



people with disability

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NGO in Special Consultative Status with the  
Economic and Social Council of the United Nations

11 September 2017

Dear Justice Strategy and Policy team,

**Re: NSW Government consultation in relation to the civil litigation  
recommendations of the Royal Commission into Institutional Responses to  
Child Sexual Abuse**

**People with Disability Australia (PWDA)** welcomes the opportunity to respond to the NSW Department of Justice Consultation Paper regarding the civil litigation recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse (the Royal Commission). PWDA commends the NSW Government for continuing to address the Royal Commission's recommendations, after introducing the *Limitation Amendment (Child Abuse) Act 2016* last year. We appreciate the opportunity to contribute to further reforms by providing context around how these issues affect people with disability.

About PWDA

PWDA is a leading disability rights, advocacy and representative organisation of and for all people with disability. We are the only national, cross-disability organisation - we represent the interests of people with all kinds of disability. We are a non-profit, non-government organisation.

PWDA's primary membership is made up of people with disability and organisations primarily constituted by people with disability. PWDA also has a large associate membership of other individuals and organisations committed to the disability rights movement.

We have a vision of a socially just, accessible, and inclusive community, in which the human rights, citizenship, contribution, potential and diversity of all people with disability are recognised, respected and celebrated. PWDA was founded in 1981, the International Year of Disabled Persons, to provide people with disability with a voice of our own.

PWDA is also a founding member of Disabled People's Organisations Australia ([DPO Australia](#)) along with Women With Disabilities Australia, First Peoples Disability Network Australia, and National Ethnic Disability Alliance. DPO's are organisations that are led by, and constituted of, people with disability.

The key purpose of DPO Australia is to promote, protect and advance the human rights and freedoms of people with disability In Australia by working collaboratively on areas of shared interests, purposes, strategic priorities and opportunities. DPO Australia is made up of four national peak DPOs that have been funded by the Australian Government to represent the views of people with disability and provide advice to Government/s and other stakeholders.

### Disability Support for the Royal Commission

PWDA has been funded by the Department of Social Services (DSS) to provide support to people with disability who may be impacted by the Royal Commission. Since 2014, we have been providing individual advocacy to people with disability regarding the Royal Commission, including providing information, advice, and support for those considering engaging with the Royal Commission, in addition to providing support for people to tell their story to the Royal Commission.

PWDA has also been delivering a suite of training packages nationwide, to people with disability, disability service providers and mainstream services. These training packages are designed to increase awareness of the sexual and human rights of people with disability, improve institutional responses to sexual abuse of people with disability and improve the capacity of mainstream services to support people with disability.

As part of our Disability Support for the Royal Commission project, we have also been providing the Royal Commission with disability specific violence prevention policy advice. The following information builds on this project specifically, as well as PWDA's long history of advocacy to raise awareness of and reform structural practices which lead to violence, abuse and/or exploitation of people with disability.<sup>1</sup> Although PWDA's work is predominantly non-legal, we nonetheless believe the insights offered below will be useful for the Department of Justice to consider in relation to the Royal Commission's civil litigation recommendations.

### Prevalence of violence against children and adults with disability

Despite there currently being no comprehensive, national mechanism to capture data on the prevalence, causes and impacts of violence against people with disability, available data does show that children and adults with disability experience violence at much higher rates than people without disability.<sup>2</sup> This is true for both

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<sup>1</sup> For more information, seminal PWDA submissions, reports and position statements, such as 'Rights Denied' and 'Everyone Everywhere' are available on PWDA's website: [www.pwd.org.au](http://www.pwd.org.au)

<sup>2</sup> Frohmader, C., & Sands, T. 2015. *Australian Cross Disability Alliance (ACDA) Submission to the Senate Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings*. Australian Cross Disability Alliance (ACDA); Sydney, Australia. p35. Available: [http://pwd.org.au/documents/Submissions/ACDA\\_Sub\\_Sen\\_Inquiry\\_Violence\\_Institutions.pdf](http://pwd.org.au/documents/Submissions/ACDA_Sub_Sen_Inquiry_Violence_Institutions.pdf)

sexual and non-sexual violence. For instance, children with disability are reported to be 3.4 times more likely than children without disability to experience some form of violence.<sup>3</sup> In addition, children with disability are 2.88 times more likely to experience sexual abuse than their peers without disability.<sup>4</sup>

There are many factors that contribute to the increased risk of violence, including sexual violence, experienced by children with disability. These include, for instance, that people with disability are often exposed to a range of institutions, as children, young people and adults, to which people without disability are not.<sup>5</sup> These facilities include residential institutions, respite care services, special schools, disability services and disability justice facilities. In addition, children with disability are disproportionately represented in out-of-home care settings.<sup>6</sup>

Children, young people and adults with disability who live in institutional and/or residential settings are more vulnerable to all forms of violence, including sexual violence.<sup>7</sup> Such violence is often perpetrated by multiple offenders, and can occur over extended periods of time.

