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Dear Professor Bonyhady and Ms Paul

## **NDIS Review**

We write to you, as most of Australia's Public Advocates and Public Guardians, to identify the key NDIS improvement imperatives and possibilities that we would encourage you to consider in the context of your review.

Many of the points raised here have previously been made by one or more of us, and indeed by others, in submissions and oral evidence to parliamentary committee inquiries, to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, and to other reform forums.

Our roles, as Public Advocates and Public Guardians, are established by state and territory legislation which articulates our responsibility as Australia's adult guardians of last resort and/or systemic advocates concerning the rights of adults with impaired decision-making ability. Our adult guardianship role is instigated when we are appointed as guardian by our state or territory civil and administrative tribunal.

At the outset, it is worth observing that the development of the NDIS has resulted in a curious, but predicted, effect on the adult guardianship system. In short, the advent of the NDIS has resulted in significantly increased use of the adult guardianship system. This is curious because consumer (not substitute decision maker) 'choice and control' is a bedrock principle of the scheme. But the scheme's effect on adult guardianship was predicted by many of us because the scheme results in a greater number of decisions needing to be made by the many NDIS participants and prospective participants who have impaired decision-making ability. For a variety of reasons, this has resulted in increased numbers of applications for, and appointments of, substitute decision-makers.

While there are situations in which adult guardianship is an appropriate safeguarding action for an NDIS participant or prospective participant, oftentimes the adult guardianship system has been used for what we would term 'instrumental' NDIS reasons. Such situations do not see the adult guardianship system performing its intended role. While this has implications for state and territory guardianship laws and practices, this submission sets out some potential NDIS reforms in this regard.

We also set out here NDIS reforms that would significantly improve the well-being of people for whom we have responsibility under guardianship orders. It is anticipated that these reforms will also have a flow on effect to improve the NDIS for all participants with impaired decision-making ability.

The suggestions provided cover the following six potential reform areas:

- better supporting individuals to make their own access and service decisions;
- better recognising informal caring and support relationships (where these do not give rise to genuine concerns about the well-being of the participant or prospective participant);
- simplifying and streamlining administrative technicalities that can result in unnecessary guardianship applications;
- improved escalation pathways for people with complex support needs;
- improved NDIS safeguarding mechanisms; and
- improved interfaces with other systems.

In preparing this combined submission it is worth noting that on some matters the views presented here are 'majority' views rather than uniform ones. In addition, the Western Australian Public Advocate would like to record that she does not, at this time, support some of the recommendations made in this submission that require further deliberation about the implications for Commonwealth/State jurisdictional issues, such as Recommendation 14 (establishment of an Australian Disability Inclusion Office) and Recommendation 15 (accommodation services).

## **NDIS improvement possibilities**

### **1. Application process**

The NDIS application process has been described as complex, confusing and time consuming. This can limit opportunities for people with impaired decision-making ability to participate, and, in some cases, can even deter people from seeking access to the NDIS and the disability-related services they may need.

In particular, the 'language' of the NDIS has been identified as a challenge by many people, including participants, their supporters, and professionals who are engaging with the system.

The process of obtaining evidence to support applications can also be time consuming and costly. The coordination of appointments with specialists and collection of information can also be challenging for some people, particularly those with complex needs.

These challenges have led, in some circumstances, to people seeking the appointment of a guardian to assist with this process.

To increase the opportunities for people to better understand and take part in this process, and prevent the appointment of guardians where this would otherwise be unnecessary, the NDIS application process could be streamlined, simplified, and further developed to include a range of accessible formats.

Various states and territories have established access schemes in a bid to assist more eligible people to become NDIS participants. For instance, the then Queensland Department of Communities, Disability Services and Seniors, using funds from the Commonwealth Government, conducted a project in 2020-21 to assist more people to access the NDIS. Under the project, an Assessment and Referral Team (ART) was established, supported on the ground by community-based non-government organisations including the Queenslanders with Disability Network (QDN). During 2020-21 the program assisted 1,648 Queenslanders with disability to access the NDIS. Almost half of these participants (49%) had tried unsuccessfully to access the scheme in the past and cited that a barrier to their success was the complexity of the access process.<sup>1</sup>

The Assessment and Referral team still operates in Queensland on a limited basis – providing 'an intensive case management approach to support eligible children and young people (7-25 years) to access the NDIS'.<sup>2</sup>

Members of this team and representatives from QDN may be able to provide the review panel with valuable insights regarding key improvements that could be made to improve the rates of entry of underrepresented cohorts into the NDIS in the future.

Equally, programs designed and funded directly by the NDIA, such as the National Community Connectors program (now discontinued), should be reconsidered as a means to increase community confidence and understanding in the NDIS and to support the access process. This is especially relevant for people with decision-making disability, including those from culturally and

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<sup>1</sup> Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships, *Annual Report 2020-21*, September 2021, Queensland.

<sup>2</sup> Department of Seniors, Disability Services and Aboriginal and Torres Strait Islander Partnerships, *Help available for children and young people aged 7-25 years to access the NDIS*, n.d. < <https://qchub.dsdsatsip.qld.gov.au/art>>.

linguistically diverse backgrounds and Aboriginal and Torres Strait Islander people, who, without appropriate confidence in and connection to the NDIA, may become subject to an application for guardianship for the sole purpose of navigating the NDIS access process.

**Recommendation 1:**

The NDIA should identify, in consultation with State and Territory disability (and cognate) departments, ways in which the NDIS application process can be made more accessible, especially to participants in underrepresented groups.

## **2. Supported decision-making**

As consumer choice is a central component of the NDIS, it is critical that any NDIS participants who require support to make decisions can access appropriate, timely support to do so.

The absence of appropriate support can limit a participant's opportunity to participate in decision-making and can result in the unnecessary appointment of guardians. As noted above, an increase in the number of people for whom Public Guardians or Public Advocates are appointed has been observed following the introduction of the NDIS.

The NDIA has recognised the importance of supported decision-making and in 2021 conducted consultations to inform the development of a new Support for Decision Making policy, which is yet to be released.<sup>3</sup> Several Public Advocates and Public Guardians made submissions focused solely on this issue and participated in this consultation process, however a few key issues and opportunities for improvement are highlighted below.

Decision-making support is enhanced by knowledge of the person at the centre of the decision, and ideally takes place within a relationship where trust has been, or can be, built over time.<sup>4</sup>

For some participants, supported decision-making may reflect a significant transition, as they may have had limited opportunity to participate in decision-making previously. For these people, support to build their capacity to participate in the decision-making process is required.

In many cases, the most appropriate person to provide this support will be a family member, friend, or other people who know the participant well.

Currently, the NDIS may fund the development of microboards (and similar arrangements) for eligible NDIS participants, which support the establishment of a formalised network of people for a participant that can assist with decision-making.

To ensure that participants are receiving skilled and high-quality support, it is also important to build the capacity of decision supporters, who may need assistance to take on this new role, or to shift to supported decision-making if they were previously making decisions on the person's behalf.

