, inhuman or degrading treatment or punishment in Article 16 of CAT where the physical and or mental pain experienced as a result of that discrimination is not to the degree of persistent pain, suffering or ill-treatment.[82]

89. People with disability are frequently subject to treatment that constitutes torture, or cruel, inhuman or degrading treatment or punishment, such as forced medical treatments and interventions, institutionalisation and indefinite detention, forced sterilisation, persistent and severe violence and abuse, long-term neglect of basic human needs, failure to provide adjustments for disability related needs, and the application of restrictive practices.[83]

90. Australia is responsible for the prevention of torture, cruel, inhuman or degrading treatment or punishment by non-state as well as state actors, including within publicly and privately funded or provided disability and mental health facilities, schools, prisons, immigration detention, hospitals and

[77] French, P. (2009) *'Accommodating Human Rights: A human rights perspective on housing, and housing and support, for persons with disability'*, People with Disability Australia, p 25
[78] CRPD/C/AUS/CO/1, para 41
[79] CRPD/C/AUS/CO/1, para 42
[80] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
[81] See e.g., Manfred Nowak, Special Rapporteur, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 63rd sess, UN Doc A/63/175 (28 July 2008); Juan E. Mendez, Special Rapporteur, *Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment*, 22nd sess, UN Doc A/HRC/22/53 (1 February 2013)
[82] People with Disability Australia, *Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture; Submission, (*October 2014), para 9.
[83] Phillip French, Julie Dardel and Sonya-Price-Kelly, *Rights Denied: Towards a National Policy Agenda about Abuse, Neglect and Exploitation of Persons with Cognitive Impairment*, (People With Disability Australia, 2009) 72

"contexts where the failure of the State to intervene encourages and enhances the danger of privately inflicted harm."[84]

91. It is critical to note that the right to be free from torture is one of the few absolute and non-derogable human rights, a matter of *jus cogens*,[85] a peremptory norm of customary international law, and as such is binding on all States, irrespective of whether they have ratified specific treaties.[86] A State cannot justify its non-compliance with the absolute prohibition of torture, under any circumstances. The UN Special Rapporteur on Torture has clarified that:

> *"Forced interventions often wrongfully justified by theories of incapacity and therapeutic necessity inconsistent with the Convention on the Rights of Persons with Disabilities, are legitimised under national laws, and may enjoy wide public support as being in the alleged "best interest" of the person concerned. Nevertheless, to the extent that they inflict severe pain and suffering, they violate the absolute prohibition of torture and cruel, inhuman and degrading treatment."*[87]

92. In 2014, the Committee against Torture (the CAT Committee) provided its Concluding Observations to Australia following its review. The CAT Committee expressed concerns regarding:

> *"the persistence of violence against women, which disproportionately affects indigenous women and women with disabilities";* and reports that *"over 50 per cent of cases of violence against women are not reported;"*[88]
>
> the over-representation of Aboriginal and Torres Strait Islander people in the criminal justice system, *"reportedly representing around 27 per cent of the total prisoner population while constituting between 2 to 3 per cent of the total population;"*[89]
>
> the continuation of mandatory detention for all asylum-seekers, including children, with *"protracted periods of deprivation of liberty;"*[90] and the *"harsh conditions prevailing in [offshore processing centres], such as mandatory detention, including for children, overcrowding, inadequate health care, and even allegations of sexual abuse and ill-treatment;"*[91]
>
> the need to include *"criminal investigations, prosecutions, and redress and compensation for victims"* as outcomes of the Royal Commission into Institutional Response to Child Sexual Abuse;[92]
>
> the *"ongoing practice of forced sterilisation of children and adults with disabilities."*[93]

93. In relation to violence against women, the CAT Committee recommend that Australia *"redouble efforts to prevent and combat all forms of violence against women…by, inter alia:*

- *Taking measures to facilitate the lodging of complaints by victims and to address effectively the barriers that may prevent women from reporting acts of violence against them;*

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[84] Committee against Torture, *General Comment 2, Implementation of article 2 by States Parties*, U.N. Doc. CAT/C/GC/2/CRP. 1/Rev.4 (2007). Para 15.
[85] Cited in: Frohmader, C. (2013) *'Dehumanised: The Forced Sterilisation of Women and Girls with Disabilities in Australia'*: WWDA Submission to the Senate Inquiry into the involuntary or coerced sterilisation of people with disabilities in Australia. Women With Disabilities Australia, Tasmania, ISBN 978-0-9876035-0-0.
[86] Ibid.
[87] Juan E. Mendez, Opcit., para 64
[88] Committee against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, 53rd sess, UN doc CAT/C/AUS/CO/4-5 (23 December 2014) para 9
[89] Ibid para 12
[90] Ibid para 16
[91] Ibid para 17
[92] Ibid para 19
[93] Ibid para 20

- *Ensuring the effective enforcement of the existing legal framework by promptly, effectively and impartially investigating all reports of violence and prosecuting and punishing perpetrators in accordance with the gravity of their acts;*

- *Strengthening public awareness-raising activities to combat violence against women and gender stereotypes;*

- *Increasing its efforts to address violence against indigenous women and women with disabilities;*

- *Guaranteeing in practice that all victims benefit from protection and have access to sufficient and adequately funded medical and legal aid, psychosocial counselling and social support schemes, which take into account their special needs, and that victims not placed under the "safe at home" model have access to adequate shelters;*

- *Further intensifying community-based approaches to addressing violence against women, with the involvement of all relevant stakeholders."*[94]

94. The CAT Committee made a number of recommendations regarding its other concerns, including:

> *"increase…efforts to address the overrepresentation of indigenous people in prisons, in particular its underlying causes"*;[95]
>
> repeal legal provisions that establish mandatory detention for asylum-seekers; ensure that any detention, *"when determined to be strictly necessary and proportionate,"* is subject to *"statutory time limits"* and *"effective judicial remedy"*;[96]
>
> *"ensure that the work of the Royal Commission supplements criminal prosecutions and court proceedings and is not a substitute for them"*; and ensure *"[v]ictims obtain redress and fair and adequate compensation, including the means for as full rehabilitation as possible"*;[97]
>
> *"enact uniform national legislation prohibiting, except where there is a serious threat to life or health, the use of sterilisation without the prior, free and informed consent of the person concerned, and that it ensure that, once adopted, this legislation is effectively applied"*;[98]
>
> *"increase the process of ratification of the Optional Protocol to the CAT."*

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

95. The Convention on the Elimination of all forms of Discrimination against Women (CEDAW)[99] articulates the rights of women and girls and the measures that States Parties must take to eliminate discrimination based on sex. Surprisingly for a women's human rights treaty, CEDAW does not contain a specific article that articulates rights concerning freedom from gender-based violence. However, in its *General Recommendation No. 19, Violence against women*,[100] the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) has made clear that the definition of discrimination in Article 1 of CEDAW *"includes gender-based violence, that is, violence*

[94] Ibid para 9
[95] Ibid para 12
[96] Ibid para 16
[97] Ibid paras 19(b) and 19(c)
[98] Ibid para 20
[99] *Convention on the Elimination of All Forms of Discrimination Against Women,* opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).
[100] Committee on the Elimination of Discrimination against Women, *General Recommendation No. 19 – Violence against women*, 11th sess, UN Doc A/47/38 (1992)

that is directed against a woman because she is a woman or that affects women disproportionately."[101]

96. *General Recommendation No. 19* also stipulates that States Parties should implement comprehensive measures to eliminate gender-based violence, including through legislation; protective, preventative and punitive measures; complaint mechanisms and remedies including compensation; data collection and analysis; research; education and awareness-raising.[102]

97. In 2010, the CEDAW Committee provided its Concluding Observations to Australia following its review process. It noted that gender inequality has particularly problematic consequences for women experiencing intersectional discrimination - Aboriginal and Torres Strait Islander women, women with disability, women from culturally and linguistically diverse backgrounds, migrant women and women from remote and rural communities.[103]

98. In relation to violence, abuse and neglect, the CEDAW Committee expressed concerns that Aboriginal and Torres Strait Islander women and girls *"face the highest levels of violence,"*[104] and women with disability experience *"high levels of violence…particularly those living in institutions or supported accommodation."*[105] The CEDAW Committee also highlighted concerns that forced sterilisation continues to be practiced in Australia, *"and notes that the Commonwealth Government considers this to be a matter for state governments to regulate."*[106] The CEDAW Committee made a number of recommendations to Australia:

> *"…to undertake a comprehensive assessment of the situation of women with disabilities in Australia";*
>
> *"…address, as a matter of priority, the abuse and violence experienced by women with disabilities living institutions or supported accommodation";*
>
> *"…adopt urgent measures to ensure that women with disabilities are better represented in decision-making and leadership positions, including through the adoption of temporary special measures such as quotas and targets…";*
>
> *"…enact national legislation prohibiting, except where there is a serious threat to life or health, the use of sterilisation of girls, regardless of whether they have a disability, and of adult women with disabilities in the absence of their fully informed and fee consent".*[107]

99. This recommendation clearly reflects a concern that gender inequality in Australia has particularly problematic consequences for women experiencing intersectional discrimination.

CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

100. The Convention on the Rights of the Child (CRC)[108] sets out the specific ways that human rights apply to all children and young people up to the age of 18 years. The CRC explicitly mentions 'disability' as a ground of discrimination that must be eliminated,[109] and contains a specific article on children with disability that sets out measures to provide for children with disability to *"enjoy a full and decent life, in conditions which ensure dignity, promote self-reliance and facilitate the child's active participation in the community"*.[110]

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[101] Ibid para 6
[102] Ibid para 24.
[103] Committee on the Elimination of Discrimination against Women, *Concluding observations of the Committee on the Elimination of Discrimination against Women – Australia*, 46th sess, UN Doc CEDAW/C/AUL/CO/7 (30 July 2010) para 26 and paras 40-45.
[104] Ibid para 40
[105] Ibid para 42
[106] Ibid para 42
[107] Ibid para 43
[108] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[109] Ibid art 2.
[110] Ibid art 23.

101. Article 19 of CRC requires States Parties "to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence…"[111] In *General Comment No. 13, The right of the child to freedom form all forms of violence*, the Committee on the Rights of the Child (the CRC Committee) stipulates that it is unacceptable to have *"any level of legalised violence against children"*; there are no exceptions to 'all forms of physical or mental violence'.[112] The CRC Committee goes on to state that children with disability *"may be subject to particular forms of physical violence such as…forced sterilisation, particularly girls;…[and] violence in the guise of treatment…to control children's behaviour."*[113]

102. In 2012, the CRC Committee provided its concluding observations to Australia following its review. It raised a number of concerns that are relevant to torture and ill treatment, violence, abuse and neglect experienced by children and young people with disability in institutional and residential settings, including:

> the pervasive discrimination faced by Aboriginal and Torres Strait Islander children, including *"significant over-representation in the criminal justice system and in out-of-home care"*;[114]
>
> the significant levels of violence against women and children, noting that *"there is an inherent risk that the co-existence of domestic violence, lawful corporal punishment, bullying, and other forms of violence in the society are inter-linked"*, and that Aboriginal and Torres Strait Islander women and children are particularly affected;[115]
>
> the significant increase in the number of children in out-of-home care; the lack of national data in relation to this increase; and *"widespread reports of inadequacies and abuse occurring in …out-of-home care"*;[116]
>
> the lack of legislation prohibiting forced sterilisation, which *"is discriminatory and in contravention of article 23(c) of the Convention on the Rights of Persons with Disabilities"*;[117]
>
> law that *"allows for disability to be the basis for rejecting an immigration request"*;[118]
>
> lack of mental health services for children and young people despite mental ill-health being *"the leading health issue for children and young people"*;[119]
>
> *the mandatory detention of children and young people who are asylum-seekers or refugees;*[120]
>
> *that the recommendations from the CRC Committee's previous review of Australia*[121] *with regard to diversion measures for children with disability in conflict with the law have not been implemented."*[122]

103. In response to these concerns, the CRC Committee made a number of recommendations to Australia, including:

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111 Ibid art 19(1).
112 Committee on the Rights of the Child, *General Comment No. 13 – The right of the child to freedom from all forms of violence*, UN Doc CRC/C/GC/13 (18 April 2011) [17].
113 Ibid [23].
114 Committee on the Rights of the Child, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding observations: Australia*, 60th sess, UN Doc CRC/C/AUS/CO/4 (19 June 2012) para 29(a)
115 Ibid para 45
116 Ibid para 50
117 Ibid para 56
118 Ibid para 56
119 Ibid para 63
120 Ibid para 79
121 CRC/C/15/Add.268, para 74(d)
122 CRC/C/AUS/CO/4, para 81(b)

develop and implement a comprehensive, national action plan to realise all the rights within the CRC;[123]

develop Commonwealth legislation to act as a comprehensive framework to reduce violence;[124]

develop, in each state and territory, a *"comprehensive strategy to prevent and address all forms of violence against children"*; introduce law to prohibit *"all forms of violence against children in all settings"*; and consolidate a *"national system of data collection, analysis and dissemination, and a research agenda on violence against children"*[125]

examine the underlying causes *"of the extent of child abuse and neglect"*; provide data that illustrates the reasons that children are being place in out-of-home care; provide all the resources needed to improve the situation of children in out-of-home care;[126]

"[e]nact non-discriminatory legislation that prohibits non-therapeutic sterilisation of all children, regardless of disability; and ensure that when sterilisation that is strictly on therapeutic grounds does occur, that this be subject to the free and informed consent of children, including those with disabilities";[127]

ensure legislation, including migration and asylum-seeker legislation, *"does not discriminate against children with disabilities and is in full compliance with…legal obligations"* under the CRPD;[128]

address the underlying causes of high rates of mental ill-health in children and young people, with a focus on suicide and other disorders linked to *"violence and inadequate quality of care in alternative care settings"*;[129]

amend immigration and asylum laws to ensure *"full conformity with the Convention and other relevant international standards"*; and *"establish an independent guardian for unaccompanied immigrant children"*;[130]

ensure children with disability in conflict with the law are provided with alternative diversionary programs rather than a judicial sentence.[131]

CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD)

104. The Convention on the Elimination of all forms of Racial Discrimination (CERD)[132] outlines the protections and measures required to eliminate racial discrimination and guarantee human rights to everyone regardless of race, colour, or national or ethnic origin. In the Australian context, it is particularly relevant to realising the rights of Aboriginal and Torres Strait Islander peoples and people from culturally and linguistically diverse and non-English speaking backgrounds.

[123] Ibid para 16
[124] Ibid para 46
[125] Ibid para 47
[126] Ibid para 51
[127] Ibid para. 57(f)
[128] Ibid para 57(e)
[129] Ibid para 64(a)
[130] Ibid para 80
[131] Ibid para 82(b)
[132] *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969).

105. In 2010, the Committee on the Elimination of Racial Discrimination (the CERD Committee) provided its concluding observations to Australia.[133] In relation to the violence, abuse and neglect in institutional settings, the CERD Committee expressed concern about:

> the continued limited access to specialist legal and interpretation services for Aboriginal and Torres Strait Islander peoples;[134]
>
> the prevailing, disproportionate incarceration rates and the continuing problems underlying deaths in custody of Aboriginal and Torres Strait Islander peoples;[135]
>
> the growth in imprisonment rates of Aboriginal and Torres Strait Islander women; and the substandard conditions in many prisons;[136]
>
> the ongoing mandatory detention of asylum-seekers, including children.[137]

106. In response to these concerns, the CERD Committee recommended that Australia:

> increase access to justice for Aboriginal and Torres Strait Islander peoples by increasing funding for *"professional and culturally appropriate indigenous legal and interpretive services"*;
>
> commit *"sufficient resources to address the social and economic factors underpinning indigenous contact with the criminal justice system"*; use restorative justice strategies; review recommendations of the Royal Commission into Aboriginal Deaths in Custody; and provide adequate health care to prisoners;[138]
>
> review the mandatory detention regime with a view to finding alternatives to detention for asylum-seekers.[139]

REDRESS AND TRANSITIONAL JUSTICE

107. Violence, abuse and neglect against people with disability in institutional and residential settings, and the inadequacy of successive Australian Governments' responses to it, represent extremely grave violations of multiple human rights – particularly the right to freedom from torture and ill-treatment. The international human rights treaties to which Australia is a party, all clearly articulate the requirement for available, effective, independent and impartial remedies to be available to those whose rights have been violated under the various treaties. The United Nations Human Rights Committee has emphasised that such remedies are particularly urgent in respect of violations of the right to freedom from torture and cruel, inhuman and degrading treatment and punishment.[140] In this context, the Australian Government is obliged to exercise due diligence to:

- prevent violence, abuse and neglect against people with disability in institutional and residential settings from taking place;
- investigate promptly, impartially and effectively all cases of violence, abuse and neglect against people with disability;
- remove any time limits for filing complaints;
- prosecute and punish the perpetrators; and,

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133 Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the cconvention, Concluding observations of the Committee on the Elimination of racial Discrimination, Australia*, 77th sess, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010)
134 Ibid para 19
135 Ibid para 20
136 Ibid para 20
137 Ibid para 24
138 Ibid para 20
139 Ibid para 24(a)
140 See UN General Assembly, *International Covenant on Civil and Political Rights,* 16 December 1966, 2200A (XXI) United Nations, Treaty Series, vol. 999, p. 171; See also: Office of the United Nations High Commissioner for Human Rights and the International Bar Association (2003) *Human Rights In The Administration Of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*. Professional Training Series No. 9; OHCHR, Geneva.

- provide adequate redress to all persons with disability who are and/or have been victims of violence, abuse and neglect in institutional and residential settings.

108. The right to redress and transitional justice[141] to people with disability who have experienced torture and ill-treatment, particularly in institutional and residential settings, is critical and urgent.[142] The different elements of a comprehensive Transitional Justice Policy are not parts of a random list, but rather, are related to one another practically and conceptually. The core elements of a comprehensive Transitional Justice Policy are:

- *Criminal prosecutions* - particularly those that address perpetrators considered to be the most responsible;

- *Reparations* - through which governments recognise and take steps to address the harms suffered. Such initiatives often have material elements (such as financial compensation) as well as symbolic aspects (such as public apologies or day of remembrance);

- *Institutional reform* - of abusive state institutions to dismantle - by appropriate means - the structural machinery of abuses and prevent recurrence of serious human rights violations and impunity;

- *Truth commissions* - or other means to investigate and report on systematic patterns of abuse, recommend changes and help understand the underlying causes of serious human rights violations.

141 'Transitional justice' refers to the set of judicial and non-judicial measures that have been implemented by different countries in order to redress the legacies of massive human rights abuses. For more information see: http://ictj.org/about/transitional-justice

142 See: United Nations *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* (A/RES/60/147).

SECTION 4: SCOPE AND PREVALENCE OF VIOLENCE AGAINST PEOPLE WITH DISABILITY

109. Violence against people with disability in institutional and residential settings is Australia's hidden shame. It is an urgent, unaddressed national crisis, of epidemic proportions,[143] yet is excluded from national policy responses relating to violence prevention, and from national policy responses relating to advancing the human rights of people with disability. This epidemic affects some of the most vulnerable, marginalised people in our communities, with specific implications for women and children with disability, Aboriginal and Torres Strait Islander peoples with disability and people with disability from non-English speaking and culturally and linguistically diverse backgrounds. The evidence is extensive and compelling. It is a deeply shameful blight on our society and can no longer remain ignored and unaddressed.[144] More often than not, violence perpetrated against people with disability in institutional and residential settings, constitutes torture and ill-treatment as defined and recognised in international human rights law, including the treaties to which Australia is a party.

110. It is widely recognised that any available data relating to incidence and prevalence of violence against people with disability, does not give the true picture of the level of risk and prevalence of violence, due to many factors, including the substantial barriers experienced by people with disability to reporting violence perpetrated against them.[145] Importantly, the vast array of 'settings' and 'places' in which people with disability live, occupy, and/or experience, also impedes the possibility of capturing the true prevalence and incidence of the multiple forms of violence perpetrated against them.[146] Regrettably, there is currently no comprehensive strategy or mechanism in Australia that captures the prevalence, extent, nature, causes and impact of violence against people with disability in the range of settings in which they reside, are incarcerated or receive support services.

