



Victorian Equal Opportunity  
& Human Rights Commission

# National Disability Insurance Scheme Quality and Safeguarding Framework

Submission to the NDIS National Consultation, Department of Social Services  
April 2015

## 1. Introduction

The Victoria Equal Opportunity and Human Rights Commission (the Commission) welcomes the opportunity to respond to the Consultation Paper on the proposal for a National Disability Insurance Scheme (NDIS) Quality and Safeguarding Framework.

The Commission is an independent statutory body that has functions under the *Equal Opportunity Act 2010* (Vic) (EO Act), the *Racial and Religious Tolerance Act 2001* (Vic) and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) (the Charter). The Commission's functions include dispute resolution, education about human rights and equality of opportunity, projects and activities aimed at eliminating discrimination and promoting human rights, conducting research and providing legal and policy advice.

The Commission has produced a number of major project reports relating to the experiences of people with disabilities. These include *Beyond Doubt: the experiences of people with disabilities reporting crime*, *Held Back: the experiences of students with disabilities in Victorian schools*, and *Desperate Measures: the relinquishment of children with disabilities into state care in Victoria*.

Within its 2014 to 2016 Strategic Plan, one of the Commission's strategic priorities is people with disabilities. The Commission has made previous submissions on human rights and the NDIS<sup>1</sup>. The Commission reiterates its support for the establishment of the NDIS to provide a rights-based model of disability services<sup>2</sup>. The NDIS Quality and Safeguarding Framework is a fundamental bedrock of the scheme to ensure appropriate protection of the rights of people with disabilities.

Under existing law, people with a disability in Victoria have some of the greatest human rights protections in the country. The Commission is concerned to ensure that the protection of the Charter and other legal safeguards are not diminished with the transition to the full national NDIS. There is a lack of clarity as to whether safeguards under the Charter and other State legislation will continue to apply to people with disabilities in Victoria under the full Scheme, and therefore deliberate legal protection in the national scheme is required.

As such, the NDIS Quality and Safeguarding Framework must identify and set out at law human rights standards for both rights holders and duty bearers. The Framework must also ensure that people with a disability in Victoria, who are currently entitled to significant protection, are not worse off after the transition to a national scheme.

## 2. Summary of recommendations

With regard to the legal protection of human rights, the Commission recommends the following:

### Recommendation 1:

The Commission recommends that the NDIS national legislation provide clear legal protection of the human rights of people with disabilities so that people in Victoria are not worse off under the national scheme.

<sup>1</sup> For example, the VEOHRC Submission to the Senate Community Affairs Legislation Committee, January 2013, <http://www.humanrightscsmission.vic.gov.au/index.php/2012-10-18-01-21-18/submissions/item/535-submission-to-the-senate-community-affairs-legislation-committee-on-the-national-disability-insurance-scheme-bill-2012-feb-2013>.

<sup>2</sup> VEOHRC Submission to the Senate Community Affairs Legislation Committee, January 2013.

Option 1:

The NDIS apply the same human rights protections across Australia by directly incorporating into federal legislation the legal rights and duties under the Convention on the Rights of Persons with Disabilities (CRPD). This may include annexing the treaty in full as a schedule to NDIS legislation. This would achieve the Scheme's aim of national consistency and protection of human rights, as well as to ensure people in Victoria maintain their current legal protections.

Option 2:

The NDIS legislative framework ensure that the Victorian *Charter of Human Rights and Responsibilities* continues to apply in Victoria after transition to the full national scheme, so that the Charter continues to afford protection to people with a disability, continues to apply to the NDIA as decision makers, and to NDIS service providers in Victoria. The national quality and safeguarding framework should also ensure that existing Victorian protections are not weakened under the full Scheme.

With regard to specific issues under the Consultation Paper, the Commission makes the following recommendations.

Recommendation 2:

The Commission recommends that the NDIS Quality and Safeguarding Framework protect the right of people with disabilities to legal recognition as a person before the law by ensuring appropriate measures to support and assist people exercise legal capacity, and safeguard against abuse.

Recommendation 3:

The Commission recommends that the NDIS Quality and Safeguarding Framework comply with the requirements of the CRPD for an independent monitoring mechanism.

Recommendation 4:

The Commission recommends that the NDIS Quality and Safety Framework take measures to protect people with disabilities from all forms of exploitation, violence and abuse by establishing a rigorous registration process for service providers and a barred persons list.

