



Submission in relation to

**Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper**

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28 April 2015

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## Letter of submission

The submission presented here represents the views of the Australian Guardianship and Administration Council (AGAC), with the exception of Western Australian members, as noted below. AGAC consists of a range of public officials who exercise roles under state and territory guardianship and associated laws. These officials include Public Advocates and Public Guardians, members of Boards and Tribunals with guardianship jurisdiction, and Public and State Trustees.

All members of AGAC are state-based statutory authorities and each is involved in National Disability Insurance Scheme (NDIS) matters. AGAC aims, where appropriate and practicable, to promote consistency in approaches between jurisdictions and to work towards international best practice in guardianship and administration (financial management) for persons with cognitive impairment or mental ill health. AGAC acknowledges, however, that there are differences between jurisdictions, and that this can lead to differences in appropriate approaches.

It is with this function in mind that AGAC provides this submission to the *Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper*. AGAC members have significant experience in the area of decision making for persons with cognitive impairment and mental ill health, and in representing, promoting and protecting the rights and dignity of people with disability.

This submission relates particularly to the following elements of the proposed NDIS quality and safeguarding framework:

- building natural safeguards
- oversight functions
- systems for handling complaints
- ensuring staff are safe to work with participants
- reducing and eliminating restrictive practices in NDIS funded supports.

AGAC largely agrees with the domains in the proposed framework: developmental, preventative and corrective; we agree that system level, service level and individual level safeguards, in addition to broader community responsibility, is a useful structure.

Many of the proposals AGAC comments on relate to the elements within the framework. This submission raises some concerns, identifies gaps and recommends improvements. We do this in order to ensure the proposed framework and those key regulatory elements will protect, promote and empower persons with disability. This submission has a particular focus on those participants with cognitive impairment and mental ill health.

AGAC has a clear and continuing interest in the outcome of the NDIS Senior Officials Working Group consultation process. We will be happy to respond to further questions which may arise and we will be pleased to meet with the NDIS Senior Officials Working Group at any time.

We acknowledge that this submission is a public document and will be available on the Department of Social Services website.

The Western Australian members of AGAC are not a party to this submission. The Western Australian and Commonwealth governments are currently trialling a different form of NDIS service provision in Western Australia to those trials that are taking place in other jurisdictions.

Yours faithfully

Anita Smith

Chair

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## Recommendations

### Substitute and Supported Decision Making

**Recommendation 1.** Substitute decision making and supported decision making need to be viewed as key National Disability Insurance Scheme (NDIS) safeguarding mechanisms for people with significant cognitive impairments or mental ill health.

**Recommendation 2.** Clarity needs to be provided about the various overlapping powers and different appointment processes for substitute decision makers under federal, state and territory laws, who currently include NDIS nominees, guardians, administrators (financial managers), and representatives appointed under enduring powers of attorney.

**Recommendation 3.** The Commonwealth Government should implement Recommendations 5–1 to 5–5 contained in the Australian Law Reform Commission's *Equality, Capacity and Disability in Commonwealth Laws Final Report*, which specifically relate to the NDIS.

**Recommendation 4.** Substitute decision making, in the context of NDIS-related decisions, should be restricted to situations of absolute necessity, and supported decision-making should be promoted and utilised wherever possible.

**Recommendation 5.** The National Disability Insurance Agency should fund a small number of innovative supported decision-making initiatives throughout Australia, through which people with impaired decision-making ability are supported to make NDIS-related decisions. Funding should be determined on a competitive basis and should be sufficient to enable these initiatives to be evaluated robustly, with a view to the most successful programs being implemented throughout Australia.

### Advocacy

**Recommendation 6.** The Commonwealth Government should commit to funding advocacy programs as a crucial NDIS safeguard. Such programs and funding should remain separate from any funded supports that are provided to individual NDIS participants.

### Complaints

**Recommendation 7.** The role of a national Disability Services Complaints Commissioner should be established whose jurisdiction covers complaints about NDIS-funded services. The office should be independent of the National Disability Insurance Agency and could be modelled on existing state and territory disability complaints commissioners and their equivalents. Functions should include:

- a. resolving complaints
- b. collecting data about complaints and reporting publicly
- c. identifying and reporting on systemic abuse, neglect and exploitation
- d. raising public awareness about the rights of persons with disability
- e. educating service providers about the benefits of effective complaints mechanisms.

### **Investigations**

**Recommendation 8.** An independent statutory authority should be empowered to conduct investigations where there are allegations or concerns about people with disability being abused, neglected or exploited. This function could sit with the proposed national Disability Services Complaints Commissioner, or with state and territory-based statutory authorities.

### **Community Visitors**

**Recommendation 9.** Community Visitors programs currently in operation should be funded to continue for a 4-year transition period from 1 July 2016.

**Recommendation 10.** Amendment of the *National Disability Insurance Scheme Act 2013* (Cth) will likely be required to enable existing state and territory Community Visitors programs to operate in the context of the full NDIS roll-out. Relevant state and territory legislation will also likely need amendment to enable these programs to continue to operate in an NDIS environment.

**Recommendation 11.** Transitional legislation at the Commonwealth level, and in those jurisdictions where Community Visitors programs exist, should specify that Community Visitors have authority to visit the accommodation settings of NDIS participants where NDIS funds are being used to provide supported accommodation services. 'Supported accommodation' services should be defined to refer to situations where the provision of accommodation is connected to the provision of personal care and support.

**Recommendation 12.** A national evaluation of existing Community Visitors programs should be commenced as soon as possible and be concluded by 1 July 2018. The evaluation should be guided by the principles contained in the *Convention on the Rights of Persons with Disabilities*, the National Standards for Disability Services, and the National Disability Strategy. The evaluation should identify a best-practice Community Visitors model by assessing, among other things, the extent to which Community Visitors programs:

- a. promote social inclusion and the empowerment of people with disability;
- b. identify matters of concern (including situations of violence, abuse, exploitation and neglect);
- c. provide a cost-effective means of monitoring the well-being of people in NDIS-funded accommodation settings.

The evaluation should also consider whether the evidence collected supports the development, based on the identified best-practice model, of a national Community Visitors scheme, or the development of nationally-consistent state and territory Community Visitors schemes.

### **Disability Worker Exclusion Scheme**

**Recommendation 13.** A disability worker exclusion scheme with appropriate safeguards should be implemented that has potential application to any person who provides NDIS-funded supports. Safeguards should include the following:

- a. the scheme must be established by legislation
- b. principles of natural justice must guide its development and operation
- c. there must be appropriate appeal mechanisms for workers who object to their listing.

## **Restrictive Practices**

**Recommendation 14.** Existing state and territory regulation of restrictive practices should continue for a 4-year transition period from 1 July 2016.

**Recommendation 15.** Those states and territories that currently do not regulate the use of restrictive practices on people with disability should develop and implement by July 2016 an external authorisation process for the use of restrictive practices.

