



Office of the Public Advocate

## Submission to the Joint Standing Committee on the National Disability Insurance Scheme Inquiry into Market Readiness

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March 2018

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# Summary of Recommendations

## Recommendation 1

The Department of Social Services and the National Disability Insurance Agency should provide ongoing funding for assertive outreach services to ensure potential participants in all regions can effectively engage with the National Disability Insurance Scheme and/or other support programs during and beyond transition.

## Recommendation 2

The National Disability Insurance Agency should ensure that Local Area Coordinators are on the ground six months before the scheme is rolled out in an area and are engaging in pre-planning with participants.

## Recommendation 3

The Australian Government should continue to fund independent advocacy outside the National Disability Insurance Agency as an essential safeguard. State and Territory governments should also continue to fund advocacy organisations.

## Recommendation 4

The National Disability Insurance Agency should commence consultation on the review of the *National Disability Insurance Scheme Market Approach*.

## Recommendation 5

The National Disability Insurance Agency should continue to fund volunteer support for decision-making programs (like the OVAL project and Choice Mentor Programs), and consider the feasibility of rolling out volunteer programs nationally.

## Recommendation 6

The National Disability Insurance Agency should consider adding professional supported decision-making services as a line item that could be funded in individual participant plans.

## Recommendation 7

The National Disability Insurance Agency as market steward, in collaboration with the Australian, State and Territories governments, should consider the effectiveness of the specialist disability accommodation (SDA) pricing framework under the National Disability Insurance Scheme. The review should consider:

- availability, diversity, and stability of SDA;
- mapping of current SDA and identification of gaps in the market;
- prioritisation of clients most in need of SDA;
- adequate supply, based on demand, and ways to stimulate the SDA market;
- robust builds for situations of crises;
- provider of last resort arrangements.

**Recommendation 8**

The National Disability Insurance Agency and the Victorian Government should publish and implement a Provider of Last Resort Framework as soon as possible.

**Recommendation 9**

The National Disability Insurance Agency should develop a streamlined plan review process to respond to participants with an acute and immediate need for crisis care and accommodation.

**Recommendation 10**

The National Disability Insurance Agency, as market steward, should commission crisis and respite accommodation for participants who need accommodation on short notice.

**Recommendation 11**

The National Disability Insurance Agency should develop legislative operational policies to govern the interaction between the National Disability Insurance Scheme Quality and Safeguards Commission and ongoing State and Territory legislation and entities.

**Recommendation 12**

The National Disability Insurance Agency and the National Disability Insurance Scheme Quality and Safeguarding Commission should establish operational protocols with Community Visitors, including a requirement for the Commissioner to accept referrals from these bodies.

## About the Office of the Public Advocate

OPA is a Victorian statutory office, independent of government and government services that works to safeguard the rights, interests and dignity of people with disability.<sup>1</sup> The Public Advocate is appointed by the Governor in Council and is answerable to the Parliament.

OPA provides a number of services to work towards these goals, including the provision of advocacy, investigation and guardianship services to people with cognitive impairments and mental illness. Last financial year, OPA was involved in 1788 guardianship matters, 365 investigations and 322 cases requiring advocacy.

Under the *Guardianship and Administration Act 1986* (Vic), OPA is required to arrange, coordinate and promote informed public awareness and understanding about substitute decision-making laws and any other legislation dealing with, or affecting persons with, disability.<sup>2</sup>

OPA has undertaken various systemic advocacy activities throughout the establishment of the National Disability Insurance Scheme and the development of a nationally consistent quality and safeguarding framework.<sup>3</sup>

OPA provides an Advice Service, which responds to complex issues requiring a high level of expertise. Last financial year, it responded to 17,469 enquiries. Most calls (59 per cent) related to guardianship, administration or enduring powers of attorney. Five per cent of all enquiries related to violence, abuse, exploitation or neglect.

OPA coordinates four volunteer programs: the Community Visitors Program, the Community Guardian Program, the Independent Third Person Program, and the Corrections Independent Support Officer Program. The office provides training and support to more than 800 volunteers.

Community Visitors are empowered by law to visit disability residential services, supported residential services, and mental health facilities in Victoria. They visit these services at any time, unannounced, to monitor and report on the adequacy of services provided in the interests of residents and patients. In 2016-2017, Community Visitors conducted 5151 visits across the state.<sup>4</sup> As a key part of the quality and safeguards arrangements operating during NDIS transition, OPA Community Visitors continue to visit disability residential accommodations, supported residential services and mental health facilities. Various residents and patients have interactions with the NDIS.

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<sup>1</sup> *Guardianship and Administration Act 1986* (Vic) pt 3.

<sup>2</sup> *Guardianship and Administration Act 1986* (Vic) s 15(e).

<sup>3</sup> See Office of the Public Advocate, *National Disability Insurance Scheme* <<http://www.publicadvocate.vic.gov.au/advocacy-research/ndis>>.

<sup>4</sup> Office of the Public Advocate. *Community Visitors Annual Report 2017*.

## OPA's involvement in the NDIS

By virtue of OPA's broad role within the Victorian disability sector, its work increasingly intersects with the NDIS as the scheme rolls across the state and Australia.

OPA has previously acted as an advocate for 57 participants who reside, or have previously resided in, Colanda Residential Services and Disability Accommodation Services in Colac and Geelong during the NDIS trial phase.

