

**BACKGROUND PAPER ON ACCESS TO
JUSTICE FOR PEOPLE WITH DISABILITY
IN THE CRIMINAL JUSTICE SYSTEM**



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In April 2013, the Australian Human Rights Commission (AHRC) released an Issues Paper concerning access to justice in the criminal justice system for people with disability who need communication supports or have complex and multiple support needs. This report responds to some of the issues raised in the paper by combining research conducted specifically by DLA Piper and information gathered at various public meetings conducted by the AHRC around Australia between April and August 2013.

1. EVIDENCE AND PEOPLE WITH DISABILITY WHO NEED COMMUNICATION SUPPORTS OR WHO HAVE COMPLEX AND MULTIPLE SUPPORT NEEDS

a) Describe the common law and Federal, State and Territory laws, policies and guidelines with respect to the determination of whether a person with disability who needs communication supports or who has complex and multiple support needs is competent to give evidence as a witness (including participation in proceedings as the defendant).

1.1 Issues

People with disability who need communication supports or who have complex and multiple support needs, are more likely to have prejudicial assessments of their competency to give evidence both as a witness to criminal proceedings and as a defendant to proceedings. This has the potential to preclude people with disabilities from accessing justice. This is an issue of concern for both victims of crime, that might be prevented from giving evidence necessary to secure a conviction in proceedings, and defendants, who might be prevented from bringing their case forward without additional supports in court.

1.2 Law and policies

Competency to give evidence, both as a witness generally and as a defendant, is governed by the various evidence legislation in the Commonwealth and in each of the States and Territories. In the Commonwealth, New South Wales, Victoria, Tasmania and the Australian Capital Territory, this is under the *Uniform Evidence Acts*.¹ Queensland, South Australia, the Northern Territory and Western Australia have not adopted the uniform evidence laws, and rely on their existing legislation.

Under the *Uniform Evidence Acts*:

1. Every person (regardless of age, race and gender) is competent to give evidence *unless* they do not have the capacity to understand a question about a fact or do not have the capacity to give an answer about a fact that is able to be understood and this incapacity is not able to be overcome.²
2. The *Uniform Evidence Acts* expressly state that mental, intellectual or physical disability are examples of reasons that lead to a person having a lack of capacity to understand a question or give an answer.³
3. A person incapable of giving evidence about one fact might be competent to give evidence about other facts.⁴

¹ *Evidence Act 1995 (Cth), Evidence Act 1995 (NSW), Evidence Act 2008 (Vic), Evidence Act 2001 (Tas), Evidence Act 2011 (ACT)*

² *Evidence Act 1995 (Cth) ss 12, 13, Evidence Act 1995 (NSW) ss 12, 13, Evidence Act 2008 (Vic) ss 12, 13, Evidence Act 2001 (Tas) ss 12, 13, Evidence Act 2011 (ACT) ss 12, 13*

³ *Uniform Evidence Acts s13(1)*

4. A person who is competent of giving evidence is not competent to give sworn evidence if they do not have the capacity to understand that they are under an obligation to give truthful evidence.⁵
5. If a person is unable to give sworn evidence they may be competent to give unsworn evidence if the court has told the person that it is important to tell the truth.⁶
6. Evidence given by a witness will not become inadmissible because that witness ceases to be competent of giving evidence.⁷
7. The court is able to inform itself as it sees fit as to questions of competency including obtaining information from persons with specialised knowledge.⁸

The *Uniform Evidence Acts* also outline examples of how disabilities might be overcome by use of interpreters and by allowing adjustments to be made for the delivery of evidence by deaf or mute witnesses.⁹ These provisions were included to make it clear that the physical disabilities of a witness give rise only to practical problems of presentation and not to competence.¹⁰ No further examples are provided under the legislation of adjustments that might be made in order to accommodate witnesses or defendants with communications or other support needs. However section 31 does permit the Court discretion to have questions asked or evidence adduced "in any appropriate way" in circumstances where a witness cannot speak or cannot hear.¹¹ Further examples of how disabilities might be overcome were not included in the *Uniform Evidence Act* on the basis that if the law was more prescriptive of the adjustments that could be made this might prevent alternative adjustments used and in turn limit the types of incapacities that might be overcome.¹² Of course, that does not preclude a further discussion of adjustments that might be made can be found below at Question 1 (b).

In Queensland everyone is presumed competent to give evidence.¹³ If a question as to the competency of a witness is raised the test is whether the witness is able "to give an intelligible account of events which he or she has observed or experienced".¹⁴ Whether a person is competent to give sworn evidence will depend on whether the court is satisfied that the person is aware that giving evidence is a serious matter and that he or she is under an obligation to tell the truth.¹⁵ When a person is not

⁴ *Evidence Act 1995* (Cth) s 13 (2), *Evidence Act 1995* (NSW) s 13 (2), *Evidence Act 2008* (Vic) s 13 (2), *Evidence Act 2001* (Tas) s 13 (2), *Evidence Act 2011* (ACT) s 13 (2)

⁵ *Evidence Act 1995* (Cth) s 13 (4), *Evidence Act 1995* (NSW) s 13 (4), *Evidence Act 2008* (Vic) s 13 (4), *Evidence Act 2001* (Tas) s 13 (4), *Evidence Act 2011* (ACT) s 13 (4)

⁶ *Evidence Act 1995* (Cth) s 13 (5), *Evidence Act 1995* (NSW) s 13 (5), *Evidence Act 2008* (Vic) s 13 (5), *Evidence Act 2001* (Tas) s 13 (5), *Evidence Act 2011* (ACT) s 13 (5)

⁷ *Evidence Act 1995* (Cth) s 13 (7), *Evidence Act 1995* (NSW) s 13 (7), *Evidence Act 2008* (Vic) s 13 (7), *Evidence Act 2001* (Tas) s 13 (7), *Evidence Act 2011* (ACT) s 13 (7)

⁸ *Evidence Act 1995* (Cth) s 13 (8), *Evidence Act 1995* (NSW) s 13 (8), *Evidence Act 2008* (Vic) s 13 (8), *Evidence Act 2001* (Tas) s 13 (8), *Evidence Act 2011* (ACT) s 13 (8)

⁹ *Evidence Act 1995* (Cth) ss 30, 31, *Evidence Act 1995* (NSW) ss 30, 31, *Evidence Act 2008* (Vic) ss 30, 31, *Evidence Act 2001* (Tas) ss 30, 31, *Evidence Act 2011* (ACT) ss 30, 31.

¹⁰ Odgers, S., *Uniform Evidence Law* (Lawbook Co, 8th ed, 2009) at [1.2.2380] citing ALRC 26, Vol 1, para 612

¹¹ Uniform Evidence Acts s31(1) s31(2)

¹² *Uniform Evidence Law Report* (ALRC Report 102)/4 para 4.75

¹³ *Evidence Act 1977* (Qld), s 9

¹⁴ *Evidence Act 1977* (Qld) s 9A (2)

¹⁵ *Evidence Act 1977* (Qld) s 9B (2)

competent to give sworn evidence a court must explain to the person the importance of telling the truth for the purpose of that person giving unsworn evidence.¹⁶

In Western Australia and South Australia, witnesses are presumed competent to give evidence on oath.¹⁷ However, a person may give evidence informally if he or she does not understand the obligation of an oath or affirmation but generally understands that there is an obligation to tell the truth while giving evidence.¹⁸

Throughout each jurisdiction in Australia the question of competency is a question of fact to be determined by a judge. In determining this question a judge may receive expert evidence and may ask questions of the witness. For example, the NSW Criminal Trials Bench Book lists basic questions that judicial officer could ask such as "how old are you?", "who lives with you?" and "do you know that you will be asked questions about something that happened a while ago?".¹⁹

1.3 Analysis

The above laws apply consistently to those with and without disabilities and people with disabilities are not automatically presumed to be incompetent and unable to give evidence.²⁰ This fits within the framework of article 12 of the Convention on the Rights of People with Disabilities that they should receive equal recognition before the law and article 13 of the Convention, that they should have access to justice, at least in a formal sense. However, those with a disability might still be precluded from giving evidence in court proceedings if they encounter prejudicial assessments relating to their competence based on their abilities²¹. Further, even if the Court permits a person with a disability to give evidence, the probative value given to that evidence might be subject to a prejudicial assessment.

b) Please describe any provisions in Federal, State or Territory law relevant to facilitating the giving of evidence by persons who needs communication supports or who have complex and multiple support needs.

1.4 Issues regarding the facilitating of evidence for persons with a disability

People with disability face a variety of barriers when interacting with the legal system. Witnesses who have communication difficulties may be particularly disadvantaged by the emphasis on oral evidence in court proceedings. If reliance is to be placed upon the evidence in chief of a witness with communication difficulties, that witness must usually be made available for cross-examination or otherwise face an adverse inference being drawn. The hostility of cross-examination, the use of coercive questioning strategies and the delay between the event and proceedings all contribute to a negative impact on the testimony of witnesses with disabilities.²² Lack of training or understanding of the abilities and disadvantages faced by people with disabilities is also a barrier to achieving justice.²³

¹⁶ *Evidence Act 1977* (Qld) s 9B (3)

¹⁷ *Evidence Act 1906* (WA) s 97, *Evidence Act 1929* (SA) s 6

¹⁸ *Evidence Act 1906* (WA) s 100A, *Evidence Act 1929* (SA) s 9

¹⁹ NSW Criminal Trials Bench Book, available at <<http://www.judcom.nsw.gov.au/publications/benchbks/criminal>>

²⁰ *R v Hill* (1851) 169 ER 495

²¹ Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers*,

March 2013, available at <http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iaijspidftc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf>

²² UK Judicial Studies Board *Equal Treatment Bench Book*, 2008, available at <http://www.judiciary.gov.uk/Resources/JCO/Documents/Training/2009_etbb_5_disability.pdf>

²³ Villamanta Disability Rights Legal Service Inc *A guide and educational tool for people working in the criminal justice system: Judges, Magistrates, Court Staff, Lawyers, Advocates, Police and Corrections Workers*, Published April 2012 by,

States and Territories have attempted to rectify these barriers through legislation.²⁴ Such legislation has had varying degrees of success.

1.4.1 Commonwealth legislation

Evidence Act 1995 (Cth)

The *Evidence Act 1995 (Cth)* is the legislation which governs the procedures for giving evidence in court proceedings. The *Evidence Act* provides for various methods to address particular inequalities inherent in the criminal justice system. Such methods are practical, procedural ways to facilitate the giving of evidence for people who may have a communication difficulty. Nevertheless these mechanisms are only as effective as the court will allow and much depends on the willingness of the court to adopt flexible evidence procedures. For instance, under the Act, a judge may direct a witness to answer a question in a particular way such as using simple language or through non-verbal communication.²⁵ This focuses on the manner and form of the questions to witnesses and their responses.²⁶ Section 31 of the Act provides that witnesses who cannot hear or speak 'adequately' may be questioned or give evidence by 'appropriate means'.²⁷ These statutory provisions also exist in the jurisdictions who have adopted the uniform evidence rules.

Under the *Uniform Evidence Acts*, the Australian Capital Territory, Victoria, New South Wales, Tasmania and the Commonwealth all follow similar legislative provisions related to evidence. Common amongst these jurisdictions include provisions for 'deaf and mute' witnesses to give evidence in an alternative way,²⁸ allowance for interpreters²⁹ (with the exception of Tasmania) and the provision that a judge must disallow an improper question.³⁰ Under the uniform evidence legislation, an improper question can include a question which is based on a stereotype based on a person's mental or physical disability. Other States and Territories have somewhat similar provisions in their respective *Evidence Acts*, however the wording is often different. Differences between the various States and Territories will be discussed in more detail below.

Disability Discrimination Act 1992 (Cth)

The *Disability Discrimination Act 1992* makes disability discrimination unlawful and promotes equal opportunity for people with disabilities in many aspects of public life such as employment, education and access to premises. Section 5 and section 6 of the Act provide that direct and indirect discrimination is prohibited under the Act.³¹ Such discrimination can include instances where the failure to make reasonable adjustments has, or is likely to have, the effect of disadvantaging persons with the disability.³² The Act specifically applies to people who perform a function under a Commonwealth law or administrate a Commonwealth law. The Act explicitly prohibits such persons

available at

<http://www.villamanta.org.au/edit/documents/People_with_ID_in_Criminal_Justice_System_Project_Final.pdf>

²⁴ See for example: *Evidence Act 1995 (Cth)*, *Evidence Act 2008 (VIC)*, *Evidence Act 1995 (NSW)*, *Evidence Act 2001 (TAS)*, *Evidence Act 2011 (ACT)*, *Evidence Act 1906 (WA)*, *Evidence Act 1977 (QLD)*, *Evidence Act 1929 (SA)*, *Evidence Act 2011 (NT)*

²⁵ *Evidence Act 1995 (Cth)* s 29

²⁶ Ibid

²⁷ Ibid s 31

²⁸ *Evidence Act 1995 (Cth)* s 31, *Evidence Act 2008 (VIC)* s 31, *Evidence Act 1995 (NSW)* s 31, *Evidence Act 2001 (TAS)* s 31, *Evidence Act 2011 (ACT)* s 31

²⁹ *Evidence Act 1995 (NSW)* s 30, *Evidence Act 2011 (ACT)* s 30, *Evidence Act 2008 (VIC)* s 30, *Evidence Act 1995 (Cth)* s 30

³⁰ *Evidence Act 1995 (NSW)* s 31, *Evidence Act 2008 (VIC)* s 41 (2), *Evidence Act 2001 (TAS)* s 41, *Evidence Act 2011 (ACT)* s 41, *Evidence Act 1995 (Cth)* s 41

³¹ *Disability Discrimination Act 1992 (Cth)* ss 5-6

³² Ibid

from discriminating against another person on the ground of the other person's disability in the performance of that function, the exercise of that power or the fulfilment of that responsibility.³³ Nevertheless, this protection is limited and would likely not apply to the physical aspects of ensuring access, such as provision of hearing loops, ramps into the court. Rather, it could apply by allowing flexibility in the way a judicial officer asks questions of people with disability.

1.4.2 New South Wales

Criminal Procedure Act 1986 (NSW)

This Act provides that evidence of a vulnerable person (being either a child or a cognitively impaired person, including persons with an intellectual disability) within the meaning of 306M may be given wholly or partly in the form of a sound and/or visual recording of an interview of the witness by an investigating official or orally in the courtroom.³⁴ A vulnerable witness can give evidence by closed circuit video, one way screen, with a court companion or in a closed court.³⁵

The Act also provides that a person with a cognitive disability can have a supportive person present, including a person who can assist with interpreting their evidence.³⁶ Also, section 306ZL provides that vulnerable persons have a right to alternative arrangements for giving evidence when the accused is unrepresented.³⁷ In such circumstances, the vulnerable person is to be examined by a person appointed by the court, not the accused. The person appointed by the court must ask the complainant or vulnerable person only those questions which the accused person requests that person to put to the complainant or vulnerable person³⁸ and must not give legal or other advice to the accused.³⁹

Evidence Act 1995 (NSW)

This Act provides that a court may give directions as to how a question may be answered.⁴⁰ Under the Act, the right of a witness to give evidence through an interpreter has been given statutory recognition by section 30.⁴¹ Whether an interpreter will be used is a matter for the discretion of the court. It is likely that a refusal to grant an adjournment in order that an interpreter be provided could amount to a denial of procedural fairness.⁴² The material consideration is whether, without an interpreter, the witness (whether a party or not) is likely to be unfairly handicapped in giving evidence. In the case of a party, the test is whether he or she cannot sufficiently understand what others are saying without the assistance of an interpreter and adequately reply.⁴³ The Local Court of NSW Bench Book deals with the use of interpreters and also provides some guidance on the use of interpreters under this Act.⁴⁴ This approach is followed in other courts in NSW. The Bench Book provides that in cases where "*persons who are so profoundly and peculiarly affected*" that only a very limited number of people would be able to interpret, a court can give such directions as are necessary to adapt to the

³³ Ibid s 29

³⁴ *Criminal Procedure Act 1986 (NSW)* s 306 (M)

³⁵ Ibid

³⁶ Ibid s 306 ZK

³⁷ Ibid s 306ZL

³⁸ Ibid ss 294A(3) & 306ZL(3)

³⁹ Ibid ss 294A(4) & 306ZL(4)

⁴⁰ *Evidence Act 1995 (NSW)* s 29

⁴¹ Ibid s 30

⁴² *Cucu v District Court (NSW)* 73 A Crim R 240 at 243, 244 and 250

⁴³ Ibid

⁴⁴ Juridical Commission of New South Wales, Bench Book- Interpreters, available at <http://www.judcom.nsw.gov.au/publications/benchbks/local/interpreters.html>

circumstances.⁴⁵ As a result, the definition of interpreter appears to be broad enough to include communication support workers other than language and sign language interpreters.

1.4.3 Western Australia

Evidence Act 1906 (WA)

This Act provides for certain provisions for "special witnesses". The section provides that special witnesses include people who have a physical disability or mental impairment (as defined in the *Criminal Law (Mentally Impaired Defendants) Act 1996*) and who would be unlikely to be able to give evidence, or to give evidence satisfactorily; or be likely to suffer severe emotional trauma; or be so intimidated or distressed as to be unable to give evidence or to give evidence satisfactorily by reason of any factor that the Court considers relevant.⁴⁶ A person declared to be a special witness may have a "communicator" in any proceedings.⁴⁷ The function of a communicator is to communicate and explain to the witness the questions they have been asked and also communicate to the court the evidence that the witness has given.⁴⁸

Section 106HA of the WA *Evidence Act* also provides for visual recording of interviews with persons with mental impairment in cases where the interviewer believes the person had, or may have, suffered physical or sexual abuse.⁴⁹ This section applies to interviews regardless as to whether the person's parent or guardian has given permission to participate in the interview.⁵⁰ The interview can be with a 'prescribed person' and can be admissible as evidence.⁵¹

1.4.4 Victoria

Criminal Procedure Act 2009 (VIC)

This Act outlines the conduct of special hearing evidence of the complainant is to be given by means of closed-circuit television or other facilities that enable communication between the room in which the complainant is present and the courtroom.⁵² Section 367 of the Act also allows for cognitively impaired witnesses to give evidence in chief by a pre-recorded audio or audio-visual recording.⁵³

Division 5 of the Act deals with the use of recorded evidence-in-chief for cognitively impaired witnesses in sexual offence and assault matters only.⁵⁴ Division 6 of the Act allows for cognitively impaired complainants to participate in a special hearing. The extent of the complainant's cognitive impairment will be considered by the court when determining whether to allow a special hearing.⁵⁵

Evidence Act 2008 (VIC)

Section 26 (a) provides that a court may make the orders it considers 'just' in relation to the way in which witnesses are to be questioned.

⁴⁵ Ibid.

⁴⁶ *Evidence Act 1906 (WA)* s 106R(3)

⁴⁷ Ibid ss 106F, 106R(4)(b) & 106R(4b)

⁴⁸ Ibid s106F

⁴⁹ Ibid s 106HA

⁵⁰ Ibid

⁵¹ Ibid s 106 HA (ba) A prescribed person for the purposes of section 106HA(1a)(a) by reference to the offices or positions held by them, or their training or experience, or any combination of those criteria

⁵² Ibid s 372

⁵³ Ibid s 367

⁵⁴ *Criminal Procedure Act 2009 (VIC)* Div 5

⁵⁵ Ibid Div 6

1.4.5 South Australia

Evidence Act 1929 (SA)

This Act allows for the court to disallow an improper question. Under the Act, an improper question can include a question which is based on a stereotype based on a person's mental or physical disability.⁵⁶ Section 13 make reference to vulnerable witnesses. This provision allows for the witness to give evidence by closed circuit video, one way screen, court companion or in a closed court.⁵⁷ The vulnerable witness must apply for these provisions in advance of the proceedings.⁵⁸ The Act also provides that the court may, on application by the prosecution, order that an audio visual record be made of the witness's evidence before the court.⁵⁹

1.4.6 Tasmania

Evidence Act 2001 (TAS)

Section 29 provides that a judge can direct a witness to answer a question in a particular way.⁶⁰

Evidence (Audio and Audio Visual Links) Act 1999

This Act provides that a Tasmanian court may, on the application of a party to a proceeding before the court or on its own motion, direct that evidence be taken, or submissions made, by audio link or audio visual link, from a participating State or from any place within Tasmania other than the courtroom or other place at which the court is sitting.⁶¹ This Act does not specifically refer to people with disability.

Evidence (Children and Special Witnesses) Act 2001

This Act provides for certain people to have additional assistance when giving evidence. This includes people with an intellectual, mental or physical disability. If the court determines that a witness meets one of these criteria then it is possible to have a support person with the witness in the court; to use an audio-visual link to give evidence rather than being in court; or to have some persons excluded from the court room.

Section 8 of the Act allows for a judge to determine by reason of intellectual, mental or physical disability, the person is, or is likely to be, unable to give evidence satisfactorily in the ordinary manner.⁶² In such circumstances the judge can make or order, or parties can make an application to allow the special witness have near him or her a person approved by the judge who may provide him or her with support; an order that the evidence of the special witness be given by audio visual link or an order that, while the special witness is giving evidence, all persons other than those specified in the order be excluded from the courtroom.⁶³

1.4.7 Queensland

Evidence Act 1977 (QLD)

⁵⁶ *Evidence Act 1929 (SA)* s 25

⁵⁷ *Ibid* s 13

⁵⁸ *Ibid* s 13 A (6)

⁵⁹ *Ibid* s 13 C

⁶⁰ *Ibid* s 29

⁶¹ *Evidence (Audio and Audio Visual Links) Act 1999* s 6

⁶² *Evidence (Children and Special Witnesses) Act 2001* s 8

⁶³ *Ibid* s 8 (2) b

Like other *Evidence Acts*, this Act provides that a court must disallow an improper question. This decision can be made by reference to the witness' mental, intellectual or physical disability.⁶⁴

Section 21 A (1) (b) (i) defines a special witness as a person who may be disadvantaged because of a mental, intellectual or physical impairment. Section 21 A (2) provides that in such circumstances a judge can order that the special witness can give evidence by closed circuit video, one way screen, court companion or in a closed court.⁶⁵ Section 21 A (2) (f) also allows for judges to direct those questioning the witness allow for breaks, ask simple questions and are asked only for a limited time.⁶⁶ Section 93 A also provides that a statement made before proceeding a person with an impairment of the mind can be admissible in court so long as the maker of the statement is available to give evidence in court.⁶⁷

1.4.8 Northern Territory

Evidence Act 2011 (NT)

Part 2 A of this Act defines a 'vulnerable witness' as a person who has an intellectual disability in the opinion of court.⁶⁸ Under this Act, a vulnerable witness can give evidence by closed circuit video, one way screen, with a court companion or in a closed court.⁶⁹ This section outlines that a court companion is there to provide emotional support for the witness.⁷⁰ Section 21 B provides that vulnerable witnesses in instances of sexual or serious violence offences can make their statements by a prior video recording.⁷¹ The Act provides that where such measures are used, the judge must issue a warning to the jury to the effect that no adverse inference is to be drawn against the accused as a result of the use of the arrangement.⁷² Section 21C also allows to evidence of vulnerable persons given outside the courtroom can be treated as if it were given in a court room.⁷³

1.4.9 Australian Capital Territory

Evidence Act 2011 (ACT)

Section 26 (a) provides that a court may make the orders it considers just in relation to the way in which witnesses are to be questioned.⁷⁴

Evidence (Miscellaneous Provisions) Act 1991 (ACT)

Division 4.3 of the Act allows for witnesses in sexual and violent offence proceeding to give evidence by audio-visual link.⁷⁵ Furthermore, the Act also stipulates that in such circumstances, the judge must warn the jury to the effect that the jury should not draw any inference against an accused person in the proceeding from the fact that the evidence of the complainant or similar act witness is given by audio-visual link.⁷⁶

⁶⁴ *Evidence Act 1977 (QLD)* s 21

⁶⁵ *Ibid* s 21 A (2)

⁶⁶ *Ibid* s 21 A (2) f

⁶⁷ *Ibid* s 93

⁶⁸ *Evidence Act 2011 (NT)* Pt 2 A

⁶⁹ *Ibid* s 21A (2)

⁷⁰ *Ibid*

⁷¹ *Ibid* s 21 B

⁷² *Ibid* 21 B (3)

⁷³ *Ibid* s 21 C

⁷⁴ *Ibid* s 26 (a)

⁷⁵ *Evidence (Miscellaneous Provisions) Act 1991 (ACT)* div 4.2B

⁷⁶ *Ibid* s 46

1.5 Analysis of legislation

Despite the fact that the Uniform Evidence Legislation and legislative changes in other jurisdictions have attempted to address issues relating to witnesses with disability who need communication supports or who have complex and multiple support needs, it appears that in practice, courts tend to use only those basic measures specifically listed in the legislation.⁷⁷ Courts are generally reluctant to use their general powers under the legislation and without judicial officers exercising their discretion in disallowing improper questions and intervening in the cross-examination of witnesses, such provisions will not assist those with disabilities.⁷⁸ Some of the other methods introduced by Australian jurisdictions to address testimony given by vulnerable witnesses includes the use of expert testimony, limitations on the Defendant's right to cross-examine, best practice guidelines, screening witnesses from the Defendant, allowing witnesses to give evidence out of Court, allowing witnesses to have a support person or intermediary with them when testifying and recording part or all of their testimony by video or audio recording. These measures have had varying degrees of effectiveness.

1.5.1 Obligations under International Human Rights Law

Australia has obligations under international human rights law to afford persons with disability equal recognition under the law and equality of access to justice. The standards mandated by the international human rights treaties provide a useful framework within which to analyse whether Australia's current legislation and practices sufficiently ensure access to justice for people with disability. The relevant treaty is the Convention on the Rights of Persons with Disabilities which was ratified by Australia in 2008. Article 11 of the CRPD states that persons with disabilities shall be able to avail themselves of qualified legal aid when such aid proves indispensable for the protection of their persons and property.⁷⁹ If judicial proceedings are instituted against them, the legal procedure applied shall take their physical and mental condition fully into account. Furthermore, Article 12 provides that persons with disabilities have the right to enjoy legal capacity on an equal basis with others and State parties should provide appropriate measures to provide access to the support measures which may be required in exercising legal capacity.⁸⁰ Furthermore, in regard to facilitation, Article 13 requires that state parties ensure effective access to justice for people with disability on an equal basis with others.⁸¹ Facilitation can include accommodating for disabilities in all stages of the proceedings as well as educating court personnel in how to address issues faced by people with disability.

According to these principles, people with disability have a right to due process of law; and a recognition of their individual capacities and limitations. Currently, the law in Australia is lacking in this respect. Even after overcoming the hurdle of establishing capacity, witnesses with disabilities are still faced with unjust outcomes and difficulties in communicating their evidence in criminal proceedings, whether that evidence is communicated in their capacity as a victim or as a third party witness.⁸² In assessing the probative value of evidence, a judicial officer should have regard to, among

⁷⁷ P Bowden, D Plater and T Henning, 'Balancing fairness to Victims, Society and Defendants in the Cross-Examination of Young Children and Complainants with an Intellectual Disability: An Impossible Triangulation?'

⁷⁸ See P Bowden, D Plater and T Henning, 'Balancing fairness to Victims, Society and Defendants in the Cross-Examination of Young Children and Complainants with an Intellectual Disability: An Impossible Triangulation?' and The Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and Their Families and Carers*, available at http://www.parliament.vic.gov.au/images/stories/committees/lawreform/iaijspidtfc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf p 221-222

⁷⁹ UN Convention on the Rights of Persons with Disabilities (CRPD), Signed by Australia on 30 March 2007, Article 11

⁸⁰ Ibid Art 12

⁸¹ Ibid Art 13

⁸² See Law Reform Commission of New South Wales, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), available at <http://www.bocsar.nsw.gov.au/lrc.nsf/pages/R80CHP2> and The Victorian Parliament Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an*

other things, the unreliability of a witness. However, there must be a distinction between an unreliable witness and a witness that is perceived to be unreliable only as a result of their disability. The current system does little to address the vulnerability of witnesses with disabilities and as a result, evidence given by such witnesses is often perceived to be unreliable and confusing.⁸³ If no effort is made to address the vulnerability of witnesses, the current adversarial system will promote unjust outcomes for persons with disabilities and members of the public who rely upon their evidence in criminal matters

1.5.2 Perceptions of credibility

In regard to the use of expert testimony, States and Territories that comply with the *Uniform Evidence Act* have now abolished the common law rule which prevented experts from providing their opinion about the credibility of witnesses.⁸⁴ This allows for an expert to correct any mistaken beliefs that juries may have about a particular witnesses' credibility. This is important for all witnesses who need communication supports or who have complex and multiple support needs as such witnesses may be less likely to seek clarification when they are confused, may be prone to anxiety and have difficulties remembering what happened a long time after the event in question.⁸⁵ Therefore expert testimony can be very useful in such cases. However there are problems with expert testimony in that it is very costly and it is difficult to find trained people in rural Australia especially who can give expert testimony.⁸⁶

1.5.3 Questioning and cross examination

Another way some jurisdictions have attempted to address problems faced by people with disability is by placing limitations on cross-examination. All Australian jurisdictions except Tasmania have enacted legislation to restrict cross-examination of vulnerable witnesses in particular cases by unrepresented defendants.⁸⁷ This attempts to remove added stress attached to cross-examination, therefore potentially increasing the reliability of the complainant's testimony.⁸⁸ In certain situations provision is made for cross-examination to occur by independent legal counsellor another Court appointed person.⁸⁹

Problems regarding cross examination are exacerbated by the duties of the defence lawyer in Australia. Defence counsel have a duty to represent their client "fearlessly".⁹⁰ This is often characterised by attempts to confuse or make witnesses appear to be unreliable. Witnesses who are vulnerable are often faced with confusing questions such as questions containing double negative and

Intellectual Disability and Their Families and Carers, available at http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iaijspidtfc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf

⁸³ P Bowden, D Plater and T Henning, 'Balancing fairness to Victims, Society and Defendants in the Cross-Examination of Young Children and Complainants with an Intellectual Disability: An Impossible Triangulation?'

⁸⁴ *Evidence Act 1995* (Cth) 108C

⁸⁵ UK Judicial Studies Board *Equal Treatment Bench Book*, 2008, available at http://www.judiciary.gov.uk/Resources/JCO/Documents/Training/2009_etbb_5_disability.pdf, p 25

⁸⁶ P Bowden, D Plater and T Henning, 'Balancing fairness to Victims, Society and Defendants in the Cross-Examination of Young Children and Complainants with an Intellectual Disability: An Impossible Triangulation?'

⁸⁷ *Criminal Procedure Act 1986* (NSW), s 306ZL; *Evidence (Miscellaneous Provisions) Act 1991* (ACT), s 38D; *Evidence Act 1906* (WA), s 106G; *Evidence Act 1977* (Qld), s 21O; *Evidence Act 1929* (SA), s 13B; *Sexual Offences (Evidence and Procedure) Act* (NT), s 5; *Criminal Procedure Act 2009* (Vic), s 356; *Crimes Act 1914* (Cth)

⁸⁸ P Bowden, D Plater and T Henning, 'Balancing fairness to Victims, Society and Defendants in the Cross-Examination of Young Children and Complainants with an Intellectual Disability: An Impossible Triangulation?'

⁸⁹ *Criminal Procedure Act 1986* (NSW) s 294A(4); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(5); *Evidence Act 1906* (WA) s 25A(1)(c); *Evidence Act 1929* (SA) s 13B; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(1)(b)

⁹⁰ *Rondel v Worsley* [1969] 1 AC 191 at 227; [1967] All ER 993 at 998

leading questions which indirectly suggest a particular answer to a question.⁹¹ These can be particularly confusing for people who need communication supports or who have complex and multiple support needs. Though the *Australian Solicitors Conduct Rules 2011*⁹² provides that a lawyer must not mislead, confuse, harass or humiliate the witness, the application of these rules can be highly subjective and it can be difficult for a lawyer to balance these conduct rules against the duty to the client.