**Recommendation 16.** A national evaluation of restrictive practice usage in relation to people with disability should be commenced as soon as possible and be concluded by 1 July 2018. The evaluation should be guided by the principles contained in the *Convention on the Rights of Persons with Disabilities* and the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector.

The evaluation should identify a best-practice model of restrictive practice regulation by assessing:

- a. the amount and type of restrictive practice usage in each state and territory;
- b. the reach of the various authorisation processes that exist in different jurisdictions in Australia; and
- c. the impact of the various authorisation processes on restrictive practice usage.

**Recommendation 17.** A national approach to restrictive practice regulation, drawing on the best-practice model identified by the national evaluation, should be in place and operate from July 2020.

## Introduction

While AGAC broadly supports the structure of the quality and safeguarding framework, we wish to bring attention to the particular challenges faced by people with cognitive impairment and mental ill health, and to those participants and prospective participants who have limited or no informal supports. Much of this concern underscores the positions expressed in this submission. Application of a consumer choice model creates difficulties for people with cognitive impairment that should not be underestimated.<sup>1</sup>

The Western Australian members of AGAC are not a party to this submission. The Western Australian and Commonwealth governments are currently trialling a different form of NDIS service provision in Western Australia to those trials that are taking place in other jurisdictions. References in this submission to AGAC and its members therefore do not include the Western Australian members.

## Scope of the problem

In Australia, people with disability experience significantly higher levels of violence, exploitation, abuse and neglect than people without disability.<sup>2</sup> The quality and safeguarding framework should, by using a human rights framework, contain a key guiding principle that people with disability should be protected from violence, abuse, neglect and exploitation. AGAC members are concerned about the risk that people with cognitive impairments will be subjected to financial abuse in an increasingly consumer-driven disability service environment.

The Productivity Commission noted that the vulnerability of some people with a disability requires government to play a role in promoting safe high-quality disability support services.<sup>3</sup>

Historical and practical reasons lie behind this position:

- there is often a power imbalance between providers and people with disability
- people with disability may often live stressful lives and with a lack of accessible information it can be difficult to plan ahead and make informed decisions
- people with disability often have no family or appropriate informal supports in their life, or may only have paid supporters
- people with cognitive impairment may have a diminished capacity to make informed decisions.<sup>4</sup>

Girls and women with disability, Indigenous people with disability, and people with disability from culturally and linguistically diverse backgrounds are at even greater risk of experiencing violence, abuse, neglect and exploitation. AGAC notes the importance of designing systems which recognise this and comments that more needs to be done to develop tailored measures for these groups. These realities apply both under current arrangements and will continue to apply when the NDIS is fully rolled out.

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<sup>1</sup> See also, Office of the Public Advocate (Victoria), *Guardianship and the National Disability Insurance Scheme: Discussion paper* (2014) 5, available at Office of the Public Advocate (Victoria), *Discussion Papers*, 1 September 2014, <<http://www.publicadvocate.vic.gov.au/research/132/>>.

<sup>2</sup> Australian Civil Society Parallel Report Group, Disability Now, *Response to the List of Issues*, CRPD Committee 10<sup>th</sup> Session, Dialogue with Australia 3-4 September 2013, Geneva, 21.

<sup>3</sup> Productivity Commission, *Inquiry into Disability Care and Support* (2011) Report No 54, Vol 1, 493.

<sup>4</sup> Ibid.

Given people with disability are often disadvantaged and isolated, it will be even more difficult for those persons to participate in a competitive market and take advantage of the opportunity for choice and control. AGAC agrees that 'the vulnerability of many people with a disability increases the risks of harm or poor outcomes, even when consumer choice is greatly enhanced under the NDIS.'<sup>5</sup> The NDIS quality and safeguarding framework must acknowledge the vulnerabilities of some persons with disability. It must address the practical challenges faced by people with cognitive impairment, particularly where there is a lack of informal supports available to them.

### **Consumer choice and the need for protection**

The consumer choice philosophy that underpins the NDIS presents challenges for those people with significant cognitive impairments and mental ill health who have difficulty making decisions.

One of the key legal safeguards for people with impaired decision-making ability is substitute decision making, which is not mentioned in the consultation paper. Over the past 30 years the states and territories in Australia have enacted a range of laws that govern decision making in the fields of guardianship, medical treatment and mental health service provision. Added to these laws now are federal laws, such as the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act), which provides for plan nominees to have substitute decision-making powers.

This has resulted in a complex substitute decision-making environment. The experience of some AGAC members who have been involved in the operation of NDIS trial sites has been that the role of, and need for, substitute decision making in relation to NDIS decisions is quite unclear. The range of potential substitute decision makers includes NDIS plan nominees and substitute decision makers appointed under state and territory laws, including guardians, administrators (financial managers), and individuals appointed under enduring powers of attorney (including enduring powers of guardianship).

The Victorian Office of the Public Advocate has produced a decision-making guide in relation to current Victorian and Commonwealth laws which seeks to navigate these complexities (see Appendix 1 'NDIA decision-making guide for adults with cognitive impairments or mental ill health'). That office has also produced a discussion paper titled *Guardianship and the National Disability Insurance Scheme* which discusses the interaction between state appointments of substitute decision makers (guardians) and Commonwealth appointments of plan nominees.<sup>6</sup> This paper considers the need to examine less restrictive alternatives to resolving matters than by appointing guardians. It also proposes that usage of the NDIS nominee provisions needs to be closely monitored and evaluated.<sup>7</sup>

The practice of appointing substitute decision makers has been uneven across the trial sites. The number of NDIS nominees who have been appointed appears to have been uniformly low. But there has been a relatively high number of guardianship applications in relation to the NDIS's operation in the NSW Hunter area trial site, and a comparatively low appointment rate of guardians in Victoria's Barwon trial site.

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<sup>5</sup> Productivity Commission, *Inquiry into Disability Care and Support* (2011) Report No 54, Vol 1, 498.

<sup>6</sup> Office of the Public Advocate (Victoria), *Guardianship and the National Disability Insurance Scheme: Discussion paper* (2014) available at Office of the Public Advocate, *Discussion Papers*, 1 September 2014, <<http://www.publicadvocate.vic.gov.au/research/132/>>.

<sup>7</sup> *Ibid* 19-20, 32.

A 2014 decision of the New South Wales Civil and Administrative Tribunal (NCAT) in the matter of KCG [2014] NSWCATGD 7, captures the complexities of the decision making-environment and the interplay between state and federal laws.<sup>8</sup> In this matter NCAT appointed the Public Guardian as limited guardian for Miss KCG with accommodation, services and advocacy functions for a period of 12 months and made the following comments in the decision:

The irony in reaching this conclusion [to appoint the Public Guardian as guardian with the intention of it accepting appointment as plan nominee] is that a state based appointment is required for a person in Miss KCG's circumstances to ensure that her interests in relation to a Commonwealth scheme are protected, as it seems there is no Commonwealth equivalent of a Public Guardian, a Public Advocate or other independent body who could be appointed as a nominee on her behalf.<sup>9</sup>

In the AGAC submission to the Australian Law Reform Commission (ALRC) inquiry into *Equality, Capacity and Disability in Commonwealth laws* we also discussed the implications of this decision for participants who do not have informal supports in their lives:

Where the NDIA is managing the plan on a participant's behalf, and the person has no capacity to provide a view and no family or friends to advocate on his or her behalf, the decisions being made by the NDIA are in the nature of substitute decisions with no independent monitoring or scrutiny.<sup>10</sup>

AGAC agrees with a central recommendation made by the ALRC, which is consistent with Article 12(4) of the *Convention on the Rights of Persons with Disabilities* and existing State and Territory legislation, namely that substitute decision making should only be a last resort and should apply for the shortest amount of time possible.

