Office of the Public Advocate

Safeguarding the rights and interests of people with disability

Joint Standing Committee on the National Disability Insurance Scheme

Inquiry into Current Scheme Implementation and Forecasting for the NDIS

February 2022

Office of the Public Advocate

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Contents

Abbreviations

APO	Authorised Program Officers
APTOS	Applied Principles and Tables of Support
CISO	Corrections Independent Support Officer
CMIA	*Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic)
ITP	Independent Third Person
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
OPA	Office of the Public Advocate
PARC	Prevention and Recovery Care
PLP	Pension-Level Projects (PLP)
RACF	Residential Aged Care Facility
SAVVI	Supporting Accommodation for Vulnerable Victorians Initiative
SDA	Specialist Disability Accommodation
SIL	Supported Independent Living
SRS	Supported Residential Services
STA	Short Term Accommodation
STO	Supervised Treatment Order
TSU	Transition Support Units
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities

Recommendations

Recommendation 1
The National Disability Insurance Agency should commission Specialist Disability Accommodation housing options for irregular support needs and where there are thin markets.

Recommendation 2
The National Disability Insurance Agency should provide clear market stewardship for Specialist Disability Accommodation and reduce administrative barriers to ensure timely participant funding outcomes.

Recommendation 3
Australian jurisdictions should implement or review practices and procedures for identifying and screening prisoners with a cognitive impairment to ensure that these functions are carried out by staff with specialist knowledge.

Recommendation 4
Corrections Victoria should adopt protocols to identify whether individuals entering its services are potentially eligible to access the National Disability Insurance Scheme and facilitate access requests at the earliest opportunity.

Recommendation 5
The National Cabinet's Disability Reform Council should fund a comprehensive gap analysis, identifying community need and government objectives, to guide Disability Reform Council's discussion of the current problems with the Applied Principles to Determine the Responsibilities of the National Disability Insurance Scheme and Other Service Systems.

Recommendation 6
The National Cabinet's Disability Reform Council should review the Applied Principles to Determine the Responsibilities of the National Disability Insurance Scheme and Other Service Systems to ensure they provide clear guidance to resolve interface questions.

Recommendation 7
The National Disability Insurance Agency should assign specific staff from their Complex Needs Pathway Planning team to be dedicated to handling matters that involve a person subject to compulsory treatment under the Victorian Disability Act.

Recommendation 8
The intergovernmental review of the Applied Principles and Tables of Support should clearly articulate State and Australian Government funding responsibilities for people subject to compulsory treatment under the Victorian Disability Act.

Recommendation 9
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:

- a provider of last resort mechanism is established as an ongoing component of the National Disability Insurance Scheme market
- 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 recommended earlier)
- as soon as possible and where necessary, participants are transitioned back to support outside provider of last resort arrangements.

Recommendation 10
All Australian Governments should work to ensure the availability of alternative psychosocial support for consumers who are not eligible for the National Disability Insurance Scheme.

Recommendation 11
The Australian Government, with State and Territory Governments, should develop comprehensive guidance regarding the regulation of congregate-care providers (for example Supported Residential Services in Victoria) which are also registered National Disability Insurance Scheme providers.

Recommendation 12
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 13
Sub-section 10(2) of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* (Cth) 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 14
The Australian Government should amend the *National Disability Insurance Scheme Act 2013* (Cth) 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 National Disability Insurance Scheme-funded services. Amendments should state that:

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

- 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.

Recommendation 15
The National Disability Insurance Agency should set up an active outreach program targeted at congregate-care providers (for example Supported Residential Services in Victoria) to ensure residents are getting independent advocacy supports, supported-decision making services and opportunities to explore independent housing options to address the largely closed institutional nature of these 'last resort' facilities.

Recommendation 16
The Australian Government should implement all aspects of Recommendation 74 from the Royal Commission into Aged Care Quality and Safety, particularly those aspects relating to the development of an annual Specialist Disability Accommodation National Plan.

Recommendation 17
The Australian Government should, as a matter of urgency, seek to clarify and finally settle with State and Territory governments the funding issues associated with the provision of necessary health supports for National Disability Insurance Scheme participants with complex health and disability needs who are wanting to transition from residential aged care facilities (and other health and disability facilities) to community-based accommodation.

1. Introduction

The Public Advocate of Victoria welcomes this opportunity to submit to the Federal Parliamentary Inquiry by the Joint Standing Committee (Committee) on the National Disability Insurance Scheme (NDIS) on Implementation and Forecasting (the Inquiry).

1.1 About the Office of the Public Advocate

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

The Public Advocate is appointed by the Governor in Council and is answerable to the Victorian State Parliament. The Public Advocate has functions under the *Guardianship and Administration Act 2019* (Vic), all of which relate to promoting the independence and human rights of people with disability and protecting people with disability from abuse, neglect and exploitation. To this end, OPA provides a range of critical services for people with cognitive impairment or mental illness, including guardianship, advocacy, and investigation services.

In 2020-21, OPA was involved in 1941 guardianship matters (964 of which were new), 425 investigations, and 352 cases requiring advocacy. OPA's Disability Act officers assist the Office to fulfil its advocacy and safeguarding roles in relation to tenancy rights of people living in disability residential services, and the civil detention and compulsory treatment provisions in the *Disability Act 2006* (Vic). The officers' interventions remain the largest single contributor to OPA's individual advocacy. 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 do so, OPA maintains a full-service communications function including media outreach, and runs an Advice Service which provided 11,619 instances of advice or information during the 2020-21 financial 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. In 2020-21, OPA delivered 73 education sessions for an audience of 2273 people.

OPA is supported by more than 600 volunteers across three volunteer programs: the Community Visitors Program, the Independent Third Person Program (ITP Program) and the Corrections Independent Support Officer (CISO) Program.

Community Visitors are Victorian Governor in Council appointed volunteers who play a vital role in safeguarding the rights of people with disability and fostering their inclusion in the community. They are empowered to make unannounced visits to supported accommodation facilities to monitor and report on the services and quality of care being provided to residents and patients. They are appointed under three separate Acts of Parliament.[1] In 2020-21, 337 Community Visitors made 3718 visits either in person or remotely, visiting 1467 sites.[2]

The ITP Program is a 24/7, state-wide volunteer service operating in all police stations in Victoria. ITPs assist persons with cognitive impairment when giving interviews and making formal statements to Victoria Police. In 2020-21, ITPs attended a total of 3631 interviews and statements. CISOs are experienced ITPs who support prisoners who have an intellectual disability at General Manager's Disciplinary Hearings at Victorian prisons and/or remand centres. In 2020-21, CISOs were invited to attend 74 hearings for 106 charges.

[1] The *Disability Act 2006* (Vic), the *Mental Health Act 2014* (Vic), and the *Supported Residential Services (Private Proprietors) Act 2010* (Vic).
[2] Office of the Public Advocate, *Community Visitors Annual Report* (Report, 2021) 10 <https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/community-visitor-annual-reports/363-community-visitor-annual-report-2020-2021> ('*Community Visitors Annual Report')*.

1.2 OPA's Engagement with Committee Inquiries

OPA believes that the NDIS is a major social and human rights reform that has the potential to positively transform the lives of the people with disability who qualify for it, their families and to create more positive attitudes towards people with disability in the broader community because of their greater inclusion and participation in it. Nevertheless, OPA recognises that in these early days of the NDIS there is a long way to go before it can be said that the NDIS is providing the improvements to the lives of people with disability, that had been envisaged. This is especially the case for people with challenging behaviours and complex support needs. To that end, OPA has made several submissions to the Committee so that OPA's extensive engagement with the NDIS can be used to point to its benefits as well as to how to improve it.

OPA has made submissions to the Committee between 2019 and 2021 on such topics as Planning, Supported Independent Living, Workforce, Quality and Safeguards Commission and Independent Assessments. This submission may draw on these previous submissions and on appropriate material from other OPA submissions and reports as well as relevant observations from OPA staff.

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

1.4 About this Submission

The submission primarily addresses term of reference b: the interfaces of NDIS service provision with other non-NDIS services provided by the States, Territories and the Australian governments, focussing on select elements of the aged care, health, and justice service systems.

1.4.1 Overarching Issues

This submission will discuss several overarching issues in a variety of different contexts: in the criminal justice system, the health/ mental health and aged care systems.

