



Queensland Advocacy Incorporated

Submission to the Parliamentary Crime and Corruption Commission

Review of the Crime and Corruption Commission

November 2015

“Relativity applies to physics, not ethics”

Albert Einstein

About QAI

Queensland Advocacy Incorporated (QAI) is independent, community-based systems and individual advocacy organisation and a community legal service for people with disability.

Our mission is to promote, protect and defend, through systems and individual advocacy, the fundamental needs and rights and lives of the most vulnerable people with disability in Queensland.

QAI does this by engaging in systems advocacy work through campaigns directed to attitudinal, law and policy change, and by supporting the development of a range of advocacy initiatives in this state.

As the people we support are a highly vulnerable and disempowered group in society, we consider it appropriate that any measures designed to target corruption within the police service and public sector specifically acknowledge and protect the rights of this group.

Core concerns

1. The detection and handling of allegations of abuse and corruption within the public sector and police service

People with cognitive impairment are not always afforded credibility by police, and prosecutors and the courts may consider them to be unreliable witnesses because of difficulties in cross-examination. Allegations of abuse or mistreatment made by people with disability do not always proceed to trial. Lack of support to assist people to progress complaints results in people feeling intimidated and humiliated by the investigative and court processes. The mere ordeal of enduring the repeated articulation of their experiences can produce serious emotional trauma, devastating blows to self-confidence and self-esteem and, at times, cause family rifts if the person is not believed or supported by their family members.

An American study determined that when victims with disabilities did report incidents of abuse to authorities, in 52.9% of cases nothing happened. Alleged perpetrators were arrested in only 9.8% of cases where abuse is reported to authorities.¹ We know of no similar Queensland research but it is not unreasonable to assume that similar applies here.

In Australia, there are some statutory, governmental and strategic initiatives that purport to address and prevent violence, abuse and neglect against people with disability. However, the measures presently in place, at both a state and federal level, are more reactive than preventative. They have proved largely ineffective.

QAI submits that disability service providers should be under a positive duty to record any incidents that suggest there may be a problem – the onus should be on the service provider

¹ A Report on the 2012 National Survey on Abuse of People with Disabilities Nora J. Baladerian, Ph.D. Thomas F. Coleman Jim Stream

to report suspected breaches of rights, not on the person with disability to report the breach. Each service provider should be required to develop and maintain a set of core indicators that flag potential issues. This must be accompanied by a shift in mindset whereby attention is paid to behaviours that may seek to communicate problems and action taken accordingly (rather than the present approach of responding to communicative behaviours in a punitive way).

2. The inadequacy of the protection afforded to whistleblowers in Queensland

In Queensland, statutory protection of whistleblowers is provided by the *Public Interest Disclosure Act 2010* (Qld). This legislation replaced the *Whistleblower Protection Act 1994* (Qld), which was introduced in the post-Fitzgerald Inquiry climate. Recently, the Federal Government has introduced equivalent protection at a commonwealth level: *Public Interest Disclosure Act 2013* (Cth).

Under the Queensland legislative regime, any person can disclose information about a substantial and specific danger to the health or safety of a person with a disability, a substantial and specific danger to the environment (as set out in the Act) or a reprisal action following a public interest disclosure.

A public sector officer may also disclose information about corrupt conduct by another person, maladministration that adversely affects someone's interests in a substantial and specific way, a substantial misuse of public resources, a substantial and specific danger to public health or safety or a substantial and specific danger to the environment.

The new legislative regime extends the scope of the former Act, in that a person may make a public interest disclosure to a journalist in circumstances where they have already made essentially the same disclosure to an appropriate public sector entity and that entity has decided not to investigate or deal with the disclosure, did not recommend taking any action, or failed to report the results of the investigation to the discloser within the prescribed six month timeframe. This extension of whistleblowing power to the media is a significant one, and was enacted following recommendations from leading academics.²

Yet while the new legislative framework offers some improvement on the old model, some major issues remain. Of particular relevance for people with disability who have experienced violence, abuse or neglect within a residential or institutional setting is the power imbalance that exists and the fear of informal reprisal. Recent concerns about the misuse of executive power and lack of accountability under the Newman government have reignited concerns about the proliferation of inappropriate conduct and the potential for reprisals in Queensland, notwithstanding the public interest disclosure protective legislation. There remains in Queensland a climate of fear and reluctance to report official misconduct, particularly by vulnerable persons.

