



# Submission to the Joint Standing Committee on the NDIS

Inquiry on the NDIS Quality and Safeguards Commission

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## Abbreviations

ALRC	Australian Law Reform Commission
DHHS	Victorian Department of Health and Human Services
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
NDIS Act	<i>National Disability Insurance Scheme Act 2013 (Cth)</i>
NDIS Commission	NDIS Quality and Safeguards Commission
OPA	Office of the Public Advocate
SDA	Specialist Disability Accommodation
SIL	Supported Independent Living
STO	Supervised Treatment Order

## Recommendations

### Recommendation 1

The Joint Standing Committee on the NDIS should conduct a follow-up inquiry on the NDIS Quality and Safeguards Commission in one year's time (i.e. 2021).

### Recommendation 2

The Disability Ministers' forum, in collaboration with the Australian Department of Social Services, should develop a plan to address the shortfalls in funding for disability advocacy services.

### Recommendation 3

The *National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018* (Cth) should be reviewed.

### Recommendation 4

The NDIS Quality and Safeguards Commission should encourage individuals and organisations with significant concerns about the wellbeing of NDIS participants to communicate those concerns to the Commission.

The NDIS Quality and Safeguards Commission should as a matter of practice provide meaningful feedback to any such individual or organisation where:

- the Commission, on reasonable grounds, considers the individual or organisation to be playing a positive role in the participant's life; and
- the provision of such information would assist the individual or organisation to promote and protect the rights and wellbeing of the participant.

### Recommendation 5

The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to include 'systemic issues' in the list of reportable incidents. A systemic issue should be defined as 'a pattern of incidents related to one participant which, when taken together, cause harm to a participant'.

### Recommendation 6

The *National Disability Insurance Scheme (Code of Conduct) Rules 2018* (Cth) and related guidance should be amended to reflect a zero-tolerance approach to abuse.

### Recommendation 7

The National Disability Insurance Agency should develop an operational protocol for planners (and Local Area Coordinators) to incorporate a formal and holistic assessment of participant risk, as outlined in the *NDIS Quality and Safeguarding Framework*. The assessment framework should be developed through a consultation process.

## **Recommendation 8**

The *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* (Cth) should be amended so that Supported Independent Living (SIL) support providers are required to be registered providers.

## **Recommendation 9**

The NDIS Quality and Safeguards Commission should publish disaggregated data and detailed thematic analyses on emerging safeguarding issues, including the following:

- complaints received (e.g. nature of the complaint, who made the complaint, time to resolution, out-of-scope complaints, outcome)
- incident reports (e.g. provider compliance with incident reporting requirements)
- use of restrictive practices (e.g. number of approved and unapproved restrictive practices)
- prevalence of violence and abuse occurring in services
- deaths in services (e.g. cause of death, investigations undertaken)
- actions taken by the Commission in relation to the above.

The data should present national, State and Territory level figures, as well as year-to-year comparisons.

## **Recommendation 10**

The Disability Ministers' forum should consider the national evaluation of Community Visitors Programs and endorse its recommendations.

## **Recommendation 11**

The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to include reference to the legislation authorising the Victorian and other Community Visitor Programs as a key component of the safeguarding arrangements in respect of NDIS funded services. Amendments should complement state laws by specifying that:

- Community Visitors are entitled to see copies of a participant's NDIS plan, provider incident reports, any documentation related to the participant's SDA tenancy arrangements, as well as the documents they are currently entitled to see when visiting (as specified in the Victorian *Disability Act 2006*);
- Community Visitors and other comparable entities who are appointed under state and territory legislation are entitled to share information to the extent necessary to advocate for participants and raise concerns with relevant complaints bodies.

# 1. About the Office of the Public Advocate

The Office of the Public Advocate (OPA) is a Victorian statutory office, independent of government and government services that works to safeguard the rights and interests of people with disability.

The Public Advocate is appointed by the Governor in Council and is answerable to the Victorian Parliament. OPA's primary functions include advocacy, investigation, and guardianship services for people with cognitive impairment and mental illness. The Office provides advice, information, and education about laws affecting people with disability and coordinates four volunteer programs, as detailed below.

In 2019-20, OPA was involved in 1792 guardianship matters (950 of which were new), 430 investigations, and 284 individual advocacy matters. The majority (72 per cent) of eligible guardianship clients were NDIS participants, compared with 58 per cent in the previous year. These figures include the 22 individuals who received guardianship and/or advocacy in the transition to community living following the closure of Colanda Residential Services in Colac.

OPA signs NDIS service deeds consenting to services where guardians have the relevant authority. In 2019-20, OPA completed 1477 NDIS service agreements, a 136 per cent increase from the previous year.

OPA has two Disability Act Officers who fulfil a safeguarding role in relation to tenancy rights of people in disability residential services (many of which recently transferred to the *Residential Tenancies Act 1997* (Vic)) and other protections enacted in the *Disability Act 2006* (Vic), for example in relation to civil detention and restrictive interventions.

OPA provides training and support to more than 700 volunteers across four volunteer programs: the Community Visitors Program, the Community Guardianship Program, the Independent Third Person (ITP) Program, and the Corrections Independent Support Officer (CISO) Program.

Community Visitors are empowered by law to visit Victorian accommodation facilities for people with disability, at any time, unannounced, to monitor and report on the adequacy of services provided. Where possible, Community Visitors communicate with residents to ensure they are treated with dignity and respect. As a key component of the quality and safeguarding arrangements operating during the transition to the NDIS, Community Visitors continue to visit disability residential accommodations, supported residential services, and mental health facilities where residents and patients have various interactions with the NDIS. In 2018-19, Community Visitors in the disability residential services stream completed 2952 visits.

OPA undertakes systemic advocacy in relation to the NDIS and the implementation of a nationally consistent quality and safeguarding framework. OPA made submissions to past inquiries led by the Joint Standing Committee on the NDIS (Joint Standing Committee) and appreciates the continued engagement on critical issues affecting the lives of people with disability.

