



Australian
Human Rights
Commission

A Future Without Violence:

Quality, safeguarding and
oversight to prevent and address
violence against people with
disability in institutional settings

JUNE 2018



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disability in institutional settings

Australian Human Rights Commission 2018



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About the Australian Human Rights Commission

The Australian Human Rights Commission (the Commission) is Australia's national human rights institution, established in 1986 by legislation of the federal Parliament. The Commission's operations are determined independently of the government through the President and Commissioners.

The Commission's purpose is to provide independent and impartial services to promote and protect human rights and fundamental freedoms, and address discrimination and breaches of human rights. The Commission engages at the policy level – encouraging government, industry and community groups alike to see fundamental rights and freedoms realised. This involves building the case for strengthening mechanisms to uphold and protect the rights of people with disability in Australia.

The Commission is accredited as an 'A' status National Human Rights Institution (NHRI) under the UN Principles relating to the Status of National Institutions (the Paris Principles). 'A' status NHRIs have independent and formal participation rights in the United Nations Human Rights Council, the Committee on the Elimination of Discrimination against Women, the Committee on the Rights of Persons with Disabilities, the Committee on the Elimination of Race Discrimination and the Committee on the Rights of the Child.

The Commission also provides human rights analysis to the courts and parliamentary inquiries, conducts research and contributes to policy development.

The Vision:

Human rights: everyone, everywhere, everyday

The Mission:

To lead the promotion and protection of human rights and freedoms in Australia by:

- making human rights part of everyday life and language
- empowering all people to understand and exercise their rights and responsibilities
- providing an efficient and effective national investigation and dispute resolution service
- holding government accountable to international human rights obligations and domestic legal standards
- fostering collaborations that inspire action on human rights.

Alastair McEwin

Disability Discrimination Commissioner



Commissioner's foreword

I was pleased to receive a request from the Attorney-General to undertake this project on violence against people with disability in institutional settings. The Commission is uniquely positioned to contribute to this important national conversation through a human rights-based lens.

This report outlines the Commission's findings and recommendations on the ways in which quality, safeguarding and oversight mechanisms that prevent and address violence against people with disability in institutional settings can be strengthened. The findings are based on evidence drawn from national consultations undertaken by the Commission with government, disabled people's organisations, disability advocacy organisations, industry and academia. This evidence is supplemented by extensive independent research, a comprehensive literature review, and advice from the project Expert Reference Group.

On behalf of the Commission, I thank all of the stakeholders from each state and territory who participated in the consultations. This report would not have been possible without the meaningful engagement from these key stakeholders, and I am grateful for the contribution of those who have shared their knowledge, expertise and experiences.

Many other people deserve acknowledgement for their contribution to this project. In particular, I wish to extend my sincere thanks to those in the Expert Reference Group who were involved with the project from start to finish and provided valuable guidance to the project team. I also wish to extend my deepest appreciation and thanks to the project team at the Commission. Their commitment to undertaking this work in a timely, professional and dedicated manner was second to none.

This report comes at a time when the disability sector is undergoing significant national reform with the phased implementation of the National Disability Insurance Scheme (NDIS). It sheds light on the challenges inherent to that reform process as it relates to quality, safeguarding and oversight mechanisms, and provides an independent assessment of these frameworks as they transition from the states and territories to the Commonwealth Government.

The prevalence and impact of violence against people with disability in institutional settings has received considerable attention in recent years, and the Commission's research builds on the significant work that has taken place in relation to this issue. Inquiries that have been undertaken into this issue have called for independent, external oversight of institutional settings, more robust reporting and complaints mechanisms, and increased regulation of disability service workers.

This report has reached similar conclusions, and contains a series of recommendations to address the challenges that currently exist and may arise moving forward. The recommendations in this report, if implemented, will contribute to strengthening quality, safeguarding and oversight mechanisms that prevent and address violence against people with disability in institutional settings.

It is important to acknowledge that quality, safeguarding and oversight mechanisms are not sufficient on their own to prevent violence against people with disability in institutional settings. Building the knowledge and capacity of people with disability to recognise instances of violence, understand their rights, and effectively engage with these mechanisms is a fundamental element of achieving change and something that must happen in addition to implementing the recommendations of this report.

This report paves the way for an important conversation that focuses on achieving a quality, safeguarding and oversight framework that successfully prevents and addresses violence against people with disability in institutional settings. It is my sincere hope that this report will prompt commitment to intensify efforts to strengthen these mechanisms, so that we have a future where people with disability can live their lives free from violence.

A handwritten signature in black ink, appearing to read 'Alastair McEwin'.

Alastair McEwin
Disability Discrimination Commissioner

June 2018

Executive summary

Australia has international obligations to respect the human rights of people with disability as articulated in the *Convention on the Rights of Persons with Disabilities* (CRPD), ratified by the Australian Government in 2008.

The CRPD requires all Australian governments to take positive action to uphold the rights of people with disability. Article 16 of the CRPD specifically enshrines the right of people with disability to be free from exploitation, violence and abuse. The CRPD requires State Parties to ensure that facilities and programs serving people with disability are subject to effective, independent monitoring and oversight.

At the request of the Commonwealth Attorney-General in June 2017, the Commission has produced this report that examines issues related to violence against people with disability in institutional settings.

The request to look into this issue follows significant work already undertaken since 2010 in the form of Royal Commissions, Senate Inquiries, and Ombudsman reports calling for independent, external oversight of institutional settings as well as stronger complaints mechanisms and increased regulation of disability service workers.

This report outlines the findings of the Commission's research, providing an analysis of current and proposed quality, safeguarding and oversight mechanisms, focusing on the disability sector, and makes four recommendations to strengthen these mechanisms in the future.

Giving effect to the rights of people with disability through effective quality, safeguarding and oversight

The Commission's research identified six essential elements to effective quality, safeguarding and oversight mechanisms that give effect to the rights of people with disability, and effectively prevent and address violence against people with disability in institutional settings. The elements are:

1. a human rights-based approach
2. a connected and integrated system
3. independent oversight and monitoring
4. robust prevention and response elements
5. accessibility for people with disability
6. continuous systems improvement through data.

A human rights-based approach is fundamental to ensuring that a quality, safeguarding, and oversight system is person-focused, and based on the needs of people with disability. Such a system empowers people with disability to have choice and control in decisions that affect them, and engage with the quality, safeguarding, and oversight mechanisms designed to protect them.

Connected and integrated services and quality, safeguarding and oversight systems are important because people with disability come into contact with government services and systems outside the disability service sector. Both the Commonwealth and state and territory governments provide these services and they each have their own quality, safeguarding and oversight mechanisms. This means that people with disability interact with multiple government service systems with varying levels of quality, safeguarding and oversight, and have multiple pathways of reporting violence and seeking support. In order to give effect to the rights of people with disability, it is vital that these systems are accessible, inclusive of and responsive to people with disability, and that they are well connected.

Inherent in advancing these rights is ensuring a focus on both the prevention of violence, and an effective response when it does occur. Another essential element is truly independent oversight of institutional settings, with community visitors and advocacy — both independent and systemic — as key mechanisms to achieve this independence.

Finally, gathering the right data on violence against people in institutional settings and on the functioning of the quality, safeguarding and oversight systems is also critical. That data should be used for continuous improvement of systems and responses and, ultimately, for protecting the lives of people with disability.

A sector undergoing significant reform

This project was undertaken during a time when the disability service sector is undergoing significant national reform. The NDIS is being implemented across Australian jurisdictions, with full national roll-out expected by 2020. The NDIS Quality and Safeguards Commission (NDIS Commission) will assume responsibility for quality, safeguarding and oversight functions for NDIS service providers and participants on 1 July 2018 in New South Wales and South Australia, 1 July 2019 in the Australian Capital Territory, Northern Territory, Queensland, Tasmania and Victoria, and 1 July 2020 in Western Australia. This progressive roll-out of the NDIS Commission is timed to coincide with the NDIS reaching full implementation in each state and territory.

The Commission acknowledges that Commonwealth, state and territory governments have been working since 2013 to develop and implement this new system. The Commission also acknowledges the strengths of many aspects of the system, and that it should result in national consistency and increased protections for people with disability than what is currently offered in some states and territories.

The roll-out of the NDIS means that the provision of most disability sector services and associated quality and safeguarding frameworks are being transferred from the states and territories to the Commonwealth Government.

The full impact of the NDIS on state-provided disability service provision, mainstream services and associated quality, safeguarding and oversight mechanisms is still being determined in many Australian jurisdictions. Stakeholders consulted for this project expressed concern about potential service gaps for people with disability in institutional settings and associated lack of access to quality, safeguarding and oversight mechanisms.

This time of significant national reform means there is a need for clear communication and increased publicly available information.

Recommendations

The Commission makes four recommendations, which focus on the incorporation of the identified essential elements of an effective quality, safeguarding and oversight system in the disability and mainstream sectors and issues in relation to transition to the NDIS.

These recommendations are based on an independent assessment of the quality, safeguarding and oversight mechanisms that exist to prevent and address violence against people with disability in institutional settings. In making the recommendations, the Commission has drawn on evidence gathered in national consultations undertaken with government, disabled people's organisations, disability advocacy organisations, industry and academia, supplemented by independent research. Further information and analysis of the recommendations are presented in Chapter 4.

Recommendation 1: Quality, safeguarding and oversight mechanisms in the disability and mainstream sectors should incorporate and implement the essential elements of a quality, safeguarding and oversight system identified in Chapter 2 of this report.

Recommendation 2: The Commonwealth and state and territory governments should increase collaborative efforts to ensure that relevant quality, safeguarding and oversight mechanisms can operate effectively during transition to the NDIS in order to ensure that people with disability have continuing access to effective quality, safeguarding and oversight mechanisms during transition.

Recommendation 3: The Commonwealth Government and the NDIS Commission should increase publicly available information about the operation of current and future quality, safeguarding and oversight mechanisms, and effectively disseminate this information to key stakeholders.

Recommendation 4: The NDIS Commission should work with the Commission within 18 months of the release of this report to identify the extent to which the essential elements identified in Chapter 2 have been implemented through the Safeguarding Framework and NDIS Commission, and whether recommendations 2 and 3 have been addressed.

Methodology

This project explored:

- the effect of the roll-out of the National Disability Insurance Scheme (NDIS) and the NDIS Quality and Safeguarding Framework (Safeguarding Framework) in each Australian jurisdiction and how this will impact and interact with the protections offered by states and territories
- ways in which governments can give effect to the rights of people with disability by strengthening the quality, safeguarding and oversight mechanisms for all people with disability in institutional settings.

The primary focus of this project was violence against people with disability in institutional settings,¹ occurring in the context of disability supports and services, and the regulation and frameworks through which this violence is addressed.²

The project's methodology included the following elements:

- desktop research, including a literature review
- establishment of an expert reference group
- mapping of existing quality, safeguarding and oversight mechanisms
- targeted national consultations.

Literature review

The Commission undertook extensive independent research including a literature review drawing upon existing research, data and materials including:

- literature and data on violence against people with disability
- previous reports examining the issue of violence, abuse and neglect in institutional settings and the experiences of people with disability
- reviews, evaluations and reports on quality, safeguarding and oversight mechanisms in the states and territories and at the federal level
- publicly available information relevant to the NDIS, the Safeguarding Framework, and the NDIS Commission.

This is available at Appendix 2.

Expert Reference Group

The Commission established an Expert Reference Group to provide guidance, strategic advice and oversight for the project.

Members of the Expert Reference Group were key stakeholders with significant expertise and experience within the disability sector relating to the issues explored throughout this report.

The Expert Reference Group met on three occasions throughout the course of the project:

- 29 November 2017 to discuss the project proposal
- 2 March 2018 to provide strategic advice on key themes arising from initial research
- 6 June 2018 to provide feedback on the draft report and recommendations.

Members of the Expert Reference Group provided valuable guidance on the format and direction of the project, assistance with engaging key stakeholders for consultations, and strategic advice on the analysis and recommendations. However, the final views expressed in the report are those of the Commission.

Members of the Expert Reference Group are listed at Appendix 3.

Mapping of existing quality, safeguarding and oversight mechanisms

The Commission undertook a detailed mapping exercise of the existing state and territory quality, safeguarding and oversight mechanisms, and in particular:

- the policy and practice in each jurisdiction currently in place to prevent and address violence against people with disability in institutional settings
- how the protections offered by state and territory mechanisms will be changed as a result of the roll-out of the Safeguarding Framework.

This is available at Appendix 4.

Targeted consultations

The Commission held targeted national consultations between February and April 2018 with government, disabled people's organisations, disability advocacy organisations, industry and academia. The Commission consulted with representatives from the Commonwealth Government and national peak advocacy bodies, as well as stakeholders in New South Wales, Victoria, Queensland, South Australia, the Australian Capital Territory, Western Australia, Tasmania and the Northern Territory. In total, 120 organisations were represented in consultations.