Some jurisdictions have produced 'best practice' guidelines for questioning vulnerable witnesses. The *Equality Before The Law Bench Book of NSW*⁹³ and *Western Australian Guidelines for Cross Examination of Children and Persons Suffering from a Mental Disability*⁹⁴ all help to ensure that questions asked of witnesses are asked in an appropriate style and provide advice at a standard to assist judicial officers to use their discretion regarding questioning witnesses. This goes some way to assist judicial officers and lawyers in dealing with people with disability who need communication supports or who have complex and multiple support needs and better facilitates the giving of evidence. Such educational materials also go some way to address requirements outlined in Article 13 of the CRDP by ensuring that court personnel are appropriately trained in dealing with issues faced by people with disability in the criminal justice system.⁹⁵ Nevertheless, the ingrained adversarial culture still remains and can potentially negate the value of such guidelines.⁹⁶

1.5.4 Use of pre-recorded evidence and audio-visual aids

Pre-recorded evidence has also been used by many jurisdictions to address the problems faced by witnesses with disability who need communication supports or who have complex and multiple support needs. This has been used with varying degrees of success. All Australian jurisdictions except New South Wales and Tasmania have a provision for the entirety of a witnesses' evidence (evidence in chief, cross examination and re-examination) to be given and recorded in pre-trial proceedings in the absence of the jury. This recording can then be replayed at trial. In New South Wales, the evidence that can be pre-recorded is limited to evidence in chief.⁹⁷ In the ACT and the Northern Territory the allowance for pre-recorded evidence is only available in cases where the case involves a sexual offence or serious violence.⁹⁸

Pre-recording evidence can have a variety of benefits for the administration of justice:

1. it can benefit the court by enhancing the quality of a witness' account by capturing it at the earliest opportunity;⁹⁹
2. it can also allow witnesses to give evidence without having to experience the stress of testifying during a trial; and

⁹¹ Villamanta Disability Rights Legal Service Inc *A guide and educational tool for people working in the criminal justice system: Judges, Magistrates, Court Staff, Lawyers, Advocates, Police and Corrections Workers*. Published April 2012 by, available at

<http://www.villamanta.org.au/edit/documents/People_with_ID_in_Criminal_Justice_System_Project_Final.pdf>, p 25

⁹² Australian Solicitors Conduct Rules (2011) Rule 21.8

⁹³ Judicial Commission of New South Wales, *Equality Before The Law Bench Book of NSW*, last updated 7 June 2013, available at <<http://www.judcom.nsw.gov.au/publications/benchbks/equality/benchbook.pdf>>

⁹⁴ District Court of Western Australia, *Guidelines for Cross Examination of Children and Persons Suffering from a Mental Disability*, last updated 14 September 2010, available at <http://www.districtcourt.wa.gov.au/_apps/News/detail.aspx?ID=774&uid=>

⁹⁵ UN Declaration of the Rights of Persons with Disability (CRPD), Signed by Australia on 30 March 2007, Article 13

⁹⁶ P Bowden, D Plater and T Henning, 'Balancing fairness to Victims, Society and Defendants in the Cross-Examination of Young Children and Complainants with an Intellectual Disability: An Impossible Triangulation?'

⁹⁷ *Criminal Procedure Act 1986* (NSW) s 306 M

⁹⁸ *Evidence (Miscellaneous Provisions) Act 1991* (ACT) div 4.2B, *Evidence Act 2011* (NT) s 21 B

⁹⁹ P Bowden, D Plater and T Henning, 'Balancing fairness to Victims, Society and Defendants in the Cross-Examination of Young Children and Complainants with an Intellectual Disability: An Impossible Triangulation?'

3. it also allows for greater judicial intervention in cross examination because recordings can be edited and any inappropriate questions can be deleted.¹⁰⁰

This flexibility in the criminal justice systems goes some way to addressing Article 12 of the CRPD by recognising some of the disadvantages faced by requiring people with disability to give evidence in a traditional adversarial setting.¹⁰¹ However the legislation, at least in NSW, appears to balance this with the right of a party to cross-examine a witness on their evidence in chief. There is some resistance to evidence being adduced by pre-recording or video-link if it prevents a judicial officer from assessing the demeanour of a witness in person.

In many states and territories in Australia, audio visual records of police interviews of a person with an intellectual disability are admissible as evidence either in addition to or in place of examination in chief.¹⁰² However, in some instances, pre-recording of evidence is allowed only when the witness is available to testify at trial.¹⁰³ This does not eradicate the problem of potentially inappropriate questioning and the often confusing language of the Court.

1.5.5 Assistance by a third person

Some jurisdictions have also allowed for an intermediary to have a role in the Court proceedings. An intermediary can be used to reduce stress and increase a vulnerable witness' understanding of the court processes. For example, in NSW there is a statutory provision for people with disability to be assisted in testifying with an intermediary.¹⁰⁴

The law has come some way in addressing concerns relating to people with disability and their interactions with the criminal justice system. However there are clearly still issues which need to be addressed. The CRPD is an important touchstone in this area.

- c) ***Describe laws, policies and guidelines from overseas jurisdictions, particularly South Africa and the United Kingdom, that are relevant to assisting people with the disabilities referred to above to give evidence in legal proceedings.***

1.6 United Kingdom

The UK has adopted various methods to attempt to address problems faced by people with disability within the criminal justice system. Like many Australian jurisdictions, English court rules allow for audio-visual records of police interviews with persons with an intellectual disability to be used as admissible evidence. Such evidence can be used either in addition to, or in place of, examination-in-chief.¹⁰⁵

As is the case in NSW, UK courts have also allowed for vulnerable witnesses to be accompanied by an intermediary.¹⁰⁶ Unlike NSW provisions, the role of an intermediary is more clearly detailed and an intermediary has the ability to draw the court's attention to inappropriate questions, which are then rephrased.¹⁰⁷ Intermediaries can be especially important where a witness uses a combination of verbal

¹⁰⁰ Ibid

¹⁰¹ UN Declaration of the Rights of Persons with Disability (CRPD), Signed by Australia on 30 March 2007, Article 12

¹⁰² See for example *Criminal Procedure Act 1986* (NSW) s 306M, *Evidence Act 1906* (WA) s 106HA

¹⁰³ See for example *Evidence Act 1977* (QLD) s 93

¹⁰⁴ *Criminal Procedure Act 1986* (NSW) s 306ZK

¹⁰⁵ *Youth Justice and Criminal Evidence Act 1999* (UK), s 28

¹⁰⁶ Ibid s 29

¹⁰⁷ Ibid

and none verbal communication methods and can allow for persons with a disability to give evidence in a more familiar and comfortable environment.¹⁰⁸

Courts are also increasingly flexible with the admission of evidence in order to promote 'fairness' in proceedings. For example, UK courts have admitted hearsay evidence untested by cross-examination¹⁰⁹ even in cases where such evidence is the dominant evidence relied upon.¹¹⁰ In order to admit such evidence, the court must focus on whether the court proceedings in their entirety are fair, rather than focusing on how particular evidence is tested.¹¹¹

1.7 South Africa

The *Criminal Procedures Act*¹¹² is the most relevant legislation for determining the competency of a witness in the South African legal system. Section 134 conveys that "an accused may call any competent witness on behalf of the defence."¹¹³ Section 193 states that it is at the court's discretion to decide on any question concerning the competency of any witness to give evidence.¹¹⁴

However section 164 (1) does provide a guideline on deciding whether a witness is competent to testify. It states that "any person, who is found not to understand the nature and import of the oath or the affirmation, may be admitted to give evidence in criminal proceedings without taking the oath or making the affirmation: Provided that such person shall, in lieu of the oath or affirmation, be admonished by the presiding judge or judicial officer to speak the truth."¹¹⁵

Section 170 of the *Criminal Procedure Act* has created a mechanism where competent intermediaries are appointed to vulnerable witnesses. The purpose of an intermediary under the Act is to reword questions in a simplified and understandable manner,¹¹⁶ however this is limited to people who are under the age of 18.¹¹⁷ Questions have been raised about the use of intermediaries for cross examination and whether or not they could be considered a disadvantage for the defendant.¹¹⁸ However South African courts have ruled that though cross-examination through an intermediary may be 'blunted', it does not mean that the accused is denied a fair trial.¹¹⁹

Special measures which can be used for vulnerable witnesses over the age 18, are conveyed in section 159 which allows for a witness to give evidence through a live telephone link as well as a live television link.¹²⁰

1.8 Norway

In Norway, vulnerable witnesses are interviewed by trained interviewers, and the interview is video recorded.¹²¹ Interviewers are trained in best practice procedures for drawing out complete and

¹⁰⁸ Ministry and Justice, *Achieving Best Evidence in Criminal Proceedings Guidance on interviewing victims and witnesses, and guidance on using special measures*, available at <http://www.justice.gov.uk/downloads/victims-and-witnesses/vulnerable-witnesses/achieving-best-evidence-criminal-proceedings.pdf>, p 32

¹⁰⁹ See, eg, *R v Sellick* [2005] 1 WLR 3257; *R v Horncastle* [2010] 2 AC 373

¹¹⁰ *R v Horncastle* [2010] 2 AC 373.

¹¹¹ *Criminal Justice Act 2003* (UK) s 114

¹¹² *The Criminal Procedures Act 1977* (South Africa)

¹¹³ *Ibid* s 134

¹¹⁴ *Ibid* s 193

¹¹⁵ *Ibid* s 164 (1)

¹¹⁶ *Ibid* s 170

¹¹⁷ *Ibid*

¹¹⁸ *Klink v Regional Court Magistrate NO and Others* (SA) 1996

¹¹⁹ *Ibid*

¹²⁰ *Ibid* s 159

accurate evidence.¹²² After the interviewer takes place, the judge, prosecution and defence counsel, who watch via CCTV link, have the opportunity to ask the interviewer to put further questions on their behalf to the witness.¹²³ This process is repeated until all the parties are satisfied that sufficient evidence has been taken and adequately tested. Counsel does not directly question the witness thus reducing some of the stress and confusion often associated with the adversarial nature of the criminal justice system.¹²⁴

1.9 Recommendations

A comparative analysis of laws regarding the competency of witnesses and the methods by which courts allow for people with a disability to give evidence, suggests that Australian jurisdictions can do more to ensure people with disability are able to adequately provide evidence in court on an equal basis. That ensures access to justice for people with a disability, but also for those who want to rely on the evidence of people with a disability.

1. Firstly, provisions should allow for flexible questions techniques of witnesses. The Norwegian model provides for witnesses with disabilities to be questioned by an independent, trained interviewer thus minimising the stress and confusion associated with court processes.¹²⁵ Further, the UK model allows for the use of an intermediary to minimise the risk of counsel posing confusing or leading questions to the vulnerable witness.¹²⁶
2. Australian jurisdictions could also benefit from adopting a more flexible approach to the admission of evidence from a witness with a disability where that witness need not be cross examined on that evidence however such an approach would need to be implemented with care to ensure the integrity of the evidentiary process and to safeguard those who would be adversely affected by the evidence. This approach would remove the inequality and disadvantage that some vulnerable witnesses may experience by cross examination procedures.¹²⁷ Creating clear guidelines on assessing a person's competence and capacity to be a reliable witness is also an important step towards meeting the rights outlined in the CRPD.
3. In addition to these changes, the promotion of education on the issues faced by witnesses with disabilities will invariably assist lawyers, judges and witnesses. The production of best practice manuals or bench books (which have already been produced in NSW and Western Australia)¹²⁸ on questioning witnesses with disabilities can only help the various actors within the criminal justice system. With a 'best practices' manual in place, judges will be better able to exercise their discretion regarding the admission of evidence and the questioning of witnesses to determine competency of witnesses. Training judges, counsel and other court personnel on how best to communicate with witnesses with disabilities will also serve to alleviate some of the difficulties associated with the court processes.¹²⁹ By providing training for those working in the criminal

¹²¹ P Bowden, D Plater and T Henning, 'Balancing fairness to Victims, Society and Defendants in the Cross-Examination of Young Children and Complainants with an Intellectual Disability: An Impossible Triangulation?'

¹²² Ibid

¹²³ Ibid

¹²⁴ Ibid

¹²⁵ Ibid

¹²⁶ *Criminal Justice Act 2003* (UK) s 114

¹²⁷ Law Reform Commission of New South Wales, *People with an Intellectual Disability and the Criminal Justice System*, Report 80 (1996), available at <<http://www.bocsar.nsw.gov.au/lrc.nsf/pages/R80CHP2>>

¹²⁸ Judicial Commission of New South Wales, *Equality Before The Law Bench Book of NSW*, last updated 7 June 2013, available at <http://www.judcom.nsw.gov.au/publications/benchbks/equality/benchbook.pdf> and District Court of Western Australia, *Guidelines for Cross Examination of Children and Persons Suffering from a Mental Disability*, last updated 14 September 2010, available at <http://www.districtcourt.wa.gov.au/_apps/News/detail.aspx?ID=774&uid=>

¹²⁹ District Court of Western Australia, last updated 14 September 2010, *Guidelines for Cross Examination of Children and Persons Suffering from a Mental Disability*, available at <http://www.districtcourt.wa.gov.au/_apps/News/detail.aspx?ID=774&uid=>

justice system regarding issues faced by people with disability, Australia would be going some way to addressing requirements outlined in Article 13 of the CRPD.¹³⁰ This could be achieved by creating a standard procedure bench book or manual for dealing with witnesses who may have a disability.

Such changes have the potential to address inadequacies in Australia's law regarding the capacity and facilitation of people with disability to give evidence. However all changes are dependent upon the willingness of those working in the field of administration of justice to educate themselves and utilise their discretionary powers to move away from a strictly traditional method of adversarial questioning.

¹³⁰ UN Declaration of the Rights of Persons with Disability (CRPD), Signed by Australia on 30 March 2007, Article 13

2. PREVENTION OF, AND RESPONDING TO, VIOLENCE AGAINST PEOPLE WITH DISABILITY

a) *Review relevant family violence / violence legislation, including crimes acts, in States and Territories across Australia and the extent to which they include and protect people with disabilities experiencing, or at risk of experiencing violence. In considering this question, please consider:*

- i. *what relationship must exist between the victim and perpetrator i.e is violence perpetrated by paid and unpaid carers covered?*
- ii. *where must the violence have taken place? Where the violence is required to have occurred at 'home' does a residential care setting, hospital or other care facility come within the definition of 'home'?*
- iii. *is the definition of 'violence' broad enough to cover the broader forms of violence experienced by people with disability?¹³¹*

2.1 Violence legislation

The following section focuses primarily on family violence legislation and intervention orders. In each state, criminal laws will also cover acts of violence, threats and abuse, as they are traditionally understood, against people with a disability regardless of relationship and location. These pieces of legislation can be found listed in the Appendix and are also covered in Chapter 5. Where the criminal laws specifically mention broader forms of violence, or specific relationships between perpetrator or offender, they are included here. For laws which relate specifically to violence in residential facilities, see Chapter 5 and the Appendix.

2.1.1 Victoria

Family Violence Protection Act

- (i) The law covering domestic/family violence in Victoria is the *Family Violence Protection Act 2008* (Vic). The Act creates a system for creating and enforcing family violence protection orders and creating offences for contravention of such orders. This Act does not explicitly say that a carer is included in the Act and is considered to be a relationship of a domestic nature. However section 9(3) specifically states that a person is not a domestic partner if they are a paid carer. This does not preclude an unpaid carer from being considered a domestic partner and therefore the Act may apply in those circumstances. 'Family member' in relation to a person ('a relevant person') is defined in s 8, including spouse, child, person in intimate

¹³¹ See for example, the ALRC Family Violence and Commonwealth Laws Information Sheet (2012) available at <http://www.alrc.gov.au/CFV-disability>. ALRC stated: People with disability experience family violence in different ways, often at higher rates and higher frequencies, for longer periods of time and at the hands of a greater number of people, than people without disability. Types of family violence experienced by people with disability may include:

- sexual or physical assault;
- stealing and financial exploitation including misappropriation of social security payments and other benefits and concessions;
- neglect and deprivation of things such as shelter, nutrition and essential medical treatment;
- specific types of abuse related to their disability such as withholding equipment, food and medication; and
- forced sterilisation and abortion.

relationship, etc. Section 8(3) provides that a 'family member' includes any other person the relevant person regards as being like a family member if it is reasonable having regard to the circumstances of the relationship, including any other form of dependence or interdependence between the relevant person and the other person (s 8(3)(g) and the provision of any responsibility or care, whether paid or unpaid, between the relevant person and the other person (s 8(3)(h)), or indeed where the relevant person live together or relate together in a home environment (s8(3)(b)) which would presumably include residential care and violence perpetrated by another resident. The Act is clearly broad enough to capture violence committed against people with a disability, so much so that an example is given of a relationship between a person with a disability and the person's carer which may over time have come to approximate the type of relationship that would exist between family members. The example reads: "A relationship between a person with a disability and the person's carer may over time have come to approximate the type of relationship that would exist between family members."

- (ii) There is no mention of where the violence must take place in order to be considered domestic or family violence for the purposes of the Act.
- (iii) The definition of family violence under the Victorian legislation is quite broad. It includes physical or sexual abuse, emotional or psychological abuse, economic abuse, behaviour which is threatening or coercive and behaviour which in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member. This does not specifically neglect or deprivation of things such as shelter or withholding equipment, food or medication, although this may be covered under economic abuse, however it is comparatively a broad definition.
- (iv) *Crimes Act 1958 (Vic)*
- (v) The *Crimes Act* contains special provisions making it an offence to have sex with or commit an indecent act with a person with a cognitive impairment, if the perpetrator is a provider of medical or therapeutic services, or is a provider of a special program. It is also a specific offence for a worker at a facility (including residential facility) to have sex with, or commit an indecent act with, an individual who resides at the facility because of a cognitive impairment (ss50-52). Cognitive impairment is defined as impairment due to mental illness, intellectual disability, dementia or brain injury.

2.1.2 South Australia

Intervention Orders (Prevention of Abuse) Act 2009 (SA)

- (i) The law covering domestic and family violence in South Australia is the *Intervention Orders (Prevention of Abuse) Act 2009 (SA)*. The Act applies to both domestic and non-domestic abuse. As such, the perpetrator and victim do not need to be in a recognised relationship to be covered by the Act and carers and co-residents would be covered under the provisions relating to non-domestic abuse. Situations of domestic abuse must be treated as a matter of priority. Section 8(8)(k) specifies that domestic abuse can include abuse by a carer within the meaning of the *Carers Recognition Act 2005 (SA)*. In reference to the *Carers Recognition Act 2005 (SA)* section 5 outlines that the carer is someone who is unpaid only..
- (ii) This Act does not specify where the violence must have taken place in order to be considered family or domestic violence.
- (iii) Under the Act in order for an intervention order to be issued there must be a reasonable suspicion that the defendant will commit an act of abuse against the victim. Under the Act an

act of abuse is defined as an act which results in physical injury, emotional or psychological harm, an unreasonable and non-consensual denial of financial, social or personal autonomy or damage to property in the ownership or possession of the person that used to be enjoyed by the person. This is a broad definition of abuse for the purposes of the Act and would conceivably include issues of neglect which could lead to physical or emotional injury. Examples given specifically include threatening to withhold medication or treatment or threatening to withdraw care upon which the person is dependent. Though this does not specifically mention deprivation of things important to the victim the definition is broad enough to include such things.

Criminal Law Consolidation Act 1935 (SA)

- (iv) The South Australian Act criminalises neglect that causes harm or death, as well as failure to provide the necessities of life when in a position attracting a duty of care. An offence under the act is an aggravated offence if the offender abused a position of trust or knew, or ought to have known, that the victim had a physical or mental disability (s5AA).

2.1.3 Western Australia

Restraining Orders Act 1997 (WA)

- (i) The Act concerning family or domestic violence in Western Australia is the *Restraining Orders Act 1997 (WA)*. The Act covers both domestic/family violence and non-domestic violence. Section 6 of this Act which defines the terms used in the Act does not include carers in the definition of family and domestic relationships.. A family and domestic relationship means a relationship between two persons who are, or were, married to each other or in a de factor relationship, are or were related to each other, or who have, or had, an intimate personal relationship or other personal relationship (s 4(1)).¹³² 'Other personal relationship' is defined as a personal relationship of a domestic nature. This may not capture carer or co-resident perpetrated violence that may be committed against people with a disability. However, an 'act of personal violence' is an act a person commits against another person with whom they are not in a family and domestic relationship (s 6(1)). The acts committed are broad and the same as those constituting domestic violence.
- (ii) There is no mention in the Act of where the violence must have taken place.
- (iii) Under the *Restraining Orders Act 1997 (WA)* the definition of violence may not be broad enough to cover the broader forms of violence experienced by people with disability. The Act defines family and domestic violence including assaulting or causing personal injury to the person, kidnapping or depriving the person of his or her liberty, damaging the person's property, behaving in an ongoing manner that is intimidating, offensive or emotionally abusive towards the person or pursuing the person or a third person with the intent to intimidate or could be reasonably expected to intimidate that person. This definition of personal violence, in comparison, is quite narrow. While it includes assault, physical injury, kidnapping and deprivation of liberty, it does not include offensive or emotionally abusive conduct or destruction of property. The definition of violence in terms of depriving a person of his or her liberty could be interpreted widely economic exploitation, neglect and deprivation although if it caused personal injury it may be covered.
- (iv) *Criminal Code Act Compilation Act 1913 (WA)*

¹³² *Restraining Orders Act 1997 (WA)* s 4(1)

- (v) The Western Australia Act imposes a duty to provide the necessaries of life on those who have charge of another who is unable to provide her or himself with such necessaries, whether the charge is voluntary or by law, contract etc (s262). The Act creates a separate offence for unlawful detention or detainment of a person who is mentally ill or has an impairment. Finally sexual offences against an incapable person are treated independently of general sexual offences.

2.1.4 Northern Territory

- (i) The law concerning family violence or domestic violence in the Northern Territory is the *Domestic and Family Violence Act 2007* (NT). Section 12 of this Act specifically includes a carer's relationship for the purposes of domestic and family violence. It includes both ongoing paid or unpaid care of another person as a carer's relationship. S9 of the Act defines domestic relationship to include people living together which would likely include co-residents.
- (ii) There is no mention of where the violence must have taken place in this Act for the Act to apply.
- (iii) The definition of violence in the *Domestic and Family Violence Act 2007* (NT) is relatively wide. Domestic violence includes conduct causing harm including sexual or other assault, damaging property, intimidation, stalking, economic abuse or any threats to do such activities. Though there is no mention specifically of neglect or deprivation the definition which includes conduct causing harm could be wide enough to include such things.

Criminal Code Act 1983 (NT)

- (iv) The Northern Territory Act includes specific crimes of sexual intercourse or gross indecency by a provider of services to mentally ill or handicapped persons (s130). It imposes a statutory duty on carers and services providers to provide the necessaries of life and use reasonable care to preserve that life. Finally an offence that includes abuse of a position of trust or authority is an aggravated offence.

2.1.5 Queensland

- (i) The law governing family violence and domestic violence in Queensland is the *Domestic and Family Violence Protection Act 2012* (Qld). Relationships covered under the Act include intimate personal relationship,¹³³ being spousal relationships, engagement relationships and couple relationships; family relationship,¹³⁴ being two people where one is a relative of the other; and informal care relationship,¹³⁵ where one person is dependent on another for help in their daily living activities (including dressing, preparing meals or shopping). However, an informal care relationship does not exist between two people if one person provides the care under a commercial arrangement.¹³⁶

These relationships don't appear broad enough to capture relationships of dependency on carers and service providers or violence perpetrated by co-residents.

¹³³ *Family Violence Protection Act 2012* (Qld) s 14

¹³⁴ *Ibid* s 19

¹³⁵ *Ibid* s 20

¹³⁶ *Ibid* 20(3)

- (ii) There is no mention of where the violence must occur in order for it to apply under the *Domestic and Family Violence Protection Act 2012* (Qld).
- (iii) The definition of violence under this Act includes physical or sexual abuse, emotional or psychological abuse, economic abuse, threatening actions, coercive actions or any other actions which control or dominate the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else. This does not explicitly include neglect or deprivation or forced sterilisation and abortion however these actions could be included under the definition of violence including any way that controls or dominates the person.
- (iv) *Criminal Code Act 1899* (Qld)
- (v) The Act creates a statutory duty to provide the necessities of life where there is a situation of dependency. The Act also creates a separate offence of sexual assault or harassment of a person with an 'impairment of the mind'.

2.1.6 New South Wales

- (i) *Domestic and Personal Violence Act 2007* (NSW)
- (ii) The Act concerning family or domestic violence in New South Wales is the *Crimes (Domestic and Personal Violence) Act 2007* (NSW). The Act not only creates a system for Apprehended Violence Orders and criminalises breaches of such orders, it also creates the offence of a 'domestic violence offence'. Section 5(f) of this Act defines domestic relationship to include the carer's relationship where a person is dependent on the on-going paid or unpaid care of that carer. Domestic relationship means the victim and perpetrator are or were married, in a de facto relationship, or in an intimate personal relationship; are or have been living together; have or had a relationship where one person cares for the other person (paid or unpaid); are relatives; or, in the case of Aboriginal and Torres Strait islander people, have been part of each other's extended family or kin, according to their culture. Section 5(e) specifically notes living in residential facilities together is sufficient to be classified as a domestic relationship, as such, violent acts by a co-resident would be covered.
- (iii) There is no mention of where the violence must occur in order for the Act to apply. However, the Local Court of NSW and the Children's Court of NSW are the only Courts that have jurisdiction to make orders under the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) in accordance with section 91. The Local Court and the Children's Court have state wide jurisdiction limited to NSW (i.e. they cannot make orders outside their jurisdiction of NSW).
- (iv) Domestic violence is not defined in this Act. Rather it defines 'domestic violence offence' by referring specifically to 55 'personal violence' offences in the *Crimes Act 1900* (NSW) where those offences are committed by persons in defined domestic relationships against other persons.¹³⁷ The offences include, for example, murder, manslaughter, wounding or causing grievous bodily harm with intent, assault, sexual assault, kidnapping, child abduction and destroying or damaging property. The list also includes narrower offences such as discharging a firearm with intent, causing bodily injury by gunpowder, not providing a wife with food, and setting traps.

¹³⁷ *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4

In addition, the Act also provides that stalking, intimidation with intent to cause fear of physical or mental harm, and attempts to commit any specified offence can amount to 'domestic violence'.¹³⁸

The NSW Police Force Domestic and Family Violence Policy has defined domestic violence as an abuse of power mainly perpetrated by men in an intimate partner relationship or after separating from the relationship. It amounts to a pattern of behaviour that can include abuse and violence, intimidation, psychological abuse, threats to harm others, threats to damage property, financial deprivation and social isolation or coercive control in order to maintain control over the victim's behaviour. Though this does not specifically mention neglect or deprivation or forced sterilisation and abortion the definition of domestic violence is wide enough in this context to include such behaviours.

Crimes Act 1900 (NSW)

- (v) The NSW *Crimes Act* includes the failure to provide the necessities of life. The Act treats separately the crime of sexual offences against those with cognitive impairments where the perpetrator is either in a carer position or is taking advantage of the fact that the victim has a cognitive impairment. Where an assault is against a person with a cognitive or physical impairment, the assault is considered to be aggravated.

2.1.7 Australian Capital Territory

- (i) In the Australian Capital Territory the law governing family or domestic violence is the *Domestic Violence and Protection Orders Act 2008 (ACT)*. The Act covers domestic relationships as well as violence in the workplace and more generally. Section 15 defines relevant relationships for domestic violence narrowly, being intimate or family relationships. This definition does not include a situation where one person provides a service for the other which is paid or on behalf of a benevolent society, or where two people are co-habiting but not in an intimate relationship. 'Relevant relationship' means 'intimate relationship'.¹³⁹ This definition appears to exclude a carer relationship or co-residents, as an intimate relationship is not taken to exist between people only because one of them provides a service for the other for a fee or rewards, on behalf of another person (including a government or corporation), or on behalf of a charitable or benevolent organisation.¹⁴⁰ However violence by a co-resident or carer would be covered under sections on personal violence.
- (ii) There is no specification of where violence must occur in order for the Act to apply.
- (iii) Section 13 under this Act defines domestic violence as actions which cause physical or personal injury, cause damage to property, is a threat made to the relevant person, is harassing or offensive, is directed at a pet of the relevant person or is a threat made to that person. It also includes a large number of offences under the *Crimes Act*, including assault, sexual assault, acts of indecency. Personal violence is much narrower; it includes personal injury or harm to property, threats to injure, or harassing or offensive conduct.

2.1.8 Tasmania

¹³⁸ Ibid

¹³⁹ *Domestic Violence and Protection Orders Act 2008 (ACT)* s 15(2)

¹⁴⁰ Ibid s 15(4)

- (i) *Family Violence Act 2004* (Tas)
- (ii) The law regarding family or domestic violence in Tasmania is the *Family Violence Act 2004* (Tas). Under section 4 of this Act, family violence, for the purposes of the Act, refers to the *Relationship Act 2003* (Tas). 'Spouse or partner' is defined as being a person with whom an affected person is, or has been, in a family relationship.¹⁴¹ 'Family relationship' means a marriage or a significant relationship, that is, a relationship between two adult persons as a couple.¹⁴² It therefore does not include carers or co-residents, except where they are a couple.
- (iii) There is no mention of where violence must occur in order for the Act to apply.
- (iv) Under section 7 of the *Family Violence Act* family violence is defined as conduct including assault, sexual assault, threats, coercion, intimidation or verbal abuse, abduction, stalking, economic abuse, emotional abuse or intimidation. This definition does not explicitly include neglect or deprivation..

Criminal Code Act 1924 (Tas)

- (v) The Act includes a duty to provide necessities of life when in a position of carer. There are special provisions regarding sexual intercourse with a person who has a mental impairment.

2.1.9 Are these definitions broad enough?

- (i) In Australia, the legal definition of "domestic/family violence" varies across jurisdictions. Most of the legislations define what constitutes a "domestic relationship" and some of these definitions are more inclusive than others. Despite the various legislative instruments available, most of the current laws do not contain definitions that are broad enough to encompass the range of violence that people with disabilities experience.
- (ii) People with disabilities are more likely to experience abuse by their caregivers (paid or unpaid), personal assistants, family members, intimate partners, friends or professionals and for longer periods of time.
- (iii) Examples of disability-related abuse may include being handled roughly during a transfer and threats of abandonment, belittling or accusation of faking from other people. People with disabilities are likely to experience financial abuse from personal assistance providers who do not work the expected hours, steal money or personal items. Medication abuse is also another common form of violence experienced by people with disabilities. Because these forms of abuse are little known, the needs of those with disabilities are easily overlooked and are further isolated.¹⁴³

¹⁴¹ *Relationship Act 2003* (Tas) s 4

¹⁴² Ibid

¹⁴³ See Chapter 5 for further information on experiences of violence by people with a disability.

b) ***Review the comparable legislation in overseas jurisdictions and evaluate whether overseas laws are more effective than Australian law for people with disabilities. Please particularly consider the recent US national violence legislation.***

2.1.10 An international comparison: United States & National Violence Legislation

In 2013, the *Violence Against Women Act* of 2013 ("**VAWA Reauthorisation**") was passed as a nationwide response to combat domestic violence, dating violence, sexual assault and stalking.

VAWA Reauthorisation includes a civil rights provision that guarantees consistent application of civil rights protections to all VAWA grant programs. This inclusion ensures that no victim can be denied services as a result of their disabilities.

Unlike its Australian counterpart, VAWA Reauthorisation incorporates a gender perspective to promote the full enjoyment of human rights and fundamental freedoms by people with disabilities. VAWA funds the Disabilities Program to train criminal justice professionals, court personnel, and victim service providers to respond effectively to women with disabilities who have been victimized.¹⁴⁴ As a result of the program, the *2012 Biennial Report to Congress: Effectiveness of VAWA Grant Programs* recorded an improvement in criminal justice response and increased offender accountability.¹⁴⁵ From 1 July 2009 to 30 June 2011, Disabilities Program staff trained 8,957 people to provide more effective services to victims with disabilities.¹⁴⁶

The *Family Violence Prevention and Services Act* ("**FVPSA**") originally enacted in 1984, was one of the earlier instrument that assist to increase public awareness about family violence and seek to provide shelters and other assistance for victims of family violence and their children. Section 10413 of FVPSA helps entities to establish 24-hour, national, toll-free telephone hotline to provide information and assistance to adult and youth victims of family violence. These entities must provide assistance and referrals to meet the needs of individuals with disabilities.

Section 3796gg-7 of the *Justice System Improvement Act* of 1979 (**JSIA**) allows the Attorney General, in consultation with the Secretary of Health and Human Services to award grants to eligible entities to provide training, consultation and information on domestic violence, dating violence, stalking and sexual assault against individuals with disabilities and to enhance direct services to such individuals.¹⁴⁷ JSIA recognises the need to provide accessible, safe and effective services to individuals with disabilities and Deaf individuals who are victims of violence and abuse.

Under the *Violent Crime Control and Law Enforcement Act* of 1994 (**VCCLEA**), the Attorney General may make grants for training programs to assist law enforcement officers, prosecutors, and relevant officers of Federal, State, tribal, and local courts in recognizing, addressing, investigating, and prosecuting instances of elder abuse, neglect, and exploitation

¹⁴⁴ Biennial Report to Congress 2012, available at < <http://www.ovv.usdoj.gov/docs/2012-biennial-report-to-congress.pdf>>

¹⁴⁵ Ibid p 93

¹⁴⁶ Ibid p 95

¹⁴⁷ *Justice System Improvement Act* (1979) (**JSIA**) s 3796gg-7, available at <<http://uscodebeta.house.gov/view.xhtml?req=granuleid:USC-prelim-title42-section3796gg-7&num=0&edition=prelim>>

and violence against individuals with disabilities, including domestic violence and sexual assault, against older or disabled individuals.¹⁴⁸

Section 5106 of the *Child Abuse Prevention and Treatment and Adoption Reform Act* of 1978 allows the Secretary to award grants to public or private organisations for training of personnel in best practices to meet unique needs of children with disabilities.¹⁴⁹

2.1.11 Definition of "Domestic Violence"

VCCLEA defines "domestic violence" to include felony or misdemeanor crimes of violence committed:¹⁵⁰

- by a current or former spouse or intimate partner of the victim;
- by a person with whom the victim shares a child in common;
- by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner;
- by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies; or by any other person against an adult or youth victim who is protected from that person's acts under the domestic or family violence laws of the jurisdiction.

c) *Evaluate the law governing the granting of restraining orders in each State and Territory. Evaluate whether the laws are broad enough to capture violence that may be committed against people with a disability.*

The laws governing the granting of restraining orders (or intervention / domestic violence orders) in each State and Territory appear to be broad enough to capture violence that may be perpetrated against people with disability. In each jurisdiction, there is legislation to allow a court to grant a restraining or intervention order in instances of family violence. In most jurisdictions, the definition of family violence is broad enough to capture violence committed against people with a disability by a non-family member in a family-like relationship, for example a carer. In fact, legislation in the ACT, New South Wales, Northern Territory, Queensland, South Australia and Victoria make specific reference to people with a disability. Where the family violence legislation does not capture this kind of relationship, there is alternative legislation to allow for the granting of restraining or intervention orders.