OPA is currently guardian for more than 80 NDIS participants, this represents approximately ten per cent of all guardianship clients. OPA also acts as an advocate for four NDIS participants. These figures will rise as the scheme continues to roll out across Victoria.

Community Visitors are active in each region where the NDIS has rolled out. While OPA is encouraged by the recent commitment from the Victorian Government that the Community Visitors scheme will continue in some form, uncertainty remains as to the operations of the program under the NDIS Quality and Safeguarding Framework.

This year, OPA published a *Guide to NDIS decision-making: When a decision can be made by, with, or for an adult with significant cognitive disability*. The guide outlines when decision-making support, advocacy, and substitute decision-making will be needed for potential and current participants at the various stages of the NDIS participant pathway. The publication contains a flowchart that outlines a process to assist in determining what decision-making arrangement may be appropriate in a circumstance and it seeks to promote informal decision-making, wherever possible.

One of the objectives of the guide, which has national application, is to explore the different informal and formal decision-making arrangements that should be considered and provided to participants to enable them to access the scheme, to participate in the planning process, and to receive services in the implementation their plan. It addresses the complexity around participants with cognitive impairment providing consent to access the scheme and the uncertainty around the expectation of some service providers that participants must sign a service agreement.

OPA has contributed to the development of the NDIS Quality and Safeguarding Framework, in addition to making submissions and presentations to various inquiries led by the Joint Standing Committee on the NDIS. OPA notes the committee's most recent report of its inquiry into transitional arrangements to the NDIS and welcomes the opportunity to contribute to the inquiry into market readiness.

## Response to the terms of reference

### b. participant readiness to navigate new markets

OPA acknowledges the continued attention from the NDIA and all levels of government to address barriers to interacting with the scheme for people with cognitive disability and/or limited or no informal supports in their lives. OPA commends the recommendations made by the committee in its recent report into transitional arrangements, to which OPA made a submission. The present submission further develops on some similar issues as they relate to participant readiness.

OPA is encouraged by the work that is being led by the NDIA to improve the participant pathway, which includes the development of a tailored approach to “meet the additional needs of people with disability in specific population groups such as young children, people with more complex needs, people with psychosocial disability, people from Aboriginal and Torres Strait Islander communities, people living in remote and very remote communities and people from culturally and linguistically diverse (CALD) communities.”<sup>5</sup> These developments will, at least in part, address OPA’s comments to this term of reference.

#### **Access**

In its reports, the committee recognises the importance of advocacy and outreach, however, the focus seems to be on the pre-planning stage and beyond. OPA brings attention to barriers preventing potential participants to access and enter the scheme.

Initial engagement with the scheme can be demanding for participants who have limited informal supports in their lives, who may be isolated, or who have no access to independent advocacy. This is further complicated where the participant has a cognitive impairment or when there is uncertainty around the capacity of the person to consent to accessing the scheme and little support available to enable access.

Community Visitors are in a unique position to observe and report from the frontline about the implementation of the NDIS for people with a cognitive impairment or mental illness. They have documented instances in which individuals have not been able to access the advocacy necessary to enable them to participate in the scheme, particularly if they have no circle of support other than paid workers. Community Visitors report that the NDIS application process can be complex and potential participants may find it challenging to work through it without assistance. Their reports from NDIS roll out areas highlight that many of the residents they visit are struggling to understand, adapt to, integrate, and navigate the new market.<sup>6</sup>

By way of example, across the 130 pension-level supported residential services (SRS) in Victoria, it is estimated that 96 per cent of residents have a disability, and between 20 to 29 percent have an intellectual disability.<sup>7</sup> Many residents do not have informal supporters who can assist them to connect with the NDIS. Despite high disability prevalence rates, there is no obligation on SRS proprietors or staff to facilitate access to the scheme for their residents. On the contrary, to encourage admission to the scheme could be perceived by some proprietors as a conflict of interest as it could place the SRS at a financial disadvantage should their clients find alternative accommodation. However, those SRS residents without external formal or informal supports remain reliant on SRS managers and staff to assist them in preparing an ‘access request’ to the NDIS because outreach initiatives may not exist in their region.

In last year’s Community Visitors Annual Report, the Residential Services Board noted that the NDIS roll out has varied greatly from area to area and from one SRS to another across Victoria.

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<sup>5</sup> National Disability Insurance Agency, *Improving the NDIS Participant and Provider Experience*, 28 February <<https://www.ndis.gov.au/news/pathway-review-released.html>>.

<sup>6</sup> Office of the Public Advocate. *Community Visitors Annual Report 2017*. Pg.10.

<sup>7</sup> Department of Health. *2013 Census of Supported Residential Services*. October 2013. Pg.3.

For instance, in Barwon, the Department of Health and Human Services (DHHS) was assisting potential NDIS participants in SRS. In the Inner Eastern Melbourne region, SalvoCare delivers the Resident Opportunities After Reform (ROAR) to build SRS capacity in supporting their residents through major reforms, including the NDIS. Community Visitors welcome and congratulate innovative outreach initiatives like these, and OPA echoes that recognition. However, Community Visitors have noted that prospective participants in other regions are not consistently offered similar levels of support. OPA is concerned that outreach programs are limited in their applicability, timeframes, and funding; consequently, they are not equitably available to all individuals who require outreach to access the scheme.

