



People with Disability Australia (PWDA)

Royal Commission into Institutional Responses to Child Sexual Abuse

Consultation Paper: Best practice principles in responding to complaints of child sexual abuse in institutional contexts

**Submission
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About People with Disability Australia

People with Disability Australia Incorporated (PWDA) is a national disability rights and advocacy organisation of and for people with disability. We operate within the human rights framework and provide advice and information; individual, group and systemic advocacy; training and education; and a representative voice of people with disability in New South Wales, nationally and internationally. We were founded in 1980, in the lead up to the International Year of Disabled Persons (1981), to provide people with disability with a voice of our own. We have a fundamental commitment to self-help and self-representation for people with disability, by people with disability.

We have a vision of a socially just, accessible and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. Our purpose is to be a leading disability rights, advocacy and representative organisation of and for all people with disability, which strives for the realisation of our vision of a socially just, accessible, and inclusive community.

We have a cross-disability focus – membership is open to people with all types of disability. Individuals with disability and organisations of people with disability are our primary voting membership. We also have a large associate membership of people and organisations committed to the disability rights movement. Our services are not limited to members; they are available to people with all types of disability and their associates.

We are governed by a board of directors, drawn from our members across Australia, all of whom are people with disability. We employ professional staff to manage the organisation and operate our various projects. Many of our staff are also people with disability.

Introduction

PWDA is pleased that the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) has situated its development of best practice principles in responding to complaints of child sexual abuse within a human rights framework.¹ Human rights provide an excellent framework for child safety mechanisms, and using the Convention on the Rights of Persons with Disabilities (CRPD) alongside the Convention on the Rights of the Child (CRC) allows a thorough consideration of the human rights of all children.

In line with a human rights framework, we would like to draw your attention to additional CRPD articles that would add value to the ones that have been outlined in the Consultation paper – Articles 13, 17, 25, 26 – and that would strengthen institutional understandings and realisation of the rights of children with disability. This introduction provides such guidance; the rest of the submission responds directly to the Consultation paper, and should be read in conjunction with it.

¹ As outlined on pages 10-11 of the consultation paper

Article 7 refers directly to children with disability, outlining that children with disability should enjoy all their human rights on an equal basis with other children. It highlights that all the obligations set out in the CRPD should be implemented in a manner that recognises the particular susceptibility of children with disability to human rights breaches. It reaffirms the CRC principles that the best interests of the child must be the primary consideration in all actions concerning children with disability, and that children with disability have an evolving capacity to participate in and make decisions affecting their lives. This reaffirmation is particularly critical for children with disability, who often have decisions made for the benefit of others, who are often not listened to or assisted to express their views and are often considered incapable of participating in decision-making. In terms of responding to complaints of child sexual abuse, children with disability are more likely to be disbelieved than other children, and face additional hurdles in attempting to report, especially where they have intellectual disability and/or complex communication needs.

Article 9 of the CRPD outlines the significance of accessibility, and provides measures that should be taken to increase accessibility for all people with disability. Institutions should be aware of these measures, and should actively ensure all aspects of their service are accessible for children with disability. In relation to this consultation paper, all complaints mechanisms, including the institutional complaint handling policy, as well as information about these mechanisms, must be made fully accessible for children and adults with disability.

Article 19 of the CRPD outlines the right for children and adults with disability to be included in the community and live independently. This article includes the right to receive mainstream services, to choose where one lives, and with whom on an equal basis with others. This right is often not fulfilled when children and adults with disability are forced to live in specialist institutional settings in order to receive services. The segregation inherent in specialist institutional settings also increases the potential for abuse and violence to occur, as these settings isolate children and young people with disability from protective relationships within their community.

Article 15 of the CRPD outlines that people with disability should be free from torture or cruel, inhuman or degrading treatment or punishment, in line with the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). This includes the right to be free from the use of restrictive practices, which are often used as a way of managing the behaviour of people with disability.² Restrictive practices include chemical, physical and mechanical restraint, as well as seclusion or isolation.

In 2013, the Committee on the Rights of Persons with Disabilities (the Committee) expressed concern regarding the use of 'unregulated behaviour modification or restrictive practices' against people with disability in Australia, and called for an immediate end to these practices. However, these practices continue to be implemented, particularly in specialised settings. Restrictive practices may be used as a response to 'challenging behaviours', which may arise as a result of trauma. Restrictive practices must be understood as a problematic and

² Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, presented to the 22nd session of the Human Rights Council 1 February 2013. A/HRC/22/53, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

exacerbating response to trauma, especially in seeking to ensure that institutions are child-safe.

Article 16 of the CRPD outlines that people with disability should be free from exploitation, violence and abuse. Children with disability experience higher levels of violence, including sexual violence, than other children.³ The right of children with disability to be free from exploitation, violence and abuse means that all child safe institutions must specifically address the deprivation of rights that put children with disability at risk of violence, including sexual violence.

Article 24 of the CRPD outlines that students with disability should have access to mainstream education, and should be provided with sufficient supports to engage effectively in the education system. However, many children with disability are excluded or limited in participating in critical school programs, such as healthy relationships and sex education programs. As a result, children with disability may not understand what constitutes inappropriate sexual behaviour or even know the names for their body parts, which can make reporting child sexual abuse very difficult.

Finally, institutions should also be aware of Article 13 of the CRPD when developing their complaint handling policy. Article 13 outlines the right of all people with disability to access justice on an equal basis with others. Institutional responses to abuse must therefore be as accessible as possible to children and young people with disability. This is yet another reason why an institution's complaint handling policy and processes must be accessible and inclusive, and responsive to the needs of children and young people with disability, including by providing age-related and appropriate assistance. We are pleased to note that the Royal Commission's Consultation Paper regularly reiterates the importance of accessible reporting mechanisms.

In addition to the inclusion of these CRPD articles, PWDA is concerned that although the Consultation Paper is clearly informed by some research regarding children's experiences of safety in institutions, the research project specifically commissioned regarding the experiences of children with disability was not included.⁴ One of the key findings of this research was that children and young people with disability must be supported to be involved in decisions relating to their care and support.