Recommendation 5:

To ensure there is no diminution of existing protections in Victoria, the Commission recommends that the NDIS Quality and Safeguarding Framework ensure an independent external complaints handling system for complaints relating to both the decision making of the NDIA itself, as well as complaints against service providers under the NDIS.

Recommendation 6:

Until such time as restrictive practices are eliminated, the Commission recommends that the most rigorous human rights monitoring mechanism be established to limit, control, and record the use of restrictive practices to ensure the rights of people with disabilities are protected.

### 3. Human rights protection

Victoria has a substantial legal framework protecting human rights in the State. These protections are set out in the Charter, the EO Act, the *Disability Act 2006 (Vic)*, the *Mental Health Act 2014* and the *Guardianship and Administration Act 2006*, among others. This legal framework not only provides legal clarity on the rights of people in Victoria, including people with a disability, it also provides standards for oversight of quality and safeguarding mechanisms.

#### 3.1 Transitional arrangements

The Barwon area of Victoria was selected as one of several launch sites across Australia for the NDIS roll out. Transitional arrangements were agreed between the State of Victoria and the Commonwealth of Australia to allow for existing Victorian departments, laws, regulations and service providers to operate the launch site pending transition to a full national scheme. A Bilateral Agreement for the NDIS launch was entered into between the Commonwealth and Victorian Governments (the Bilateral Agreement) for the launch site in Victoria. The Bilateral Agreement is to be reviewed until the Council of Australian Governments (GOAG) agrees to arrangements for transition to the full scheme.

The Bilateral Agreement provides for Victoria's existing quality assurance framework to apply to the launch site. It also clearly states the aim of both Governments that there be no diminution of Victoria's quality assurance system and safeguards as the NDIS transitions to a full national scheme. At paragraph 15, the Bilateral Agreement specifies that:

“The existing Victorian quality assurance and safeguards framework as set out in Appendix C 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 approaches in the longer term that does not diminish Victoria's existing quality assurance system and safeguards...” [emphasis added].

Appendix C of the Bilateral Agreement sets out the main components of the Victorian Disability Act 2006 governing quality assurances and safeguards in Victoria's disability sector, as well as the Mental Health Act 1986. Significantly, Appendix C lists the rights-based framework for the protection of the rights of people with a disability in Victoria, including the Charter and the EO Act.

In order to ensure that Victoria's existing quality assurance system is not diminished in the transition to the full NDIS, the NDIS Quality and Safeguarding Framework will need to protect human rights at law and provide appropriate safeguarding mechanisms as operate at present in Victoria.

#### 3.2 Maintaining human rights protection

It is critical that the existing legal safeguards of people with a disability in Victorian be carried through in the development of the full national scheme. Without deliberate inclusion, it cannot be assumed that such legal safeguards will apply in the full national Quality and Safeguarding Framework. The Charter imposes human rights obligations on public authorities. As the Victorian Department of Health and Human Services relinquishes its role as a provider of disability services and a direct funder to service providers, there is a lack of clarity as to whether the National Disability Insurance Agency (NDIA) would meet the test of a public authority under the Charter, and it is unclear whether some service providers funded under the Scheme would be considered “functional public authorities” under the Charter. While State funding will flow to the NDIA in the full Scheme, services providers may no longer be considered functional public authorities exercising functions on behalf of the State with the changed funding model to the Commonwealth. As such, the obligations under the Charter may no longer apply. Under the full scheme, it is unclear whether, for example, a residential disability service in Victoria which had been

bound to act in a way that is compatible with the Charter because as a service provider under State government funding the service is a functional public authority, would continue to have such obligations under the full scheme.

The Commission emphasises the need to bring certainty as to human rights protections in the national NDIS legal framework. The market approach of the NDIS is changing the relationship between people with disabilities and services providers, giving greater autonomy to people with disabilities whilst shifting the responsibility to the individual. Human rights protections are a crucial safeguard in managing the risks associated with this shift.

