



Government
of South Australia

Office of the Public Advocate South Australia

Submission to: Review of the NDIS Quality and Safeguarding Framework

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NDIS Review: NDIS Quality and Safeguarding Framework

1. Introduction

The Public Advocate welcomes the opportunity to provide a submission to the *NDIS Review: NDIS Quality and Safeguarding Framework* (the Framework). The Public Advocate will also provide a more detailed submission to the *NDIS Review* which also focusses on issues relating to safeguarding.

The Public Advocate was a member of the South Australian *Safeguarding Task Force*¹ which was established by the South Australian Minister for Human Services in May 2020 following the death of Ann-Marie Smith, a NDIS participant. The Task Force examined and reported on the gaps in safeguarding of people with disability across the State and Commonwealth. The *Safeguarding Task Force Supplementary Report*² (September 2020) was submitted to the Minister nearly four years after the development of the Framework (December 2016) identified areas of safeguarding that had not been addressed or implemented, some of which were addressed in the Framework.

2. The Public Advocate

The Public Advocate in South Australia promotes the rights and interests of people with impaired decision-making capacity. The Public Advocate is supported by the Office of the Public Advocate (OPA) to provide guardianship, investigation, advocacy, dispute resolution, and information to support people who need assistance with decision making.

The Public Advocate is a statutory officer who advocates for and on behalf of adults with impaired decision-making capacity and their families, carers, and supporters. In particular, the Public Advocate administers South Australian laws that relate to guardianship for adults who are unable to make decisions for themselves, who are at risk of abuse or neglect and may require assistance with decision making.

The Public Advocate can be appointed by the South Australian Civil and Administrative Tribunal (SACAT) as a guardian if a person has impaired decision-making capacity, there is a lifestyle, accommodation, and/or health decision to be made and there is no other appropriate person to be appointed.

What this means in practice is that the Public Advocate will only be appointed if there is no one else in a person's life able or willing to make necessary decisions, or if there is family conflict meaning that agreement on decisions is difficult or not possible. Consequently, the Public Advocate often must make decisions for people who have complex needs or experience complex situations and who are often without support networks.

The Public Advocate is the guardian for approximately 1850 South Australians with impaired decision-making capacity. Of these, approximately 1230 are participants of the NDIS. The Public Advocate is keen to advocate for the rights of these, and other South Australians who have impaired decision-making capacity and disability.

¹ [DHS - Safeguarding Task Force](#) accessed 12/5/2023

² [Safeguarding Task Force Supplementary Report - Sept 2020 \(opa.sa.gov.au\)](#) accessed 12/5/2023

The Public Advocate undertakes systemic advocacy to protect and promote the rights and safety of South Australians with impaired decision-making capacity. The Public Advocate makes submissions for reviews of legislation and consultations on matters of public policy, which are presented to Ministers and senior government officials. These papers are available on the OPA website³. Most of these papers relate to various aspects of the NDIS.

The Public Advocate is also the Principal Community Visitor (PCV) and oversees the administration of the Community Visitor Scheme (CVS) in South Australia. The PCV performs functions under the *Mental Health Act 2009* (SA) and the *Disability Service (Community Visitor Scheme) Regulations 2013* (SA).

The Public Advocate also delegates powers under the *Guardianship and Administration Act 1993* (GAA) to Community Visitors to visit people under the guardianship of the Public Advocate who are NDIS participants.

The Disability Advocate was a position located within the OPA from January 2019 to December 2022. The purpose of the role was to ensure that South Australians with a disability and their families were getting a good deal from the NDIS during the transition from State-funded to NDIS-funded arrangements.

During this time the Disability Advocate met hundreds of people with disability, families, advocates, and carers to speak with them about their experiences with the NDIS, what was working well and areas for improvement. The reports that were prepared (usually with the Public Advocate as senior author) on a range of topics were presented to Ministers and senior State and National Disability Insurance Agency (NDIA) officers and are available on the OPA website. The Disability Advocate also co-chaired the *Safeguarding Taskforce* with Disability Rights Advocate Kelly Vincent.

