

The Senate

Community Affairs
Legislation Committee

National Disability Insurance Scheme
Amendment (Quality and Safeguards
Commission and Other Measures) Bill 2017
[Provisions]

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45th Parliament

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Abbreviations

Act	<i>National Disability Insurance Scheme Act 2013</i>
AFDO	Australian Federation of Disability Organisations
ASU	Australian Services Union
Bill	National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017
COAG DRC	Council of Australian Governments' Disability Reform Council
Commission	NDIS Quality and Safeguards Commission
Commissioner	NDIS Quality and Safeguards Commissioner
Committee	Senate Community Affairs Legislation Committee
DANA	Disability Advocacy Network of Australia
Department/DSS	Department of Social Services
DPOA	Disabled People's Organisation Australia
EM	Explanatory Memorandum
HSU	Health Services Union
Human Rights Committee	Parliamentary Joint Committee on Human Rights
Minister	Commonwealth Minister for Social Services
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
NDIS Framework	NDIS Quality and Safeguarding Framework
NDS	National Disability Services
OPA Victoria	Victorian Office of the Public Advocate

PACYPC	ACT Public Advocate and Children and Young People Commissioner
PGPA Act	<i>Public Governance, Performance and Accountability Act 2013</i>
QAI	Queensland Advocacy Incorporated
Scrutiny Committee	Senate Standing Committee for the Scrutiny of Bills
VCOSS	Victorian Council of Social Services
VICSERV	Psychiatric Disability Services of Victoria

List of recommendations

Recommendation 1

2.91 The Committee recommends the Bill be passed.

Chapter 1

Introduction

Purpose of the Bill

1.1 The National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 (Bill) amends the *National Disability Insurance Scheme Act 2013* (Act) to:

- establish the independent National Disability Insurance Scheme Quality and Safeguards Commission (Commission); and
- make administrative amendments in response an independent review of the Act.

1.2 In introducing the Bill, the Minister for Social Services (Minister), the Hon. Christian Porter MP, stated the 'commission will deliver on the government's commitment to establish nationally consistent quality assurance mechanisms and safeguards for National Disability Insurance Scheme participants'.¹ The Minister further stated it is expected the Commission will enable participants to take reasonable risks in exercising choice and control in the supports they receive, whilst balancing governments' duty of care obligations to participants.²

Bill structure

1.3 The Bill is structured in two schedules. **Schedule 1** of the Bill establishes the NDIS Commission and empowers it to:

- (a) regulate the registration of National Disability Insurance Scheme (NDIS) providers (proposed Divisions 2 and 9 of Part 3A of Chapter 4 and proposed section 181F);
- (b) oversee compliance and enforce breaches relating to provider conduct (proposed Division 8 of Part 3A of Chapter 4 and proposed paragraph 181E(d));
- (c) receive and management reports and complaints regarding provider conduct (Divisions 5, 6 and 7 of Part 3A of Chapter 4 and proposed section 181G);
- (d) provide policy leadership and standards for worker screening (proposed section 73T, proposed paragraph 181E(f) and proposed paragraph 181F(c));

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

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

- (e) provide national leadership on the reduction and elimination of restrictive practices (proposed section 181H); and
- (f) facilitate the exchange of information between certain regulatory bodies (Division 2 of Part 1).³

1.4 **Schedule 2** of the Bill makes a range of administrative amendments which facilitate the operation of the Act, in response to an independent review of the Act, conducted in 2015.⁴

Background

Schedule 1

1.5 In December 2016, the Council of Australian Governments' Disability Reform Council (COAG DRC) endorsed the NDIS Quality and Safeguarding Framework (Framework). In summary, the Framework:

...provides a nationally consistent approach to help empower and support NDIS participants to exercise choice and control, while ensuring appropriate safeguards are in place, and establishes expectations for providers and their staff to deliver high quality supports.⁵

1.6 The objectives of the framework are intended to deliver NDIS support services which:

- (a) maintain the rights of people with disability;
- (b) ensure informed decision making;
- (c) establish person-centred outcomes that promote choice and control for participants;
- (d) are safe and free from abuse; and
- (e) enable monitoring and responsiveness.⁶

1.7 As a significant formulation of regulatory policy, the framework was developed through a process of consultation, impact analysis, attention to inquiries into abuse and neglect in disability support services and targeted policy work.⁷

1.8 The Explanatory Memorandum (EM) for the Bill explains:

The Bill is an important step towards implementing the Framework and giving effect to the Commonwealth Government's regulatory responsibilities under the Framework.⁸

3 Explanatory Memorandum (EM), pp. iv–v.

4 As completed by Ernst and Young.

5 Department of Social Services (Department), *NDIS Quality and Safeguarding Framework*, December 2016, p. 9.

6 Department, *NDIS Quality and Safeguarding Framework*, December 2016, pp [TBC].

7 Department, *NDIS Quality and Safeguarding Framework*, December 2016, pp. 8–10.

8 EM, p. ii.

1.9 In the 2017–18 Budget, the government announced it would fund the establishment of the Commission to operationalise the Framework.⁹

Schedule 2

1.10 Schedule 2 of the Bill makes administrative amendments to the Act in response to an independent review, made under section 208 of the Act, which was required to be caused by the Minister within two years of the NDIS commencing.

