

Excluding Citizens with Disabilities from Voting

Challenging barriers in Australia

A DISCUSSION PAPER FROM THE CENTRE FOR WELFARE REFORM

Matthew Potocnik

APRIL 2019



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Foreword

We often think that the fight for democracy is simply about ensuring that people have the right to vote. But even when the right to vote is achieved for most people, some people with disabilities are still excluded by laws that dictate that people with intellectual disabilities cannot vote. Recently advocates in Spain successfully overturned legislation that excluded people with intellectual disabilities from their right to vote. This is a vital step forward.

The case of Australia is interestingly different, and important. Australians pride themselves on laws that actively demand that every citizen fulfils their duty to vote. But when it comes to people with disabilities this law, and all the obligations that go with it, are ignored. Here people are being excluded, not by law, but by prejudice.

As Matthew Potocnick describes, it would not be too difficult to create a system that supported people to vote. Although it has clearly been an ongoing battle to open up these civil rights to everyone and we should be grateful to Matthew Potocnick for taking this task seriously.

Voting, of course, is a very limited form of citizen action; but it is a critical symbol of our citizenship. Imagine if we went further and we really took our mutual citizenship seriously and saw each other as equals, who share responsibility for securing our community life together. Imagine if we saw people with intellectual disabilities as people who make an important contribution to our community. This would be the sign that inclusion was truly coming to life.

Simon Duffy

Director of the Centre for Welfare Reform

I. Introduction

“Sometimes it's the very people who no one imagines anything of, who do the things no one can imagine.”

Christopher Morcom

My experience working in the Disability Sector started in the State of Victoria as an employee of what is now the Department of Health and Human Services (DHHS) as a Disability Support Officer. It was my job to support residents living in Disability Accommodation Services (DAS). However my life changing experience with disability really commenced when my son was diagnosed with Angelman Syndrome at the age of nine months. He is severely intellectually and physically disabled. It was my idea to become professional in the field and more equipped to manage his developmental needs, thereby giving him the best shot in life.

Working for the DHHS, amongst other disability organizations, was an enormous shock. Professionalism was non-existent and the whole sector was hyper-reactive and crisis-driven, a description given to the services in 2008 by the Auditor General. Any proactive measures were met with hostility. Managers and staff invented their own policies and people with intellectual disability were seen as a bother and treated as a liability.

However, every now and then hope presented itself in the kindest and most surreal manner through the views of the occasional staff member and their actions, where residents were treated as human beings and asked for their opinion and consulted around issues that affected them. I saw this as the foreshadowing element of reform: inclusion.

Years later, the Disability Act 2006 was introduced to promote inclusion and in 2007 the Victorian Human Rights Charter. The Charter introduced guidelines, which are foundational to any respectful and quality service provider; directing how individuals should be treated, with freedom, respect, equality and dignity. Australia still does not have a Federal Human Rights Charter.

On the 1st of July 2016 one of the largest health reforms in Australia's history, the National Disability Insurance Scheme (NDIS) was rolled out nationally. The NDIS is a massive expense for Australia with its small and aging population but it is, hopefully, the answer to Australia's greatest shame and its biggest economic crisis; hundreds of thousands of individuals and families who struggle, amidst a society that doesn't see people with disability or relate to their plight and where until the mid-1980's people with intellectual disability were excluded and institutionalized.

2. A broken bureaucracy

Prior to the launch of the NDIS, Commonwealth and State governments purged themselves by conducting inquiries into the actions of disability service providers. There was no follow up despite the many testimonies. These inquiries, through the lack of follow-up action, amounted to an amnesty for service providers and allowed government to begin again. The NDIS promised a new beginning, starting this time with reform under the structure of Individualized Support Plans (ISPs) and funding through the NDIS.

From Australia's largest economic and humanitarian crisis, to the introduction of the NDIS, Australian bureaucracy has struggled to provide an adequate framework and safeguards to ensure inclusion of individuals with intellectual disability. In many ways the person with disability is like a round peg being forced into a square hole - the square hole being our society. Australian government departments don't understand the nature or the dynamics of disability support. Essentially, disability supports positively discriminate and by these means they help to enable and empower individuals to be able to participate in the community, to achieve inclusion via active participation.

