Office of the Public Advocate

Safeguarding the rights and interests of people with disability

Submission to the NDIS Act Review

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Recommendations

Recommendation 1

The Australian Government should change the name of the NDIS Participant Service Guarantee to the ‘NDIS Service Guarantee to People with Disability’.

Recommendation 2

The National Disability Insurance Agency should, in its review of the New Starter Program, establish a requirement that all planners and Local Area Coordinators (LAC) have relevant disability and mental health training.

Recommendation 3

Section 33 of the *NDIS Act 2013* should be amended to include ‘the individual contact information for the participant’s planner or Local Area Coordinator (LAC)’ as a matter that must be included in a participant’s plan.

Recommendation 4

The National Disability Insurance Agency should establish protocols or memoranda of understanding (MOU) with organisations and statutory authorities with whom it has ongoing working relationships.

Recommendation 5

The National Disability Insurance Agency should publish, consult on, and implement its Maintaining Critical Supports and Immediate Support Response policy and framework as a matter of urgency. This policy and framework should ensure that:

- multiple designated providers of last resort are clearly identified;
- providers of last resort are adequately resourced to enable them to respond immediately in situations of market failure which includes having staff available on short notice;
- the providers and their staff have specialised experience, skill and expertise that are relevant to the specific needs of participants;
- clear procedures exist to guide planners, local area coordinators and support coordinators when the need arises for a provider of last resort to provide any approved support (not just ‘critical’ supports);
- participant plans have built-in flexibility for situations in which a provider of last resort is required, including the ability to access contingency funding;
- as soon as possible, participants are transitioned back to support outside provider of last resort arrangements;

- provider of last resort mechanisms are established as an ongoing component of the NDIS market (i.e. they continue to exist once the transition to the NDIS is fully completed).

Recommendation 6

The National Disability Insurance Agency should ensure Local Area Coordinators (LAC) are adequately resourced to fulfil their role, which includes the ability to link participants to NDIS and mainstream and community supports.

Recommendation 7

The *NDIS Act 2013* should be amended to remove sub-section 29 (1)(b), which states that a person ceases to be a participant in the NDIS when 'the person enters a residential care service on a permanent basis, or starts being provided with community care on a permanent basis, and this first occurs only after the person turns 65 years of age.'

Recommendation 8

Section 18 of the *NDIS Act 2013* should be amended to allow for an access request to be made by a person on behalf of a potential participant.

Recommendation 9

The National Disability Insurance Agency's administrative processes, including at the point of access to the scheme, should be sufficiently flexible to enable it to give full effect to its legislative obligation to ensure that people are provided with the support to make and implement their own decisions.

Recommendation 10

The *NDIS Act 2013* should be amended to include a time limit on the internal review process under sub-section 100(1), failing which the application for review is deemed to have been rejected.

Recommendation 11

Section 103 of the *NDIS Act 2013* should be amended to state that applications can be made to the Administrative Appeals Tribunal for a review of a deemed decision of the CEO under sub-section 100(1).

Recommendation 12

Section 16 of the *NDIS Act 2013* should be amended to state that the National Disability Insurance Agency may fund any assessment that is requested or required in the preparation of a plan or as part of a plan review.

Recommendation 13

The National Disability Insurance Agency should develop a streamlined process for eligible participants to enter the Complex Support Needs Pathway, from the point of access to the scheme.

Recommendation 14

The National Disability Insurance Agency should amend the *Guide to using the Provider Supported Independent Living (SIL) Pack* to clearly state that a participant is eligible for SIL in a participant's plan without requiring the participant to have identified their likely future accommodation setting (whether SDA or other).

Recommendation 15

The *NDIS Act 2013* should be amended to enable the CEO to share a draft plan with participants, providing participants with the opportunity to respond within a set timeframe.

Recommendation 16

The *NDIS Act 2013* should be amended to require the National Disability Insurance Agency to provide written reasons, on request from a participant or person acting on their behalf, for discrepancies between requested and approved supports.

Recommendation 17

The National Disability Insurance Agency should publish guidance for planners to provide clear breakdowns and descriptions of the specific supports to be provided under each line item in participant plans. Where the amount of funding is significant, more detailed breakdowns should be provided.

Recommendation 18

The National Disability Insurance Agency should implement the recommendations made in OPA's report *NDIS Service Agreements: Making Choice and Control More Real*.

Recommendation 19

Section 37(2) of the *NDIS Act 2013* should be amended to state that a plan can be varied after it comes into effect, without undergoing a full plan review, if the change in circumstance does not change the participant's statement of goals and aspirations.

Recommendation 20

Section 4.10 of the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016* should be amended to include 'whether the safety of the participant is compromised in their current living arrangement' as an additional matter to take into account when an interim option is to be determined.

Recommendation 21

Section 33 of the *NDIS Act 2013* should be amended to include 'a person's SDA eligibility, including the type and location of the SDA' as a matter that must be included in a participant's plan.

Recommendation 22

The *National Disability Insurance Scheme (Nominees) Rules 2013* should be amended to include more robust safeguards in relation to nominees, akin and aligned to state and territory guardianship legislation.

Recommendation 23

The National Disability Insurance Agency should take further, reasonable steps to further operationalise the *Nominees – Operational Guideline*.

Recommendation 24

The *NDIS Act 2013* should be amended to include reference to the legislation authorising the Victorian and other Community Visitor Programs as a key component of the safeguarding arrangements in respect of NDIS funded services. Amendments should state that:

- Community Visitors are entitled to see copies of a participant's NDIS plan, any documentation related to the participant's SDA tenancy arrangements, as well as the documents they are currently entitled to see when visiting (as specified in the Victorian *Disability Act 2006*).

- Community Visitors and other comparable entities who are appointed under state and territory legislation are entitled to share information to the extent necessary to advocate for participants and raise concerns with relevant complaints bodies.

Recommendation 25

The *National Disability Insurance Scheme (Code of Conduct) Rules 2018* and related guidance should be amended to reflect a zero-tolerance approach to abuse.

Recommendation 26

Sub-section 73Z(4) of the *NDIS Act 2013* should be amended to include 'a pattern of incidents related to one participant which, when taken together, cause harm to a participant' as a reportable incident.

Recommendation 27

The *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* should be amended so that Supported Independent Living (SIL) support providers are required to be registered providers.

Recommendation 28

Sub-section 10(2) of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* should be amended to include that, when considering whether a member of the applicant's key personnel is suitable to be involved in the provision of supports or services for which the applicant will be registered to provide, the Commissioner has regard to 'whether the member is a fit and proper person' to provide disability services.

Recommendation 29

The Australian Government, with State and Territory Governments, should develop comprehensive guidance in relation to regulating congregate care providers (e.g. Supported Residential Services in Victoria) who are also registered NDIS providers.

Recommendation 30

The National Disability Insurance Agency should put in place a policy that support coordinators should ordinarily be independent of a participant’s accommodation and core support providers.

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.[1]

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

In 2018-19, OPA was involved in 1,823 guardianship matters (978 of which were new), 404 investigations, and 258 cases requiring individual advocacy. The Public Advocate was guardian for 284 NDIS participants, a substantial increase from 2017-18. Moreover, over the last two years, there has been an overall increase in the proportion of people with an intellectual disability under the guardianship of the Public Advocate. OPA suspects the increase is at least in part related to the NDIS.

In the last financial year, OPA provided individual or short-term advocacy for 54 NDIS participants and undertook 42 investigations in relation to individuals where NDIS matters were relevant. The Office acted as an advocate for 57 participants previously resided in Colanda Residential Services and Disability Accommodation Services in Colac and Geelong during the NDIS trial phase.

OPA's Advice Service provided 13,344 individual instances of advice. Notably, demand for advice and information on the NDIS has accrued; the service recorded 246 enquiries in relation to NDIS, a sevenfold increase from the 31 NDIS related queries in 2017-18.

OPA provides training and support to more than 700 volunteers across four volunteer programs: the Community Visitors Program, the Community Guardian Program (which was recently renamed the Community Advocacy and Guardianship Program), the Independent Third Person Program, and the Corrections Independent Support Officer Program.

Community Visitors are empowered by legislation to visit disability residential accommodations, supported residential services, and mental health facilities where residents and patients have various interactions with the NDIS. The NDIS and its national safeguards are now fully implemented, and the Victorian Government remains committed to the continuation of the Community Visitors Program in this new context. However, legislative changes to the *Disability Act 2006* (Vic) and the implementation of the *NDIS Act 2013* (Cth) are creating significant operational challenges, particularly for the disability services stream of the program.

OPA undertakes a range of systemic advocacy activities in relation to the transition to the NDIS and the implementation of a nationally consistent quality and safeguarding framework.

OPA welcomes the opportunity to contribute to the review of the *National Disability Insurance Scheme Act 2013* (NDIS Act) and thanks the review committee for its

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[1] *Guardianship & Administration Act 1986* (Vic).

engagement with stakeholders. While the NDIS has great potential to provide choice and control to people with disability, OPA notes that this intention has not yet been fully realised as the scheme continues to disadvantage people with cognitive impairment.

Most of the information presented in this submission has been published in OPA reports and submissions to past inquiries, most recently to the Joint Standing Committee on the NDIS inquiries on planning and Supported Independent Living (SIL). This submission should be read in conjunction with the following complementary OPA publications:

- *Guide to NDIS decision-making: When a decision can be made by, with, or for an adult with significant cognitive disability*
- *The Illusion of Choice and Control: The difficulties for people with complex and challenging support needs to obtain adequate supports under the NDIS*
- *Service Agreements in the NDIS: Making choice and control more real*

2. Red tape: legislation or operation?

The discussion paper, *Improving the NDIS Experience: Establishing a Participant Service Guarantee and removing legislative red tape*, states that inefficiencies in NDIS processes have disproportionately impacted specific participant cohorts. The discussion paper proposes a Participant Service Guarantee (Guarantee), with the aim that all people with disability will be able to "understand and use the NDIS, and the NDIS ensures its services are appropriate and sensitive"[2] to the needs of specialised groups.

