



Office of the Public Advocate

Safeguarding the rights and interests of people with disability



Proposed NDIS Legislative Improvements and the Participant Service Guarantee Submission

October 2021

Office of the Public Advocate
Level 1, 204 Lygon Street,
Carlton, Victoria, 3053
Ph: 1300 309 337
NRS: 1300 555 727
www.publicadvocate.vic.gov.au

Contents

Abbreviations	3
Recommendations	4
1. Office of the Public Advocate	6
2. About this submission	6
2.1 A human rights approach	7
3. Changes to the National Disability Insurance Scheme Act 2013 and its Attendant Rules.....	7
3.1 Schedule 1: Participant Service Guarantee	7
3.2 Schedule 2: Make the NDIS work better for people with disability	8
3.2.1 Psychosocial disability	8
3.2.2 Board eligibility and co-design.....	9
3.3 NDIS Act 2013 Rules	10
3.3.1. Plan management and default option (NDIA-managed)	10
3.3.2 Supports <i>not</i> to be provided by certain providers	11
3.3.3 Supported Disability Accommodation Rules and Grandfathering Provisions	14

Abbreviations

CISO	Corrections Independent Support Officers
Convention	United Nations Convention on the Rights of Persons with Disabilities
ITP	Independent Third Person
NDIS Act	National Disability Insurance Scheme Act 2013
NDIA	National Disability Insurance Agency
OPA	Office of the Public Advocate
PSG	Participant Service Guarantee
SDA	Supported Disability Accommodation
Tune Review	Review of the National Disability Insurance Scheme Act 2013

Recommendations

Recommendation 1

The Australian Government should amend the draft *National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021* to require the Chief Executive Officer to provide participants with a draft plan in advance of:

- (i) final planning discussions
- (ii) the approval of the statement of participant supports to be included in the plan.

The Chief Executive Officer should provide participants with the opportunity to respond to the draft plan within a set timeframe.

Recommendation 2

The National Disability Insurance Agency should:

- create co-design opportunities and support people with a disability to participate in co-design opportunities
- support people with a disability to join the National Disability Insurance Scheme board.

This would support meaningful participation, especially for people with cognitive impairment.

Recommendation 3

The National Disability Insurance Agency should ensure that any risk assessment undertaken to determine whether a person can self-manage their plan or have their plan plan-managed, is based on the human rights framework of the United Nations Convention on the Rights of Persons with Disabilities, particularly Article 12 'Equality Before the Law'.

Recommendation 4

The National Disability Insurance Agency should ensure that all participants receive information about their plan management options, in appropriate formats, with sufficient information provided to enable participants to make informed choices.

Recommendation 5

The Australian Government, with State and Territory Governments, should develop comprehensive guidance regarding the regulation of congregate-care providers (e.g. Supported Residential Services in Victoria) which are also registered National Disability Insurance Scheme providers.

Recommendation 6

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.

Recommendation 7

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 8

The Australian Government should ensure on-the-ground, independent oversight of people on National Disability Insurance Scheme packages by existing (and yet to be established) Community Visitor programs – even in private homes where warranted.

Recommendation 9

The Australian Government should amend the *NDIS Act 2013* 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 National Disability Insurance Scheme-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 10

The National Disability Insurance Agency and the Victorian Government establish an inter-jurisdictional taskforce to look at the Supported Residential Services sector and resolve the human rights issues therein.

Recommendation 11

The National Disability Insurance Agency should provide an assurance that those people with rights under the National Disability Insurance Scheme (Supported Disability Accommodation) Rules 2016, specifically section 4.11, will continue to have that entitlement under any new National Disability Insurance Scheme (Supported Disability Accommodation) Rules.

Recommendation 12

The Australian Government should set out in any amendment of the National Disability Insurance Scheme (Supported Disability Accommodation) Rules 2020 the original section 4.11.

1. Office of the Public Advocate

The Office of the Public Advocate (OPA) is a Victorian statutory office, independent of government and government services, that works to safeguard the rights and interests of people with disability. The Public Advocate is appointed by the Governor in Council and is answerable to the Victorian State Parliament.

The Public Advocate has seven functions under the *Guardianship and Administration Act 2019* (Vic), all of which relate to promoting the independence and human rights of people with disability and protecting them from abuse, neglect, and exploitation. To this end, OPA provides a range of critical services for people with cognitive impairment or mental illness, including guardianship, advocacy, and investigation services. Last financial year, OPA was involved in 1792 guardianship matters (950 which were new), 430 investigations, and 284 cases requiring advocacy.

