

23 May 2023

NDIS Review Secretariat - Department of the Prime Minister and Cabinet  
PO Box 6500  
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Via email: [contactus@ndisreview.gov.au](mailto:contactus@ndisreview.gov.au)

Dear Professor Bonyhady and Ms Paul

### **Comments on NDIS Quality and Safeguarding Framework Issues Paper, and NDIS Participant Safeguarding Proposals Paper**

Thank you for the opportunity to comment on the NDIS Quality and Safeguarding Framework Issues Paper, and the NDIS Participant Safeguarding Proposals Paper. I will take the opportunity to comment on both of these papers in this letter, since there is some obvious overlap between the ideas in both papers (and in my comments on them). Throughout this letter I make reference a number of times to the submission from Australia's Public Advocates and Public Guardians to the NDIS Review (dated 17 March 2023), which I will refer to as the 'PA/PG submission'. I also refer to my two-volume report on Adult Safeguarding in Queensland, the second volume of which was tabled in Queensland Parliament on 8 December 2022.<sup>1</sup>

#### **NDIS Quality and Safeguarding Framework Issues Paper**

The main comment I make about the NDIS Quality and Safeguarding Framework echoes comments made in the Issues Paper about the framework's operational impact. It is in fact unclear to me how much the framework has been resourced and to what extent it has been operationalised. Certainly, I am aware that of the three safeguarding 'components', the 'developmental' and 'preventative' components have received less attention than originally intended, for well-publicised reasons concerning the need to bring people into the developing scheme.

When it comes to the third, 'corrective', component, my principal observation is that there has been a lack of synthesis and indeed communication between the various elements. My particular experience concerns the challenging and quite unworkable information exchange practices that occurred between Community Visitors and the NDIS Quality and Safeguards Commission when I was based in Victoria. My experience was that after a referral was made to the Commission, only very scant information about the Commission's response was able to be provided back to Community Visitors, which made follow-up by Community Visitors very difficult (the current privacy provisions in the *NDIS Act* are a significant inhibitor here). This experience indeed gave rise to the concern that I have voiced in consultations with the NDIS Review team that privacy trumps well-being under current NDIS safeguarding arrangements. I make further comments about this topic below.

#### **NDIS Participant Safeguarding Proposals Paper**

I agree with, and support, the three proposals articulated in the NDIS Participant Safeguarding Proposals paper, namely that there should be one strategic approach to participant safeguarding,

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<sup>1</sup> Office of the Public Advocate (Qld), *Adult Safeguarding in Queensland, Volume 2: Reform Recommendations* <[https://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0011/749027/adult-safeguarding-vol-2-final.pdf](https://www.justice.qld.gov.au/__data/assets/pdf_file/0011/749027/adult-safeguarding-vol-2-final.pdf)>, 2022.

that an improved engagement with participants on risk and safeguards is required, and that improved individual safeguards are warranted for those in need of these (I do make the point that a number of mechanisms listed at p. 32 under the 'NDIS Commission safeguards' heading are not in fact overseen by the Commission).

In relation to the first proposal I note that Recommendation 10 in the PA/PG submission called for the adoption of 'a clear policy and associated guidelines surrounding the provision of services to any NDIS participant whose wellbeing is at significant risk due to the disability services market's inability to meet the participant's service entitlements.'

On the second proposal, it will be particularly important to build into a participant's pathway a direct discussion about risk and safeguards. I think this is an excellent idea, though I am somewhat nervous about how this might be operationalised in busy settings with possibly junior staff. Some detailed thought will need to be given to how this can be meaningfully implemented in a way that is particularised to individuals so that it does not become a 'tick-a-box' run through of generic safety information.

The discussion about the third proposal (improved individual safeguards) certainly raises the matters that I would wish to see included. Greater support for decision-making (pp. 35-6 of the proposals paper) will be a very important way of increasing the ability of many participants to exercise greater control over their lives, which is a crucial safeguarding step forward for them. I note here parenthetically that Recommendation 2 in the PA/PG submission sought a number of reforms that would enable participants to be better supported to make their own funded, and other, decisions.

The need for improved information sharing practices among agencies (pp. 36-37 of the proposals paper), as indicated in my comments above on the current Quality and Safeguarding Framework (and in Recommendation 13 of the PA/PG submission), is a crucial reform development that will require legislative change. More than just enabling agencies to exchange safety-related information, I would like to see agencies actively encouraged (and on occasions obliged) to share safeguarding information in appropriate circumstances. In my office's 2022 report on Adult Safeguarding in Queensland, I discussed this topic and made the following recommendation:

'Prescribed agencies should be authorised to provide personal information about at-risk adults to other prescribed agencies in circumstances where the provider of the information reasonably believes that the information will assist the recipient:

- to exercise an official function concerning the safety or wellbeing of an at-risk adult; or
- to address a concern about the safety or wellbeing of an at-risk adult that has arisen in the course of the provision of services to the adult.'<sup>2</sup>

The call for greater navigation assistance (pp. 37-38 of the proposals paper) is something I strongly support; such a reform necessitates, in my view, substantially elevated basic skill requirements for support coordinators, something the PA/PG submission considered in Recommendation 8. On this score, it will be important for there to be better, and more-longer term, funding of advocates, who have a crucial role to play to assist isolated participants (on this point see also the PA/PG submission at p. 16).

The need for 'a clear point of contact to raise issues about safeguarding' (p. 39 of the proposals paper) is something that is fundamental to an effective safeguarding system. The PA/PG submission engaged this point in Recommendation 12, where we called for the publication of 'clear emergency contact information for NDIS participants and their supporters that can be used in situations where the participant may be at risk due to the absence of adequate disability support services'.