These overarching issues are:

- **Housing** - The lack of availability of safe, appropriate disability accommodation that is suitable for the participant and meets their disability support needs, including their mental health and psychosocial disability needs. The housing should be provided in a timely manner when needed to prevent the participant being inappropriately placed, becoming homeless, or incarcerated;
- **Disability Supports** - These supports are provided at appropriate levels, in a timely manner in an environment which is safe and where the NDIS participants' rights are respected and upheld;
- **Resolution of interface issues** - The lack of clarity of the Applied Principles and Tables of Support (ATPOS) principles particularly, but not exclusively, in relation to the criminal justice system, is resolved;

- **Provider of Last Resort** – The lack of a provider of last resort to provide housing or other services and supports for people with disability who other disability support providers refuse to accept (or unable to accept) as clients because of their behaviours of concern or the level of supports in the participant's plan is not sufficient; a critical issue that must be resolved.

1.4.2 The Interface: Applied Principles and Tables of Support (APTOS)

The *National Disability Insurance Scheme Act* (2013) (Cth) saw the establishment of the social insurance scheme and the National Disability Insurance Agency (NDIA) to administer it. The scheme's main objective is to ensure that all Australians who acquire a permanent disability before age 65 have the necessary supports to manage their everyday activities. The Barwon trial site commenced operation in Victoria in July 2013. The Victorian Government has since pulled back from direct disability service provision, including the full hand-over of the day-to-day operations of state-owned disability group homes to community sector organisations. Nevertheless, both levels of government still have responsibility to promote the wellbeing of people with disability and fulfil Australia's responsibilities under the United Nations *Convention on the Rights of Persons with Disabilities* (UNCRPD). Indeed, the NDIS was never intended to be the sum total of efforts to improve outcomes for people with disability in line with what is expected under the UNCRPD. The *Australia's Disability Strategy 2021-2031* sets out other avenues for improvement.[3]

Therefore, in order to define clearly the respective realms of responsibility for the Australian Government and the states and territories in regard to supporting people with disability, the Applied Principles and Tables of Support (APTOS) was developed. APTOS was reviewed and agreed by the former Council of Australian Governments in November 2015. The document, which has not been reviewed since its inception, provides guidance regarding responsibility for services for people with disability in 11 sectors including health, aged care, and justice.

2. Criminal Justice interface

In OPA's response to the Disability Royal Commission's inquiry into the criminal justice system in 2020, OPA described a context for people with disability in contact, or at risk of contact, with the criminal justice system that is largely unchanged today. Housing, access to the NDIS for eligible parties, and sufficient skilled and willing service providers all remain serious issues, especially for people with behaviours of concern related to their disability.

The following case story of Ali, an OPA client, demonstrates many of the issues for people in the criminal justice interface. This cohort includes people subject to civil orders like Victoria's Supervised Treatment Orders (STOs).

[3] Australian Government, *Australia's Disability Strategy, 2021-2031* (Strategic Plan, 2021) <https://www.dss.gov.au/communique-australias-disability-strategy-2021-2031>.

Ali's Story

Ali is a young adult who has been let down by multiple people and systems, including, over the years, their family of origin, child protection, community mental health, the NDIS and the criminal justice system. Ali has an intellectual disability and a diagnosed mental health condition. They require, and have been found eligible for, 24/7 supports under the NDIS. They had been eligible for Specialist Disability Accommodation (SDA) funding for more than two years, with multiple failed attempts made by their guardian and specialist support coordinator to secure an appropriate SDA placement. These failures stemmed from thin markets in the regional areas where Ali wanted to live alongside administrative difficulties with the type of SDA approved in Ali's plan being considered by the care team as unsafe for Ali and any prospective co-resident. Ali had lived in a single unit for years in out-of-home care and had been approved for a two-person SDA.

After two-years of chasing SDA options, Ali's guardian decided to move Ali into a rental property head-leased by a Supported Independent Living provider. Ali had been placed on the Sex Offender Register and their unit was co-located with units for children in out-of-home care. The guardian no longer felt able to wait for an SDA option (in spite of the superior residential rights protections and the more desirable separation between accommodation and support provision).

Since moving into the new, single occupancy rental, Ali's well-intentioned support provider has struggled to manage their challenging behaviours. This, and other challenges (including distance), has contributed to Ali's Behaviour Support Practitioner withdrawing supports. Not having cared for participants with offending behaviours before, they are struggling to know how to support Ali and reduce their chance of reoffending. Ali's disability prevents them from fully understanding what is required of them under the *Sex Offenders Registration Act 2004* (Vic), and their care team say Ali is unable to comply with the Act's requirements without substantial support.

Ali's NDIS planner has responded to requests for NDIS funding support to help prevent further criminal justice engagement with the statement:

"*In regard to [Ali's] obligations and reporting requirements related to [their] justice involvement, this is not the responsibility of the NDIS and support should be provided to [Ali] by [their] Disability Justice worker."*

The guardian reports that Ali's Disability Justice worker does not see it as their job to provide the on-the-ground supports necessary to ensure Ali's compliance with the Act, nor have they offered any training to Ali's support staff to aid them in understanding Ali's situation. They have recently referred Ali to Victoria's Forensic Disability Justice Service but it is unclear what supports this service will offer, including whether it will provide training to Ali's direct support staff.

As well as housing difficulties, Ali's care team were also unhappy with the lack of engagement of Ali's community mental health workers. Ali currently has no mental health practitioner and receives no trained mental health supports, despite continuing to receive daily medication that Ali's most recent Behaviour Support Practitioner believed were prescribed to treat an acute mental illness.

The key points of relevance to this inquiry illustrated by Ali's story include:

- Specialist Disability Accommodation related difficulties, including thin markets and clear workable processes.
- The funding stalemate (discussed at section 2.3) disadvantages NDIS participants who need support with prosocial behaviours or compliance with State civil orders as a result of their disability

- The presence of thin markets for the provision of supports to participants with complex needs. Ali's support provider, who did not have relevant experience with supporting people with behaviours of concern or engagement with the criminal justice system, was the only one willing to take them on. A provider of last resort is required for people with complex needs who cannot attract an appropriate support provider.

2.1 Housing

The provision of safe, stable and disability appropriate housing would go a long way towards addressing many of the problems OPA sees for people with a disability in contact with the criminal justice system. OPA is aware that a lack of appropriate housing options is what keeps some people with disability languishing in remand or unable to be released on bail. This lack of housing has resulted from both a dearth of State investment in public and social housing and the failure of the NDIS's SDA 'market' to generate timely, sufficient options for the eligible members of this cohort. In Victoria, the most commonly available disability housing option for people not eligible for aged care or for those people who have mental illness who cannot access appropriate housing (staffed with community mental health workers) are Supported Residential Services (SRS). These privately run, largely unfunded facilities do not have the resources to appropriately support this cohort.

2.1.1 Specialist Disability Accommodation

As demonstrated above, in Ali's story, achieving positive housing outcomes using funding for SDA is often hampered by thin markets and significant administrative hurdles, which include communication difficulties between the many parties who need to be involved (assessment providers, support coordinators and NDIA planners). Ali's care team sought a change in the type of SDA they had been approved for—from 2-person SDA to single occupancy—but had gotten nowhere after two years of advocacy and assessment reports.

As has happened for Ali, OPA knows of a number of other people with complex support needs who have found themselves in accommodation settings owned and operated by their main support provider. This outcome is against the NDIS's original goal of promoting the separation of accommodation and support provision for participants, which has continued to be promoted by disability advocates like the Summer Foundation. This trend was also acknowledged in the 2019 paper *Challenges in housing and support under the NDIS*.[4]

Recommendation 1
The National Disability Insurance Agency should commission Specialist Disability Accommodation housing options for irregular support needs and where there are thin markets.

Recommendation 2
The National Disability Insurance Agency should provide clear market stewardship for Specialist Disability Accommodation and reduce administrative barriers to ensure timely participant funding outcomes.

[4] Independent Advisory Council to the NDIS, *Challenges in housing and support under the NDIS* (Paper, November 2019), 14 <Challenges+in+housing+and+support+-+November+2019+-+paper.pdf (squarespace.com)>.

2.2 Eligibility

The Australian Institute of Health and Welfare's report *The health of Australia's prisoners 2018* found that disability that placed limitations on the person's participation in education or employment was much higher in the prison population than the general community (for equivalent age groups). For example, among people aged 35 to 54 years, 'almost 1 in 10 (10%) people in the community and more than 1 in 3 (35%) prison entrants reported having education or employment participation limitations'.[5] Data for the same age cohort found that prisoners were slightly less likely than the general community to have 'core activity limitations', hence it is likely that the education and employment restrictions for prisoners were more likely related to cognitive than physical disability (for example, intellectual disability).