111. People with disability who live in institutional and residential settings are highly susceptible to violence (particularly sexual violence) from numerous perpetrators and frequently experience sustained and multiple episodes.[147] Due to the 'closed' nature of institutional and residential settings, away from public scrutiny, this violence is very difficult to detect, investigate and prosecute.[148] This is hardly surprising, given the fact that institutional settings are widely acknowledged to be breeding grounds for the perpetration of violence and abuse, and of cultures that condone violence and abuse.[149] Perpetrators often deliberately target people with disability in institutional and residential settings, particularly those who are least able to resist or make a formal complaint. The common scenario of perpetrators moving between services, either by choice, or as a result of intervention by management, is a serious dimension of the epidemic that is violence against people with disability in institutional environments.[150] Violence is also often built into the very processes of an institutional setting, whereby practices such as forced medication, solitary isolation or seclusion, withholding food and/or money and/or medication, restraint, strip-searches, bullying and harassment - are widely used as 'management' tools and/or as punishment or 'treatment'.[151]

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[143] For example, figures from the Victorian Office of the Public Advocate (OPA) show that between 2006-2011, police examined more than 1000 cases of alleged abuse involving people with severe disabilities living in state residential care or private homes in Victoria - including 282 allegations of assault, 320 of rape, and six alleged abductions or kidnapping. See: 'Law failing to protect disabled in state care'; *The Age Newspaper*, April 24, 2011. Accessed online October 2011 at: http://www.theage.com.au/victoria/law-failing-to-protect-disabled-in-state-care-20110423-1dse1.html

[144] National Campaign to End Violence and Abuse against People with Disability in Residential and Institutional Settings: 'Letter to the Australian Prime Minister, Hon. Tony Abbott' (January 2015)' at: http://wwda.org.au/papers/subs/subs2011/

[145] SafePlace Institute (2000) OpCit.

[146] Frohmader, C., Dowse, L, and Didi. A. (2015) OpCit.

[147] Attard, M., & Price-Kelly, S. (2010) *Accommodating Violence: The experience of domestic violence of people with disability living in licensed boarding houses,* PWDA, NSW. See also: World Health Organisation, *Violence against adults and children with disabilities*, see http://www.who.int/disabilities/violence/en/, See also: Coulson Barr, L. (2012) *'Safeguarding People's Right to be Free from Abuse: Key considerations for preventing and responding to alleged staff to client abuse in disability services'* (Occasional Paper No.1, Disability Services Commissioner, 2012).

[148] French, P., Dardel, J., Price-Kelly, S. (2009) OpCit.

[149] See: Frohmader, C. (2014) *'Gender Blind, Gender Neutral': The effectiveness of the National Disability Strategy in improving the lives of women and girls with disabilities.'* Prepared for Women With Disabilities Australia (WWDA), Hobart, Tasmania. ISBN: 978-0-9585268- 2-1. Available online at: http://wwda.org.au/wp-content/uploads/2013/12/WWDA_Sub_NDS_Review2014.pdf

[150] Cited in Coulson-Barr, L. *Safeguarding People's Right to be Free from Abuse. Key considerations for preventing and responding to alleged staff to client abuse in disability services*. Disability Services Commissioner, Victoria. Accessed online March 2014 at: http://odsc.vic.gov.au/public/editor_images/annual%20reports/dsc_occ_paper_no_1.pdf

[151] Queensland Advocacy Incorporated (2014) *'Torture and other Cruel, Inhuman and Degrading Treatment or Punishment in Australia* 53rd Session CAT Geneva Nov 2014: Fact Sheet 7: Treatment. See also: Anti-Discrimination Commission Queensland (2006) *'Women in prison,'* Anti-Discrimination Commission Queensland, especially Chapter 7

GENERAL INCIDENCE & PREVALENCE DATA

112. Despite the lack of national, statistically verified evidence on the scope and prevalence of violence against people with disability, including those in institutional and residential settings, it is now well established that people with disability experience, and are at a far greater risk of violence than others in the population and that this violence often goes un-recognised and un-addressed.[152]

113. For example, 18% of people with disability report being victims of physical or threatened violence compared to 10% without disability.[153] People with disability experience, and are a greater risk of crimes from both strangers and people who are known to them.[154] 71% of people with disability report feeling very unsafe 'after dark' compared to 47% of people without disability.[155] People with intellectual disability are ten times more likely to experience violence than people without disability,[156] and are three times more likely to be victims of assault, sexual assault and robbery compared with people who do not have an intellectual disability.[157]

114. People with psychosocial disability continue to be over-represented in Australian prison systems.[158] Between 50-78% of prisoners have experienced a 'psychiatric disorder' compared with 11% of the general population, [159] with 46% of prisoners on discharge identifying as having a psychosocial impairment.[160] Twenty per cent (20%) of prisoners have an intellectual disability compared with 2–3% of the general population.[161] Approximately 150 people around Australia are currently detained under mental impairment legislation in prisons and psychiatric units.[162] At least 20% of children in residential care facilities have an intellectual disability.[163]

115. Seventy-five per cent of reported elder abuse cases involve the abuse of an older person with cognitive impairment.[164] Forty-four to 80% of people with disability who show 'behaviours of concern' are administered a form of chemical restraint,[165] between 50% and 60% are subjected to regular physical restraint,[166] and those with multiple impairment and complex support needs are subjected to much higher levels of restraint and seclusion.[167] More than a quarter of all people with intellectual disability will be subject at some time in their life to some form of restraint and/or seclusion.[168] Sixty-nine per cent of a people with cognitive impairment who used an Independent Third Person (ITP)[169] have experienced sexual assault. A further 25% have experienced other crimes against the person.[170]

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[152] French, P., Dardel, J., Price-Kelly, S. (2009) *Rights Denied: Towards a National Policy Agenda about Abuse, Neglect and Exploitation of Persons with Cognitive Impairment. People with Disability Australia*. Available online at: http://www.pwd.org.au/issues/preventing- violence.html

[153] Council of Australian Governments (2011) *National Disability Strategy 2010-2020*, Commonwealth of Australia.

[154] Groce, N. (2006) *People with Disabilities, in Social Justice and Public Health*, Barry S. Levy & Victor Sidel (Eds), accessed online April 2011 at: http://www.aidslex.org/site_documents/DB-0018E.pdf

[155] National Disability Strategy 2010–2020: *Progress report to the Council of Australian Governments 2014*; unpublished draft.

[156] Council of Australian Governments (2011) *National Disability Strategy 2010-2020*, Commonwealth of Australia.

[157] Carlene Wilson and Neil Brewer, 'The incidence of criminal victimisation of individuals with an intellectual disability' (1992) 27(2) *Australian Psychologist*, 114–117, 115

[158] Available research and data tends to focus on people with intellectual and psychosocial disability. There is a tendency to overlook the significant over-representation of people with acquired brain injury in the criminal justice system, as well as other impairments/disability – such as over-representation of deaf people and hearing impaired people.

[159] NSW Law Reform Commission, *'People with Cognitive and Mental Health Impairments in the Criminal Justice System: An Overview'* (Consultation Paper No 5, January 2010) 13–15.

[160] *Joint NGO report to the United Nations Committee Against Torture; Torture and cruel treatment in Australia*. October 2014; Human Rights Law Centre, Victoria.

[161] NSW Law Reform Commission, *'People with Cognitive and Mental Health Impairments in the Criminal Justice System: An Overview'* (Consultation Paper No 5, January 2010) 13–15.

[162] Senate Standing Committee on Legal and Constitutional Affairs; *Attorney-General's Department; Group 2; Program 1.3, Question No. 88*, 16 October 2012.

[163] Commission for Children and Young People, *"...as a good parent would..."* Inquiry into the adequacy of the provision of residential care services to Victorian children and young people who have been subject to sexual abuse or sexual exploitation whilst residing in residential care (Melbourne: Commission for Children and Young People, August 2015).

[164] Black, B. (2008) *'The human rights of older people and agency responses to elder abuse'*, research report, Centre for Human Rights Education, Curtin University of Technology, Perth; Boldy, D., Webb, M., Horner, B., Davey, M., and Kingsley, B. (2002) *'Elder Abuse in Western Australia: Report of a Survey Conducted for the Department for Community Development - Seniors' Interests'*, Curtin University of Technology: Division of Health Sciences. Freemason's Centre For Research Into Aged Care Services, Perth.

[165] Lynne Webber, Mandy Donley and Hellen Tzanakis, *'Chemical Restraint: What Every Disability Support Worker Needs to Know'* (Article, Office of the Senior Practitioner, 2008).

[166] Ibid.

[167] Ibid.

[168] Australian Psychological Society (May 2011) *Psychologists call for prompt end to restrictive practices in disability sector.* Media Release; May 2011.

[169] Independent Third Persons (ITPs) are used in Victoria to attend police interviews for adults and young people with disability to ensure that they are not disadvantaged during the interview process. The ITP Program is made up of volunteers. See: http://www.publicadvocate.vic.gov.au/our-services/volunteer-programs

[170] Victorian Equal Opportunity and Human Rights Commission (2014) *Beyond doubt: The experiences of people with disabilities reporting crime – Research findings.* ISBN 978-0-9875444-9-3; Melbourne, Victoria.

116. The use of forced invasive and irreversible 'psychiatric treatments' on people with mental health impairment or psychosocial disability has increased sharply in recent years.

117. In NSW, ECT treatments for mental health patients have increased by almost 30 per cent in the past five years particularly amongst young women under 24 years of age.[171] In 2009-10 in NSW, 716 applications were made to the NSW Mental Health Review Tribunal to administer ECT to involuntary patients. Only 20% of the 716 applications included legal representation for the patient. The NSW Mental Health Act 2007 allows for determinations of more than 12 ECT treatments *'if the Tribunal is satisfied that more are justified, having regard to the special circumstances of the case.'* In 2009-10, 5.4% of cases were for more than 12 treatments approved.[172]

118. In 2009-10 the Queensland Mental Health Tribunal scheduled 462 ECT applications in relation to 355 patients. This was 15.5% higher than the previous year. Of these, 98 (21.2%) were applications for patients undergoing emergency ECT.[173]

119. More than 1100 people received ECT in the Victorian public mental health system in 2009-10. Of these, 377 (or about one third) were deemed 'involuntary patients' who did not consent to the ECT. Involuntary mental health patients received more than half of the 12,968 ECT sessions administered in the Victorian public psychiatric system in 2009-10.[174] The use of ECT in Victoria's public mental health services has increased by 12% since 2003-04, and private ECT sessions have increased by 71% during the same period.[175] A 2011 investigation into Victoria's mental health system reported that:

> *'Practices from a previous age appear routine in some hospitals: threatening patients with electroconvulsive therapy (ECT) if they refuse to take medication; locking bathrooms to prevent patients drinking water, which would negate the effect of the ECT; and imposing a form of solitary confinement as punishment for improper behaviour. Such attempts to subdue and control patients are disturbing enough in fiction such as One Flew Over the Cuckoo's Nest; they have no place in hospitals in 21st century Australia.'*[176]

INCIDENCE & PREVALENCE DATA ON GENDERED DISABILITY VIOLENCE

120. The gendered nature of violence against people with disability sees more than 70% of women with disability having been victims of violent sexual encounters at some time in their lives.[177] A staggering 90% of women with an intellectual disability have been subjected to sexual abuse, with more than two-thirds (68%) having been sexually abused before they turn 18 years of age.[178] Twenty per cent of women with disability report a history of unwanted sex compared to 8.2% of women without disability,[179] and the rates of sexual victimisation of women with disability range from four to 10 times higher than for other women.[180] More than a quarter of rape cases reported by females in Australia are perpetrated against women with disabilities.[181] Twenty-one per cent (21%) of women with disability report feeling 'very unsafe' after dark, compared to 8% of men with disability and 4.5% of people without disability.[182] Only 4 in 10 Australians are aware of the greater risk of violence

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171 The Sydney Morning Hearld, *'Electric shock therapy on the rise for young'*; June 26, 2011; http://www.smh.com.au/lifestyle/diet-and-fitness/electric-shock-therapy-on-the-rise-for-young-20110625-1gklc.html

172 NSW Mental Health Review Tribunal (2010) *Annual Report of the Mental Health Review Tribunal*. Accessed online October 2011 at: http://www.mhrt.nsw.gov.au/mhrt/pdf/Annualreport200910.pdf

173 Queensland Government (2010) *Mental Health Review Tribunal Annual Report 2009-10*. Accessed October 2011 at: http://www.mhrt.qld.gov.au/wp-content/uploads/2010/12/mhrt-annual-Report-2009-10.pdf

174 Baker, R. & McKenzie, N. (2011) OpCit.

175 Ibid.

176 The Age Newspaper; *Silence hides shameful neglect of mentally ill*; September 5, 2011; Accessed online October 2011 at: http://www.theage.com.au/opinion/editorial/silence-hides-shameful-neglect-of-mentally-ill-20110904-1js7t.html

177 Ibid.

178 Australian Law Reform Commission (ALRC) (2010) *Family Violence — A National Legal Response. ALRC Final Report 114.* Accessed online January 2013 at: http://www.alrc.gov.au/publications/family-violence-national-legal-response-alrc-report-114

179 Dowse, L., Soldatic, K., Didi, A., Frohmader, C. and van Toorn, G. (2013) Stop the Violence: Addressing Violence Against Women and Girls with Disabilities in Australia. Background Paper. Hobart: Women with Disabilities Australia. Available online at: http://wwda.org.au/wp-content/uploads/2013/12/STV_Background_Paper_FINAL.pdf

180 Ibid.

181 Heenan, M., & Murray, S. (2006). *Study of reported rapes in Victoria 2000–2003. Summary research report.* Melbourne: Statewide Steering Committee to Reduce Sexual Assault. Published by the Office of Women's Policy, Department for Victorian Communities.

182 National Disability Strategy 2010–2020: *Progress report to the Council of Australian Governments 2014*; unpublished draft.

experienced by women with disability.[183]

121. Women with disability are also 40% more likely to be the victims of domestic violence than women without disability.[184] Evidence indicates that every week in Australia, three women are hospitalised with a brain injury as a direct result of family violence.[185] Violence is present in the lives of one in four women with disability who accessed service support in Australia between 2012-13.[186] Eighty-five (85%) of women with mental health impairment report feeling unsafe during hospitalisation, 67% per cent report experiencing sexual or other forms of harassment during hospitalisation and almost half (45%) report experiencing sexual assault during an in-patient admission.[187] Women comprise 74% of all elder abuse victims,[188] and are more likely to experience elder abuse than males, at a rate two and a half times higher.[189] Women with disability represent more than 50% of the female prison population in Australia. More than half of all women incarcerated in Australian prisons have a diagnosed psychosocial disability and a history of sexual victimisation.[190] The percentage of women with disability in prisons is greater than men with disability. The rate of incarceration of women with disability from Aboriginal and Torres Strait Islander backgrounds is also higher than equivalent figures for men.[191] Women with psychosocial disability and intellectual or learning disability are disproportionately classified as high security prisoners and are more likely to be in high security facilities, than other prisoners.[192]

122. Electroconvulsive therapy (ECT) performed on involuntary persons (ie: without that persons consent) indicates that in Australia three times more women than men are subject to the practice, across all age cohorts.[193] Forced contraception through the use of menstrual suppressant drugs is a widespread, current practice in Australia, particularly affecting girls and women with intellectual and/or cognitive impairment. It is widely used in group homes and other forms of institutional settings, and is often justified as a way of reducing the 'burden' on staff/carers who have to 'deal with' managing menstruation of disabled women and girls.[194] Furthermore, women and girls with disability in Australia continue to be at risk of, and experience, gross violations of their reproductive rights, such as forced sterilisation (often wrongfully justified by theories of incapacity and therapeutic necessity) which is recognised globally as an egregious form of gender-based violence that violates the absolute prohibition of torture and ill treatment.[195]

INCIDENCE & PREVALENCE DATA ON VIOLENCE AGAINST ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLE WITH DISABILITY

123. Although there is essentially no data in Australia on the incidence of violence against Aboriginal and Torres Strait Islander people with disability, nor any research that examines the impact of such violence, it is known that violence against Aboriginal and Torres Strait Islander people is

[183] VicHealth 2014, *Australians' attitudes to violence against women. Findings from the 2013 National Community Attitudes towards Violence Against Women Survey (NCAS)*, Victorian Health Promotion Foundation, Melbourne, Australia.
[184] Brownridge, D. (2006) 'Partner violence against women with disabilities: Prevalence, risks and explanations', *Violence against Women*, vol. 12, no. 9, pp. 805–22.
[185] Brain Injury Australia (August 11, 2015) *Media Release: Every week in Australia, one woman is killed - the result of family violence. Every week in Australia, three women are hospitalised with a brain injury - the result of family violence.* http://www.braininjuryaustralia.org.au/
[186] The main types of violence experienced by the women included domestic violence (80%); emotional abuse (68%); sexual violence and abuse (63%); financial abuse (58%); the withholding of care (23%), and the withholding of medication (14%). Importantly, findings from the national 'Stop the Violence Project (STVP) study provided data only on women and girls with disability who had accessed services. However, as highlighted by the STVP, it is highly likely that significant numbers of women and girls with disability who are experiencing or at risk of violence do not access any type of service. This suggests that the prevalence of violence against women and girls with disability is likely to be substantially higher. See: Dowse, L. et al (2013) OpCit.
[187] Victorian Mental Illness Awareness Council, cited in Victorian Equal Opportunity and Human Rights Commission (2014) *Beyond doubt: The experiences of people with disabilities reporting crime – Research findings*. ISBN 978-0-9875444-9-3; Melbourne, Victoria.
[188] Faye, B. & Sellick, M. (2003) *'Advocare's Speak Out Survey "S.O.S" on Elder Abuse'*, Advocare Incorporated, Perth
[189] Boldy, D., Webb, M., Horner, B., Davey, M., and Kingsley, B. (2002) OpCit.
[190] *Joint NGO report to the United Nations Committee Against Torture; Torture and cruel treatment in Australia.* (November 2014), Human Rights Law Centre, Victoria.
[191] See: Women with Disabilities Australia (WWDA) *Submission to the CRPD Committee 9th Session; 15th – 19th April 2013; Half Day of General Discussion on Women and Girls with Disabilities*.
[192] Sisters Inside, Submission: *'Rights of Women Prisoners'*, National Human Rights Consultation, June 2009; www.sistersinside.com.au/media/FINAL%20-%20National%20HR%20Submission%20June%202009.pdf
[193] In Frohmader, C. (2011) *Submission to the Preparation Phase of the UN Analytical Study on Violence against Women and Girls with Disabilities, (A/HRC/RES/17/11).* Prepared for Women With Disabilities Australia (WWDA). Available online at: http://www.wwda.org.au/WWDASubUNStudyViolenceWWDDec2011.pdf See Also: 'Child shock therapy'; *Herald Sun Newspaper*, January 25, 2009. Accessed online December 2012 at: http://www.heraldsun.com.au/news/victoria/child-shock-therapy/story-e6frf7kx-1111118657718
[194] In Frohmader, C. (2011), OpCit.
[195] Méndez, Juan. E, (2013) UN.Doc A/HRC/22/53.

approximately 10 times higher than against the non-Aboriginal and Torres Strait Islander people.[196] Aboriginal women are 35 times more likely to suffer family violence and 80 times more likely to sustain serious injury requiring hospitalisation, and 10 times more likely to die due to family violence, than non-Aboriginal women.[197] Aboriginal women are also less likely than non-Aboriginal women to disclose their experiences of violence, with studies showing that around 90 per cent of violence is not disclosed.[198] Data from 2008 showed that three out of five Aboriginal and Torres Strait Islander men (55%) and women (60%) who had experienced physical violence in the 12 months prior to interview, reported that they experience a disability or long term health condition.[199]

124. Aboriginal and Torres Strait Islander children have higher rates of hospitalisations due to injury, higher rates of injury mortality and more frequent contact with child protection and youth justice systems than non-Indigenous children.[200]

