

State Government of Victoria submission to Inquiry into the National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021

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The Victorian Government welcomes the opportunity to contribute to the Senate Community Affairs Legislation Committee (the Committee) Inquiry into the National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021 (the Amendment Bill). The Committee has invited submissions addressing issues that may be of relevance to respondents.

The Victorian Government supports measures that improve protections for National Disability Insurance Scheme (NDIS) participants at risk of harm. The Victorian Government supports the implementation, through the Amendment Bill, of recommendations made by the Hon Alan Robertson SC through his Independent Review into the NDIS Quality and Safeguards Commission's oversight and the death of Ann-Marie Smith in South Australia in April 2020 (the Robertson Review).

In particular, the provisions of the Amendment Bill that promote facilitation of information exchange between the NDIS Quality and Safeguards Commission (the NDIS Commission) and states and territories regarding worker screening, the broadened scope of reportable incidents, extension of banning orders and new provisions related to NDIS workers as key personnel.

This submission aims to identify additional critical issues the Victorian Government considers should be addressed through this Bill to improve protections for participants at risk of harm.

Summary

The Victorian Government notes there was no consultation with states and territories regarding the development of the Amendment Bill. As such, the Committee's Inquiry provides an opportunity to raise outstanding critical gaps in quality and safeguards which should have been considered in the development of the Amendment Bill. These are:

1. Inadequate safeguards for plan managed participants
2. Barriers to information sharing with state and territory authorisation bodies for restrictive practices
3. Lack of legislative recognition of state and territory community visitor schemes.

The Victorian Government has consistently raised these gaps in quality and safeguards for at-risk NDIS participants and considers they should be addressed through the Amendment Bill. The Victorian Government makes the following recommendations for the Committee's consideration:

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Recommendation 1: That the Amendment Bill addresses the Tune review recommendation that a participant who requests to 'plan manage' their NDIS funding be subject to the same considerations that apply when a participant seeks to 'self-manage'.

Recommendation 2: That the Amendment Bill explicitly provides for information sharing between the NDIS Quality and Safeguards Commission and state and territory authorisation bodies for restrictive practices.

Recommendation 3: That the Amendment Bill explicitly recognises the role of state and territory community visitor schemes and addresses current impediments to sharing information about at-risk participants.

Background

The Victorian Government has a zero-tolerance approach to abuse of people with disability and an ongoing commitment to strengthen safeguards. As a Government and as a society we must ensure the right safeguards are in place so people with disability and their families can rely on receiving quality supports.

The National Quality and Safeguards Framework (the Framework) provides a nationally consistent approach to help empower and support NDIS participants to exercise choice and control, while ensuring appropriate safeguards are in place, and establishes expectations for providers and their staff to deliver high quality supports.

The Framework specifies that the Commonwealth will be responsible for the following functions:

- provider registration including quality assurance
- a complaint handling system
- serious incident notification
- restrictive practice oversight; and
- investigation and enforcement.

Worker screening is a shared responsibility between the Commonwealth, states and territories. State and territory worker screening units are responsible for worker screening checks in their own jurisdictions. The Commonwealth has responsibility for working with all governments to develop national policy and standards and operation of a national worker screening database.

Restrictive practices is the other area of shared responsibility between the Commonwealth, states and territories. A NDIS senior practitioner provides clinical leadership in positive behaviour support and reducing and eliminating the use of restrictive practices in the NDIS. States and territories remain responsible for the authorisation and prohibition of restrictive practices in their jurisdiction.

During transition to the NDIS, the Victorian Government worked with the Commonwealth and other states and territories to ensure the Framework is comprehensive, and, where possible, improved on existing safeguards. Since implementation, the Victorian Government has continued to advocate for strengthened safeguards and protections for people most at risk of harm.

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Discussion

1. Inadequate safeguards for plan managed participants

All NDIS participants are able to choose their providers of supports. Some participants may ask someone else to do it for them (a plan nominee), decide to manage the supports in their plan themselves (self-manage), or use a registered plan manager (plan manage). In other cases, the National Disability Insurance Agency (NDIA) and the participant may agree that the NDIA will be responsible for purchasing and managing the supports in their plan.

The Victorian Government considers the approach to approving plan management arrangements leads to a gap in quality and safeguards which:

- places NDIS participants at unacceptable risk
- undermines the intent of the Framework.

People who choose to plan manage or self-manage their plans are not limited to using registered NDIS providers. The only exception being supports that require mandatory registration— that is, supported disability accommodation, specialist behaviour support services and supports involving the use of a regulated restrictive practice.