Article 12(4) of the *Convention on the Rights of Persons with Disabilities* provides that:

States Parties shall ensure that all measures that relate to the exercise of legal capacity provide for appropriate and effective safeguards to prevent abuse in accordance with international human rights law. Such safeguards shall ensure that measures relating to the exercise of legal capacity respect the rights, will and preferences of the person, are free of conflict of interest and undue influence, are proportional and tailored to the person's circumstances, apply for the shortest time possible and are subject to regular review by a competent, independent and impartial authority or judicial body. The safeguards shall be proportional to the degree to which such measures affect the person's rights and interests.<sup>11</sup>

The ALRC recommended reform of Commonwealth, state and territory laws and legal frameworks concerning individual decision-making, which would be guided by the proposed National Decision-Making Principles.<sup>12</sup>

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<sup>8</sup> The implications of this matter was also discussed in submissions from AGAC and NCAT to the 2014 Australian Law Reform Commission inquiry into *Equality, Capacity and Disability in Commonwealth Laws*. The Victorian Office of the Public Advocate also examined this matter in its *Guardianship and the National Disability Insurance Scheme: Discussion paper* (2014) 33-36 available at Office of the Public Advocate, *Discussion Papers*, 1 September 2014, <<http://www.publicadvocate.vic.gov.au/research/132/>>.

<sup>9</sup> KCG [2014] NSWCATGD 7, [69].

<sup>10</sup> Australian Guardianship and Administration Council, *Submission to Australian Law Reform Commission Inquiry Equality, Capacity and Disability in Commonwealth Laws: Discussion Paper 81* (2014) 6.

<sup>11</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12(4).

<sup>12</sup> See in particular pages 11-15 for an articulation of the recommended National Decision-Making Principles and the Commonwealth Decision-making Model: Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth laws*, Final Report (2014) 11-15.

AGAC wishes to refer the NDIS Senior Officials Working Group to those recommendations and supports the ALRC's recommendations in relation to decision-making arrangements under the NDIS:

The ALRC recommends that the Commonwealth decision-making model be applied to the NDIS, which already incorporates elements of supported decision making.

This will require some amendment of the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act) and Rules to provide for legal recognition of 'supporters' and 'representatives', including provisions for their appointment, removal and associated safeguards.

The ALRC also recommends that the Chief Executive Officer (CEO) of the National Disability Insurance Agency (NDIA) should retain the power to appoint a 'representative' for a participant as a measure of last resort. There are circumstances where the exercise of this power is necessary—in the absence of a Commonwealth guardianship tribunal or equivalent body—to ensure that people with a disability are properly supported in relation to the NDIS.

There should be a presumption that an existing state or territory appointed decision-maker with comparable powers and responsibilities should be appointed as an NDIS representative. Amendments to the legislation governing state and territory decision-makers may be necessary to facilitate this.

In the light of the shift towards a supported decision-making model, the ALRC also recommends that the Australian Government provide guidance and training in relation to decision-making and the NDIS.<sup>13</sup>

The ALRC's recommendations in this regard were as follows:

#### **Objects and principles**

**Recommendation 5–1** The objects and principles in the *National Disability Insurance Scheme Act 2013* (Cth) should be amended to ensure consistency with the National Decision-Making Principles.

#### **Supporters**

**Recommendation 5–2** The *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules should be amended to include provisions dealing with supporters consistent with the Commonwealth decision-making model.

#### **Representatives**

**Recommendation 5–3** The *National Disability Insurance Scheme Act 2013* (Cth) and NDIS Rules should be amended to include provisions dealing with representatives consistent with the Commonwealth decision-making model.

#### **Appointment by the CEO**

**Recommendation 5–4** The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to incorporate provisions dealing with the process and factors to be taken into account by the CEO of the National Disability Insurance Agency in appointing representatives. These provisions should make it clear that the CEO's powers are to be exercised as a measure of last resort, with the presumption that an existing state or territory appointee will be appointed, and with particular regard to the participant's will, preferences and support networks.

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<sup>13</sup> Ibid paras [5.2 – 5.5] 129-130.

### **Interaction with state and territory systems**

**Recommendation 5–5** The *National Disability Insurance Scheme Act 2013* (Cth) should be amended to provide that, before exercising the power to appoint a representative, the CEO of the National Disability Insurance Agency may make an application to a state or territory guardianship or administration body for the appointment of a person with comparable powers and responsibilities. The CEO may then exercise the power to appoint that person as a representative under the NDIS Act.

### **Support for decision making**

Within the NDIS support needs to be provided for decision making. Support for decision making falls within the developmental and preventative domains of the proposed framework, both at the individual and service level.

AGAC notes the consultation paper did not discuss the importance of support for decision making and the accessibility of those arrangements to people with limited supports in their life. Where supported decision-making is discussed, one instance is in relation to the role of National Disability Insurance Agency (NDIA) planners, as being able to ‘facilitate supported decision-making in the planning process and gain an understanding of the needs of families and carers in supporting the participant.’<sup>14</sup>

AGAC query whether planners have received, or will receive, the training, administrative support, and importantly, whether they have the time required in order for them to adequately facilitate supported decision making in the planning process. This particularly applies where participants do not have supportive families or carers. For those participants who have a limited number of family and friends, the first difficulty lies in accessing people who may be able to support them to make decisions. Support with decision making is crucial if participants are to exercise choice and control within the NDIS.

AGAC refers to the obligations on nations under article 12(3) of the *Convention on the Rights of Persons with Disabilities*:

States Parties shall take appropriate measures to provide access by persons with disabilities to the support they may require in exercising their legal capacity.<sup>15</sup>

The South Australian Office of the Public Advocate, the Victorian Office of the Public Advocate, and the New South Wales Trustee and Guardian and the Public Guardian, have been involved in supported decision-making trials and would be happy to provide further information on the operations of these schemes should that be required.

AGAC strongly supports the use of supported decision making within the NDIS as a way to build a participant’s capacity to make decisions, and AGAC suggests that NDIS-specific supported decision-making initiatives should be encouraged and funded by the NDIA (as per recommendation 5 below).

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<sup>14</sup> NDIS Seniors Officials Working Group, Disability Reform Council, *Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper* (2015) 85.

<sup>15</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 12(3).