In sum, the laws governing the granting of restraining/intervention orders in each state and territory are broad enough to capture violence that may be committed against people with a disability.

2.1.12 Australian Capital Territory

A person can apply to the Magistrates Court for a protection order under s 9 of the *Domestic Violence and Protection Orders Act 2008*. This Act allows for three types of orders:

¹⁴⁸ *Violent Crime Control and Law Enforcement Act* (1994) available at <http://uscodebeta.house.gov/view.xhtml?path=/prelim@title42/chapter136/subchapter3/partG&edition=prelim>

¹⁴⁹ *Child Abuse Prevention and Treatment and Adoption Reform Act* (1978) available at <http://uscodebeta.house.gov/view.xhtml?req=granuleid:USC-prelim-title42-section5106&num=0&edition=prelim>

¹⁵⁰ *Violent Crime Control and Law Enforcement Act* (1994) available at <http://www.law.cornell.edu/uscode/text/42/13925>

- Domestic Violence Orders;¹⁵¹
- Personal Protection Orders;¹⁵² and
- Workplace Protection Orders.¹⁵³

For a domestic violence order, a person's conduct is domestic violence if it:¹⁵⁴

- causes physical or personal injury to a relevant person; or
- causes damage to the property of a relevant person; or
- is directed at a relevant person and is a domestic violence offence; or
- is a threat, made to a relevant person, to do anything in relation to the relevant person or another relevant person that, if done, would fall under paragraph (a), (b) or (c); or
- is harassing or offensive to a relevant person; etc.

The definition of 'relevant person' covers current or former domestic partners, relatives, children and parents, and someone who is or has been in a relevant relationship.¹⁵⁵

For a personal protection order, a person's conduct is personal violence if the person:¹⁵⁶

- causes personal injury to the aggrieved person or damage to the aggrieved person's property;
- threatens to cause personal injury to the aggrieved person or damage to the aggrieved person's property; or
- is harassing or offensive to the aggrieved person.

It may therefore be more appropriate for a personal protection order to be used by a person with a disability in relation to the carer context, as that does not require any familial relationship between the perpetrator of the violence and the victim.

The Act expressly considers people with disability when considering who may apply for a non-emergency protection order, and allows for an aggrieved person to apply in their own right with leave of the court or by their litigation guardian.¹⁵⁷

The availability of both domestic violence orders and personal protection orders ensures this legislation is broad enough to capture violence that may be committed against people with a disability.

2.1.13 New South Wales

¹⁵¹ *Domestic Violence and Protection Orders Act 2008 (ACT)* s10

¹⁵² *Ibid* s11(4)

¹⁵³ *Ibid* s11(3)

¹⁵⁴ *Ibid* s13(1)

¹⁵⁵ *Ibid* s 15(1)

¹⁵⁶ *Ibid* s 14

¹⁵⁷ *Ibid* s 19(1)

Under the *Crimes (Domestic and Personal Violence) Act 2007* courts in NSW can grant two types of apprehended violence orders ('AVO'):

Apprehended Domestic Violence Order (ADVO);¹⁵⁸ and

Apprehended Personal Violence Order (APVO).¹⁵⁹

The order can be made by the Local Court and the Children's Court.¹⁶⁰

A person can apply for an ADVO when they are, or were, in a domestic relationship.

A person can apply for an APVO when they are not in, or have not been in, a domestic relationship with the perpetrator. For example, an application for an APVO could be made between neighbours, co-workers, former friends, any person they have reason to fear, etc.

ADVOs are sufficiently broad to capture violence that may be committed against people with a disability, as it is available to people who are or have been in a dependent care arrangement with another person, including paid carers, and to people living in the same residential facility.¹⁶¹ Similarly, APVOs cover situations where violence may be committed against a person with a disability by a non-family member.

An AVO application can be made by the victim personally, or by the police on their behalf.

In AVO proceedings, both the applicant and the defendant are entitled to choose a person to be near them when giving evidence.¹⁶² That person may be a parent, guardian, relative, friend of support person,¹⁶³ and may act as an interpreter for the party if either the applicant or the defendant has difficulty in giving evidence associated with a disability.¹⁶⁴

2.1.14 Northern Territory

Under the *Domestic and Family Violence Act 2007*, two types of orders ('DVO') can be made: court DVOs¹⁶⁵ and police DVOs.¹⁶⁶ There are three types of court DVOs:

A CSJ DVO made by the Court of Summary Jurisdiction,¹⁶⁷ and interim¹⁶⁸ and consent¹⁶⁹ DVOs;

A DVO made in criminal proceedings;¹⁷⁰ and

A DVO confirmed by the Court of Summary Jurisdiction.¹⁷¹

¹⁵⁸ *Crimes (Domestic and Personal Violence) Act 2007 (NSW) Part 4*

¹⁵⁹ *Ibid* Part 5

¹⁶⁰ *Ibid* 91

¹⁶¹ Legal Aid NSW, 'Information for Applicants and Persons in Need of Protection' (September 2012) 2

¹⁶² *Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 46(2)*

¹⁶³ *Ibid* s 46(3)(a)

¹⁶⁴ *Ibid* 46(3)(b)

¹⁶⁵ *Domestic and Family Violence Act 2007 (NT) Part 2.4*

¹⁶⁶ *Ibid* Part 2.6

¹⁶⁷ *Ibid* s 28

¹⁶⁸ *Ibid* s 35

¹⁶⁹ *Ibid* s 38

¹⁷⁰ *Ibid* s 45

A protected person must be in a domestic relationship with a person against whom a DVO is sought.¹⁷²

The Act is broad enough to capture violence that may be committed against people with a disability because a person is in a domestic relationship with another person if the person is or has been in a carer's relationship with the other person.¹⁷³

An application for a DVO can be made by an adult in a domestic relationship with the defendant, a young person with the leave of the court, an adult acting for a person in a domestic relationship with the defendant, or a police officer.¹⁷⁴

Additionally, a personal violence restraining order may be granted under part IVA of the *Justices Act 1928*. The purpose of this part is "to ensure the safety and protection of persons who experience personal violence outside a domestic relationship as defined in the *Domestic and Family Violence Act*".¹⁷⁵

2.1.15 Queensland

A protection order may be granted under the *Domestic and Family Violence Protection Act 2012* where the court is satisfied that:

- a relevant relationship exists between the aggrieved and the respondent;
- the respondent has committed domestic violence against the aggrieved, and
- the protection order is necessary or desirable to protect the aggrieved from further domestic violence.

Relationships covered under the Act include intimate personal relationships, family relationships and informal care relationships (i.e. where there is no commercial arrangement).

An application for a protection order can be made by a police officer, a person's solicitor, a person authorised to do so in writing, a guardian appointed under the *Guardian and Administration Act 2000* or an attorney appointed under the *Powers of Attorney Act 1998*.¹⁷⁶

2.1.16 South Australia

Under the *Intervention Orders (Prevention of Abuse) Act 2009*, an intervention order may be issued for the protection of any person against whom it is suspected the defendant will commit an act of abuse.¹⁷⁷

The Act specifically allows for an act of abuse being committed against a person by their carer,¹⁷⁸ thereby ensuring the legislation is broad enough to capture violence that may be committed against a person with a disability.

¹⁷¹ Ibid s 82

¹⁷² Ibid s 13(2)

¹⁷³ Ibid s 9(g)

¹⁷⁴ Ibid s 28

¹⁷⁵ Ibid s 81

¹⁷⁶ *Powers of Attorney Act 1998 (QLD) s 25*

¹⁷⁷ *Intervention Orders (Prevention of Abuse) Act 2009 (SA) s 7(1)(a)*

Additionally, the *Summary Procedure Act 1921* allows for the granting of restraining orders under pt 4 div 7.

2.1.17 Tasmania

Under the *Family Violence Act 2004*, the Magistrates Court may grant a family violence order ('FVO'), if satisfied on the balance of probabilities that a person has committed family violence and they may do so again.¹⁷⁹

An application for an FVO may be made by a police officer, an affected person, an affected child, or any other person where leave is granted by the court.¹⁸⁰

Jurisdiction to grant a FVO requires an incidence of 'family violence', which includes certain conduct committed by a spouse or partner.¹⁸¹ The Act covers caring relationships, but these must be unpaid.

However, under part XA of the *Justices Act 1959*, a court may grant a restraining order if satisfied on the balance of probabilities that a person has caused personal injury or damage to property and they are likely to again, or have threatened as such.¹⁸²

An application for such an order may be made by a police officer, an affected person, the guardian or administrator of a person, or another person with leave of the court.¹⁸³

As such, legislation in Tasmania appears to be sufficiently broad to capture violence that may be committed against people with a disability.

2.1.18 Victoria

The Magistrates' Court can make intervention orders to protect people who have experienced violent, threatening or abusive behaviour. The two types of orders are:¹⁸⁴

- A family violence intervention order, which helps to protect applicants from a family member who is violent towards them.
- A personal safety intervention order, which helps to protect applicants from someone other than a family member who makes them feel unsafe.

An application for an intervention order can be made under the *Family Violence Protection Act 2008* where there is a family relationship or a person is or has been involved in a relationship.¹⁸⁵

'Family member' in relation to a person ('a relevant person') is defined in s 8.

Section 8(3) provides that a 'family member' includes any other person the relevant person regards as being like a family member if it is reasonable having regard to the circumstances of the relationship,

¹⁷⁸ Ibid s 8(8)(k)

¹⁷⁹ *Family Violence Act 2004* (TAS) s 16

¹⁸⁰ Ibid s 15

¹⁸¹ Ibid s 7

¹⁸² Ibid 106B(1)

¹⁸³ Ibid 106B(2)

¹⁸⁴ Magistrates' Court of Victoria, 'Intervention Orders' < <http://www.magistratescourt.vic.gov.au/jurisdictions/intervention-orders>>

¹⁸⁵ *Family Violence Protection Act 2008* (VIC) s 53: interim order; section 74: final order

including the provision of any responsibility or care, whether paid or unpaid, between the relevant person and the other person (s 8(3)(g)):

The Act is clearly broad enough to capture violence committed against people with a disability, so much so that an example is given of a relationship between a person with a disability and the person's carer which may over time have come to approximate the type of relationship that would exist between family members.¹⁸⁶

The example reads: "A relationship between a person with a disability and the person's carer may over time have come to approximate the type of relationship that would exist between family members."

An application for an order can be made by a police officer, the affected family member, any other person with the adult affected family member's consent, or if the affected family member has a guardian, the guardian or any other person with permission of the Court.¹⁸⁷

An application for an intervention order can also be made under the *Personal Safety Intervention Orders Act 2008* where there is no family relationship. This Act replaced the intervention order system previously administered under the *Stalking Intervention Order Act 2008*.

The same people who can apply for a family violence order can apply for a personal safety intervention order.¹⁸⁸

The Victorian legislation governing the granting of restraining orders therefore appears to be broad enough to capture violence that may be committed against people with a disability.

2.1.19 Western Australia

Restraining orders can be made under s 11A the *Restraining Orders Act 1997* if the court is satisfied that the respondent has committed an act of abuse against the person seeking protection and is likely to do so again, or a person seeking to be protected reasonably fears the respondent will commit an act of abuse.

An 'act of abuse' means an act of family and domestic violence,¹⁸⁹ which is limited to a situation where there is a family and domestic relationship.¹⁹⁰

A family and domestic relationship means a relationship between two persons who are, or were, married to each other or in a de factor relationship, are or were related to each other, or who have, or had, an intimate personal relationship or other personal relationship.¹⁹¹

The legislation may however capture violence perpetrated against people with a disability since it covers an 'act of personal violence' between persons not in a family and domestic relationship.¹⁹²

d) Consider any policies relevant to assessment of when a restraining order is granted and how these policies might impact on people with a disability.

¹⁸⁶ Ibid s 8

¹⁸⁷ Ibid s 45

¹⁸⁸ Ibid s 15

¹⁸⁹ *Restraining Orders Act 1997* (WA) s 3

¹⁹⁰ Ibid s 6(1)

¹⁹¹ Ibid s 4(1)

¹⁹² Ibid s 6(1)

The author was unable to find any specific policy relevant to the assessment of when a restraining order is granted. However, the granting of a restraining order is determined by the relationship between the parties and the definition of the behaviour that warrants a restraining order being granted.

The definition of 'violence' was considered in questions 2(a) and 2(b), and the above section considers the relationships necessary for the granting of restraining orders.

2.2 Compliance with CRPD

Article 16 requires States Parties to "take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse".

There is no specific reference to restraining orders, however they are implied in this Article as a measure to protect from violence. Australia therefore has an obligation to take appropriate legislative measures to protect persons with disabilities from violence and abuse. Legislation governing the granting of restraining orders complies with this requirement.

2.3 Recommendations

The laws governing the granting of restraining orders are sufficiently broad to capture violence that may be committed against people with a disability. However, the following recommendations should be considered:

1. The legislative protection could be strengthened through more explicit reference to violence committed against people with a disability. This need not be through the insertion of new provisions, but merely through the use of examples of violence experienced by people with a disability, as in s 8 of the *Family Violence Protection Act 2008* (Vic).
2. Additionally, further scope for who may apply for a restraining order in some jurisdictions might assist people with a disability as they may not be confident in or capable of bringing an application themselves.

3. DIVERSION

a) *Review diversion options available to police and the courts for people with intellectual, cognitive or psychosocial disability or an acquired brain injury who come into contact with the criminal justice system. Consider:*

- i. *diversion options available to police in states and territories across Australia*
- ii. *diversion options available to courts in states and territories across Australia.*
- iii. *extent to which women, children, Aboriginal and Torres Strait Islander people with intellectual, cognitive or psychosocial disability are diverted and beneficial and detrimental impact of diversion.*

“Diversion involves the redirection of offenders away from conventional criminal justice processes, with the aim of minimising levels of contact with the formal criminal justice system...It can be legislated by certain criteria or based on the discretion of police or magistrates.”¹⁹³

3.1 Diversion options available to police

All States and Territories (except the Northern Territory) have at least one diversion program run by police, but all are in relation to drugs and none make any specific mention of people with intellectual, cognitive or psychosocial disability or an acquired brain injury (**people with disability**). Many of the court-run diversion programs outlined in the next section do allow police to make referrals, but they are administered by the court and so the power lies with the court and not the police. In comparison, the programs listed in the table below require no court assistance to be administered. Police therefore have the power to refer offenders into treatment or provide them with a caution instead of formally charging them.

AUSTRALIAN POLICE DRUG DIVERSION PROGRAMS	
Jurisdiction	Program
New South Wales	<ul style="list-style-type: none"> • Cannabis Cautioning Scheme
Victoria	<ul style="list-style-type: none"> • Cannabis Cautioning Program • Drug Diversion Program
Australian Capital Territory	<ul style="list-style-type: none"> • Police Early Intervention and Diversion Program
Tasmania	<ul style="list-style-type: none"> • Illicit Drug Diversion Initiative
Western Australia	<ul style="list-style-type: none"> • Cannabis Intervention Requirement

¹⁹³ Jennifer Ogilvie and Katie Willis, 'Police drug diversion in Australia' (March 2009) *Australian Institute of Criminology Criminal Justice Bulletin*. Available at: <http://ncpic.org.au/ncpic/publications/aic-bulletins/article/police-drug-diversion-in-australia>

	<p>Scheme</p> <ul style="list-style-type: none"> • All Drug Diversion
South Australia	<ul style="list-style-type: none"> • Police Drug Diversion Initiative
Queensland	<ul style="list-style-type: none"> • Police Diversion Program

There is nothing discriminatory on paper about there being no specific mention of people with disability in these programs. However, it does create a potential that those with disability may not gain the same benefit from the above programs as people without disability. This may be because their participation is deemed too difficult by those administering the program or there may be a lack of understanding as to how the program can be tailored to meet the needs of people with disability.

Equal benefit of the law is required by Article 5(1) of the Convention on the Rights of Persons with Disabilities (Convention). Therefore, to overcome this potential for discrimination and ensure compliance with Article 5(2) of the Convention, alterations may be needed to the programs to ensure that the ability to participate and benefit from the programs is equal, regardless of disability. For example, the Victorian Cannabis Cautioning Program "involves providing a cautioning notice for simple use/possess cannabis offences to adult offenders who meet the police criteria. Cannabis educational information and a referral for a cannabis education session accompany the caution."¹⁹⁴ To guarantee that a person with disability is able to understand the caution and benefit from the educational opportunities the program offers, it may be necessary to present the information in a different way.

Another option is to promote the training of those working in the field of administration of justice, including police, so that they are aware of, and therefore have the ability to implement, the sorts of alterations that may be needed to ensure people with disability can participate in these diversion programs as successfully as others. This is suggested by Article 13(2) of the Convention.

3.2 Diversion options available to courts

3.3 Australian Capital Territory

There are no specific court-based diversion programs for people with an intellectual, cognitive or psychosocial disability or an acquired brain injury.

3.4 Northern Territory

There are no specific court-based diversion programs for people with an intellectual, cognitive or psychosocial disability or an acquired brain injury.

3.5 New South Wales

3.5.1 *Mental Health (Forensic Provisions) Act 1990 (NSW)*

¹⁹⁴ Victoria Police, 'Drug and Alcohol Strategy Unit'. Available at: http://www.police.vic.gov.au/content.asp?Document_ID=5059

Part 3 of the above legislation facilitates diversion of defendants to mental health services through the Local Courts, in place of conviction through the criminal justice system. Section 31 of the Act outlines that the diversionary powers available “apply to criminal proceedings for summary offences and indictable offences triable summarily before a Magistrate, as well as any related bail proceedings. [However] committal proceedings are excluded.”¹⁹⁵

Section 32 gives a magistrate the ability to set aside criminal charges for an accused who is developmentally disabled, suffering from mental illness, or who has a mental condition for which treatment is available in a mental health facility but who are not mentally ill persons.¹⁹⁶ Under section 32(3) they are able to order that charges be dismissed and that the accused be released:

- a. into the care of a responsible person, unconditionally or subject to conditions; or
- b. on the condition that the defendant attend on a person or at a place specified by the magistrate for assessment of the defendant’s mental condition or treatment or both; or
- c. unconditionally.¹⁹⁷

In *Director of Public Prosecutions v El Mawas*¹⁹⁸ it was held that the seriousness of the offence was a relevant matter to be taken into account in determining whether to apply section 32. The Court concluded that the section entails "a discretionary decision in which the magistrate is permitted latitude as to the decision which might be made, a latitude confined only by the subject matter and object of the Act."

“Importantly, in exercising discretion to grant orders under section 32, the court must be confident that a treatment service is available.”¹⁹⁹ However, within six months of an order being made, should a magistrate believe that a condition is not being complied with, they are able to call the person back to court and may deal with the charge as if the accused had not been released. Conversely, if the order is complied with for six months, then the charge is considered dismissed.²⁰⁰ Credit Referral of Eligible Defendants into Treatment (CREDIT)

Credit Referral of Eligible Defendants into Treatment (CREDIT)

- 3.1.2 CREDIT is a court-based intervention program for adult defendants, participation in which is either voluntary or court-ordered. The main goals of the program are:
1. "to reduce re-offending by encouraging and assisting defendants appearing at local courts to engage in education, treatment or rehabilitation programs and by assisting them to receive social welfare support; and

¹⁹⁵ Deborah Bradford and Nadine Smith, 'An Evaluation of the NSW Court Liaison Services' (2009) 4. Available at: [http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/R58_CLS.pdf/\\$file/R58_CLS.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/R58_CLS.pdf/$file/R58_CLS.pdf)

¹⁹⁶ Ibid

¹⁹⁷ *Mental Health (Forensic Provisions) Act 1990*, s 32

¹⁹⁸ [2006] NSWCA 154

¹⁹⁹ Deborah Bradford and Nadine Smith, 'An Evaluation of the NSW Court Liaison Services' (2009) 4. Available at: [http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/R58_CLS.pdf/\\$file/R58_CLS.pdf](http://www.bocsar.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/R58_CLS.pdf/$file/R58_CLS.pdf)

²⁰⁰ Ibid

2. to contribute to the quality of decision-making in the local court by helping ensure that information on defendants' needs and rehabilitation efforts are put before the court."²⁰¹

Defendants may partake in the program regardless of the possibility of re-offending and do not need to plead guilty. However, there is a set criteria that must be met in order to be eligible:

- "the defendant must be an adult;
- the defendant must have an identifiable problem related to his/her offending behaviour, for example, mental health problems;
- the defendant must be motivated to address the problems related to his/her offending behaviour; and
- the defendant must reside within areas where he/she is able to participate in treatment and other services."²⁰²

On the other hand, a defendant will automatically be ineligible if the Department of Corrective Services is supervising them, they are on remand, have been convicted of a sex offence in the last five years or if currently charged with a sex offence.²⁰³ This does not mean that people with disability are excluded.

Referral to the CREDIT program can take place either before or after a plea is entered. Pre-plea referrals can be made by magistrates, police officers, solicitors, and staff of other court-based programs (e.g. Mental Health Court Liaison Service, Magistrates Early Referral into Treatment, and Forum Sentencing). A defendant can also self-refer. Post-plea referrals can only be made by a magistrate.²⁰⁴

There are two stages to the assessment process, the initial eligibility assessment and then a more extensive needs assessment by a CREDIT caseworker in order to formulate an intervention plan. The length of the program will be different for each participant but normally lasts between two and six months. Whilst undertaking the program, a magistrate may request that the defendant appear at court to give an update as to progress.²⁰⁵

Of the 483 participants in CREDIT between August 2009 and 2011, almost half (46.4%) had a diagnosed disability. Nearly two in three (67%) had a psychiatric disability and one in four had either an acquired brain injury/other cognitive disability (12.9%) or an intellectual disability (12%).²⁰⁶

3.6 Queensland

²⁰¹ Lily Trimboli, 'NSW Court Referral of Eligible Defendants into Treatment (CREDIT) pilot program: An evaluation' (February 2012) 159 *Contemporary Issues in Crime and Justice*, 1 and 3. Available at: [http://www.lawlink.nsw.gov.au/Lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb159.pdf/\\$file/cjb159.pdf](http://www.lawlink.nsw.gov.au/Lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb159.pdf/$file/cjb159.pdf)

²⁰² Ibid, 3-4

²⁰³ Ibid, 4

²⁰⁴ Lily Trimboli, 'NSW Court Referral of Eligible Defendants into Treatment (CREDIT) pilot program: An evaluation' (February 2012) 159 *Contemporary Issues in Crime and Justice*, 4. Available at: [http://www.lawlink.nsw.gov.au/Lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb159.pdf/\\$file/cjb159.pdf](http://www.lawlink.nsw.gov.au/Lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb159.pdf/$file/cjb159.pdf)

²⁰⁵ NSW Government (Justice and Attorney General), CREDIT Brochure. Available at: [http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/98676_Credit_Brochure_v8LR.pdf/\\$file/98676_Credit_Brochure_v8LR.pdf](http://www.lawlink.nsw.gov.au/lawlink/cpd/ll_cpd.nsf/vwFiles/98676_Credit_Brochure_v8LR.pdf/$file/98676_Credit_Brochure_v8LR.pdf)

²⁰⁶ Lily Trimboli, 'NSW Court Referral of Eligible Defendants into Treatment (CREDIT) pilot program: An evaluation' (February 2012) 159 *Contemporary Issues in Crime and Justice*, 9. Available at: [http://www.lawlink.nsw.gov.au/Lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb159.pdf/\\$file/cjb159.pdf](http://www.lawlink.nsw.gov.au/Lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb159.pdf/$file/cjb159.pdf)

3.6.1 Queensland Courts Referral (QCR)

This program involves a bail-based process that allows defendants to be linked to non-government organisations and government agencies, enabling them to focus on the origins of the offending behaviour. Anyone with a mental illness, intellectual disability or cognitive impairment is able to apply for referral to the program, provided they are appearing in the Roma Street Arrest Courts of the Brisbane Magistrates Court, have been granted bail or are eligible for bail, and are in need of services that will assist them with issues concerning their disability.²⁰⁷

However, a defendant will be unable to participate in the program if their charges necessitate an indictment, they are unwilling to participate, or the appropriate service provider/s do not have capacity to take the defendant on.²⁰⁸

The goals of the program are to:

- "provide short term assistance to defendants appearing on charges who have a health and/or social problem through referral to treatment or community support services; and
- reduce the likelihood of long term re-offending."²⁰⁹

The defendant is connected with the QCR Case Assessment Group, where they will be interviewed to determine their eligibility and core issues, as well have the most appropriate treatment or service identified. This information is then given to the Magistrate for their final decision as to eligibility. "A Magistrate may impose bail conditions that a defendant engage with the QCR process...A defendant's failure to comply with a condition of bail may result in [them] being charged with a further criminal offence for breach of bail and they may be removed from the QCR process."²¹⁰ This does not mean that people with disability are excluded.

3.7 South Australia

3.7.1 Magistrates Court Diversion Program (MCDP)

This program is aimed at adults accused of a minor indictable or summary offence who's intellectual or mental functioning has been impaired because of mental illness, intellectual disability, a personality disorder, acquired brain injury, or a neurological disorder.²¹¹

MCDP aims to:

1. "Prevent further offending behaviour by providing access to early assessment and interventions that address mental health or disability needs of defendants and their offending behaviour;

²⁰⁷ Department of Justice and Attorney General, 'Courts Innovation Program Queensland Courts Referral (QCR)'. Available at: http://www.courts.qld.gov.au/_data/assets/pdf_file/0009/205587/cip-fs-qld-courts-referral-qcr.pdf

²⁰⁸ Ibid

²⁰⁹ Ibid

²¹⁰ Department of Justice and Attorney General, 'Courts Innovation Program Queensland Courts Referral (QCR)'. Available at: http://www.courts.qld.gov.au/_data/assets/pdf_file/0009/205587/cip-fs-qld-courts-referral-qcr.pdf

²¹¹ Courts Administration Authority of South Australia, 'Magistrates Court Diversion Program'. Available at: <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Magistrates-Court-Diversion-Program.aspx>

2. Provide assistance to the court in the identification and management of people with a mental impairment in the court system; and
3. Provide a diversion option in the Magistrates Court, for people who may otherwise plead a mental impairment defence under section 269 of the *Criminal Law Consolidation Act (1935)*.²¹²

To be eligible for the program, it must be established that there is a connection between the mental impairment and the offending behaviour. The participant must also be willing to plead guilty to the most serious charges.²¹³ "A Clinical Advisor (a registered psychologist) must be satisfied at the preliminary assessment that the person understands the program and consents to being involved."²¹⁴

Referral can be made from a number of sources, including a magistrate, lawyer, prosecutor, police officer, guardian, service providers. Self-referral is also possible. The magistrate then officially activates the referral at the first hearing.²¹⁵

The program consists of 4 primary steps:

1. Referral;
2. Assessment and Acceptance;
3. Treatment and Review; and
4. Finalisation of Matters.²¹⁶

The program usually runs for six months. During this period, the offender is required to attend court roughly every two months (more frequently if necessary) to allow the magistrate to monitor compliance and make any other necessary orders. Section 19C of the *Criminal Law (Sentencing) Act 1988* (SA) allows a magistrate to release a successful participant without conviction or penalty. Other outcomes include "suspended sentences with lengthy good behaviour bonds and supervision orders with treatment, program attendance and counselling conditions."²¹⁷

The program operates in four regional courts: Murray Bridge, Mount Gambier, Port Augusta and Whyalla.²¹⁸

3.7.2 Treatment Intervention Program (TIP)

²¹² Ibid

²¹³ Ibid

²¹⁴ Elizabeth Richardson and Bernadette McSherry, 'Diversion down under - Programs for offenders with mental illnesses in Australia' (2010) 33 *International Journal of Law and Psychiatry*, 250

²¹⁵ Law Reform Commission of Western Australia, 'Chapter Three: Mental Impairment Court Intervention Programs' (June 2008) *Court Intervention Programs - Consultation Paper - Project No. 96*, 100. Available at: http://www.lrc.justice.wa.gov.au/files/P96_Forepages.pdf

²¹⁶ For more information on these steps, please see: <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Magistrates-Court-Diversion-Program.aspx>

²¹⁷ Law Reform Commission of Western Australia, 'Chapter Three: Mental Impairment Court Intervention Programs' (June 2008) *Court Intervention Programs - Consultation Paper - Project No. 96*, 100-101. Available at: http://www.lrc.justice.wa.gov.au/files/P96_Forepages.pdf

²¹⁸ Courts Administration Authority of South Australia, 'Magistrates Court Diversion Program'. Available at: <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Magistrates-Court-Diversion-Program.aspx>

TIP integrates evidence based practices to address recidivism and manage mental health symptoms. The program aims to reduce re-offending, improve mental and physical health and reduce drug use. "It targets adults who have been charged with a minor indictable or summary offence, where there is a link between the offending behaviour and mental impairment and/or substance abuse."²¹⁹ Mental impairment includes mental illness, intellectual disability, a personality disorder, an acquired brain injury, or a neurological disorder.²²⁰

The TIP program extends over 6 months. The program may involve periodic court reviews, linking participants to community treatment services, supervisor contact, drug testing, and rehabilitation plans. Successful completion of the program is determined by the participant having "no fresh charges, attended and engaged in the treatment sessions, and demonstrated a willingness and ability to cease or significantly reduce substance abuse."²²¹

TIP has replaced the MCDP program in those courts where it operates, which is all metropolitan Magistrates Courts: Adelaide, Christies Beach, Elizabeth, Holden Hill and Port Adelaide. There is also an equivalent in the Youth Court, the Youth Court Treatment Intervention Program.²²²

3.8 Tasmania

There are no specific court-based diversion programs for people with an intellectual, cognitive or psychosocial disability or an acquired brain injury. There is a Mental Health Diversion List (MHDL) Program operating in the Hobart & Launceston Magistrates Courts and this will be discussed below in the section on therapeutic courts.

3.9 Victoria

3.9.1 Mental Health Court Liaison Service (MHCLS)

MHCLS offers assessment and advice services for those attending the Magistrates' court on criminal charges. It also facilitates access to treatment and suitable services through cooperation with relevant agencies. To access the program, the person must "have a mental illness and display concerning behaviour that is thought to be related to mental illness."²²³

The objectives of the program include diverting offenders with a mental illness out of the criminal justice system, placing them instead into suitable mental health treatment and thereby reducing recidivism levels.²²⁴

A referral can be made from a range of sources, including magistrates and other court personnel, police, legal practitioners, treatment agencies, court welfare services and disability services, family and carers. Self-referrals are also possible.²²⁵

²¹⁹ Courts Administration Authority of South Australia, 'Treatment Intervention Program'. Available at: <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Treatment-Intervention-Program.aspx>

²²⁰ Ibid

²²¹ Courts Administration Authority of South Australia, 'Treatment Intervention Program'. Available at: <http://www.courts.sa.gov.au/OurCourts/MagistratesCourt/InterventionPrograms/Pages/Treatment-Intervention-Program.aspx>

²²² Ibid

²²³ Forensicare, Mental Health Court Liaison Service Brochure. Available at: <http://www.forensicare.vic.gov.au/assets/pubs/Mental%20Health%20Court%20Liaison.pdf>

²²⁴ Magistrates' Court of Victoria, 'Mental Health Court Liaison Service'. Available at: <http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/mental-health-court-liaison-service>

MHCLS is administered by Forensicare, the Victorian Institute of Forensic Mental Health, and operates at the Melbourne, Ringwood, Heidelberg, Dandenong, Frankston, Broadmeadows and Sunshine Magistrates' Courts.²²⁶

3.9.2 Court Integrated Services Program (CISP)

"The program provides accused persons with access to services and support to reduce rates of re-offending and promote safer communities." It is run at the Melbourne, Latrobe Valley, and Sunshine Magistrates' Courts.²²⁷

CISP offers a multi-disciplinary team-based method of valuation and referral to treatment and support services, such as acquired brain injury services, mental health care, and disability support. It also provides different levels of support depending on the required needs of the participant and case management for higher risk participants.²²⁸

CISP's objectives are to:

- "Provide short term assistance before sentencing for accused with health and social needs;
- Work on the causes of offending through individualised case management;
- Provide priority access to treatment and community support services; and
- Reduce the likelihood of re-offending."²²⁹

Any party involved in a court proceeding can be referred to CISP. Referrals can come from a magistrate, court staff, legal representatives, police officers, support services, family, friends or by self-referral. Participation in the program is available irrespective of a plea being entered or an intention to plead guilty. The participant must consent to be involved however, and must be on summons, bail or remand pending a bail hearing.²³⁰

3.10 Western Australia

3.10.1 Intellectual Disability Diversion Program (IDDP)

This program is intended to divert adults with an intellectual disability into suitable support services rather than through the court system.²³¹ The aims of this program are to "reduce recidivism among the

²²⁵ Forensicare, Mental Health Court Liaison Service Brochure. Available at: <http://www.forensicare.vic.gov.au/assets/pubs/Mental%20Health%20Court%20Liaison.pdf>

²²⁶ Magistrates' Court of Victoria, 'Mental Health Court Liaison Service'. Available at: <http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/mental-health-court-liaison-service>

²²⁷ Magistrates' Court of Victoria, 'Court Integrated Services Program'. Available at: <http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/court-integrated-services-program-cisp>

²²⁸ Ibid

²²⁹ Magistrates' Court of Victoria, 'Court Integrated Services Program'. Available at: <http://www.magistratescourt.vic.gov.au/jurisdictions/specialist-jurisdictions/court-support-services/court-integrated-services-program-cisp>

²³⁰ Ibid

²³¹ Jacqueline Joudo, 'Responding to substance abuse and offending in Indigenous communities: review of diversion programs' (2008) *Australian Institute of Criminology - Research and Public Policy Series No. 88*, 53. Available at: <http://aic.gov.au/documents/1/8/0/%7B1807C117-551B-4D5A-B30C-CF07EF532F7D%7Drpp88.pdf>

intellectually disabled offender group, to reduce the rate of imprisonment by diversion and appropriate dispositions and to generally improve the ways in which the justice system deals with intellectually disabled offenders."²³²

Referrals can be made by anyone, including family members, police officers, members of the judiciary, prosecutors, mental health nurses and Community Corrections officers. To participate in the IDDP, the person must have a diagnosed intellectual disability, be accused of a minor, non-violent offence, and appear at the Central Law Courts. The accused needs to also volunteer to participate.²³³

Once eligibility is established, the matter is adjourned in order for an individualised intervention plan to be developed in cooperation with the accused, their family and support services, tailored to the address the core underpinnings of the offending behaviour. Progress reports are given to the court during the duration of the program, which usually runs for six months.²³⁴ "Where an intervention plan is successfully completed, the matter is finalised, with participants receiving a reduced sentence and a certificate of participation...Conviction will result in a criminal record, but a spent conviction is normally imposed."²³⁵ A spent conviction means that the person may not need say that they were charged with and convicted of an offence, except in certain exemplary circumstances, such as when appointed or being considered for appointment to a position where the responsibilities may necessitate contact with children in a school, community kindergarten, college or hostel. It is unlawful for an employer, contractor or similar body to discriminate against someone for having a spent conviction.²³⁶

Advantages And Disadvantages Of Diversion

The New South Wales Law Reform Commission has identified that "much of the evaluative data available [on the effectiveness of diversion] is anecdotal or equivocal. In particular, there is a lack of research providing comprehensive evaluations of the outcomes of diversionary programs, particularly evaluations of specific program outcomes."²³⁷ Nevertheless, advantages and disadvantages of diversion are available.