Unlike self-management, which under the NDIS Act requires a risk assessment, there is no requirement for a risk assessment when plan management is chosen by a participant. This means a participant can choose to self-manage their plan following a risk assessment, but the same participant choosing a plan management option would not be subject to a risk assessment, irrespective of their level of vulnerability or cognitive capacity.

A risk assessment for people who request to self-manage their funding considers whether people who self-manage can use unregistered providers and have capacity to manage the attendant risks.

While providers of plan management must be registered with the NDIS Commission, there is no requirement for the support providers that may be accessed through plan management arrangements to be registered.

The Victorian Government has consistently advocated that the current lack of safeguards for participants who choose to plan manage poses an unacceptable risk from unregulated providers and that there should be equivalent safeguards to participants who self-manage their NDIS plans.

The *Review of the National Disability Insurance Scheme Act 2013* undertaken by David Tune AO PSM (the Tune Review) also identified issues with plan management. The review received feedback that while there are benefits to plan management services, including enabling choice and control, there are potential risks for participants engaging unregistered providers through plan management without the same risk assessment that is currently required for self-managing participants. Feedback to the review included the need to balance the benefits of having access to a greater choice of service providers with exposing participants to a greater risk of abuse, neglect or exploitation as the additional safeguards for registered providers are not required of unregistered providers.

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The review found the NDIA has a responsibility to protect participants who are using plan management options, particularly those with limited decision-making capacity, from procuring unregulated supports and to ensure they have the capacity to make informed decisions about the supports or services that would most appropriately meet their needs. On this basis, it was recommended a request for plan management should be subject to the same safeguards and risk assessment as self-managing participants, as set out in section 44 of the NDIS Act.

The Victorian Government supports the Tune review plan management recommendation and has strongly advocated for plan management to be subject to the same conditions and requirements that apply to self-management, particularly with respect to risk assessment.

The Commonwealth had advised this recommendation would be addressed through proposed amendments to the NDIS Act to implement the participant service guarantee, independent assessments and other Tune review recommendations. The Commonwealth has advised States and territories that amendments will be progressed in relation to the participant service guarantee. The timelines for these amendments and whether they will also address broader Tune review recommendations is currently not clear.

The Victorian Government considers the Tune review plan management recommendation should be included in the Amendment Bill to ensure the current gap in safeguards, which creates an acceptable risk to participants, is addressed as soon as possible.

Recommendation 1: That the Amendment Bill addresses the Tune review recommendation that a participant who requests to 'plan manage' their NDIS funding be subject to the same considerations that apply when a participant seeks to 'self-manage'.

2. Barriers to information sharing with state and territory authorisation bodies for restrictive practices

The NDIS Act defines a restrictive practice as "...any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability." The use of restrictive practices significantly impacts on human rights and as such requires robust and seamless oversight and safeguards.

The Framework identifies requirements for restrictive practices as a shared responsibility between the Commonwealth, states and territories. The NDIS Commission oversees restrictive practices, while States and Territories remain responsible for the authorisation and prohibition of the use of restrictive practices in their jurisdiction.

Section 181H of the NDIS Act outlines the NDIS Commissioner's functions in relation to behaviour support including to:

- provide leadership in relation to behaviour support, and in the reduction and elimination of the use of restrictive practices.

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- build capability in the development of behaviour support by developing and implementing a competency framework for registered NDIS providers whose registration includes the provision of behaviour support assessments and developing behaviour support plans.
- develop policy and guidance materials in relation to behaviour supports and the reduction and elimination of the use of restrictive practices.
- oversee the use of behaviour support and restrictive practices, including by monitoring registered NDIS provider compliance with the conditions of registration relating to behaviour support plans.

Section 181H(g) provides that the NDIS Commissioner will assist States and Territories to develop a regulatory framework, including nationally consistent minimum standards, in relation to restrictive practices which is:

- in line with the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector; and
- consistent with the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006.

The National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (the NDIS Rules) set out conditions that apply to registered NDIS providers who use restrictive practices in delivering NDIS supports. These include minimum requirements for developing a behaviour support plan containing a regulated restrictive practice and that:

- the use of a restrictive practice cannot occur where prohibited in a State or Territory (section 8)
- must be undertaken in accordance with State or Territory authorisation processes (section 9)
- must be reported to the NDIS Commission (section 14).

The Victorian Government is committed to working with jurisdictions to achieve national consistency in restrictive practice authorisation and to addressing the negative impacts misuse of these practices have on people with disability.

The Victorian Government has taken action to strengthen its authorisation process for the use of these practices to support transition to the NDIS. This includes amendments to the *Disability Act 2006* to provide an authorisation process for NDIS participants and prohibition of practices by the Victorian Senior Practitioner.