In 2010 before the Victorian State election, I first identified this deficit in Australian bureaucracy. As a disability professional I attended a client focus group, I was working for DHHS. I asked the manager of DAS: "How are we going to support the residents to enrol and vote in the election?" "We mustn't be seen to be leading them, Matthew" was the response. I was perplexed by the answer. I knew that this was part of my Duty of Care and also a compliance requirement of the Victorian State Disability Act of 2006 and the 2007 Victorian Human Rights Charter.

In 2003 I commenced work for the DHHS at the grassroots level concerned with the poor culture and the quality of care received by the residents. By 2010, with Disability Act of 2006 and the Victorian Human Rights Charter in place, I found myself overwhelmingly involved in tracking down the source of the corruption: a bureaucracy with no accountability. I left DHHS in 2010 and worked as an individual, family and systemic advocate. It became evident to me that our bureaucracy plays a critical role in introducing new policy and legislation. It also consolidates and maintains the stability of government and the status quo, to resist change. It is imperative that all minorities including individuals who have intellectual disability have their issues present at a government, political and bureaucratic level to ensure a holistic, fair and inclusive society. No single minority should be excluded.

3. Voting isn't complicated

Four years later I was working for the Victorian Electoral Commission (VEC) during the year of the 2014 State election as the Disability Support and Education Officer. I was told that it was the VEC's mandate to capture every Victorian Citizen's vote.

I delivered education workshops to people with disability across Victoria. The workshops were exciting and engaged the whole audience. The workshops were designed to dispel myths about the rights of people with disability to participate in electoral processes. They also taught people with disability that enrolling and voting was not something to be scared of.

The principle of voting was explained simply. A workshop session would begin by pinning up an illustration of a town's park. The park setting included illustrations of a variety of activities and jobs happening around it. The audience was asked, what jobs do you see happening in this picture, of your town? There was a rubbish truck with the workers picking up rubbish, a parking officer writing a ticket, an ambulance and a lollipop lady holding a stop sign to allow children to cross at the crossing.

The jobs were quickly pointed out and another question asked, what would happen if no one did these jobs or if the rubbish was only collected every month? The audience quickly grasped the concept that the jobs were important. I then explained that when we have elections we pick the person who will be the boss; and who makes sure the things that are important to us are taken care of.

The audience would then be asked what is important to you? This was then followed by the question, who thinks their football team is important, which team is the best? Again response was thick and fast and everyone had a personal opinion. I then said, ok: let's have an election and we can all vote for our favourite team to win the finals!

With further instruction and assistance everyone filled out their ballot (see Figure 1), numbering preference of all the teams starting with number one, their team. They were all placed in the ballot box. The ballots were then counted and written on the board according to each team, often including preferences.

Usually the workshop would be concluded with a recap; and it would be stated again, remember, if you are an Australian citizen and eighteen years of age or older you can vote; you don't have to be able to read or write, you don't have to be able to speak, and if you have a disability, it is still your right to enrol and vote. This part of the job was very satisfying; many who attended the workshop had spent their whole lives in institutions. This

would be their first opportunity to participate in our democratic process as full active citizens practicing their equality, where everyone's vote is equal, including theirs.



Figure 1. Football ballot paper

4. Excluding citizen representation

While working for the VEC I also embarked upon a project to help identify the barriers faced by people with intellectual disability living in DAS. A kit was delivered to every Community Residential Unit (CRU) across Victoria. The kit included a DVD about people with intellectual disability preparing to enrol and vote. An Electoral Planner instructed staff and residents on specific dates and actions and how to enrol and vote in time for the 2014 State election.

It also included a choice of three ways to vote:

1. by post,
2. by early voting or
3. by voting on the day.

To identify the enrolment and voting barriers for people living in DAS the Project was to be surveyed at the CRU level. Survey questions were designed to identify specifics and only about ten questions were required. The first question would ask, how many people live in the CRU, the second, how many are eligible to enrol and vote, the third, how many are deemed not to have capacity or are of unsound mind. “Unsound mind,” is the antiquated term that identifies whether a person has capacity, or can make an informed decision. DHHS told me that the purpose of the third question, to record the individuals who were deemed not to have capacity, could not be asked.

5. Victorian Electoral Commission

My manager told me that the project failed at a direct care level. She said, all the houses were sent their kits, but house staff basically didn't do their job. This is true. However this was because the project was not accountable at the critical management level, with the implementation of the survey accountable to each house and each house supervisor.