3.11 Advantages of diversion

3.11.1 Benefits to the criminal justice system

Diversion not only improves the efficiency of the criminal justice system by reducing the number of people going through the court system, but it may also increase the awareness of those working in the field as to the needs of those with disability (amongst others). It also reduces the use of remand and

²³² Law Reform Commission of Western Australia, 'Chapter Three: Mental Impairment Court Intervention Programs' (June 2008) *Court Intervention Programs - Consultation Paper - Project No. 96*, 105. Available at: http://www.lrc.justice.wa.gov.au/files/P96_Forepages.pdf

²³³ Jacqueline Joudo, 'Responding to substance abuse and offending in Indigenous communities: review of diversion programs' (2008) *Australian Institute of Criminology - Research and Public Policy Series No. 88*, 53

²³⁴ Law Reform Commission of Western Australia, 'Chapter Three: Mental Impairment Court Intervention Programs' (June 2008) *Court Intervention Programs - Consultation Paper - Project No. 96*, 106. Available at: http://www.lrc.justice.wa.gov.au/files/P96_Forepages.pdf

²³⁵ Jacqueline Joudo, 'Responding to substance abuse and offending in Indigenous communities: review of diversion programs' (2008) *Australian Institute of Criminology - Research and Public Policy Series No. 88*, 53

²³⁶ Legal Aid Western Australia, 'What Spent Convictions Orders Do' (2010). Available at: <http://www.legalaid.wa.gov.au/InformationAboutTheLaw/crime/criminalrecords/Pages/SpentConvictionOrders.aspx>

²³⁷ New South Wales Law Reform Commission, 'Report 135: People with cognitive and mental health impairments in the criminal justice system - Diversion' (June 2012) 33. Available at: <http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r135.pdf>

facilitates non-custodial sentences being ordered in suitable cases, thereby reducing the number of people being sent to prison.²³⁸

3.11.2 Reducing reoffending

This is the key aim of many of the programs outlined above and appears to be achieved by providing various types of interventionist services to those with disability (amongst others), thereby allowing them to address the core issues related to the offending.

3.11.3 Access to support services

Another advantage of diversion is that it provides those with disability access to treatment, support and other services that they may have been unaware of or would otherwise be unavailable without a referral.

3.12 Disadvantages of diversion

3.12.1 Net-widening effects and sentence escalation

Although a benefit of diversion is that it may increase the availability of services for people with disability, this may also turn into a disadvantage. Some commentators have voiced concerns that diversion "could have the paradoxical result of entrenching more people in that system due to a desire to provide them with programs that would not otherwise be available if they were not charged with criminal offences."²³⁹ Likewise, sentence escalation could be a negative consequence of diversion if a magistrate enforces a more severe sentence to bring a person with disability within the eligibility criteria to participate in an intervention program.²⁴⁰

3.12.2 Serious offending

As is clear from the above list of programs, court diversion is only an option for minor or summary offences and is therefore considered inappropriate for serious or indictable offences. "The view may be taken that there are some offences that are so serious that punishment is inevitable, and diversion is not appropriate...However...in some cases, an impairment may have a significant impact on the way in which seriousness is judged."²⁴¹ Therefore, an entire group of people with disability facing criminal charges are ineligible to participate in these programs and obtain the benefits of the services they provide. It should be noted, however, that there are a range of other services available for those charged with, or sentenced for, indictable offences.

3.12.3 Coercion and consent

Concern has been raised by some commentators, such as A Freiberg, regarding the voluntary nature of entering into diversion programs. There is a fear that people with disability are being coerced into partaking or that involvement comprises onerous obligations, particularly where the person has not

²³⁸ Ibid, 34-35

²³⁹ New South Wales Law Reform Commission, 'Report 135: People with cognitive and mental health impairments in the criminal justice system - Diversion' (June 2012) 41. Available at: <http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r135.pdf>.

²⁴⁰ Ibid

²⁴¹ Ibid, 42

been found guilty or does not need to plead guilty to participate.²⁴² "Defendants may be encouraged, or feel under pressure, to plead guilty, which may derogate from a proper adjudication of guilt."²⁴³ To overcome this, it is imperative that participation is voluntary, the participant clearly understands what the program involves and a guilty plea is not required.

3.12.4 Unfairness or disadvantage for participants

The requirements of a diversion program can sometimes be more onerous than going through the criminal justice system. "For example, participation in a diversion program could involve intensive monitoring by a court or a case manager, attending a service provider, taking medication and so on, over a period of several months."²⁴⁴ The issue is that, although the objective of the court may be rehabilitative, the person with disability may deem the requirements of the diversion program to be punitive and excessive compared to what would be enforced for a person without disability, therefore creating discrimination issues incompatible with article 5(1) of the Convention.

3.13 Recommendations

It is important for all states and territories to have a court diversion program available to people with disability who need communication support or have multiple and complex support needs. This is because a person will be disadvantaged if they live in a State or Territory that does not provide such a program, which creates potential non-compliance with Article 5(1) of the Convention: "States Parties recognize that all persons...are entitled without any discrimination to the equal protection and equal benefit of the law."²⁴⁵

In those states that do offer court diversion programs, it is exceedingly difficult to compare them, as each is tailored with specific eligibility criteria, program objectives and participation requirements. That being said, there are suggested improvements that can be made.

1. For those programs that specify one form of disability, such as mental illness or intellectual disability, expanding the reach of the program to include all forms of disability should be considered, thereby providing scope for a much larger group of participants to benefit from the case management, treatment and support services available and removing any discrimination.
2. Diversion programs must also have objectives such as reducing re-offending and addressing the core reasons for the offending to ensure that they are assisting those with disability to get the support they need to remain out of the criminal justice system in the future, as well as addressing social disadvantage. In this way, those programs that work with the individual to provide a tailored plan are going to achieve the best outcome for that individual. This is because each form of disability "is experienced differently by different people, and is often associated with many complex and interacting problems."²⁴⁶

²⁴² New South Wales Law Reform Commission, 'Report 135: People with cognitive and mental health impairments in the criminal justice system - Diversion' (June 2012) 43. Available at: <http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r135.pdf>

²⁴³ A Freiberg, 'Therapeutic Jurisprudence in Australia: Paradigm Shift or Pragmatic Incrementalism?' (2002) 20 *Law in Context* 6, 19. Available at: <http://digital.federationpress.com.au/t42c2/14/>

²⁴⁴ New South Wales Law Reform Commission, 'Report 135: People with cognitive and mental health impairments in the criminal justice system - Diversion' (June 2012) 44. Available at: <http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r135.pdf>

²⁴⁵ Convention on the Rights of Persons with Disabilities, Article 5(1)

²⁴⁶ National Justice Chief Executive Officers' Group and the Victorian Government Department of Justice, 'Diversion and support of offenders with a mental illness - Guidelines for best practice' (August 2010) Available at http://www.aic.gov.au/media_library/aic/njceo/diversion_support.pdf

3. Furthermore, it is vital to the success of diversion programs that participation be voluntary. To ensure that a participant has not been coerced, it is important that they understand what participation involves, including what is expected of them in terms of attending treatment and other support services. A safeguard here is to have someone who specialises in communicating with an intellectual, cognitive or psychosocial disability or an acquired brain injury explain this to the participant, rather than someone who has no training. Example can be taken from South Australia's MCDP program, which requires a Clinical Advisor (a registered psychologist) to be satisfied as to the participant's understanding.
4. Finally, participation in court diversion programs should not be considered onerous, as it changes the perception from participation being supportive (especially for people with intellectual disability) and a rehabilitative measure to participation being punitive. In this way, those programs that still automatically sentence successful participants, such as Western Australia's IDDP should consider releasing a successful participant without conviction or penalty in certain circumstances.

b) Review the operation of therapeutic courts (for example mental health courts) in states and territories across Australia available for diversion for people with disability who have intellectual, cognitive or psychosocial disability or an acquired brain injury.

3.14 Therapeutic Courts

Therapeutic courts are courts which depart from the narrow consideration of legal issues and seek to engage with the underlying causes or issues that have brought the individual before the court.²⁴⁷ These courts are also referred to as "problem solving courts" and may include areas such as mental health, domestic violence and drugs.²⁴⁸ This is in contrast to the traditional criminal justice system which adopts adversarial and punitive measures focused on punishing and deterring offenders.²⁴⁹

Therapeutic courts aim to provide better outcomes for the individuals involved and society as a whole by aiming to reduce reoffending behaviour.²⁵⁰ Participation in mental health courts is usually voluntary and courts employ a multi-disciplinary team in order to address the underlying causes of the offence. This is based on the idea of therapeutic jurisprudence. Therapeutic jurisprudence recognises that the traditional criminal justice system is ineffective in dealing with offenders with underlying conditions such as mental disorders.²⁵¹

3.15 Mental Health Courts

The basic concept of a mental health court is that the best way of reducing the risk of further offending is by treating the mental illness.²⁵² Like drug courts, mental health courts originated in the

²⁴⁷ Mark Harris, The Koori Court and the Promise of Therapeutic Justice, available at <https://elaw.murdoch.edu.au/archives/issues/special/the_koori_court.pdf>

²⁴⁸ Ibid

²⁴⁹ Law Reform Committee, Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers (March 2013), Chapter 7 - Criminal responsibility and court processes. Available at <http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/aijspdftc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf>

²⁵⁰ Sarah Ryan & Darius Whelan, Diversion of Offenders with Mental Disorders: Mental Health Courts [2012] 1 Web JCLI, Available at <<http://webjcli.ncl.ac.uk/2012/issue1/ryan1.html>>

²⁵¹ Ibid

²⁵² The Honourable Wayne Martin AC, The WA Mental Health Court Address at the Mental Health Law Centre (WA) Inc Annual General Meeting, available at <<http://www.supremecourt.wa.gov.au/files/Mental%20Health%20Law%20Centre.pdf>>

United States. Despite their differences, mental health courts tend to have a number of common characteristics:

- a specialised list
- a dedicated court team
- a non-adversarial approach
- access to community treatment
- continuing supervision
- systems of reward and sanctions; and
- voluntary participation.²⁵³

3.16 Benefits of Mental Health Courts

Mental health courts aim to keep people with mental health problems out of the prison system. This is beneficial especially where prisons do not have access to mental health treatment programs. Prison is often an inappropriate place to send those with mental health disorders as it can lead to increased stigmatisation and further deteriorate mental health. Furthermore it is generally held that prisons are not often well-equipped to deal with mental health problems and staff are often not sufficiently trained in the area to provide much benefit to offenders.²⁵⁴

Mental health courts also go some way in addressing the cause of the problem that led the offender to commit the crime. This is an important aspect of therapeutic jurisprudence. The aim of mental health courts is to eventually include offenders back into their communities. In this respect, some advocates claim that mental health court participants are less likely to reoffend than people in the normal adversarial court process.²⁵⁵

Mental health courts can potentially reduce the costs associated with the criminal justice system. Participation in mental health programs as opposed to incarceration is generally less costly. Additionally a study in the United States found that the costs associated with an offender are significantly reduced in the years following their sentence. This can be attributed to the fact that offenders in the mental health court system usually require less supervision than offenders who are diverted to a gaol for instance.²⁵⁶

3.17 Disadvantages of Mental Health Courts

There has been some opposition to the creation of mental health courts. Mental health courts have been accused by some as diverting limited funding to dealing with mentally ill people in the court system as opposed to dealing with mental health within the community. Mental health courts have

²⁵³ Ibid

²⁵⁴ Law Reform Committee, Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers (March 2013), Chapter 7 - Criminal responsibility and court processes, available at <http://www.parliament.vic.gov.au/images/stories/committees/lawreform/iajspdftc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf>, 246

²⁵⁵ Ibid

²⁵⁶ Ibid

also been criticised as falsely claiming to be voluntary. This is due to the variation amongst jurisdictions about the requirements of participants in mental health courts. Some jurisdictions require an offender to plead guilty as a pre-condition to acceptance into the program. It has also been argued that a mental health court has the potential to be paternalistic and therefore can create a coercive environment for the accused.²⁵⁷

Other arguments against therapeutic courts, including mental health courts, is that procedures to be adopted by courts must be to enhance the rights of defendants and that the overarching principles of open justice and natural justice should not be sacrificed by this type of reform.²⁵⁸

There is also the risk that a less formal mental health court could potentially reduce important due process rights which are characteristic of the traditional court setting. Lack of formality could potentially lead to lack of procedural safeguards.²⁵⁹

Mental health courts have also been criticised as lacking in evidence which supports their benefit for the offender and the community as a whole. However as mental health courts are generally in their infancy it is difficult to find empirical data which supports their aims. Despite these criticisms, mental health courts have the potential to be successful in Australia and can address the serious problems faced by people with mental illness in the criminal justice system.²⁶⁰

3.18 Mental Health Courts in Australia

3.18.1 Western Australia

From the first quarter of this year the Mental Health Commission and Department of the Attorney General are jointly implementing Western Australia's first mental health court diversion and support project. At this stage this is a pilot program for 20 months in the Perth Magistrates Court and the Perth Children's Court. Both diversion services involve placing mental health specialist teams in the court to provide assessments, reports, liaison with community services and develop plans to support people with mental illness.²⁶¹

The Mental Health Review Board of Western Australia also reviews whether involuntary orders should continue. The Mental Health Review Board also hears appeals from involuntary patients who are dissatisfied with their decision.²⁶²

3.18.2 New South Wales

Section 32 of the *Mental Health (Criminal Procedure) Act 1990* (NSW) enables magistrates in summary proceedings to divert offenders from the criminal justice system and dismiss their charges either unconditionally or conditionally.²⁶³

²⁵⁷ Ibid

²⁵⁸ Jelena Popovic, Court Process and Therapeutic Jurisprudence: Have We Thrown The Baby Out With the Bathwater? Available at <http://elaw.murdoch.edu.au/archives/issues/special/court_process.pdf>

²⁵⁹ Law Reform Committee, Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers (March 2013), Chapter 7 - Criminal responsibility and court processes Available at <http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iaijspidtfc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf>; >246

²⁶⁰ Ibid

²⁶¹ Government of Western Australia Mental Health Commission, Mental Health Court Diversion and Support Program Available at <www.mentalhealth.wa.gov.au>

²⁶² Mental Health Review Board Western Australia, What is the Mental Health Review Board, available at, <<http://www.mhrbwa.org.au/about/>>

The NSW Statement Community and Court Liaison Service (**SCCS**) is an initiative which provides mental health services in 20 NSW Local Courts. They provide comprehensive assessments and provide recommendations to the magistrate for diversion to appropriate treatment. The SCCS is available to those who are charged with minor offences.²⁶⁴

The New South Wales Mental Health Tribunal is a specialist quasi-judicial body that has a wide range of powers that enable it to conduct mental health inquiries. The tribunal reviews cases of forensic patients at least once every six months and makes recommendations regarding their detention and the appropriateness of their release.²⁶⁵

In April 2011 the NSW Law Reform Commission and the Sydney Institute of Criminology hosted a consultation process in relation to whether there should be a mental health court or a specialist list to address issues of diversion for people with cognitive and mental health impairments in the criminal justice system.

In June 2012 the NSW Law Reform Commission released "Report 135 - People with cognitive and mental health impairments in the criminal justice system - Diversion". The Report is quite extensive and examines, amongst other things, diversion processes in existing courts and the growing trend towards mental health courts. At chapter 12 of the report the NSW Law Reform Commission recommended a Court Referral for Integrated Service Provision List (CRISP) in the Local and District Courts.²⁶⁶

3.18.3 Victoria

The Assessment and Referral Court (**ARC**) List is managed by the Magistrates Court of Victoria and helps people with a mental illness or cognitive impairment receive appropriate support.²⁶⁷ Participation on the list is voluntary, and therefore if a defendant wishes to remove themselves from the list they will return to the regular court process.²⁶⁸

Eligibility for the list is governed by the *Magistrates' Court Act 1989* (Vic) and typically requires the accused to meet one of the five diagnostic criteria listed and following that a functional criteria. Eligibility is not open to those defendants charged with serious sexual or violent offences. Unlike the Tasmanian list, the Victorian list accepts participants with a sole diagnosis of intellectual disability.²⁶⁹

Provided the accused meets both the diagnostic criteria and functional criteria there must be proof that there will be a potential benefit to the accused from receiving such services in accordance with an individual support plan. Evaluation for the program is currently in process.²⁷⁰

²⁶³ Judicial Commission of NSW, *Diverting mentally disordered offenders in the NSW Local Court*, available at <<http://www.judcom.nsw.gov.au/publications/research-monographs-1/monograph31>>

²⁶⁴ NSW Government Justice Health & Forensic Mental Health Network, *Courts*, available at, <<http://www.justicehealth.nsw.gov.au/about-us/health-care-locations/courts>>

²⁶⁵ NSW Government, *Mental Health Review Tribunal*, available at <<http://www.mhrt.nsw.gov.au/the-tribunal>>

²⁶⁶ New South Wales Law Reform Commission, *Report 135 - People with cognitive and mental health impairments in the criminal justice system - Diversion*, available at <<http://www.lawreform.lawlink.nsw.gov.au/agdbasev7wr/lrc/documents/pdf/r135.pdf>>

²⁶⁷ Courts and Tribunals Victoria, *Assessment and Referral Court (ARC) List and Mental Health*, available at <<http://www.courts.vic.gov.au/courts-tribunals/specialist-courts-and-initiatives/assessment-and-referral-court>>

²⁶⁸ Law Reform Committee, *Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers* (March 2013), Chapter 7 - Criminal responsibility and court processes, available at <http://www.parliament.vic.gov.au/images/stories/committees/lawreform/iaijspidtc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf>

²⁶⁹ Ibid

²⁷⁰ Ibid

Victoria also has the Mental Health Court Liaison Service (**MHCLS**) which is an initiative of the Magistrates Court of Victoria. The MHCLS aims to provide court assessment and advice services to Magistrates in relation to people appearing before the Magistrate who may have a mental illness.²⁷¹

The Mental Health Review Board of Victoria conducts reviews and appeals. The reviews are in relation to continued treatment of involuntary and security patients and decisions to extend community treatment orders. The appeals are initiated by, or on behalf of, patients against their continued treatment as involuntary or security patients.²⁷²

3.18.4 South Australia

The Magistrates' Court Diversion Program has been in operation since 1999, and was Australia's first specialised court for people with mental impairments.²⁷³ The program usually runs for six months and is open to people with mental illness, intellectual disability, brain injury, dementia, or a personal disorder who commit summary and certain minor indictable offences.²⁷⁴

Participation in the program is voluntary and while defendants are not required to plead guilty, they must indicate they will not contest charges against them. Evaluation of the program has indicated that fewer participants offended following the program, and fewer charges were laid against the participants in the 12 months following the program (compared to 12 months prior). Despite the positive results however, the number of defendants leaving court with a criminal record has increased.²⁷⁵

The Guardianship Board is a South Australian tribunal that makes decisions if a person is shown to have a mental incapacity. The Board also has authority under the *Mental Health Act 2009* (SA) to make and review orders about the mental illness of individuals in relation to community treatment orders and involuntary inpatients.²⁷⁶

3.18.5 Tasmania

Tasmania's Mental Health Diversion List (**MHDL**) Program operates with dedicated Magistrates in Hobart and Launceston.²⁷⁷ In 2010 the MHDL received a Certificate of Merit as part of the Australian Crime and Violence Prevention Awards.²⁷⁸ The MHDL uses existing provisions in the *Bail Act 1994* (TAS) and the *Sentencing Act 1997* (TAS) to divert offenders into treatment.²⁷⁹ Participants must comply with a personalised treatment plan and must attend court on a regular (usually monthly) basis to discuss their progress. Compliance may be met with verbal encouragement, adjustments to the treatment/supervision plan, conferral of other rewards, or graduation.²⁸⁰

²⁷¹ New South Wales Law Reform Commission, Report 135 - People with cognitive and mental health impairments in the criminal justice system - Diversion, available at <http://www.lawreform.lawlink.nsw.gov.au/agdbasev7/wr/lrc/documents/pdf/r135.pdf>

²⁷² Mental Health Review Board of Victoria (Available online at <http://www.mhrb.vic.gov.au/index.php/hearing-process/175-types-of-hearing-conducted-by-the-board>)

²⁷³ NSW Government, Mental Health Review Tribunal, available at <http://www.mhrt.nsw.gov.au/the-tribunal>

²⁷⁴ Ibid

²⁷⁵ Ibid

²⁷⁶ Guardianship Board, What we do, available at http://www.guardianshipboard.sa.gov.au/about_us/what_we_do

²⁷⁷ Magistrates Court of Tasmania, Mental Health Diversion, available at http://www.magistratescourt.tas.gov.au/divisions/criminal_and_general/mental_health_diversion

²⁷⁸ Ibid

²⁷⁹ Esther Newitt and Victor Stojcevski, Magistrates Court of Tasmania Mental Health Diversion List Evaluation Report (May 2009), 4

²⁸⁰ NSW Government, Mental Health Review Tribunal, available at <http://www.mhrt.nsw.gov.au/the-tribunal>

The Mental Health Tribunal in Tasmania is comprised of a panel including a lawyer, a person with a mental health background and a community member. The tribunal conducts independent reviews in relation to continuing care Orders and community treatment orders.²⁸¹

3.18.6 Queensland

Queensland's Mental Health Court decides the state of mind of people charged with criminal offences.²⁸² The focus is on criminal responsibility and fitness, rather than therapeutic jurisprudence or diversion. The court consists of a single judge assisted by two psychiatrists. It hears appeals from the Mental Health Review Tribunal about unsound mind, fitness for trial and diminished responsibility.²⁸³

The Brisbane Magistrates Court operates the Special Circumstances Court Diversion Program (SCCDP) which commenced in June 2009.²⁸⁴ The target group includes adults charged with summary offences who are suffering from impaired decision making capacity due to mental illness, intellectual disability or neurological disorders. Participation in the program is voluntary, but the defendant must either plead guilty or indicate an intention to plead guilty in order to be accepted. The defendant's matter is stood down or adjourned until an assessment of their eligibility for the program can be undertaken.²⁸⁵

The Queensland Mental Health Review Tribunal is established under the *Mental Health Act 2000* (Qld) to review the involuntary status of individuals with mental illness.²⁸⁶

3.18.7 Northern Territory

The Northern Territory, like many of the other States, has a Mental Health Review Tribunal which makes decisions about the care and treatment of people with mental illness.²⁸⁷ While there is no mental health court at this stage the Northern Territory has established two specialist courts which are The Substance Misuse Assessment and Referral for Treatment Court (SMART Court) and the Community Courts which harness the cultural strengths and influences of Indigenous communities and embraces principles of restorative justice.²⁸⁸

3.18.8 Australian Capital Territory

Under the *Crimes (Restorative Justice) Act 2004* (ACT), Australian Federal Police may refer offenders to a restorative justice program to be used as an alternative to the traditional court process. The program focuses on the reparation of harm caused by the offenders. Participation in the program may be taken into consideration at the sentencing phase if the case has gone to court following participation in the program, but such participation will not automatically result in reduction of the sentence that otherwise would have been handed down. If an offender chooses to withdraw from the

²⁸¹ Mental Health Tribunal Tasmania, What is the Mental Health Tribunal, available at <<http://www.mentalhealthtribunal.tas.gov.au/home#cco>>

²⁸² Queensland Courts, Mental Health Court, available at <<http://www.courts.qld.gov.au/courts/mental-health-court>>

²⁸³ NSW Government, Mental Health Review Tribunal, available at <<http://www.mhrt.nsw.gov.au/the-tribunal>>

²⁸⁴ Dr Tamara Walsh, A Special Court for Special Cases (The University of Queensland), available at <<http://www.aija.org.au/online/Pub%20no90.pdf>>

²⁸⁵ NSW Government, Mental Health Review Tribunal, available at <<http://www.mhrt.nsw.gov.au/the-tribunal>>

²⁸⁶ Queensland Government, Mental Health Tribunal, available at <<http://www.mhrt.qld.gov.au/>>

²⁸⁷ Department of Attorney-General and Justice, Mental Health Review Tribunal, available at <<http://www.nt.gov.au/justice/courtsupp/mentalhealth/>>

²⁸⁸ Northern Territory Magistrates Courts, Specialist Courts, available at <http://www.nt.gov.au/justice/ntmc/specialist_courts.shtml>

program prior to sentencing, this will be a point considered by the court at the point of the sentencing. Finally, the restorative process is considered to be suited to indigenous offenders, with 10% of youths referred for offences being indigenous offenders. Accordingly, an Indigenous officer will assist in matters relating to Indigenous clients.²⁸⁹

The Mental Health Tribunal hears applications for orders for the treatment of individuals suffering from mental illness. The Mental Health Tribunal also considers applications for the release of those involuntarily detained.²⁹⁰

3.19 Mental Health Courts Internationally

3.19.1 Canada's position on Mental Health Courts

The Canadian criminal justice system has embraced the idea of mental health courts. The Toronto Mental Health Court is a full-time mental health court which was established in 1998. In Canada a plea of guilty is not a necessary pre-condition for entry into the court. This is unlike some Australian jurisdictions which require the offender to plead guilty before they can access the use of the mental health court system.²⁹¹

Generally the accused is brought before a traditional court and when there are concerns about their fitness to stand trial in the traditional adversarial court system the offender is transferred to the mental health court to be assessed. At this point the offender's participation in the mental health court in assessing their fitness to stand trial is not voluntary. If the offender is assessed to be fit to stand trial the offender then can make a decision about whether they would like to have their case assessed in the traditional court system or whether they would like to remain within the jurisdiction of the mental health court. At this point participation is voluntary.²⁹²

Similarly to Australian jurisdictions the Canadian Criminal Code outlines offences which can be diverted to the mental health court and which cannot be diverted to the mental health court. In Canada offences are divided up into three categories. The category includes presumptively divertible offences, discretionary offences and non-divertible offences. In situations where a sentence has been given in the mental health court and the offender has not complied with the sentence Canadian mental health courts will usually employ other methods as opposed to gaol terms and the sanctions for the offender. Such methods could include increased frequency of status hearings or changes to the treatment plan. In Canada it is clear that there is a desire to keep people who fall under the mental health court jurisdiction out of jail.²⁹³

3.19.2 United Kingdom's position on Mental Health Courts

²⁸⁹ Australian Institute of Criminology, Responding to substance abuse and offending in Indigenous communities: review of diversion programs, available at <<http://www.aic.gov.au/documents/1/8/0/%7B1807C117-551B-4D5A-B30C-CF07EF532F7D%7Drrp88.pdf>>

²⁹⁰ Mental Illness Fellowship of Australia, The mental health legal framework in the ACT, available at, <http://www.mifa.org.au/sites/www.mifa.org.au/files/documents/MH%20Legal%20ACT.pdf>

²⁹¹ Law Reform Committee, Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers (March 2013), Chapter 7 - Criminal responsibility and court processes, available at <http://www.parliament.vic.gov.au/images/stories/committees/lawreform/iajspdftc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf>, 246

²⁹² Ibid

²⁹³ Ibid

Since the early 1990s the United Kingdom has promoted the diversion of Mentally Disordered Offenders away from the criminal justice system and into the care of health and social services.²⁹⁴ There are around 100 diversion and liaison schemes in operation in England and Wales. However, courts in the UK have only recently begun to incorporate mental health courts into their criminal justice system. Mental health courts were piloted in the UK in 2009.²⁹⁵

In order to get access to the mental health court in the UK, offenders are screened at the charge stage and if it is deemed that they require further assessment by the mental health courts, they are referred there. Other people can also refer defendants to the mental health court. Referrals can be made police defence solicitor the Court probation officers and custody officers. People with double diagnosis of mental health and substance abuse problems are not permitted to participate in the mental health court unless their primary need is of a mental health nature.²⁹⁶

3.19.3 New Zealand's position on Mental Health Courts

In New Zealand Forensic Mental Health Services (**FMHS**) provide services to people with serious mental illness who present problems of criminal behaviour and risk to others. FMHS operate between the criminal justice system and mental health services and provide assessment, treatment and rehabilitation. The FMHS is in five centres in New Zealand and consists of a multidisciplinary team.²⁹⁷ New Zealand also has a Court Liaison Service (**CLS**) which was established in 1992 to provide psychiatric advice to the District and High Courts in Wellington.²⁹⁸

3.20 Recommendations

By examining mental health courts in jurisdictions other than Australia it is clear that some changes can be made within Australia to improve therapeutic courts for those with mental health problems. Article 13 of the Convention on the Rights of Persons with Disabilities outlines that State parties shall ensure effective justice for persons with disabilities on an equal basis with others. This includes the provision of procedural accommodation to facilitate their effective role as participants in the criminal justice system.

People with mental health issues are currently not an equal basis with others within the traditional adversarial criminal justice system. Consequently mental health courts go some way to addressing the issues faced by those with mental health issues. In order to improve mental health courts within Australia certain changes can be made.

It is recommended that:

1. States and Territories should provide uniform mental health court services throughout Australia. Like the pilot program in the UK, referral to the mental health court system should be encouraged by not only police and Court staff but also by friends, social workers, lawyers, support workers

²⁹⁴ David Scott, Dr Martin Dempster, Dr Michael Donnelly, Dr Sinead McGiloway and Dr Fred Browne, The effectiveness of Criminal Justice Liaison and Diversion Services (CJLDS) for Mentally Disordered Offenders: A systematic review Campbell Systematic Reviews, available at <www.campbellcollaboration.org>

²⁹⁵ Law Reform Committee, Inquiry into Access to and Interaction with the Justice System by People with an Intellectual Disability and their Families and Carers (March 2013), Chapter 7 - Criminal responsibility and court processes, available at <http://www.parliament.vic.gov.au/images/stories/committees/lawrefrom/iajpsidtfc/2013-03-05_Access_to_justice_intellectually_disabled_-_Final_Report.pdf>, 246

²⁹⁶ Ibid

²⁹⁷ Sandy Simpson, New Zealand Provision of Forensic Mental Health Services, available at <<http://www.rethinking.org.nz/images/newsletter%20PDF/Issue%2035/Paper%20for%20Prison%20fellowship.pdf>>

²⁹⁸ Phillip Brinded, Fiona Malcolm, Nigel Fairley and Bernadine Doyle, Diversion versus liaison: psychiatric services to the courts, Wellington, New Zealand, Criminal Behaviour and Mental Health (volume 6 issue 2, June 1996), 123-196

and community members who are aware of an accused's mental health problems or potential mental health problems.

2. Participants in the mental health courts in Australia should not have to enter a plea of guilty as a pre-condition to participate in the mental health court program.
3. There must be clear guidelines as to the role of the defendant's lawyer within the proceedings in order to minimise the potential of mental health courts to become paternalistic and coercive.
4. There must be an effort made to ensure that participants are aware that their participation in the mental health court system is voluntary and offenders must be competent to choose to enter into the mental health court program of their own volition.

4. CAPACITY AND PEOPLE WITH DISABILITY WHO NEED COMMUNICATION SUPPORTS OR WHO HAVE COMPLEX AND MULTIPLE SUPPORT NEEDS

a) Describe the Federal, State and Territory laws, policies and guidelines relevant to determining whether a person is fit to plead.