OPA notes that individuals with cognitive impairment are not specifically identified as a 'specialised group' yet they continue to be disadvantaged by the scheme. Scheme actuary estimates show that they form an important proportion of participants. The National Disability Insurance Agency (the Agency) has, in many instances, engaged with OPA on operational issues affecting participants with cognitive impairment. Still, more needs to be done to improve their experience of the NDIS and this submission will speak to OPA's experience in working with this cohort.

The title of the discussion paper refers to 'legislative red tape'. It should be noted that red tape is often attributable to processes that are established to implement legislation and, as such, while the issues may be derived from legislation, they cannot necessarily be solved solely through law reform. Some of the issues raised in this submission are amenable to be remedied through legislative change, others are operational in nature and will instead require adjustments to Agency policies, guidelines, and practices. Where possible, this submission makes recommendations that are specific to legislation, however, in some instances, OPA considers the review team best placed to determine the appropriate vehicle for resolution.

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[2] Department of Social Services (Australia). *Improving the NDIS Experience: Establishing a Participant Service Guarantee and removing legislative red tape.* 5.

3. Participant Service Guarantee

OPA welcomes the intention of the Guarantee to cut red tape. An additional aim should be that the Guarantee increase the accountability of the Agency in enhancing the NDIS experience and delivering better outcomes for participants.

3.1. Terminology

The starting point of the discussion around the Guarantee should address terminology; the name of the Guarantee restricts its remit to ‘participants’, which may inadvertently perpetuate the exclusion of groups of people who face significant barriers to entering the scheme.

In the NDIS Act, a person becomes a ‘participant’ on ‘the day the CEO decides that the person meets the access criteria’.[3] A ‘prospective participant’ is a person in relation to whom an access request has been made but not yet decided.[4] Thus, in the strict sense of the law, a person is not considered to be a ‘prospective participant’ until an access request is registered with the Agency.

However, there are impediments that exist for people with cognitive impairment in successfully making access requests. These are described in in section 4 of this submission. Using the definition provided in the NDIS Act, individuals who have not or cannot make an access request are not ‘prospective participants.’ This should not absolve the Agency of their responsibility to facilitate access for all potentially eligible individuals.

It can be assumed that the intention of the proposed Guarantee is to include all people with disability, including those preceding the point of access, however, it is important that the name of the Guarantee explicitly reflect this.

Recommendation 1

The Australian Government should change the name of the NDIS Participant Service Guarantee to the ‘NDIS Service Guarantee to People with Disability’.

3.2. Enforcement

The NDIS Act already legislates some timelines that the Agency must abide by, yet the current NDIS Act review is an acknowledgment that these are not always abided by. OPA notes that stricter accountability mechanisms need to be put in place to hold the Agency accountable.

The intention behind any legislative change or measure must be centred around participants; the priority should be on minimising the suffering imparted upon beneficiaries (or potential beneficiaries) of the scheme. Indeed, in the worst cases, delays in the NDIS access and planning processes has caused harm that could have been avoided to some participants. OPA’s report *The Illusion of Choice and Control* bears account to the significant human impact and harm experienced by clients when the delivery of supports under the NDIS has been delayed and/or inadequate. These challenges engender

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[3] *National Disability Insurance Scheme Act 2013* (Cth) s 28.

[4] *National Disability Insurance Scheme Act 2013* (Cth) s 9.

detrimental, sometimes devastating, consequences for the person. For instance, some of the stories in the report demonstrate how delayed or inadequate provision of supports and poor quality of services leads to avoidable detention and other infringements on an individual's human rights, and significantly compromises their ability to achieve their chosen life goals.

For these reasons, OPA strongly suggests that, rather than developing punitive measures by, for instance, imposing penalties (financial or otherwise) on the Agency, non-compliance with the Guarantee should instead result in some form of compensation to participants, with the objective of preventing further harm or detriment to their wellbeing.

3.3. Principles

OPA supports the inclusion of principles for NDIA service standards and here comments on the proposed list.

Expert

Agency staff and planners shape the experience of NDIS participants by, among other things, supporting them to identify their goals and aspirations and determine the supports that will be required to fulfil these. To achieve this in a meaningful way, planners (and other delegates of the CEO) need an in depth understanding of disability.

OPA staff observe that planners have varying degrees of experience and expertise, and a range of qualifications. Some planners demonstrate an in-depth understanding of disability and can, for instance, directly estimate the required number of hours per service during a planning meeting. In contrast, other planners come to the role with a more superficial knowledge base and as a result, are less precise in their recommendations as to what should be included in a participant plan.

The level of skill and expertise of the planner appointed to any one participant is seemingly determined by chance – outside of the Complex Support Needs Pathway – which creates noticeable inequities for participants. OPA also observes a discrepancy in the level of skill of Local Area Coordinators (LACs) in comparison to Agency appointed planners. Inconsistency in the expertise of planners and LACs is directly correlated to the quality of the plans that are then provided. OPA notices that participants who can self-advocate and/or have a network of supports to assist during planning are more likely to receive better quality plans.

The NDIS consumer directed model does, by nature and design, place an onus on participants to independently navigate through the different stages of the scheme. This is not a straightforward task and OPA queries whether the qualification requirements for planners and LACs are strict enough in requiring the skills necessary to support all participants, including those with cognitive impairment, in effectively interacting with the scheme. In Victoria, for example, OPA would hope that planners and LACs are, at a minimum, required to have a Certificate IV in disability and have undergone a training like Mental Health First Aid.

OPA is aware that the Agency is currently reviewing its New Starter Program and updates a recommendation made in *NDIS service agreements: Making choice and control more real*.

Recommendation 2

The National Disability Insurance Agency should, in its review of the New Starter Program, establish a requirement that all planners and Local Area Coordinators (LAC) have relevant disability and mental health training.

Connected

The success of the scheme is underpinned by a well-founded disability sector. This requires strong connections between all the different actors operating and navigating the NDIS landscape. OPA considers three levels of connection that fall within the remit of the Agency and that therefore should be specifically included in the Guarantee.

a) Participants are connected to the Agency

Every participant should be accorded a single point of contact to an Agency staff member, whether this be a planner, LAC or other. In practice, individual contact information for Agency staff (i.e. phone number and email address) is sparingly shared with participants (or to OPA delegated guardians). Participants and their supporters instead often resort to a 1-800 number or generic email address, which removes any assurance, and indeed accountability, that the Agency will respond in a timely manner, if at all.

Recommendation 3

Section 33 of the *NDIS Act 2013* should be amended to include ‘the individual contact information for the participant’s planner or Local Area Coordinator’ as a matter that must be included in a participant’s plan.

b) The Agency is connected to the wider disability sector

The Agency is now one of the major players in the disability sector. In carrying out its operations, it routinely interacts with several agencies, whether government or other. Working arrangements should be formalised through protocols with the relevant bodies and organisations.

In OPA’s case, a protocol or Memorandum of Understanding (MOU) with the Agency would streamline administrative processes and solidify existing working relationships between staff in both organisations. For example, an MOU would facilitate referrals made by OPA delegated guardians to the NDIS Complex Support Needs Pathway, which is directly relevant to a significant proportion of OPA’s guardianship clients. In the establishment and earlier stages of implementation of the pathway, OPA developed a working relationship with senior Agency staff, but this unfortunately has not resulted in a streamlined process for eligible OPA clients to access the pathway. OPA delegated guardians report that persistent advocacy is habitually required to enter the pathway; OPA staff sometimes need to escalate the matter to senior Agency staff, slowing down the planning process. A protocol or MOU could remove the unnecessary steps and effort in this ad-hoc referral pathway.

There are several other organisations that have ongoing contact with the Agency. For instance, health services and hospitals often support patients to access the scheme who have been admitted to their service after surviving a catastrophic or traumatic life event (e.g. an unexpected stroke or a vehicle accident), which has resulted in the acquirement of a permanent disability. Given their continued involvement, hospitals could benefit from protocols for information sharing, in line with privacy regulations, to expedite the access and planning process. OPA recently became aware of major Victorian hospitals facing difficulties in being recognised by the Agency as a single institution. Instead, individual social workers (i.e. from different wards within the same hospital) are sometimes requested by the Agency to obtain consent to receive information regarding the same patient. Hospital settings are dynamic by nature; patients typically interact with many individual practitioners and care teams by reason of rostered changes in personnel or through being transferred from one ward to another. The absence protocols, at an organisational level, halts the discharge of patients who may be ready to go home with a cost to both the health service and the patient, in terms of outcomes and well-being.

Recommendation 4

The National Disability Insurance Agency should establish protocols or memoranda of understanding (MOU) with organisations and statutory authorities with whom it has ongoing working relationships.

c) Participants are connected to providers

Finally, to be ‘connected’ means that participants are guaranteed that they will not be left without the services they need to fulfil their goals and aspirations. Yet, it is well known that participants face thin markets in the provision of specific NDIS supports and/or are not supported to navigate the NDIS market. The Agency, as market steward, plays in pivotal, if intermediary role in ensuring participants are connected to providers.

OPA considers that thin markets will be a chronic feature of the NDIS market, especially those affecting participants with complex needs. Consequently, market intervention strategies should not rely on temporary measures. OPA stresses the urgent need for a provider of last resort framework and notes the Disability Reform Council’s most recent recommendation for the Maintaining Critical Supports Project to be expedited.

OPA amends a recommendation from *The Illusion of Choice and Control*.