Specific legal protection will need to be incorporated within Commonwealth law to ensure that people with disabilities in Victoria are not worse off under the national scheme, as guaranteed under the Bilateral Agreement between the State of Victoria and the Commonwealth. There is a distinction between service standards and legal obligations. Service standards may offer some protection however standards do not have legal force<sup>3</sup>. People with disabilities in Victoria are currently protected by legally enforceable rights, a safeguard which must be maintained. This could be achieved by direct incorporation of international human rights law in the NDIS Commonwealth law or by continuing to bind the NDIA and service providers in Victoria to existing Victorian laws.

### 3.3 Incorporating CRPD

Some of Australia's international obligations under international human rights treaties to which it has ratified are stated as "objects" under the *National Disability Insurance Scheme Act 2013* (Cth) (NDIS Act). Specifically, the NDIS Act at section 3 states the objects of the Act are to:

*"(a) in conjunction with other laws, give effect to Australia's obligations under the Convention on the Rights of Persons with Disabilities done at New York on 13 December 2006 ([2008] ATS 12)...*

*(i) in conjunction with other laws, give effect to certain obligations that Australia has as a party to:*

*(i) the International Covenant on Civil and Political Rights done at New York on 16 December 1966 ([1980] ATS 23); and*

*(ii) the International Covenant on Economic, Social and Cultural Rights done at New York on 16 December 1966 ([1976] ATS 5); and*

*(iii) the Convention on the Rights of the Child done at New York on 20 November 1989 ([1991] ATS 4); and*

*(iv) the Convention on the Elimination of All Forms of Discrimination Against Women done at New York on 18 December 1979 ([1983] ATS 9); and*

*(v) the International Convention on the Elimination of All Forms of Racial Discrimination done at New York on 21 December 1965 ([1975] ATS 40)."*

Australia signed the CRPD and ratified the instrument on 17 July 2008. Australia entered into the treaty with an interpretative "Declaration"<sup>4</sup>. Australia did not register a reservation so that it accepts the obligations under the CRPD subject only to the interpretative Declaration.

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<sup>3</sup> See, the VEOHRC Submission to the Senate Community Affairs Legislation Committee, January 2013, <http://www.humanrightscommission.vic.gov.au/index.php/2012-10-18-01-21-18/submissions/item/535-submission-to-the-senate-community-affairs-legislation-committee-on-the-national-disability-insurance-scheme-bill-2012-feb-2013>, page 3.

<sup>4</sup> Declaration: "Australia recognizes that persons with disability enjoy legal capacity on an equal basis with others in all aspects of life. Australia declares its understanding that the Convention allows for fully supported or substituted decision-making arrangements, which provide for decisions to be made on behalf of a person, only where such arrangements are necessary, as a last resort and subject to safeguards;

Australia recognizes that every person with disability has a right to respect for his or her physical and mental integrity on an equal basis with others. Australia further declares its

It is important to note that while the NDIS Act has an objective to give effect to human rights treaties, it does not legally incorporate those human rights. The human rights instruments mentioned at section 3 of the NDIS Act are not legally enforceable.

The CRPD elaborates on and clarifies how international human rights standards apply to persons with disabilities. It sets out the obligations on States to implement the treaty including obligations to refrain from engaging in any act or practice that is inconsistent with the CRPD. The CRPD requires State parties to ensure that public authorities and institutions act in conformity with the CRPD<sup>5</sup>. The CRPD extends to all parts of federal States without any limitations or exceptions<sup>6</sup>. The CRPD sets out specific State obligations such as those relating to addressing equality, women and children with disabilities, awareness raising, accessibility, mobility, and rehabilitation. It also identifies adaptations that must be made for people with disabilities to effectively exercise their rights including, among others:

- right to life
- equality before the law
- access to justice
- right to liberty and security of person
- freedom from torture and other cruel inhuman or degrading treatment or punishment
- freedom from exploitation, violence and abuse
- right to respect for physical and mental integrity
- right to liberty of movement and nationality
- right to live in the community
- freedom of expression and opinion and access to information
- right to privacy
- right to respect for home and family
- right to education
- right to health
- right to work
- right to an adequate standard of living
- right to participate in political and public life
- right to cultural life.