4.1 Overview

This paper provides an overview of the current laws in Australia relevant to determining whether a person is fit to plead or fit to stand trial.

All Australian States and Territories have legislation dealing with a person's fitness to plead or fitness to stand trial in criminal proceedings. 'Fitness to stand trial' (or 'fitness to be tried') is generally considered to be a broader concept that encompasses 'fitness to plead'. Fitness to plead concerns an accused's fitness upon arraignment, while fitness to stand trial concerns an accused's fitness after arraignment and during the trial.

In most Australian jurisdictions, there is little distinction between fitness to plead and fitness to stand trial and both concepts are generally dealt with together.

Overall, the legislation dealing with this issue is lengthy and complex and differs between the States and Territories. Some jurisdictions deal with the issue in a similar fashion, but no two jurisdictions have identical legislation. The differences include:

- 4.1.1 whether there is a presumption a person is fit to plead or fit to be tried;
- 4.1.2 whether the terms 'fitness to plead' and 'fitness to stand trial' are expressly defined (some jurisdictions do not define the concepts and rely on the common law definitions instead);
- 4.1.3 who can raise the question of an accused's fitness (prosecution, defence or the court) and when the question can be raised;
- 4.1.4 whether fitness is determined by a judge, jury or alternative forum (such as a specialised mental health court);
- 4.1.5 whether, upon a finding of unfitness, the accused is detained, released or dealt with in some other way; and
- 4.1.6 whether fitness to plead and fitness to stand trial are relevant to both summary and indictable offences.

4.2 Common Law

Fitness to plead or fitness to stand trial is a concept that is derived from the common law. The common law still applies in each Australian state and territory, but has been modified to various extents by the relevant legislation in each jurisdiction.

The common law creates a rebuttable presumption that an accused person is fit to plead or fit to be tried.²⁹⁹ If an accused's unfitness is raised, the onus of proving unfitness rests with the party raising the question. At common law, the prosecution has a higher burden of proof than the defence. If

²⁹⁹ *Eastman v The Queen* (2000) 203 CLR 1

the question is raised by the prosecution, an accused's unfitness is to be proved "beyond reasonable doubt".³⁰⁰ However, if the question is raised by the defence, an accused's unfitness is only to be proved on the "balance of probabilities".³⁰¹ Importantly, the difference in burden of proof has been removed by legislation in most Australian jurisdictions. The issue of fitness is generally a question to be determined by a jury.

Generally, the courts examine either fitness to plead or fitness to stand trial. However the same common law test of fitness is generally applied in the context of both fitness to plead and fitness to stand trial.³⁰²

The common law test of fitness to plead or fitness to be tried generally involves determining whether the accused has sufficient intellectual capacity to understand the court proceedings brought against them. The issues relevant to identifying fitness were identified in *R v Pritchard*³⁰³ as follows:

"There are three points to be inquired into: - First, whether the prisoner was mute of malice or not; secondly, whether he can plead to the indictment or not; thirdly, whether he is of sufficient intellect to comprehend the course of proceedings on the trial, so as to make a proper defence - to know that he might challenge any of you to whom he may object - and to comprehend the details of the evidence".

In *R v Presser*,³⁰⁴ it was held the following factors should be considered when deciding whether an accused is fit to plead or stand trial:

- 4.2.1 accused's ability to understand the charge;
- 4.2.2 accused's ability to plead to the charge and to exercise the right to challenge jurors;
- 4.2.3 accused's ability to understand generally the nature of the proceedings;
- 4.2.4 accused's ability to follow the course of the proceedings;
- 4.2.5 accused's ability to understand the substantial effect of any evidence that may be given against them;
- 4.2.6 accused's ability to make their defence or answer to the charge; and
- 4.2.7 accused's ability to give any necessary instructions to their legal counsel.

Other relevant factors may include the length of the trial and the accused's likely mental condition during the course of the proceedings.³⁰⁵

4.3 Commonwealth

The Commonwealth *Crimes Act 1914* ("**Federal Act**") addresses the issue of fitness to be tried. While the Federal Act gives magistrates discretionary powers to deal with persons with an intellectual

³⁰⁰ *R v Presser* [1958] VR 45

³⁰¹ *R v Donovan* [1990] WAR 112

³⁰² *Eastman v The Queen* (2000) 203 CLR 1

³⁰³ (1836) 7 Car & P 303; 173 ER 135

³⁰⁴ [1958] VR 45

³⁰⁵ *Kesavarajah v R* (1994) 181 CLR 230

disability or mental illness accused of summary offences, these powers do not directly deal with fitness to be tried.

4.4 Fitness to be tried

The Federal Act does not define, or provide a test for, 'fit to be tried', other than saying it includes 'fit to plead'³⁰⁶ so the common law principles remain relevant.

Unlike most Australian jurisdictions, the Federal Act does not contain a presumption that a person is fit to plead or be tried.

4.5 Indictable offences

The fitness provisions contained in Division 6 of the Federal Act deal specifically with indictable offences.

The question as to the accused's fitness is raised by the prosecution, the accused or the accused's representative.³⁰⁷ There is no provision for the magistrate court to raise the issue;

If the issue is raised, the magistrate must refer the proceedings to the court in which the proceedings would have been referred had the accused been committed for trial.

The appropriate court then determines whether the accused is fit to be tried. The Federal Act does not contain any provisions on how fitness to be tried is to be determined by the court or as to any procedures that must be followed.

The court has the power to detain the accused in prison or a hospital for as long as is reasonably necessary for the court to make an appropriate order in relation to fitness.³⁰⁸

If the accused is found to be unfit to be tried, the court must then determine if there is a prima facie case the accused committed the indictable offence.³⁰⁹ If so, the court can dismiss the charge and release the accused from custody, provided it is satisfied it is inappropriate to inflict punishment other than nominal punishment on the accused.³¹⁰

If the court determines it is not appropriate to dismiss the proceedings, the court must determine whether the accused will be fit for trial within 12 months based on the medical evidence. If the court considers the accused will be fit for trial within 12 months, the court is afforded the power to detain the accused in a hospital or prison until they are fit for trial.³¹¹ If the accused is found not to be fit for trial within 12 months, the court may order that the accused be detained for a specified period of time, not exceeding the maximum sentence of imprisonment that could have been imposed on the accused.³¹²

4.6 Summary offences

³⁰⁶ *Crimes Act 1914* (Cth) s 16

³⁰⁷ *Ibid* s 20B(1)

³⁰⁸ *Ibid* s 20B(4)

³⁰⁹ *Ibid* s 20B(3)

³¹⁰ *Ibid* s 20BA(2)

³¹¹ *Ibid* s 20BB

³¹² *Ibid* s 20BC

Fitness to be tried for summary offences may be dealt with under Division 8 of the Federal Act. Division 8 of the Federal Act does not deal directly with the issue of an accused's fitness, however it is sufficiently wide to enable accused persons who are unfit to plead or stand trial to be dealt with under this division. It is not mandatory that accused persons who are unfit to plead or stand trial are dealt with under this division. Rather, the Federal Act provides that the court may choose to exercise certain powers if an accused is mentally ill or intellectually disabled (whether or not they are fit to plead or fit to be tried).³¹³ Importantly, the powers afforded to the court under Division 8 are discretionary and the court may choose not to exercise them.

Specifically, under Division 8 of the Federal Act, the court may dismiss the charge or make any appropriate order if:

- it appears to the court a person accused of a summary offence is suffering from a mental illness or an intellectual disability; and
- it would be more appropriate to deal with the accused under Division 8 than in accordance with law.³¹⁴

The court may, amongst other things, order proceedings to be adjourned, remand the accused on bail or discharge the accused into the care of a responsible person or on the condition that the accused be regularly assessed or treated for a specified period not exceeding three years.³¹⁵

4.7 New South Wales

In New South Wales, fitness to be tried provisions are contained in the *Mental Health (Forensic Provisions) Act 1990* (NSW) ("**NSW Act**"). Unlike the Federal Act, the NSW Act was specifically enacted to regulate how persons affected by mental illness and other mental conditions are dealt with in criminal proceedings.

The NSW Act deals specifically with fitness to be tried for indictable offences in the Supreme and District Courts (and summary offences in the Supreme Court). Similar to the Federal jurisdiction, the NSW Act does not deal directly with fitness to be tried for summary offences in the Local Court, but affords magistrates some discretionary powers to deal with mentally ill or intellectually disabled persons.

4.7.1 Fitness to be tried

The NSW Act does not define 'fitness to be tried'. It does, however, define 'mentally ill person' and 'mental condition'.

Like the Federal jurisdiction, the NSW Act does not contain a presumption that a person is fit to plead or be tried.

Under the NSW Act, the question of a person's fitness to be tried for an indictable offence in the Supreme and District Courts (or a summary offence in the Supreme Court) may be raised by a party to

³¹³ *Crimes Act 1914* (Cth), s 20BQ

³¹⁴ *Ibid*

³¹⁵ *Ibid*

the proceedings.³¹⁶ This question should preferably be raised before the person is arraigned, but may be raised during the course of the proceedings.³¹⁷

If the accused's fitness is raised before arraignment, the court must determine whether an inquiry should be conducted to determine fitness.³¹⁸ If the accused's fitness is raised after arraignment, the court must hear submissions relating to the conducting of an inquiry (see below).³¹⁹

The court need not conduct an inquiry and may dismiss the charge if it is not appropriate to punish having regard to any relevant matters including the nature of the offence and the accused's disability.³²⁰

Before conducting the inquiry, the court can make any appropriate order, including detaining the accused in custody for up to 28 days or requesting the accused to undergo a psychiatric examination.³²¹

4.7.2 Inquiry

The question of a person's fitness to be tried is to be determined by a single judge³²² on the balance of probabilities.³²³ The onus of proof of the question of fitness does not rest on any particular party. The accused is to be legally represented, unless the court allows otherwise.³²⁴

If the accused is found unfit to be tried, they must be referred to the Mental Health Review Tribunal to determine whether they will become fit to be tried within 12 months.³²⁵ This determination is made on the balance of probabilities.³²⁶

If the Tribunal determines the accused will be fit to be tried within 12 months and is satisfied the accused has a mental illness, the Tribunal may:

- grant the accused bail for up to 12 months; or
- detain the accused at a mental health facility or some other place for up to 12 months.³²⁷

If the Tribunal determines the accused will not be fit to be tried within 12 months, the Tribunal must notify the Director of Public Prosecutions.³²⁸ After receiving notification from the Tribunal and

³¹⁶ *Mental Health (Forensic Provisions) Act 1990* (NSW), s 5

³¹⁷ *Ibid* s 7

³¹⁸ *Ibid* s 8

³¹⁹ *Ibid* s 9

³²⁰ *Ibid* s 10(4)

³²¹ *Ibid* s 10(3)

³²² *Ibid* s 11(1)

³²³ *Ibid* s 6

³²⁴ *Ibid* s 12(3)

³²⁵ *Ibid* s 16(1)

³²⁶ *Ibid* s 16(1)

³²⁷ *Ibid* s 17

³²⁸ *Ibid* s 16(4)

advice from the Director of Public Prosecutions, the court may dismiss the matter or refer it to a 'special hearing' to determine whether the accused has committed the offence.³²⁹

4.7.3 Special hearings

The provisions regarding special hearings are lengthy and complex. Broadly, if the accused is found guilty at the special hearing, the court must refer the accused back to the Tribunal to determine whether the person is suffering from a mental illness or condition. If so, the court may detain the accused in a health facility or other place for an unspecified period of time.³³⁰

4.7.4 Summary offences

Like the Commonwealth, Part 3 of the NSW Act affords a magistrate powers to deal with mentally ill persons charged with relevant summary offences. Specifically, the magistrate may dismiss the charge or make any appropriate order if they consider:

- a person accused of a summary offence is suffering from a mental illness, a mental condition or a development disability; and
- it would be more appropriate to deal with the accused under Part 3 than in accordance with law.³³¹

4.8 Queensland

Determination of fitness to plead or stand trial is dealt under both the *Criminal Code 1899* (Qld) ("**Queensland Act**") and *Mental Health Act 2000* (QLD). In Queensland the legislation deals with fitness to plead for indictable offences only, and does not contain any provisions applicable to fitness to plead for summary offences. This failure has been criticised by the Queensland Court of Appeal in *R v AAM; Ex parte Attorney General (Qld)* [2002] QCA 305.

4.8.1 Fitness to plead

The relevant legislation in most jurisdictions contain a rebuttable presumption that a person is fit to plead or stand trial. Although the Queensland Act does not contain a presumption specifically related to fitness to plead or stand trial, it contains a rebuttable presumption that a person is of sound mind.³³²

The terms 'fitness to plead' or 'fitness to stand trial' are not specifically defined in the Queensland Act, however the terms are, to a certain extent, given meaning by the relevant provisions. Whether a person is considered fit to plead depends on whether the person is 'capable of understanding the proceedings at the trial, so as to be able to make a proper defence'.³³³ Whether a person is considered fit to stand trial depends on whether the person is of 'sound mind'.³³⁴

An accused's fitness to plead may also be determined by a jury and the Mental Health Court.

4.8.2 Determination by jury

³²⁹ Ibid s 19

³³⁰ Ibid s 30

³³¹ *Criminal Code 1899* (Qld), s 32

³³² Ibid s 26

³³³ Ibid s 613

³³⁴ Ibid s 645

A jury may be called upon to determine a person's fitness when the accused pleads to the indictment or at any time during the trial.³³⁵ The Queensland Act does not state who can raise an issue as to a person's fitness to plead. Rather, the question is raised:

- if, at the time the accused is to enter a plea, the accused's fitness to plead "appears uncertain" for any reason,³³⁶ or
- if, during the trial, it is "alleged or appears" that the person is not of sound mind.³³⁷

The question as to a person's fitness to plead may be determined by a jury, if at the time the accused is to enter their plea, it 'appears to be uncertain, for any reason, whether the person is capable of understanding the proceedings at the trial, so as to be able to make a proper defence'.³³⁸ If the jury determines the accused is of unsound mind, the court may order to the accused to be discharged or kept in custody in a manner that the court thinks fit.³³⁹ The accused is to be kept in custody until they can be dealt with according to law (such as the *Mental Health Act 2000* (Qld)).

Further, a jury will be required to determine whether a person is not of sound mind, if it is alleged or appears that the person is not of sound mind during the trial.³⁴⁰ If the jury finds the accused to be of unsound mind, they court must order the person to be kept in custody until they can be dealt with under the *Mental Health Act 2000* (Qld).³⁴¹

If the jury determine the accused is unfit (either when the accused is called upon to plead or at any time during the trial) and a custody order was made, the court must notify the Director of Mental Health of the order. The Director is then required to refer the matter to the Mental Health Review Tribunal.³⁴²

An order may be made detaining the accused in a high security unit or an authorised mental health service.³⁴³

4.8.3 Determination by Mental Health Court

An accused may be referred to the Mental Health Court if there is "reasonable cause" to believe an accused who committed an indictable offence:

- is mentally ill (or was mentally ill at the time the offence was committed); or
- has an intellectual disability of a degree that issues of unsoundness of mind, diminished responsibility or fitness for trial should be considered by the Mental Health Court.³⁴⁴

³³⁵ Ibid ss 613(1) and 645(1)

³³⁶ Ibid ss 613(1)

³³⁷ Ibid ss 645(1)

³³⁸ Ibid s 613

³³⁹ Ibid s 613(3)

³⁴⁰ Ibid s 645(1)

³⁴¹ Ibid s 645(1)

³⁴² *Mental Health Act 2000* (Qld), ss 300 and 301

³⁴³ Ibid s 302

³⁴⁴ Ibid s 256

The matter of the person's mental condition relating to the offence may be referred to the Mental Health Court by—

- the accused or their legal representative;
- the Attorney-General;
- the prosecution;
- if the person is receiving treatment for mental illness, the Director of Mental Health;
- the Supreme Court or District Court.

The court may grant or refuse the accused bail, remand the person in custody or adjourn the proceedings.³⁴⁵

The Mental Health Court must determine whether an accused is fit for trial. 'Fit for trial' is defined under the *Mental Health Act 2000* (Qld) to mean:

'fit to plead at the person's trial and to instruct counsel and endure the person's trial, with serious adverse consequences to the person's mental condition unlikely'.³⁴⁶

This definition was considered in *R v M*,³⁴⁷ where the Queensland Court of Appeal stated:

'Fitness for trial, in relation to the capacity to instruct counsel, posits a reasonable grasp of the evidence given, capacity to indicate a response, ability to apprise counsel of the accused's own position in relation to the facts, and capacity to understand counsel's advice and make decisions in relation to the course of the proceedings'.³⁴⁸

It is not clear why the test for fitness expressed in the *Mental Health Act* differs from the test in the Queensland Act.

If the Mental Health Court decides the person is unfit for trial, the court must also decide whether the unfitness for trial of a permanent nature.³⁴⁹

Not of permanent nature

If the Mental Health Court finds an accused is only temporarily unfit for trial, proceedings for the offence are stayed until the Mental Health Review Tribunal decides the person is fit for trial.³⁵⁰

The Mental Health Court must make a forensic order the person be detained for involuntary treatment or care.³⁵¹

Permanent nature

³⁴⁵ Ibid s 260

³⁴⁶ *Mental Health Act 2000* (Qld), Schedule 1

³⁴⁷ *R v M* [2002] QCA 464

³⁴⁸ Ibid at 13

³⁴⁹ *Mental Health Act 2000* (Qld), s 271

³⁵⁰ Ibid s 280

³⁵¹ Ibid s 288

If the Mental Health Court decides the accused is permanently unfit for trial, proceedings against the accused are discontinued and further proceedings must not be taken against the accused for the offence.³⁵²

The Mental Health Court may make a forensic order that the person be detained for involuntary treatment or care.³⁵³ Before making the order, the Mental Health Court must consider the patient's treatment, security needs and community safety.³⁵⁴

Under the forensic order, the accused may be detained in an authorised mental health facility or a high security unit for treatment or care. The Mental Health Court may also order limited community treatment.³⁵⁵ This allows the accused to reside in the community with active monitoring by a mental health service with regular reviews by the Mental Health Review Tribunal.

4.9 South Australia

In South Australia, the *Criminal Law Consolidation Act 1935 (SA)* ("**SA Act**") deals with fitness to stand trial. Unlike most other Australian jurisdictions, the SA Act does not distinguish between summary and indictable offences when determining fitness.

4.9.1 Fitness to stand trial

The SA Act contains a rebuttable presumption that a person is presumed to be fit to stand trial³⁵⁶ and provides 'a person is mentally unfit to stand trial on a charge of an offence if their mental processes are so disordered or impaired, they are:

- unable to understand, or respond rationally to, the charge or the allegations on which the charge is based;
- unable to exercise (or to give rational instructions about the exercise of) procedural rights (such as, for example, the right to challenge jurors); or
- unable to understand the nature of the proceedings, or to follow the evidence or the course of the proceedings.³⁵⁷

If there are reasonable grounds to suppose a person is mentally unfit to stand trial, the court may order the investigation of the accused's mental fitness.³⁵⁸ The issue may be raised by either party to the proceedings or the judge.³⁵⁹

If an accused is found to be unfit to stand trial, the court may:

- order the unconditional release of the accused;

³⁵² Ibid s 283

³⁵³ Ibid s 288

³⁵⁴ Ibid s 288(4)

³⁵⁵ Ibid s 289

³⁵⁶ *Criminal Law Consolidation Act 1935 (SA)*, s 269I

³⁵⁷ Ibid s 269H

³⁵⁸ Ibid s 269J

³⁵⁹ Ibid s 269J(2)

- make a supervision order releasing the accused in the community on strict conditions; or
- make a supervision order committing the accused to detention in secure psychiatric care.³⁶⁰

The court can also proceed first with a trial of the objective elements of the offence before determining an accused's fitness to stand trial.³⁶¹ This allows the court to bypass the need to determine fitness, if one of the objective elements cannot be made out.

4.10 Victoria

The *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) ("**Victorian Act**") contains provisions concerning an accused's fitness to stand trial.

Consistent with New South Wales, Tasmania and Western Australia, Victoria has a specific legislation dealing with fitness of an accused in criminal proceedings. The main purposes of the Victorian Act are to provide criteria for determining unfitness to stand trial and procedures for dealing with persons who are unfit to stand trial or found not guilty because of mental impairment.³⁶²

Like Queensland, in Victoria, the legislation deals with fitness to plead for indictable offences, but not summary offences.

4.10.1 Fitness to stand trial

The Victorian Act contains a rebuttable presumption that a person is fit to stand trial.³⁶³

The Victorian Act relevantly says a person will be considered unfit to stand trial for an offence if, because the person's mental processes are disordered or impaired, the person is or, at some time during the trial, will be-

- unable to understand the nature of the charge;
- unable to enter a plea and exercise the right to challenge jurors or the jury;
- unable to understand the nature of the trial (namely that it is an inquiry as to whether the person committed the offence);
- unable to follow the course of the trial;
- unable to understand the substantial effect of any evidence that may be given in support of the prosecution; or
- unable to give instructions to his or her legal practitioner.³⁶⁴

³⁶⁰ Ibid s 269O

³⁶¹ Ibid s 269

³⁶² *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic), s 1

³⁶³ Ibid s 4

³⁶⁴ Ibid s 6

The question of an accused's fitness for trial is determined on the balance of probabilities.³⁶⁵ The party raising the question of fitness has the onus of proving the issue.³⁶⁶ If the question is raised by the judge, no party bears the onus of proving it.³⁶⁷

The question as to fitness may be raised at the committal proceedings, or at any time during the trial.

If the question of an accused's fitness for trial is raised at the committal proceeding, the committal must proceed and if the accused is committed for trial, the question must be reserved for determination by the trial judge within 3 months after the committal.³⁶⁸ If the trial judge is satisfied there is a real question as to the fitness of the accused, the matter must be investigated.³⁶⁹

If the question of an accused's fitness for trial is raised during a trial and the trial judge is satisfied there is a real question as to accused's fitness, the matter is to be adjourned and an investigation conducted.³⁷⁰

4.10.2 Investigation

Before conducting an investigation, a court may make any appropriate order, including:

- an order granting the accused bail;
- an order remanding the accused in custody in an appropriate place (if the necessary facilities or services are available at that place);
- an order remanding the accused in custody in a prison (if no practicable alternatives);
- an order the accused be medically examined with the results be put before the court (if in the interests of justice).³⁷¹

During the investigation, the court is to hear relevant evidence and submissions put by the prosecution and the defence.³⁷² The court may also call evidence or require the accused to be examined by an expert and require the examination results to be put before the court.³⁷³

The question of whether the accused is fit to stand trial must be determined by a jury.³⁷⁴ If the jury finds the accused is unfit to stand trial, the judge must determine whether there is a reasonable prospect the accused will become fit to stand trial within 12 months.³⁷⁵

4.10.3 Fit to stand trial within 12 months

³⁶⁵ Ibid s 7

³⁶⁶ Ibid

³⁶⁷ Ibid

³⁶⁸ Ibid s 8

³⁶⁹ Ibid s 9(1)

³⁷⁰ Ibid s 9(2)

³⁷¹ Ibid s 10

³⁷² Ibid s 11(1)

³⁷³ Ibid s 11(1)

³⁷⁴ Ibid s 11(2)

³⁷⁵ Ibid s 11(4)

If the jury decides the accused is unfit to stand trial but the judge finds the accused likely to become fit to stand trial within the next year, proceedings must be adjourned.³⁷⁶ While proceedings are adjourned, the judge may make orders placing the accused on bail or remanding the accused in custody at an appropriate place.³⁷⁷ An accused is only to be remanded in custody at a prison if there is no practicable alternative.³⁷⁸

After the 12 month period, an accused is presumed to be fit for trial, unless a real and substantive question as to the accused's fitness arises.³⁷⁹ If such a question is raised, the court is to hold a special hearing within 3 months.³⁸⁰

4.10.4 Not fit to stand trial within 12 months

If the jury decides the accused is unfit to stand trial and the judge decides the accused is unlikely to become fit to stand trial within the next year, the court must proceed to hold a special hearing within three months (although the court is able to seek an extension of time).³⁸¹

4.10.5 Conducting a special hearing

The purpose of a special hearing is to determine, beyond reasonable doubt, if the accused person committed the offence charged.³⁸² A special hearing is to be conducted as a criminal trial and determined by a jury.³⁸³

The following orders may be issued after a special hearing:

- If the accused is found not guilty, the accused must be discharged.³⁸⁴
- If the accused is found not guilty because of mental impairment, the finding is to be treated as a finding at a criminal trial of not guilty because of mental impairment.³⁸⁵
- If the accused is found guilty, the finding is taken to be a qualified finding of guilt and the court must make a supervision order or discharge the accused unconditionally.³⁸⁶

4.11 Western Australia

In Western Australia, fitness to plead is dealt with in the *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)* ("**WA Act**"). Western Australia, like New South Wales, Victoria and Tasmania, is another jurisdiction in which the legislation deals almost exclusively with fitness to plead or stand trial in criminal proceedings.

³⁷⁶ Ibid s 12(2)
³⁷⁷ Ibid
³⁷⁸ Ibid s 12(4)
³⁷⁹ Ibid s 14
³⁸⁰ Ibid s 14(2)
³⁸¹ Ibid s 12(5)
³⁸² Ibid s 15
³⁸³ Ibid s 16
³⁸⁴ Ibid s 18(1)
³⁸⁵ Ibid s 18(2)
³⁸⁶ Ibid ss 18(3), 18(4)

The WA Act deals with both summary and indictable offences.

4.11.1 Fitness to stand trial

The WA Act creates a rebuttable presumption an accused is mentally fit to stand trial.³⁸⁷ The question of whether an accused is mentally fit to stand trial may be raised by the prosecution, defence or the presiding judicial officer, at any time before or during the trial.³⁸⁸

The WA Act provides a person is unfit to stand trial because of a mental impairment, they are:

- unable to understand the nature of the charge;
- unable to understand the requirement to plead to the charge or the effect of a plea;
- unable to understand the purpose of a trial;
- unable to understand or exercise the right to challenge jurors;
- unable to follow the course of the trial;
- unable to understand the substantial effect of evidence presented by the prosecution in the trial; or
- unable to properly defend the charge.³⁸⁹

The WA Act distinguishes between proceedings in courts of summary jurisdiction and proceedings in the Supreme Court and District Court.

4.11.2 Summary offences

For summary offences, the court decides the issue if the accused's mental fitness to stand trial is raised.³⁹⁰

If the court is satisfied the accused will not become mentally fit to stand trial within 6 months, it must dismiss the charge and either release the accused or make a custody order.³⁹¹

If the court is satisfied the accused may become mentally fit to stand trial within 6 months, the court must adjourn the proceedings.³⁹² While proceedings are adjourned, the court is satisfied the accused will not become fit for trial within the 6 months, the court may order release the accused or make a custody order.³⁹³

4.11.3 Indictable offences

³⁸⁷ *Criminal Law (Mentally Impaired Accused) Act 1996 (WA)*, s 10

³⁸⁸ *Ibid* s 11

³⁸⁹ *Ibid* s 9

³⁹⁰ *Ibid* s 16

³⁹¹ *Ibid* s 16(5)

³⁹² *Ibid* s 16(2)(b)

³⁹³ *Ibid* s 16(4)

Similarly, in relation to Supreme Court and District Court proceedings, the judge decides whether the accused's mental fitness to stand trial becomes an issue.³⁹⁴

If the judge is satisfied the accused will not become mentally fit to stand trial within 6 months, the court must:

- quash the indictment (or if there is no indictment, dismiss the charge and quash the committal); and
- either release the accused or make a custody order.³⁹⁵

If the judge is satisfied the accused may become mentally fit to stand trial within 6 months, the judge must adjourn the proceedings.³⁹⁶ While proceedings are adjourned, if the judge is satisfied the accused will not become fit for trial within the 6 months, the judge may release the accused or make a custody order.³⁹⁷

4.11.4 Custody orders

The WA Act sets out the procedures to be followed when a mentally ill accused is detained because of a custody order. A custody order includes detention in an authorised hospital, a declared place, a detention centre or a prison.³⁹⁸ An accused is not to be detained in a hospital unless they have a mental illness capable of being treated and the following apply:

- the treatment is required to protect the health or safety of the accused or any other person or to prevent the accused doing serious damage to property.
- the accused has refused or is unable to consent to the treatment.
- the treatment can only satisfactorily provided in a hospital.³⁹⁹

The Mentally Impaired Accused Review Board is to decide the place of detention.⁴⁰⁰

An accused is to remain in detention until released by an order of the Governor.⁴⁰¹ The Governor may release the accused unconditionally or on conditions.

4.12 Australian Capital Territory

In the Australian Capital Territory, the *Crimes Act 1900* (ACT) ("**ACT Act**") deals with unfitness to plead in the context of both summary and indictable offences.

4.12.1 Fitness to plead

³⁹⁴ Ibid s 19(1)
³⁹⁵ Ibid s 19(4)
³⁹⁶ Ibid s 19(2)(b)
³⁹⁷ Ibid s 19(4)
³⁹⁸ Ibid s 24
³⁹⁹ Ibid s 24
⁴⁰⁰ Ibid s 25(1)
⁴⁰¹ Ibid s 24

The ACT Act contains a rebuttable presumption that a person is fit to plead.⁴⁰² The question of an accused's fitness to plead may be raised by a party to the proceedings or the court.⁴⁰³ The question of an accused's fitness to plead is decided on the balance of probabilities and no party bears the burden of proof.⁴⁰⁴

Under the ACT Act, an accused is considered unfit to plead if 'the person's mental processes are disordered or impaired to the next that the person cannot -

- understand the nature of the charge;
- enter a plea to the charge and exercise the right to challenge jurors or the jury;
- understand that the proceeding is an inquiry about whether the person committed the offence;
- follow the course of the proceeding;
- understand the substantial effect of any evidence that may be given in support of the prosecution;
- give instructions to the person's lawyer.⁴⁰⁵

The ACT Act distinguishes between committal hearings and other proceedings in the Magistrates Court as well as between serious and non-serious offences.

If the question of an accused's fitness is raised in the Magistrates Court (other than at a committal hearing), the court must determine whether there is a real and substantial question about the accused's fitness to plead.⁴⁰⁶ If so satisfied, the court must reserve the question for investigation. If the accused's fitness becomes an issue at a committal hearing, the hearing must be completed with the question of an accused's fitness to be considered by the Supreme Court if the person is committed for trial.⁴⁰⁷

If the Supreme Court is satisfied there is a real and substantial question about the accused's fitness to plead, the question must be reserved for investigation.⁴⁰⁸

4.12.2 Investigation

If the accused's fitness to plead has been reserved for investigation, the court must adjourn the proceedings and may make one of the following orders:

- an order granting bail;
- an order remanding the defendant in custody in an appropriate place;

⁴⁰² Ibid s 312

⁴⁰³ *Crimes Act 1900* (ACT), s 313

⁴⁰⁴ Ibid s 312(3), (4)

⁴⁰⁵ Ibid s 311(1)

⁴⁰⁶ Ibid s 314

⁴⁰⁷ Ibid s 314

⁴⁰⁸ Ibid s 314(3)

- an order requiring the defendant to be medically examined;
- an order discharging the jury if the question arose in a trial for which a jury had been empanelled;
- any other order considered appropriate.⁴⁰⁹

The court must then commence an investigation, unless satisfied it is inappropriate to punish the accused, because of the accused's mental impairment.⁴¹⁰ If the court proceeds with an investigation, it must hear relevant evidence and submissions.⁴¹¹ The court may also call evidence, require the accused to be medically examined and the examination results to be put before the court.⁴¹²

The court must determine if the accused will be fit to plead within 12 months.⁴¹³

4.12.3 Not fit to plead within 12 months

If the court decides the accused is unfit to plead and is unlikely to become fit to plead within the next year, the court must hold a special hearing (for proceedings in the Supreme Court) or a hearing (if proceedings are in the Magistrates Court).⁴¹⁴

In a hearing in the Magistrates Court, the Magistrates Court must determine whether it is satisfied beyond reasonable doubt the accused engaged in the conduct constituting the offence. The Magistrates Court may remand the accused in custody, require the accused to go before to Australian Capital Territory Civil and Administrative Tribunal (ACAT) and allow ACAT to make a mental health order.⁴¹⁵

A special hearing in the Supreme Court should generally be a trial by jury.⁴¹⁶ The jury must advise the court if satisfied beyond reasonable doubt the accused engaged in the conduct constituting the offence.⁴¹⁷

If the offence was a non-serious offence, the Supreme Court may make any appropriate order it considers appropriate, including remanding the accused in custody or requiring the accused to go before ACAT and allowing ACAT to make a mental health order.⁴¹⁸ If the offence was a serious offence, the Supreme Court must remand the accused in custody, unless satisfied it is more appropriate for the accused to go before to ACAT and for ACAT to make a mental health order.⁴¹⁹

4.12.4 Fit to plead within 12 months

If the court decides the accused is unfit to plead and is likely to become fit to plead within the next year, the court must adjourn the proceedings and:

⁴⁰⁹ Ibid s 315(2)
⁴¹⁰ Ibid s 314(4)
⁴¹¹ Ibid s 315A
⁴¹² Ibid s 315A
⁴¹³ Ibid s 315A(4)
⁴¹⁴ Ibid s 315C
⁴¹⁵ Ibid s 335
⁴¹⁶ Ibid s 316(2)
⁴¹⁷ Ibid s 317(1)
⁴¹⁸ Ibid s 318
⁴¹⁹ Ibid s 319

- if the offence is a serious offence, remand the accused in custody or release the accused on bail
- if the offence is not a serious offence, make appropriate order, including remanding the accused in custody or requiring the accused to go before to ACAT and allowing ACAT to make a mental health order.⁴²⁰

4.12.5 Referral to ACAT after conviction

If an accused has been referred to ACAT after being convicted in the Supreme Court or Magistrates Court, the accused may be referred to ACAT to determine whether the accused has a mental impairment. If ACAT determines the accused has a mental impairment, ACAT must notify the court and can recommend how the accused should be dealt with.⁴²¹ The court must consider ACAT's recommendations and may make any appropriate order.⁴²² The court must not imprison the person for a period greater than any period of imprisonment to which the person could have been sentenced.⁴²³

4.13 Northern Territory

In the Northern Territory, the *Criminal Code Act* ("**NT Act**") contains fitness to plead provisions. Like Queensland and Victoria, the NT Act only deals with fitness to plead for indictable offences and not summary offences.