1.11 The independent review was produced in December 2015 and found that opportunities had arisen to amend, or clarify, elements of the NDIS legislative framework to better enable the objectives and principles of the scheme.¹⁰ Thirty three recommendations were made in the review, the majority of which proposed amendments to the Act.¹¹

1.12 The COAG DRC considered the review's recommendations and released its response in December 2016, in which the vast majority of the review's recommendations were agreed to.¹²

1.13 Amendments in schedule 2 of the Bill are aligned with COAG DRC's response to the independent review.¹³ The EM provides a breakdown of the recommendations implemented, or not implemented, by schedule 2 of the Bill.¹⁴

Financial impact

1.14 Amendments in schedule 1 will cost \$209 million over the forward estimates.¹⁵ Amendments in schedule 2 are not expected to have financial impact.¹⁶

1.15 Expenses for the Commission will be split across a number of government entities, including the Department of Social Services (Department), Department of Human Services and the Office of the Commonwealth Ombudsman.¹⁷

1.16 The Department informed that an allocation of \$29.3 million has been made over four years to develop information and communications technology solutions to support the Commission's work.¹⁸

9 Commonwealth of Australia, *Budget Measures: Budget Paper No. 2 2017–18*, p. 154.

10 Ernst and Young, *Independent review of the NDIS Act*, December 2015, p. 3.

11 Ernst and Young, *Independent review of the NDIS Act*, December 2015, pp. 5–6.

12 Council of Australian Governments Disability Reform Council, COAG response to the independent Review of the National Disability Insurance Scheme Act 2013, December 2016.

13 EM, p. v.

14 EM, pp. 68–71.

15 EM, p. vi.

16 EM, p. vi.

17 Commonwealth of Australia, *Budget Measures: Budget Paper No. 2 2017–18*, p. 154.

18 Ms Anna Fieldhouse, Department of Social Services, *Committee Hansard*, 5 September 2017, p. 31.

1.17 Regulatory savings resulting from the Bill are expected to be \$23.2 million per annum. These savings are primarily attributed to lower fees to services providers, through streamlined verification processes under the Provider Registration and Code of Conduct. Regulatory savings will be partially offset by additional regulatory costs resulting from more stringent serious incident reporting requirements and restrictive practice oversight provisions included in the Bill.¹⁹

Consideration by other committees

1.18 The Bill has been considered by the Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee) and the Parliamentary Joint Committee on Human Rights (Human Rights Committee).

Legislative scrutiny

1.19 The Scrutiny Committee considered whether provisions contained in the Bill raise concerns under the scrutiny principles of Senate Standing Order 24(a)(i), (ii), (iii) and (iv).

1.20 The Scrutiny Committee made several key observations, including:

- the desirability for the Bill to provide high level guidance on the broad discretionary powers of the NDIS Quality and Safeguards Commissioner (Commissioner) to release personal information for the purposes of the Act;
- the importance of several items of delegated legislation to understanding the primary legislation;
- the appropriateness of delegating administrative powers under the *Regulatory Powers (Standard Provisions) Act 2014* to enable 'other persons' to assist Commission officials in exercising 'potentially coercive or investigatory powers';
- the appropriateness of including more defined provisions regarding fair hearing rights for providers to be afforded an opportunity to submit to proceedings which may result in the issuing of a provider' ban order; and
- the preference for powers proposed under proposed section 202A to be confined so that powers of the Commissioner are delegated to a narrower scope of Commission officials.²⁰

Human rights

1.21 The Human Rights Committee considered the Bill's compatibility with the right to privacy. In particular, the Human Rights Committee considered proposed subsection 67E(1) and proposed section 67F. Proposed subsection 67E(1) provides for the Commissioner to disclose information held by the Commission in certain listed circumstances for the purposes of the Act. Proposed section 67F enables provisions

19 EM, p. 97.

20 Senate Standing Committee for the Scrutiny of Bills, Scrutiny Digest 6/17, pp. 50–55.

regarding the Commissioner's excise of disclosure powers to be made in the NDIS Rules.

1.22 The statement of compatibility with human rights for the Bill outlines disclosure provisions. The rationale is predicated on the role of the Commissioner in receiving information regarding potential cases of abuse, or statutory breaches, and the requirement for a capacity to work with mainstream systems to ensure such occurrences are addressed.²¹

1.23 The Human Rights Committee accepted the rationale for disclosure provisions as legitimate.²² But questioned the breadth and proportionality of the discretion afforded to the Commissioner when balanced against the principle of protecting the right to privacy.²³

Conduct of the inquiry

1.24 On 31 May 2017, the Minister introduced the Bill in the House Representatives.²⁴

1.25 Pursuant to resolution of the Senate, the provisions of the Bill were referred to the Senate Community Affairs Legislation Committee (Committee) on 15 June 2017, for inquiry and report by 5 September 2017. On 17 August 2017, the Senate granted an extension of time for reporting until 13 September 2017.²⁵ On 13 September 2017, the Senate granted an extension of time for reporting until 13 October 2017.²⁶ On 13 October 2017 the Committee presented an interim report and on 16 October 2017, the Senate granted an extension of time for reporting to 8 November 2017.²⁷

