



11 February 2021

Sent via email: DRCEnquiries@royalcommission.gov.au

Dear Commissioners,

Response to Safeguards and Quality Issues Paper

The Victorian Office of the Public Advocate (OPA) welcomes the opportunity to respond to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Royal Commission) *Safeguards and Quality Issues Paper*.

As the Royal Commission would be aware, OPA is a Victorian statutory office, established under the *Guardianship and Administration Act 2019* (Vic), independent of government and government services that works to safeguard the rights and interests of people with disability.

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

OPA welcomes the continued opportunity to contribute to this Royal Commission. The Public Advocate and two Community Visitors appeared as witnesses before the Royal Commission at its December 2019 hearings in Melbourne to speak about violence in group homes. In November 2019, OPA released a report, *I'm too scared to come out of my room*, that was submitted to the Royal Commission in response to the *Group Homes Issues Paper*. OPA has contributed submissions on the following topics:

- Health care for people with cognitive disability
- The Criminal Justice System
- Emergency Planning and Response
- Restrictive Practices
- Rights and Attitudes
- Employment.

OPA is also preparing to respond to further requests for information from the Royal Commission, including *The Experience of First Nations People with Disability in Australia Issues Paper* and a specific submission on parents with disability and their interaction with the child protection and family law systems.

OPA notes that each previous submission explores safeguarding and quality matters in the context of the specific issues paper. OPA agrees with the Royal Commission in its understanding that "[s]afeguards can be defined as 'actions designed to protect the rights of people to be safe from the risk of harm, abuse and neglect, while maximising the choice and control they have over their lives'"¹ and that safeguards can be both informal and formal.

Similarly, OPA agrees that “[q]uality services are those that include a focus on providing positive outcomes for people who use services, involve individuals and staff in service design, encourage continuous improvement, and use available data to monitor performance and improve the service.”²

This letter submission responds broadly to the *Safeguards and Quality Issues Paper*, by highlighting a select number of high-level key issues relevant to the people OPA represents, supports, visits, and advises. It will do so by focusing on safeguarding and quality in the following areas:

1. National Disability Insurance Scheme
2. Supported Residential Services
3. Adult safeguarding

1. National Disability Insurance Scheme

Seven-and a-half years into the roll out of the National Disability Insurance Scheme (NDIS), it is apparent that participants with complex support needs are not yet enjoying the improvements that it promised to deliver. The NDIS Quality and Safeguarding Framework (NDIS Q&S Framework), serves as the blueprint for ensuing legislation, rules, and practices, however OPA observes gaps and areas for improvement.

The NDIS Quality and Safeguards Commission has a role to play in raising the quality of services in the sector and in ensuring that workers and providers are upskilled to meet the NDIS Practice Standards.

Ultimately, the responsibility for safeguarding is shared by the NDIA, the NDIS Commission, State and Federal Governments, and statutory authorities, but the role of providers, workers, and the community at large should not be overlooked. OPA makes the following additional brief comments below:

Informal supports and developmental safeguards

The principles underpinning the NDIS Q&S Framework include the presumption of capacity to exercise choice and control. This is an important element, one that relates to article 12 of the United Nations *Convention on the Rights of Persons with Disabilities*—equal recognition before the law—which imparts an obligation on State Parties to take appropriate measures to provide access to supports required to exercise their legal capacity. This human rights approach to supporting participants is lacking in the NDIS Q&S Framework.

In Victoria, it is accepted and recognised in law that a person is considered to have decision-making capacity if they can make decisions when provided with practicable and appropriate support. What does this mean in the NDIS context? One of the key aspects of supported decision-making is that it should be directed by the will and preferences of the person being supported.

NDIS-funded supports do not adequately address more generalised decision supports that many isolated individuals with cognitive impairment require to engage with the NDIA and their NDIS-funded supports. For instance, a participant may require decision-making supports in the planning stages, and indeed, to choose their providers and support coordinator. An advocate or other supporter can assist the participant with these tasks where they are uncontentious.

The very foundation for choice and control as OPA sees it lies in shared decision-making and the NDIA has a pivotal role, and indeed obligation, to facilitate access to decision-making supports. OPA questions whether the legislated objectives of the NDIS Act—to support participants to exercise their legal capacity—are being met at the access and planning stages, which represent the initial and perhaps most crucial opportunity in realising the intention of choice and control. These are developmental safeguards that are also absent from the NDIS Q&S Framework.

Instead, OPA observes at times an overreliance by the NDIA on substitute decision-making as a means for supporting participants who may lack decision-making capacity in completing administrative requirements germane to NDIS access and planning (for example, signing an Access Request Form). OPA stresses the importance of the NDIA recognising the importance of decision-making supports at all points of a participant's or prospective participant's interactions with the scheme. This could be achieved by incorporating the Australian Law Reform Commission's National Decision-Making model and its principles into the NDIS Act.³

OPA made the following points in its submission to the Joint Standing Committee on the NDIS Inquiry into the NDIS Quality and Safeguarding Commission, which have been synthesised for the purposes of this submission.⁴ I also enclose a copy of that submission given its relevance to this Issues Paper.

