



Office of the Public Advocate

Safeguarding the rights and interests of people with disability



# Submission to the NDIS Review

Participant Safeguarding Proposals Paper

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June 2023

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## **Acknowledgement of Country**

This submission was written on the land of the Wurundjeri and Boon Wurrung people of the Kulin Nation. We acknowledge and pay our respects to Aboriginal and Torres Strait Islander peoples and Traditional Custodians throughout Victoria, including Elders past and present.

We also acknowledge the strength and resilience of all First Nations people whose social and emotional wellbeing continues to be negatively affected by discrimination, racism, child removal and other devastating ongoing effects of colonisation.

# Recommendations

## **Recommendation 1**

OPA recommends that planners and support coordinators ensure that participants are offered the opportunity to build their capacity through participation in peer and other support programs, including building relationships with (unpaid) people in the community.

## **Recommendation 2**

OPA recommends that the NDIA ensure participants who have cognitive disability who are without informal supporters have access to funded supported decision-making services, especially for participating in NDIS planning processes.

## **Recommendation 3**

OPA recommends that the Australian Government and the NDIA implement 'Tier 2' services and programs which promote community inclusion and fill service gaps.

## **Recommendation 4**

OPA recommends that the NDIA, in collaboration with the NDIS Quality and Safeguards Commission, ensure support coordinators and other funded service providers understand the scope of their role and their duty of care responsibilities.

## **Recommendation 5**

OPA recommends that planners undertake face-to-face yearly planning meetings with participants who are flagged as 'vulnerable', prioritising participants who have a cognitive disability and live in circumstances characterised by significant power imbalance.

## **Recommendation 6**

OPA recommends that the NDIA, and the NDIS Quality and Safeguards Commission where appropriate, provide regular education and implement effective monitoring and accountability processes in relation to NDIS actors' safeguarding responsibilities.

## **Recommendation 7**

OPA recommends that the Australian Government lead the development of:

- an agreement with states and territories that specifies responsibilities for key adult safeguarding systems and addresses remaining safeguarding gaps
- information sharing agreements between the NDIA and the NDIS Quality and Safeguards Commission and state and territory safeguarding bodies to enable effective safeguarding of participants.

## **Recommendation 8**

OPA recommends that the NDIA enter into information sharing agreements designed to enable states and territories Community Visitor Schemes to fulfil their safeguarding responsibilities and target their limited resources to people in the riskiest circumstances.

## **Recommendation 9**

OPA recommends that the Australian Government lead the development of an agreed set of national principles for Community Visitor Schemes which recognises the value and diversity of state and territory safeguarding goals.

**Recommendation 10**

OPA recommends that the Australian Government consider contributing to the funding of Community Visitor Schemes to enable them to provide safeguarding protections to NDIS participants with cognitive disability living in supported accommodation settings.

**Recommendation 11**

OPA recommends that the Australian Government act to provide Community Visitor Schemes a clear role in Australia's Disability Strategy and Safety Targeted Action Plan, giving the programs operational certainty for at least the next 5 years.

**Recommendation 12**

OPA recommends that the Disability Reform Council review the Applied Principles to Determine the Responsibilities of the National Disability Insurance Scheme and Other Service Systems to ensure they provide clear guidance to resolve interface questions.

**Recommendation 13**

OPA recommends that the NDIA ensure that a provider of last resort mechanism is established as an ongoing component of the NDIS.

**Recommendation 14**

OPA recommends that the Victorian Government introduce adult safeguarding legislation to establish a new, specialist adult safeguarding function, preferably within an existing agency such as the Office of the Public Advocate.

**Recommendation 15**

OPA recommends that state and territory governments amend their guardianship legislation in order to give public advocates and public guardians the broad power 'to investigate, via complaints or on their own motion, the abuse, neglect and exploitation of adults with apparent impaired decision-making ability, where this apparent impaired ability is likely to be more than temporary.'

**Recommendation 16**

OPA recommends that the NDIS Review panel define 'private homes' to determine appropriate face-to-face safeguarding responses to participants depending on their personal circumstances.

## 1. About the Office of the Public Advocate

The Office of the Public Advocate (OPA) is a Victorian statutory office, independent of government and government services, that works to safeguard the rights and interests of people with disability.

The Public Advocate has seven functions under the *Guardianship and Administration Act 2019* (Vic), all of which relate to promoting the independence and human rights of people with disability and protecting people with disability from abuse, neglect, and exploitation. To this end, OPA provides a range of critical services for people with cognitive impairment or mental illness, including guardianship, advocacy, and investigation services. In 2021-22, OPA was appointed as substitute decision maker in 1976 guardianship matters.<sup>1</sup> In recent years, the profile of its clients has begun to change. As in previous years, the complexity of cases remains a key feature of guardianship matters, each of which has multiple dimensions ranging from complex disability presentations and service provision arrangements to complex family dynamics. A key contributor to this increasing complexity is the introduction of the National Disability Insurance Scheme (NDIS).

Another key function of the Public Advocate is to promote and facilitate public awareness and understanding about the Guardianship and Administration Act and any other legislation affecting persons with disability or persons who may not have decision-making capacity. To do so, OPA supports a full-service communications function with 120 publications in print or PDF, a website attracting approximately 150,000 visitors in the last year and strong media relations. It also operates an Advice Service which provided 10,133 instances of advice last financial year<sup>2</sup> and a community education program for professional and community audiences across Victoria. OPA's community education engages on a range of topics such as the role of OPA, guardianship and administration, and enduring powers of attorney and advance planning under the Medical Treatment Planning and Decisions Act.

OPA supports approximately 600 volunteers across three volunteer programs: the Community Visitors Program, the Independent Third Person (ITP) Program and the Corrections Independent Support Officer (CISO) Program. Most relevantly to this review, OPA Community Visitors are independent volunteers empowered by law to visit Victorian accommodation facilities for people with disability or mental illness – including Specialist Disability Accommodation, Supported Residential Services, and new NDIS-generated forms of supported accommodation (commencing on or before 1 July 2024). They monitor and report on the adequacy of services provided in the interests of residents. In 2021-22, Community Visitors made 3411 statutory visits, including to sites of criminal and civil detention.<sup>3</sup>

## 2. Human rights approach

This submission applies a human rights approach that:

- holds that all people with disability have the right to enjoy equality of opportunity and to effectively participate in, and be fully included in, society
- recognises that most challenges experienced by people with disability are a result of disabling systems and environments, rather than being due to an inherent 'lack' in the individual

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<sup>1</sup> Office of the Public Advocate, *Annual Report* (2022) 9.

<sup>2</sup> *Ibid* 10.

<sup>3</sup> Office of the Public Advocate, *Community Visitors Annual Report 2020-2021* (2021) 10.

- considers impairment as an expected dimension of human diversity
- seeks for people with disability to be supported and resourced to have the capabilities to lead a dignifying and flourishing life.

