

Matters for the Royal Commission's attention

This submission highlights the key issues that the Commission for Children and Young People in Victoria considers are directly relevant to the matters the Royal Commission is examining and require the Royal Commission's attention:

- the importance of Victoria's Child Safe Standards and Reportable Conduct Scheme to preventing and responding to abuse of children and young people with disability in organisations
- the particular vulnerabilities of children and young people with disability in the child protection, out-of-home care and youth detention systems.

Child Safe Standards and Reportable Conduct Scheme

Victoria's Child Safe Standards (the Standards) and Reportable Conduct Scheme (the Scheme), administered by the Commission, are directly relevant to the Royal Commission's terms of reference relating to the prevention, reporting and investigation of violence, abuse, neglect and exploitation of people with disability:

- The Standards require approximately 60,000 relevant organisations to implement policies and practices to prevent, respond to and report allegations of child abuse.¹ They include a specific principle requiring organisations to promote the safety of children with disability.
- The Scheme requires approximately 12,500 relevant organisations across various sectors to notify the Commission of alleged 'reportable conduct' against children and carry out investigations under the Commission's oversight.² Our role includes reviewing the adequacy of organisations' investigations. Reportable conduct includes sexual offences,³ sexual misconduct,⁴ physical violence,⁵ behaviour that causes significant emotional or psychological harm to a child and significant neglect of a child.⁶

Victoria is the only jurisdiction to have legislated both Child Safe Standards and a Reportable Conduct Scheme to prevent abuse of children in organisational settings, as recommended by the Royal Commission into Institutional Responses to Child Sexual Abuse.

An issue the Commission is contending with is that often we do not know if a reportable conduct allegation involves a child with disability, because that information is not consistently provided and, sometimes, an alleged victim's details are not known to an organisation. This means the data available is very likely to be an under-representation of the number of allegations we receive relating to children with disability.

We know that from the start of the Scheme in July 2017 to 30 June 2019, 247 allegations across a range of sectors involved a child recorded as having a disability (nine per cent of all reportable conduct allegations over this period). Of the matters completed at 30 June 2019, 25 per cent of these allegations were substantiated. In contrast, the substantiation rate for the entire Scheme over this period was 31 per cent.

Almost sixty per cent of allegations involving a child with disability related to physical violence. This is a higher proportion than the Scheme as a whole, for which 49 per cent of allegations to 30 June 2019 related to physical violence.

Of the physical violence allegations involving a child with disability that were finalised by 30 June 2019, almost one third were found to be substantiated (22 of 77 finalised allegations). This is slightly lower than the 35 per cent substantiation rate for physical violence allegations for the Scheme as a whole up to 30 June 2019.

Substantiated cases included conduct in the disability sector where adults had:

- pulled a child across the ground by their arm and feet
- raised a closed fist to a child, while holding the child with the other hand
- threatened to let a child be harmed by another child
- threatened to throw something at a child
- slapped a child over their head
- restrained a child by their ankle.

There were also substantiated cases of physical violence against children with disability in the out-of-home care sector (see below) and the education sector (see **Attachment B**).

Children with disability were also the victims of substantiated cases of behaviour causing significant emotional or psychological harm to a child,⁷ significant neglect of a child⁸ and sexual misconduct.⁹ All of these cases occurred in the disability, out-of-home care and education sectors.

After two years of operation, we have seen positive improvements in many organisations' child-safe practices, cultures and responses to allegations. However, we also see differing attitudes and levels of capacity across organisations and sectors and barriers to effective prevention, reporting and investigation. Some of these issues relate specifically to children with disability. Our concerns include:

- organisations paying insufficient attention to the Child Safe Standard principle relating to the safety of children with a disability¹⁰
- low reporting of reportable conduct allegations by the disability sector¹¹
- organisations failing to interview children in reportable conduct investigations concerning them – this is common across sectors and organisations in respect of all children but seen especially when a child's disability means they are unable to communicate verbally and organisations have not given adequate thought to how the child might be assisted to tell their story.¹²

The Commission's legislation includes the requirement to educate and strengthen the capacity of organisations involved in both schemes. The Commission continues to increase awareness of the Standards and Scheme through targeted communication with the disability sector and supporting effective reporting and investigation practices. We have developed

specialist resources in collaboration with Griffith University to help organisations include children in investigations.