I drafted a letter for the Victorian Electoral Commissioner, Warwick Gately to send to the secretary of DHHS. It included legislation compliances and the request for the addresses of CRU's across Victoria. Shortly there after we went to DHHS and met with the manager who just happened to be that very same manager who told me in 2010, “we can't be seen to be leading them”. The manager denied us the use of the list and suggested that a link be used. This was unsatisfactory and meant that there would be no accountability for the people living in DAS to participate in the election or to be provided with the necessary supports and the project failed.

I argued in regard to the wording on the planner that was sent out in the kits and in regard to the Commissioners' letter to staff and residents. On the Planner it stated:

*“Talk to residents about who **wants to** vote in the State election and why it is important”.*

In the Commissioners' letter it stated:

*“If a resident can meaningfully and intentionally indicate that they **want to enrol and vote**, either verbally or using their communication aids, then they should be provided with assistance to do so.”*

In Australian Electoral Law it is not a matter of “wanting”. It is compulsory to enrol and vote.

The VEC has created and implemented its own variation of what constitutes an eligible citizen or elector, and uses this variation to determine whom they recognize as an Australian citizen. This apathetic and unlawful interpretation of the Electoral Act defaces democratic process, the Victorian State Disability Act 2006 and the Victorian Human Rights Charter.

Unless people with intellectual disability and people living with disability in general participate in electoral processes there are simply very few reasons for government and bureaucracy to make provisions and improve other areas of equality, such as political status, employment, arts, their supports and inclusion. While active citizenship is far removed from the day-to-day grassroots of living with a disability it does hold the reigns of reform and it does hold government and the foundational right of equality for people with disability to account.

6. A more positive approach

An apathetic approach directly contributes to people with disability not participating in electoral processes. It could be said that this is a negative use of behavioural science. This is why it is important that every individual is accounted for including those who don't have capacity, to ensure people with disability are not identified as people who are of unsound mind and that resources are properly attributed and their human rights recognized. Without Risk Management people with disability are placed in a similar category as those who are ineligible citizens. The VEC and DHHS can't be bothered to engage people with disability.

The first country to use behavioural science was the United Kingdom in 2010. Behavioural science has been used to help persuade social direction. One such project attempted to increase organ donor participation. A simple prompt was asked, "If you needed an organ transplant would you have one? If so, please help others". The Obama administration also employed behavioural science. The group was called the Nudge Unit. It seems timely and appropriate that Australian Electoral Commissions use behavioural science to help change culture to build a more positive level of participation by electors and a greater obligation for bureaucracy to serve and realize the rights of all citizens.

7. 21st Century Suffragette

After the 2014 Victorian State election I returned to DAS working for the DHHS. The residents asked me about my experience away and we started talking about the importance of voting. One resident, Heather, spoke up and said, “I think voting is really important, I’d like to vote!” She didn’t vote in the 2014 Victorian State election but she told me she wanted to. Heather didn’t know why she didn’t vote in 2014, but she was keen to participate in the Federal election. Heather indicated that she wanted to vote for the other bloke, not the one who’s currently in.

In 2016 I wrote to the Australian Electoral Commission regarding Heather’s wishes. I spoke with the Assistant Australian Electoral Commissioner who asked to be put in contact with a local manager responsible for Heather’s request. I put the Commissioner in touch with Michael, one of DHHS’s Managing Directors. I had previously spoken to Michael about the Department’s breach of “Duty of Care” in supporting the rights of people with disability in their care.

I emailed the Commissioner to follow up on Heather’s request. He wrote, “I can confirm that Michael made contact with Ms Blacklock to provide support to her and her carers”.

On the 2nd of July 2016 the day after the launch of the NDIS nationally, Australia conducted its Federal election. I telephoned Heather’s home and asked the staff if Heather was voting today, I mentioned that Michael had apparently been in touch with them? The staff responded by exclaiming, “It’s the first we’ve heard of it!” Heather Blacklock didn’t participate in the Federal election. Heather’s rights were ignored. The Department breached their “Duty of Care.” The Department was also responsible for Heather failing her obligation and compliance to Commonwealth Electoral Law.