### 3. Overview

OPA welcomes the NDIS Review and the explicit consideration of safeguarding that this paper engages. OPA fully supports the human rights and person-centred principles underpinning this paper and the draft proposals.

As the proposals stem from the context of the NDIS Review, OPA understands the lens of ‘participant safeguarding’ that these proposals apply. However, as the paper recognises, there are no easy boundaries for the many aspects of society and its regulatory and legislative frameworks which together contribute to ‘safeguarding’ people with disability. For example, most current safeguarding efforts do not distinguish between NDIS participants and other people with disability.

OPA suggests that an NDIS participant safeguarding strategy would benefit from additional clarity concerning the scope of the National Disability Insurance Agency (NDIA) and NDIS safeguarding efforts and how they interact with, and ideally support, state and territory safeguarding frameworks for people with disability (as well as broader national efforts – for example, the recommendations of the Australian Law Reform Commission’s (ALRC) Adult Safeguarding report<sup>4</sup>).

The National Disability Strategy recognises the value of systems working together to reduce harm to people with disability.<sup>5</sup> The Safety Targeted Action Plan—one way that the Disability Strategy is implemented—includes actions for the Australian Government in relation to identifying gaps and improving information sharing.<sup>6</sup> There are measures around the review of the NDIS Quality and Safeguards Framework<sup>7</sup> and desire for ‘[i]mproved information sharing between the NDIS and other service systems to provide better support in delivery of care for NDIS participants by 2023’.<sup>8</sup>

OPA suggests the following approach would engage the majority of the safeguarding issues that arise for its clients in relation to their interactions with the NDIS. OPA’s work with Victoria’s Community Visitor Program, tenancy rights for people with disability, and guardianship (among others) inform this submission.

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<sup>4</sup> Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Report No 131, May 2017).

<sup>5</sup> Commonwealth of Australia Department of Social Services, *Australia’s Disability Strategy 2021-2031* (Strategy, 2021) 35:

Governments are committed to working together alongside people with disability, communities, businesses and the non-government sector to implement this Strategy and realise its vision in a coordinated and targeted way.

<sup>6</sup> Commonwealth of Australia Department of Social Services, *Safety Targeted Action Plan* (Plan, 2021) 9. Actions for the Australian Government include:

- Undertake stocktake of NDIS supports and protections for NDIS participants to identify gaps or opportunities to strengthen cross-system government supports and protections. (Action 3.1).
- Lead the development and implementation of actions to reduce the risk of harm for people with disability by:
  - Improving information sharing, referrals processes and interfaces to ensure seamless transitions and dynamic identification of risk between systems including health, education, justice, domestic, family and sexual violence services, child-protection, and the NDIS.
  - Expanding on and considering outreach models. (Action 3.2)

<sup>7</sup> Commonwealth of Australia Department of Social Services, *Safety Targeted Action Plan* (Plan, 2021) 8.

<sup>8</sup> This is an effectiveness indicator under objective 3 of the *Safety Targeted Action Plan*: Commonwealth of Australia Department of Social Services, *Safety Targeted Action Plan* (Plan, 2021) 9.

## **Possible approach: an NDIS participant safeguarding strategy**

Participant Safeguarding through empowerment and capacity building is an essential goal, and the NDIA should lead this work.

As recognised by this review, and the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission), capacity building alone is insufficient. Systemic factors inside of and external to the NDIS impact the safety and wellbeing of NDIS participants and other people with disability and require different types of safeguarding actions: for example, independent monitoring and outreach services; referrals and facilitating the operation of broader established safeguarding regimes as required. This requires clarity of roles at state and territory and Commonwealth levels, and agreements about how parties will work together to create a comprehensive safeguarding system. Furthermore, the NDIS participant safeguarding strategy should be designed to recognise that different cohorts of participants require different safeguarding models.

### **The 2-part model**

#### **Part 1: Clear safeguarding responsibilities for the NDIS and NDIS funded actors**

- Sufficient and appropriate investment in participant capacity building and peer support opportunities
- A strong 'second tier' system to empower both participants and other people with disability
- Clear safeguarding responsibilities and accountabilities which are regularly communicated to all NDIS actors.

#### **Part 2: Effective safeguarding of NDIS participants requires collaboration with state and territory actors**

- An agreement between the Australian Government and states and territories that specifies responsibilities for key adult safeguarding systems, enables their effective operation (through appropriate information sharing) and addresses remaining safeguarding gaps.

### **Understanding the complexity of 'safeguarding'**

The NDIS Review acknowledges the work of state and territory safeguarding bodies, including Community Visitor schemes, state and territory-based tenancy protections and guardianship regimes. The proposed new NDIS-wide Participant Safeguarding Strategy needs to clarify the scope of the types of safeguarding it can offer (for example, safeguards that are participant specific and tied to NDIS-funded processes and actors) and how these efforts complement the complex map of safeguarding systems offered by states and territories.

Developing a clear map of safeguarding gaps and opportunities for all people with disability, with clarity around the responsibilities of both local and national actors, is essential for the development of a safeguarding strategy that would work in the way the draft proposals envisage. States and territories, which hold a large portion of responsibility for safeguarding people with disability, would come together with the Department of Social Services (DSS), the NDIA and the NDIS Quality and Safeguards Commission (NDIS Commission) to agree on how to best cover the remaining ground and fill any safeguarding gaps identified.

Without the buy-in of states and territories and achievement of the original intent of the Information Linkages and Capacity Building program for robust accessible mainstream services, action on 'participant safeguarding' will be limited to NDIS-specific issues and will not succeed in safeguarding people facing more complex situations.<sup>9</sup>

### **Empowerment is not enough (yet)**

OPA agrees that the most 'at-risk' people with disability are not inherently vulnerable. This set of people find themselves in difficult circumstances, without appropriate or sufficient supports, often due to gaps in and between the systems that were designed to support them. Unsurprisingly, the most 'at-risk' people OPA engages with predominantly access multiple service systems—including justice and mental health—and experience intersectional disadvantage.

This is the group of people who have been discussed at length by the Disability Royal Commission. A full picture of the complex web of safeguarding frameworks that operate in Australia, and everyone's agreement on how they will work together to best fill safeguarding gaps for 'at-risk' adults, is necessary to ensure the wellbeing and safety of all people with disability.

### **Safeguarding: identification and response**

Effective safeguarding includes identification and response. It must be clear who holds responsibility for responding to complaints or identified safety issues. Currently, while the NDIA can receive information about troubling participant circumstances, it is unclear how they prioritise investigating reports, and what referral responsibility it takes.