Consequently, justice responses to violence against these individuals not only recognise the increased rates of violence against people with disability in institutional settings, but must also acknowledge the multiple barriers to reporting they experience.

### People with disability and access to justice

In addition to experiencing an increased risk of violence, children and adults with disability also face barriers to participating in the justice system.<sup>8</sup> Indeed, the continued provision of disability services to people with disability in segregated, closed settings, such as those listed above, can severely limit the access children and adults with disability have to supportive and trustworthy reporting avenues and mechanisms.

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<sup>3</sup> Robinson, S. 2011. *Enabling and protecting: Proactive approaches to addressing the abuse and neglect of children and young people with disability*, Children with Disability Australia, p. 9.

<sup>4</sup> Llewellyn, G., Wayland, S., Hindmarsh, G. 2016. *Disability and Child Sexual Abuse in Institutional Contexts*, Royal Commission into Institutional Responses to Child Sexual Abuse, Sydney.

<sup>5</sup> PWDA, 2013. *Royal Commission into Institutional Responses to Child Sexual Abuse: Submission Issues Paper 3, Child Safe Institutions*, p6. Available: <http://www.childabuseroyalcommission.gov.au/getattachment/a4579ac4-6e23-4c60-a7c7-eceab841158e/42-People-with-Disability-Australia-Incorporated>

<sup>6</sup> For more information, see PWDA, 2016a. *Submission to Consultation Paper: Institutional Responses to Child Sexual Abuse In Out of Home Care*, People with Disability Australia. Available:

<http://www.childabuseroyalcommission.gov.au/getattachment/02170c97-5bc7-4b34-8252-cb0fe822186f/40-People-With-Disability-Australia>

<sup>7</sup> Frohmader and Sands 2015, op cit., p35. See also: Attard, M., & Price-Kelly, S. 2010. *Accommodating Violence: The experience of domestic violence of people with disability living in licensed boarding houses*, PWDA, NSW.

<sup>8</sup> For further discussion of the barriers to justice, see: *Disability Rights Now: Civil Society Report to the United Nations Committee on the Rights of Persons with Disabilities*, August 2012, p82. Available:

<http://www.afdo.org.au/media/1210/crpd-civilsocietyreport2012-1.pdf>; French, P. 2007. *Disabled Justice: The barriers to justice for persons with disability in Queensland*, Queensland Advocacy Incorporated; and Victorian Equal Opportunity and Human Rights Commission, 2014. *Beyond Doubt: the experiences of people with disabilities reporting crime*, Available: <http://www.humanrightscommission.vic.gov.au/index.php/our-resources-and-publications/reports/item/894-beyond-doubt-the-experiences-of-people-with-disabilities-reporting-crime>

Responses to people who have experienced child sexual abuse in institutional settings must therefore be cognisant of these barriers to justice. This includes barriers to all forms of criminal and civil justice. While some barriers to justice can be similar to those experienced by other victim/survivors, particularly those who have experienced trauma, many barriers are specific to children and adults with disability.<sup>9</sup>

For instance, the justice system, including the police, court systems and court personnel, are often influenced by discriminatory stereotypes, myths and attitudes about disability,<sup>10</sup> and also about sexual assault and broader types of violence.<sup>11</sup> A tendency to blame victims, or detoxify violence against people with disability, for instance, feeds into the reluctance of people with disability to access criminal justice system responses to their experiences.<sup>12</sup> For instance, enduring ableist community attitudes, including the notion of 'carer sacrifice', and media representations of disability<sup>13</sup> can influence the willingness of police or services to acknowledge (and therefore pursue) violence being perpetrated by carers and/or disability service workers.<sup>14</sup>

In light of the above, this consultation and its proposed changes are so important for removing some of the legal barriers from the NSW civil litigation system for people who have experienced child abuse in institutional settings. Indeed, as people with disability are less likely to access criminal justice responses, due to the overwhelming number of barriers they experience, accessible civil responses (including accessible and appropriate redress) are all the more important.

While PWDA cannot speak to some of the specific questions laid out in the consultation paper, we offer our thoughts on the following three categories as presented in the paper: the liability of institutions, ensuring there is someone to sue, and the requirement to have insurance. We approach these issues while keeping with the goals of civil liability in mind, that is, to appropriately compensate those who have experienced abuse, while also deterring behaviour that could lead to future perpetrations of such crimes.