Correctional services do not screen all entrants for evidence of disability and this presents a hurdle to supporting NDIS access for eligible prisoners. One exception is Victoria's Youth Justice system which has implemented some changes to better support young people with disabilities as part of its 2020-2030 strategic plan.[6] All entrants are now screened for intellectual disability within a specified time, but problems remain around ensuring appropriate referrals are made for these children and whether the NDIA response is adequate.[7]

Data on how many people in the prison population are NDIS participants is not publicly available, which, alongside the lack of clear data about the disability needs of prisoners, makes it difficult to speak with certainty about the extent of the problem. Two small pieces of this puzzle suggest that unmet disability needs are rife in prisons and juvenile detention settings. First, a personal communication between Queensland Corrective Services and the Queensland Productivity Commission (noted in a report on NDIS markets) provides information that in September 2020 'only 155 of 9,070 prisoners in Queensland were identified as having an NDIS flag in internal records'.[8] While that does not mean that other prisoners were not NDIS participants, the ability of the systems to work together is compromised by this lack of information. Second, the Koori Youth Justice Taskforce which reviewed cases of Aboriginal children and young people involved in the system from October 2018 to March 2019, found that 37 per cent of 296 people presented with cognitive difficulties, while only 11 per cent were NDIS participants or receiving disability services.[9]

While having a disability does not necessarily make a person eligible for the NDIS, systems that do not adequately promote identification of disability in criminal justice settings nor enable the NDIA and corrections to work together to benefit the person undermine the human rights of people with disability.

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[5] Australian Institute of Health and Welfare (AIHW), *The health of Australia's prisoners 2018* (2019), 82–83.
[6] Victoria State Government Department of Justice and Community Safety, *Disability action plan – Implementation plan 2020-21*, (Strategic plan, December 2020) <https://www.justice.vic.gov.au/about-the-department/disability-action-plan-implementation-plan-2020-21>.
[7] Commission for Children and Young People (Victoria), *Our youth, our way: Inquiry into the over-representation of Aboriginal children and young people in the Victorian youth justice system* (Report, 2021) 229 <https://ccyp.vic.gov.au/assets/Publications-inquiries/CCYP-OYOW-Final-090621.pdf> ('*Our youth, our way'*).
[8] Queensland Productivity Commission, *The NDIS market in Queensland (Draft Report)* (2020), 423 <https//qpc.blob.core.windows.net/wordpress/2020/11/NDIS-market-in-Queensland-draft-report.pdf>.
[9] *Our youth, our way*, (n 7) 229.

OPA highlighted the four steps to enhancing access to the NDIS for eligible people in corrections in its 2020 submission to the Disability Royal Commission:[10]

- Identification: Individuals who may have a disability are identified as they enter prison
- Access: Individuals with disability who are in prison can access the NDIS
- Planning: Participants can take part in planning meetings
- Plan implementation: Participants can access NDIS-funded supports while in custody.

While the first two steps fall more to state responsibilities, all four require a functional interface between systems. On the NDIA's side, a commitment to funding assessments and engaging in planning processes while a person is in prison is essential. And, once an NDIS plan is in place, the support coordinator, in collaboration with the correctional facility, needs to support the participant to engage NDIS-funded services. In addition:

- Protocols must be in place for NDIS-funded providers to enter the custodial setting to provide supports
- If no existing providers exist to meet the demand, a provider of last resort arrangement needs to be in place and triggered.[11]

Recommendation 3
Australian jurisdictions should implement or review practices and procedures for identifying and screening prisoners with a cognitive impairment to ensure that these functions are carried out by staff with specialist knowledge.

Recommendation 4
Corrections Victoria should adopt protocols to identify whether individuals entering its services are potentially eligible to access the National Disability Insurance Scheme and facilitate access requests at the earliest opportunity.

2.3 Defining responsibilities

As mentioned in section 1.4.2, the APTOS is intended to clearly define the respective realms of responsibility for the Australian, state and territory governments in regard to supporting people with disability, including in relation to the justice interface.

In recent years, disputes between the NDIA and the states about responsibilities for people with disability in the justice sector have become more frequent. The Disability Royal Commission's Public Hearing 15: People with cognitive disability and the criminal justice system: NDIS interface continued the Commission's investigation of this issue in mid-August 2021. The hearing explored the 'dichotomy' that seems to have taken hold in this space: the idea that criminal (offence-related) behaviours that 'are not clearly a direct consequence of a person's disability'[12] can be clearly identified and separated from those that are. Evidence given at the hearing highlighted inter-jurisdictional funding disputes that have resulted from this position; OPA has witnessed the impact of these unresolved

[10] Office of the Public Advocate, *Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability: The Criminal Justice System Issues Paper* (March, 2020) 47-49 <https://www.publicadvocate.vic.gov.au/opa-s-work/submissions/royal-commission-into-violence-abuse-neglect-and-exploitation-in-disability-care/138-opa-submission-in-response-to-the-drc-criminal-justice-system-issues-paper> ('*Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability')*.
[11] Ibid.
[12] Australian Government Department of Social Services, 'Principles to determine the responsibilities of the NDIS and other service systems', *The Applied Principles and Tables of Support to Determine Responsibilities NDIS and other service* (27 November 2015) 23 <ndis-principles-determine-responsibilities-ndis-and-other-service-1.pdf (dss.gov.au)>.

disputes in our guardianship and advocacy work. The key issue here being the difficulty in determining the root cause of someone's offending behaviours, especially where cognitive impairment and a history of trauma or institutionalisation are involved. In practice, this has led to difficulties convincing the NDIA to fund services for people with disability in the justice space. Counsel assisting the Commission, Dr Mellifont, proposed that the issue be resolved by amending the rules and principles to the default position of 'where there is overlap between disability and criminogenic needs, that the Commonwealth will fund supports as though they are all disability needs' which would create 'a clearer …, easier system for the person to navigate.'[13]

Evidence given by NSW and Northern Territory government officers and then by Australian Government officers demonstrated the tensions between these jurisdictions around funding responsibilities. Evidence also exposed an apparent stalemate – with states pushing for a review of APTOS and legislative change to clarify responsibilities, and the Australian Government stating that this is unnecessary and that they are working with states to negotiate responsibilities on a case-by-case basis.[14]

People on STOs under the *Disability Act 2006* (Vic) sit in an even greyer area. STOs are civil orders not criminal orders. While there is a reference to civil orders in the APTOS, the responsibilities for services to people in this cohort is not definitive and under some interpretations may invoke the dichotomy referred to above and its problems. (More on this in section 2.4 STOs).

The Productivity Commission in 2019 suggested that a comprehensive gap analysis was necessary to ensure all people with disability continue to receive the supports they require, for governments to meet their human rights responsibilities.[15] This would also assist with resolving the current confusion over who and what is covered by the NDIS and state services, and who is missing out altogether.

Recommendation 5
The National Cabinet's Disability Reform Council should fund a comprehensive gap analysis, identifying community need and government objectives, to guide Disability Reform Council's discussion of the current problems with the Applied Principles to Determine the Responsibilities of the National Disability Insurance Scheme and Other Service Systems.

Recommendation 6
The National Cabinet's Disability Reform Council should review the Applied Principles to Determine the Responsibilities of the National Disability Insurance Scheme and Other Service Systems to ensure they provide clear guidance to resolve interface questions.

The Committee made a similar recommendation in its inquiry into NDIS planning:

> The committee recommends that the Commonwealth, states and territories, through the appropriate inter-governmental forum, consider the appropriate division of responsibility for the funding of supports for participants in the criminal justice system.[16]

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[13] Transcript of Proceedings, *The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (The Hon Ronald Sackville AO QC, Ms Andrea Jane Mason OAM, Mr Alastair McEwin AM,13 August 2021) 182 <https://disability.royalcommission.gov.au/publications/transcript-day-2-public-hearing-15-brisbane>.

[14] Ibid.

[15] Australian Government Productivity Commission, *Review of the National Disability Agreement* (Productivity Commission Study Report, January 2019) 99 <https://www.pc.gov.au/inquiries/completed/disability-agreement/report>.

[16] Joint Standing Committee on the NDIS, *NDIS Planning Final Report* (Report, 2020) rec 6 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/NDISPlanning/Final_Report>.