Another key finding of Robinson's research was that the experiences of children and young people with disability in institutional settings can be quite different to their peers. Robinson outlines that these different experiences are primarily due to the tendency for children and young people with disability to receive services and support in segregated, specialist institutions. In many ways, these isolated settings and institutional practices serve to make children and young people with disability more vulnerable to abuse.

³ Sally Robinson (2012), 'Enabling and protecting: Proactive approaches to addressing the abuse and neglect of children and young people with disability,' Children with Disability Australia.

⁴ S. Robinson (2016) *Feeling safe, being safe: What is important to children and young people with disability and high support needs about safety in institutional settings?*, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney, 2016.

This reiterates a key point. Children and young people, including those with disability, are not ‘inherently vulnerable’ in and of themselves. Rather, they may be made vulnerable by institutional settings, procedures or practices. It is thus the responsibility of each institution to reduce the level of vulnerability experienced by children and young people under its care through the implementation of accountable and transparent policies and procedures as best practice. Adopting this understanding of the vulnerability of children ensures that institutions are held adequately to account, especially where failures to implement adequate complaint handling and responses to child sexual abuse has meant that children in institutions have been targeted by perpetrators.

Recommendations

Throughout this submission, PWDA provides guidance regarding the key areas the Royal Commission is investigating in relation to this area. However, some of our key recommendations include:

- Institutions should ensure that the complaint handling policy is accessible to all children and adults, by ensuring it is available in a range of alternative formats, including Easy English, Braille, and non-PDF formats, among others.
- The complaint handling process must outline the significant role that can be played by professionals in communication support and/or trauma-informed care.
- Child protection training must be revisited to ensure that the complaint handling policy and processes remain fresh in the minds of staff.
- Children with disability must be included in the audit process of institutional policies, procedures and practices.
- The complaint handling policy should state that whenever an allegation of child sexual abuse is made, a police investigation and an internal investigation must both occur.
- Systemic reviews, or root cause analysis, should be considered a compulsory element of every internal investigation.
- Boards of management should be providing external oversight in child protection matters, reporting on progress through consultation and annual reports.

Best Practice Principles

3.1 Six principles to strong and effective complaint response

While we appreciate that the Royal Commission’s Terms of Reference cover a diverse range of institutions, and that best practices may need to be tailored to consider the conditions of individual organisations, every organisation may provide services to children with disability. Thus it is important that these best practices are as inclusive and accessible as possible, to ensure that every organisation is responsive to the needs of all children.

1. An institutional culture that makes decisions based on the best interests of the child and is aware of the inherent vulnerability of children in their care.

Institutional cultures should not be based on the notion of ‘the inherent vulnerability of children’. Treating children as ‘inherently vulnerable’ presents an inaccurate view of children

and reduces institutional responsibility for their safety. This is not the kind of institutional culture we would like to see fostered by the best practice principles.

Rather, we would take a similar view to that presented by the social model of disability, and suggest that vulnerability, like disability, is something that is produced within certain contexts. In this regard, the 'vulnerability of children' is created by unsafe institutions. We must move away from considering children as 'inherently vulnerable', to ensure that institutions are aware of the level of control they have over the vulnerability of children. There are, in turn, many things that they can change, within their environment and culture, to make all children safer.

Furthermore, by assuming that children are 'inherently vulnerable', institutions may establish and promote behaviours that look appropriate under this assumption, but in reality are inappropriate and do not ensure the safety of children under the care of these institutions. For instance, the 'vulnerability' of people with disability has often become the occasion for denying them their human rights. Examples include institutionalising people 'for their own good,' appointing substitute decision-makers, and/or depriving people of opportunities for developing friendships and other networks for fear of abuse being perpetrated. These responses to vulnerability have all put people with disability at risk, precisely because the vulnerability was erroneously understood to arise from the person's impairment rather than from the response to that impairment (the disability).

Institutional cultures should demonstrate and promote standards of behaviour that are the same for all children. One of the key issues that children with disability face is that behaviour that would be unacceptable towards other children may be considered acceptable when directed towards them. For example, in NSW, children with disability are routinely subject to 'physical restraint' in school settings, yet this treatment is not reportable under the Reportable Conduct Scheme administered by the NSW Ombudsman. Such restraints and other forms of restrictive practices, including chemical restraint or isolation, may be implemented as an institution's response to so-called 'challenging behaviours' exhibited by children with disability. In this way, behaviours that may indicate that a child with disability has experienced sexual violence may be brushed off as another part of that child's impairment, one that needs to be fixed or managed. Please see the attached submission regarding reportable conduct schemes for further information.

As such, all institutions must have a basic understanding of trauma, including the different ways that it may manifest in children with disability, and how to respond to children who have experienced child sexual abuse. The institutional culture must therefore be aware of the various ways in which trauma may manifest, to ensure swift action can be taken when child sexual abuse is identified or alleged.

2. A child-focused complaint handling policy

This policy must be accessible to all children and adults, and we are pleased to note the acknowledgement of communication and support needs as part of making this policy accessible. Explicit mention of forms of communication or support would strengthen this, as the majority of organisations lack a basic understanding of communication accessibility and will require this guidance. For instance, ensuring that the policy is available in Easy English, large print, audio and pictorial formats, in PDF and non-PDF formats (to facilitate the use of

screen-readers) and in Auslan, Braille and so on as appropriate (noting that children who need these policies ought not to be forced to request them being made available in the format they require).

In addition, the policy and complaints handling process must take into consideration the need for emotional or other supports. The policy should outline that counselling services must be accessible and readily available for those involved in the complaint.

3. A process that is clear and accessible to children and adults, and emphasises responsiveness and accountability

The complaint handling process must in all circumstances be accountable to an agency external to the institution. Furthermore, we would suggest that there always be an external body to which children can make a complaint. They must be provided with information about the appeals process and about the options that are available to them if they feel the institutional investigation was inappropriate or inadequate. There is a real need to have a level of external accountability for every institution – both formal and informal.