Incorporating the CRPD into the NDIS legal framework would achieve a number of objectives. It would provide national consistency on the rights of people with a disability and clarify consistently the obligations for duty bearers, both of which underpin the quality and safeguarding framework. It would enable Australia to meet its international obligations under the CRPD. The incorporation of the treaty into the national law would also keep the commitment of the State and Commonwealth Governments that there be no diminution of the rights of people in Victorian. This is consistent with the recommendation of the United Nations Committee on the Rights of Persons with Disabilities. When considering Australia's initial report, the UN Committee recommended:

*"...that the State party [Australia] increase efforts to promote and protect the rights of children with disabilities, by incorporating the Convention into legislation, policies, programs, service*

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understanding that the Convention allows for compulsory assistance or treatment of persons, including measures taken for the treatment of mental disability, where such treatment is necessary, as a last resort and subject to safeguards;

Australia recognizes the rights of persons with disability to liberty of movement, to freedom to choose their residence and to a nationality, on an equal basis with others. Australia further declares its understanding that the Convention does not create a right for a person to enter or remain in a country of which he or she is not a national, nor impact on Australia's health requirements for non-nationals seeking to enter or remain in Australia, where these requirements are based on legitimate, objective and reasonable criteria."

<sup>5</sup> Article 4(1)(d) of the Convention on the Rights of Persons with Disabilities.

<sup>6</sup> Article 4(5) of the Convention on the Rights of Persons with Disabilities.

*standards, operational procedures and compliance frameworks that apply to children and young people in general...".*

The Commission recommends that the NDIS Quality and Safeguarding Framework directly incorporate the CRPD into federal legislation to bring certainty as to standards, achieve national consistency and protect rights that currently exist for Victorians.

### 3.4 The Victorian Charter of Human Rights and Responsibilities

Alternatively, the Commission proposes that the Charter continue to apply to NDIS in Victoria under the full scheme. Victoria's Charter creates a positive obligation on public authorities to act consistently with human rights when carrying out duties.<sup>7</sup> Public authorities include public officials within the meaning of the *Public Administration Act 2004*, entities established by a statutory provision that have functions of a public nature, and entities whose functions are or include functions of a public nature when it is exercising those functions on behalf of the State or a public authority, among others. This includes some private organisations and agencies exercising functions of a public nature on behalf of the State whether under contract or otherwise. In order to determine whether a function is "of a public nature" a number of factors may be taken into account including whether the function is conferred on the entity by or under a statutory provision, whether the function is connected to or generally identified with functions of government, whether the function is of a regulatory nature or whether the entity is publicly funded to perform the function.<sup>8</sup>

Victorian disability service providers receiving public funds to deliver services of a public nature on behalf of the State are bound by the Charter. Disability service providers are required to comply with the obligations on public authorities in section 38 of the Charter, which makes it unlawful to act in a way that is incompatible with human rights and, in making any decision, to fail to give proper consideration to a relevant human right. For example, if a Victorian registered disability provider is considering introducing electronic tagging devices and CCTV cameras in a group home to monitor the whereabouts and safety of residents, they are required under the Charter to give proper consideration to a resident's rights to privacy, equality before the law, freedom of movement, right to liberty and protection from degrading treatment.

If a service provider seeks to limit a right in any way, the Charter sets out at section 7(2) the legal requirements that must be satisfied for a lawful and reasonable limitation of rights. The service provider is obliged to consider less restrictive means of achieving the same aim.<sup>9</sup>

Failure to meet obligations under the Charter can lead to a complaint by an individual to the Ombudsman or a person may raise a Charter argument in a proceeding already before a court or tribunal. The Charter is also an important tool for advocates to be able to directly negotiate with disability services to ensure the dignity and rights of participants in the NDIS are observed, and in advocating for practice change at a service and system level. Clients of disability services in Victoria, families, care givers and advocates can point to legal rights for protection and safeguarding. This offers much greater protection to people with disabilities than service standards that have no legal force. It also offers disability services providers, as duty bearers, clarity as to the legal rights they are obliged to comply with for clients, thereby raising standards, allowing issues to be taken more seriously, and offering resolution of issues without formal complaints mechanisms.

Human rights are enshrined into law in only two jurisdictions within Australia: Victoria, in the Charter and in the ACT *Human Rights Act 2004* (ACT). There is no similar provision in service standards or

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<sup>7</sup> Section 38 of the Charter.

<sup>8</sup> See non exhaustive list at section 4(2) of the Charter.