1.26 Information regarding the inquiry was placed on the Committee's website.²⁸

Submissions

1.27 The Committee wrote to relevant organisations and invited them to make a submission to the inquiry by 28 July 2017.

21 EM [statement of compatibility with human rights, p. 13].

22 Parliamentary Joint Committee on Human Rights, Human rights scrutiny report: Report 7 of 2017, August 2017, p. 28.

23 Parliamentary Joint Committee on Human Rights, *Human rights scrutiny report: Report 7 of 2017*, August 2017, p. 29.

24 House of Representatives, *Votes and Proceedings*, No. 56, 31 May 2017, p. 801.

25 *Journals of the Senate*, No. 55, 17 August 2017, p. 1759.

26 *Journals of the Senate*, No. 62, 13 September 2017, p. 1983.

27 *Journals of the Senate*, No. 64, 16 October 2017, p. 2062.

28 See: Community Affairs Legislation Committee, http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/NDIS_QualitySafeguards (accessed 6 September 2017).

1.28 At the time of reporting, the Committee received had 47 submissions which were published on the Committee's website. A list of submissions received is at Appendix 1.

Witnesses

1.29 Public hearings for the inquiry were held on 4 and 5 September 2017 in Canberra.

1.30 The Committee heard evidence from 17 organisations. A list of witnesses is at Appendix 2.

1.31 The Committee would like to thank the organisations which made submissions to the inquiry and provided evidence at its public hearings.

Receipt of NDIS draft rules

1.32 On 10 October 2017, the Minister for Social Services provided the following draft NDIS Rules to the Committee:

- NDIS (Protection and Disclosure of Information) Rules;
- NDIS (Incident Management and Reportable Incidents) Rules;
- NDIS (Complaints) Rules;
- NDIS Practice Standards (Schedule: Core Module); and
- NDIS (Behavioural Support) Rules.

1.33 The Committee agreed to a request from the Minister for these draft rules to be accepted confidentially, as the documents would be subject to future consultation with industry stakeholders.

Note on references

1.34 References to the Committee *Hansard* are to the proof *Hansard*. Page numbers may vary between the proof and official *Hansard* transcripts.

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).¹ 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.²

2.3 Of particular concern to submitters was the lack of detail regarding the NDIS rules,³ the NDIS Practice Standards⁴ and the NDIS Code of Conduct,⁵ which were described as 'critical pathways for delivering quality and safeguards within a consumer directed scheme.'⁶

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

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.⁷

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,⁸ will provide 'the detail necessary to support the evolving nature of the Commission's regulatory activities'.⁹

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...'¹⁰ 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.'¹¹

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.¹² The Victorian Council of Social Services (VCOSS) shared a similar view,

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.

recommending that broad consultation be undertaken with the disability sector regarding the NDIS Rules.¹³

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.'¹⁴

2.9 The Committee notes the Department has stated it will continue to consult on the ongoing development of the NDIS Rules.¹⁵ 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.¹⁶

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.¹⁷ 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.¹⁸

2.11 VCOSS expressed concern the NDIS Practice Standards would not apply to unregistered providers.¹⁹ 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.'²⁰

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

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.²¹

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.²²

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.²³

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.'²⁴

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.²⁵

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 received²⁶ as well as additional consultations to occur in October 2017.²⁷

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

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.

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.²⁸ As observed by Carers Victoria and Carers Queensland, Category D rules require consultation with states and territories under the Act, but not their agreement.²⁹

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.'³⁰ Some submitters suggested that 'rules which relate to key areas of the Framework should be subject to agreement from all jurisdictions.'³¹

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.³² 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.'³³

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.'³⁴

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

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'.³⁶

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.'³⁷ The Department further clarified that consultation on the NDIS Code of Conduct has already been undertaken with more to occur in October 2017,³⁸ and that functions for the Commission to undertake consultation were included in the Bill.³⁹

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.⁴⁰

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.⁴¹

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.'⁴²

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

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.'⁴³

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...⁴⁴

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.⁴⁵ 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.'⁴⁶

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'.⁴⁷

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

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'.⁴⁸

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.⁴⁹

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.⁵⁰

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.⁵¹ 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.⁵²

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.'⁵³ 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.

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.

Reporting to Parliament

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

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.⁵⁶

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.⁵⁷

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.⁵⁸

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

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.⁵⁹

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.'⁶⁰ 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.⁶¹

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.⁶²

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.⁶³

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.'⁶⁴

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

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.

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.⁶⁵

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.'⁶⁶ 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.⁶⁷

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.⁶⁸

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.⁶⁹

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.⁷⁰

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.

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.'⁷¹ However multiple submitters expressed concern that no specific provisions regarding co-design are included in the Bill.⁷²

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.'⁷³

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.'⁷⁴

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.⁷⁵

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.⁷⁶

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:

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*.

