



Anti-Discrimination Commissioner, Tasmania

Submission to the Senate Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings

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Office of the Anti-Discrimination Commissioner
Celebrating Difference, Embracing Equality

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1. Introduction

Thank you for the opportunity to comment to the Senate Inquiry in violence, abuse and neglect against people with disability in institutional and residential settings.

Information provided by a range of stakeholders suggests that people with disabilities are much more susceptible to violence, abuse and neglect than the rest of the population and that in many instances it is not appropriately addressed.¹

The closed nature of large institutional and residential facilities presents particular risks and evidence suggests there is a reluctance to report abuse because of fear of retaliation or victimisation. That is not to say, however, that people with disability living in the community are not also more at risk of violence, abuse and neglect than others. This indicates a continuing failure to ensure that people with disability enjoy the same protections under the law as others.

In addition to strong legislative and policy frameworks, it is evident that to address these issues improvement is required to the way in which service providers (both within and outside specialist disability services) recognise and address abuse, neglect and violence.

The following provides information on issues relevant to the Inquiry that have been raised within my jurisdiction, including information on relevant complaints received by me in relation to associated matters.

I would be happy to elaborate on these matters should you wish me to do so.

¹ See, for example Carolyn Frohmader, *Fact Sheet: Violence against people with disabilities in institutional and residential settings* (2014) People with Disability Australia <<http://www.pwd.org.au/issues/preventing-violence.html>> at 10 April 2015.

2. Legislative and policy framework

Tasmania has the highest proportion of people with disability of any state or territory in Australia, with around 119,000 or 24.6% of people in Tasmania having some form of disability.²

The large number of people with disability in Tasmania is, in part, due to the age profile of the Tasmanian population. Tasmania has the highest proportion of people aged 65 years and over with disability (55%), due to the number of people who have acquired disability as they age.³ Those with profound or severe core-activity limitation account for approximately 7% of the total population, again the highest proportion within the population of any state or territory.⁴

In 2012–13, 6,547 people in Tasmania used specialist disability services funded by the State Government under the National Disability Agreement (NDA) (this total excludes people who received specialist psychiatric services only).⁵ Of these, 1,326 people received accommodation services primarily provided by the non-government sector and a further 471 accessed respite services.⁶

Government commitment to equality and equal opportunity on the basis of disability

The strategic policy approach to the provision of services delivered and regulated by Tasmanian Government agencies, including under State laws and programs, to people with disability is set out with the Tasmanian Government's *Disability Framework for Action*. First developed in 2005, the

² Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings, 2012* (Cat. No. 4430.0 Table 4).

³ Ibid.

⁴ Ibid.

⁵ Productivity Commission, *Report on Government Services 2015* (Volume F: Chapter 14: Community Services) <<http://www.pc.gov.au/research/recurring/report-on-government-services/2015/community-services>> at 10 April 2015.

⁶ Ibid, Table 14A.15 Users of NDA government and non-government provided services by service type.

current *Framework* was adopted by the Tasmanian Government in 2013.⁷ It covers the period 2013–17.

The ‘vision’ outlined in the *Disability Framework for Action* is for ‘[a] fully inclusive and participatory society in which people with disability are valued and respected as equal and contributing members of the community’.⁸ This includes people with disability having their independence recognised so they are able to make choices about decisions affecting their lives.

The *Disability Framework for Action* requires each Tasmanian Government Agency to prepare a Disability Action Plan and work collaboratively with other levels of government, industry and the non-government sector to achieve outcomes.⁹

In relation to the protection of rights and access to justice, the *Disability Framework for Action* commits the Tasmanian Government to ensuring appropriate laws and regulations are in place to protect the rights of people with disability. It also commits to ensuring appropriate complaints mechanisms and support for people with disability to exercise choice and control over their lives.