4.13.1 Fitness to stand trial

The NT Act contains a rebuttable presumption that a person is fit to stand trial.⁴²⁴ The question of an accused's fitness to stand trial may be raised by a party to the proceedings and if so, the party that raises the question bears the onus. The question may also be raised by the court and if so, the prosecution has carriage of the matter and no party bears the onus.⁴²⁵ The question of an accused's fitness is decided on the balance of probabilities.⁴²⁶

The NT Act provides a person is unfit to stand trial if the person is :

- unable to understand the nature of the charge;
- unable to plead to the charge or to exercise the right of challenge;
- unable to understand the nature of the trial;
- unable to follow the course of the proceedings;
- unable to understand the substantial effect of any evidence that may be given in support of the prosecution;

⁴²⁰ Ibid s 315D

⁴²¹ Ibid s 331(1)

⁴²² Ibid s 331(2)

⁴²³ Ibid s 331(1)

⁴²⁴ *Criminal Code Act* (NT), s 43K

⁴²⁵ Ibid s 43K

⁴²⁶ Ibid s 43K

- unable to give instructions to legal counsel.⁴²⁷

If the question of an accused's fitness for trial arises at committal proceedings, the committal proceedings continue as normal. If the person is committed for trial, the question of fitness is reserved for determination by the Supreme Court at the trial.⁴²⁸ The Supreme Court must then order an investigation.

If the question of an accused's fitness for trial arises after a trial has begun and the court is satisfied there are reasonable grounds to question the accused's fitness, the question should be investigated and the proceedings adjourned or discontinued.⁴²⁹

Before ordering the investigation, the Supreme Court may make interim orders, including an order the accused be placed on bail or remanded in custody. Before making these orders, the Supreme Court must consider various matters, including the accused's impairment, danger to any person, the relationship between the impairment and the offence, available resources and the likelihood of the accused complying with conditions imposed.⁴³⁰

Prior to ordering the investigation, the Supreme Court may also order the production of reports relating to the fitness of the accused or expert examination of the accused.⁴³¹

4.13.2 Investigation

During the investigation, the Supreme Court hears relevant evidence and submissions put by the prosecution and the defence.⁴³² The Supreme Court may also call evidence or require the accused to be examined by an expert, with the examination results to be put before the court.⁴³³

The question of whether the accused is fit to stand trial must be determined by a jury.⁴³⁴ If the jury finds the accused is unfit to stand trial, the judge must determine whether there is a reasonable prospect the accused will become fit within 12 months.⁴³⁵

If the parties to the proceedings agree the accused is unfit to stand trial, the Supreme Court need not investigate and record this (without the jury having to make a determination).⁴³⁶ The judge must then determine whether there is a reasonable prospect the accused will become fit within 12 months (i.e. the same as if an investigation had been undertaken).⁴³⁷

4.13.3 Fit to stand trial within 12 months

If the judge decides the accused is unfit to stand trial but is likely to become fit to stand trial within the next year, proceedings must be adjourned.⁴³⁸ While proceedings are adjourned, the judge may

⁴²⁷ Ibid s 43J
⁴²⁸ Ibid s 43M
⁴²⁹ Ibid s 43N
⁴³⁰ Ibid s 43ZN
⁴³¹ Ibid s 43O
⁴³² Ibid s 43P(2)
⁴³³ Ibid s 43P(3)
⁴³⁴ Ibid s 43P
⁴³⁵ Ibid s 43R(3)
⁴³⁶ Ibid s 43T
⁴³⁷ Ibid s 43T(2)
⁴³⁸ Ibid s 43R(4)

make orders placing the accused on bail or remanding the accused in custody at an appropriate place.⁴³⁹ An accused is only to be remanded in custody at a prison if there is no practicable alternative.⁴⁴⁰ Before making an order while proceedings are adjourned, the Supreme Court must consider various matters, including the accused's impairment, danger to any person, the relationship between the impairment and the offence, available resources and the likelihood of the accused complying with conditions.⁴⁴¹

After the 12 month period, an accused is presumed to be fit for trial, unless the Supreme Court, the prosecution or the defence raise a real and substantive question as to the accused's fitness.⁴⁴² If such a question is raised, the Supreme Court must hold a special hearing within 3 months.⁴⁴³

4.13.4 Not fit to stand trial within 12 months

If the judge decides the accused is unfit to stand trial and is unlikely to become fit to stand trial within the next year, the Supreme Court must hold a special hearing within three months (although the court is able to seek an extension of time).⁴⁴⁴

4.13.5 Conducting a special hearing

The purpose of a special hearing is to determine, beyond reasonable doubt, whether the accused person committed the offence charged.⁴⁴⁵ A special hearing is conducted as a criminal trial and determined by a jury.

At the special hearing, the following orders may result:

If the accused is found not guilty, the accused must be discharged.⁴⁴⁶

If the accused is found to be not guilty because of mental impairment, the Supreme Court must make a supervision order or an order that the accused be released unconditionally.⁴⁴⁷

If the accused is found to be guilty, the finding is taken to be qualified and the Supreme Court must make a supervision order or an order discharging the accused unconditionally.⁴⁴⁸

4.13.6 Supervision orders

The Supreme Court consider a variety of matters before making a supervision order, including the accused's impairment, danger to any person, the relationship between the impairment and the offence, available resources and the likelihood the accused will comply with conditions.⁴⁴⁹

⁴³⁹ Ibid s 43R(5)

⁴⁴⁰ Ibid s 43R(6)

⁴⁴¹ Ibid s 43ZN

⁴⁴² Ibid s 43R(7)

⁴⁴³ Ibid s 43R(9)

⁴⁴⁴ Ibid ss 43R(1 and 43U)

⁴⁴⁵ Ibid s 43V

⁴⁴⁶ Ibid s 43X(1)

⁴⁴⁷ Ibid s 43X(2)

⁴⁴⁸ Ibid s 43X(3)

⁴⁴⁹ Ibid s 43ZN

Under a supervision order, the Supreme Court may commit the accused person to custody in a prison or other appropriate place or release the accused person (subject to conditions).⁴⁵⁰ An accused must only be placed in prison as a last resort, if there is no practicable alternative.⁴⁵¹

Supervision orders are indefinite, but may be appealed, varied or revoked.⁴⁵²

4.14 Tasmania

In Tasmania, the fitness to plead provisions are contained in the *Criminal Justice (Mental Impairment) Act 1999* ("**Tasmania Act**"). Consistent with the legislation in New South Wales, Victoria and Western Australia, the Tasmania Act was specifically enacted to deal with persons who are unfit to stand trial in criminal proceedings.

The Tasmania Act deals with fitness to plead for both indictable and summary offences.

4.14.1 Fitness to stand trial

The Tasmania Act creates a rebuttable presumption that a person is presumed to be fit to stand trial.⁴⁵³ The question of an accused's fitness to stand trial may be raised by a party to the proceedings or the court.⁴⁵⁴ The question of an accused's fitness to stand trial is decided on the balance of probabilities.⁴⁵⁵

The Tasmania Act provides a person is unfit to stand trial if their mental processes are disordered or impaired or they are:

- unable to understand the nature of the charge;
- unable to plead to the charge or to exercise the right of challenge;
- unable to understand the nature of the proceedings;
- unable to follow the course of the proceedings;
- unable to make a defence or answer the charge.⁴⁵⁶

If the question of an accused's fitness for trial arises during preliminary proceedings, the question is reserved for determination by the Supreme Court. If the question of an accused's fitness for trial arises after a trial has begun, the question should be investigated and the proceedings may be adjourned or discontinued.

4.14.2 Investigation

The court must not commence an investigation unless satisfied there appears to be a real and substantial question as to accused's fitness to stand trial. If the court proceeds with an investigation, the court must hear any relevant evidence and submissions from the prosecution and defence. The

⁴⁵⁰ Ibid s 43ZA

⁴⁵¹ Ibid s 43ZA (2)

⁴⁵² Ibid ss 43ZC, 43ZB and 43ZD

⁴⁵³ *Criminal Justice (Mental Impairment) Act 1999* (Tas), s 9

⁴⁵⁴ Ibid s 10

⁴⁵⁵ Ibid s 9

⁴⁵⁶ Ibid s 8

court may also call evidence or require the accused to be medically examined and require the examination results to be put before the court.

The question of whether the accused is fit to stand trial must be determined by a jury.⁴⁵⁷

4.14.3 Not fit to stand trial within 12 months

If the court decides the accused is unfit to stand trial and is unlikely to become fit to stand trial within the next year, the court must hold a special hearing.⁴⁵⁸ A special hearing is to be conducted as a criminal trial.⁴⁵⁹

If the accused is found not guilty of an offence (including on the ground of insanity), the court is to:

- make a restriction order;
- release the accused and make a supervision order;
- make a continuing order;
- release the accused and make a community treatment order;
- release the accused on such conditions as the court considers appropriate;
or
- release the defendant unconditionally.⁴⁶⁰

4.14.4 Fit to stand trial within 12 months

If the court decides the accused is unfit to stand trial and is likely to become fit to within the next year, the court must adjourn the proceedings.⁴⁶¹

4.15 Conclusion

In each Australian jurisdiction, the legislation dealing with an accused's fitness to plead or fitness to stand trial in criminal proceedings is complex, and in some respects, ambiguous. The disparity between the legislation applicable in the various jurisdictions further complicates matters.

New South Wales, Tasmania, Victoria and Western Australia have separate legislation dedicated to the issue of fitness to plead or fitness to stand trial. Other jurisdictions deal with the issue within their criminal statutes. In Queensland, the issue of fitness to plead or fitness to stand trial is dealt with in more than one statute.

Further, in most jurisdictions, fitness to plead or fitness to stand trial in the context of summary offences is an issue which is neglected or given little attention. Only South Australia, Tasmania, Western Australia and the ACT allow magistrates to deal specifically with the issue of an accused's fitness. Victoria, Queensland and the Northern Territory do not have legislation dealing with this issue in the context of summary offences. The Commonwealth and Northern Territory legislation

⁴⁵⁷ Ibid s 12(1)

⁴⁵⁸ Ibid s 15(1)

⁴⁵⁹ Ibid s 16(1)

⁴⁶⁰ Ibid s 18

⁴⁶¹ Ibid s 14(2)

does not deal specifically with fitness to plead or stand trial for summary offences and only affords magistrates some discretionary powers when dealing with accused persons who are intellectually disabled.

There is certainly a case for a more streamlined and consistent approach to determining an accused's fitness to plead or stand trial in criminal proceedings for both summary and indictable offences. This would improve access to justice for people with disabilities, particularly intellectual disabilities, whose fitness to plead is likely to be an issue in criminal proceedings. The Victorian Law Reform Commission is currently reviewing the Victorian legislation on fitness to plead or fitness to stand trial in order to determine how the process can be improved and the outcome of this review could act as a catalyst for further legislative reform.

4.16 Recommendations

The following are a list of general recommendations which may assist in improving the law determining an accused's fitness to plead or stand trial in criminal proceedings.

1. There is much disparity between the legislation applicable in each Australian State and Territory. It is recommended that a more uniformed and consistent approach to determining an accused's fitness to plead or stand trial is developed.
2. The legislation dealing with fitness to stand trial is lengthy and complex. It is recommended that the legislation is simplified and consolidated into a single piece of legislation.
3. It is recommended that each jurisdiction deal with fitness to plead and fitness to stand trial in the context of both summary and indictable offences. Consideration must be given as to whether a similar process is applied in the context of summary offences.
4. It is recommended that the definitions of fitness to plead and fitness to stand trial are reviewed and clarified and that a more comprehensive list of criteria used to determine fitness to plead and fitness to stand trial is developed. Consideration must be given as to whether the definition is restricted to people with a mental illness or intellectual disability.
5. Consideration must be given to the distinction between fitness to plead and fitness to stand trial and whether this must be made clear in the legislation.

5. VIOLENCE IN DISABILITY RESIDENTIAL CARE SETTINGS

a) *How is violence in disability residential care settings dealt with?*

Introduction

5.1 Purpose and Scope

There has been growing concern regarding the high prevalence of violence perpetrated against people with disabilities within the disability service sector. This report looks at violence within the context of disability residential care settings, addressing the following topics:

- *Acts of violence against people with disabilities:* generally and specifically in the context of disability residential care settings, its proposed causes and the common perpetrators of such violence;
- *Legal and administrative frameworks available to address violence against people with disabilities:* including legislative instruments providing regulatory mechanisms, complaints /administrative law mechanisms, criminal law, human rights, carer-specific laws, policies and guidelines and civil action⁴⁶²;
- *Barriers to the use of these legal frameworks* including barriers to the reporting of offences and flaws with the legislative framework itself; and
- *General recommendations* to improve the efficacy of the current legal framework.

5.2 Report Findings

Within Australia, at both the Commonwealth and State levels, there is a large variety of legislative and administrative mechanisms available that theoretically addresses the issue of violence against people with disabilities in residential care settings. Despite this, acts of violence continue to occur and are underreported and mismanaged. For a number of reasons, including failure to report incidents and the barriers to the criminal justice system that people with disabilities generally experience, the legal or administrative mechanisms are underused. There are also significant gaps in the legislative framework and its constituent instruments. General recommendations to address these problems include strengthening the complaints mechanisms, heightening awareness and providing sensitivity and tenancy rights training.

Contextualising the Problem: Violence in Disability Residential Care Settings

5.3 Violence Against People with Disabilities Generally

It is well-documented that people with a disability are more likely to be victims of crime. A matrix summarising all the possible scenarios of such violence against people with disabilities appears in Figure 1 of the **Appendix**. Women with disabilities are at an even higher risk of being victims of crime, particularly as victims of sexual assault and harassment. While there is very little data being collected on this issue, there is research to indicate that women with an intellectual disability are 10

⁴⁶² Note that in this report we have not reviewed mental health legislation.

times more likely than other women to be assaulted. Another study estimated that, among women with an intellectual disability, 90% have been assaulted (68% before the age of 18)⁴⁶³.

The higher rate of victimisation amongst people with a disability, particularly women, has been associated with the presence of certain personal risk factors of: dis-inhibition, desire for affection, ready compliance with authority, inability to judge others' motivations, absence of social skills to distinguish between appropriate and exploitative behaviour, feelings of helplessness and powerlessness, low self-esteem and impulsivity. Historically it has been associated with the social inequalities and imbalances of power, destructive stereotyping and vilification experienced by the group and the inherent vulnerabilities of the individuals involved⁴⁶⁴.

5.4 Reasons for Violence in Residential Settings

These inequalities, vulnerabilities and risk factors are heightened in the context of residential care. Specifically, the following factors can increase the risk of victimisation of residents with a disability⁴⁶⁵:

- *Basic features of the residential service:* such as overcrowding, low ratios of staff, poorly trained staff, lack of private space/physical layout of the building, lack of external accountability, lack of visitors/outside influences, complete control of carers/imbalance of power⁴⁶⁶;
- *Circumstances associated with being in residential care:* such as dependence, isolation, limited access to mainstream services for victims of abuse;
- *Characteristics of individuals that are housed therein:* for example a tendency to want to 'please' others, compliance with requests, lack of education regarding their rights and what is appropriate or inappropriate behaviour; and
- *People with disabilities being over-protected by carers* through infantilisation, exclusion from decision-making, lack of teaching of survival tools and deprivation from sexual education and interaction⁴⁶⁷.

As such, there is a strong association between institutionalisation and violence whereby residents in such facilities are significantly more vulnerable to violence than those not in such facilities⁴⁶⁸.

5.5 Rates of Violence and Forms of Violence

Although there is a marked lack of empirical data on the topic, anecdotal and qualitative evidence indicates a high prevalence of violence in residential care facilities housing people with disabilities⁴⁶⁹. People with disabilities have reported experiencing up to twenty different forms of violence, abuse and neglect - including: physical, sexual and emotional abuse, abusive behaviour management. failure to provide basic requirements and discriminatory abuse. Domestic violence, which encompasses informal and formal care relationships, and intra-resident relationships, comprising largely of

⁴⁶³ S Salthouse and Frohmader C, 'Double the Odds - Domestic Violence and Women with Disabilities' [2004] *Home Truths Conference* 8.

⁴⁶⁴ Ibid.

⁴⁶⁵ Community Services Commission and Intellectual Disability Services, 'Crime prevention in residential services for people with disabilities' [2001] *Community Services Commission*.

⁴⁶⁶ European Parliament, 'Report on Violence and Discrimination against disabled people' [1999] *European Disability Forum*

⁴⁶⁷ P French, J Dardel and Price-Key S, 'People with Disability Australia: 2010 Rights Denied' [2010] *People With Disability* 21

⁴⁶⁸ Price-Kelly S and Attard A, 'Accommodating Violence: The Experience of domestic violence and people with disability living in licensed boarding house' [2010] *People with Disability Australia*

⁴⁶⁹ Above n 468; Above n 463; French P, 'Disabled Justice: The Barriers to Justice for Persons with Disability in Queensland' [2007] *Queensland Advocacy Incorporated*.

physical, emotional and financial abuse or negligence and neglect, is a daily lived experience of residents in certain disability residential care facilities⁴⁷⁰. Of these forms of violence the most prevalent was psychological violence - including verbal abuse and insults (compromising 46% of all violence). Physical violence represents only 21% of violence experienced. The most prevalent form of physical injuries noted were scalds, fractures and burns⁴⁷¹.

5.6 Perpetrators of Violence

Other limited data reveals certain prominent trends in profile of the perpetrators of such violence against people with disabilities in residential care settings. Resident-to-resident assault was common (accounting for approximately 44% of all injuries in residential care)⁴⁷². Disabled male residents are the most common perpetrators of sexual abuse against disabled female co-residents⁴⁷³.

Male caregivers are identified as the other main perpetrator of sexual violence against female disabled women in their care⁴⁷⁴. Perpetrators are thought to be attracted to these working environments due to their easy access to potential victims⁴⁷⁵.

Indeed, the commission of violence by carers or service providers has been found to be the most pervasive trend, irrespective of the gender of victim, form of violence and form of disability of the victim⁴⁷⁶.

This trend necessitates further consideration of the issue in terms of the current redress mechanisms available to victims and interested parties (including intervention and punishment) and the formulation of further improvements to ameliorate the situation.

Framework to Address the Problem

There is currently a complex array of laws, complaint mechanisms, guidelines and administrative bodies in place in Australia to address violence in the context of disability residential care.

5.7 Significant Legislative Instruments

Across each State/Territory and at the Federal level there are key legislative instruments, theoretically addressing the issue of violence against people with disabilities from different perspectives (with different legislative purposes), to purportedly holistically address the issue as follows⁴⁷⁷:

1. *Regulatory mechanisms*: Regulation of disability service providers is primarily through the imposition of conditions, standards and guidelines on such providers. Providers receiving funding from the government, or who seek accreditation from the government, generally receive this on the condition that they follow certain standards or put in place particular processes, such as a complaints process⁴⁷⁸. Non-compliance can lead to warnings, reduction in funding, loss of accreditation or, in some cases civil liability, although in many cases the

⁴⁷⁰ Above, n 468, Above n 463, Above n 466, Department of Health, 'No Secrets: Guidance on developing and implementing multi-agency policies and procedures to protect vulnerable adults from abuse [undated], *Home Office*.

⁴⁷¹ Above, n 466

⁴⁷² Above, n 465

⁴⁷³ Above, n 468

⁴⁷⁴ Above n 468

⁴⁷⁵ Above, n 467, 22

⁴⁷⁶ Above, n 463

⁴⁷⁷ Robinson S and Chenoweth L, 'Preventing abuse in accommodation services: From procedural response to protective cultures' [2011] *Journal of Intellectual Disabilities* 67.

⁴⁷⁸ *Ibid*.

legislation precludes the creation of civil causes of action. In a limited number of cases these standards and conditions also apply to privately funded service providers.

Unfortunately, in many cases conditions or requirements are not explicitly set out in either the Act or Regulations but are left to the relevant department to create. No indication is given in legislation as to the content of such conditions. While such requirements and standards will often include human rights principles and make mention of a need to ensure a safe environment for residents, there is often no express standard or requirement to report abuse, either to the Police or another third party. Rather the focus is on internal resolution and complaint mechanisms. Mandatory reporting mechanisms are generally around departmental reporting for the purpose of general monitoring, rather than responding to particular incidents of violence.

This legislation, as well as the subordinate legislation, is summarised in Figure 2 of the **Appendix**.

2. *Complaints mechanisms/Administrative law mechanisms*: Avenues for review of the decisions/treatment of people with disabilities in residential facilities are available, in certain jurisdictions in Australia, through administrative law action and more informal complaint mechanisms. Generally these are provided for in a disability service act, or a health care and complaints act. For example, the Ombudsman of New South Wales has the power to receive complaints about treatment and service in residential facilities, as well as review the complaint-handling mechanisms of those same facilities. Complaints received may be investigated, conciliated or referred to a third party including, presumably, the police.⁴⁷⁹

The focus appears to be on the conduct of the service provider and, in many cases, the types of complaints covered is restricted to those related to the provision of the service itself. As such, complaints regarding violence by another residential facility client, or by family members may not be covered by the legislation, except indirectly, for example by complaining about the service provider's failure to deal with the act of violence appropriately.

A summary of all such legislative instruments in Australia is provided for in Figure 3 of the **Appendix**.

There is significant overlap between these first two categories, as often the same legislation will set up standards and also create a complaints or monitoring mechanism.

3. *Criminal law*: Criminal law offences attach to acts of violence against people with disabilities and by people with disabilities in a number of ways:
 - General criminal offences such as assault, endangering health or sexual harassment apply equally to acts taking place within residential facilities as to the general population;
 - Aggravated offences, i.e. where the victim is a person with a disability, particularly an intellectual disability, or the perpetrator is in a position of authority, trust or is a carer;
 - Particular offences that specifically relate to acts against people with a disability, or people in a position of dependence, such as failure to provide

⁴⁷⁹ *Community Services (Complaints, Appeals and Monitoring) Act 1993* (NSW) Part 4

the necessities of life, or sexual assault against a person with an intellectual disability⁴⁸⁰; and

- Criminal offences particular to acts occurring in residential facilities, or framed to specifically include acts in residential facilities.

For example, New South Wales and Victoria both have legislation that specifically addresses violence in residential facilities. In New South Wales the *Crimes (Domestic and Personal Violence Act) Act 2007* defines a domestic setting to include a residential facility and covers acts of violence that occur there. In Victoria it is a crime for a worker in a residential facility to have sex with a client with a cognitive impairment⁴⁸¹.

In addition, in many cases, sentencing legislation or Regulations list the fact that a victim is a vulnerable person (e.g. has a disability), or that the offender abused a position of trust or authority as an aggravating factor to be taken into account when sentencing. By contrast, it is considered a mitigating factor if the offender is not fully aware of the consequences of his or her actions because of the offender's age or disability⁴⁸².

A summary of criminal offences is provided for in Figure 4 of the **Appendix** below.

5.8 Other Important Legislative Instruments

The following additional statutory and common law avenues are also available to respond to acts of violence within residential facilities:

4. *Civil action*: As noted above, civil law offences exist in some jurisdictions in Australia in respect of non-compliance with standards and conditions. Civil law suits are available under common law for a breach of tortious duty. This would cover both assault and negligence, or failure to prevent assault and is applicable to such acts by an individual or an organisation providing services, including, where appropriate, the government agency providing the service.
5. *Human Rights and Discrimination laws*: Australia is a party to the *Convention on the Rights of Persons with Disabilities*⁴⁸³. Under the Convention individuals have a right to freedom from exploitation, violence and abuse, and freedom from torture, cruel, inhuman or degrading punishment⁴⁸⁴. The State also has an obligation to provide information and education on how to avoid, recognize and report instances of exploitation, violence and abuse. The Convention imposes an obligation to ensure that “*measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law*”⁴⁸⁵.

Domestically, each State/Territory and the Federal Government have enacted legislation to protect people with disabilities from discrimination. Under that legislation direct and indirect discrimination on the basis of disability in the provision of goods and services, accommodation, education, employment and a number of other fields of public life is

⁴⁸⁰ Above, n 470.

⁴⁸¹ *Crimes Act 1958* (Vic) ss 50-52.

⁴⁸² See for example *Crimes (Sentencing Procedure) Act 1999* (NSW) s21A

⁴⁸³ UN Committee on the Rights of Persons with Disabilities (CRPD), *Report of the Committee on the Rights of Persons with Disabilities on its 1st session*, 8 October 2009, CRPD/C/1/2, available at: <http://www.refworld.org/docid/4ae57ad32.html>

⁴⁸⁴ *Ibid* Articles 16 and 15.

⁴⁸⁵ *Ibid* Article 12

unlawful. In a number of states, the legislation also protects against harassment and vilification. At the Federal level, and in some States, the legislation specifically incorporates some of Australia's obligations under the Convention, along with subordinate legislation. Theoretically, discrimination in the way reports of violence are handled would be unlawful under this legislation.

A summary of this legislation appears under Figure 5 of the **Appendix**.

6. *Carer-Specific law*: There has been some legislation enacted in various jurisdictions in Australia which promotes the rights of carers. The legislation provides carers with legal recognition of their roles and their importance and otherwise protects their interests by requiring adherence to the 'Carers Charters'. These Charters set out obligations in terms of the treatment of carers, including a requirement to respect and recognise their work. This legislation is summarised in Figure 6 of the **Appendix**.
7. *Employment/Workplace Health and Safety Law*: The operation of workplace law may serve to protect carers against violence in residential care facilities, that being their place of work. Such laws generally extend to any other person on the premises, and so would usually serve to protect residents. There is largely national harmonised workplace healthy and safety legislation entitled: *Work Health and Safety Act 2011* (or 2012 for South Australia and Tasmania). However, Victoria has the *Occupational Health and Safety Act 2004* (Vic) and Western Australia the *Occupational Safety and Health Act 1984* (WA).

5.9 Policies, Procedures and Guidelines

Further to these main pieces of legislation there exists a plethora of subordinate legislation as well as departmental policies and guidelines which ensure the practical operation of the aforementioned Acts. Policies will sometimes mandate that certain types of abuse or assault must be reported, either to police or to a relevant minister, or they may require that service providers have internal dispute and complaint resolution mechanisms to respond to particular types of abuse or neglect. The most relevant of policies, procedures and guidelines are summarised in Figure 7 of the **Appendix**.

The existence of such a large number of legislative instruments, subordinate legislation and policies, practices and procedures purportedly addressing the issue of violence in residential care settings is promising. Individuals appear to be provided with a number of avenues in which to respond to acts of violence, including:

- Internal resolution of complaints and incidents according to policy guidelines;
- Reporting assaults to the police;
- Reporting acts of violence to community visitors or commissioners responsible for monitoring residential facilities;
- Reporting acts of violence or neglect to a complaints board;
- Compulsory reporting of incidents to departments; and
- Pursuit of civil claims, including breach of statutory or common law duty.

The plethora of avenues for responding to acts of violence creates an impression that justice and support for victims of abuse is sufficiently accessible, appropriate and available.

Addressing Violence in Disability Residential Care: The Reality

The reality of the situation, however, is that despite the above legislation and response options, the issue of violence in disability residential care settings is still not being adequately addressed⁴⁸⁶. There is, however, very little data available on the particular patterns of usage of these mechanisms of redress, making it difficult to determine exactly where the barriers to prevention and remedy lie⁴⁸⁷. However, anecdotal evidence suggests that acts of violence against persons with disabilities are dealt with 'in house' in an administrative fashion, rather than as a criminal act or through the various formal complaints and support mechanisms described above.

There are numerous reasons hypothesised for the continued prevalence of violence in residential care settings without detection and/or it being addressed.

5.10 Barriers to Disclosure/Reporting

One major reason thought to contribute to the failure to adequately respond to violence is the existence of numerous barriers in relation to reporting the incident⁴⁸⁸. The vulnerable position of people with disabilities and the lack of ability to freely communicate means that the information relating to an occurrence of violence sometimes has to be passed along in various ways before it is prosecuted by police as a criminal offence⁴⁸⁹. At each stage of disclosure there are numerous impediments acting on the individual empowered with passing on the information, each time decreasing the likelihood it will be treated ultimately as a criminal offence and dealt with by the police⁴⁹⁰. A summary of the impediments experienced at each stage of reporting is summarised in a flow-chart diagram in Figure 8 of the **Appendix**.

5.11 The Decision to Report at all

Before any disclosures are made at all regarding an incident of violence in residential care settings there are numerous factors that dissuade a person with a disability from raising the issue at all. These include:

- *Lack of knowledge as to what is inappropriate*: victims may not be aware that certain behaviour is inappropriate (especially sexual abuse) and therefore may not know there is any need or right to report⁴⁹¹. This may occur even when the individual themselves finds the event traumatising, distressing or painful;
- *Lack of education regarding rights*: victims may be unaware of their rights to make a complaint or pursue legal action⁴⁹². There may be no knowledge of viable alternative avenues of resolution to those presented to them.⁴⁹³
- *Communication difficulties*: victims may be physically incapable of reporting and communicating the incident (for example augmentative communicative devices may not have words available for 'rape' or 'genitalia');⁴⁹⁴

⁴⁸⁶ Above, n 468

⁴⁸⁷ Above, n 463, Above n 468

⁴⁸⁸ Ibid., 10

⁴⁸⁹ Sin CH, Hedges A, Cook C, Mguni N and Comber N, 'Disabled people's experiences of targeted violence and hostility' [2009] *Office for Public Management* 10

⁴⁹⁰ A flow-chart of all barriers at each stage of the process is included in the Appendix

⁴⁹¹ Above, n 468

⁴⁹² Ibid.

⁴⁹³ Above, n 463, 10

⁴⁹⁴ Above, n 463

- *Fear of reprisal*: from the perpetrator if they continue to live in the same residence, or if they receive care from them;
- *Shame and stigma*: there may be a wish to avoid the stigma attached to victimisation⁴⁹⁵. Particularly in regards to sexual assault, there are feelings of shame, fear, guilt and self blame regarding the assault. This is common to sexual assault outside residential facilities as well⁴⁹⁶;
- *Loss of autonomy*: victims may fear that the situation will be taken out of their hands/pursued even when they do not wish to pursue it. This fear is perpetuated by mandatory reporting requirements stipulated under the departmental policies in relation to abuse and neglect. For example, in New South Wales certain forms of abuse trigger an obligation to contact relevant authorities (such as the Police)⁴⁹⁷;
- *Negative responses* victims may also fear that they will not be believed⁴⁹⁸ or that they will be ridiculed, blamed or persecuted⁴⁹⁹;
- *Power imbalance*: between staff and resident, particularly if the staff member is the perpetrator may prevent a person speaking out. Residents may fear negative repercussions such as having changes in medication implemented and being locked in solitary confinement. For people with a history of abuse, severe power imbalances may feel normal, preventing people from recognising experiences as abusive or from speaking out⁵⁰⁰.

As a result of these aforementioned influences incidents of violence are generally under-reported to police (or any other authorities) by people with an intellectual disability. One study revealed that 40% of crimes against persons with mild and moderate intellectual disabilities and 71% of crimes against persons with more severe intellectual disability are not reported to police⁵⁰¹.