Under Australian law Heather has committed an offence by not enrolling or voting. Heather’s request to participate in the Federal election was also presented in a video to the Parliamentary Electoral Matters Committee - Parliament of Victoria (PEMC) and the Commonwealth, Joint Standing Committee on Electoral Matters (JSCEM) in 2015. The PEMC refused to accept Heather’s video as part of a submission because Heather mentioned who she wanted to vote for. The JSCEM also refused to accept the video of Heather’s request because she mentioned, she had not voted in the 2014 Victorian State election.

8. Disability reform

In the context of current disability reform, individuals with disability are individually assessed for the supports necessary for them to participate in all areas of our society, including electoral participation. This process is designed to empower individuals, develop community inclusion and result in participation. It is essential that electoral commissions utilize this “fundamental framework” to address and include the individualized needs of citizens with disability.

While specialized disability processes are available to assist people with disability to participate in electoral processes, no current electoral material or any forms of communication to voters is specifically individualized. This is not to say that these systems, such as telephone voting for people with vision impairment, cannot provide an individual process, they can. However, it is not specific to the individual, it is specific to a disability. In this case people with vision impairment may be satisfied with this electoral tool, but it is not individualized. Also in this process there is only the individual's declaration across a telephone line to state their identity and their vote is not private. In short, the process deals with the disability and is not specific to that individual.

Acknowledging the fact that people living with disability have their own individualized supports, it is essential to develop this relationship and address the potential application of new technology to voting, scrutiny and counting, with particular reference to its application to remote voting. This is essential since, in Victoria only about 1% of residents who reside in DAS participate in any electoral process, that is, about 54 out of 5,400. The number of people living in DAS in other States and Territories may be much larger.

The fundamental point is that despite these individuals having individualised supports they are still not participating in electoral processes. The laws support this participation, particularly in Victoria where we have the Victorian Human Rights Charter, the 2006 Disability Act and of course Commonwealth Electoral Law. There is really no reason why people who reside in DAS should be excluded from the electoral process. They are individually supported and staff, have a “Duty of Care” to ensure the residents they support are able to comply with the mandatory requirements to enrol and vote.

The NDIS Act fails to acknowledge that support should be available to people with disability if required, to enable them to participate in mandatory electoral processes. Every citizen must vote, but the NDIS doesn't include electoral support in Participant's Plans, unless asked.

9. The legislative divide

It is mandatory to enrol and mandatory to vote in Federal and State elections in Australia. However while the electoral commissions will issue fines for not voting or enrolling the onus of this obligation is the responsibility of the citizen not the electoral commission. This obligation is known as the “burden of proof” and it is up to the citizen to ensure they enrol and vote.

This dynamic makes the citizen directly responsible for sound democratic participation, in one context, but also limits the mandate of the electoral commission. The electoral commission however, must make electoral participation accessible to all citizens.

For people with disability this dynamic is different if they are identified as having a “protected attribute”. This means they should not be discriminated against because they have a disability and their human rights and civic obligations may require support to enable them to participate and comply with mandatory laws and electoral process.

People who live in Disability Accommodation Services (DAS) are fully supported and the obligation is shared between them and their Disability Service Provider and the staff. This shared responsibility is where citizens become ostracised from participating. The Service Providers are not accountable to any safeguards that would ensure engagement and participation. In these circumstances the Parliamentary Electoral Matters Committee, who oversee the conduct of the elections should seek to ensure safeguards are implemented and a register is established to record that each citizen has been engaged in regard to their rights and obligations and their requirements for support to participate in electoral process.

While Commonwealth Electoral Law means it is compulsory to enrol and vote, it is up to the individual to do so. This is where the Electoral Act does not accommodate the positive discrimination aspect of disability supports. People with intellectual, and many other disabilities may need supports to assist in ensuring they can participate. This is real and adequate accessibility. This is also a case of the round peg in the square hole.

Not enrolling normally incurs a penalty which is a fine of \$180. Not voting is a \$20 fine. Neither, the PEMC or the JSCEM followed up on Heather's right to vote, nor did they ensure that Heather or any of the other 5,400 odd electors were adequately supported to comply with Mandatory Commonwealth Electoral Law in the 2016 Federal election.