125. Aboriginal and Torres Strait Islander people with disability are significantly over-represented in a number of institutional settings, particularly prisons. Of the 150 people detained on order under mental impairment legislation around Australia, one third are Indigenous Australians. It is also estimated that approximately 50 Aboriginal persons with disability are currently being detained indefinitely in prisons and psychiatric units throughout Australia.[201]

INCIDENCE & PREVALENCE DATA ON VIOLENCE AGAINST PEOPLE WITH DISABILITY FROM CULTURALLY AND LINGUISTICALLY DIVERSE (CALD) BACKGROUNDS

127. Although there is no known prevalence data on violence against people with disability from culturally and linguistically diverse (CALD) backgrounds, research has found that immigrant and refugee women are more likely to be murdered as a result of domestic violence,[202] and that cultural values and immigration status enhance the complexities normally involved in domestic violence cases.[203] It is recognised that CALD women with disability are less likely than other women to report acts of violence, particularly domestic violence and sexual assault, due to multiple and intersecting barriers, which include linguistic barriers, cultural barriers and lack of knowledge or awareness of the criminal justice system.[204]

128. It is globally recognised that refugees and asylum seekers with disability are at heightened risk of violence, including sexual and domestic violence.[205] Australia's asylum seeker laws, policies and practices have resulted in institutionalised, severe and routine violations of the prohibition on torture and ill-treatment, have subsequently been found to create serious physical and mental pain and suffering, and continue to cause life-long disability and impairments.[206] More than one third of people held in detention have been diagnosed with mental health impairments which have been directly attributed to the harsh conditions, the protracted periods of closed detention, sexual and other forms

[196] Memmott, P., Stacy, R., Chambers, C. & C. Keys (2001) *Violence in Indigenous Communities.* Attorney-General's Department. Available at: http://www.crimeprevention.gov.au/Publications/FamilyViolence/Documents/violenceindigenous.pdf
[197] In Frohmader, C. (2011) OpCit. See also Sutton, C. *Violence against Aboriginal women 80 times worse.* Perth Now Newspaper, June 10, 2013; accessed online at: http://www.perthnow.com.au/news/violence-against-aboriginal-women-80-times-worse/story-fnhnv0wb-1226661209335?nk=15a73840245f7154a7d4daaca2fc800f; See also: VicHealth (2011) *Preventing violence against women in Australia: Research summary*. Victorian Health Promotion Foundation. Available at: http://www.vichealth.vic.gov.au
[198] Cited in Woodlock, D., Western, D. & Bailey, P. (2014) OpCit.
[199] ABS [4714.0] - *National Aboriginal and Torres Strait Islander Social Survey*, 2008
[200] Productivity Commission, *Report on Government Services 2015; Chapter 15: Volume F; Child protection.* At: http://www.pc.gov.au/research/recurring/report-on-government-services/2015/community-services/child-protection
[201] Sitori, M., McGee, P. and Baldry, E. (2012) *The Imprisonment and Indefinite Detention of Indigenous Australians with a Cognitive Impairment;* A Report Prepared by the Aboriginal Disability Justice Campaign. Sydney: University of NSW.
[202] Commonwealth of Australia (2009) *Time For Action: The National Council's Plan For Australia To Reduce Violence Against Women And Their Children 2009–2021- A Snapshot.* Department of FaHCSIA, Canberra, March 2009.
[203] Bartels, L. (2010) *Emerging issues in domestic/ family violence research*. Research in Practice Report No. 10, Australian Institute of Criminology, Canberra.
[204] Dowse, L. et al (2013) OpCit; See also: Women With Disabilities Australia (WWDA), University of New South Wales (UNSW), and People with Disabilities Australia (PWDA) (2013) *Report of the Proceedings and Outcomes of the National Symposium on Violence against Women and Girls with Disabilities*. Hobart: Women with Disabilities Australia; See also: Multicultural Disability Advocacy Association of NSW (MDAA) (2010) *'Violence Through Our Eyes: Improving Access to Services for Women from non-English Speaking Backgrounds with Disability and Carers Experiencing Violence Project Report'*. See also: National Ethnic Disability Alliance (NEDA) (2001) *Domestic Violence and Women from a NESB with Disability*. Paper prepared by NEDA, 2001.
[205] United Nations High Commissioner for Refugees, cited in National Ethnic Disability Alliance (NEDA) (2015) *The Plight of People Living with Disabilities within Australian Immigration Detention: Demonised, Detained, and Disowned.* NEDA, Canberra.
[206] *Joint NGO report to the United Nations Committee Against Torture; Torture and cruel treatment in Australia*. (November 2014), Human Rights Law Centre, Victoria.

of violence, overcrowding, inadequate health care, and fear for and about the future.[207] Evidence of mistreatment and sexual and physical violence perpetrated against asylum seekers in immigration detention facilities provide just another example of institutional settings as breeding grounds for the perpetration of violence, and of cultures that condone violence and abuse. As at September 2014, there were 382 people with disability in detention. Twenty eight of these were children with disability, aged between two and 17-years-old, [208] who on average, had been detained for a year.[209]

INCIDENCE & PREVALENCE DATA ON VIOLENCE AGAINST CHILDREN AND YOUNG PEOPLE WITH DISABILITY

129. Children and young people with disability experience higher rates of violence and abuse than other children, and often experience multiple and ongoing episodes of violence.[210] Children with disability are three to four times more likely to experience sexual abuse than their peers, with many not having the language or ability to communicate the abuse.[211] Sexual abuse of children in Australia occurs at appallingly high rates in institutional settings, in which children with disability are significantly overrepresented.[212] Children and young people with disability experience, gross violations of their human rights, which are tantamount to torture and ill treatment, through state sanctioned practises such as forced electroshock and forced sterilisation. For example, Medicare statistics for 2007-2008 record 203 ECT treatments on children younger than 14 - including 55 aged four and younger.[213] Certain legislation in Australia currently allows for children to undergo ECT provided they, or their parent or guardian have given informed consent.[214]

130. Violence and abuse perpetrated against children and young people with disability in schools, educational and child care settings, including out-of-home care,[215] is a widespread, unaddressed problem in Australia.[216] Restraint, seclusion, segregation, sexual violence and abuse, withdrawal of food and drink, bullying and harassment are commonplace yet are often downplayed and justified as 'behaviour management' and/or 'behaviour modification' practices.[217]

131. Juvenile detention centres are yet another institutional setting where young people with disability experience, and are at risk of, violence and abuse. Evidence suggests that between 50-90% of all detainees in juvenile detention facilities were abused as children and nearly 40% of girls in these settings have experienced childhood sexual abuse.[218] Data and evidence from NSW indicates that 50% of all young people in juvenile detention centres have an intellectual disability, [219] and 39% of

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[207] Ibid.
[208] http://www.dailytelegraph.com.au/newslocal/inner-west/fight-to-get-refugees-living-with-a-disability-out-of-immigration-detention-centres/story-fngr8h4f-1227326273893
[209] National Ethnic Disability Alliance (NEDA) (2015) OpCit. See also: Australian Human Rights Commission (2014) *The Forgotten Children: National Inquiry into Children in Immigration Detention;* AHRC, Sydney. See also: Joint NGO report to the United Nations Committee Against Torture (2014) OpCit.
[210] Robinson, S. (2013) *Enabling & Protecting: Proactive Approaches to Addressing the Abuse and Neglect of Children and Young People with Disability.* Children With Disability Australia, Melbourne.
[211] Cited in Coulson-Barr, L. OpCit.
[212] Royal Commission into Institutional Responses to Child Sexual Abuse (2014).
[213] 'Child shock therapy'; *Herald Sun Newspaper*, January 25, 2009. Accessed online December 2012 at: http://www.heraldsun.com.au/news/victoria/child-shock-therapy/story-e6frf7kx-1111118657718
[214] See for example: See: *Western Australia Mental Health Act 2014* (No. 24 of 2014), Part 14; Para 196.
[215] **Out-of-home care** is defined by the Australian Government as: Overnight care, including placement with relatives (other than parents) where the government makes a financial payment. It includes care of children in legal and voluntary placements (that is, children on and not on a legal order) but excludes placements solely funded by disability services, psychiatric services, youth justice facilities and overnight child care services. There are five main out-of-home care placement types: 1) *Residential care* – where placement is in a residential building with paid staff. 2) *Family group homes* – provide care to children in a departmentally or community sector agency provided home. These homes have live-in, non-salaried carers who are reimbursed and/or subsidised for the provision of care. 3) *Home-based care* – where placement is in the home of a carer who is reimbursed (or who has been offered but declined reimbursement) for expenses for the care of the child. This is broken down into three subcategories: (a) relative/kinship care – where the caregiver is a relative (other than parents), considered to be family or a close friend, or is a member of the child or young person's community (in accordance with their culture) who is reimbursed (or who has been offered but declined reimbursement) by the State/Territory for the care of the child. For Aboriginal and Torres Strait Islander children, a kinship carer may be another Aboriginal and Torres Strait Islander person who is a member of their community, a compatible community or from the same language group; (b) foster care – where the care is authorised and carers are reimbursed (or were offered but declined reimbursement) by the state/territory and supported by an approved agency. There are varying degrees of reimbursement made to foster carers; (c) other – home-based care which does not fall into either of the above categories. 4) *Independent living* – including private board and lead tenant households. 5) *Other* – includes placements that do not fit into the above categories and unknown living arrangements. This includes boarding schools, hospitals, hotels/motels and defence force. See: Productivity Commission, Report on Government Services 2015; Chapter 15, p.73.
[216] See for eg: http://www.abc.net.au/news/2015-04-03/experts-slam-need-to-cage-boy-wth-autism-at-canberra-school/6369470; See also: Robinson, S. (2013) Op Cit.
[217] Robinson, S. (2013) OpCit.
[218] http://www.smh.com.au/national/juvenile-detainees-shocking-histories-20110411-1db5e.html; See also: http://www.smh.com.au/nsw/abuse-and-neglect-putting-children-on-path-to-crime-20130719-2q9p6.html
[219] Adele Horin, 'Report Finds Disability and Disadvantage Common in Young Offenders', *Sydney Morning Herald* (Sydney), 27 February 2010; www.smh.com.au/nsw/report-finds-disability-and-disadvantage-common-in-young-offenders-20100226-p95r.html

these are young Aboriginal and Torres Strait Islander people.[220] In addition, 85% of young people in juvenile detention centres in NSW have a 'psychological condition', with two thirds (73%) reporting two or more 'psychological conditions'. Young women and Aboriginal and Torres Strait islander young people are significantly over-represented in these figures.[221] In addition, 32% of all young people in juvenile detention centres in NSW in 2010 had a traumatic brain injury or a head injury, with a significant rise in the incidence of brain injury for young women – increasing from 6% in 2003 to 33% in 2010.[222]

132. Violence (including sexual violence) perpetrated against children and young people with disability in residential and out-of-home care is a nation-wide problem requiring urgent action and systemic reform. At 30 June 2014, 43,009 children were in out-of-home care nationally, 14,991 of which were Aboriginal and Torres Strait Islander.[223] Several hundred children in out-of-home care were victims of substantiated sexual or physical abuse or neglect during 2013-14,[224] and these figures are recognised to be grossly conservative due to incomplete data for the current reporting period, and the fact that NSW, VIC and the NT either do not collect these data and/or do not collect all the required data.[225] Although the available statistical data is disaggregated by Aboriginal and Torres Strait Islander status, it is not gendered, and provides no other disaggregation, including disability status.

133. Despite the lack of statistical data on the incidence and prevalence of violence (including sexual violence) against children with disability in out-of-home care, there is indisputable evidence at not only the appallingly high levels, but also the fact that much remains hidden. A highly disturbing dimension of this issue is the fact that children with disability in out-of-home care who experience, or are at risk of experiencing violence (including sexual violence) are forced to remain with 'carers' who have allegations against them while the case is being decided. There is widespread and justifiable concern that the current lack of oversight of out-of-home care is likely to become much worse as governments outsource foster care, as in NSW.[226]

134. A damning report released in August 2015 by the Victorian Commissioner for Children and Young People, and which detailed a year-long investigation into sexual abuse of children in residential care in Victoria,[227] confirmed the appalling level of violence perpetrated against children and young people in these settings. Amongst other things, the investigation found:

- 75% of children in residential care who had been subject to sexual abuse are girls;
- a significant number of children were subject to more than ten reports (each) of sexual abuse in a 12 month period;
- Aboriginal children and young girls are significantly over-represented in the number of children in residential care facilities;
- young children with disability are accommodated with older children with known sexually problematic or abusive behaviours;
- children, including those with disability, are subject to restrictive and intrusive care practices and deprivation-based practices;
- children in residential care live in appalling physical conditions;
- the lack of monitoring of residential care settings by Government, facilitates violence and abuse;
- the low skill base and poor supervision of staff is a factor in sexual abuse of children in residential care;

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[220] Devon Indig et al. *'2009 NSW Young People in Custody Health Survey: Full Report'.* (Report, Justice Health, NSW Health and Human Services Juvenile Justice, NSW Government, 2011) 15.
[221] Ibid
[222] Ibid.
[223] Productivity Commission, Report on Government Services 2015; Chapter 15: Volume F; Child protection. At: http://www.pc.gov.au/research/recurring/report-on-government-services/2015/community-services/child-protection
[224] Ibid. See also: Trembath, B. (28 January 2015) *National Children's Commissioner 'very concerned' by figures showing hundreds of kids in foster care abused.* ABC News, http://www.abc.net.au/news/2015-01-28/hundreds-of-children-in-foster-care-abused-last-year-report-find/6052006; See also: ABC News (14 January 2014) *Foster carer charged over physical assault of three children in her care;* Access online at: http://www.abc.net.au/news/2014-01-13/foster-carer-charged-over-physical-assault-of-three-children-in/5197950
[225] See: Productivity Commission, Report on Government Services 2015; Chapter 15, p.28-30.
[226] Pryor, L. (16 September 2013) Foster children left in care despite serious allegations of abuse'; *Sydney Morning Herald*; http://www.smh.com.au/nsw/foster-children-left-in-care-despite-serious-allegations-of-abuse-20130915-2tt1h.html
[227] Commission for Children and Young People, "...as a good parent would..." (2015) OpCit.

- current carers register allows potential offenders to move between different vulnerable groups without detection (eg: working between aged care, disability and children's sectors).

ADDITIONAL RESEARCH EVIDENCE ON VIOLENCE AGAINST PEOPLE WITH DISABILITY

135. In addition to the limited and scattered statistical evidence on violence against people with disability, other research undertaken in Australia has established that people with disability:

- experience, and are more exposed to practices which qualify as torture or ill treatment (such as forced or coerced sterilisation, forced abortion, forced contraception, gendered disability violence, chemical restraint, indefinite detention, forced psychiatric interventions, forced treatments);[228]

- continue to be subjected to multiple forms and varying degrees of 'deprivation of liberty' and are subjected to unregulated or under-regulated restrictive interventions and practices,[229] often imposed as a means of coercion, discipline, convenience, or retaliation by staff, family members or others providing support;[230]

- experience intersectional forms of discrimination that combine to significantly heighten the risk and likelihood of them experiencing violence;[231]

- fall through a number of legislative, policy and service delivery 'gaps' as a result of the failure to understand the intersectional nature of the violence that they experience, the vast circumstances and spaces in which such violence occurs, and the intersecting forms of discrimination which make them more likely to experience, and be at risk of, violence;[232]

- witness cases involving crimes against them often go unreported, and/or inadequately investigated, and/or remain unsolved and/or result in minimal sentences;[233]

- are disproportionately affected by human rights violations in the prison system;[234]

- are often denied effective access to justice because violations of their rights are not taken seriously;[235]

- are often denied the right to legal capacity – due to stigma and discrimination, through judicial declaration of incompetency or merely by a doctors decision that the individual 'lacks capacity' to make a decision;[236]

- are less likely to receive service support to address violence;[237]

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[228] Frohmader, C., Dowse, L., and Didi, A. (2015) 'Preventing Violence against Women and Girls with Disabilities: Integrating A Human Rights Perspective'. Women With Disabilities Australia (WWDA), Hobart, Tasmania. ISBN: 978-0-9585268-4-5. See also: Committee of Ministers of the Council of Europe (2009) *Declaration: Making gender equality a reality.* 119th Session of the Committee of Ministers, Madrid, 12 May 2009.

[229] Office of the Public Advocate (2010) *Submission to the Victorian Law Reform Commission in Response to the Guardianship Information Paper*. Accessed online October 2011 at: http://www.publicadvocate.vic.gov.au/file/file/Research/Submissions/2010/OPA-Submission-to-VLRC-May-2010.pdf See also: French, P., Dardel, J. & Price-Kelly, S. (2010) *Rights Denied: Towards a National Policy Agenda About Abuse, Neglect & Exploitation of Persons with Cognitive Impairment.* People With Disability Australia (PWD), Sydney, NSW.

[230] Cited in McVilly, K. (2008). *Physical restraint in disability services: current practices; contemporary concerns and future directions.* A report commissioned by the Office of the Senior Practitioner, Department of Human Services, Victoria, Australia.

[231] Frohmader, C., Dowse, L., and Didi, A. (2015) OpCit.

[232] Ibid.

[233] WWDA (2007b) OpCit; Healey, L., Howe, K., Humphreys, C., Jennings, C. & Julian, F. (2008) *Building the Evidence: A report on the status of policy and practice in responding to violence against women with disabilities in Victoria.* Published by the Victorian Women with Disabilities Network Advocacy Information Service, Melbourne; French, P., Dardel, J., & Price-Kelly, S. (2010) OpCit.

[234] Joint NGO report to the United Nations Committee Against Torture (204) OpCit.

[235] Frohmader, C. (2014) *'Gender Blind, Gender Neutral': The effectiveness of the National Disability Strategy in improving the lives of women and girls with disabilities.* Prepared for Women With Disabilities Australia (WWDA), Hobart, Tasmania. ISBN: 978-0-9585268-2-1.

[236] United Nations General Assembly, Human Rights Council (2013) *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Juan E Méndez; 1st February 2013; UN Doc. A/HRC/22/53.

[237] Ibid.

- are often not believed when reporting sexual assault and other forms of violence;[238]

- experience and are at great risk of violence within disability services which do not have the capacity or expertise to recognise overt forms of violence and even less capacity to identify subtle, covert and other forms of violence;[239]

- are often deliberately left in settings and circumstances where they experience violence because there is no other 'alternative to the abusive situation'. [240]

[238] Ibid.
[239] Dowse, L. et al (2013) OpCit.
[240] French, P. (2007) OpCit; See also: French, P. et al (2010) OpCit.

SECTION 5: HUMAN RIGHTS VIOLATIONS INTEGRAL TO VIOLENCE AGAINST PEOPLE WITH DISABILITY

136. The experience of violence, abuse and neglect for people with disability in institutional and residential settings is underpinned by interconnecting and multidimensional violations of a range of human rights.

137. Human rights are interdependent, indivisible and inter-related, and must be addressed in totality for their realisation. This section examines critical human rights that must be upheld in order to eliminate violence, abuse and neglect against people with disability in institutions and residential settings – equal recognition before the law; liberty and security of the person; freedom from torture and ill-treatment; protecting the integrity of the person; access to justice.

138. Violations of these human rights are pervasive in Australia, yet many remain unidentified as human rights violations and some have been addressed in a piecemeal and ad hoc way. Understanding these human rights violations within a torture and ill-treatment framework would ensure that these critical human rights are comprehensively understood and addressed in order to eliminate violence, abuse and neglect against people with disability in institutional and residential settings.

EQUAL RECOGNITION BEFORE THE LAW

139. CRPD article 12, *Equal recognition before the law*, establishes that all people with disability have full legal capacity and the right to receive supports to exercise this legal capacity, including decision making support. Legal capacity is fundamental "for the exercise of civil, political, economic, social and cultural rights."[241]

140. The denial of legal capacity deprives people with disability of basic human rights, including the right to give consent to medical treatment and interventions, the right to control fertility, right to bodily integrity, the right to liberty and security and the right to access to justice. The denial of legal capacity for people with disability underpins human rights violations, such as forced medical treatment and interventions, forced sterilisation and abortion, the application of restrictive practices, indefinite detention, denial of access to justice and forced living arrangements.