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.⁷⁷

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.⁷⁸

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.⁷⁹

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.'⁸⁰ 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.'⁸¹

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.⁸²

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.'⁸³

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

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.'⁸⁴

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.⁸⁵

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).⁸⁶

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.⁸⁷

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.⁸⁸ The Department's submission affirms that states and territories would be responsible for the authorisation of restrictive practices.⁸⁹

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.'⁹⁰ VCOSS' submission observes that the Bill has not legislated the role of senior practitioner—rather, a behavioural report function—and

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.

recommends that the powers and function of the Senior Practitioner be legislated.⁹¹ 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.⁹²

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'.⁹³ 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.⁹⁴

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'.⁹⁵ 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.⁹⁶

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.⁹⁷ Other submitters suggested a similar need for clarity around the role of the senior practitioner differentiation from the functions of state and territory bodies.⁹⁸

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.⁹⁹

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.¹⁰⁰

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.'¹⁰¹

Own motion investigations

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

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.'¹⁰⁴

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.'¹⁰⁵ 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.¹⁰⁶ 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

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.¹⁰⁷

2.83 Other submitters to the inquiry supported, or recommended, the Commissioner being empowered to undertake own motion investigations.¹⁰⁸ 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.¹⁰⁹

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.¹¹⁰

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

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.¹¹¹

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.¹¹² 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.¹¹³ 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

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.

governments.¹¹⁴ 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

114 EM, pp. 56–57.

Additional comments by Australian Labor Party Senators

1.1 Labor Senators recognise the need for a strong quality and safeguarding framework to be established as soon as possible. This is required to protect and prevent people with disability from experiencing harm arising from poor quality or unsafe supports or services under the National Disability Insurance Scheme (NDIS).

1.2 However through this Inquiry a range of significant issues have been raised by stakeholders, including disability organisations, providers, unions and States, that Labor Senators believe need to be addressed.

1.3 First, Labor Senators would like to note that some of the concern among stakeholders about the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 (Bill) could have been avoided with a more transparent and earlier consultation process.

1.4 Labor Senators note that as part of this Inquiry, the Government released some of the draft NDIS rules, and that consultation processes with stakeholders have now begun. At the time that submissions were due and hearings held the majority of stakeholders had not seen the draft rules relevant to them. This is particularly important given many key issues are delegated to be resolved within these rules, rather than the primary legislation. As a result it was very difficult for stakeholders to be supportive of the Bill, given they had no visibility of how key objectives of the Bill were to be approached.

1.5 Labor Senators wish to note here concerns that should be addressed. The Government should work with stakeholders to resolve these issues, including through amendments to the Bill where necessary.

Advocacy

1.6 As noted in the Chair's report, several submissions to the Inquiry raised concern about the absence of the role for advocacy in the Bill itself, including those from Australian Federation of Disability Organisations (AFDO) and Disability Advocacy Network of Australia (DANA), Disabled People's Organisation Australia (DPO Australia) and Queensland Advocacy Incorporated.

1.7 Disability organisations have raised concern that independent advocacy is not well understood in the context of the NDIS, and there is confusion and marginalisation of this important role. In a number of situations, independent advocates are refused entry into closed settings, such as boarding houses and group homes and larger residential facilities despite the evidence that indicates higher risks of violence and abuse in these settings. Sometimes, independent advocates are the only trusted support for people with disability, and NDIS providers must acknowledge and facilitate access to independent advocacy.

Recommendation 1

Labor Senators support this view and therefore recommend that amendments be made to ensure that the Bill explicitly states that NDIS participants have the right to access independent advocacy and that provisions are made to define and protect this role.

1.8 The role of independent advocacy needs to be included in the Bill, not only the Rules.

1.9 Labor Senators would be supportive of amendments similar to those proposed by DPO Australia and AFDO and DANA in their submissions, along the lines of the following:

- At section 4(13), or in a new subsection within section 4, a specific statement that articulates the right of NDIS participants to independent advocacy for any NDIS engagement, including with the NDIS Quality and Safeguards Commission;
- At section 73W, an additional provision (c) that stipulates that NDIS providers acknowledge and facilitate access to the role of independent advocacy in complaints management and resolution systems;
- At section 73X(2)(b), independent advocates should be included along with people with disability, complainants, and NDIS providers;
- At section 73Z(3), an additional provision (c) that stipulates that action may include ensuring that the person with disability has access, or is referred to independent advocacy;
- At section 73ZA(d), include 'independent advocate' to the list of disclosures qualifying for protection under the law (this is particularly critical, as advocates should have the same protections as others, and currently do not have these protections);
- At section 181E(c), include providing advice on the right to complain and to access independent advocacy;
- At section 181D(4)(a), include a phrase similar to, 'including through recognising the support and role of independent advocacy';
- At section 181F(d), include a phrase similar to, 'including recognition of the role of independent advocacy in supporting people with disability';
- At section 181G(c), include a phrase similar to, 'including through recognising the support and role of independent advocacy'.

Procedural Fairness

1.10 Unions have raised concern about the absence of provisions in the Bill to ensure procedural fairness for NDIS workers who are subject to complaints or investigations.