Institutions should understand accountability as extending to the wider community as well, not just to the people involved within the complaints process. It is important that the process is open and transparent, and that the community at large, including other children, parents, guardians, carers and others, know about any investigations occurring in their community. This provides an additional layer of oversight, preventing isolation of the issue and those involved, and ultimately increasing the responsiveness of the institution. We are aware of a case in which policing the protective mechanisms put in place in relation to an alleged perpetrator ultimately fell to the victim's family, as the institution did not inform other parents or families of the allegation or investigation. This is evidently an important gap to address.

4. Protocols are in place for managing relationships and sharing information with other agencies

There must be recognition of the need for the involvement of external agencies or bodies throughout the complaint handling process. For instance, the institution should facilitate and maintain contact with individuals or organisations with expertise around communication support and/or trauma-informed care. The involvement of trauma-informed supporters would ensure that the safety and wellbeing of children is paramount throughout the complaint handling process.

Protocols to manage relationships throughout the process must take into account the significant impacts that disclosure may have on not only the complainant, but also their family, friends and supporters. As such, the process must ensure that those affected by the proceedings are adequately supported, and protected from fears of retribution or harassment. For instance, there must be protocols in place which outline that complainants must be provided with access to supports of their choice to ensure they feel as safe as possible after disclosing. This may require steps to be taken to ensure, for example, that the perpetrator's close friend does not provide intimate care to the complainant the night after the child had made a disclosure.

5. Training is provided about the complaint handling process

Training must appropriately convey the responsibilities of all staff, volunteers and others as outlined by the complaint handling policy. It is important that training is revisited to ensure that the policy and processes are fresh in the minds of staff, to avoid accidental deviation from them. To ensure the engagement of staff members, awareness of the complaint handling process should be a mandatory element of all performance reviews.

6. An ongoing audit process is in place

Children, and children with disability in particular, must be included in the audit process of institutional policies, procedures and practices. This must not be performed by one child and taken to be representative of all children, and should instead involve consultation with a wide range of children of different ages, backgrounds and communication needs. The progressive improvement of institutional policies, procedures and practices should be overseen by the board, and informed by this consultation with children and by a systemic analysis of data collected regarding complaints.

3.2 Suggested topics of a complaint handling policy

The second point on page 18, regarding how to make a complaint, should be rephrased to ensure that independent bodies are not only notified in the event that an institution fails to respond, but also when institutions respond inadequately. Examples include where an investigation solely involves discussing the complaint with the alleged perpetrator, where responses to the allegation include recommending the parent of the alleged victim 'have a cup of tea' with the alleged perpetrator, or where parents believe the protective mechanisms put in place are inadequate to the risk.⁵

The third dot point, relating to children with diverse experiences and needs, should explicitly outline the specific ways in which institutions can respond to the needs of the children identified. Explicit information should be provided about how to support and respond to children with disability, children from culturally and linguistically diverse backgrounds and Aboriginal and Torres Strait Islander children. Otherwise, this leaves the development of the policy to the uncertain awareness and/or knowledge of existing staff; they may need to consult with the relevant experts in these areas to ensure these amendments are meaningful.

Additionally, in discussing out of home care (OOHC), an acknowledgement should be made that these three groups of children are disproportionately located in OOHC. Explicit recommendations regarding the safeguarding of children in OOHC contexts should also be offered. Institutions will be better able to respond to the needs of these groups of children if the Royal Commission is explicit in outlining the possible ways in which they should act.

⁵ These examples are derived from PWDA's Royal Commission related individual advocacy.

The sixth point, in regards to how to perform a risk assessment of the complaint, should outline a consideration of how the actions of the accused are to be monitored throughout the complaints process, if they are still working with children.

The ninth point, on the top of page 19, should make it clear that institutions should not be choosing between police investigations and performing their own institutional investigation. Police investigations are designed to find evidence to support conviction of a perpetrator. Institutional investigations are designed towards different ends: the findings may respond to the risk posed by a particular individual but may also necessitate changes to policy, procedures, practices or physical environments. These changes should ultimately make these institutions safer for all children. This point should explicitly state that the investigation performed by the police is designed to have a different outcome to that performed by an institution, and they should both occur whenever an allegation of child sexual abuse is made.

This is especially salient for children with disability, who face many barriers to justice. Children may not be recognised as having disability, and may therefore not be provided with the communication supports they may require. This lack of support may result in these children providing incomplete or inaccurate evidence, or the police deeming the information to be incorrect.

Further, cases of child sexual abuse against children with disability may not be recommended for prosecution by the police, as they may believe the child is not a reliable witness, or doesn't have the capacity to engage in a criminal trial. In many circumstances, organisations will not know if conviction will even be pursued until months or even years after the incident has occurred. In these circumstances, it is important that an organisation has amended its policies and practices to ensure that children are not placed at risk solely because the outcome of criminal processes are as yet undetermined.

The tenth point outlines criteria for who should investigate the complaint. However, it should not be up to the institution to determine that the person they've chosen to investigate is impartial and objective. Seniority within an institution does not automatically translate to impartiality, and the policy must reflect this. In many circumstances, a principal of a school or a senior manager of a non-government organisation will have an inherent conflict of interest given their role in protecting the organisation's reputation.

Additionally, the twelfth point outlines that the investigator must be able to demonstrate that they are impartial and objective. This must be able to be demonstrated to the wider community as a way of ensuring the accountability of the complaints handling process.

The following point outlines how communication should happen with stakeholders. We question the limited list of stakeholders listed in this section, as surely other children, parents, guardians, carers and others in the wider community must also receive effective and informative communication throughout the complaint handing process as well.

In relation to appeal processes, these should be externally managed. Every victim should have the right to have the institution's investigation examined and reviewed by an external, independent body with expertise in the area. The likely expansion of the NSW Ombudsman's 3A power (Reportable Conduct Scheme) demonstrates the need for this kind of oversight. Additionally, this breadth should be considered by all jurisdictions introducing Reportable Conduct Schemes, and a key element in COAG 'harmonisation' of these Schemes proposed in early 2016 (see attached submission on Reportable Conduct Schemes).