141. State and territory guardianship, mental health and financial management laws primarily regulate the area of legal capacity and substitute decision-making in Australia. While state and territory laws in this area vary, they all breach, are inconsistent with, or fail to fulfil obligations under article 12 of the CRPD.[242]

142. The interpretative declaration on article 12 held by Australia states that Australia understands that article 12 allows for "fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards …"[243] The existence of this interpretative declaration stymies the process of critical reform in this area.

143. The CRPD Committee has observed that "there has been a general failure to understand the human rights-based model of disability implies a shift from the substitute decision-making paradigm to one that is based on supported decision-making".[244]

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[241] Committee on the Rights of Persons with Disabilities, *General Comment No.1 – Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) para 8.
[242] CRPD Civil Society Parallel Report Project Group, *Disability Rights Now* (August 2012) para 191, p 71
[243] *Convention on the Rights of Persons with Disabilities*: Declarations and Reservations (Australia), UN OHCHR. 2008.
[244] Committee on the Rights of Persons with Disabilities, *General Comment No.1 – Article 12: Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) para 3

144. The denial of legal capacity and the failure to provide support to exercise legal capacity is disability discrimination. This means that violence, abuse and neglect experienced as a consequence of this discrimination may constitute torture, cruel, inhuman or degrading treatment or punishment.[245]

145. In 2014, the Australian Law Reform Commission (ALRC) tabled in parliament the final report of its inquiry into barriers to equal recognition before the law and legal capacity for people with disability, *Equality, Capacity and Disability in Commonwealth Laws*.[246] The report makes 55 recommendations for reform, aimed at providing people with disability equal recognition before the law in line with article 12 of the CRPD — in particular, in relation to the right to make decisions that affect their lives and to have those decisions respected.

146. The ALRC's key recommendation outlines National Decision-Making Principles and Guidelines that reflect the necessary focus on supported rather than substitute decision-making and represents an important shift in Australian law.

147. In September 2013 the CRPD Committee made a recommendation in its concluding observations to Australia that the ALRC inquiry should look at how Australian law and policy could be brought into conformity with the CRPD including in areas such as informed consent to medical treatment and access to justice.[247]

148. However, the final report did not recommend that Australia remove its interpretative declaration to article 12. The ALRC inquiry did not directly address State and Territory financial management, guardianship and mental health laws; it only examined how Commonwealth laws and legal frameworks interact with State and Territory laws in the areas under review.[248] These State and Territory laws articulate the most fundamental ways in which people with disability have their legal capacity denied or diminished in Australia. Consequently, "substantive compliance with article 12 will be difficult to assess without a thorough analysis of financial management, guardianship and mental health laws at the State and Territory levels."[249]

FREEDOM FROM TORTURE OR CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

A) RESTRICTIVE PRACTICES

149. People with disability in Australia are routinely subjected to unregulated and under-regulated behaviour management or treatment programs, known as restrictive practices that include chemical, mechanical, social and physical restraint, detention, seclusion and exclusionary time out.[250]

150. These practices can cause physical pain and discomfort, deprivation of liberty, prevent freedom of movement, alter thought and thought processes, and deprive persons of their property and access to their children.[251]

151. There is a lack of evidence that these practices "offer positive health outcomes" and they "are commonly associated with further trauma, risk of violence and potential human rights abuse".[252] Many of the practices would be considered crimes if committed against people without disability, or

[245] People with Disability Australia, Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture (October 2014) People with Disability Australia, para 34, p 14
[246] Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (2014), Commonwealth of Australia, https://www.alrc.gov.au/news-media/equality-capacity-and-disability-alrc-report
[247] CRPD/C/AUS/CO/1, paras 24-26
[248] Australian Law Reform Commission, OpCit p.5
[249] Disability Coordination Group, *'Factsheet: Equality before the law and supported decision-making'*, Australia's UPR 2015 NGO Coalition (May 2015) http://www.pwd.org.au/documents/Word/AusUPRFactSheetSupportedDecisionMaking.docx
[250] CRPD Civil Society Parallel Report Project Group, *Disability Rights Now* (August 2012) p.91.
[251] People With Disability Australia and NSW Mental Health Coordinating Council, Submission to the NSW Legislative Council: 'Substitute Decision-Making: Time for Reform', *Inquiry into Substitute Decision-Making for People Lacking Capacity*, 2009, 27.
[252] National Mental Health Consumer and Carer Forum, *'Ending Seclusion and Restraint in Australian Mental Health Services'* (Position Statement, 2009); National Mental Health Commission, *'Position on seclusion and restraint in mental health'* (29 May 2015), http://www.mentalhealthcommission.gov.au/our-work/national-seclusion-and-restraint-project/our-position-paper-a-case-for-change.aspx

outside of institutional and residential settings.[253] However, when "perpetrated against persons with disabilities", restrictive practices "remain invisible or are being justified" as legitimate treatment, behaviour modification or management instead of recognised as "torture or other cruel, inhuman or degrading treatment or punishment".[254]

152. Available research has shown that "behaviours of concern" are often "adaptive behaviours to maladaptive environments", and "legitimate responses to difficult environments and situations", especially "communal settings [which] multiply behaviours which make [people with disability] feel unsafe".[255] These behaviours can be viewed as a form of resistance or protest to maladaptive environments; and should be viewed as legitimate responses to problematic environments and situations. Changing services, systems and environments should be the starting point for changing behaviour, rather than changing the person.[256]

153. Protests against treatment or institutionalisation itself may often be understood as "behaviours of concern" necessitating restrictive practices. Additionally, many people with disability experience "informal restrictions" or prohibited practices, which are never recorded, reported or addressed. People with disability can not feel safe or trust staff if they constantly fear further violence.[257]

154. There is an important relationship between the use of restrictive practices and other forms of violence within institutional and residential settings: the use of restrictive practices desensitises both staff and people with disability, undermining their ability to recognise violence, to view it as unacceptable and respond to it as a crime.[258]

155. In addition, 'behaviours of concern' may be the result of trauma arising from a history of violence. Subjecting people with disability who have already experienced trauma - such as many children in out-of-home care, victims of domestic violence, people seeking mental health responses, migrants and asylum seekers who have experienced conflict and war - to restrictive practices will only compound the trauma, and make recovery even more difficult.

156. Restrictive practices occur, but are not limited to the disability and mental health service settings, such as large residential institutions, group homes, boarding houses and mental health facilities as well as government, private and special schools, hospitals, residential aged care facilities, prisons, juvenile justice facilities, immigration detention and family homes.[259]

157. The *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* [260](the National Framework) was endorsed by all Australian governments in March 2014. The National Framework states the importance of protecting the human rights of people with disability in line with the CRPD, but it still has limitations:[261]

- the focus is still on when and how to authorise restrictive practices rather than eliminating their use, and addressing the environmental factors that may give rise to 'behaviours of concern';
- the focus is on the disability support system, despite the fact that people with disability receive supports from, and move between different service settings, such as mental health facilities, hospitals, prisons and schools;
- there is no coverage or connection to other initiatives seeking to address restrictive practices, such as the National Mental Health Commission's National Seclusion and Restraint Project;[262]

[253] See People with Disability Australia (2014), *Consideration of the 4th and 5th Reports of Australia by the Committee to the Convention Against Torture* at http://www.pwd.org.au/documents/pubs/SB14-UNCAT.doc
[254] Manfred Nowak, Special Rapporteur, *Interim Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 63rd sess, UN Doc A/63/175 (28 July 2008) para 58
[255] Ramcharan, P., Nankervis, K., Strong, M., and Robertson, A. (2009) *'Experiences of Restrictive Practices: A view from people with disabilities and family carers: A final research report to the Office of the Senior Practitioner'* Office of the Senior Practitioner, Victoria, pp. 1-3.
[256] Ibid 17.
[257] Ramcharan, P., et al (2009) OpCit.
[258] French, P. et al (2009) OpCit.
[259] People with Disability Australia, (2014) OpCit; Women with Disabilities Australia, Submission to the UN, *Analytical Study on Violence against Women and Girls with Disabilities*, December 2011, 25; French, P. et al (2009) OpCit.
[260] https://www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-framework-for-reducing-and-eliminating-the-use-of-restrictive-practices-in-the-disability-service-sector
[261] People with Disability Australia (2014) OpCit, pp. 23-35.
[262] National Mental Health Commission, *National Seclusion and Restraint Project*, http://www.mentalhealthcommission.gov.au/our-work/national-seclusion-and-restraint-project.aspx

- there is no reference to Australia's obligations under CAT: understanding restrictive practices within the CAT Framework would ensure much greater protections that would include the enactment of nationally consistent legislation to criminalise torture, cruel, inhuman or degrading treatment or punishment, the provision for legal action to be taken to remedy a breach, the ratification of the Optional Protocol to CAT and the establishment of an independent national preventative mechanism to monitor places of detention, including disability residential settings, mental health facilities, disability justice centres and prisons.

B) MEDICAL OR SCIENTIFIC EXPERIMENTATION WITHOUT INFORMED CONSENT[263]

158. Many people with disability are particularly susceptible to being chemically restrained and administered medication in combinations that may pose a risk to their physical and mental health or cause actual bodily harm. This can occur, but is not limited to disability residential settings, mental health facilities, out-of-home care settings, prisons and residential aged care settings. There are limited protections from abuse of medication regimes and a lack of criminal offences concerning the maladministration of medications to control and manage behaviour.[264]

159. The Special Rapporteur on Torture has noted that, in line with article 15 of the CRPD, medical or scientific experimentation "is permissible only when the person concerned gives his or her free consent and when the very nature of the experiment cannot be deemed torture or cruel, inhuman or degrading treatment".[265]

160. Few measures have been taken to protect people with disability from medical or scientific experimentation where they are unable to give their free and informed consent, including people with disability who require support in exercising their legal capacity. Only legislation in Victoria and the Australian Capital Territory contains provisions prohibiting medical or scientific experimentation or treatment on persons without their full, free and informed consent.[266]

LIBERTY AND SECURITY OF THE PERSON

A) INDEFINITE DETENTION[267]

161. All Australian jurisdictions have in place legislation that addresses a defendant within the criminal justice system and their fitness to stand trial. These justice diversion provisions are applied when people with cognitive or psychosocial disability are deemed 'unfit' to stand trial. An unfitness test may arise as an issue before or during the trial process.[268] These justice diversion provisions have resulted in people with disability being detained indefinitely in prisons or psychiatric facilities without being convicted of a crime, and for periods that may significantly exceed the maximum period of custodial sentence for the offence. This situation is exacerbated by a lack of appropriate accommodation, therapeutic, rehabilitation and disability support options available for people with disability who are deemed unfit to stand trial due to an intellectual, cognitive or psychosocial disability. This practice of arbitrary detention is disproportionately experienced by Aboriginal and Torres Strait Islander people with disability.[269]

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263 Some of the discussion in this section has been extracted from CRPD Civil Society Parallel Report Project Group, *Disability Rights Now* (August 2012).
264 French, P. et al (2009) OpCit.
265 Manfred Nowak (2008) OpCit.
266 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 10(c); *Human Rights Act 2004* (ACT) s 10(2).
267 Some of the information in this section is extracted from Disability Coordination Group, *'Factsheet: Over representation and the indefinite detention of persons with disability within the criminal justice system'*, Australia's UPR 2015 NGO Coalition (May 2015), http://www.pwd.org.au/documents/Word/AusUPRFactSheetIndefiniteDetentionFN.docx
268 Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws*, ALRC Report 124, (2014).
269 Aboriginal Disability Justice Campaign, *'Position Statement on the Inappropriate Incarceration of Aboriginal People with Cognitive Impairment'*, (Position Paper, People with Disability Australia, October 2008), www.pwd.org.au/systemic/adjc.html

162. In 2013, the CRPD Committee recommended that Australia establish "legislative, administrative and support frameworks that comply with the Convention", and stop using prisons "for the management of unconvicted persons with disabilities".[270]

163. In 2014, the Australian Human Rights Commission (AHRC) found that the Commonwealth had failed:

> *"to take measures to work with the Northern Territory to provide accommodation and other support services, other than accommodation in a maximum security prison, for people with intellectual disabilities who are unfit to plead to criminal charges".*[271]

164. The complainants in this case were four Aboriginal men with cognitive disability who complained that their detention was arbitrary, the conditions of their detention were inhumane, and "the lack of alternatives to detention…and the lack of mental health and rehabilitation services" had resulted in a breach of their human rights.[272] The AHRC found that the Commonwealth had breached rights to liberty and security of the person under articles 9(1) and 10(1) of the *International Covenant on Civil and Political Rights* (ICCPR)[273] and article 14(1) of the CRPD. It also found breaches to CRPD articles 19 [Living independently and being included in the community*]*; 25 [Health]; 26 [Habilitation and rehabilitiation]; and in the case of two of the complainants, the AHRC found they had been subjected to torture and ill-treatment in breach of ICCPR article 7 and CRPD article 15, [Freedom from torture or cruel, inhuman or degrading treatment or punishment].[274]

165. The Australian Government rejected the finding, stating that the complaint was not within the jurisdiction of the Commonwealth but a matter for state and territory governments, and it would therefore "not engage in a detailed assessment of [the AHRC's] recommendations".[275] The Australian Government has 'washed its hands' of the significant human rights violations experienced by these four men, and effectively of the violence, abuse and neglect that is inherent to the indefinite detention of unconvicted people with disability in prisons and other facilities.

166. The response to the issue of indefinite detention in the Northern Territory and Western Australian has been to build Disability Justice Centres, and in Queensland to detain people in its Forensic Disability Service and highly restrictive 'community based treatment settings'. However, these facilities still operate as institutional places of detention, with features such as long term solitary living arrangements, locked windows and doors, video surveillance and limited opportunities for physical, recreational, therapeutic, rehabilitation or social activities.[276]

167. Congregating unconvicted people with disability in this way can increase stigma towards people with disability and community perceptions of dangerousness. It is also well documented that the institutional congregation of people with disability intensifies their exposure to restrictive practices and other forms of violence, abuse and neglect. The development of this new form of institution for people with disability is discriminatory; and also heightens the imperative for Australia to implement a robust oversight mechanism to monitor places of detention such as the model provided by the Optional Protocol on the Convention against Torture (OPCAT).[277]

168. In reviewing Commonwealth laws and programs and legal capacity for people with disability, the Australian Law Reform Commission recommended reform of the 'unfitness' test, provision of supports, limits and reviews on detention. Australia has yet to respond to this report.[278]

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[270] CRPD/C/AUS/CO/1, para 32(a)
[271] *KA, KB, KC and KD v Commonwealth of Australia* (2014) AusHRC 80, para 273
[272] Ibid para 10
[273] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976)
[274] *KA, KB, KC and KD v Commonwealth of Australia,* OpCit., para 273
[275] Attorney-General for Australia, Senator the Hon George Brandis QC, *Statement on the tabling of the Australian Human Rights Commission Report – KA, KB, KC and KD v Commonwealth of Australia [2014] AusHRC 80*, Australian Government, p 2.
[276] People with Disability Australia (2014) OpCit.
[277] Ibid, para 101, p. 36
[278] Australian Law Reform Commission (2014) OpCit, p.191.

B) OVER-REPRESENTATION IN CRIMINAL AND JUVENILE JUSTICE SYSTEM[279]

169. It is now well established that people with disability are over-represented in both the criminal and juvenile justice systems. The CRPD Committee expressed its concern about this situation, particularly for "women, children, [and] Aboriginal and Torres Strait Islander persons with disability".[280]

170. In 2008, the CAT Committee made a number of recommendations to Australia in its concluding observations: abolish mandatory sentencing, apply measures to reduce overcrowding such as non-custodial forms of detention, and ensure detention is used as a measure of last resort, particularly in relation to juveniles.[281] These recommendations were reiterated in the CAT Committee's concluding observations in 2014.[282] Contrary to these recommendations, little to no progress has been made and people with disability continue to be over represented in the criminal justice system.

171. In 2005 and again in 2012, the CRC Committee expressed concern about the over-representation of children with disability in the juvenile justice system in Australia. It recommended that Australia address issues for children and young people in conflict with the law "without resorting to judicial proceedings".[283] Despite this recognition there has been no coordinated approach to research, identify and implement measures to address this issue.

172. Prison conditions are extremely poor with evidence of "overcrowding and a lack of emphasis on rehabilitation", the use of harmful practices, "such as routine strip-searches and solitary confinement" and "substandard healthcare, including mental health care".[284] This is exacerbated for prisoners with disability who are often not provided with the necessary supports and safeguards they require to maintain their security. Key issues include:

- inadequate access to necessary services and supports, such as mental health care and medical services and supports;[285]
- lack of protective supports to address the greater risks of people with disability, particularly people with intellectual disability to sexual assault, abuse and victimisation, and coercion into breaking rules and conducting illegal activities, such as drug dealing;[286]
- inadequate complaints processes and mechanisms for recording and responding to incidents, to support prisoners to make complaints and to ensure adequate protections against retribution for making complaints, including being placed in protective custody;
- lack of information about prisoner rights and access to support to exercise their rights;
- lack of identification of people with disability in prison, and consequent measures to provide necessary supports;[287]
- inadequate services to provide support to prisoners leading up to their release, or provide assistance from community and forensic mental health workers;[288]
- lack of planning with disability, mental health and other social supports to facilitate successful return to the community;[289]
- lack of physical access to prison facilities and services; and

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[279] Some information in this section is extracted from CRPD Civil Society Parallel Report Project Group, *Disability Rights Now* (August 2012), http://www.pwd.org.au/documents/project/undrc/CRPD-CivilSocietyReport2012.doc

[280] CRPD/C/AUS/CO/1, para 32(a)

[281] Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, 40th sess, UN Doc CAT/C/AUS/CO/1 (22 May 2008) para 23.

[282] Committee against Torture, *Concluding observations on the combined fourth and fifth periodic reports of Australia*, 53rd sess, UN doc CAT/C/AUS/CO/4-5 (23 December 2014)

[283] Committee on the Rights of the Child, *Concluding Observations: Australia*, 40th sess, UN Doc CRC/C/15/Add.268, (20 October 2005) page 15; UN Doc CRC/C/AUS/CO/4 para 82(b)

[284] Australian NGO Coalition, *Australia's 2nd Universal Periodic Review – Joint Submission on behalf of the Australian NGO Coalition* (March 2015) Human Rights Law Centre, Kingsford Legal Centre, National Association of Community Legal Centres, paras 74-76.

[285] Anand Grover, UN Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, *Addendum: Mission to Australia*, UN Doc A/HRC/14/20/ADD 4 (3 June 2010) para 64, pp 16-18.

[286] Kathy Ellem, *'The Impact of Imprisonment for People Labelled as Having an Intellectual Disability: A Qualitative Life Story Approach in the Queensland Context'* (PhD Research Proposal, School of Social Work and Applied Human Sciences, The University of Queensland, undated), www.sistersinside.com.au/media/ResearchProposal15KathyEllem.pdf.

[287] Forensicare (Victorian Institute of Forensic Mental Health), *Submission to the Senate Select Committee on Mental Health, 'Forensic Mental Health — Working with Offenders with a Serious Mental Illness'*, 2005, 20, www.aph.gov.au/senate/committee/mentalhealth_ctte/submissions/sub306.pdf

[288] Ibid 20–1.

[289] Ibid 19.

- lack of access to relevant aids and communication devices, sign language and community language interpreters and lack of personal care and hygiene supports.