Recommendation 5

The National Disability Insurance Agency should publish, consult on, and implement its Maintaining Critical Supports and Immediate Support Response policy and framework as a matter of urgency. This policy and framework should ensure that:

- **multiple designated providers of last resort are clearly identified;**
- **providers of last resort are adequately resourced to enable them to respond immediately in situations of market failure which includes having staff available on short notice;**
- **the providers and their staff have specialised experience, skill and expertise that are relevant to the specific needs of participants;**
- **clear procedures exist to guide planners, local area coordinators and support coordinators when the need arises for a provider of last resort to provide any approved support (not just ‘critical’ supports);**

- **participant plans have built-in flexibility for situations in which a provider of last resort is required, including the ability to access contingency funding;**
- **as soon as possible, participants are transitioned back to support outside provider of last resort arrangements;**
- **provider of last resort mechanisms are established as an ongoing component of the NDIS market (i.e. they continue to exist once the transition to the NDIS is fully completed).**

In relation to system navigation, OPA has identified a noticeable service gap that was previously filled by case management. Agency policy directives suggest that LACs and support coordinators have a role in connecting participants to ‘community, mainstream and other government agencies.’ However, in practice OPA has observed that, until now, planners, LACs, and support coordinators are limited in their activities to the remit of supports funded in an NDIS plan. There is an absence of a holistic wrap around support for participants,

OPA repeats a recommendation made in its submission to the Joint Standing Committee to the NDIS’ inquiry on planning.

Recommendation 6

The National Disability Insurance Agency should ensure Local Area Coordinators (LAC) are adequately resourced to fulfil their role, which includes the ability to link participants to NDIS and mainstream and community supports.

Informative

An additional principle is suggested here that would further enhance the principle of ‘accessibility’, which is limited to the way in which the Agency presents information. Here, OPA references the availability and ease of access of information, as well as the actual content.

It is crucial for information delivered by the Agency to not only be accessible, but also to be clear and understandable by all audiences that consume it. Given that the NDIS is predicated on participants and potential participants proactively navigating and interacting with the scheme, information needs to be delivered in a way that is empowering and enables choice and control. OPA finds this not yet to be the case.

By nature of its work, OPA as an organisation has developed some level of expertise in areas of NDIS legislation and policy that are relevant to its work and clients. Notwithstanding this expertise, some senior OPA staff, with commendable years of experience, are challenged to fully grasp the nuances and intricacies of the reformed legislative and service landscape. This is despite having worked with, and advocated for, a number of participants in NDIS services and having access to internal and external expert advice. OPA presumes many participants would find it just as difficult, if not more, given that their involvement with the scheme may be confined to their own experiences.

A lack of clear information leads to inconsistencies in practices among Agency staff. Despite on the ground disparities, OPA finds that for the most part, when issues are escalated to Agency senior staff who draw upon policy and legislation, they tend to be resolved. This indicates that NDIS policy and legislation in many instances comprises a robust foundation for practice and that the inconsistencies in practice may rather result from the lack of clear communication of the policy or legislation. OPA suggests this additional principle of communicating in a way that is 'informative' is relevant within and outside of the Agency.

4. Getting started: Eligibility and application

4.1. Eligibility for participants 65 years or older

OPA appreciates the age eligibility requirement,[5] but has recently been involved in a matter where a person with an NDIS plan saw their eligibility revoked by reason of their age.

The Public Advocate was appointed as a guardian with powers to make decisions relating to accommodation for Issy, a 66-year-old woman. At the time of appointment, Issy was receiving NDIS funding to access community activities. She was living in a Supported Residential Service (SRS) in country Victoria, but that service was closing, thus prompting the need to source alternative accommodation.

A lack of suitable and available disability accommodation options in that area led the guardian to consent to Issy moving into a residential aged care facility, close to the community centre she frequented. In the first instance, Issy occupied a respite bed and later her placement was made permanent as she informed the guardian that she was happy there. Following this, a scheduled NDIS planning meeting was cancelled by the Agency who informed OPA that Issy had lost her NDIS eligibility by way of section 29 of the NDIS Act which stipulates that a person ceases to be a participant when "the person enters a residential care service on a permanent basis, or starts being provided with community care on a permanent basis, and this first occurs only after the person turns 65 years of age."[6]

OPA was advised that a new access request could not be made and, furthermore, that a decision made under section 29 is not a 'reviewable decision' as defined under the NDIS Act.

By losing NDIS funding, Issy faces a significant decrease in the supports that are provided to her. The aged care system does not provide disability supports to the same extent that were available to her under the scheme. While the guardian has requested a plan review in the hopes of applying for Supported Independent Living (SIL) and/or Specialist Disability Accommodation (SDA) funding, this will not change the fact that there is a scarce supply of suitable options in that region.

Thin markets in supported disability accommodation, and in the housing market more broadly, limited Issy's options by no fault of her own. Had she been only a few years younger she could have entered aged care and continue to benefit from the NDIS into old age. Her story illustrates how section 29, when implemented, can result in age-based

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[5] *National Disability Insurance Scheme Act 2013* (Cth) s 22(1).

[6] *National Disability Insurance Scheme Act 2013* (Cth) s 29(1)(b).

discrimination; it is, as prescribed in the Act, only those who enter residential aged care after the cut off age who lose NDIS funding.

OPA recommends that this provision be removed altogether from the NDIS Act.

Recommendation 7

The *NDIS Act 2013* should be amended to remove sub-section 29 (1)(b), which states that a person ceases to be a participant in the NDIS when 'the person enters a residential care service on a permanent basis, or starts being provided with community care on a permanent basis, and this first occurs only after the person turns 65 years of age.'

4.2. Making an access request

Any prospective NDIS participant must test their eligibility for the scheme through an Access Request Form (ARF). Section 18 of the NDIS Act provides that "a person may make a request (an access request) to the Agency to become a participant in the National Disability Insurance Scheme". In its strictest sense, section 18 can be interpreted as not permitting a person to make an access request on behalf of someone else.

In practice, the Agency requires an ARF to be completed and signed, ideally by the person who will become a participant, as stated in the legislation. This requirement can be difficult to comply with, especially for persons with cognitive impairment. When a potential participant cannot sign an ARF, the Agency is prepared to accept an ARF signed on behalf of a potential participant by a supporter. Where appointed, a guardian, administrator/financial manager, or attorney with relevant authority can sign an ARF on behalf of a potential participant. The ARF states that the person signing must be a parent, legal guardian or representation. These categories are a combination of both informal and formal (i.e. legal) supports. Therefore, the roles of informal supporters should be recognised in facilitating entry into the scheme. In some rare cases, the Agency has accepted an ARF signed by an advocate. Agency policies also permit a person to make a verbal access request, although OPA is aware that this option is not routinely offered to prospective participants.

In one case, the Public Advocate was appointed as guardian of a person who had capacity to request access to the NDIS but could not physically sign the ARF due to the nature of her disability. She could, when provided with adequate support to do so, verbally communicate her wishes and preferences, including her desire to enter the scheme. The potential participant's delegated guardian assisted with the completion of the ARF but the Agency would not allow verbal consent from the prospective participant to the ARF and instead required the delegated guarding to sign. In this telling example, a seemingly minor procedural task led to an avoidable restriction on a participant's right to exercise their decision-making capacity.

The Agency cannot sign an ARF for a potential participant, but other forms of support can and should be provided to assist with this simple administrative task. Where a potential participant has a significant cognitive disability and is unable to sign the ARF, reasonable adjustments should be undertaken to obtain verification from them by other means, for example, by using alternative communication methods.[7]

OPA has previously received advice that the Agency would accept an ARF signed by a service provider on behalf of a potential participant if there is no conflict of interest. However, the Agency does not always recognise the role of healthcare professionals and allied health practitioners in supporting potential participants to access the scheme. OPA delegated guardians observe that, in some instances, the Agency has refused ARFs signed by a hospital healthcare professional, claiming a conflict of interest. Hospital-based healthcare providers are funded separately to the NDIS and therefore should not be in conflict with the scheme.

An amendment to section 18 of the NDIS Act to enable a person to make an access request on behalf of a potential participant would facilitate access for people who may need access to the scheme the most. It would align with Australia's obligations under the United Nations Convention on the Rights of Persons with Disabilities (UN Convention) and more meaningfully enliven the principles of the NDIS Act to provide reasonable accommodations at the stage of access to the scheme.

Recommendation 8

Section 18 of the *NDIS Act 2013* should be amended to allow for an access request to be made by a person on behalf of a potential participant.

OPA is concerned that in an increasing number of cases, the Agency is requesting guardianship appointments for the sole purpose of enabling participants to complete the administrative requirements to enter the scheme and complete planning. This is as an instrumental use of guardianship for administrative efficiency and is misaligned with the legislative intent of guardianship. Guardianship should remain importantly a measure of last resort, as it is prescribed in legislation.

In Victoria, the *Guardianship and Administration Act 1986* (Vic) prescribes that, when determining whether or not a person is in need of a guardian, the Victorian Civil and Administrative Tribunal (VCAT) must consider, among other considerations, 'whether the needs of the person in respect of whom the application is made could be met by other means less restrictive of the person's freedom of decision and action.'[8] Guardianship legislation in other jurisdictions replicate this provision. In Victoria again, the new *Guardianship and Administration Act 2019* (Vic) legislates the presumption that a person has decision-making capacity if the person can make decision with support. In the case presented above, the potential participant had capacity to make and communicate her decision when provided with an alternative consent method. Requests for guardianship or requests made of guardians by the AGENCY in these circumstances deny participants their right to have control of decisions that affect their lives where they have capacity to do so.

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[7] Office of the Public Advocate (Vic), *Guide to NDIS Decision Making* (2018).

[8] *Guardianship and Administration Act 1986* (Vic) s 22 (2).

Recommendation 9

The National Disability Insurance Agency's administrative processes, including at the point of access to the scheme, should be sufficiently flexible to enable it to give full effect to its legislative obligation to ensure that people are provided with the support to make and implement their own decisions.

4.3. Timeliness of access decisions

When a person has made an access request, the potential participant embarks on a process in which there are no substantive time frames with which the Agency must comply and limited options to complain about delays. It commonly takes many months for a participant to finally receive their plan; delays can start at the point of first contact with the Agency.