1.11 The Government has argued that the general administrative law principles of procedural fairness apply to decisions made by the Commission and therefore no

further detail is required in the legislation or regulations. The Department of Social Services has also raised concern that by prescribing procedural fairness in legislation or regulation they could inadvertently limit procedural fairness.

1.12 Labor Senators note, however, that these same administrative law principles apply in relation to employment in the Australian Public Service (APS), and nonetheless there are comprehensive procedures for APS employees if they are subject to an investigation, which are underpinned in legislation and regulation.

1.13 The procedural fairness framework for APS employees is as follows:

- Section 15(3) of the *Public Service Act 1999* (the Act) requires agency heads to develop written procedures for determining whether an employee has breach the APS Code of Conduct, and if so, what sanction should apply.
- Section 15(4) of the Act requires those written procedures to:
 - Comply with the procedural requirements set out in the APS Commissioner's Directions; and
 - Have due regard to procedural fairness.
- Sections 43 – 47 of the APS Commissioner's Directions 2016 (a legislative instrument) set out 'basic procedural requirements' that, in summary, require the following:
 - The agency must notify the employee of the details of the suspected breach of the Code of Conduct;
 - The employee must be given a reasonable opportunity to make a statement in relation to the suspected breach (before the agency makes a determination in relation to the suspected breach);
 - If a determination is made that an employee has breached the Code of Conduct the agency must inform the employee of:
 - The determination;
 - The sanction/s under consideration; and
 - The factors that are under consideration in determining the sanction;
 - The employee must be given a reasonable opportunity to make a statement in relation to the sanctions;
 - The decision maker must be independent and unbiased;
 - The process must be carried out with as little formality and as expeditiously as possible.
- In accordance with s 15(4) of the Act each agency must have written procedures that comply with the above requirements. By way of example the Secretary of the Department of Social Services has published a four page document (dated 21 December 2016) setting out the procedure to be followed in the event of an investigation into an employee. Those procedures are

consistent with the APS Commissioner's Directions, but go further, and include:

- A note that procedural fairness generally requires that the employee be informed of material that is before the decision maker that is adverse to the person or their interests;
- There should be logically probative evidence to support the making of adverse findings, on the balance of probabilities;
- That the decision maker must agree to a request by the employee to have a support person present in any meeting or interview (where the request is reasonable).

Recommendation 2

Labor Senators recommend that similar provisions must be included as part of the NDIS Quality and Safeguarding legislation.

1.14 This would include an amendment to the Bill to include new section stating that the Commissioner's Complaints Function must be exercised in accordance with the Complaints Rules and in accordance with procedural fairness; and amendments to the Complaints Rules to ensure the following:

- The Commission will generally exercise its powers in accordance with procedural fairness.
- That before making any decision in relation to conduct under investigation the Commission must:
 - notify the worker of the details of the complaint or investigation into their conduct;
 - provide the worker with any material before the Commission that is adverse to the worker or their interests;
 - provide the worker with a reasonable opportunity to make a statement in relation to the alleged conduct.
- If a determination is made that the worker has engaged in misconduct, before making any decision in relation to what sanction should apply the Commission must:
 - notify the worker of the determination, the sanctions under consideration and the factors that are under consideration in determining the sanction;
 - provide the worker with a reasonable opportunity to make a statement in relation to the proposed sanctions.
- The process should be carried out as expeditiously as possible and in a timely way.
- The Commission must agree to a request by the employee to have a representative present in any meeting or interview.

1.15 Both unions and disability organisations have noted the need for investigations to be carried out in a timely manner. While this is stated in the above proposed amendment to the rules, the inclusion of actual timeframes for each stage of the process is desirable and should be further considered.

Categorisation of rules for consultation with States

1.16 The Bill proposes that most of the rules that underpin the operation of the Commission and other regulatory matters are classified as 'Category D' meaning they only require consultation with member states rather than agreement. The Bill proposes that rules that relate to behaviour support and worker screening are classified as Category B, which require agreement from a majority of member states.

1.17 The Victorian Government and National Disability Services (NDS) have argued that rules are fundamental to the detailed design and implementation of the Framework and should require the agreement of all jurisdictions, at least during implementation phase and in the early years of the Framework's operation.

1.18 Labor Senators support this view. For the scheme to be nationally consistent it is important that, at least in the early years of establishment, States and Territories are properly consulted and agree on key elements of the quality and safeguarding framework.

1.19 Victoria has proposed to amend clause 79 to classify all rules as Category A, requiring agreement from all jurisdictions (excluding regulations made under section 9 (definition of NDIS provider)); and to insert a new section to provide that an absence of a response from a jurisdiction within 28 business days of receiving a request from the Commonwealth Minister to approve a rule or rules, will be deemed as an agreement by that state or territory to the rule or rules being proposed.

Recommendation 3

Labor Senators recommend that the Government work with Victoria and other concerned organisations to address this issue, including any necessary amendments to the Bill or rules.

Registration of providers and worker screening

1.20 Several submissions, including from the Australian Services Union (ASU), Health Services Union (HSU), United Voice and NDS, raised concern that the Bill does not require all providers to be registered NDIS providers.