While the NDIS has great potential to provide choice and control to people with disability, this intention is not yet fully realised for all participants. Some OPA clients who have complex and challenging support needs are not yet seeing the benefits that the NDIS is intended to deliver. OPA welcomes the opportunity to contribute to this inquiry into the NDIS Quality and Safeguards Commission.

## 2. About this submission

The NDIS Quality and Safeguards Commission (NDIS Commission) commenced operation in Victoria on 1 July 2019, however the transition to full scheme safeguarding arrangements is behind schedule and not yet complete (in large part due to delays described in section 3.6.1 of this submission). Consequently, OPA's observations of, and interactions with, the NDIS Commission are limited. In addition, the COVID-19 pandemic and its related restrictions have forced the sector, and the NDIS Commission, to operate in unusual circumstances. Therefore, OPA considers there is reason for the Joint Standing Committee to conduct a follow-up inquiry on the NDIS Commission in a year's time to gain a more accurate and comprehensive understanding of its effectiveness.

### Recommendation 1

**The Joint Standing Committee on the NDIS should conduct a follow-up inquiry on the NDIS Quality and Safeguards Commission in one year's time (i.e. 2021).**

The terms of reference inquire on the NDIS Commission's operations, as well as on the adequacy of its authorising legislation and policy. For the most part, the issues identified in this submission can be attributed to legislation and policy that, in OPA's view, diminish the effectiveness of the NDIS Commission in safeguarding the rights of NDIS participants.

This submission is based on OPA's involvement with the NDIS, in supporting participants with cognitive impairment through its many program areas (listed at Section 1). OPA continues to advocate for quality and safeguarding to be guided by a human rights approach to protection and service delivery in the NDIS. This submission responds to the Joint Standing Committee's terms of reference and highlights:

- the limitations of the NDIS' complaints-based system
- the role of independent advocacy, including but not limited to OPA and Community Visitors
- the amendments needed in NDIS quality and safeguarding policies to prevent violence, abuse, neglect and exploitation of NDIS participants

OPA draws upon the Interim Report of the Government of South Australia's Safeguarding Taskforce, commissioned by the South Australian State Government in response to the tragic death of Ann-Marie Smith. The report examines "gaps and areas that need strengthening in safeguarding arrangements for people with disabilities living in the State"<sup>1</sup> and while somewhat specific to South Australia, also speaks to safeguarding in a national context.

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<sup>1</sup> Government of South Australia. *Safeguarding Task Force Interim Report*. (15 June 2020) 3.

### 3. Response to the terms of reference

#### 3.1. Monitoring, investigation and enforcement powers

##### 3.1.1. Monitoring in a complaints-based model

The NDIS is founded on a consumer-based model wherein participants are given choice and control to purchase disability services from a marketplace. In this model, consumer-based actions – the choices made by participants and participant led complaints – are viewed as indicators of quality.

OPA is concerned that the NDIS' market-based approach to 'consumer choice', and its associated safeguards, generate risks to the safety and rights of people for whom 'the market' has historically failed. The effectiveness of such an approach is dependent upon the ability of participants to fully activate their rights within the market.

A complaints-based system places the impetus on participants to come forward to express their dissatisfactions, and this can act to disregard the range of factors that may prevent people with disability from doing so. For example, a participant may fear losing services if they come forward or, in the case of people with cognitive impairment who may not have the capacity or opportunity to articulate their concerns, a complaint can be too burdensome to initiate. This can be compounded for people who have limited informal supports in their lives. The shortcoming lies in the model and not necessarily the NDIS Commission, but the NDIS Commission can work to lessen the burden on participants.

OPA stresses the importance of representative bodies, advocacy organisations, and other consumer bodies in assisting NDIS participants to make complaints (further discussed in section 3.2). Indeed, the NDIS Quality and Safeguarding Framework recognises the role of formal independent advocacy and the importance of these programs being adequately resourced to support participants. It is worrisome that many advocacy organisations report being strained, operating with reduced or uncertain funding, and dealing with increasing waitlists.

OPA appreciates that the Australian Government is leading a "national demand and gap analysis of independent disability advocacy and decision-making supports"<sup>2</sup> and that the findings of this work will inform Disability Ministers' in making future funding decisions for these services. It is critical that this work be promptly progressed.

#### **Recommendation 2**

**The Disability Ministers' forum, in collaboration with the Australian Department of Social Services, should develop a plan to address the shortfalls in funding for disability advocacy services.**

This submission, particularly section 3.7.2, speaks to the complementary role of outreach and independent oversight mechanisms, like Community Visitors Programs, in protecting and promoting the human rights of people with disability, especially those who may not make full use of complaints processes or for whom a complaints-based model is insufficient.

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<sup>2</sup> Meeting of Commonwealth, State and Territory Disability Ministers (Government of Australia). *Statement* (24 July 2020) 1.

### 3.1.2. Market oversight

Market stewardship in the NDIS is central to ensuring the market is sustainable and responds to demand so that no participant is left behind. The functions of the market steward include monitoring, facilitating, and various forms of market intervention.<sup>3</sup> The NDIA is a key player here, but there is also a role for the NDIS Commission.

The *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) lists market oversight as one of the NDIS Commissioner's core functions which includes the "monitoring of changes in the NDIS which may indicate emerging risk" and the "monitoring and mitigating of risks of unplanned service withdrawal".<sup>4</sup>

The NDIS Commission website elaborates, if only slightly:

The NDIS Commission will provide market oversight by collecting, analysing and advising on a range of unique data to identify trends and changes in the NDIS market. This information will highlight the emerging benefits and risks, service delivery trends, quality issues and other important factors that help governments and the market to shape the NDIS over time.<sup>5</sup>

The website advises that further information will be released shortly as to exactly how the NDIS Commission will undertake these functions. It will be useful for the NDIS Commission to publicly report on this.

Directives on market stewardship in the NDIS are diffused across multiple policy documents. While the specifics of the shared governance arrangements are not yet known, it is clear that market stewardship is intended to be shared by the NDIA, Australian, State and Territory Governments, and the NDIS Commission. OPA appreciates the Joint Standing Committee's past work and recommendations for an overarching strategy document that would articulate roles and responsibilities. The Joint Standing Committee will observe that little progress has been achieved. Despite substantial evidence from the sector that thin markets are disproportionately affecting some participants, the promises of a Maintaining Critical Supports and a Provider of Last Resort Framework are unrealised, and the outcomes of the Department of Social Services' Thin Market Project are unclear.