The NDIS should provide clear guidelines to ensure that best practice in supported decision-making occurs and should make training and educational resources available to decision supporters. Any resources developed should also draw on existing resources, such as the La Trobe Support for Decision Making Practice Framework<sup>5</sup> developed by the La Trobe University Living with Disability

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<sup>3</sup> National Disability Insurance Agency, Consultation summary: Supporting you to make your own decisions, December 2021.

<sup>4</sup> J. Douglas & C. Bigby, 'Development of an evidence-based practice framework to guide decision making support for people with cognitive impairment due to acquired brain injury or intellectual disability', *Perspectives in Rehabilitation*, vol. 42, no. 3, 2020, pp. 434-441.

<sup>5</sup> C. Bigby, J. Douglas, & S. Vassallo, The La Trobe Support for Decision Making Practice Framework: An online learning resource, 2019 <<https://www.supportfordecisionmakingresource.com.au/>>.

Research Centre and the research report recently released by the Disability Royal Commission, *Diversity, dignity, equity and best practice: a framework for supported decision-making*.<sup>6</sup>

While many NDIS participants who need support for decision-making have family, friends or other informal supporters who are able to assist, not everyone has someone in their life who they would like to support them with decision-making, or someone who is willing or able to provide this support.

For these NDIS participants, decision-making support would be a reasonable and necessary support and should be funded in their NDIS plan. This would help to increase the participation of NDIS participants in the decision-making process.

It would be important that this funding reflect the additional time and resources required to undertake supported decision-making. This should also be provided on an ongoing basis to ensure that people can access this support as required.

It would also be important to develop safeguards for participants to ensure that decision-making supporters are acting appropriately and effectively in their role. For example, there would need to be a mechanism in place to review the appropriateness of supported decision-making arrangements and to enable participants to freely change their decision-making supporter where this is their preference.

Consideration should also be given to how to prevent conflicts of interests in relation to this role to ensure NDIS participants are supported to make decisions without undue influence. For example, it would often be a conflict of interests where a person acting as the decision-making supporter is also the participant's service provider.

The broader societal issue of the potential abuse (intended or unintended) of people with (and sometimes by) informal decision-making supporters (including family and friends) may also need to be addressed through additional awareness raising and education of the general community regarding the rights of people with disability to be involved centrally in decisions that affect them.

## **Recommendation 2:**

The NDIA should:

- a) enable certain NDIS participants to be provided with funded support, as part of their NDIS plans, in order to assist them to make their own NDIS-related decisions, with a view also to building their capacity to make decisions in other areas of their lives. In determining whether the funding of this support is reasonable and necessary, consideration should be given to whether the participant has a significant cognitive disability (including psychosocial disability), and whether they have family members or other informal supporters who are available and able to assist them to make relevant decisions;
- b) continue to contribute funds to assist in the development and operation of microboards (and similar arrangements); and identify and publicise best practice principles in the operation of microboards (and similar arrangements); and
- c) develop resources (inclusive of real-life examples and case studies) to guide people who are supporting the decision-making of NDIS participants.

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<sup>6</sup> Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Diversity, dignity, equity and best practice: a framework for supported decision making*, 24 January 2023. <<https://disability.royalcommission.gov.au/system/files/2023-01/Research%20Report%20-%20Diversity%2C%20dignity%2C%20equity%20and%20best%20practice%20a%20framework%20for%20supported%20decision-making.pdf>>.

### 3. Recognition of, and interaction between, representative decision makers

Under the NDIS, participants are assumed to have the ability to make their own decisions, however there is provision for the appointment of Plan Nominees and Correspondence Nominees in the *National Disability Insurance Scheme Act 2013 (NDIS Act)*. Plan Nominees have the role most closely aligned with guardians, as they can make decisions about the planning or management of a participant's NDIS funding.

Currently, under the *NDIS Act*, there is limited recognition of the role of an appointed guardian.

In some jurisdictions, in order to recognise the role of a guardian, the guardian is appointed as the person's Plan Nominee. Indeed, there is reference in the *NDIS Act* to the appointment of nominees needing to take account of state and territory guardianship appointments.<sup>7</sup>

In other jurisdictions, there are concerns about the legal authority of guardians appointed under state and territory laws to perform the federally created role of Plan Nominee.

In the recent case of *Deacon v National Disability Insurance Agency [2022] AATA 3209*, the AAT noted that guardians are not recognised under the legislation as being able to make decisions about a participant's plan unless they have been appointed as a Plan Nominee under the *NDIS Act*.

The Tribunal noted [at 46]:

the NDIS Act makes clear who, other than an adult participant themselves, can do acts that may be done by the participant under or for the purposes of the NDIS Act. This is a plan nominee or nominees appointed under s 86 of the NDIS Act. The Nominee Rules do refer to guardians (or other persons whose responsibilities in relation to the participant are relevant to the duties of a nominee) in s 88(4) of the NDIS Act. This provision, however, does little more than require the NDIA to take into account whether there is a person who has guardianship of the participant (perhaps with a presumption that they might be appointed or be consulted) when deciding who to appoint as an adult participant's plan nominee.

There is also no requirement, in the provisions concerning the appointment of nominees, for the NDIA to consider appointing people already appointed by participants to make decisions for them under enduring powers of attorney (or comparable instruments).

A proposed solution to this lack of fit between NDIS nominee provisions, and State and Territory substitute decision-making laws, would be to recognise guardians and attorneys, to the extent and for the period articulated in their appointing instrument, as having the same ability to take actions on behalf of participants as Plan Nominees (without being appointed as Plan Nominee).

Another issue that has been identified regarding the NDIS and appointed decision makers is that Public Trustees are not able to view participant plans. As a result, there is a risk that expenses covered by a participant's NDIS plan may be unnecessarily funded from the person's estate. Once paid, these expenses cannot be recouped.

This could be addressed by enabling people who have been appointed to make financial decisions for a participant to view their plan where this is relevant to the performance of the duty of the appointed person.

#### **Recommendation 3:**

The *NDIS Act* should be amended to include the following provisions:

- a) A person who is appointed by a Court or Tribunal, or who is appointed by a participant under an enduring instrument (such as an enduring power of attorney), who has power to

<sup>7</sup> National Disability Insurance Scheme Act 2013 (Cth) s 88(4).

make decisions for a participant and whose responsibilities in relation to the participant are relevant to the duties of a nominee, is hereby recognised, to the extent and for the period that the appointing instrument allows, as having the same ability to take actions on behalf of a participant as a nominee appointed under section 86 or section 87.

- b) A person who is appointed by a Court or Tribunal, or who is appointed by a participant under an enduring instrument (such as an enduring power of attorney), who has power to make financial decisions for a participant, is entitled upon request to inspect the participant's plan where this is relevant to the performance of the appointed person's duties.

**Recommendation 4:**

In situations where there is an appointed guardian or attorney with relevant powers, the NDIA should ordinarily avoid the appointment of a plan nominee. In the event of a conflict between an appointed guardian or attorney and a plan nominee, the NDIA should consider removing the plan nominee, for the duration of the appointment of the guardian or attorney.