These resources and other information about the Standards and Scheme, including the Commission's regulatory approach, are available on our website (<https://ccyp.vic.gov.au/>) and we welcome questions from the Royal Commission.

Child protection, out-of-home care and youth justice

Before highlighting issues relating to the child protection, out-of-home care and youth justice (in particular youth detention) systems, three overarching points about the children and young people involved with these systems must be emphasised:

- They are among the most vulnerable children and young people in the community. Their childhoods have commonly involved experiences of trauma, abuse and/or neglect in the family home and they typically have multiple, intersecting, complex needs.
- Children and young people in the youth justice system have often also been involved with the child protection and out-of-home care systems.¹³
- Aboriginal children and young people are significantly over-represented in these systems. In Victoria, Aboriginal children and young people are 13 times as likely as non-Aboriginal children and young people to be in the youth justice system,¹⁴ while the rate of Aboriginal children and young people in out-of-home care is 20.5 times the rate for non-Aboriginal children and young people.¹⁵

Aboriginal children and young people are also more likely to have a disability,¹⁶ which can compound their vulnerability in the child protection, out-of-home care and youth justice systems.

Children and young people with disability involved with child protection

Children with disability involved with the child protection system are at higher risk of further abuse and neglect.¹⁷ The Commission's legislation requires an inquiry to be completed into the services provided to every child who died and was known to Victoria's Child Protection service in the 12 months before their deaths. These child death inquiries aim to identify aspects of the service system that need to be improved and regularly involve children with disability.¹⁸

In 2018, the Commission completed an analysis of our previously completed child death inquiries involving children with complex medical needs and/or disability.¹⁹ This inquiry found that almost all the children had experienced multiple risk factors that placed them at significant risk of harm including family violence and parental substance misuse.²⁰ The majority of children and young people with disability died in violent and extremely traumatic circumstances.

Inquiry findings relevant to the Royal Commission's work included:

- In many cases, Child Protection's assessments of risk to children and young people were inadequate. In several cases, under-assessment of risk resulted in children and young people's ongoing exposure to significant safety concerns. The inquiry also identified cases where Child Protection did not sufficiently investigate potentially non-accidental injuries such as bruises, or allegations or indicators of sexual abuse. The Commission recommended that all Child Protection workers receive training to strengthen capacity to assess risk to children with disability.
- There was a lack of communication, information-sharing and co-ordination between Child Protection and disability services. In some cases, this resulted in neither system having a complete understanding of the risk of harm to the child. The Commission identified that the introduction of the NDIS could further complicate information-sharing between Child Protection and disability services.
- Child Protection was found to have had very limited direct contact with children, undermining their ability to have input into decisions and plans that concerned them. It was rare for Child Protection to speak directly to the child when assessing risk to them.
- Few children and young people with disability appeared to be connected to the services they needed to address the significant risk of harm and developmental and behavioural challenges they encountered. Some families reached 'crisis point' because they did not receive the services they needed and had expressly asked for.

The inquiry considered the service system before the introduction of the NDIS and highlighted implications for the operation of the NDIS, including the importance of:

- NDIS-approved service providers being capable of identifying and reporting on risks of harm to children and young people, as well as empowering them (and the people who support them) to speak out about abuse
- robust information-sharing mechanisms to ensure all services involved with a child or young person have a shared understanding of the risk of harm and can mitigate these risks
- children with disability having independent advocates to help them participate in decisions and planning affecting them, and an independent body to make complaints to.

DHHS is progressively responding to the Commission's recommendations, including the development of guidance in Child Protection's new risk assessment framework relating to the unique needs of children with disability and developing information-sharing processes with the NDIA. The department also advises it is working with the NDIA regarding potential funding models for children and young people with disability who have increased vulnerability due to their family circumstances.

However, as at February 2020, several of the Commission's key concerns remain inadequately addressed, including:

- the need for independent advocates who can work with, and inform, children about the planning process and available supports
- the need for an independent body that has a specialist focus on vulnerable children and young people with disability to advocate for their interests and receive complaints from them²¹
- the guarantee of a service delivery model that is tailored to children and young people from vulnerable families.

