

# Chapter 2

## Key issues identified

2.1 Submitters to the inquiry welcomed the Bill and the establishment of the National Disability Insurance Quality and Safeguards Commission (Commission).<sup>1</sup> However, submitters raised concerns with aspects of the Bill, including:

- significant items contained in delegated legislation;
- the independence and transparency of the Commission;
- provisions for NDIS provider registration;
- the role of independent advocacy and inclusivity; and
- other matters pertaining to the Commission's functions and administration.

### Significant items in delegated legislation

2.2 Submitters to the inquiry commented on the scope and significance of various instruments which the Bill makes provision for, stating that the detail of these instruments should be included in the primary legislation. The Department outlined the NDIS rules in evidence to the Committee:

The bill includes 23 rule-making powers. Of these rule-making powers, the following six rules are essential to the operation of the commission: NDIS practice standards, NDIS code of conduct, complaints management and resolution rules, incident management and reportable incident rules, behaviour support rules, and protection and disclosure of information rules.<sup>2</sup>

2.3 Of particular concern to submitters was the lack of detail regarding the NDIS rules,<sup>3</sup> the NDIS Practice Standards<sup>4</sup> and the NDIS Code of Conduct,<sup>5</sup> which were described as 'critical pathways for delivering quality and safeguards within a consumer directed scheme.'<sup>6</sup>

2.4 The Minister explained the rationale for including the detail of these significant rules in instruments, rather than the Bill itself:

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1 See for example National Disability Insurance Agency, *Submission 7*, p. 1; National Mental Health Consumer and Carer Forum, *Submission 12*, p. 1; ACT Human Rights Commission, *Submission 23*, p. 1; Disabled Peoples Organisation Australia (DPOA), *Submission 34*, p. 5; People with Disabilities Western Australia (PWD WA), *Submission 45*.

2 Mr Andrew Whitecross, Department of Social Services (Department), *Committee Hansard*, 5 September 2017, p. 26.

3 Victorian Council of Social Service (VCOSS), *Submission 21*, p. 11.

4 United Voice, *Submission 32*, p. 5.

5 Health Services Union (HSU), *Submission 30*, p. 5.

6 ACT Public Advocate and Children and Young People Commissioner (PACYPC), *Submission 23*, p. 4.

Separating the rules from the Bill provides appropriate flexibility and enables the Commission to be responsive in circumstances where the NDIS market environment is uncertain and rapidly changing. The NDIS is still in transition and it is growing and evolving rapidly. Currently the NDIS involves almost 7,000 providers with about 73,000 workers, supporting about 75,000 participants with approved plans, and in full scheme this is expected to grow to 13,500-40,000 providers with perhaps 160,000 workers, supporting over 460,000 participants. These providers and workers will include current disability service providers and new entrants, including a number of emerging new "digital disrupter" models with "Uber" type service provision. The rapid change in scale and complexity of the NDIS market means that unpredictable risks may emerge in the medium term. The Commission will need to deal promptly with new and emerging areas of risk in the effective regulation of NDIS providers, both now and into the future. It is therefore appropriate that these aspects of the scheme be covered by rules that can be adapted and modified in a timely manner.<sup>7</sup>

### *NDIS Rules*

2.5 As noted above, the Bill sets out the legislative framework within which the core functions of the Commission will sit, however the NDIS Rules made under the Act,<sup>8</sup> will provide 'the detail necessary to support the evolving nature of the Commission's regulatory activities'.<sup>9</sup>

2.6 Disabled People's Organisation Australia (DPOA) said of the NDIS Rules: '[t]he effectiveness of the NDIS Commission in protecting people with disability from violence, abuse and neglect depends heavily on the NDIS Rules...'<sup>10</sup> The Queensland Office of the Public Advocate commented similarly: '[t]he success of safeguards in this context will depend heavily upon proper implementation and administration of the NDIS Rules.'<sup>11</sup>

2.7 The EM discusses the wide-ranging circumstances that the NDIS Rules will cover, including significant matters such as disclosure provisions and reportable incidents. The Law Council of Australia expressed their support for the development of rules regarding the Commissioner's disclosure powers and reportable incidents, and noted that relevant stakeholders should be consulted on the development of the rules.<sup>12</sup> The Victorian Council of Social Services (VCOSS) shared a similar view,

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7 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest No. 8: Ministerial responses – response from the Hon Christian Porter MP*, 9 August 2017, p. 3.

8 Provisions for the NDIS Rules are specified under Section 209 of the Act, as legislative instruments made by the Minister for the purposes of the Act.

9 Department, *Submission 4*, p. 20.

10 DPOA, *Submission 34*, p. 6.

11 Queensland Office of the Public Advocate, *Submission 2*, p. 1.

12 Law Council of Australia, *Submission 11*, p. 2.

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recommending that broad consultation be undertaken with the disability sector regarding the NDIS Rules.<sup>13</sup>

2.8 The practical need for consultation with the disability sector was highlighted by Carers Victoria and Queensland, who noted that whilst they expected further detail was to come in the NDIS rules when developed later, there was insufficient detail in the Bill to 'make an accurate assessment of the impact on care relationships.'<sup>14</sup>

2.9 The Committee notes the Department has stated it will continue to consult on the ongoing development of the NDIS Rules.<sup>15</sup> Furthermore, in a question on notice, the Department proposed that anyone who would like to be involved in the consultation process may contact the Department via: [ndisqualitysafeguards@dss.gov.au](mailto:ndisqualitysafeguards@dss.gov.au).<sup>16</sup>