#### 4. Consistency of 'reasonable and necessary' determinations

The NDIS funds 'reasonable and necessary' supports and services for eligible participants. To be considered 'reasonable and necessary', supports must meet each of the criteria described in the *NDIS Act*,<sup>8</sup> including that the support will assist the participant to 'pursue the goals, objectives and aspirations included in the participant's statement of goals and aspirations', that it 'represents value for money', that it is likely to be 'effective and beneficial', and that the support is 'most appropriately funded or provided through the National Disability Insurance Scheme' and not an alternative scheme or system.

However, NDIS participants and their supporters can find it challenging to understand the types of services and supports that meet these criteria, and in particular, often find it difficult to understand how the terms 'reasonable and necessary' and 'value for money' are applied.

Clarity is needed around what these criteria mean and how they are interpreted in order to achieve greater consistency in funding decisions. This would also enable NDIS participants and their informal supporters, or those seeking to access the NDIS, to better understand the types of supports for which they are eligible.

It is acknowledged that the NDIA has been progressing work on updating guidelines and documents to ensure that these are written in plain and Easy English and use less jargon; the NDIA has also produced resources on the types of supports that are funded, which include examples, to provide information about what is considered 'reasonable and necessary'.<sup>9</sup> However, continued work in this area is required.

There are also concerns that decisions regarding whether particular supports meet the criteria of 'reasonable and necessary' for individual participants are not always consistent or transparent. An example of this occurring that has been noted by a number of us, is where, following a plan review, an NDIS participant's budget is significantly reduced despite there being no significant change in the person's abilities, needs, goals, or circumstances. In a number of cases this reduction in funding occurs despite recommendations to the contrary from allied health practitioners, service providers, and others who know the person well.

Greater transparency about how and why these decisions are made is required in order to enable a better understanding of how the criteria are applied and to improve consistency in decision-making. This would likely also assist in reducing the number of applications for appeal made to the

<sup>8</sup> National Disability Insurance Scheme Act 2013 (Cth) s 34.

<sup>9</sup> National Disability Insurance Agency, NDIS Quarterly report to disability ministers, 30 September 2022.

Administrative Appeals Tribunal (AAT) and the new administrative review body that will be established to replace the AAT.

It is also important that planning decisions give appropriate consideration to any assessments or reports provided by allied health professionals or service providers who are currently providing disability support.

**Recommendation 5:**

The NDIA should improve the transparency of its decisions concerning the application of relevant criteria to the provision of support for participants. In particular, the NDIA should provide greater clarity about what 'reasonable and necessary' and 'value for money' mean when applied to decisions concerning the provision of funded NDIS supports.

## 5. Service agreements

Under the NDIS, a service agreement between an NDIS service provider and participant describes the support that will be provided and how this support will be provided.

The NDIA recommends the use of written service agreements for all services, however written agreements are currently only mandated for Specialist Disability Accommodation supports.

If a service agreement is negotiated between a service provider and a participant, the NDIA recommends that the following be considered:

- what supports are being provided;
- the costs of the supports;
- the responsibilities of the provider and participant;
- how long the agreement goes for and how it can be changed; and
- dispute resolution processes.<sup>10</sup>

Given the importance of service agreements to the management of service expectations, it is recommended that existing requirements be extended to mandate written service agreements for higher, more complex levels of support in addition to the provision of Specialist Disability Accommodation.

These classes of support are ones where there is a higher level of risk for the participant, creating a need for greater clarity around what services will be provided, how they will be delivered, and the responsibilities of the provider and the participant.

The classes of support for which it is recommended written service agreements become mandatory include (in addition to the provision of Specialist Disability Accommodation):

- high intensity daily personal activities;
- assistance with daily life tasks in a group or shared living arrangement; and
- specialist positive behaviour support that involves the use of a restrictive practice.

In Queensland, sites where these classes of support are provided are those that a community visitor must visit under the *Public Guardian Act 2014 (Qld)*, to protect the rights and interests of consumers.<sup>11</sup> As a visitable site, participants receiving these classes of support have already been identified as being at higher risk of potential abuse, neglect or exploitation. Not having a written service agreement in place for these participants increases this level of risk.

<sup>10</sup> National Disability Insurance Agency, *Things to consider when making a service agreement*, fact sheet, 2020.

<sup>11</sup> Public Guardian Act 2014 (Qld) s 39.

With regard to the practice associated with service agreements, the NDIS Practice Standards and Quality Indicators note that service agreements should be developed in collaboration with a participant and that participants should be 'supported to understand their service agreement and conditions using the language, mode of communication and terms that the participant is most likely to understand'.<sup>12</sup>

In practice, service agreement documents are often long and complex, which can affect the ability of NDIS participants and their informal supporters to understand these agreements.

In addition, the self-imposed business requirement by a large number of service providers to have signed service agreements in place has led to a significant rise in guardianship applications and appointments, in situations when participants themselves are unable to sign agreements. Oftentimes this has been in circumstances where none of the other risks to the person that normally accompany a guardianship appointment have been present.

In order to address this problem, we make the following suggestion. The NDIA should make clear that while the actual signing of service agreements is not a legal requirement, appropriate steps need to be taken by the service provider to articulate to the participant and their family and supporters the specific nature of the service that is being provided (on this topic, see the process by which SDA residency agreements may be established in Victoria under Part 12A of the *Residential Tenancies Act 1997*). To this end, we recommend that written service agreements be accompanied by an Easy English document, where appropriate, which explains the key provisions of the service agreement in a way that can be easily understood by participants (to the greatest extent possible), their informal supporters and/or decision-making representatives (if already in place for NDIS matters). These should also be provided in languages other than English for participants who require this.

It would be helpful if NDIA communications to providers focused on driving a cultural shift away from long, complicated agreements, in favour of straightforward, simple agreements, particularly where the support provided, and support setting, is not complicated.

Once a service agreement is operational, it is further recommended that it be uploaded to the participant's and service provider's NDIS portals. This requirement would mean that copies of service agreement documents are maintained in a system that is independent of both the service provider and participant and cannot be altered without the knowledge of both parties.

This requirement is particularly relevant if service agreements are not signed and dated by the participant and/or their decision-making representative. In these cases, we recommend a statement by the service provider should be required to accompany the service agreement, outlining when and how the service agreement was discussed with the participant and/or their decision-making supporters or representative. This statement should also include reference to any materials provided, such as an Easy English version of the agreement, and explain the extent to which the participant and any supporters or representative understood and acknowledged the terms of the agreement.

Once operational, service agreements lodged on the service provider's portal should be able to be accessed by the NDIS Quality and Safeguards Commission, to facilitate complaint investigations, and by the NDIA for the purpose of audits associated with the broader value for money objectives of government.

The NDIA could also consider, through its communications to providers, supporting a better understanding amongst providers that any service agreements signed by guardians cannot be for periods that extend beyond the duration of the order (noting that the service can continue when guardianship ceases but that the terms of the agreement will need to be negotiated with the NDIS participant and/or their supporters or representative).

For those States and Territories where community visitor programs are in operation, community visitors, visiting for the purpose of protecting the rights and interests of at-risk NDIS participants, should also be

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<sup>12</sup> NDIS Quality and Safeguards Commission, NDIS Practice Standards and Quality Indicators, version 4, November 2021, p. 14.



able to access service agreements, where appropriate to their role, if they are concerned about the services being received by the participant and are preparing a referral to the NDIS Quality and Safeguards Commission.

