

Additional comments by Australian Greens Senators

1.1 The Australian Greens are astonished that the Majority Committee Report recommends that the Bill be passed, given the large volume of concerns raised during the inquiry process and the significant number of recommendations put forward by submitters and witnesses. The Australian Greens recommend that the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 (Bill) not be passed until significant amendments are made to it to address the concerns raised.

1.2 While the Australian Greens strongly support the concept of an independent statutory authority to ensure that people with a disability are protected from violence, abuse or neglect and that best practices are followed by those working with and supporting people with a disability, we are disappointed that the National Disability Insurance Scheme (NDIS) Quality and Safeguards Commission (Commission) will only have a remit for NDIS participants (and some other groups such as those over 65 receiving continuity of support), but not all people with a disability.

1.3 Therese Sands, the Director of Disabled People's Organisations Australia (DPO Australia), said:

... we note with disappointment that the NDIS Quality and Safeguards Commission will not provide comprehensive protection against violence, abuse and neglect for all people with disability across a broad range of service systems and situations. It will only provide protection to the 10 per cent of people with disability who directly access NDIS supports, and it will not have a mandate to address individual or systemic issues outside of the NDIS. This means that the majority of people with disability as well as NDIS participants, when interfacing or using other service systems, will have protection only through existing regulatory and policy frameworks that have to a large extent been shown to provide inadequate protection.¹

1.4 One of the key recommendations of the Senate Community Affairs References Committee inquiry on violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability was:

Recommendation 2

10.16 The committee recommends the Australian Government consider the establishment of a national system for reporting and investigating and eliminating violence, abuse and neglect of people with a disability, which should, at a minimum:

1 Ms Therese Sands, Disabled People's Organisations Australia, *Committee Hansard*, 4 September 2017, p. 1.

- be required to work in collaboration with existing state and territory oversight mechanisms;
- cover all disability workers, organisations and people with disability, without being restricted to NDIS participants;
- include a mandatory incident reporting scheme; and
- include a national worker registration scheme with pre-employment screening and an excluded worker register.

10.17 These elements are best implemented through the establishment of a national, independent, statutory protection watchdog that has broad functions and powers to protect, investigate and enforce findings related to situations of violence, abuse and neglect of people with disability.²

1.5 The Australian Greens still strongly support this recommendation.

1.6 The headline recommendation of the Community Affairs inquiry was:
Recommendation 1

10.10 The committee recommends that a Royal Commission into violence, abuse and neglect of people with disability be called, with terms of reference to be determined in consultation with people with disability, their families and supporters, and disability organisations.³

1.7 The Australian Greens still strongly support this recommendation. We took this policy to the last federal election and will continue to advocate for the Government to implement this recommendation. This Bill does not do away with the need for a royal commission.

1.8 The Australian Greens also note that there was a large volume of submissions to this inquiry, many of which proposed a number of recommendations for strengthening the Bill. We recognise that this is demonstrative of the need for further consultation on the Bill and its associated instruments. The Government should not proceed with the Bill until the issues raised in the submissions and by witnesses are addressed.

1.9 This report outlines a number of the concerns we have with this Bill, but we acknowledge this report does not address all suggested recommendations and additions made throughout the inquiry.

2 Community Affairs References Committee, "Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability", November 2015, p. xv.

3 Community Affairs References Committee, "Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability", November 2015, p. xv.

Concerns relating to Schedule 1

Significant items in delegated legislation

1.10 The Bill provides the overarching structure for the Commission, but the rules will provide the operational detail. The Bill contains 23 rule-making powers. Concerns have been raised that the rules have not yet been released publicly (some witnesses mentioned having seen drafts of some of these sets of rules, particularly the Code of Conduct) and regarding the need to allow sufficient time for consultation to be undertaken with people with disability and their advocates and their representative organisations.

1.11 It is concerning that a large volume of the operational detail has been withheld from the legislation and will potentially only be publicly available following passage of this Bill.

1.12 As Melissa Coad, Executive Projects Coordinator, United Voice said:

... we would like to see this bill contain detail on critical points to ensure a national framework that is open and transparent and ensures the integrity of the NDIS.⁴

1.13 Leigh Svendsen, Senior National Industrial Officer, Health Services Union (National), said:

... I think we worked out that employees are mentioned twice in the bill and one of those is in a footnote, which is really pretty ridiculous for something that's then going to, allegedly, provide safeguards and minimum standards and provide employees with a code of conduct and a practice standard to which they are supposed to adhere or they'll be blacklisted and can't work in the sector and therefore would lose their income. That's fairly ridiculous in a bill like this to actually be indicating that it wants to establish those standards and not even mention them. We're very critical of the fact that there's essentially nothing in the bill that gives us any direction around that, and therefore there will be nothing in the act. I think that allows for too much latitude.⁵

1.14 Andrew Whitecross, Group Manager, NDIS Market Reform, Department of Social Services said:

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.⁶

4 Ms Melissa Coad, United Voice, *Committee Hansard*, 4 September 2017, p. 20.

5 Ms Leigh Svendsen, Health Services Union (National), *Committee Hansard*, 4 September 2017, p. 23.

6 Mr Andrew Whitecross, Department of Social Services, *Committee Hansard*, 5 September 2017, p. 28.

1.15 When considering this Bill, the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) raised concerns regarding the placing of significant matters in delegated legislation, rather than in this Bill. The Scrutiny Committee specifically mentioned the Code of Conduct and breach of it potentially being the subject of significant penalties and was of the view that its establishment should be included in primary legislation 'unless a sound justification for its inclusion in delegated legislation has been provided'.⁷ In a subsequent report, the Scrutiny Committee acknowledged the Minister's response (which is included in part in the Majority Committee Report) regarding this and other matters relating to this Bill, but reiterated its scrutiny view.⁸

