



Review of the NDIS Act and the new NDIS Participant Service Guarantee

November 2019

About the Office of the Public Guardian

The Office of the Public Guardian (OPG) is an independent statutory office which promotes and protects the rights and interests of children and young people in out-of-home care or staying at a visitable site, and adults with impaired decision-making capacity. The purpose of the OPG is to advocate for the human rights of our clients.

The OPG provides individual advocacy to children and young people through the following functions:

- the child community visiting and advocacy function, which monitors and advocates for the rights of children and young people in the child protection system including out-of-home care (foster and kinship care), or at a visitable site (residential facilities, youth detention centres, authorised mental health services, and disability funded facilities), and
- the child legal advocacy function, which offers person-centred and legal advocacy for children and young people in the child protection system, and elevates the voice and participation of children and young people in decisions that affect them.

The OPG provides an entirely independent voice for children and young people to raise concerns and express their views and wishes. When performing these functions, the OPG is required to seek and take into account the views and wishes of the child to the greatest practicable extent.

The OPG also promotes and protects the rights and interests of adults with impaired decision-making capacity for a matter through its guardianship, investigations and adult community visiting and advocacy functions:

- The guardianship function undertakes both supported and substituted decision-making in relation to legal, personal and health care matters, supporting adults to participate in decisions about their life and acknowledging their right to live as a valued member of society.
- The investigations function investigates complaints and allegations that an adult with impaired decision-making capacity is being neglected, exploited or abused or has inappropriate or inadequate decision-making arrangements in place.
- The adult community visiting and advocacy function independently monitors visitable sites (authorised mental health services, community care units, government forensic facilities, disability services and locations where people are receiving NDIS supports, and level 3 accredited residential services), to inquire into the appropriateness of the site and facilitate the identification, escalation and resolution of complaints by or on behalf of adults with impaired decision-making capacity staying at those sites.

When providing services and performing functions in relation to people with impaired decision-making capacity, the OPG will support the person to participate and make decisions where possible, and consult with the person and take into account their views and wishes to the greatest practicable extent.

The *Public Guardian Act 2014* and *Guardianship and Administration Act 2000* provide for the OPG's legislative functions, obligations and powers. The *Powers of Attorney Act 1998* regulates the authority for adults to appoint substitute decision makers under an advance health directive or an enduring power of attorney.

Submission to the review

Position of the Public Guardian

The Office of the Public Guardian (OPG) welcomes the opportunity to provide a submission to the Review of the NDIS Act and the new NDIS Participant Service Guarantee (the review). The views contained in this submission are that of the OPG and do not purport to represent the views of the Queensland Government.

This submission raises issues experienced by the OPG's clients in their interactions with the NDIS, including issues relating to planning and supported independent living recently raised in submissions to the Joint Standing Committee on the NDIS, the need for a federal community visitor program to complement the NDIS Quality and Safeguards Commission, and concerns with the *NDIS (Restrictive Practices and Behaviour Support) Rules 2018*.

The OPG would be pleased to lend any additional support as the review progresses. Should clarification be required regarding any of the issues raised, the OPG would be happy to make representatives available for further discussions.

Overview and recommendations

The OPG strongly commends the review and supports proposals that will bring improvements to the National Disability Insurance Scheme (NDIS). Below is a summary of the recommendations the Public Guardian sees as critical to the ongoing progression and success of the NDIS in Queensland, if it is to truly ensure 'choice and control' and that it does not, unintentionally, infringe the human rights of its participants.

The NDIS represents one of the most significant disability support reforms in recent Australian history, and provides a unique opportunity to transform the lives of people with disability. Even in its early stages of full scheme in Queensland, we have witnessed many positive outcomes for people with disability, with improved situations, increased supports, and a real opportunity for choice and control in their lives. However, for many others the NDIS has been a source of confusion, frustration and disappointment, with inaccessible processes, lengthy delays and inconsistent outcomes. The OPG is committed to the NDIS achieving its maximum potential in Queensland, so that our eligible clients can access the full benefits of the scheme and exercise choice and control in their disability supports.

The Public Guardian recommends:

NDIS Planning

1. The position description for National Disability Insurance Agency (NDIA) planners should provide that the following attributes are mandatory (wholly or in part) rather than optional, particularly for senior and specialist planners: an understanding of or lived experience in disability; experience in human services, allied health or disability; and relevant qualifications in human services, allied health or disability.

2. The NDIA should ensure that development of plans is facilitated by NDIA planners rather than Local Area Coordinators for participants with complex needs and life circumstances.
3. The NDIA should promote direct contact between planners and participants as standard practice to support the development of collaborative, tailored and effective plans.
4. The NDIA should ensure that the most appropriate type of planning meeting (in person or by telephone) is available to all participants, to maximise the effectiveness of the meeting and the outcomes for participants in their plans.
5. The NDIA should accommodate the needs of all parties to a planning meeting, including through utilising assistive technology such as video conferencing and allocating the most suitable planner for the client's circumstances.
6. The NDIA should ensure that the development of plans for clients with complex supports needs are facilitated by NDIA planners with experience, expertise and/or qualifications in fields relevant to both the client's life circumstances and any applicable mainstream interfaces.
7. Consideration should be given to lifting the NDIA staff cap to improve the NDIA's ability to respond to market needs and employ sufficient planners commensurate to the demand for development and review of plans at any given time.
8. The Commonwealth Government should establish the National Disability Advocacy Program Decision Support Pilot as a permanent legislative program under the NDIS, and consider expanding its scope to include funding for decision-making support in plan reviews.
9. Participants should have the right to review their draft plan and provide feedback on its accuracy prior to finalisation, which will contribute to better plan outcomes, reduce the need for formal plan reviews, and support the development of longer-term plans.
10. NDIA planners should consider whether participants have appropriate support throughout the planning process, and refer them to appropriate support avenues if required, including an advocate, service provider, plan nominee and/or formal decision maker.
11. The NDIA should ensure that unused funding is not removed from plans in circumstances where the underspend is due to a lack of service providers; this funding should be retained so that participants are able to immediately access services when an appropriate provider becomes available without having to undergo a formal plan review.
12. The NDIA should allow for both longer plans and the rollover of plans when a participant's situation is stable, supports are meeting the person's reasonable and necessary needs with no requirement for additional funding, and circumstances are not likely to change.
13. The NDIA should consider incorporating a discussion about the National Redress Scheme into planning meetings, including a referral to appropriate services which provide advice and supports to access the National Redress Scheme.

Supported Independent Living (SIL)

14. The NDIS should allow for interim arrangements while gathering evidence for SIL, which enables people to transition to their SIL accommodation while undergoing the process for formal approval.