In recent years, the profile of its clients has begun to change. As in previous years, the complexity of cases remains a key feature of guardianship matters, each of which has multiple dimensions ranging from complex disability presentations and service-provision arrangements to complex family dynamics. A key contributor to this increasing complexity is the introduction of the National Disability Insurance Scheme (NDIS), and the interface with the justice system, in addition to the lack of appropriate and accessible housing for people with complex and challenging support needs.

A key function of the Public Advocate is to promote and facilitate public awareness and understanding about the Guardianship and Administration Act and any other legislation affecting persons with disability or persons who may not have decision-making capacity. To this end, it provides the full suite communications service including strong media relations with 23 stories on systemic advocacy in the mass media last financial year. It also operates an Advice Service which provided 12,624 instances of advice last year. OPA also coordinates a community education program for professional and community audiences across Victoria on a range of topics such as the role of OPA, guardianship and administration, and enduring powers of attorney.

OPA is supported by more than 600 volunteers across three volunteer programs: the Community Visitors Program, the Independent Third Person (ITP) Program and the Corrections Independent Support Officer (CISO) Program. The ITP Program is an on-call, statewide service operating in all police stations in Victoria. ITPs assist persons with cognitive impairment when making formal statements to Victoria Police. Last financial year, ITPs attended a total of 3718 interviews. CISOs are experienced ITPs who support prisoners with an intellectual disability at Governor's disciplinary hearings at Victorian prisons and/or remand centres. Between July 2017 to March 2020, CISOs attended 254 hearings at seven Victorian prisons.

Community Visitors are independent volunteers empowered by law to visit Victorian accommodation facilities for people with disability or mental illness. They monitor and report on the adequacy of services provided in the interests of residents and patients. They ensure that the human rights of residents or patients are being upheld and that they are not subject to abuse, neglect, or exploitation. In their annual report, Community Visitors relate their observations on the quality and safety of the services they visit and make recommendations to the Victorian Government. More than 400 Community Visitors visit across three streams: disability services, supported residential services and mental health services. Last financial year, Community Visitors made 4142 statutory visits, including to sites of criminal and civil detention.

2. About this submission

OPA welcomes the opportunity to comment on the proposed NDIS legislative improvements and the Participant Service Guarantee (PSG), which draw upon the findings and the

recommendations of the 2019 independent review of the *National Disability Insurance Scheme Act 2013* (NDIS Act) by David Tune PSM (the Tune Review).

OPA recognises the Department of Social Services for its 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. Therefore, what follows has a specific focus on the implications of the proposed changes for people with cognitive impairments, who OPA believes are yet to receive the full benefits of the NDIS.

2.1 A human rights approach

This submission applies a human rights approach that:

- holds that all people with disability have the right to enjoy equality of opportunity and to participate effectively in, and be fully included in society
- recognises that most challenges experienced by people with disability are a result of disabling systems and environments, rather than being due to an inherent 'lack' in the individual
- considers impairment as an expected dimension of human diversity
- seeks for people with disability to be supported and resourced to have the capabilities to lead a dignifying and flourishing life.

3. Changes to the National Disability Insurance Scheme Act 2013 and its Attendant Rules

This section will discuss OPA's view on the Bill's changes to the *NDIS Act 2013* and the relevant rules in turn.

3.1 Schedule 1: Participant Service Guarantee

OPA welcomes the intention of the Participant Service Guarantee (PSG) to cut red tape. An additional aim should be to increase the accountability of the National Disability Insurance Agency (NDIA) in enhancing the NDIS experience and delivering better outcomes for participants. The PSG is a positive development that should provide greater certainty to NDIS participants and the disability sector about what to expect from the NDIA in terms of service standards and timelines.

Perhaps one of the most beneficial aspects of the PSG is that it provides for plan variations in certain circumstances. This ability to vary a plan without requiring a re-assessment enables a more flexible and expeditious response to a change in the participant's circumstances. OPA appreciates the greater clarity and flexibility provided by the PSG to vary a plan to accommodate small changes in the plan, or to reassess in circumstances where more significant changes have occurred.

OPA also supports the proposed changes in terminology to differentiate between a variation, re-assessment and review. These changes should make it easier for participants to understand the difference between processes for making changes to an NDIS plan and participants' appeal (review) rights if they disagree with a decision about their plan that a NDIA delegate may make. It will be necessary, however, to develop clear guidance for NDIA staff tasked with determining whether a variation or a re-assessment is appropriate in the particular circumstances.