The NDIS Act provides that once an access request is made, the Agency must do one of two things within 21 days: the CEO must either decide whether or not the prospective participant meets the access criteria or make a request (or more than one request) of the prospective participant.[9] Whilst this provision appears to provide potential participants with some certainty, this certainty is illusory.

If the CEO does not make a decision within the prescribed 21-day period, the CEO is taken to have decided that the prospective participant does not meet the access criteria. This deemed decision (refusal) is then automatically reviewed pursuant to subsection 100(1), which provides that if the CEO is taken to have made the reviewable decision because of subsection 21(3), the decision will be reviewed automatically.[10] This deemed decision is not a decision in respect of which an application may be made to the Administrative Appeals Tribunal pursuant to section 103 of the Act.

The CEO must then cause the reviewable decision to be reviewed by a reviewer. The reviewer must make a decision "as soon as reasonably practicable" either confirming, varying or setting aside the reviewable decision and substituting a new decision.[11] The potential participant is unable, under the NDIS Act, to make an application to the Administrative Appeals Tribunal (AAT), or take any other action until the reviewable decision is made. This gives no comfort to a person waiting for essential supports.

If instead of making a decision (or being deemed to have), the CEO makes a request under subsection 26(1), the potential participant then enters a different pathway, which also provides no obligation on the Agency to ensure that a plan has been implemented within a certain period of time.

Requests under subsection 26(1) include, broadly speaking, a request for further reasonably necessary information for deciding whether the participant meets the access criteria, or that the prospective participant undergo and assessment or examination and provide the subsequent report to the Agency within 28 days (unless a different period is specified in the request).

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[9] *National Disability Insurance Scheme Act 2013* (Cth) s 20.
[10] *National Disability Insurance Scheme Act 2013* (Cth) s 100(1).
[11] *National Disability Insurance Scheme Act 2013* (Cth) s 100(6).

If the person is unable to comply with this request within the prescribed 28 days, which can be difficult given the thin markets in respect of some professionals such as occupational therapists, they are deemed to have withdrawn the access request.

If the prospective participant is able to comply with the request and provide the additional information within 28 days, then the CEO must make an access decision within 14 days or make a further request for further information. People with significant support needs in these circumstances can find themselves stuck in a seemingly perpetual cycle of requests for further information, in some cases relating to information that has previously been provided, with no sense of any timeframe in which an access decision will be made. For some people with a disability in these circumstances, the only practical option available is to appeal to their local member of parliament to intervene on their behalf or to go to the media.

Recommendation 10

The *NDIS Act 2013* should be amended to include a time limit on the internal review process under sub-section 100(1), failing which the application for review is deemed to have been rejected.

Recommendation 11

Section 103 of the *NDIS Act 2013* should be amended to state that applications can be made to the Administrative Appeals Tribunal for a review of a deemed decision of the CEO under sub-section 100(1).

5. Creating your plan

5.1. Pre planning

OPA and Community Visitors observe that preparation for planning is a critical step in the process. Some aspects of planning, such as understanding the terminology of the scheme, may appear to be simple yet eventuate into a higher quality plan.

OPA appreciates that a pre-planning resource is available on the AGENCY’s website but considers the publication to be a minimal intervention that does little to proactively support participants in the planning process. Moreover, the website information is not necessarily presented in an accessible format, with many broken links and numerous references to complex policy and legislation.

OPA is not aware of any pre-planning occurring with LACs, as intended in the new participant pathway. That being said, the LAC model, in which LACs provide ‘grassroots support’, is promising in theory and one that should be further developed and adequately resourced as recommended earlier.

The terminology of ‘pre-planning’ is sometimes used by planners; participants and their guardians have sometimes been invited to ‘pre-planning’ meetings only to realise after the fact that the pre-planning meeting was to be the only meeting that would take place. Misleading terminology in and of itself is a form of red tape; it creates misunderstandings and distorts the expectations of participants and their supporters.

Recommendation 11

The National Disability Insurance Agency should ensure that across all jurisdictions people with disability can access pre-planning supports.

5.2. Assessments

Clinical assessments

The terminology and language used in assessments provided to the Agency by health care and allied health practitioners influences a planner (or delegate)'s decision as to which supports get funded in a plan. Assessments are provided by clinical experts who make recommendations as to how best to support clients. In a meeting with OPA, hospital staff unanimously agreed on the dedication required to prepare assessments for the Agency; they stressed their duty of care in 'getting it right' to ensure that patients are afforded adequate supports after discharge from the hospital.

Assessments are typically written using a health care paradigm or framework, but in the NDIS context are interpreted by planners who are looking to squarely match clinical recommendations to administrative or legislative requirements. To this point, health services have advised OPA that they must often edit the assessments to mimic the Agency's preferred terminology, compromising clinical precision. For instance, one hospital worker submitted a patient assessment in respect of permanent repercussions associated with a stroke, which was refuted by the Agency as not meeting the NDIS' disability requirement. The practitioner amended and re-submitted the assessment relating the same clinical presentation as an Acquired Brain Injury (which, while clinically correct, is less precise) and this was accepted. This administrative back and forth delays service delivery and imposes unrequired work on health care practitioners.

OPA has concerns about planners (or other delegates of the CEO) refuting and misinterpreting clinical assessments when deciding which supports ultimately get funded in a participant plan. In practice, there seems to be an unfavourable attitude or culture among Agency staff that participants request overly costly supports and equipment, negating the expertise of clinical assessors.

The *National Disability Insurance Scheme (Supports for Participants) Rules 2013* sets out criteria or considerations that the CEO or their delegate must apply in assessing the proposed supports. The four criteria are:

- 'Value for money
- Whether the support is effective and beneficial
- Taking account of the expectations of what is reasonable to expect families, carers, informal networks and the community to provide in informal supports
- Whether the support is appropriate under the NDIS'[12]

OPA queries whether planners are sufficiently trained to refute clinical advice. It may be the case that the Agency enlists technical expertise to assist with more complex matters, but the consultation is usually confined within the Agency rather than occurring collaboratively

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[12] *National Disability Insurance Scheme (Supports for Participants) Rules 2013* (Cth) part 3.

with the participant and their supporters. Ultimately, if a health or allied health professional makes a recommendation, it should be accepted as a ‘reasonable and necessary’ support.

In practice, OPA has found that the tension between the first two criteria (i.e. value for money versus expert opinion) is often resolved by the Agency by giving disproportionate weight to safeguarding the financial viability of the scheme, without a full exploration of all available options and sometimes, to the detriment of a participant’s wellbeing. An emphasis on short term financial savings compromises both the participant and, arguably, the scheme by increasing costs in the long term.

Costs of assessments

There is a real inequity that stems from a participant or potential participant’s capacity to fund their own assessments. Participants who have a Transport Accident Commission (TAC) package or other independent means can pay the cost themselves and, consequently, receive and implement their NDIS plan earlier than those who need an additional plan review to get to the same point. The planning process can be delayed by at least two months, often much longer if the participant is required to await a plan review to receive funding for the necessary and reasonable supports identified in the assessment.

Section 16 of the NDIS Act states that ‘the Agency may provide support and assistance to people in relation to doing things under, or for the purposes of, this Chapter’. OPA recommends this section be amended to explicitly refer to the Agency providing financial support.

Recommendation 12

Section 16 of the *NDIS Act 2013* should be amended to state that the National Disability Insurance Agency may fund any assessment that is requested or required in the preparation of a plan or as part of a plan review.

5.3. Participant pathways

OPA welcomes the work initiated by the Agency to improve the participant experience and develop tailored pathways. However, the iterative approach that has been preferred whereby new features are trialled in a specific region and, if deemed successful, are then scaled up, can contribute to red tape, inequities, and delays. This is the case in the roll out of the Complex Support Needs Pathway that is fully rolled out and available across Victoria, but not in other States and Territories. OPA urges the Agency to speed up the roll out to ensure all potential participants are afforded an equal opportunity to enter the pathway.

The AGENCY’s definition for ‘complex support needs’ includes the involvement of a participant in multiple service systems including, among others, guardianship, mental health, and criminal justice. Therefore, the Complex Support Needs Pathway is, by definition, directly relevant to a significant proportion of OPA’s guardianship clients.

OPA advocated for the establishment of the pathway and developed a good working relationship with senior AGENCY staff in the earlier stages of its implementation. This level of engagement is most welcome, but unfortunately has not resulted in a streamlined process for eligible OPA clients to access the pathway. Allocation to the pathway team is fraught and at times has required persistent advocacy from guardians to bypass the 1800 call centre gate-keeper. In many cases, it remains necessary to escalate the issue to senior OPA and Agency staff, further delaying planning, sometimes at great cost to participants.

OPA builds upon recommendation 4 and repeats here a recommendation made in its submission to the Joint Standing Committee on the NDIS' inquiry into planning.

Recommendation 13

The National Disability Insurance Agency should develop a streamlined process for eligible participants to enter the Complex Support Needs Pathway, from the point of access to the scheme.

5.4. Supported Independent Living (SIL) eligibility

In its submission to the recent Joint Standing Committee on the NDIS inquiry into Supported Independent Living (SIL), OPA uncovered the burdensome process for obtaining SIL funding in an NDIS plan.

The NDIS *Guide to using the Provider Supported Independent Living (SIL) Pack* includes a flow chart outlining the SIL quoting process on page 3. In this version of the process:

- the participant and the SIL provider meet to understand the needs and goals of the participant
- the provider develops a quote and submits it to the Agency
- the Agency assesses the quote the quote is finalised and approved prior to the planning meeting
- at the planning meeting the SIL quote and other supports are discussed
- the plan is completed
- and the quote is 'implemented'.

This version of the process applies best to existing disability residential services clients who are not seeking a change to their support arrangements. The process involves the existing (or proposed) SIL provider submitting a detailed quote to the Agency (including staffing ratios, pay rates for various shifts, and a house roster, among other things). The Agency either accepts the quote and SIL is included in the participant's plan or they refute it and the provider may enter into negotiations with the Agency to come to an agreement.