OPA is confident that the Joint Standing Committee will continue to monitor progress against its recommendation for a market stewardship strategy document to be developed by the Australian Department of Social Services and NDIA.<sup>6</sup> This is ever more important in light of the COVID-19 pandemic, which OPA expects will cause many providers to leave the sector.

With regards to the NDIS Commission's market oversight function, OPA makes the following suggestions. Firstly, the NDIS Commission should be transparent and forthcoming on its activities in this realm and secondly, it should use its monitoring and investigation powers to identify and address systemic (i.e. market) issues.

<sup>3</sup> National Disability Insurance Agency. *NDIS Market Approach: Statement of opportunity and intent* (November 2016) 3.

<sup>4</sup> *National Disability Insurance Scheme Act 2013* (Cth) s181E(i)

<sup>5</sup> <https://www.ndiscommission.gov.au/providers/ndis-market-oversight>

<sup>6</sup> Joint Standing Committee on the National Disability Insurance Scheme, *Inquiry into market readiness for provision of services under the NDIS* (September 2018) 10.



### **3.1.3. Investigation powers**

The NDIS Commission can initiate investigations—a significant and important power—but it is too early to comment on how and when this power is exercised. For instance, legislation does not explicitly direct the NDIS Commission to investigate systemic issues in the provision of services, but OPA hopes it will do so. An amendment to the definition of ‘reportable incident’ would greatly assist in alerting the NDIS Commission to potential issues, as explained in section 3.2.2.

Based on its few interactions with the NDIS Commission, OPA sees value in encouraging the NDIS Commission to exercise its functions more broadly. By way of example, in a recent matter, OPA was made aware of a participant who was subject to physical, emotional, and financial abuse by a family member. One form of abuse saw the family member in question interfere with the participant’s NDIS supports; among other things, the family member pressured the participant to continue to live with them when it was known to others that they would prefer to make use of their NDIS funds to trial independent living.

OPA referred the case to the NDIS Commission, cognisant that the scope for intervention would be limited. OPA requested that the NDIS Commission make inquiries to ascertain whether NDIS providers were aware of the abuse and to encourage providers to support the participant by seeking to reduce further interference and abuse by the family member. The NDIS Commission declined taking action on the basis that the referral was outside its remit.

The outcome is disappointing to OPA. Firstly, it illustrates a lack of recognition for providers, for example support coordinators, who can play a meaningful role in keeping participants safe. Secondly, it represents a missed opportunity to advance the primary objectives of the NDIS Quality and Safeguarding Framework; that is, to allow participants to live free from abuse, violence, neglect and exploitation and to empower participants to exercise choice and control over their NDIS supports.

### **3.1.4. Education functions**

While not included in the terms of reference for this inquiry, OPA briefly comments on the NDIS Commissioner’s function to “promote the provision of advice, information, education and training to NDIS providers and people with disability.”<sup>7</sup> Developmental safeguards (i.e. capacity building for participants, workers, and providers) are key components of the NDIS Quality and Safeguarding Framework. While the NDIS Commission is still in its early stages of operation, OPA hopes to see an increase in education functions, in support of a complex and rapidly evolving sector.

## **3.2. Complaints and reportable incidents – including allegations of abuse and neglect of NDIS participants**

### **3.2.1. Complaints and referrals**

In July 2020, two information sharing schedules were agreed upon and formalised between the NDIS Commission and each OPA and the Community Visitors Program (disability services stream). This as an important step forward in OPA’s relationship with the NDIS Commission.

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<sup>7</sup> *National Disability Insurance Scheme Act 2013* (Cth) s181E(c).

In the handful of referrals put forth by OPA,<sup>8</sup> the privacy requirements established in NDIS Act and Rules have at times prevented the effective sharing of information by the NDIS Commission. In some instances, the NDIS Commission has been unable to update OPA on the progress of its work in relation to a referral, thereby diminishing OPA's ability to undertake a more targeted advocacy response. The information sharing schedules cannot overcome legislative restrictions on the NDIS Commission when it comes to sharing information. Ultimately, it is participants who are disadvantaged.

At a sector-wide level, there is evidence that the NDIS Commission fails to fully recognise (and utilise) the role of independent advocates in supporting participants. In one example provided to OPA, a participant with a cognitive impairment was supported by a funded disability advocacy organisation to make a complaint to the NDIS Commission about financial exploitation by a registered service provider. The NDIS Commission in turn indicated it could only receive the referral with the consent of the participant, who, due to the nature of their impairment, could not consent. The NDIS Commission did eventually accept the complaint but excluded the advocate from the complaints process, depriving the participant from that necessary support.

The NDIS Commission seems to be grappling with an unresolved tension between two opposing legislative obligations: to recognise the role of advocacy in representing the interests of people with disability and to respect a participant's privacy.<sup>9</sup>

OPA considers the NDIS Commission could do more to encourage and provide feedback to individuals and organisations that are acting to promote the wellbeing of people with significant cognitive impairment, especially those who are unable to articulate their complaint without appropriate support. Indeed, this is facilitated by the following legislative provision:

The Commissioner may give information, including about action taken in relation to an issue raised in relation an issue raised in a complaint, to any person or body that the Commissioner considers has a sufficient interest in the matter<sup>10</sup>

OPA makes the following recommendations.

### **Recommendation 3**

***The National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018 (Cth) should be reviewed.***

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<sup>8</sup> While the information sharing schedules will facilitate the making of referrals by OPA and the Community Visitors Program to the NDIS Commission, the Public Advocate and the Community Visitors Board (disability services) are permitted by legislation to make referrals and therefore could do so prior to the schedules being finalised.

<sup>9</sup> *National Disability Insurance Scheme Act 2013 (Cth)* s4.

<sup>10</sup> *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018 (Cth)* s25.