OPA notes the Australian Government response to the Committee report noted but did not support that recommendation in February 2021, instead listing a set of interventions they were using to address the underlying problem.[17] OPA notes that evidence provided by states and territories to the Disability Royal Commission on this topic strongly suggests that those interventions have not fully resolved the problems at the Criminal Justice interface.[18]

OPA is concerned that people with disability who are eligible for the NDIS are experiencing negative outcomes flowing from this disagreement over funding jurisdiction. Some people are spending longer than necessary in remand and in prison—as the result of transition planning and funding hurdles and a lack of 'last resort' accommodation and supports. Access to prisons for NDIS funded support workers may be difficult to arrange without the useful organisational connections OPA has with Corrections Victoria. OPA is certainly aware of a handful of high-profile matters where the NDIA and Corrections Victoria are working well together and making every effort to keep people out of prison; in at least one of these cases current difficulties for the person appear to stem from lack of access to acute mental health services.

Disputes over responsibilities for supporting people with disability to exit correctional settings must be causing confusion, inequitable decisions and poor outcomes for many people with disability. While often the 'block' is a lack of appropriate supported accommodation, where the responsibility for providing this accommodation should rest is not always the same. For people on compulsory treatment orders related to their disability, the problems are usually 'thin markets' or an NDIS plan that is insufficient to address the risks posed by the person's behaviours (to themselves and sometimes to others). However, for people on *Crimes (Mental Impairment and Unfitness to be Tried) Act 1997* (Vic) (CMIA) dispositions, who do not have access to forensic disability services because of their form of disability (for example, a person with an Acquired Brain Injury), the pathway out of prison is made very difficult by the lack of a State-funded therapeutic custodial option. OPA is aware that without a therapeutic pathway, a person's ability to progress from a Custodial Supervision Order to a Non-Custodial Supervision Order is severely impacted. Such people have no obvious pathway out of prison and often spend years in prison even when found not guilty on grounds of mental impairment.

2.4 Supervised Treatment Orders

OPA forms part of the State's protective oversight of people on STOs, a legislative regime that enables civil detention of people with an intellectual disability who fulfil certain criteria. The law prevents the publication of any material which might identify a person on an STO so OPA is not able to provide this inquiry with any case studies for this cohort. The following is a general discussion of the types of problems that arise for this group, some of which were also evident in Ali's story above.

OPA's experience with this cohort in recent years has raised serious concerns about the impact of the APTOS dichotomy on their access to services and supports. The fact that this cohort is under civil detention and therefore not technically part of the criminal justice system puts them in a very grey area of funding responsibility. Of course, the STO regime is a state regime, and a very small one – covering fewer than 40 people. However, OPA finds that this group have definitely been disadvantaged by the lack of clarity around funding and duty of care responsibilities and that these issues need to be jointly addressed. This confusion is not aided by the contradictory goals of the STO regime when compared to the NDIS—supervision to protect the community versus individual choice and control.

[17] Australian Government, *Australian Government response to the Joint Standing Committee on the National Disability Insurance Scheme (NDIS) Final Report: Inquiry into NDIS Planning* (Report, 2021) 5-6 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/NDISPlanning/Final_Report>.
[18] Ibid.

For example, the relationship and responsibilities of Authorised Program Officers (APO) versus Support Coordinators to NDIS participants subject to an STO is not clear and the person suffers. A common example is how likely an APO is to pursue an NDIS plan review where the plan is insufficient to fully deliver the STO treatment plan. The APO may make assumptions about what the NDIA will or will not fund based on experience with other clients and so not seek funding for some elements of the plan. It is unclear if the APOs' responsibility extends to pursuing the NDIA over plans that have been delayed or to seeking multiple plan or decision reviews. Some APOs note that they generally look to Support Coordinators to advance plan reviews and service options as required and do not actively follow-up on progress. And the Support Coordinators, who APOs are relying on to pursue the funding necessary to implement the STO treatment plan, have no clear responsibility in relation to the STO treatment plan at all. Do they share the APO's understanding of the necessity of fully funding the STO treatment plan and see it as their role to pursue this?

With the expansion of the disability services sector in response to the NDIS, APOs have been required to work with and educate new service providers (for example, Support Coordinators or people providing community access supports) who are new to the particulars of the STO regime. APOs report that this role can be very time consuming, especially where the other party is attempting to promote the NDIS goal of participant choice and control in a way that conflicts with the restrictions placed on the person by their order.

OPA is also aware of matters where supports listed in the person's treatment plan, or recommended by the person's behaviour support practitioner, have remained unfunded by the NDIA due to disagreement over the scope of the NDIA's funding responsibility. Sometimes this will be because of current gaps in legislative responsibility in relation to the justice cohort more broadly and the STO cohort specifically, while other times this appears to be due to internal NDIA policy developments in relation to 'red flag' terms such as treatment and supervision.

The NDIA's decisions to reject specific funding requests in relation to STO matters may or may not be unreasonable interpretations of the Act and its subordinate legislation. They often fall into the disability/justice grey-area, where state/territory and Australian governments responsibilities are poorly defined and resolution may only be achieved after lengthy inter-jurisdictional negotiations (if it is achieved at all). Whatever the reason for delay or denial of specific funding elements of a person on an STO, the outcomes of this situation are that the person is detained without the full range of supports they need to promote their wellbeing, maximise community participation and progress towards lower levels of restrictions (as STO legislation intends).

Sometimes this lack of necessary supports goes on for many months. Sometimes the extended funding negotiations put pressure on existing supports and result in gaps in funding and service delivery. In these circumstances, people on STOs suffer.

OPA notes that many of these issues are also faced by people subject to other forms of compulsory treatment under the Victorian Disability Act (including people in Residential Treatment Facilities or subject to Compulsory Supervision Orders).

Recommendation 7
The National Disability Insurance Agency should assign specific staff from their Complex Needs Pathway Planning team to be dedicated to handling matters that involve a person subject to compulsory treatment under the Victorian Disability Act.

Recommendation 8
The intergovernmental review of the Applied Principles and Tables of Support should clearly articulate State and Australian Government funding responsibilities for people subject to compulsory treatment under the Victorian Disability Act.

2.5 Provider of last resort

2.5.1 Provider choice and control

Sourcing a willing provider, whether for SDA or other supports, now requires an increasing amount of work involving multiple parties advocating for NDIS participants in this cohort. Before the NDIS, the courts could exercise pressure on the State to find a suitable disability residential service to enable prison release, as the State held a central vacancy management role and also operated and/or funded services in the sector. Now, the State no longer acts as a centralised vacancy manager of registered disability accommodation or Specialist Disability Accommodation. This means there is no single entity that can be compelled or held to account to provide accommodation or, indeed, any other services. The implementation of a person's plan, no matter the amount of funding or approved line items it contains, is halted if there are no providers to deliver the supports identified in the plan. An emerging issue is the retraction and refusal of specialist providers to take in clients with complex behaviours of concern. Until recently, OPA could be confident that a handful of providers would be skilled, resourced, available, and willing (for the most part) to support clients with offending behaviours. Their high levels of expertise and skills are still in need, but increasingly, providers advise OPA that some clients are "too difficult" and/or pose too great a risk to the occupational health and safety of their staff. Agencies also sometimes fear that they may be held responsible for the actions of the participant if they cause harm to others in the community. This is a rhetoric that is becoming familiar to OPA. This is one of the greatest downfalls to the NDIS' marketised approach: that choice and control is granted to both participants and providers. While there are often financial incentives for providers to take on participants with substantial NDIS funding, OPA concludes that, for many providers, the perceived risks outweigh the monetary benefits.

2.5.2 No provider of last resort

In the absence of willing providers in a marketised sector, no entity holds the duty of care, once squarely owed by governments, to provide services to people with disability. In the NDIS market, no one provider can be called on to step in in the event of market failure. In addition to the issue noted above, some specialist providers are leaving the market altogether as they claim the individualised funding model does not lend itself to funding services at the intersection of justice and disability. OPA holds grave concerns about the growth stunt in the forensic disability sector, especially in community settings. An important gap is created in the absence of a provider of last resort (which was effectively the State) and the dearth of specialist providers in the market. Moreover, further market issues are expected as providers struggle to survive in the sector during the COVID-19 pandemic. There is urgent need for government intervention to ensure a provider of last resort can fill gaps in the market.

Recommendation 9
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:

- **a provider of last resort mechanism is established as an ongoing component of the National Disability Insurance Scheme market**
- **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 recommended earlier)**
- **as soon as possible and where necessary, participants are transitioned back to support outside provider of last resort arrangements.**

3. Health interface

OPA welcomes the opportunity to draw the attention of the Committee to select interface issues arising between the Victorian health and mental health system's and the NDIS. The following discussion will present general OPA practice knowledge drawn from the experience of its Advocate Guardian Program and Community Visitors Program. In regard to the relevant term of reference B, OPA is including mental health within 'health.'