For people with disability who do not live in any type of supported accommodation, the absence of informal and formal supports can result in complete estrangement from the NDIS. The following case study from OPA's Advocate Guardian Program provides an example of how individuals with disability can miss out on the NDIS because they lack the capacity required to advocate for themselves throughout the access and planning process, because they cannot complete the access request and paperwork without support, and/or because the support provided by families or others is not sufficient to facilitate access:

B, 18, is a young woman with an intellectual disability. Her mother also has an intellectual disability and a partner who has allegedly abused her.

B now lives with her grandparents who are non-English speaking and visits her mother under supervision.

DHHS' Family and Children Services was initially involved, but now that B is no longer a minor, she is no longer eligible for their services. B has recently graduated from a special school. Neither the school nor DHHS organised handover to a new provider so B now does not have any services. Funding cuts limit the capacity of the school to remain involved but has provided B and her family with information on the NDIS.

B's level of impairment coupled with the limited capacity of her carers (mother's intellectual disability; grandparents' linguistic barriers) make it challenging for her to access the NDIS without support. Fortunately, OPA has been able to provide advocacy for B and started the NDIS access and planning process with a kind case manager who is acting pro-bono. Without this support, B would have fallen through the cracks though clearly eligible for the scheme.

OPA is certainly thankful for the good-will of providers—like the case manager in B's story—who continue to assist individuals with disability to access the NDIS, but this is not a viable solution to a wider systemic issue. There is a clear need for comprehensive, assertive outreach initiatives for eligible individuals who would otherwise miss out.

OPA notes the committee has recognised the need for assertive outreach in its report on the inquiry into transitional arrangements for the NDIS. Recommendation 20 states:

“The committee recommends the Department of Social Services and the NDIA develop and publically release a plan outlining how assertive outreach services will be delivered beyond transition to ensure people with disability who are hard-to reach can effectively engage with the NDIS and / or other support programs.”

OPA supports this recommendation, but stresses the urgent need for its implementation. It is OPA's view that outreach should be delivered *during* and after transition to bolster participant readiness to access the scheme.

**Recommendation 1: The Department of Social Services and the National Disability Insurance Agency should provide ongoing funding for assertive outreach services to ensure potential participants in all regions can effectively engage with the National Disability Insurance Scheme and/or other support programs during and beyond transition.**

### ***Pre-planning***

The committee is aware that NDIS planning meetings typically provide little opportunity for potential participants to meet a planner more than once. As a consequence, prospective participants must arrive to their planning meeting well-prepared. Pre-planning is critical to the development of a plan that will meet a participant's needs, however, potential participants do not always have access to people who can support them in this process.

Some participants require supports to: complete access requests, collate documentation in preparation for the planning meeting, and, perhaps most importantly, articulate appropriate goals that will determine which supports the National Disability Insurance Agency ultimately approves, or otherwise, in their NDIS plan.

OPA recognises the NDIA's commitment to produce information and resources to assist participants in the pre-planning stages. However, their proposed formats (i.e. print or electronic) are not adequate for all potential participants (as in B's story) and should be complemented by the work of Local Area Coordinators (LAC). This will be especially important where the person has limited or no informal supports in their lives. OPA repeats and endorses recommendation 5.2 from the Productivity Commission's final report on its study of NDIS Costs.

**Recommendation 2: The National Disability Insurance Agency should ensure that Local Area Coordinators are on the ground six months before the scheme is rolled out in an area and are engaging in pre-planning with participants.**

OPA understands that the NDIA funds LACs to help potential participants to understand and access the NDIS, create a first plan and put that into action.<sup>8</sup> OPA recognises these responsibilities as crucial to the success of the scheme, but is unsure whether the current roll out circumstances enable LACs to fulfil their roles and achieve positive outcomes for their clients. To date, OPA guardians report limited contact with LACs; this is often because the complexity of the lives of OPA clients under guardianship is such that the NDIA facilitates the planning process.

In past submissions to the committee, OPA has described how time and resource constraints reduce the capacity of LACs to support participants at every step of their NDIS journey. Indeed, the committee recognises that LACs are spending the majority of their time providing planning services. Still, many participants are requesting plan reviews shortly after their planning meeting, an indication that their initial plan may not be an accurate reflection of their support needs. In cases where OPA guardians are involved in planning, they note that they have to play an active advocacy role to ensure planners gain a detailed understanding of the participant's needs.

LACs also face challenges in their roles and responsibilities towards improving the lives of people with disability who are *not* NDIS participants, given their attention is overwhelmingly diverted to providing planning services.

Again, OPA notes the work the NDIA are undertaking in relation to improving participant pathways, from early engagement with the scheme through to access, planning, implementation of plans and reviews. Suggested improvements, if successfully piloted and implemented, may address some of the failings of the current system. OPA understands that consultations for this work are underway; it is crucial that pilot sites commence as soon as possible so as to maximise the number of participants that benefit from the improvements.

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<sup>8</sup> National Disability Insurance Agency, *Local Area Coordination* <<https://www.ndis.gov.au/communities/local-area-coordination.html>> 1 March 2018.

## **Advocacy**

OPA recognises that the insurance model of the scheme is predicated on increasing participant capacity to autonomously engage and interact with the market. While it is important to strive for participant independence, it should be recognised that some participants might never develop the capacity to be fully independent. The NDIS has the capability to increase a participant's quality of life, but it is possible, and indeed likely in many instances, that the increase in capacity will not necessarily equate to a decrease in the need for advocacy or for all NDIS-funded supports.