## Recommendation 4

**The NDIS Quality and Safeguards Commission should encourage individuals and organisations with significant concerns about the wellbeing of NDIS participants to communicate those concerns to the Commission. The NDIS Quality and Safeguards Commission should as a matter of practice provide meaningful feedback to any such individual or organisation where:**

- **The Commission, on reasonable grounds, considers the individual or organisation to be playing a positive role in the participant’s life; and**
- **The provision of such information would assist the individual or organisation to promote and protect the rights and wellbeing of the participant.**

### 3.2.2. Reportable incidents

OPA and Community Visitors are concerned that the threshold for, and oversight of, reportable incidents were diminished in the transition to the NDIS Quality and Safeguarding Framework. In the course of the NDIS roll out, several inquiries investigated abuse in disability services in Victoria, leading to significant improvements in relation to incident reporting. In a 2015 report, the Victorian Ombudsman stressed that client safety and wellbeing should be the central purpose of incident reporting<sup>11</sup> and in 2016, a Victorian parliamentary inquiry into abuse in disability services made landmark recommendations to this effect.

The Victorian Parliamentary Committee suggested that the systemic normalisation of abuse within disability services should be addressed through “major cultural changes” commencing with mandatory reporting and a zero-tolerance of abuse approach.<sup>12</sup>

Incident reporting is mandatory in the NDIS, although only for registered providers (which is problematic) and not to the extent previously recommended and implemented in Victoria. One important loss is the inclusion of systemic or repeated issues (of mismanagement or abuse) as reportable incidents. In response to the Parliamentary Committee’s recommendations, the Victorian Department of Health and Human Services (DHHS) updated its incident reporting framework to amend the definition of ‘major impact’ incidents to include “a pattern of incidents related to one client which, when taken together, meet the level of harm to a client defined above. This may be the case even if each individual incident is a non-major impact incident.”<sup>13</sup> OPA and Community Visitors would like to see a similar provision added to the list of reportable incidents under the NDIS Act.

## Recommendation 5

**The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to include ‘systemic issues’ in the list of reportable incidents. A systemic issue should be defined as ‘a pattern of incidents related to one participant which, when taken together, cause harm to a participant’.**

<sup>11</sup> Victorian Ombudsman. *Reporting and investigation of allegations of abuse in the disability sector: Phase 2 – incident reporting* (December 2015).

<sup>12</sup> Family and Community Development Committee (Parliament of Victoria). *Inquiry into abuse in disability services – Final Report* (May 2016), 55.

<sup>13</sup> Department of Health and Human Services (State of Victoria). *Client incident management guide – client incident management system* (23 January 2020) 7.

Community Visitors can view incident reports to assist in their role. Access to these reports provides Community Visitors with crucial information on issues that impact resident welfare and, more broadly, helps them to gain an understanding of what has occurred between visits (e.g. what measures have been put in place to address matters previously identified). Importantly, access to incident reports allows Community Visitors to assess whether a provider is under-reporting and/or incorrectly classifying incidents. Errors in incident reporting are somewhat common and could be due to, as in the example provided below, staff not realising that an incident report should be completed or how the incident should be categorised.

Community Visitors had concerns regarding the aggressive behaviour of a resident in a group home. Other residents had told Community Visitors that they were afraid and staying in their rooms because of this resident's behaviour. There was concern that the traumatic impact of the exposure to violent incidents, even where residents had not been assaulted themselves, was not adequately captured in incident reporting. The service provider responded that incident reports "have not been completed for the emotional abuse on other residents as the documentation process would take hours to complete."<sup>14</sup>

In accessing incident reports, Community Visitors take on a quality assurance role in that they can provide advice and guidance to providers on ways to improve their reporting practices. This is all the more important in the NDIS safeguarding context, where the frequency and comprehensiveness of the NDIS Commission's auditing of incident reporting management systems are not yet clear.

If Community Visitors are to perform this aspect of their role, they must be granted access to incident reports, but this is one of the long-standing difficulties in the program. In 2018-19, Community Visitors could only access incident reports on 59 per cent of their visits to disability services. The issue is present across the three streams of the program and while not a new hurdle, the advent of the NDIS further complicates the landscape as there are now multiple incident management systems operating in Victorian disability services.<sup>15</sup> Recommendation 12 seeks to address this.

### **3.3. NDIS Code of Conduct and Practice Standards**

The NDIS Code of Conduct and Practice Standards have significant application, in that all NDIS providers regardless of their registration status must comply with their directives. Consequently, these two policies can be seen to set the bar for the minimum acceptable quality and safety indicators. It is crucial that the guidance accompanying these policies be founded on principles that promote the human rights of people with disability.

#### **3.3.1. Code of Conduct**

One of the objectives of the NDIS Code of Conduct is to educate and inform its users (i.e. NDIS workers and providers) about their human rights obligations under the United Nations *Convention on the Rights of Persons with Disabilities*, but OPA considers some provisions in the NDIS Code of Conduct to be inadequate in affirming the safety and wellbeing of participants, particularly those most at risk of abuse and/or for whom a complaints-based system is not sufficient. In OPA's view, the Guidance to the NDIS Code of Conduct offers

<sup>14</sup> *Community Visitors Annual Report 2018-19* (2019) 39.

<sup>15</sup> *Community Visitors Annual Report 2018-19* (2019) 21.

too great a liberty to providers in determining the extent of policies, systems, and procedures they must put in place to eliminate abuse. In past submissions, OPA recommended that the NDIS Code of Conduct be amended to articulate a stronger stance on preventing and responding to abuse within disability services. OPA maintains and expands on this position here.