173. The fastest growing group of prisoners in Australia is women, and in particular Aboriginal women, and over half of this group have "a diagnosed psychosocial disability and a history of sexual victimisation".[290] The common use of strip searches is particularly degrading and re-traumatising for female prisoners.[291] There is a critical need to "invest more in understanding gender-specific patterns of criminalisation, and in particular, the relationship between victimisation and offending".[292]

174. The increased risk of young people with disability entering the juvenile justice system is linked to failures that include:[293]

- lack of support services, appropriate treatment and positive behaviour intervention programs, family based out of home care and accommodation options;
- the use of inappropriate and harmful service practices, such as physical restraint and medication;
- the risk or actual occurrence of physical and sexual assault;
- the reliance on the police to resolve 'challenging' behaviour or 'behaviours of concern'; and,
- failures to provide early intervention and disability support with family and educational settings.[294]

175. Once children and young people with disability are in the juvenile justice system, there is often an emphasis on punishment of the crime and rehabilitation, rather than on appropriate assessment, intervention and support services. As a result, many children and young people with disability are not identified, which means their specific support needs are not addressed. There are also concerns regarding the inappropriateness of the design of facilities and the environment within juvenile detention facilities, which can also contribute to a decreasing state of emotional and mental health.[295]

176. In some Australian states and territories, there are broad powers that allow for the transfer of juvenile detainees to adult prisons which exposes them to greater risk of physical and mental harm including sexual assault, and limited opportunity for rehabilitation.[296] Instances of assault including sexual assault remain rife in the Australian prison system, particularly among young male inmates.[297]

177. There is no legislation that articulates the basic human rights of prisoners in many jurisdictions and there is no independent oversight mechanism for places of detention.[298]

178. In 2013, the CRPD Committee recommended to Australia to urgently "[e]stablish mandatory guidelines and practice to ensure that persons with disabilities in the criminal justice system are provided with appropriate support and accommodation."[299]

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[290] Australian Bureau of Statistics, *Prisoners in Australia, 2013* (ABS Catalogue No 4517.0, 5 December 2013), www.abs.gov.au/ausstats/abs@.nsf/mf/4517.0
[291] Anita Mackay, *'Accommodating people in cages and shipping containers: the reality of overcrowded prisons'*, Regarding Rights (31 January 2014), http://asiapacific.anu.edu.au/regarding-rights/2014/01/31/accommodating-people-in-cages-and-shipping-containers-the-reality-of-overcrowded-prisons/#more-1213
[292] *Joint NGO report to the United Nations Committee Against Torture* (October 2014), OpCit. p 19.
[293] People With Disability Australia, Submission to the Senate Community Affairs References Committee, *Protecting Vulnerable Children: A National Challenge — Second Report on the Inquiry into Children in Institutional or Out-of-Home Care*' (March 2005) 173.
[294] Ibid.
[295] Ibid.
[296] The Shopfront Youth Legal Centre, The Shopfront Youth Legal Centre, Submission: *'Sexual Assault of Young Men in Prison Project'*, *National Human Rights Consultation*, 15 June 2009, www.humanrightsconsultation.gov.au/www/nhrcc/submissions.nsf/list/DB51D48972D82AFBCA25761500277B6A/$file/Jane%20Sanders_AGWW-7T26DXAGWW-7T26DX.pdf
[297] Ibid 3.
[298] Bronwyn Naylor, *Castan Human Rights Report 2014*, The Castan Centre for Human Rights (2014) p 8, www.law.monash.edu.au/castancentre/policywork/hr-reports/2014/human-rights-report-2014.pdf
[299] CRPD/C/AUS/CO/1, para 32(b)

C) IMMIGRATION DETENTION[300]

179. Australia's policy of indefinite mandatory detention of asylum seekers has been the subject of substantial condemnation from human rights treaty bodies and other UN experts.[301]

180. In both its 2008 and 2014 concluding observations, the CAT Committee recommended that Australia abolish its policy of onshore and offshore mandatory immigration detention and advised using detention as a measure of last resort only and setting a reasonable time limit for detention.[302] The Committee also recommended that children no longer be held in immigration detention under any circumstances, and as a matter of priority, ensure that asylum seekers who have been detained are provided with adequate physical and mental health care.[303] Australia has not addressed any of the Committee's recommendations.

181. The current conditions facing detainees in immigration detention raise concerns with respect to Australia's obligation to ensure people with disability, particularly those with psychosocial disability are not subject to cruel, inhuman or degrading conditions, or that detainees do not develop mental health conditions as a result of their incarceration.[304]

182. Specific areas of concern for people with disability include overwhelming evidence of heightened risks of physical and sexual violence, inadequate and inaccessible facilities; lack of access to necessary aids, equipment, medication, health and allied health care; lack of access to diverse language and communication supports and support for families and carers.[305] There is also evidence of the withdrawal of essential medication and equipment, including instances of hearing aids and prosthetic limbs being removed and destroyed,[306] the use of solitary confinement[307] and the separation of people with disability from their primary carers, including spouses.[308]

183. In November 2013, Christmas Island Detention Centre Medical Officers wrote an open letter of concern regarding the operation of the Centre. The letter identified the Christmas Island immigration detention centre as unsuitable for any person living with significant intellectual or physical disability: "[t]he detention environment exacerbates their burden of care and the facilities and medical services provided are inadequate to accommodate their needs." It described how a young woman with cerebral palsy was "confined to a wheelchair in one of the island compounds''. Despite medical officers raising concerns from the time of her arrival that she was "not suitable for the detention environment", and although ''exhibiting signs of mental distress, she had not been transferred.[309]

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[300] Some information in this section is extracted from People with Disability Australia (2014) OpCit.

[301] See Human Rights Committee, *Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant – Concluding observations of the Human Rights Committee: Australia*, 95th sess, 2624th mtg, UN Doc CCPR/C/AUS/CO/5 (7 May 2009) [23]-[24]; Committee on Economic, Social and Cultural Rights, *Consideration of Reports Submitted by States Parties Under Articles 16 And 17 of the Covenant – Concluding Observations of the Committee on Economic, Social and Cultural Rights: Australia*, 42nd sess, 26th mtg, UN Doc E/C.12/AUS/CO/4 (12 June 2009) [25], [30]; Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 44 of the Convention – Concluding observations: Australia*, 60th sess, 1725th mtg, UN Doc CRC/C/AUS/CO/4 (28 August 2012) [31], [80]; Committee on the Rights of the Child, *Consideration of reports submitted by States parties under article 8, paragraph 1, of the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict – Concluding observations: Australia*, 60th sess, 1725th mtg, UN Doc CRC/C/OPAC/AUS/CO/1 (11 July 2012) [24]; Committee on the Elimination of Racial Discrimination, *Consideration of reports submitted by States parties under article 9 of the convention – Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*, 77th sess, 2043rd mtg, UN Doc CERD/C/AUS/CO/15-17 (27 August 2010) [24]; Anand Grover, Human Rights Council, *Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest standard of physical and mental health – Mission to Australia*, 14th sess, Agenda Item 3, UN Doc A/HRC/14/20/Add.4 (3 June 2010) [64]; Human Rights Council, *Compilation prepared by the Office of the High Commissioner for Human Rights in accordance with paragraph 15(b) of the annex to Human Rights Council resolution 5/1: Australia*, 10th sess, UN Doc A/HRC/WG.6/10/AUS/2 (15 November 2010) [47]-[49]; Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Australia*, 17th sess, Agenda Item 6, UN Doc A/HRC/17/10 (24 March 2011) [18], [42], [78].

[302] Committee against Torture, *Concluding Observations of the Committee against Torture: Australia*, 40th sess, UN Doc CAT/C/AUS/CO/3 (22 May 2008) para 11; UN Doc CRC/C/AUS/CO/4 para 16

[303] Committee against Torture, UN UN Doc CAT/C/AUS/CO/3 (22 May 2008) para 11; UN Doc CRC/C/AUS/CO/4 para 11, para 16

[304] See *Keenan v United Kingdom* (2001) 33 EHRR 913. See also *Price v United Kingdom* (2001) 34 EHRR 1285; *McGlinchey v United Kingdom* (2003) 37 EHRR 821; *Holomiov v Moldova* [2006] ECHR 30649/05; *Istratii v Moldova* [2007] ECHR 8721/05.

[305] National Ethnic Disability Alliance (NEDA) (March 2015) OpCit.

[306] Evidence given by Dr John-Paul Sanggaran Australian Human Rights Commission, *National Inquiry into Children in Immigration Detention 2014* (Public Hearing, Sydney, 31 July 2014).

[307] Human Rights Law Resource Centre, Submission to the Joint Standing Committee on Migration Review of Immigration Detention, *Inquiry into Immigration Detention in Australia*, August 2008, 20, www.hrlrc.org.au/content/topics/refugees-and-asylum-seekers/refugee-rights-submission-inquiry-immigration-detention/

[308] Suresh Rajan, 'Fairness does not mean everyone gets the same. Fairness means everyone gets what they need' (21 May 2015) *The Stringer*, Saturday 22nd of August 2015, http://thestringer.com.au/fairness-does-not-mean-everyone-gets-the-same-fairness-means-everyone-gets-what-they-need-rick-riordan-10311

[309] *Christmas Island Medical Officer's Letter of Concerns* (November 2013), www.theguardian.com/world/interactive/2014/jan/13/christmas-island-doctors-letter-of-concern-in-full

D) FORCED LIVING ARRANGEMENTS

184. One of the most pervasive human rights abuses experienced by people with disability is their segregation, isolation and confinement from the community in institutional and residential settings.[310]

185. In order to receive essential support services, people with disability are often obliged or compelled to live in institutional and residential settings, such as large residential centres, group homes, boarding and rooming houses, aged care facilities, nursing homes, out-of-home care facilities and other kinds of supported accommodation.

186. It is well-established that children and adults with disability who live in institutional and residential settings are at heightened risk of, or actually experience widespread and sustained instances of all forms of violence, abuse and neglect throughout their lives.[311] It is extremely difficult to leave or escape this violence, abuse and neglect as there are often no alternative housing and support options, or the alternatives are provided in another institutional or residential setting when 'vacancies' become available.[312]

187. The segregated and 'closed' nature of institutional and residential settings prevents public scrutiny. This creates greater risks for people with disability who are unable to report instances of violence, abuse and neglect to support workers, who may be the perpetrators of violence, or where the person with disability fears that disclosure will lead to further violence and mistreatment.[313]

188. Many institutional and residential settings are designed for particular residents, such as those with intensive behaviour support needs or those with a history of violence and trauma, such as many children with disability living in out-of-home care settings. Residents are not living together by choice, but because of particular characteristics, and this can increase risk factors for violence, abuse and neglect.

189. Institutional and residential settings can effectively establish a culture of violence, abuse and neglect that becomes normalised in the lives of people with disability and support staff.[314]

190. Violence, abuse and neglect in institutional and residential settings constitutes torture and/or ill-treatment because it is experienced repeatedly and it is sustained over a long period of time; it is often not treated as a crime; and it is underpinned by discrimination that compels people with disability to live in these settings.[315]

191. CRPD article 19, *Living independently and being included in the community* applies the civil and political right of liberty and security of the person (CRPD article 14) to the right of people with disability to choose where and with whom they live, and to have the same housing options as other members of the community.[316]

192. People with disability often require social support, such as personal and health care, domestic assistance, and living skill support to live in the housing option of their choice. This means that article 19 requires people with disability to receive the essential supports they need to live in housing that enables independence, autonomy, participation and inclusion in the community.

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310 French, P. (2009) 'Accommodating Human Rights: A human rights perspective on housing, and housing and support, for persons with disability', People with Disability Australia, p 25

311 See e.g. Commission for Children and Young People (August 2015), *"...as a good parent would..."* OpCit.; French, P. et al (2010) OpCit., http://www.pwd.org.au/documents/pubs/Accommodating%20Violence%20Report.pdf; NSW Ombudsman, '*More than Board and Lodging: the Need for Boarding House Reform* (Special Report to Parliament, NSW Ombudsman, August 2011) http://www.ombo.nsw.gov.au/publication/PDF/specialreport/SR%20Boarding%Houses.pdf; Blackwood, A. (2014) 'Yooralla failings: no more excuses' November 25, *The Age*, http://www.theage.com.au/comment/yooralla-failings-no-more-excuses-20141125-11t5cl.html, See also McKenzie, N, Michelmore, K., Cronau, P. (2014) *'In Our Care'* OpCit.

312 Independent advocates report that the lack of appropriate housing and support is one of the most critical issues facing people with disability, particularly to protect them from violence, abuse and neglect.

313 CRPD Civil Society Parallel Report Project Group, op. cit., para 284, p. 107

314 French, P. et al (2009) OpCit., Price-Kelly, S. and Attard, M. OpCit.

315 People with Disability Australia (2014) OpCit, p.51.

316 French, P. (2009) OpCit.

193. However, housing and support for people with disability continues to be viewed through a 'supported accommodation' framework that does not separate housing needs from social support needs. This perpetuates the view that some people with disability, particularly those with 'high' or 'complex' support needs "require special purpose care facilities and arrangements".[317] The lack of available, accessible housing and necessary supports for people with disability "has focused Australia on funding and providing additional 'innovative' supported accommodation models, instead of focusing on genuine community living options that separate housing needs from support needs".[318]

194. In the April 2015 Council of Australian Governments (COAG) Reform Council Communique, the role of housing in the NDIS was discussed. The Communique refers to the "need to support existing specialist accommodation supply", to test 'innovative accommodation pilots", and to increase "the supply of specialist disability housing" that will "be in addition to the ongoing mainstream housing effort".[319] This implies that housing and support for people with disability are still being viewed within a 'supported accommodation' framework.

195. This increases the risk that new 'contemporary' institutional and residential settings will be funded and built, which will "still segregate, congregate and isolate people on the basis of disability and require people with disability to be placed in them in order to receive the supports they need".[320]

196. However, the CRPD is clear that institutional accommodation and social support are an explicit violation of human rights, and one that governments have an immediate responsibility to prevent and remedy.

197. In 2013, the CRPD Committee expressed concern to Australia about 'contemporary' housing models for people with disability "replicate institutional living arrangements", and recommended that resources should be allocated for the necessary supports "that would enable persons with disabilities to live in their communities".[321]

PROTECTING THE INTEGRITY OF THE PERSON

A) INVOLUNTARY TREATMENT[322]

198. People with disability face a deprivation of their mental and physical integrity through involuntary treatment and a breach of their rights under article 17 of the CRPD, *Protecting the integrity of the person*. The CRPD Committee has stated that involuntary or forced treatment by psychiatric and other health and medical professionals is a violation of the right to be free from torture.[323]

199. The Special Rapporteur on Torture has stated that "the more intrusive and irreversible the treatment, the greater the obligation on States to ensure that health professionals provide care to persons with disabilities only on the basis of their free and informed consent".[324]

200. In relation to forced psychiatric treatment, the Special Rapporteur on Torture has stated that "Article 14 of CRPD prohibits … the existence of a disability as a justification for deprivation of liberty",[325] and that ''provisions allowing confinement or compulsory treatment in mental health settings, including through guardianship and other substituted decision-making, must be repealed.''[326]

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317 CRPD Civil Society Parallel Report Project Group, OpCit., para 337
318 Ibid
319 COAG Disability Reform Council *Communique*, 24 April 2015, http://mitchfifield.dss.gov.au/media-releases/coag-disability-reform-council-communiqu
320 CRPD Civil Society Parallel Report Group, op.cit, para 338.
321 CRPD/C/AUS/CO/1, para 41
322 Some of the discussion in this section has been extracted from CRPD Civil Society Parallel Report Group, op.cit.
323 Committee on the Rights of Persons with Disabilities, *General Comment No 1 (2014) – Equal recognition before the law*, 11th sess, UN Doc CRPD/C/GC/1 (19 May 2014) [42].
324 Manfred Nowak (2008) OpCit, para.59.
325 Ibid,16.
326 Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez Human Rights Council Twenty-second session, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G13/116/31/PDF/G1311631.pdf?OpenElement page 2.

201. States' and Territories' mental health laws regulate consent to medical treatment, including involuntary detention and forced treatment. While they all differ, "none of these laws comply with international human rights standards".[327]

202. Within the mental health legislative, policy and practice framework, many people with psychosocial disability are subject to the widespread use of non-consensual psychiatric medications, electroconvulsive therapy (ECT), restrictive practices, such as seclusion and restraints and arbitrary detention.

203. On ratification of the CRPD Australia made an interpretive declaration stating that it understands article 17 to allow "for compulsory assistance or treatment of persons, including measures taken for the treatment of psychosocial disability, where such treatment is necessary, as a last resort and subject to safeguards".[328] The interpretative declaration reinforces the view that the existing legislative, policy and practice frameworks governing compulsory assistance or treatment should be maintained.

204. Instead of addressing mental health laws as an inherent breach of human rights, states and territories have focused on reviewing and amending mental health legislation in an effort to increase compliance with human rights. However, the Special Rapporteur on Torture has stated that ''forced psychiatric interventions, when committed against persons with psychosocial disabilities, satisfies both intent and purpose required under Article 1 of CAT notwithstanding claims of 'good intentions' by medical professionals."[329]

205. In 2013, the CRPD Committee recommended to Australia to:

> *"…repeal all legislation that authorises medical intervention without the free and informed consent of the persons with disabilities concerned, committal of individuals to detention in mental health facilities, or imposition of compulsory treatment, either in institutions or in the community…"*[330]

B) FORCED STERILISATION[331]

206. Forced sterilisation of people with disability, particularly women and girls with disability is an ongoing practice in Australia,[332] despite the fact that it has been identified as an act of violence, a form of social control and a form of torture by the UN Special Rapporteur on Torture,[333] and as a form of violence by the CRC Committee.[334]

207. Since 2005, UN human rights treaty bodies, the Human Rights Council, UN special procedures and international medical bodies have made strong recommendations to Australia to enact national legislation to prohibit forced sterilisation.[335]

208. State and territory guardianship legislation and some other child protection acts[336] regulate and provide a degree of protection from forced sterilisation for all children and young people. However there is no law in Australia that explicitly prohibits forced sterilisation of children except in

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327 *Joint NGO report to the United Nations Committee Against Torture* (October 2014) p. 83
328 *Convention on the Rights of Persons with Disabilities*: Declarations and Reservations (Australia), op.cit.
329 A/HRC/22/53 Juan E. Mendez para 32.
330 UN Doc CRPD/C/AUS/CO/1, Para 34
331 Much of this section is extracted from Disability Coordination Group, *'Factsheet: Forced sterilisation'*, Australia's UPR 2015 NGO Coalition (May 2015), http://www.pwd.org.au/documents/Word/AusUPRFactSheetForcedSterilisation.docx
332 People With Disability Australia, Submission No 50 to Senate Standing Committee on Community Affairs, *The Involuntary or Coerced Sterilisation of People with Disabilities in Australia*, March 2013; Women With Disabilities Australia, Submission No 49 to Senate Standing Committee on Community Affairs, *The Involuntary or Coerced Sterilisation of People with Disabilities in Australia*, March 2013; Organisation Intersex International Australia, Submission No 23 to Senate Standing Committee on Community Affairs, *The Involuntary or Coerced Sterilisation of People with Disabilities in Australia*, 15 February 2013.
333 Juan E. Mendez, Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, 22nd sess, Agenda Item 3, UN Doc A/HRC/22/53 (1 February 2013) para 48.
334 Human Rights Committee, *General Comment No 13: The Right of the Child to Freedom from All Forms of Violence*, UN Doc CRC/C/GC/13 (18 April 2011) [16], [21].
335 See UN Docs: CAT/C/AUS/CO/4-5; CRPD/C/AUS/CO/1; CRC/C/AUS/CO/4; A/HRC/WG.6/10/L; CEDAW/C/AUS/CO/7; CRC/C/15/Add.268; A/67/227; A/HRC/22/53; Human Rights Council, 10th sess, UN Doc A/HRC/WG.6/10/L (3 February 2011) rec 86.39, p.15.See also: FIGO (International Federation of Gynecology and Obstetrics), *Female Contraceptive Sterilization*, http://www.wwda.org.au/FIGOGuidelines2011.pdf
336 See e.g. *Children and Young Persons (Care and Protection) Act 1998* (NSW)

circumstances where there is a serious threat to health or life; or that prohibits forced sterilisation of adults without their full and informed consent except in circumstances where there is a serious threat to health or life.[337]

209. In September 2012, the Senate Community Affairs References Committee (the Senate Committee) commenced an Inquiry into the involuntary or coerced sterilisation of people with disability in Australia, and released its Report in 2013.[338] The Committee recommended the prohibition of forced sterilisation if an adult with disability has the 'capacity' to provide consent. However, based on Australia's interpretative declaration in respect of Article 12 of the CRPD the Report also recommends that where a person with disability does not have 'capacity' for consent, substitute decision-making laws and procedures may permit the sterilisation of persons with disability.[339] This is not consistent with international human rights law that views forced sterilisation as a form of torture that must be prohibited, or with CRPD article 12 which requires substitute decision-making regimes to be replaced by supported decision-making ones.

