

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

Submission: April 2016

Attention: Royal Commission into Institutional Responses to Child Sexual Abuse

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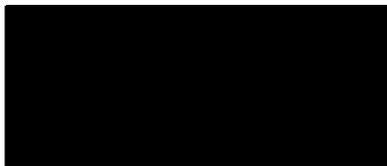
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1. About the Disability Services Commissioner

The Victorian Disability Services Commissioner (VDSC) commenced on 1 July 2007 under the *Disability Act 2006* (Victorian Disability Act) to improve services for people with a disability in Victoria.

This independent statutory office works with people with a disability and disability service providers in Victoria to resolve complaints.

Our complaints resolution process is free, confidential and supportive. We encourage and assist the resolution of complaints in a variety of ways including informal approaches to resolution, assessment conferences, conciliation processes and under certain circumstances through investigations.

We research ways to improve outcomes for people with a disability and improve disability services' complaints systems. We also provide capacity development activities for people with a disability, their families and disability services through a variety of education and information dissemination. Our approach to our work reflects the objectives of the Victorian *Disability Act 2006* and our values and principles that are aligned to the *United Nations Convention on the Rights of Persons with Disabilities*.

Since the establishment of this office we are able to provide comments and proposals based on the evidence and knowledge we have gained in responding to over **5,500 matters to date**. Victorian disability service providers also readily contribute to our growing body of knowledge by reporting each year on the number and types of complaints they received and how they were resolved (as provided for by the Victorian Disability Act). Almost **12,500 complaints reported by service providers** provide information to identify systemic issues and inform the ongoing development of the disability service system.



2. General comments regarding best practice principles

We welcome the opportunity to contribute to the Royal Commission into Institutional Responses to Child Sexual Abuse, and share a particular focus on children and young adults with a disability.

VDSC recognises that children and young people in institutional settings have an increased vulnerability and are therefore entitled to and require special protections due to their age and capacity.

In Victoria, children with a disability in out of home care represent approximately 4 per cent of all children in out of home care; however this increases significantly to 24 per cent of children in a residential setting.¹ While a significant proportion of these children would meet the threshold for access to disability services, many do not. Due to the structure of programs in Victoria, many of these children do not have access to independent complaint mechanisms related to the support they receive.

In consideration of the complaints framework for disability in Victoria, it is important to recognise that there are two systems that exist, 1) complaints mechanisms and 2) critical incident reporting. These systems need to work together in order to provide a holistic response to complaints of abuse that focuses on future prevention.

We acknowledge that the framework captures reporting and incidents within the definition of complaints, however there should be a strong focus on these two systems working together and therefore where a complaint/incident is raised this should automatically trigger a 'complaint response'. This is particularly important where the alleged assault is reported by a child, family or community member, aligning with the Australian standard definition of complaint:

Expression of dissatisfaction made to or about an organisation, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.

(Australian Standard 2014 AS/NZS 10002:2014)

The VDSC has tertiary oversight of critical incident reporting of alleged staff-to-client physical or sexual assaults. From 2012 to 2015 a large proportion were reported by either the person subject to the alleged assault, a family member or other member of the public. Where an allegation is reported as an incident-only, it is common for the organisational response to outweigh the support response provided to the person. The lens used for complaints handling takes a stronger focus on identifying and resolving issues for the longer term.

The benefits of recording such reports as both incidents and complaints are twofold:

- It helps to ensure a focus on the person's experience, concerns and outcomes sought.
- It provides a more accurate reflection of the complaints actually received by the sector.

¹ Source: Victorian Auditor-General's Report (2014) *Residential care services for children*; and Victorian Department of Health and Human Services Audit. Data at June 2013.

Comment on the best practice principles

The first principle needs to recognise that family members, and not the institution may still have decision making rights. However, the concept of instilling a culture that sets a zero tolerance standard for inappropriate behaviour is critical.

The second principle regarding a child focused complaints policy (#2), should specify 'disability', as our experience is that this tends to be a supplementary focus for children in out of home care.

The reference to communication and support needs appears to be heavily linked to CALD backgrounds, this sits better in the process principle (#3).