In addition, I would observe that this need for a clear safeguarding contact point is the reason I called recently for the appointment here in Queensland of an Adult Safeguarding Commissioner.<sup>3</sup> The identification of a clear safeguarding contact point is very important in and of itself. But it also

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<sup>2</sup> Ibid, p 42-43,

<sup>3</sup> Ibid, p 11.

has very important implications for the ability and willingness of both participants, and people around them (including strangers), to play active 'natural' safeguarding roles. Knowing who to contact when things are not going well immeasurably increases the likelihood that people will take an interest in the wellbeing of people around them, since they will know who to contact if needs be. The challenge in the NDIS context is to identify how the various (and jurisdictionally different) state and territory safeguarding agencies should best interact with the NDIS Quality and Safeguards Commission and the NDIA. Considerable further work will be needed on this score, though the headline 'no wrong door' approach should guide all of our reform actions here.

The need for fast-track critical safety responses (p. 39 of the proposals paper) is something I and others have also raised and strongly support (see, for instance, Recommendation 12 in the PA/PG submission).

I devote my final comments to the importance of outreach and visitation (p. 40-43 of the proposals paper). The significance of someone other than service providers having 'eyes on' participants with significant support needs cannot be overstated. I am a strong advocate for the importance of independent Community Visitors visiting NDIS participants with high support needs. Obviously, Community Visitors do not exist in all jurisdictions, something which will be important to be remedied. In addition, I do not think the criteria that currently determine who is visited (in the jurisdictions that have these schemes) has yet been worked out satisfactorily.

Some jurisdictions (e.g. NSW) are broad in their criteria, which necessitates a considerable degree of triaging. Some jurisdictions are very specific (e.g. Queensland and Victoria) but the terminology used means that it can be hard to identify just who meets the criteria of being 'visitable'. In Queensland, the definition of 'visitable site'<sup>4</sup> is complex. It refers to places where participants receive certain levels of funded support but excludes a 'private dwelling house', and it is particularly the definition of 'private dwelling house' that is complex. For instance, a person who is subject to a restrictive practice who lives alone is defined not to be in a 'private dwelling house', but they would be in a 'private dwelling house' if they lived with a relative (and satisfied other criteria).

In Victoria, a significant focus of visits by Community Visitors to NDIS participants is their visits to houses that come within the legislative definition of an 'SDA enrolled dwelling'.<sup>5</sup> The development of the SDA market, and alternative accommodation settings where NDIS participants with high support needs live, is such that this criterion now is too narrow.

The origin of Community Visitors programs goes back to a time where 'place-based' visitations made sense (historically they visited institutions). With the advent of more varied accommodation settings, place-based criteria no longer make sense. Instead, we need to focus on ensuring that people with high support needs and other relevant criteria are entitled to visits by Community Visitors. The challenge here is to develop the safeguard in such a manner that it is in place for people who would benefit from it, but so that visits by Community Visitors are not forced upon those who would not benefit from them, or who choose not to have them.

I think it makes sense to establish an 'opt-out' entitlement among certain NDIS participants to be visited by Community Visitors. The reason for this is that an opt-in entitlement could see service providers, intentionally or otherwise, pressuring participants not to ask to see Community Visitors. While an opt-out process could, of course, still see pressure placed on participants to ask not to be visited, this would at least involve communication with the person about their preference, which would provide the opportunity for some discussion about the reason for their decision (especially if it were suspected that pressure had been put on the person to opt out of visits).

As regards who should be visited by Community Visitors, I would like to see simple entitlement criteria. My proposal would be that persons receiving certain classes of supports should have an 'opt out entitlement' to be visited by Community Visitors.

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<sup>4</sup> *Public Guardian Act 2014 (Qld)*, s 39.

<sup>5</sup> *Disability Act 2006 (Vic.)* s 30A

What exactly the classes of supports are that would see a person receiving visits by Community Visitors on an opt-out basis is a subject on which I would like to see engagement and consultation with people with disability. The current Queensland provision could be used as a starting point for this discussion. This defines 'relevant class of supports' to include any of these supports: 'high intensity daily personal activities'; 'assistance with daily life tasks in a group or shared living arrangement'; 'specialist positive behaviour support that involves the use of a restrictive practice'; or 'specialist disability accommodation'.<sup>6</sup>


A very important accompaniment to clear criteria about who is required to be visited by Community Visitors, will be clear responsibility concerning whose role it is to identify the individuals (and their addresses) whom Community Visitors are required to visit. This is a significant added complexity for community visiting schemes as they transition from being 'placed focussed' to being 'person-focussed'. To put it plainly, a legislated entitlement for a person to be visited by Community Visitors will mean very little if the relevant Community Visitor scheme is unaware of the person's name or address.

In my view the responsibility for identifying who is required to be visited by Community Visitors will most obviously lie with the National Disability Insurance Agency, and perhaps the NDIS Quality and Safeguards Commission (this is not the case at present). This will be particularly so if the criteria for visits by Community Visitors are to include the receipt by relevant participants of certain levels of funded NDIS support (since these agencies will be able to identify people receiving the threshold level of funded support).

Thank you again for this opportunity to be consulted in the course of the Review's important work.

I am very happy to be contacted to discuss any of the points contained in this letter.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'John Chesterman', with a long horizontal flourish extending to the right.

John Chesterman (Dr)  
**Public Advocate**

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<sup>6</sup> *Public Guardian Act 2014 (Qld)*, s 39.