The national targeted consultations focused primarily on the disability sector. Some stakeholders from the health and mental health sectors were also consulted in acknowledgement that many people with disability in institutional settings have significant interactions with these sectors and that they are closely related to the disability sector.

The Commission sought the input of people with disability into this project through extensive consultation with representatives of people with disability, through disabled people's organisations and disability advocacy organisations, as well as carers advocacy groups, who represent the needs and interests of their clients and members. These organisations also have detailed knowledge of relevant quality, safeguarding and oversight systems through their daily work.

The information gathered during the consultation process is drawn on throughout the report and informs the Commission's recommendations.

A full list of individuals and organisations consulted is at Appendix 5.

Outline of the report

Chapter 1: This chapter provides background information on the prevalence of violence against people with disability, the human rights of people with disability as they relate to the scope of this project, and the policy and legal frameworks relating to people with disability in Australia.

The chapter also provides a high-level analysis of disability sector quality, safeguarding and oversight mechanisms. It outlines the state and territory quality, safeguarding and oversight mechanisms currently in operation, and also examines the ways in which the disability service sector is a rapidly changing landscape undergoing significant national reform.

Finally, this chapter considers how current quality, safeguarding and oversight mechanisms may be affected by the roll-out of the Safeguarding Framework and the NDIS Commission, and provides a summary of mainstream service sectors and the various sector specific quality, safeguarding and oversight mechanisms.

Chapter 2: The Commission's research identified a number of essential elements to effective quality, safeguarding and oversight mechanisms that uphold the rights of people with disability, and effectively prevent and address violence against people with disability in institutional settings.

The elements apply to quality, safeguarding and oversight mechanisms in both disability specific and mainstream sectors. The elements are:

1. a human rights-based approach
2. a connected and integrated system
3. independent oversight and monitoring
4. robust prevention and response elements
5. accessibility for people with disability
6. continuous systems improvement through data.

These elements form the analysis framework for this report against which the quality, safeguarding and oversight mechanisms in the disability and mainstream sectors are examined in the following chapter.

Chapter 3: This chapter contains an analysis of the extent to which the Safeguarding Framework and the NDIS Commission implement the essential elements of an effective quality, safeguarding and oversight system outlined in the previous chapter.

It is acknowledged that human rights principles underpin the establishment of the NDIS Commission and the Safeguarding Framework. The practical implementation of human rights should be a priority that is continually monitored as the NDIS Commission and the Safeguarding Framework are operationalised.

Similarly, the NDIS Commission is intended to create a connected and integrated quality, safeguarding and oversight system for NDIS participants. However during transition there has been uncertainty regarding lines of responsibility and accountability for some state and oversight entities, that would benefit from increased communication and cooperation from the Commonwealth and state and territory governments.

The establishment of the NDIS Commission as an external authority is a crucial step to achieving the requisite independent oversight and monitoring. To supplement the NDIS Commission, the Commonwealth and state and territory governments should consider the inclusion of community visitors in the Safeguarding Framework, and take steps to ensure that independent individual and systemic advocacy organisations have adequate powers and funding.

This chapter also examines the effectiveness of preventative and response mechanisms under the Safeguarding Framework. To effectively prevent and address violence in institutional settings, a quality, safeguarding and oversight system must target barriers and be accessible to people with disability, including addressing intersectionality.

The NDIS Commission has the potential to collect nationally-consistent data to ensure continuous system improvement. Collated data should be made publicly available where possible to inform policy and service system reform, and be disaggregated to fully encapsulate intersectional experiences.

This chapter also outlines some high-level themes in relation to whether the quality, safeguarding and oversight mechanisms in mainstream sectors implement the essential elements of an effective system outlined in the previous chapter. The Commission acknowledges that mainstream services are complex, broad and significantly varied across the jurisdictions. As such, this report aims to highlight critical and prevalent issues that arose in consultations in relation to quality, safeguarding and oversight in mainstream service sectors, rather than providing a detailed analysis of all quality, safeguarding and oversight mechanisms in mainstream sectors. It is suggested that a more comprehensive review of these mechanisms, and their operation in the post NDIS environment, be undertaken to ensure that effective quality, safeguarding and oversight mechanisms are in place for all people with disability in Australia, both within and outside of the NDIS.

Chapter 4: The Commission has made four recommendations, which focus on the incorporation of the identified essential elements of an effective quality, safeguarding and oversight system in the disability and mainstream sectors, and issues in relation to transition to the NDIS.

The Commission's recommendations are based on an independent assessment of the quality, safeguarding and oversight mechanisms that exist to prevent and address violence against people with disability in institutional settings. In making its recommendations, the Commission has drawn on evidence gathered in national consultations undertaken with government, disabled people's organisations, disability advocacy organisations, industry and academia, supplemented by independent research.

- 1 See glossary at Appendix 1.
- 2 The following issues have been determined to be outside the scope of this report, however, the Commission acknowledges that these are important issues that impact the lives of people with disability: gaps in service delivery, attitudes towards people with disability, peer and family violence.

Chapter 1 – Background

1.1 Summary

This chapter provides background information on the prevalence of violence against people with disability, the human rights of people with disability as they relate to the scope of this project, and the policy and legal frameworks relating to people with disability in Australia.

The chapter also provides a high-level analysis of disability sector quality, safeguarding and oversight mechanisms. It outlines the state and territory quality, safeguarding and oversight mechanisms currently in operation, and also examines the ways in which the disability service sector is a rapidly changing landscape undergoing significant national reform.

Finally, this chapter considers how current quality, safeguarding and oversight mechanisms may be affected by the roll-out of the Safeguarding Framework and the NDIS Commission, and provides a summary of mainstream service sectors and the various sector specific quality, safeguarding and oversight mechanisms.

1.2 About violence against people with disability

Violence against people with disability in institutional settings is a significant social policy issue in Australia.

The Australian Bureau of Statistics reports that 4.3 million Australians live with disability.¹ There is no available data on how many of those people are currently in institutional care or how many have experienced violence in such settings.²

People with disability experience violence at a higher rate than other people in the community.³ Disability advocates report that '18% of people with disability report being victims of physical or threatened violence compared to 10% of people without disability'.⁴

The Commission acknowledges that the data available may not reflect total incidents of violence due to a lack of nationally consistent data sets,⁵ widespread underreporting of violence and abuse generally,⁶ and the barriers faced by people with disability in reporting violence and abuse in particular.⁷ The rate of people with disability experiencing violence is therefore likely to be higher than currently reported.

People with disability who are receiving disability services in institutional settings are particularly vulnerable to violence for a number of reasons. The closed nature of some institutional settings means that this violence is often not detected or reported and therefore not subsequently addressed.⁸ Social isolation and lack of access to advocacy services can create an environment where people with disability may not be able to identify that what they are experiencing is violence, do not know their rights, how to report it or to seek help. Some types of disability may add to a person's risk of experiencing violence. For example, people with intellectual disability and those who have complex communication needs may be more vulnerable to violence, abuse and neglect.⁹

Furthermore, people receiving services may hesitate to make a complaint out of fear of retribution.¹⁰ A lack of appropriate institutional responses to violence can also contribute to the systemic silencing of victims of violence, abuse or neglect within these settings.

Intersectionality of violence against people with disability

People with disability may experience different forms of violence based on their gender identity, sexual orientation, race and/or ethnic origin, and age. These characteristics may also affect how people with disability respond to violence.

In addition to generalised incidents of violence and abuse, women with disability have been identified as being more vulnerable to gender-based violence in institutional settings, such as sexual violence and forced sterilisation or abortion.

The *Convention on the Rights of Persons with Disabilities* acknowledges that women with disability are subject to intersectional discrimination,¹¹ and that women and girls are often at a greater risk of experiencing violence, abuse and neglect.¹² The UN Committee on the Rights of Persons with Disabilities has expressed concern about the ‘high rates of violence perpetrated against women and girls living in institutions and other segregated settings’.¹³ The UN Special Rapporteur on the rights of persons with disabilities notes that many forms of gender-based violence against women with disability are a ‘consequence of the intersection between disability and gender, and might happen while a girl or young woman with disabilities performs daily hygiene, receives treatment or is overmedicated’.¹⁴ The Committee on the Rights of Persons with Disabilities has also noted that harmful stereotyping of women with disability can exacerbate the barriers faced when reporting violence.¹⁵

Data in relation to instances of violence against lesbian, gay, bisexual, transgender and intersex (LGBTI) people with disability people is limited, however the UN Human Rights Council has recognised the increased risk of violence faced by LGBTI people.¹⁶ In 2011, the UN Human Rights Council adopted a resolution on sexual orientation and gender identity, and expressed concern regarding violence and discrimination against people based on their sexual orientation and gender identity.¹⁷

Children with disability are also disproportionately vulnerable to certain forms of violence, abuse and neglect. For example, they may be subject to the use of ungoverned or unapproved restrictive practices, forced sterilisation or abortion, and sexual violence. The UN International Children’s Emergency Fund’s 2013 *The State of the World’s Children* report noted that children with disability are three to four times more likely to be subjected to violence than children without disability.¹⁸ The report also noted that ‘[c]hildren who may already be suffering stigma and isolation have also been shown to be more likely to suffer physical abuse’.¹⁹

While data collection relating to Aboriginal and Torres Strait Islander people with disability is particularly limited,²⁰ the information available suggests that they are at greater risk of violence than non-Aboriginal and Torres Strait Islander people with disability.²¹ The overrepresentation of Aboriginal and Torres Strait Islander people with disability in institutional settings, such as prisons,²² may contribute to this.

People with disability from culturally and linguistically diverse (CALD) backgrounds may face greater barriers in reporting violence and abuse as they may be less likely to report acts of violence, ‘particularly domestic violence and sexual assault, due to multiple intersecting barriers’.²³

In this report the Commission considers intersectional experiences of violence for people with disability including violence against women with disability, violence against children with disability, violence against LGBTI people with disability, violence against older people with disability, violence against Aboriginal and Torres Strait Islander people with disability, and violence against people with disability from CALD backgrounds. The report does this by analysing the extent to which the quality, safeguarding and oversight system in place in the disability and mainstream service sectors acknowledge and cater to the specific needs of these groups.

1.3 About the rights of people with disability

Human rights are based on principles of dignity, equality and mutual respect, and apply to all people equally. Human rights are set out in international treaties and conventions that have both general application and focus on specific groups within society. People with disability have specific rights enshrined in the *Convention on the Rights of Persons with Disabilities* (CRPD).²⁴

The CRPD is based on the social model of disability and acknowledges that disability results from the ‘interaction between persons with impairments and attitudinal and environmental barriers that hinder their full and effective participation in society on an equal basis with others’.²⁵

The CRPD places an obligation on State Parties, in consultation with people with disability, to ensure that barriers to people with disability’s full enjoyment of fundamental rights of freedoms are removed. People with disability should be ‘actively involved in decision-making processes about policies and programmes, including those directly concerning them’.²⁶

As a State Party to the CRPD, the Australian Government must ‘ensure and promote the full realisation of all human rights and fundamental freedoms for all persons with disabilities without discrimination of any kind on the basis of disability’.²⁷ This obligation is extended to ‘all parts of federal States without exceptions’.²⁸ This means that the Australian Commonwealth, state and territory governments are all required to take positive action to uphold the rights of people with disability.