15. The NDIA should promote SIL as a positive and empowering option for people with high-level and complex disability support needs, and ensure that consistent information is provided by planners and other stakeholders.
16. The NDIA should allow SIL funding for people with disability to live alone in their own home as the norm, rather than the exception.
17. The NDIA should allow greater flexibility between the use of SIL and core supports, to enable each funding source to be used for the other purpose if required in the circumstances.
18. The planning meeting for SIL should include a discussion about the person's accommodation arrangements, and the person should be referred to appropriate services for information and advice to ensure the person understands their accommodation arrangements and has any required tenancy agreements in place prior to entering SIL.
19. The NDIA should allow funding for SIL support and advocacy, to enable the person to understand the SIL service agreement and to reduce the need for formal guardianship appointments to the greatest extent possible.
20. The NDIA should facilitate improved information sharing between prospective co-tenants to ensure compatibility prior to participants entering a SIL arrangement, to the greatest extent possible.
21. The NDIA should allow for increased SIL funding to ensure appropriate staffing numbers for the level of care required and number of participants residing at the SIL location.
22. The NDIA should allow for pre-SIL capacity building supports, and work collaboratively with relevant state agencies to address concerns and ensure a person's readiness for transition from state services to SIL in a timely manner.
23. The NDIA should consider contracting emergency SIL providers of last resort to ensure participants are supported through unexpected SIL placement breakdowns and relinquishments.

Community visitor oversight and advocacy

24. The Commonwealth Government should legislate for and fully fund a national community visitor program within the NDIS Quality and Safeguards Commission.

NDIS (Restrictive Practices and Behaviour Support) Rules 2018

25. Rules 6 and 21 of the *NDIS (Restrictive Practices and Behaviour Support) Rules 2018* should be amended to expressly state that a restrictive practice may only be used in response to behaviour that causes harm, with complementary amendments to the Explanatory Statement.

Planning

The experience, expertise and qualifications of planners

The OPG has observed that the experience, expertise and qualifications of planners is varied and sometimes not known unless advised by the individual planner. In the OPG's experience, specialist planners do advise of their qualifications, and sometimes planners are internally considered by the NDIA to be content experts, for example in mental health or a specific type of disability. Planners have a range of experiences and levels of expertise which is evident in the way they are either able to understand, or lack understanding of the needs of participants and the ability to engage appropriately with participants. Some planners also lack understanding about the role of formal guardianship in relation to an adult participant, particularly public guardianship where the OPG is a statutory office through which any delegate of the Public Guardian can act on behalf of the client to make relevant decisions.

The experience, expertise and qualifications of planners may vary by region in Queensland; in the Cairns region the OPG has observed that many of the planners were new to the disability sector, while in the Ipswich region (South East Queensland) there has been an improvement in the understanding of complex needs and the role of the Public Guardian in the period since the rollout of the NDIS in 2017. In the Townsville region, stakeholders have expressed to OPG's Community Visiting and Advocacy unit ongoing concerns about the quality of planning, in the period since the commencement of the NDIS in 2016 in that region.

Under the current position description for NDIA planners it is stated that it is 'highly desirable that applicants have an understanding of or lived experience in disability; experience in human services, allied health, disability will be highly regarded; and relevant qualifications in human services, allied health, disability is desirable.' The OPG considers that these attributes are vital to ensuring quality in planners' deliberations and decision making, particularly in relation to addressing complex needs. It would therefore be preferable that these attributes were mandatory, wholly or in part, rather than optional, especially for senior and specialist planners. The OPG acknowledges that the pool of planners with relevant experience, expertise and qualifications may be limited in the early stages of full scheme NDIS, but is hopeful it will continue to increase as the scheme matures.

Recommendation 1:

The position description for NDIA planners should provide that the following attributes are mandatory (wholly or in part) rather than optional, particularly for senior and specialist planners: an understanding of or lived experience in disability; experience in human services, allied health or disability; and relevant qualifications in human services, allied health or disability.

In the OPG's experience, clients generally experience better outcomes when the development of their plan is facilitated by a planner at the National Disability Insurance Agency (NDIA) rather than a Local Area Coordinator (LAC), particularly if the client has complex needs and life circumstances. The NDIA itself is aware that specialist support is required in this area, and to this end is progressively rolling out a Complex Support Needs Pathway, which will include dedicated NDIA Complex Support Needs planning teams and a network of specialised planners with strong experience in high level coordination

and/or allied health experience. However, in the meantime, LACs continue to undertake planning for clients with complex needs who require specialised support in disability or other mainstream interface areas. For example, a LAC attempted to lead a planning meeting at a mental health ward for an OPG guardianship client who had been staying there for some months with significant behaviours. The mental health team at the ward refused to allow the LAC to proceed and insisted that the planning meeting be conducted by an NDIA planner, which resulted in a further delay for the client in being able to access the NDIS and transition from the mental health ward. The relative inexperience of LACs has also been observed in their approach to information sharing, with some LACs being unwilling to share plans with independent advocates even after consent is provided by the participant's formal decision maker. The NDIA should therefore ensure that development of plans is facilitated by NDIA planners rather than LACs for participants with complex needs and life circumstances.

Recommendation 2:

The NDIA should ensure that development of plans is facilitated by NDIA planners rather than Local Area Coordinators for participants with complex needs and life circumstances.

There are also inconsistencies in whether, and the extent to which, direct contact with planners is facilitated. Some planners may encourage direct contact with participants and their representatives, including by sharing their direct work phone numbers, while others work predominantly offline with little direct contact. In the OPG's experience, direct contact with planners is a key element of the planning process which supports the development of collaborative, tailored and effective plans. The NDIA should promote direct contact between planners and participants as standard practice to ensure consistency and effective collaboration.

Recommendation 3:

The NDIA should promote direct contact between planners and participants as standard practice to support the development of collaborative, tailored and effective plans.

The OPG has experienced some issues in the conduct of planning meetings which may relate to the experience, expertise and qualifications of planners. Some planners conduct planning meetings too quickly on the assumption that the participant's needs are stable and no changes are required to the participant's plan. In other cases, the planners may not have documentation that has been submitted by stakeholders for the participant at the planning meeting, which increases the risk that the plan is not properly informed and may be deficient in the supports provided to the participant.