Clarity about the scope of safeguarding responsibilities of all players in the NDIS is essential.<sup>10</sup> When a participant safety or wellbeing concern is identified by an NDIA staff member or funded provider, that cannot be addressed by plan review or complaint to the NDIS Commission, the national safeguarding system will be essential. This may include the police, mainstream or family violence services, or adult safeguarding bodies (such as those that exist in South Australia, New South Wales and the ACT and that were recommended by the ALRC for all states and territories). See below for further discussion of a collaborative national safeguarding model.

## **4. NDIS safeguarding responsibilities**

OPA recognises the value and opportunities presented by the development of an NDIS Participant Safeguarding Strategy. Specifically, it is an opportunity to articulate the ways in which the NDIA and NDIS-funded actors can and should contribute to participant safeguarding, and to hold them accountable for doing so.

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<sup>9</sup> Some examples of these include: capacity building in participant plans, funded-service quality and regulation, clarity and education for service providers and support coordinators about the extent of their safeguarding responsibilities. All of these NDIS-specific safeguarding improvements would benefit many participants – but would rarely address the safeguarding quandaries faced by the most 'at-risk' participants and people in similar circumstances.

<sup>10</sup> OPA experiences that often, neither support coordinators, disability support providers nor disability accommodation providers are clear about the extent of their roles and responsibilities in relation to participant safety.

OPA has identified three areas that should be included in the participant safeguarding strategy:

- Sufficient and appropriate investment in participant capacity building and peer support opportunities
- A strong 'second tier' system to empower both participants and other people with disability
- Clear safeguarding responsibilities and accountabilities which are communicated to all NDIS actors.

All three areas are realms of NDIS responsibility.

## **Sufficient and appropriate investment in participant capacity building and peer support opportunities**

This safeguarding opportunity falls squarely into the empowerment and capacity building realm and does not require balancing of risks or privacy considerations. The participant safeguarding proposals paper engages this area quite comprehensively and OPA supports the statements therein around the safeguarding benefits of participant capacity building and enhanced decision-making skills.

Three areas that OPA would highlight in this area are:

- Opportunities for participation in peer support and mentoring programs
- NDIS funded investment in building participants' social and informal support networks
- Supported decision-making services.

When discussing 'natural safeguards', OPA recognises the unparalleled empowerment opportunities provided by peer support programs. Positive outcomes including self-advocacy skills flow from being in community with peers who have faced similar circumstances. Such programs can also be used to educate people about their rights in relation to NDIS services.

OPA also knows that not everyone has the 'natural safeguards' provided by friends and other informal supports—this circumstance is especially common for people with cognitive disability living in supported accommodation settings. Hence, OPA believes NDIS plan goals and funding should, in consultation with participants in this situation, be dedicated to building their social and informal networks. Sitting alone with a support worker in a shopping centre food court week-after-week should not be considered to meet the goal of 'social inclusion'.<sup>11</sup>

NDIS planners and support coordinators have a role here: to ensure social inclusion goals are actively building a person's natural safeguards, either through peer support opportunities or through other opportunities to participate in community with people they might develop relationships with.

### **Recommendation 1**

**OPA recommends that planners and support coordinators ensure that participants are offered the opportunity to build their capacity through participation in peer and other support programs, including building relationships with (unpaid) people in the community.**

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<sup>11</sup> Bruce Bonyhady made this observation in his joint session with Lisa Paul at Disability Service Consulting (DSC) Annual NDIS Conference; Community Visitors often report similar observations.

OPA is a long-time promoter of the value of supported decision-making opportunities for people with cognitive disability. While people with informal supporters may have access to support which improves their decision-making capabilities, people without such support require paid or volunteer services to ensure they can exercise their legal decision-making capacity and rights. In OPA's experience, such services are not widely available, limited and overstretched.

### **Recommendation 2**

**OPA recommends that the NDIA ensure participants who have cognitive disability who are without informal supporters have access to funded supported decision-making services, especially for participating in NDIS planning processes.**

## **A strong 'second tier' system to empower both participants and other people with disability**

OPA's vision is for a just and inclusive society that respects and promotes the dignity and human rights of all people. OPA's purpose is to promote and protect the rights and interests of people with disability, and work to eliminate abuse, neglect and exploitation. The missing 'second tier' of the NDIS is essential to achieving OPA's vision and purpose.

The 'second tier' of the NDIS was intended to include disability services and supports outside of those provided under an individual's NDIS plan, meeting the support needs of the many people with disability who are not eligible for an NDIS plan. Some visions for Tier 2 include improved interfaces with mainstream services and disability support organisations and local area coordinators who would help people navigate the service system.

While the Information Linkages and Capacity Building (ILC) program has funded some peer support and supported decision-making projects, the funding has been time-limited and successful programs have closed down due to the short-term funding model.<sup>12</sup>

Peer support programs and community inclusion programs could also be funded as part of 'Tier 2' but as long-term investments in building people's capacity to make decisions about their own lives.

OPA recognises the importance of building the skills and capacity of mainstream services to meet the needs of people with disability. OPA also sees the value of supporting inclusive, local community-based initiatives to empower and support people with disability. For example, OPA was acutely aware of the closing of many community-based mental health services that occurred during the roll-out of the NDIS. That gap is still felt.

### **Recommendation 3**

**OPA recommends that the Australian Government and the NDIA implement 'Tier 2' services and programs which promote community inclusion and fill service gaps.**

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<sup>12</sup> For example, VALiD's Choice Mentor Program, which supported people with disability who have limited support in their life from family and friends, to build capacity to make decision about their own lives. A Choice Mentor assisted participants to make decisions about their lifestyle, accommodation, health care, work, and accessing services. The program received ILC funding, which was extended, and was then discontinued.

## **Clear safeguarding responsibilities and accountabilities which are regularly communicated to all NDIS actors**

OPA's practice experience suggests that NDIS actors are unclear about the scope of their roles, including responsibilities for participant safeguarding. Planners, support coordinators and funded service providers require clear guidance as to the expectations of each role, including:

- specifying duty of care responsibilities
- requirements for regular face-to-face interactions with 'at-risk' participants
- obligations to respond to concerns about abuse, neglect and exploitation and refer participants to further supports as required (including police, safeguarding bodies or family violence services).

With so many changes happening in the scheme, regular high quality training and upskilling would benefit both participants, NDIA staff and registered providers, as would opportunities for high quality training for unregistered providers. OPA understands that a lot of work has been and will be done in relation to defining the roles of NDIS actors. In practice, OPA guardians regularly interact with support coordinators who have not received recent training with regard to the scope and expectations of their role. Their interpretation of the scope of the role can tend towards a more expansive, 'case management' style of support, or may be narrower. Support coordinators may lack either the skills or understanding to effectively connect people into services to achieve their capacity and skill building goals or see connections to 'unfunded' mainstream supports (including relevant safeguarding agencies) as outside of their role. Sometimes their confusion about the scope of their role may be increased by inconsistent expectations of NDIS planners.