#### *NDIS Practice Standards*

2.10 The Committee heard evidence that pointed to the importance of consultation in the development of the NDIS Practice Standards. Advocacy organisation JFA Purple Orange, expressed support for the NDIS Practice Standards 'which will unify, and be a significant improvement on, the varied current State based systems' but recommended they be developed in consultation with people living with disability.<sup>17</sup> The Health Services Union (HSU) raised concerns with the lack of detail around the NDIS Practice Standards proposed in the Bill, particularly given the centrality of these to the operation of worker screening.<sup>18</sup>

2.11 VCOSS expressed concern the NDIS Practice Standards would not apply to unregistered providers.<sup>19</sup> People with Disabilities WA raised concerns there may be confusion between the NDIS Practice Standards and the existing National Standards for Disability Services and stated a need to 'identify the difference in practice to ensure that providers are not duplicating effort on two separate standards.'<sup>20</sup>

2.12 In its submission to the inquiry, the Department advised that the NDIS Practice Standards are being developed in consultation with a group of key stakeholders, including advocates and service providers:

The development of the NDIS Practice Standards is being overseen by a Technical Reference Group with representation from each of the states and territories, the Commonwealth Department of Health, the NDIA, and

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13 VCOSS, *Submission 21*, p. 11.

14 Carers Victoria and Carers Queensland, *Submission 27*, p. 1.

15 Department, *Submission 4*, p. 6.

16 Department, *Answers to Questions on Notice taken 5 September 2017*, [p. 5].

17 JFA Purple Orange, *Submission 37*, p. 12.

18 HSU, *Submission 30*, p. 5. See also United Voice, *Submission 32*, p. 5.

19 VCOSS, *Submission 21*, p. 17.

20 PWD WA, *Submission 45*, p. 5.

stakeholders from Disabled People's Organisations Australia, National Disability Services, Children and Young People with Disability Australia.<sup>21</sup>

2.13 Matters regarding provider registration and workforce screening are discussed in further detail later in this chapter.

### *Code of Conduct*

2.14 United Voice submitted that while the Bill provides for the creation of a Code of Conduct, it remains silent on the content of the Code. United Voice expressed its concerns with the draft Code of Conduct released by the Department included that it requires providers and workers to meet existing obligations around quality, but does not address serious workforce issues which put quality service delivery at risk and ultimately threaten the sustainability of the NDIS.<sup>22</sup>

2.15 The Australian Services Union (ASU) submitted that the Code of Conduct should include clear commitments that NDIS workers will be afforded procedural fairness in the event of a complaint or investigation, and are able to respond to allegations at an early stage and have access to an internal appeals process.<sup>23</sup>

2.16 The ACT Public Advocate and Children and Young People Commissioner (PACYPC) expressed support for the Code of Conduct, and recommended it be aligned with existing codes and standards 'to ensure providers and workers can reasonably comply with all their obligations.'<sup>24</sup>

2.17 The Department clarified the Code of Conduct 'will apply to all providers and workers who are funded under the NDIS, regardless of whether they are registered, and to persons employed or otherwise engaged by NDIS providers' and submitted it is a key mechanism for the Commission to oversee and enforce compliance of providers who engage in unacceptable conduct.<sup>25</sup>

2.18 The Department further submitted that the Code of Conduct would be drafted based on the public consultation it has already undertaken, with over 100 submissions and 530 survey responses received<sup>26</sup> as well as additional consultations to occur in October 2017.<sup>27</sup>

## **Consultation**

2.19 In considering the instruments provided for in the Bill, submitters commented on the proposed classification of those instruments under the Act and noted that

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21 Department, *Submission 4*, p. 10.

22 United Voice, *Submission 32*, p. 4.

23 Australian Services Union, *Submission 31*, pp. 5-6.

24 PACYPC, *Submission 23*, p. 6.

25 Department, *Submission 4*, p. 9.

26 Department, *Submission 4*, p. 9.

27 Mr Andrew Whitecross, Department, *Committee Hansard*, 5 September 2017, p. 26.

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varying the classifications of the instruments affects governments' obligation to consult on those instruments under the Act.

2.20 Proposed amendments to section 209(8) of the Act provide that the majority of the NDIS Rules made for the quality and safeguarding purposes under the Act will be classified as Category D rules.<sup>28</sup> As observed by Carers Victoria and Carers Queensland, Category D rules require consultation with states and territories under the Act, but not their agreement.<sup>29</sup>

2.21 The NDIS Rules which deal with classes of provider registration approved to provide behavioural support, and the NDIS Practice Standards to the extent they deal with worker screening, will be classified as Category B rules. The EM explains the Category B classification has been used for these rules, as implementation will 'require agreement with a host jurisdiction because they relate to an area, law or program of a host jurisdiction.'<sup>30</sup> Some submitters suggested that 'rules which relate to key areas of the Framework should be subject to agreement from all jurisdictions.'<sup>31</sup>

2.22 Submitters and witnesses have noted that consultation goes to the heart of inclusivity and stressed the need for ongoing consultation by the Commission with people with disability and relevant advocacy organisations.<sup>32</sup> DPOA submitted 'it is critical that the development of the NDIS Rules involves engagement and consultation with people with disability and their representative and advocacy organisations.'<sup>33</sup>

2.23 Further to this, Australian Federation of Disability Organisations (AFDO) and the Disability Advocacy Network of Australia (DANA) recommended the Bill include a requirement that public consultation be undertaken on any changes to rules 'to ensure transparency and that people with disability have a voice in the way in which quality and safeguards should be delivered.'<sup>34</sup>

2.24 The PACYPC recommended that the Commission's operations 'incorporate regular opportunities for consumer participation and consultation.'<sup>35</sup>

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28 National Disability Services (NDS), *Submission 22*, p. 2.