The OPG has also experienced inconsistency and inflexibility in the type of planning meeting (such as face-to-face or by telephone) that is offered to the client and their representatives. Planning meetings conducted in person have regularly proven to provide far better outcomes for clients than planning meetings conducted over the phone. In some circumstances, LACs and NDIA planners are willing to hold meetings at the client's home or another place where the client is staying if they are unable to attend an office. However, the OPG has observed that some LACs and NDIA planners refuse to conduct in-home planning sessions, which can result in clients being unable to participate in the development of their own plan if they have no other support or cannot participate in the planning meeting by telephone. The OPG is aware that NDIA staff have encouraged service providers to escalate these issues

through the NDIA feedback and complaints process. The NDIA should ensure that the most appropriate type of planning meeting is available to all participants, to maximise the effectiveness of the meeting and the outcomes for the participants in their plans.

Recommendation 4:

The NDIA should ensure that the most appropriate type of planning meeting (in person or by telephone) is available to all participants, to maximise the effectiveness of the meeting and the outcomes for participants in their plans.

Recommendation 5:

The NDIA should accommodate the needs of all parties to a planning meeting, including through utilising assistive technology such as video conferencing and allocating the most suitable planner for the client's circumstances.

The ability of planners to understand and address complex needs

Estimates from the NDIA indicate that at full scheme, 10 to 15 per cent of participants may require complex supports. Planners need the ability to understand and address these complex needs, and to draw on expertise from across the NDIA to develop better plans for people with complex needs. As noted above at 'A. The experience, expertise and qualifications of planners', the NDIA has developed a new Complex Support Needs Pathway which will include dedicated NDIA Complex Support Needs planning teams. The OPG is hopeful this initiative should increase the number and capability of planners who are able to understand and address complex needs in time as implementation of the pathway progresses. While this is a good start, such teams need to be quickly established and in particular must be accessible to participants living in regional, rural and remote locations.

The OPG has observed that the ability of planners to understand and address complex needs varies depending on the experience of the planner. Some planners are flexible and creative in developing plans to meet the client's support needs, while others may be more rigid and adhere to set parameters rather than focusing on outcomes for the client. If the planner is more familiar with the client's diagnosis, they appear to be more willing to make the plan work for the client; conversely, trauma and other impacts may not be taken into account if the planner lacks understanding about the complexity of the client's support needs and life circumstances. In some cases, it appears the planner may already have a preconceived idea of what will be funded prior to the planning meeting. For example, the OPG has observed that some planners who have previous knowledge of clients through former state disability services appear to have predetermined the client's needs and funding levels before the meeting.

The complexity of the client's support needs and life circumstances may be exacerbated by intersecting with mainstream interfaces. The OPG has observed that planning is particularly challenging when the planner is required to interact with the justice system, mental health system or child protection system to facilitate the client's transition to the NDIS. For those in custody or detained in authorised mental health services, effective planning during the period of being detained is vital to ensure the client's successful transition to community. Critical mainstream interface issues include funding for clients in custody, which the OPG has anecdotally heard is ceased when people enter custody, and can affect applications for bail if the client cannot readily access support; limited mechanisms to seek further

supports for clients in mental health settings, which leads to longer periods of detention than may be necessary; and a disconnect between the expectations of courts and tribunals requiring 24/7 support for a client to manage forensic risk and the actual supports that the NDIS is able to provide.

Other issues relating specifically to the interface between the NDIS and the mental health system include insufficient resourcing to support collaboration across multiple systems and to coordinate individual planning processes for people with complex support needs, resulting in poor discharge planning and extended stays in hospital. NDIA timeframes for access, plan reviews and planning do not align with rapid health responses to meet changing needs for the target group, causing delays in hospital discharge processes. Finally, some NDIA planners (and support coordinators) lack necessary clinical expertise, leading to a failure to incorporate key support recommendations in plans.

The OPG has also observed specific issues which relate to the interface between the NDIS and the child protection system. Effective assessments and interventions for children and young people in care with impairments and disabilities remain challenging. Often placement stability and advocacy by carers (kinship, foster or residential) will impact on how effectively the identified issues are responded to in planning processes. For young people with crossover issues in youth justice there are issues about effective therapeutic and social supports for those with developmental and neurological disabilities which directly link to behaviours that place them at risk of criminalisation.

A planner with experience and understanding of these mainstream interface areas is more readily able to navigate these issues and facilitate the client's transition to community through their plan. It is critical that the development of plans for clients with complex support needs is facilitated by an NDIA planner with experience, expertise and/or qualifications in fields relevant to both the client's circumstances and any relevant mainstream interface areas.

Recommendation 6:

The NDIA should ensure that the development of plans for clients with complex supports needs are facilitated by NDIA planners with experience, expertise and/or qualifications in fields relevant to both the client's life circumstances and any applicable mainstream interfaces.

The overall number of planners relative to the demand for plans

In the OPG's experience, there has been a significant improvement in the number of planners relative to the demand for plans since the commencement of the NDIS. However, the demand for plans continues to exceed the number of planners, resulting in delays to plans. This issue is further compounded by the increasing demand for plan reviews (both planned and unplanned), which impedes the ability of planners to develop plans and undertake plan reviews in an efficient and timely manner. The OPG has observed that plan dates are being changed to manage plans, particularly for younger people in residential aged care and clients on the Complex Support Needs Pathway, as there are few planners with the experience, expertise or qualifications to undertake this work. These issues appear to indicate an understaffing of planners which may be impacted by the NDIA's staff cap. The OPG is aware that an increase of the NDIA's staff cap is being progressively rolled out over the next two years. However, lifting the staff cap entirely may improve the NDIA's ability to respond to market needs and employ sufficient planners commensurate to the demand for development and review of plans at any given time.

Recommendation 7:

Consideration should be given to lifting the NDIA staff cap to improve the NDIA's ability to respond to market needs and employ sufficient planners commensurate to the demand for development and review of plans at any given time.

Participant involvement in planning processes and the efficacy of introducing draft plans

Direct participant involvement in planning is fundamental to the integrity of the process and the core NDIS tenets of choice and control. A strong planning process should ensure that participants lead the development of their plans without exception, and their nominee, support person or decision maker is able to contribute in an advocacy or representative role if applicable. However, the system remains more accessible for people with physical rather than intellectual disabilities, and good planning outcomes continue to be more common for people with high-functioning capabilities. The planning process can be quite complex and participants with some level of impaired decision making capacity may experience challenges navigating the scheme without advocacy or decision-making support. Participants in this situation may be unaware of the supports that are available, and often require an advocate or representative who understands their specific situation to support the participant to access the system. This may include assisting the participant with their access application, preparing for the planning meeting, advocating for appropriate supports to be included in the participant's plan, and activating the plan.