1.16 DPO Australia said in its submission:

Given the importance of the NDIS Rules for effective implementation of the functions of the NDIS Commission, it is critical that the development of the NDIS Rules involves engagement and consultation with people with disability and their representative and advocacy organisations. Such engagement and consultation reflects the proposed amendments outlined for section 4(9) in Schedule 2 of the Bill that emphasises the centrality of people with disability and the need for their inclusion in a "co-design capacity" (discussed below under Schedule 2).⁹

1.17 The Victorian Council of Social Service (VCOSS) said:

Depending what category the NDIS rules are classified as (i.e. Categories A to D) the NDIA may only be required to consult with the State and Territories (Category D), rather than obtaining agreement from the majority of jurisdictions (Category C), the particular host jurisdiction (Category B) or every host jurisdiction (Category A). We believe the NDIS rules should be open for consultation with the Disability sector, given the impact these rules will have on the operation of the scheme.¹⁰

1.18 The Victorian Government said they:

understand that the Commonwealth intends to re-classify a majority of the rules as Category D, requiring consultation from jurisdictions and some rules as Category B, which will require agreement from host jurisdictions. Victoria considers that this is inadequate and strongly believes that rules that relate to key elements of the Framework should be subject to agreement from all jurisdictions.¹¹

1.19 The Australian Greens acknowledge that there is a need for some flexibility and responsiveness with arrangements for the Commission; however, we are also aware that some of the 23 sets of rules are essential to the Commission's functioning.

7 Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 6/17, p. 52.

8 Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 8/17, p. 115.

9 Disabled People's Organisation, Submission 34, p. 6.

10 Victorian Council of Social Service, Submission 21, p. 11.

11 Victorian Government, Submission 38, p. 2.

We want to see these six essential rules released publicly as a matter of urgency and some of the crucial details from these rules added to the Bill itself.

1.20 While we understand that the Government is currently consulting on a number of these sets of rules, the consultation is currently limited to a select number of organisations as the rules have not yet been publicly released.

1.21 It is also important to note that the deadline for stakeholder feedback on these draft rules is not due until the end of November. Consequently, we do not have a clear picture at this stage of whether there are significant concerns about the rules being consulted on. As we understand it, the only deadline that has passed is that for feedback on the NDIS Worker Screening Consultation Paper.

1.22 The Australian Greens are of the view that there needs to be proper engagement and consultation on these rules with people with disability, their advocates and their representative organisations and that the essential rules should be agreed on.

Independence of the NDIS Quality and Safeguards Commissioner

1.23 A number of submitters and witnesses raised the issue of the Commission's independence. There are concerns that the Minister's extensive ability to direct the NDIS Quality and Safeguards Commissioner (the Commissioner) will impact on his or her independence.

1.24 The relevant provision in the Bill is the proposed subsection 181K(1), which states:

The Minister may, by legislative instrument, give directions to the Commissioner about the performance of his or her functions and the exercise of his or her powers.

1.25 Subsection (3) states:

The Commissioner must comply with a direction given under subsection (1).

1.26 It should be noted that the accompanying note under subsection (1) makes it clear that such directions are not subject to the disallowance provisions in section 42 of the *Legislation Act 2003*. This was confirmed by the Department of Social Services when a number of its officers appeared at the second hearing of the inquiry.¹²

1.27 Patrick McGee, National Manager, Policy Research Advocacy, Australian Federation of Disability Organisations (AFDO) said:

We're talking about the most vulnerable in the community: people who don't have a voice because they have a cognitive impairment, people who are confined to their beds because they have no movement, people who are reliant upon others to have the same set of rights as everybody else in our

12 Mr Andrew Whitecross, Department of Social Services, *Committee Hansard*, 5 September 2017, p. 34.

community—the same set of political and civil rights, and the same set of economic, cultural and social rights.

When you are reliant on someone else to enact those rights for you, as many people with disabilities are, then the protections that you should be afforded need to be of an extra high quality. We're saying that the quality and safeguards commission framework enables that. But, if you have your political masters sitting above a commission that is supposed to be able to protect these people—the most vulnerable in our community—then, in cases where the issues that the commission comes across may stray into political issues, there is a concern from the perspective of the AFDO about how these people's rights will in fact be protected.

I have experience of the Northern Territory, where people were being detained in jails because that was the easiest function for the government to respond to those people's circumstances. We were often shut out, and shut down from talking about that. So we've got to make sure that this quality and safeguards commission and the commissioner's functions and powers are completely independent of the minister and that the minister doesn't actually have oversight of them. That's one very important thing at section 181K of the bill.¹³

1.28 Emma King, Chief Executive Officer, VCOSS, said:

The commission will only be effective in safeguarding the rights of people with disability if they feel they can trust in it. To generate that trust, the commission must have strong powers and independence to be able to act on the complaints and the information it receives. If the commission is hamstrung in its ability to respond or unable to speak publicly about problems, it will quickly lose the confidence of people to report abuse or other deficiencies.¹⁴

1.29 Therese Sands said:

I will add that, if you take, for example, some of the state based ombudsmen, they are completely independent and not subject to ministerial direction. For example, the New South Wales Ombudsman is completely independent. So some of the functions of the state based ombudsmen will now be at a national level in this commission. I think there is just general concern being expressed that that same level of independence not subject to ministerial direction is not at that level—is not within the proposed NDIS commission.¹⁵

1.30 The Australian Greens share the concerns raised regarding subsection 181K(1) of the Bill and have concerns that directions made under this subsection will

13 Mr Patrick McGee, Australian Federation of Disability Organisations, *Committee Hansard*, 4 September 2017, p. 3.

14 Ms Emma King, Victorian Council of Social Service, *Committee Hansard*, 4 September 2017, p. 13.

15 Ms Therese Sands, Disabled People's Organisations Australia, *Committee Hansard*, 4 September 2017, p. 4.

not be disallowable by the Parliament. The Commissioner needs to be able to carry out his or her work without fear of interference from the Minister and/or the Government of the day. Consequently, the Australian Greens do not support subsection 181K(1) as it stands. The Australian Greens support the recommendation of AFDO and the Disability Advocacy Network of Australia (DANA) that 'ministerial control of the Commission should be qualified at section 181 K so that the Minister's control must be consistent with Vision and Principles of the National Disability Strategy'.¹⁶ At the very least the directions made under this subsection should be disallowable.