This is where Commonwealth Electoral Law desperately requires strengthening to bridge mechanisms such as individualised disability support and the symbiotic nature of the “burden of proof”, which is a shared

responsibility between the Service Provider and the individual in receipt of services and supports. This is where the potential application of new technology to voting, scrutiny and counting can be implemented.

Service Providers are at the very least, partly responsible, for ensuring residents are adequately supported and that they participate in electoral processes.

There is a system known as the smart roll that notifies individuals that they are required to participate and enrol. The smart roll uses rental tenancy and drivers licence data to identify eligible citizens. It has been my suggestion that all people in receipt of NDIS supports who are eighteen years or older be registered on the electoral roll or their eligibility as citizens registered and/or their need for individualized support to enrol and vote, recorded too. Non-eligible electors must be registered. Australian electoral law needs to make a suitable provision to Risk Manage those who cannot manage their own burden of proof. Australian electoral law does not adequately differentiate between people with disability and those with unsound mind.

10. Human rights first

People with disability who require firstly, engagement secondly, qualification of individualized supports and thirdly, the delivery of their individualized supports if necessary, should have these elements included in the category “Participants Plans”. This is where the NDIS Act needs to be strengthened to ensure individuals satisfy “the burden of proof” and comply with Commonwealth Electoral Law.

In Australia and in the United Kingdom there is one foundational principle that precedes electoral process and democracy; it is the rights of the citizen. It is fundamental that electoral rights of all citizens need to be protected and qualified to ensure sound democratic governance. In the United Kingdom and Australia it is essential that a register is developed to ensure accountability and service delivery to citizens who are unable bear a “burden of proof. This is the only way the rights of these people with disability can be protected and their access to electoral processes and participation assured.

In the recent election in the United Kingdom how were eligible citizens with disability differentiated from non-eligible electors with disability, and what role does Service Provision need to fulfil?

“In a time of universal deceit - telling the truth is a revolutionary act.”

George Orwell

People with disability living in DAS who are eighteen years of age or older should be registered on the electoral roll: inclusion before exclusion. In the event of people not voting correspondence should be sent to the Service Providers (the home of the resident, their CRU) to establish the reasons for not participating. This data and the number of individuals being supported should be available to the electoral commissions to ensure eligible citizens are being appropriately supported and resourced. This process would also serve as a necessary and appropriate training process for Service Providers and their staff, which would improve carer appreciation and respect for individuals with disability, their rights and their responsibility to comply with compulsory Australian Commonwealth Electoral Law.

Neither, the PEMC or the JSCEM followed up on Heathers right to vote, nor did they ensure that Heather or any of the other 5,400 odd electors were adequately supported to comply with Commonwealth Electoral Law in the 2016 Federal election. Despite thousands of citizens neither enrolling, or voting the Australian Electoral Commission issued no fines, to my knowledge, yet these people are supported and reside in government-funded accommodation.

On behalf of the NDIS Consumer Watch, I made a request to the Minister for Administration and Finance, Senator Scott Ryan requesting that the Joint Standing Commonwealth Electoral Matters Committee (JSCEM) conduct an inquiry into the “Delivery of Individualized Supports and their assurance to support and comply with Human Rights, Mandatory Commonwealth Law and State/Territory Legislations” to secure electoral participation and sound democratic process.

However, Senator Scott Ryan suggested that a submission be made to the JSCEM in regard to the conduct of the 2016 Federal election and an inquiry may be undertaken from the JSCEM. I placed a submission with the JSCEM, but the Committee stripped evidence from it and no inquiry was undertaken.

It is critical during this period of reform that our electoral processes and our bureaucracy effectively ensure ‘Duty of Care’ and the rights of people with disability while transitioning from DHHS to the NDIS. The irony is that the Acting Director for the transition of the DHHS to the NDIS is the manager who denied the VEC accountability and who told me in 2010, “we cannot be seen to be leading them.”

“Who controls the past controls the future. Who controls the present controls the past.”

George Orwell

12. Citizenship is not optional

I am continually astounded by comments made by some of my relatives and disability care professionals. They tell me that they don't think people with intellectual disability should be allowed to vote. It seems they are of the opinion that being a citizen is something special and that it is a responsibility that cannot be taken lightly; they are right. Unfortunately they recognize this importance as their own and fail to understand that it is not "a self-importance" it is the "individuals' importance" an opinion from the individual placed on the ballot paper and an opinion that is not open to the judgment of others. In this period of disability reform it is time that all people with disability have their say.