3. Responses

3.1 What is working well about the Framework? What is not working well to promote safeguards of people with disability and the quality of supports?

The Framework was signed off on 9 December 2016 at the early stages of the roll out to full scheme of the NDIS across most parts of Australia. It precedes the establishment of the NDIS Quality and Safeguards Commission (the Commission) on 1 July 2018 and at the time, provided a useful framework for the establishment of the Commission. Parts of the Framework are still relevant but nearly seven years on it is evident that it is overdue for a review.

The Discussion paper also notes that the Independent Review has heard and identified that:

- *The Framework does not appear to be directly used to guide the work of the NDIS Commission and other actors. This means there is a lack of long-term, whole-of-scheme approaches to NDIS quality and safeguarding arrangements.*
- *The Framework has not evolved or been updated to reflect changes in the NDIS and its market. As a result, parts of it are outdated and need to be reassessed.*

³ [Office of the Public Advocate | Office of the Public Advocate \(opa.sa.gov.au\)](https://opa.sa.gov.au) accessed 12/5/2023

- *Current strategies have not adequately addressed the unique experience of diverse participants. Supports are often not culturally appropriate and the need to recognise this diversity as part of promoting quality and safeguards has not been adequately addressed in the Framework or measures implemented under it.*⁴

The original Framework has lost its currency due to the changing nature of the NDIS and safeguarding issues which have arisen since full scheme. The original Framework presents more as a consultation report discussing what *will* happen rather than a clear framework by which to promote safeguarding and quality of services for people with disability. The length and complexity of the Framework makes it less accessible and user friendly and it appears to have been lost in the mass of other documents relating to the NDIS. A revised Framework based on the foundations of the original Framework specifying *what is required* rather than *what will* happen is timely, needed and welcome.

3.2 Is there still a need for a Framework? If so:

- a) What role should the Framework play going forward?**
- b) What should a future Framework look like?**
- c) What monitoring of the implementation and ongoing effectiveness of the Framework is required?**

More than ever, there is a need for a clear framework which is visible to people with disability, their families, service providers and other stakeholder's aka actors. The Framework needs to define roles and responsibilities and holds the Commission and service providers accountable. Since the commencement of the NDIS there have been several cases of abuse, neglect and exploitation of people with disabilities who are NDIS participants reported by the media. The Royal Commission into Abuse Neglect and Exploitation of Persons with Disabilities⁵ and the broader *NDIS Review* will report findings and recommendations later this year. The Framework needs to consider and incorporate learnings from these reports and address responses to identified safeguarding issues in the redeveloped Framework.

The Framework also needs to consider how the quality of services will be scrutinised, regulated, and monitored. It is noted that registered service providers are required to undergo a quality audit at registration and at re-registration, but this does not adequately address issues of quality. With the advent of the NDIS and the move away from disability services and supports funded through State government contracts, the previous quality assurance mechanisms no longer exist. The sector has become marketised with many new and inexperienced providers entering the sector. This has had an impact on the quality of services and on providers being able to pick and choose which participants they assist. This often leaves people with complexities in their lives such as people under guardianship of the Public Advocate unable to find willing and capable providers.

The Framework must be highly visible, useable, current, and functional. The Commission and service providers need to be aware of their role and responsibilities within the Framework and consequences for not complying with the Framework. The Commission currently undertakes regulatory activities to reinforce safeguarding for

⁴[NDIS Quality and Safeguarding Framework issues paper \(ndisreview.gov.au\)](#) accessed 12/5/2023

⁵

participants, this should be extended to addressing concerns about the quality of disability services across the sector.

Although the Commission has limited (if any) power to regulate unregistered providers, it can still play an important education role with all agencies about the Framework and their responsibilities. The Commission already has eLearning modules for NDIS workers which provide a good foundation for NDIS workers and are available free online. The Commission has a role to play in educating participants about service providers' responsibilities, what they should expect from a service provider and avenues for redress when safeguarding and quality issues arise.

The new Framework should continue to be underpinned by the objects and principles set out in the *NDIS Act 2013*⁶, the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)⁷, the National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector⁸ and Australia's Disability Strategy 2021-31 (ADS)⁹ which supersedes the National Disability Strategy 2010-2020 (NDS)¹⁰.