Table 1 outlines areas for action identified in the *Framework* in the areas of protection of rights, justice and legislation.¹⁰

Table 1: Areas for action: rights protection, justice and legislation¹¹

2.1	Increase awareness and acceptance of the rights of people with disability
2.1.1	Promote awareness and acceptance of the rights of people with disability.
2.2	Protect rights
2.2.1	Ensure that relevant Tasmanian legislation complies with the principles and articles in the <i>Convention on the Rights of Persons with Disabilities</i> .
2.2.2	Maintain and strengthen protections and supports for people with disability who experience or are at risk of experiencing violence, sexual assault, abuse and neglect.

⁷ Government of Tasmania, *Disability Framework for Action 2013-2017* (2012) Department of Premier and Cabinet
<http://www.dpac.tas.gov.au/divisions/cdd/policy/our_policies/disability_framework_for_action>
at 10 April 2015.

⁸ Ibid, 15.

⁹ Ibid, 12.

¹⁰ Ibid, 20.

¹¹ Ibid, 20.

2.3 Enable rights and responsibilities to be exercised

- 2.3.1 Ensure people with disability have every opportunity to be active participants in the civic life of the community—as jurors, board members and elected representatives.
- 2.3.2 Ensure supported decision-making safeguards for those people who need them are in place, including accountability of guardianship and substitute decision-makers.
- 2.3.3 Support independent advocacy to protect the rights of people with disability.
- 2.3.4 Enable people with disability to exercise their rights through self-advocacy and through appropriate complaints, review and appeal mechanisms.
- 2.3.5 Review Tasmania’s guardianship legislation to explore how “supported decision making” might be implemented in place of some “substitute decision making” arrangements and ensure that the legislation is consistent with the *Convention on the Rights of Persons with Disabilities*.
- 2.3.6 Explore ways to improve the experience of people with intellectual disability who come into contact with the child protection system.

2.4 Provide more effective responses from the criminal justice system to people with disability who have complex needs or increased vulnerabilities

- 2.4.1 Improve support for people with an intellectual disability, cognitive impairment or mental illness in, or at risk of entering, the criminal justice system, and on leaving it.

Oversight of disability service provision

The Tasmanian *Disability Services Act 2011* (Tas) provides the legislative framework for the delivery of disability services in Tasmania. The *Disability Services Act* obliges those providing services to people with disability to do so in a manner that upholds and maintains their rights as equal members of the Tasmanian community.

Section 5(2) of *Disability Services Act* includes the requirement to apply the following principles:

- (a) the needs and best interests of persons with disability are to be promoted;
- (b) so far as is practicable, and having regard to the intellectual capacity of the person with disability, decisions or actions that may directly affect a person with disability –
 - (i) should only be taken after the person has been consulted; and

- (ii) should take into account the wishes of the person, to the extent that they are consistent with the needs and best interests of the person and the safety of the person and others; and
- (iii) should only result in the restriction of the freedom of decision and action of the person, if at all, to the smallest extent that is practicable in the circumstances;
- (c) the inherent dignity of persons with disability and their individual autonomy, including the freedom to make their own choices and their right to independence, is to be respected;
- (d) persons with disability are not to be discriminated against;
- (e) persons with disability are to be given the opportunity for full and effective participation and inclusion in society;
- (f) there is to be respect for persons being different, and acceptance of persons with disability, as part of human diversity and humanity;
- (g) persons with disability are to be given opportunities that are equal, or equivalent, to the opportunities available to persons without disability;
- (h) specialist disability services are to be as physically and technologically accessible as possible to persons with disability;
- (i) equality between men and women is to be promoted;
- (j) the fact that the capacities of children with disability may evolve as they mature, and the right of children with disability to preserve their identities as equal citizens, are to be respected.

Standards prescribed under the *Disability Services Act* require services to be designed and administered to ensure people with disabilities have access to advocacy support and appropriate grievance and complaint procedures.

Policy directives provide guidance to service providers on steps that must be taken to prevent abuse and protect service users from harm.