**Recommendation 6:**

The NDIA should require written service agreements to be in place for a wider range of funded services than just the provision of Specialist Disability Accommodation. This should include the following supports:

- a) high intensity daily personal activities;
- b) assistance with daily life tasks in a group or shared living arrangement; and
- c) specialist positive behaviour support that involves the use of a restrictive practice.

**Recommendation 7:**

The NDIA should clarify that the actual signing of service agreements is not a legal requirement, and, at the same time, the NDIA should emphasise that appropriate steps need to be taken (and recorded) by service providers to articulate to the participant and their family and/or supporters the specific nature of any service that is being provided.

## **6. Support coordination and case management**

For many people, support coordination is essential to their ability to access appropriate services and supports under the NDIS. It is therefore critical that participants are able to access support coordination appropriate to meet their needs.

There are three levels of support coordination for which NDIS participants may receive funding. Depending on their requirements, they may be eligible for support connection (level 1), coordination of supports (level 2), or specialist support coordination (level 3).<sup>13</sup>

All levels of support coordination can assist participants to understand their NDIS plan and help them to connect with supports and services.

Participants who have more complex situations or require specialist support may receive support from a specialist support coordinator (level 3). A level 3 coordinator can also assist to identify and address possible barriers to service access and, where required, design a service plan to meet the specific support needs of a participant.

While the structure associated with the provision of support coordination under the NDIS (as described above) appears sound, the quality of support coordination services provided to NDIS participants is extremely variable and inconsistent.

Problems with the provision of support coordination include:

- A lack of a clear understanding by NDIS participants and their family and supporters of the respective roles of a local area coordinator, NDIA planner, plan managers, support coordinators and service providers.
- Support coordinators not being required to hold any mandatory minimum qualifications or training.
- A lack of training and resources being available for support coordinators from the NDIA.
- A lack of oversight and accountability of the activities performed by support coordinators.

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<sup>13</sup> National Disability Insurance Agency, Support coordinators, 2021 <<https://www.ndis.gov.au/providers/working-provider/support-coordinators>>.

It is also worth noting that funded support coordination often results in very limited time being available to the support coordinator to carry out their work; it is also widely thought that people have to know to ask for support coordination to be included in their NDIS plans.

While support coordination for participants with less complex needs may be adequate, those participants who require multiple supports from a range of different service providers need a coordinator who is able to seamlessly connect these services together. An example of this is a support coordinator for a participant with complex medical needs. In all likelihood, this participant will need their support coordinator to know that essential appointments with specialists are required, any follow up assessments or actions are implemented, and any preventative or maintenance supports are accessed. In thinking about this, there is no expectation that the support coordinator needs to actually supply these services, however they do require coordination to ensure that various services work together to get things done.

While the example above relates to health, similar issues are prevalent in the interface between the NDIS and other systems including, as two relevant examples, the justice and housing systems.

These issues are not new and have long been recognised by key players in the NDIS system. For example, the recent own motion inquiry conducted by the NDIS Quality and Safeguards Commission identified problems in the interface between the health system and supported accommodation services under the NDIS, which can lead to issues with participants having inadequate access to health care and a deterioration of their health.<sup>14</sup>

There is currently the potential for specialist support coordination to assist participants to navigate complex systems and obtain the services required to maintain their health, wellbeing and community connections. This specialist support coordinator role, at times, resembles the role of a case manager, which the NDIS design has never incorporated.

The failings of support coordination, particularly if the role cannot be adequately filled by appropriately qualified and experienced people in the future, may mean that individual case management is the only viable option available for those participants with particularly complex needs.

When support coordination for a participant breaks down, particularly when the participant has complex needs, they will often enter a crisis situation where their health and wellbeing is at significant risk. This issue was recognised in a recent adult safeguarding project conducted in Queensland, resulting in the following recommendation from the Public Advocate;

The National Disability Insurance Agency should ensure that NDIS participants are able to have their entitlement to, and the provision of, funded support coordination reviewed on an urgent basis in situations where the absence of adequate support coordination is placing the well-being of an NDIS participant at significant risk.<sup>15</sup>

It is also important to acknowledge that, for some NDIS participants, support coordination will be required on an ongoing basis and is unlikely to be able to be significantly reduced over time.

**Recommendation 8:**

The NDIA should:

- a) publicise the criteria that must be met before participants have access to specialist support coordinators;

<sup>14</sup> NDIS Quality and Safeguards Commission, Own motion inquiry into aspects of supported accommodation, Inquiry report, 2023.

<sup>15</sup> Public Advocate (Qld), Adult Safeguarding in Queensland, Volume 2: Reform recommendations, November 2022, Brisbane, Queensland.

- b) ensure that NDIS participants are able to have their entitlement to, and the provision of, funded support coordination reviewed on an urgent basis in situations where the absence of adequate support coordination is placing the well-being of an NDIS participant at significant risk;
- c) develop criteria concerning the skills required by specialist support coordinators, which could include mandatory minimum qualifications;
- d) review existing training that is available to support coordinators and develop mandatory standardised introductory, intermediate, and advanced training packages for support coordinators; and
- e) review the oversight mechanisms associated with the work of support coordinators.

## 7. Behaviour support and restrictive practices

Behaviour support plans contain person-centred, evidence-based strategies to address behaviours or 'environments of concern'.<sup>16</sup> They can include the use of restrictive practices, subject to the relevant state or territory authorisation process, and where this is the least restrictive approach to ensuring the safety of the participant or others.

Public Guardians and Public Advocates often have a role in authorising and/or monitoring the use of restrictive practices.

Authorisation processes for restrictive practices vary across jurisdictions, with additional processes also required for NDIS compliance. These requirements are particularly complicated for service providers working across jurisdictions or on a national basis.

The problematic authorisation processes for aged care restrictive practices have recently been the subject of discussion, with calls to develop processes that are clearer and will better contribute to a reduction in the use of restrictive practices. For example, the Queensland Public Advocate has recommended the use of a senior practitioner model, as is currently operating in Victoria and the Australian Capital Territory, for the authorisation of restrictive practices, which has the potential to be applied on a national and a cross-sector basis (encompassing areas like disability, the NDIS, health, aged care and education).

Authorisation processes aside, behaviour support plans that include the use of restrictive practices must also include plans for the reduction and elimination of the practices. These plans should also be reviewed 'if there is a change in circumstances which requires the plan to be amended — as soon as practicable after the change occurs' or 'at least once every 12 months while the plan is in force'.<sup>17</sup>

The NDIS Quality and Safeguards Commission recently published the results of an evaluation of the quality of lodged behaviour support plans for NDIS participants, which found that most of the plans reviewed scored as 'weak' or 'underdeveloped'.<sup>18</sup> The evaluation report notes that the NDIS Quality and Safeguards Commission has initiatives underway to improve the quality of behaviour support plans.

Additionally, there often appears to be a focus on the development of behaviour support plans, but less focus on the implementation, monitoring, and review of these plans. For example, we are aware of numerous situations where staff working with NDIS participants do not know about the

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<sup>16</sup> Jorgensen et al, 'Environments of concern': reframing challenging behaviour within a human rights approach, *International Journal of Developmental Disabilities*, Volume 69, Issue 1, February 2023 (published online).