29 Carers Victoria and Carers Queensland, *Submission 27*, p. 1.

30 EM, p. 65.

31 Victorian Government, *Submission 25*, p. 2.

32 NDS, *Submission 22*, p. 1. See also submissions from ACT Disability, Aged and Carer Advocacy Service (ADACAS), *Submission 24*, Australian Federation of Disability Organisations (AFDO) and (Disability Advocacy Network of Australia (DANA), *Submission 44*, VCOSS, *Submission 21* and Young People in Nursing Homes National Alliance, *Submission 43*.

33 DPOA, *Submission 34*, p. 6.

34 AFDO and DANA, *Submission 44*, p. 11. This issue was also raised in submissions from ADACAS, *Submission 24*, NDS, *Submission 22*, Northcott, *Submission 46*, and VCOSS, *Submission 21*.

35 PACYPC, *Submission 23*, p. 3.

2.25 National Disability Services (NDS) observed that under the NDIS Framework, states and territories will undertake certain functions, including worker screening and the approval of restrictive practices. NDS submitted 'state and territory governments have an integral (if reduced) role in overseeing the delivery of high-quality supports to people with disability'.<sup>36</sup>

2.26 The Department clarified that consultations on a range of matters, such as the NDIS Rules, will be undertaken and stated 'we are working closely with state and territory jurisdictions and will involve other key stakeholders in the development of the key standards and rules that we need to operationalise the legislation.'<sup>37</sup> The Department further clarified that consultation on the NDIS Code of Conduct has already been undertaken with more to occur in October 2017,<sup>38</sup> and that functions for the Commission to undertake consultation were included in the Bill.<sup>39</sup>

2.27 Many submitters noted that to date, consultation with people with disability and relevant advocacy organisations has been an established methodology in developing the Commission and the establishment of the NDIS itself.<sup>40</sup>

2.28 Evidence presented by the Department outlined the level of consultations that have been undertaken to date. In summary, the Department undertook a public consultation on the Framework in 2015 which:

...ran from February to May and involved public meetings in capital cities and regional locations, and workshops with specific stakeholder groups. We received 220 submissions, 585 questionnaire responses resulting in a consultation report setting out themes.<sup>41</sup>

2.29 The Department told the Committee there was a large degree of agreement in the consultations, and this is reflected in the key elements of 'a national independent complaints and reportable incidents function; nationally consistent quality and assurance and registration, regulation and oversight of restrictive practices, and national worker screening.'<sup>42</sup>

### **Independence and transparency of the Commissioner**

2.30 Submitters to the inquiry expressed concern regarding the independence and transparency of the NDIS Commission, in particular: the extent to which the Commonwealth Minister may issue ministerial directions to the Commission; the

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36 NDS, *Submission 22*, [p. 22].

37 Mr Andrew Whitecross, Department, *Committee Hansard*, 5 September 2017, p. 24.

38 Mr Andrew Whitecross, Department, *Committee Hansard*, 5 September 2017, p. 26.

39 Mr Bruce Smith, Branch Manager, Quality and Safeguards Policy, Department, *Committee Hansard*, 5 September 2017, p. 26.

40 See submissions from Catholic Social Services Australia, *Submission 19*, National Mental Health Consumer and Carer Forum, *Submission 12*, Volunteering Australia, *Submission 20* and Young People In Nursing Homes National Alliance, *Submission 43*.

41 Mr Andrew Whitecross, Department, *Committee Hansard*, 5 September 2017, p. 23.

42 Mr Andrew Whitecross, Department, *Committee Hansard*, 5 September 2017, p. 23.

approach to appointing the Commissioner and the reporting obligations of the Commission.

***Ministerial directions—Proposed section 181K***

2.31 Chapter 6A of the Bill contains provisions which establish the Commission, its functions and administrative arrangements. Proposed subsection 181K(1) of that chapter makes provision for the Commonwealth Minister to issue directions, by legislative instrument, to the Commissioner 'about the performance of his or her functions and exercise of his powers.'<sup>43</sup>

2.32 Proposed subsection 181K(1) was a key focus of submitters' concerns regarding the independence of the Commissioner. In giving evidence, Ms Therese Sands, Director, DPOA summarised:

...we're concerned that section 181K(1) allows the Commonwealth minister to give directions to the NDIS commissioner about his or her functions, and this could have the effect of constraining or compromising the independence of the NDIS commissioner...<sup>44</sup>

2.33 Submitters to the inquiry have consistently highlighted the importance of both the real and apparent independence of the NDIS Commission to provide efficient quality and safeguarding oversight of the NDIS.<sup>45</sup> VCOSS submitted to the inquiry: '[c]onfidence in the Commission's independence is essential for an effective quality and safeguarding system.' Mr Patrick McGee, National Manager – Policy, Advocacy and Research, AFDO, also highlighted this in evidence to the Committee: '[i]ndependence is an inherent mechanism by which quality and safeguarding for people with disabilities is successful.'<sup>46</sup>

2.34 Queensland Advocacy Incorporated (QAI) noted that while statutory authorities are frequently utilised to manage sensitive areas of regulation free from political consideration, recommended that section 181K limit the Minister's direction powers to 'providing guidance that is consistent with the National Disability Strategy'.<sup>47</sup>

2.35 The Committee notes that proposed subsection 181K(2) limits the Minister's directions under proposed subsection 181K(1), so that the Minister may not issue directions regarding specific individuals, or providers, and must not be inconsistent with the Act. The Department in its submission reiterates that the Minister's directions

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43 National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017, proposed subsection 181K(1).