Finally, the eighteenth point, regarding a systemic review or root cause analysis, should clearly state that these are necessary following any allegations of child sexual abuse. A compulsory systemic review would encourage investigators to realise that in many circumstances, organisational cultures, policies and procedures enable, support and sustain perpetrators. In this sense, perpetrators are a necessary but not sufficient cause of child sexual abuse in institutions; investigators should be oriented to addressing the ways that organisations enable perpetration.

PWDA has repeatedly heard from people telling their stories to the Royal Commission that they wish to contribute to creating safer organisations and preventing other children from having the same experiences they had. For many people coming forward and telling their experiences of child sexual abuse, justice is not simply about an individual response to their own experience, but comes from their story being taken as the grounds for addressing the risks posed to children in institutional settings. Instances of child sexual abuse ought to be taken seriously enough that each allegation requires reflection, reviews and improvements to how they operate. It would be very positive indeed if institutions could recognise the worth of systemic reviews, and actively and positively change to incorporate these systemic learnings.

Implementing the Principles

4.1 Creating a culture that encourages reports

A lot of the institutions in which children with disability spend time are segregated from mainstream society and external oversight mechanisms. As such, violations of the human rights of children residing in these institutions often go unnoticed or unreported. These institutions frequently have problematic internal cultures, and environments often manage, isolate or otherwise constrain children with disability. Restrictive practices, including physical, chemical and mechanical restraint, may be used in these settings, making it harder for children to recognise, report and escape any violence they may be experiencing.⁶

As such, creating an environment that actively supports and encourages all children and adults to report any concerns they may have requires a much broader set of actions than that outlined

⁶ See PWDA submission to the Royal Commission Issues Paper 3, Child Safe Institutions for more information about the ways in which children with disability are at particular risk in relation to the problems posed by these cultures.

in the Consultation Paper. These actions are very focused on child sexual abuse itself, rather than on the context within which child sexual abuse may occur. It is important that institutional cultures assist children in recognising and reporting in advance of any specific issue needing to be addressed. Additionally, more focus should be placed on creating child safe institutions more generally – institutions which implement and support the human rights of children, which empower them to make decisions, including about their own bodies, and which support the early development of consent, for example.

It is important to establish an institutional environment in which there are robust understandings of consent practices around everyday contact. Children, staff, volunteers, management, parents, guardians and carers should all have an understanding of what consent means, and how it is exercised in everyday situations and contexts. This would increase the knowledge children have regarding their rights and appropriate treatment of them. Furthermore, if consent is required for all everyday activities, this would make child sexual abuse easier to recognise and report.

In relation to the fourth dot point on page 20, instead of simply stating that responses should be culturally, cognitively and developmentally appropriate, it would be beneficial to explicitly say how this can be ensured. This could include, for instance, making sure that policies and procedures are available in Easy English and Pictorial formats, and are provided in appropriate electronic formats (both PDF and non-PDF versions).

4.2 Institutional structure and senior management

Accountability for the complaints handling process should be shared across all levels of management and governance. Boards of management should act as a form of external oversight to operational staff, ensuring that the institution's policies, and the best practice principles, are being implemented and followed appropriately.

Ideally, boards and other governance mechanisms of institutions should view child protection as a serious element of their oversight mechanism, similar to that of workplace health and safety responsibilities. Boards should be overseeing the safety of children in their organisations, and reporting publicly on their progress, perhaps through annual reports. Consultation with children, including children with disability, would need to be a robust part of this reporting and oversight process. For instance, the board could receive a report, emerging from a consultative focus group with service users, relating to how their institution can improve how safe they are for children. Building this into governance structures would ensure that the culture of encouraging reports and emphasising child safety is supported from the top down.

4.3 Listening to children when they disclose

Listening to children when they disclose is an important part of encouraging other children, parents and other stakeholders to trust the complaint handling process. Letting children know that they were right to disclose, and that the abuse was not their fault are good first steps in this process.

Listening also involves ensuring that the child is supported to disclose through the use of a communication aide or interpreter. Institutions must ensure that children have access to the

necessary supports, and should consider whether additional assistance is required to support children. Furthermore, the disabling effects of trauma must be taken into account when listening to children as they disclose. There may be the need for an intermediary, a communication expert or a counsellor to talk to the child and assist them to make a disclosure. This would likely be beneficial to all children making disclosures of child sexual abuse.

Listening to children must also involve keeping them updated on the progression of the complaints handling process. This could involve, for instance, letting children know about the steps to be taken after their disclosure, and giving them timeframes in relation to what actions they can expect in the aftermath.

In relation to the barriers faced by children, the barriers faced by certain groups of children should be highlighted in this space. Institutions may not be aware of the additional barriers to reporting experienced by children with disability, Aboriginal and Torres Strait Islander children or children from culturally and linguistically diverse backgrounds. We feel it is important to explicitly outline at least some of the specific barriers faced by these groups.

Having no one to disclose to, for example, is something more likely to be experienced by children with disability. This is because of the segregated nature of disability specific institutions, and the lack of oversight mechanisms in these settings. Additionally, children with disability are in general more isolated, depriving them of many of the supports other children can access both in disclosing and in 'testing' potential disclosures.⁷ Children with disability are also disproportionately located in OOHC. This may mean children with disability are fearful of being moved from their placement, as they may lose their support network or may be moved away from siblings and friends.

Similarly, children with disability may have a distinct lack of trust in authority figures and complaint systems, as they may have previously made complaints which were ignored by staff, senior management or internal complaints mechanisms. These previous negative experiences often create yet another barrier to disclosure.

In addition, children with disability may also lack knowledge about their body and rights. This is because children with disability are often excluded from sex and relationships education, or the education provided to them may be inaccessible or inadequate.

Furthermore, when considering the lack of support to communicate effectively, it must also be recognised that children using assistive or alternative communication devices may still face barriers. This is because communication devices may not be inclusive of the names for body parts, or a vocabulary relating to abuse. Even if these can be added, children may not have integrated this terminology into their vocabulary in advance, making it difficult for them to use it accurately.