Own motion investigation powers

1.31 As outlined in the Majority Committee Report, some submitters are of the view that the own motion investigation powers of the Commission are unclear and that it would seem that they are limited to reportable incidents and complaints received.

1.32 VCOSS said in its submission:

We 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 to investigate systemic issues and cases where there are allegations or concerns about people with disability experiencing violence, abuse or neglect.¹⁷

1.33 The Majority Committee Report says:

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.¹⁸

1.34 The Department explained that the Regulatory Powers (Standard Provisions) Act 2014 applies to this Bill.¹⁹

1.35 The Australian Greens want to see stronger own motion investigation powers included in the Bill itself, rather than operate via reference to another law. We also want to see these own motion powers extend to the National Disability Insurance Agency and community partners.

Broad discretionary disclosure powers

1.36 Under the Bill, the Commissioner has discretionary information disclosure powers.

16 Disability Advocacy Network of Australia and the Australian Federation of Disability Organisations, *Submission 44*, p. 22.

17 Victorian Council of Social Service, *Submission 21*, p. 10.

18 *Majority Committee Report*, p. 23.

19 Mr Andrew Whitecross, Department of Social Services, *Committee Hansard*, 5 September 2017, p. 36.

1.37 The proposed paragraph 67E(1)(a) of the Bill provides the Commissioner may:

if the Commissioner is satisfied on reasonable grounds that it is in the public interest to do so in a particular case or class of cases – disclose information acquired by a person in the performance of his or her functions or duties or in the exercise of his or her powers under this Act to such persons and for such purposes as the Commissioner determines[.]

1.38 Proposed subsection 67E(2) then provides:

In disclosing information for the purposes of paragraph (1)(a) ..., the Commissioner must act in accordance with the National Disability Insurance Scheme rules made for the purposes of section 67F.

1.39 However, proposed section 67F provides that:

The National Disability Insurance Scheme rules may make provision for and in relation to the exercise of the Commissioner's power to disclose information for the purposes of paragraph 67E(1)(a)...

1.40 This means that there is no requirement for rules to be made. Although, as we understand it, the Government has commenced drafting these rules. However, a future Government may make a different decision.

1.41 The Scrutiny Committee raised concerns in relation to the extremely broad nature of the provision of this power. The Scrutiny Committee noted that:

There is no requirement that rules be made in relation to the Commissioner's power to disclose the information and no information on the face of the primary legislation as to the circumstances in which the power can be exercised (other than that the Commissioner must be satisfied that it is in the public interest to make the disclosure). There is also no requirement that before disclosing personal information about a person, the Commissioner must notify the person, give the person a reasonable opportunity to make written comments on the proposed disclosure and consider any written comments made by the person.²⁰

1.42 A number of submitters also raised concerns about the breadth of this power. The Health Services Union said in its submission:

As drafted, the provisions in the Bill are so open there is nothing to preclude the Commissioner making protected information available generally on the basis that it is in the public interest to do so.²¹

1.43 The Australian Greens share the concerns raised regarding the discretionary disclosure powers. The protection and disclosure of information rules are one of the six essential rules and as stated above we want these essential rules released publicly as a matter of urgency and some of the crucial details from these rules added to the Bill itself.

20 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest* 6/17, p. 51.

21 Health Services Union, *Submission* 30, p. 5.

Market oversight

1.44 One of the concerns raised through the inquiry was the Commissioner's conflicting functions of investigating, managing and resolving complaints and providing NDIS market oversight.

1.45 One of the witnesses to the inquiry, Mary Mallett, Chief Executive Officer, DANA said:

... there is an inherent tension in the commissioner's core functions, which are a bit odd. Of the commissioner's core functions, the first one is about upholding the rights of and promoting all the good stuff—the health, safety and wellbeing of people with disability. It's all about getting the whole system to improve. But the last of the commissioner's core functions is the market oversight. So the same commissioner who is promoting and protecting the rights of people and safeguarding them also has to monitor the changes in the market and monitor and mitigate the risks of unplanned service withdrawal. The commissioner may be responsible for a rural, regional or remote area where already there aren't enough services being provided.

If you have a service—using a remote area as an example—where there are lots of complaints coming in about the service and it's clear they are not providing good service or that there are issues about their registration maybe, the commissioner has also got to manage the issue of the risk of that service provider withdrawing and there being no service provider in the area. It's an odd tension that is consciously in there. We've talked about it with the DSS quality and safeguarding people at an earlier stage. It is deliberately in there, but that's a challenge for this commission to manage. It's one where we would worry about how that's going to play out.²²

1.46 Similarly, Mark Farthing, Senior Policy Adviser, Health Services Union (Victoria No. 2 Branch (HACSU)) said:

The interesting thing we allude to in our written submission is that the commission has to have regard to the prevalence of market failure. It is a conflicting relationship. So if it's the only provider in town and it's done something wrong, the commission can't make a binding direction because if it makes a binding direction which puts this provider out of business it will have created market failure and not upheld its quality and safeguarding duties as well.²³

1.47 The Australian Greens are concerned that the Commissioner is to provide NDIS market oversight as one of their core functions, particularly when it may impinge on their ability to rule on complaints under its complaints function.