The decision to provide participants with a copy of their draft plan in advance of final planning decisions and the approval of the statement of a participant supports to be included in the plan is also positive, but it should be provided to the participants irrespective of whether it

was requested or not. While draft plans could potentially become burdensome if provisions are not drafted cautiously, OPA, nonetheless, believes that the benefits would outweigh this risk which 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 NDIA accountable to participants, promote transparency in decisions made by the NDIA, and provide a more genuine opportunity for participants to exercise choice and control.

Recommendation 1

The Australian Government should amend the draft *National Disability Insurance Scheme (Participant Service Guarantee) Rules 2021* to require the Chief Executive Officer to provide participants with a draft plan in advance of:

(i) final planning discussions

(ii) the approval of the statement of participant supports to be included in the plan.

The Chief Executive Officer should provide participants with the opportunity to respond to the draft plan within a set timeframe.

The clarification of the requirement of the Commonwealth Ombudsman to report annually to the Australian Parliament on how well the PSG is operating, and NDIA efforts to improve participant experience with the NDIS, is necessary. It would improve both the quality of NDIA engagement and to promote and protect the rights of participants when engaging with the NDIA.

It should be noted, however, that at a recent public consultation session on the Bill and rules, which OPA attended, disability sector participants expressed concern about the ability of the NDIA CEO to vary or reassess an NDIS plan without the participant's consent (s.47 and s.48). OPA shares those concerns. Many attendees feared that this provision was a backdoor way to introduce Independent Assessments and cuts to the "reasonable and necessary" criteria in section 34 of the NDIS Act to cut participants' plans. Those present at the consultation were assured this was not the case and advised that the power merely gave the NDIA the power to raise necessary variations and/or schedule timely reassessments. However, the expression of these concerns is illustrative of the lack of trust between the NDIA and the disability sector. It is important that the NDIA clarifies any ambiguity in the legislation to address these concerns. The proposed rules deal with this issue and will be discussed later in this submission.

3.2 Schedule 2: Make the NDIS work better for people with disability

3.2.1 Psychosocial disability

It is pleasing that the NDIA has recognised that the existing eligibility definition for people with psychosocial disability has impeded access to the NDIS for this group. OPA welcomes the improvement to eligibility criteria with respect to psychosocial disability in line with the 2015 Independent Review of the Act¹ and endorsed by recommendation 8 of the Tune Review.

In relation to recommendation 8(a) of the Tune Review, OPA welcomes the recognition and clarification that a psychosocial disability that is episodic or fluctuating may be taken to be permanent, and that the person is likely to require NDIS support for their lifetime.

¹ Ernst & Young, *Independent review of the NDIS Act* (2015)

The implementation of recommendation 8(a) is by way of proposed amendment to the *Disability requirements* in s 24² and the *Early intervention requirements* in s 25³ of the NDIS Act.

However, section 27 of the legislation provides that NDIS rules may prescribe circumstances or criteria to be applied when assessing a number of things, one of which is whether impairments are, or are likely to be, permanent for the purposes of relevant parts of sections 24 and 25.⁴

Notwithstanding regard that must be had to ss 24(2), 24(3) and 25(1A), OPA is concerned that future qualifications could be prescribed in the rules concerning the circumstances or the criteria to be applied when assessing whether an impairment is 'permanent or likely to become permanent' and that this may further narrow the scope of eligibility and reduce access to the NDIS.

In relation to the Tune Review recommendation 8(b), OPA is pleased to see the proposed deletion in s 24(1)(a) of 'to one or more impairments attributable to a psychiatric condition' and substitution with 'the person has one or more impairments to which a psychosocial disability is attributable.' At s 25(1)(a)(ii), the deletion of 'has one or more identified impairments that are attributable to a psychiatric condition and are, or are likely to be, permanent; or', and replacement with 'has one or more identified impairments to which a psychosocial disability is attributable and that are, or are likely to be, permanent; or', is welcomed.

OPA is pleased to see the removal of the reference to 'psychiatric conditions' for the purposes of determining eligibility and its replacement with 'psychosocial disability.' This amendment is an important move away from the medical model of disability. It brings the language of the legislation into alignment with the social model of disability and, as such, goes some way towards adopting a human rights-based lens.

3.2.2. Board eligibility and co-design

A key principle of the NDIS is participant 'choice and control'. This principle, which recognises that people with disability are the 'experts' in their own lives, cannot be exercised in a meaningfully way without the operationalisation of the principle of co-design.