⁷ See PWDA submission to the Royal Commission Issues Paper 9, Risk of Child Sexual Abuse in Schools for more information.

4.4 The kinds of behaviour that should be reported

Issues around privacy can be more complicated for children with disability. Children with disability may need support with intimate personal care such as getting changed, toileting or showering. As such, the code of conduct should be altered to build in oversight mechanisms in these cases. For instance, it could specify that two staff members are required to be present while children are getting changed, or being assisted in changing, at school.

Additionally, some of these behaviours seem to be quite age specific. For instance, toddlers or children in child care may need to have their nappies changed, a situation which should still be subject to the code of conduct.

There also needs to be clarification around what constitutes inappropriate clothing. Community standards should be adequate in this regard; V-neck tops for women should not be understood to be problematic for example.

4.5 What to do if the police are investigating

Police clearly need to be investigating as a top priority, but this doesn't mean that the internal investigation doesn't need to act. The institution may be required to delay their internal investigation until after the police have gathered sufficient evidence, however, the complaint handling policy must explicitly state that institutions can, and should, commence their investigation prior to criminal processes being finalised.

If the police have collected sufficient evidence from the child complainant, appropriate information sharing could occur between the police and the institution. For instance, the police could share an outline of what the child has disclosed, so the institution itself does not have to talk to the child (and risk re-traumatising them). This would allow the institution to perform its internal investigation based on this information sharing with the police, as well as information garnered from other outlets.

The police, in turn, need to be mindful of the issues that the institution may be facing. It could perhaps be written into police policy that the police should notify the institution as soon as it is appropriate for the institution to undertake its own investigation. Likewise, it should be written into complaints handling policies that if this doesn't occur by a certain point, the institution should contact the police.

These investigations need to be understood as complementary – they should be enabled to occur alongside each other, as one investigation definitely does not negate the other.

4.6 What to do if the police do not investigate or it does not result in a conviction

The complaint handling process should be clear that irrespective of what the police do, the institution itself still has the responsibility to pursue internal processes. This would mean that the institution undertakes an investigation if the police do investigate, if they don't investigate, or if the police investigation does not result in a conviction.

Institutions must not wait for a conviction to act or investigate, as they could be waiting for years. The purpose of the institutional investigation needs to be sufficiently clear – outlining that the institution must look at their policies, procedures and practices, and how to improve these to prevent child sexual abuse. These systemic changes are different to the criminal response offered by the police, yet are just as important for the safety of children.

4.7 Types of complaints

The complaints handling policy should outline the limitations that can arise from making an anonymous complaint to ensure that those making such a complaint are aware of the consequences. Ideally, the culture of the institution should encourage reports and complaints from all of its stakeholders, and as part of this, institutions should improve the formal and informal protections offered to whistle blowers reporting instances of sexual violence occurring within the institution. Increasing the protections offered to these whistle blowers may mean that there is a decrease in the number of anonymous complaints that are made, and subsequently, more could be done to respond to these allegations.

In addition to the two types of historical complaints outlined in the consultation paper, we believe there is one more - complaints made by victims who are still within the institution where they experienced sexual abuse as a child. In these instances, the risk to the individual in making the complaint is substantially higher than it would be for other adults.

Complaints made by these individuals should be treated in a similar fashion to contemporaneous complaints, due to the risk of retribution, harassment or other consequences people face. We are aware of a number of circumstances in which people are still in institutions and residential settings that are run by the same organisation running the institution in which they were abused as children. We have heard of confidentiality being breached and people receiving inadequate support as a consequence of reaching out for assistance in relation to their previous abuse.

In relation to the rates of unsubstantiated or false complaints, issues of barriers to justice for people with disability are again relevant. The perceived unreliability of people with disability throughout investigations, both criminal and civil, may mean that people with disability are disproportionately represented in cases which do not lead to charges being laid and/or conviction. Indeed, the current statistics provided by the NSW Ombudsman, in relation to reportable conduct (against adults) perpetrated in supported accommodation facilities, provides further evidence that this is the case. Of the 618 cases reported in the last year or so, only 12 resulted in criminal charges being laid. Similarly, of the cases of reportable conduct against children in out of home care, children with disability are victims in 36% of substantiated cases, but represent only 6% of those cases going forward to police charge.⁸

To address the rates of unsubstantiated complaints, we would recommend the provision of communication support to all children making allegations of child sexual abuse. Providing these often traumatised children with specialised, trauma informed support would increase their ability to give the best possible evidence within criminal processes.

⁸ NSW Ombudsman, 'Data – disability' at the NSW Reportable Conduct Forum 2016. https://www.ombo.nsw.gov.au/_data/assets/pdf_file/0017/31760/Data-disability.pdf

4.8 Provision of support

There is no explicit mention of support for children with disability in this section, such as communication support. This could include the use of alternative or augmentative communication devices, providing Auslan interpreters, providing information in Braille, Easy English or Pictorial formats, and/or providing electronic information in PDF and non-PDF formats.

Changing an OOHC placement when necessary is a positive idea, and should be extended to other circumstances, including changing respite, day programs or special schools, for instance.

Furthermore, child sexual abuse can affect whole communities, and thus support for other parties should include support for wider communities. Frequently allegations of child sexual abuse can confront and upset a community, especially where many members of the community have been either employed or had long association with an institution. In our experience, unresolved trauma impacts can extend through the community and this can in turn affect the inclusion of children making allegations, and their families.

In the longer term, this may affect the child safety of the culture within an organisation, as community members may experience triggering in relation to new allegations, and may not respond ideally to reports. Addressing these unresolved trauma impacts may include strategies such as broad availability of counselling, and/or community arts or history projects. These have the added benefit of providing a way for children to learn more about what responses to their complaints should be understood as acceptable or unacceptable.

Additionally, communication support may also be required by the accused. The accused should also have access to sex and relationships education, or treatment programs as other forms of support.