1.21 Under the current National Disability Insurance Scheme Act 2013 (the Act), if funding under a participant's plan is managed by the National Disability Insurance Agency (the Agency), supports can only be provided by a registered NDIS provider (subsection 33(6) of the Act). Plan managers must also be registered providers because of section 42 of the Act.

1.22 Therefore providers can only be unregistered where they are providing supports to a self-managed participant.

1.23 Under subsection 35(2) of the current Act, the NDIS rules may provide for the manner in which supports are to be funded or provided. This rule making power has

been used to require Specialist Disability Accommodation providers to be registered (under the current NDIS (Specialist Disability Accommodation) Rules).

1.24 The Bill as currently proposed provides for rules to be made requiring providers of specified classes of supports to be registered. The Registration and Practice Standards Rules, on which consultation is ongoing, will confirm the classes of support for which providers must be registered. These will apply even to providers providing supports in these classes to self-managed participants.

1.25 In addition, there are mechanisms available in the Bill for the Commission to require individual providers to be registered in order to provide supports, for example by placing a conditional ban on a provider or imposing a condition of registration that it can only provide a particular category of supports (outside its registration group) if it is registered for that category of supports.

1.26 There is a general consensus across disability organisations that any further requirement for providers to be registered would impinge on the choice and control of participants, by limiting their ability to manage their own risk and choose their own providers. Labor Senators also see this side of the argument, and appreciate that this is contentious issue.

1.27 Unions have also raised concern the Bill does not call for universal worker screening, as unregistered providers are not required to be screened. Similarly many in the disability community believe that universal screening would compromise choice and control.

Recommendation 4

Labor Senators recommend that further work is required to address these issues.

1.28 Children and Young People with Disability Australia (CYDA) have also raised concern that the registration process should include specific safeguards for children, for example including that the rules should specify requirements that must be met for providers to be considered child-safe.

Recommendation 5

Labor Senators recommend that the Government work with CYDA and other stakeholders to address issues specific to children in the framework, including any necessary amendments to the Bill and rules.

Workforce Training

1.29 Unions, including the ASU, HSU and United Voice, are concerned that workers will not get access to adequate training and support to understand the Framework, the Bill, and the associated Code and Practice Standards, and to consistently meet their obligations under the regulatory regime.

1.30 They have argued that the Commission should have an additional responsibility for workforce development and training to proactively focus on the quality of supports and the skills of the workforce, and should be resourced to fulfil this responsibility.

1.31 Further, training is not covered under the NDIS pricing framework, therefore employers are not supported to ensure employees are provided with adequate training. This leaves a risk that employees will not receive adequate training, or will be forced to undertake in their own time and at their own expense.

Recommendation 6

Labor Senators recommend that further work is required to address this issue and recommend that the Government work with unions and other stakeholders to resolve it, including any necessary amendments to the Bill and rules.

Restrictive Practices

1.32 The Explanatory Memorandum states that the Commission will have responsibility for 'national oversight and policy setting in relation to behaviour support and monitoring the use of restrictive practices, within the NDIS with the aim of reducing and eliminating such practices'.

1.33 Disability organisations including DPO Australia, AFDO and DANA, NDS and CYDA, have raised particular concern that the Bill does not include regulatory powers to enable the NDIS Commissioner to prohibit certain restrictive practices.

1.34 As DPO Australia states, current mechanisms for restrictive practice oversight 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. This already creates inequity in protection from practices that have been found to constitute torture and ill-treatment, and this Bill should be providing the highest level of protections equally across Australia.

1.35 The Government has argued that its regulatory power in this area is limited by the need for the Commonwealth to rely on section 51(xxix) of the Constitution, the external affairs power, to draw on Convention on the Rights of People with Disability commitments.

1.36 The Government's advice is that the Commonwealth cannot directly authorise restrictive practices; therefore it is necessary for States and Territories to remain responsible for regulating the authorisation of restrictive practices.

1.37 The Government has also argued that the Bill provides for a number of powers of the Commission which have a very strong regulatory effect in relation to restrictive practices – particularly through the registration powers:

- Unregistered providers will not be able to use restrictive practices
- Registered providers will not be able to use restrictive practices unless they:
 - Have approval in the jurisdiction, consistent with that jurisdiction's requirements; and
 - Have been developed as part of a positive behaviour support plan which has been developed by an approved behaviour support practitioner.
- Behaviour support practitioners will need to be approved by the Commission and will be subject to standards set out by the Commission.

- All uses of restrictive practices will need to be reported to the Commission and the use of unauthorised restrictive practices will be reportable incidents.
- The combination of these powers will mean that there will be tight controls and national transparency around the use of restrictive practices in the NDIS.

1.38 DPO Australia has suggested that at the very least, section 181H should include provision for the Commissioner to the work with States and Territories to design and implement a nationally consistent regulatory framework for eliminating restrictive practices and authorising positive behaviour support. This framework should be mandatory, reviewable and enforceable, and include mandatory requirements for the use of positive behaviour supports. A nationally, consistent regulatory framework should be co-designed with people with disability and their representative organisations.

Recommendation 7

Labor Senators recommend that the Government work with DPO Australia and other concerned organisations to address this issue, including any necessary amendments to the Bill or rules.