Australia is a party to other core international human rights treaties that outline relevant human rights for people with disability, including:

- *International Covenant on Civil and Political Rights* (ICCPR)²⁹
- *International Covenant on Economic, Social and Cultural Rights* (ICESCR)³⁰
- *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)³¹
- *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW)³²
- *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD)³³
- *Convention on the Rights of the Child* (CRC).³⁴

Australia also ratified the *Optional Protocol to the Convention Against Torture* (OPCAT)³⁵ in 2017 and has endorsed the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP).³⁶

These instruments address human rights issues that are relevant to people with disability, such as the right to equality and non-discrimination, freedom from torture, rights of women, rights of children, right to health, and the right to liberty and security of person.³⁷

The right to be free from exploitation, violence and abuse

Article 16 of the CRPD enshrines the right of people with disability to be free from exploitation, violence and abuse.³⁸ This imposes a positive obligation on State Parties to ‘take all appropriate legislative, administrative, social, educational and other measures to protect persons with disabilities, both within and outside the home, from all forms of exploitation, violence and abuse, including their gender-based aspects’.³⁹

The Convention also focuses on the prevention of violence, requiring that State Parties ensure that facilities and programs serving people with disability are subject to effective, independent monitoring and oversight.⁴⁰ State Parties are also required to ensure that effective legislation and policies are in place that enable instances of violence, abuse and neglect to be ‘identified, investigated and where appropriate, prosecuted’.⁴¹

To this end, the UN Special Rapporteur on the rights of persons with disabilities noted that:

To prevent the occurrence of all forms of exploitation, violence and abuse in the provision of support, States must ensure independent monitoring of all the facilities and programmes that provide services to persons with disabilities as well as the establishment of appropriate and effective safeguards.⁴²

The right to be free from exploitation, violence and abuse and universal prohibitions against ill-treatment are also enshrined in other treaties to which Australia is a signatory, including for example, the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW).⁴³ CEDAW requires State Parties to address specific forms of violence against women.⁴⁴ In addition, violence is recognised as both a source and a consequence of discrimination against women, and as such Article 5 of CEDAW requires all State Parties to work towards the elimination of prejudices and practices ‘based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women’.⁴⁵ The Committee on the Elimination of Discrimination Against Women notes that varying and intersecting forms of discrimination against women means that gender-based violence affects women to varying degrees and that governments need to formulate legal and policy responses with this in mind.⁴⁶

Article 19 of the *Convention on the Rights of the Child* (CRC),⁴⁷ also notes that State Parties ‘shall take all appropriate ... measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse’ whilst in care. The CRC also ensures that State Parties recognise that children with disability ‘should enjoy a full and decent life’,⁴⁸ and enshrines the right of the child to the ‘enjoyment of the highest attainable standard of health’.⁴⁹

Article 7 of the *UN Declaration on the Rights of Indigenous Peoples* (UNDRIP)⁵⁰ ensures the rights of Indigenous people to life, physical and mental integrity, liberty and security of person. UNDRIP also articulates a collective right to live in freedom, peace and security.⁵¹

Other relevant human rights

Right to be free from torture

Violence, abuse and neglect can also amount to torture, or cruel, inhuman or degrading treatment or punishment (ill-treatment), for the purposes of the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT).⁵² People with disability are commonly subjected to practices such as forced sterilisation, sedation, and seclusion, as well as chemical restraint and unauthorised restrictive practices. The UN Special Rapporteur on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment has noted with concern that ‘such practices, when perpetrated against persons with disabilities, remain invisible or are being justified, and are not recognised as torture or other cruel, inhuman or degrading treatment or punishment’.⁵³

Australia ratified CAT in 1989, and on 21 December 2017 the Australian Government ratified the *Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment* (OPCAT).⁵⁴ CAT and OPCAT are important human rights instruments that provide a framework for identifying and combating violence and other forms of ill-treatment in any setting where a person is deprived of their liberty, including in certain institutional settings.

Specifically, OPCAT requires independent inspections of all places of detention in Australia.⁵⁵ The Subcommittee on Prevention of Torture has interpreted OPCAT’s scope broadly, noting that coverage of OPCAT extends to many places where people may be deprived of their liberty, including prisons, mental health and social care institutions.⁵⁶

OPCAT may therefore present an opportunity to change the mechanisms available to prevent and address violence against people with disability in institutional settings through the establishment of a National Preventive Mechanism to monitor places of detention, including where people with disability are detained.

Right to an accessible environment

Article 9 of the CRPD enshrines the right of people with disability to an accessible environment, including accessible information and communications.⁵⁷ It is also a cross-cutting general principle under Article 3 of the CRPD, thereby underpinning interpretation and implementation of all CRPD provisions. An accessible and enabling environment is of vital importance, as it serves as a precondition for people with disability to participate fully and equally in society, and to live independently.

While a ‘right of access’ is part of international human rights law, accessibility as envisaged by the CRPD is not expressly contained in other international human rights instruments. Article 25(c) of ICCPR provides for every citizen to have access, on general terms of equality, to public service in their country. The CERD guarantees everyone the right of access regardless of race, colour or ethnicity to any place or service intended for use by the general public, such as transport, hotels, restaurants, parks etc.⁵⁸ These articles are somewhat distinct from the accessibility issues that the CRPD envisages, which are generally technical and (human-built) environmental barriers. The Committee on the Rights of Persons with Disability in its General Comment No. 2 (2014) asserts that ‘[a]ccessibility should be viewed as a disability-specific reaffirmation of the social aspect of the right of access’.⁵⁹

In relation to violence, abuse and neglect, the Committee on the Rights of Persons with Disabilities has specifically noted that State Parties must ensure that support services and procedures are accessible ‘in order to provide effective and meaningful protection from violence, abuse and exploitation to persons with disabilities’.⁶⁰

Right to equality and non-discrimination

Equality and non-discrimination are at the core of all human rights treaties. Discrimination and inequality can be both a cause and a consequence of violence, and relevant non-discrimination and equality rights can serve to combat stigma, prejudice and violence.

Rights of equality and non-discrimination are referred to numerous times in the CRPD,⁶¹ and are invoked repeatedly throughout the CRPD with the consistent use of the phrase ‘on an equal basis with others’, which connects many of the substantive rights of the CRPD to the non-discrimination principle.⁶² Specifically, the CRPD states, ‘all persons are equal before and under the law and are entitled without discrimination to the equal protection and equal benefit of the law’.⁶³ The CRPD also requires governments to prohibit discrimination based on disability and guarantee to people with disability equal and effective legal protection against discrimination, as well as to take all appropriate steps to ensure that reasonable accommodation is provided.

Non-discrimination and equality rights are enshrined in the major human rights treaties,⁶⁴ and require State Parties to the conventions to take measures to eradicate discrimination. For example, while neither the ICCPR nor ICESCR explicitly refer to disability as a prohibited ground of discrimination, Article 2(1) of the ICCPR and Article 2(1) of ICESCR ensure that State Parties guarantee that rights articulated in the relevant instrument are exercised without discrimination on the basis of ‘other status’.

The right to equality and non-discrimination can impose both negative and positive obligations on State Parties. For example, laws, policies and programs should not be discriminatory, the law should provide protection against discrimination, and public authorities should not apply laws, policies or programs in a discriminatory manner.

The Committee on the Rights of Persons with Disabilities in its General Comment No 6 (2018), on equality and non-discrimination, expressed concern that laws and policies of State Parties still ‘approach disability through charity and/or medical models’,⁶⁵ and that these laws are often ‘not regarded as disability-based discrimination because they are justified as being for the protection or care ... or in their best interest’.⁶⁶

Right to health

The right to the highest attainable standard of health has been at the core of international human rights instruments, since the inception of the Universal Declaration on Human Rights that states that ‘[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family’.⁶⁷ It is a fundamental human right enshrined in many human rights instruments, including the CRPD,⁶⁸ ICESCR,⁶⁹ CRC,⁷⁰ and CEDAW.⁷¹

Under Article 25 of the CRPD, State Parties have an obligation to take all appropriate measures to ensure access for people with disability to health services without discrimination.⁷² The Committee on Economic, Social and Cultural Rights expounded on this notion in its General Comment No 14, stating that ‘any discrimination in access to health care ... on the grounds of ... physical or mental disability ... has the intention or effect of nullifying or impairing the equal enjoyment or exercise of the right to health’.⁷³

Right to liberty and security of the person

Liberty and security of the person is one of the most critical rights to which everyone, including people with disability, is entitled. Article 14 of the CRPD relates to the liberty and security of the person, prohibiting arbitrary detention and categorically declaring, ‘the existence of a disability shall in no case justify a deprivation of liberty’. Article 14 also reaffirms the prohibition on discrimination based on disability in ensuring that the operation of the article is exercised ‘on an equal basis with others’.⁷⁴

In this way, Article 14 of the CRPD provides stronger safeguards and more comprehensive protection than the equivalent Article 9 of the ICCPR. The ICCPR also provides that ‘all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’.⁷⁵

The Committee on the Rights of Persons with Disabilities in its guidelines on Article 14, has called on State Parties to protect the security and personal integrity of people with disability deprived of their liberty through the elimination of the use of forced treatment, seclusion and restraint.⁷⁶ In particular, the Committee found that these practices are inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment against people with disability pursuant to Article 15 of the CRPD.

1.4 Policy and legal frameworks

The National Disability Strategy

The implementation of the *Convention on the Rights of Persons with Disabilities* (CRPD) in Australia is guided by the National Disability Strategy (NDS).⁷⁷ The NDS is a national policy in relation to people with disability in Australia. It adopts the social model of disability, recognising that ‘attitudes, practices and structures are disabling and can prevent people from enjoying economic participation, social inclusion and equality’.⁷⁸

The NDS aims to provide a coherent approach to improving the lives of people with disability, their family and carers in Australia across the different jurisdictions and service sectors.⁷⁹

The NDS sets out goals across six key policy areas based on the CRPD:

- inclusive and accessible communities
- rights protection, justice and legislation
- economic security
- personal and community support
- learning and skills
- health and wellbeing.⁸⁰

The NDS is supported by a series of timed implementations plans, and aims to engage people with disability in implementation and monitoring of progress.⁸¹

The NDS notes the importance of advocacy services in facilitating people with disability to overcome barriers that limit their participation in the community, and participating in decision making about their lives.⁸² It sets out a policy direction focused on ensuring that people with disability are safe from violence, exploitation and neglect, grounded in an evidence base that suggests that people with disability are more vulnerable to violence, neglect and exploitation.⁸³ The NDS notes that ‘[p]eople with disability fare worse in institutional contexts where violence may be more common’.⁸⁴

The NDS has also identified areas of further action, including developing ‘strategies to reduce violence, abuse and neglect of people with disability’.⁸⁵

Other relevant strategies and frameworks

Successive Australian governments have contributed to a broad policy framework relevant to the issue of violence against people with disability in institutional settings through policies including: the National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Sector;⁸⁶ the National Plan to Reduce Violence Against Women and Their Children 2010–2022;⁸⁷ and the National Disability Agreement.⁸⁸ Government entities in all states and territories are also required to develop individual Disability Action Plans, which identify barriers to inclusion, and set out how entities will remove these barriers and create accessible communities.⁸⁹

In 2017–18, the Commission has led the development of the National Principles for Child Safe Organisations. This project has been commissioned by the Australian Government, with consultation from the states and territories and national sector peak bodies and advocacy groups including the disability sector. The development of the National Principles is a key action under the National Framework for Protecting Australia’s Children 2009–2020 and in response to the Royal Commission into Institutional Responses to Child Sexual Abuse. The National Principles reflect the Royal Commission’s ten standards for creating child safe institutions, with a broader scope that goes beyond sexual abuse to also cover other forms of potential harm to children and young people. The principles will act as a national benchmark for protecting the safety and wellbeing of children and young people in organisational settings. They apply to organisations of different sizes and across various sectors, including organisations that engage with or provide services to children and young people with disability. The principles highlight that organisations should consider the particular needs of children from diverse backgrounds and circumstances, including children with disability. Draft National Principles were endorsed by Commonwealth, State and Territory Community Services Ministers in October 2017. The final National Principles will be submitted to the Council of Australian Governments for endorsement in mid-2018 to create a national consistent benchmark across all jurisdictions. Implementation of the National Principles will then proceed in line with the responses of Australian governments to the Royal Commission’s recommendations. Following the Royal Commission, the Australian Government is establishing an Office of Child Safety which will oversee and monitor implementation of the principles.⁹⁰

Criticisms of the policy framework

The existing policy framework, and in particular the NDS, is Australia's central mechanism for implementing the CRPD into policies and programs that affect people with disability.⁹¹ The Commission has expressed a number of concerns in relation to the fact that the existing policy framework is not currently fully implementing Australia's obligations under the CRPD.⁹² The Commission is particularly concerned that the implementation of the NDS is limited by the lack of: a national co-ordination mechanism; an operational plan; a monitoring and evaluation framework; and dedicated resources.⁹³

The disability sector has also shared concerns that Australia is not meeting its obligations under the CRPD.⁹⁴ An overarching point of concern for advocacy groups is that none of the primary policies are designed to specifically address violence against people with disability in institutional settings.⁹⁵ In addition, the lack of meaningful indicators for measurement of achievement against policy goals and enforcement mechanisms limits the practical application of these policies.⁹⁶

In relation to the NDS specifically, the sole performance indicator for violence, abuse and neglect, 'feelings of safety in different situations', has been criticised for being an ineffective measure for understanding, monitoring and addressing violence against people with disability, including in institutional settings.⁹⁷

In addition, stakeholders have expressed concerns that the NDS has been side-lined in the process of the NDIS roll-out. Both government and advocacy stakeholders in the consultations expressed the view that the NDS should be revised and refreshed in the current landscape. The Commission understands the Commonwealth Government, as part of the development of a national disability framework for beyond 2020, has commenced an independent targeted review of the National Disability Strategy 2010-2020 to inform a wide-ranging public consultation process.