5.12 Initial reporting of incident (to third party or other agency, including police)

When a person does report an incident quite often they do not report it to the police or other formal complaint handling bodies. For example, when female victims do seek help most tend to seek informal support (family and friends)⁵⁰². However, the majority of studies focus on reporting to the police, with far fewer studies on reporting to third parties. A recent study in Scotland indicates that 90% of disabled victims reported to a third party whereas only 41% reported the incident directly to the police⁵⁰³. It is often then up to the third party to report the incident to a person or agency with the powers to adequately respond to the incident. Unfortunately, it would appear that there are also various impediments acting on the person receiving the report that often prevent them forwarding the report to the relevant authorities, including:

- *Paternalism*: third parties may hold a belief that not reporting the incident will be protect the person with a disability from further actions/investigations. A person may believe that any further action may have a negative impact upon the victim⁵⁰⁴;

⁴⁹⁵ Above, n 467

⁴⁹⁶ Haley Clark, Bianca Fileborn 'Responding to women's experiences of sexual assault in institutional and care settings *ACCSA Wrap* No 10, 2011, available at <http://www.aifs.gov.au/acssa/pubs/wrap/wrap10/index.html> at 10

⁴⁹⁷ NSW Department of Youth and Community Services *Abuse and Neglect Policy 2012* available at http://www.adhc.nsw.gov.au/_data/assets/file/0020/228062/Abuse_and_Neglect_Policy_Apr_2012.pdf

⁴⁹⁸ Above, n 463, 10

⁴⁹⁹ Suellen Murray and Anastasia Powell 'Sexual assault and adults with a disability: enabling recognition, disclosure and a just response' *ACSSA Issue* 9, 2008 available at <http://www.aifs.gov.au/acssa/pubs/issue/i9.html> at 4

⁵⁰⁰ Above n 496 at 8

⁵⁰¹ Above, n 467, 38

⁵⁰² Above, n 463, 10

⁵⁰³ Above, n 489, 50

⁵⁰⁴ Above, n 467

- *Disbelief*: reports of violence by people with disabilities are often not believed (whereby victims are seen as asexual, overly sexed/consenting, incapable of consenting/conceptualising what sex is)⁵⁰⁵;
- *Futility*: a belief by those receiving reports of violence against people with disabilities that, even if they were to pass on the report, no further action would be taken or that it won't result in an outcome⁵⁰⁶;
- *Disability blaming*: the focus of police or others is often on a person's disability rather than the abuse. It can lead to victims being blamed for the abuse or inappropriate service provision;
- *Fear of retaliation* from abusers or employers, loss of employment or less favourable working conditions⁵⁰⁷;
- *Internal resolution mechanisms* are followed rather than reporting to external bodies⁵⁰⁸. These often focus on the victim, rather than the perpetrator, particularly if the perpetrator is another client. Many people hold the belief that the behaviour is 'normal' for people with disabilities - and it is dealt with internally for this reason⁵⁰⁹. Guidelines and policies will often require internal resolution mechanisms to be created, placing some responsibility on carers and service providers to respond to abuse themselves. Indeed, even where it is mandatory to report certain types of violence to the police there are exceptions and discretion as to what is reported. For example, in guidelines on abuse and neglect in New South Wales, there is an exception to mandatory police reporting in circumstances where the perpetrator has an intellectual disability who lacks understanding of the behaviour, or where the physical contact between residents (such as pushing or striking) is such that the incident is appropriate for resolution using behaviour management strategies and internal processes. These exceptions apply even in cases of sexual assault;
- *Differential treatment where perpetrator is a fellow client*. guidelines on reporting and managing issues of abuse and neglect sometimes differentiate between abuse that is perpetrated by clients and abuse that is perpetrated by staff, with staff abuse triggering mandatory police reporting, where reporting is discretionary if the perpetrator is a client⁵¹⁰. This reflects, and perhaps reinforces, the concept that violence between clients is merely an internal concern requiring behaviour management; and
- *general belief by agencies that they are better equipped to deal with the situation than a third party*: agencies specialising in the particular form of crime experienced by the victim often hold this belief. This belief is particularly encouraged by the regulatory mechanisms that require compliance to standards rather than a human-centred approach⁵¹¹.

In some states, mandatory reporting of incidents to a relevant authority should theoretically increase the incidents of reporting. However, the reporting process itself can be fraught with complications and barriers, including:

- *Discretion to report*: the discretion to report in certain cases, such as where the perpetrator has an intellectual disability, or it is considered appropriate for resolution internally;
- *Selection of appropriate agent*: reporting often requires an assessment to be made by the complainant as to the 'appropriate agency' to contact. Here a choice could be made to direct the complaint to the administrative complaints bodies available in most States/Territories rather than police/criminal law centres;

⁵⁰⁵ Above, n 463, 12

⁵⁰⁶ Above, n 467

⁵⁰⁷ Above, n 477, 67. Above, n 467, 31

⁵⁰⁸ Above, n 463, 12

⁵⁰⁹ Above, n 468

⁵¹⁰ See NSW Family and Community Services *Abuse and Neglect Policy and Procedures* 2012 available at http://www.adhc.nsw.gov.au/__data/assets/file/0020/228062/Abuse_and_Neglect_Policy_Apr_2012.pdf

⁵¹¹ Above, n 463, 10

- *Decision-making of the person with the information:* mandatory reporting relies on the person who is aware of the incident (the one who the person with disability has initially reported to) deciding to report it at all; and
- *Complaint bodies:* finally, the procedures and policies of the complaint bodies that often receive complaints (as relevant 'authorities' for the purposes of the aforementioned policies) often require mediation and attempts at informal conciliation, after which, it may not be required or appropriate to continue to prosecution.

5.13 Reporting to the police

The focus of much of the legislation, regulations, policies, procedures and guidelines is to move away from criminal justice responses (and arrest/incarceration) and towards early intervention approaches, situational or environmental approaches and community or social approaches⁵¹². This, combined with the barriers to disclosure at two stages, means that reports rarely reach the police⁵¹³.

However, where a report does escalate to the police, statistics indicate that the police response is often in the form of 'warnings' to residents rather than Apprehended Violence Orders (or equivalent) or investigation and prosecution. Reasons for this approach taken by the police is believed to include:

- *Discriminatory treatment as to the gravity of the complaint:* police may avoid investigations involving people with disabilities due to the perception that these offences are less grave in nature⁵¹⁴;
- *Disbelief:* there is a similar disbelief of the complainant to that described above: people with disabilities being asexual, consenting/highly sexualised, incapable of understanding sex⁵¹⁵. The complainant may also be viewed as vexatious or unreasonable in their alleged incessant pursuit of their rights⁵¹⁶.
- *Inappropriate procedures:* the police often have procedures that they must adhere to that are not adapted to the needs of people with disabilities and are therefore, combined with a lack of understanding about people with disabilities generally, make them unable to deal with the complainant with disabilities appropriately⁵¹⁷.

However it is not always possible to know why police choose not to investigate a complaint, as there is evidence to suggest that police often fail to even report receiving a complaint and making a decision not to investigate⁵¹⁸.

5.14 Inability to Fully Participate in the Criminal Justice System

Should the incident be escalated to a criminal prosecution by the police, the victim faces numerous challenges in their participation in the criminal justice system generally. Often the person is not appropriately identified as having a disability and therefore is not provided with the necessary amendments to the general procedure⁵¹⁹. Other challenges faced by people with disabilities when accessing the justice system include:

⁵¹² Above, n 465, 2

⁵¹³ Above, n 463, 38

⁵¹⁴ Ibid

⁵¹⁵ Above, n 468

⁵¹⁶ Above, n 467, 32.

⁵¹⁷ Ibid.

⁵¹⁸ Above, n 467, 32

⁵¹⁹ Above, n 467, 37

- *Credibility as witness*: there is a perceived or assumed lack of credibility as a witness. This is potentially the greatest issue⁵²⁰. Indeed, many of the cases successfully prosecuted against carers in respect of violence against people with disabilities (particularly in Queensland where there are specific aggravated offences) are often overturned or the sentence is reduced on appeal on the basis of the lack of credibility of the disabled witness⁵²¹. Such cases stem from a precedent (*Bromley v the Queen* 1986 HCA) that suggests that having an intellectual disability affects a witnesses' capacity to give evidence⁵²²;
- *Impact of delays*: any delays caused by the initial information gathering stages can be particularly disadvantageous to people with an intellectual disability, as it may be harder to remember facts and there may be greater frustration at delays⁵²³;
- *Court room setting*: is also inappropriate for some people with disabilities. Depending on the disability the level of noise, chaotic activity, fluorescent lighting may be problematic⁵²⁴;
- *Costs*: additionally often people with disabilities are unable to afford commercial legal services and, given its difficulty, are often unable to attain free legal representation⁵²⁵.

Previous negative experiences with the criminal justice system may also make victims more reluctant to go down that path again. Further information regarding barriers to access to justice and issues of competence can be found in Chapter 1 of the main report.

5.15 The Legal Framework itself

The legislative 'framework' outlined above, despite its variety of options for redress, has some fundamental weaknesses which undoubtedly contribute to the aforementioned patterns of usage.⁵²⁶

5.15.1 Incorrect legislative focus: failure to address systemic issues

The current laws and practices have generally focused on responding to specific incidents of violence and have failed to give adequate space to allow for more systemic reviews and solutions. The disability service regulatory framework is undoubtedly significantly improved in terms of its acknowledgment of different categories of abuse. It is, however, questionable whether this has resulted in a reduction of incidents, experience and responses to abuse and neglect. Legislation is generally reactive in nature, failing to develop a consistent approach to identify, examine and learn from patterns of abuse and violence and develop systemic responses that are effective. In this way violent incidents are still viewed as singular and isolated events for the large part, meaning responses (including non-reporting) proceed on that basis⁵²⁷.

5.15.2 Tone and Spirit of Legislation, Policies and Procedures

The numerous operational policies and procedures that have been developed to guide staff to deal with abuse and neglect. Whilst these resources are undoubtedly useful they may have given rise to a situation where abuse and neglect is considered primarily a policy issue that needs to be addressed by the services, rather than it being a potentially criminal issue for the justice system to respond to. Because of this, staff members may treat the offending behaviour as simply requiring behaviour

⁵²⁰ Above, n 468

⁵²¹ *R v Mrzljak Esad Eso* [2004] QCA 420; *R v Martin* [1992] QCA 205; *R v AW* [2005] QCA 152; *R v S* [2002] QCA 141

⁵²² See also *Libke v The Queen* [2007] HCA 30

⁵²³ Above, n 467, 35

⁵²⁴ Above, n 467, 35

⁵²⁵ *Ibid.*, 36

⁵²⁶ Above n 477, 67

⁵²⁷ *Ibid.*, 65

management or staff management or view it as a programmatic problem⁵²⁸. Indeed the plethora of legislation and guidelines may well serve to create confusion as to the appropriate manner in which to deal with a complaint or incidence of abuse. As an example, the guidelines on abuse and neglect in New South Wales lists 13 pieces of relevant legislation alone, not including their related subordinate legislation, guidelines and policies⁵²⁹. Within these 13 pieces of legislation there would be a number of different requirements placed on service providers, including internal complaint resolution, reporting to a complaints body and the option to forward complaints to law enforcement.

Indeed, the legislation generally sets a tone that emphasises internal management of violence by services, promoting compliance to practice standards and management of risks rather than a rights-based approach. Amendments to legislation over the past decade have promoted service providers' compliance with legislative standards and satisfying conditions in subordinate legislation (as conditions of funding and quality assurance) and have therefore moved away from focusing on the clients that are at the heart of the provision of the service⁵³⁰.

The audit process mandated under many of the disability services Acts further promotes a managerial approach, focusing on assessment of evidence and policy and procedure (particularly in Queensland) rather than the substantive effect of that policy. The structure of the regulatory mechanisms in numerous states is such that it allows, and in certain cases even encourages, the construction and adherence to internal standards of treatments and complaint mechanisms, whereby the perpetrators are empowered with their own monitoring and oversight instead of an external body (such as the Government providing financial assistance/licenses).

5.15.3 Unsuitability of legislative mechanisms for intended users(Complaints Mechanism)

A number of concerns have been expressed regarding the lack of uniformity, and lack of power within complaint-handling bodies. There exists a wide variety of mechanisms, each with different levels of power to compel respondents to participate in the resolution of complaints, or even to make conclusive findings. While some complaints bodies are expressly required to refer complaints on to other bodies that may be more suited to handling complaints, rarely is the police force explicitly named as a possible body to be referred to..

That being said, the culture of various complaints bodies is also important. There is a view that the bodies are superficial and service-improvement oriented rather than person-centred. The apparent focus on 'local resolution' of complaints is criticised as it appears to, and in some cases does, trivialise the significant harm done to the complainant. Those organisations that have a more activist, human rights culture are generally seen as more effective in bringing about change and resolution⁵³¹.

Complaint mechanisms may also not be adequately accessible and acceptable for people with particular disabilities. For example, some of the complaint mechanisms provided for within the various laws rely on articulate complainants. A significant number of people with disabilities are therefore potentially excluded from this process; as such it will fail to uncover the most insidious violence against those most vulnerable⁵³². To illustrate: the phone intake system available under the

⁵²⁸ Ibid., 65

⁵²⁹ NSW Department of Youth and Community Services *Abuse and Neglect Policy 2012* available at http://www.adhc.nsw.gov.au/_data/assets/file/0020/228062/Abuse_and_Neglect_Policy_Apr_2012.pdf

⁵³⁰ Above n 477, 68

⁵³¹ Above n 467, 53

⁵³² Above, n 477, 71

National Abuse Hotline is automated and requires the complainant to fill out a form, both forms of reporting are inappropriate for people with particular disabilities⁵³³.

There are often compulsory requirements to seek reconciliation, compelling residents to cooperate to resolve complaints where they otherwise might not wish to, particularly in situations where the perpetrator may be another inmate or a staff member.

Ultimately it is difficult to know the efficacy of such complaint mechanisms as the complaint bodies often don't publish data on incidents of violence, complaints, internal resolution processes⁵³⁴.

5.15.4 Limited scope of legislation/regulation (Regulatory and Complaints Mechanisms)

The framework surrounding the regulation of disability service providers in numerous states and territories currently excludes numerous disability service providers. As the regulatory oversight imposed by legislation is often attached to the provision of government funding and/or licenses, any services that choose not to pursue funding or licences (and there is evidence to suggest an increase in the number of privately funded/unlicensed service providers) are not subject to the legislation. Most importantly, associated standards of treatment and guidelines of treatment for people with disabilities in care are also avoided, these only being imposed as a condition to the grant of licenses and/or funding. As such, only states and territories where there a license is compulsory are able to regulate all service providers⁵³⁵.

Furthermore, some commentators believe that, even in cases where there are conditions and oversight of service providers, such oversight is inadequate. Specifically, there has allegedly been insufficient monitoring and enforcement of standards by administering bodies. The Department of Aging, Disability and Home Care (**DADHC**) of New South Wales has been a particular target of such criticism⁵³⁶. Indeed, the recent case of *People with Disability Australia Incorporated v The Honourable Andrew Constance Minister for Disability Services*⁵³⁷ was a (failed) civil law suit against the Department regarding their failure to appropriately discharge their duties under the *Disability Services Act 1993* (NSW) (under s6 of the Act).

There is also a concern that certain licensing conditions, particularly those relating to abuse and mistreatment, may be unenforceable, depending on the wording of the enabling legislation. For example, around 2006 the DADHC received legal advice stating that many licence conditions had been deemed *ultra vires*. While it was valid to impose conditions as to resident numbers, physical and structural requirements and record-keeping, those relating to financial exploitation, abuse, mistreatment and neglect of residents were considered invalid by virtue of being *ultra vires*.⁵³⁸

Finally, there is a distinct conflict of interest implicit in the oversight and compliance of the service providers. Specifically, often the monitoring bodies are the same as those providing the funding. Indeed, the Department responsible for Disability is invariably the administering body for the Disability Services Act that mandate compliance with Disability Standards enabled under the Act. There is a conflict of interest such that the Disability Departments, providing funding to the service providers, are also required to assess their compliance with attached service standards. There are some fears that the Department's requirement to keep functioning service providers open (so that there is not

⁵³³ Above, n 467, 53

⁵³⁴ Ibid., 54

⁵³⁵ Above, n 468

⁵³⁶ Ibid

⁵³⁷ [2013] NSWSC 467 (7 May 2013)

⁵³⁸ Above, n 468, 51

an increase in the already unmet need of such facilities and such that the government itself does not need to open them themselves) results in their oversight of, or ignoring of, blatantly underperforming service providers⁵³⁹.

In terms of complaints mechanisms, it was noted above that there are concerns that the complaint-handling bodies lack sufficient power to compel participation in processes or make binding recommendations. In addition to this, complaint bodies are often restricted to hearing only complaints about the provision of services or the actions of service providers. Acts of abuse or harassment by service providers are often not specifically mentioned, although would presumably be covered. Acts by other clients do not appear to be covered by the complaints mechanisms at all.

5.15.5 Reporting Requirements

Standards and regulations occasionally mandate (without discretion) the forwarding of reported incidents of violence against people with disabilities to the police. Reports must be provided to the police without consultation with the victim or consideration as to the appropriate means of redress. In addition to the concerns raised above, this creates a deterrent to disclosure of the violence in the first instance. This mandatory reporting seems to act as a deterrent to reporting the incident at all for fear of further repercussions (such as the involvement of other agencies, including child protection)⁵⁴⁰.

5.16 Recommendations to Improve Usage of Mechanisms/Addressing the Issue of Violence in Disability Residential Care Settings

There are numerous recommendations that might help improve the current situation, including the following:

5.16.1 Amendment of legislation:

1. *Expand the scope of the regulatory legislation:* to include all disability services within mechanisms irrespective of whether they are receiving funding and/or are licensed by the government⁵⁴¹;
2. *External monitoring bodies:* should be introduced such that statute-based standards (by a non-interested third party/independent watchdog) and inter-agency policies and procedures are investigated in a uniform manner and follow-up policy is created to further improve the investigation process⁵⁴²;
3. *Increased powers of complaint-handling bodies:* administrative law/complaints mechanisms should be amended to empower complaint-handling bodies to look into systemic issues and force service providers to participate in the resolution of complaints (the ability to conduct general reviews and undertake own inquiries)⁵⁴³. These bodies should also have mandatory reporting requirements to ensure that policies, recommendations and collection of data and policies are

⁵³⁹ Above, n 477

⁵⁴⁰ Chesterman J 'Violence against people with cognitive impairments' [2010] *Office of Public Advocate* 34

⁵⁴¹ Above, n 468

⁵⁴² Above, n 470

⁵⁴³ Above, n 467, 53. For example: creation of statutory basis for complaint-making bodies where no such basis exists (e.g. CRSS, Cth; HACC, Vic) so that they may have the following statutory powers: complaint handling, own motion complaint mechanisms, ability to conduct reviews of service providers, funding, policy and programme reviews and audits, undertake own motion inquiries into systemic issues, public reporting on outcomes of inquiries, publish policy recommendations, collect and develop policies.

transparent and available to the public. These complaint mechanisms should include personal remedies⁵⁴⁴;

4. *Introduce additional criminal offences*: reform criminal laws (uniformly across the country) to include aggravated offences (where the offence is committed against people with disabilities)⁵⁴⁵.
5. *Prevention*: a focus at departmental level on preventative schemes, including research into and development of preventative measures⁵⁴⁶; and
6. *Procedural requirements for investigation*: all legislative frameworks should include mandatory requirements for the investigation and prosecution of abuse against people with disabilities.

5.16.2 Disclosure Barriers

7. *Training and education*: to address the issues faced by people with disabilities in disclosing abuse, people with disability should be able to receive information about: their rights and what constitutes an actionable breach of these rights (including provisions of relevant documents in an accessible format), their sexuality and sexual abuse, and the policies in place to tackle violence against people with disabilities. Equally, third parties (including police and residential care providers) should be provided with awareness and sensitivity training regarding the sexuality of people with disabilities, the barriers to disclosure that people with disabilities experience in relation to accessing the justice system generally and the techniques to adopt when working with people with disabilities generally.
8. *Amendments to disclosure procedures*: the investigative procedures of such third parties should also be monitored and reconceptualised to be more suitable for people with disabilities⁵⁴⁷. Finally, where guidelines and policies require reporting of incidents to police or another third party, the guidelines should ensure all incidents of abuse are reported, regardless of whether the perpetrator is a client.

5.16.3 General Recommendations

Generally, some recommendations to improve the current system include:

9. Increase the scrutiny of staff credentials and suitability before they are allowed to work with vulnerable people (including people with disabilities)⁵⁴⁸;
10. strengthen the tenancy rights of people with disabilities living in residential care facilities including by: providing rights to tenants (so they do not fear eviction) in the form of Residential

⁵⁴⁴ Ibid. For example, Amendment of NSW mechanism - explicit extension of the community-based services to include human resources, explicit requirement of Ombudsman to recognise aggravated forms of human rights violence, creation of personal remedies

⁵⁴⁵ Above, n 467; For example in NSW: *Crimes Act 1900 NSW*: Inclusion of aggravated circumstances other than merely Part 10 Sexual offences. Specifically, introduction of aggravating circumstances in respect of s59 assault occasioning actual bodily harm, s61 common assault, s33 wounding of GBH with intent and reckless GBH. Inclusion of a specific offence of unlawful deprivation of liberty. Inclusion of aggravating offence in relation to Part 3 Property offences and Part 4. Updating of s44 to provide offence of criminal negligence where there was no provision of foods/necessities to people with disabilities by carers/service providers. Inclusion of offence to administer poisons and other noxious substances. Inclusion of offence to perform forced sterilisation. Inclusion of criminal law regarding financial abuse, neglect and exploitation⁵⁴⁵. Inclusion of restrictive practices prevention laws

⁵⁴⁶ Above, n 465, 42.

⁵⁴⁷ Ibid.; For example, Use of open and general questions, non-suggestive prompting, narrative descriptions of events with few interruptions, use of picture prompts, recording for use in Court⁵⁴⁷ and reliance on support person and regular breaks.

⁵⁴⁸ Above, n 468.

Tenancy Agreements⁵⁴⁹ and providing housing alternatives to people with disabilities (with Commonwealth funded scheme) where people with disabilities are less subjected to violence⁵⁵⁰,

5.17 Conclusion

There is a variety of far-reaching legislative and administrative protections available to address the issue of violence against people with disabilities in residential care settings. However, such mechanisms fail to overcome the significant barriers that people with disabilities regularly experience when seeking to prevent, stop or obtain redress for acts of violence. Indeed, in certain circumstances the extensive laws, regulations and policies may even worsen the situation. As such, reform that is more preventative in nature (and which addresses the root causes of the problems, rather than merely the symptoms of it) is necessary, as is a more independent oversight of the residential care service providers and their workers. Education and sensitivity training of service providers and police may assist in ensuring incidents of violence and abuse are dealt with more appropriately and that available avenues for address are accessed when needed. Any such reform should be done in consultation with disability advocacy groups and other important stakeholders.

⁵⁴⁹ Above, n 467.

⁵⁵⁰ Ibid.

6. APPENDIX

6.1 **Figure 1:** All violence (forms, perpetrators, form of disability) experienced by people with disabilities

Form of Disability	Form of Violence	Perpetrator (Context of Violence)
<ul style="list-style-type: none"> • Physical disability • Mental Illness • Sensory or speech disability • Intellectual disability • Acquired brain injury • Disability brought about via drug or alcohol dependence • Reading and/or writing difficulties, • A combination of the above 	<ul style="list-style-type: none"> • Physical violence • Psychological/emotional abuse • Exploitation (including financial) • Medical abuse • Negligence/failure to provide care 	<ul style="list-style-type: none"> • Family member • Friend • Partner • Acquaintance • Disability service provider <ul style="list-style-type: none"> ○ Hospitals ○ Psychiatric institutions ○ Boarding houses ○ Nursing homes ○ Retirement homes ○ Carers ○ Transport workers • Other resident

6.2 **Figure 2:** Regulatory mechanisms available to address violence against people with disabilities in residential care facilities

Jurisdiction	Legislative Instrument
Federal	<p><i>Disability Services Act 1986 (Cth)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ All employment, advocacy and research disability service providers requiring accreditation/funding or certification by the Commonwealth Government. It does not apply to residential facilities except to the extent that a person receiving rehabilitation support requires accommodation. • <u>Relevance:</u> <ul style="list-style-type: none"> ○ The Act empowers the Commonwealth to provide accommodation services to persons eligible for rehabilitation assistance. provides for the funding of disability services, particularly employment and advocacy, as well as rehabilitation. ○ Regulatory Mechanisms: <ul style="list-style-type: none"> ▪ The Minister is empowered to create Standards for the provisions of goods and services (s5A). See below for Standards. ▪ Grants of financial assistance are only given to certified organisations. Certification brings with it monitoring by the Disability Services Review Panel (14B-14F, 14K, s26). Organisations are required to comply with standards. Failure to comply will result in a declaration of non-compliance. <p>The Governor-General is empowered to make Regulations to enforce powers under the Act, including the imposition of offences (and attached fines not exceeding \$1000) for a commission of these offences (s36). However no regulations have been made.</p>

	<p><i>Disability Services Standards (Eligible Service Standards) (FAHCSIA) Determination 2010</i> <i>(National Standards for Disability Services)</i> <i>Disability Services Standards (FaCSIA) 2007</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Standards:</u> <ul style="list-style-type: none"> ○ These Standards apply to services funded under the Commonwealth <i>Disability Services Act</i> as outlined above • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ The Standards are to ensure the consistent application of consumer rights and equality for people with disabilities throughout the country. Each National Standard states the results to be achieved for each consumer standard noted and then key practices (Supporting Standards) that should be in place to achieve the desired Standard – including the mandatory creation of policies and procedures by each agency. The Disability Service Standards (FACCSIA) 2007 notes Key Performance Indicators in respect of each standard also. ○ The most relevant Standards in relation to violence against people with disabilities are as follows: <ul style="list-style-type: none"> ▪ <u>Standard 2: Individual Needs:</u> Each person with a disability receives a service which is designed to meet, in the least restrictive way, his or her individual needs and goals ▪ <u>Standard 3: Decision-Making and Choice:</u> Each person with a disability has the opportunity to participate as fully as possible in making decisions about the events and activities of his/her daily life in relation to the services he/she receives (3.8,3.9) ▪ <u>Standard 7:</u> Each consumer is free to raise and have resolved, any complaints or disputes he or she may have regarding the service (7.7,7.10)
ACT	<p><i>Disability Services Act 1991 (ACT)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to disability service providers applying/receiving funding by ACT Government. • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ The Act governs the funding disability services. ○ Regulatory Mechanisms: <ul style="list-style-type: none"> ▪ Standards are imposed on services by way of conditions (s7) tied to grants of financial assistance (s6), these grants being reviewed every 5 years (s8) ▪ The Minister is approved to create Guidelines in respect of the provision of financial assistance to such bodies (s10) and Standards (s11) ▪ Residential Services must receive official visitors under the <i>Official Visitors Act</i> (see below under complaints mechanisms). ○ Offences: <ul style="list-style-type: none"> ▪ Executive can include offences in Regulations attached to the provision of funding(which attract 10 penalty units) (s12). No such regulations have been created at the time of writing.
NSW	<p><i>Disability Services Act 1993 (NSW) and Disability Services Regulations 2010 (NSW)</i> (Currently under review)</p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to disability service providers seeking/receiving NSW Government funding

	<ul style="list-style-type: none"> • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Governs funding and provision of disability services in NSW ○ Regulatory Mechanism: <ul style="list-style-type: none"> ▪ There is a duty on the Minister to ensure that services are provided in accordance with the Act in respect of funding provided (s6) ▪ The Minister can provide financial assistance to such service providers (s10) and may impose terms and conditions on this funding (S11). These decisions are reviewable decisions by the Administrative Decisions Tribunal (s20) ▪ Schedule 1 provides the Principles applicable to People with Disabilities, including recognition of the right to protection from neglect, abuse and exploitation and the right to have any grievances and complaints heard and resolved
	<p><i>Boarding Houses Act 2012 (NSW)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to all disability service providers within the scope of 'assisted boarding house' definition (s35), that is, a place that accommodates two or more people with additional needs. • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Regulatory mechanism: <ul style="list-style-type: none"> ▪ Assisted boarding houses must be authorised. Conditions may be imposed by the Director General. Conditions are not outlined in legislation. ▪ There may be enforcement officers appointed to determine compliance of assisted boarding house with imposed conditions under the authorisation. They have the power to enter, investigate and issue compliance notices. ▪ There are conditions and mandatory requirements imposed on the operation of authorised assisted boarding houses (s82-84), in particular removal of young residents in the premises (s85-86) ▪ The manager of a boarding house must report any sexual assault allegations to the Director General and a Police Officer. Failure to do so is an offence. Any other assaults or serious complaints must be reported to the Director General but it is not required that they be reported to the Police. ○ Offences: <ul style="list-style-type: none"> ▪ Offence to operate a boarding house without the requisite authorisation without a suitable excuse (s41-43) ▪ Offence to not comply with conditions imposed on authorisation of assisted boarding house ▪ Offence not to report a reportable incident, such as sexual assault.
	<p><i>Boarding Houses Regulations 2013 (NSW)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Regulation:</u> <ul style="list-style-type: none"> ○ Applicable to all 'assisted boarding houses.' • <u>Effect of Regulation:</u> <ul style="list-style-type: none"> ○ Standards to be abided by in such boarding houses is provided for (Schedule 1) (s11, under s43(1)(a) of the Act), including: <ul style="list-style-type: none"> ▪ Staffing (Part 1) ▪ Physical environment (Part 2) ▪ Lifestyle (Part 3) ▪ Health and Well-being (Part 4)

	<ul style="list-style-type: none"> ○ Offence-creating provisions where no compliance (s31) <ul style="list-style-type: none"> ▪ Schedule 2 defines penalty notice offences (column 1) and attached monetary penalties, as prescribed for individuals and corporations (column 2) ● Boarding houses must have a policy for for handling complaints, ethical conduct of staff and for illness, accident and emergency treatment. Details of any complaint must be recorded.
	<p><i>Community Welfare Act 1987 (NSW)</i></p> <ul style="list-style-type: none"> ● <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Those that are receiving funding for community welfare or social development programs, or indeed those that are running them. These are not necessarily limited to programs for people with a disability. (s6(1)) <p><u>Effect of Act:</u></p> <ul style="list-style-type: none"> ○ Creates a Disability Advocacy Council ○ Ensures the provision of services to people with an intellectual or physical disability (s36). ○ Allows the Minister to investigate and impose conditions upon such services (s6(1)) ○ No complaint mechanism is provided.
NT	<p><i>Disability Services Act 2012 (NT)</i></p> <ul style="list-style-type: none"> ● <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applies to all disability services providers assisting people under treatment and supervision orders that receive Government funding. ● <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Regulatory mechanism: <ul style="list-style-type: none"> ▪ Outlines principles for treatment and care and determines eligible entities for funding. ▪ Creates a Community Visitor scheme. Community Visitors can make enquiries and take complaints. ▪ Outlines situations in which restrictive practices may be used. ○ Complaints Mechanism: <ul style="list-style-type: none"> ▪ Complaints are made to the Manager who must undertake an investigation. No requirement to forward on a complaint to an independent body. ○ Offences <ul style="list-style-type: none"> ▪ Prohibition (and makes it a criminal offence, by virtue s2B of the Act) restrictive practices interventions (Division 3)
Qld	<p><i>Disability Services Act 2006 (Qld)</i></p> <ul style="list-style-type: none"> ● <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Disability service providers within the definition in the Act, including privately funded providers. ● <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Promotes the equality of human rights of people with disabilities (s18, s19) ○ Service delivery mechanisms (s20-33) ○ Disability service standards can be, and have been, made by Minister (s34) and include <ul style="list-style-type: none"> ▪ Service access ▪ Individual needs ▪ Decision-making ▪ Privacy, dignity and confidentiality ▪ Participation and integration

	<ul style="list-style-type: none"> ▪ Complaints and disputes ▪ Protection of human rights and legal rights and freedom from abuse and neglect ○ Requirement of policies and procedures in place for protection of service users, including prevention of abuse (in all its forms) and the service provider supports user in exercising their legal rights <ul style="list-style-type: none"> ▪ 10: ○ Regulatory mechanism: <ul style="list-style-type: none"> ▪ There are processes in place to review whether services meet these standards. ○ Funding of certain non-government bodies for disability services providers, with a permitted imposition of conditions on such funding (Part 6-8) ○ Disability Services Queensland can respond to concerns for the safety of a client. ○ ○ Screening of workers in government-funded facilities is mandatory (Part 10) <ul style="list-style-type: none"> ▪ Enforcement mechanisms of the aforementioned standards and compliance with these standards (Part 11). This includes the creation of authorised officers who may enter a service provider location if they believe a person is at risk of abuse. ○ Complaint Mechanism <ul style="list-style-type: none"> ▪ Complaints can be made regarding the provision of disability services (Part 5) ▪ The chief executive can refer complaints to a number of bodies, including the ombudsman, crime commission and the adult guardian. ○ Offences <ul style="list-style-type: none"> ▪ Failure to complete mandatory screening process of staff (Part 13) ▪ Prohibition on the use of restrictive practices against people with disabilities in disability service provider facilities (Part 10A) <p>In Queensland the Disability Services department has a Critical Incident Reporting Police for reporting forms of abuse and neglect in certain circumstances.⁵⁵¹</p>
	<p><i>Disability Services Regulation 2006 (Qld)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Regulation:</u> <ul style="list-style-type: none"> ○ All disability service providers funded under the Act (s13) • <u>Effect of Regulation:</u> <ul style="list-style-type: none"> ○ Disability Service Standards (as permitted by s34 of the Act) whereby mandatory standards of service providers must be complied with (s4) and policies must be made on point (s5) and these policies must be implemented (S6). This includes having a policy on preventing abuse, neglect and exploitation. <ul style="list-style-type: none"> ▪
SA	<p><i>Disability Services Act 1993 (SA)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Disability service providers seeking/receiving funding from the SA Government (s4, s5) • <u>Effect of Act:</u>

⁵⁵¹ Disability Services Queensland *Critical Incident Reporting Policy 2008*

	<ul style="list-style-type: none"> ○ Creation of standards for the provision of disability services (s2) ○ Regulatory Mechanism: <ul style="list-style-type: none"> ▪ Compels those funded under the Act to comply with the standards in the Schedule (s5) <ul style="list-style-type: none"> • Schedule 1 sets out principles: Enshrinement of human rights of people with disabilities - including the right to be free from abuse and neglect (Principle 2) • Schedule 2 sets out objects: Requirement to have grievances of people with disability using the service providers resolved (Object 1(h)) ▪ Allows the review by the Minister of disability services provided (s7) ▪ Applicable Principles relating to disability standards to be pursued (Schedule 1) ○ Complaint Mechanism: <ul style="list-style-type: none"> ▪ Mechanism of community visitor to establish compliance with regulations and standards of treatments and mandatory reporting to Principal Community Visitor (Regulations, s4 and 6)
Tas	<p><i>Disability Services Act 2011 (Tas)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ All services receiving funding under the Act, • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Funding of disability services and imposing standards of treatment for residents in relation to those services, particularly the regulation of restrictive practices (s3). It does not appear that these standards have been created. ○ Funding of the services (Part 3) including monitoring functions (Part 3, Division 2), for example authorised persons may enter premises. ○ Creates functions of the Senior Practitioner in oversight of the service providers, particularly in relation to restrictive practices (Part 5 and 6) ○ There does not appear to be a complaints mechanism
Vic	<p><i>Disability Act 2006 (Vic)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Disability service providers that are seeking/are funded by the Victorian Government • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Aims to ensure best practice provision of disability services ○ Regulatory mechanisms: <ul style="list-style-type: none"> ▪ Establishment of Victorian Disability Advisory Council (Part 3, Division 2) ▪ Appointment and empowerment of Disability Services Commissioner (Part 3, Division 3) ▪ Appointment and empowerment of the Disability Services Board (Part 3, Division 4) ▪ Appointment and empowerment of Senior Practitioner (Part 3, Division 5) for restrictive practices ▪ Community Visitors can enquire into suspected abuse and neglect. Matters may be referred to any other person, Disability Services Commissioner or Ombudsman are mentioned, Police are not. ▪ Requirement for standards, as under the State Disability Plans and Action Plans (Part 4) ▪ Extension of principles to residential and institution settings (Part 5, Division 2 and 3)

	<ul style="list-style-type: none"> ▪ Requirement of monitoring of standards of the residents (Part 6, Division 3) ○ Rights and Duties: <ul style="list-style-type: none"> ▪ The service providers must provide information to new residents of their services, including the right to make a complaint (Part 6) ▪ Duties relating to the management of residents' money (Part 6, Division 2) ▪ Compulsory treatment of residents (Part 8) ○ Complaints Mechanism <ul style="list-style-type: none"> ▪ Requirement for internal complaints mechanism by service providers and reasonable efforts at internal resolution and report on the number of complaints (Part 6, Division 6) ▪ Visits by Community Visitor to Residential Services to monitor and receive complaints (Part 6, Division 7) ○ Offences <ul style="list-style-type: none"> ▪ Prohibition on restrictive practices (Part 7)
WA	<p><i>Disability Services Act 1993 and Disability Service Regulations 2004 (WA)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to all those disability service providers funded by the WA Government • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Regulatory Mechanisms <ul style="list-style-type: none"> ▪ Disability Services Commission created to provide oversight and create Regulations relating to disability service providers (Part 2) ▪ Creation of Ministerial Advisory Council on Disability to create, and monitor compliance with, guidelines, standards and procedures relating to the care of people with disabilities by service providers (Part 3) ▪ Funding to service providers contingent on compliance with standards and policies including freedom from abuse and neglect (Standard 10), right to pursue grievances (standard 7), receipt of services to protect their legal and human rights (standard 6). Recipients of grant funding must also sign an agreement which, among other things, would require them to report to the commission any significant physical or psychological harm to a person with a disability, any assault, including sexual assault, or neglect that results, or is likely to result, in significant harm to the individual. ○ Complaints Mechanism <ul style="list-style-type: none"> ▪ Complaints about service providers can be made to the Director of the Health and Disability Services Complaints office. Complaints are limited to those regarding service providers. . Focus is on resolution by negotiation and settlement. ○ Offences <ul style="list-style-type: none"> ▪ Failure of service providers to provide relevant information is an offence attracting pecuniary penalty (s48A) ▪ Ill-treatment or wilful neglect by an individual towards a person with a disability while that person is under their care, supervision or authority. (s53) Penalty is \$4000 or imprisonment for 12 months. Prosecution is by the CEO of the Commission.