4.9 Communicating with other children, parents, guardians and others

The complaints handling process should ensure that there is a protocol in place for notifying other children, parents, guardians, others and the wider community about what is happening. Communication with these groups should explicitly outline that further disclosures will be supported and investigated. Often, public or semi-public communication is the main way in which other children, parents, guardians and others know how the institution is responding to allegations of child sexual abuse, or how they will respond to such allegations in the future.

Institutions must be mindful in their communication that for some children and adults, how the institution is seen to be communicating about and handling the allegation will determine whether or not they feel like they can safely disclose. This is especially important if there is any possibility that there may be more than one victim of a perpetrator or perpetrators.

When communicating about the complaints handling process or any allegations, the primary concern of the institution should be ensuring and protecting the safety and wellbeing of the children in its care.

4.10 The investigation

The investigation should be open to scrutiny and review. It must be emphasised in the complaints handling policy that the person making the allegation does not have to be held up to a criminal threshold, in that no one should be making assessments of the complainant or their competence to participate in trial. It should be clear, for the safety of all, that internal investigations are in part risk management processes, and are not guided by criminal evidentiary standards.

The investigation should be broader than just determining whether the accused breached the institutional code of conduct. It must look further, in terms of finding out what more could the institution have done, what should it have noticed, where did the gaps emerge and how can they be addressed, and how can this allegation or case be used to increase the safety of the institution for children.

The investigation must be carried out by an independent, impartial investigator, who should then make recommendations to the institution's board of governance. The board should act on the recommendations in an open and accountable manner. Indeed, the final report of the investigator should be made publicly available (although redactions may be necessary to ensure confidentiality) to encourage the board of governance to act, and act transparently, to increase the safety of the institution. This would also go some way to ensuring that the institution did not ignore the outcomes of the report in an attempt to protect their reputation, for instance.

4.12 After the investigation has been completed

As mentioned, the final report of the investigation must be made public and appropriate action must be taken in a transparent manner. Some of these processes may need to be rolled out over time, so it is important that the board are involved in implementing them through strategic planning.

The complaint handling policy must include procedures for external monitoring of the investigation, including an option for an external review or appeal process, to be implemented if the complainant felt that the institution responded inappropriately or inadequately.

4.14 Managing the media

The complaint handling policy must clearly outline that the safety and wellbeing of children must always be prioritised over any fears of defamation, reputation protection or engaging positively with the media.

4.15 Induction and training for staff and volunteers

The Consultation Paper outlined that institutions often think that child protection policies are too complex, and that staff are therefore not trained in how to implement them. This is worrying, as abuse can run rampant if staff are unable to, or unsure how to, act appropriately. Training on the complaints handling policy and processes should form part of the induction of all paid and unpaid employees. As induction processes are not as expensive as external

training programs, this makes a basic level of education more manageable for both large and small institutions to implement. Professional development should also include ongoing training around child protection. As previously mentioned, awareness of child safety procedures, policies and processes should also feature in performance evaluations to ensure staff are engaged and aware of them.

More specialist training could be provided to staff, including information about trauma-informed support, how to recognise the signs of child sexual abuse, and what to do when they feel overwhelmed or need additional support. Training should also include how to recognise disability and how to find the resources required to respond appropriately and adequately to child sexual abuse perpetrated against children with disability. Staff in leadership positions should have additional specialised training in relation to intersectionality, and how to support children who may face multiple barriers to disclosure.⁹

Oversight of complaints handling – reportable conduct schemes

Please see the attached submission relating to reportable conduct schemes.

Advice and support for institutions

Guidance should be provided to institutions – small and large – to assist them to recognise disability and respond to it adequately throughout complaint handling processes. Peak disability bodies and local disability advocacy organisations would likely be able to assist to this end. Additionally, communication professionals should be consulted to develop protocols for ensuring that children with complex communication needs can make reports and complains easily.

⁹ Intersectionality refers to the various layers of identity, social position and experiences of a person, for example an Aboriginal girl with disability. These layers intersect and can lead to intersectional discrimination i.e. forms of discrimination that are unique and cannot be correctly understood by simply describing them as ‘double’ or ‘triple’ or even ‘multiple’ discrimination.



People with Disability Australia (PWDA)

Royal Commission into Institutional Responses to Child Sexual Abuse

Submission regarding Reportable Conduct Schemes and Children with Disability

**Submission
April 2016**

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Introduction

Last year, Australia was horrified to hear that a child with disability in an ACT school had been locked in a cage made of swimming pool fencing. Many of the questions raised following this situation related to oversight: how was it possible that the cage had been built and funded without anyone being notified? The fact that the principal responsible had only been moved to a non-school role raised concerns for many in the community.¹ This was not the only instance of inappropriate restrictive practices against children with disability in educational settings reported last year – and such reports indicate that these problems are cross-jurisdictional – but it remains emblematic of some of the serious forms of violence that an oversight scheme like a reportable conduct scheme ought to address.

Children with disability have a human right to be protected from all forms of violence (Article 19, Convention on the Rights of the Child and Article 16, Convention on the Rights of Persons with Disabilities). Yet children with disability experience a prevalence of maltreatment 3.4 times higher than other children.² They also experience a higher incidence of sexual abuse.

The role of Reportable Conduct schemes

As the investigations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission) are progressively demonstrating, sexual abuse is frequently associated with other forms of violence against children. Children who are experiencing physical violence where that violence is treated as legitimate are less likely to identify other forms of violence, including sexual violence, as problematic. They are also unlikely to trust that reporting sexual abuse to an adult will result in action being taken, if action is not taken in relation to physical abuse.

In other words, the role of Reportable Conduct schemes in keeping children safe is not solely enacted by investigating and overseeing investigations related to sexual abuse. Rather, Reportable Conduct schemes are key to producing child safe institutions through responding to *all* forms of inappropriate conduct towards children. They act to ensure that institutional responses to all forms of inappropriate conduct towards children are held to community standards.