In the child death inquiries that have been completed since the 2018 inquiry, the Commission continues to see many of the same issues. It is likely some of the problems identified in the inquiry are now even more of a risk following the introduction of the NDIS, given the many unresolved gaps in the new service system as it relates to vulnerable children and families. These circumstances, combined with the fact that the child protection system is under significant demand pressure,²² reinforce the need for the Royal Commission to give attention to this highly vulnerable group of children involved with the child protection system.

Children and young people with disability in the out-of-home care system

It is critical that the Royal Commission examine the experiences and risks of violence and abuse faced by children with disability in out-of-home care, including kinship care, foster care and residential care.

The Royal Commission into Institutional Responses to Child Sexual Abuse highlighted this group's heightened vulnerability to abuse.²³ That Royal Commission identified the 'significant over-representation' of children and young people with disability in out-of-home care, while noting the data was incomplete.²⁴

Poor data quality is an ongoing issue in Victoria: approximately 8,000 children live in out-of-home care in Victoria,²⁵ and the number of children with disability is not currently known, due to inadequate data.²⁶ The Commission explored this issue in our 2018 inquiry and DHHS is currently implementing strategies to improve identification data,²⁷ but has advised it will take considerable time to acquire a comprehensive profile of the level of disability among these children.²⁸ This is unacceptable in our view.

A DHHS audit in July 2019 showed that only six per cent of children in the child protection system at that point in time were recorded as living with disability.²⁹ This is almost certainly a significant under-representation, given the Royal Commission heard expert evidence that 'at least 24 per cent and up to 30 per cent of children in out-of-home care are children with disability'.³⁰ In 2012, the Victorian Equal Opportunity and Human Rights Commission reported that around 20 per cent of children in residential care lived with disability.³¹ The Commission's monitoring of serious incidents in out-of-home care indicates that this figure is likely to be conservative.

In 2019, Victorian organisations Berry Street and Centre for Excellence in Child and Family Welfare raised concerns in the media about the increasing number of children and young people with disability entering the out-of-home care system as a result of the introduction of the NDIS.³² The poor data capture means DHHS is currently unable to accurately monitor any such increase.

Children with disability face significant risks in out-of-home care settings. In particular, many of the serious incidents in out-of-home care occur in residential care units, as highlighted in the Commission's 2019 inquiry, *In our own words: Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system*.³³ The inquiry found that, of approximately 6,500 serious incidents reports in 2018-19, 75 per cent involved children in residential care, despite that group of children only making up only five per cent of the out-of-home care population. Unfortunately, due to the data deficiencies, it is currently not possible to know with certainty how many incidents involved children with disabilities.

Our *In our own words* inquiry found that children with disability and complex behaviour in an out-of-home care placement were at heightened risk of being placed in residential care following placement breakdown and instability in home-based care.³⁴ It also reported that complexity related to disability is a common driver of children younger than 12 entering residential care.³⁵ During the inquiry consultations, children and young people told us that living in residential care was often violent and dangerous, often due to challenging behaviours of other children and people.³⁶ The inquiry found that 'poor placement mix' of children – resulting from a lack of appropriate placement options for children living with complex trauma – is a key contributor to their poor safety. In their current form, residential care units are not suitable places for children with complex needs associated with their disability.

Since the Reportable Conduct Scheme started in July 2017, the highest proportion of mandatory notifications of alleged reportable conduct and substantiated reportable conduct has related to workers in the out-of-home care sector. However, it must be noted that:

- the sector has been in the Scheme since it started, whereas some other sectors have entered the Scheme incrementally
- workers and volunteers in the out-of-home care sector have frequent contact with children compared with some other sectors covered by the Scheme
- the sector entered the Scheme with comparatively well-developed processes for reporting child abuse compared with other sectors.³⁷