The Framework should maintain the focus on the three safeguarding pillars, 'Developmental measures' 'Preventative measures', and 'Corrective measures' as these provide a clear three-tiered approach to categorising safeguarding activities.

The Framework needs to specify who it covers and the roles and responsibilities of each party in safeguarding under the three pillars. The Framework should be explicit in how safeguarding and quality activities will be regulated, monitored and how safeguarding breaches will be addressed under the three pillars.

As noted in the discussion paper, the Framework has focused more heavily on preventative and corrective measures, with less focus on developmental strategies.¹¹ . The Commission should be focussing efforts on developmental measures as these measures strengthen the capability of people with disability, workers, and providers to reduce the risk of harm and promote quality.

The current Framework notes what is needed to strengthen natural supports but should recognise the unique challenges and barriers faced by people under guardianship of the Public Advocate, those with profound and significant intellectual disability, First Nations people and participants from CALD backgrounds. These groups can be at greater risk of violence, abuse neglect and exploitation and experience increased barriers to raising safeguarding and quality issues.

The review of the Framework should look for opportunities to harmonise with other Commonwealth sectors such as aged care and early childhood. This will support people's understanding of what to expect across the age spectrum and how to report. It could also reduce the compliance and regulatory burden on these sectors as people

⁶ [National Disability Insurance Scheme Act 2013 \(legislation.gov.au\)](#) accessed 12/5/2023

⁷ [United Nations Convention on the Rights of Persons with Disabilities \(UNCRPD\) | Australian Human Rights Commission](#) accessed 12/5/2023

⁸ [National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector | Department of Social Services, Australian Government \(dss.gov.au\)](#) accessed 12/5/2023

⁹ [Disability Strategy | Department of Social Services, Australian Government \(dss.gov.au\)](#) accessed 12/5/2023

¹⁰ [National Disability Strategy 2010-2020 Fact Sheet | Department of Social Services, Australian Government \(dss.gov.au\)](#) accessed 15/5/2023.

¹¹ [NDIS Quality and Safeguarding Framework issues paper \(ndisreview.gov.au\)](#) accessed 15/5/2023

move through them. It is noted that there are differences between each of these sectors but the primary focus of human rights remains consistent across all.

The Framework should be reviewed more frequently than every seven years to ensure that it maintains currency and responsive to changes with the NDIS as they arise.

Supported Decision Making

Supported Decision Making needs to be included in the Framework as a developmental measure. The Disability Royal Commission held two round tables (31 May and 1 June 2022)¹² to discuss proposed reforms and how a national policy and legislative framework for supported decision making can be implemented with Public Hearing 30 focussing on guardianship, substituted and supported decision making. There needs to be a shift and agencies need to be upskilled on how to support participants with decision making challenges and to build their capacity.

Since the commencement of the full-scheme NDIS in 2017 there has been an increase in appointments of the Public Advocate as guardian for NDIS participants. The appointment of the Public Advocate as guardian should only occur as a last resort where there is no other person to assist with decision making. Supporting participants in decision making outside of formal guardianship appointments helps the participants' right to exercise autonomy.

Advocacy

The Framework recognises advocacy as a preventative measure to prevent harm and promote quality. The advent of the NDIS has seen wait times grow for individual advocacy agencies to now be more than six to 12 weeks. Funding for advocacy agencies in South Australia is primarily through the National Disability Advocacy Program (NDAP). The exception is Uniting Communities which received State government funding to provide legal advocacy for 3 years (until June 2023) as an outcome of the *Safeguarding Task Force* recommendations. The Framework should recognise the six broad models of advocacy¹³ as citizens, family, individual, legal, self and systemic advocacy. Each of these models has a different focus but all prevent harm and promote quality. Although outside of the scope of the Framework review further funding should be committed to advocacy services to ensure a timely response can be provided to participants attempting to navigate the NDIS.