AGAC wishes to reaffirm its position that supported decision making is not easily implemented in all situations. In any supported decision-making arrangements, whether provided for in legislation or not, appropriate safeguards, including substitute decision making, need to be available so that people who may require support to exercise, or are unable to exercise, their decision-making ability are not inadvertently placed at greater risk.<sup>16</sup>

### **Substitute and Supported Decision Making**

**Recommendation 1.** Substitute decision making and supported decision making need to be viewed as key National Disability Insurance Scheme (NDIS) safeguarding mechanisms for people with significant cognitive impairments or mental ill health.

**Recommendation 2.** Clarity needs to be provided about the various overlapping powers and different appointment processes for substitute decision makers under federal, state and territory laws, who currently include NDIS nominees, guardians, administrators (financial managers), and representatives appointed under enduring powers of attorney.

**Recommendation 3.** The Commonwealth Government should implement Recommendations 5–1 to 5–5 contained in the Australian Law Reform Commission's *Equality, Capacity and Disability in Commonwealth Laws Final Report*, which specifically relate to the NDIS.

**Recommendation 4.** Substitute decision making, in the context of NDIS-related decisions, should be restricted to situations of absolute necessity, and supported decision-making alternatives should be promoted and utilised wherever possible.

**Recommendation 5.** The National Disability Insurance Agency should fund a small number of innovative supported decision-making initiatives throughout Australia, through which people with impaired decision-making ability are supported to make NDIS-related decisions. Funding should be determined on a competitive basis and should be sufficient to enable these initiatives to be evaluated robustly, with a view to the most successful programs being implemented throughout Australia.

### **Data sharing**

AGAC members wish to highlight the problems arising in the trial sites around data sharing and the inability of the NDIA and statutory authorities to access important data. AGAC queries how the NDIA may become aware that a guardian or an administrator has been appointed for a participant, or a prospective participant. It is crucial for a guardian with the appropriate authority to be involved in the planning process, and guardians must be able to submit feedback on any plan before it can be approved.

AGAC note that the NSW Trustee and Guardian has a Memorandum of Understanding with the NDIA that has operated since July 2014. On the whole this is working well and issues relating to the effective exchange of data are being addressed. State Trustees Limited in Victoria is negotiating a Memorandum of Understanding with the NDIA in relation to the sharing of relevant data. This will need to be done at the national level to ensure consistency, or alternatively, the development of nationally-consistent MOUs for implementation at the state and territory level could achieve this.

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<sup>16</sup> Australian Guardianship and Administration Council, *Submission to Australian Law Reform Commission Inquiry Equality, Capacity and Disability in Commonwealth Laws*, Discussion Paper No 81 (2014) 2.

## Evaluation of the framework

In implementing the quality and safeguarding framework, AGAC suggest that it is crucial that the framework as a whole be evaluated within a reasonable time-frame post full roll-out of the scheme to ensure that it is achieving the desired outcomes. It is desirable that during the transition period the framework has the capacity to be iterative in nature; that is, to establish the framework within the context of regular review and continuous improvement. When issues arise for which the framework is deemed insufficient or where additional or modified safeguards are needed, then these issues can be addressed and the framework updated accordingly. As the sector develops and transforms it is important that the framework is flexible in the way that it responds to sector change.

## Principles

AGAC considers the following principles as crucial to the development of the framework, and to guide any evaluation of the outcomes of the framework in the future. These principles are shaped by the rights enshrined in the *Convention on the Rights of Persons with Disabilities*:

- Protection from violence, abuse, neglect and exploitation
  - independent monitoring mechanisms and facilities and programs designed to serve persons with disabilities are effectively monitored by independent authorities, including Community Visitors
- Choice and Control
  - access to advocacy
  - the availability of supported decision making and less restrictive alternatives to guardianship, to enhance legal agency
  - continued use of substitute decision-making arrangements where necessary
- Complaints resolution
  - independent complaints body to manage, investigate and resolve complaints
  - effective responses to serious incident reporting, and access to justice opportunities
- Reduction and elimination of the use of restrictive practices
  - practices applied as a last resort, for the shortest time possible and legally and clinically authorised by an independent authority.

## Protection from violence, abuse, neglect and exploitation

People accessing services through the NDIS have the right to live free from abuse, neglect and exploitation. The NDIS quality and safeguarding framework omits as a guiding principle 'protection from violence, abuse, neglect and exploitation'. Protection from violence, abuse, neglect and exploitation informs the operations of AGAC members, as this is a specific legislative function for a number of members.<sup>17</sup> This principle guides the policy and practice in the area of decision making for people with cognitive impairment and mental ill health in addition to the advocacy work undertaken by some member bodies.<sup>18</sup> AGAC members, therefore, consider the addition of a principle to protect people with disability from violence, abuse, neglect and exploitation to be a crucial human rights safeguard.

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<sup>17</sup> See, for example, *Guardianship and Administration Act 1986* (Vic) s 15(c)(iv).

<sup>18</sup> *Ibid* s 15(c)(iv); 16(1)(h). In 2013, OPA (Vic) produced the *Interagency Guideline for Addressing Violence, Neglect and Abuse* (IGUANA), a good practice guideline for organisations, staff members and

Article 16 of the *Convention on the Rights of Persons with Disabilities* provides that:

States Parties shall take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects.<sup>19</sup>

In order to prevent the occurrence of all forms of exploitation, violence and abuse, States Parties shall ensure that all facilities and programmes designed to serve persons with disabilities are effectively monitored by independent authorities.<sup>20</sup>

The NDIS Act also contains statements about the rights of persons with disability, including that they have the same right as other members of Australian society to respect for their worth and dignity and to live free from abuse, neglect and exploitation.<sup>21</sup> AGAC advocates for the inclusion in the NDIS Act of a guiding principle in the same vein as article 16 of the *Convention on the Rights of Persons with Disabilities*.

### **Proposed guiding principle - Risk-based person-centred approach**

The consultation paper proposes a risk-based person centred approach as a guiding principle of the framework, reflecting the aim of the scheme. The consultation paper states that safeguards under the NDIS should relate to the actual level of risk faced by a person. The consultation paper focuses on the level of risk to the participant related to the service provided, rather than the level of risk associated with the participant themselves because of their impairment and because of society's disabling factors. AGAC suggests that the proposed guiding principle needs to be reconsidered within this context.

## **Part 1: Proposed Quality and Safeguarding framework**

### **Maintain and improve existing quality and safeguarding frameworks**

AGAC would like to underline the importance of the provisions in the bilateral agreements between the Commonwealth Government and the state and territory governments, in which state and territories were assured that quality and safeguarding arrangements within the NDIS would not diminish those safeguards currently operating.