Between 1 July 2017 and 30 June 2019, the out-of-home care sector also had the highest proportion of allegations involving children recorded as having a disability (47 per cent). Of the matters completed by 30 June 2019, 17 per cent of allegations in the out-of-home care sector were substantiated, almost half the substantiation rate for the Scheme as a whole up to 30 June 2019 (31 per cent). Most of the substantiated matters related to physical violence, including a case of physical assault by a worker that caused bruising to a child's face.³⁸

Children and young people with disability requiring accommodation outside the family home

The Commission holds significant concern for the safety and wellbeing of children with complex disability support needs being placed in accommodation outside the family home, because their parents feel unable to continue caring for their children on a daily basis.³⁹

The concerns are two-fold: we lack confidence that adequate or timely supports are provided to these children via the NDIS, resulting in parents making these extremely difficult decisions; and we are concerned about the rigour of the oversight of the services provided to these children. While Child Protection works with the NDIS to place, and provides funds for 'board and lodging' for, these children, it has no mandate to oversight their care and placement.

The Commission's capacity to oversight services to, and treatment of, these children and young people has reduced as a result of these arrangements. The Commission is monitoring the implementation of recently finalised agreements between DHHS, NDIA and the Commonwealth Department of Social Services to support these children and young people. Though the agreements have only been in place a short time, it is concerning that the Commission is already encountering obstacles obtaining relevant information for child death inquiries from the NDIA.

Direct, onsite monitoring by the NDIS Quality and Safeguards Commission will be important, to ensure strong oversight mechanisms for these settings are in place and ensure the safety and wellbeing of children and young people in these circumstances.

Children and young people with disability in youth justice detention

We are pleased the Royal Commission is giving attention to criminal justice issues and the experiences of children and young people with disability in youth detention.⁴⁰ This is especially important given the Committee on the Rights of the Child's recent statement that 'children with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, fetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all'.⁴¹

The latest survey of children and young people in Victoria's youth justice centres identified that 38 per cent have cognitive difficulties that affect their daily functioning, 12 per cent are linked with a Forensic Disability Service and four per cent are accessing NDIS funded disability supports or services.⁴² It has been recognised that the actual prevalence of disability is much higher.⁴³

The lack of reliable and accurate identification of children and young people with disability creates particular risks in custodial environments, when staff in youth justice centres may misinterpret a child or young person's behaviour, and potentially trigger a 'custodial response' to 'non-compliance' including use of force and restraint. The Commission is aware

of one incident involving an Aboriginal child diagnosed with a borderline intellectual disability who was restrained by staff for an extended period in an isolation cell, resulting in injuries.

Unreasonable use of force by staff on children and young people is a matter of ongoing concern to the Commission.⁴⁴ Alleged assaults by staff have accounted for high proportions of serious youth justice incidents reported to the Commission in the past two years.⁴⁵ Inadequate data capture by Youth Justice means we cannot identify with confidence how many of these incidents involved children and young people with disability.

It is also likely that the children and young people with disability experience other, intersecting vulnerabilities. Across the detention population, two-thirds of the children and young people are victims of abuse, trauma or neglect, more than half have a history of substance misuse, around half have mental health issues and more than a quarter have a history of self-harm or suicidal ideation.⁴⁶ The Commission is aware of at least three young children and people with disability⁴⁷ with these additional characteristics involved in serious incidents, including multiple self-harm incidents, over the past year.

In Victoria, these incidents take place in the context of unacceptably high levels of 'lockdowns' – children and young people locked in their rooms for extended periods due to staff shortages. This issue has been a significant concern of the Commission over recent years,⁴⁸ and we observe increasingly frustrated, unoccupied and constrained children and young people.

Youth justice centres require particular attention because they are closed environments where children and young people are 'potentially vulnerable to mistreatment and abuse'.⁴⁹ Victoria's youth justice centres are complex, volatile environments where children and young people can often witness or directly experience incidents of violence and abuse (as defined by the Royal Commission).⁵⁰

A child or young person with disability can be more vulnerable to assaults, standovers and intimidation from other children and young people in youth detention. As a result, suitable placements must be made available for these children and young people, but often this is not the case. The Commission's 2017 inquiry *The Same Four Walls* recommended that Victoria's youth justice centres have designated accommodation options for vulnerable children and young people, such as those with an intellectual disability.⁵¹ The responsible department is progressing implementation of this recommendation, including consideration of this issue in the plans for the new youth justice facility due to be completed in 2021.⁵² However, the system remains crowded and options to separate and safely accommodate particularly vulnerable children and young people, including those with disability, has not improved since our 2017 report.