Community Visitor Scheme

The Public Advocate is also the Principal Community Visitor (PCV) in South Australia. As funding for disability services no longer sits with the State, the Community Visitor powers to visit funded services under the *Disability Services Act 1993 (SA)* has reduced to state government services. The Public Advocate delegates powers under the *Guardianship and Administration Act 1993 (SA)* (GAA) to visit people under the guardianship of the Public Advocate who are NDIS participants. The PCV also undertakes visits to both community and inpatient mental health facilities where clients of the Public Advocate and NDIS participants can also access services. The CVS does

¹² [Supported decision-making and guardianship - proposals for reform roundtable | Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability](#) accessed 15/5/2023

¹³ [National Disability Advocacy Program | Department of Social Services, Australian Government \(dss.gov.au\)](#) accessed 15/5/2023

not currently visit people in non-government Supported Independent Living (SIL) arrangements funded by the NDIS or participants in their own home.

The CVS is listed as a corrective measure within the Framework which proposed continuation of Community Visitor Schemes in each state during transition. In December 2018 the *Community Visitor Schemes Review* undertaken by Westwood Spice,¹⁴ at the request of the Department of Social Services for the Disability Reform Council of Australian Governments, included six recommendations to support the interface with the NDIS Commission. The report also noted that the CVS would benefit from being included in the broader Quality and Safeguarding Framework which it noted was to be reviewed in 2021-2022.

There appears to have been limited movement towards a nationally consistent approach to the Community Visitor Scheme but its importance as a safeguarding mechanism is acknowledged and it should continue to be reflected in the revised Framework.

Restrictive Practices

Restrictive practices feature in the Framework as a preventative measure. The inappropriate use of restrictive practices presents a risk to the safety and rights of people with disability and needs to remain at the forefront of the Safeguarding Framework.

The Commission began regulating restrictive practices in South Australia on 1 July 2018. While the NDIS Commission regulates the use of restrictive practices, their authorisation is determined by State and Territory laws.

Until May 2021 the authorisation for certain restrictive practices sat under the *Guardianship and Administration Act 1993 (GAA) (SA)*. In May 2021 the *Disability Inclusion Act 2018 (SA)* was amended to include new provisions enabling the authorisation of restrictive practices.

The provisions require registered NDIS providers to supply the Senior Authorising Officer with a behaviour support plan when seeking authorisation for use of a restrictive practice for people who are NDIS participants.

The new system for NDIS participants means that most restrictive practices for NDIS participants must be authorised by either:

- An Authorised Program Officer, who will be appointed by the NDIS provider, with particular qualification requirements and who is not directly involved in the participant's care (low-level restrictive practices); or
- the Senior Authorising Officer, whose office sits within the Department of Human Services.

Detention continues to be authorised by the SA Civil and Administrative Tribunal (SACAT), upon the application of guardians.

While the new Disability Inclusion legislation requires any use of a restrictive practice to be authorised in accordance with the Act, the Office of the Public Advocate continues to

¹⁴ [Community Visitors Schemes Review | Department of Social Services, Australian Government \(dss.gov.au\)](#) accessed 15/5/2023

have a role in reviewing behaviour support plans (that include restrictive practices), reviewing authorisations and applying for review if required.

3.3 What supports, services and actors should the Framework cover?

The actors who should be covered or have a role in this Framework include all services funded by the NDIA. This is not limited to the funding through a participant's plan but also services funded through the Department of Social Services (DSS) such as Information Linkages and Capacity Building (ILC) grant recipients and Partners in the Community (PITC).

Some actors are not registered providers with the Commission but are still required to comply with the NDIS Code of Conduct¹⁵ The Framework needs to ensure that appropriate developmental measures are taken to ensure participants are equipped with the knowledge and skills to ensure they have appropriate safeguards in place when choosing these providers and avenues for recourse when safeguarding issues arise.