3. Level of complaint about disability discrimination

Human rights protections

Australia is party to several United Nations human rights treaties that specify obligations relevant to people with disability in institutional and residential settings.

The *Convention on the Rights of Persons with Disabilities* articulates a range of obligations that, if implemented, will ensure the rights of people with disability are realised in Australia.¹²

- **Article 4** requires parties to adopt ‘all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the ... Convention’;
- **Article 13** requires parties to ensure effective access to justice for persons with disability;
- **Article 14** requires parties to ensure that people with disability are not unlawfully or arbitrarily deprived of their liberty;
- **Article 15** requires parties to ensure that people with disability are not subject to torture or cruel, inhuman or degrading treatment or punishment; and
- **Article 16** requires parties to ensure that persons with disability are not subject to any form of exploitation, violence or abuse.

Other instruments specify human rights standards relevant to the purposes of this Inquiry. These include:

- the *International Covenant on Civil and Political Rights* (ICCPR);
- the *International Covenant on Economic, Social and Cultural Rights* (ICESCR);
- the *International Convention on the Elimination of all forms of Racial Discrimination* (ICERD);

¹² United Nations, *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, ATS 12, (entered into force 3 May 2008, ratified by Australia 17 July 2008, entered into force for Australia 16 August 2008) (*Convention on the Rights of Persons with Disabilities*).

- the *International Convention on the Elimination of all forms of Discrimination Against Women* (CEDAW);
- the *Convention on the Rights of the Child* (CRC); and
- the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).

It should be noted, however, that human rights obligations are not comprehensively incorporated into Australian domestic law. Whilst the Tasmanian *Disability Services Act* reflects the intent of the *Convention on the Rights of Persons with Disabilities*, no specific reference is made to the Convention in the Act, whilst at the national level the *Convention on the Rights of Persons with Disabilities* is not an international instrument scheduled under the *Australian Human Rights Commission Act 1986* (Cth).

Discrimination complaints

Of the 181 complaints made under the *Anti-Discrimination Act* in 2013–14, 90 (or 49.7%) included allegations of discrimination on the basis of disability.¹³

The provision of facilities, goods and services is the most often identified area of complaint involving those who identify disability as an attribute, followed by employment and the provision of accommodation. (Employment is the highest area of complaint for many of the other attributes.) Case studies outlining the broad nature of complaints relevant to the subject of the Inquiry are outlined in the key issues section of this submission.

Protection under discrimination law

The *Anti-Discrimination Act* provides that it is unlawful to discriminate against a person on the basis of disability.¹⁴ It also makes it unlawful to:

- engage in conduct that offends, humiliates, intimidates, insults or ridicules on the basis of disability¹⁵; and
- incite, by a public act, hatred towards, serious contempt for, or severe ridicule of a person or group of persons on the grounds of disability.¹⁶

Discrimination is unlawful when it occurs in connection with specified areas of activity, including employment; education and training; provision of facilities, goods and services; accommodation; membership and activity of clubs; administration of any law of the State or any State program; and/or awards, enterprise agreements or industrial agreements.¹⁷

¹³ Anti-Discrimination Commissioner, Tasmania, *Annual Report 2013–14* (2014) 52.

¹⁴ *Anti-Discrimination Act 1998* (Tas) s 16(k).

¹⁵ *Anti-Discrimination Act 1998* (Tas) s 17(1) as amended in 2013 with effect from 1 January 2014.

¹⁶ *Anti-Discrimination Act 1998* (Tas) s 19(b).

¹⁷ *Anti-Discrimination Act 1998* (Tas) s 22. Express protection in relation to the administration of any law of the State or any State program and awards, enterprise agreements or industrial agreements has only been applied to disability from 1 January 2014, as a result of amendments to the Act in 2013.