210. The Australian Government response to the Inquiry Report[340] passes responsibility for action on forced sterilisation to State and Territory jurisdictions; and retains the focus on better regulation and non-binding guidelines rather than prohibition of forced sterilisation. It effectively accepts current legislative and practice frameworks for the authorisation of forced sterilisation within Australia.

ACCESS TO JUSTICE

211. Recent reports demonstrate that barriers to accessing justice for people with disability, whether as a victim, a witness or a defendant are a significant problem in every jurisdiction in Australia.[341] Barriers exist in legislation, in policy and in the practices of police, prosecutors, courts and judges. These barriers mean that people with disability are not afforded the same legal rights, protections and redress mechanisms as other people in the community.

212. Many people with disability are "being left without protection and at risk of ongoing violence, or [are] more likely to be jailed and destined to have repeated contact with the criminal justice system… many offenders had previously been victims of violence and this had not be responded to appropriately".[342]

213. Laws, policy and practice may prevent people with disability from giving evidence, making legal decisions or participating in legal proceedings:

- Laws of evidence may deny legal capacity for people with cognitive impairments and prevent them from giving evidence; or assumptions about the credibility of their evidence may be made by police and court officers, such as prosecutors, judges and magistrates.[343]

- Laws and procedures may not allow for people with disability to use sign language interpreters, communication aids or communication support workers. This has led to serious assault, sexual assault and violent crimes going unprosecuted.[344]

- Comprehensive training in providing accommodations and supports to people with disability is neither compulsory nor consistent across different jurisdictions for judicial officers, legal

[337] People with Disability Australia (2014) OpCit, p.32.
[338] Senate Standing Committees on Community Affairs, *Involuntary or coerced sterilisation of people with disabilities in Australia* (2013) Commonwealth of Australia, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=clac_ctte/involuntary_sterilisation/first_report/index.htm
[339] Ibid, para 4.45
[340] Australian Government, *Australian Government response to the Senate Community Affairs References Committee reports* (May 2015), http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Involuntary_Sterilisation/Additional_Documents
[341] Australian Human Rights Commission (2014) *'Equal Before the Law: Towards Disability Justice Strategies'*, https://www.humanrights.gov.au/sites/default/files/document/publication/2014_Equal_Before_the_Law.pdf; Victorian Equal Opportunity and Human Rights Commission (2014) OpCit.
[342] Australian Human Rights Commission (2014), op. cit., p. 9
[343] French, P. (2007) *'Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland'* (Report, Queensland Advocacy Incorporated, 22 May 2007).
[344] See eg. Kelly Vincent, *'Justice denied no more'*, (Media Release, 2 July 2015), http://www.kellyvincentmlc.com/dignity-for-disability-mlc-kelly-vincent-media-release-justice-denied-no-more

practitioners and court staff.[345] A lack of awareness about disability issues leads to discrimination and negative attitudes.[346] In spite of Police commitment in some jurisdictions to addressing these forms of discrimination, it continues to occur.[347]

- Where a police report is made, investigation may be limited because of perceptions that the person with disability will not be viewed as a credible witness. Inadequate investigation can impede the authorisation of briefs, and prevent cases from reaching the point of being considered for prosecution.[348]

- Some protections in giving testimony that may be available to 'vulnerable' persons are dependent upon particular crimes, such as domestic violence or sexual assault. In some cases, testimony can be given through closed-circuit television, or through the recording of the initial report, relieving witnesses of the need to present at court. However people with disability may be denied access to these protections because the violence against them may not be included in the legislative definition of that crime, such as domestic violence legislation that may not include institutional and residential settings.

- Discriminatory attitudes, such as the belief that violence against people with disability is 'different' or less serious may impact on the outcomes of cases. For example, many crimes do not provide for the disability of the victim to be considered as an aggravating factor, but the 'burden' of supporting a person with disability may, in some instances be used to mitigate against criminal responsibility. Evidence suggests that sentencing, especially of family members who have committed crimes against their children with disability may be less harsh because the 'burden' of supporting their child is considered a legitimate factor to reduce prison terms.[349]

214. For people with disability in institutional and residential settings, barriers can make it almost impossible to access justice, seek protection and achieve redress. For example:

- The reframing of violence, abuse and neglect, including crimes are often reframed by terminology such as 'abuse' or 'service incidents'. This creates a greater potential for such 'incidents' to go undetected, unreported, and not investigated or prosecuted because they are more likely to be dealt with administratively within the service setting. For example, research suggests that disability service providers have wide discretion in determining whether an alleged 'incident' of sexual assault against people with disability justifies reporting the 'incident' to the police, even if there is a requirement of mandatory reporting.[350]

- Police often treat reports of violence, abuse and neglect experienced by people with disability differently to people without disability. This is particularly the case where there is a perception that the person with disability is already being 'cared' for in an institutional or residential setting, even when the violence, abuse and neglect has been reported as occurring in that facility. There is an assumption that the facility deals with people with disability and that it is not a police matter. In many cases, people with disability are returned back to these facilities, and these incidences remain 'hidden' and unacknowledged.[351]

- A reliance on assistance, support and personal care in relationships support workers and service providers can create a level of dependency and sometimes powerlessness, and a fear that disclosure of violence, abuse and neglect will place these relationships at risk.[352]

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[345] For different examples of training programs for Court staff see NSW Attorney General's Department, *'Disability Strategic Plan'*, and Victorian Department of Justice, *'Disability Action Plan'*, Disability issues or discrimination law is currently not compulsory for Australian law graduates.
[346] Louis Schetzer and Judith Henderson, *'Access to Justice and Legal Needs, Stage 1 Public Consultations'* (Report, Law and Justice Foundation of NSW, 2003) 216, 225, www.lawfoundation.net.au/report/consultations
[347] Victorian Equal Opportunity and Human Rights Commission (2014), op cit, pp.20-21
[348] Ibid.
[349] Sullivan, C. (2015) OpCit.
[350] Suellen Murray and Anastasia Powell, *'Sexual Assault and Adults with a Disability: Enabling Recognition, Disclosure and a Just Response'* (Issues Paper No 9, Australian Centre for the Study of Sexual Assault, 2008) 9–10, http://www.aifs.gov.au/acssa/pubs/issue/acssa_issues9.pdf
[351] CRPD Civil Society Parallel Report Group, op.cit, para 280.
[352] French, P. et al (2009) OpCit, Suellen Murray and Anastasia Powell, OpCit, 7.

- The greater risks and actual incidences of violence, abuse and neglect in institutional and residential settings mean that these experiences are 'normalised', and not recognised or reported by residents and staff as violence, even when they constitute crimes.[353]

- There are few gender and age specific programs for people with disability aimed at empowerment, increasing self-esteem and knowledge of rights and what to do if these rights are breached.[354]

215. The barriers to seeking legal protection for people with disability in institutional and residential settings mean that perpetrators of violence often seek out and move between these environments as violence is highly unlikely to be reported or prosecuted. This undermines the intent of criminal record checks if no criminal convictions are ever recorded.

216. In 2013, the CRPD Committee expressed concerns about the lack of guidance on access to justice for people with disability and that justice systems did not allow for different forms of communication. It recommended justice system training on working with people with disability be mandated and that laws and policy be amended to ensure access to justice.[355]

[353] CRPD Civil Society Parallel Report Group, op. cit., para 281(b)
[354] French, P. et al (2009) OpCit.
[355] CRPD/C/AUS/CO/1, para 28

SECTION 6: FAILURES IN THE AUSTRALIAN LEGISLATIVE, POLICY AND SERVICE LANDSCAPE

217. People with disability in Australia represent the most detained and violated sector of our population - disproportionality prevalent in prisons, institutionalised and segregated within communities, locked up in schools, confined in mental health facilities, incarcerated in detention centres, and trapped within their own homes. Wide-ranging systemic failures in legislation, policies and service systems in Australia facilitate conditions that give rise to torture and ill-treatment of people with disability. These failures are embedded within and underscored by an ableist culture which sees the promotion and support of laws, systems, policies and practices which not only deny people with disability their right to legal capacity but which provide a legitimised gateway through which torture and ill-treatment against people with disability can flourish.

218. Successive Australian governments have failed (and continue to fail) to apply and act with due diligence to protect the rights of all people with disability at risk of torture and ill-treatment.[356] They have failed to give effect to Australia's international human rights obligations in understanding, preventing and addressing violence experienced by people with disability. They have failed to create effective systems and structures that address the root causes and consequences of violence against people with disability. They have failed to take all appropriate measures (including legislative, institutional and regulatory) to prohibit all forms of violence against people with disability, whether the violence takes place in private or public.[357] Critically, they have failed to provide and ensure available, effective, independent and impartial remedies (including the right to redress and transitional justice) to people with disability who have experienced torture and ill-treatment through violence.

ISSUES IN LEGISLATION

219. Australia has clear obligations under international human rights law to enact, implement and monitor legislation addressing all forms of violence against people with disability, including its gender-based dimensions, and including those egregious forms of violence that affect people with disability disproportionately, such as forced sterilisation, forced institutionalisation and forced abortion.[358] The incorporation of international human rights law into the domestic legal, judicial and administrative order at every level and the adoption of measures for implementation are critical prerequisites for Australia's capacity and responsibility to meet its obligations to not only ensure legal protection for people with disability, but also to promote a culture where no form of violence against people with disability is tolerated.[359]

220. Despite the epidemic of violence against people with disability in Australia, there is no specific legal, administrative or policy framework for the prevention, protection, investigation and prosecution of violence against people with disability. Although Australia has a number of laws, policies, frameworks and service systems to prevent and address violence, and to advance the human rights of people with disability, these are grossly ineffective for people with disability experiencing, or at risk of experiencing violence.

221. In recognising that violence perpetrated against people with disability in institutional and residential settings, constitutes torture and ill-treatment,[360] the lack of a specific legislative framework (such as a judicially-enforceable Human Rights Act) to address and prevent acts of torture and ill-treatment remains problematic. Although the Australian Government signed the Optional Protocol to the

[356] State responsibility to act with due diligence is both a systemic-level responsibility, i.e. the responsibility of States to create good and effective systems and structures that address the root causes and consequences of violence against people with disability; and also an individual-level responsibility, i.e., the responsibility of States to provide each victim with effective measures of prevention, protection, punishment and reparation. See for example: UN General Assembly, *Report of the Special Rapporteur on violence against women, its causes and consequences* [Rashida Manjoo], Human Rights Council Twenty-third session, 14 May 2013, UN. Doc. A/HRC/23/49. See also: Abdul Aziz, Z. & Moussa, J. (2014) *Due Diligence Framework: State Accountability Framework for Eliminating Violence against Women*. International Human Rights Initiative, Inc. (IHRI).
[357] UN General Assembly, Report of the Special Rapporteur on violence against women, its causes and consequences, OpCit.
[358] United Nations General Assembly (2012) *Thematic study on the issue of violence against women and girls and disability*: Report of the Office of the United Nations High Commissioner for Human Rights (A/HRC/20/5)
[359] Ibid.
[360] As defined and recognised in international human rights law.

Convention Against Torture (OPCAT) in May 2009, it is yet to ratified and implemented domestically by the Australian Government.[361] This means that people with disability experiencing acts of torture and ill treatment in institutional and residential settings have no effective remedy or redress under the Convention Against Torture (CAT).

222. Current family and domestic violence legislation in Australia provides an example of where legislation aimed predominately to address violence against women, offers little protection for people with disability (particularly women and girls) in institutional and residential settings. For example, across Australia, there is no uniform definition or consensus as to what constitutes violence against women.[362] It is generally understood in the context of 'domestic', 'spousal', 'intimate partner' or 'family' violence', and this conceptualisation is reflected in most domestic and family violence legislation in Australia. However, domestic and family violence legislation differs across States and Territories - providing different levels of protection and definitions of what constitutes 'domestic violence' and/or 'family violence' and what constitutes a 'domestic relationship'. Some broader definitions include residential settings, such as group homes and institutions, where people with disability often live and interact domestically with co-residents, support workers, service managers, visitors and a range of other staff.[363] However, even where there are broader definitions, domestic and family violence legislation is rarely utilised, largely because violence perpetrated against people with disability in institutional and residential settings is not characterised as domestic/family violence and rarely are domestic violence related interventions deployed to deal with this type of violence.[364] Where narrower definitions apply, which is the case in most domestic and family violence legislation, people with disability in institutional and residential settings are completely excluded from these protections.

223. An analysis of existing domestic and family violence legislation in Australia indicates that it is neither embedded nor operationalised in a comprehensive human rights frame, it is piecemeal and inconsistent in definitions and scope, does not capture and encompass the various forms of violence as experienced by women with disability in their domestic settings, focuses largely on protection from traditional forms domestic/family violence after the violence has occurred, and offers little in the way of providing legal protection for people with disability, particularly women and girls, including those in institutional and residential settings.[365] In addition, whilst it may be nominally possible for women with disability who experience violence to take measures such as apprehended or personal violence orders, the practical likelihood of such measures being taken by women with disability in institutional settings is minimal. Instead, rather than promoted by legislation, their access to effective protection is dependent on mediation and intervention by others such as staff or carers, who may also be the perpetrators of the violence.[366]

224. Guardianship law and mental health legislation are examples of current legislative frameworks that, by their very nature, give rise to the perpetration of torture and ill-treatment of people with disability in institutional and residential settings. State and territory guardianship and mental health laws primarily regulate the area of legal capacity and substitute decision-making in Australia. While state and territory laws in this area vary, they all breach, are inconsistent with, or fail to fulfil Australia's obligations under international human rights law, including for example Article 12 of the Convention on the Rights of Persons with Disabilities (CRPD). These state and territory laws provide different and inconsistent tests for assessing a person's ability to exercise legal capacity, which leads to uncertainty, confusion and inappropriate application of legal principles. There is no nationally consistent legislation that outlines principles and provisions for assessing what constitutes a valid decision that should be recognised by the law. Moreover, existing legislation does not focus on

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361 *Joint NGO report to the United Nations Committee Against Torture* (October 2014) OpCit.

362 The 1993 United Nations Declaration on the Elimination of Violence Against Women defines violence against women as *"any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life". See also:* Australian Bureau of Statistics (ABS) (2006) *Personal Safety Survey Australia 2005.* Australian Bureau of Statistics, Canberra, (Re-issue) Cat. No. 4906.0.

363 *'Disability Rights Now'* Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities; August 2012.

364 Frohmader, C. & Swift, K. (2012) Opening minds & opening doors: Re- conceptualising 'domestic violence' to be inclusive of women with disabilities in institutions. *CDFVRe@der*, Vol. 11, No. 2, pp. 7-8. See also *'Disability Rights Now'*, OpCit.

365 Frohmader, C., Dowse, L., & Didi, A. (2015) OpCit.

366 Women With Disabilities Australia (WWDA) (2007b) *'Forgotten Sisters - A global review of violence against women with disabilities'*. WWDA Resource Manual on Violence Against Women With Disabilities. Published by WWDA, Tasmania, Australia.

measures (such as supported decision making) that would enable or support a person with disability to make decisions so that their decisions are recognised as valid before the law.[367]

225. For example, in In 2012, the Western Australian Government released its *Draft Mental Health Bill 2011*, which proposed to legislate that a sterilisation procedure could be performed on a child who has a mental illness provided that the child has sufficient maturity and understanding to make reasonable decisions about matters relating to himself or herself and/or the person has given informed consent to the sterilisation procedure being performed.[368] Although this particular clause was removed from the draft Bill after civil society outrage and intervention, the current Western Australian Mental Health Act 2014 still makes provision for forced treatments, including for example forced Electroconvulsive therapy (ECT) on children.[369]

226. The *Disability Discrimination Act (DDA) (1992)* and other State and Territory anti-discrimination legislation provide limited scope for people with disability experiencing violence in institutional and residential settings.[370] Publicly funded institutions providing accommodation for people with disability such as group homes, institutions and boarding houses, as well as prisons, are largely conceptualised as being within the private sphere, that is, domestic arrangements which are publicly funded.[371] Compliance with the DDA is driven mainly by a system of individual complaints, through which people with disability enforce their rights. However, the realistic likelihood of people with disability in institutional settings being able to seek redress through anti-discrimination legislation such as the DDA, for acts of violence perpetrated against them, is minimal. The DDA has never been used in relation to violence against people with disability in institutional settings, as it is essentially designed to prohibit discrimination against people with disability in the areas of employment, education, the provision of goods, services and facilities, and access to premises.[372] In addition, there remain face significant barriers and disincentives for people with disability generally, to using the complaints processes available within disability specific legislation.[373]

227. The *National Disability Insurance Scheme*[374] *(NDIS) Act 2013*[375] is a pertinent example of how Governments may be unintentionally complicit in rendering crimes of violence against people with disability in institutional and residential settings invisible, and/or minimised. The objects of the NDIS Act 2013, amongst other things, are to "give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities" and to give effect to Australia's obligations under the other international human rights treaties to which it is a party.[376] The NDIS Act contains General Principles guiding all actions under the Act, and includes a specific principle drawn from CRPD Article 16, stating that "people with disability have the same right as other members of Australian society to respect for their worth and dignity and to live free from abuse, neglect and exploitation". Article 16 of the CRPD however, indicates that States Parties "shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, ***violence*** and abuse, including their gender-based aspects". Omission of the word 'violence' from the principles of the NDIS Act may seem, on face value, relatively inconsequential. However, as previously highlighted, the use of the term 'abuse' instead of 'violence' serves to minimise the severity of crimes perpetrated against people with disability; can be used to deliberately de-criminalise or trivialise serious offences, and results in poor or inappropriate service responses.[377] In this context, it remains unlikely that the NDIS

[367] People with Disability Australia (2014) OpCit.
[368] Western Australia Mental Health Bill 2011 [Draft Bill for public comment] Sterilisation Procedure (at Part 12, Division 3; paragraphs 208-210, pp.135-136).
[369] See: *Western Australia Mental Health Act 2014* (No. 24 of 2014), Part 14; Para 196.
[370] A Review of the DDA undertaken by the Productivity Commission in 2004, found that the DDA had been more effective for people with physical disabilities and sight or hearing impairments than it had been for people with other disabilities (such as intellectual disability and mental illness). The DDA had been of limited effect for people with multiple disabilities, people living in institutions, as well as for indigenous Australians, people from Non-English speaking backgrounds, and those living in rural areas. See: Productivity Commission (2004) *Review of the Disability Discrimination Act 1992*, Report no. 30, Melbourne.
[371] STVP Background
[372] Frohmader, C. (2011) OpCit.
[373] For a further discussion on barriers to using anti-discrimination legislation, see: Frohmader, C. (2011) OpCit.; Dowse, L. et al (2013) OpCit; and French, P. (2007) OpCit.
[374] The NDIS is a new way of providing individualised support for eligible people with permanent and significant disability, their families and carers. It will progressively replace the existing disability arrangements in the states and territories participating in the NDIS (Western Australia has made no commitment to the full rollout of the NDIS) and the Commonwealth. See: http://ndis.gov.au/
[375] https://www.comlaw.gov.au/Details/C2013A00020
[376] See: *National Disability Insurance Scheme Act 2013* Part 2: 3 (1)(a); Part 2: 3 (1)(i).
[377] Women With Disabilities Australia (WWDA) (2007b); Dowse, L. et al (2013) OpCit;

Act 2013 can provide access to effective protection for people with disability experiencing violence in institutional and residential settings.