The OPG notes the Department of Social Services *National Disability Advocacy Program Decision Support Pilot*, which enables advocacy organisations in each state and territory to provide decision-making support for people seeking to engage with the NDIS, is currently funded to 30 June 2020. The need for advocacy and decision-making support services is an ongoing demand for people with some level of impaired decision-making capacity, which will also be impacted by increasing numbers of plan reviews. The Commonwealth Government should allocate long-term funding to the pilot and consider expanding its scope to include plan reviews as the scheme matures.

Recommendation 8:

The Commonwealth Government should establish the National Disability Advocacy Program Decision Support Pilot as a permanent legislative program under the NDIS, and consider expanding its scope to include funding for decision-making support in plan reviews.

The OPG has observed that participant involvement in planning processes can vary by region. In the Cairns region there has been a recent emphasis on the participant's attendance at their planning meeting, and there have been instances where planning meetings did not proceed without the adult participant, which is a welcome development where previously meetings were sometimes conducted without either the participant or formal guardian present. In the Townsville region the OPG has observed ongoing challenges in relation to the location of planning meetings, which are held at the NDIA office to accommodate planners; limitations on the number of people who can attend the meeting with the participant; and at times the appropriateness of cultural considerations at the meeting.

In the OPG's experience, draft plans may be provided on occasion, but most OPG clients do not receive plans before they are finalised. This is a lost opportunity for the participant to review the plan to ensure it reflects their goals and needs, and to correct any errors or misrepresentations before the plan is approved by the NDIA. A plan is a deeply personal document which includes detailed information about the participant's life, goals, capabilities and disabilities. Participants should have the right to review their plan before it is finalised, in line with the NDIS philosophy of choice and control. The lack of participant review at the drafting stage increases the risk of deficient plans, which lead to formal plan reviews that further burden the system and cause more delays in the planning process. Introducing the draft plan as an official step in the planning process will contribute to better plan outcomes, reduce the need for formal plan reviews, and support the development of longer-term plans.

Recommendation 9:

Participants should have the right to review their draft plan and provide feedback on its accuracy prior to finalisation, which will contribute to better plan outcomes, reduce the need for formal plan reviews, and support the development of longer-term plans.

The incidence, severity and impact of plan gaps

The OPG has observed two types of plan gaps experienced by clients. The first is a gap in the plan itself, where key supports have not been included in the plan when it was first developed due to poor planning or changed circumstances, and must be addressed through a formal plan review. In the OPG's experience, plan rework is often required due to gaps in plans not meeting the needs of participants, and short plans have been common due to the frequency of plan reviews. A lack of appropriate advocacy and decision-making support for participants with some level of impaired decision making capacity during the planning process can also significantly increase the risk of plan gaps. Some planners are more adept than others at developing comprehensive and cohesive plans which ensure there will be no gaps in supports for clients during the life of the plan. Providing draft plans to participants for review, discussed above at 'E. Participant involvement in planning processes and the efficacy of introducing draft plans', may also help to identify gaps before the plan is finalised. Ensuring participants have appropriate support throughout the planning process, including an advocate, service provider, plan nominee and/or formal decision maker if required, can also assist in promoting a collaborative approach to planning which reduces the possibility of plan gaps.

Recommendation 10:

NDIA planners should consider whether participants have appropriate support throughout the planning process, and refer them to appropriate support avenues if required, including an advocate, service provider, plan nominee and/or formal decision maker.

The second type of plan gap occurs between plans, where one plan ends and there are delays in the plan review process, which requires a different approach to ensure continuity of service to the participant. The OPG notes that from early August 2019, the NDIA is making changes to the NDIS myplace portal to improve the review process where there may be a gap between new and old plans. The aim is to ensure that participants will be able to receive services regardless of a delay in the scheduled plan review process. It also means providers will continue to be able to claim for services

while the participant prepares for a plan review. This is welcome initiative for both participants and providers.

The review process and means to streamline it

In the OPG's experience, the introduction of the Complex Support Needs Pathway team has been a very positive development which has resulted in successful plans and a great improvement in the review process.

Some participants have had plans reviewed by the NDIA which have resulted in funding reductions. In some instances, the funding has been reduced because the plan under review was unable to be fully implemented due to a lack of service providers (a thin or non-existent market), leading the NDIA to conclude those services were not required. In the OPG's experience, the participant continues to need the services funded under the original plan, but due to the current thin market of service providers in certain regions and particular specialist services, the funds were unable to be used and are at risk of being removed from the plan under review. The NDIS is still in the early stages of full scheme, and it will take time for the service provider market to grow to meet the demand for services and the needs of participants. The NDIA should continue to make these funds available to participants in their plans, so that participants are able to immediately access services when an appropriate provider becomes available without having to undergo a formal plan review.

Recommendation 11:

The NDIA should ensure that unused funding is not removed from plans in circumstances where the underspend is due to a lack of service providers; this funding should be retained so that participants are able to immediately access services when an appropriate provider becomes available without having to undergo a formal plan review.

The OPG has observed that the Change of Circumstances review process is quite onerous and protracted with extensive delays leaving clients at serious risk of losing services and other negative outcomes. For example, an OPG client required a Change of Circumstances review because she had given birth to a child and her support needs had drastically changed as a result of her new family circumstances. However, the wait time for the review of her plan was five months, despite the OPG escalating the issue and contacting the NDIA repeatedly. The review process could be streamlined by increasing the number of NDIA staff who undertake reviews, and lifting the staff cap to ensure there are sufficient planners available to respond to the demand for plan reviews, as explored above at 'D. The overall number of planners relative to the demand for plans'.

Appeals to the AAT and possible measures to reduce the number

The OPG is aware that the incidence of appeals to the Administrative Appeals Tribunal (AAT) has grown considerably since the commencement of the NDIS, and that in a significant and growing proportion of applications the AAT has changed the decision under review, with the majority being resolved during pre-hearing processes. The OPG understands that the applications which have progressed to a hearing and decision generally have resulted in positive outcomes for participants with a few exceptions. While early resolution of disputes is always welcome for the individual, without a formal AAT decision the outcome may be limited to that particular matter, rather than creating a precedent which can be relied

upon by others in similar situations. It is important that this external appeals process is supported, as it assists the NDIA to refine its systems and processes, and ensures accountability and consistency in its decision making. The OPG considers that the number of appeals to the AAT may continue to rise relative to the growing number of people in the NDIS, but may stabilise as the NDIS continues to evolve and improve through learnings from the appeals process and AAT decisions.

The circumstances in which plans could be automatically rolled-over

The OPG considers that plans should automatically roll over when a participant's situation is stable, supports are meeting the person's reasonable and necessary needs with no requirement for additional funding, and circumstances are not likely to change. Rolling such plans over would ease the burden of the NDIA's plan review caseload so that it can more effectively respond to unscheduled reviews or those in which the participant's situation has changed, thus streamlining the review process.