The proposed timeline interestingly appears to contradict the description of that same process in the guidelines included on the first page of the template *Supported Independent Living (SIL) Quote.* The key difference is that where the participant is not already receiving

SIL supports, the Agency requires evidence that the person is eligible for such supports before they accept a SIL quote.

Once a participant has been confirmed by the Agency as eligible for SIL supports, the participant can seek a SIL provider of their choice (subject to availability) who is interested in providing them with a service and is willing to submit a quote for that service to the Agency. The procedure is problematic due to thin markets, especially where the service sought is for people with complex behaviours. OPA's report *The Illusion of Choice and Control* provides more detailed evidence of how thin markets impact people with complex and challenging support needs.

Where a participant wants to live independently or move into SDA but does not have a current suitable address to which SIL supports could be delivered, the planner does not generally include the person's eligibility for SIL in the NDIS plan. The very thin supported housing market, especially for participants with complex and challenging support needs, effects the ability of participants to obtain necessary core support provision. This is because without a home in which necessary supports can be provided, it is very difficult to get a support service to engage with the participant. Lack of housing is a hurdle to obtaining quotes for and implementing SIL supports.

This means that plans are not flexible – they fund existing rather than aspirational circumstances – and therefore participants will require a plan review to trigger the SIL quote process once they have secured their preferred support arrangement. This poses an important disadvantage for participants accessing the scheme from within custody or as an inpatient within a health service or for participants who are in situations of transience or homelessness.

Recommendation 14

The National Disability Insurance Agency should amend the *Guide to using the Provider Supported Independent Living (SIL) Pack* to clearly state that a participant is eligible for SIL in a participant's plan without requiring the participant to have identified their likely future accommodation setting (whether SDA or other).

5.5. Draft plans

Draft plans were included in the planning process in the NDIS Barwon trial site but were later eliminated for reasons that remain unclear. OPA acknowledges the Agency's commitment to joint planning meetings but is surprised to see that the roll out of this new process is contingent upon a detailed evaluation of the soft launch of the pilot.

Varying levels of delegation within the Agency can result in claims made in a planning meeting not being approved in a participant's final plan. This triggers a review process, which is, arguably, much lengthier and burdensome than if a draft plan had been shared.

Draft plans can potentially become burdensome if provisions are not drafted cautiously. OPA nonetheless believes that the benefits would outweigh this risk that can easily be mitigated. Draft plans could be legislated as a 'notice' to which the participant can choose to respond should they wish to amend its content. Draft plans hold the Agency accountable to participants, promote transparency in decisions made by the Agency, and provide a more genuine opportunity for participants to exercise choice and control.

Recommendation 15

The *NDIS Act 2013* should be amended to enable the CEO to share a draft plan with participants, providing participants with the opportunity to respond within a set timeframe.

5.6. Planning discrepancies

OPA delegated guardians have multiple examples of discrepancies between participant plans. In *The Illusion of Choice and Control*, OPA told the story of Yasmin who received a plan that was $200,000 (64 per cent) smaller than the quotes provided in the planning meeting, without any justification being provided by the Agency. This lack of decision-making transparency, which is compounded by the failure of the decision-maker to give clear reasons for any refusals or discrepancies in funding, makes it difficult to understand the basis of decisions and to advocate effectively on the participant's behalf.

Equally frustrating is the lack of clarity regarding who within the Agency actually makes the decision regarding plan approval. In some cases, OPA delegated guardians experience positive planning meetings where the planner seemed to grasp what was required, but then the approved plan was returned inexplicably smaller.

In some cases, participants received less funding and consequently fewer services under the NDIS than they did under the previous funding model (i.e. DHHS Individual Support Package). As previously explained, this is likely due, in part, to failures of planners (or delegates of the CEO) to accept professional advice around complex needs, as well as a perceived pressure to keep NDIS costs low and sustainable. In other cases, OPA delegated guardians have seen initial participant plans purposely limited with a focus on getting a support coordinator in place to prepare and make the case for a subsequent, more sizeable plan.

OPA finds that many people with complex and challenging support needs do eventually obtain substantial NDIS funding. However, obtaining approval for adequate, ongoing funding sometimes only occurs after significant external pressure is applied by a guardian, the media and/or a court, or following an often-predictable crisis (sometimes at great cost to the participant). When more significant plans are approved, the Agency is clear on its expectation that the increased funding is temporary and the support models will have to be scaled back, in line with the insurance model of the scheme.

Providing more detailed information about planning discrepancies may lead to fewer plan reviews and may limit the number of appeals. Providing sufficient detail increases the capacity of people involved in the planning process to improve future plans, facilitates advocacy, and improves options to adequately support participants.

OPA updates a recommendation from The Illusion of Choice and Control.

Recommendation 16

The *NDIS Act 2013* should be amended to require the National Disability Insurance Agency to provide written reasons, on request from a participant or person acting on their behalf, regarding discrepancies between requested and approved supports.

5.7. Plan format

Community Visitors have visited participants who do not have a final NDIS plan but are receiving NDIS supports or who have not received a plan in a format that is accessible to them (i.e. in plain or Easy English).

OPA guardians observe discrepancies in the level of detail provided in participant plans, in some cases, the items approved in NDIS plans are described in such brief and vague terms that it is hard for someone (i.e. the participant or a third party) to understand what has actually been funded. The Agency points to recent improvements made to the formatting of NDIS plan, however OPA considers efforts to date have been insufficient in making plans accessible, especially for participants with cognitive impairment.

In an example provided in *The Illusion of Choice and Control*, the plan provided to a participant named Sue allocated over $1 million in ‘core supports’, with the breakdown simply stating:

- “Funding for low risk daily adaptive equipment
- [A]ssistance in individual living arrangement for person with complex needs (x 1)
- Funding for recreational, social and community activities of your choice.”

Brevity and vagueness in the descriptions of supports funded under a person’s NDIS plan, especially where the quantum of funding is large, complicate oversight of the plan’s implementation (e.g. whether the funding is spent appropriately). Some OPA clients are poorly placed to monitor this themselves, and guardians are not always provided with a copy of the person’s plan and do not have access to the NDIS portal to oversee how, and how much of, a person’s funds have been spent.

The stakes are higher when SIL is involved. The approval process for SIL to be included in a participant plan requires that a participant seek out a SIL provider of their choice who is available and willing. The chosen SIL provider will develop and submit a quote to the Agency, who either accepts or negotiates with the SIL provider. Only once the quote is accepted will it be included in the participant’s plan. The agreed amount is not documented in the plan, so there is no transparency as to the amount of funding being paid to the SIL provider, not even for the participant. Further, the quote and consequently the funding is then tied to the specific SIL provider who submitted the quote and does not seem to be transferable in the same way that other NDIS funded services are.

Section 33 of the NDIS Act relates to ‘matters that must be included in a participant’s plan’. With regards to the level of detail, section 33(3) provides ‘the supports that will be funded or provided under the National Disability Insurance Scheme may be specifically identified in the plan or described generally, whether by reference to a specified purpose or otherwise.’

Whilst providing general descriptions does permit a greater level of flexibility for the participant, OPA considers that, in some cases, this flexibility is better provided by providing a more responsive plan review process. OPA repeats a recommendation from *The Illusion of Choice and Control* for suggested formatting of NDIS plans.

Recommendation 17

The National Disability Insurance Agency should publish guidance for planners to provide clear breakdowns and descriptions of the specific supports to be provided under each line item in participant plans. Where the amount of funding is significant, more detailed breakdowns should be provided.

6. Using and reviewing plans

6.1. Service agreements

The *NDIS Practice Standards and Quality Indicators* requires that service agreements be developed collaboratively between each participant and service provider. When guardians are appointed with an authority to consent to services, they are often seen as the appropriate person to sign service agreements.

In many instances, an OPA delegated guardian is unable to sign the contracts, as to do so would exceed the scope of their authority or alternatively would require the guardian to take responsibility for matters that only the participant has control over (e.g. require the represented person to treat the staff of the service provider with courtesy and respect).

The OPA legal unit developed a deed which limits itself to matters that can be agreed to by a guardian on behalf of a participant. The process of signing deeds remains resource intensive for OPA; in 2018-19, OPA completed 625 NDIS agreements. Notwithstanding the increased workload, OPA currently sees no alternative to its involvement in the preparation and signing of deeds as necessary because without an agreement, service providers will frequently refuse to commence service delivery.

Increasingly, applications for guardianship are being made by service providers at the request of the Agency for the sole purpose of signing service agreements. OPA notes the following indicators in the Practice Standards that could circumvent the need for a guardian, in the situation where a participant would not be able to sign a service agreement.

- ‘Each participant is supported to understand their service agreement and conditions using the language, mode of communication and terms that the participant is most likely to understand.
- Where the service agreement is created in writing, each participant receives a copy of their agreement signed by the participant and the provider. Where this is not practicable, or the participant chooses not to have an agreement, a record is made of the circumstances under which the participant did not receive a copy of their agreement.’[13]

It is not necessary for service providers to have a signed service agreement in order to comply with the legislation and associated practice standards. However, it appears from the requests for the appointment of a guardian that this is not understood by all Agency staff.

Similarly, some service providers seem to be under the misapprehension that a signed service agreement is mandatory and refuse to provide services without one. Other

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[13] NDIS Quality and Safeguards Commission (Cth), *NDIS Practice Standards* (July 2018) 14.

providers appear to consider that even if the agreement is not signed, it must be ‘received’ by the participant. As a result, OPA receives service agreements from service providers asking that, even if the guardian cannot sign the agreement, they confirm that the agreement has been received by the Office. This has occurred even in cases where OPA and the service provider have signed the OPA deed. OPA queries whether this practice and the practice of some service providers to require a signed service agreement are promoted by independent auditors employed by the NDIS Quality and Safeguards Commission.