44 Ms Therese Sands, Director, DPOA, *Committee Hansard*, 4 September 2017, pp.1–2.

45 VCOSS, *Submission 21*, p. 8; National Mental Health Consumer and Carer Forum, *Submission 12*, p. 2; Macular Disease Foundation Australia, *Submission 15*, p. 1; Council for Intellectual Disability NSW, *Submission 25*, p.4.

46 Mr Patrick McGee, National Manager – Policy, Advocacy and Research, AFDO, *Committee Hansard*, 4 September 2017, p. 3.

47 Queensland Advocacy Incorporated (QAI), *Submission 35*, [p. 22].

must be of a general nature and fall within the legislative function of the Commission. In giving evidence to the Committee, the Department clarified that the Bill's provisions for ministerial direction are 'a common governance arrangement for Commonwealth independent authorities and, in our view, is appropriate to scope and role of the Commission'.<sup>48</sup>

### ***Appointment of the Commissioner***

2.36 Proposed section 181L of the Bill provides for the Minister to appoint the Commissioner for a period of three years. The Commissioner may be reappointed under section 33AA of the *Acts Interpretation Act 1901*.

2.37 Some submitters have expressed concern that the appointment provisions are not satisfactory for ensuring the Commissioner's independence.<sup>49</sup>

2.38 VCOSS expressed concern that the appointment of the Commissioner by the Minister alone may result in an actual, or apparent, conflict of interest and recommended that an alternate 'fair and transparent method of appointing the Commissioner' be adopted.<sup>50</sup>

2.39 The Victorian Office of the Public Advocate (OPA Victoria) expressed a similar view and recommended that the independence of the Commissioner may be improved by lengthening the Commissioner's term of appointment to five years.<sup>51</sup> Ms Colleen Pearce, Public Advocate of Victoria, explained this recommendation in evidence to the Committee:

If your contract is only for three years, that really limits what you can achieve. A person in that role can feel more secure if they have a longer term appointment. Three years seems to me to be particularly short.<sup>52</sup>

2.40 The Committee notes the EM states that the term of appointment for the Commissioner is 'in keeping with Australian Government Policy on the selection of statutory office holders working in, or in conjunction with, Australian Public Service agencies.'<sup>53</sup> The Committee also notes that under subsection 14(2) of the *Public Service Act 1999* statutory office holders are bound by the APS Code of Conduct, a provision of which is adherence to the APS Value of impartiality.

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48 Mr Andrew Whitecross, Department, *Committee Hansard*, 5 September 2017, p. 25.

49 Council for Intellectual Disability, *Submission 25*, p. 5.

50 VCOSS, *Submission 21*, p. 8.

51 Office of the Public Advocate Victoria, (OPA Victoria), *Submission 29*, p. 6.

52 Ms Colleen Pearce, Public Advocate, OPA Victoria, *Committee Hansard*, 5 September 2017, p. 12.

53 EM, p. 59.



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### **Reporting to Parliament**

2.41 Submitters proposed that the Commission should report regularly and directly to Parliament on the Commissioner's statutory functions.<sup>54</sup> OPA Victoria recommended to the Committee: '[t]he Minister should be required to table the annual report in each house of the Australian Parliament.'<sup>55</sup>

2.42 The intent of parliamentary reporting requirements was summarised by the VCOSS:

Requiring the Commission to report directly to Parliament will increase the transparency and accountability of the Office. Tabling reports and documents in Parliament will ensure information is available to members of Parliament as well as the public, and provide a public record of the Commission's operations and activities, investigations and recommendations.<sup>56</sup>

2.43 The Committee notes that under proposed subsection 181A(3) the Commission is established as a listed entity under *Public Governance, Performance and Accountability Act 2013* (PGPA Act). Under section 46 PGPA Act, Commonwealth entities are to prepare and give an annual report to the respective Minister for presentation to Parliament.

2.44 The Department's submission confirms reporting arrangements will be in accordance with reporting requirements under the PGPA Act:

The Commission must fulfil the standard reporting obligations of Commonwealth entities under the Public Governance, Performance and Accountability Act 2013 (the PGPA Act). This includes the provision of an annual report, which will be presented by the Minister to Parliament.<sup>57</sup>

### **Provider registrations**

2.45 A key measure in the Bill is to require the Commission to establish and maintain the NDIS Provider Register, and imposes requirements on those registered providers.<sup>58</sup>

2.46 NDS expressed concern that self-managing NDIS participants are able to purchase supports from unregistered providers, who will not be audited against quality standards or have an obligation to report serious incidents. NDS submitted 'this would expose a significant proportion of NDIS participants to unacceptable risks. It would

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54 Carers Australia, *Submission 1*, p. 2; Psychiatric Disability Services of Victoria (VICSERV), *Submission 16*, p. 2.