While we acknowledge the complexities and challenges of Victoria's youth justice system, it is essential that more is done to make these centres safe and rehabilitative environments for children and young people with disability.

We continue to monitor the issues carefully, providing advice to the relevant Ministers and government departments on these issues. We welcome the implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which will be an important step in improving the experiences of children with disability in youth detention.

It is important that the Royal Commission consider the experiences and risks faced by children and young people with disability in youth detention.

Issues relating to education

We address issues relating to education separately, including seclusion, restraint, bullying and matters relating to inclusive education in **Attachment B**.

- 1 See *Child Wellbeing and Safety Act 2005* (Vic), Part 6.
- 2 See *Child Wellbeing and Safety Act 2005* (Vic), Part 5A.
- 3 Including sexual offences committed against a child, with a child and in the presence of a child.
- 4 Including sexual misconduct committed against a child, with a child and in the presence of a child.
- 5 Including physical violence committed against a child, with a child and in the presence of a child.
- 6 *Child Wellbeing and Safety Act 2005* (Vic), section 3.
- 7 From 1 July 2017 to 30 June 2019, there were 43 allegations of behaviour causing significant emotional or psychological harm to a child. Of the matters completed by 30 June 2019 (n=29), seven were substantiated (24 per cent).
- 8 From 1 July 2017 to 30 June 2019, there were 16 allegations of significant neglect of a child. Of the matters completed by 30 June 2019 (n=7), four were substantiated (57 per cent).
- 9 From 1 July 2017 to 30 June 2019, there were 28 allegations of sexual misconduct. Of the matters completed by 30 June 2019 (n=21), three were substantiated (14 per cent).
- 10 See page 69 of our 2018-19 Annual Report.
- 11 See pages 80-85, 95 and 100-101 of our 2018-19 Annual Report.
- 12 See page 78 of our 2018-19 Annual Report and the Commission's *Guide for including children and young people in reportable conduct investigations*, particularly at page 16. Supporting children to participate in investigations relevant to them is consistent with Child Safe Standard 7, which requires organisations to promote the participation and empowerment and aligns with children's rights under the Convention on the Rights of the Child.
- 13 Baidawi, S & Sheehan, R 2019, 'Crossover kids: Offending by child protection-involved youth', *Trends & issues in crime and criminal justice no. 582*. Canberra: Australian Institute of Criminology; State of Victoria, Sentencing Advisory Council 2019, *Crossover Kids: Vulnerable Children in the Youth Justice System; Report of the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory 2017*, Volume 3B, Chapter 35.
- 14 Australian Institute of Health and Welfare 2019 *Youth Justice in Australia 2017-18*, page 9.
- 15 Australian Institute of Health and Welfare 2019 *Child protection Australia 2017-18*, page 53.
- 16 Australian Bureau of Statistics 2017 4433.0.55.005 – *Aboriginal and Torres Strait Islander People with a Disability*; also see State of Victoria, Department of Health and Human Services 2017 *Korin Korin Balit-Djak: Aboriginal health, wellbeing and safety strategic plan 2017-2027*, page 15.
- 17 Stalker, K & McArthur, K 2012, 'Child abuse, child protection and disabled children: A review of recent research', *Child Abuse Review*.
- 18 *Commission for Children and Young People Act 2012* (Vic), section 34.
- 19 *Inquiry into services provided to vulnerable children and young people with complex medical needs and/or disability* (June 2018). This report has not been made public to allow the Commission to provide a greater level of detail to the Victorian Government to drive system change. We invite the Royal Commission to contact us if further detail would assist.
- 20 In 2016, Victoria's Royal Commission into Family Violence reported that 'children with disabilities are more likely to be victims of family violence – particularly sexual abuse': *Royal Commission into Family Violence: Report and recommendations*, Volume II, page 115.
- 21 The NDIS Quality and Safeguards Commission does not have a dedicated focus on vulnerable children and young people or an advocacy role.