Legal landscape

A number of federal and state and territory laws exist to protect and promote the rights of people with disability, such as anti-discrimination legislation,⁹⁸ the *Human Rights Act 2004* (ACT), and the *Charter of Human Rights and Responsibilities Act 2006* (Vic). However, these do not specifically address violence against people with disability in institutional settings.

The primary legislation designed to respond to violence against people with disability is contained in the state and territory criminal codes.⁹⁹ In some jurisdictions, family violence legislation is drafted in a way that may include violence perpetrated by carers against people with disability in institutional settings.¹⁰⁰ Other actions classified as violence, including emotional abuse or manipulation, may not fall under criminal legislation. In certain circumstances, disability-specific interventions that might otherwise be considered an offence, such as restrictive practices or forced sterilisation,¹⁰¹ are legalised.¹⁰²

Legislation, regulations and standards outlining general obligations of disability service providers are also in operation across all jurisdictions.¹⁰³

1.5 Disability sector reform

The disability service sector is currently undergoing significant national reform. The NDIS is currently being implemented across Australian jurisdictions, with full national roll-out expected by 2020. The newly established NDIS Commission will start operating from 1 July 2018 in New South Wales and South Australia, 1 July 2019 in the Australian Capital Territory, Northern Territory, Queensland, Tasmania and Victoria, and 1 July 2020 in Western Australia. Until the NDIS is at full scheme in each jurisdiction, NDIS participants, providers and workers will continue to operate under their state or territory's existing quality and safeguarding systems.

The roll-out of the NDIS means that the provision of most disability services and associated quality and safeguarding frameworks and mechanisms are being transitioned from the states and territories to the Commonwealth Government. The full impact of the NDIS on state-provided disability service provision, mainstream services and associated quality and safeguarding mechanisms is still being determined in many Australian jurisdictions.

State and territory quality, safeguarding and oversight mechanisms

Formal state and territory quality, safeguarding and oversight systems include complaint handling, investigation and incident reporting, worker screening, service provider standards,¹⁰⁴ regulation of the use of restrictive practices, funded advocacy programs and community visitor programs. The mechanisms in place vary by jurisdiction, as does the level of safeguarding and oversight available to people with disability in institutional settings. Government departments and entities, such as an Ombudsman or a Disability Services Commissioner, often provide complaint handling and investigation powers. Some organisations' jurisdiction is limited to the decisions of public agencies, whereas some extend to private service providers. These oversight bodies often have the ability to hear and resolve complaints, and may have the ability to undertake investigations in relation to the conduct of service providers. Whether these organisations have the ability to undertake own-motion investigations varies between jurisdictions.¹⁰⁵ Some organisations also operate critical incident reporting systems, which require them to report certain behaviours to government and other oversight bodies, however there is inconsistency between jurisdictions in what they are required to report.¹⁰⁶

Community or official visitor programs (community visitors) also currently operate in most jurisdictions; New South Wales, Victoria, Queensland, South Australia and the Australian Capital Territory have community visitor programs that visit disability accommodation services.¹⁰⁷ The programs are implemented by independent government organisations such as the Ombudsman, Senior Practitioner, Public Advocate, or Public Guardian. Organisations' jurisdiction may cover individual or systemic issues, and may be limited to one sector such as disability, or cover a range of institutions, which interact with people with disability. Some community visitors are paid staff and some are volunteers depending on the jurisdiction.¹⁰⁸

Governments in all jurisdictions have committed to reducing the use of restrictive practices through the National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Services Sector.¹⁰⁹ There are significant discrepancies in how restrictive practices are regulated across jurisdictions, which is provided in a range of legislation policy documents or other guidance materials. In addition, some jurisdictions require prior authorisation to use restrictive practices, others have reporting requirements relating to the use of restrictive practices, and statutory office holders responsible for investigating their use.¹¹⁰ Some jurisdictions such as Victoria and South Australia also have a Senior Practitioner function that monitors the use of restrictive practices and provides education and guidance on their use.¹¹¹

Some form of worker-screening requirements exists in all jurisdictions.¹¹² All jurisdictions require a working with children check for people working with children, including children with disability.¹¹³ All jurisdictions also require some form of screening for people working with adults with disability, however the content of these requirements vary between the jurisdictions.¹¹⁴

In addition, disability service providers who receive government funding in all jurisdictions must comply with the National Standards for Disability Services, and associated state-based standards.¹¹⁵ Additional requirements exist in some states and territories and are prescribed by legislation.¹¹⁶ The extent of oversight this provides varies by jurisdiction, and there remains some institutional settings that are not covered by these measures.

Disability specific advocacy organisations and peak bodies exist in all jurisdictions. There are different types of advocacy including individual advocacy, systemic advocacy, self-advocacy, citizen advocacy and group advocacy.¹¹⁷ The Commonwealth Department of Social Services provides funding to advocacy organisations through the National Disability Advocacy Program, as well as the NDIS Appeals Program which involves direct funding to advocacy peak bodies for the provision of systemic advocacy services.¹¹⁸ State and territory governments have also historically provided funding for advocacy services.¹¹⁹ The amount of funding allocated for these services varies greatly between the jurisdictions.

All states and territories also have a human rights and equal opportunity commission or an anti-discrimination board with complaint jurisdiction in relation to discrimination against people with disability in certain areas of public life.¹²⁰

The state and territory quality, safeguarding and oversight landscape is currently going through significant change with the roll-out of the NDIS, Safeguarding Framework, and NDIS Commission.

Issues with disability sector state and territory quality, safeguarding and oversight mechanisms

Prior to the development and implementation of the NDIS, provision of disability services and relevant quality, safeguarding and oversight mechanisms was the sole responsibility of state and territory governments. The majority of these mechanisms will cease to have oversight of disability specific service delivery as this function will transfer to the NDIS Commission at full NDIS roll-out in each jurisdiction. However, as full roll-out across Australia will not be achieved until 2020, some state and territory disability quality, safeguarding and oversight mechanisms will remain in place in the short term. Further, some oversight mechanisms may maintain ongoing jurisdiction in states and territories where the relevant government department retains a service provision role as a provider of last resort.

Despite the state and territory oversight mechanisms available, violence against people with disability in institutional settings has remained a serious and widespread issue.¹²¹

Some state and territory mechanisms are considered best practice in terms of effectively preventing and addressing instances of violence, abuse and neglect.¹²² However, previous reports and inquiries have highlighted areas for needed reform across the state and territory quality, safeguarding and oversight mechanisms. There are a number of issues raised in these reports and inquiries including: a general sense of uncertainty around how the different mechanisms work and relate to one another; the accessibility of the different mechanisms for people with disability; their effectiveness in preventing and responding to instances of violence against people with disability in institutional settings; inadequate training and remuneration of disability service workers; and the inconsistent levels of protections offered to people with disability in different jurisdictions.¹²³

The NDIS and the Safeguarding Framework

The NDIS

In March 2013, the *NDIS Act* was passed and the NDIS launched in July 2013.¹²⁴ States and territories have signed bilateral agreements with the Commonwealth Government detailing operational and funding arrangements to transition state and territory government funded specialist disability services to the federally funded NDIS.

NDIS Eligibility criteria

In order to access the NDIS you must:

- hold Australian residency
- be under 65 years of age
- live in an area where NDIS is available (once the NDIS is fully rolled out it will be available to anyone regardless of geographical location)
- meet the NDIS disability rules
 - » have an impairment or condition that is likely to be permanent (lifelong) and that stops you from doing everyday things by yourself
- meet the NDIS early intervention rules
 - » have an impairment or condition that is likely to be permanent (lifelong), or
 - » be a child under 6 years of age with a developmental delay and the delay means you usually need more help with your self-care, communication, learning or motor skills than another child of the same age.¹²⁵

The NDIS is a market-based system in which eligible people with disability are provided individualised funding to access the supports they require, through their chosen service providers, to participate in the community.¹²⁶

The Safeguarding Framework

The NDIS has its own Safeguarding Framework, to ensure that all NDIS participants have access to the same tools and supports across Australia. The Safeguarding Framework aims to ensure that appropriate safeguards are in place for people with disability receiving NDIS funded supports, and establish standards for NDIS service providers around delivering quality support. The stated objectives of the Safeguarding Framework include ensuring that NDIS funded services: allow participants to live free from abuse, violence, neglect and exploitation; facilitate informed decision-making; and monitor and respond to emerging issues as the NDIS develops.¹²⁷

The Safeguarding Framework consists of three elements: developmental, preventative and corrective.¹²⁸ The Framework therefore consists of measures designed to build capability and support systems, prevent harm and promote equality, and respond when issues arise.¹²⁹ The three elements are designed to work together to create a whole system approach that is 'mutually supporting and reinforcing'.¹³⁰

The NDIS Commission

The *NDIS Commission Act* amends the *NDIS Act* to establish the NDIS Commission and was passed by Federal Parliament on 4 December 2017. The NDIS Commission will be established as an independent Commonwealth body designed to oversee operation and implementation of the Safeguarding Framework. The functions of the NDIS Commission are set out in the *NDIS Commission Act* and the scheduled NDIS Quality and Safeguards Commission Rules, Explanatory Statements and NDIS (Quality Indicators) Guidelines (the NDIS Commission Rules and Guidelines), which were registered on 18 May 2018.¹³¹

The NDIS Commission will begin operations in New South Wales and South Australia in July 2018 and in the other states and territories in July 2019, except for Western Australia which reaches full NDIS roll-out in July 2020.¹³² The NDIS Commission will undertake a broad range of education and capacity building, as well as regulatory preventative and corrective, functions to ensure that NDIS supports are delivered in line with the NDIS Commission Rules and Guidelines, and that people with disability have the knowledge and capacity to access NDIS quality, safeguarding and oversight mechanisms.

The NDIS Commission will undertake the following regulatory and corrective functions:

- registration and regulation of NDIS providers, including Practice Standards and a Code of Conduct
- compliance monitoring, investigation and enforcement action
- responding to complaints and reportable incidents including abuse and neglect of a person with disability
- national policy setting for the screening of workers
- national oversight and policy setting in relation to behaviour support and monitoring the use of restrictive practices within the NDIS with the aim of reducing and eliminating such practices
- facilitating information sharing arrangements between the NDIS Commission, the National Disability Insurance Agency, state and territory and other Commonwealth regulatory bodies.¹³³

In addition to its regulatory and corrective functions, the NDIS Commission also has a strong focus on developmental and capacity building for people with disability, and for disability service workers and providers, including in relation to how to comply with the new practice standards and NDIS Code of Conduct. Additional developmental and capacity building work will also be undertaken by the NDIA through the separate yet interconnected Information, Linkages and Capacity Building (ILC) Framework. These functions are outlined in Appendix 6.

Impact of the Safeguarding Framework and NDIS Commission on the state and territory quality, safeguarding and oversight landscape

The roll-out of the Safeguarding Framework will significantly alter the disability service sector and related quality, safeguarding and oversight mechanisms.

What this landscape will look like during and after full transition is the subject of ongoing negotiations taking place between the Commonwealth, state and territory governments.

A number of issues need to be worked through to establish this new system. First, Commonwealth, state and territory governments must determine their respective roles and responsibilities. Second, state and territory governments must determine how to implement the service delivery and oversight mechanisms which are not transferred to the Commonwealth. Third, the Commonwealth must determine how the NDIS Commission will work with remaining state and territory government entities in the relevant sectors.

During consultations, stakeholders in all jurisdictions stated that uncertainty remains about transition arrangements and the landscape at full roll-out in relation to the jurisdiction of the NDIS Commission, how state and territory entities would be affected by its establishment, and how they would be expected to work with the NDIS Commission.

Following the conclusion of consultations conducted by the Commission for this project in April 2018, the role of the NDIS Commission was further clarified in the release of the NDIS Commission Rules and Guidelines. However, these do not articulate the impact of the NDIS Commission on the jurisdictions of state and territory quality, oversight and safeguarding mechanisms.

The Safeguarding Framework and NDIS Commission will affect many of the existing state and territory quality, safeguarding and oversight mechanisms as they relate to the disability sector.¹³⁴

Organisations with disability specific quality and safeguarding jurisdiction may cease to operate entirely. For example, the Office of the Disability Services Commissioner Victoria will be dissolved in 2019.¹³⁵ Organisations with cross-sectoral jurisdiction may lose the disability specific aspect of their jurisdiction. For example, the role of the New South Wales Deputy Ombudsman for Disability Services is likely to lose jurisdiction over disability services as disability service provision will be transferred from the New South Wales Government to the Commonwealth, while retaining jurisdiction over other state government entities.

Some jurisdictions have confirmed that if required they will maintain the relevant state and territory systems of service provision in place and become 'providers of last resort' for people with disability who are not eligible for the NDIS. In this context, state and territory governments will maintain quality, safeguarding and oversight mechanisms.