<sup>17</sup> National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018 (Cth) s 22.

<sup>18</sup> NDIS Quality and Safeguards Commission, *Behaviour support plan quality: Summary results to December 2021*, 16 August 2022.

participants' behaviour support plans, where behaviour support plans are not being implemented properly, or where plans that appear not to be effective remain in place.

To address this issue, improved training for support staff is required to ensure that behaviour support plans are implemented appropriately, monitored, and updated as needed to ensure their effectiveness in both addressing the situation, and in reducing the use of restrictive practices.

From a public monitoring and accountability perspective, while there is some data available on the unauthorised use of restrictive practices under the scheme (published by the NDIS Quality and Safeguards Commission), there is currently limited data available on the authorised use of restrictive practices and the effectiveness of behaviour support plans in reducing the use of restrictive practices on NDIS participants. Improved collation and sharing of this data, including making additional information publicly available, would support the service-based monitoring of restrictive practice usage and would contribute to the development of evidence-based plans to assist in reducing the use of restrictive practices.

We note here also that there can be difficulties in identifying suitable behaviour support practitioners to prepare behaviour support plans for participants who require these, which can lead to a range of challenges including delayed discharge of NDIS participants from hospitals.

It should also be noted that, while discussion regarding individual behaviour support plans generally centres around the use of restrictive practices, these types of plans are meant to operate, depending on an individual's needs, at a much broader level. They can be an effective tool in areas including:

- the prevention and de-escalation of anti-social behaviours that may lead to contact with the criminal justice system;
- the management of relationships, particularly in shared or group home arrangements; and
- activities that involve the person accessing new environments for the first time such as hospitals, other medical services, community-based activities, or respite.

Any improvements to the development, content, and implementation of behaviour support plans are therefore likely to have broader benefits for NDIS participants.

**Recommendation 9:**

The NDIS Quality and Safeguards Commission should continue to audit, and publicly report on, the quality of behaviour support plans that are in place for NDIS participants. The Commission should also extend its provision of best practice guidance on reducing the use of restrictive practices.

**8. Thin markets**

The issue of thin markets has been highlighted in numerous reports and inquiries into the NDIS, but remains a significant concern, particularly for participants with complex needs, participants who live in rural and remote areas, participants who identify as Aboriginal or Torres Strait Islander, and participants who are from culturally and linguistically diverse backgrounds.

This is an issue that can affect many people who have the Public Guardian or Public Advocate appointed as their guardian, as these people are likely to have complex needs or situations.

Thin markets make it difficult for participants to access the supports and services that are appropriate to meet their needs and can limit their opportunities for choice and control. For some, even a basic level of service provision cannot be obtained.

The National Disability Insurance Scheme Market Enablement Framework (2018) describes how market stewardship may be undertaken and the 'levers' that may be used by the NDIA to address identified issues, including:

- providing information;
- building consumer and community capacity;
- changing market settings, and;
- commissioning a service.

The *Review of the National Disability Insurance Scheme Act 2013* conducted by David Tune in 2019 recommended that 'the NDIS Rules are amended to give the NDIA more defined powers to undertake market intervention on behalf of participants'.<sup>19</sup>

The recent *National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Act 2022* clarifies that the NDIA may provide funding to 'a person or entity to assist one or more participants to fully access supports'.<sup>20</sup>

The NDIA has also recently released information on Coordinated Funding Proposals, which may support access to services in areas where there are thin markets.<sup>21</sup>

However, in the absence of a 'provider of last resort', further information is needed about how the NDIA will respond in situations where the wellbeing of a participant is at significant risk due to the person not being able to access necessary supports or services.

To address this, the NDIA should adopt and publicise a clear policy on the provision of services to NDIS participants who may be at risk due to the disability services market's inability to meet the participant's service entitlements.<sup>22</sup>

**Recommendation 10:**

The NDIA should adopt and publicise 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.

## 9. Complex support needs

The NDIS Complex Support Needs Pathway provides specialised support to participants who have complex needs or situations that necessitate interaction with other systems, for example compulsory mental health services, homelessness, or correctional services.

This pathway enables eligible participants to access support from skilled and experienced planners and coordinators to provide the level of support required by people with complex needs.

We note that the Complex Support Needs Pathway has been beneficial for a number of people with complex needs for whom we have been appointed as guardian. However, access to this pathway has rarely been straightforward for participants.

<sup>19</sup> D Tune, *Review of the National Disability Insurance Scheme Act 2013: Removing red tape and implementing the NDIS Participant Service Guarantee*, Department of Social Services, Canberra, 2019, p 124.

<sup>20</sup> National Disability Insurance Agency, *2022 NDIS legislation amendments- July update* (30 June 2022) <https://www.ndis.gov.au/news/7700-ndis-legislation-amendments-2022>.

<sup>21</sup> National Disability Insurance Agency, *Coordinated funding proposals*, December 2021, <<https://www.ndis.gov.au/providers/market-monitoring-and-intervention/coordinated-funding-proposals#:~:text=participants%20and%20providers,-,What%20is%20a%20CFP%3F,specialist%20providers%20to%20underserved%20communities>>.

<sup>22</sup> This recommendation was also made in the Queensland Public Advocate's recent report on Adult Safeguarding: Adult Safeguarding in Queensland, Volume 2: Reform Recommendations, 2022.

As a result, we would suggest that the NDIA consider ways to clarify and enhance the process of engaging with this pathway, particularly for people who have a guardian appointed.

**Recommendation 11:**

The NDIA should identify clear contact points within the agency with whom Public Guardians and Public Advocates can liaise when they are appointed as guardians for NDIS participants with complex support needs. Among other things, this should enable fast engagement with the complex support needs pathway when that is warranted.

## 10. Urgent and emergency situations

In urgent situations, for example when a person is experiencing a crisis or is at significant risk due to difficulties in accessing necessary disability-related supports, timely responses are required to prevent poor outcomes such as avoidable hospitalisation, homelessness, or harm to the person or other people.

To assist in addressing these situations, the NDIA has various escalation pathways in place with state and territory governments. An example of this is the Critical Service Issues Response (CSIR) process, which has been in use in New South Wales for a number of years as a way for New South Wales Government agencies to escalate matters that require immediate resolution when there is a safety risk to the participant or others.

Within the CSIR escalation process there are three levels of escalation. Each level has a defined timeframe for resolution, or the matter escalates to the next level to more senior officials and decision-makers.

While the intent of the CSIR escalation pathway is to bring resolution to complex matters, there is a significant deficit in the timeliness of decisions being progressed or made. This is despite the existing timeframes for further escalation.

The delays can be extensive and put the participant, and sometimes the community, at significant risk. By the time a CSIR escalation is made, the participant is usually already at significant risk because of gaps in support, because funding has been exhausted, or because a provider has ceased providing services. The further delay in decision-making or progress means the risks to the person increase and, in some cases, there is an absence of all services, or the person has no accommodation. This can result in consequences such as hospitalisation or the person coming into contact with the criminal justice system.

The NDIA has also established an NDIS After Hours Crisis Referral Service that can be accessed by approved referrers. This service works with the referring agency to identify available support services and implement solutions outside of business hours.