The circumstances in which longer plans could be introduced

As above in relation to the rolling over of plans, the OPG is supportive of longer plans in cases where a participant's situation is stable, supports are meeting the person's reasonable and necessary needs with no requirement for additional funding, and circumstances are not likely to change. This may include clients staying in Queensland's state-managed Accommodation Support and Respite Services (AS&RS) or stable Supported Independent Living (SIL) arrangements. Longer plans may also benefit parents with impairments who have identified goals of parenting skills and reunifying and/or contact with their children, who may have or are at risk of being removed from their care. Longer plans should increase the stability of a participant's situation and are able to be reviewed at any time if needed. Longer plans will also reduce the administrative burden on the NDIA with respect to the frequency of regular plan reviews, and allow the NDIA to prioritise unscheduled and Change of Circumstances reviews where the participant may urgently require additional or different supports.

In the OPG's experience, plans of up to two years generally achieve an effective balance between stabilising the participant's supports and reviewing the progress of the plan's implementation. The two-year timeframe ensures that plans are actioned promptly, while longer plans may decrease motivation to implement all elements of a plan in a timely manner for the participant. The OPG has observed some planners may be moving towards two-year plans as the norm with additional evidence requirements to justify shorter plans as the exception, although there does not appear to be consistent practice in this regard at present.

Recommendation 12:

The NDIA should allow for both longer plans and the rollover of plans when a participant's situation is stable, supports are meeting the person's reasonable and necessary needs with no requirement for additional funding, and circumstances are not likely to change.

The adequacy of the planning process for rural and regional participants

The OPG has experienced positive outcomes in the planning process for rural, regional and remote participants, including flexibility in the scheduling of planning meetings to coincide with OPG visits so that the delegate guardian can attend the meeting with the client in person. However, other rural and

remote participants may be disadvantaged in the planning process due to a lack of NDIA staff in some locations, including planners, LACs and ECEI services.

While the adequacy of the planning process for rural, regional and remote participants may vary, the biggest challenge is the limited ability to implement plans due to the lack of services available in these locations. Any plans produced must take into account the severe shortage of service provider options in rural and remote areas. For example, plans might include a necessary therapy component but qualified therapists are only available in major regional centres. The use of Allied Health Assistants in rural and remote locations who have both a knowledge of the local community and are certificate qualified can assist in the provision of NDIS services under the guidance of a fully qualified practitioner who is located in a major town or city.

Referral opportunities

The Australian Government has established a National Redress Scheme to provide support to people who have experienced institutional child sexual abuse, including access to counselling and psychological services, a direct personal response, and a monetary payment. A significant proportion of Redress Scheme applicants identify as having a disability. While the Redress Scheme is an entirely separate initiative to the NDIS, the planning process may be an ideal opportunity to provide clients with information on the Redress Scheme. This could include a referral to appropriate services which provide advice and supports to access the Redress Scheme.

Recommendation 13:

The NDIA should consider incorporating a discussion about the National Redress Scheme into planning meetings, including a referral to appropriate services which provide advice and supports to access the National Redress Scheme.

Supported Independent Living

The approval process for access to SIL

In the OPG's experience, the approval process for SIL is very slow and difficult to navigate. The evidence requirements for SIL are quite onerous and prohibitive, and the person must spend significant time and resources gathering information to support an application for SIL, during which the person may be left 'in limbo' without any other suitable arrangements. The OPG has observed that some service providers will assist clients to obtain private rental property before their SIL application is approved. This results in considerable expenditure of both the person's own resources and their existing NDIS plan while awaiting SIL, as demonstrated in the case example below. The OPG has also observed an increase in guardianship appointments for previous clients, who require support to navigate the complexities of the SIL approval process. The NDIS should allow for interim arrangements while gathering evidence for SIL, which enable the person to transition to their SIL accommodation while undergoing the process for formal approval. This interim funding could be based on reports and assessments obtained within a reasonable period prior to the SIL application, and the person's funding and living arrangements under the former state or territory disability service. The SIL planning meeting should also discuss other options and contingencies for a person who is placed in a SIL, such as moving out or to another SIL.

Recommendation 14:

The NDIS should allow for interim arrangements while gathering evidence for SIL, which enables people to transition to their SIL accommodation while undergoing the process for formal approval.

There is inconsistency in the information provided to people about SIL and its promotion by the NDIA and other stakeholders. For example, the OPG has observed a lack of community education to stakeholders about the varying levels of support under SIL, and there is a perception that the OPG's clients should all have 24/7 support for supervision. This perception is potentially harmful as it presumes that people under guardianship require fulltime support, and does not allow for capacity building which is a key tenet of the NDIS. The OPG has also observed that in particular regions, some planners have a negative view about putting SIL into a person's plan. Planners have advised the OPG that SIL is restrictive and too expensive, and that the client does not meet the requirements, even when there is clearly a need for that level of support. In these circumstances the planner appears to be attempting to build the client's plan around drop-in services rather than a SIL arrangement, even in places where there are a number of people living at the accommodation who may require and benefit from SIL supports. In the OPG's experience it has become more difficult to obtain SIL supports for clients in certain regions, with planners requiring more evidence for SIL even when the client has demonstrated their need for significant support requirements in their existing NDIS plan. The NDIA should promote SIL as a positive and empowering support option for people with high-level and complex needs, and ensure that consistent information is provided by planners and other stakeholders.

Recommendation 15:

The NDIA should promote SIL as a positive and empowering option for people with high-level and complex disability support needs, and ensure that consistent information is provided by planners and other stakeholders.

The funding of SIL

It is very difficult to obtain SIL funding for a single person in their own home, even if this is the most appropriate option to reflect the rights and will of the person. It can also have a significant impact on their cultural and religious needs and personal preferences. In most cases the person is forced into shared accommodation because of cost efficiencies to the NDIA in co-locating people with disability to share supports. The OPG considers this is a grievous infringement on the person's human rights and is fundamentally contrary to article 19(a) of the United Nations *Convention on the Rights of Persons with Disabilities*, which requires State Parties to ensure that '*persons with disabilities have the opportunity to choose their place of residence and where and with whom they live on an equal basis with others and are not obliged to live in a particular living arrangement*'. It is also contrary to the NDIS tenets of choice and control. The OPG has received information from the NDIA that to make the case that a client should live alone with one-on-one SIL support, they need to be able to show why the client *cannot* live with other people. It appears the default position is that people with disability must live together to obtain SIL funding unless they can prove otherwise. Obtaining this kind of evidence is very challenging, and almost requires the client to show that they have tried shared accommodation and the arrangement has failed. People with disability have the right to choose to live alone in their own home, equal with any other person, and should not be forced to live with others in order to obtain SIL

supports. The government does not require any other person receiving supports to live with other people in order to obtain that support, therefore it should not be expected of people with disability. This practice is discriminatory and should be ceased immediately.