However, the majority of quality, safeguarding and oversight bodies consulted did not know how the Safeguarding Framework would individually affect them. Many did not know if they would continue to have a residual role for people receiving disability service provision under the NDIS, or for people outside the NDIS who may be provided disability services by a state or territory government provider of last resort.

Some of the organisations that were unclear about their jurisdiction during consultations in April 2018 are in states that are due to reach full roll-out on 1 July 2018. The window to ensure that any change to organisations' jurisdiction does not result in gaps in quality, safeguarding and oversight mechanisms for people with disability in institutional settings is closing fast in relation to those jurisdictions.

There is also uncertainty in relation to the future of community visitor programs and state based funding for advocacy services. The Safeguarding Framework documentation states that an 'independent evaluation of existing state and territory community visitor schemes' will be conducted, and that the result of the evaluation will be considered by the Disability Reform Council in relation to the role of community visitors in the NDIS.¹³⁶

Quality, safeguarding and oversight for people with disability in the changing landscape of the disability sector

As discussed above, exactly what the quality, safeguarding and oversight landscape will look like at full roll-out of the Safeguarding Framework remains unknown.

When the NDIS is fully operational, many people with disability who seek disability specific government support will fall under the jurisdiction of the NDIS Commission. Some people may continue to fall within the jurisdiction of state and territory providers of last resort. As noted above, these systems vary by jurisdiction and offer different levels of protection to people with disability.

The Commission's research indicates that the majority of people with disability who are not eligible for the NDIS and therefore do not come under the NDIS Commission, are likely to access mainstream services to receive required services and supports. It is therefore necessary to outline the quality, safeguarding and oversight mechanisms available in the mainstreams sectors.

1.6 Mainstream service sectors

What are mainstream services?

For the purposes of this report, mainstream services are defined as government service sectors provided to the public including health, mental health, aged care, justice, education, and child protection services.

People with disability who are not NDIS eligible are likely to access mainstream service provision and associated quality, safeguarding and oversight mechanisms.

What quality, safeguarding and oversight mechanisms exist in mainstream services?

Mainstream services have their own oversight and safeguarding mechanisms for people who are eligible to access these services. Sector specific mechanisms are outlined below.

In addition to the mechanisms listed below, there are universal quality, safeguarding and oversight mechanisms, which include the police, consumer law protections, and Anti-Discrimination commissions. These mechanisms are outside of the scope of this report.

Health care

Oversight of the mainstream health system has national and state and territory components.

On the national level, the Australian Commission on Safety and Quality in Health Care is the agency responsible for leading and coordinating national improvements in safety and quality in health care.¹³⁷

The Australian Health Practitioner Regulation Agency (AHPRA) is responsible for the oversight of registered health care practitioners by implementing the National Registration and Accreditation Scheme.¹³⁸ AHPRA receives complaints in relation to the health, conduct or performance of a student or registered health care practitioner if a complainant is concerned that the practitioner is behaving in a way that presents a risk to the complainant, to patients or members of the public.¹³⁹ The focus of AHPRA's powers are disciplinary in that AHPRA can suspend, limit and cancel the registration of a health practitioner, preventing them from practicing across Australia.¹⁴⁰

At a state and territory level, the relevant departments responsible for the funding and operation of mainstream health services often have an internal review mechanism. All states and territories also have health services complaints entities that can receive complaints regarding the conduct of registered and unregistered health practitioners. While the functions and remit of the organisations vary across jurisdictions, generally, these bodies can investigate concerns about health care practitioners and can offer a dispute resolution service, such as mediation or conciliation, to resolve disputes between a complainant and a health service provider.¹⁴¹

Mental health

Oversight of mainstream mental health services varies depending on the jurisdiction and the type of complaint raised. On the national level, the National Mental Health Commission provides independent reports and advice to government on critical issues in the mental health sector and advocates for change at the systemic level.¹⁴²

In all jurisdictions except Victoria, the various state and territory mental health organisations have monitoring, reviewing, systemic advocacy and policy oversight functions. The Victorian Mental Health Complaints Commission is unique in its oversight function as a complaint handling body.

Complainants across all states and territories have access to service provider internal review mechanisms, the complaint handling mechanisms available in the mainstream health sector and the Ombudsman if a service has been funded by the state or territory government department.

In Victoria, complainants in the mental health sector will also have access to the Victorian Office of Disability Service Complaints until its operation ceases in 2019, after the transition to the NDIS is complete.

There are mental health official visitor programs in most jurisdictions to provide independent oversight of mental health institutions. Most jurisdictions also have a statutorily appointed Chief Psychiatrist who has certain powers relating to the relevant state or territory mental health laws.¹⁴³

Mental health legislation differs across the jurisdictions in providing safeguards to protect the rights and dignity of people living with mental illness. Legislation can cover safeguards in relation to privacy, communication with patients, consent, involuntary treatments and compulsory orders. Some states have legislative provisions that deal specifically with restrictive practices used in mental health services.¹⁴⁴ In other states, restrictive practices are regulated through a policy directive.¹⁴⁵

Aged care

Aged care services fall under federal jurisdiction.

The Commonwealth Government has announced the establishment of a new Aged Care Quality and Safety Commissioner that will bring aged care regulation, compliance and complaints handling together. These reforms will include:

- developing options, in consultation with the aged care sector, for a Serious Incident Response Scheme to ensure the right systems are in place to identify an incident and prevent it from occurring again
- a performance rating against quality standards
- a user-friendly provider comparison tool on the My Aged Care website.¹⁴⁶

Current system:

Under the current system, the Australian Aged Care Quality Agency has responsibility for ensuring high quality care for people receiving Australian Government-subsidised aged care. Its functions include the accreditation of residential aged care services, conducting quality reviews of service providers, monitoring compliance with standards and promoting high quality care.¹⁴⁷

The Aged Care Complaints Commission is a national organisation that has oversight over all complaints regarding aged care services. The Complaints Commission's functions are to provide information, education and complaint resolution services across Australia.¹⁴⁸

The Australian Government Department of Health Ageing and Aged Care oversees aged care funding and regulation.¹⁴⁹ The Department has an internal feedback receipt mechanism.¹⁵⁰

The Commonwealth Ombudsman provides oversight of the actions and decisions of Australian Government agencies including the Aged Care Complaints Commissioner.

The National Aged Care Advocacy Program 'provides free, independent and confidential advocacy support to older people (and their representatives) receiving, or seeking to receive, Australian Government funded aged care services'.¹⁵¹ Advocacy services are delivered through a network of nine state and territory organisations that make up the Older Persons Advocacy Network. In the aged care sector, advocates have a right of access to aged care facilities.¹⁵²

Some states and territories also operate elder abuse helplines.¹⁵³

Justice

Correctional oversight systems vary across the different states and territories. State and territory government departments responsible for administering corrective services often have an internal complaints handling process. Prisoners can usually report complaints to prison officers or the superintendent.¹⁵⁴ In some jurisdictions, prisoners can complain directly to the Attorney-General's Department.¹⁵⁵

Some jurisdictions' corrections oversight landscape includes the role of a Custodial Inspector. Often, the functions of the Custodial Inspector are to conduct independent scrutiny, inspect, review and report on custodial centres.¹⁵⁶

State and territory Ombudsmen have oversight of state and territory funded corrections services and often have formal and informal systems in place to ensure incarcerated people have access to oversight. Prisoners can often report to the relevant state or territory Ombudsman directly through established reporting protocols.¹⁵⁷

Some jurisdictions operate official visitors programs that provide independent oversight within correctional facilities.¹⁵⁸

Education

While education systems vary across the different jurisdictions, there seems to be a consistent approach to oversight within the context of education service delivery. Each school has a complaints policy and process, and each jurisdiction's Department of Education has an internal complaints handling process.

If the complaint relates to a state government school, external reviews of complaints may be conducted by the relevant state Ombudsman. There is no equivalent complaint body for independent schools; however these schools may be accountable to other external authorities like an accreditation body, such as the Victorian Registration and Qualifications Authority.

Child protection

Oversight of the different child protection systems operating in Australia is complex and varies across the different states and territories. Government departments responsible for child protection services often have internal complaint handling mechanisms. In addition, all state and territory Ombudsmen have oversight of child protection services being administered by state and territory governments.

All jurisdictions with the exception of New South Wales have a Children's Commissioner as a statutory office holder. Instead, New South Wales has an Advocate for Children and Young People and a Children's Guardian.¹⁵⁹ The Office of the Children's Commissioner in the Northern Territory and the Office of the Children and Young People Commissioner in the Australian Capital Territory have a complaints handling function where people can raise complaints to the Commission about child protection services.¹⁶⁰

In Victoria, the Commission for Children and Young People administers a reportable conduct scheme relating to allegations of child abuse made against workers and volunteers in organisations.¹⁶¹ In most jurisdictions, the role of the Children's Commissioner is also to promote the safety and wellbeing of children through systemic advocacy functions.

All Australian states and territories have legislated mandatory reporting requirements relating to child abuse and neglect.¹⁶² Most jurisdictions have a child protection helpline that anyone can call to report incidents of abuse against children. There is also a National Child Abuse Helpline administered by Child Wise, a non-for-profit child abuse prevention organisation.¹⁶³

All states and territories have pre-employment screening requirements that people must meet if they wish to work around children. Working with Children Checks carry different procedures and requirements and are administered by different bodies depending on the state or territory. Some jurisdictions also have a community visitors program that visit children and young people in government and non-government out of home care or accommodation facilities and provide independent oversight of those institutions.¹⁶⁴

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Chapter 2 – Essential elements of a quality, safeguarding and oversight system

2.1 Summary

The Commission's research identified a number of essential elements to effective quality, safeguarding and oversight mechanisms that uphold the rights of people with disability, and effectively prevent and address violence against people with disability in institutional settings.

The elements apply to quality, safeguarding and oversight mechanisms in both disability specific and mainstream sectors. The elements are:

1. a human rights-based approach
2. a connected and integrated system
3. independent oversight and monitoring
4. robust prevention and response elements
5. accessibility for people with disability
6. continuous systems improvement through data.

These elements form the analysis framework for this report against which the quality, safeguarding and oversight mechanisms in the disability and mainstream sectors are examined.

2.2 A human rights-based approach

A human rights-based approach to quality, safeguarding and oversight systems means designing a system that has fundamental rights and freedoms and how to give effect to them at its core.

A human rights-based approach is therefore fundamental when designing an effective quality, safeguarding and oversight system to prevent and address violence against people with disability in institutional settings. It ensures that the system is person-focused, and is based on the needs of people with disability. Such a system empowers people with disability to participate in the process of making decisions that affect them, and engage with quality, safeguarding and oversight mechanisms.

Human rights are based on principles of dignity, equality and mutual respect, and apply to all people equally. These principles are articulated in specific rights such as the right to: dignity and respect; to live free from abuse, neglect, violence and exploitation; and to participation and full inclusion in the community.

Human rights are set out in international treaties and conventions that both have general application, and focus on specific groups within society. People with disability have rights under all relevant international human rights treaties to which Australia is a signatory including the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, the *Convention on the Elimination of All Forms of Discrimination against Women*, the *International Convention on the Elimination of All Forms of Racial Discrimination*, and the *Convention on the Rights of the Child*. People with disability also have specific rights enshrined in the *Convention on the Rights of Persons with Disabilities*.¹

Fundamental human rights principles in a human rights-based system are:

- the underpinning elements of all aspects of quality, safeguarding and oversight systems
- clearly articulated in all system documentation, including framework documentation and implementation plans, and information disseminated to the public about the system
- incorporated into operational frameworks, service standards and codes of conduct, to ensure they are implemented in practice.

2.3 A connected, integrated system

People with disability access a range of services within and outside the disability sector. In order to ensure that the needs of people with disability are met, quality, safeguarding and oversight systems must be connected and integrated. Integration should occur across the different service sectors, and across jurisdictional boundaries.

Where different quality, safeguarding and oversight systems operate in siloes and do not work together, they may be unable to address effectively many of the complex and intersectional issues faced by people with disability, or to ensure that all people with disability have access to the necessary safeguards and oversight. Intersections between systems happen, for example, when a person with disability who is an NDIS participant is hospitalised, or if a child with disability in school is receiving both NDIS-funded supports and supports funded by the education system.

This is a critical issue in relation to violence against people with disability in institutional settings. In instances of violence, a well-coordinated and rapid response across different sectors and jurisdictions may be needed to prevent further violence, or to ensure the ongoing safety of a person with disability after an act of violence occurs. A delayed response may mean that opportunities to prevent violence are missed, or that safeguarding and oversight mechanisms are unable to quickly restore a person's safety.²

Information sharing is essential to a connected and integrated system. It is often easier to share information within a jurisdiction than between jurisdictions.³ Restrictions on information sharing between jurisdictions complicate the ability for organisations to communicate and provide effective and efficient services, safeguarding and oversight to a person with disability.