However, current responses in these urgent and crisis situations are often limited by a lack of availability of appropriate services, especially after hours, such as crisis supports, crisis accommodation and respite services.

To ensure that the NDIS After Hours Crisis Referral Service is able to respond effectively, it is critical that the service receives sufficient funding to enable it to provide innovative solutions in crisis situations.

Furthermore, only approved referrers are able to access this service, meaning that in many after-hours situations NDIS participants and their supporters will have to call emergency services, or the person will need to attend their local hospital, even though these might not be the most appropriate services to respond.

A more appropriate, timely emergency response is required to ensure that participants are able to access necessary services and supports in urgent situations, including where the person (or others) are at significant immediate risk.

**Recommendation 12:**

The NDIA should:

- a) continue to operate and publicise escalation pathways and the NDIS After Hours Crisis Referral Service and adjust these as necessary in order to guarantee that they can provide immediate, effective solutions in crisis situations for all NDIS participants regardless of where they live; and
- b) publicise 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.

## 11. Safeguards

The NDIS Quality and Safeguards Commission (the Commission) needs to take a proactive approach to the safeguarding of NDIS participants, particularly those who may be at particular risk of experiencing violence, abuse, neglect and exploitation. However, the current approach to safeguarding appears to be largely focused on the regulation of service providers and the provision of responses to participant complaints.

The serious incident reporting and complaints processes are the key methods by which service providers and participants can register concerns with the Commission.

Some participants or service providers may be reluctant to make complaints due to a lack of understanding about the process, or this may be caused by a fear that they may experience negative consequences following a complaint, or they may have unmet support needs to engage in the process.

Greater transparency from the Commission regarding what people can expect when making a complaint could contribute to increasing people's knowledge about the process and give people greater confidence to make a complaint.

Following serious incidents, when actions such as de-registration are taken against service providers by the Commission, it is important to ensure that these actions are clearly communicated to participants who have engaged those service providers and, where appropriate, their decision-making supporters or appointed decision-makers, to ensure timely identification of new service providers and any necessary safeguarding actions.

While serious incident reporting and complaints processes are important, they do not represent a proactive approach to safeguarding participants. A greater emphasis on the safeguarding of participants is required, including strategies that aim to prevent the abuse, neglect and exploitation of NDIS participants. New strategies are also required to ensure the timely identification of, and responses to, situations of potential or actual harm.

A number of the recommendations noted in the sections above, if implemented, would help to improve safeguards for NDIS participants. However, several potential reforms are also highlighted below.

These reforms constitute necessary additional safeguards to enhance formal complaint mechanisms, as these mechanisms alone are insufficient to protect NDIS participants from abuse, neglect and exploitation.

### **Advocacy**

The funding of advocacy supports for vulnerable NDIS participants is essential in providing valuable links into the community and a level of independent oversight of the quality of the services provided to the person, while empowering them to express their views and exercise choice and control in their lives.

While we recognise that advocacy support is currently available via the National Disability Advocacy Program (NDAP), this is currently inadequate to meet the needs of many NDIS participants with particularly complex needs (that may affect their ability to communicate via traditional methods) and who have little or no informal support networks. In these circumstances, a proactive approach to the provision of advocacy is required, most appropriately via a broadening of the NDAP to ensure that NDIS participants with complex support needs have access where necessary to advocacy support.

Once appointed, an advocate should be able to readily see the NDIS participant alone, free from the influence or intrusion of support workers. Where this access is denied or interfered with, it should also be regarded as a risk flag for the NDIS participant that should be reported by the advocate to the NDIS Quality and Safeguards Commission.

### **Community Visitor Programs**

Community visitor schemes, which see community visitors attend particular types of accommodation where at-risk adults reside to monitor and report on the appropriateness of the accommodation setting and the services being provided to residents, can provide a critical safeguard for those NDIS participants who are at greater risk of violence, abuse, neglect, or exploitation.

Community visitor programs for people with disability have been established in each state and territory with the exception of Western Australia and Tasmania. While there is variation in how community visitor schemes operate across jurisdictions, following the introduction of the NDIS, many participants living in supported accommodation are no longer included in the schemes, leaving them without a critical safeguard.

Additionally, a number of people who previously qualified for supported accommodation now find that they are ineligible for Specialist Disability Accommodation and are moving into provider-owned and/or operated properties where they pay rent and receive Supported Independent Living support, but which community visitors cannot visit. These people often are at equal risk of violence, abuse, neglect, and exploitation as people living in Specialist Disability Accommodation, who are visited by community visitors, but this safeguard is not available to them.

Under Australia's Disability Strategy 2021-2031, in the Safety Targeted Action Plan, the Australian Government has committed to leading 'priority work with state and territory governments to improve cross-system supports, including ... State and Territory based community visitor schemes', with the aim of having 'an agreed approach to community visiting as part of the NDIS Quality and Safeguards Framework by 2022'.<sup>23</sup>

Progressing this action would ensure that a critical safeguard is in place for NDIS participants who are at greater risk of abuse or exploitation.

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<sup>23</sup> Department of Social Services, *Safety Targeted Action Plan*, Department of Social Services, Canberra, 2021, p. 9.



### **The issue of sharp practices**

The NDIS Code of Conduct, which applies to both registered and unregistered service providers and workers, states that workers and service providers should 'act with integrity, honesty and transparency'.<sup>24</sup>

In the accompanying Guidance for Workers, it is noted that this includes avoiding participation in or the promotion of 'sharp practices', which can include:

- a. providing services or expending funds contrary to a person with disability's approved plan
- b. asking for or accepting any additional fees for providing the service
- c. offering inducements or rewards that have no particular link to a person's NDIS plan
- d. engaging in high-pressure sales.<sup>25</sup>

We can report that in situations where these practices do occur, the response of the Commission is often limited.

Improved responses are required to prevent these practices.

### **Improving participant understanding of the role of the NDIA and the Commission**

As has been previously noted, for example by the Joint Standing Committee on the NDIS (the Committee) in its report on the NDIS Quality and Safeguards Commission, many participants, their family members, and other informal supporters appear to be unclear about the roles of the NDIA and the Commission. NDIS participants and their informal supporters need greater clarity about the roles and distinction between these agencies in order to ensure that they know which agency to contact to answer their questions or where to report their concerns.

In its report, the Committee recommended that:

the NDIS Quality and Safeguards Commission develop an overarching communications and engagement strategy for building visibility of its work among providers and people with disabilities and engaging in capacity-building activities with participants and providers.<sup>26</sup>

It also recommended that:

the NDIS Quality and Safeguards Commission and National Disability Insurance Agency together develop and publish protocols for coordination and engagement to ensure consistent messaging and clear division of responsibilities.<sup>27</sup>

Implementation of these recommendations, which we endorse, would provide greater clarity about, and awareness of, the roles of these agencies.

#### **Recommendation 13:**

The Australian Government should:

- a) Urgently remove information sharing barriers that currently prevent the NDIA and NDIS Quality and Safeguards Commission from sharing relevant information with community visitor schemes;
- b) Lead the development of an agreed approach to community visiting as part of the NDIS Quality and Safeguards Framework, as noted in the Safety Targeted Action Plan under Australia's Disability Strategy 2021-2031;

<sup>24</sup> National Disability Insurance Scheme (Code of Conduct) Rules 2018 (Cth) s 6.