Similarly, that principle is not fulfilled if 'lived experience of disability' is not recognised as a sufficient qualification for membership of the NDIA board governing the scheme. While section 127 of the NDIS Act provides that a person is eligible for appointment as a board member if the minister is satisfied that the person has skills, experience, or knowledge in, among other things, the provision or use of disability services, in practice, this alone does not appear to be sufficient.

In order for people with disability to be able to participate meaningfully and effectively, they need to be appropriately supported, particularly if they have a cognitive impairment. The NDIA should support and facilitate the participation of people with disability on the NDIA

² The proposals include the addition of a subsection (3) to section 24, providing that 'an impairment or impairments to which a psychosocial disability is attributable and that are episodic, or fluctuating may be taken to be permanent, and the person may be taken to be likely to require support under the National Disability Insurance Scheme for the person's lifetime, despite the episodic or fluctuating nature of the impairments'

³ The proposals include the addition of subsection (1A) to s. 25 of the NDIS Act that: 'For the purposes of subparagraph (1)(a)(ii), an impairment or impairments to which a psychosocial disability is attributable and that are episodic, or fluctuating may be taken to be permanent despite the episodic or fluctuating nature of the impairments' is thorough and provides welcomed clarity.

⁴ *National Disability Insurance Act 2013* (Cth) s.27(a)

board and in co-design opportunities to ensure that that participation occurs in a meaningful way.

Recommendation 2

The National Disability Insurance Agency should:

- **create co-design opportunities and support people with a disability to participate in co-design opportunities**
- **support people with a disability to join the National Disability Insurance Scheme board.**

This would support meaningful participation, especially for people with cognitive impairment.

3.3 NDIS Act 2013 Rules

3.3.1. Plan management and default option (NDIA-managed)

Currently, when a participant requests to self-manage their NDIS plan, the NDIA undertakes a risk assessment to ensure that it is appropriate for the person to self-manage it. The new rule proposes that this protection is extended to participants who wish to use a plan manager.

While OPA supports the proposal to extend the protection of a risk-management assessment to participants who wish to use a plan manager, any 'risk assessment' must be based on the human rights principles expressed in the United Nations Convention on the Rights of Person with Disabilities (2006) (the Convention), which, in turn, are reflected in s.3 of the NDIS Act.

Article 12 of the Convention, 'Equality Before the Law', presumes that a person has capacity to manage their financial affairs and make their own decisions regardless of their disability, unless proven otherwise. Any 'risk assessment' should presume capacity in the first instance and not unduly burden, humiliate or distress the participant. Any assessment should be undertaken as quickly as possible, and the participant should be made fully aware of their appeal rights if they disagree with the decision.

Recommendation 3

The National Disability Insurance Agency should ensure that any risk assessment undertaken to determine whether a person can self-manage their plan or have their plan plan-managed, is based on the human rights framework of the United Nations Convention on the Rights of Persons with Disabilities, particularly Article 12 'Equality Before the Law'.

Furthermore, if a participant does not nominate to self-manage their plan or to have it plan-managed, the default option is to have it managed by the NDIA (Agency-managed) . This third option reduces a participant's choices as they are only able to use registered service providers to provide supports.

Participants are not told by the NDIA before a plan meeting that they must nominate their plan-management option at the meeting. A person cannot make a choice if they are unaware that they have one, the options and the consequences of their choice of plan management type. The NDIA should ensure that participants are aware that they will need to nominate their choice at the plan meeting and the NDIA should provide information to the participant about the various options including the consequences of each for consideration prior to the meeting.

Recommendation 4

The National Disability Insurance Agency should ensure that all participants receive information about their plan-management options, in appropriate formats, with sufficient information provided to enable participants to make informed choices.

3.3.2 Supports *not* to be provided by certain providers

Section 8 of the proposed *NDIS (Plan Management) Rules 2021, Supports not to be provided by particular providers*, was included with the intention of addressing matters of conflict of interest that were identified in the Tune Review. The review highlighted the particular issues arising regarding accommodation settings where residents shared a service provider for assistance with daily living. The relevant recommendations are listed below:

14. *The NDIA undertakes a review of its operational guidelines when funding Supported Independent Living, with an emphasis on increasing the involvement of participants, families and carers in the decision-making process and the principles of choice and control.*

16. *The NDIS Rules are amended to:*

a. set out the factors the NDIA will consider in funding support coordination in a participant's plan

*b. outline circumstances in which it is not appropriate for the providers of support coordination to be the provider of any other funded supports in a participant's plan, to protect participants from provider's conflicts of interest.*⁵