### **Recommendation 4**

**OPA recommends that the NDIA, in collaboration with the NDIS Quality and Safeguards Commission, ensure support coordinators and other funded service providers understand the scope of their role and their duty of care responsibilities.**

The recent introduction of the NDIS Supported Decision-Making Policy, a positive development, highlights the need for regular training for all NDIS actors, including staff working for private providers to ensure everyone involved with supporting participants is up-to-date with related NDIS policies.

OPA also understands that NDIS planners rarely conduct in-person planning meetings, a shift that has been cemented since the pandemic. OPA suggests that a yearly, face-to-face planning meeting held with participants who have a cognitive disability and few or no informal supporters (or otherwise identified by the NDIA as ('vulnerable')), would be an effective way of building in a regular safeguarding opportunity for this group. OPA suggests the benefits of proactively offering face-to-face planning meetings with the opportunity of referring concerns to the relevant adult safeguarding body where they fall outside scope of NDIS interventions, could go a long way to ensuring participants living in the riskiest circumstances (characterised by significant power imbalance, which may be present, for example, in SDA between a resident and a support worker) are safe from violence, neglect or exploitation.

### **Recommendation 5**

**OPA recommends that planners undertake face-to-face yearly planning meetings with participants who are flagged as ‘vulnerable’, prioritising participants who have a cognitive disability and live in circumstances characterised by significant power imbalance.**

To ensure that all NDIS actors are working effectively together for participants, with shared understanding of their roles and safeguarding responsibilities, OPA recommends that the NDIA (and the NDIS Quality and Safeguards Commission, as appropriate) should provide regular education and implement effective monitoring and accountability processes in relation to safeguarding responsibilities. This will be especially necessary following changes or better articulation of safeguarding responsibilities following this review.

### **Recommendation 6**

**OPA recommends that the NDIA, and the NDIS Quality and Safeguards Commission where appropriate, provide regular education and implement effective monitoring and accountability processes in relation to NDIS actors’ safeguarding responsibilities.**

## **5. NDIS actor collaboration with state and territory safeguarding bodies**

Effective safeguarding of NDIS participants requires collaboration with state and territory safeguarding bodies. OPA recognises that safeguarding the most ‘at-risk’ participants will not be achieved by NDIS-funded actors alone, due to the intersectional nature of issues facing this group of people. Further, the NDIS is an insurance scheme, based on principles of choice, control and capacity building (among others). State and territory safeguarding bodies, for example in the fields of adult safeguarding, Community Visitor Schemes, child protection, guardianship, mental health, restrictive practices regulation and tenancy rights, ideally operate as person-centred, human rights compliant regimes and also have legislated, protective mandates. States and territories clearly have a wide range of important safeguarding responsibilities which protect participants and non-participants alike.

OPA asserts that there is a place for protection in a national safeguarding system, but that the role of NDIS actors should be carefully considered and perhaps focus on warm referrals to adult safeguarding bodies where their concerns cannot be addressed by an better or more appropriate services or support systems, or capacity building response.

As such, solid relationships between state and federal actors are essential to delivering the full and required scope of participant safeguarding, especially for participants who access and interact with multiple service systems. Solid and effective safeguarding relationships cannot be achieved without information sharing agreements. OPA suggests a safeguarding map be developed to support this agreement and identify current safeguarding gaps.

OPA’s experience suggests that the NDIA approach to participant privacy is weighted toward not providing information, even to other agencies with legislative safeguarding obligations. Careful consideration should be given to whether they are creating a barrier to appropriate information sharing for effective safeguarding. This may not be the case in all circumstances, for example, OPA guardians have access to a case escalation pathway at the NDIA, and good relationships have been developed between OPA’s Community Visitor Program and the NDIS Quality and Safeguards

Commission, although these relationships need to be formalised by way of information sharing agreements. OPA investigators have difficulty accessing information about people with disability, who may or may not be participants, for the purpose of writing reports for the Victorian Civil and Administrative Tribunal – a body with legislated adult safeguarding roles. This information barrier may result in poor outcomes for the person with disability, either being subjected to more or less intervention in their lives as was necessary to prevent violence, neglect or exploitation.

### **Recommendation 7**

**OPA recommends that the Australian Government lead the development of:**

- **an agreement with states and territories that specifies responsibilities for key adult safeguarding systems and addresses remaining safeguarding gaps**
- **information sharing agreements between the NDIA and the NDIS Quality and Safeguards Commission and state and territory safeguarding bodies to enable effective safeguarding of participants.**

OPA is aware that independent disability advocates, or community members, face difficulties when they raise concerns about people with cognitive disability (sometimes known participants) in relation to their quality of life or wellbeing. While OPA agrees it is not necessarily appropriate to divulge a participant's personal information to the concerned party, who have not been given formal consent to speak on the participant's behalf, OPA is concerned that for people with significant cognitive disability who cannot provide formal consent to their advocates and informal supporters, this information blockage could compromise their safety. Further, in rare cases it may even lead to the appointment of a guardian, as sometimes that is the only way to obtain sufficient information about a person's circumstances to address the concerns being raised. In such cases where a person has active and engaged informal supports, guardianship should not be the least restrictive option available for addressing safeguarding or quality of life concerns. Engagement with advocates and informal supporters of people with significant cognitive disability who do not have a guardian can be utilised as a safeguarding opportunity.

## **Community Visitor Schemes**

Establishing the role that Community Visitor Schemes should play in an NDIS participant safeguarding strategy is complicated by the diversity and scope of the schemes currently operating across the country. These schemes are funded and legislated by states and territories and are designed to achieve state and territory-determined safeguarding goals.

OPA's Community Visitor program is a long established, volunteer-based model. It has more visiting capacity than any other equivalent program by virtue of its large volunteer pool.

OPA supports the review's recognition of the safeguarding value of Community Visitor Schemes. The value of these schemes should not be undermined by limiting them to safeguarding NDIS participants alone. Instead, the schemes should be considered as one crucial aspect of the national safeguarding system for all people with disability. Community Visitor Schemes may be appropriately leveraged to promote safeguarding outcomes for NDIS participants. This could be achieved through formalised information sharing agreements, with consideration being given to sharing specific NDIA data with different Community Visitor Schemes that would

enable them to ensure that people residing in the 'riskiest' contexts are prioritised for visiting.

OPA considers the OPA Community Visitor Program to operate best in supported accommodation settings, for which it was developed. The Disability Royal Commission and the NDIS Joint Standing Committee have brought attention to the issues raised by the growth in supported accommodation opportunities for people with disability that has occurred alongside growth in individualised funding for supports of daily living (sometimes known as Supported Independent Living funds). OPA's Community Visitor Program, especially the Supported Residential Services (SRS) stream, has been a strong voice in raising concerns about financial exploitation and poor service outcomes for people with cognitive disability in new, largely unregulated forms of supported accommodation. OPA and the program also hold serious concerns about the rights and unmet service expectations for residents of SRS.