Independent Complaints Commissioner

1.39 Several submissions, including those from the Victorian Government, AFDO and NDS, raised concern about the independence of the Commissioner with regard to his or her complaints role. In particular, there was concern about the proposed structure of the Commission and that there could be perceived or actual conflict between its three key roles of provider registration, practice standards and complaints. Concern was also raised about the Commissioner being subject to Ministerial direction with regards to complaints.

1.40 In response to these concerns the Government has explained that structuring the Commission as one agency is based on recommendations by the Productivity Commission in the context of aged care in the *Caring for Older Australians Inquiry* (2011). The rationale is that combining the functions in one organisation will lead to better efficiency, information sharing and continuous improvement of processes across functions. For example the Productivity Commission Inquiry report states:

To limit the potential for confusion and overlapping regulation, to increase the efficiency of regulation and to facilitate best practice regulation, a single organisation should administer the regulation of quality, and investigations of noncompliance. (p. 404)

Second, the current governance arrangements for accreditation need to be reconsidered within the context of an enhanced consumer-oriented and outcomes focussed approach to assessing the quality of care. Moreover, many features of best practice 'responsive regulation' (appendix F) are difficult to achieve when one aspect of regulatory responsibility (that is, accreditation and the assessment of performance against Quality Standards) is structurally separated from compliance investigations and enforcement decisions surrounding quality. Regulatory behaviour would be enhanced by locating quality assessment within the same organisation that receives consumer complaints, monitors compliance, provides information on ways

that providers could improve the quality of their care services and makes the enforcement decisions. (p. 402)

1.41 Labor Senators also note that the Government has confirmed that a Deputy Commissioner will be appointed with responsibility for complaints and reportable incidents. The Minister's directions will be to the Commissioner (as opposed to the Deputy Commissioner) about the performance of functions under the Bill which includes the complaints function. As set out in Section 181K of the Bill, these directions must be of a general nature only and cannot, for example, relate to a specific complaint, individual or NDIS provider.

1.42 Labor Senators believe that this does address concerns about the Commission's complaints role, but that these are issues that should be monitored once the Commission is established including as part of the review process.

People with disability outside the scope of the Commission

1.43 There is concern among stakeholders, including AFDO and DANA, DPO Australia and NDS, that the Commission will only cover NDIS participants, and therefore that people with disability who receive supports outside of the NDIS will not be covered.

1.44 The Government's response to this has been that people receiving supports through other systems, such as the health, education and justice systems, will continue to be covered by the quality and safeguards arrangements of those systems; and that the Commission will not replace existing functions in the states and territories that have a broader scope (such as an ombudsman, a human rights commission or a public advocate).

1.45 Disability organisations remain concerned about people falling through the cracks and not being covered by a disability-specific quality and safeguarding framework.

Recommendation 8

Labor Senators recommend that the Government work with stakeholders and States and Territories to address this issue, and ensure that people with disability are sufficiently covered in all jurisdictions.

1.46 Labor Senators also wish to again note that NDIS Quality and Safeguarding Framework certainly does not negate the need for a Royal Commission into violence and abuse against people with disability as the Government claims. Labor again calls on the Government to establish a Royal Commission as soon as possible.

Review

1.47 Labor Senators note that the Explanatory Memorandum states that a review of the NDIS quality and safeguarding framework will commence in mid-2021 (three years after commencement), with a report to be provided to the Council of Australian Governments Disability Reform Council by mid-2022, covering 'the efficiency and effectiveness of the framework in meeting its objectives, any unintended consequences arising from their implementation, and any identify any weaknesses in the regulatory framework'.

1.48 This review will be an important opportunity to reassess areas of concern and address any issues that have arisen through the early operation of the Commission and Framework. It is vital that this review is an open, transparent and consultative process and that the review itself is made publicly available.

Recommendation 9

Labor Senators recommend that the review make particular reference to the issues that have been raised here.

Senator Murray Watt

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

Appendix 1

Submissions and additional information received by the Committee

Submissions

- 1 Community and Public Sector Union
- 2 Office of the Public Advocate (Queensland)
- 3 Summer Foundation
- 4 Department of Social Services
- 5 Attendant Care Industry Association
- 6 Home Modifications Australia
- 7 National Disability Insurance Agency
- 8 Royal Institute for Deaf and Blind Children
- 9 Australian Blindness Forum
- 10 Queensland Nurses and Midwives' Union
- 11 Law Council of Australia
- 12 National Mental Health Consumer and Carer Forum
- 13 HelpingMinds
- 14 Alzheimer's Australia
- 15 Macular Disease Foundation Australia
- 16 VICSERV
- 17 Ms Carmen-Emilia Tudorache
- 18 Community Mental Health Australia (plus an attachment)