Well-connected and integrated quality, safeguarding and oversight mechanisms across jurisdictions will:

- have clearly defined roles and responsibilities
- adopt a 'no wrong door' approach to receipt of a complaint, working with the person with disability to determine the correct organisation to handle their complaint and referring matters on where required
- work cooperatively across the sectors and jurisdictions when presented with a person with disability whose concern spans sectors and jurisdictions
- have open channels of communication, and the ability to share information between the jurisdictions and relevant sectors to prevent and respond to incidents of violence, including rapid responses to urgent/emergency situations.

2.4 Independent oversight and monitoring

Independent oversight and monitoring of institutional settings is critical to ensure that violence, abuse and neglect do not go unreported or unaddressed.⁴ Independent oversight and monitoring provides an additional layer of accountability for service providers; and assists people with disability to identify and report instances of violence, abuse and neglect in institutional settings.

Best practice independent oversight and monitoring can be achieved through independent complaint and reporting bodies that have oversight of a service system, and the operation of community visitors and independent individual and systemic advocacy programs.

Independent complaint and reporting agencies

Oversight mechanisms should include independent complaint and reporting agencies, to oversee service provision systems through the receipt of complaints and a serious incident reporting function. Such mechanisms provide crucial oversight of service provision systems, and aim to ensure that services to people with disability are provided safely and effectively and in line with the required standards of service delivery.

To operate effectively, these mechanisms will:

- be a separate entity from service providers
- have powers enshrined in legislation to receive complaints, investigate and report on incidents of violence
- have own motion powers to undertake inquiries into issues of concern
- have oversight and monitoring functions which are not subject to the direction of government
- be adequately resourced to undertake these functions.

Community visitors schemes

Community visitors safeguard rights and maintain an adequate standard of care for people with disability through independent oversight of residential institutional settings.

Community visitors have four primary functions:

- **monitoring** residential institutions through visitation
- **reporting** on standards of care observed and issues of concern
- **advocating** for people with disability when issues are identified
- **assisting** in the resolution of complaints.

Community visitors provide a link between people in residential institutions, service providers, and the broader community and assist in identifying and preventing instances of violence, abuse and neglect. The powers of community visitors to make unannounced visits, speak to people with disability and workers within institutional settings, and in some jurisdictions, examine service provider documentation, enable them to identify issues of concern and bring these to the attention of governments and other oversight agencies.⁵

Community visitors programs that effectively identify and address instances of violence, abuse and neglect against people with disability in institutional settings, will:

- be a separate entity from service providers to ensure their independence
- have the power to make unannounced visits to institutions to ensure that they can accurately report on the standards of care provided in institutional settings, coupled with legal powers of entry
- have the ability to meet with people with disability, workers, service providers, and review relevant documentation about the workings of residential institutions
- have clear lines of reporting to governments, to ensure that there is an obligation for governments to act on reports
- incorporate adequate training and funding to enable the above functions to be carried out.

Individual advocacy

Independent individual advocates assist people with disability to identify and report instances of violence, abuse and neglect, as well as advocate for individuals and their rights through complaints processes which are often complex.⁶ Individual advocates play a particularly critical role for people with disability who may not know their rights or how to recognise violence; who have complex communication needs; or who face additional barriers in reporting violence, abuse and neglect. The importance of their role within an holistic quality, safeguarding and oversight system in general, and in relation to violence specifically, has been recognised by recent government reports.⁷

To provide an effective independent oversight and monitoring mechanism individual advocates will:

- be independent from service providers and government agencies responsible for disability service provision
- have the authority to enter an institution at the request of people with disability
- be adequately trained and resourced to carry out these functions.

Systemic advocacy

Systemic advocacy organisations also play a critical role in advocating for change and reporting to governments on issues that affect a group of people with disability, as well as their families and carers.⁸ These issues can include the causes of violence, abuse and neglect, and the barriers faced when trying to access quality, safeguarding and oversight mechanisms. For example, in Victoria, the Public Advocate ‘has a mandate to be an advocate against violence and abuse’ and ‘call for better responses to allegations of abuse and better monitoring of service provision’.⁹

Systemic advocacy organisations include statutory roles such as the Public Advocate, which in many jurisdictions monitor systemic issues affecting people with disability and promote their rights and interests,¹⁰ and non-government disabled people’s organisations and disability advocacy organisations that receive government funding to undertake systemic advocacy work.¹¹

Effective systemic advocacy organisations will:

- be independent of government
- have access to information on incidents of violence, abuse and neglect in institutional settings
- have the power to report to government on issues of concern
- be well trained and resourced to undertake these functions.

2.5 Robust prevention and response elements

Violence against people with disability in institutional settings is a complex and multifaceted issue. To effectively reduce violence against people with disability in institutional settings, quality, safeguarding and oversight systems must both address the underlying causes of violence, and take appropriate measures after violence has occurred.

A variety of factors contribute to violence, abuse and neglect occurring in institutions. These include: the culture within many institutional settings; a lack of training for relevant staff and providers on appropriate rights-based service provision; ineffective regulation of the service provision industry; a lack of knowledge amongst people with disability about their rights, what constitutes violence and how to report violence or seek help; and the limited powers of many oversight mechanisms to take action in response to allegations of violence.¹²

Quality, safeguarding and oversight systems should therefore include a range of mechanisms to address the factors that contribute to violence.¹³ These should include activities to address the underlying attitudes and behaviours that lead to violence in these contexts;¹⁴ early intervention initiatives such as building the capacity of people with disability to identify violence, abuse and neglect; and the enabling of a range of response and corrective mechanisms following an incident of violence.¹⁵

Quality, safeguarding and oversight systems that effectively prevent and respond to violence will:

- raise the awareness and capacity of people with disability to understand their rights, what constitutes violence, abuse and neglect, and how to raise concerns, report violence and seek help
- educate workers and service providers about what constitutes violence, abuse and neglect, and appropriate methods of service delivery
- regulate workers and service providers to ensure that high standards of service provision are maintained, that people providing services are screened appropriately, and that perpetrators of violence are held to account after violence occurs
- establish complaint and reporting systems that enable people to seek redress after violence has occurred
- have the power to take action after an incident of violence, abuse and neglect occurs against a person with a disability, to ensure their safety and prevent further violence.

2.6 Accessibility for people with disability

People with disability can face significant barriers when attempting to access quality, safeguarding and oversight mechanisms to report their experiences of violence, abuse and neglect in institutional settings. These barriers include: fear of retribution, social isolation, and a lack of awareness about one's rights and how to seek help.¹⁶ To be effective, a quality, safeguarding and oversight system must address or reduce these barriers and be accessible to people with disability.

People's experience of disability can also intersect with other characteristics such as gender identity, sexual orientation, race and/or ethnic origin, and age. These factors can affect people's experience of violence and how they respond to violence, and can create additional barriers to people accessing quality, safeguarding and oversight systems. An effective system must therefore take account of intersectionality and ensure that it caters to the needs of specific groups and is accessible to all people with disability.

Accessible quality, safeguarding and oversight mechanisms for people with disability who have experienced or who are vulnerable to experiencing violence will:

- provide information in a variety of accessible formats to meet people's different communication needs
- disseminate information in a variety of ways, including face to face, over the phone, online, and out-reach through advocates and organisations that provide services and supports to people with disability
- maintain open channels of communication with people with disability, their family, friends and carers to facilitate raising issues of concern where the person with disability may not be able to, or feel comfortable doing so, themselves
- be inclusive of people with disability including women, children, LGBTI people, Aboriginal and Torres Strait Islander people, and people from culturally and linguistically diverse backgrounds with disability.

2.7 Continuous system improvement through data

There is no national picture of the prevalence and causes of violence against people with disability in institutional settings. Data collection is inconsistent and ad hoc across the different jurisdictions, service sectors, and institutional settings.¹⁷ A further concern is that the data that is collected is often not shared to enable it to inform advocacy and policy reform.¹⁸

The development of nationally consistent data on violence against people with disability in institutional settings is essential to achieve a significant and sustained reduction in violence against people with disability over the long term.¹⁹ Nationally consistent data enables identification of system-wide problems, the planning and implementation of targeted interventions, and creation of benchmarks against which progress can be measured across all jurisdictions.

To effectively inform policy development across the different jurisdictions, quality, safeguarding and oversight mechanisms will collect data that is:

- based on nationally consistent definitions to ensure that it can be used to create a consistent picture of violence against people with disability in institutional settings
- disaggregated by factors such as age, gender identity, sexual orientation, race, type of disability, place of residence, and cultural background²⁰
- made publicly available so that it can feed into the development of policy and systems to prevent and address violence against people with disability in institutional settings.

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Chapter 3 – Quality, safeguarding and oversight in the disability and mainstream sectors

3.1 Summary

This chapter contains an analysis of the extent to which the Safeguarding Framework and the NDIS Commission implement the essential elements of an effective quality, safeguarding and oversight system outlined in the previous chapter.

It is acknowledged that human rights principles underpin the establishment of the NDIS Commission and the Safeguarding Framework. The practical implementation of human rights should be a priority that is continually monitored as the NDIS Commission and the Safeguarding Framework are operationalised.

Similarly, the NDIS Commission is intended to create a connected and integrated quality, safeguarding and oversight system for NDIS participants. However during transition there has been uncertainty regarding lines of responsibility and accountability for some state and oversight entities, that would benefit from increased communication and cooperation from the Commonwealth and state and territory governments.

The establishment of the NDIS Commission as an external authority is a crucial step to achieving the requisite independent oversight and monitoring. To supplement the NDIS Commission, the Commonwealth and state and territory governments should consider the inclusion of community visitors in the Safeguarding Framework, and take steps to ensure that independent individual and systemic advocacy organisations have adequate powers and funding.

This chapter also examines the effectiveness of preventative and response mechanisms under the Safeguarding Framework. To effectively prevent and address violence in institutional settings, a quality, safeguarding and oversight system must target barriers and be accessible to people with disability, including addressing intersectionality.

The NDIS Commission has the potential to collect nationally-consistent data to ensure continuous system improvement. Collated data should be made publicly available where possible to inform policy and service system reform, and be disaggregated to fully encapsulate intersectional experiences.

This chapter also outlines some high-level themes in relation to whether the quality, safeguarding and oversight mechanisms in mainstream sectors implement the essential elements of an effective system outlined in the previous chapter. The Commission acknowledges that mainstream services are complex, broad and significantly varied across the jurisdictions. As such, this report aims to highlight critical and prevalent issues that arose in consultations in relation to quality, safeguarding and oversight in mainstream service sectors, rather than providing a detailed analysis of all quality, safeguarding and oversight mechanisms in mainstream sectors. It is suggested that a more comprehensive review of these mechanisms, and their operation in the post NDIS environment, be undertaken to ensure that effective quality, safeguarding and oversight mechanisms are in place for all people with disability in Australia, both within and outside of the NDIS.

3.2 A human rights-based approach

A human rights-based approach to quality, safeguarding and oversight systems, means designing a system with fundamental rights and freedoms and how to give effect to them at its core.

An analysis of the information available on the Safeguarding Framework indicates that the human rights principles of dignity, equality and mutual respect underpin the Safeguarding Framework, and are engaged by its various elements.

Underpinning principles

Human rights principles underpin the NDIS Commission and the Safeguarding Framework.

The NDIS Commission and Safeguarding Framework oversee the NDIS which aims to promote the rights of people with disability by giving effect to the *Convention on the Rights of Persons with Disabilities* (CRPD) and other relevant international conventions.¹

The Safeguarding Framework documentation notes that:

The NDIS gives effect to a number of key provisions in the UN Convention on the Rights of Persons with Disabilities. Consistent with this, the NDIS Quality and Safeguarding Framework is intended to uphold and respect the rights of people with disability.²

The *NDIS Act* specifically states that the objects of the Act include giving effect to Australia’s obligations under the *Convention on the Rights of Persons with Disabilities*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Rights of the Child*, the *Convention on the Elimination of all Forms of Discrimination Against Women*, and the *International Convention on the Elimination of All Forms of Racial Discrimination*.³ The objects of the *NDIS Act* also include supporting the independence and social and economic inclusion of people with disability, and raising greater community awareness to facilitate inclusion of people with disability in the broader community.⁴ The objects of the *NDIS Act* apply to the NDIS Commission.