Violence, abuse and neglect of people with disability

Discrimination prohibited under the Tasmanian Act includes both 'direct' and 'indirect' discrimination.¹⁸ The Tasmanian Act provides, in section 14, that:

- (2) Direct discrimination takes place if a person treats another person on the basis of any prescribed attribute ... less favourably than a person without that attribute ...
- (3) For direct discrimination to take place, it is not necessary –
 - (a) that the prescribed attribute be the sole or dominant ground for the unfavourable treatment; or
 - (b) that the person who discriminates regards the treatment as unfavourable; or
 - (c) that the person who discriminates has any particular motive in discriminating.

Indirect discrimination is defined in section 15 of the Tasmanian Act:

- (1) Indirect discrimination takes place if a person imposes a condition, requirement or practice which is unreasonable in the circumstances and has the effect of disadvantaging a member of a group of people who –
 - (a) share, or are believed to share, a prescribed attribute; or
 - (b) share, or are believed to share, any of the characteristics imputed to that attribute –

more than a person who is not a member of that group.
- (2) For indirect discrimination to take place, it is not necessary that the person who discriminates is aware that the condition, requirement or practice disadvantages the group of people.

These provisions are broadly equivalent to those found in the *Disability Discrimination Act 1992* (Cth) (the DDA).¹⁹

¹⁸ *Anti-Discrimination Act 1998* (Tas) s 14(1).

¹⁹ *Disability Discrimination Act 1992* (Cth) ss 4, 5, 7 and 24.

Table 2: Disability discrimination complaints by area of activity²⁰

Area of Activity	# of complaints alleging disability discrimination
Provision of facilities, goods and services	53
Employment	31
Accommodation	11
Education and training	6
Membership and activities of clubs	4
Administration of State laws and programs	2
Industrial awards and enterprise agreements	0

Sexual harassment

The *Anti-Discrimination Act* also makes sexual harassment unlawful. Sexual harassment is defined under Section 17(3) of the Act as behaviour that:

- (a) subjects another person to an unsolicited act of physical contact of a sexual nature; or
- (b) makes an unwelcome sexual advance or an unwelcome request for sexual favours to another person; or
- (c) makes an unwelcome remark or statement with sexual connotations to another person or about another person in that person's presence; or
- (d) makes an unwelcome gesture, action or comment of a sexual nature; or
- (e) engages in conduct of a sexual nature in relation to another person that is offensive to that person

in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, intimidated, insulted or ridiculed.

Sexual harassment was alleged or identified in 8.3 per cent of complaints made in 2013–14.

Other prohibited conduct

People with disability are frequently subjected to 'hate speech' and other forms of vilification.

Inciting hatred, serious contempt or severe ridicule on the basis of disability was alleged in 52 complaints in 2013–14, and conduct that offends, humiliates,

²⁰ Ibid 59

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intimidates, insults or ridicules on the basis of disability was cited in 39 complaints in the same year.²¹

Table 3 provides information on the number of complaints where the behaviour or activity is alleged to have taken place on the basis that a person has (or is imputed to have) a disability.

Table 3: Prohibited conduct complaints by area of activity²²

Complaints alleging incitement to hatred, serious contempt or severe ridicule on the basis of disability	
Employment	20
Provision of facilities, goods and services	21
Accommodation	7
Education and training	1
Administration of State laws and programs	1
Membership and activities of clubs	1
Industrial awards and enterprise agreements	1
Complaints alleging conduct that offends, humiliates, intimidates, insults or ridicules on the basis of disability	
Employment	13
Provision of facilities, goods and services	20
Accommodation	5
Education and training	1
Administration of State laws and programs	0
Membership and activities of clubs	0
Industrial awards and enterprise agreements	0

Victimisation

Section 18 of the *Anti-Discrimination Act* makes it unlawful to engage in victimisation. This provision is intended to provide protection from negative consequences for those who take action about conduct that may be unlawful under the Act, or who are involved in a complaint made under the Act:

- (1) A person must not victimise another person because that other person –
 - (a) made, or intends to make, a complaint under this Act; or
 - (b) gave, or intends to give, evidence or information in connection with any proceedings under this Act; or

²¹ Ibid 61
²² Ibid

- (c) alleged, or intends to allege, that any person has committed an act which would amount to a contravention of this Act; or
 - (d) refused or intends to refuse to do anything that would amount to a contravention of this Act; or
 - (e) has done anything in relation to any person under or by reference to this Act.
- (2) Victimization takes place if a person subjects, or threatens to subject, another person or an associate of that other person to any detriment.