Providers require additional guidance as to how to best implement these requirements and draft the content of service agreements. OPA has observed that concerning onerous and unfair terms are included in many of the NDIS service agreements sent to OPA for signing by guardians, including inappropriate rights of assignment, indemnities and liabilities and personal responsibilities, inadequate descriptions of services and improper signing of agreements.

The OPA *NDIS Service Agreements: Making Choice and Control More Real* report speaks to the challenges faced by participants with complex and challenging support needs in negotiating and signing NDIS service agreements. A roundtable was organised by OPA and attended by Agency representatives who confirmed that signed service agreements are not mandatory for the delivery of NDIS services, yet they are considered as best practice by many providers. OPA’s report makes specific recommendations to improve the Agency’s guidance in relation to service agreements. The report is provided in attachment to this submission with the recommendation that the Agency implements its recommendation. OPA advocates for the Guarantee to protect participants where an agreement contains unfair and onerous terms or remains unsigned.

Recommendation 18

The National Disability Insurance Agency should implement the recommendations made in OPA’s report *NDIS Service Agreements: Making Choice and Control More Real*.

6.2. Change in circumstances

Notwithstanding the issues accessing the pathway noted above, the Complex Support Needs Pathway is overall a very welcome initiative that has led to better outcomes for participants. Many of the features of the pathway would be beneficial to all NDIS participants. Specifically, the shorter timelines and flexibility of plans developed through the Complex Support Needs Pathway are promising features. Plans developed through the pathway are, on average, delivered within shorter time frames (i.e. usually within one week as opposed to within two to six weeks in the ‘regular’ pathway).

Perhaps one of the most beneficial characteristics of the pathway is the built-in flexibility of plans, whereby the allocated funding for any given line item can be adjusted by the planner without having to undergo a full plan review. This is informed by the continuous engagement between planner and support coordinator and is possible because of the delegated authority bestowed upon planners to make funding adjustments. The flexibility cuts through red tape, providing participants with a dynamic NDIS plans that are genuinely responsive to their changing circumstances and fluctuating needs.

OPA considers that where there is no change to a participant's goals and aspirations or, in other words, where the change in circumstance only relates to a change to a line item, a plan should be amended without the need to undergo a full review.

Recommendation 19

Section 37(2) of the *NDIS Act 2013* should be amended to state that a plan can be varied after it comes into effect, without undergoing a full plan review, if the change in circumstance does not change the participant's statement of goals and aspirations.

6.3. Plan review

The issues of delay that arise in the context of making an access request are also relevant to plan reviews. Often, the need for a review arises from a change in circumstances in which the participant is vulnerable or at risk until the review takes place and a new plan is implemented. In the most serious cases, as detailed below, a participant can be exposed to violence, remain in hospital or within the corrections system for longer than necessary while waiting for the NDIS review process to take its course.

According to the NDIS Act, the CEO must decide whether or not to conduct a review within 14 days of receiving a request. If the CEO fails to make a decision within that timeframe, they are taken to have decided not to conduct the review. As in the case of a deemed decision in respect of an access request, this deemed decision in relation to a request for a review is automatically reviewed and is not prescribed under the Act as a reviewable decision. The reviewer must, 'as soon as reasonably practicable', make a decision confirming, varying or setting aside the reviewable decision and substituting a new decision.

The participant must wait until the outcome of this review before any further action can be taken. As in the case of potential participants waiting on the outcome of an access request, participants waiting for the outcome of a review are left waiting for an inordinate period of time in what can be precarious circumstances.

Recommendations 10 and 11 of this submission are equally applicable and relevant in the context of plan reviews.

6.4. SDA reassessment

OPA and Community Visitors have received advice from the Agency that in order for an SDA relocation to be enacted, whether initiated by a participant or other interested party, an SDA reassessment is required. The intention is, presumably, to provide a participant with choice and control over the features of their next SDA however, delays in obtaining reassessments can have adverse effects on participants.

In one example, Community Visitors advocated on behalf of a participant living in an SDA who was subject to abuse by a co-resident. The participant requested a relocation, which, for obvious safety reasons, needed to occur quickly. While waiting for the reassessment, the participant and their family successfully secured an alternative SDA provider who agreed to service provision. Delays in obtaining a reassessment left this person with no other option than to wait in their current, unsafe environment for more than six months. The perpetrator of the abuse would have likely faced similar delays had they been asked to relocate. This seems to contrary to the process outlined in section 4.2 of the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016.*

OPA notices that the Agency has very recently amended the *Specialist Disability Accommodation Operational Guideline - Describing SDA in a participant's plan* which now states "The participant's plan should also specify the appropriate SDA type and location so that this can be funded for the participant without the need for a plan review should the participant move."[14] This guidance needs to be effectively operationalised within all levels of the Agency, and especially with planners.

In cases like the one presented above, a single participant is effectively assigned two SDA vacancies, that is, the one they reside in and the one that reserved for them to move into. Community Visitors have numerous examples of this (i.e. upwards of 30 participants). While this is a necessary measure for a participant in the short-term, these situations can last many months during which other participants could benefit from accessing either of the vacancies. From the point of view of providers, these types of delays, which are not uncommon, cause a serious financial strain. In the long run, OPA and Community Visitors fear that administrative delays engendered by SDA reassessments could deter SDA providers from entering or remaining in the NDIS market.

Recommendation 20

Section 4.10 of the *National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2018* should be amended to include 'whether the safety of the participant is compromised in their current living arrangement' as an additional matter that should be taken into account.

Recommendation 21

Section 33 of the *NDIS Act 2013* should be amended to include 'a person's SDA eligibility, including the type and location of the SDA' as a matter that must be included in a participant's plan.

6.5. Thin markets

While market stewardship does not fall within the remit of legislation, the health of the NDIS market does impact the ability of participants to use their allocated NDIS funding.

In the transition to the NDIS, OPA and Community Visitors have been made aware that some providers are facing significant challenges in adapting to the 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

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[14] https://www.ndis.gov.au/about-us/operational-guidelines/specialist-disability-accommodation-operational-guideline-3

fee-for-service model. Furthermore, many providers are suffering from back logged payments from the Agency that are halting their cashflow and ability to continue to operate. Indeed, Community Visitors have seen the closure of small, yet previously successful providers caused by a lack of financial ability to withstand the transition into the NDIS business framework.

One example stated above is the requirement to develop service agreements: one provider has explicitly advised OPA that their service does not receive funding for negotiating agreements, a time-consuming task from which they cannot be exempted.

OPA fears the new market will eventually be monopolised by 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 as well as compromise consumer choice by lessening the pool of providers operating within the market.

OPA sees a clear role for the Agency as market steward to support providers more proactively to transition and mature into the new market model. This could include supporting providers with cashflow or block funding smaller organisations.

7. Quality and Safeguards

The review of the NDIS Act is focused on the Participant Service Guarantee. However, OPA considers some amendments to secondary legislation relating to quality and safeguards are necessary to engender better outcomes for participants.

Safeguards under the NDIS Quality and Safeguards Framework are largely focused on ensuring effective complaints processes and on the ‘natural’ safeguard of consumer choice. OPA has been vocal about the ways in which this model is problematic for people with cognitive impairment, especially those with no informal supports. To summarise, a complaints process requires a (supported) proactive complainant and ‘consumer choice’ requires a selection of viable service options to be available. These requirements are, in OPA’s experience, frequently unmet, especially for people with complex and challenging support needs.

7.1. National Disability Insurance Scheme (Nominee) Rules 2013

The NDIS confers its own substitute decision-making arrangements outside of state-based guardianship laws, under the NDIS Act and further in the *National Disability Insurance Scheme (Nominees) Rules 2013* (Cth) (Nominees Rules).

Under the NDIS Act, a plan nominee can be appointed at the request of the participant or on the initiative of the CEO of the Agency or their delegate. The CEO or their delegate can appoint a plan nominee. A planner can act as a delegate of the CEO and thus, could effectively appoint a plan nominee.

The Nominees Rules provide that a plan nominee can undertake actions on behalf of a participant in relation to the preparation, review, or replacement of the participant’s plan, or the management of funding for supports under the participant’s plan. These acts may be done by the plan nominee to the extent specified in the instrument of appointment, noting that the CEO or delegate can limit the matters that a plan nominee is appointed to deal with.

In 2014, OPA published the Guardianship and the NDIS: Discussion paper to explore aspects of the interface between the appointment and scope of the roles of a guardian and plan nominee. Parts of the paper, which is provided in attachment to this submission, are still relevant and OPA repeats some of its key considerations here.

How is a plan nominee appointed?

The Nominees Rules state that the appointment of a plan nominee is justified only when it is not possible for the participant to be assisted to make decisions for themselves. The Agency has developed an operational guideline to assist planners and other Agency staff acting as delegates of the CEO to determine whether the appointment of a nominee is necessary. General considerations include that the CEO (or delegate) have regard to the participant's wishes (including the existence of formal and informal networks around the participant). Presumably, if other formal or informal arrangements are operating effectively, the CEO or delegate will not find it necessary or justifiable to appoint a plan nominee, yet OPA finds this to not always be the case.

The appointment of a plan nominee can be a restrictive action. It can result in a participant's right to make a decision being unduly restricted or even removed, for example if the appointed nominee decides that the participant is not capable of doing an act or thing. Yet procedural safeguards built into guardianship legislation are not reflected in the NDIS Act to oversee the potential restrictions on a participant's rights.

The Nominee Rules state that '[p]eople with disability are presumed to have capacity to make decisions that affect their own lives', and that that 'appointments of nominees will be justified only when it is not possible for participants to be assisted to make decisions for themselves'. There is no guide to the applicable test or principles to be applied when undertaking that assessment.

In Victoria, VCAT has the sole power to appoint guardians only if they are satisfied that the person has a disability, cannot make reasonable personal and lifestyle decisions because of that disability, and needs a decision made for them or about them and there are no alternative, less restrictive methods of making the decision. It is unclear whether similar considerations are involved in the appointment of plan nominees.