Supports and advocacy should therefore be available to participants throughout their NDIS journey, not only in the access and planning stages. OPA welcomes the Committee's recommendation on this matter and repeats the office's recommendation made to the National Disability Advocacy Program Review for the ongoing need for independent advocacy. This is critical given the indication of some state governments that they will no longer fund disability advocacy.

**Recommendation 3: The Australian Government should continue to fund independent advocacy outside the National Disability Insurance Agency as an essential safeguard. State and Territory governments should also continue to fund advocacy organisations.**

### **e. the role of the NDIA as market steward**

In commenting on the role of the NDIA as market steward, OPA draws upon the *NDIS Market Approach: Statement of Opportunity and Intent* (NDIS Market Approach), published by the NDIA in November 2016.

Firstly, OPA notes the need for an updated version of this strategy, given that some states are approaching full implementation and that the NDIS Quality and Safeguards Commission will begin operating in two states in July 2018. An updated strategy would more clearly delineate the roles and responsibilities of all parties involved in market stewardship.

**Recommendation 4: The National Disability Insurance Agency should commence consultation on the review of the *National Disability Insurance Scheme Market Approach*.**

### ***Participant enabling environment***

The NDIS Market Approach proposes a role for the market steward to create a 'participant enabling environment' by developing infrastructures that "facilitate efficient transactions" and that support consumer and community capacity building. OPA identifies an existing gap in this area that could benefit from market intervention: the lack of supported decision-making for people with disability engaging with the NDIS.

OPA draws upon General Principle 4 of the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) that states: "people with disability should be supported in all their dealings and communications with the Agency so that their capacity to exercise choice and control is maximised in a way that is appropriate to their circumstances." The NDIS Act spells out the specific Principle that "the Agency may provide support and assistance (including financial assistance) to prospective participants and participants in relation to doing things or meeting obligations under, or for the purposes of, this Act".<sup>9</sup>

It is critical, and indeed an obligation on the NDIA, that all potential and current NDIS participants be supported to communicate their wishes and have appropriate alternative decision-making arrangements through all NDIS processes (i.e. access, planning, implementation and review). These supports augment the readiness of participants to interact with the market and achieve choice and control. One way to create this is through supported decision-making.

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<sup>9</sup> *National Disability Insurance Scheme Act 2013* (Cth) s 6.

Supported decision-making enables people with cognitive impairment to be self-determining and exercise their legal decision-making rights (legal capacity). When legally recognised, supported decision-making can be an alternative to formal substituted decision-making and enable people with disability to make valid decisions.<sup>10</sup> Research has demonstrated that “with proper support, a person who would otherwise be deemed to lack capacity is, in fact, able to make personal decisions”.<sup>11</sup>

Supported decision-making is based on the universal right of persons to make their own decisions, in addition to recognising the right of people to receive whatever support they require in this process. OPA considers it central to fully realising the aim of the NDIS to enable people with disability to have choice and control over their financial packages and service delivery.

OPA acknowledges the good intentions of the NDIA on developing the following decision-making supports. However, OPA considers the current approach to be fragmented and notes that not all supports are in operation. Here, OPA lists and comments on the limitations of existing decision-making supports in the NDIS.

- Local Area Coordinators (LACs): The NDIS website identifies various roles of LACs: to help participants as they move from stage to stage through the NDIS process, including to support participants to understand the NDIS; access the NDIS; create a first plan; put the NDIS plan into action; and, review their plan.
  - As described earlier, OPA has concerns about the current capacity of LACs to fully realise their assigned functions.
- Plan nominees: The *National Disability Insurance Act 2013* (Cth) legislates the role of plan nominees who act on behalf of NDIS participants and are able to engage in supported decision-making in exercising their duties.<sup>12</sup>
  - OPA considers the provisions around plan nominees are not adequate for people with disability who are isolated and do not have any informal supporters who could accept an appointment as plan nominee.
  - Furthermore, plan nominees cannot be appointed for participants under 18 years of age and can only be appointed for a person who is an NDIS participant (i.e. plan nominees cannot be appointed prior to a person submitting an access request and becoming a participant).
  - OPA has other concerns in relation to the method of appointment and the scope of the plan nominee role.<sup>13</sup>
- Support coordination: Participants can receive this funded line item to support them in the implementation of their plan through providing assistance to choose and coordinate providers, develop service agreements, manage the funding in plans.
  - As detailed in OPA’s submission to the committee’s inquiry into transitional arrangements, support coordinators are not always appropriately specialised or trained to work with more complex clients.

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<sup>10</sup> Office of the Public Advocate. *Supported Decision-Making in Victoria: A guide for families and carers*. November 2017.

<sup>11</sup> Office of the Public Advocate. *Supported decision-making: Background and discussion paper*. November 2009.

<sup>12</sup> OPA notes that plan nominees can also be substitute decision makers; the plan nominee can determine how they wish to execute their role.

<sup>13</sup> For further discussion in relation to this, see Office of the Public Advocate, *Submission to the independent review of the National Disability Insurance Scheme Act 2013* (2015) <<http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/ndis/law-reform/247-submission-to-ndis-act-review-2015>>.