3.1 Hospital discharge issues

OPA has observed, through its Hospital Team within the Advocate Guardian Program, that wait times for approval of Supported Independent Living (SIL) by the Home and Community Team at the NDIA have increased significantly for some OPA clients who are in hospital to enable them to return to state-funded housing or their own properties in the community.

OPA has experienced situations where a number of clients have been presented with the option to discharge and hope that SIL approval is granted before the funds in their current plan are exhausted. It appears that the NDIA is providing multiple plan rollovers to ensure continuity of funding while clients' SIL applications are pending approval. OPA has observed that this appears the only way to assist clients to be discharged to community whilst awaiting accommodation approvals.

3.2 Mental Health discharge issues

OPA now draws the attention of the Committee to the Community Visitor Program run by OPA. Community Visitors perform an integral role of safeguarding the rights and interests of people with a disability. They provide a voice for Victoria's most vulnerable and marginalised individuals to ensure that they are not subject to abuse, neglect or exploitation.[19] They inquire into the adequacy of services and facilities provided to people receiving treatment in these facilities. Under the *Mental Health Act 2014*, Community Visitors have considerable functions and powers and they can speak with anyone who is receiving mental health services who wishes to communicate with them and view any documents required to be kept under the Act. Mental Health visits are made to consumers and residents in mental health facilities providing 24-hour care including the community step-down or step-up facilities, Prevention and Recovery Care (PARC) services.[20]

Mental health Community Visitors, in their safeguarding role, observe and report on issues affecting Victorians at the above-mentioned services and, as such, are uniquely positioned to witness interface issues arising between the Victorian mental health system and the NDIS. Community Visitors commonly witness NDIS interface issues at the point of discharge.

[19] Office of the Public Advocate, *Annual Report* (Report, 2021) 40 <https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/annual-reports/opa-annual-reports/359-opa-annual-report-2020-2021>.
[20] Ibid 14.

During 2020-2021, Community Visitors logged 50 significant concerns related to consumers' discharge. One consumer was not able to be discharged because there was an absence of positive discharge options available. Another was unable to be discharged because there was no positive therapeutic environment available. The consumer could return to the family home, however this was not the best therapeutic option and all attempts to connect the consumer to community-based supports failed.[21] This points to the need for a provider of last resort and, again, highlights the issue of lack of appropriate accommodation resulting in delayed discharge or discharge being unavailable indefinitely in the absence of suitable accommodation (as discussed above regarding the NDIA's refusal of SDA and consequent lack of access to SIL supports).

To connect with patients and residents during the 2020-2021 COVID-19 lockdowns, the Community Visitor program developed an Easy English mail-out survey designed to assure patients and residents that they had not been forgotten. The survey was conducted across the program's three streams prompted a call back from a Community Visitor if requested.

Of relevance to this discussion, there were 64 responses in the Mental Health stream with 16 people requesting follow-up. Their key concern was access to secure accommodation post-discharge.[22] It is clear that access to appropriate housing where suitable supports can be delivered is essential to supporting mental health. OPA wishes to highlight to the Committee the vital importance of secure housing and the dangerous consequences, including death, of discharge from hospital, psychiatric units and short-term accommodation into homelessness. The NDIS is uniquely placed to contribute to solutions to this problem. As a provider of disability accommodation, with effective market stewardship, the NDIS can ensure adequate supply and facilitate access to permanent supportive housing for people with enduring psychosocial disability who are at risk of homelessness.[23] By way of example, OPA now presents the following case story from the Community Visitor Program depicting issues arising at the mental health and NDIS interface.

Van's Story

Community Visitors had advocated for over two years for Van who has a brain injury. Van has lived in an aged care mental health unit for five years but he is considerably younger than most of the other consumers at the unit and he wants to move to supported accommodation in the community. He has no family or regular visitors other than NDIS support workers. Community Visitors had received updates that planning was in progress to assist Van to relocate but progress seemed very slow. OPA arranged a referral to the DFFH Intensive Support Team as there seemed to be a lack of clarity about the consumer's NDIS transition process which had been ongoing for several years. Despite supportive assessments from health practitioners, his NDIS application for SDA funding had been declined resulting in him missing out on an identified vacancy. This matter still remained unresolved at 30 June 2021.[24]

In the above case story, Van's needs remain unmet at the point of discharge: he remains in age-inappropriate accommodation rather than being housed in the community, contrary to his will and preference. This system breakdown at the interface between the NDIS and Victoria's Intensive Support Team has failed Van, as it has failed and continues to fail many people with psychosocial disabilities. Improvement at the State and Territory, and NDIS interface is a vital opportunity to better meet the needs of Australia's most marginalised people.

[21] *Community Visitors Annual Report*, (n 2) 50.
[22] *Community Visitors Annual Report*, (n 2) 7.
[23] Beyond Blue, *Submission to Royal Commission into Victoria's Mental Health System*, (July 2019) 29.
[24] *Community Visitors Annual Report,* (n 2) 50.

By way of example, OPA now presents an additional case story from its Advocate Guardian Program depicting NDIS interface issues arising at the point of discharge.

Blair's Story

Blair has an intellectual disability and mental illness. They are a young person who has been in a Secure Extended Care Unit (SECU) for the last two years. Blair is awaiting the outcomes of NDIS decisions regarding their eligibility and access to SDA accommodation and SIL supports.

Blair's involuntary treatment order is due to be reviewed early next year and is unlikely to be extended. Notably, both their care team and the Mental Health Tribunal agree that they are at risk of harming themselves and possibly others if, in the absence of supported accommodation, they were to discharge themselves when the current order lapses.

Applications and all supporting documentation for SDA and SIL were submitted however there has been no outcome from the NDIA Home and Living Panel after 3 months.

The above case story again demonstrates the system breakdown at the interface of the state-funded hospital and the federally funded NDIS. When state-funded care and NDIS supports do not work cohesively, vulnerable people such as Blair are left without safe housing options and subsequently also without appropriate supports. Importantly, Blair's care team and the Mental Health Tribunal Member have already identified a significant degree of risk in this matter that remains unresolved.

3.3 Housing

OPA, via its Advocate Guardian Program, is aware of people getting 'stuck' in Transition Support Units (TSU) for significant periods of time because suitable housing can neither be identified nor funded. OPA observes that an inability to find suitable SIL accommodation and unsuccessful applications for SDA feature in this mental health, housing and NDIS interface issue. The impact is twofold: there is an ongoing delay to their discharge date, and the bed is unavailable to others who are waiting, and needing, to access the service.

The NDIS and its processes, in this situation do not meet the needs of people who remain in TSUs but for the fact that alternative suitable accommodation has not been found. This situation also demonstrates the interrelationship between accommodation needs and psychosocial support needs. As a result of accommodation needs not being met by the NDIS, OPA is aware of mental health consumers remaining in a state-funded, secure environment. While the NDIA can of course decide that a person is ineligible for SDA, if suitable accommodation were available and provided by the state in the absence of SDA-eligibility, then appropriate SIL supports could be delivered in a suitable setting. It is unacceptable that a lack of appropriate housing effectively denies access to necessary disability supports for which people are eligible.

Additionally, these circumstances reinforce the need for a provider of last resort as discussed above at section [2.5]. If no existing providers exist to meet the demand, a provider of last resort arrangement needs to be in place and triggered to ensure the needs of vulnerable Victorians.[25] Relevant recommendations are presented at [2.1] and [2.5] in relation to housing and provider of last resort respectively.

[25] *Submission to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability*, (n 10) 47-49.

Charlie's story

Charlie is a person who has complex disability and mental health needs, and a significant trauma history. Charlie's disability-related behaviours of concern pose a risk of harm to themselves and the community. Charlie's advocate guardian made representations on Charlie's behalf to local community mental health services urging the services to treat Charlie on an emergency basis. The advocate guardian observed that Charlie's SIL housing agency had inadequate skills to effectively advocate to mental health services on Charlie's behalf. The advocate guardian also noticed that the community mental health services recognised Charlie's intellectual disability only but not their other needs, that include anxiety, paranoia and suicidal ideation.

Charlie has not been approved for SDA and, having stayed at Short Term Accommodation (STA) for some time now, is unlikely to receive further STA funding. Consequently, Charlie is at serious risk of eviction from the STA into homelessness or an SRS. The guardian considers that SRS accommodation would be unsuitable for Charlie because of their complex needs, namely that their anxiety and paranoia make them reliant on constant reassurance from staff that they are 'safe' and no one is coming to 'get' them, including multiple times through the night. Charlie's dual disability and mental health needs mean their behaviour can be volatile and includes absconding from the building at night.