Recommendation 16:

The NDIA should allow SIL funding for people with disability to live alone in their own home as the norm, rather than the exception.

There is insufficient flexibility between the use of SIL and core supports that can enable funding from one source to be used for another purpose when needed. For example, the OPG was appointed as the formal guardian for an 18 year old young person who had transitioned from child protection, having lived in a very protective environment. The OPG advocated for a carer to be on call for the young person if they were unwell, or upset about something at their day program and wanted to come home to their SIL arrangement. This arrangement required the use of additional SIL funding rather than core supports. The OPG has also observed that there may be gaps in funding between SIL and core supports. For example, there is a half hour overlap for carers transporting clients between their day program and SIL which is not funded by either area, resulting in an eventual shortfall in funding. Conversely, the OPG has received inconsistent information that SIL providers are entitled to be paid when the client is out at their day program, on the basis that the SIL provider is providing 24/7 care for the client. However, the OPG understands that SIL is not funded while the client is out of the home and receiving other services under the core supports of their NDIS plan. The OPG recommends that greater flexibility is introduced between the use of funding provided for SIL and core support, to enable each funding source to be used for the other purpose if required in the circumstances.

Recommendation 17:

The NDIA should allow greater flexibility between the use of SIL and core supports, to enable each funding source to be used for the other purpose if required in the circumstances.

SIL and tenancy agreements

The OPG has observed that participants may lack understanding about the difference between SIL and their accommodation arrangements, which places participants at risk of unstable or unfair rental arrangements. It should be standard practice that participants are protected by both SIL and tenancy agreements (where relevant) before moving into their SIL arrangement. However, many participants move into SIL on the mistaken belief that their SIL agreement with a service provider also encompasses their accommodation arrangement, when in actual fact there is no formal tenancy agreement in place. Once the participant moves into the accommodation, it is a common experience for the participant to find that the service provider has significantly increased the rent, and there is little recourse for the participant because there is no formal tenancy agreement or accommodation protections in place.

While the NDIA generally doesn't have responsibility for the accommodation arrangements of participants, the SIL planning meeting is an ideal opportunity to flag this issue with participants and refer them to appropriate services for information, advocacy and advice. The planning meeting for SIL should include a discussion about the person's accommodation arrangements, and the person should

be referred to appropriate services for information and advice to ensure the person understands their accommodation arrangements and has any required tenancy agreements in place prior to entering SIL.

Recommendation 18:

The planning meeting for SIL should include a discussion about the person's accommodation arrangements, and the person should be referred to appropriate services for information and advice to ensure the person understands their accommodation arrangements and has any required tenancy agreements in place prior to entering SIL.

Complex service agreements

The service agreements for SIL are generally quite complex. The inherent complexity restricts a participant's ability to fully comprehend the implications and nuances that may apply under such agreements, and increases the risk of unfair clauses being included that benefit of agencies and service providers to the detriment of the participant. The OPG has observed unfair clauses in SIL service agreements with negative consequences for the participant. For example, participants may be charged cancellation fees if they don't give notice or attend a particular component of the arrangement such as an outing, in circumstances where they may not understand the terms of the agreement or the financial implications of failing to give notice or attend. The OPG has also observed a direct link between complex service agreements and an increase in formal guardianship appointments, where the OPG is appointed because a decision needs to be made about SIL and the complexity of the agreement has impeded the participant's ability to autonomously engage with agreement, even with decision-making support and advocacy. This has been an ongoing issue that occurred prior to the introduction of the NDIS. This increase in formal guardianship appointments includes previous clients of the OPG who were in stable state funded service arrangements with no decisions to be made, but now require a formal substitute decision maker to transition from the state services into SIL, which contravenes the 'choice and control' objectives of the NDIS and also unfairly impact upon a person's human rights.

The OPG has also observed an increase in indefinite or ongoing formal guardianship appointments, in circumstances where the guardianship appointment would previously have been revoked after all required decisions about disability supports and accommodation have been made. For example, prior to the NDIS, the OPG would be appointed as guardian for adults in Queensland's state-managed Accommodation Support and Respite Services (AS&RS), which was a SIL-like arrangement with block funding, and revoked after the decisions about accommodation and services were complete. However, under the NDIS, the OPG is increasingly being appointed for an indefinite period of time on the basis that there are decisions that possibly need to be made at some time in the future, namely the review of plans. The OPG considers that an indefinite appointment is completely inappropriate, contrary to the participant's right to choice, control and exercise of their own autonomy, and is not the least restrictive option given it is an ongoing imposition on the person's autonomy and right to make their own decisions, potentially for the rest of their life. The NDIA should allow funding for SIL support and advocacy, to enable the person to understand, and make informed decisions about the SIL service agreement and to reduce, and where possible, entirely remove the need for formal guardianship appointments.

Recommendation 19:

The NDIA should allow funding for SIL support and advocacy, to enable the person to understand the SIL service agreement and to reduce the need for formal guardianship appointments to the greatest extent possible.

Co-tenancy and compatibility

The OPG has observed a number of issues in relation to co-tenancy and compatibility in SIL arrangements. Of 18 accommodation related issues raised by OPG's Community Visiting and Advocacy unit in the 2018-19 financial year, 6 related to concerns about co-tenant compatibility. Factors identified through issues raised by the Community Visiting and Advocacy unit that impact on compatibility include: personality differences and general incompatibility; behaviours of an adult negatively impacting on others in the household, at times resulting in harm being reported; lack of available accommodation alternatives; and unwillingness of tenants or their decision makers to consent to accommodation changes. Given the current thin market in some areas (particularly regional, rural and remote areas), the OPG is concerned about whether there are adequate vacancies to allow sufficient weight to be given to compatibility. There is also concern about whether there will be adequate sharing of information with participants and decision makers to determine if a co-tenancy arrangement is likely to be suitable. The NDIA should facilitate improved information sharing between prospective co-tenants to ensure compatibility prior to participants entering a SIL arrangement, to the greatest extent possible.