- Support coordination does not adequately address more generalised decision-support that many isolated individuals with cognitive impairment will require to engage with the NDIS and their NDIS-funded supports.
- Information, Linkages and Capacity Building Commissioning Framework
  - While the ILC Framework can fund effective initiatives, the funding is not targeted to NDIS participants and its structure does not afford ongoing funding. Ongoing funding would encourage organisations to improve their capacity to provide supported decision-making and invest in the expertise of their own staff. This is required to ensure continued access to evolving decision-making supports.

The NDIA, as market steward, has a clear obligation to resource alternative forms of support to actively empower participants to exercise choice and control. In OPA's view, the offerings in their current form are not sufficiently comprehensive, nor are they always delivered by staff who are specialised in this area.

OPA identifies an emerging need for investment in training for people to provide decision-making support to NDIS participants who could benefit from this form of assistance at any stage in the NDIS participant pathway. Disability services, and the sector more broadly, need to develop a better understanding of the concept of supported decision-making and the ethical considerations that should be guiding practice. Training from appropriately qualified professionals will help to safeguard participants against informal coercion and undue influence when receiving decision-making support. The NDIA as market steward should resource the development of greater practice knowledge in the sector.

In doing so, OPA encourages the NDIA to consider models of both volunteer and professional decision-making supporters and provides an example of successful work that has been accomplished in this area.

OPA has developed a successful model of supported decision-making in its recent OVAL Project. The OVAL project was a partnership between Victoria's disability advocacy peak body, VALiD, and OPA that trialled a supported decision-making program for people with cognitive impairment who have limited informal supports. The project matched 15 NDIS participants with 15 volunteers who received training to support participants in building their capacity generally and becoming more engaged in choosing and controlling the support they received from the NDIS.

The NDIA is now funding the Choice Mentor Program (which OPA commends), the second chapter of the OVAL project, led by VALiD and offered in two metropolitan regions of Melbourne and in the Barwon region.<sup>14</sup>

In awaiting of outcomes of the Choice Mentor Program, OPA refers the committee to the final chapter of the OVAL project's report for a discussion on the national implications of this volunteer supported decision-making model. OPA recommends that the NDIA closely follow the progress of the program in determining the feasibility and benefits of rolling out volunteer support for decision-making programs nationally.

**Recommendation 5: The National Disability Insurance Agency should continue to fund volunteer support for decision-making programs (like the OVAL project and Choice Mentor Programs), and consider the feasibility of rolling out volunteer programs nationally.**

Alongside volunteer support models, OPA considers there will also be a role for independent professional decision-supporters in the NDIS market place.

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<sup>14</sup> For more information see: <<https://www.valid.org.au/what-we-do/choice-mentors>>.

The NDIA needs to consider the best form of market intervention to foster and develop the capacity of the market to meet the need for independent professionals in supported decision-making services. OPA strongly advocates for supported decision-making to be accessible to participants as a funded line item in their NDIS plan.

**Recommendation 6: The National Disability Insurance Agency should consider adding professional supported decision-making services as a line item that could be funded in individual participant plans.**

***Enable existing providers to mature***

Another role of the market steward is to “enable existing providers to mature” alongside developments in the market. The NDIA recognises that, as market steward, it will need to actively intervene during transition. The *NDIS Market Approach* states that the transition to the NDIS market-based model is an opportunity for existing providers to grow and expand: “organisational growth is limited only by the ability of organisations to meet consumer demand and needs”.

OPA and Community Visitors are noticing that some providers are facing significant challenges in transitioning to the NDIS market model and are concerned that they are not being adequately supported to successfully mature into the new market.

The enormity of the transition should not be minimised. Community Visitors have been informed of important changes in models of operation: increases in contact hours, reductions in staff supervision, casualisation of work, loss of provision of essential work material (phones, cars, etc.) including physical office space.

The NDIS funding structure is established to enable providers to deliver these types of supports to their staff, but economies of scale are such that smaller providers are lacking the resources or business savviness to adapt their financial processes to an insurance-based, fee-for-service model. Indeed, Community Visitors have begun to note the closure of small, yet previously successful providers caused by a lack of financial ability to withstand the transition into the NDIS business framework.

For instance, OPA’s legal services have noted a significant increase in the amount of time they now spend scrutinising service agreements received by OPA guardians from NDIS service providers. Service agreements often include obligations outside the scope of a guardian’s powers, for example, in addressing requirements regarding participants who may have difficulty in self-regulating behaviours. One provider has explicitly advised OPA that their service does not receive funding for negotiating agreements, which can take time, but they nonetheless have to negotiate individual service agreements with each participant.

OPA fears the new market will eventually be monopolised by those large scale providers who can take advantage of the economies of scale of the NDIS pricing model. OPA expects that many small providers will continue to be negatively impacted by the transition to the NDIS if they are not adequately supported by the market steward. This would represent a significant loss of expertise and excellence for the disability sector.

OPA sees a clear role for the NDIA as market steward to support providers more proactively to transition and mature into the new market model.

## **g. the provision of housing options for people with disability, with particular reference to the impact of Specialist Disability Accommodation (SDA) supports on the disability housing market**

### ***SDA availability***

The NDIS Market Approach accepts that the NDIS marketplace will take time to develop and the committee acknowledges that this is especially true for the provision of housing options.

According to NDIA estimates, SDA will be available for approximately six per cent or 28,000 of total NDIS participants across Australia. At this point in the implementation of the scheme, the provision of suitable accommodation under the NDIS continues to be an issue; the market is not yet at a point where supply matches demand. OPA is concerned that, in the foreseeable future, the new SDA model cannot guarantee sufficient availability, variety, or stability for participants.