In this example, the represented person's needs are unmet and look to remain unmet as they are currently without appropriate accommodation and a future SRS placement is likely to be unsuitable. Relevant recommendations are presented at [2.1], [2.5] in relation to housing and provider of last resort.

3.4 Mental health service system 'gap' and immature market

As a general observation, the diversion of state funding away from community-based mental health supports to the NDIS has resulted in a reduction of community-based mental health services, many of which no longer exist. This has negatively affected people with mental health needs who were previously receiving community-based supports but are not eligible for the NDIS: this cohort has been left without support (or with inadequate support) as a result of this 'gap' at the interface of state-funded and NDIS funded supports. OPA notes that numerous, key mental health organisations expressed grave concerns about the 'gap'[26] in mental health services and 'fragmentation'[27] of the mental health service system between NDIS and community-based supports in submissions to the Royal Commission into Victoria's Mental Health System.

Recommendation 10
All Australian Governments should work to ensure the availability of alternative psychosocial support for consumers who are not eligible for the National Disability Insurance Scheme.

There are elements of the NDIS support market for people with psychosocial disability that are immature, where people's needs are not necessarily being met appropriately, or, there is extreme complexity at the interface between the variety of service systems a person with psychosocial disability may be accessing. New and inexperienced service providers have emerged in response to the opportunity and implementation of the NDIS. Consequently, some mental health consumers who are NDIS participants are receiving poor quality

[26] Submissions to Royal Commission into Victoria's Mental Health System with discussion of 'Gap': Albury Wodonga Health, Anglicare, Australian College of Emergency Medicine, Australian Association of Social Workers, Australian Federation of Disability Organisations, Beyond Blue, Cohealth, Forensicare, Mental Health Legal Centre, National Disability Services, National Mental Health Commission, Orygen, Sacred Heart Mission, Vincent Care, Women's Mental Health Network Victoria.
[27] Alfred Health, *Submission to Royal Commission into Victoria's Mental Health System* (July 2019), 7; Monash Health, *Submission to Royal Commission into Victoria's Mental Health System* (July 2019), 40; Vincent Care, *Submission to Royal Commission into Victoria's Mental Health System* (July 2019), 16.

supports inappropriate to their needs. Observations expressed to the Royal Commission into Victoria's Mental Health System include this view from Anglicare: 'the small proportion of people with an NDIS package who suffer from a Mental Health condition, more often than not, have no Mental Health support as part of their package — and even those that do fail to receive appropriate services.'[28] OPA concurs with St Vincent's Hospital that safeguarding and protections are required as a matter of priority to ensure people with psychosocial disability and mental illness receive high quality supports appropriate to their needs: '[g]reater protection is needed to ensure adequate accreditation of service providers, to maximise the value and to prevent exploitation of consumers' limited NDIS resources.'[29]

3.5 Mental Health and Wellbeing Act

Turning now from failings to opportunities, Victoria's new Mental Health and Wellbeing Act presents an opportunity for the Parliament of Victoria to consider the way the new legislation will operate at the interface with the National Disability Insurance Act 2013. It is hoped that the legislative drafting and government approval process currently on foot (late 2021 to mid-2022) will provide opportunities for drafters and parliamentarians to consider the cross-jurisdictional overlay and see the Victorian mental health system in context together with the NDIS. As a result of Victorian mental health funding being redirected to the NDIS, significant 'gaps' arose (as discussed above) in a mental health system already in crisis. However, OPA notes that Victoria's new Mental Health and Wellbeing Act cannot solve failings within the NDIS or interface issues arising from within the NDIS. No amount of solely State or Territory legislative reform in isolation can ameliorate NDIS interface issues; the nature of the problem demands collaboration and working together. OPA urges the Committee to act upon the recommendations presented in this submission to ease the significant interface issues discussed, particularly housing and provider of last resort.

4. Supported Residential Services interface

4.1 Privatised system of last resort

In Victoria, the SRS sector provides supported accommodation for about 4000 people experiencing vulnerabilities.[30] SRS are owned and operated by private providers and house residents with diverse health needs related to ageing, disability, complex mental health conditions and addiction. The sector includes facilities 'designed with low staffing ratios to accommodate large numbers of residents in a communal setting for a fee of 85-95 percent of the disability or aged pension'[31] (often referred to as pension-level SRS) as well as facilities which cater to those who can afford to pay more. Only some SRS receive funding through the Victorian Government's Supporting Accommodation for Vulnerable Victorians Initiative (SAVVI) or the Pension-Level Projects (PLP). However, several pension-level facilities are without any Victorian Government funding or support.

The recent PhD by former OPA staff member Elizabeth Dearn, "Choice and control? Understanding how residents with psychosocial disabilities remain in 'transinstitutional' settings despite the 'once in a lifetime' opportunity of the National Disability Insurance Scheme", examines the experiences of 12 NDIS participants living in pension-level SRS.

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[28] Anglicare, *Submission to Royal Commission into Victoria's Mental Health System* (1 July 2019) 31 (*Anglicare submission*).
[29] St Vincent's Hospital Melbourne, *Submission to Royal Commission into Victoria's Mental Health* System (July 2019), 29.
[30] *Community Visitors Annual Report,* (n 2) 18.
[31] Elizabeth Anne Dearn, 'Choice and control? Understanding how residents with psychosocial disabilities remain in 'transinstitutional' settings despite the 'once in a lifetime' opportunity of the National Disability Insurance Scheme' (PhD Thesis, RMIT, 2021), xviii <https://researchrepository.rmit.edu.au/esploro/outputs/doctoral/Choice-and-control-Understanding-how-residents/9922072369901341?institution=61RMIT_INST>.

A key plank of the work is exploring how a participant's capacity for choice and control under the NDIS is influenced by the SRS setting and the views and power held by key people in the participant's life—which includes SRS proprietors. The research concludes that:

> SRS can be defined as an 'end in [themselves] itself' comparable to institutional types such as Goffman's homes for aged or incurables, where the purpose is 'either to lock people away from society, or simply to dump them somewhere conveniently'.[32]

Dearn's work is highly relevant to the question of how the NDIS can achieve its stated goals while participants continue to reside in institutional settings, and OPA recommends it to the Committee.

OPA guardians are regularly left with no alternative but to make a decision to place people in SRSs to avoid homelessness and/or facilitate discharge from hospital or acute mental health settings. This aligns with Dearn's finding that most SRS residents do not actively chose to enter SRS and their 'freedom to leave is influenced not by force and physical barriers, but low economic capital and the presence or experience of legal restrictions'.[33] Furthermore:

> 'That the two top exit destinations for SRS residents in 2018 were 'another SRS' and 'death' … is perhaps indicative of the difficulty people experience in finding alternatives to SRS that match their choices.'[34]

4.2 Potential for conflict of interest

While OPA and Community Visitors have been raising concerns about the conditions of SRS for over 30 years, recent media attention has generated greater public awareness of the SRS sector and exposed the downsides of its NDIS interface; one element of which has been the commodification of vulnerable people. *The Age* in its recent article *State seizes control of supported care homes over abuse, 'uninhabitable conditions'*[35] described an investigation by the Victorian Government which revealed "coercion and abuse of residents, uninhabitable living conditions, forgery of signatures and access to NDIS services being hindered."[36] A 2020 investigation by *The Age* revealed two SRS that were caught up in "an ugly turf war with rival disability providers over the right to access residents' lucrative NDIS funding packages, with allegations of abuse and residents being moved in the middle of the night."[37]

These occurrences lend support to Dearn's argument:

> 'That, rather than residents being free to achieve self-determination, the SRS model was inadvertently strengthened by NDIS and that residents became more embedded in SRS as a result. [Dearn] conclude[d] with the observation that the NDIS was not sufficient for SRS residents to achieve choice and control over their lives, because of the limiting structures and relationships within which residents

[32] Ibid 129; Dearn quoting Christie Davies, 'Goffman's concept of the total institution: criticisms and revisions' (1989) *Human Studies*, 12(1) 77–95.
[33] Ibid 122.
[34] Ibid 124.
[35] Jewel Topsfield and Royce Millar, 'State seizes control of supported care homes over abuse, 'uninhabitable conditions', *The Age* (online, 13 January 2022) <https://www.theage.com.au/national/victoria/state-seizes-control-of-supported-care-homes-over-abuse-uninhabitable-conditions-20220112-p59nlx.html>.
[36] Ibid.
[37] Ibid.

were making choices. Significant change in residents' cultural, social and economic capital will be needed for them to experience transformation in the NDIS.'[38]