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volunteers working with adults who are at risk of violence, neglect and abuse. IGUANA was developed in collaboration with a range of statutory agencies and service providers in the disability, mental health, sexual assault and family violence sectors in Victoria following forums in 2012 and 2013. Many of these organisations signed up, committing to integrate IGUANA into their responses to violence, neglect and abuse. OPA Vic is keen to ensure all providers of NDIS supports endorse IGUANA and implement it in their practices. Amendments may need to be made pending development of a nationally consistent system for handling complaints: Office of the Public Advocate (Victoria), *Interagency Guideline for Addressing Violence, Neglect and Abuse* (2013) available online at Office of the Public Advocate, IGUANA guideline, 29 August 2013 <<http://www.publicadvocate.vic.gov.au/publications/539/>>.

<sup>19</sup> *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) art 16(1).

<sup>20</sup> Ibid.

<sup>21</sup> NDIS Seniors Officials Working Group, Disability Reform Council, *Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper* (2015) 4. See also *National Disability Insurance Scheme Act 2013* (Cth) s 4(6).

For example, the bilateral agreement between the Commonwealth Government and Victorian Government stated the following:

The existing Victorian quality assurance and safeguards framework ... will apply in the Barwon launch site as it applies to the relevant new and existing funded client support programs for the launch subject to further development of and transition to a nationally consistent risk-based quality assurance approach in the longer term that does not diminish Victoria's existing quality assurance system and safeguards.<sup>22</sup>

The Commonwealth Government should ensure that the strengths of existing state and territory quality assurance and safeguarding arrangements are recognised, maintained and improved in the development of the nationally-consistent framework.

### **Building natural safeguards**

The natural safeguards proposed in the consultation paper apply most readily to people who can advocate for themselves. AGAC is concerned about those participants who find it difficult, or are unable, to articulate their views or concerns. Where a participant's communication is impaired, and where the participant is socially isolated, there may have been no communication assessment carried out in the past. Participants in these circumstances will not have access to aids or supports to assist them. People need the means to communicate and articulate their views in some way to participate in the scheme.

Many people with disability are desensitised into accepting poor services. Advocating for something better may be new terrain for some participants and prospective participants. AGAC is aware that many people with disability, particularly those with higher support needs, continue to lead precarious lives.<sup>23</sup>

Building personal support networks takes time and dedication. For those people with cognitive impairment who are socially isolated, with little or no informal supports, the process of establishing relationships of trust is even more complex. Fundamentally, building natural safeguards necessarily relies somewhat on the participant being able to advocate for themselves.

AGAC is of the view that the consultation paper does not fully comprehend these practical realities faced by people with disability on a daily basis. Notwithstanding the consultation paper's focus on regulatory elements, the very real struggles people with cognitive impairment encounter will compromise their right to exercise choice and control within the NDIS.

#### **QUESTION**

Are there additional ways of building natural safeguards that the NDIS should be considering? What can be done to support people with a limited number of family and friends?

AGAC appreciates that the consultation paper is focusing on regulatory elements as applying to NDIS-funded supports. AGAC is of the view that regulatory elements need to be humanised in this context. Regulation of itself will fall short in this sector. State and territory experience lends itself to the argument that there is a need for a comprehensive approach, taking with it the important element of independent advocacy, and consideration of the statutory functions of state and territory bodies, like public advocates, public guardians, and public trustees.

<sup>22</sup> *Schedule B: Bilateral Agreement for NDIS Launch between the Commonwealth and Victoria* (2012) [15], Appendix C, 11-13.

<sup>23</sup> See, for example, Office of the Public Advocate (Victoria), *Inquiry into the social inclusion of Victorians with a disability Submission to the Parliament of Victoria, Family and Community Development Committee* (2014) 7.

## Advocacy

Advocacy and supported decision-making arrangements can play a crucial role for participants who have limited or no informal supports in their lives. Many participants with cognitive impairment accessing the NDIS may have the added disadvantage of being socially isolated and without a network of support to assist them to access and navigate the scheme.

AGAC is concerned that currently there is little oversight in terms of monitoring a participant's plan where there are no informal supports to fill this role. Experience to date suggests that the role of the local area coordinators is limited, and often is exercised in response to a crisis, rather than providing any formal monitoring role.

AGAC is also concerned that there is effectively no case management within the NDIS, as originally envisaged by the Productivity Commission.<sup>24</sup> This places people with cognitive impairment at risk. It cannot be assumed that all participants will be able to undertake their own case management, having never had the opportunity to do so in the past.

Advocacy is a crucial support to enable a participant to access, navigate and benefit from the scheme. Advocacy is also an important safeguard for participants and prospective participants in relation to the general quality of available services, and the protection of people with disability from abuse, neglect and exploitation. The NDIS Act recognises the role of advocacy in representing the interests of people with disability.<sup>25</sup>

The consultation paper refers to disability advocates as being a safeguard that operates outside the NDIS. Advocacy has a crucial part to play within the scheme. In practice, advocacy will perform a quality assurance and safeguarding role within the scheme.

AGAC supports the Productivity Commission's recommendation in relation to advocacy, that the Australian Government:

should continue to provide funding for general advocacy by non-government organisations, with no involvement by the National Disability Insurance Agency in this funding role. State and territory funding of disability advocacy groups should continue.<sup>26</sup>

### **Advocacy**

**Recommendation 6.** The Commonwealth Government should commit to funding advocacy programs as a crucial NDIS safeguard. Such programs and funding should remain separate from any funded supports that are provided to individual NDIS participants.

<sup>24</sup> See, for example, Australian Law Reform Commission, *Equality, Capacity and Disability in Commonwealth laws*, Final Report (2014) 484-488.

<sup>25</sup> "The role of advocacy in representing the interests of people with disability is to be acknowledged and respected, recognising that advocacy supports people with disability by: a) promoting their independence and social and economic participation; b) promoting choice and control in the pursuit of their goals and the planning and delivery of their supports; and c) maximising independent lifestyles of people with disability and their full inclusion in the mainstream community": *National Disability Insurance Scheme Act 2013* (Cth) s 4(13).

<sup>26</sup> Productivity Commission, *Inquiry into Disability Care and Support* (2011) Vol 1, rec [10.4].

## **Oversight functions**

### **Monitoring the implementation of a participant's plan**

The consultation paper states that the NDIA will oversee the operation of the NDIS in relation to monitoring whether the goals in individual plans have been achieved and it will also gather information about which supports are most effective. In the experience of some AGAC members, it appears somewhat common that the needs of a participant have been under-assessed. For example, a participant requires a certain level of incontinence assistance, but does not receive the required amount in their plan.

A related risk is that some participants are being assessed to have a high level of comprehension and coping skills in the planning meeting, and consequently they are not receiving the reasonable and necessary supports required to meet their needs. There is a role here for the NDIA, specifically for planners and local area coordinators, to monitor the implementation of a participant's plan.

### **Market oversight and market failure**

AGAC also sees a role for the Board of the NDIA to provide market oversight functions given its responsibility for the financial integrity of the scheme and the importance of an effective market for achieving the NDIS's aims.

In the case of market failure, or where there is a thin market segment and therefore no competition, likely in many rural and regional areas, the NDIA could have a role in addressing these market inefficiencies. There is a significant risk of price gouging if the market is not monitored. It is imperative that the NDIA, or any other independent oversight body, have a role in strengthening the market to counter this risk.