The committee has closely followed the case of an NDIS participant who was held in remand for over 500 days for lack of suitable accommodation in the community. OPA takes this opportunity to provide an update on Ms Z:

Ms Z has now been living in the community for three months and is doing relatively well. She lives in a house with 24/7 support from staff with whom she is developing a good rapport. Staff are devising individualised engagement strategies and have seen major gains, thus far.

With their support, Ms Z is becoming increasingly independent. For instance, she likes to go the grocery store or to the café on her own and has begun taking the lead in everyday tasks like laundry and caring for her personal hygiene. Improvements are slow but, nonetheless, noticeable as was to be expected for a participant with complex needs.

The NDIS-funded staff have been thorough in their risk management planning through collaborations with neighbouring, non-NDIS funded supports such as local police, ambulance, Crisis Assessment and Treatment (CAT) teams, and nearest emergency department. Thus far, these partnerships have proven successful in responding to any occurring crisis, but it is evident that, because of her complex needs, Ms Z needs these supports – that are related to her disability – in addition to those funded in her NDIS plan.

The transition into community has not been without its challenges. Ms Z has absconded on three or four occasions, sometimes for days at a time. The intervention order against her remains in place by her father, but Ms Z does not fully grasp its purpose or understand its conditions. In other words, there is a real risk that she may breach the intervention order which may result in her returning into custody.

OPA has also recently been informed that Ms Z's housing is under threat as there are plans for it to be liquidated within the next 12 months. There is uncertainty as to how the NDIA will respond or who will take responsibility for funding another property given the quantum of her initial NDIS package.

The case of Ms Z illustrates how the SDA model is not designed to guarantee long-term housing stability for its residents because arrangements are contingent upon private rentals that can be sold at any time. The risk of SDA liquidation by private proprietors negatively impacts participants; if the sale were to happen quickly, it could place residents in urgent need of temporary or crisis accommodation. This is especially concerning for people with significant cognitive impairment or psychosocial disability whose overall wellbeing greatly benefits from housing stability.

OPA welcomes the NDIA's Exploring Housing Options Package for "people who need to move house and where their disability makes finding a new place to live difficult", but recognises it may be an inadequate market intervention if there is an insufficient supply of diverse housing options.

While the SDA pricing structure should generate supply, this will take time and, thus, an interim solution is required. The current market intervention strategy seemingly does not consider or address the shortage of SDA.

The responsibility to stimulate development in the NDIS market, and more specifically in the SDA market, is imparted on the NDIA as market steward. This should be done in collaboration with Australian, State, and Territories governments who have made the commitment to guarantee housing options for people with disability in the National Disability Strategy and, in Victoria, in the State Disability Plan.

**Recommendation 7: The National Disability Insurance Agency as market steward, in collaboration with the Australian, State and Territories governments, should consider the effectiveness of the specialist disability accommodation (SDA) pricing framework under the National Disability Insurance Scheme. The review should consider:**

- **availability, diversity, and stability of SDA;**
- **mapping of current SDA and identification of gaps in the market;**
- **prioritisation of clients most in need of SDA;**
- **adequate supply, based on demand, and ways to stimulate the SDA market;**
- **robust builds for situations of crises;**
- **provider of last resort arrangements.**

### **i. provider of last resort arrangements, including for crisis accommodation**

OPA agrees with the NDIA that “thin markets will persist for some groups, including some participants:

1. living in regional, remote and very remote areas
2. with complex, specialised or high intensity needs, or very challenging behaviours
3. from culturally and linguistically diverse backgrounds
4. who are Aboriginal and Torres Strait Islander Australians
5. who have an acute and immediate need (crisis care and accommodation)”<sup>15</sup>

In its submission to the committee’s inquiry into transitional arrangements, OPA made the following recommendation: “the NDIA, in collaboration with State and Territory governments, should address the ‘thin market’ problems already appearing in relation to accommodation and services to people with complex needs”.

OPA expands on that recommendation below, by providing context on thin markets appearing in relation to these two participant groups.

#### ***Participants with complex, specialised or high intensity needs, or very challenging behaviours***

OPA envisages the need for Provider of Last Resort arrangements will be ongoing for participants with complex needs, rather than a temporary or artificial market artefact. As NDIS enrolment numbers rise, OPA is aware of an increasing number of NDIS participants with complex needs who are facing difficulties in exercising choice and control with their scheme supports. OPA is concerned that those most in need will be abandoned by service providers and, indeed, the scheme.

Improved choice and control for people with disability causes a commensurate increase in choice for providers to select the clients they wish to accept.

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<sup>15</sup> National Disability Insurance Agency. *NDIA Submission in response to the Productivity Commission Position Paper on NDIS Costs*. July 2017.

In a pre-NDIS environment, block funding was distributed by government departments, which created a level of accountability and, in practice, entitled funders to encourage providers to take on particular clients. In the NDIS funding model, funding is (and should always remain) subject to the direction of participants. This, however, reduces obligations on providers to accept particular clients. OPA has seen that, with increased choice and control for participants, comes increased choice and control for providers.