Case example

In a household where four adult participants with some level of impaired decision making capacity were residing, the behaviour of one 45 year old resident was found to be having a profound impact on the remaining residents. The behaviours described to the Community Visitor included the man insisting on eating meals alone, insisting others stay in their rooms until he was finished so they are not visible while he was eating, and yelling loudly at the residents. The service provider reported the man to be controlling and that he often used his voice to force other residents to their rooms when he didn't want them in his area. One of the other residents directly confided to the Community Visitor that he felt unsafe due to the man's behaviour. The Community Visitor has been advocating for several months for changes to the co-tenancy arrangement. The Community Visitor spoke with the service provider, who was willing to seek a sole tenancy for the man, and informed the appointed OPG guardian of the resident who voiced feeling unsafe. The private guardian of the man refused to consent to his relocation out of the household into a single tenancy. The resulting situation is the Community Visitor is still advocating for change, including review of the co-tenancy arrangements and appropriate interventions to manage the impact of the behaviours.

Recommendation 20:

The NDIA should facilitate improved information sharing between prospective co-tenants to ensure compatibility prior to participants entering a SIL arrangement, to the greatest extent possible.

SIL staffing

The OPG has observed a number of issues in relation to staffing in SIL arrangements. OPG's Community Visiting and Advocacy unit identified 4 issues in 2018-19 regarding staffing, including compatibility of adults and staff; and a need for increased staffing ratios due to behavioural needs. It was apparent that SIL funding levels in shared or group accommodation was a consideration when discussing choice and control in staffing. This issue is also relevant to the issues raised by the OPG in relation to shared accommodation and SIL funding at 'C' above. The NDIA should allow for increased SIL funding to ensure appropriate staffing numbers for the level of care required and number of participants residing at the SIL location.

Recommendation 21:

The NDIA should allow for increased SIL funding to ensure appropriate staffing numbers for the level of care required and number of participants residing at the SIL location.

Transitioning from state services to SIL

The OPG has observed a number of issues in relation to continuity of supports and transitioning from state health facilities to SIL arrangements. In 2018-19 the Community Visiting and Advocacy unit raised 11 issues that relate to NDIS for people residing in Queensland Health facilities. The nature of these issues includes adequacy of supports to develop skills and progress toward discharge to community living in SIL placements; refusal of the treating team to allow discharge to a SIL due to concerns about the person's independent living skills; delays in discharge while waiting for a suitable SIL placement to become available; delays in discharge while waiting for the NDIS planning meeting; support to relocate to another part of the state; and the conduct of staff during transition from the mental health facility to the SIL. Many clients are approved for SIL but remain in an acute care unit and are unable to transition because of the lack of SIL placements. The OPG also observed a similar lack of provision and coordination of services for cases in other areas, such as an unplanned prisoner release which results in the prisoner urgently requiring SIL accommodation. While some of these issues may require primary action by Queensland Health or the relevant state agency, the NDIA should allow for pre-SIL capacity building supports, and work collaboratively with the relevant state agency to address concerns and ensure the person's readiness for transition to SIL in a timely manner.

Case example

An OPG Community Visitor visited an adult woman who had resided in a mental health unit for over 250 days. Staff of the unit identified that the delay in discharge was due to having to wait for a planning meeting and for suitable accommodation. It was identified that the woman was one of approximately 78 patients across the Hospital and Health Service who were awaiting NDIS plans at the time. It was identified that there were regular meetings occurring between the Department of Housing (Qld), NDIA and Queensland Health to discuss the matter of long stay patients who were awaiting NDIS plans.

Case example

A woman spoke with an OPG Community Visitor about her frustrations awaiting a suitable SIL placement to enable her to be discharged from the mental health unit. The woman had a completed NDIS plan with the goal of living in the community. Staff of the mental health unit reported the delay to be a result of the waiting for a suitable co-tenant to be identified.

Case example

A woman complained to an OPG Community Visitor that the medical officer had refused to sign a Department of Housing application which resulted in delays to being discharged. She reported that she had NDIS funding allocated to allow her to live in the community, but the medical officer had refused to sign the housing application as they didn't support the woman living alone. Instead, they wanted to work with the woman to acknowledge her skill limitations for independent living and to have her agree to discharge to a supported accommodation facility instead.

Recommendation 22:

The NDIA should allow for pre-SIL capacity building supports, and work collaboratively with relevant state agencies to address concerns and ensure a person's readiness for transition from state services to SIL in a timely manner.

Relinquishment by SIL provider

The OPG has observed a significant issue whereby a participant may be relinquished by a SIL provider. In SIL locations where co-tenancy arrangements are in place, this can result in housing instability and in some instances a need for the participant to move out of their home. This issue could be alleviated by the NDIA funding more SIL arrangements for single participants living on their own, discussed at 'C. Funding of SIL' above. The NDIA should also consider establishing emergency SIL providers of last resort to ensure participants are supported through unexpected SIL placement breakdowns and relinquishments.

Case example

Two adults resided together in the site since early 2018. No co-tenancy concerns were reported when they were visited by an OPG Community Visitor. The home was a Department of Housing property. The SIL provider made a decision to end SIL services to one of the clients due to concerns about the conduct of his private guardian. The guardian of the other resident wished for him to remain with the SIL provider. As a result of the decision, the resident who remained with the SIL provider had to move from the home into short term accommodation until they could source another property and a co-tenant. The resident who was relinquished remained in the property supported by a new SIL provider, with intentions to advertise a vacancy. The decision taken by the SIL provider resulted in significant housing instability.

Recommendation 23:

The NDIA should consider contracting emergency SIL providers of last resort to ensure participants are supported through unexpected SIL placement breakdowns and relinquishments.

Community visitor program oversight and advocacy

Community visitors have an essential role within the NDIS complaints scheme, particularly in relation to monitoring, advocating for issue resolution, and supporting persons with impaired cognitive capacity to exercise their rights.

NDIS COAG Disability Reform Council Quarterly Reports continue to indicate that more than 70 per cent of participants have some form of cognitive impairment (including autism, intellectual disability, psychosocial disability, developmental delay, and other neurological impairments).

It is clear from the experience of the OPG (not just through its community visiting and advocacy function, but that of approximately 3,421 guardianship clients in 2018-19), that it is unrealistic to assume that people with a cognitive impairment (especially clients who are non-verbal), can self-advocate and access these mechanisms. Indeed this erodes any concept of choice and control for these participants. Effectively, without community visitors, there is no mechanism for people with a cognitive impairment (in particular non-verbal clients) to access the NDIS Quality and Safeguards Commission (the Commission) and raise their concerns.

In 2018-19, Queensland community visitors conducted 5,343 visits to 6,601 adults at 1,380 sites, in which they identified 2,301 issues. A significant proportion of these matters related to personal safety and security, including complaints of abuse or assault. Further, at the request of the Queensland Civil and Administrative Tribunal, community visitors identified large numbers of issues relating to the inappropriate use of restrictive practices. Quite simply these matters would not have been brought to the attention of LACs or the Commission, without the vehicle of a community visitor scheme. It is feasible to assume that the abuse of the fundamental human rights of adults with impaired capacity identified in these cases would neither be observed, nor addressed without the presence of community visitors in these facilities.