VCAT holds primary responsibility for overseeing the activities of substitute decision makers through regular reassessments of their appointments, among other things. OPA is not aware of an equivalent body who could perform this role in the Commonwealth sphere. It is OPA's understanding that there are no legislative provisions authorising the NDIS Quality and Safeguards Commission (or any other body) to accept complaints against plan nominees nor to proactively monitor plan nominee appointments.

OPA continues to advocate for a more robust framework of safeguards and accountability mechanisms, proportionate to the restrictions that such an appointment could impose on a participant, to be included in the NDIS Act in relation to the appointment of plan nominees.

Should guardians be appointed as nominees?

A guardian with relevant authority (i.e. access to services and/or accommodation) can represent the wishes and preferences of the participant in the planning discussion. Guardianship laws in each state and territory generally require a guardian, when making a decision, to act as an advocate for the person, to act in consultation with the person, and to take their wishes into account.

Where a participant has a guardian with relevant authority, the Agency can choose to appoint the guardian as a participant's plan nominee. To this point, the Agency policy position is that 'where it has been identified by the Agency that the participant requires a nominee and there is a guardianship arrangement in place, the presumption is that the guardian will be appointed as the nominee.' Further, 'there is a presumption that a guardian should be appointed nominee where their responsibilities are comparable to the duties of a nominee'. OPA contests these presumptions.

The presumption that a guardian will have comparable duties to a plan nominee is illustrative of some of the misconceptions about the proper limitations on a guardian's role. The powers attributed to a plan nominee are usually much broader than those accorded to a guardian. For instance, a plan nominee can act on behalf of a participant to manage funding for supports under their NDIS plans, whereas a guardian would arguably (at least in Victoria) never have the authority to direct a represented person's finances. OPA appreciates that the Agency could restrict the nominee appointment to only include some actions and thus align the appointment with the authority of a guardian, but OPA has not seen this occur. Consequently, as a general rule, OPA refuses the appointment as a plan nominee to avoid confusion. In any case, a guardian with relevant authority would not require an appointment as plan nominee to carry out their legislative functions.

The Nominees Rules prescribe 'requirements with which the CEO is to comply when appointing a nominee'. The Rules state 'the CEO is to consult, in writing, with any court-appointed decision-maker or participant-appointed decision-maker in relation to any appointment'. In OPA's experience, these legislative requirements are not consistently applied. For example, in one instance, an OPA delegated guardian was informed that they had, unbeknownst to them, been appointed as plan nominee by the participant's planner.

In the rare instances where the Public Advocate is appointed as guardian for a participant for whom a plan nominee arrangement is already in place, there has been miscommunication and tension between the roles. Having both a guardian with relevant authority (access to services and/or accommodation) and a plan nominee creates an overlap in substitute decision-making authority that can be difficult to manage.

The interaction between the two roles – guardian and plan nominee – is complex. While the legislation provides clarity about the interface between the roles, it is OPA's experience that not all planners or nominees necessarily understand the respective roles. In one case, the Public Advocate was appointed guardian for an NDIS participant whose sister was plan nominee. The sister had in fact applied to VCAT to be appointed as guardian but VCAT declined to appoint her to the role because of conflict within the family. The sister was difficult to reach, not only by the guardian but also by the NDIS planner and service providers who required her involvement in order to plan and contract services for the participant. The NDIS planner, in good faith, requested that the delegated guardian sign off on NDIS related decisions to expedite the process for the participant, seemingly not understanding the boundaries in decision-making authority between the plan nominee and the delegated guardian. According to OPA's interpretation of legislation, the nominee should overrule the guardian on any decision that relates to the NDIS plan. This effectively means that while a guardian can (and should) be consulted and can continue to advocate on behalf of the participant, they cannot effectively make any NDIS related decisions on behalf of a participant, as this responsibility falls to the plan nominee.

Where both a guardian and a plan nominee have been appointed and no decisions need to be made that lay outside of NDIS funded services (and therefore under the guardian's authority), the guardianship appointment would in effect be redundant.

Are nominees substitute or supported decision makers?

OPA supports the option for participants to request a plan nominee. A plan nominee has substitute decision-making capability, but the intention of the role seems primarily to be to support to the participant, consult with them, and manage the participant's plan. Ultimately, "a plan nominee appointed on the initiative of the CEO is able to do an act on behalf of the participant only if the nominee considers that the participant is not capable of doing the act." In practice, this means that a nominee could act both as a supported or a substitute decision maker, depending on the decision at hand. OPA questions whether grouping the two roles under the same appointment is appropriate. In Victoria, legislation such as the Powers of Attorney Act 2014 and the new Guardianship and Administration Act 2019 clearly separate the roles of substitute and supported decision maker.

The establishment of distinct appointments for supported and substitute decision-makers enables appropriate and distinct oversight of the two roles, ensuring the appropriate use of substitute decision making. OPA stresses that supported decision-making should remain the preferred and less restrictive option to substitute decision-making and should be promoted, facilitated, and utilised by planners and participants wherever possible. To blend the role with substitute decision making under one appointment can cloud the responsibilities of a plan nominee who is afforded the ability to move from one role to the other with little to no oversight. Without appropriate clarity and safeguards around substitute decision-making for plan nominees, there is potential for unnecessary restrictions to be placed on a participant's decision-making authority.

Recommendation 22

The *National Disability Insurance Scheme (Nominees) Rules 2013* should be amended to include more robust safeguards in relation to nominees, akin and aligned to state and territory guardianship legislation.

Recommendation 23

The National Disability Insurance Agency should take further, reasonable steps to further operationalise the *Nominees – Operational Guideline*.

7.2. Community Visitors

Community Visitors programs exist in most States and Territories, although their operating parameters are slightly different. In Victoria, Community Visitors are empowered under the *Disability Act 2006* to visit disability residential services. In the transition to the NDIS safeguarding environment, the program requires significant reform, but Community Visitors continue to play a vital safeguarding role, providing independent on-site monitoring of service delivery and accommodation standards, as well as relaying complaints by residents to relevant complaints bodies as required.

Earlier this year, the Community Visitors New Operating Model Steering Committee was convened to respond to changes in the disability sector, including amendments to the *Disability Act 2006*, the rollout of the NDIS, and the commencement of the Quality and Safeguards Commission in Victoria. Community Visitors are developing a Memorandum of Understanding (MOU) with the NDIS Quality and Safeguards Commission. The Committee is also considering facilities that can be visited, whether current visit arrangements need modification, training for Community Visitors, and how issues of concern can best be escalated. The impact of the transfer of the regulation of tenancy in Specialist Disability Accommodation from the Disability Act to the *Residential Tenancies Act 1997*, and, hence, under the purview of Consumer Affairs Victoria, is also being considered.

Notwithstanding the work being completed at a state level, OPA considers Community Visitors should be referenced in the NDIS Act.

Recommendation 24

The *NDIS Act 2013* should be amended to include reference to the legislation authorising the Victorian and other Community Visitor Programs as a key component of the safeguarding arrangements in respect of NDIS funded services. Amendments should state that:

- **Community Visitors are entitled to see copies of a participant's NDIS plan, any documentation related to the participant's SDA tenancy arrangements, as well as the documents they are currently entitled to see when visiting (as specified in the Victorian *Disability Act 2006*).**
- **Community Visitors and other comparable entities who are appointed under state and territory legislation are entitled to share information to the extent necessary to advocate for participants and raise concerns with relevant statutory bodies.**

Program funding and access to SDA are essential to ensuring Community Visitors can maintain a safeguarding role in the new environment. Access to information, including a participant's plan and SDA tenancy agreement, is crucial to the ongoing effectiveness of Community Visitors.

When Community Visitors identify a concern in relation to a participant or an SDA, they must have effective referral pathways to ensure these concerns are addressed or resolved. These concerns may include that the Community Visitor is suspicious that the participant has been pressured or manipulated by a third party to refuse entry to the Visitor or, for example, concerns which arise from the state of the property. Currently, without limiting Community Visitor referral options, section 33 of the Disability Act states a selection of people to whom matters arising from their functions may be referred: the Secretary, the Disability Services Commissioner, the Senior Practitioner and the Ombudsman. OPA proposes this list be amended to also include: the NDIS Quality and Safeguards

Commissioner and the CEO of the Agency. The Community Visitors Rules should explicitly reference this.

The NDIS has diversified the market of disability service providers; people with disability ow have a multiplicity of providers in their lives, which in most cases is a great development, but also can make a participant more vulnerable than ever. The absence of individual case management means service providers can now operate in an environment that is increasingly difficult to monitor. Yet, it is well known that people with disability are at increased risk of violence, exploitation, neglect, and abuse and Community Visitors have consistently reported on the prevalence of this occurring in the course of service delivery.

The Community Visitors Program has rolled out abuse detection training to Community Visitors this year to enhance their capacity to identify and report incidents of abuse and neglect. Community Visitors continue to identify serious matters of abuse and neglect in disability services and refer these to the Victorian Disability Services Commissioner. In 2018-19, Community Visitors referred 133 matters;[15] the response from the Disability Services Commissioner has been limited and it should be noted that their office is expected to cease operating once all residents in state-based disability services have successfully transitioned to the NDIS (within 12 to 18 months).

The continued dedicated efforts of Community Visitors to respond to the abuse of people with disability assist to affirm the ‘zero tolerance’ approach endorsed by the Victorian Government. Community Visitors would like to see a similar approach adopted federally via the NDIS Code of Conduct.

The *NDIS (Code of Conduct) Rules 2018* require that providers and workers “take all reasonable steps to prevent and respond to all forms of violence against, and exploitation, neglect and abuse of, people with disability.”[16] The associates guidance provide some further direction, but are not as exhaustive as the Victorian *Code of conduct for disability service workers: Zero tolerance of abuse of people with a disability.* For instance, it does not define the different types of abuse.

OPA repeats a recommendation made in the 2018-19 Community Visitors Annual Report.