Of course, some, even most, of the growth in alternative living options for people with disability are welcome and represent the success of the NDIS in supporting individual goals and preferences. However, OPA and the Victorian Government recognise and are concerned about the gaps for resident safeguarding and tenancy rights that are emerging in a subset of these NDIS-created housing options. The Victorian Government has passed amendments to the *Residential Tenancies Act 1997 (Vic)* which will work with provisions in the *Disability Act 2006 (Vic)* to enable Community Visitors to visit a wider range of residential settings (on or before 1 July 2024). These settings can be broadly described as supported accommodation settings where the person's residential status is tied to their funded, at-home disability supports. These are the types of settings OPA Community Visitors already visit: Specialist Disability Accommodation group homes, SRS and residential mental health services. However, these newer, inadvertently NDIS-funded settings (usually head leased properties where residents' tenancy rights are unclear and where people have little, if any, choice of in-home service provider) are not easily identified by the Victorian Government or by OPA.

This is a clear example of where the state's safeguarding responsibilities in relation to tenancy rights can benefit NDIS participants with cognitive disability. The NDIA could use its data matching capacity to identify properties where multiple participants are living and in receipt of Supported Independent Living funding being delivered by the one provider. This information could then be shared with OPA's Community Visitor Program. Without appropriate information sharing, participants who are living in situations of significant power imbalance and have low personal and social capital will continue to be at risk of financial exploitation and poor life outcomes.

#### **Recommendation 8**

**OPA recommends that the NDIA enter into information sharing agreements designed to enable states and territories Community Visitor Scheme to fulfil their safeguarding responsibilities and target their limited resources to people in the riskiest circumstances.**

Given the various safeguarding goals of Community Visitor Schemes, OPA suggests that developing agreed national principles and mapping the safeguarding ground currently covered by each jurisdiction would be an appropriate starting place. Different jurisdictions have different legislative frameworks and local circumstances to respond to.

#### **Recommendation 9**

**OPA recommends that the Australian Government lead the development of an agreed set of national principles for Community Visitor Schemes which recognises the value and diversity of state and territory safeguarding goals.**

The difficulties that have arisen for states and territories seeking to meet their safeguarding responsibilities must be recognised, for example in relation to tenancy rights and supported accommodation settings. No longer holding information about people receiving disability services who reside in the jurisdiction presents a significant safeguarding hurdle—OPA has seen this in relation to guardianship and administration investigations and the emergence of supported accommodation settings that fall outside current legislative protections for people with disability. In recognition of these difficulties, the Australian Government should consider making a financial contribution to this work, to better enable states and territories to meet their safeguarding obligations.

#### **Recommendation 10**

**OPA recommends that the Australian Government consider contributing to the funding of Community Visitor Schemes to enable them to provide safeguarding protections to NDIS participants with cognitive disability living in supported accommodation settings.**

Community Visitor schemes have faced a period of uncertainty since the introduction of the NDIS. OPA is pleased that key bodies, including this review, have recognised the value of Community Visitor Schemes, including the broader safeguarding and inclusion roles they play in their jurisdictions. OPA suggests that now it is appropriate to act to confirm the importance of the schemes by offering them certainty about their place in a national safeguarding system for people with disability that extends beyond NDIS participant safeguarding and is more aligned with Australia's Disability Strategy and Safety Targeted Action Plan.

#### **Recommendation 11**

**OPA recommends that the Australian Government act to provide Community Visitor Schemes a clear role in Australia's Disability Strategy and Safety Targeted Action Plan, giving the programs operational certainty for at least the next 5 years.**

OPA highlights below the Victorian Community Visitor Program model and what it sees as the particular strengths and benefits of this model, for consideration by this review.

### **Strengths of the Victorian Community Visitor Program**

The strengths of the Victorian Community Visitor Program lie in its foundation: Community Visitors are independent of government, are volunteers, and report directly to Parliament.

In 1982, Ben Bodna (who later became the first Public Advocate) was involved in drafting the Community Visitors provisions, as part of his then role administering the Law Department of the Attorney-General.

From his experience with the prison system he was aghast at the shameful things done to people isolated from the community behind the walls of institutions. The basis for rejuvenating the outmoded visitation scheme [Official Visitors] came from his conviction that community connectedness and democratic processes provided superior social protection against cruelty. He persuaded others of his view that enhanced protection, and greater connectedness, would be achieved by having the inspection of services

carried out by ordinary people drawn from the community. Crucially, they would report to the people's democratic forum, the parliament.<sup>13</sup>

The following essential features of the role and powers of Community Visitors in Victoria underpin the achievements of the Program.

Community Visitors:

- are Governor-in-Council appointments, and are therefore independent of government<sup>14</sup>
- provide an annual report to Parliament, with recommendations for sector change/improvement<sup>15</sup>
- are volunteers
- advocate for people with disability who may have no one else to support them or any other person to advocate on their behalf
- have a human rights safeguard focus
- are an early warning system for the community
- highlight what is occurring in practice, and whether or not policy and practice manuals are being utilised
- highlight where the system fails and advocate for systemic change
- have the authority to access information about people including incident reports<sup>16</sup> and report back to the Community Visitors Program any matters of concern, all of which are recorded
- escalate more serious issues through the Community Visitors Boards and the Public Advocate to government, regulators and complaints bodies
- report publicly on serious incidents of violence, abuse and neglect of people with disability in disability services, residential services and mental health facilities
- are people who want to learn about disability, commit to undertake training and provide a link to the community for people with disability.<sup>17</sup>

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<sup>13</sup> Mark R Feigan, 'The Victorian Office of the Public Advocate: a first history 1986-2007' (PhD Thesis, La Trobe University, 2011) 86-87.

<sup>14</sup> Community Visitor appointments are Governor-in Council appointments. This has been the case since the commencement of the program in 1988. In 1988 these appointments were made under the *Intellectually Disabled Persons' Services Act 1986* s. 53, and *Mental Health Act 1986* s.108. From 1990 Community Visitor appointments were also made under the *Health Services Act 1988* s. 116. In 2023 these appointments are made under the *Disability Act 2006* s. 28; *Supported Residential Services (Private Proprietors) Act 2010* s. 182; *Mental Health Act 2014* s. 214 (and from 1 September 2023 under the *Mental Health and Wellbeing Act 2022* s. 395).

<sup>15</sup> There are requirements for the Community Visitor Boards (each comprising the Public Advocate and two community visitors elected by community visitors) to submit to the relevant Minister an annual report of the activities of community visitors, which the Minister must provide to both houses of Parliament. The Community Visitor Boards are required to do this under the *Disability Act 2006* s. 35; *Supported Residential Services (Private Proprietors) Act 2010* s. 195; *Mental Health Act 2014* s. 224 (and from 1 September under *Mental Health and Wellbeing Act 2022* s. 409).