The NDIS funding model, which allows participants to exercise choice and control in relation to the supports and services they receive, is also in line with Australia’s international law obligations to recognise people with disability as having the legal capacity to make decisions about the issues that affect them.⁵

In addition to the human rights underpinning the NDIS, the Safeguarding Framework itself has human rights as one of its foundational principles,⁶ and makes particular reference to the rights of people with disability to ‘dignity and respect; to live free from abuse, neglect, violence and exploitation; and to participation and full inclusion in the community’.⁷

In addition, the NDIS Commission Rules and Guidelines note that one function of the NDIS Commission is to ‘build the capability of NDIS participants and providers to uphold the rights of people with disability’.⁸

The elements of the Safeguarding Framework

The Safeguarding Framework includes the following elements:

- complaint and reportable incidents functions
- provider registration and worker screening functions
- the regulation of the use of restrictive practices.

Human rights principles are incorporated into the design of all of these elements of the Safeguarding Framework.⁹ The Human Rights Compatibility Statement for the *NDIS Commission Act* notes that each of the elements engage with the rights of people with disability as expressed in the CRPD.¹⁰ For example, it notes that the NDIS Commission’s complaints function engages the rights enshrined in the CRPD to protect people with disability from violence, abuse, and neglect, and ensure that action is taken in response to these behaviours.¹¹

Human rights are also specifically referenced in other Safeguarding Framework documentation such as the NDIS Commission Rules and Guidelines, which set out the expectations of how NDIS service providers should structure their business and delivery of supports and services.¹² This documentation includes guidance on measures that providers should put in place to uphold the human rights of people with disability in their everyday practice,¹³ and has a specific focus on the right of people with disability to be free from violence, abuse and neglect. For example, the NDIS Code of Conduct supports the rights of NDIS participants to ‘have access to safe and ethical supports’.¹⁴ The NDIS Code of Conduct aims to achieve this through setting minimum standards of care, shaping the culture of service providers, and empowering people with disability in relation to their rights.¹⁵

Implementation of human rights principles through the Safeguarding Framework

Human rights in practice

The Commission acknowledges that human rights principles underpin and have shaped the Safeguarding Framework and NDIS Commission. However, where many programs have difficulty in relation to human rights is their implementation in practice. It is therefore important to examine whether sufficient protections are in place to ensure that human rights will be implemented throughout these mechanisms in practice.

Implementation of human rights

In accordance with obligations under the CRPD to consult people with disability in relation to the development of legislation, policies and other relevant decision-making processes,¹⁶ extensive consultations were held with people with disability and their advocates and representatives during the drafting of the Safeguarding Framework.¹⁷

During the writing of this report at the end of May 2018, the NDIS Commission Rules and Guidelines were released. There are eleven NDIS Commission Rules and one NDIS Commission Guideline. Nine of these documents outline the rules that NDIS service providers must comply with when conducting their business in order to maintain their registration.¹⁸ The NDIS Commission Guideline outlines practical steps that should be taken by NDIS providers to ensure compliance with the NDIS Commission Rules, including steps that should be taken to ensure that human rights are implemented in practice.¹⁹ The NDIS Commission Rules and Guidelines' Statements of Compatibility with Human Rights outline the specific human rights implemented by the Rules, including the right to ensure that people with disability live free from exploitation, violence and abuse.²⁰ For example, the *National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018* Statement of Compatibility with Human Rights states that setting standards which must be complied with by NDIS providers to obtain and maintain their NDIS registration 'embeds a requirement for NDIS providers to be independently monitored, in accordance with Article 16 (3)' of the CRPD.²¹

In addition, further guidance currently in development provides detailed information for workers and service providers on how to comply with the NDIS Commission Rules and Guidelines, with a focus on human rights implementation. For example, the currently available draft guidance on the NDIS Code of Conduct for service providers and workers emphasises the practical implementation of the rights of people with disability.²²

The focus in these documents on the practical implementation of human rights may go some way towards addressing the problems identified during this project, namely the concern that while human rights were acknowledged in Safeguarding Framework documentation, limited information was provided in relation to their practical implementation.

The NDIS Commission Rules and Guidelines are a practical step towards the realisation of human rights throughout the Safeguarding Framework, however they do not have the status of legislation, and are therefore easier to amend. This was a matter of concern to some stakeholders.²³ On the one hand, this enables a degree of flexibility as the Safeguarding Framework is rolled out, to ensure that the NDIS Commission Rules and Guidelines are sufficiently detailed and targeted to achieve their objectives. As the Safeguarding Framework is rolled out progressively in different jurisdictions, the NDIS Commission Rules and Guidelines will be able to be amended to incorporate lessons learnt during implementation, and deal with risks as they arise.

On the other hand, the incorporation of information and guidance on the practical implementation of human rights into the NDIS Commission Rules and Guidelines also means that these measures are not technically offered the degree of protection as would be provided if this information were incorporated into law.

The NDIS Commission Rules and Guidelines indicate a significant focus on the practical realisation of human rights and prevention of violence, abuse and neglect throughout the Safeguarding Framework. It is important that the degree to which the Safeguarding Framework practically implements the rights of people with disability is continually monitored throughout implementation.

Interaction of human rights and a market-based system

As the oversight component of a market-based system, the Safeguarding Framework is inherently concerned with addressing the rights of people with disability as consumers. Throughout consultations conducted for this research, stakeholders expressed concern that the market-based approach adopted by the NDIS would mean that market principles and notions of consumer rights would overshadow and potentially replace holistic consideration and inclusion of human rights within the Safeguarding Framework.

Market-based systems often prioritise efficiency over equity.²⁴ Efficiency is the primary concern of private sector markets, whereas traditionally, governments have had a responsibility to also ensure equitable access to services. As such, it can be problematic to use markets for the delivery of support services, particularly in the context of the NDIS due to a vast array of complex needs experienced by participants.²⁵

The Safeguarding Framework policy documentation makes consistent reference to market principles and consumer rights.²⁶ The language of the NDIS Commission Rules and Guidelines appears to reflect a more person-focused, human rights-based approach. However, this issue should be monitored throughout implementation, to ensure that human rights more broadly are prioritised as the Safeguarding Framework is rolled out.

A further concern in relation to the market-based system is the possible power imbalance between a (potentially large) service provider organisation and a person with disability, and the absence of specific, purpose built protective or balancing elements present in other market-based systems. For example, in the labour market, the power imbalance between a large employer organisation and an employee is generally balanced through labour unions and collective action. In the NDIS, a strong advocacy sector and community visitors programs may act to correct this power imbalance and ensure human rights are upheld, however as discussed below, the future of these mechanisms is unclear following full roll-out of the NDIS.

In addition, ‘weak’ or ‘thin’ markets can also undermine human rights principles, such as choice and control and lead to poor quality service delivery.²⁷ For example, in rural and remote areas where there may not be many alternative service providers, people with disability have limited choice in relation to service providers, and may not report violence experienced through their services for fear that they will lose access to services in proximity to where they live. This issue will be monitored by the NDIS Registrar.²⁸

State and territory human rights laws

A further issue for consideration is the impact of the Safeguarding Framework on the legislative human rights frameworks that currently exist in Victoria and the Australian Capital Territory.²⁹ During consultations stakeholders expressed concerns that the transition from a state and territory to a federal disability system may result in a reduction in rights protection for participants in these jurisdictions.

The Victorian *Charter of Human Rights and Responsibilities* ‘creates a positive obligation on public authorities to act consistently with human rights when carrying out their duties.’³⁰ Some of the relevant rights enshrined in the Charter and the Australian Capital Territory *Human Rights Act* include: the right to life,³¹ protection from torture and cruel, inhuman or degrading treatment,³² freedom of expression,³³ protection of families and children,³⁴ cultural rights,³⁵ taking part in public life,³⁶ right to liberty and security of person,³⁷ and humane treatment when deprived of liberty.³⁸

There is currently no certainty as to whether these legislatively enshrined protections will be maintained in Victoria and the Australian Capital Territory for people with disability receiving supports under the NDIS. For example, it is not clear whether NDIS providers would be covered by the jurisdiction of the Victorian *Charter*.³⁹ In its submission to the NDIS National Consultation on the Quality and Safeguarding Framework, the Victorian Equal Opportunity and Human Rights Commission stated that the ‘NDIS Quality and Safeguarding Framework must identify and set out at law human rights standards for both rights holders and duty bearers’.⁴⁰ This does not appear to have taken place.

Overall, the Commission acknowledges that the Commonwealth Government has taken a human rights-based approach throughout the Safeguarding Framework, by developing a system that is both grounded in human rights principles, and engages human rights through its intended purpose and structure. However the challenges arise in relation to human rights is their implementation in practice. This is of particular importance given the market-based structure of the NDIS, and the potential of such a system to sideline the implementation of human rights.

Upholding the human rights of people with disability should be a priority in the practical implementation of the Safeguarding Framework. To give effect to the rights enshrined in the CRPD and other relevant human rights treaties to which Australia is a signatory,⁴¹ the focus must now be on the practical implementation of human rights throughout the Safeguarding Framework. Steps must be taken to ensure that the NDIS Commission, NDIS providers and workers all incorporate human rights into their everyday practice. Steps should also be taken to ensure that the transition to the Safeguarding Framework does not result in a downgrading of human rights protections in jurisdictions with specific human rights legislation.

Mainstream services and a human rights-based approach

Many of the mainstream service sectors engage human rights in their operations, such as the right to health and education enshrined in relevant international conventions.⁴²

However, contrary to the disability sector that adopts the social model of disability and attempts to take a human rights-based approach to quality, safeguarding and oversight, some mainstream services generally approach disability from a medical rather than social model, and consequently may not incorporate the rights of people with disability enshrined in the CRPD into their operation.

For example, the *Behind Closed Doors: Preventing Violence Neglect and Abuse against West Australians with Disability* report notes that disability care needs are often not provided in mainstream health service contexts,⁴³ and that the standard of care provided can breach people's human rights.⁴⁴ Stakeholders consulted for this project expressed concerns that the failure to take a human rights-based approach also extends to quality, safeguarding and oversight practices.

During consultations some stakeholders expressed the view that staff in the health sector lacked adequate or appropriate training on a holistic approach to disability. This means that health practitioners are often not well informed or well equipped to respond to the multifaceted needs of people with disability. Staff understanding of disability and the resulting culture of an institution, make a significant difference to the prevention of, and response to, incidents of violence, abuse and neglect in institutional settings.

The Commission has not undertaken a detailed review of mainstream services, however consultations indicated that further work is required in the mainstream sectors to ensure that all quality, safeguarding and oversight mechanisms effectively uphold the rights of people with disability.

3.3 A connected and integrated system

People with disability access a range of services within and outside the disability sector. The NDIS eligibility criteria mean that there are many Australians with disability who will not receive NDIS funded supports. Irrespective of NDIS eligibility, people with disability will always need to access mainstream services in their everyday lives, or may have additional needs that are not met under the NDIS.

Disability and mainstream services each have their own quality, safeguarding and oversight mechanisms. To ensure that these mechanisms operate effectively for people with disability who are accessing multiple service sectors, quality, safeguarding and oversight should be integrated across the sectors. If mechanisms in the different sectors are siloed, it may be more difficult for people with disability to access the relevant mechanisms and receive the support they require.

The NDIS Commission creates an integrated quality, safeguarding and oversight system covering all NDIS participants. Having the NDIS Complaints Commissioner, Senior Practitioner, and NDIS Registrar within the one body will facilitate information sharing and coordination when a response to a complaint or incident report is required, enabling the NDIS Commission to take a 'no wrong door' approach to complaints across the disability sector relating to the NDIS.⁴⁵ These functions of the NDIS Commission are discussed in more detail in Appendix 6.

In addition, in recognition of the need to integrate with quality, safeguarding and oversight systems in the mainstream sectors, the NDIS Commission has the power to share information with external agencies where it is deemed to be in the public interest to do so.⁴⁶

The *NDIS Commission Act* Statement of Compatibility with Human Rights states that the purpose of these provisions is to enable the NDIS Commission to share information to facilitate thorough investigation of violence, abuse and neglect being perpetrated in the mainstreams sectors.⁴⁷

The NDIS Commission Rules and Guidelines set out factors that the NDIS Commissioner must take into account when determining whether the sharing of information is in the public interest or otherwise authorised.⁴⁸ With reference to violence, abuse and neglect, in determining whether the sharing of information is in the public interest, the NDIS Commissioner must consider whether the information relates to an individual's 'life, health or safety', and the ability of that individual to seek assistance themselves.⁴⁹ The NDIS Commission may share information where necessary:

- for enforcement of a criminal law or prevention of an action that will have significant adverse impact on an individual⁵⁰
- to assist a child welfare agency carry out its responsibility in relation to the safety and welfare of a child⁵¹
- to assist professional bodies to determine whether a person's conduct is appropriate in line with relevant rules and standards.⁵²

These mechanisms allow for the sharing of information to facilitate an effective response to violence, abuse and neglect in institutional settings. However, to be effective in practice they must be utilised by the NDIS Commission.