55 OPA Victoria, *Submission 29*, p. 6.

56 VCOSS, *Submission 21*, p. 9.

57 Department, *Submission 4*, p. 8.

58 The Hon Christian Porter MP, Minister for Social Services, *House of Representatives Hansard*, 31 May 2017, p. 5741.

also establish a two-tiered market, with one tier more regulated than the other and bearing higher compliance costs.<sup>59</sup>

2.47 The Macular Disease Foundation of Australia raised similar concerns with the lack of oversight over non-registered providers, and recommended 'further legislative amendments be made to clarify the process in which the Commission can direct unregistered providers to adhere to regulatory requirements and directions.'<sup>60</sup> The Victorian Council of Social Service also recommended the Commission develop a broad and clear list of services which cannot be delivered by unregistered providers.<sup>61</sup>

2.48 The HSU raised a number of concerns that the amendment imposed requirements on registered providers, such as establishing a complaints management system, but provided no detail relating to the form and function of such systems. Overall, the HSU recommended the Bill should provide greater clarity and detail around these issues.<sup>62</sup>

2.49 In its submission, the Department outlines how the registration scheme will operate:

A person or organisation that wishes to be registered with the Commission will undergo an audit against the NDIS Practice Standards, which will form an NDIS rule. These audits will be conducted by independent third-party auditors, similar to current arrangements for disability and other human service providers in some jurisdictions.

The new regulatory requirements for providers and their workers will be tailored to ensure registration is proportionate to the level of risk associated with the supports and services provided.<sup>63</sup>

2.50 The Department clarified that only providers who wished to provide higher-risk supports and services needed to be registered, which was 'intended to strike the right balance between providing protections for people with disability and...building NDIS participants' capacity to make decisions, including in relation to taking reasonable risks in the pursuit of their goals.'<sup>64</sup>

### ***Worker screening***

2.51 The HSU submitted the current proposal for worker screening was a 'negative licencing scheme' as it focuses only on excluding workers after a negative incident. Instead the HSU recommended 'the establishment of a national registration and

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59 NDS, *Submission 22*, pp. 3–4. Similar concerns were raised in submissions from Australian Services Union, *Submission 31*, Catholic Social Services Australia, *Submission 19*, United Voice, *Submission 32* and VCOSS, *Submission 21*.

60 Macular Disease Foundation Australia, *Submission 15*, p. 1.

61 VCOSS, *Submission 21*, p. 17.

62 HSU, *Submission 30*, pp. 4-7.

63 Department, *Submission 4*, p. 10.

64 Department, *Submission 4*, p. 10.

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accreditation scheme for disability workers that is modelled on the proposed Victorian Disability Workforce Registration and Accreditation Scheme' which would improve the quality and skills of workers and safety of participants, assist in improving perceptions of the sector to prospective workers and assist in developing more articulated career pathways.<sup>65</sup>

2.52 United Voice raised a similar concern that the Bill 'provides for a nationally consistent approach rather than a single national process, giving responsibility to States and Territories to enact the screening process.'<sup>66</sup> United Voice went on to state support for a national pre-employment screening process for all people working for an NDIS registered provider which should be more robust than police or criminal background checks alone.<sup>67</sup>

2.53 VCOSS recommended that the worker registration scheme be expanded to include people in management and executive roles because of the role such workers have in reporting and investigating concerns and complaints regarding abuse or poor practices.<sup>68</sup>

2.54 NDS supported the introduction of worker screening, but recommended this should be supported by a national database to ensure workers found guilty of unacceptable practices are not able to move across jurisdictions or sectors without their records following them.<sup>69</sup>

2.55 The Department submitted that the process of worker screening was intended to 'align as much as possible with the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse, Working with Children Checks Report' and that a nationally consistent approach to screening NDIS workers will be implemented under a combination of Commonwealth and state and territory legislation and policy, as states and territories will remain responsible for the operational aspects of worker screening including worker screening units.<sup>70</sup>

### **Independent advocacy and inclusivity**

2.56 Two key issues raised by many organisations throughout the inquiry relate to the importance of ensuring the voices of individual persons with disability remain central to the design and ongoing operations of the Commission. The first issue raised was the overall inclusivity of the Commission towards people with disability, and the second issue was the importance of independent advocacy in ensuring people are able to effectively represent their own rights and participate in quality and safeguard processes, especially in the NDIS' marketplace model.

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65 HSU, *Submission 30*, pp. 7-8.

66 United Voice, *Submission 32*, p. 5.

67 United Voice, *Submission 32*, pp. 5-6.

68 VCOSS, *Submission 21*, p. 15.

69 NDS, *Submission 22*, p. 4. See also Prader-Willi Syndrome Association of Australia, *Submission 33*, p. 2.

70 Department, *Submission 4*, p. 11.

### ***Inclusivity***

2.57 Many submitters expressed strong support for the concept of co-design, to ensure the voices of people with disability are heard in the establishment and ongoing design of the Commission, and stated their agreement with the amendment that inserts 'a new general principle into section 4, being that people with disability are central to the NDIS and should therefore be included in a co-design capacity.'<sup>71</sup> However multiple submitters expressed concern that no specific provisions regarding co-design are included in the Bill.<sup>72</sup>

2.58 Psychiatric Disability Services of Victoria endorsed the new general principle in Section 4 that promotes the centrality of people with disability into the NDIS decision-making framework, but raised concerns that 'there is no agreed process with people with lived experience on how this should be applied.'<sup>73</sup>

2.59 DPOA also supported the new section 4(9A), but stated 'this amendment will only have practical effect if it is supported by policy and guidelines that genuinely articulate what co-design means.'<sup>74</sup>

2.60 Multiple submitters also raised the issue of the accessibility of information as an inclusivity issue, and recommended the Bill include explicit requirements on the Commission to provide information in accessible formats, including Easy Read format.<sup>75</sup>

### ***Independent advocacy***

2.61 Independent advocacy, including supported decision-making, was seen by multiple submitters and witnesses as critical to ensuring that individual person's with disability were able to effectively participate in the NDIS in general, and specifically in any negotiations or complaints processes. However, submitters raised concerns that there are no express provisions in the Bill which empower the formal function of independent advocacy.<sup>76</sup>

2.62 AFDO and the DANA submitted the success of the Commission's complaints handling processes, and the NDIS itself, relies on the availability of advocacy services:

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71 EM, p. 71.