<sup>16</sup> *Disability Act 2006* s.130; *Supported Residential Services (Private Proprietors) Act 2010* s.187; *Mental Health Act 2014* s. 217 (and from 1 September under *Mental Health and Wellbeing Act 2022* s. 401).

<sup>17</sup> Community Visitors undertake mandatory training and visits before their appointment. They undertake an application process, induction training, 10 hours of observation visits incorporating a guided reflections process followed by stream-specific training. After this a Regional Convenor (volunteer team leader) must recommend their appointment and paperwork lodged with the Minister's office and is then sent to the Governor-in-Council.

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*[It is] a model of empowerment and inclusion... Community Visitors evolved from the visiting of institutions to group homes. They often live in the area of houses that they visit. They know people over the longer term. They are able to go at different times of the day or on the weekend. And they form friendships and relationships in a way that aren't possible with paid employees. They form part of the social capital of Victoria.*

*...Victoria has a very strong and proud tradition of volunteers. And they have formed part of the community of people who live with disability in various housing options.*

*...I say that a person who comes and works as a volunteer for us has had substantial training in disability-related, mental health related issues, and when they leave, they take that knowledge into the community.<sup>18</sup>*

*The Public Advocate, Colleen Pearce*

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In Victoria there are three Community Visitor streams:

- the Disability stream that visits disability accommodation
- Mental Health stream that visits prescribed public mental health services
- Residential Services stream that visits supported residential services.

The safeguarding functions and powers for the three streams are set out in Victorian legislation<sup>19</sup> and include powers of entry and inspection.<sup>20</sup>

Community Visitors in the three streams have similar functions and powers.

In general terms, these are to visit and inquire into:

- the appropriateness and standard of facilities
- the adequacy of opportunities for inclusion and participation by residents
- whether the services being delivered to residents are provided in accordance with the relevant principles, legislation, rules and regulations
- whether individual plans for residents exist and are being complied with and updated
- whether people are being physically or chemically restricted or isolated in any way and how this is justified and monitored
- whether information is being provided to residents as required
- residents' wellbeing and safety

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<sup>18</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Transcript Day 4 - Public Hearing 26, Parramatta* (Transcript, 1 September 2022) 333

<<https://disability.royalcommission.gov.au/publications/transcript-day-4-public-hearing-26-parramatta>>.

<sup>19</sup> *Disability Act 2006* ss 30, 30A, 129-130; *Supported Residential Services (Private Proprietors) Act 2010* ss 184, 186-187; *Mental Health Act 2014* ss 216-217; *Mental Health and Wellbeing Act 2022* ss. 399-401.

<sup>20</sup> *Disability Act 2006* s.130; *Supported Residential Services (Private Proprietors) Act 2010* s.187; *Mental Health Act 2014* s. 217 (and from 1 September under *Mental Health and Wellbeing Act 2022* s. 401).

- whether residents have complaints, complaints procedures and the speed and extent of resolution.

OPA acknowledges that while the volunteer model works well in Victoria, it may not work in other jurisdictions. OPA believes that states and territories should operate their own models, as long as the schemes operate consistently with an agreed set of national principles.

## 6. Additional context in response to select consultation questions

### Q2. What is working well, and not well, to promote the safeguarding of participants?

In addition to the comments and recommendations provided above, OPA provides some more detailed descriptions of safeguarding issues specific to OPA.

#### What is working well to support OPA safeguarding functions

OPA has welcomed the following initiatives that promote the safeguarding of NDIS participants:

- The complex needs pathway<sup>21</sup>
- The NDIA Critical Service Issues Response (CSIR) escalation pathway which is available to OPA to access for urgent situations impacting upon participants<sup>22</sup>

For OPA's Community Visitor Program, there are improved pathways for bringing issues to the NDIS Commission and to the Victorian Human Services Regulator and mental health areas of the Victorian Department of Families Fairness and Housing.

#### What is not working well to support OPA safeguarding functions

##### NDIS system failing to adjust to the needs of participants with cognitive disability

OPA has recently reflected in its February 2023 *Reflections on guardianship* report<sup>23</sup> that guardianship is currently filling advocacy, supported decision making, and other gaps in natural safeguards. OPA is also seeing guardianship fill practical and process gaps for participants with cognitive disability in accessing and navigating the NDIS.

OPA is concerned that intentions of the Victorian *Guardianship and Administration Act 2019* to align concepts and terminology with the United Nations *Convention on the Rights of Persons with Disabilities* and to prevent unnecessary intrusions on the right to make decisions are not being fully realised.

<sup>21</sup> NDIS, *Improved NDIS planning for people with complex support needs* (16 November 2018) <<https://www.ndis.gov.au/news/1002-improved-ndis-planning-people-complex-support-needs>>.

<sup>22</sup> However, OPA is aware that issues of privacy prevent advocates or other interested parties from accessing a similar pathway to engage with the NDIA about urgent situations. 'For example when a person is experiencing a crisis or is at significant risk due to difficulties in accessing necessary disability-related supports, timely responses are required to prevent poor outcomes such as avoidable hospitalisation, homelessness, or harm to the person or other people'.

<sup>23</sup> Office of the Public Advocate, *Reflections on guardianship: The law and practice in Victoria* (Report, February 2023) <<https://www.publicadvocate.vic.gov.au/opa-s-work/research/580-reflections-on-guardianship-the-law-and-practice-in-victoria>>.

The introduction of the NDIS and greater individual choice and control about disability supports should not result in greater reliance on substitute decision-making. This is at odds with a key object of the *National Disability Insurance Scheme Act 2013* (NDIS Act) to:

[I]n conjunction with other laws, give effect to Australia's obligations under the *Convention on the Rights of Persons with Disabilities*.<sup>24</sup>

It appears that the NDIS systems and processes, and the changed relationship between service providers and people with disability in a market-based system, have had the unintended consequence of increasing the use of guardianship.

It is concerning to see the NDIS impacting on the autonomy of people with disability.<sup>25</sup>

In the report OPA notes that:

OPA's data shows that the largest group of people who the Public Advocate is guardian for has changed from older people with dementia, to younger people with an intellectual disability, followed by people with a psychosocial disability. Concerningly, the younger a person is at the time they are made subject to OPA guardianship, the longer they will typically spend under guardianship.<sup>26</sup>

- The complexities of the NDIS system are compounded for NDIS participants who require specialised and intensive coordinated support in accessing NDIS services.
- Even though service agreements are not legally required for the provision or receipt of most types of NDIS supports, service providers often seek these for business reasons.
- Also of concern, is that people are staying under guardianship for longer, often because of delays in securing housing, services or adequate NDIS plan funding.

### **Lack of clarity around funding responsibilities**

OPA is concerned about the lack of clarity around funding responsibilities for people with disability and participants between Victoria (and, OPA understands, other states and territories) and the NDIA which results in service gaps for people with disability. This issue was covered (using the example of the criminal justice system interface) during the Disability Royal Commission 'Public Hearing 15: People with cognitive disability and the criminal justice system: NDIS interface'.