Most importantly, the NDIS Code of Conduct should be more direct in supporting a zero-tolerance approach to abuse within services. The NDIS Code of Conduct requires workers and providers to “take all reasonable steps to prevent and respond to all forms of violence, exploitation, neglect and abuse of people with disability”. The language of zero-tolerance can be found only in the Guidance for providers and not that for workers, which is a significant omission.<sup>16</sup>

The wording should be more direct and affirmative to create safe cultures within services. The Victorian Parliamentary Committee, in its 2016 inquiry, recommended more robust measures that could inspire change in the NDIS context; the Parliamentary Committee recommended that a zero-tolerance guiding principle for the delivery of disability services should be articulated in legislation and that “all disability service providers be required to “demonstrate their commitment to the principle of zero tolerance as a condition of registration.”<sup>17</sup>

## **Recommendation 6**

**The *National Disability Insurance Scheme (Code of Conduct) Rules 2018 (Cth)* and related guidance should be amended to reflect a zero-tolerance approach to abuse.**

Second, OPA suggests that the definitions of abuse in the NDIS Code of Conduct are too succinct. The DHHS Code of Conduct, while no longer applicable to NDIS providers, is a useful comparison tool; it defines abuse broadly to encompass “physical, sexual, emotional and financial abuse, including abuse by a person with disability towards another person with disability.”<sup>18</sup> Each category or type of abuse is in turn individually defined.

Third, the NDIS Code of Conduct should guide workers and providers on how and when to report and respond to abuse. In 2013, OPA published an Interagency Guideline for Addressing Violence, Neglect and Abuse (IGUANA), a practice guideline for organisations, staff members and volunteers working with adults with disability who are at risk of violence, neglect or abuse. IGUANA was developed in collaboration with a range of statutory agencies and service providers and has been endorsed by over 30 organisations across Victoria. Despite IGUANA being somewhat dated, and notwithstanding the changed safeguarding arrangements, the principles behind the recommended course of action still hold currency and OPA would like to see a similar level of detail in the NDIS Code of Conduct Guidance.

<sup>16</sup> *National Disability Insurance Scheme (Code of Conduct) Rules 2018 (Cth)* s6(f).

<sup>17</sup> Family and Community Development Committee (Parliament of Victoria). *Inquiry into abuse in disability services – Final Report* (May 2016), xxviii.

<sup>18</sup> Department of Health and Human Services (State of Victoria). *Code of conduct for disability service workers: Zero tolerance of abuse of people with disability* (March 2018), 6.

Fourth, the NDIS Code of Conduct states that all NDIS providers and workers must contribute to the reduction and elimination of restrictive practices yet provides little guidance on how to practically work towards this goal. While it is true that, in the NDIS context, only registered providers can deliver behaviour supports and therefore administer *authorised* restrictive practices, this should not be taken to mean that unregistered workers (or providers) are not administering *unauthorised* restrictive practices, either willingly or inadvertently.

There is growing evidence that the use of unauthorised restrictive practices is a common occurrence; the NDIS Commissioner shared staggering data with the Royal Commission into violence, abuse, neglect and exploitation of people with disability showing 65 000 reported instances of unauthorised restrictive practices in multiple settings just in the six months from July to December 2019.<sup>19</sup> In some of these instances, a restrictive practice was administered to a person with disability contrary to or without appropriate positive behaviour strategies being in place to prevent their future use.

Every unauthorised restrictive practice that is administered must be reported to the NDIS Commission, and behaviour support specialists and other providers will be across their requirements to do so. However, OPA is doubtful that sufficient guidance is contained in the Code to explain to unregistered workers and providers what constitutes a restrictive practice and when to report its use.

### 3.3.2. Practice Standards

OPA has concerns around some of the NDIS Practice Standards, which it raised with the Joint Standing Committee in past submissions. OPA considers providers could benefit from further guidance in relation to certain areas of service delivery. For example, in its submission to the Joint Standing Committee's inquiry on Supported Independent Living (SIL), OPA delved into the Specialist Disability Accommodation (SDA) tenancy management process. The Practice Standards include just one line on tenancy management, as follows:

Each participant accessing a specialist disability accommodation dwelling is able to exercise choice and control and is supported by effective tenancy management.<sup>20</sup>

OPA can find no evidence of any further specifications for NDIS providers as to what 'effective tenancy management' should entail, even though other organisations in the sector have long worked towards establishing processes that promote fairness and equity in this particular area of service delivery. For instance, previous DHHS guidelines (which no longer apply) set a mandatory minimum advertising time and proposed considerations in relation to resident compatibility.

<sup>19</sup> Transcript of Proceedings (Royal Commission into violence, abuse, neglect and exploitation of people with disability, Thursday 27 February 2020) 800.

<sup>20</sup> NDIS Quality and Safeguards Commission. *NDIS Practice Standards: NDIS Practice Standards and Quality Indicators Version 1* (July 2018) 41.

Another example, also detailed in OPA's submission to the SIL inquiry and acknowledged by the Joint Standing Committee in its report, relates to conflicts of interest. Again, the Practice Standards touch upon conflict of interest but in certain circumstances, OPA considers more robust policies should be put in place.

OPA has several examples of support coordinators who are employed by the same provider that is delivering other NDIS funded services under the same plan. OPA and Community Visitors are aware of a number of cases where a participant is subject to undue influence or coercion by their support coordinator to enlist the same agency to provide other NDIS supports. A complicating factor is the thin market that exists in the provision of supports for people with complex needs and challenging behaviours.

OPA appreciates the Joint Standing Committee's recommendations to address the above in its report on SIL.

### **3.4. Provider registration and worker screening arrangements**

OPA considers the provider registration arrangements in the NDIS in relation to participants who may be at risk of abuse and neglect are in need of alteration. The NDIS Quality and Safeguarding Framework suggests a tiered registration system that differentiates providers delivering high from low risk supports, a paradigm that centres around the level of risk attributed to the service that is provided rather than the level of risk associated with the participant and their circumstances. NDIS legislation requires only certain classes of 'high risk' supports (e.g. SDA, specialist behaviour support) and providers delivering services to participants who have a plan managed by the NDIA.

While the latter category is likely to capture the majority of OPA's clients, OPA and Community Visitors are concerned that some participants at risk of abuse, neglect and exploitation may be able to receive NDIS services from providers that are not required to register.