72 See submissions from Community Mental Health Australia, *Submission 18*, DPOA, *Submission 31*, JFA Purple Orange, *Submission 37*, National Mental Health Consumer and Carer Forum, *Submission 12*, People with Disabilities WA (PWD WA), *Submission 45*, VICSERV, *Submission 16* and Victorian Advocacy League for Individuals with Disability (VALID), *Submission 26*.

73 VICSERV, *Submission 16*, p. 3.

74 DPOA, *Submission 34*, pp. 12-13.

75 See submissions from PWD WA, *Submission 45*, QAI, *Submission 35* and VALID, *Submission 26*.

76 This issue was raised in submissions from PACYPC, *Submission 23*, AFDO and DANA, *Submission 44*, Alzheimer's Australia, *Submission 14*, DPOA, *Submission 34*, OPA Victoria, *Submission 29*, and VCOSS, *Submission 21*.

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Without advocacy, individualised schemes such as NDIS have the potential to maintain power imbalances between service providers and people with disability that existed under block funding. The design of this new system must take into account that some NDIS participants will require advocacy support to effectively raise or communicate concerns, resolve issues before they escalate, or participate meaningfully in complaints resolution processes.<sup>77</sup>

2.63 The OPA Victoria agreed with this view and pointed to the need for people with cognitive impairment to be supported to use the NDIS consumer choice model.<sup>78</sup>

2.64 DPOA went further, and submitted the Bill should have included amendments to the NDIS Act to ensure that decision-making arrangements within the NDIS Act comply with the Convention on the Rights of Persons with Disability.<sup>79</sup>

2.65 The PACYPC outlined similar concerns in its submission, that 'participants with cognitive impairment will need a significant investment in supports to help build their capacity to actively develop and maintain natural safeguards as well as participate actively in formal safeguarding processes.' The PACYPC submitted that this would require both education and appropriate supports for people with disability, and recommended 'that the developmental elements of a quality and safeguards framework are specifically articulated as part of the role of the NDIS QASC.'<sup>80</sup> The Victorian Council of Social Service (VCOSS) also pointed to the need to educate people 'in a way they understand, about how to make a complaint and understanding whistleblower protections.'<sup>81</sup>

2.66 AFDO and DANA submitted that although the role of independent advocacy has been embedded in Section 4 of the Act, it has not been adequately included in the provisions of this Bill establishing the Commission. AFDO and DANA recommended the Bill should include express reference to a person's right to independent advocacy.<sup>82</sup>

2.67 QAI made a similar recommendation that the Bill should include an amendment which 'establishes the principle that participants have a right to and will be referred to advocacy during the making of complaints under the Quality and Safeguards Framework.'<sup>83</sup>

2.68 The Victorian Advocacy League for Individuals with Disability Inc. pointed to the inclusion of advocacy within the Framework, but argued there is no

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77 AFDO and DANA, *Submission 44*, p. 16.

78 OPA Victoria, *Submission 29*, p. 3.

79 DPOA, *Submission 34*, pp. 10-11. See also submissions from PWD WA, *Submission 45*, and QAI, *Submission 35*.

80 PACYPC, *Submission 23*, p. 3.

81 VCOSS, *Submission 21*, p. 20. This issue was also raised by VALID, *Submission 26*.

82 AFDO and DANA, *Submission 44*, p. 15.

83 QAI, *Submission 35*, p. 4.

'commitment to ensure that sufficient resources will be provided to resolve the current and rising unmet need for advocacy.'<sup>84</sup>

### **Restrictive practice and the role of the Senior Practitioner**

2.69 Proposed section 181H makes provisions for the Commission to have a *behavioural support function*, which will provide leadership for the reduction and elimination of restrictive practice by NDIS providers. These provisions enable the Commission to undertake several functions, including: developing a competency framework; developing policy and guidance material; providing education and training; overseeing use through compliance and collecting information; and undertaking and publishing research.<sup>85</sup>

2.70 Proposed paragraph 73Z(f) includes the unauthorised use of restrictive practice in the definition of a reportable incident. The NDIS rules will make provisions for the management of reportable incidents and the administration of which is a function of the Commissioner under proposed paragraph 181F(e). NDIS providers are required to comply the NDIS rules regarding reportable incidents as a condition of their registration under proposed paragraph 73F(2)(h).<sup>86</sup>

2.71 As an additional safeguard under proposed section 73F, AFDO and DANA recommended the Commissioner should be able to mandate that a person with a disability has access to an independent advocate to assist them through any processes associated with a reportable incident.<sup>87</sup>

2.72 As explained in the EM, it is foreseen that the provisions under proposed section 181H will be managed by the position of Senior Practitioner, who will have appropriate clinical expertise.<sup>88</sup> The Department's submission affirms that states and territories would be responsible for the authorisation of restrictive practices.<sup>89</sup>

2.73 The NDIS Framework proposed that in the legislative framework statutory powers would be afforded to the NDIS senior practitioner who, amongst other things, will have 'the power to proactively examine current practice in behaviour support and the use of restrictive practices.'<sup>90</sup> VCOSS' submission observes that the Bill has not legislated the role of senior practitioner—rather, a behavioural report function—and

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84 VALID, *Submission 26*, p. 5. The lack of funding for independent advocacy was also raised by ADACAS, *Submission 24*, Action for More Independence & Dignity in Accommodation (AMIDA), *Submission 36*, PWD WA, *Submission 45*, QAI, *Submission 35*, and VCOSS, *Submission 21*.