Below is a list of those who should be featured and/ or subject to the Framework:

- The NDIS Quality and Safeguards Commissioner
- NDIS Quality and Safeguards Commission staff
- NDIA Planners and front of house staff
- NDIS Community Connectors
- NDIS Health Liaison Officers (HLOs)
- NDIS Justice Liaison Officers (JLOs)
- Local Area Coordination (LAC)/ Partners in the Community (PITC) staff
- Support Coordinators (SC)
- Specialist Support Coordinators (SSC)
- Psychosocial recovery coach
- Allied Health and other therapy services
- Behaviour support practitioners
- Plan managers
- Disability service providers
- Specialist disability supports/ services
- Public Guardians and administrators
- Community Visitors
- Unregistered providers

There are other organisations such as advocacy agencies, the Administrative Appeals Tribunal, Commonwealth Ombudsman, and state government agencies working with participants that should also have a good understanding of the Framework.

¹⁵ [NDIS Code of Conduct | NDIS Quality and Safeguards Commission \(ndiscommission.gov.au\)](https://www.ndiscommission.gov.au) accessed 15/5/2023

3.4 What changes are required to the roles and responsibilities of different actors in the Framework?

a) How could these actors work together better to deliver a coordinated approach to quality and safeguarding?

The Framework needs to clearly define the difference between registered and unregistered providers and the limitations of the Commission when it relates to unregistered providers. It was noted in the discussion paper that a larger than expected proportion of participants are choosing to use unregistered providers. The new Framework should strengthen the developmental focus on the education of participants to understand the risks associated with using unregistered providers and define clear avenues to allow participants using unregistered providers to address safeguarding and quality issues.

Participants need access to education/ information on safeguards required by each of the actors and the limitations of certain safeguards.

There is also a need to assess risks to participants and reassess these risks as their situation changes. The Framework discussed risk assessment during the plan development stage. The *Safeguarding Task Force* Report identified a number of safeguarding gaps relating to identification of risk or vulnerability of certain participants. In that case, the NDIS Commission had a clear role only in regulating and policing the performance of the registered service provider, but no agency had a clear role in identifying the risk to Ann-Marie Smith. The assessment of risk to the individual participant sits with all actors, including the NDIS Commission. The Framework needs to set out the expectation about ensuring risks for individuals are considered by all actors balancing the individuals right to autonomy, choice, and control.

Information exchange

The Framework should consider provisions to support information sharing when participants may be at risk, consistent with relevant state and Commonwealth legislation.

At times, there is the need to share information in relation to safeguarding people with disability. In South Australia the Information Sharing Guidelines (ISG)¹⁶ prescribe the conditions when client information can be shared between South Australian Government agencies and organisations funded by the South Australian Government. The Office of the Public Advocate is working towards the signing of the Attorney-General's Department Schedule under the Memorandum of Understanding for information Exchange between the NDIA and South Australian State Government Agencies. This work commenced at the end of 2019 and has now been placed on hold by the NDIA who is seeking legal advice. The OPA currently relies on NDIS information provided via the SA Department of Human Services (DHS).

Registered NDIS service providers are required as part of their registration to report 'Reportable incidents' to the NDIS Commission. The Public Advocate expects service providers to inform the OPA of incidents for Public Advocate clients who are NDIS

¹⁶ [About the Information Sharing Guidelines | Department of the Premier and Cabinet \(dpc.sa.gov.au\)](https://www.dpc.sa.gov.au/about-the-information-sharing-guidelines) accessed 15/5/2023

participants as specified when they are engaged through their acceptance of the service agreement.

3.5 What changes are required to the types of strategies and measures implemented under the Framework? For example:

- a. How should the Framework go about balancing different priorities, such as the balance between protecting people with disability from harm and promoting their choice and control; and the balance between ensuring regulatory approaches support market entry and quality service delivery while protecting participants who are at risk of harm?**

The challenge of balancing the priorities of protecting people with disability and promoting choice and control will always be an inherently vexed issue. This can be complicated by nominee arrangements under the *NDIS Act 2013* (cwth) and State guardianship laws. Developmental measures are key to ensuring that participants are equipped and supported to make choices. This needs to be balanced with assessment of risk for the participant and ensuring they understand the risks and when required putting safeguards in place to minimise the risk.

- b. What is required to drive improvements in the quality of supports and services?**

Safeguarding Gap 6 in the *Safeguarding Task Force* report was that:

Participants and their families are unclear about how to raise matters of concern with the Commission and the Commission does not routinely undertake proactive inspections to vet the performance of service providers.¹⁷

A clear pathway (no wrong door approach) to complaints needs to be available to participants and their families. Timely responses to complaints including any remedial actions need to be provided to participants.