The child focused policy should be more focused on ensuring the child's engagement, family engagement and responses to the child, regardless if the matter is preceded through other legal processes or not.

3. Our experience of complaints and critical incident oversight relevant to this submission

The following provides commentary on the implementation of the best practice principles outlined in the consultation paper from our experience in handling enquiries and complaints and through our oversight of alleged reports of staff-to-client incidents or unexplained injuries. Section 5 of this report provides context as to our role in complaints and critical incidents.

#4.1 Creating a culture that encourages reports

A critical sign of culture is an overall response and encouragement of all people to speak up and raise issues, not just related to issues of abuse. This must be supported by Boards of management and evidenced throughout the organisation in regards to capturing feedback and complaints. Education needs to be provided that an increase of complaints is more likely to be related to a positive complaints culture and people becoming more confident in raising and recording issues of dissatisfaction, rather than an increase in dissatisfaction itself.

Promotion of information on complaint pathways should be both provided and also visible in the organisation and be discussed at all review points with the child and/or adults. The content should be appropriately pitched. See Attachment One: Everything you wanted to know about complaints.

An important aspect of the development of a positive complaints culture is that the organisation recognises the importance of family and significant others in the child's life (both as a safeguard and source of support) and works to establish an open and constructive working relationship with those people. VDSC addresses this in the second of our Occasional Papers, *Families and service providers working together* (<http://www.odsc.vic.gov.au/occasional-papers>). See Attachment Two.

Staff protection which aligns with the organisation's legal obligations should also be ensured when staff disclose witnessing or suspicion of inappropriate behaviour.

#4.2 Institutional structure and senior management

VDSC agrees that chief executive officers, complaints managers and any relevant boards and councils have a responsibility and oversight of responses to complaints of any description. In accordance with the Australian Standard 2014 AS/NZS 10002:2014 we are also of the view that responding to complaints is the responsibility of all staff within an organisation. As such, it is important that all staff are supported to understand the value and importance of complaints and are trained in how to respond effectively to and refer on a complaint when it is raised.

The VDSC's [Good practice guide and self audit tool: Developing an effective person centred complaints resolution and culture](#) outlines considerations when developing an organisational policy and practice. See Attachment Three.

This section should explicitly include data provided at board meetings, and management systems.

#4.3 Listening to children when they disclose

All children deserve the best care and support for their safety and development, including support to express their needs and any concerns. A child with disability requires specialist planning and support to ensure that safety is not further compromised by the impact of their disability. Where the child has cognitive or communication limitations additional effort should be made to ensure that appropriate communication devices are used, that information is provided in accessible forms and that those supporting the child are aware of behaviours and signs that

the child is dissatisfied or distressed and what strategies can be used to support the child in those instances.

#4.4 The kinds of behaviour that should be reported

VDSC supports the need for consistent definitions of abuse. All abuse should be reported. This includes the use of force, seclusion or other forms of restrictive practice. It is also important that support workers are trained to recognise the signs of grooming and that they are confident to speak up about their concerns.

#4.5 What to do if the police are investigating

VDSC have developed practice guidance for services to plan and implement the investigation process in response to allegations of staff to client assault <http://www.odsc.vic.gov.au/Investigations-guidance-for-service-providers>>. See Attachment Four.

This includes liaising with police with regards to ensuring that any investigation conducted by the organisation does not interfere with or impact on an investigation being conducted by the police..<

There are also grounds to continue or resume a complaints resolution process following criminal investigation by police. This includes the requirement for service providers to ensure person centred practice as well as the follow up of staff conduct and that complaints are used to identify improvements in organisational processes and systems beyond the individual incident.

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

Often Police are unable to obtain sufficient evidence to pursue criminal matters. Regardless of whether there is a criminal prosecution it is essential that other mechanisms exist to inquire into whether an appropriate service response has been provided to the child and that the safety and welfare of that child and other children is secured. The inquiry into any complaint should focus on whether the needs of the child have been considered, while the police investigation focuses on criminal matters. A complaints mechanism allows people to take their issues directly to the service provider, or directly to an independent body. In Victoria complaints can be made to the Disability Commissioner about disability services. However in Victoria approximately half of the children with disability in out of home care in 2014 were not in receipt of funded disability services (instead receiving support from mainstream services) which excludes them from being able to make a complaint to VDSC.