<sup>9</sup> See s7(1)(e) of the Charter.

consumer law legislation. Having a legal right and a legal obligation frame engagement between service providers and clients very differently compared to non enforceable principles or standards. Protection and recognition of legal rights have been hard fought by people with disabilities internationally and in Victoria. Victoria has made a strong commitment to protecting the rights of people in the State, including people with disabilities. These rights must not be lost with the transition to the full scheme.

If there CRPD is not incorporated in the national legislative framework, the Commission recommends that provision be made in the NDIS legislation to ensure that the Charter continues to apply in Victoria after the transition to the full national scheme. Service providers are already required to comply with a range of State legislation when operating in a given jurisdiction. However, this option would not necessarily provide consistent human rights protection throughout Australia. The Commission also recommends that the existing quality assurance frameworks in Victoria, which continue to operate at present under the Bilateral Agreement, are not weakened under the full scheme.

### 3.5 The Victorian Equal Opportunity Act

The *Equal Opportunity Act 2010* (the EOA) continues to apply to the NDIA and service providers regardless of the transition to the national framework. The NDIS and service providers are providing services in an area of public life covered by the EOA. Private companies and non-governmental organisations who provide services are already bound by the EOA and will continue to be bound. New providers will also be bound by the EOA. It is, therefore, not necessary to make special provision for these protections.

#### Recommendation 1:

The Commission recommends that the NDIS national legislation provide clear legal protection of the human rights of people with disabilities so that people in Victoria are not worse off under the national scheme.

##### Option 1:

The NDIS apply the same human rights protections across Australia by directly incorporating into federal legislation the legal rights and duties under the Convention on the Rights of Persons with Disabilities (CRPD). This may include annexing the treaty in full as a schedule to NDIS legislation. This would achieve the Scheme's aim of national consistency and protection of human rights, as well as to ensure people in Victoria maintain their current legal protections.

##### Option 2:

The NDIS legislative framework ensure that the Victorian *Charter of Human Rights and Responsibilities* continues to apply in Victoria after transition to the full national scheme, so that the Charter continues to afford protection to people with a disability, continues to apply to the NDIA as decision makers, and to NDIS service providers in Victoria. The national quality and safeguarding framework should also ensure that existing Victorian protections are not weakened under the full Scheme.

## **4. Issues in the Consultation Paper**

The NDIS Consultation Paper seeks input from the community on a number of key areas within the Quality and Safeguarding Framework. The Commission takes the position that the Framework should



be underpinned by legally protected human rights and should strive for the highest standards for persons with disabilities consistent with Australia's domestic commitments and law, as well as Australia's international obligations.

#### 4.1 Building participants' capacity and safeguards for participants who manage their own plans

The NDIS consultation process seeks inputs on measures to build the capacity of people with disabilities who are participants under the Scheme, to make their own decisions. It also seeks inputs on safeguards for people who manage their own plans. These issues relate to the right of all people to exercise legal capacity. The Commission is, therefore, supportive of measures ensuring that human rights protections be the backbone of the Quality and Safeguarding Framework, including effective safeguards against abuse.

The NDIS framework aims to adopt a human rights approach to the provision of services to people with disabilities. There has been a paradigm shift in approach - from treating people with disabilities as the beneficiaries of charity - to recognising people as rights holders with legal capacity to make decisions on their own behalf. This latter approach is consistent with international human rights law as well the Charter.

The CRPD recognises the right of everyone to recognition as a person before the law under the Covenant on Civil and Political Rights.<sup>10</sup> It reaffirms that people with disabilities are entitled to equal recognition before the law.<sup>11</sup> It clarifies the nature of State obligations to ensure people with disabilities effectively exercise this right. The Charter also protects the right to recognition as a person before the law in section 8.

The right to legal recognition makes clear that people do not lose their legal capacity to make decisions for themselves on the basis of a disability. People with a disability have the right to make decisions for themselves on the same basis as others, including relating to their care, medical issues, voting, accommodation, etc. For people with disabilities to effectively exercise legal capacity, the CRPD clarifies the obligation for State Parties to take appropriate measures to provide access by persons with disabilities to the support they may require. This will involve a range of actions including measures for access to information that is accessible, timely, reliable, relevant and current. Information may be drawn from a variety of sources.

To exercise legal capacity, people with disabilities under the NDIS have a right to information to make informed choices about products and the provision of services. They have the right to make decisions regarding their NDIS plan, including whether they wish to self manage the plan. Participants in the NDIS should have access to the experiences of others as well as reports from independent and professional auditing.