### A consistent definition of child abuse

PWDA concurs with the concerns raised on page 13 of the consultation paper that distinctions between different types of child abuse could complicate and draw out civil litigation processes. Despite this, we do not believe that the definition currently

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<sup>9</sup> PWDA, 2016b. *Submission to Consultation Paper: Criminal Justice*, People with Disability Australia. Available: [http://www.childabuseroyalcommission.gov.au/getattachment/e7f22c43-46d2-4dbf-8e32-6fd70792549a/People-with-Disability-Australia-\(PWDA\)](http://www.childabuseroyalcommission.gov.au/getattachment/e7f22c43-46d2-4dbf-8e32-6fd70792549a/People-with-Disability-Australia-(PWDA))

<sup>10</sup> French, P. 2007, op cit. p30.; see also Australian Human Rights Commission, 2014. *Equal Before the Law: Towards Disability Justice Strategies*, Available: [https://www.humanrights.gov.au/sites/default/files/document/publication/2014\\_Equal\\_Before\\_the\\_Law.pdf](https://www.humanrights.gov.au/sites/default/files/document/publication/2014_Equal_Before_the_Law.pdf)

<sup>11</sup> Wakefield, S. and Taylor, A. 2015. *Judicial education for domestic and family violence: State of knowledge paper*, Australia's National Research Organisation for Women's Safety, p20. Available: <http://media.aomx.com/anrows.org.au/s3fs-public/QCDFVR%20Revised%20edition%20150908.pdf>

<sup>12</sup> For more information, see: Victorian Equal Opportunity and Human Rights Commission, 2014, op cit.

<sup>13</sup> Sherry, Mark. 2000. *Hate Crimes Against People with Disabilities*, Women With Disabilities Australia.

Available: <http://wwda.org.au/issues/viol/viol1995/hate/>; Guest, Annie. 2010. 'Disabled Australians subjected to hate crimes', *ABC News*. Available: <http://www.abc.net.au/news/2010-08-07/disabled-australians-subjected-to-hate-crimes/935662?pfmredir=sm>; Young, Stella. 2013. 'Disability is no justification for murder', *The Drum*, 3 September 2013. Available: <http://www.abc.net.au/news/2013-09-03/young-kyla-puhle-death/4930742> .

<sup>14</sup> Frohmader, C., & Sands, T. 2015, op cit. p19.

used in the *Limitation Amendment (Child Abuse) Act 2016* (NSW) should be adopted for these new civil liability reforms.

Instead, we believe that the definition of child abuse should be broad enough to encapsulate the wide range of conduct to which this term applies. PWDA recommends that this include:

- Sexual abuse
- Physical abuse
- Psychological abuse
- Any other abuse (connected abuse) perpetrated in connection with the sexual, physical or psychological abuse of the child.

The key point of difference is our rejection of the threshold of 'serious' physical abuse used in the abovementioned Act. The term 'physical abuse' should instead be used, and again, should be applied to a broad range of conduct to ensure the definition encapsulates the various types of physical abuse to which children with disability may be subject, which can include seclusion and restraint.

In addition, we recommend the explicit inclusion of psychological abuse. As the consultation paper outlines on page 13, physical and psychological abuse may occur in combination with child sexual abuse. While we understand that the existing definition includes psychological abuse as a type of 'connected abuse', it is nonetheless important that this type of violence is also included as a standalone offence.

Children with disability in institutional settings may experience psychological abuse in very targeted and specific ways, for instance, harassment or degradation based on their disability or having their disability or support needs trivialised or denied. This type of abuse can also include threatening physical harm, threatening to withdraw care and/or support if they speak up about violence they have witnessed, or threatening to restrict their access or entitlements within the facility.

#### Issue A: The liability of institutions

PWDA is pleased to see that the proposed new non-delegable duty of care would be imposed on some institutional settings in which children with disability are disproportionately represented, including residential facilities for children (including residential out of home care and juvenile detention centres), boarding schools, disability services for children and health services for children.

PWDA recommend that the non-delegable duty of care also be extended to disability services and mainstream health services that are not specific to young people and children, but which may also be responsible for the 'care, supervision or control'<sup>15</sup> of adults. A child with disability may receive services from a disability service that is not child specific, however the duty of care for this service towards that child should be the same. PWDA would like to see the non-delegable duty of care be extended to all mainstream services that may provide care, support or services to children with disability.

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<sup>15</sup> Consultation paper p16.