#4.7 Types of complaints

Anonymous and confidential complaints

Some of the most serious complaints that are investigated by our office have been received confidentially or anonymously from staff and others. One of the reasons that this occurs is because staff may not have the confidence that their feedback will be well received and that it might impact on their working arrangements. People with a disability and their families/carers may fear retribution through withdrawal of services or that they (or their child/adult) might be treated differently to others as a consequence of the complaint.

The policy should be clear that anonymous and confidential complaints can be made by the person, or a family member/carer/guardian, or any member of the public on their behalf.

In her recent report about the abuse in the disability sector, the Victorian Ombudsman has recommended strengthening the legislation for protection of employees who disclose matters of abuse. VDSC supports this recommendation with the extension of the powers for people with a disability and others who make complaints on their behalf.

There is an existing protection currently present in the Victorian Disability Act which states that a person cannot threaten, intimidate, persuade or even attempt to persuade another person not to

make a complaint to VDSC, or to cease dealing with VDSC (s126 (a)). Furthermore, this section provides that it is an offence for a person to refuse to employ, to dismiss or subject another person to any detriment because they intend to make a complaint to VDSC or take part in discussions with DSC on any matters (s126 (b)).

The NSW Ombudsman Act (s25(x)) provides for circumstances where individuals are disclosing information for the purpose of making a complaint, where otherwise disclosure would be a breach of other legislative obligations. Specifically, protection afforded where disclosure of information relates to the making of a complaint the Act prescribes that there is no liability for defamation or other civil liability is incurred because of the disclosure.

Unsubstantiated and false complaints

VDSC suggest that '**unsubstantiated and false complaints**' are two very different situations and should be treated separately. This is particularly important for a child with a disability who may not be able to provide the necessary information for a clear allegation. The child may be expressing past experiences or making a complaint as an expression of their needs. In these instances the matter should still be taken seriously, the person supported and the situation monitored. VDSC's practice guidance provides definitions of substantiation with respect to allegations of staff to client assault in disability services. We also note the difficulty in substantiating allegations where a person with a disability has a cognitive impairment or limited communication.

#4.8 Provision of support

Refer to VDSC [practice guidance](#) sections referring to responding to an incident and support for the person.

#4.9 Communicating with other children, parents, guardians and others

Refer to VDSC [practice guidance](#) responding to an incident and support for the person.

The communication policy should identify communication at the different stages of the complaint and/or investigation process. Communication should be provided in accessible forms, including easy English.

#4.10 The investigation

VDSC have developed practice guidance for services to plan and implement the investigation of allegations of staff to client assault in disability services in a manner that equally responds to the person's needs as well as the organisational response.

<<http://www.odsc.vic.gov.au/Investigations-guidance-for-service-providers>>.

A section that we see fit for inclusion is Planning the investigation.

#4.11 Procedural fairness

#4.12 After the investigation has been completed

Refer to *Section 6 Decision making - responding to the investigation* in our practice guidance

<<http://www.odsc.vic.gov.au/Investigations-guidance-for-service-providers>>.

#4.13 Documentation and access to records

The policy should indicate the recording of information by staff that is factual.

#4.14 Managing the media

#4.15 Induction and training for staff and volunteers

Training provided should align with the cultural changes required around complaints, and adopt a whole of office approach. This should include general complaints policy, avenues for raising issues and protection for staff. Refresher training should be built into the policy and training should be pitched at all levels in the organisation.

The voice of children and adults with a disability will be better heard when services employ a positive attitude to people making complaints and recognise the value of learning through complaints. A critical component of cultural change is the ability, through reflective practice, to identify and redress issues that have arisen from service delivery that does not align with human rights and relevant standards or principles of the *Disability Act 2006*.