<sup>25</sup> NDIS Quality and Safeguards Commission, *The NDIS Code of Conduct: Guidance for workers*, 2018, p. 20.

<sup>26</sup> Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *NDIS Quality and Safeguards Commission*, 2021, p. 50.

<sup>27</sup> Joint Standing Committee on the National Disability Insurance Scheme, Parliament of Australia, *NDIS Quality and Safeguards Commission*, 2021, p. 52.

- c) Negotiate with state and territory governments in clearly defining those NDIS participants ('visitable cohorts') whom community visitors should be required to visit; and
- d) Increase funding for the National Disability Advocacy Program to ensure that isolated NDIS participants with significant cognitive disability (including psychosocial disability) have access to advocacy support.

## 12. Information, linkages and capacity

The promises of the NDIS included, in the words of the Productivity Commission,<sup>28</sup> that it would 'provide advice to people about those instances where support would be more appropriately provided through non-NDIS services' (recommendation 3.4) and that the National Disability Insurance Agency (Recommendation 4.1) should:

improve engagement of the general community and people with disabilities by: ...

- undertaking local initiatives, including improving access to buildings and public spaces, to address disability issues within the community ...
- specifying roles for local area coordinators and disability support organisations to connect NDIS participants with the local community and to build the capacity of the community for such interaction.<sup>29</sup>

These elements formed core components of the then-named 'Tier Two' elements of the scheme (which subsequently came under the 'Information Linkages and Capacity' banner).

The hope was that the scheme would be transformative not just for funded NDIS participants but also for the many people with disability who would not become individually funded participants (or people who obtained only minimal funded support through the scheme). This would be achieved by, among other things, making mainstream institutions and services more accessible.

This promise has not been realised, in substantial part because the key people in the scheme who were responsible for this element, the Local Area Coordinators, were given significant responsibility for bringing people into the scheme and for developing plans. This requirement overtook their other potential roles.

In addition to other changes sought in this submission, we would like to see the scheme play the broader role that was originally envisaged in promoting greater mainstream accessibility for Australians with disability.

### **Accessibility of mainstream services for people with disability**

There are some obvious synergies between this topic area and several of the outcome areas and policy priorities included in Australia's Disability Strategy 2021-2031. We would, however, particularly like to see the establishment of clearer mechanisms for analysing and reporting on outcomes nominated in the strategy.

Existing governance arrangements for Australia's Disability Strategy see decision-making accountability resting with 'a forum comprising Australian Government, state and territory disability ministers'.<sup>30</sup> Meanwhile, 'overall strategic oversight and direction for the Strategy is managed by a forum of Deputy Department Heads from the Australian Government and state and territory government departments with responsibility for disability matters'.<sup>31</sup> The strategy also has roles for an Advisory Council and a coordinating Central Policy and Implementation Unit.

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<sup>28</sup> Productivity Commission, Disability care and support, Inquiry report, Vol 1., No. 54, 2011, p 64.

<sup>29</sup> Ibid, p. 66.

<sup>30</sup> Department of Social Services, Australia's Disability Strategy 2021-2031, p. 59.

<sup>31</sup> Ibid.

These governance arrangements and reporting requirements are relatively opaque. We would suggest that clearer responsibility be given to one agency which would have the responsibility to report on the accessibility of mainstream institutions and services to people with disability.

One reform option may include the Australian Disability Discrimination Commissioner assuming greater responsibility for reporting on the accessibility of mainstream institutions and services to people with disability.

Our preference, though, would be for this role to be performed by a small national office, possibly named the Australian Disability Inclusion Office, which could be part-funded by the scheme, and which could be charged with reporting annually – via agreed measures – on the accessibility of mainstream institutions and services to people with disability. In performing this role, it will also be important for the Office to consider and potentially measure ‘interface’ accessibility, meaning the level of coordination and collaboration that exists between major systems (NDIS, health, housing, transport) to facilitate access by people with disability, and particularly those with impaired decision-making ability.

The guiding framework for the Australian Disability Inclusion Office would need to be underpinned by human rights.

### ***Supported decision-making practice leadership***

The proposed Australian Disability Inclusion Office might also have responsibility for promoting supported decision-making practice leadership. As noted, supported decision-making is an area that has particular relevance for the NDIS, given that the scheme is devised around recipients of services choosing which services they receive. For participants whose disabilities impact on their decision-making, there exists significant potential for them to be assisted to make their own decisions, rather than have others – including adult guardians – appointed to make decisions for them. This is a topic that will likely be the subject of key reform proposals from the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability later this year.

### ***Systemic NDIS engagement problems***

The proposed Australian Disability Inclusion Office could also have a role in identifying and seeking to resolve systemic NDIS engagement problems. While this submission contains operational suggestions on NDIS engagement concerns, which centre around the proposal for a greater role to be played by the scheme’s complex support needs area, this broad topic could also be an area of focus for the proposed Australian Disability Inclusion Office, given the close relationship between these engagement problems and the broad topic of mainstream accessibility.

#### **Recommendation 14:**

The NDIA should advocate for, and part fund, the establishment of an Australian Disability Inclusion Office, which would have the roles of:

- a) advocating for, and reporting on, the accessibility of mainstream services for people with disability;
- b) providing supported decision-making practice leadership; and,
- c) addressing systemic NDIS engagement problems.

## **13. Housing**

It can be particularly challenging for people with complex support needs or situations, including many people for whom a Public Guardian or Public Advocate is appointed as a guardian, to find appropriate and secure housing.

Concerns about the adequacy of the housing arrangements of many NDIS participants are well known, with some of these difficulties being examined in the NDIS Quality and Safeguards Commission's recent report on its *Own Motion Inquiry into Aspects of Supported Accommodation*.<sup>32</sup>

The lack of sufficient, affordable housing options for many NDIS participants, including individualised housing options, is a key issue that has been the subject of much discussion.

For some NDIS participants, such as those who live in remote or very remote areas, there may be no SIL services and SDA available in their community.

Issues relating to the separation of housing and support services have also been raised in many previous discussions and submissions, highlighting the range of problems that can occur where service providers are both the provider of a person's accommodation and their other support services.

In this submission, we would also like to highlight situations that have developed in state and territory regulated forms of accommodation like boarding houses and hostels, which are often known as supported accommodation or supported residential services.

The operation of NDIS plans in shared accommodation services like these, that are often operated on a for-profit basis, does create problems and regulatory gaps that need to be considered in this review.

For example, in Queensland, boarding houses and hostels are regulated by the Queensland Department of Communities, Housing and the Digital Economy under the *Residential Services (Accreditation) Act 2002*. This Act and the associated regulation divides supported accommodation (in boarding houses and hostels) into three levels based on the level of support provided to residents.

Many residents who are NDIS participants may require Level 3 services, which include things like (in addition to a private room, shared facilities and meals); medication management and health care, help with clothing and hygiene management, leisure activities, building social networks, external support services and participation in decision-making processes.