OPA recognises the continued engagement and involvement of the Victorian DHHS, until now, in assisting NDIS participants who are difficult to engage or have complex needs, and those whose access to the NDIS is delayed. In cases where OPA is involved, the DHHS has, with some negotiation, accepted to find alternative accommodation and/or support providers for participants with complex needs. In previous correspondence,<sup>16</sup> OPA referred the committee to the specialist unit established by DHHS during transition to full scheme. They have few staff who face high demand and ongoing pressure, but have certainly been a welcome support in the transition to the new market.

The need for and the effectiveness of punctual interventions by DHHS reveals an important gap that should not be ignored: there is a lack of suitable NDIS providers for this participant cohort and a crucial need for an enduring provider of last resort, for accommodation, supported independent living, and other disability supports. OPA is greatly concerned about the lack of clarity around Provider of Last Resort arrangements and notes the alarming decisions made in other states for government departments to entirely withdraw from service provision in the disability sector (e.g. New South Wales' Family and Community Services Department) and in the provision of funding for independent advocacy at the state level.

The NDIS Market Approach proposes a model in which the "Agency directly commissions the provision of goods and services in order to ensure supply"; OPA has yet to see the NDIA enact this. In the absence of a systematic approach, OPA sees clear and urgent need for a framework for Provider of Last Resort.

OPA hopes and expects that a clearly articulated Provider of Last Resort Framework will be published and implemented in Victoria to identify what government entity will be responsible for ensuring participants receive the services they need in thin or failing markets. The publication of the framework should occur as soon as possible, as recommended by the committee in its latest report.

**Recommendation 8: The National Disability Insurance Agency and the Victorian Government should publish and implement a Provider of Last Resort Framework as soon as possible.**

OPA takes this opportunity to identify some elements that are integral to a comprehensive Provider of Last Resort framework. OPA highlights the complexity of this exercise, as the need for a Provider of Last Resort will eventuate in a variety of contexts. It provides broad considerations here, but encourages further work for the development of multiple frameworks that are targeted to suit different situations, contexts or supports. For instance, a strategy for SDA provider of last resort will look different to a strategy for a support coordinator of last resort. The framework should consider the following elements:

- The Provider of Last Resort is clearly identified
- Staff and workers are trained and available on short notice
- The provider and its staff have specialised experience, skill, and expertise that are relevant to the specific needs of the participant
- The provider and its staff can provide high quality services

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<sup>16</sup> Questions taken on notice at the public hearing on the inquiry into transitional arrangements to the NDIS. Correspondence from OPA to the JSC on the NDIS, dated 24 November 2017.

- A protocol is put in place to advise planners, LACs, and support coordinators of the procedure to follow when the need arises for a provider of last resort
- A vacancy management strategy exists for the provider to prioritise clients with the most urgent need
- Participant plans have a built-in flexibility for situations in which a provider of last resort is required, including the ability to access contingency funding.

### ***Participants with an acute and immediate need***

The NDIS is predicated on a number of assumptions: that participants have regular, ongoing needs; that the needs of participants will decrease over time as a result of early intervention and appropriate supports; that participants will develop capacity; and that the capacity of mainstream services will increase. OPA acknowledges that the NDIA is now aware that this will not be the case for all, or even many, NDIS participants and is now adapting NDIS policy and practice to slowly reflect this.

In OPA's view, the initial design of the scheme disregarded the natural, sometimes frequent occurrence of unexpected events and crises that affect the ability of participants to maintain ongoing accommodation and supports, compounded where the participant has a cognitive impairment.

OPA is seeing a number of situations where Supported Independent Living (SIL) providers (who are sometimes also SDA providers) retreat from clients once they display difficult behaviours because the risk imposed on their staff becomes too significant. In these circumstances, participant behaviours can be interpreted as occupational health and safety hazards that providers must consider when deciding whether to initiate or continue providing services to a particular individual.

This case study was initially presented to the committee in OPA's submission to the inquiry on transitional arrangements as a case example of a participant with complex needs who displays behaviours that threaten his tenancy. The following is an update to the case:

H is a young man who received a Notice of Temporary Relocation (under the *Disability Act 2006* (Vic) from his supported accommodation in mid-2017. In the last update to the committee, H had complied with the notice and moved out of the SDA into a motel.

He has since then moved twice more and had settled into a public housing unit. The public housing property was not modified to cater for H's behaviours and anxiety. He consequently destroyed the house to the extent that the service provider refused to continue providing services due to occupational health and safety issues.

His Supported Independent Living (SIL) provider was then changed, after which he absconded from the house, only to be admitted to hospital under an Inpatient Treatment Order and now waits for appropriate, robust housing to become available in 12 to 16 weeks. Because of the exceptional circumstances, the Mental Health Tribunal has agreed to let him occupy a mental health bed on the grounds that he had no safe alternative.

When crises of this nature occur for NDIS participants, there are severely limited accommodation of last resort options for people who require a robust build in an emergency situation. As described earlier in this submission, the SDA market is experiencing a shortage of options. In practice, this translates to participants being housed in inappropriate settings that are detrimental to their wellbeing, such as in hospital (H) or in custody (Ms Z).<sup>17</sup> Without a doubt, the lack of suitable accommodation for NDIS participants is placing a strain on other sectors. More troublesome, these environments are overly restrictive and put participants at risk of homelessness or prison if they are discharged from these institutional settings without adequate supports.

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<sup>17</sup> Note that OPA is also aware that the shortage of suitable accommodation is equally affecting TAC participants.