22 Ms Mary Mallett, Disability Advocacy Network of Australia, *Committee Hansard*, 4 September 2017, p. 4.

23 Mr Mark Farthing, Health Services Union (Victoria No. 2 Branch (HACSU)), *Committee Hansard*, 4 September 2017, pp. 24-25.

Unregistered providers

1.48 Concerns were raised during the inquiry regarding the different treatment of registered and unregistered providers under the Bill.

1.49 VCOSS said:

the different treatment of registered compared to non-registered providers may create an uneven playing field and expose self-managing participants to unscrupulous providers seeking to make easy money out of the NDIS. It may also place participants at risk of harm. We believe the processes for using unregistered providers require further consideration and consultation with the sector and disability community. ... Developing a broad and clear list of services which cannot be delivered by unregistered providers could also help to reduce these risks.²⁴

1.50 National Disability Services (NDS) said:

[we are] very concerned about the disparate approaches to quality and safeguarding according to who manages an NDIS participant's funding. Participants who self-manage their funding (or who have their package managed by a family member) will be able to purchase supports from unregistered providers. Unregistered providers will not be audited against quality standards or have to report serious incidents to the Commission (such as the serious fall of a participant while showering). Given that the NDIA is promoting self-management (with the hope that the proportion will reach 40%), this would expose a significant proportion of NDIS participants to unacceptable risks. It would also establish a two-tiered market, with one tier more regulated than the other and bearing higher compliance costs. The tiers would be determined principally not by the degree of participant vulnerability or the risk profile of the service type, but by how participants choose to manage their funds.²⁵

1.51 The Australian Greens have concerns about how unregistered providers will be treated under the Bill. We acknowledge the right of people with disability to individual choice and control, but we want to see a reasonable balance struck. Accordingly, the Australian Greens want to see worker screening (discussed below) made compulsory for unregistered providers.

Worker screening

1.52 It was clearly articulated throughout the inquiry that there is a need for a single, national worker screening process – one that involves positive screening, rather than negative screening that excludes a worker where harm has occurred through the use of banning orders.

1.53 Currently, only those involved in direct provision of supports and services to people with disability will be required to undertake screening. Responsibility for enacting the screening process will lie with the states and territories.

24 Victorian Council of Social Service, *Submission 21*, p. 17.

25 National Disability Services, *Submission 22*, pp. 3-4.

1.54 Melissa Coad said:

Worker screening should be national, not merely nationally consistent. It should provide a national register of screened workers and not a negative or barred persons list. These, at minimum, should clearly be set out in the legislation.²⁶

1.55 Mark Farthing said:

It's completely left to the practice standards. There's no reference to it in the bill. It's not going to be a national database of screened workers. It's going to be nationally consistent standards, with each state and territory then implementing the scheme from there. That's our understanding, as we've gone through in our written submissions. There's just very little detail on it. Given the critical nature of workforce screening as both a preventative and a corrective measure for dealing with abuse, it really should be detailed a little bit more in the legislation.²⁷

1.56 Leigh Svendsen said:

I would just like to add that we already have a nationally consistent screening process for aged-care workers which might be seen to be working relatively well, but for aged-care workers it creates significant problems, and those problems will only be exacerbated if the same scheme is rolled out for support workers for disability. If the current scheme is required in each jurisdiction, apart from the complications about non-sharing of information and people moving between jurisdictions and there being some difficulty in relation to that particular issue, the reality is that a worker has to get a new screen done, a new police check done, for every employer that they work for.

Most employees in this sector and in aged-care work for multiple employers. That means they have to do it several times and get several police checks because it's only relevant to the one that they do for that particular employer. It's going to be exacerbated because a lot of the workforce who are likely to be providing NDIS services will also be providing aged-care services. We will have a double whammy for those people. Therefore, we support what UV said, and what I think we have said clearly in our submissions and in other submissions, that it is necessary to go to a national standard screening process and scheme as opposed to a nationally consistent one because each of the states and territories have different screening processes and minimums.²⁸

1.57 The Health Services Union said in its submission:

26 Ms Melissa Coad, United Voice, *Committee Hansard*, 4 September 2017, p. 20.

27 Mr Mark Farthing, Health Services Union (Victoria No. 2 Branch (HACSU)), *Committee Hansard*, 4 September 2017, p. 20.

28 Ms Leigh Svendsen, Health Services Union (National), *Committee Hansard*, 4 September 2017, p. 20.

As drafted, ... [t]here is no reference to information-sharing between jurisdictions regarding workforce screening, giving rise to the possibility that an individual barred from practice in one jurisdiction could practice in another. In the HSU's submission worker screening must be standard; held by a third party [government]; provide screening for a person seeking employment or individual provider registration; should provide for tiered clearance; and should provide that clearance for whichever employer or provider relationship the person seeks to access.²⁹

1.58 In its submission, VCOSS said:

People at every level of an organisation from the staff delivering direct services to participants through to management, CEO and Board Members, can contribute to abuse, neglect and poor practice. If not included in screening and compliance processes, there is a risk only workers will be penalised, and managers and executives who were aware of the behaviour will continue to operate in the same organisation or move to a new organisation.³⁰

1.59 The Australian Greens want to see a single, national worker screening process that has a national database so that records follow individuals across jurisdictional boundaries. We also want to see the requirement to undertake screening extended to people in management and executive roles.