The role of advocates to support people with disabilities is critical in building the capacity of people to make decisions. The capacity of the advocate themselves should also be in focus to ensure advocates understand that nature of the right to exercise legal capacity. Training and access to reliable information are relevant to advocates.

At the same time, the CRPD recognises that some people with a disability require differing levels of support and assistance to exercise their legal capacity. Supported decision making may take a variety of forms from support to have information explained in an accessible way, through to total support. To prevent abuse, State Parties are obliged to provide appropriate and effective safeguards, including measures that:

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<sup>10</sup> Article 16 ICCPR.

<sup>11</sup> Article 12(1) the Convention on the Rights of People with Disabilities.

- respect the wishes, will and preferences of the person
- are free of conflict of interests and undue influence
- are proportionate and tailored to the person’s circumstances
- apply for the shortest time possible
- are subject to regular review by a competent, independent and impartial authority or judicial body.<sup>12</sup>

These are important safeguards which should underpin the NDIS Quality and Safeguarding Framework. Where greater decision making supports are required, measures must be in place to ensure the wishes of the person with a disability are respected and that any decision is in the best interests of the person. The Council of Australian Governments identified this issue as an area for future action in the National Disability Strategy 2010-2020, where it stated:

*“2.12 Ensure supported decision-making safeguards for those people who need them are in place, including accountability of guardianship and substitute decision-makers.”*

#### Recommendation 2:

The Commission recommends that the NDIS Quality and Safeguarding Framework protect the right of people with disabilities to legal recognition as a person before the law by ensuring appropriate measures to support and assist people exercise legal capacity, and safeguard against abuse.

#### 4.2 Monitoring and oversight

The NDIS Consultation Paper invites input on appropriate mechanisms for monitoring and oversight of the NDIS. While the NDIS has a number of governmental oversight mechanisms, it is important that such monitoring be independent. The Commission observes that the CRPD contains obligations to establish independent monitoring, which could be implemented through the NDIS Quality and Safeguarding Framework. An independent monitoring mechanism may be mandated with responsibilities to promote, protect and monitor the implementation of the CRPD through the NDIS, as well as any other functions under the CRPD.

The CRPD requires that each country establish mechanisms for national implementation and monitoring of the Convention. Article 33 states:

*“1. States Parties, in accordance with their system of organization, shall designate one or more focal points within government for matters relating to the implementation of the present Convention, and shall give due consideration to the establishment or designation of a coordination mechanism within government to facilitate related action in different sectors and at different levels.*

*2. States Parties shall, in accordance with their legal and administrative systems, maintain, strengthen, designate or establish within the State Party, a framework, including one or more independent mechanisms, as appropriate, to promote, protect and monitor implementation of the present Convention. When designating or establishing such a mechanism, States Parties shall take into account the principles relating to the status and functioning of national institutions for protection and promotion of human rights. [emphasis added]*

<sup>12</sup> Article 12(4) the Convention on the Rights of People with Disabilities.

3. *Civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process.*"

In considering Australia's initial report to the United Nations Committee on the Rights of Persons with Disabilities (the UN Committee) on measures taken to give effect to its obligations under the treaty, the Committee expressed concerns that Australia lacks a participatory and responsive structure for the implementation and monitoring of the CRPD in line with Article 33 of the Convention. It recommended that Australia immediately set up a monitoring system that would be fully in line with the provisions of article 33 of the Convention.<sup>13</sup>

**Recommendation 3:**

The Commission recommends that the NDIS Quality and Safeguarding Framework comply with the requirements of the CRPD for an independent monitoring mechanism.

#### 4.3 NDIA provider registration and ensuring staff are safe to work with participants

The NDIS Consultation Paper sought views of appropriate mechanisms for the registration of services providers under the Scheme and measures to ensure staff are safe to work with people with disabilities under the NDIS. People with disabilities are often among the most vulnerable to abuse and exploitation. The Commission is concerned to ensure that the NDIS Quality and Safety Framework enact measures to protect people with disabilities from all forms of exploitation, violence and abuse including by establishing a rigorous registration process for service providers as well as a barred persons list.