OPA has previously made the recommendation that NDIS plans should have a built-in flexibility to respond to the fluctuating needs of participants with cognitive impairment and complex behaviours or needs, such as the need to rapidly access crisis accommodation. OPA welcomes the NDIA's work to develop a "streamlined process for making minor changes to a plan without triggering a plan review", but suggests that changes related to a person's accommodation would qualify as more than a 'minor change'. With current wait times for plan reviews sitting at more than four months, there is a clear need for a streamlined approach to respond to crises affecting a participant's accommodation.

**Recommendation 9: The National Disability Insurance Agency should develop a streamlined plan review process to respond to participants with an acute and immediate need for crisis care and accommodation.**

In light of recent policy developments, OPA makes an additional recommendation in relation to the thin market for accommodation. OPA understands that the amount of days a carer can apply for respite has significantly decreased from what was previously available. There is certainly scope for market intervention by the NDIA, potentially through the commissioning or development of both crisis and respite accommodation for participants who need accommodation on short notice, particularly for those who need robust accommodation and who cannot be housed in motels or caravan parks.

**Recommendation 10: The National Disability Insurance Agency, as market steward, should commission crisis and respite accommodation for participants who need accommodation on short notice.**

OPA reiterates the need for a review of the SDA pricing framework, as well as for a Provider of Last Resort Framework specific to this context.

## **j. other matters**

The development and implementation of comprehensive safeguards is an essential component of the NDIS market. OPA raises concerns about the readiness of the market to begin implementing appropriate safeguards in a timely and efficient manner. OPA takes this opportunity to reiterate comments and recommendations made in relation to the NDIS Quality and Safeguarding Framework.

### ***Market oversight function***

In its submission to the NDIS Quality and Safeguards Framework, OPA commented on the commission's market oversight functions. Based on the NDIS Market Approach strategy, the distinctions between the market steward (NDIA) and market oversight (NDIS Quality and Safeguards Commission) are unclear to OPA. An updated version of the strategy should provide clarity.

The NDIS Quality and Safeguards Commission will need to interact with State and Territory legislation and entities. To this end, OPA has been informed that the commission will "establish operational relationships with other regulators". OPA notes the absence of legislation or operational policies to govern the interaction between the commission and Victoria's protections: the Senior Practitioner, Community Visitors, guardianship and administration laws and bodies such as the Public Advocate and State Trustees Limited, and DHHS. OPA is aware of a similar lack of provisions in other States and Territories.

Existing safeguards are at risk and the absence of various intergovernmental agreements or policies to establish links and processes with State entities following full transition ensures fragmented safeguards.

**Recommendation 11: The National Disability Insurance Agency should develop legislative operational policies to govern the interaction between the National Disability Insurance Scheme Quality and Safeguards Commission and ongoing State and Territory legislation and entities.**

The continuation of Community Visitors schemes and the benefits they bring to people with disability (particularly people with cognitive impairment) is reliant on explicit recognition of their role by the Commonwealth in the NDIS legislation. Without this, it will be difficult to argue that community visitors would have a right to enter homes and inspect NDIS documents, a concern that Community Visitors have already begun to express in the transition to the NDIS.

In the absence of legislative acknowledgment of the Community Visitors' role, OPA encourages the Commission to establish operational relationships with these safeguarding bodies. This would include a requirement for the Commissioner to accept and acknowledge referrals from both OPA and the Community Visitors Program, the implementation of an information sharing protocol with feedback loops, and obligations upon all bodies to respond to and act on any referrals. These comments apply equally to other state and territory safeguarding and monitoring bodies.

**Recommendation 12: The National Disability Insurance Agency and the National Disability Insurance Scheme Quality and Safeguarding Commission should establish operational protocols with Community Visitors, including a requirement for the Commissioner to accept referrals from these bodies.**

### ***Tenancy rights and other safeguards***

OPA worries about the loss of tenancy rights during and beyond transition to full scheme. Despite transitional arrangements for tenancy protections under the Disability Act (Vic) to remain in Victoria, OPA is already observing an increase in private rental accommodations that is not gazetted under the Act and, consequently, offer limited tenancy protections to residents with disability under the *Residential Tenancies Act 1997* (Vic).

The safeguards afforded by the Disability Act to protect the tenancies of individuals whose behaviours may place them at risk of losing their tenancy are essential, but at this stage remain non-existent in the NDIS context. While OPA appreciates that greater regulation of the housing sector may inhibit innovation and deter providers from entering the market, it also contends that without legislative amendments on the part of Victoria (and other States and Territories), the transition to the NDIS Quality and Safeguards Framework will eliminate many of the necessary existing safeguards previously available to SDA residents. This can lead to negative outcomes for participants with complex needs.

OPA refers the Committee to its submission to the Victorian Government's consultation on Rights in Specialist Disability Accommodation.<sup>18</sup> While the submission is focused on the Victorian sector, it has national application in that it highlights OPA's concerns for the rights of residents living in SDA after full scheme roll-out. This submission speaks to the need for appropriate and comprehensive safeguards in the 'new' disability housing market.

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<sup>18</sup> Office of the Public Advocate, *Submission to Rights in Specialist Disability Accommodation* <<http://www.publicadvocate.vic.gov.au/our-services/publications-forms/research-reports/ndis/accomodation/418-submission-to-the-rights-in-specialist-disability-accommodation-review-july-2017-pdf>>