With the withdrawal of many state and territory governments from the provision of disability services, there will increasingly be no disability-related support provider of last resort in those jurisdictions. In this instance – where there is no available or willing provider to deliver services to a participant – it is not clear where the responsibility lies to ensure that the participant receives the reasonable and necessary supports to which they are entitled. AGAC here sees the need for a continuing role to be played by state and territory governments.

The Public Trustee and Guardian in New South Wales (NSW) raised a particular concern in relation to market risk and monitoring. Broadly for Trustees, and particularly in the case of the NSW Public Trustee and Guardian, one of the big risks is duplication of funding; that is, the NDIS is paying for something that the NSW Government is already paying for, and the required information exchange in such situations has either not occurred or has failed. This leads to a depletion of the funding base and poses a systemic risk to the program, and to the individual participant, if it is not addressed. The NSW Trustee and Guardian notes that matter is the focus of the MOU it has signed with the NDIA.

#### **QUESTION**

What functions and powers should an oversight body have?

An oversight body's roles should include:

- monitoring the market for NDIS services with a focus on the risk of price gouging
- responding to failure in the market
- strengthening the market.

## Concern around the market-based model for support provision

The consultation paper states that a market-based model for support provision depends on competition in that market and ongoing user confidence.<sup>27</sup> AGAC suggests that using market protections have obvious limitations when consumers have significant cognitive impairments or mental ill health.

Not all NDIS participants will interact with the market in the same way, or with the same tools at their disposal. It is also not practicable to anticipate that people will all necessarily use the services of the NDIA to enhance their capacity to interact with the market.

The consumer choice philosophy of the NDIS will result in key relationships being between individuals and service providers, rather than being between governments and service providers. This inevitably gives government less regulatory reach, both contractually (through standards monitoring in service provision agreements) and in terms of location-based monitoring.<sup>28</sup> On this point, AGAC is concerned about the risks posed to participants of financial abuse and lack of adequate service provision.

## Part 2: Detail of key regulatory elements of the Quality and Safeguarding framework

### Systems for handling complaints

#### QUESTION

How important is it to have an NDIS complaints system that is independent from providers of supports?

It is critical to have a complaints system that is independent from providers of supports.

AGAC supports the proposal for the establishment of an independent statutory complaints office independent of the NDIA. Possible models include existing state and territory disability services commissioners and their equivalents. This independent office could sit within the Commonwealth Ombudsman's office, or it could be a stand-alone office.

#### QUESTION

Should an NDIS complaints system apply only to disability-related supports funded by the NDIS, to all funded supports, or to all disability services regardless of whether they are funded by the NDIS?

AGAC members recognise that there are discrete groups of people using NDIS-funded supports; people with physical disability, people with sensory impairment, people with cognitive impairment and people with mental ill health, for example. There are difficulties that exist in relation to having one complaints authority for NDIS services. The real challenge is how to tailor a complaints mechanism towards these discrete groups.

<sup>27</sup> NDIS Seniors Officials Working Group, Disability Reform Council, *Proposal for a National Disability Insurance Scheme Quality and Safeguarding framework consultation paper* (2015) 23.

<sup>28</sup> John Chesterman, 2014. 'Modernising adult protection in an age of choice', *Australian Journal of Public Administration*, vol. 73, pp. 517-524, 519.

Overall the possibility that a national disability complaints commissioner might be established has attracted various views within AGAC. Some AGAC members see value in establishing the position of an independent authority, or commissioner, to oversee services for vulnerable persons more generally, given the comparable vulnerability of some NDIS participants and some aged-care assistance recipients. In discussing a combined authority – for both NDIS and aged care complaints – some AGAC members are concerned that the broader a complaints system is, the less able it would be to encourage complaints.

AGAC accepts that the use of the word ‘disability’ in the title of any complaints authority may create a barrier for some people with mental ill health wishing to make a complaint. But given the fact that ‘disability’ is used in the name of the scheme, it makes sense to use this in the title of a new complaints authority.

In addition to creating a formal administrative appeals process it will be important for marginalised people to be encouraged to be their own advocates in complaining about service provision.<sup>29</sup> A challenge exists when it comes to providing accessible processes by which people with significant cognitive impairment or mental ill health can complain about the provision of services to them and be encouraged to do so. Many participants will require support to make a complaint. AGAC members refer to the successful ‘It’s ok to complain’ core message and associated accessible information provided by the Victorian Disability Services Commissioner.<sup>30</sup>

It is within this element of the framework that advocacy can play a vital role to provide support to a person to make a complaint. AGAC refers to the discussion about advocacy earlier in this submission.

### **Complaints**

**Recommendation 7.** The role of a national Disability Services Complaints Commissioner should be established whose jurisdiction covers complaints about NDIS-funded services. The office should be independent of the National Disability Insurance Agency and could be modelled on existing state and territory disability complaints commissioners and their equivalents. Functions should include:

- a. resolving complaints
- b. collecting data about complaints and reporting publicly
- c. identifying and reporting on systemic abuse, neglect and exploitation
- d. raising public awareness about the rights of persons with disability
- e. educating service providers about the benefits of effective complaints mechanisms.

A protocol between a national disability complaints commissioner would need to be developed with the NDIA to institute systems to protect the privacy of providers while maintaining the rights of persons with disability as the primary goal.

<sup>29</sup> See broadly John Chesterman, 2014. ‘Modernising adult protection in an age of choice’, *Australian Journal of Public Administration*, vol. 73, pp. 517-524.

<sup>30</sup> Disability Services Commissioner (Victoria), *Making a complaint to the Disability Services Commissioner : Information Sheet Plain English*, June 2013, <[http://www.odsc.vic.gov.au/public/editor\\_images/InfoSheets1\\_%20PEng\\_WEB\\_MakingComplaint.pdf](http://www.odsc.vic.gov.au/public/editor_images/InfoSheets1_%20PEng_WEB_MakingComplaint.pdf)>.

## Authority to investigate

Usual market protection mechanisms (including complaints and survey-based monitoring) do not apply in the same way to the provision of services to people with significant cognitive impairments.<sup>31</sup> Noting this, AGAC wishes to stress that systems for protecting vulnerable people cannot rely solely on user-complaints mechanisms. There is an increasing need for an authority to investigate situations of concern because there are an increasingly diverse array of settings in which disability services are being, and will be, provided.

AGAC considers it important that an authority nationally or in each state and territory be empowered to conduct investigations into situations of concern, where there are allegations or concerns about the abuse, neglect or exploitation of people with disability. This could be a function for the guardian of last resort; for example, OPA Vic have published significantly on this possibility, and the Victorian Law Reform Commission in its review of Victoria's guardianship laws proposed this reform.<sup>32</sup> Alternatively, an investigatory role could be a function of the national Disability Services Complaints Commissioner.

A number of inquiries are either underway, or soon will be, that examine investigation and reporting processes where people with disability have been subjected to violence.