OPA is aware that in Victoria, there are increasing numbers of SRS proprietors setting up NDIS businesses. In some of these businesses there is a lack of transparency and accountability about the use of NDIS funds. As reported in their most recent annual report, Community Visitors have documented allegations that a growing number of SRS residents are susceptible to exploitation by proprietors who are unable to explain the use of NDIS funds to pay for services previously provided by the SRS. Community Visitors are concerned that some NDIS participants may not be getting the much-needed services funded in their NDIS plan.[39]

In February 2021, the Public Advocate wrote to the NDIS Quality and Safeguards Commission documenting seven cases of alleged abuse by proprietors of SRS residents identified by Community Visitors. These were:

- refusing entry to or threatening to evict residents who would not sign up to the SRS proprietors' NDIS business
- double dipping of resident funds where the NDIS support worker is allegedly providing individual support services to a particular resident while simultaneously being employed in the SRS serving all the residents
- lack of transparency around the use of NDIS funds as some residents have claimed that their NDIS funds have 'disappeared'
- services previously provided as part of a resident's SRS agreement, such as showering assistance, is now only available to those who can pay separately under their NDIS plan, while SRS residents without plans now only receive 'shower reminders' with no reduction in SRS fees
- charging residents with an NDIS plan separately for services they already pay for in their SRS fees such as cleaning and laundry
- charging for NDIS services such as psychological support, that are not provided
- technological equipment purchased for residents through their NDIS plan disappearing for extended periods of time.[40]

All of this is evidence of the power held by SRS proprietors over residents, and what happens for residents (exploitation, abuse and neglect) when safeguards are ineffective and regulatory responsibilities are unclear.

At the SRS/NDIS interface, there is a complex regulatory matrix operating; regulation can depend on the source of the funding, status of the provider and legislation that may not align. In Victoria, social service reform will occur through the introduction of new Social Services Standards and the development of a new independent regulatory body to oversee them. Passage of the Social Services Regulation Bill 2021 provides for regulation of a variety of services including SRS, family violence, homelessness and disability services not within the NDIS. The new regulator will also oversee children youth and families services. OPA has concerns about one regulator overseeing these diverse sectors and eagerly awaits the consultation regarding the new Social Service Standards which will be critical to regulation of the SRS sector. For SRS residents who also receive NDIS services from the SRS proprietor (whether the same company or an affiliated company), they lie at a complex interface where jurisdictional oversight is not always clear.

Community Visitors have identified a need for improved and stronger oversight of SRS. In their recent Annual Report, Community Visitors argued that regulatory change must ensure

[38] Dearn (n 32) 13.
[39] *Community Visitors Annual Report*, (n 2) 8.
[40] *Community Visitors Annual Report,* (n 2) 76.

that current and prospective SRS proprietors meet a strengthened 'ft and proper' person criteria to ensure they are appropriate service providers for this vulnerable clientele. Further, they argue that a stronger regulation and enforcement system tailored to the sector's operations that includes improved mandatory staff qualifications and increased compliance requirements for proprietors is required to meet the increasing resident complexity and the resulting challenges.[41]

OPA has seen in the past that regulatory bodies assume responsibility solely for the provision of the services they regulate and people fall through the cracks between the maze of services and regulation. *The Age* investigations referred to above speak to the complexities, and Community Visitors who visit SRS have been identifying ongoing and emerging interface issues regarding regulation and safeguarding since the introduction of the NDIS; an environment which is becoming increasingly complex.

The NDIS Quality and Safeguards Commission has published Compliance and Enforcement priorities for 2021-2022, one of which is the management of conflicts of interests by NDIS providers. The pace at which the SRS sector is evolving at the NDIS interface requires sophisticated regulation and a human rights approach that values quality of service and opportunity for choice and control and access to advocacy and support for decision making for residents in relation to where they live and the services they access.

OPA's recent submission on the NDIS Act Amendment Bill (Participant Service Guarantee) 2021 made a number of recommendations in response to amendments contained in Section 8 of the proposed *NDIS (Plan Management) Rules 2021* (Cth)*,* Supports not to be provided by particular providers. OPA noted the proposed rule 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 submission is available on OPA's website and the key recommendations are included here. These repeat recommendations made in OPA's submission to the Tune Review:

Recommendation 11

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

Recommendation 12

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 13

Sub-section 10(2) of the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* (Cth) 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.

[41] *Community Visitors Annual Report,* (n 2) 8.

Recommendation 14

The Australian Government should amend the *National Disability Insurance Scheme Act 2013* (Cth) 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 National Disability Insurance Scheme-funded services. Amendments should state that:

- **Community Visitors are entitled to see copies of a participant's National Disability Insurance Scheme 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).**
- **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.**

4.3 Advocacy and support at the interface

Dearn's work, however, demonstrates that even with such protections, SRS are not settings in which it will usually be possible to achieve a full and flourishing life, or social inclusion, even with the additional funds provided to eligible residents under the NDIS. Their institutional nature precludes such positive outcomes. At best, adequate regulation will prevent clear exploitative practices and abuses. Dearn's position that a significant improvement in SRS "residents' cultural, social and economic capital will be needed for them" to experience the benefits promised by the NDIS suggests that the NDIA should act to promote more equitable outcomes. Alongside the crucial planks of alternative, independent housing options with adequate supports and independent advocates, SRS residents would also likely benefit from targeted, funded outreach to help them access and fully benefit from the NDIS.

Dearn found that every resident involved in their research "expressed the goal to move out of SRS at some point in the study, supporting research which shows that most people with psychosocial disability prefer to live in independent housing with support rather than in congregate care settings. However … eighteen months after the start of the study only three residents had moved into independent housing, all unrelated to the NDIS."[42] Further, Dearn argues that SRS were never designed as a recovery model, with low staffing levels and the role of SRS staff not including "any recovery or rehabilitation support".[43] Hence, they have never been a setting where people with psychosocial disabilities flourish.

Recommendation 15

NDIA should set up an active outreach program targeted at congregate-care providers (for example Supported Residential Services in Victoria) to ensure residents are getting independent advocacy supports, supported-decision making services and opportunities to explore independent housing options to address the largely closed institutional nature of these 'last resort' facilities.

The other fixes are bigger than the NDIS and would involve joint intention of both Australian and state and territory governments to address housing affordability, social and public housing shortages as well as adequately funded, comprehensive acute and community mental health systems that do not end up depositing people in SRS.

[42] Dearn (n 32) 123.
[43] Dearn (n 32) 126.

5. Aged Care interface

The following material updates OPA's submission to the Australian Government's Royal Commission on Aged Care Quality and Safety (2019) (Royal Commission).[44]

5.1 Young People in Residential Aged Care

Lisa Corcoran's public account of her experience of living as a young person—43 years old—in a Residential Aged Care Facility (RACF) to the Royal Commission supports OPA's view of the inappropriateness of RACFs for younger people with disability. Lisa's statement at the time of her presentation to the Royal Commission (September 2019) that she was "counting down the days until she moves" into specialist disability accommodation (SDA) which had already been approved, is most welcome and highlights the importance of making more SDA readily available to avoid further inappropriate admissions.[45]

When the NDIS began its rollout in July 2013, six thousand young people were living in RACF and were deemed a 'priority group' in the transition to the NDIS. Five years on at the end of 2018, most of the cohort had an active NDIS plan but 5,905 were still residing in a RACF. At 30 June 2020, 4,860 people under the age of 65 were living in residential aged care.[46] The SDA market has taken a long time to develop and is often not available to the many people with disability who need this type of housing. This lack of availability is compounded by delays in the planning process and both SDA and SIL funding approval. OPA guardians from the hospital and intake team have remarked that the administrative process to move someone into aged care is much quicker than the NDIS SDA pathway. The difficulty getting SIL approval can also delay a person's ability to remain or return home, OPA Guardians have observed the following regarding the availability of SIL:

- wait times for approval of SIL via the Home and Community Team at NDIA seems to have increased significantly.
- Sometimes, even when an OPA Guardian found an appropriate SDA property, the level of SIL funding the NDIA provided was inadequate to meet the young person's needs so they could not move out of an RACF. Therefore, when a younger person is awaiting discharge from a hospital, these bureaucratic hurdles can result in guardians consenting to a placement into a RACF, for lack of an alternative NDIS-funded vacancy. It takes strong and persistent advocacy from guardians to prevent younger people being moved from hospital into RACFs. This is a good example of the interface between the state and Australian governments: the hospital (state) wants the patient to leave to free up a bed, while the NDIA (Australian Government) takes its time making its decision, while OPA (state statutory entity) is caught in the middle trying to advocate for appropriate accommodation where none exists unless the NDIA agrees to fund it.