Reviewing the principles on which NDIS and state and territory funding responsibilities are decided would lead to better safeguarding outcomes. Funding and

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<sup>24</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 3.

<sup>25</sup> Office of the Public Advocate, *Reflections on guardianship: The law and practice in Victoria* (Report, February 2023) 33.

<sup>26</sup> From OPA's data report (Appendix):

There has been a sustained upward trend in the numbers of people under 65 years old who are under OPA guardianship since 2008, with a notable increase in the average length of order for people under 65 in the latter part of this 14-year period. Overall, increasing numbers of people under 65 being subject to OPA guardianship over this period, along with fewer people having their orders revoked in under 2 years, has significantly contributed to the demand for OPA guardianship services since 2015/16. The fact that the greatest rise in demand came from people with an intellectual disability, closely followed by people with an identified psychosocial disability, means the NDIS is likely a factor in this trend.

service gaps impact on safeguarding and participant safety and wellbeing, including people's ability to develop own 'natural safeguards'. These gaps and arguments have negatively impacted some OPA guardianship clients over the last few years, as well as people with cognitive disability on Supervised Treatment Orders.

## **Recommendation 12**

**OPA recommends that the Disability Reform Council review the Applied Principles to Determine the Responsibilities of the National Disability Insurance Scheme and Other Service Systems to ensure they provide clear guidance to resolve interface questions.<sup>27</sup>**

### **Lack of responsiveness to change in circumstances**

An example of a current lack of responsiveness in promoting the safeguarding of participants relates to circumstances of co-resident violence and abuse in disability group homes and supported residential services (SRS).

Alarming, these circumstances are not always perceived by others as a circumstance requiring action but can become a normalised day-to-day experience for many people with disability. This was highlighted in OPA's 2019 report *"I'm too scared to come out of my room"*.<sup>28</sup> The following quotes from self-advocates on their experience of violence and abuse in group homes appear in the report:

"[There is] only one person [in my home] who gets along with me and speaks to me nicely. The others don't. That's out of the five of us... The others come to me and say they want to break my computer or punch me. They yell and swear at me a lot... I get called a lot of names that are not nice." "I've been abused by a resident. He says all these nasty things to me. It still happens. I'm very scared of him. This is someone I [currently] live with." "We have a resident who is [quite old] and she starts yelling and swearing... It happens every day at my house."

"Every day he swears at me and does this [holds up a fist]."

"This guy does the same thing over and over and over. I asked the CVs [Community Visitors] if he can be moved out. I'm quite scared to go in my own house."<sup>29</sup>

"A lady at my house picks on me and does threats."

"Sometimes there's lots of fighting. It's stressful for me because they swear a lot."

This lack of responsiveness impacts on people with disability having access to the same rights to be safe at home as members of the general community. The NDIA

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<sup>27</sup> Slightly amended from Office of the Public Advocate, *Submission to the Joint Standing Committee on the National Disability Insurance Scheme Inquiry into Current Scheme Implementation and Forecasting for the NDIS* (Submission, February 2022) 14 <<https://www.publicadvocate.vic.gov.au/opa-s-work/submissions/joint-standing-committee-on-the-ndis/425-submission-on-the-ndis-inquiry-into-current-scheme-implementation-and-forecasting>>.

<sup>28</sup> Office of the Public Advocate, *"I'm too scared to come out of my room"* (Report, November 2019) <<https://www.publicadvocate.vic.gov.au/opa-s-work/research/142-i-m-too-scared-to-come-out-of-my-room>>.

<sup>29</sup> Office of the Public Advocate, *"I'm too scared to come out of my room"* (Report, November 2019) 19 <<https://www.publicadvocate.vic.gov.au/opa-s-work/research/142-i-m-too-scared-to-come-out-of-my-room>>.

must take urgent action when they become aware that a participant is living in an unsafe situation including making funding available to move into alternative housing.

There is the need for the NDIS participant safeguarding strategy to map safeguarding gaps in this area and work with states and territories to ensure these safeguarding issues can be resolved.

OPA has also previously noted the need for providers of last resort, including for crisis accommodation<sup>30</sup> and for contingency funding to be immediately accessible in crises.<sup>31</sup>

### **Recommendation 13**

**OPA recommends that the NDIA ensure that a provider of last resort mechanism is established as an ongoing component of the National Disability Insurance Scheme.**

### **Lack of taking in account circumstances of First Nations people and CALD communities**

OPA has noted previously that:

- First Nations peoples' experiences of disability sit in the context of compounding disadvantage caused by experiences of colonisation and systemic racism.<sup>32</sup>
- Those who live in regional and remote areas experience the issue of thin markets acutely and the system may not provide for needs, such as sorry business.
- Best-practice supported decision making for First Nations people with disability should be developed through projects controlled by First Nations people.

## **Q5. What could be done beyond the NDIS to improve the safeguarding of people with disability?**

Aside from the need for interjurisdictional collaboration and information sharing agreements discussed above, OPA notes the need for states and territories that have not yet instituted an adult safeguarding body (per the recommendations of the Australian Law Reform Commission Inquiry<sup>33</sup>) to do so.<sup>34</sup>

The investigations and interventions gap for people with cognitive disability who are experiencing (or at risk of) abuse that does not require a policing response needs to be addressed. This is of vital importance, including because at-risk adults do not fall neatly into service-defined categories. OPA's report *Line of sight: Refocussing*

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<sup>30</sup> Office of the Public Advocate, *Submission to the Joint Standing Committee on the NDIS: Inquiry in the capabilities and culture of NDIA* (Submission, October 2022) 5.

<sup>31</sup> Ibid 6.

<sup>32</sup> OPA does not seek to represent itself as the voice of First People's with disability. The recommendations made in this component of the submission are based on previous work undertaken by OPA with Connecting Home.

<sup>33</sup> Recommended in Australian Law Reform Commission, *Elder Abuse – A National Legal Response* (Report No 131, May 2017) 387 [rec 14-1].

<sup>34</sup> Jurisdictions that have acted on the ALRC recommendation are NSW, SA and ACT: NSW Ageing and Disability Commission, SA Adult Safeguarding Unit, ACT Human Rights Commission has additional functions and powers.