Recommendation 25

The *NDIS (Code of Conduct) Rules 2018* and related guidance should be amended to reflect a zero-tolerance approach to abuse.

7.3. National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018

As is broadly known, people with disability in Australia experience significantly higher levels of violence, abuse, neglect and exploitation than people without disability. Using a variety of platforms, and stemming from reports from Community Visitors, OPA actively champions a zero tolerance of abuse and violence in the disability sector. OPA would like to highlight the important role Community Visitors play in the protection of people with disability from violence and abuse. For many years now, Community Visitors have reported their serious

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[15] *Community Visitors Annual Report* (2018-19) 19.
[16] *National Disability Insurance Scheme (Code of Conduct) Rules* (Cth) s 6(f).

concern of systemic violence and abuse of people with disability in shared supported accommodation.

In 2018-19, Community Visitors recorded 170 issues of abuse and neglect in Victoria disability services;[17] the number of incidents reported has increased over the years. Community Visitors are concerned that the threshold for, and oversight of, reportable incidents has diminished in the transition to the NDIS Quality and Safeguarding Framework.

In 2015, the Victorian Ombudsman led an investigation into the *Reporting and investigation of allegations of abuse in the disability sector*. The Victorian Ombudsman highlighted the importance of raising awareness and building capacity within the disability workforce to identify abuse and follow the prescribed response. In her report, she stresses that client safety and wellbeing should be one of the primary purposes of incident reporting.[18] In response to the Ombudsman and other government inquiries on this issue, the Victorian Department of Health and Human Services updated its incident reporting framework[19] to amend the definition of 'major impact' incidents to include systemic issues that may amount to harm. This is defined as 'a pattern of incidents related to one client which, when taken together, meet the level of harm to a client defined above. This may be the case even if each individual incident is a non-major impact incident.' OPA and Community Visitors would like to see a similar provision added to the list of reportable incidents under the NDIS Act.

Recommendation 26

Sub-section 73Z(4) of the *NDIS Act 2013* should be amended to include 'a pattern of incidents related to one participant which, when taken together, cause harm to a participant' as a reportable incident.

7.4. National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018

In the NDIS Quality and Safeguarding Framework, provider registration is mandatory for providers delivering supports deemed to be 'higher risk'. According to section 7 of the *NDIS (Provider Registration and Practice Standards) Rules 2018*, the following classes of providers must be registered under the NDIS Act: SDA, specialist behaviour support, any support during which there is likely to be a need for use of a regulated restrictive practice. Providers must also be registered to deliver any service and support to NDIS participants who have a plan managed by the Agency. While the latter category is likely to capture many participants receiving SIL, OPA and Community Visitors are concerned some SIL providers may be able to operate without registration despite having increased contact with a vulnerable cohort of participants.

Recommendation 27

The *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* should be amended so that Supported Independent Living (SIL) support providers are required to be registered providers.

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[17] *Community Visitors Annual Report* (2018-19).

[18] Victorian Ombudsman *Reporting and investigation of allegations of abuse in the disability sector report 2- incident reporting* (2015) 11.

[19] Department of Health and Human Services (Vic) *Client incident management guide* (2017).

Section 9 of the Rules establishes how the Commission will determine that the applicant (provider) is suitable to provide supports or services to people with disability. OPA and Community Visitors note that the provisions do not include a test of character. This seems necessary to establish whether the person is suitable to provide services to a population of vulnerable people who may be risk. Community Visitors point to the *Migration Act 1958* (Cth) where thorough criteria are applied to identify any concerns related to a person's character.[20]

Recommendation 28

Sub-section 10(2) of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* should be amended to include that, when considering whether a member of the applicant's key personnel is suitable to be involved in the provision of supports or services for which the applicant will be registered to provide, the Commissioner has regard to 'whether the member is a fit and proper person' to provide disability services.

Conflict of interest

Congregate care

OPA has multiple examples of Supported Residential Services (SRS) proprietors entering the NDIS marketplace. SRS in Victoria are privately operated residences that provide accommodation and support for individuals who need assistance with everyday activities. There are 3,983 registered SRS beds[21] across the state with each SRS differing in services, resident profiles, and fees. Similar facilities exist in other jurisdictions, such as Licensed Boarding Houses in NSW, psychiatric hostels in WA, Supported Residential Facilities in SA, and Boarding Houses and Hostels in QLD.[22]

SRS proprietors are known to attend planning meetings, and in some cases, they can act as an advocate for the person, however, some instead advocate for their own financial interests. Community Visitors are observing a sizeable number of SRS proprietors registering as NDIS providers in a range of categories including support coordination, community access, SIL and SDA, and intensive supports with daily living.

SRS proprietors have been seen to exert undue influence and pressure on residents to choose the proprietor's new NDIS business to spend their plan monies. Proprietors have advised that, in part, they have to seek additional income as the SRS financial model is no longer feasible to operate if they rely solely on resident rent for survival. OPA and Community Visitors have multiple examples of SRS' where this is happening. For example, one SRS proprietor harassed a resident to sign up with them for support coordination, even though the participant had previously enjoyed working with a different support coordinator. The previous support coordinator was able to accommodate the participant's expressed preference for a younger female support worker, whereas the new provider allocated an older man. In another case, an SRS offered a resident a discounted SRS accommodation fee in return for selecting them as an NDIS provider.

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[20] *Migration Act 1958* (Cth) s 5C.

[21] Department of Health and Human Services (Vic), *Supported Residential Services Census 2018* (2018).

[22] Private Congregate Care (PCC) Alliance. *People with psychosocial disability living in Supported Residential Services (SRS): Submission to the mental health Royal Commission* (2019).

OPA's main concerns relate to the SRS/NDIS provider's conflict of interest and the undue influence and power they may have over their residents. For example, participants have reported that SRS providers threaten eviction if they do not do what the provider is pressuring them to do. SRS are often used as an accommodation of last resort, especially for people with mental illness or Acquired Brain Injury (ABI). Consequently, this conflict of interest has the potential to affect a very vulnerable cohort.

OPA guardians involved in matters where the person's SRS provider is also one of their NDIS providers have, in at least two instances, had to weigh very carefully the likelihood that the participant would be evicted if they did not comply with the pressures placed on them (and the participant) to accept their NDIS services on behalf of the participant. One participant has been threatened with eviction as the result of push-back from the OPA guardian in relation to accepting NDIS services from a participant's SRS provider. In many cases, eviction would render the participant homeless.

Community Visitors also have some evidence that SRS proprietors may be using a person's plan funding to pay for services that the participant has already paid for as part of their SRS room and board (which is usually deducted from a person's Disability Support Pension). For instance, at one SRS some residents have received NDIS funding for additional support with laundry or cleaning of their rooms, services that are already included in the SRS Residential and Services Agreement. This 'double dipping' can easily go unnoticed by either regulating body given that there is no oversight mechanism to identify issues at the interface of State and Commonwealth level systems.

The suggestion here is not that SRS proprietors be automatically banned from providing a resident with NDIS funded supports, as there are benefits to additional funding bolstering service provision in SRS where the provided supports and services are otherwise very basic, especially in pension level SRS. Some residents might also have long-term relationships with SRS staff which translate into positive outcomes should they use those same people to provide additional services funded under an NDIS plan. The Victorian state-government provided funding to boost services to residents for these reasons. Nevertheless, the conflict of interest inherent in this type of scenario is real and troubling, and OPA is aware that similar conflicts of interest are appearing in other congregate care settings across Australia.

In Victoria, DHHS has initiated a Targeted Compliance Review (TCR) to ensure that services provided as part of an SRS Residential Services Agreement remain separate to those funded by an NDIS plan. Community Visitors are waiting for the results of this TCR, all the while acknowledging that a 'point in time' review will not be sufficient to manage or mitigate the ongoing potential conflict of interest.

OPA amends a recommendation made in its submission to the Joint Standing Committee on the NDIS' inquiry into SIL.

Recommendation 29

The Australian Government, with State and Territory Governments, should develop comprehensive guidance in relation to regulating congregate care providers (e.g. Supported Residential Services in Victoria) who are also registered NDIS providers.

Support Coordination

Following receipt of their plan, a participant must then implement supports by choosing their preferred providers within the NDIS market. The support coordinator, if and where appointed, aids in choosing and coordinating providers, developing service agreements, and managing the funding in an NDIS plan. At the time of a plan review, support coordinators are well placed to comment on the quality or effectiveness of services. Thus, support coordinators support participants in exercising choice and control.

A support coordinator cannot choose providers, nor can they sign service agreements on behalf of the participant. They can however accompany a participant in making these decisions. As such, support coordination is certainly necessary, but does not adequately address more generalised decision support that many isolated individuals with cognitive impairment require to engage with the NDIS and their NDIS-funded supports.

Furthermore, because of their influential role in the implementation of NDIS plans, support coordinators can face an obvious conflict of interest if they are employed by an organisation that is providing other NDIS funded services under the same plan. To receive multiple services from a single provider may be beneficial to some participants, for instance, in rural areas where the market may be scarce. However, it does also have the potential to become problematic for participants who may not have the capacity to fully understand the implications of this ‘double appointment’.

OPA appreciates that registered providers are legislatively bound by the Terms of Business, which state that ‘a registered provider must not (by act or omission) constrain, influence or direct decision making by a person with a disability and/or their family so as to limit that person’s access to information, opportunities, choice and control.’ Firstly, support coordinators do not necessarily have to be registered to operate within the NDIS environment. Secondly, OPA queries whether sufficient, explicit guidance is delivered to providers around this provision. Finally, it is unclear how this is being monitored.

OPA speaks to the potential dangers of engaging a support coordinator from the same provider as SIL in its submission to the Committee’s concurrent inquiry on SIL and repeats a recommendation made in that concurrent submission.

Recommendation 30

The National Disability Insurance Agency should put in place a policy that support coordinators should ordinarily be independent of a participant’s accommodation and core support providers.