The NDIS Quality and Safeguarding Framework suggests that the NDIS registration model is to be complemented with a formal participant risk assessment during the plan development process:

It is generally agreed that a holistic assessment of the risks a participant faces, which takes into account their family circumstances, informal supports and individual capabilities is critical to enabling informed choice. It is also critical to identifying those who may be most at risk of abuse, violence, neglect and exploitation or who may be vulnerable to other risks, such as service provider failure. Families and carers, in particular, can play an important role supporting individuals to make choices about their supports.<sup>21</sup>

The assessment would allow the NDIA to "consider" the participant's vulnerability to exploitation, abuse and financial risk, which would inform the planner in discussing potential risk management strategies with the participant.<sup>22</sup>

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<sup>21</sup> Department of Social Services (Government of Australia) *NDIS Quality and Safeguarding Framework* (9 December 2016) 31.

<sup>22</sup> *Ibid.*

The proposed approach aligns with recommendations made by the Australian Law Reform Commission (ALRC), in its *Elder Abuse* report, around safeguarding and supporting at-risk adults.<sup>23</sup> To be clear, ‘risk’ or vulnerability should not be assumed to be inherent to any individual, but rather a result of their circumstances that “renders them unable to protect themselves.”<sup>24</sup> The South Australian Safeguarding Taskforce specifies that vulnerability is increased by factors such as social isolation, lack of proper care from service providers, or systemic factors.<sup>25</sup>

The ALRC recommends the following definition of ‘at-risk adults’:

People over 18 years of age who:

- have care and support needs;
- are being abused or neglected, or are at risk of abuse or neglect; and
- are unable to protect themselves from abuse or neglect because of their care and support needs.<sup>26</sup>

The ALRC recommendation extends to a variety of contexts but its essence—that efforts should be made to identify and support at-risk adults—can and should feature in the NDIS context, as was intended in the NDIS Quality and Safeguarding Framework.

OPA is unaware of any holistic participant risk assessment such as the one described above being undertaken by planners or Local Area Coordinators. The Complex Support Needs Pathway could be one avenue to facilitate the identification of ‘at risk’ participants, but, as the Joint Standing Committee knows, access to the Pathway remains difficult and, regardless, does not include, to OPA’s knowledge, a formal and holistic assessment of participant risk.

The South Australian Safeguarding Taskforce’s interim report raises this as a concern, that “vulnerable participants [are] not being routinely identified and assigned ongoing support coordination in their NDIS plan” and recommends that the “the NDIS Quality and Safeguards Commission needs to consider the risk factors associated with the use of unregistered providers of personal support, particularly for vulnerable participants.”<sup>27</sup> OPA agrees on both accounts, but the responsibility here does not solely lie with the NDIS Commission, as the NDIA will need to implement the required measures (including assessments).

## Recommendation 7

**The National Disability Insurance Agency should develop an operational protocol for planners (and Local Area Coordinators) to incorporate a formal and holistic assessment of participant risk, as outlined in the NDIS Quality and Safeguarding Framework. The assessment framework should be developed through a consultation process.**

<sup>23</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (May 2017).

<sup>24</sup> Ibid.

<sup>25</sup> Safeguarding Taskforce (Government of South Australia). *Interim Report* (15 June 2020) 9.

<sup>26</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (May 2017), 387.

<sup>27</sup> Safeguarding Taskforce (Government of South Australia). *Interim Report* (15 June 2020) 9.



In addition to the above, OPA recommends that SIL support providers should be required to register.

## **Recommendation 8**

***The National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018 (Cth) should be amended so that Supported Independent Living (SIL) support providers are required to be registered providers.***

### **3.4.1. Transparency and public access to information**

The NDIS Quality and Safeguards Framework has a strong focus on building the capacity of participants. It explicitly recognises “the need for participants to be informed and discerning consumers for the benefits of a market-based system to be realised.”<sup>28</sup> The NDIS Commission holds information that is valuable to participant decision-making and its annual reports and website should publicise this information, as much as is possible within the bounds of privacy regulation.

In terms of public access to information on providers, the NDIS Commission website hosts a publicly available list of registered providers. The website has one document on banning orders against NDIS providers. The format is not necessarily accessible or user-friendly.

Because of the transition schedule, the NDIS Commission's 2018-19 annual report naturally only contains data in relation to the two states in which it operated during that time. Nonetheless, it is disappointing that the report does not provide more detailed information on the NDIS Commission's activities and the ways in which it exercised its various functions and powers. The quantitative data provided in a two-page infographic summary is superficial and there is little to no qualitative analysis.

In the consumer-driven market environment of the NDIS, the publication of information about providers, including complaints made against them, should be an indispensable mechanism to equip participants with the tools and knowledge to make be informed purchasers and consumers of NDIS supports. Through public reporting, the NDIS Commissioner enacts core functions and fulfils the objects of the NDIS Act to support the independence of people with disability, and, more importantly, to enable people with disability to exercise choice and control in the pursuit of their goals, and the planning and delivery of their supports.

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<sup>28</sup> Department of Social Services (Government of Australia) *NDIS Quality and Safeguarding Framework* (9 December 2016) 7.

## **Recommendation 9**

**The NDIS Quality and Safeguards Commission should publish disaggregated data and detailed thematic analyses on emerging safeguarding issues, including the following:**

- **complaints received (e.g. nature of the complaint, who made the complaint, time to resolution, out-of-scope complaints, outcome)**
- **incident reports (e.g. provider compliance with incident reporting requirements)**
- **use of restrictive practices (e.g. number of approved and unapproved restrictive practices)**
- **prevalence of violence and abuse occurring in services**
- **deaths in services (e.g. cause of death, investigations undertaken)**
- **actions taken by the Commission in relation to the above.**

**The data should present national, State and Territory level figures, as well as year-to-year comparisons.**

### **3.5. Communication and engagement with state and territory authorities**

OPA welcomes the NDIS Commission's engagement and communication, particularly in recent times.

In the past weeks, the Community Visitors Program and Boards have had opportunities to test and improve the parameters of their relationship with the NDIS Commission. For example, Community Visitors recently agreed to provide a weekly report of serious matters to the NDIS Commission. Some of the practical challenges that remain to be agreed upon include:

- consistent working definitions of abuse, neglect and exploitation;
- expected or acceptable timeframes for response from the NDIS Commission and vice-versa;
- extent of the information to be provided by the NDIS Commission in response to Community Visitors.