85 EM, pp. 55–56.

86 Bill, proposed paragraph 73F(2)(h).

87 AFDO and DANA, *Submission 44*, p. 19.

88 EM, p. 55.

89 Department, *Submission 4*, p. 6.

90 Department, *NDIS Quality and Safeguarding Framework*, December 2016, p. 71.

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recommends that the powers and function of the Senior Practitioner be legislated.<sup>91</sup> VCOSS notes:

[w]ithout legislating the functions and powers of Senior Practitioner there is a risk the role of building the capacity of providers and eliminating restrictive practice will be de-prioritised. This may lead to the Commission's role being consumed by compliance and enforcement activities.<sup>92</sup>

2.74 Submitters to the inquiry expressed disappointment and concern regarding the scope of the Commission's powers regarding restrictive practices. DPOA expressed concern that the restrictive practice oversight arrangements under proposed section 181H are 'very weak given that restrictive practices cause significant breaches of human rights, and can constitute torture, cruel, inhumane or degrading treatment or punishment'.<sup>93</sup> Ms Sands elaborated on DPOA's view in evidence to the Committee:

[w]e argue that the NDIS commission should have the strongest powers possible with regard to the elimination of restrictive practices, including legislative powers to prohibit certain restrictive practices and impose criminal penalties.<sup>94</sup>

2.75 The OPA Victoria expressed concern that the safeguarding system in the area of restrictive practice may be compromised by aspirations for national consistency and suggested that '[i]n time, the model of Victoria's Senior Practitioner should be implemented across Australia'.<sup>95</sup> DPOA noted that if authorisation of behaviour supports occurs at the state and territory, then there should be an agreement for a nationally consistent mechanism for disability support approvals.<sup>96</sup>

2.76 The PACYPC's submission stated that further clarification of the Commissioner's behavioural support role was needed, noting that Offices of the Senior Practitioner exist in several NDIS jurisdictions and it unclear as to how the Commission would work in collaboration with these entities that have similar responsibilities in monitoring the use of restrictive practices.<sup>97</sup> Other submitters suggested a similar need for clarity around the role of the senior practitioner differentiation from the functions of state and territory bodies.<sup>98</sup>

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91 VCOSS, *Submission 21*, p. 12.

92 VCOSS, *Submission 21*, p. 13.

93 DPOA, *Submission 34*, p. 8.

94 Ms Therese Sands, Director, DPOA, *Committee Hansard*, 4 September 2017, p. 2.

95 OPA Victoria, *Submission 29*, pp. 9–10.

96 DPOA, *Submission 34*, p. 8.

97 PACYPC, *Submission 23* p. 5.

98 AMIDA, *Submission 36*, p. 3.

2.77 Some submitters are concerned that the reduction and elimination of restrictive practice may be limited by the availability of NDIS supports and services, for example for those in who live in rural and regional locations.<sup>99</sup>

2.78 The Committee notes that the Department's submission to the inquiry covers many of the issues raised by submitters, including those restrictive practices can represent a breach of human rights. The Department clearly stated:

For the vast majority of people with behaviours of concern, it should be possible to eliminate the use of restrictive practices over time by understanding and responding to the issues underlying the behaviours.<sup>100</sup>

2.79 The Department highlights a number of significant powers in the Bill which underpin the reduction and elimination of restrictive practices and says that in combination: 'these powers will greatly enhance national transparency and control over the use of restrictive practices in the NDIS.'<sup>101</sup>

### ***Own motion investigations***

2.80 The NDIS Framework indicates the Commissioner would have the authority to undertake own motion investigations.<sup>102</sup> The Framework discusses that the Commissioner may utilise own motion investigative powers in addressing breaches of the NDIS Code of Conduct.<sup>103</sup>

2.81 Submitters to the inquiry have suggested that the own motion investigation powers of the Commission are 'unclear in the Bill and appear to be restricted to being based on actual complaints received.'<sup>104</sup>

2.82 VCOSS suggest that the Bill provides limited investigative powers to the Commissioner, and notes that Divisions 5 and 6 of the Bill propose that the NDIS rules determine 'the matters in which the Commissioner may authorise the inquiry on his or her own initiative.'<sup>105</sup> VCOSS highlights the Commissioner is empowered to determine whether certain provisions of Part 3A of the Act have been breached by providers in relation to civil penalties, or an offence under the *Crimes Act 1914* or Criminal Code as it pertain to Part 3A.<sup>106</sup> VCOSS recommends the Commission have own motion powers, stating:

[w]e believe the Commission should have own motion powers to conduct inquiries and investigate matters without having received a complaint or serious incident notification... These powers should enable the Commission

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99 QAI, Submission 35, [p. 11].