For this accommodation and level of support services, a payment of around 85% of the disability support pension (or equivalent) is made by the resident. However, this amount is not a regulated requirement.

In response to the introduction of the NDIS, many boarding houses and hostels have also become NDIS registered service providers and are responsible for the provision of SIL services to residents.

In this environment, transparency and accountability rapidly disappear and fundamental conflicts of interest are apparent. There is little or no regulation or monitoring of the interface between the payment and receipt of these accommodation services and supports provided in a participant's NDIS plan. For example, an NDIS participant could receive supports that fund assistance with the preparation of meals and the administration of medication in their plan, however the charge for this service as part of their accommodation arrangement with the boarding house or hostel may not be reduced to reflect this situation.

As has been identified for some SDA and other group housing arrangements, this type of environment can also limit choice and control. It has been noted by stakeholders that NDIS participants living in boarding houses and hostels find it difficult to change service providers and access supports external to those provided by the accommodation service. Moving out of the accommodation service may also be difficult, as this can also require changing service providers

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<sup>32</sup> NDIS Quality and Safeguards Commission, *Own motion inquiry into aspects of supported accommodation*, inquiry report, 2023.

and support coordinators in situations where they are essentially attached to the accommodation service.

There are also concerns about safeguards for people living in boarding houses and hostels. In Queensland, for example, the owner/manager of a supported accommodation service that provides disability supports under the NDIS may not have to register as a Level 3 (state regulated) service, instead being classified as a level 1 (accommodation only) or 2 (accommodation and meals). This means that state safeguards afforded to people receiving level 3 supported accommodation, including visits by the Queensland Public Guardian's official Community Visitor Scheme, are no longer provided. This effectively reduces the level of oversight of the supports provided in these settings and places residents at additional risk.

Should residents of this type of accommodation require housing modifications and other fixed supports that are funded in their plan, the installation of this type of equipment in what is essentially transitory accommodation is also problematic.

Some strategies used by service providers to address housing affordability can also create safeguarding problems. For example, in South Australia there are some service providers that are renting properties and then subletting the property to NDIS participants. These participants may not be protected under relevant legislation, such as the *Residential Tenancies Act 1995 (SA)*. There is also a risk that if an NDIS participant wants to change their service provider, or if the services are withdrawn by the provider, that the person may also lose their accommodation.

There is often also a lack of transparency in the recording of the costs associated with these arrangements, with some SIL providers deducting up to 80% of a person's Disability Support Pension, and not clearly documenting the separate costs for rent, utilities and food.

**Recommendation 15:**

The NDIA should review, with relevant state and territory government departments, the complex and often overlapping ways that NDIS regulation of SDA and SIL services interact with state and territory regulation of accommodation services, with a view to identifying and further discussing the potential for there to be greater regulatory alignment.

#### **14. The NDIS and the aged care system**

Australia's ageing population will significantly impact on the operation of the NDIS in the future. In this submission we would like to suggest that there be greater alignment between the NDIS and the national aged care system.

In 2021 the Australian Government began consultation on alignment of regulation across care and support sectors including disability services, aged care and veterans' care, to enhance consistency, safeguards and the quality of services across these sectors.<sup>33</sup>

Continued work towards regulatory alignment will make it easier for service providers, including NDIS service providers, to provide services across these sectors. This will also support greater worker mobility across sectors, and it will create efficiencies in regulatory systems.

There is also a need for greater clarity around NDIS participants' entitlement to support once they turn 65 years of age.

There are some sources reporting that once an NDIS participant reaches 65 years of age, they can only receive the existing level of supports nominated in their plan at this time, and that if their care

<sup>33</sup> Australian Government Department of Health and Aged Care, *Aligning regulation across the care and support sectors*, 2022 <<https://www.health.gov.au/our-work/aligning-regulation-across-the-care-and-support-sectors#consultation-approach>>.

needs increase, they will have to move to the aged care system. It has also been reported that younger NDIS participants who are living in residential aged care facilities will be automatically moved to the aged care system once they turn 65 years old.

For many people with significant disability, including some people who have a Public Guardian or Public Advocate appointed for decision-making, changing from NDIS funded supports to supports funded through the aged care system could result in a significant decrease in funded, disability-appropriate supports, which would likely affect their health, wellbeing and independence.

Further clarity is needed on this topic.

**Recommendation 16:**

The Australian Government should broaden and accelerate work that is underway on increasing the regulatory alignment between the NDIS and Aged Care sectors to enable consistency in the following areas:

- a) the regulation of restrictive practices;
- b) worker clearances; and
- c) the safeguarding functions of the NDIS Quality and Safeguards Commission and the Aged Care Quality and Safety Commission.

**Recommendation 17:**

The NDIA should provide guidance about the entitlement of NDIS participants who joined the scheme prior to turning 65 years of age, to continue to receive services after they reach 65 years of age, in particular when there is a change in their disability-related support needs.

## **15. Addressing NDIS-related issues for Aboriginal and Torres Strait Islander people**

Many of the issues raised throughout this submission are relevant for Aboriginal and Torres Strait Islander people who are NDIS participants or who are seeking to access the NDIS to obtain disability-related support.

However, there are also specific issues that Aboriginal and Torres Strait Islander people may experience when engaging with the NDIS, and solutions that should be explored to ensure that they are able to access culturally appropriate services and support. For example, this may include:

- funding for Return to Country and cultural consultants or brokers within participants' NDIS plans;
- developing specialist strategies to overcome NDIS accessibility issues for Aboriginal and Torres Strait Islander people trying to access the scheme or already in the scheme; and
- adopting localised decision-making models, whereby NDIA decision-makers engage with key stakeholders to ensure that funding and access decisions appropriately reflect an individual's needs, the cultural needs of Aboriginal and Torres Strait Islander people generally, and take adequate account of the needs of people living in remote and very remote areas.

It is noted that the NDIA has been co-designing a new First Nations Strategy with Aboriginal and Torres Strait Islander people with disability, their families, carers, and the disability community.

Continued engagement, including in relation to this review, is needed to ensure that Aboriginal and Torres Strait Islander people are able to access the NDIS and receive appropriate services and support.

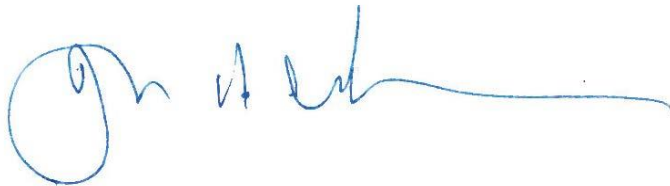
**Recommendation 18:**

The NDIS Independent Review Panel should continue to engage with Aboriginal and Torres Strait Islander people to identify ways in which the scheme can be improved for First Nations participants.

We would be very happy to discuss and further evidence the points raised here.

For correspondence purposes, please contact John Chesterman, Queensland Public Advocate ([john.chesterman@justice.qld.gov.au](mailto:john.chesterman@justice.qld.gov.au)).

Yours sincerely,

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

John Chesterman  
Queensland Public Advocate

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**This submission has been prepared, and is supported, by:**

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Please note: with a state election on 25 March 2023 the NSW Public Guardian is subject to caretaker conventions (and is, for that reason, unable to be a signatory).