In 2013–14, there was an increase in the number of complaints made under the Tasmanian Act in which victimisation was alleged or otherwise identified. Over 34 per cent of complaints received included alleged or identified actions that could amount to victimisation.

4. Issues

No publicly available data is available to determine the levels of abuse, neglect or violence against persons with disabilities in institutional or residential settings in Tasmania. Nor is there a clear mechanism for reporting such abuse, neglect or violence, or for recording and responding to it.

Because of this, it is difficult to quantify the extent to which there is adherence to relevant standards within the State. Qualitative information suggests, however, that violence, abuse and neglect continue to be experienced by people with disability living in institutional and residential settings in Tasmania, and that there may not be a sufficiently comprehensive framework for dealing with allegations of violence, abuse or neglect nor strict adherence to protocols for reporting and investigating such human rights abuses where they do exist.

Requirement to notify

The *Preventing and responding to abuse in services policy* issued by the Tasmanian Department of Health and Human Services requires all service providers in the event of an alleged abuse to:²³

- ensure clients have immediate access to health care;
- preserve evidence of alleged assaults until such time as a police assessment has been completed;
- notify the Department within two working days of an allegation;
- provide a report on progress with the matter within 28 working days; and
- inform the client's guardian or other responsible person.

Action taken to respond to an allegation is determined by the nature, type and severity of the allegation. The policy requires Tasmania Police be contacted if the abuse might be considered an offence under the Tasmanian *Criminal Code Act 1924* (Tas).

Failure to comply with the policy may lead to disciplinary action or action under the DSA for funded service providers.

²³ Government of Tasmania, *Preventing and Responding to Abuse in Services Policy* (2014) Department of Health and Human Services
<http://www.dhhs.tas.gov.au/disability/publications/policies_procedures_and_guidelines> at 10 April 2015.

Whilst there is a requirement to notify the Department of Health and Human Services within two working days of being notified of an allegation of abuse, complaints made to my office would suggest that not all incidents are reported

Nor is there a clear understanding about the procedures adopted by residential or other accommodation service providers about the mechanisms for investigating such complaints.

Case summary

K has an intellectual disability and lives in a disability group home. A complaint was made by K's relative alleging sexual harassment and uninvited sexual conduct by another resident.

The complainant felt there was a failure to adequately supervise residents or implement preventative strategies.

The complainant also claimed there were failures to report serious incidents.

These claims were substantiated by the service provider, resulting in the need for staff to be counselled on their obligations in this area.

Independence of complaint procedure

Whilst procedural guidelines established under the *Preventing and responding to abuse in services policy* requires organisations to establish internal mechanisms for investigating allegations of abuse, it is my view that there needs to be a specialised independent complaint mechanism available in Tasmania to people with disability in receipt of disability support services (or other human services, other than health services).

Whilst Tasmania has a Health Complaints Commissioner, there is a continuing lack of clarity about whether or not the health complaints process overseen by the Health Complaints Commissioner encompasses complaints about disability support services. While some may be currently covered because they are primarily health services providers, this is not the case for all providers.

Further, the relevant legislation, the *Health Complaints Act 1995* (Tas) provides the Health Complaints Commissioner with significant discretion as to whether or not she or he will deal with a complaint beyond assessment.²⁴ If a complaint is investigated, the Commissioner is required to prepare a report and can include in that report recommend actions. The health service provider is required to report back to the Commissioner on actions taken. Unlike discrimination law, there is no right to a remedy under the Act for the person on whose behalf a complaint has been made.²⁵

²⁴ *Health Complaints Act 1995* (Tas) s 25.