6.3 **Figure 3:** Complaints mechanisms/administrative law mechanisms available to address violence against people with disabilities in the context of residential care settings. This does not include human rights and discrimination complaints mechanisms. These can be found under Figure 5.

Jurisdiction	Legislation / Mechanism
Federal	<ul style="list-style-type: none"> • Abuse and Neglect Hotline – if the complaint is about a government funded service, the complaint is referred to the relevant department for investigation. Other complaints will either be referred to the appropriate agency, such as an Ombudsman who can otherwise investigate or address the report. The Hotline also provides advice to callers on how to raise a complaint at a local level. • Aged Care Complaints Scheme for aged care services subsidised by the government. Home and Community Care (HACC) also has state based complaints policies in most States for complaints against Commonwealth funded HACC providers.
ACT	<p><i>Official Visitor Act 2012 (ACT)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of the Act:</u> <ul style="list-style-type: none"> ○ Any services falling within the ambit of certain legislation, the relevant one for this report being the <i>Disability Services Act 1997</i> • <u>Effect of the Act:</u> <ul style="list-style-type: none"> ○ Review of Disability Service Providers: <ul style="list-style-type: none"> ▪ An official visitor appointed under the act may visit and inspect services covered under the <i>Disability Services Act</i> and receive complaints from people regarding the accommodation, services and care provided. Official visitors may also refer such complaints to an investigative entity such as the Police. It appears that a complaint can only be made by a person with a disability. <p>See also the <i>Human Rights Commission Act 2005 (ACT)</i> which establishes a complaint mechanism for disability service complaints – further information is provided in Figure 5.</p>
NSW	<p><i>Community Services (Complaints, Reviews and Monitoring) Act 1993 (NSW)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ All services provided under the Community Welfare legislation (including, most relevantly, <i>Disability Services Act 1993</i>.) • <u>Effect of the Act:</u> <ul style="list-style-type: none"> ○ Promotes the resolution of complaints against community service providers through informal or alternative dispute resolution mechanisms (s3) ○ Review/Regulation of Disability Service Providers: <ul style="list-style-type: none"> ▪ Requires the Community Services Ombudsman to monitor the community service providers in terms of compliance with relevant standards (s11) ▪ Creates the position of ‘official community visitors’ who can inspect accommodation and report back to the Ombudsman who may investigate matters arising out of the reports. ▪ Ombudsman must also undertake systemic review of deaths of children and people with disabilities in care. ○ Complaint Mechanisms: <ul style="list-style-type: none"> ▪ Complaints may be made to the Ombudsman about a service

	<p>or the conduct of a person providing a service., Complaints may be made by any person who has a genuine concern in the subject matter of the complaint. Complaints may be referred to another body, including, presumably, the Police.</p>
NT	<p><i>Health and Community Services Complaints Act (and Regulations) (NT)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act</u> <ul style="list-style-type: none"> ○ Applicable to all community services for people with disabilities (s4) • <u>Effect of the Act:</u> <ul style="list-style-type: none"> ○ Complaints Mechanism: <ul style="list-style-type: none"> ▪ Encourages the internal resolution of complaints between users and service providers. ▪ Establishes the Health and Community Services Complaints Commission which can investigate and conciliate complaints regarding the service provider. ▪
Qld	<p><i>Health Quality and Complaints Commission Act 2006</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to all 'health services', including residential care settings for people with disabilities (s8) • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ The Commission monitors and reviews health services and creates standards, as well as receiving and managing complaints regarding the provision of such services. (s4) Focus is on internal resolution and conciliation. However the Commissioner may refer matters to another entity, presumably including the Police.
SA	<p><i>Health and Community Services Complaints Act 2004 (SA)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Disability service providers that are health care or community service providers. • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Sets up the office of the Health and Community Services Complaints Commissioner. ○ The Commissioner can receive complaints from users of services or people who are in charge of the health of a user. ○ Complaints that can be received are those that regard the manner in which a service is or is not provided. ○ The Commissioner can refer complaints to another body if deemed appropriate. <p>Emphasis is on conciliation.</p>
Tas	N/A
Vic	See above <i>Disability Act 2006</i> under Regulatory Mechanisms / Victoria for complaint mechanisms.
WA	<p><i>Health and Disability Services (Complaints) Act 1995 (WA)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to all disability service providers • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Creates the Health and Disability Services Complaints Office which can investigate and conciliate complaints regarding the provision of services. However, the user must have tried to resolve the complaint internally first. ○ Complaints can be referred to another body, but only with the consent

	of the complainant.
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6.4 **Figure 4:** Criminal law mechanisms available to address violence against people with disabilities in residential care settings⁵⁵²

Jurisdiction	Legislation
Federal	<p><i>Criminal Code 1996 (Cth)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of the Act:</u> <ul style="list-style-type: none"> ○ Applicable to all criminal offences under the Act, as committed within Australia and, in certain circumstances, extraterritorially. ○ Introduces concept of corporate criminal responsibility, thus a corporation providing services may also be held liable for a criminal offence • <u>Relevant sections</u> <ul style="list-style-type: none"> ○ Relevant offences include torture or the infliction of severe, physical or mental pain or suffering by a person acting in an official capacity or with the acquiescence of a public official or person acting in an official capacity (s274.2)
ACT	<p><i>Crimes Act 1900 (ACT)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to all criminal offences, under the Act, as committed in the ACT • <u>Relevant sections:</u> <ul style="list-style-type: none"> ○ Covers general offences of assault, wounding, grievous bodily harm, sexual assault, acts endangering life or health, threats, forcible confinement, torture .
	<p><i>Domestic Violence and Protection Orders Act 2008 (ACT)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Acts of violence, either in a domestic relationship, in a workplace or in general. • <u>Relevant sections:</u> <ul style="list-style-type: none"> ○ The Act provides for intervention orders in cases of domestic and personal violence. Personal violence is defined by its effect, for example, personal injury or harm to property or conduct that is harassing or intimidating to the person. Personal violence is violence perpetrated by any person against another person that is not in a domestic relationship.
NSW	<p><i>Crimes (Domestic and Personal Violence) Act 2007 (NSW)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to all relationships defined as domestic and personal under the Act, the scope of the definition of such offences being inclusive of disability service providers (carers) (s5) • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Criminalisation of domestic and personal violence offences by carers/disability service providers (s11)
	<p><i>Crimes Act 1900 (NSW)</i></p>

⁵⁵² In most, if not all, State and Federal sentencing legislation the fact that the victim or perpetrator had a disability, or that the perpetrator was in a position of trust or authority are relevant considerations in sentencing. The legislation has not been included here..

	<ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to all offences under the legislation that occur in New South Wales • <u>Relevant provisions:</u> <ul style="list-style-type: none"> ○ Criminalisation of endangering life, failure to provide necessities of life, common assault, assault causing actual bodily harm, sexual assault, indecent assault acts of violence against people with disabilities (and all citizens generally) ○ Separate treatment of sexual-offences against those with cognitive impairments in the context of a carer relationship or where the perpetrator is taking advantage of the cognitive impairment. (s66F) ○ Aggravated sexual assault and indecent assault includes assault against a person with a physical or cognitive impairment.
NT	<p><i>Criminal Code Act 1983 (NT)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to all offences under the Act committed in the Northern Territory • <u>Relevant sections:</u> <ul style="list-style-type: none"> ○ Criminalisation of acts of violence, including causing death or harm, failure to rescue or provide help, recklessly or negligently causing harm, assault, sexual assault, deprivation of liberty, wrongful custody of mentally ill person (against all persons, including people with disabilities) ○ Specific crime of sexual intercourse or gross indecency by provider of services to mentally ill or handicapped person (s130) ○ Imposes a statutory duty on carers and service providers to provide necessities of life and use reasonable care to preserve that life. ○ Abuse of position of trust or authority makes an offence an aggravated offence. <p><i>Domestic and Family Violence Act 2007 (NT)</i></p> <ul style="list-style-type: none"> • <u>Scope / Applicability of Act:</u> <ul style="list-style-type: none"> ○ Family and domestic violence, including situations of paid or unpaid care of another person or cohabitation (ss9-12). • <u>Relevant Sections</u> <ul style="list-style-type: none"> ○ Domestic relationship includes where individual is living with, or has with lived the other person, or where there is a carer relationship, paid or unpaid. ○ Violence includes any conduct causing harm, intimidation, stalking, economic abuse or threats of any of the above. (s5)
Qld	<p><i>Criminal Code Act 1899 (Qld)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to all criminal offences, under the Act, as committed in the State of Queensland • <u>Relevant sections:</u> <ul style="list-style-type: none"> ○ Criminalisation of acts of violence including sexual assault, sodomy, assault, offences endangering health or life, deprivation of liberty, threats and torture . ○ Creates a statutory duty to provide the necessities of life ○ The Act also provides for a separate offence of sexual assault or harassment of a person with an ‘impairment of the mind’ (s216)

	<p><i>Domestic and Family Violence Protection Act 2012 (QLD)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Violent acts in spousal, engagement, couple and family relationships and informal care relationships. It does not include commercial arrangements for care, or people living together not related or in a relationship.
SA	<p><i>Criminal Law Consolidation Act 1935 (SA)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to all criminal offences under the Act, as occurring in South Australia • <u>Relevant sections:</u> <ul style="list-style-type: none"> ○ Criminalisation of neglect causing harm or death, assault, causing harm and serious harm, creating a risk of harm, failure to provide food, sexual assault, indecent assault, acts of violence against citizens, including people with disabilities ○ The Act states that an offence is an aggravated offence if the offender abused a position of trust or knew or ought to have known that the person had a physical or mental disability. (S5AA) <p><i>Intervention Orders (Prevention of Abuse) Act 2009</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act</u> <ul style="list-style-type: none"> ○ Domestic and family violence whether inside or outside South Australia • <u>Relevant sections</u> <ul style="list-style-type: none"> ○ Abuse includes acts that result or are intended to result in physical injury or emotional or psychological harm, damage to property or denial of financial, social or personal autonomy. Examples given specifically include threatening to withhold medication or treatment or threatening to withdraw care upon which the person is dependent.
Tas	<p><i>Criminal Code Act 1924 (Tas)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to all criminal offences committed in Tasmania • <u>Relevant sections:</u> <ul style="list-style-type: none"> ○ Criminalisation of assault, indecent assault, duty to provide necessities, endangering health or life, wounding, grievous bodily harm, ○ Special provisions regarding sexual intercourse with person with 'mental impairment' (s126) <p><i>Family Violence Act 2004 (Tas)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act</u> <ul style="list-style-type: none"> ○ Family violence between spouses or couples. • <u>Relevant sections</u> <ul style="list-style-type: none"> ○ The Act is restricted to violence between spouses or partners. It does not include broader relationships of dependency, care or cohabitation. ○ Acts of violence are quite broad and includes assault, threats, intimidation, economic and emotional abuse.

Vic	<p><i>Crimes Act 1958 (Vic)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to all criminal offences committed in the State of Victoria • <u>Relevant sections:</u> <ul style="list-style-type: none"> ○ Criminalisation of acts causing serious injury, threats, endangering life or health, assault, rape, indecent assault, compelling sexual penetration, detention. ○ Special provisions regarding sex and indecent acts with a person with a cognitive impairment by either providers of medical or therapeutic services or by providers of special programs. It specifically makes it an offence for a worker at a residential facility (including mental health services) to have sex with, or commit an indecent act with, a person who is there because of a cognitive impairment (ss50-52).
WA	<p><i>Family Violence Protection Act (2008)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act</u> <ul style="list-style-type: none"> ○ Acts or threats of violence within a family setting • <u>Relevant sections</u> <ul style="list-style-type: none"> ○ Act regulates family intervention orders and creates offences for breach of an order. ○ Family relationship includes people living together in a home like environment, relationships of dependence and care (s8) ○ Violence includes physical, emotional and economic abuse, threats, coercion etc (ss5-7). <p><i>Criminal Code Act Compilation Act 1913 (WA)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable to all criminal offences committed in Western Australia • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Criminalisation of assault, acceleration of death, grievous bodily harm, wounding, common or serious assault, sexual assault, threats. ○ Imposes a duty to provide necessities of life ○ Separate offence for unlawful detention or detainment of person who is mentally ill or has an impairment (s337) ○ Separate offence for sexual offences against incapable person (s330) <p><i>Restraining Orders Act 1997 (WA)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act</u> <ul style="list-style-type: none"> ○ Acts or threats of violence • <u>Relevant sections</u> <ul style="list-style-type: none"> ○ Act regulates violence intervention orders and creates offences for breach of an order. ○ Covers acts of violence both in a domestic relationship and acts of personal violence. ○ Violence includes assault and causing physical injury, kidnapping and deprivation of liberty. In relation to domestic relationships only it also includes threats, intimidation, emotional abuse and damage to property (ss5-7).

6.5 **Figure 5:** Human Rights mechanisms available to address violence against people with disabilities in context of residential care

Jurisdiction	Legislation
Federal	<p><i>Disability Discrimination Act 1992</i> (Cth)</p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act</u> <ul style="list-style-type: none"> ○ Applicable to all people who have, have had, are believed to have or are likely to have in the future, a disability and their carers and assistants (s4) • <u>Effect of Act</u> <ul style="list-style-type: none"> ○ Makes it unlawful for a person to discriminate on the basis of disability in areas of public life. ○ Relevant provisions: <ul style="list-style-type: none"> ▪ Direct and indirect discrimination (ss5-6) are unlawful - particularly in relation to the provision of goods and services (s24) and accommodation (s25) ▪ Contravention of disability standards legislated for by the Minister (under s31) is unlawful (s32) ▪ Liability for unlawful acts extends to those persons who incite or participate in the unlawful behaviour (s122) ▪ It is unlawful for a person to harass a person with a disability relating to the provision of goods and services (s39) ○ Provides a complaints mechanism through the Australian Human Rights Commission and then an avenue to the Federal Court of Australia ○ Offences: <ul style="list-style-type: none"> ▪ There are no offences created by unlawful actions under the Act (s125) except as expressly provided. For example, it is an offence (a criminal offence by virtue of operation of s12A applying the Criminal Code to all offences under the Act) to victimise someone who attempts to utilise the complaint mechanism under the Act or the <i>Australian Human Rights Commission Act 1986</i> (Com) (s42), it is similarly an offence to incite or participate in such behaviour (s43) <p><i>Australian Human Rights Commission Act 1986</i> (Cth)</p> <p><u>Scope/Applicability of Act:</u></p> <ul style="list-style-type: none"> • Monitoring of Australia’s obligations under various International Human Rights Treaties and investigating complaints and issues under Federal Discrimination Legislation. <p><u>Effect of Act:</u></p> <ul style="list-style-type: none"> • Complaints Mechanism: <ul style="list-style-type: none"> ○ Establishment of Australian Human Rights Commission - including its powers, functions and duties (Part II) ○ The Commission can hear, and attempt to conciliate, complaints of unlawful discrimination.

ACT	<p><i>Human Rights Act 2004 (ACT)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ . ○ Applicable to the actions of all ACT public officials, public entities and entities exercising a public function (including those receiving public funding). • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Provides non-exhaustive (s7) list of human rights a person is entitled to as an individual (Part 3 onwards), including, most relevantly the right to equality before the law (not be discriminated against because of disability (s8) and the right to protection from torture, cruel, inhuman or degrading treatment (s10). ○ Public authorities, including police officers, public employees or people acting in public function must act in accordance with the <i>Human Rights Act</i>. Failure to do so does not create a civil action in and of itself.
	<p><i>Human Rights Commission Act 2005 (ACT)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Anyone making a complaint regarding discrimination, health services, human rights, disability services or services for children and young people. • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Creates the Human Rights Commission and empowers it to receive and conciliate complaints regarding discrimination, disability services, human rights, health services and services for children and young people, as provided for under various pieces of legislation. Establishes and empowers a number of Commissioners including the Disability and Community Services Commissioner (Div 3.4) and Human Rights Commissioner (Div 3.7) ○ –Commission can conciliate complaints, refer them to the appropriate statutory holder or refer to the ACT Civil and Administrative Tribunal (Div 4.2A). <p><i>Discrimination Act 1991 (ACT)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of the Act:</u> <ul style="list-style-type: none"> ○ Public acts of discrimination, vilification and harassment on the basis of various characteristics, occurring within the ACT • <u>Relevant provisions:</u> <ul style="list-style-type: none"> ○ Renders it unlawful to discriminate against people with disabilities (s8), particularly in relation to provision of goods and services (s20) and accommodation (s21) (with exceptions to this under s26, 53 and 54) ○ It is unlawful to sexually harass people in the provision of goods and services or accommodation (s62, s63) ○ These unlawful acts extend to those inciting or intending to do the listed acts (s73) ○ These unlawful acts are not considered offences under the Act and do not create civil offences (71, s72) . However a person may make a complaint to the Human Rights Commission and the complaint may ultimately be referred to ACAT.
NSW	<p><i>Anti-Discrimination Act 1977 (NSW)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of the Act:</u> • Public acts of discrimination, vilification and harassment on the basis of

	<p>various characteristics, occurring within NSW <u>Relevant provisions:</u></p> <ul style="list-style-type: none"> ○ Makes it unlawful to discriminate against people with disabilities - specifically in relation to goods and services (s49M) and accommodation (s49N) (Part 4A) ○ Protection of persons from these unlawful acts (s123) ○ Victimisation of complainant under the Act is unlawful (s50) ○ Establishment of the Anti-Discrimination Board and the complaint mechanisms under the Act (Part 8 and Part 9) in respect of alleged unlawful acts (of discrimination)
NT	<p><i>Anti-Discrimination Act 2011 (NT)</i></p> <ul style="list-style-type: none"> ● <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Public acts of discrimination, vilification and harassment on the basis of various characteristics, occurring within the NT. ● <u>Relevant provisions:</u> <ul style="list-style-type: none"> ○ Prohibition of discrimination on the basis of impairment (s19) ○ Prohibition of discrimination in relation to provision of accommodation (s38) ○ Prohibition of discrimination in relation to goods and services provided (s41) ○ It is an offence to victimise those intending to make a complaint under the Act in respect of alleged harassment or discrimination (s23) ○ It is an offence to fail to accommodate a special need (s24) ○ The Act provides a complaints mechanism.
Qld	<p><i>Anti-Discrimination Act 1991 (Qld)</i></p> <ul style="list-style-type: none"> ● <u>Scope/Applicability of Act:</u> ● Public acts of discrimination, vilification and harassment on the basis of various characteristics, occurring within QLD <u>Relevant provisions:</u> <ul style="list-style-type: none"> ○ Prohibition of discrimination against persons (s6), particularly on the basis of particular characteristics (including impairment, s7) ○ Prohibition of discrimination in certain areas/activities, including accommodation (Chapter 2, Part 4, Division 8) or provision of goods and services (Chapter 2, Part 4, Division 4) ○ Prohibition of sexual harassment (Part 6) ○ Prohibition of victimisation of complainants under the Act (Chapter 5, Part 4) ○ The Anti-Discrimination Commission can receive, investigate and attempt to conciliate, complaints of discrimination under the Act. Individuals may obtain a referral to the tribunal if not conciliated.
SA	<p><i>South Australia Equal Opportunity Act 1984 (SA)</i></p> <ul style="list-style-type: none"> ● <u>Scope/Applicability of Act:</u> ● Public acts of discrimination, vilification and harassment on the basis of various characteristics, occurring within QLD <u>Relevant provisions:</u> <ul style="list-style-type: none"> ○ Unlawful to discriminate on basis of intellectual impairment, in education, employment, provision of services, goods, accommodation, land etc. ○ Renders unlawful conduct regarding sexual harassment by service or accommodation providers. ○ Complaint mechanism: Complaints are directed in writing to the Equal Opportunity Commissioner and conciliation required and ultimately referral to Equal Opportunity Tribunal for hearing for legally enforceable determination

Tas	<p><i>Anti-Discrimination Act 1998 (Tas)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> • Public acts of discrimination, vilification and harassment on the basis of various characteristics, occurring within Tasmania <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Prohibition of discrimination on the basis of an attribute, including disability (s16(k)) ○ Dispute resolution mechanism, requiring attempted conciliation (Part 6)
Vic	<p><i>Charter of Human Rights and Responsibilities Act 2006 (Vic)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> <ul style="list-style-type: none"> ○ Applicable within the territory of Victoria. ○ Public officials, including those of organisations acting in a public capacity, must act and make decisions in accordance with the Charter. • <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Protection of human rights and imposing obligations of agents to enforce such rights where required (s1) ○ Part 2 stipulates particular human rights, numerous which are relevant particularly for people with disabilities, including protection from torture and cruel, inhuman and degrading treatment and equality before the law. ○ Victorian Equal Opportunity and Human Rights Commission established to monitor compliance (Part 6) <p><i>Victoria Equal Opportunity Act 1995 (VIC)</i></p> <ul style="list-style-type: none"> • <u>Scope/Applicability of Act:</u> • Public acts of discrimination, vilification and harassment on the basis of various characteristics, occurring within Victoria <u>Effect of Act:</u> <ul style="list-style-type: none"> ○ Unlawful acts: <ul style="list-style-type: none"> ▪ Unlawful to discriminate on the basis of impairment, in the provision of goods and services, accommodation, education etc ▪ Unlawful to sexually harass another person ○ Complaint mechanisms: complaints can be made to Commissioner for Equal Opportunity where conciliation is attempted before referring to the Victorian Civil and Administrative Tribunal for hearing and legally enforceable determination.

6.6 **Figure 6:** Carer-specific laws addressing violence in residential care settings

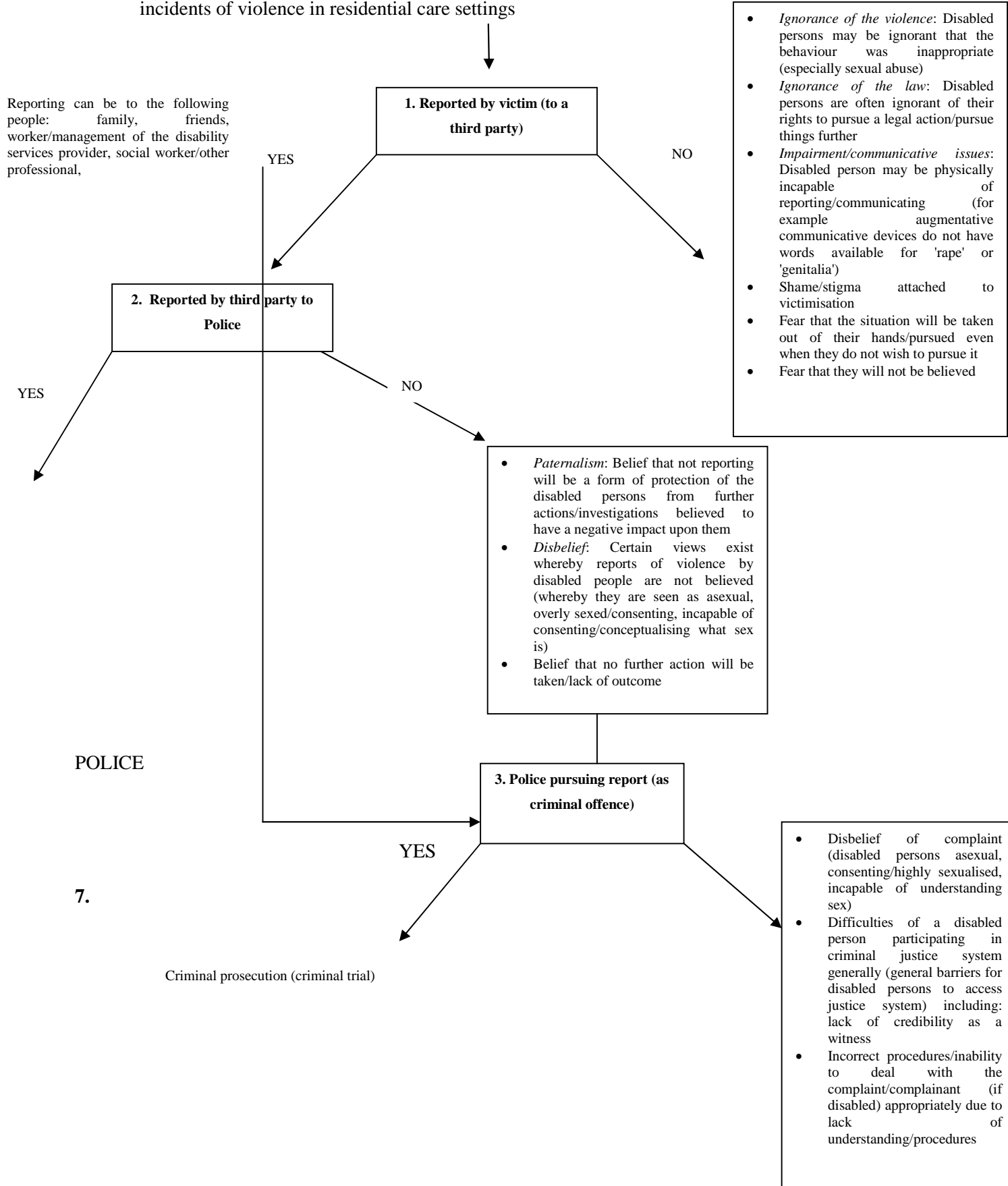
- *Carer Recognition Act 2010 (Cth)*
- *Carers (Recognition) Act 2010 (NSW)*
- *Carers Recognition Act 2009 (NT)*
- *Carers (Recognition) Act 2008 (Qld)*
- *Carers (Recognition) Act 2005 (SA)*
- *Carers Recognition Act 2012 (Vic)*
- *Carers Recognition Act 2004 (WA)*

6.7 **Figure 7:** Policies, procedures and Regulations addressing violence against people with disabilities in residential care (this is not an exhaustive list and is likely to be out of date fairly quickly)

Jurisdiction	Policies, Procedures and Guidelines
Federal	<ul style="list-style-type: none"> • Community Care Common Standards • Draft National Standards for Disability Services
ACT	<ul style="list-style-type: none"> • Policy Management Framework • ACT Disability Policy Framework • ACT Carers' Charter • Disability ACT - Duty of Care • Disability ACT - Response to Death of a Client
NSW	<ul style="list-style-type: none"> • Boarding House Complaints and Guidelines and Procedures (Residential Centre for Handicapped Persons) • Licensed Boarding Houses Fact Sheet (Ombudsman) • Abuse and Neglect Policy and Procedure • Behaviour Support Policy and Manual • Incident Management Policy • Disability Service Standards • Integrated Monitoring Framework • Working Safely in Community Services (2006) • NSW Police Force Code of Practice • Working Safely in Health Services • Preventing and Responding to Bullying at Work 2002 • Exploring and implementing person centred approaches • Licensed Residential Centres Licensing and Monitoring Policy Manual Part A: Requirements and conditions of the pre-qualification scheme Part B: Conditions for lodgment of applications Part C: Application Form Part D: Service specification Part E: Glossary of terms Prequalified Panel for Accommodation Support Services
NT	<ul style="list-style-type: none"> • Disability Service Standards Implementation Guide • Disability Service Standards
Qld	<ul style="list-style-type: none"> • A Guide to Disability Services Act Guide • Disability Services Regulation • Service Agreement Version 2.1 - Standard Terms of Funding • Disability Service Standards • Disability Services Funding Guidelines • Human Services Quality Framework • Queensland Manual Community Care Services • Making a Complaint: Queensland Community Care Program
SA	<ul style="list-style-type: none"> • Managing Risks of Violence at Work in Home and Community Based Care (Workcover SA) • Zero tolerance: Response to Violence in NSW Health Workplace • Do with Not For - Statement of Intent • Safeguarding People with Disability: Overarching Policy, Management of Care Concerns, Restrictive Practices
Tas	<ul style="list-style-type: none"> • Abuse Policy and Guideline • Aversive, Restrictive and Intrusive Practices in Services for People with a Disability Policy and Guidelines • Compliments and Complaints Procedure

	<ul style="list-style-type: none"> • Personal Relationships and Sexuality - Guidelines 2006 (DS 030) • Personal Relationships and Sexuality Policy (DS031) - Currently Under Review • Restrictive Interventions Guidelines (P2012/1077-005)
Vic	<ul style="list-style-type: none"> • Guide for Disability Service Providers • Making a suggestion or complaint about DSP (Client Services Charter) • Other restrictive Practice guide - Senior Practitioner • Disability Policy and Information Manual • Restrictive interventions implementation guide • Residential Treatment Facilities implementation guide • One DHS Standards • Strengthening Rights in Residential Services Policy • Registration of Disability Service Providers • Disability Carers Action Plan: Recognition and Supporting Carer Relationships • Community Visitors Protocol • Incident Reporting Instructions (2008) • Policy Responding to Physical and Sexual Assault (2005) • Monitoring Framework for Health, Housing and Community Sector (October 2005) • Code of Conduct for Victorian Public Sector (2007) • Complaints Handling Principles (06) • Risk Management Framework (04) • Disability Service Commission's Good Practice Guide and Self-Audit Tool (2009) • Practitioners' Guide to the Disability Act 2006 • Promoting Better Outcomes: Managing and Review Adverse Events • Personal Relationships and Sexual Health Policy • DHS Duty of Care Policy • Strengthening Rights in Residential Services Policy • Residential Services Practice Manual 12 (3rd Edition) • Code of Practice for the Prevention and Management of Occupational Violence in Disability • Victims' Disability Strategy
WA	<ul style="list-style-type: none"> • Consumer Complaints Management Policy and Procedure • Serious Incident Reporting Guidelines • Police Disability Access and Inclusion Plan 2007-2012

6.8 **Figure 8:** Flow-chart depiction of barriers that people with disabilities face when disclosing incidents of violence in residential care settings



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