Monitoring in a complaints-based model

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

Market oversight

The NDIS Q&S Commission should be transparent and forthcoming on its activities in this realm and secondly, it should use its monitoring and investigation powers to identify and address systemic (i.e. market) issues.

Investigation powers

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

Complaints and referrals

OPA and the Community Visitors Program (disability services stream) each has an information sharing schedule with the NDIS Q&S Commission.

In response to OPA and Community Visitor referrals, there have been instances where the privacy requirements established under the NDIS Act and Rules have prevented the effective sharing of information by the NDIS Q&S Commission. In some instances, the NDIS Commission has been unable to update OPA on the progress of its work in relation to a referral, thereby diminishing OPA's ability to undertake a more targeted advocacy response

(and, indeed, to fulfill its own safeguarding role). OPA notes that good will is there; but that detailed feedback is required to ensure the effective operation of safeguarding bodies.

At a sector-wide level, there is evidence that the NDIS Commission fails to fully recognise (and utilise) the role of independent advocates in supporting participants. OPA considers the NDIS Commission could do more to encourage and provide feedback to individuals and organisations that are acting to promote the wellbeing of people with significant cognitive impairment, especially those who are unable to articulate their complaint without appropriate support.

OPA's submission to the Joint Standing Committee on the NDIS Inquiry into the NDIS Q&S Commission recommended that the *National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018* (Cth) be reviewed, and that the NDIS Q&S Commission should as a matter of practice provide meaningful feedback to any such individual or organisation where:

- The Commission, on reasonable grounds, considers the individual or organisation to be playing a positive role in the participant's life; and
- The provision of such information would assist the individual or organisation to promote and protect the rights and wellbeing of the participant.⁵

This would enable OPA and Community Visitors to perform their important safeguarding roles effectively.

Code of conduct

The NDIS Code of Conduct should be more direct in supporting a zero-tolerance approach to abuse within services.

Identification of risk

The NDIS Quality and Safeguarding Framework should identify and support at-risk adults.

In its 2017 report on *Elder Abuse—A National Legal Response*, the Australian Law Reform Commission (ALRC), made recommendations around safeguarding and supporting at-risk adults.⁶ 'Risk' or vulnerability should not be assumed to be inherent to any individual, but rather a result of their circumstances that "renders them unable to protect themselves."⁷ The South Australian Safeguarding Taskforce (established in response to the tragic death of Ann Marie Smith) specifies that vulnerability is increased by factors such as social isolation, lack of proper care from service providers, or systemic factors.⁸

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

People over 18 years of age who:

- have care and support needs;
- are being abused or neglected, or are at risk of abuse or neglect; and
- are unable to protect themselves from abuse or neglect because of their care and support needs.⁹

The ALRC recommendation can extend to a variety of contexts. This is explored further below under 'Adult safeguarding'.

Community Visitors

OPA sees value in broadening the scope of Community Visitors, by extending the program's applicability to all NDIS participants who are identified as being at-risk.

The Productivity Commission identifies Community Visitors as a "well targeted way of monitoring groups with particular vulnerability who receive care and support in situations where poor practice or outcomes are more likely to go undetected."¹⁰ That the NDIS Q&S Framework does not make full use of the extent of their reach suggests a disjointed approach. There should be a clear and direct link between the identification of a participant's vulnerability and their access to the oversight of Community Visitors.

Community Visitors are a crucial safeguard for the protection and promotion of the human rights of people with disability. Over the 33 years of operation of the Victorian program, the role of Community Visitors in raising public awareness of important matters has contributed to major improvements in disability services. Notably, Community Visitors were involved in the closing of Victorian institutions, and more recently, highlighting issues of abuse and violence in the sector.

OPA supports greater variety in the market, nevertheless the diffuse nature of service provision under a market-based system has drawbacks for the safeguarding functions of Community Visitors. Access to information, including a participant's Supported Disability Accommodation (SDA) tenancy agreement and NDIS plan, is crucial to the ongoing effectiveness of Community Visitors and has been an ongoing issue in the transition to the NDIS.

When Community Visitors identify a concern in relation to a participant or an SDA, they must have effective referral pathways to ensure these concerns are addressed or resolved. It is critical that Community Visitors receive a response to the referral and ensuing investigation (or decision not to investigate) for them to continue to provide their important safeguarding role.

Thin markets: provider of last resort

The urgent need for a comprehensive market response remains to prevent further unnecessary harm.

Perhaps the inaction can be attributed to the absence of a well-established governance structure for market stewardship, which has resulted in piece-meal or ad-hoc assignments of roles and responsibilities across several policy areas.

There is an ongoing need for a provider of last resort framework to be established as a permanent fixture of the NDIS market.