4. Additional submission topics

Independent oversight mechanisms

For the consideration of the Royal Commission are the public integrity issues that are linked to the community expectations and confidence. In the context of a National Disability Insurance Scheme the VDSC has strongly advocated for an independent oversight body with the discrete focus of people with disability for issues of complaints, critical incidents and restrictive intervention (refer to our [submission](#) to the Commonwealth Department of Social Services).

For these functions, autonomy from government is necessary due to the highly sensitive nature of information held, and perceived interference government could play in managing conflicts with service providers and staff. For example, until recently the Aged Care Complaints Scheme did not display sufficient independence as it reported to the Secretary of the Department of Social Services (Commonwealth). The scheme transferred responsibility to an independent Aged Care Complaints Commissioner on 1 January 2016.

While the recent COAG Disability Reform Council communique identifies in-principle agreement to the above features of a national quality and safeguards system, an outstanding issue remains the workforce screening. At a state level, VDSC see that the most exemplar example of reportable conduct schemes in the disability context, is held by the NSW ombudsman, Deputy Ombudsman & Community and Disability Services Commissioner. The most compelling aspect of a proposed scheme is the ability to make determinations on employment barring based on reasonable proof as opposed to criminal proceedings. This is important due to the characteristics of the people who are victims of abuse, children and particularly so for children with disability, often being unable to provide the perceived standard of 'evidence' for criminal conviction.

Access to advice and support when responding to complaints

The findings from our complaint investigations to date are further confirmation of the issues identified and reported by VDSC from our oversight of critical incidents related to allegations of staff to client assaults and unexplained injury.

Many investigations conducted by service providers are inadequate and fail to take into account the immediate needs of the person with a disability, the requirement to report allegations to police, consideration of others who might have had contact with a potential perpetrator in the past and follow up of training and supervision of relevant staff members. VDSC outlined these concerns in 2012 in its first Occasional Paper, *Learning from Complaints – Safeguarding People's Right to be Free from Abuse* (Attachment Five), and went on to publish a guidance paper for service providers to improve their response and investigation of matters titled *Investigations – Guidance for Service Providers* (Attachment Four and available on the [DSC website](#)).

While VDSC have developed practice advice for the sector, it is apparent that the skills required for formal investigations largely do not exist within many disability service organisations. This would be particularly so for smaller organisations. VDSCs preference would be for organisations to access quality investigative responses via the oversight agency, or in conjunction with the oversight agency who can support and build the capacity of the organisation. It might be the that the oversight body also recognises or establishes a pool of external organisations with the requisite competency to conduct investigations. Consideration could be given to the oversight body establishing standards for the sector with help-desk support for investigations. A further option would be for the oversight body to determine the internal competency of organisations that can conduct investigations internally. VDSC experience is that thorough investigations are time and resource intensive. All these options would require sufficient resourcing to ensure adequate and timely responses to issues.

Powers for compelling outcomes

When a VDSC investigation is concluding, the Commissioner may require, 'Actions to remedy the complaint' within the timeframes stipulated by the Victorian Disability Act 2006 (s119). Actions to remedy only apply to investigations conducted under s118.

This legislative power is intended to result in improvements in service delivery to persons with disability, service practice and, in some cases, systemic process. In the investigations to date, we have seen positive changes made as a result of the service provider completing specific actions to remedy. The Commissioner is able to request information to demonstrate that the actions to remedy the complaint have been completed any number of times until satisfied that appropriate action has been taken to remedy the complaint. The legislative intent of this power was not to punish a provider – rather to bring about improvements in service delivery for people in receipt of disability services. As stated above, conduct that requires sanctioning is referred to an entity with relevant powers (i.e. Police or regulatory bodies such as Australian Health Practitioners Regulation Agency).

The legislation permits VDSC to name a provider if they fail to meet actions to remedy in very limited circumstances. All matters are otherwise prevented from publication due to the secrecy provision contained in s128 of the Act and other privacy laws.

Aligning oversight mechanisms

The Victorian government has commenced design of a reportable conduct scheme for children. How this and other schemes might align under a national model needs to be considered.