² See for example: AJ Brown, 'Restoring the Sunshine to the Sunshine State Priorities for Whistleblowing Law Reform in Queensland' *Griffith Law Review* (2009) 18(3) 666.

The findings of the largest study of whistleblowers in Australia revealed a 'crisis of competence in the official capacity of government structures to respond effectively to disclosures made in the public interest'.³ This is alarming, as in the absence of other safeguards vulnerable people are reliant on whistleblowers to report corruption within services.

A further Australian study found that, despite the enactment of the former Queensland act, all of the factors that dissuaded whistleblowing prior to the passage of the act remained – informal sanctions for whistleblowers, a culture of secrecy and fear and authoritarian management practices. It concluded that the terms 'accountable', 'ethical', and 'workplace democracy' were 'powerful markers in a false geography of consensus and care'.⁴

These studies were not specifically in the context of vulnerable and disempowered groups. It is highly concerning to understand that there are significant disincentives for most people to report corruption; the difficulties facing people with disability are significantly heightened.

The closed-off practices of institutions with responsibility for the care of people with disability and residential places where congregate care is provided have been aided by the difficulties experienced by some people with disability to communicate their concerns and experiences and the disbelief and distrust with which those who are able to communicate such concerns are met.

People with disability who experience adverse treatment are a particularly vulnerable group. There are a number of reasons for this, including:

1. Many people within this group have difficulty communicating their concerns or experiences and require the provision of appropriate support to do so.
2. Many people within this group have experienced a history of institutionalisation, or of violence, abuse or neglect, which can exacerbate their concerns with identifying and communicating inappropriate conduct by those in positions of power.
3. Many people within this group lack a supportive familial and friendship network that offers a buffer of support and thus experience feelings of isolation and fear about the withdrawal of services.
4. The limited options in terms of accommodation and services for people with disability mean that the fear of reprisal is particularly significant and may be a disproportionately powerful disincentive to report misconduct when compared with other groups.

³ William De Maria & Cyrelle Jan, 'Behold the shut-eyed sentry!', *Crime, Law and Social Change* (1995/96) 24(2): 151-166.

⁴ William De Maria and C Jan, 'Eating its Own: The Whistleblower's Organization in Vendetta Mode' *Australian Journal of Social Issues* (1997) 32(1):37-59, 38-39, 55.

5. The prescribed avenues for reporting abuse and inappropriate treatment are often difficult or impossible for a person with disability to access, due to the nature of their disability and their disempowerment and lack of appropriate support.

For these reasons, we consider that there is the need for additional and separate safeguards and supports to protect and defend the rights of people with disability who may be subject to violence, abuse or neglect within an institutional environment. Below, we outline our recommendations for addressing this issue.

3. The lack of an independent, proactive investigative body tasked with detecting and reporting incidents of abuse

People with disability who experience abuse particularly when living in congregate settings will often tell someone who is part of the support service if they have no family connections. The very nature of dependency upon paid supports will increase a person's vulnerability to abuse, and in many situations their complaints are unheeded. The denial of the validity of their complaint or lack of immediate investigation or response by the service provider or family member undermines a person's confidence in their supports and will increase feelings of fear, abandonment and isolation.

Key recommendations

To address the core concerns outlined above, QAI makes the following key recommendations:

1. Commissioning of an independent body (like the CCC and similar to NZ's Independent Police Conduct Authority or the UK's Independent Police Complaints Commission or Canada's Civilian Review and Complaints Commission for the RCMP) that is tasked to:
 - a. investigate claims of police excessive use of force, fatal shootings by police, or other police actions resulting in death or serious bodily harm to members of the public;⁵
 - b. monitor places of detention consistent with our international obligations pursuant to the United Nations Convention Against Torture, including:
 - i. examining conditions of detention and treatment of detainees in Police custody;
 - ii. proactively investigating places of detention and residential care and treatment (including, for example, aged care facilities);
 - iii. make any recommendations it considers appropriate for improving conditions of detention and treatment of detainees, and for preventing torture or other cruel, inhuman or degrading treatment;

⁵ Although the Coroner is tasked to investigate fatal shootings the process needs to be more timely.