As previously mentioned, NDIS legislation can place constraints on collaboration. The NDIS Commission's privacy obligations restrain the sharing information, which can in turn limit the advocacy OPA and Community Visitors can undertake on the ground. As such, progress in relation to a participant's complaint can be slowed and the critical role of OPA and Community Visitors is underutilised, and arguably stifled by legislation.

At the of writing, OPA considers it has not yet reached the ideal or indeed necessary information sharing practices with the NDIS Commission.

## 3.6. Management of the transition period

### 3.6.1. Supports provided in-kind

The full roll out of the NDIS in Victoria remains very complicated, at both the policy and operational levels. There are a number of safeguards that OPA wishes to see continue, including:

- tenure rights of people with disability;
- the authorisation of the use of restrictive practices including the role of the Senior Practitioner under the *Disability Act 2006* (Vic);
- the continuation of compulsory treatment of people with disability in relation to the risks they pose to others and the legal structure in the *Disability Act 2006* (Vic) authorising and monitoring this.

Victoria passed the *Disability (National Disability Insurance Scheme Transition) Amendment Act 2019* (Vic) on 25 June 2019 to come into effect on 1 July 2019. The Act made amendments to the tenure arrangements earlier enacted to apply to participants living in SDA-enrolled dwellings. Once participants enter into SDA residency agreements (or these were established with them), their tenure becomes regulated by Part 12A of the *Residential Tenancies Act 1997* (Vic), instead of the Part 5 of the *Disability Act 2006* (Vic). Once the SDA agreement is formalised, Victoria's Disability Service Commissioner ceases to be the relevant complaints body to be replaced by the NDIS Commission.

The transition of group homes previously run by Victoria's DHHS and where DHHS was the SDA provider were considered to be in-kind arrangements under the *Bilateral Agreement between the Commonwealth of Australia and Victoria on the National Disability Insurance Scheme*. It was initially hoped that participants in Victorian group homes would transition to the scheme by 31 December 2019. However, this deadline was not met in the majority of cases and most of the eligible houses remain within the Victorian system, thus complaints should still be made to the Victorian Disability Services Commissioner.

Transition in relation to tenure also affects the operations in relation to regulated restrictive practices for people on Supervised Treatment Orders (STOs) (i.e. compulsory treatment orders made under the *Disability Act 2006* (Vic)). The confusion in relation to one matter as to whether the operator of the service was in this role as an NDIS service provider or a Victorian 'disability service provider' under the Disability Act ultimately led to the issuing of further clarifying regulations, the *Disability (Disability (National Disability Insurance Scheme Transition) Amendment Act 2019) Transitional Regulations 2020* (Vic).

Notwithstanding the above regulations, there remains confusion about which legal arrangements apply to participants and this requires an analysis of their tenure, the documents of tenure, whether they are in properties subject to in-kind arrangements, and whether the SIL provider is only a SIL provider or remains a Victorian disability service provider.

At times, it would be helpful to know if a person is living in an SDA enrolled dwelling in order to adequately direct and target OPA's advocacy. Previously, this information was held by the NDIS Commission, but it considered it could not disclose the information to OPA as it could have breached the confidentiality of the owner of the dwelling. The matter is now covered in the information sharing schedule recently agreed to with the NDIS Commission.

However, it is OPA's understanding that the list of NDIS SDA-enrolled dwellings is now held by the NDIA, not the NDIS Commission, and OPA does not have a special information sharing arrangement with the NDIA.

There are additional difficulties for participants on STOs who are transitioning into SDA-enrolled dwellings. Under the Disability Act, STOs can only be made for a maximum of one year. When a person on a STO transitions to an SDA residency agreement, their treatment plan is taken to be their NDIS behaviour support plan, but they will need to obtain a behaviour support plan developed by an NDIS registered behaviour support practitioner. There is concern that there are too few such practitioners to develop the plans in a timely manner. In these instances, thin markets lead to delays during which a person with disability may be subject to avoidable restrictions.

There are other complications for this group of participants who require supervision when in the community, but some NDIS providers providing more generalised services (for example, to access the community for recreation or shopping) are not set up for, or funded, to provide supervision as is required alongside their services. Consequently, the participant is stymied from having these supports in their NDIS plan, jeopardising the easing of restrictive practices as part of the person's treatment regime.

These issues are unique to the Victorian landscape, as they exist in the uneasy intersection of federal and state legislation. The solutions are likely to be complex. OPA advocates for the NDIA, the Australian and the Victorian Governments to work collaboratively to ensure the affected NDIS participants can access reasonable and necessary services in their plan, as well as the required safeguards.

### **3.6.2. Community Visitors' authorising framework**

The NDIS Quality and Safeguarding Framework attributes a safeguarding role to Community Visitors for the duration of the transition to the NDIS, and orders an independent national evaluation of the various Community Visitors schemes across Australia to assist the Disability Reform Council (DRC)<sup>29</sup> in determining what the continued role of the visitors should be at full scheme. The evaluation report is dated December 2018. There have been seven DRC meetings since then, including one on 10 December 2018, but none of the DRC Communiqués mention Community Visitors or the evaluation.

While Community Visitors' programs exist in most States and Territories, their operating parameters slightly differ. In Victoria, Community Visitors are independent volunteers who are empowered by legislation to visit disability 'residential services', 'SDA enrolled dwellings where there are SDA residency agreements in place', 'short-term accommodation and assistance dwellings', 'designated mental health services' and 'supported residential services' (SRS). Community Visitors play a vital safeguarding role for people with disability, providing independent on-site monitoring of service delivery and accommodation standards, as well as referring concerns to relevant bodies as required. The legislated powers of

<sup>29</sup> OPA is aware that National Cabinet has announced a review of the former Council of Australian Government (COAG) Councils, including the Disability Reform Council (DRC). As noted in the Statement from the 24 July 2020 meeting: "While the review is underway, disability ministers continue to meet to discuss critical issues of national significance in accordance with agreed protocols and the *National Disability Insurance Scheme Act 2013* (Cth). The future form and role of a disability ministers' forum will be determined under the revised Ministerial Forum structure, including progressing current actions".