At the federal level there is the ongoing:

- Senate Inquiry into violence, abuse and neglect against people with disability in institutional and residential settings.

In Victoria there are a number of inquiries that are relevant to the proposed NDIS safeguarding and quality framework:

- Victorian Ombudsman: Reporting and investigation of allegations of abuse in the disability sector
- Victorian Parliamentary inquiry (later this year) into systemic failures in Victoria's disability care system.
- Royal Commission into Family Violence.

AGAC suggests the NDIS Senior Officials Working Group considers the recommendations stemming from these inquiries, and where relevant and appropriate, consider implementing those recommendations into the NDIS quality and safeguarding framework.

### **Investigations**

**Recommendation 8.** An independent statutory authority should be empowered to conduct investigations where there are allegations or concerns about people with disability being abused, neglected or exploited. This function could sit with the proposed national Disability Services Complaints Commissioner, or with state and territory-based statutory authorities.

<sup>31</sup> See broadly John Chesterman, 2014. 'Modernising adult protection in an age of choice', *Australian Journal of Public Administration*, vol. 73, pp. 517-524.

<sup>32</sup> See, for example, Victorian Law Reform Commission, *Guardianship: Final report*, Report No 17 (2012); Office of the Public Advocate, *Submission to the Victorian Law Reform Commission Guardianship: Consultation Paper* (2011).

## Community Visitors

### QUESTION

Should there be a Community Visitor scheme in the NDIS and, if so, what should their role be?

Yes. In those jurisdictions where Community Visitors schemes operate, AGAC members are unified in their view that those schemes should continue after full roll-out of the NDIS.

Community Visitors have been important in raising concerns about abuse and service system failures on behalf of vulnerable clients living or staying in disability accommodation services, supported residential services and mental health facilities. Most importantly Community Visitors offer meaningful independent monitoring of service quality.

The consultation paper inaccurately identifies the role of Community Visitors programs as a system for handling complaints. AGAC is of the view that Community Visitors programs are more comprehensive and valuable than the consultation paper suggests. Community Visitors are more accurately categorised as an on-site monitoring and quality safeguard, who promote and protect the rights and dignity of persons with disability. On this point, AGAC wishes to refer to the earlier discussion about the proposed framework, and the need for the insertion of a core principle concerning the elimination of violence, abuse, exploitation and neglect of people with disability. This is central to the work of Community Visitors programs across Australia.

The Productivity Commission proposed that an NDIS quality framework should maintain the role of Official Community Visitors, and that they should play an important role in promoting the rights of, and overseeing the welfare of, the most vulnerable people in the disability system.<sup>33</sup> The Productivity Commission expressed the view that Community Visitors programs should be introduced in jurisdictions where they do not already exist.<sup>34</sup>

AGAC endorses the views of the Productivity Commission on this matter:

Community visitors are a well targeted way of monitoring groups with particular vulnerability who receive care and support in situations where poor practices or outcomes are more likely to go undetected. The capacity for random inspection strengthens industry wide incentives to comply with service standards as well as other laws and regulations. As such, these schemes should be implemented in states where they do not currently exist under the appropriate state and territory statutory bodies, potentially with funding assistance from the NDIS.<sup>35</sup>

With the growth of disability services available for participants and the greater scope for in-home care and private support as a result of the roll-out of the NDIS, thought must be given to how Community Visitors programs will operate and in what settings such programs will operate. Legislative reform will be required to ensure their important role is maintained and built upon.

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<sup>33</sup> Productivity Commission, *Inquiry into Disability Care and Support* (2011) Report No 54, Vol 1, 52.

<sup>34</sup> Ibid. In Western Australia and Tasmania Community Visitor programs only operate in mental health facilities and not disability residential services. In the Northern Territory Community Visitors can only visit a limited number of facilities.

<sup>35</sup> Ibid 509.

As the consultation paper notes, there are a variety of Community Visitors schemes currently in operation in Australia. Some use volunteers, some use paid staff, and the roles and responsibilities of Community Visitors differ between jurisdictions. While the Productivity Commission proposed that it would be desirable to replicate the features of the Victorian model, specifically the publication of annual reports and the use of volunteers, it is proposed that the current Community Visitors schemes continue for a period of 4 years.<sup>36</sup>

In order for this to happen, in the context of the full NDIS roll-out, there will need to be some legislative reform at both Commonwealth level and state and territory level. This will be needed to ensure that Community Visitors are empowered to visit a wide range of NDIS-funded supported accommodation settings. The existing Community Visitors schemes will also need to be adequately resourced if they are to continue to operate in the years after the full NDIS roll-out begins.

AGAC also proposes that an evaluation process be commenced as soon as possible and be concluded by 1 July 2018 in order for the most effective of the various Community Visitors schemes to be identified. This could then lead to the development of a national Community Visitors scheme, or the development of nationally-consistent state and territory-based Community Visitors schemes.

AGAC proposes the evaluator consider:

- the extent to which Community Visitors programs:
  - promote social inclusion and the empowerment of people with disability;
  - identify matters of concern (including evidence of violence, abuse, exploitation and neglect) and how the programs address this;
  - provide a cost-effective means of monitoring the well-being of people in NDIS-funded accommodation settings

The evaluator should also consider the following questions:

- should there be a national program of official/community visitor bodies managed by states and territories but regulated under federal legislation
- should there standardised data collection
- should there be a standardised process for reporting of serious incidents
- should Community Visitors be volunteers or paid employees, or a combination of both
- should Community Visitors programs be supported by statutory authorities, for example Public Advocates, Public Guardians, Ombudsmans, or by government departments
- what level of funding should Community Visitors programs be given
- should Community Visitors programs report directly to Parliament, or directly to the relevant minister
- should there be an online reporting system in which Community Visitors would be required to submit their visit reports
- should Community Visitors visit particular accommodation settings on a regular basis or should Community Visitors be rotated through accommodation settings in their regions.

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<sup>36</sup> Ibid.

Building on the recommendations of the Productivity Commission, AGAC makes the following recommendations:

### **Community Visitors**

**Recommendation 9.** Community Visitors programs currently in operation should be funded to continue for a 4-year transition period from 1 July 2016.

**Recommendation 10.** Amendment of the *National Disability Insurance Scheme Act 2013* (Cth) will likely be required to enable existing state and territory Community Visitors programs to operate in the context of the full NDIS roll-out. Relevant state and territory legislation will also likely need amendment to enable these programs to continue to operate in an NDIS environment.

**Recommendation 11.** Transitional legislation at the Commonwealth level, and in those jurisdictions where Community Visitors programs exist, should specify that Community Visitors have authority to visit the accommodation settings of NDIS participants where NDIS funds are being used to provide supported accommodation services. 'Supported accommodation' services should be defined to refer to situations where the provision of accommodation is connected to the provision of personal care and support.