Community visitors are critical to ensuring a functioning and effective complaints process. However, community visitors in Queensland are more than conduits for lodging complaints. They are dedicated advocates who pursue the resolution of concerns both for, and with, the clients they support.

Given the high incidence of active participants with an approved plan in the NDIS having a diagnosis of intellectual disability, autism or psychosocial disability, community visitors are vital in ensuring that these participants are able to make complaints, can access and navigate complaints mechanisms, and achieve resolution of issues that matter to them.

Persons with these types of disabilities face inherent challenges in relation to raising issues and complaints. This includes significant personal, physical, mental and systemic barriers these participants may have to overcome in order to develop basic skills to self-advocate. Community visitors are vital source of support to this cohort in identifying issues of concern, and helping them to address and resolve issues.

Key NDIS documents recognise the critical role of community visitors in any complaints process, particularly for this vulnerable group of persons. The *National Disability Insurance Scheme Quality and Safeguarding Framework Consultation Report* (consultation report) dated 31 August 2015 noted the 'substantial' support for some form of community visitor type function (p 56). In particular, it recognised the importance of the community visitor function in:

- promoting and protecting the rights and wellbeing of people with disability who are at higher risk, particularly those with intellectual disability, complex communication needs, and few natural supports
- identifying issues that people with disability would not otherwise raise and support people to make complaints
- provide an avenue for staff to report issues
- provide an early warning system, helping to prevent abuse and neglect
- escalate serious issues
- identify misuse of restrictive practices.

The consultation report also noted the significant barriers that people with disability can face in accessing complaints, stating '*stakeholders noted the important role that advocates, community visitors and natural support people play in supporting people to make complaints*', with community visitors acting as a useful support for people with few natural supports.

Further, the *NDIS Quality and Safeguarding Framework Decision RIS* (RIS paper) adopted by the COAG Disability Reform Council on 6 March 2017 noted Victorian community visitors identified 287 cases of violence, neglect or abuse in 2013–14 (p 17). Significantly, the RIS paper also noted the estimated rates of serious harm lent 'weight to anecdotal and other evidence that the number of people affected by abuse from providers of supports, as well as by other residents, is significant'.

The Commonwealth has undertaken a review of Australian community visitor schemes and their interface with the NDIS Quality and Safeguarding Framework, the outcome of which is pending. Independently of the review, the Queensland Government recognised the critical role of community visitors and amended relevant legislation to enable the continued operation of the OPG's Community Visiting and Advocacy unit in relation to sites where certain classes of NDIS supports are being provided to adult and child participants. Queensland community visitors can visit sites, other than private dwelling houses, where adult NDIS participants are in receipt of the following high levels of support and care from registered NDIS providers:

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

Queensland community visitors can also visit sites where respite services are provided to child NDIS participants. Community visitors are 'eyes and ears' that see and hear what really happens on the ground with the delivery of services, and therefore are able to detect issues of concern, and read the 'early warning signs' to pre-empt a breakdown in the delivery of services. They are also equipped with the 'teeth' to complain and advocate on behalf of a person to ensure that their rights and interests are

protected. The OPG's Community Visiting and Advocacy unit is regarded as a critical facet of the rights-protection for people with disability in Queensland.

The OPG strongly recommends that a national community visitor program should be provided for and fully funded within the Commission. The OPG firmly believes that given the high incidence of persons with cognitive impairments who are participants within the NDIS, if no provision is made for community visitors within the complaints scheme, it will not work. Without a professional and fully funded community visitor program within the NDIS, there will only be a small subset of NDIS clients to whom the Commission is able to offer rights-protection.

Recommendation 24:

The Commonwealth Government should legislate for and fully fund a national community visitor program within the NDIS Quality and Safeguards Commission.

NDIS (Restrictive Practices and Behaviour Support) Rules 2018

The *NDIS (Restrictive Practices and Behaviour Support) Rules 2018* (RPBS Rules) and Explanatory Statement do not articulate as clearly as they should the linkage between a type of regulated restrictive practice and its use in response to harmful behaviours of persons with disability.

It is a critical concern of the OPG that 'behaviours of harm' is insufficiently referred to in the RPBS Rules or the Explanatory Statement, which instead focuses on 'behaviours of concern'.

The Queensland restrictive practices regime specifically provides that restrictive practices should only be used for the primary purpose of controlling or responding to 'behaviour that causes harm', and it is closely linked with the need for positive behaviour support plans and strategies for the reduction and elimination of restrictive practices. The term 'harm' is defined in section 144 of the *Disability Services Act 2006* to mean physical harm to the person, a serious risk of physical harm to the person, or damage to property involving a serious risk of physical harm to the person.

There is no clear connection in the RPBS Rules between the use of a restrictive practice and the behaviour which may trigger its use. The RPBS Rules provide that the restrictive practice is used 'to influence a person's behaviour' (r.6) and 'in response to risk of harm' (r.21). The Explanatory Statement provides that the restrictive practice is used 'to address behaviours of concern that are of such intensity, frequency or duration that the safety of the person or others is placed in jeopardy; or may cause a risk of harm more broadly.' The Explanatory Statement further provides that 'the primary purpose of the use of restrictive practices must be to respond to a person with disability's behaviour of concern to protect that person or others from harm.'

In Queensland, restrictive practices are used in response to 'behaviour that causes harm'. The OPG is gravely concerned that this concept has been reduced to 'behaviour of concern' and 'risk of harm' in the RPBS Rules and the Explanatory Statement. It is arguable that 'behaviour that causes harm' has a higher threshold and can be easily evidenced by incident history, rather than 'behaviour of concern', which is a wide term that is subjective and therefore potentially open to self-serving interpretation or abuse.

The OPG strongly recommends that both r.6 and r.21 of the RPBS Rules are amended to expressly state that a restrictive practice may only be used in response to *behaviour that causes harm*, rather than ‘to influence a person’s behaviour’ ‘in response to *risk of harm*’.

The OPG acknowledges that work is being undertaken between the Commonwealth and states and territories to develop greater national consistency in relation to the principles, definitions and authorising arrangements for restrictive practices. It is critical that this work encompasses the connection between the use of restrictive practices in response to behaviours causing *harm*, as opposed to behaviours of concern.

Recommendation 25:

Rules 6 and 21 of the *NDIS (Restrictive Practices and Behaviour Support) Rules 2018* should be amended to expressly state that a restrictive practice may only be used in response to behaviour that causes harm, with complementary amendments to the Explanatory Statement.