Victoria's authorisation process is one component of the restrictive practice process. Robust authorisation is dependent on adequate information being available to inform this decision. Prior to transition to the NDIS, the Victorian Senior Practitioner had access to all necessary individual information related to the use of restrictive practices and implementation of behaviour support plans to inform the authorisation process. Following transition, this information is held by the NDIS Commission and not available to the Victorian Senior Practitioner.

The Victorian Government considers lack of adequate information to inform individual authorisation decisions is placing Victorian participants at risk.

For robust authorisation to occur, individual records must be provided to ensure that prior to a decision to authorise or re-authorise all information regarding the implementation of the behaviour

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support plan, incidents and use of restrictive practices is available to the Victorian Senior Practitioner. The effectiveness of Victoria's authorisation process and of nationally consistent principles is significantly impacted by the lack of satisfactory information provided by the NDIS Commission.

The Victorian Government has requested urgent action to address the legislative barriers that impede information sharing with the Victorian Senior Practitioner to ensure the rights of Victorian participants subject to regulated restrictive practices are upheld.

The Amendment Bill specifically facilitates information disclosure with state and territory bodies for the shared responsibility of NDIS worker screening. However, it does not explicitly address information sharing for the other area of shared responsibility, restrictive practices, to enable appropriate authorisation of restrictive practices by state and territory bodies.

The Amendment Bill enables bodies to be prescribed through NDIS rules for information sharing. The Victorian Government considers this inadequate for shared areas of responsibility as the decision to prescribe bodies remains with the NDIS Quality and Safeguards Commission. The Victorian Government considers that as a shared area of responsibility the disclosure of information to state and territory authorising bodies for restrictive practices is a critical safeguard to supporting at-risk participants and should be explicit in the NDIS Act.

Recommendation 2: That the Amendment Bill explicitly provide for information sharing between the NDIS Quality and Safeguards Commission and state and territory authorisation bodies.

3. Lack of legislative recognition of state and territory community visitor schemes.

In Victoria, community visitors are volunteers appointed by Governor in Council under the Disability Act and managed by the Office of the Public Advocate. They visit residential services to inquire into the quality of services and standard of care provided to residents.

Each year approximately 400 community visitors visit up to 5,000 people with disability, who live in over 1,000 different residential services. In 2019, the Victorian Government made amendments to the Disability Act to facilitate transition to the NDIS and enable community visitors to visit NDIS supported disability accommodation and short- term accommodation and assistance properties.

The role of community visitors within the National Framework was considered through the Department of Social Services *Community Visitor Schemes Review* (the National review). The review found that community visitors have a contribution to make to the Framework and that this contribution should be formally recognised. The National Review also found that to support community visitors' interface with the NDIS Commission, the following matters should be agreed between the NDIS Commission and states and territories:

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- Authority of Community Visitors to enter NDIS services
- 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 in relation to restrictive practices monitoring and reporting.

More recently, the Robertson Review recommended the NDIS Commission consider establishing its own equivalent to State and Territory based community visitor schemes to provide for individual face-to-face contact with vulnerable NDIS participants and that the NDIS Act should be amended to provide for this function. The Robertson review also recommended that until this happens, the Commission should continue to support state and territory community visitors and that any doubts about state and territory powers under those schemes in relation to NDIS participants should be resolved between the law officers of the Commonwealth and states and territories. While the majority of the Robertson review recommendations are addressed in the Amendment Bill, provisions to address this recommendation related to community visitors are not included.

The Victorian Community Visitors Annual Report 19-20⁹ (the Report) notes that community visitors continue to encounter difficulties in accessing information relating to NDIS participants, restricting their ability to perform their safeguarding role. The Report calls for formal recognition of state-based community visitor schemes within the Framework. The Report also advocated for amendment to the NDIS Act to include reference to legislation authorising the community visitors as a key component of NDIS safeguarding arrangements. Amendments should ensure that community visitors are able to access and share information to the extent necessary to advocate for participants and raise concerns with relevant bodies.

The Victorian Government considers community visitors are a critical safeguard for vulnerable and at-risk people with disability in the community. As such, the Victorian Government considers the Amendment Bill should partially address the recommendation of the Robertson review to enable legislative recognition of state and territory community visitor schemes and address current impediments to sharing information about at-risk participants. The Victorian Government considers the broader components of the Robertson review recommendation require ongoing consultation between jurisdictions.

Recommendation 3: That the Amendment Bill explicitly recognise the role of state and territory community visitor schemes and address current impediments to sharing information about at-risk participants.