²⁵ *Health Complaints Act 1995* (Tas) Part 6.

Violence, abuse and neglect of people with disability

As Anti-Discrimination Commissioner, I can properly deal with a number of enquiries and complaints relevant to this Inquiry under the *Anti-Discrimination Act 1998* (Tas) because they disclose possible breaches of the Act (see previous summary). This is not, however, true for all complaints because of the nature of the alleged conduct and the specificity of discrimination-related protections provided in the Act.

It is my view, therefore, that robust, independent, human-rights oriented complaints mechanisms must be established by establishing a new independent disability or community services complaints procedure to handle complaints about disability service provision and related matters.

These arrangements would need to include strong protections against victimisation for those making complaints or otherwise exposing abusive, violent or neglectful practices and generally be:

- accessible, including through the provision of appropriate communication and advocacy supports for a person with disability wishing to make a complaint and reasonable adjustments to the complaint handling processes where required;
- subject to review of any decision not to investigate a complaint;
- transparent, effective and culturally appropriate; and
- able to make findings and order remedies, including service adjustments, systemic adjustments and appropriate penalties, in situations where complaints are substantiated.

Notifications received through the national Disability Services Abuse and Neglect Hotline currently investigated by Departmental staff, could also be referred into this process.

Access to mainstream services

It is important that mainstream services are fully inclusive of people with disability. Community based support systems, including those related to sexual assault, domestic violence, victim's services, child protection and community legal services all play an important role in addressing issues raised by violence within the community. However many services do not have specific policies or procedures concerning the provision of services to people with disability, and in some instances it is evident that people with disability are excluded because services are not typically accessible.

Abuse, neglect and violence against people with disability require effective service coordination taking into account the particular needs of the individual concerned. However many service providers lack the knowledge and skills to effectively deliver services to people with disability, including those living in residential or institutional settings.

Access to independent advocacy and support

Concern has been expressed by disability advocates about the failure to provide genuine independent monitoring and oversight of institutions providing services to people with disability.²⁶ Abuse is thought to be therefore largely undetected.

The Tasmanian *Disability Services Act* provides for the establishment of the role of Senior Practitioner. The primary function of the Senior Practitioner is to authorise and monitor restrictive practices in services provided or funded by the Department of Health and Human Services. Monitoring and compliance of standards established under the *Disability Services Act*, including those related to reporting and investigation of broader forms of abuse, are the responsibility of Departmental staff.

A key concern raised by advocacy organisations is the failure to implement arrangements that would allow for independent witnesses or procedures that would allow for unannounced checks on conditions within institutional or residential settings.

Independent advocacy services provide an important safeguard for protecting the rights of people with disability, however services are largely provided at the request of individuals and their authority to act comes directly from the person requesting their service. In certain circumstances, where a person cannot direct an advocate or understand their rights are being violated, advocacy services may intervene without formal authority ‘in the best interests’ of the person.²⁷

While Standards under the *Disability Services Act* require programs and services to be designed and administered to ensure that persons with disability have access to advocacy support, the capacity of advocacy services to take and resolve complaints is not formally mandated or resourced under that Act.

To assist in providing oversight of facilities and services available to people with disability, consideration should be given to establishing by statute in every jurisdiction: an independent Disability Services (or Community Services Complaints Commissioner in smaller jurisdictions such as Tasmania), and an Official Visitors program modelled on similar services available to mental health patients and prisoners.

There are two Official Visitor programs. These are the Mental Health Official Visitors Program and the Prison Official Visitors Program.