Complaints

1.60 Some submitters suggested the Commission should be able to receive and investigate complaints about the National Disability Insurance Agency (NDIA) and the Local Area Coordinators (LACs).

1.61 As it stands, the Commission will be responsible for receiving, investigating, managing and resolving complaints about the provision of supports or services by NDIS providers. Complaints about the NDIA and LACs will continue to be dealt with through existing channels such as the Administrative Appeals Tribunal or the Commonwealth Ombudsman.³¹

1.62 In its submission, VCOSS said:

Enabling the Commission to receive and investigate complaints about the NDIA and NDIA-funded LACs would allow it to more effectively understand and resolve complaints. It would also make it easier for individuals and the disability sector to know where to make a complaint.

Overseeing all complaints would better allow the Commission to understand and address systemic analysis and trends. It would also better enable the Commission to deliver on one of its core functions "to provide

29 Health Services Union, *Submission 30*, p. 7.

30 Victorian Council of Social Service, *Submission 21*, p. 15.

31 Victorian Council of Social Service, *Submission 21*, p. 10.

advice or recommendations to the Agency or the Board in relation to the performance of the Agency's functions".³²

1.63 The Public Advocate and Children and Young People Commissioner (PACYPC) said:

The Bill does not give NDIS QASC authority to investigate complaints about the NDIA (sections 181E and 73X). This may be problematic, as the performance of NDIS providers is inextricably linked to decisions by NDIA about funding allocations and plans. ... The NDIS QASC may find it difficult to provide oversight of the NDIS system if they are prevented from considering the full implications of a complaint.³³

1.64 The Australian Greens agree that the Commissioner should be able to receive and investigate complaints about the NDIA and the LACs.

Community Visitor Programs

1.65 A number of submitters recommended that Community Visitor Programs or similar should assist with identifying complaints and subsequently referring complaints to the Commissioner. Queensland Advocacy Incorporated also suggested that they should play a role in investigating complaints.³⁴

1.66 In this regard, People with Disability Western Australia said:

The introduction of third party mechanisms such as the community visitor scheme would have far more positive impact on quality and safeguarding than would an overregulated Code of Conduct standing on its own. This also provides another person or authority to disclose information to without fear of retribution from either the person with disability or their staff.³⁵

1.67 The Australian Greens support the suggested involvement of Community Visitor Programs or similar in identifying and referring complaints.

Procedural Fairness

1.68 The Australian Services Union raised concerns regarding the Bill's omission of the term procedural fairness in relation to a complaint against or investigation of a worker.

1.69 Linda White, Assistant National Secretary, Australian Services Union, said:

... the bill is entirely silent on what workers can expect in the event that a complaint is made or an investigation is commenced in relation to their conduct. In our view, at a minimum, the legislation needs to be clear that workers will be afforded procedural fairness following a complaint or

32 Victorian Council of Social Service, *Submission 21*, p. 11.

33 Public Advocate and Children and Young People Commissioner, *Submission 23*, p. 6.

34 Queensland Advocacy Incorporated, *Submission 35*, p. 4.

35 People with Disability Western Australia, *Submission 45*, p. 9.

during an investigation, and it must be a requirement that any investigation is completed as soon as practicable.³⁶

1.70 She further went on to say:

Again, the way the code of conduct operates, it does seem to suggest that if you do something wrong, colloquially, then somehow the screening unit will change or put a note on your file. Again, we think procedural fairness is extremely important if that is to occur. If it is going to affect your livelihood, you need to be in a position to be able to address what is put to you or put on your file in screening.³⁷

1.71 The Australian Greens note that because the Code of Conduct is not contained in this Bill and is yet to be finalised, there is a lack of clarity about how exactly it will operate in practice.

1.72 The Australian Greens are concerned that there is no explicit mention in the Bill of procedural fairness and want to see this included.

Oversight of restrictive practices

1.73 Concerns were expressed during the inquiry regarding the limited power of the Commissioner to reduce and eliminate the use of restrictive practices as the states and territories will continue to have the power to authorise such practices in behaviour support plans of people with disability in their jurisdiction.

1.74 DPO Australia said in its submission:

DPO Australia is very concerned that this oversight function for the NDIS Commissioner is very weak given that restrictive practices cause significant breaches of human rights, and can constitute torture, cruel, inhuman or degrading treatment or punishment. There is a strong relationship between the use of restrictive practices and other forms of violence, abuse and neglect against people with disability, which undermines the ability of people with disability and support workers to recognise violence and respond to it as a crime.³⁸

1.75 They also said:

In addition, if authorisation of behaviour support plans is to be conducted at the State and Territory level, then there needs to be agreement at the State and Territory level for nationally consistent regulatory mechanisms for authorisation of behaviour support plans. The current mechanisms at State and Territory level are varied and inconsistent, with some consisting of relatively weak policy functions within government departments and others having established regulatory bodies and mechanisms.³⁹

1.76 Therese Sands gave evidence arguing:

36 Ms Linda White, Australian Services Union, *Committee Hansard*, 5 September 2017, p. 17.

37 Ms Linda White, Australian Services Union, *Committee Hansard*, 5 September 2017, p. 20.

38 Disabled People's Organisations Australia, *Submission 34*, p. 8.

39 Disabled People's Organisations Australia, *Submission 34*, p. 8.

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.⁴⁰

1.77 In its submission, VCOSS referred to Victoria's *Disability Act 2006* and the powers conferred on its Senior Practitioner, including its ability to order a disability service provider to cease or change a practice, procedure or treatment. It suggested that the NDIS Senior Practitioner should have similar authority.⁴¹

1.78 In a similar vein, the Office of the Public Advocate Victoria suggested that '[i]n time, the model of Victoria's Senior Practitioner should be implemented across Australia.'⁴²

1.79 Whether or not the role of Senior Practitioner would be legislated and how such a role would interact with its counterparts in other jurisdictions was raised.