- 22 As highlighted in two recent Commission inquiries, *Lost, not forgotten – Inquiry into children who died by suicide and were known to Child Protection* (October 2019), pages 30-31; *In our own words – Systemic inquiry into the lived experience of children and young people in the Victorian out-of-home care system* (November 2019), page 20. These inquiries also highlight the need for early intervention to prevent vulnerable children and young people entering the child protection and out-of-home care systems in the first place.
- 23 *Final Report – Volume 12: Contemporary out-of-home care*. See, e.g., Chapter 3, page 106.
- 24 Volume 12, Chapter 2, pages 52 and 59.
- 25 Not including children and young people on 'permanent care' orders.
- 26 Data on the disability status of children and young people in out-of-home care in Victoria was not included in the AIHW's *Child protection Australia 2017-18* report – see page 51.
- 27 In response to the Commission's recommendation that Child Protection (DHHS) systematically collect and report on the number of children with complex medical needs and/or disability who are clients of Child Protection.
- 28 For details, see our 2018-19 Annual Report, page 34.
- 29 The disability status of thousands of children and young people were not recorded. DHHS is seeking to rectify this by the end of February 2020 and conducting a further audit in March 2020.
- 30 Volume 12, Chapter 4, page 217. Also see CREATE Foundation 2018, *Out-of-home care in Australia: Children and young people's views after five years of National Standards*, pages 19-20.
- 31 *Desperate measures: The relinquishment of children with disability into state care in Victoria*, page 7.
- 32 See Berry Street Media Release, 'NDIS forcing children with disability into child protection system', 9 May 2019 at <https://www.berrystreet.org.au/news/2019/ndis-forcing-children-disability-child-protection-system>.
- 33 Tabled in Victorian Parliament on 27 November 2019. See pages 176-178. For details about the Commission's incident monitoring, see pages 35-38 of our 2018-19 Annual Report.
- 34 Or 'contingency placements' in hotel rooms, serviced apartments or short-term housing (for example). See *In our own words*, pages 25, 41, 131, 144-145.
- 35 See *In our own words*, pages 27 and 155.
- 36 *In our own words*, pages 28, 171-173.
- 37 For details, see pages 81-85 and 95 of our 2018-19 Annual Report. Also see *In our own words*, pages 176-178.
- 38 There were seven substantiated cases of physical violence.
- 39 See, for example, 'Advocates blame NDIS failures as families give up severely disabled children to child protection', ABC, 9 May 2019.
- 40 Noting the Royal Commission's workshop on people with disability in the criminal justice system on 2 September 2019, Senior Counsel Assisting's remarks on 16 September 2019, at Transcript pages 19 and 22, and the Issues Paper released on 14 January 2020.
- 41 General Comment 24, paragraph 28.
- 42 Victorian Youth Parole Board Annual Report 2018-19, page 29.
- 43 Armytage, P & Oglloff J 2017, *Youth Justice Review and Strategy: Meeting needs and reducing offending – Part 1*, pages 157-160. Also see recommendation 6.42.
- 44 For details, see pages 43-47 of our 2018-19 Annual Report, pages 22-23 of our 2017-18 Annual Report
- 45 For details, see pages 45-46 of our 2018-19 Annual Report. For children under 18, the Commission's oversight function complements the Reportable Conduct Scheme.
- 46 Victorian Youth Parole Board Annual Report 2018-19, page 29.
- 47 Including borderline intellectual functioning.
- 48 See our 2017 inquiry, *The same four walls – Inquiry into the use of isolation, separation and lockdowns in the Victorian youth justice system (The same four walls)*.
- 49 Commonwealth Ombudsman 2019, *Implementation of the Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, page 1.
- 50 'Violence and abuse include assault, sexual assault, constraints, restrictive practices (physical and chemical), forced treatment, forced interventions, humiliation and harassment, financial and economic abuse and significant violations of privacy and dignity on a systemic or individual basis': Practice Guideline 1, page 2.
- 51 *The same four walls*, page 72.
- 52 Media Release – The Hon Ben Carroll MP, *Building a Safer and More Secure Youth Justice System*, 27 September 2019.