**Recommendation 12.** A national evaluation of existing Community Visitors programs should be commenced as soon as possible and be concluded by 1 July 2018. The evaluation should be guided by the principles contained in the *Convention on the Rights of Persons with Disabilities*, the National Standards for Disability Services, and the National Disability Strategy. The evaluation should identify a best-practice Community Visitors model by assessing, among other things, the extent to which Community Visitors programs:

- a. promote social inclusion and the empowerment of people with disability;
- b. identify matters of concern (including situations of violence, abuse, exploitation and neglect);
- c. provide a cost-effective means of monitoring the well-being of people in NDIS-funded accommodation settings.

The evaluation should also consider whether the evidence collected supports the development, based on the identified best-practice model, of a national Community Visitors scheme, or the development of nationally-consistent state and territory Community Visitors schemes.

### **Ensuring staff are safe to work with participants**

No one system can ensure fully that staff are safe to work with people with disability. It is critical, therefore, that robust requirements are implemented in order to protect persons with disability from violence, abuse, neglect and exploitation.

Training and minimum qualifications of staff should be mandatory, in addition to system-wide requirements that fall under the NDIS provider registration elements of the framework.

AGAC also is aware that workplace culture is a central determinant of the way staff treat people with disability. Workplace culture inevitably affects the way staff report and respond to allegations of abuse, neglect and exploitation within their own workplace. AGAC suggests that it is the responsibility of the service provider, in addition to the NDIA and the disability services complaints commissioner, to educate providers and provide training materials to build the capacity of the sector to ensure that staff are safe to work with participants.

## QUESTION

Who should make the decision about whether employees are safe to work with people with disability?

AGAC is of the view that a voluntary code of conduct for staff is insufficient and will lead to a significant reduction in safeguards in all states and territories.

Given the comparable vulnerability of some NDIS participants with recipients of intensive aged-care support, AGAC would support some attention being paid to the viability of creating a national vulnerable persons check, based on the Australian Capital Territory model provided for in the *Working with Vulnerable People (Background Checking) Act 2011 (ACT)*.

For now, AGAC is in favour of creating a disability worker exclusion scheme with appropriate safeguards inbuilt. Careful consideration will be needed in determining the criteria that would result in a worker's name appearing on an exclusion list. AGAC would be happy in due course to provide advice on the development of these criteria. For now AGAC makes following recommendation:

### **Disability Worker Exclusion Scheme**

**Recommendation 13.** A disability worker exclusion scheme with appropriate safeguards should be implemented that has potential application to any person who provides NDIS-funded supports. Safeguards should include the following:

- a. the scheme must be established by legislation
- b. principles of natural justice must guide its development and operation
- c. there must be appropriate appeal mechanisms for workers who object to their listing.

## **Reducing and eliminating restrictive practices in NDIS funded supports**

As an initial comment, AGAC considers the use of restrictive practices to be a measure of last resort, and supports the various developments underway at the federal and state and territory levels to reduce and eliminate restrictive practice usage.

The consultation paper notes that regulation of the use of restrictive practices in relation to people with disability varies significantly across the states and territories.<sup>37</sup> In this area, national consistency is not easily achieved when significantly different protections exist throughout the country.

AGAC members agree that there should be an independent authorisation process where restrictive practices are utilised, but AGAC members do not have a unified view in relation to who should authorise the use of restrictive practices. Different models currently exist: such as the Victorian model, where the Senior Practitioner regulates the use of restrictive practices; and the Queensland model, where a guardian can be appointed for a restrictive practice matter.

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<sup>37</sup> Disability Reform Council, *Proposal for a National Disability Insurance Scheme Quality and Safeguarding Framework consultation paper* (2015) 69.

## QUESTION

Who should decide when restrictive practices can be used?

Fundamentally AGAC members agree that:

- there needs to be an external party to authorise the use of a restrictive practice. Options include authorisation by a substitute decision maker or an independent officer such as a Senior Practitioner
- a voluntary code of practice is insufficient.

### Monitoring and reporting on the use of restrictive practices

The National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector states:

As part of the NDIS, a quality assurance and safeguards system will be implemented and will include responsibilities for oversight of and reporting on the use of restrictive practices by services providing supports to participants.<sup>38</sup>

Rather than seek now to identify a preferred model of restrictive practice regulation, AGAC would like current authorisation processes, where they exist, to continue for four years. Those jurisdictions without such a process should, in AGAC's view, be required to develop one.

Similar to the recommendations in relation to Community Visitors, AGAC also calls for an evaluation of restrictive practice regulatory models to be commenced as soon as possible and be concluded by 1 July 2018, after which a preferred regulatory model can be identified.

### **Restrictive Practices**

**Recommendation 14.** Existing state and territory regulation of restrictive practices should continue for a 4-year transition period from 1 July 2016.

**Recommendation 15.** Those states and territories that currently do not regulate the use of restrictive practices on people with disability should develop and implement by July 2016 an external authorisation process for the use of restrictive practices.

**Recommendation 16.** A national evaluation of restrictive practice usage in relation to people with disability should be commenced as soon as possible and be concluded by 1 July 2018. The evaluation should be guided by the principles contained in the *Convention on the Rights of Persons with Disabilities* and the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector.

The evaluation should identify a best-practice model of restrictive practice regulation by assessing:

- a. the amount and type of restrictive practice usage in each state and territory;
- b. the reach of the various authorisation processes that exist in different jurisdictions in Australia; and
- c. the impact of the various authorisation processes on restrictive practice usage.

**Recommendation 17.** A national approach to restrictive practice regulation, drawing on the best-practice model identified by the national evaluation, should be in place and operate from July 2020.

<sup>38</sup> National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector (2014) 2.

## **Appendix 1 - NDIA decision-making guide for adults with cognitive impairments or mental ill health**

Guide to assist the NDIA to determine when decision-making support, advocacy, and substitute decision making is needed for current and potential adult NDIS participants who have significant cognitive impairments or mental ill health

Developed by the Office of the Public Advocate (Vic) in consultation with the NDIA Victoria Launch Site

### **Key principles**

1. Decision-making capacity should be assumed and this assumption should only be displaced on the basis of evidence.

2. Capacity is decision-specific. A person can be said to have capacity to make a decision where they can:

- understand relevant information,
- retain or remember relevant information,
- use or weigh up relevant information, and
- communicate the decision in words, gestures or other means.

(See, for example, *Powers of Attorney Act 2014* (Vic) section 4; *Mental Health Act 2014* (Vic) section 68.)

3. People should wherever possible be provided with the support to make and implement their own decisions (see United Nations *Convention on the Rights of Persons with Disabilities*, Article 12(3); *National Disability Insurance Scheme Act 2013* (Cth) sections 4 and 5).

4. Substitute decision making should only be used as a last resort, where no less restrictive alternative exists (see United Nations *Convention on the Rights of Persons with Disabilities*, Article 12 (4), *Guardianship and Administration Act 1986* (Vic) section 22(2), *Charter of Human Rights and Responsibilities Act 2006* (Vic) section 7 (2)).

## NDIA decision-making guide for adults with cognitive impairments or mental ill health