(Meeting of Commonwealth, State and Territory Disability Ministers (Government of Australia). *Statement* (24 July 2020)).

Community Visitors enable them to assess services on the ground and through their annual reports, the Community Visitors Boards make recommendations to the Victorian Government on systemic improvements to drive positive change.

The Community Visitors scheme applies an outreach advocacy model, which is crucial for people with disability who, by reason of cognitive impairment and/or a history of disempowerment, may be unable to contact an advocate or may not recognise that they could benefit from the support of an advocate. Community Visitors are often referred to as the 'eyes and ears' of the community because for some residents, Community Visitors are the only unpaid and independent people in their lives.

One of the most important aspects of the Community Visitors' role is the reporting of abuse matters. It is, however, a complex area for a variety of reasons: residents may be unable to report what has happened or they may not perceive what has happened to them as abuse. Community Visitors can assist in this area and, importantly, keep service providers accountable.

The national evaluation recognised the contributions of Community Visitors and recommended their continuation at full scheme. The report made two key recommendations:

- the role of Community Visitors should continue to be provided by state and territory-based schemes where they exist
- to support Community Visitors schemes' interface with the NDIS Commission, the following matters should be agreed between the NDIS Commission and states and territories:
  - authority of Community Visitors to enter the premises of NDIS providers
  - data and information sharing
  - compulsory reporting to the NDIS Commission on alleged reportable incidents and failure to adhere to incident management processes
  - reporting on patterns of concern to the NDIS Commission and State/Territory agencies
  - role of Community Visitors Scheme in relation to restrictive practices monitoring and reporting.<sup>30</sup>

The implementation of the above recommendations is at least in part conditional on the endorsement of Disability Ministers (previously known as Disability Reform Council). The Victorian Government has a long-standing commitment to maintain the Program While awaiting a decision on the ongoing role of CVs from Disability Ministers, attempts have been made by the Victorian Community Visitors Program to carry on with their safeguarding functions, but this has not been straightforward. The DRC's acceptance of the above recommendations would facilitate the work of Community Visitors and be an important recognition of their contribution to safeguarding in the NDIS.

## **Recommendation 10**

**The Disability Ministers' forum should consider the national evaluation of Community Visitors Programs and endorse its recommendations.**

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<sup>30</sup> Department of Social Services (Government of Australia). *Community Visitors Schemes Review* (December 2018) 11.

While amendments have been made to Victorian legislation to enable Community Visitors to continue to operate in an NDIS environment, federal legislative reform is required to ensure that Community Visitors have an ongoing role in safeguarding the wellbeing of NDIS participants. OPA repeats a recommendation made in its submission to the review of the NDIS Act.

## Recommendation 12

**The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to include reference to the legislation authorising the Victorian and other Community Visitor Programs as a key component of the safeguarding arrangements in respect of NDIS funded services. Amendments should complement state laws by specifying that:**

- **Community Visitors are entitled to see copies of a participant's NDIS plan, provider incident reports, any documentation related to the participant's SDA tenancy arrangements, as well as the documents they are currently entitled to see when visiting (as specified in the Victorian *Disability Act 2006* (Vic))<sup>31</sup>**
- **Community Visitors and other comparable entities who are appointed under state and territory legislation are entitled to share information to the extent necessary to advocate for participants and raise concerns with relevant complaints bodies.**

As the scheme matures and its accommodation market diversifies, the remit of Community Visitors in the disability services stream is shrinking. The NDIS affords greater choice, diversity and flexibility to participants in terms of accommodation settings and arrangements. Without a doubt, this is a welcome development, but safeguards must be in place to protect participants who are most vulnerable to abuse and exploitation.

Currently, Victorian Community Visitors in the disability services stream are limited in their NDIS-related role to visiting Short Term Accommodation and Assistance (STAA) and SDA-enrolled dwellings, and only if certain conditions are met (including that all residents have entered into an SDA-agreement). Actuarial predictions estimate that only 6 per cent of NDIS participants will be eligible to access SDA, a reduction in the reach of Community Visitors within the sector. Moreover, the NDIS permits accommodation sites to be established outside of SDA properties that very closely resemble what was previously defined as disability 'residential service'. These settings will no longer benefit from the independent oversight provided by Community Visitors.

OPA notes the Joint Standing Committee made the following recommendation in its report on SIL:

That the National Disability Insurance Scheme Quality and Safeguards Commission implement additional oversight measures for participants in group living arrangements.<sup>32</sup>

<sup>31</sup> *Disability Act 2006* (Vic) s130(3).

<sup>32</sup> Joint Standing Committee on the National Disability Insurance Scheme (Commonwealth of Australia). *Report into Supported Independent Living* (May 2020) 81.

The South Australia Safeguarding Taskforce makes a broader recommendation for the value of Community Visitors to be reaffirmed “as an additional safeguard for vulnerable participants.”<sup>33</sup> OPA sees value in broadening the scope of Community Visitors for the program to be available to all NDIS participants who are identified as being at risk, but this will require further thinking and necessitate governmental commitments.

## 4. Concluding remarks

As a key safeguarding body in Victoria, OPA, like the NDIS Commission, is committed to building and implementing a quality assurance and safeguarding framework that creates the best possible outcomes for people with disability.

In relation to many of the issues identified in this submission, OPA considers the NDIS Commission to be restricted by some aspects of NDIS legislation and policy. With this in mind, it may be timely to review both the NDIS Quality and Safeguarding Framework and the relevant NDIS Rules.

In closing, the South Australian Safeguarding Taskforce makes an important claim that “the best safeguard for any vulnerable individual is to have many people in their lives, preferably people who love and look out for them, who make sure the person is not left to their own devices when things go wrong.”<sup>34</sup> The responsibility is shared by the NDIA, the NDIS Commission, State and federal Governments, and statutory authorities, but the role of providers, workers, and the community at large should not be overlooked.

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<sup>33</sup> Safeguarding Taskforce (Government of South Australia). *Interim Report* (15 June 2020) 18.

<sup>34</sup> *Ibid* 14.