- iv. provide an annual report to the responsible Minister on its functions under the Act.
 - c. receive complaints:
 - i. alleging misconduct or neglect of duty by any member of Police; or
 - ii. concerning any Police practice, policy or procedure affecting a complainant;
 - d. devise protocols and Issue guidelines for handling allegations of discrimination;
 - e. publish reports;
 - f. report on access to the police complaints system and key principles leaflet to help police forces improve accessibility to the complaints system.
2. QAI recommends that the PCCC make an unequivocal recommendation that Australia ratify the Optional Protocol to the Convention Against Torture.
- a. Australia signified it's in principle agreement with the terms of the OPCAT by signing the OPCAT on 19 May 2009, which is an important benchmark for greater protection through enhanced oversight and inspection of places of detention.
 - b. To date, Australia has failed to ratify the OPCAT – this means that while we have expressed in-principle agreement with the OPCAT, we have not yet taken the practical steps ratification requires, such as establishing a National Preventative Mechanism (a national system of inspection of all places of detention).
 - c. Ratification of the OPCAT will provide a significant safety net, by providing a proactive mechanism for the detection of corruption and mistreatment, abuse and neglect within institutional settings in Australia.
3. Safeguards need to be put into place to ensure that instances of abuse are reported via the appropriate channels and properly responded to. At a minimum, this requires that:
- a. consideration is given to developing more appropriate means of reporting a grievance for people with different types of disability;
 - b. the culture of the service is conducive to receiving complaints – that is, complaints are welcomed as a means of improving service provision;
 - c. people with disability are provided with adequate support, including advocacy support, to express their concerns in safe environment;
 - d. attention must be paid to helping people with disability who lack an adequate support network to build a support base within their community;

- e. any complaints must be listened and responded to appropriately – it is imperative that people with disability are listened to and their complaint taken seriously, and that they **feel** that they are listened to and their complaint taken seriously;
- f. the onus should not be on the person to know or recognise what avenues for complaints are available. For any service or system that prides itself on excellence this should be offered at any reasonable expression of dissatisfaction;
- g. If a person is experiencing dissatisfaction with either a service or system this should automatically generate a prompt to the internal complaints system and once this is exhausted or rejected for whatever reason is escalated to the independent mechanism;
- h. any complaints handling process is easily accessible to both complainants and respondents – i.e. it must be available in a simple-to-use format, in a number of forms, and not overly bureaucratic. For people with disability, this can be particularly challenging to ensure. Flexibility as to form is required – there should be no requirement that a complaint from a person with impaired capacity be in a prescribed form or meet certain requirements to be actioned;
- i. the onus must be on the service provider to investigate informal complaints as well. This will obviously require the introduction of safeguards to ensure that complaints are reported and actioned appropriately;
- j. an important component in accessibility for people with impaired capacity is ensuring that they have the support – this includes support to feel empowered to make the complaint, support to provide adequate detail to enable the complaint to be investigated, support to respond to any questions regarding the complaint. To this end, it is integral that their support people are proactively involved from the earliest opportunity;
- k. proactive mechanisms ensure that potential problems are detected. It is inappropriate to place the full onus of understanding, identifying, communicating and pursuing a complaint on a person with impaired capacity. In many instances, there are indicators of a problem that are apparent to relevant observers. Protocols must be put in place to aid the identification and reporting of any indications of sub-optimal service delivery;
- l. ensure that the system does not rest on assumptions such as that complainants will have access to and the ability to effectively use the internet, the telephone, etc., both as a means of accessing information relevant to making a complaint and to communicate the complaint;
- m. consider the power imbalance that can exist between a person with impaired capacity and a service provider. People with impaired capacity are often in a very vulnerable situation and may fear reprisal for making a complaint. It is essential

that they feel supported to voice any complaints without concern about retribution or cessation/reduction of the service. It is important that the NDIS vision of having people with disability empowered as consumers within a disability services market translates into empowerment for people with impaired capacity to feel they have options and can therefore voice dissatisfaction with unsatisfactory service and have autonomy to exercise choice and seek change;

- n. the investigation of the complaint should be answerable to the person with disability.

Thank you for considering this submission.