- 19 Catholic Social Services Australia
- 20 Volunteering Australia
- 21 Victorian Council of Social Service
- 22 National Disability Services
- 23 Public Advocate and Children and Young People Commissioner
- 24 ADACAS
- 25 Council for Intellectual Disability
- 26 Victorian Advocacy League for Individuals with Disability Inc
- 27 Carers Victoria and Carers Queensland
- 28 ACT Human Rights Commission
- 29 Office of the Public Advocate Victoria
- 30 Health Services Union
- 31 Australian Services Union
- 32 United Voice
- 33 Prader-Willi Syndrome Australia
- 34 Disabled People's Organisations Australia
- 35 Queensland Advocacy Incorporated
- 36 Action for More Independence and Dignity in Accommodation
- 37 JFA Purple Orange
- 38 Victorian Government
- 39 Office of the Australian Information Commissioner
- 40 National Mental Health Commission
- 41 Mental Health Australia

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- 42 Children and Young People with Disability Australia
 - 43 Young People In Nursing Homes National Alliance
 - 44 Australian Federation of Disability Organisations and Disability Advocacy Network of Australia
 - 45 People With Disabilities (WA) Inc
 - 46 Northcott
 - 47 JacksonRyan Partners (plus response from Department of Health and Human Services Victoria)
 - 48 Tasmanian Government

Additional Information

- 1 Reasonable, necessary and valued: Pricing disability services for quality support and decent jobs, June 2017, from Australian Services Union, received 4 September 2017
- 2 Information regarding proposed national workers' screening arrangements, from Health Services Union, received 5 September 2017

Answers to Questions on Notice

- 1 Answers to Questions taken on Notice during 5 September public hearing, received from Australian Services Union, 6 September 2017
- 2 Answers to written Questions on Notice from Senator Brown, received from Disabled People's Organisations Australia, 7 September 2017
- 3 Answers to Questions taken on Notice during 5 September public hearing, received from National Disability Insurance Agency, 8 September 2017
- 4 Answers to Questions taken on Notice during 5 September public hearing, received from Department of Social Services, 8 September 2017
- 5 Answers to Questions taken on Notice during 5 September public hearing, received from Children and Young People with Disability Australia and Young People in Nursing Homes National Alliance, 12 September 2017

Appendix 2

Public hearings

Monday, 4 September 2017

Parliament House, Canberra

Witnesses

Disabled People's Organisations Australia

SANDS, Ms Therese, Director

Australian Federation of Disability Organisations

McGEE, Mr Patrick, National Manager, Policy Research Advocacy

Disability Advocacy Network of Australia

MALLETT, Ms Mary, Chief Executive Officer

Victorian Government

FOLEY, the Hon. Martin, Minister for Housing, Disability and Ageing and Minister for Mental Health

Victorian Council of Social Service

KING, Ms Emma, Chief Executive Officer

NOWELL, Ms Carly, Policy Adviser

REYNDERS, Mr Llewelyn, Policy Manager

Health Services Union

FARTHING, Mr Mark, Senior Policy Adviser, HSU (Victoria No. 2 Branch (HACSU))

SVENDSEN, Ms Leigh, Senior National Industrial Officer, HSU (National)

McCORMICK, Mr Danny, Member, Team Leader, Disability Support Worker, HSU (Tasmania)

United Voice

COAD, Ms Melissa, Executive Projects Coordinator

National Mental Health Commission

D'SOUZA, Ms Vanessa, Acting Director, Policy, Analysis and Reporting

National Disability Services

ANGLEY, Mrs Philippa, Executive Officer to the Chief Executive

BAKER, Dr Kenneth, Chief Executive

Tuesday, 5 September 2017

Parliament House, Canberra

Witnesses

Young People in Nursing Homes National Alliance

BLACKWOOD, Mr Alan, Policy Director

Children and Young People with Disability Australia

GOTLIB, Ms Stephanie, Chief Executive Officer

Office of the Public Advocate, Victoria

PEARCE, Ms Colleen, Public Advocate

ACT Human Rights Commission

GRIFFITHS-COOK, Ms Jodie, Public Advocate and Children and Young People
Commissioner

TOOHEY, Ms Karen, Disability and Community Services Commissioner

Australian Services Union

WHITE, Ms Linda, Assistant National Secretary

GASKE, Ms Emeline, National Campaign and Growth Coordinator

McFARLAND, Mr Angus, Assistant Secretary, New South Wales Branch and ACT
Branch

AHRENS MURRAY, Ms Petra, ASU delegate

ANDERSON, Ms Deborah, ASU delegate

SLADE, Ms Trudie, ASU delegate

Community Mental Health Australia

BRESNAN, Ms Amanda, Executive Director

VIERECK, Mr Simon, Executive Officer, Mental Health Community Coalition ACT

Victorian Advocacy League for Individuals with Disability Inc.

STONE, Mr Kevin, Chief Executive Officer

Department of Social Services

WHITECROSS, Mr Andrew, Group Manager, NDIS Market Reform

SMITH, Mr Bruce, Branch Manager, Quality and Safeguards Policy

FIELDHOUSE, Ms Anna, Director, Quality and Safeguards Commission Service
Model

HAWKE, Ms Sarah, Director, Policy and Legislation

National Disability Insurance Agency

MCKINNON, Ms Margaret, Acting Deputy Chief Executive Officer, Governance and Stakeholder Relations

NEVILLE, Ms Liz, Branch Manager, Provider Pathway Design and Engagement Branch