One current OPA guardianship matter involves a young person who has been living in aged care for about eight years. Over this time, there have been a number of proposals to move the person out of aged care and into more appropriate housing in the community. The person was initially accepted at two possible locations and was subsequently declined

[44] Office of the Public Advocate, *Submission to the Royal Commission into Aged Care Quality and Safety* (2019) <https://www.publicadvocate.vic.gov.au/opa-s-work/submissions/aged-care-royal-commission/199-submission-to-the-royal-commission-into-aged-care-quality-and-safety>.
[45] DPS Publishing, 'Royal Commission: "My number one goal is to get the f*** out of the nursing home"'*Talking Aged Care (*Article, 9 September 2019) <https://www.agedcareguide.com.au/talking-aged-care/royal-commission-my-number-one-goal-is-to-get-the-f-out-of-a-nursing-home>.
[46] Australia Government, Australian Institute of Health and Welfare, *People using aged care* (Undated) <https://gen-agedcaredata.gov.au/Resources/Factsheets-and-infographics/People-using-aged-care>.

housing because the NDIS funding was inadequate to cover the person's support needs, which include a two-person transfer at all times. This is a frustrating and disappointing example of system failure at the interface between state-funded housing and NDIS funded supports. But for insufficient NDIS funding to meet the person's essential care needs, this person would now be living in age-appropriate housing. Sadly, the person remains in aged care.

Joseph's Story

Joseph is in his forties and was in hospital with a severe medical condition that requires significant carer support. The hospital wanted him to go into aged care because he had been in their ward for more than six months. The guardian contacted a community advocacy group working to move young people out of aged care to assist in identifying appropriate accommodation options. Joseph would have been eligible for SDA, however, after several weeks, an appropriate SIL property was found, and he moved into that property.

The 2019 Younger People in Residential Aged Care (YPIRAC) Action Plan was released on 22 March 2019. The Action Plan was superseded by the *YPIRAC Strategy 2020-2025* released on 30 September 2020.[47] The latest update to the YPIARC strategy has indicated that as of June 30, 2021, significant gains had been made on meeting the strategy's ultimate target of having no person under 65 years living in an RACF in Australia by the end of 2025, unless they chose to do so. 156 people were admitted to RACFs. This is a 37 per cent reduction on the previous year. There were 3,899 people under 65 years living in in an RACF. This is a 20 per cent reduction on the previous financial year. One hundred people under the age of 45 years were living in RACFs at 30 June 2021, a 23 per cent reduction on the previous year.[48]

OPA recognises that progress has been made however guardians still experience pressure to place younger clients in aged care. Hospitals would like a guardian to place their client with high support needs who is ready for discharge in any available accommodation including aged care, regardless of its suitability for the person, as that would free up a hospital bed. While there are an increasing number of NDIS practitioners available to assist NDIS participants not to move prematurely into aged care, there is often nowhere else for people with significant support needs to go. This situation is particularly true for people aged between 60 and 64, who are increasingly entering aged care, as the Action Plan acknowledges, with the majority of younger people who were in aged care in the June quarter of 2021 being in that age group.[49] Because of their age, this group is unattractive to the market and options are limited. In a limited number of cases, where the person may have had a degenerative illness and needed palliative care, it may have been reasonable for the person to move into an RACF, but otherwise it is not.

If the Australian Government's policy targets on younger people in aged care are to be met, then the NDIA needs to use its ability to leverage the market to stimulate the growth of new SDA that meets the housing needs of people with complex needs.

The situation is compounded by the fact that it would have been perfectly reasonable a year ago to assume that younger people at risk of premature entry to aged care would be provided with SDA and probably SIL, but currently guardians are finding that this is not the case, and their applications are being refused.

[47] Australian Government, *Younger People in Residential Aged Care Facilities 2020-25* (Canberra, 2020)
[48] Australian Government, Australian Institute of Health and Welfare, *GEN fact sheet June 2021 Younger people in residential aged care* (Canberra, 2021) <https://www.gen-agedcaredata.gov.au/Resources/Younger-people-in-residential-aged-care>.
[49] Australian Government, *Younger People in Residential Aged Care Strategy 2020*-25: Annual Report 30 June 2020 – 30 June 2021 (Report, 2021) 26, Table 10.

Nicholas' Story

Nicholas has been an NDIS participant for several years and has now he is over 65. He has an intellectual disability and other medical conditions, which means he can no longer return to his previous accommodation—an SRS which was not suitable for him but he had no other place to live—which can now not meet his needs. Nicholas has previously been refused SDA. While in hospital, his NDIS supports going into hospital were reduced because they were considered to be the responsibility of the health system.

Nicholas requires a high level of staffing support, and he has been refused SIL previously. The guardian has observed that it appears increasingly unlikely that clients who require the higher levels of support will have their SIL request approved. If this revised SIL request is refused, an RACF may be the only option. Both the guardian and Nicholas' family feel that aged care would not manage his disability well and wish him to remain in the NDIS for as long as possible. The request for SIL was put in several months ago and Nicholas is still in hospital awaiting an outcome.

The NDIA asked that an option of aged care is considered even though Nicholas is entitled to remain in the NDIS, which is better suited to his needs than an RACF would. Is this an example of the NDIA attempting to shift its costs from the NDIS to the aged care system?

OPA is aware of the Summer Foundation's work to create more accessible housing options for people with disability who need SDA through its partnerships with government and community housing providers. Its top priority is to build housing that will enable younger people with disability to move out of RACFs into suitable housing in the community.[50] Further investment in this type of housing could reduce the rate at which younger people were moving into aged care, reducing the scale of the problem over time.

Guardians have noted that it is particularly difficult to find age-appropriate disability specific accommodation in rural and regional areas, particularly if the person has complex needs. In a rural area, the particular people with complex support needs are known to the few available service providers, who often say they cannot support the person concerned. This can mean that no appropriate service provider is available, which can either lead to a lack of necessary care or it may force the person to move to a larger metropolitan city away from their family and friends. This situation may be particularly disconcerting for Aboriginal and Torres Strait Islander peoples who may wish to live on country and be near their kin.

The Aged Care Royal Commission recommended in relation to SDA (Recommendation 74) that:

> "g. requiring the National Disability Insurance Agency to publish an annual Specialist Disability Accommodation National Plan setting out, among other things, priority locations and proposed responses to thin or underdeveloped markets
>
> h. providing directly for, where appropriate and necessary, accommodation in the Specialist Disability Accommodation market, particularly in thin or underdeveloped markets".

In its response, the Australian Government did not directly address this request, indicating instead a number of SDA documents with different data in each one. OPA would like to see the type of SDA plan produced, as discussed by the Royal Commission.[51]

[50] Summer Housing, *Housing Model* (2017) <https://summerhousing.org.au/about-us/housing-model/>.
[51] Australian Government, *Response to the Final Report of the Royal Commission into Aged Care Quality and Safety* (Report, 2021), Recommendation 74, 48 <https://www.health.gov.au/sites/default/files/documents/2021/05/australian-government-response-to-the-final-report-of-the-royal-commission-into-aged-care-quality-and-safety.pdf>.

Recommendation 16
The Australian Government should implement all aspects of Recommendation 74 from the Royal Commission into Aged Care Quality and Safety, particularly those aspects relating to the development of an annual Specialist Disability Accommodation National Plan.

The Australian Government should recognise that the huge demand for SIL and SDA is unmet and requires even more government investment and market stimulation. This gap in the housing market has forced and is forcing many younger people with significant disability to enter the aged care system prematurely and inappropriately. Application processes for these disability-specific supports should be streamlined and shortened to allow a greater number of people with disability to access these supports more quickly than is currently the case. The even greater gap in the housing market in rural and regional areas requires more attention to meet current and future demand.

OPA is aware that many younger people living in RACF have complex health needs which cannot be met by disability support workers. This is often one of the reasons that young people are forced to move into RACFs. OPA strongly supports the Queensland Office of the Public Advocate's recommendation on this issue to the Royal Commission.[52]

Recommendation 17
The Australian Government should, as a matter of urgency, seek to clarify and finally settle with State and Territory governments the funding issues associated with the provision of necessary health supports for National Disability Insurance Scheme participants with complex health and disability needs who are wanting to transition from residential aged care facilities (and other health and disability facilities) to community-based accommodation.

[52] The Public Advocate (QLD), *Submission to the Royal Commission on Aged Care Quality and Safety* (April 2019) 33 <https://www.justice.qld.gov.au/__data/assets/pdf_file/0010/699679/opa-submission-royal-commission-into-aged-care-quality-and-safety-final.pdf>.