OPA holds significant concerns for the wellbeing of people living in unregulated group settings. This is an area of supported accommodation provision which has arisen in response to the provision of NDIS funding. Recent articles in *The Age* newspaper draw attention to the commodification of vulnerable people who had been receiving supports in Victoria's Supported Residential Services.⁶

OPA appreciates efforts to implement the Tune Review recommendations in relation to conflict of interest – particularly where participants are cut off from independent oversight of their circumstances due to their NDIS supports all coming from the one provider. This is clearly most problematic for participants with cognitive impairment, where the service provider holds all the power and, unless the person or their supporter makes a complaint, is subject to limited oversight of the services being provided. However, OPA has little confidence that the proposed amendments will prevent the types of situations seen to date.

Sections 8(d)(ii)-(e)⁷ allude to the types of situations OPA is aware of, for example, Supported Residential Services providers who threaten to evict participants who do not want

⁵ Tune Review, 2019.

⁶ For example, Jewel Topsfield and Royce Millar, 27 September 2021 "How Denise Morgan escaped Albert Park's house of horrors", *The Age*, <[How Melbourne's Hambleton House became a squalid residence for some of the most vulnerable \(theage.com.au\)](https://www.theage.com.au/news/how-melbourne-s-hambleton-house-became-a-squalid-residence-for-some-of-the-most-vulnerable-20210927)>.

⁷ (d) the provision of the support to the participant by that person is likely to adversely affect the participant's:

- (i) inclusion in the participant's community; or
- (ii) ability to exercise choice and control in relation to the other supports specified in the statement of participant supports;

(e) there is a risk that that person may inappropriately influence the participant's choice of providers of other supports specified in the statement of participant supports;

to use their services for community access, or co-residents who enter a particular accommodation setting on the grounds that everyone's assistance with daily living will be provided by a particular service. However, it would be necessary to have explicit guidance for NDIA planners around how they might identify such conflicts, and the types of settings in which these conflicts are most likely to arise.⁸

OPA suggests that the following strategies could be included in the policy and guidelines that support the implementation of these new rules:

Recommendation 5 (repeated from recommendations made in OPA's submission to the Tune Review):

The Australian Government, with State and Territory Governments, should develop comprehensive guidance regarding the regulation of congregate-care providers (e.g. Supported Residential Services in Victoria) which are also registered National Disability Insurance Scheme providers.

Recommendation 6

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.

However, OPA is aware that organisations and individuals have created separate companies that provide different categories of NDIS-funded supports to get around rules or guidelines that intend to provide separation between key supports – for example, accommodation and daily living. In depth investigation of the corporate structures would be necessary to ensure that the intent of these new provisions is achieved.

To fully enliven the intent of these provisions, OPA recommends strengthening independent oversight of vulnerable participants, especially those living in unregulated settings with other NDIS participants and receiving assistance with daily living supports. To this end, OPA believes the application of a 'fit and proper person' test to all NDIS service providers (especially those accessing the types of unregulated accommodation settings discussed here and, in the media, would go a long way to mitigating the likelihood of participant isolation, neglect, and exploitation.

OPA refers to and repeats a recommendation made in OPA's submission to the Tune Review:

Recommendation 7

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.

⁸ For example, OPA also questions how independent the advice of a Support Coordinator might be when their organisation also provides a range of other NDIS funded supports (from allied health to other core supports).

Similarly, Victoria's Community Visitors Program plays a critical role in safeguarding against the exploitation of people with a disability. This was confirmed by the Productivity Commission in its *Inquiry into Disability Care and Support Report* which stated that:

*"Official Community Visitors should play an important role in promoting the rights of, and overseeing the welfare of, the most vulnerable people in the disability system (and be introduced in jurisdictions where they do not already exist)."*⁹

In Victoria, Community Visitors:

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

Similar Community Visitors' schemes exist in most States and Territories, although their operating parameters are slightly different. The Productivity Commission noted that "it is desirable to replicate features of the Victorian model, including the publication of annual reports and the use of volunteers" in other Australian jurisdictions.¹⁰

The national Community Visitor Scheme Review recognised the contributions of Community Visitors and recommended their continuation at full scheme. The report made two key recommendations:

- The role of Community Visitors should continue to be provided by state and territory-based schemes where they exist
- To support Community Visitors schemes' interface with the NDIS Commission, the following matters should be agreed between the NDIS Commission and states and territories:
 - Authority of Community Visitors to enter the premises of NDIS providers
 - Data and information sharing
 - Compulsory reporting to the NDIS Commission on alleged reportable incidents and failure to adhere to incident management processes
 - Reporting on patterns of concern to the NDIS Commission and State/Territory agencies
 - Role of Community Visitors Schemes in relation to restrictive practices monitoring and reporting.¹¹

⁹ Productivity Commission, *Inquiry into Disability Care and Support* (2011) Report No 54, Vol 1, 52.