*Victoria's adult safeguarding laws and practices* outlines adult safeguarding gaps in Victoria and makes a series of recommendations.<sup>35</sup>

#### **Recommendation 14**

**OPA recommends that the Victorian Government introduce adult safeguarding legislation to establish a new, specialist adult safeguarding function, preferably within an existing agency such as the Office of the Public Advocate.**

The legislation should:

- enable the agency to receive and assess reports of abuse, neglect and exploitation of at-risk adults via a well-resourced and publicised helpline; undertake investigations; and make and coordinate referrals to other agencies
- be underpinned by human rights principles, including the principles of supported decision-making and informed consent to safeguarding actions, wherever possible
- provide that the functions and powers of the new adult safeguarding agency apply to a specific cohort of at-risk adults who are unable to protect themselves from abuse, neglect and exploitation because of their care and support needs
- provide a broad definition of abuse that captures the type of controlling behaviours commonly exhibited by perpetrators of abuse of at-risk adults.<sup>36</sup>

#### **Recommendation 15**

**OPA recommends that state and territory governments amend their guardianship legislation in order to give public advocates and public guardians the broad power 'to investigate, via complaints or on their own motion, the abuse, neglect and exploitation of adults with apparent impaired decision-making ability, where this apparent impaired ability is likely to be more than temporary'.<sup>37</sup>**

## **Q9. What helps build natural safeguards in participants' lives? What makes this harder?**

The issue was discussed above in relation to actions NDIS actors can take to enhance participant capacity building and social inclusion.

OPA holds the greatest safeguarding related concerns for people without 'natural community supports', including friends and well-intentioned family members. OPA suggests NDIS actors should ensure that participants with low personal and social capital should be given:

- Appropriate NDIS funding supports – to help people find real, reliable (unpaid) friends where they have none.
- Assistance to develop a good plan that has social inclusion goals, and an effective and suitably funded support coordinator holding everyone responsible for achieving the plan.

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<sup>35</sup> Office of the Public Advocate, *Line of sight: Refocussing Victoria's adult safeguarding laws and practices* (Report, August 2022) <<https://www.publicadvocate.vic.gov.au/opa-s-work/research/503-line-of-sight-refocussing-victoria-s-adult-safeguarding-laws-and-practices>>.

<sup>36</sup> Office of the Public Advocate, *Line of sight: Refocussing Victoria's adult safeguarding laws and practices* (Report, August 2022) 15.

<sup>37</sup> Office of the Public Advocate, *Decision Time: Activating the rights of adults with cognitive disability* (Report, February 2021) ix <<https://www.publicadvocate.vic.gov.au/opa-s-work/research/141-decision-time>>.

- Q10. What can be done to support participants in decision-making?

OPA notes that the focus on building participant capabilities and natural safeguards is a positive goal. Best practice supported decision-making services and advocacy services are a vital component.

For example, provision of best practice supported decision making could be provided by:

- disability advocacy organisations and could include the development of local programs<sup>38</sup>
- support coordinators, with appropriate skills
- appropriately skilled independent intermediaries.

Building capacity for people will benefit from a focus on the network of people around individuals—their co-residents, peer support initiatives, staff, community members, Community Visitors and other safeguarding programs.

## **Q11. How should information sharing between government agencies to promote safeguarding be balanced with privacy considerations?**

In addition to comments above on the necessity of information sharing agreements, OPA suggests that once agreement on the roles of both state and national safeguarding bodies has been reached, privacy considerations can be considered in the specific contexts of the safeguarding goals and responsibilities of the relevant parties. Protocols and Memoranda of Understandings can be tailored to balance safeguarding goals with privacy considerations.

Such considerations may prompt legislative amendment to ensure legislated privacy requirements do not lead to significant safeguarding failures.

Examples from OPA's Community Visitor Program listed below demonstrate some of the ways information sharing between agencies and safeguarding bodies could result in more effective safeguarding for all people with disability, including participants.

- Community Visitors not currently able to visit all eligible visitable properties because the NDIA will not provide them with a list of SDA-enrolled dwellings.
- The NDIS Commission do not usually communicate the outcomes of complaints or high-risk abuse referrals. OPA remains unaware of what specific actions have been taken to address concerns, meaning OPA is unable to reassure participants which can leave them feeling frustrated, disempowered and potentially at further risk of serious harm.
- The NDIA needs to consider which other entities it would be valuable to receive information from. For example, Community Visitors could assist in

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<sup>38</sup> For example, the OVAL project that was run by the advocacy organisation VALID (with OPA's support) assisted isolated people with cognitive impairments in the Barwon region of Victoria to make NDIS-related decisions. See: Office of the Public Advocate, *The Oval Project* (July 2017) <<https://www.publicadvocate.vic.gov.au/opa-s-work/research/144-research-item-on-frontpage>>. VALID later operated a Choice Mentors Program 'to support people with disabilities with limited or no informal and family support to have support with their decision making'. See: VALID, *VALID Annual Report 2019-20* (Report, 2020) 38. <<https://valid.org.au/wp-content/uploads/2023/04/VALID-AGM-Report-2020.pdf>>.

identifying people without informal supporters so that the NDIA can assign funding for supported decision making and social inclusion.

**Q13. What options for outreach and visitation or other support can be provided to participants in different higher-risk settings and circumstances? What benefits would this provide?**

As discussed above, OPA's Community Visitor Program has always visited people in supported accommodation settings (in accord with Victorian laws). These settings are characterised as higher-risk settings on account of the power imbalance between the residents and service providers. Furthermore, those people with disability most reliant on paid supports typically reside in these settings – creating a further imbalance of power.

OPA suggests that there needs to be intensive consultation with participants, families and organisations about how people are identified as 'at-risk' by the NDIA and what this means for their privacy and safeguarding rights; it would be ideal for Community Visitors if the NDIA shared information about visitable people they consider 'at-risk' so that Community Visitors could prioritise visiting them.<sup>39</sup>

**Q14. How should any model for outreach and visitation operate for participants living in private homes? Should this be based on participants opting into or opting out of receiving visits or other forms of outreach?**

OPA well understands the needs for and benefits of face-to-face interactions with people with disability living in risky circumstances characterised by significant power imbalance.

OPA's Community Visitor Program visits residential services, not family homes or private rentals.

OPA suggests that this review needs to clearly define what it means by 'private homes' in order to best understand the types of safeguarding risks and most appropriate responses to such settings. For example, different categories of private homes – properties head-leased by providers and sub-leased to participants in the private rental market versus a family home – will involve different likelihoods and types of risks to participants. Hence, these safeguarding responses to these settings should be different and designed in accordance with balancing risks with privacy considerations. While Community Visitor schemes are well designed to address service-based issues and promote community inclusion, perhaps peer support workers or NDIS planners might be more appropriate safeguarding options for people living in family homes?

**Recommendation 16**

**OPA recommends that the NDIS Review panel define 'private homes' to determine appropriate face-to-face safeguarding responses to participants depending on their personal circumstances.**

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<sup>39</sup> Victoria's laws now allow CVs (commencing July 2024) to visit a wider range of disability supported accommodation settings. The NDIA could proactively share information about the addresses of participants whose 'risky accommodation setting' and 'lack of informal supports' put them at particular risk of exploitation, neglect and abuse. This would enable CVs to visit them and, where issues are identified, share this information with the NDIA or the Commission.