The CRPD obliges States Parties to 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>14</sup>. Additionally, State Parties must take all appropriate measures to prevent all forms of exploitation, violence and abuse by establishing measures to make available to persons with disabilities, their families and caregivers information and education on how to avoid, recognise and report instances of exploitation, violence and abuse.

Under the Australian National Disability Strategy 2010-2020, the Council of Australian Governments outlines concerns regarding the exploitation of people with disabilities and points to Australia's obligations under Article 16 of the CRPD. It has adopted a national policy for "*people with a disability to be safe from violence, exploitation and neglect*".

Most States have in place a registration and quality assurance framework for service providers in the disability sector. A consistent and robust national registration system for service providers is an important measure to raise the quality of service provision and also protect against the exploitation and abuse of people with disabilities. A key aspect of a registration system will be specially trained and accredited auditors to ensure service providers conform to standards and respect the rights of people with disabilities.

The Commission's 2014 report *Beyond Doubt: the experiences of people with disabilities reporting crime* revealed that disability service providers were not always reporting crime and therefore perpetrators of abuse against people with disabilities may believe they can act with impunity. The report also found that workers in disability services who have been found to have abused, assaulted or

<sup>13</sup>United Nations CRPD/C/AUS/CO/1 4 October 2013.

<sup>14</sup> Article 16(1) the Convention on the Rights of Persons with Disabilities.

neglected a client may move from service to service if no criminal conviction was recorded against them. To respond to this issue, the Commission recommended the introduction of a registration system for employees in disability, mental health and other services working with adults with disabilities. Specifically, the Commission recommended the following:

*“The Victorian Government should prohibit persons who have been found to have abused, assaulted or neglected a client of a disability, mental health and other service for people with disabilities from working or volunteering in such services by placing them on a register of unsuitable persons. This scheme should include an independent mechanism to determine the suitability of persons to continue to work with adults with disabilities. Subject to evaluation, it should be the first step in the development of a more comprehensive registration scheme for those delivering services to adults with disabilities”.*<sup>15</sup>

Consistent with this recommendation, the Commission supports the proposal for a barred persons list as part of the Quality and Safeguarding Framework.

Since the release of *Beyond Doubt*, the Victorian Department of Health and Human Services has established a Disability Worker Exclusion Scheme excluding certain employees from working in particular service settings in Victoria.

#### Recommendation 4:

The Commission recommends that the NDIS Quality and Safety Framework take measures to protect people with disabilities from all forms of exploitation, violence and abuse by establishing a rigorous registration process for service providers and a barred persons list.

#### 4.4 Systems for handling complaints

The Consultation Paper provides options for a system of complaints handling for participants of the NDIS. Under existing arrangements, complaints mechanisms established at law in Victoria continue to apply to the NDIS as a whole. In the transition to the national Scheme, the Commission seeks to avoid the NDIS Quality and Safeguarding Framework diminishing existing protections.

Under existing Victorian law, people with disabilities in Victoria have a number of mechanisms for complaint handling, as follows:

- Internal process for complaints under the *Disability Act 2006*
- The Disability Services Commissioner under the *Disability Act 2006*
- Community Visitors Scheme under the *Disability Act 2006*
- Senior Practitioner under the *Disability Act 2006*
- Office of Public Advocate
- Victorian Ombudsman
- Authorised Officers at supported residential services.

With the transition to a full national system some of these mechanisms may no longer have jurisdiction to deal with service providers funded under the NDIS. For example, the Disability Services Commissioner in Victoria handles complaints of bodies on the register of disability service providers, which is state based. These mechanisms may no longer have jurisdiction for services under the NDIS.

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<sup>15</sup> See VEOHRC report *Beyond Doubt*, 2014, page73.

In order to preserve existing standards in Victoria, both internal and external complaints handling mechanisms should be established. Disability service providers should be required to establish effective internal complaints handling processes as part of the standards for registration. The complaints mechanisms must be available and accessible to participants.

A formal independent external complaints body should have specific powers to investigate and resolve individual complaints regarding the decision making of the NDIA as well as complaints against service providers. These objectives are most closely captured by option 3(b) of the Consultation Paper. The Commission, therefore, supports the proposal for an external independent complaints handling mechanism that can deal with complaints relating to the decision making within the NDIA and those relating to service delivery.