228. The *Disability Services Act (1986)* provides a legislative framework for a range of disability services, to assist people with disability to receive services 'necessary to enable them to work towards full participation as members of the community' and to assist them to achieve 'positive outcomes, such as increased independence, employment opportunities and integration in the community.' The Disability Services Act makes provisions for a set of guiding standards for the delivery of quality services known as the Disability Services Standards. The Act itself is not set in a human rights framework, is not gendered and makes no provision for the Disability Services Standards to be developed in a human rights context. Although the Disability Services Standards have been re-developed in recent years to recognise rights under the CRPD, the level of torture and ill-treatment of people with disability within disability service settings (including institutional and residential settings) clearly demonstrate that the Standards are not embedded into a robust, rigorous and enforcable compliance framework. Furthermore, issues identified with the Standards include that they rely on service providers having a working knowledge of what constitutes violence against people with disability (including the intersectional nature of the violence that they experience); they are essentially adult focused, and are concerned primarily with the collection of quantitative data rather than incorporating in-depth qualitative reporting methods for service recipients, which would be more likely to reveal experiences of violence.[378]

229. Most State and Territory disability services legislation (*Disability Services Acts*) are out-dated and not set in a human rights framework. They are not gendered and make no reference to violence in any context. Most of the State and Territory Disability Services Acts were enacted in the early 1990's to give effect to the Commonwealth *Disability Services Act 1986*. Several jurisdictions have identified the need to review and update their Disability Services Act as part of their implementation of the *National Disability Strategy* (NDS). State and Territory disability services legislation remain largely ineffective in providing for effective protection for people with disability experiencing violence in institutional and residential settings.

230. The importance of legislation in combating violence (particularly violence against women) has been well documented. The law provides the institutional framework for defining and responding to violence - it sets the boundaries of what is deemed acceptable and unacceptable; it has the potential to provide clear definitions of the various forms of violence and those actions that are defined as criminal; and it sends out a strong message that violence is a public issue not a private concern. Legislation is also one of the most important routes whereby protection, redress, and justice are created.[379]

231. International human rights treat monitoring bodies have consistently expressed their concern at the lack of federal legislation in Australia for the protection of women and 'marginalised groups' against all forms of violence (particularly gender based violence). In recognising the gendered nature of violence, the human rights treaty monitoring bodies have repeatedly recommended that Australia develop national legislation to prevent and address violence against women, in all its forms. [380]

232. Comprehensive, inclusive and coherent human rights-based legislation is fundamental for an effective and coordinated response to preventing and addressing violence against people with disability, including those in institutional and residential settings. [381]

233. A number of DPOs and advocates have argued that, in order to drive the social, cultural and behavioural shifts required to eliminate violence, (particularly violence against women) Australia

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[378] Dowse, L. et al (2013) OpCit;

[379] Goldfarb, S. (2005) *Combating Violence Against Women in the Legal Domain*. Paper prepared for the *'Violence Against Women: Good practices in combating and eliminating violence against women' Expert Group Meeting.* Organised by the UN Division for the Advancement of Women in collaboration with the UN Office on Drugs and Crime. Vienna, Austria.

[380] Committee on the Elimination of Discrimination against Women (2010) *Concluding observations of the Committee on the Elimination of Discrimination against Women: Australia*. CEDAW Forty-sixth session, 12 – 30 July 2010. CEDAW/C/AUS/CO/7.

[381] United Nations Department of Economic and Social Affairs (2010) *Handbook for Legislation on Violence against Women*, Division for the Advancement of Women, New York. See also: The Advocates for Human Rights (2011) *Developing Legislation On Violence Against Women And Girls*, UN Women, http://www.endvawnow.org/en/modules/view/8-legislation.html

would benefit from national uniform 'violence against women' legislation, modelled on the *Istanbul Convention*.[382] This Convention, developed by the Council of Europe,[383] creates a blueprint for a co-ordinated, victim-centred approach to combating all forms of violence against women and domestic violence. It defines and criminalises the various forms of violence against women as well as domestic violence and includes for example, female genital mutilation, forced marriage, forced abortion and forced sterilisation. It recognises the obligation of the state to fully address it in all its forms and to take measures to prevent violence against women, protect its victims and prosecute the perpetrators. The Convention applies equally to girls under the age of 18 years. The Convention prioritises prevention of violence, and includes detailed measures for protection, prosecution, integrated policies, and monitoring. It gives significant attention to women and girls with disability.

234. Importantly, whilst the *Istanbul Convention* addresses all forms of violence against women (including domestic violence as a form of gender-based violence), it does not lose sight of men, children and elderly victims of domestic violence, to whom the Convention may be applied if states parties wish.[384]

ISSUES IN POLICY FRAMEWORKS

235. Current policies and discourses around the prevention of violence in Australia are predominantly focused on addressing and preventing 'domestic/family violence'. Recent events, (such as the Victorian Government announcement of a Royal Commission into Family Violence; the Senate Inquiry into Domestic Violence; the profile and media coverage of family violence campaigner Rosie Batty; the establishment of the Prime Ministers National Advisory Panel on Domestic and Family Violence; the COAG announcement of $30 million on a national awareness campaign to stop domestic violence, and so on) have been successful in placing 'domestic/family violence' firmly onto the national agenda and into the consciousness of the public. Whilst this is welcomed and arguably long overdue, it presents both risks and challenges for people with disability, particularly those in institutional and residential settings, in that the focus on narrow conceptual understandings of 'domestic/family violence' as spousal and/or intimate partner violence, risks seeing other forms of violence against people with disability become further obscured, resulting in the marginalisation of people with disability in policies and service responses designed to address and prevent violence.

236. The primary policy responses to preventing and addressing violence against people with disability in Australia include the *National Disability Strategy 2010-2020* (NDS),[385] the *National Plan to Reduce Violence Against Women and their Children 2010-2022* (the National Plan),[386] the *National Framework for Protecting Australia's Children 2009-2020;* and the current development of the *National Disability Insurance Scheme Quality and Safeguarding Framework*.[387]

237. The *National Disability Strategy* (NDS) sets out the national policy framework for guiding Australian governments to meet their obligations under the CRPD. The NDS is supported by three Implementation Plans developed over its ten-year life span. The NDS is not gendered - it treats men and women with disability as a homogenous group. Referring only to 'people with disability' in all elements of the Strategy, the NDS assumes and implies that all women/girls and men/boys with disability, share the same needs and perspectives, have a common set of issues, and experience disability in the same way.[388] The NDS excludes appropriate and concrete consideration of intersectionality, which has the potential to perpetuate discrimination (and gender inequality), and

[382] For information on the *Istanbul Convention*, go to: http://www.coe.int/t/dghl/standardsetting/convention-violence/default_en.asp; For a copy of the *Istanbul Convention*, go to: http://www.coe.int/t/dghl/standardsetting/convention-violence/convention/Convention%20210%20English.pdf
[383] The Council of Europe is the continent's leading human rights organisation. It includes 47 member states, 28 of which are members of the European Union. See: http://www.coe.int/en/web/about-us/who-we-are
[384] Frohmader, C. & Cadwallader, J. (2014) OpCit.
[385] Commonwealth of Australia (2011) *National Disability Strategy 2010-2020*; Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), Canberra.
[386] https://www.dss.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022
[387] The NDIS Quality and Safeguarding Framework will replace existing state-based arrangements and is intended to give participants choice and control over their supports and allow people to take reasonable risks to achieve their goals. The Framework is intended to be risk-based and will apply only to supports funded through the NDIS. See: https://engage.dss.gov.au/ndis-qsf/
[388] Ibid.

result in misleading analyses of issues and/or inaccurate assessments of likely policy outcomes.[389] The NDS contains limited measures to address violence against people with disability, identifying only that there is a need to *'develop strategies to reduce violence, abuse and neglect of people with disabilities*'. The first NDS Implementation Plan - *Laying the Groundwork: 2011–2014* - contains only one specific action to achieve this, which is to: 'ensure that the *National Plan to Reduce violence against women and their Children 2010–2022* and the *National Framework for Protecting Australia's Children* have priority action to improve the safety and wellbeing of women and children with disability.'[390] In addition, the NDS is under-resourced, has inadequate measures for accountability, has inadequate performance indicators, and lacks an over-arching mechanism to drive and co-ordinate its implementation.[391] Alarmingly, the only indicator in the NDS to measure the 'reduction of violence, abuse and neglect of people with disability' is by measuring 'Feelings of safety in different situations' (with the different situations being 'At home alone during the day'; 'At home alone after dark'; 'Walking alone after dark'). Clearly, this sole indicator is completely ineffective in understanding, monitoring and addressing the myriad forms of violence experienced by people with disability, including (and particularly) those in institutional and residential settings. [392]

238. The *National Plan to Reduce violence against women and their Children 2010–2022'* has significant limitations in addressing and preventing violence against women ad girls with disability in institutional and residential settings. It focuses on traditional notions of domestic/family violence (ie: intimate partner/spousal violence) and sexual assault, and has little emphasis on girls with disability. It fails to address the many forms of violence perpetrated against women and girls with disability (such as sexual and reproductive rights violations; restrictive practices; forced treatment; seclusion and restraint; deprivation of liberty) and the many settings and spaces in which violence against women and girls with disability occurs (such as institutions, service settings, out-of-home care). These forms of violence and settings currently fall 'outside' the scope of the *National Plan*. Whilst the second three year action plan of the National Plan [*'Moving Ahead 2013-2016'*], does prioritise women with disability[393] by providing the opportunity to *'prioritise and implement key outcomes from the Stop the Violence Project (STVP)'*,[394] the STVP was itself, limited in scope as its contracted focus was on building the evidence base to reform service provision for women with disability who are experiencing or at risk of violence. The STVP was unable to *'address the myriad issues and complexities inherent in the multiple forms of violence perpetrated against women with disabilities'.*[395]

239. The *National Framework for Protecting Australia's Children 2009-2020* contains very limited reference to disability across the six intended outcomes. Indeed, the primary action in relation to children with disability is to 'enhance support' to achieve Outcome 3, in which the disability of a child is problematically understood as a 'risk factor' for child abuse or neglect. The other 5 outcomes, which include ensuring that *'child sexual abuse and exploitation is prevented and survivors receive adequate support,'* include no reference to disability. Essentially, this means that the only appearance that children with disability make in the *National Framework for Protecting Australia's Children* is where their disability is treated as a cause of the violence and abuse they experience: a

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389 For example, Outcome Area 2 of the National Disability Strategy (NDS) [Rights protection, justice and legislation] has five key Policy Directions to meet this outcome. Policy Direction 4 is: *'People with disability to be safe from violence, exploitation and neglect'*. However, the actions designed to address Policy Direction 4 exclude consideration of intersectionality are therefore not necessarily appropriate for women with disability, children with disability, Aboriginal and Torres Strait Islander people with disability, or people with disability from non-English speaking and culturally or linguistically diverse backgrounds. For a more detailed discussion of these issues, see: Frohmader, C. (2014) Op Cit.

390 Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)(2013) *National Disability Strategy 2010 – 2020 Report to the Council of Australian Governments 2012*.

391 In Frohmader, C. (2014) OpCit.; See also: *'Disability Rights Now'* Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities; August 2012.

392 In Frohmader, C. (2014) OpCit.;

393 Commonwealth of Australia (2014) *Second Action Plan 2013-2016 – Moving Ahead – of the National Plan to Reduce Violence against Women and their Children 2010-2022*. Department of Social Services, Canberra.

394 The *'Stop the Violence Project'* (STVP) emerged from WWDA's long standing commitment to addressing one of the most pressing issues for its membership: violence against women and girls with disabilities in Australia. Managed and implemented by WWDA, in conjunction with a research team at the University of New South Wales (UNSW) and a project team from People with Disabilities Australia (PWDA), the project was national in scope and its intent was to lay the groundwork for improved service provision by building the evidence-base for future reforms so that the service system is more responsive to the needs of women and girls with disabilities.

395 Women With Disabilities Australia (WWDA), People with Disabilities Australia (PWDA) and the University of New South Wales (2013) *'Stop the Violence: Addressing Violence Against Women and Girls with Disabilities in Australia';* Report of the Proceedings and Outcomes of the National Symposium on Violence against Women and Girls with Disabilities; Sydney, 25 October 2013. WWDA, Hobart, Tasmania. See also: Dowse, L. et al (2013) OpCit.

clear case of blaming the victim.[396] Although the research priorities under the Framework include disaggregating by disability, much of the research has excluded those settings where children with disability are overrepresented and where violence is endemic, including for example, out of home care run by disability service providers, psychiatric facilities and hospitals. [397]

240. The *National Disability Insurance Scheme Quality and Safeguarding Framework*[398] is currently under development. The NDIS Quality and Safeguarding Framework will replace existing state-based arrangements and is designed to give participants choice and control over their supports and allow people to take reasonable risks to achieve their goals. Central to the Framework are developmental safeguards designed to make sure participants have the *"capabilities and supports to be able to choose quality supports and to build good and safe lives."*[399] A national consultation has taken place to assist in informing the development of the NDIS Q&S Framework, and 'next steps' in the development process are currently being determined through Commonwealth-State processes. However, although the Framework is yet to be finalised, DPOs have expressed deep concern at the proposed framework that formed the basis of national consultations. It is outside the scope of this Submission to detail the wide range of concerns expressed by people with disability and their representative organisations at the proposed draft, however key issues include:

- lack of full compliance with the CRPD on which it is premised, particularly in relation to Article 12 [Equal recognition before the law];
- failure to address and operationalise issues of intersectionality, including gender;
- the focus on when and how to 'authorise' restrictive practices rather than preventioning their use;
- the use of out-dated and non-rights based languarege and interpretations;
- the fact that it only applies to services providing supports to NDIS particpatnts;
- the assumption that a market-driven NDIS will stimulate greater choice and control for people with disability;
- the lack of an independent market regulaton authority to monitor the NDIS market;
- the assumption that the current specialist disability and mainstream service systems alraedy protect people with disability, particularly women and children with disability from violence, exploitation and harmful practices;
- the assumption, that disability and mainstream supports are robust, and the interaction between these systems is seamless;
- the failure to recognise the critical role of DPOs and independent advocacy in ensuring quality and safeguarding for people with disability.

241. These policy frameworks, including at the level of their operationalisation, have found to not only be ineffective in preventing and addressing violence against people with disability in institutional and residential settings, but also contribute to violence against people with disability being hidden and/or obscured.

ISSUES IN COMPLAINTS MECHANISMS

242. In relation to disability service providers and settings, the Commonwealth and the states and territories currently have a variety of ways of handling complaints, whether made by people with disability themselves, family and friends, or third parties.[400] Most states and territories currently require reporting of 'serious incidents' (also referred to as 'critical incidents') which are considered as 'events which threaten the safety of people or property', and may include for example:

- the death of, or serious injury to, a service recipient;
- allegations of, or actual, sexual or physical assault of a service recipient;
- significant damage to property or serious injury to another person by a service recipient.

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396 Frohmader, C. & Cadwallader, J. (2014) *Joint Submission from National Cross-Disability Disabled People's Organisations (DPO's) to the Senate Standing Committee on Finance and Public Administration 'Inquiry into Domestic Violence in Australia'.* Available at: http://wwda.org.au/wp-content/uploads/2013/12/Final_Draft_DPO_Sub_DV_Senate2014.pdf

397 Sobsey, R. (1994) *'Violence and Abuse in the Lives of People with Disabilities: The End of Silent Acceptance?'* Baltimore: Paul H Brookes Publishing Co.

398 The NDIS Quality and Safeguarding Framework will replace existing state-based arrangements and is intended to give participants choice and control over their supports and allow people to take reasonable risks to achieve their goals. The Framework is intended to be risk-based and will apply only to supports funded through the NDIS.

399 Department of Social Services (February 2015), *'Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework'*. Prepared by the NDIS Senior Officials Working Group for the Disability Reform Council.

400 Ibid.

243. The very fact that the disability service system continues to use the language and terminology of 'serious incidents' or 'critical incidents' to describe events such as "death" and/or "sexual assault" reflects the systemic and entrenched ableist culture that permeates the system. This language and terminology is a euphemism for what is understood and recognised in the broader community as violence, rape, sexual and physical assault, grievous bodily harm, domestic violence, gender-based violence etc.[401]

244. Notification requirements and the analysis of the data obtained currently differ substantially between jurisdictions. In most states and territories, 'serious incidents' in funded disability services are required to be reported to the funding agency.[402] This presents an inherent conflict of interest, and has been found to be a major problem in the reporting (and non-reporting) of violence against people with disability in institutional and residential settings. There is now indisputable evidence to demonstrate that the 'covering up' of complaints, 'serious/critical' and other 'incidents', is rampant at all levels of the system – at the direct service delivery level, at management and governance levels, and at 'funding agency' levels, including large Government Departments.[403]

245. In addition, the widespread problem of 'whistleblowers' being bullied, harassed, persecuted, intimidated, deployed to other positions, and sacked, when reporting (or attempting to report) violence against people with disability in institutional and residential settings – is yet another serious dimension in the complaints processes and mechanisms, and remains an un-addressed, systemic issue nationwide.[404]

246. Although there are a variety of complaints mechanisms throughout Australia which can be used to report violence against people with disability in some institutional and residential settings, these mechanisms have been found to have limited effect in investigating, responding to, and preventing violence against people with disability across the range of settings and spaces where such violence occurs. Examples of such mechanisms include: state and territory Ombudsman, Disability Commissioners and Public Advocates, although not all states and territories have all of these roles. At the national level, the National Disability Abuse and Neglect Hotline is promoted as a complaints mechanism.

247. Ombudsman, Disability Commissioners and Public Advocates all have significant limitations, due to a range of factors, including for example, different mandates, different roles and responsibilities, limited capacity to investigate and impose sanctions, and lack of own-motion powers to investigate. Many are empowered only to consider decisions made within disability services and provide reports and recommendations. Compliance with these reports and recommendations has been found to be low.[405] For example, an investigation by the NSW Ombudsman in 2011 into residents with psychosocial and intellectual disabilities living in boarding houses licensed by the state government, found that residents had been physically and sexually assaulted by staff and other residents, had

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[401] People With Disability Australia (PWDA) and Women With Disabilities Australia (WWDA) (2015) *Submission to the Consultation Paper – Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework*. Available at: http://wwda.org.au/wp-content/uploads/2015/06/NDIS_QSF_PWDA_WWDA_Final.pdf

[402] In some cases there are requirements to report some or all incidents to independent agencies such as police or complaints commissioners.

[403] See for eg: McKenzie, N, & Baker, R. (August 12, 2012) 'Yooralla incident poorly handled', *The Age Newspaper*; Accessed at: http://www.theage.com.au/national/yooralla-incident-poorly-handled-20120820-24io8.html; Baker, R. & McKenzie, N. (July 29, 2013) 'Host of problems at home in crisis', *The Age Newspaper;* Accessed at: http://www.theage.com.au/victoria/host-of-problems-at-home-in-crisis-20130728-2qsmq.html; McKenzie, N, & Baker, R. (December 10, 2013) 'Two Yooralla staff at Benalla accused of sexual misconduct'; *The Age Newspaper;* Accessed at: http://www.theage.com.au/victoria/two-yooralla-staff-at-benalla-accused-of-sexual-misconduct-20131209-2z1uw.html; McKenzie, N., Michelmore, K. & Cronau, P. (24th November, 2014) *'In Our Care'*; Four Corners, ABC TV; Accessed at: http://www.abc.net.au/4corners/stories/2014/11/24/4132812.htm; *DPP v Kumar* [20 November 2013] VCC; Commission for Children and Young People, *"...as a good parent would..."* Inquiry into the adequacy of the provision of residential care services to Victorian children and young people who have been subject to sexual abuse or sexual exploitation whilst residing in residential care (Melbourne: Commission for Children and Young People, 2015); Baker, R. & McKenzie, N. (2011) Patient 'silenced' after sex abuse. *The Age Newspaper*, November 21, 2011. Accessed at: http://www.theage.com.au/victoria/patient-silenced-after-sex-abuse-20111120-1npeh.html; Brouwer, G. (2011) *Ombudsman Investigation Assault of a Disability Services Client by Department of Human Services Staff.* Ombudsman Victoria. Accessed online October 2011 at: http://www.ombudsman.vic.gov.au/resources/documents/Assault_of_a_Disability_Services_Client_by_Department_of_Human_Services_Staff.pdf; Office of the Health Complaints Commissioner (Tasmania) (2005) *Report of an investigation into Ward 1E and Mental Health services in Northern Tasmania.* Report by the Health Complaints Commissioner, Tasmania. See also: Victorian Ombudsman (June 2015) *Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight.* Melbourne, Victoria.