100 Department, *Submission 4*, p. 12.

101 Department, *Submission 4*, p. 14.

102 Department, *NDIS Quality and Safeguarding Framework*, December 2016, p. 48.

103 Department, *NDIS Quality and Safeguarding Framework*, December 2016, p. 96.

104 AMIDA, *Submission 36*, [p.2].

105 Bill, proposed paragraphs 73X(2)(g) and 73Z(2)(d).

106 VCOSS, *Submission 21*, p. 10.



to investigate systemic issues and cases where there are allegations or concerns about people with disability experiencing violence, abuse or neglect.<sup>107</sup>

2.83 Other submitters to the inquiry supported, or recommended, the Commissioner being empowered to undertake own motion investigations.<sup>108</sup> Mr Mark Farthing, Senior Policy Advisor, HSU noted in evidence to the Committee the own motion powers currently afforded to the Victorian Disability Services Commission and said: [i]f own-motion powers weren't provided to the national complaints commissioner, that would be a diminution of protections for every Victorian with a disability.<sup>109</sup>

2.84 The Department's submission to the inquiry suggests that Divisions 5 and 6 of the Bill make provision for the Commissioner's own motion investigation capacity regarding complaints and reportable incidents. Notably, Divisions 5 and 6 of the Bill outline the parameters in which the NDIS Rules may deal with matters of complaints management and reportable incidents, including own motion inquiry. The Department gave evidence to the Committee assuring that the Commissioner would have full power to conduct investigations, including investigations into systemic and individual complaints. The Department stated:

The bill triggers the operation of the Regulatory Powers (Standard Provisions) Act 2014, which creates a consistent framework across Commonwealth bodies for monitoring and investigative powers, use of civil penalties and infringement notices, acceptance and enforcement of undertakings and use of injunctions.

## **Schedule 2—NDIS review**

### ***Proposed paragraph 24(1)(f)***

2.85 The Bill proposes the addition of paragraph 24(1)(f) to the Act. This paragraph adds to the list of disability requirements applicable to a prospective NDIS participant, in particular the support required by a prospective participant:

...must be most appropriately provided through the NDIS and not more appropriately funded or provided through other mainstream general systems of service delivery or supports such as health or education.<sup>110</sup>

2.86 In a late submission, the Tasmanian Government submitted its concern to the inquiry that paragraph 24(1)(f) 'has the effect of making a person's eligibility for the

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107 VCOSS, *Submission 21*, p. 10.

108 Home Modifications Australia, *Submission 6*, p. 5; NDS, *Submission 22*, [p. 3]. ACT Disability, Aged and Carer Advocacy Service, *Submission 24*, p. [1]; Council for Intellectual Disability, *Submission 25*, p. 5; OPA Victoria, *Submission 29*, p. 9.

109 Mr Mark Farthing, Senior Policy Advisor, HSU, *Committee Hansard*, 4 September 2017, p. 24.

110 EM, p. 74.

NDIS subject to whether they are receiving, or should be receiving, a service from a system outside the NDIS.<sup>111</sup>

2.87 At the time of drafting this report, this claim has not been tested with the Minister or the Department.

### **Committee view**

2.88 The Committee recognises the significant work undertaken in developing the NDIS Framework, particularly the extensive consultation process and the consensus reached with state and territory governments.<sup>112</sup> The Committee agrees with the broad consensus view from people with disability and civil society on the critical need for change within the existing quality and safeguards systems and views the NDIS Framework and the derived Bill as an effective mechanism to help achieve this.

2.89 The Committee notes that the Bill has been developed in consultation with state and territory government officials and peak bodies representing people with disability.<sup>113</sup> However, the Committee heard there are additional concerns from submitters and witnesses regarding specific elements of the Bill. The key concerns raised by submitters have been explored in this chapter. The Committee notes the concerns of some stakeholders regarding the differences between the NDIS framework and the Bill, but recognises that the provisions of the Bill appear to retain the integrity and policy intent of the NDIS Framework.

2.90 Many concerns raised by submitters go to the lack of detail contained in the Bill, particularly around the NDIS Rules. However, the Committee accepts that the approach taken by the Government, in presenting the rules separately through delegated legislation for the purposes of consultation and flexibility, is reasonable. The Committee notes that the Department is continuing to consult on the development of the NDIS Rules, which are disallowable instruments that are subject to parliamentary scrutiny.

2.91 The Committee notes the provisions for the proposed establishment of the Commission appear to be in accordance with that of similar independent Commonwealth authorities. However the Committee notes that for the Commission to be effective, it will need to be open to engaging with the processes of other entities, including disability advocacy programs.

2.92 Similarly, the Commission will need to work in close collaboration with states and territory governments on matters critical to the Commission's core functions, such as the reduction and elimination of restrictive practices. Whilst the Commission has been empowered to provide leadership and oversight of restrictive practices matters, authorisation for the use of restrictive practices remains with state and territory

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111 Tasmanian Government, *Submission 48*, p. 1.

112 Mr Andrew Whitecross, Group Manager, NDIS Market Reform, DSS, Committee Hansard, 5 September 2017, p. 25.

113 Department, *Submission 4*, p. 6.

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governments.<sup>114</sup> An important balance will need to be struck between the national functions of the Commission and the authorisation functions of the State and Territories.

2.93 The Committee notes the overall support for the NDIS Framework and notes the Bill operationalises the Government's quality and safeguarding obligations under that framework. Greater consistency and national oversight of quality and safeguarding provisions is a critical priority. The Committee welcomes the establishment of the NDIS Commission.

### **Recommendation 1**

**2.94 The Committee recommends that the Bill be passed.**

**Senator Slade Brockman**  
**Chair**

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114 EM, pp. 56–57.