1.80 VCOSS said:

the Bill as it is currently written does not create an Office of Senior Practitioner... Instead, the Bill establishes ... a behaviour support function. The explanatory memorandum states it in 'envisaged' ... a national Senior Practitioner will be responsible for [this] function.⁴³

1.81 VCOSS recommended that the functions and powers of the Senior Practitioner be legislated to ensure that the role of the Commissioner with regards to restrictive practices is not de-prioritised.⁴⁴

1.82 The Public Advocate and Children and Young People Commissioner for the Australian Capital Territory said:

Further clarification is required as to the parameters of this function and how this function will interface and/or work in collaboration with Offices of the Senior Practitioner that exist in a number of jurisdictions, which similarly have responsibilities for monitoring restrictive practices. To avoid confusion, any potential duplication and overlap functions needs to be avoided and the roles and responsibilities of the NDIS QASC pertaining to this function need to be clearly articulated.⁴⁵

1.83 The Australian Greens share the concerns raised regarding the relative weaknesses of oversight function of the Commissioner and agrees that the powers conferred need to be substantially strengthened. We would like to see the role of the Senior Practitioner included in the legislation, together with the crucial details of the

40 Ms Therese Sands, Disabled People's Organisations Australia, *Committee Hansard*, 4 September 2017, p. 2.

41 Victorian Council of Social Service, *Submission 21*, p. 12.

42 Office of Public Advocate Victoria, *Submission 29*, pp. 9-10.

43 Victorian Council of Social Service, *Submission 21*, p. 12.

44 Victorian Council of Social Service, *Submission 21*, p. 13.

45 Public Advocate and Children and Young People Commissioner, *Submission 23*, p. 5.

behaviour support rules (as outlined above), and how it will interact with other Offices of the Senior Practitioner spelled out.

Independent advocacy

1.84 A number of submitters and witnesses raised concerns over the lack of provisions in the Bill relating to independent advocacy, and outlined the important role independent advocacy plays in supporting people with disability.

1.85 It was noted that the Quality and Safeguarding Framework itself refers to the important role of independent advocacy, yet this is not reflected in the Bill.⁴⁶

1.86 People with Disabilities Western Australia said in its submission:

Advocacy has an important role to develop a person's capacity to act with informed choice and control. Independent individual advocacy builds a person's capacity as the advocate is working alongside a person, helping them to understand their options and ensuring their voice is heard. Advocacy is also a form of independent monitoring as it raises issues from an individual to a systemic level to address systemic abuse and discrimination. The ability to build capacity in terms of knowledge of rights, knowledge of complaints systems, and confidence in self-advocacy are all areas that will develop natural safeguards.⁴⁷

1.87 It also said:

There is a concern that the Bill will establish a dual role for the Commission when handling complaints. The Bill details that Commission will support people to be heard and provide protections for victimisation should they make a complaint, there is potential for impartiality to be compromised if the Commission is both interrogator and supporter. There is a strong case for independent advocacy to be available to ensure the rights of people are upheld in an unbiased way.⁴⁸

1.88 DANA and AFDO recommended in its joint submission:

(in accordance with the evidence and widely expressed views on the importance of advocacy) that the Quality and Safeguards Commission and Other Measures Bill 2017 ('the Bill') amends the National Disability Insurance Scheme Act 2013 ('NDIA Act') to include express reference to a person's right to advocacy and right to have advocates present during Quality and Safeguards Commission processes, whether the person is a prospective or actual NDIS participant, and that advocates and advocacy, including systemic advocacy, should be included in the protections for disclosures of violence, abuse and neglect.⁴⁹

46 Disabled People's Organisations Australia, *Submission 34*, p. 9.

47 People with Disabilities Western Australia, *Submission 45*, p. 4.

48 People with Disability Western Australia, *Submission 45*, p. 8.

49 Disability Advocacy Network of Australia and the Australian Federation of Disability Organisations, *Submission 44*, p. 22.

1.89 DPO Australian said in its submission:

... the Bill does not cover independent advocates who may disclose information. This is despite the fact that legal action and malice can, and has been directed at advocates by service providers and / or staff of services providers that have been the subject of disclosures.

Independent advocates should have the same protections against disclosure of information as nominees, family members, carers or significant others of a person with disability.⁵⁰

1.90 The Australian Greens want to see independent advocacy explicitly provided for in the Bill to ensure people with disability have access to independent advocates and that independent advocates are accommodated through the Quality and Safeguards Commission processes. We also want to see independent advocates named as disclosers on information under section 73ZA of the Bill.

Concerns with Schedule 2

1.91 Schedule 2 outlines amendments to the *National Disability Insurance Scheme Act 2013* (Act) based on the outcomes of an independent review of the Act in 2015 by Ernst & Young (Review) before the NDIS had been operating.

1.92 Any amendments to the Act must be closely examined given that this Act is fundamental to the implementation of human rights for people with disability. DPO Australia highlights that the Act is 'critical to the implementation of human rights for people with disability as it gives effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities (CRPD)' and that 'any amendments to the NDIS Act must further advance the rights of people with disability'.⁵¹

Decision-making and the Convention on the Rights of Persons with Disabilities (CRPD)

1.93 A recommendation from the Review of the Act was to 'operationalise the ALRC recommendations relating to the NDIS'.⁵² The EM states that this recommendation has not been implemented in this Bill as the 'COAG considered that the principles suggested by the ALRC are already broadly established or reflected in the NDIS framework'.⁵³

1.94 DPO Australia says that there has been no formal Australian Government response to the Australian Law Reform Commission's (ALRC) final report, *Equality, Capacity and Disability in Commonwealth Laws*.⁵⁴ The ALRC report outlined recommendations to improve the Act's compliance with article 12 of the CRPD, *Equal*

50 Disabled People's Organisations Australia, *Submission 34*, pp. 9-10.

51 Disabled People's Organisations Australia, *Submission 34*, p. 4.

52 Ernst & Young, "Independent review of the NDIS Act", December 2015, Department of Social Services, p. 68.

53 *Explanatory Memorandum*, p. 68.