[404] See for eg: McKenzie, N., Michelmore, K. & Cronau, P. (24th November, 2014) *'In Our Care'*; Four Corners, ABC TV; Accessed at: http://www.abc.net.au/4corners/stories/2014/11/24/4132812.htm;

[405] See for eg: NSW Ombudsman (2011) *More than board and lodging: the need for boarding house reform*. NSW Ombudsman, Sydney.

died in appalling circumstances, and been denied basic rights, including contact with their families.[406] Disturbingly, the report from the investigation was the Ombudsman's fourth in less than 10 years on the failure of the state to protect boarding house residents, in particular those with psychosocial and intellectual disabilities. In releasing the report of the 2011 investigation, the Ombudsman stated:

> *"My office has made many recommendations over the past nine years aimed at improving the circumstances of people living in licensed boarding houses and progressing the broader reforms. We have received repeated advice from ADHC about its intentions to progress a review of the legislation governing licensed boarding houses, and interagency work to explore options for reform of the boarding house sector. However, almost a decade in, the legislative review has not been completed, and no decisions have been made about the proposed reforms. The slow pace of work and the lack of practical action to commence necessary reforms are unreasonable given the implications for the individuals living in boarding houses. The need for concerted and sustained cross-government action to achieve real and improved outcomes for people living in licensed and unlicensed boarding houses is overdue."*

248. Where they exist the role of Public Advocates also vary. They too can be limited in their scope and power to prevent and respond to violence and abuse of people with disability (particularly outside disability service settings), and have, in recent years spoken out about their lack of investigative powers and also the failure of laws in protecting people with disability from violence and abuse.[407] The effectiveness of Disability Services Commissioners in investigating and addressing and complaints relating to violence against people with disability (including those in institutional and residential settings) remains questionable. For example, in June 2015, Victoria's Disability Services Commissioner publicly defended his decision not to conduct any investigations between 2010-2014 "despite lots of complaints" (including complaints of sexual violence and abuse against people with disability in institutional settings) because he believed he had "he had no legal remit to do so and that it was a matter for police." He further advised that rather than conduct a single investigation in more than 4 years, his office had adopted an 'alternative dispute resolution process that was focused on finding resolutions'.[408] The very notion of 'soft' forms of resolution (such as mediation and conciliation) in this context is startling. These forms of 'resolution' would never be considered appropriate responses to allegations of sexual violence and abuse of people *without* disability. Such responses not only undermine the significance of the crime, they also have the potential to enable perpetrators continued access to their victim/victims and to endanger the safety of other potential victims. Critically and disturbingly, such responses provide no understanding of the inherent power differential between a perpetrator and their victim/s.

249. Community Visitor schemes (although again, not all states and territories have these schemes) may provide a limited safeguard for *some* people with disability in *some* institutional and residential settings. However, their role and function varies, depending on jurisdiction. In Victoria, for example community visitors are volunteers empowered by law to visit Victorian Government funded disability accommodation services, supported residential services and mental health facilities at any time, unannounced. Community Visitors raise issues with management of the service and the funding agency (a Government Department), and in cases of abuse or neglect Community Visitors notify the Public Advocate. The findings, observations and recommendations of Community Visitors are compiled in an annual report to Victorian Parliament.[409] In 2013-14, the Office of the Public Advocate

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[406] NSW Ombudsman (2011) *More than board and lodging: the need for boarding house reform*. NSW Ombudsman, Sydney. See also: See: *'PWD Advocacy and Grand Western Lodge'* at: http://www.pwd.org.au/gwl.html for a more detailed background. See also: Horin, A. (2011) Shocking abuse and neglect revealed in boarding houses across NSW. *The Sydney Morning Herald*, August 17, 2011; Accessed online October 2011 at: http://www.smh.com.au/lifestyle/life/shocking-abuse-and-neglect-revealed-in-boarding-houses-across-nsw-20110816-1iwbk.html

[407] See for eg: Haxton, N. (2011) *More protection needed to prevent abuse of the disabled*. ABC PM, July 5, 2011. Accessed online October 2011 at:http://www.abc.net.au/pm/content/2011/s3261847.htm; See also: Tomazin, F. (2011) *Law failing to protect disabled in state care*. The Age, April 24, 2011; Accessed online October 2011 at: http://www.theage.com.au/victoria/law-failing-to-protect-disabled-in-state-care-20110423-1dse1.html

[408] Donelly, B. (June 23, 2015) 'No disability abuse investigations despite 'lots of complaints'; *The Age Newspaper*, Accessed at: http://www.theage.com.au/victoria/no-disability-abuse-investigations-despite-lots-of-complaints-20150622-ghuprw.html

[409] http://www.publicadvocate.vic.gov.au/our-services/community-visitors

community visitors program received 147 reports of abuse, neglect or violence against vulnerable people across disability services, including incidents involving staff members.[410]

250. The Community Visitor Scheme (CVS) in South Australia is an independent statutory scheme that visits and inspects state-funded: acute mental health facilities; emergency departments of hospitals; disability accommodation services; and supported residential facilities. However, the current legislative framework for the disability accommodation services and supported residential facilities do not provide the coercive powers to visit facilities without notice and have subsequently "impacted on the CVS's ability to visit and inspect" these services.[411] The SA CVS reports annually to the South Australian Government through the Minister for Disability.

251. In NSW, Official Community Visitors are appointed by the Minister for Disability Services and the Minister for Community Services under the *Community Services (Complaints, Reviews and Monitoring) Act 1993*. There are 30 Official Community Visitors in NSW.[412] They visit most government and non-government accommodation services for children, young people and people with a disability throughout NSW. They also visit people living in licensed boarding houses. Their role is to report to the Ministers and the NSW Ombudsman about the quality of services. However, only services that are operated, funded or licensed to provide accommodation and care by the NSW State Government are visited. The Official Community Visitors have the authority to enter and inspect a visitable service without notice.[413]

252. Queensland also has a legislated Community Visitors Program, where three different types of accommodation called 'visitable sites' can be visited without notice. These 'sites' are: Disability accommodation provided or funded by the Department of Communities; Authorised mental health services; and Private hostels (classified with level 3 accreditation). Community Visitors refer complaints back to the Queensland Government.[414] Queensland also has a separate Community Visitor Program for children and young people in out-of-home care.[415]

253. At the national level, the *National Disability Abuse and Neglect Hotline*[416] (The 'Hotline') is promoted as one of the Australian Government's main initiatives to prevent and address violence against people with disability, including those in institutional and residential settings. The Hotline is fully funded by the Australian government and operated on behalf of the government by WorkFocus Australia – a privately-owned business specialising in employment services.[417] The Hotline is an Australia-wide telephone hotline for reporting 'abuse and neglect' of people with disability in government funded disability services, which include open or supported employment; accommodation; community services; and respite care services. If a caller reports 'abuse or neglect' against a person with a disability in one (or more) of the government-funded service/s, the Hotline will *'refer the report to the government body that funds the service, and the funding body will investigate the report.'*[418] If a caller reports 'abuse or neglect' in any other situation, the Hotline will *'refer the report to an agency able to investigate or otherwise address the report, such as an ombudsman or complaints-handling body.'*[419] The Hotline provides support to callers on how a complaint about abuse and neglect *'might be raised and resolved at the local level.'*[420] If a caller with a disability needs support to make a complaint, the Hotline refers the person to an advocacy organisation.

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410 Donelly, B. (June 23, 2015) 'No disability abuse investigations despite 'lots of complaints'; *The Age Newspaper*, Accessed at: http://www.theage.com.au/victoria/no-disability-abuse-investigations-despite-lots-of-complaints-20150622-ghuprw.html
411 South Australian Community Visitor Scheme (2015), *Disability Accommodation Services, Principal Community Visitor Annual Report 2013-14*; Adelaide, South Australia.
412 https://www.ombo.nsw.gov.au/what-we-do/coordinating-responsibilities/official-community-visitors
413 Ombudsman NSW, *Official Community Visitor Scheme*. Accessed online November 2011 at: http://www.ombo.nsw.gov.au/aboutus/coordnteoffcommvstrprog.html
414 http://www.publicguardian.qld.gov.au/adult-guardian/adult-community-visitors
415 http://www.publicguardian.qld.gov.au/child-advocate/child-community-visiting
416 See: http://www.disabilityhotline.net.au/
417 http://www.workfocusgroup.com/news/company-news/opening-of-services-to-help-give-people-with-disability-a-voice/
418 See: http://www.disabilityhotline.net.au/
419 Ibid.
420 Ibid.

254. The Hotline's *'Policies and Procedures 2014-2016'*[421] document makes it clear that the Hotline is 'principally a referral service and not a complaints resolution service', although makes explicit that the procedures of the Hotline service are based on the *Australian Standard on Complaints Handling.*[422] This Standard sets out 13 elements of an effective complaints handling system,[423] including for example:

- *Remedies:* A complaints handling process shall have the capacity to determine and implement remedies.
- *Data collection:* There shall be an appropriate systematic recording of complaints and their outcomes.
- *Systemic and recurring problems:* Complaints shall be classified and analysed for identification and rectification of systemic and recurring problems.
- *Accountability:* There shall be appropriate reporting on the operation of the complaints handling process against documented performance standards.
- *Reviews:* A complaints handling process shall be reviewed regularly to ensure that it is efficiently delivering effective outcomes.

255. However, there is no evidence that the Hotline complies with or meets these Standards. For example, the Hotline has now existed for over a decade. It provides both monthly statistical reports to the Australian Government (on the number and nature of reported cases of abuse and neglect, without personal information); an accompanying monthly 'commentary report' which analyses the statistics and reports on trends in the figures; and an annual report analysing the number, type and nature of matters received and systemic issues raised. These monthly and annual reports are provided to the Australian Government to 'develop policy responses', including on 'trends that are identified'.[424] Yet no data derived from the Hotline, or reports of any type, have ever been publicly reported or even made available on request. In fact DPOs requesting access to ANY information from the Australian Government from the Hotline have been consistently denied, with one being advised by Government personnel that making such information publicly available may give the "wrong impression" about Government funded disability services.[425]

256. There is no legislative base for the Hotline and it therefore has no statutory functions, powers and immunities. It has no investigative powers, no power to compel any other agency to investigate a complaint, and no power to formally review complaint investigation processes and outcomes. The Hotline does not have any systemic investigation, inquiry or review powers, and is unable to initiate action at its own motion. There is a clear lack of transparency relating to outcomes of notifications; there are a number of service types that are excluded from its mandate (such as licenced boarding houses), and definitions which set the scope of its work fail to incorporate a domestic context.[426] The Hotline relies on definitions of 'abuse' even where criminal or legislative definitions such as assault, sexual assault or rape and so on may also define the act.

257. As one of the key Australian Government 'initiatives' to prevent and address violence against people with disability, the *National Disability Abuse and Neglect Hotline* is completely ineffectual in detecting, reporting and responding to violence against people with disability in institutional and residential settings.

258. The evidence provided in this section demonstrates the ad hoc and largely ineffective nature of existing complaints mechanisms in investigating, responding to, and preventing violence against people with disability across the range of settings and spaces where such violence occurs. For many

[421] Complaints Resolution and Referral Service (CRRS) & National Disability Abuse and Neglect Hotline (The Hotline) *Policies and Procedures 2014-2016*; Accessed online at: http://www.disabilityhotline.net.au/linkservid/034CEFFE-0043-24A5-2F77E0F490A96E57/showMeta/0/
[422] See Australian Standard *AS 4269-1995*. This Standard provides a complaints handling framework for complainants and service providers, and for complaints handling agencies. The Standard also serves as a framework for service providers in the development of agency complaints handling policies and procedures.
[423] The 13 elements of an effective complaints handling system are: 1) Commitment; 2) Fairness 3) Resources 4) Visibility 5) Access 6) Assistance 7) Responsiveness 8) Charges 9) Remedies 10) Data collection 11) Systemic and recurring problems 12) Accountability 13) Reviews.
[424] Complaints Resolution and Referral Service (CRRS) & National Disability Abuse and Neglect Hotline (The Hotline) *Policies and Procedures 2014-2016*; Accessed online at: http://www.disabilityhotline.net.au/linkservid/034CEFFE-0043-24A5-2F77E0F490A96E57/showMeta/0/
[425] Anecdotal report from Women With Disabilities Australia (WWDA).
[426] Frohmader, C. (2011) OpCit.

years, DPOs and advocates have highlighted these failings and argued that Australia urgently requires an independent statutory national protection authority with specific purpose legislation to address and respond to all forms of violence against people with disability, regardless of the setting in which it occurs and regardless of who perpetrates it. DPOs and advocates that such a mechanism should include as a minimum, the following core functions:

- a 'no wrong door' complaint handling function – the ability to receive, investigate, determine, and make recommendations in relation to complaints raised;
- the ability to initiate 'own motion' complaints and to undertake own motion enquiries into systemic issues;
- the power to make recommendations to relevant respondents, including Commonwealth and State and territory governments, for remedial action;
- the ability to conduct policy and programme reviews and 'audits.'
- the ability to publicly report on the outcomes of systemic enquiries and group, policy and programme reviews, or audits, including through the tabling of an Annual Report to Parliament;
- the ability to develop and publish policy recommendations, guidelines, and standards to promote service quality improvement;
- the ability to collect, develop and publish information, and conduct professional and public educational programs;
- the power to enable enforcement of its recommendations, including for redress and reparation for harms perpetrated.

ISSUES IN DATA COLLECTION

259. As highlighted earlier in this Submission, there is currently no comprehensive strategy or mechanism in Australia that captures the prevalence, extent, nature, causes and impact of violence against people with disability in the range of settings in which they reside, are incarcerated or receive support services. These substantial gaps in the evidence base stem from a range of factors, including but not limited to:
- systemic ableism;
- multiple and conflicting understandings of disability and of violence within the legislative, policy, program and service sector arenas;
- policy 'siloing';
- fragmentation and lack of co-ordination between sectors;
- inadequate and inconsistent record keeping;
- apathy and indifference to the issue;
- methodological processes which exclude people with disability;
- indifference to human rights obligations in this area.

260. The Australian Bureau of Statistics (ABS) [427] is generally understood as the major source of reliable and robust quantitative national data. It conducts a number of different surveys related to violence and related to disability. These include: the *Personal Safety Survey* (PSS),[428] the *General Social Survey* (GSS),[429] and the *Survey of Disability and Aged Care* (SDAC).[430]

261. The *Personal Safety Survey* (PSS) is they key national data source regarding violence in Australia. It was first conducted in 2005 and again in 2012. The survey collects information about the nature and extent of violence experienced by men and women since the age of 15. It also collects detailed information about men's and women's experience of current and previous partner violence, lifetime experience of stalking, physical and sexual abuse before the age of 15 and general feelings of safety.

427 The ABS is Australia's National Statistical Office. See: http://www.abs.gov.au/
428 http://www.abs.gov.au/ausstats/abs@.nsf/mf/4906.0
429 http://www.abs.gov.au/ausstats/abs@.nsf/mf/4159.0
430 http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4430.0Main+Features12012?OpenDocument

262. The *General Social Survey* (GSS) was conducted in 2014 with Australians aged 15 years and over. The main purpose of the survey was to provide an understanding of the multi-dimensional nature of relative advantage and disadvantage across the population. The *Survey of Disability and Aged Care* (SDAC) is a national survey that has been conducted seven times since 1981 and was last conducted in 2012. The SDAC survey aims to measure the prevalence of disability in Australia and the need for support of older people and those with disability. It also provides a demographic and socio-economic profile of people with disability, older people and carers; and provides data and information on carers (to people with disability, long-term health conditions and older people).

263. Both the PSS and GSS systematically exclude people with disability living in institutional settings (i.e. not in a private home), and those who live in remote areas, where Aboriginal and Torres Strait Islander people are over-represented.[431] Neither the PSS or GSS data collection methods involve inclusive research practices. The PSS is performed by an interviewer and a specific requirement of the survey is that all interviews are conducted alone in a private setting. Interpreters and support persons are excluded, where a respondent requires the assistance of another person to communicate with the interviewer, the interview is not conducted.[432] These methodological restrictions mean that both the PSS and GSS miss a very significant proportion of those people with disability who are known to be at the highest risk of experiencing violence.[433]

264. The SDAC does include a range of institutional and residential settings. However, it asks no questions in any context about violence, abuse or neglect. Additionally, SDAC surveys are completed by support workers or carers, rather than by people with disability themselves. Once again, these methodological restrictions and omissions constitute a missed opportunity for the development of informed policy and programs related to violence against people with disability in institutional and residential settings.

[431] The *National Aboriginal and Torres Strait Islander Social Survey (NATSISS)* also operates within these sampling parameters.
[432] http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/4906.0Explanatory%20Notes12012?OpenDocument
[433] Frohmader, C., Dowse, L. & Didi, A. (2015) OpCit.

APPENDIX 1: TERMS OF REFERENCE

Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability

On 11 February 2015, the Senate referred the following matter to the Senate Community Affairs References Committee for inquiry and report:

Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability.

The terms of reference are:

a) the experiences of people directly or indirectly affected by violence, abuse and neglect perpetrated against people with disability in institutional and residential contexts;

b) the impact of violence, abuse and neglect on people with disability, their families, advocates, support persons, current and former staff and Australian society as a whole;

c) the incidence and prevalence of all forms of violence, abuse and neglect perpetrated against people with disability in institutional and residential settings;

d) the responses to violence, abuse and neglect against people with disability, as well as to whistleblowers, by every organisational level of institutions and residential settings, including governance, risk management and reporting practices;

e) the different legal, regulatory, policy, governance and data collection frameworks and practices across the Commonwealth, states and territories to address and prevent violence, abuse and neglect against people with disability;

f) Australia's compliance with its international obligations as they apply to the rights of people with disability;

g) role and challenges of formal and informal disability advocacy in preventing and responding to violence, abuse and neglect against people with disability;

h) what should be done to eliminate barriers for responding to violence, abuse and neglect perpetrated against people with disability in institutional and residential settings, including addressing failures in, and barriers to, reporting, investigating and responding to allegations and incidents of violence and abuse;

i) what needs to be done to protect people with disability from violence, abuse and neglect in institutional and residential settings in the future, including best practice in regards to prevention, effective reporting and responses;

j) identifying the systemic workforce issues contributing to the violence, abuse and neglect of people with disability and how these can be addressed;

k) the role of the Commonwealth, states and territories in preventing violence and abuse against people with disability;

l) the challenges that arise from moving towards an individualised funding arrangement, like the National Disability Insurance Scheme, including the capacity of service providers to identify, respond to and prevent instances of violence, abuse and neglect against people with disability; and

m) what elements are required in a national quality framework that can safeguard people with disability from violence, abuse and neglect in institutional and residential settings.

2. That for this inquiry:

'institutional and residential settings' is broadly defined to include the types of institutions that people with disability often experience, including, but not restricted to: residential institutions; boarding houses; group homes; workplaces; respite care services; day centres; recreation programs; mental health facilities; hostels; supported accommodation; prisons; schools; out-of-home care; special schools; boarding schools; school buses; hospitals; juvenile justice facilities; disability services; and aged care facilities; and

'violence, abuse and neglect' is broadly understood to include, but is not limited to: domestic, family and interpersonal violence; physical and sexual violence and abuse; psychological or emotional harm and abuse; constraints and restrictive practices; forced treatments and interventions; humiliation and harassment; financial abuse; violations of privacy; systemic abuse; physical and emotional neglect; passive neglect; and wilful deprivation.