In relation to the proposed reverse onus of proof reforms, PWDA agrees that institutions should be required to prove that they took 'reasonable steps' to prevent abuse from occurring (in order to avoid liability). This would ease some of the burden that is currently placed upon people who have experienced institutional child abuse to provide evidence and proof of their own abuse. We agree that what is 'reasonable' will depend on various factors of the institution, including its size, the nature of its work, and so on, however we recommend guidelines be developed to provide organisations with consideration around what is considered 'reasonable'. A risk-assessment approach informed by these guidelines would take into consideration the additional risks experienced by certain cohorts, ensuring institutions are aware of the increased risks of violence experienced by children with disability in out of home care, for instance, or the risks experienced by Aboriginal children in juvenile justice facilities. By providing institutions with this information, they would be alerted to the fact that a higher threshold of 'reasonable steps' might need to be taken when considering the safety of some groups of children.

As far as PWDA understands, the liability of the institution towards non-delegable duty of care and the proposed reverse onus of proof reforms will be extended to people to which the institution delegates duty of care, as well as more broadly to persons associated with the institution (which would automatically capture those in the first category). We support this extension of institutional liability to include the range of people covered by these categories.

By extending the institutional liability to such a wide range of people in a variety of (paid and unpaid) positions, it is therefore of the utmost importance that institutions make every effort to protect children in their care from all forms of violence by implementing clear, inclusive and robust preventative mechanisms. Indeed, if institutions have appropriate quality and safeguarding measures in place to prevent all forms of child abuse, they should not really be in a position to fear allegations of abuse nor litigation.

All institutions that have children in their care have a responsibility to protect those children and uphold their rights. This includes their right to be free from all forms of violence and abuse. For this reason, PWDA agrees with the recommended new non-delegable duty of care for certain institutions, as well as the proposed reverse onus of proof. We believe that these reforms would provide some legislative preventative measures, and would also make the civil litigation process more inclusive of the types of violence children with disability may experience, and the settings in which such violence takes place. As such increasing the inclusivity and responsiveness of civil litigation legislation far outweighs the potential risk of organisations ceasing to offer particular services to children.

#### Issue B: Ensuring there is someone to sue

PWDA supports the Royal Commission's recommendations, aimed to end the use of the 'Ellis defence'. Implementing these recommendations would ensure that plaintiffs are provided the opportunity for full consideration of the merits of their civil claims (as outlined on page 25 of the consultation paper).

### Issue C: Requirement to have insurance

PWDA agrees with the recommendation of the Royal Commission that all unincorporated institutions which are (directly or indirectly) funded by the Commonwealth and/or state and territory governments be required to hold insurance for child abuse in order to be eligible for such funding.

While we acknowledge that some smaller organisations may be unable to afford the costs of increased child abuse insurance, we believe that higher insurance premiums could act as a motivating factor for some organisations, encouraging them to implement more robust quality and safeguarding mechanisms to protect children in their care. Improvements to child protection practices would be a positive step for institutions, and as mentioned in response to Issue A, would in all likelihood mitigate the risk of future litigation. Indeed, as outlined in the consultation paper, insurers would likely require institutions to not only implement, but also routinely report on their child safety strategies, risk management procedures and investigative practices. This would again serve to reduce the risk of child abuse in these settings, and therefore decrease the risk of future costly litigation.

### Overall impact of civil litigation reform

While we acknowledge that civil litigation reforms are not always effective at deterring the behaviour of individuals, it nonetheless contributes to a more responsive and accessible justice system for people who have experienced violence. Indeed, as the consultation paper makes clear, a multi-faceted approach to child abuse is required to efficiently balance the compensation and deterrence elements of civil litigation.

In addition, civil litigation reforms must go hand in hand with a suite of other robust preventative efforts that promote child safety in institutions. This includes, for instance, requiring persons associated with institutions to have up-to-date Working with Children Checks and police checks (while acknowledging the limitations of these checks) and proactively implementing, monitoring, reporting on and updating child-safe policies and practices.

Overall, PWDA agrees that ‘changing the law may encourage cultural change over time, by moulding public opinion on what is acceptable behaviour and firmly grounding appropriate institutional behaviour in the law.’<sup>16</sup> Compelling institutions to take proactive steps – which are appropriate and necessary for their size, nature and the services they offer – is key in improving justice responses to people with disability who have experienced child abuse in institutional settings.

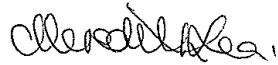
While certain institutions may view the proposed reforms as increasing risk related to providing particular services to children, we believe that the right of an individual to receive acknowledgement and compensation for harm and distress caused while in the care of an organisation is absolutely paramount.

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<sup>16</sup> Consultation paper p10.

PWDA thanks the NSW Department of Justice for the opportunity to provide feedback on this consultation paper. We again commend the commitment of the NSW Government to making additional reforms that will make it easier for people who have experienced institutional child abuse to seek justice, and we would welcome further consultation on any of the matters raised.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Meredith Lea', with a small flourish at the end.

**MEREDITH LEA**  
Senior Policy Officer