54 Disabled People's Organisations Australia, *Submission 34*, p. 10.

recognition before the law, starting with the need to establish national decision-making principles to guide reform.

1.95 The Australian Greens share DPO Australia's concerns that there are still provisions in the NDIS that are based on substitute decision-making models and therefore not compliant with the CRPD. DPO Australia notes that:

there is still a focus on whether a person with disability has capacity to make their own decisions, rather than on what supports a person with disability needs to exercise their right to make their own decisions. There is also still a focus on a 'best interests' approach to decision-making instead of the 'will and preferences' model for decision-making as articulated in article 12 of the CRPD.⁵⁵

1.96 It is disappointing that the Government has not strengthened the Act's compliance with the CRPD as recommended by the ALRC. The Australian Greens support DPO Australia's recommendations that:

The next review of the NDIS Act should incorporate amendments that implement the recommendations from the Australian Law Reform Commission's report, *Equality, Capacity and Disability in Commonwealth Law*.

The Australian Government should develop a legislative reform framework that establishes national decision-making principles to guide law and policy reform in line with the recommendations from the Australian Law Reform Commission's report, *Equality, Capacity and Disability in Commonwealth Law*.[.]⁵⁶

Chronic health conditions

1.97 According to the Explanatory Memorandum, proposed subsection 24(1)(f) aims to provide 'clarity on how the disability requirements are intended to operate for people with chronic health conditions.'⁵⁷

1.98 DPO Australia notes that this amendment risks ruling out groups of people with disability, such as those with chronic health conditions, from the NDIS:

The proposed amendment means that the determination of whether a person meets the disability requirement is dependent on whether the NDIS can provide reasonable or necessary supports, or whether those supports should be provided through another service system, such as health. This creates the risk of ruling out groups of people with disability, such as those with chronic health conditions from the NDIS based on decisions regarding whether the NDIS can fund supports for people with disability. This is contrary to the object and principles of the NDIS and is not supported.⁵⁸

55 Disabled People's Organisations Australia, *Submission 34*, p. 10.

56 Disabled People's Organisations Australia, *Submission 34*, p. 11.

57 *Explanatory Memorandum*, p. 74.

58 Disabled People's Organisations Australia, *Submission 34*, p. 11.

1.99 DPO Australia states that 'confusion and uncertainty regarding eligibility and the provision of reasonable and necessary supports through the NDIS or other service systems is apparent', but 'is more appropriately dealt with through clearer guidance to NDIA to staff, people with disability and the community, and greater transparency and accountability for transfer of services to the NDIS by States and Territories.'⁵⁹

1.100 Community Mental Health Australia (CMHA) also raises concerns over the addition of 24(1)(f), noting that there is a strong correlation between mental health and chronic disease and that patients with severe mental disorders have a 10-25 year life expectancy reduction, with the vast majority of deaths related to chronic physical medical conditions.⁶⁰

1.101 Referring to an exchange between the NDIA and I during a Budget Estimates hearing on 30 May, CMHA said:

The points made by the NDIA through this exchange note that with comorbidity, both conditions – i.e. the disability and the chronic illness or condition – will be considered as part of the disability and considered in eligibility for the NDIS; and that support would be provided to a person with mental illness and a chronic illness where the mental illness impacted their ability to manage the chronic illness.⁶¹

1.102 CMHA then goes on to say:

There is however a significant lack of clarity around how co-morbidity fits within the NDIS, given the changes proposed through the Bill.⁶²

1.103 The CMHA believes:

There must be ways of providing coordinated support to people with psychosocial disability and comorbidity, such as chronic illness, who are NDIS participants without them having to go to more than one service system. Coordinated, wrap-around support – regardless of what the support needs are – is the crucial part of a psychosocial approach to addressing mental illness and this will be lost if people are required to seek help in more than one service system, many of whom are not able to do this. The Federal Government and the State and Territory Governments must be able to determine with confidence where there is service crossover, and come to payment arrangements where that is required, so that NDIS participants receive the support they need through one package.⁶³

1.104 The Australia Greens agree with both DPO Australia and CMHA that further examination is required of the interface between disability and chronic disease before any changes to the Act on this issue are made. Consultation should be undertaken with

59 Disabled People's Organisations Australia, *Submission 34*, p. 12.

60 Community Mental Health Australia, *Submission 18*, pp. 4-5.

61 Community Mental Health Australia, *Submission 18*, p. 3.

62 Community Mental Health Australia, *Submission 18*, p. 3.

63 Community Mental Health Australia, *Submission 18*, p. 4.

people with disability and their representative and advocacy organisations, and the findings and recommendations of the Productivity Commission should be taken into account and inform any potential solution.