2. Supported Residential Services (SRS)

OPA and the Community Visitors Residential Services Board (the Board) have identified an urgent need for improved regulation of the SRS sector which provides accommodation for approximately 4000 of Victoria's most vulnerable citizens.¹¹ Safeguarding must be a key element of the future system. It is also critical that the current flaws in the regulation framework and its operationalisation be remedied. Community Visitors reported on this extensively in their 2019-2020 Annual Report.¹²

Community Visitors frequently observe the inadequacy of relying solely on regulation to protect the rights and wellbeing of vulnerable residents, resulting in gross neglect and human suffering.

What could a quality and safeguarding framework for the SRS sector look like? As a point of comparison, it is worth considering the Victorian disability quality and safeguarding framework prior to transition to the NDIS Q&S Framework. In sum, its key external oversight consisted of the following:

- the Disability Services Commissioner
- the Office of the Public Advocate
- Community Visitors
- the Senior Practitioner
- a quality framework that was regulated and monitored (this included independent review of the response to serious incidents).¹³

There is a need for an independent oversight body of the SRS sector. There is also a need for a quality and safeguarding framework to guide oversight, administration and regulation of the SRS sector to better protect the safety and wellbeing of residents, and this framework should be guided by a human rights approach.

3. Adult safeguarding

The ALRC recommended adult safeguarding laws as a further way the state can seek to protect at-risk adults from abuse.¹⁴

This was in response to its funding that:

No government agency in Australia has the clear statutory role of safeguarding and supporting adults who, despite having full decision-making ability, are nevertheless at risk of abuse. In the ALRC's view, this protection and support should be provided by state adult safeguarding agencies.¹⁵

OPA (and many others) has long highlighted a gap in the current ability of government agencies and the health service system to combat elder abuse: the problem of who is responsible for investigating and responding to a situation of concern involving a vulnerable older person where there is no obvious crime or medical emergency.¹⁶ OPA has also long argued for the Public Advocate to have the power to investigate where a person with a disability is believed to be suffering abuse, exploitation or neglect",¹⁷ noting the extended investigation powers could also benefit at-risk adults.¹⁸

On this point, the ALRC recommended that 'Adult safeguarding laws should be enacted in each state and territory. These laws should give adult safeguarding agencies the role of safeguarding and supporting "at-risk" adults". The ALRC noted that 'Existing public advocates and public guardians ... may be appropriate for the broader safeguarding function... However, some states or territories may prefer to give this role to another existing body or to create a new statutory body.'

I hope the Royal Commission finds this submission helpful. OPA would be happy to elaborate on the key points made if the Royal Commission would find this useful.

Yours sincerely,

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Public Advocate

¹ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Safeguards and Quality Issues Paper* (November 2020) 1.

² *Ibid* 2.

³ Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth Laws* (2014) chapter 3.

⁴ Office of the Public Advocate, *Submission to Joint Standing Committee on the NDIS Inquiry into the NDIS Quality and Safeguards Commission* (2020)

<<https://www.publicadvocate.vic.gov.au/resources/submissions/submissions-to-the-joint-standing-committee-on-the-ndis>>.

⁵ For further information, see *ibid* 9-10.

⁶ Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (May 2017).

⁷ As it applies in the UK and Scotland: Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (May 2017).

⁸ Safeguarding Taskforce (Government of South Australia), *Interim Report* (15 June 2020) 9.

⁹ Recommendation 14–3: Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (May 2017) 15.

¹⁰ Productivity Commission, *Inquiry into Disability Care and Support* (2011) Report No 54, Vol 1, 509.

¹¹ Supported Residential Services (SRS) are almost all privately operated facilities that provide accommodation and support for Victorians who need help with everyday activities. They are regulated by the Victorian Government under the *Supported Residential Services (Private Proprietors) Act 2010*. The purpose of the legislation is to create a regulatory framework for SRS that provide for minimum standards of accommodation and support to be upheld (s. 1) that ‘protect the safety and wellbeing of residents’ (s. 6). The number of people in SRS can range from five to 80. Typically, each SRS has about 30 residents. SRS businesses can be broadly divided into two types: ‘pension-plus’ facilities where residents may pay more than \$1000 a week for their room, meals, care and support, and ‘pension-level’ SRS where residents are charged 85-95 per cent of the disability or aged pension: *Community Visitors Annual Report 2019-2020* (2020) 18.

¹² Office of the Public Advocate, *Community Visitors Annual Report 2019-2020* (2020) 16-35.

¹³ Victorian Ombudsman, *Reporting and investigation of allegations of abuse in the disability sector: Phase 1 – the effectiveness of statutory oversight* (2015) 15.

¹⁴ Noting that “Properly enforced criminal law is perhaps the primary state protection against elder abuse”: Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (May 2017) chapter 14.

¹⁵ *Ibid* 384.

¹⁶ For example: Chesterman, 2013; Lacey “Neglectful to the point of cruelty? Elder abuse and the rights of older persons in Australia”, *Sydney Law Review*, 2014, vol. 36, pp. 99-130.

¹⁷ Office of the Public Advocate, *Submission to Victoria Law Reform Commission Guardianship Consultation Paper* (2011) 43.

¹⁸ Office of the Public Advocate, *Submission to the Australian Law Reform Commission in Response to the Elder Abuse Issues Paper* (2016) 22.