If a discrete entity was established for one component of the human services i.e. children, clear information sharing provisions and operational working agreements should exist across the most vulnerable groups in human service delivery i.e. disability, mental health, aged persons. Further, legislation should enable delegation of functions to other entities to ensure efficiency, responsiveness and appropriate expertise.

5. Additional Information: Our role in complaints and critical incidents

For the purpose of clarity, we take this opportunity to describe two functions undertaken by the Disability Service Commissioner.

Complaints:

The Victorian Disability Services Commissioner (VDSC) was established in 2007 primarily as a complaints handling body, with a focus to support a changed culture recognising the rights of people with a disability and improve the provision of disability services in Victoria.

The intention is for the office holder to discharge their powers by informal means. This is the foundation for our approach to build the sector's capacity through influencing attitudinal and practice change rather than just achieving compliance.

Over 95 per cent of issues raised with our office are related to issues other than assault or abuse (over 85 per cent other than assault, abuse or neglect). Most complaints relate to issues of service quality including insufficient service/care, inadequate or insufficient communication, or staff behaviours and attitudes. Almost half of the enquiries and complaints raised pertain to group homes.

Critical Incidents:

The Commissioner's Inquiry in 2011 into the Quality of Support Review processes that follows allegations incident of staff-to-client assaults in Department operated services, recommended 21 improvements to the process. This included a recommendation for independent oversight of these incident reports.

In response the then Minister for Disability Services and Reform requested VDSC to conduct independent review of incident reports relating to allegations of staff-to-client assault and unexplained injuries (commenced June 2012). Our role assumed through this referral by the Minister is to provide advice to the Minister, Department Health & Human Services and service providers on individual incidents, themes and issues identified from our reviews.

- In 2012-13 we reviewed 281 incident reports
- In 2013-14 we reviewed 309 incident reports
- In 2014-15 we reviewed 332 incident reports

VDSC believes there is significant opportunity to ensure that regulation and safeguards take a person-centered approach (also highlighted in Women with Disability Victoria evidence on 19 October 2015). This is the model VDSC adopts in its oversight of critical incident reports.

For the last three years we note the following recurring issues; namely that greater attention must be given to the person as is given to the organizational process.

- A lack of focus on people's outcomes and safeguarding people's rights during investigations.
- The need for the disability sector to have more proactive engagement with Victoria Police
- A lack of clarity and shared understanding of the definitions of assault and abuse

To fill a void of information in Victoria, VDSC developed practice guidance for the sector to support the rigor of the approach adopted by disability service providers responding to incidents that give adequate attention to the wellbeing of people who receive services. We are currently

supporting work by the NSW Deputy Ombudsman & Community and Disability Services Commissioner to develop a ready-reckoner approach for direct support staff in NSW.

It is important to reiterate:

- oversight of staff-to-client alleged assault or unexplained injuries is conducted by our office through Ministerial referral
- we have no legislative power to conduct assessment or investigation into critical incidents.

Currently only NSW has independent oversight through a legislative mandate and associated powers. It is our view that Victoria or any national model should have sufficient legislated powers to ensure appropriate responses to oversight of (reportable) critical incidents, and that this function sits suitably with complaints handling.

Attachments

Attachment One: Everything you wanted to know about complaints... Disability Services Commissioner, 2013.

Attachment Two: Learning from Complaints, Occasional Paper 2, Families and Service Providers working together: Developing policy principles and strategies to support families of adults with a disability and disability service providers to work more effectively together. Disability Services Commissioner, 2014

Attachment Three: Good practice guide and self-audit tool: Developing an effective person-centred complaints management culture and process. Second Edition. Disability Services Commissioner, 2013.

Attachment Four: Investigations: Guidance for Good Practice: Investigations of incidents of alleged staff to client assault and unexplained injuries. Disability Services Commissioner, 2014.

Attachment Five: Learning from Complaints, Occasional Paper 1, Safeguarding people's rights to be free from abuse: Key considerations for preventing and responding to alleged staff to client abuse in disability services. Disability Services Commissioner, 2012