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

¹¹ Westwood Spice, *Community Visitor Schemes Review* (2018) 10-11.

While amendments have been made to Victorian legislation to enable Community Visitors to continue to operate in an NDIS environment, federal legislative reform is required to ensure that Community Visitors have an ongoing role in safeguarding the wellbeing of NDIS participants.

In particular, the NDIS Act should be amended to include reference to legislation authorising the Victorian and other Community Visitors programs as a key component of the NDIS safeguarding arrangements.

Recommendation 8

The Australian Government should ensure on-the-ground, independent oversight of people on National Disability Insurance Scheme packages by existing (and yet to be established) Community Visitor programs – even in private homes, where warranted.

OPA refers to and repeats an amended version of a recommendation made in OPA's submission to the Tune Review:

Recommendation 9

The Australian Government should amend the *NDIS Act 2013* to include reference to the legislation authorising the Victorian and other Community Visitor Program 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 which 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.**

In addition, OPA makes the following recommendation in relation to the Supported Residential Services sector in Victoria:

Recommendation 10

The National Disability Insurance Agency and the Victorian Government establish an inter-jurisdictional taskforce to look at the Supported Residential Services sector and resolve the human rights issues therein.

3.3.3 Supported Disability Accommodation Rules and Grandfathering Provisions

OPA raises an issue which is not specifically addressed in the proposed new SDA rules. It is concerned to see that the grandfathering provision in the previous 2016 Rules is not clearly stated in the 2020 (current) Rules, or in the proposed amendments to the NDIS SDA Rules.

The NDIS SDA Rules 2016, section 4.11, sets out the right of people to stay where they are living on the basis that they were 'grandfathered' into the SDA.

Section 4.11 provided –

4.11 If a participant is:

(a) *currently residing in SDA (whether or not it is of the appropriate SDA type or in the appropriate location determined for the participant under paragraphs 4.3-4.9) because:*

- (i) *the participant was residing there before any determination was made under this Part in relation to the participant; or*
- (ii) *the participant moved there in accordance with an earlier determination under this Part; and*

(b) *the participant wishes to continue to reside there for a period of time;*

then the dwelling in which the participant currently resides may be determined for the participant so that the participant can continue to reside there.

This section also contained the following additional information:

The CEO will also need to have regard to a range of other matters in the Act and other NDIS rules in deciding whether to fund this SDA —see paragraphs 2.5-2.6.

Even if a current SDA dwelling is determined for a participant, the appropriate SDA type and location determined for the participant (under Step 1) should also be recorded in the plan (see paragraph 5.8). However, the plan would need to be reviewed before a participant moves from their current SDA to a dwelling of the appropriate SDA type and in the appropriate location determined for the participant.

This section was not repeated in the *NDIS (SDA) Rules 2020*, which replaced the 2016 Rules. Instead, the 2020 Rules simply state under the heading 'Things done under the old rules' –

40 *Things done under the old rules*

(1) This section applies if:

- (a) a thing was done for a particular purpose under the National Disability Insurance Scheme (Specialist Disability Accommodation) Rules 2016 as in force immediately before those rules were repealed; and
- (b) the thing could be done for that purpose under this instrument.

(2) *The CEO may, but is not required to:*

- (a) *accept the thing as done for that purpose under this instrument; or*
- (b) *accept the thing, along with additional things required by the CEO, as done for that purpose under this instrument.*

It is not reasonable to expect a participant to navigate to a revoked instrument in order to identify their entitlement to SDA. OPA makes the following recommendations to ensure that participants are able to identify their entitlements without the need to navigate a maze of current and revoked legislative instruments.

Recommendation 11

The National Disability Insurance Agency should provide an assurance that those people with rights under the National Disability Insurance Scheme (Supported Disability Accommodation) Rules 2016, specifically section 4.11, will continue to

have that entitlement under any new National Disability Insurance Scheme (Supported Disability Accommodation) Rules.

Recommendation 12

The Australian Government should set out in any amendment of the National Disability Insurance Scheme (Supported Disability Accommodation) Rules 2020 the original section 4.11.