In August 2018 before the Victorian State election in November 2018, the Victorian Parliamentary Electoral Matters Committee (PEMC) who oversee the conduct of electoral processes and the Victorian Electoral Commission (VEC) raised these issues with the VEC. The VEC does not have any Risk Management to mitigate against people with disability not being engaged or supported to enrol and vote. We can only hope that the PEMC insists that the VEC develop Safeguards and Risk Management in the form of a register to ensure individual citizens are engaged and or supported to enrol and vote.

Don't waste your opinion! Don't waste your vote! It is beyond the judgment of others and it is the essential ingredient in determining a sound democracy and responsible government.

"We shall not cease from exploration. And the end of all our exploring will be to arrive where we started and know the place for the first time."

T.S. Eliot

Notes

The Australian Government is being put under pressure to undertake a Royal Commission into Abuse in Disability. Matthew Potocnik as an experienced professional and advocate strongly recommends that the abuse of Human Rights is included in its Terms of Reference and that this includes the Civic Rights and Responsibilities of Citizens with disability, particularly those living in Disability Accommodation Services.

Names have been used sparingly in this publication to attempt to bring some transparency to these issues, where bureaucracy needs to be accountable to the law and its citizens.

These issues were recorded in an incident report submitted to the DHHS in 2016 when Matthew Potocnik formally resigned.

Evidence was submitted to the Parliament of Victoria in the Inquiry into Abuse in Disability Services 2015.

Evidence was submitted to the Victorian Ombudsman in relation to the inquiry into *Reporting and Investigation of allegations of abuse in the disability sector & Phase 2 – incident reporting*.

The Secretary of DHHS, was found to be in breach of “Duty of Care” in relation to a different matter. She was transferred in 2015 to the Department of Treasury.

Michael continues to work for DHHS in a Director capacity.

The Acting Director of DHHS Reform to the NDIS continues to work for DHHS in the same capacity.

Potocnik’s most recent submission: [Potocnik Report 2017 PWD Excluded](#)

The letters overleaf (Figures 2 and 3) were received in June and September 2018.



Figure 2. Correspondence from the Electoral Matters Committee - June 2018



PARLIAMENT OF VICTORIA
Electoral Matters Committee

19 September 2018

Mr M Potocnik
NDIS Consumer Watch

Dear Mr Potocnik

I refer to your recent correspondence to me as Chair of the Electoral Matters Committee.

As you are aware the committee met with the VEC on Monday 17 September discussing planning for the 2018 Victorian state election. During that meeting I raised with the VEC the specific issues you have communicated to me. The VEC, in response, outlined how it provides voting and enrolment services to people living in shared accommodation in Victoria. As a consequence of those discussions the committee is now more aware about how the VEC will provide voting services for people living in shared accommodation for the 2018 Victorian state election.

Thank you again for drawing the committee's attention to these issues.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Louise Asher'.

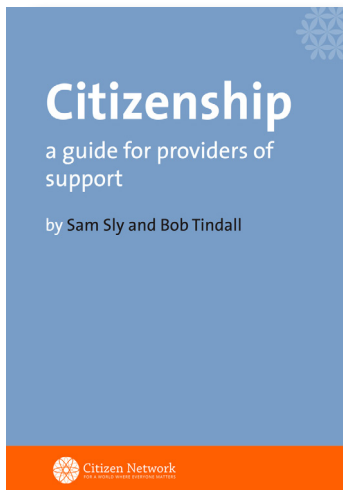
Hon Louise Asher MP
Chair
Electoral Matters Committee

Figure 3. Correspondence from the Electoral Matters Committee - September 2018

ABOUT THE AUTHOR

Matthew Potocnik is currently continuing to advocate for the rights of people with disability and is providing submissions to government. He wishes to introduce foundational safeguards to help underpin safety for people living with disability in our society. He is also continuing to work in an artistic capacity to help express the essential elements of these changes in our society. Matthew is the primary carer for his son Levi.

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You may also be interested in:

Citizenship

A new guide for providers of support working to develop true citizenship for all. Using the Keys to Citizenship as a framework, Sam Sly and Bob Tindall provide practical advice for people and organisations who provide support.

This paper is available to read at:

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