As identified in the safeguarding gap the Commission does not routinely undertake proactive inspections to vet the performance of service providers.

The Commission currently requires registered service providers to undertake Quality Audits at the point of registration and at re-registration. The Public Advocate has no oversight on how these are undertaken and what is examined in these audits so is unable to comment on this aspect of driving improvement.

Service providers need to ensure that staff are appropriately skilled and qualified to provide support. There appears to be no minimum qualification for unregistered providers to provide disability support. Participants need to be upskilled to ask the right questions before engaging service providers to ensure they are receiving high quality supports.

- c. What is required to ensure the regulation of providers and workers is proportionate and effective?**

The NDIS Commission should have a role in ensuring that participants are not put under financial pressure by virtue of rents charged by SIL providers who provide accommodation under closed SIL arrangements. This is not regulated by the state

¹⁷ [Safeguarding Task Force Supplementary Report - Sept 2020 \(opa.sa.gov.au\)](#) accessed 15/5/2023

under the *Residential Tenancies Act 1993* and should be regulated in the same way as charges by SDA providers is regulated.

3. Conclusion

The Framework provided a strong foundation for the establishment of the Commission and the functions it performs in 2016. There are many elements of the Framework which are still current and need to transfer to the new Framework.

The Framework is overdue for a review given that the NDIS and the Commission are fully operational nationally.

The review should consider the findings from the Disability Royal Commission and the NDIS Review which are both due to report later in 2023. The Royal Commission hearings have seen many people with disability report on incidents of abuse neglect and exploitation across all areas of Australian society, not just disability specific support services and will have learnings for a range of services people with disability access.

In reviewing the Framework, opportunities for harmonisation with other Commonwealth sectors such as aged care and early childhood should be explored.

The SA Public Advocate looks forward to the opportunity to provide further feedback on the Framework in the future.

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Appendix 1: Glossary

Acronym	Full title
ADS	Australia's Disability Strategy (2021-2031)
AGD	Attorney-General's Department (SA)
CVS	Community Visitor Scheme
DHS	Department of Human Services (SA)
DRC	Royal Commission into Abuse Neglect and Exploitation of People with Disability
DSS	Department of Social Services (Cwlth)
GAA	<i>Guardianship and Administration Act 1993</i> (SA)
HLO	Health Liaison Officer
ILC	Information, Linkage and Capacity Building
ISG	Information Sharing Guidelines
JLO	Justice Liaison Officer
LAC	Local Area Coordinator
NDAP	National Disability Advocacy Program
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
NDS	National Disability Strategy (2010-2020)
OPA	Office of the Public Advocate (SA)
PA	Public Advocate (SA)
PCV	Principal Community Visitor
PITC	Partners in the Community
SACAT	South Australian Civil and Administrative Tribunal
SIL	Supported Independent Living
SC	Support Coordinator
SSC	Specialist Support Coordinator
UNCRPD	United Nations Convention on the Rights of Persons with Disabilities

Appendix 2: Questions

1. What is working well about the Framework? What is not working well to promote safeguards of people with disability and the quality of supports?
2. Is there still a need for a Framework? If so:
 - a. What role should the Framework play going forward?
 - b. What should a future Framework look like?
 - c. What monitoring of the implementation and ongoing effectiveness of the Framework is required?
3. What supports, services and actors should the Framework cover?
4. What changes are required to the roles and responsibilities of different actors in the Framework?
 - a. How could these actors work together better to deliver a coordinated approach to quality and safeguarding?
5. What changes are required to the types of strategies and measures implemented under the Framework? For example:
 - a. How should the Framework go about balancing different priorities, such as the balance between protecting people with disability from harm and promoting their choice and control; and the balance between ensuring regulatory approaches support market entry and quality service delivery while protecting participants who are at risk of harm?
 - b. What is required to drive improvements in the quality of supports and services?
 - c. What is required to ensure the regulation of providers and workers is proportionate and effective?



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