#### Recommendation 5:

To ensure there is no diminution of existing protections in Victoria, the Commission recommends that the NDIS Quality and Safeguarding Framework ensure an independent external complaints handling system for complaints relating to both the decision making of the NDIA itself, as well as complaints against service providers.

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

The NDIS Consultation paper raised the question of how best to manage restrictive practices under the NDIS Quality and Safeguarding Framework. Restrictive practices in managing behaviours of people with disabilities raise a number of important human rights considerations, particularly where consent of the individual has not been given. Until such time as restrictive practices are eliminated, the Commission emphasises the obligation of the NDIS to establish a rigorous human rights monitoring mechanism to limit, control, and record the use of restrictive practices. It must not fall below existing standards in Victoria and it must protect the rights of people with disabilities.

Importantly, as outlined above, people with disabilities have the right to recognition as a person before the law and enjoy legal capacity on an equal basis with others. A number of other human rights are relevant to the use of restrictive practices such as the right to freedom of movement on an equal basis with others<sup>16</sup>, the right to life<sup>17</sup>, the right to liberty and security of person<sup>18</sup>, protection from torture and cruel, inhuman or degrading treatment<sup>19</sup>, right to human treatment when deprived of liberty<sup>20</sup>, and right to privacy<sup>21</sup>.

In 2013, the UN Committee on the Rights of Persons with Disabilities expressed concern that under Australian law a person can be subjected to medical intervention against his or her will if the person is deemed to be incapable of making or communicating a decision about treatment. The UN Committee recommended:

*“34. ... that the State party [Australia] repeal all legislation that authorizes medical intervention without the free and informed consent of the persons with disabilities concerned, committal of*

<sup>16</sup> See article 18 of the Convention on the Rights of Persons with Disabilities and section 12 of the Charter.

<sup>17</sup> See article 10 of the Convention on the Rights of Persons with Disabilities and section 9 of the Charter.

<sup>18</sup> See article 14 of the Convention on the Rights of Persons with Disabilities and section 21 of the Charter.

<sup>19</sup> See article 19 of the Convention on the Rights of Persons with Disabilities and section 10 of the Charter.

<sup>20</sup> See article 14(2) of the Convention on the Rights of Persons with Disabilities and section 22 of the Charter.

<sup>21</sup> See article 22 the Convention on the Rights of Persons with Disabilities and section 13 of the Charter.

*individuals to detention in mental health facilities, or imposition of compulsory treatment, either in institutions or in the community, by means of Community Treatment Orders.”<sup>22</sup>*

In relation to Australian practices, the UN Committee also expressed concern that persons with disabilities, particularly those with intellectual impairment or psychosocial disability, are subjected to unregulated behaviour modification or restrictive practices such as chemical, mechanical and physical restraints and seclusion, in various environments.<sup>23</sup> As such, the UN Committee recommended that:

*“36. ... the State party [Australia] take immediate steps to end such practices, including by establishing an independent national preventive mechanism to monitor places of detention — such as mental health facilities, special schools, hospitals, disability justice centres and prisons —, in order to ensure that persons with disabilities, including psychosocial disabilities, are not subjected to intrusive medical interventions.”*

Governments in Australia have adopted a policy of reducing, with the view to eliminating, the use of restrictive practices. A *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector* was endorsed by Commonwealth, State and Territory Disability Ministers on 21 March 2014.

Until the elimination of the use of restrictive practices, the NDIS Quality and Safeguarding framework must provide the highest possible protection in reporting and monitoring the use of such practices. The national mechanism should not fall below protection currently existing in Victoria such as the roles played by the mandatory reporting of behaviour support plans, the role of the Office of Professional Practice, Senior Practitioner, and the Restrictive Intervention Data System (RIDS). In the move to a national system, people with disabilities in Victoria should not have less protection than currently exists.

#### Recommendation 6:

Until such time as restrictive practices are eliminated, the Commission recommends that the most rigorous human rights monitoring mechanism be established to limit, control, and record the use of restrictive practices to ensure the rights of people with disabilities are protected.



Victorian Equal Opportunity  
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<sup>22</sup> Concluding Observations relating to Australia's Initial Report, United Nations CRPD/C/AUS/CO/1 4 October 2013.

<sup>23</sup> Paragraph 35 Concluding Observations on Australia by UN Committee on the Rights of Persons with Disabilities, United Nations CRPD/C/AUS/CO/1 4 October 2013.