Centrality of people with disability and co-design

1.105 The Australian Greens support the intent of the proposed subsection 4(9A), which states that, 'People with disability are central to the National Disability Insurance Scheme and should be included in a co-design capacity'. However, DPO Australia notes that there is 'currently no agreed policy on co-design principles, processes and implementation' and that implementation of section 4(9A) 'should be supported by a nationally, consistent co-design policy and guidelines that are developed and agreed with people with disability and their representative organisations'.⁶⁴

1.106 CMHA also notes that they support the intention of subsection 4(9A), but that there is 'no agreed process with people with lived experience on how this should be applied, and the amendments being proposed actually contradict principles of co-design'.⁶⁵

1.107 The Australian Greens share the concerns of DPO Australia and CMHA. We are also concerned that this amendment could result in nothing more than tokenism. Subsection 4(9A) should be supported by a nationally, consistent co-design policy and guidelines that are developed and agreed with people with disability and their representative organisations. Consultation also needs to be undertaken on this amendment.

Intersectionality

1.108 The amendment to Paragraph 5(d) removes the words 'and the gender,' and replaces it with ', the gender identity, sexual orientation and intersex status'. The Australian Greens support the intent of this amendment to include reference to gender identity, sexual orientation, and intersex status. However, DPO Australia highlights that the terms "gender" and "gender identity" are not interchangeable, and that removing 'and the gender,' removes recognition of the specific circumstances women with disability experience.⁶⁶ The *Sex Discrimination Act 1984* covers 'sex, sexual orientation, gender identity, intersex status...' The Australian Greens support DPO Australia's recommendation to amend Paragraph 5(d) to state 'the cultural and linguistic circumstances, and the sex, gender, gender identity, sexual orientation and intersex status of people with disability should be taken into account'.⁶⁷

1.109 Section 5(d) of the Act stipulates that 'the cultural and linguistic circumstances... of people with disability should be taken into account'. However, DPO Australia raises concerns that this does not cover 'the unique circumstances of

64 Disabled People's Organisations Australia, *Submission 34*, p. 13.

65 Community Mental Health Australia, *Submission 18*, p. 6.

66 Community Mental Health Australia, *Submission 18*, p. 6.

67 Disabled People's Organisations Australia, *Submission 34*, p. 14.

Aboriginal and Torres Strait Islander people with disability'.⁶⁸ The CRPD acknowledges 'the difficult conditions faced by person with disabilities who are subject to multiple or aggravated forms of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national, ethnic, indigenous or social origin, property, birth, age or other status'.⁶⁹ The Australian Greens support DPO Australia's recommendation to amend Section 5 to include, 'The unique cultural and social factors that concern Aboriginal and Torres Strait Islander people with disability should be respected and acknowledged'.

People with disability and appointments to the NDIA Board

1.110 DPO Australia raises concerns that the proposed amendment to subsection 127(2) of the Act 'confines eligibility for people with disability to be appointed to the NDIA Board to only one of the areas that qualify for membership of the NDIA Board',⁷⁰ which is '(a) the provision or use of disability services;'. They highlight that this amendment 'can be read as limiting eligibility to "the provision or use of disability services"' and that to 'strengthen recognition that people with disability should be strongly considered when selecting Board members', this amendment should apply to (a) – (d) in subsection 127(2).

1.111 The NDIS Civil Society Statement highlights that 'it must not be assumed that people with disability do not have the significant disability, governance, financial and industry expertise required' to be eligible for appointment to the NDIA Board.⁷¹

1.112 DPO Australia also raises concerns that the term used in the proposed amendment, "person with lived experience of disability", is being increasingly used to refer to people who have connections to people with disability and that any amendments to this section should refer to "persons with disability".⁷²

1.113 The Australian Greens support changing the phrase "a person with lived experience of disability" to "a person with disability" in the proposed amendment, and expanding the proposed amendment to include paragraphs (b) – (d) of subsection 127(2) of the Act.

Change of "review" to "reassessment"

1.114 The Australian Greens share CMHA's concerns regarding the amendments to change all references of "review" to "reassessment".

1.115 The CMHA has concerns regarding:

the explanatory statement not being clear on the interference or impact of this. The explanation states it reflects a change in terminology only and

68 Disabled People's Organisations Australia, *Submission 34*, p. 14.

69 Convention on the Rights of Persons with Disabilities, UN Doc A/RES/61/106, Preamble (p).

70 Disabled People's Organisations Australia, *Submission 34*, p. 14.

71 Civil Society Statement to the Australian Government, May 2017, p. 4.

72 Disabled People's Organisations Australia, *Submission 34*, p. 15.

does not change the rights of participants, however, there would be the same concerns as above regarding interpretation by the NDIA.⁷³

1.116 We support CMHA's recommendation that consultation needs to be undertaken on this amendment.

Inserting "sustainable" into subsection 4(15)

1.117 The Australian Greens share CMHA's concerns regarding the proposed new subsection 4(15) and the inclusion of the term "sustainable".

1.118 As CMHA says:

While these amendments would seem appropriate on face value, the significant issues that are occurring around what is 'reasonable and necessary' would mean that the addition of further words that focus on sustainability may cause further complications if the main driver is a cost factor.⁷⁴

1.119 We support CMHA's recommendation that consultation needs to be undertaken on this amendment.

Recommendation 1

The Bill not be passed in its current form.

Recommendation 2

The Bill be split into two; Schedule 1 and Schedule 2 should be separate bills.

Further consultation should be carried out on the amendments contained in Schedule 2 prior to a new bill containing these measures being introduced.

Any new bill containing the Schedule 2 amendments should also contain amendments addressing the recommendations made in the reports of the Joint Standing Committee on the National Disability Insurance Scheme.

Recommendation 3

Schedule 1 requires amendments addressing the issues raised in these additional comments.

Recommendation 4

The Senate not proceed with debate on the Schedule 1 amendments until the six essential rules have been publicly released and all consultation processes regarding these six rules are complete.

73 Community Mental Health Australia, *Submission 18*, p. 5.

74 Community Mental Health Australia, *Submission 18*, p. 6.

Senator Rachel Siewert
Senator for Western Australia