Mental Health Official visitors check on the care and treatment of patients in State-run mental health hospitals and other approved facilities and can receive complaints from patients. Such monitoring and complaint handling is not,

²⁶ Phillip French, Julie Dardel, Sonya Price-Kelly, *Rights Denied: Towards a national policy agenda about abuse, neglect and exploitation of persons with cognitive impairment* (2010) People with Disability Australia [18] <http://www.pwd.org.au/pwda-publications/reports.html> at 10 April 2015.

²⁷ Department of Health and Human Services, *The role of Advocacy Services in the Tasmanian Disability Sector* (2011) <<http://www.dhhs.tas.gov.au/disability/publications/general>> at 10 April 2015.

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however, available to people with disability in institutional or residential settings.

The roles and functions of Official visitors are prescribed in legislation and visitors have the authority to visit approved facilities on a regular basis. They are able to receive complaints; check that individuals protected by the scheme are being informed of and accorded their rights; and monitor the adequacy and quality of facilities. Contraventions of the relevant legislation or other matters of concern are also able to be referred to the Principal Official Visitor for investigation. Complaints are able to be made by the person affected; a support person or family member; and/or any person whom the visitor believes has a genuine interest in the person's welfare. Suspected contraventions of the relevant legislation can be referred to the Health Complaints Commissioner or the Ombudsman.

Access to specialist services

The service environment in which disability specific support needs are delivered within Tasmania has undergone significant change over recent years, beginning with a transition away from large institutional facilities to a model of predominantly supported accommodation based around group homes. There remain several large institutional settings in Tasmania.

At the same time, however, the demand for residential support has over many years outstripped the available supply and the waiting list for supported accommodation, whilst now being reduced, has been relatively high. In 2012–13, for example, 142 people were on the supported accommodation waiting list. This reduced to 111 in 2013–14.²⁸

I have received several complaints of failure to provide appropriate services or the lack of availability of choice in the nature and type of services provided. Denying access to preferred services and lack of choice increases personal vulnerability and heightens the risk of abuse and neglect.

²⁸ Department of Health and Human Services, *Annual Report 2013-2014* (2014) <http://www.dhhs.tas.gov.au/about_the_department/publications/annual_reports> at 10 April 2015.

Case summary: inappropriate placement in aged care facility

G is 54 years of age and has an intellectual and physical disability requiring intensive support. G was living in disability supported accommodation until the service provider withdrew its services and no other suitable accommodation was available. As a result, G was moved to an aged-care facility.

G's request that more suitable accommodation be found was refused because she had tried disability specific accommodation previously and this had not been successful. Nursing home staff kept telling that G that she is too young to be in an aged-care facility and is not wanted there.

After moving into the aged-care facility, G also asked for day support activities through her disability support provider. She was told she should now seek these through an aged-care provider on the basis she was no longer eligible for disability services as disability day support programs were not available to persons living in residential aged care.

Case summary: inconsistent support service provision

L is 32 years of age and has severe physical and mental disability and epilepsy. She is unable to communicate verbally and has rods in her spine due to scoliosis. L is totally dependent on her family and carers for all daily living requirements. L's mother complained about a lack of communication around rostering of support workers for L's care, including withdrawal of services at short notice. Support workers for L were routinely not available or refused to provide her with the required support.

The failure to provide settled support arrangements interrupted L's daily routine and caused her to become anxious and unsettled. This led to noticeable behavioural changes, which were identified a sign of stress and anxiety. This resulted in the family considering L moving into shared accommodation, which they felt would give stability and routine to L.

Case summaries: refusal of service

T was refused services because of his violent outbursts that were directly related to his disability.

B was excluded from care because of behaviour associated with his autism spectrum disorder.

The way in which services are delivered to people within institutional settings often promotes a sense of powerlessness and lack of control. This can lead to a culture of coercion, including emotional and psychological abuse.

Case summary

W is resident at a large institutional facility. He is unable to speak as a result of his disability, but is able to communicate using electronic equipment. W has complex medical needs.