Reportable Conduct schemes are therefore particularly important for children with disability. This is not only because of the heightened risk posed to children with disability. It is also because there are numerous examples of treatment of children with disability in institutional settings which are treated as legitimate within those settings, but would be, or should be, unacceptable by community standards. Examples include double standards which exist in relation to restrictive practices used against children with disability in educational settings. It should be noted that the United Nations (UN) Special Rapporteur on torture and other cruel, inhuman or degrading punishment has emphasised that certain

¹ Emma MacDonald, 'School principal loses her job over student cage inquiry,' 9 Sept 2016, *The Canberra Times*, available at: <http://www.canberratimes.com.au/act-news/school-cage-inquiry-to-see-principal-disciplined-20150908-gjhhqa.html>

² Sally Robinson (2012), 'Enabling and protecting: Proactive approaches to addressing the abuse and neglect of children and young people with disability,' Children with Disability Australia. Submission regarding Reportable Conduct schemes and children with disability 2 of 6

forms of treatment used solely against people with disability fall within the UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).³

Reportable Conduct schemes can play a key role in ensuring that all institutions are aware of their human rights obligations with respect to children with disability, and ensure adequate responses and improvements where these obligations are not fulfilled.

Reportable Conduct schemes also bring with them the benefits of tracking problems regarding inappropriate conduct, including violence, across a variety of settings. The findings and reports of the NSW Ombudsman regarding the heightened risk for children with disability demonstrates some of the key issues. Recent reports demonstrate that children with disability are substantially overrepresented in substantiated reports to the Reportable Conduct Scheme in NSW.

In out-of-home care, 36% of substantiated reportable conduct reports relate to children with disability, who according to the Department of Family and Community Services, represent only 12% of the out of home care population. Children with disability are also overrepresented in relation to sexual abuse reports, at 22% of all substantiated reports. Additionally, this data reveals issues related to access to justice for children with disability: 'despite the fact that 29% of notifications which we close involves a child with disability or additional needs, they represent only 6% of all open matters that involve a criminal charge.'⁴

Ensuring that children with disability are fully included

As the Royal Commission moves towards commenting publicly on Reportable Conduct schemes, we seek to provide advice regarding the function of the only Australian Reportable Conduct scheme in relation to children with disability. The NSW 3A Reportable Conduct scheme is being treated as the model for two other proposed models, in the ACT and in Victoria. It is also likely to have substantial influence as the Council of Australian Governments develop their proposed 'harmonisation' of Reportable Conduct schemes.

In this context, it is very important that the Royal Commission, each jurisdiction considering a Reportable Conduct scheme and the COAG all understand the limitations of the NSW Reportable Conduct scheme when it comes to children with disability. Many kinds of violence, abuse and harmful behaviour against children are excluded from Ombudsman oversight through the NSW scheme. This is predominantly because either a) they happen in institutions that are excluded from the scheme, or because b) the definition of reportable conduct explicitly or implicitly excludes these forms of violence. As noted above, if Reportable Conduct schemes are to be understood to be a form of external oversight ensuring child safe institutions, they must adequately address all forms of harmful conduct against all children, especially children with disability.

³ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, presented to the 22nd session of the Human Rights Council 1 February 2013. A/HRC/22/53, available at: http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session22/A.HRC.22.53_English.pdf

⁴ NSW Ombudsman, 'Data – disability' at the NSW Reportable Conduct Forum 2016. https://www.ombo.nsw.gov.au/__data/assets/pdf_file/0017/31760/Data-disability.pdf

PWDA recommends that any Reportable Conduct Schemes ensure that children with disability and their experiences of violence are fully included in this scheme by:

- **Including disability-specific settings (including those designed primarily for adults)**
- **Amending the definition of reportable conduct to ensure that all forms of violence against children with disability cannot be excluded**
- **Ensuring that Claim or Kind Determinations cannot be made to dilute the oversight mechanism**
- **Understanding a key responsibility of oversight is development of the sector in order to reduce violence against children with disability.**

Reach of the scheme

Organisations should be included insofar as they provide services to children, rather than on the basis of how they are funded. Organisations which are designed for adults but are used by children must also be included. Additionally, it must also include all institutions that children with disability are more likely than other children to make use of: respite, day centres, special schools, psychiatric facilities, residential facilities (including those which primarily or only provide services to adults), therapeutic camps, and so on. This has not been the case with the NSW Reportable Conduct scheme, although this is likely to change over the next year.⁵

Institutions and organisations designed for children with disability have a history of being far more ‘closed’ in how they function than other institutions. There is strictly limited community oversight, and this can mean that behaviours and the treatment of children with disability within these settings does not live up to community standards. Indeed, in some circumstances, behaviour towards or treatment of children with disability can become neglectful or even violent, perhaps without staff or clients noticing. Thus it is particularly important that these settings are included.

Defining ‘Reportable Conduct’

It is important to understand how the NSW Scheme functions to exclude some forms of violence against children with disability from oversight so that this can be addressed in the Royal Commission’s commentary regarding Reportable Conduct schemes.

The first exception to the definition in the NSW Scheme is: ‘conduct that is reasonable for the purposes of the discipline, management or care of children, having regard to the age, maturity, health or other characteristics of the children and to any relevant codes of conduct or professional standards.’ Unfortunately, disability is frequently interpreted as one of these ‘other characteristics of the children’.

Additionally, many settings understand violence against children with disability as ‘reasonable’ in line with this definition, even when they fail to implement strategies that support a child to manage the complex demands of being in a service provision setting

⁵ NSW Ombudsman (2016) ‘Strengthening the oversight of workplace child abuse allegations: A special report under section 31 of the *Ombudsman Act 1974*’ tabled in NSW Parliament 17 February 2016, available at: <https://www.ombo.nsw.gov.au/news-and-publications/news/strengthening-the-oversight-of-workplace-child-abuse-allegations>

with others. In many cases, the setting has been provided with detail about such strategies by parents or other professionals. This is often the background to an instance of violence against a child. A child with autism, for example, might become overstimulated and react violently, with a teacher then responding violently in turn. The use of what is euphemistically called 'physical restraint' often involves behaviour that would count as physical violence if a child without disability were subject to it. However, because this conduct is interpreted as 'reasonable for the purposes of discipline, management or care of children,' it may not be reported. This situation, however, would have been entirely manageable in a non-violent way, had the child received proper forms of support.