W complained that health services provided to him at the facility did not allow enough time for him to engage in discussion around options. Communication often ended up being through a nurse (not of his choosing) or his advocate and the health service practitioner failed to engage with W directly.

When W complained about the way he was being treated, all health services were withdrawn.

Case summary

P is 80 years of age and in poor health. P lives in a residential facility.

In his complaint, P claimed that he and other residents were being bullied, abused and intimidated by a staff member of the facility. The behaviour included overly strict rules, being refused access to food supplies, verbal abuse and threatening gestures.

P had made a complaint to the governance body of the facility, but had not got any response.

Barriers to accessing justice in the criminal justice system

Widespread evidence suggests that crimes against people with disability are largely unreported to police and that where reports are made, there are low rates of investigation or prosecution.²⁹

A review of the criminal justice system conducted by my office in 2013 suggests there are a number of ongoing barriers to people with disability accessing the criminal justice system in Tasmania.

Key issues identified included:

- a lack of protocols and training of police to assist in dealing with people with disability as either victims or alleged offenders;
- failure to regularly facilitate access to a support person or provide adjustments to facilitate access to justice;
- a perception that people with disability are unreliable witnesses and limited in their capacity to give evidence leading to decisions not to prosecute in situations where people with disability have been the victim of a criminal act;
- a lack of specialist legal services to assist people with disability who come into contact with the criminal justice system;
- inflexible rules of evidence that prevent people with disability giving evidence or participating in legal processes in a way that is appropriate to their ability or preferred methods of communication;
- lack of access to specialist disability services for prisoners with disability; and
- lack of access to advocacy services.

These findings were consistent with those identified by the Australian Human Rights Commission in its February 2014 report *Equal before the law: towards disability justice strategies*.³⁰ Barriers identified by the Australian Human Rights Commission included:

- lack of adequate protection in situations where a person may be the victim of violence or other unlawful behaviour;
- higher risk of people with disability being jailed and having ongoing contact with the criminal justice system;
- widespread difficulty in identifying disability and responding to the needs of people with disability as service users;
- lack of consistent access to supports and other adjustments to enable effective access to the justice system;
- inappropriateness of formal legal or court procedures in certain circumstances;
- lack of appropriate diversionary measures for people with disability who come into contact with the justice system; and
- lack of access to bail or the supports necessary to comply with bail conditions.

²⁹ Phillip French, Julie Dardel and Sonya Price-Kelly, above n 26, 28–37.

³⁰ Australian Human Rights Commission, *Equal before the law: towards disability justice strategies* (2014) <<https://www.humanrights.gov.au/publications/disability-rights>> at 10 April 2015.

Violence, abuse and neglect of people with disability

To assist in addressing these issues, my office has been tasked with responsibility to co-ordinate the development of a Tasmanian Disability Justice Strategy in 2015. The Strategy will identify barriers to access for people with disability to the justice system and strategies to be implemented to increase level of support and remove those barriers.

As the AHRC report pointed out, however, the lack of access to justice in the criminal justice system is a problem for all jurisdictions. It is my view, therefore, that national standards be established aimed at removing all barriers to people with disability have equal access to the law and that these standards be linked to the National Disability Strategy and the National Disability Agreement, as recommended by the AHRC.³¹

Legal Framework

There are at present no laws in Tasmania that specifically make violence, abuse, neglect or vilification on the basis of disability a criminal offence or an aggravating factor when assessing penalties for other general offences, such as rape of assault.

While civil remedies are available in certain circumstances under anti-discrimination law, it is my view that actions which exploit the vulnerability of those with disability should form the basis of enhanced criminal offence provisions. This should be accompanied by the introduction of provisions which presume legal capacity and require the provision of supports in circumstances where this may be required to realise that capacity.

It is my view that this would form the basis for addressing commitments under the CRPD and related instruments to provide people with disability effective access to justice and enhance the responsiveness of the criminal justice system to behaviour that may constitute such offences.

³¹ Ibid p36