The NSW Scheme effectively allows certain organisations to assess whether or not a particular form of conduct is 'reportable'. This can undermine the oversight function granted to the Ombudsman in these circumstances. For example in NSW, decisions about whether certain behaviour within public schools is reportable conduct is made by the Employee Performance and Conduct Directorate within the Department of Education and Training. As a result, the Department of Education's perspective on whether or not a particular behaviour is reasonable for the care of other children may preclude particular instances of violence against children with disability from even reaching the Ombudsman. In other words, the exception in the legislation tends to collude with potential reporters' failures to recognise violence against children with disability as violence.

Class or Kind Determinations

Under the NSW Scheme, a 'Class or Kind Determination' was made with schools that has provided guidance regarding reportable conduct and agreement that some forms of conduct need not be reported to the Ombudsman. This Determination has been identified as key to enabling schools to comply with the Reportable Conduct Scheme by reducing the 'onerous' demands it makes on schools. It has been presented as essential to the successful compliance of schools with the Scheme.

The 'Class or Kind Determination' made with schools, however, has also provided greater specificity about the definition of reportable conduct:

The amendments also make it clear that employees, particularly teachers, can take reasonable action to exercise effective classroom management and discipline. This includes actions such as reasonably restraining a student for the safety of that student or others, comforting a distressed student or raising their voices to restore order with a group of students.⁶

As discussed in the previous section, this definition may inadvertently exclude some of the forms of violence a child with disability may experience in school.

In addition to the exception described above, the Class or Kind Determination excludes from 'reportable conduct':

'using reasonable force to:

- Disarm a child seeking to harm themselves or another; or
- Separate children in the act of fighting; or

⁶ NSW Department of Education and Training (2004), 'Responding to Allegations against Employees in the Area of Child Protection' available at http://www.dec.nsw.gov.au/detresources/pd04_08_alleg_childprot_Mk2_GSPuJAJdZT.pdf

- Move a child away from a place where the person may be harmed; or
- Restrain a child from causing intentional damage to property.⁷

The exclusion of these forms of conduct from being reported can collude with the ongoing failure across a range of institutions to understand that these forms of 'reasonable force' can constitute violence against children with disability.

The creation of this scheme is the perfect opportunity to address issues in professional practice which may or may not be criminal but may result in other forms of harm, especially if these strategies are ongoing. These problems substantially affect children with disability. The scheme must be designed to protect against breaches of human rights, such as the solitary confinement evidenced in the 'child in the cage' incident.

Developing responses to children with disability

For children with disability to be safe, institutional settings must have good understandings of disability, of the heightened risk of violence that children with disability are at, and how to respond to both. This, however, is rare in most service settings. A Reportable Conduct scheme should be designed to maximise sector development in relation to disability. This means that the scheme must intervene in and not inadvertently support misperceptions about disability or double-standards regarding acceptable conduct towards children with disability. For this reason, any proposed scheme would be well-served to operate with a broader understanding of 'reportable conduct' than informs the NSW Scheme.

In NSW, the Scheme operates in service settings that often do not have positive records of recognising and responding appropriately to disability. There is, in general, a poor understanding of disability and impairment in our society. In many cases, a disability or a support need will not be recognised or fulfilled without a formal diagnosis of impairment. A child with disability may instead be understood as recalcitrant, as refusing to comply, or as having 'challenging behaviour'.

Alternately, where a diagnosis has been made, it may be used to 'explain away' distress, leading to the dismissal of the cues that reportable conduct may have occurred.

A child with disability was at an out of school hours (OOSH) centre held in a building on school grounds. When her mother arrived to pick her up, she was told that her daughter had 'had a temper tantrum' and refused to move. This sounded very unlike her child, and on investigation, the mother found that actually her daughter couldn't move her legs. When she was taken to the hospital, it was found that her hip was broken.

The mother was then investigated by Child Protection due to an unexplained injury. Eventually, with much advocacy from the mother and the child's advocates, a Department of Education and Training interview with the centre

⁷ Class or Kind Determination by the NSW Ombudsman under section 25CA of the Ombudsman Act 1974 concerning the Association of Independent Schools of NSW Limited and its member schools (2012) available at [https://www.aisnsw.edu.au/Services/ChildProtection/Documents/Class%20or%20Kind%20Determination%20\(2012\).pdf](https://www.aisnsw.edu.au/Services/ChildProtection/Documents/Class%20or%20Kind%20Determination%20(2012).pdf)

staff found that there were compliance issues on the part of the OOSH centre specifically in documenting and reporting the incident.

Eventually, the OOSH centre was compelled to undertake an investigation, and found no wrongdoing. The NSW Ombudsman's investigations similarly found that there was no available evidence of wrongdoing on the Centre's part. Essentially, as no one documented this incident, there was no trail to follow. The characterisation of the child as 'having a temper tantrum', when it is likely that she was in severe pain exemplifies the way that disability can be used to dismiss signs of reportable conduct.

Other important outcomes for children with disability

Perhaps one of the most important benefits of the NSW Reportable Conduct Scheme has been to provide some data about violence and other inappropriate behaviours against children with disability. This data is extremely rare, especially given that crimes data does not disaggregate by disability, and is consistently inadequate in relation to children and adults with disability.

Additionally, the data from the Reportable Conduct Scheme in NSW has demonstrated that – even with the issues outlined above with respect to exceptions, Determinations and the limited reach – children with disability experience a very disproportionate rate of violence. It also demonstrates that violence against children with disability only very rarely results in criminal charges.

The formulation of any new Reportable Conduct scheme should draw on these learnings, and seek to develop a mechanism that will ensure that children with disability are provided with the same protections as other children. It should be designed to ensure capture of those experiences of violence which are often excluded by other services such as the police, as well as providing a basis for improving the criminal justice responses to children experiencing harm.

Final note

We would be pleased to support the Royal Commission's investigations of Reportable Conduct Schemes and their potential for assisting institutions in becoming child safe, and in protecting children from harm, especially sexual abuse.