During consultations, stakeholders across all jurisdictions expressed the view that more needs to be done to achieve successful cooperation and integration.

A connected and integrated system during transition to the NDIS

The NDIS Commission will come into operation on 1 July 2018, a number of years after the roll-out of the NDIS began. As a result, the Commonwealth Government and states and territories have agreed that state and territory quality, safeguarding and oversight mechanisms continue to apply until full roll-out of the NDIS is reached in each jurisdiction.⁵³ Due to the staggered implementation of the NDIS, there will be overlap between the jurisdiction of the NDIS Commission, and pre-existing state and territory mechanisms in some jurisdictions. It is therefore critical that the different mechanisms work productively together to provide effective quality, safeguarding and oversight to people with disability.

During consultations conducted between February and April 2018, stakeholders reiterated that the interaction between the NDIA, the NDIS Commission, and state and territory quality, safeguarding and oversight mechanisms has not been made clear.

Uncertainty remained in relation to the jurisdiction of the NDIA, the specific role and responsibilities of the NDIS Commission, and how the different Commonwealth, state and territory mechanisms should work together in order to effectively provide quality, safeguarding and oversight for people with disability.

The Commission understands that negotiations between the Commonwealth and states and territories in relation to responsibility and accountability for services and related quality, safeguarding and oversight mechanisms at full roll-out is ongoing and unresolved in the public sphere.

However, research indicates that, during transition, more information needs to be provided by the Commonwealth to state and territory governments and entities in some jurisdictions about lines of responsibility and accountability during transition, and how to resolve complex issues that require cross-jurisdictional input.

Stakeholders said that uncertainty in relation to these issues can result in negative impacts on people with disability, who may, as a result, face delays in being able to access the relevant services and quality, safeguarding and oversight mechanisms. This has the potential to lead to particularly serious consequences in relation to instances of violence against people with disability in institutional settings. A delay in reporting violence or raising an issue of concern may mean that opportunities to prevent violence are missed, or that safeguarding and oversight mechanisms are unable to quickly restore a person's safety.⁵⁴

The roll-out of the NDIS and NDIS Commission is a significant government reform, and a degree of uncertainty as the necessary changes are worked through is to be expected. The Commission acknowledges that large-scale system reform takes time and involves many different stakeholders.

Where discussions between Commonwealth, state and territory governments in relation to roles and responsibilities are ongoing, there will be an associated delay in finalising the quality, safeguarding and oversight mechanisms that will be in place in the different jurisdictions. This will in turn delay clarification of how remaining state and territory mechanisms will work with the NDIS Commission.

The Commission acknowledges that since consultations for this project were completed, further work has been done towards clarifying some of these issues, including the issuance of new guidance material in relation to the operation of the NDIS Commission and Safeguarding Framework.

Perceptions of the Safeguarding Framework's capacity to foster cross-jurisdictional cooperation and facilitate effective quality, safeguarding and oversight for people with disability may be further strengthened as the NDIS Commission commences and more information about responsibility, accountability and approaches to cooperation and integration are finalised and communicated to relevant state and territory entities.

It is critical that during the process of transition, people with disability are not disadvantaged, and have continued access to timely and effective quality, safeguarding and oversight mechanisms. It is important that effective state and territory mechanisms continue to operate during transition. Increased communication and cooperation is also required from the Commonwealth and state and territory governments to ensure that relevant state and territory mechanisms clearly understand the new system and can operate effectively during the transition to the NDIS.

3.4 Independent oversight and monitoring

Independent oversight and monitoring is a critical feature of a system designed to prevent and address violence against people with disability in institutional settings. Independent oversight establishes additional checks and balances on service providers, ensuring service providers remain accountable by identifying and responding to instances of violence, abuse and neglect.

Effective independent oversight can be achieved through the establishment of independent complaint and reporting bodies that have oversight of a service system, and the operation of community visitors and advocacy programs.

NDIS Commission

The purpose of establishing the NDIS Commission is to provide independent and external oversight of the delivery of NDIS funded supports. It is an independent Commonwealth body that will regulate the NDIS market, and is autonomous from other government departments, including the Commonwealth Department of Social Services and the NDIA, as well as disability service provision.

The establishment of the NDIS Commission marks the first time that a single independent oversight body has had responsibility for disability sector-wide quality and safeguarding including all complaints, serious incident reporting, compliance monitoring, provider regulation, oversight of restrictive practices and their reduction and elimination over time, the coordination of national worker screening, and own motion investigative powers.⁵⁵

Prior to this, relevant functions have sat with a variety of different bodies, including state and territory government departments and Ombudsmen.

The establishment of the NDIS Commission as an external authority independent from the NDIA and service delivery is a crucial step to achieving the requisite independent oversight and monitoring. Given the NDIS Commission is yet to begin operations at the time of writing this report, the question as to its independence is considered in light of what is known about its proposed structure, composition and powers.

In submissions on the *NDIS Commission Bill*, stakeholders expressed concern in relation to the true independence of the NDIS Commission from the relevant Minister.⁵⁶ In particular, it was noted that section 181K(1) of the Bill (also incorporated in the *NDIS Commission Act*), states that ‘the Minister may, by legislative instrument, give directions to the NDIS Commissioner about the performance of his or her functions and the exercise of his or her powers’.

The Office of the Public Advocate in Victoria, in its submission regarding the *NDIS Commission Bill*, questioned the true independence between the NDIS Commissioner and the Minister.⁵⁷ It argued that ‘[t]he risk of interference would be lessened if the appointment of the Commissioner occurred through a more independent mechanism’,⁵⁸ and also suggested that the independence of the NDIS Commission would be strengthened if it reported annually to the Australian Parliament.⁵⁹

While the independence of the NDIS Commission has been raised as a potential issue of concern, it should be noted that the *NDIS Act* states that directions from the Minister must be of a general nature, and ‘must not relate to a particular individual or provider’ and ‘must not be inconsistent with this Act, the regulations or an instrument made under this Act’.⁶⁰ This could be argued to maintain the independence of the NDIS Commissioner in relation to dealing with particular complaints or issues of concern that are brought to its attention.

Community visitors

Community visitors provide a link between people in residential institutions, service providers, and the broader community and assist in identifying and preventing instances of violence, abuse and neglect.

Community visitor programs differ by jurisdiction in relation to their structure and governing frameworks, jurisdiction and visitation powers. Nonetheless, government and advocacy representatives consulted were overwhelmingly in favour of the continuation of community visitors programs. However, there is currently no provision in the Safeguarding Framework or the NDIS Commission to continue community visitors programs, or security of funding for state and territory-based community visitors programs.

Through the Disability Reform Council, the Commonwealth Government and states and territories will undertake an independent evaluation of community visitor schemes to inform decisions about the possible role of community visitors within the NDIS.

If community visitors are not incorporated into the work of the NDIS Commission, the responsibility of continuing these programs will lie with states and territories. In some jurisdictions, such as Victoria, the government has made a commitment to continue the program outside of the Safeguarding Framework. However, there is uncertainty in many jurisdictions surrounding the future of community visitors.

While deliberations in relation to the future of community visitors are ongoing, states and territories are considering how the programs might continue to operate in and with the NDIS at full scheme roll-out. Issues being worked through include whether state and territory-based community visitors schemes will have the legal authority to enter NDIS-funded service providers within their jurisdiction. A further issue is how a community visitors scheme should operate, given the move away from residential institutions through the NDIS to home-based disability service provision, and whether community visitors will be able to refer complaints to the NDIS Commission.

In its submission to the Senate Community Affairs Legislation Committee on the *NDIS Commission Bill 2017*, the Office of the Public Advocate in Victoria noted that community visitors have additionally played an important role during the transition period, and have been able to ‘observe and report on various issues experienced by residents of disability services who are NDIS participants’.⁶¹

In the event that community visitors programs are discontinued after the roll-out of the Safeguarding Framework, a critical feature of a robust independent oversight and monitoring system will be lost. This could significantly increase the risk of violence, abuse and neglect being perpetrated against people with disability in residential institutional settings. The powers of community visitors to conduct unannounced visits to institutions gives them an unparalleled ability to identify issues early, or act on their own concerns or the concerns of family, friends and carers of people with disability. Community visitors also facilitate communication with service providers and government organisations in relation to issues of concern.

Due to the particular vulnerabilities of some NDIS participants, specifically people with intellectual disability and other cognitive impairments, it may be difficult for people to self-advocate in instances of violence, abuse and neglect without the support of an independent oversight mechanism such as community visitors.

In the event that community visitor schemes are discontinued, or so drastically defunded that they become ineffectual, then the independent oversight that such schemes deliver will be significantly compromised after the roll-out of the Safeguarding Framework.

Overall, community visitor programs form a critical part of a robust independent monitoring and oversight system. Best practice community visitors are independent from service provision, have broad powers of operation and entry to institutional settings, have clear lines of reporting to governments, and are well resourced. The Commonwealth and state and territory governments should give serious consideration to the inclusion of community visitors in the Safeguarding Framework.

Independent individual advocacy

Independent individual advocacy ensures that people are able to effectively represent and advocate for their own rights, and participate meaningfully in the quality and safeguarding frameworks, particularly in complaints processes. They play a vital role in redressing any power imbalances that may be inherent in the system.

Recognition in the Safeguarding Framework

Individual advocacy sits outside of the NDIS Commission, yet plays a vital role in enabling people with disability to access its different mechanisms. It is therefore critical that the role of advocates is formally acknowledged and facilitated within the new system.

In submissions to the Community Affairs Legislation Committee on the *NDIS Commission Bill*, concerns were raised by a number of organisations arguing that the Bill had no express provisions supporting the formal function of independent advocacy.⁶²

The *NDIS Commission Act* now incorporates a number of express provisions that recognise the role of advocates, including a requirement that NDIS providers facilitate advocates to be involved in internal complaints processes where requested by a person with disability.⁶³ The *NDIS Commission Act* also provides that the NDIS Commissioner, in performing his or her functions, 'must acknowledge, recognise and respect the role of advocates (including independent advocates) in representing the interests of people with disability'.⁶⁴ The NDIS Commission Rules and Guidelines reflect these provisions and outline that providers and the NDIS Commission should facilitate access to independent advocates for people who wish to make a complaint.⁶⁵

Despite these express provisions, during the Commission's consultations some Commonwealth Government stakeholders expressed the view that the NDIS would reduce the need for individual advocates overall, and that there will be a degree of overlap between the Information, Linkages and Capacity Building Framework funded activities and current individual advocacy functions. Some Commonwealth Government stakeholders also stated that the capacity building activities provided under the Safeguarding Framework and ILC Framework will result in a reduced need for individual advocates as people with disability will build their capacity to self-advocate.

The degree to which the ILC Framework will provide services that will reduce the need for individual advocacy is unclear, as limited information is publicly available regarding coverage of the ILC Framework. In addition, the majority of ILC funding has yet to be distributed. Therefore, at the time of writing, the extent to which ILC activities will target violence, abuse and neglect against people with disability in institutional settings is unknown.

During consultations, disabled people's organisations and disability advocacy organisations expressed views that the roll-out of the NDIS has, in fact, resulted in a greater demand for individual advocates, with many people with disability requesting advocacy assistance for interacting with the NDIS itself. Advocacy stakeholders told the Commission that a large percentage of their resources is currently going towards work in relation to the NDIS, reducing their capacity to undertake advocacy work in relation to other issues.

Funding of individual advocacy

The Commonwealth National Disability Advocacy Program will continue with the roll-out of the Safeguarding Framework, however advocacy services may experience a reduction in state-based funding as a result of the transfer to a federal disability service system. Victoria and New South Wales have made commitments to continue state-funded advocacy services after full roll-out of the NDIS in those jurisdictions.⁶⁶ Most jurisdictions, however, are uncertain about the future of state-based funding for individual advocacy services, as state and territory funding for advocacy services has been included in the funding transferred to the Commonwealth for implementation of the NDIS.⁶⁷

The Commission welcomes the incorporation of specific legislative provisions in the *NDIS Act* and other relevant documentation, in response to concerns raised in submissions on the *NDIS Commission Bill* regarding the role of independent advocacy. However, this does not alleviate concerns that defunding or significantly reducing funding for individual advocacy services will create a practical gap in quality, safeguarding and oversight. A lack of individual advocacy services may result in people with disability being deprived of an advocate who is independent of service providers and the NDIA⁶⁸ to promote and protect their rights, and may limit people's ability to identify and raise issues of violence abuse and neglect, as well as meaningfully participate in any quality, safeguarding and oversight processes.

Systemic advocacy

Organisations that undertake systemic advocacy seek changes to legislation, systems, policy and service practices that impact upon the lives of many people with disability. The 2011 *Productivity Commission Inquiry Report into Disability Care and Support* noted that independent systemic advocacy will work to uncover system failures, agitate for systemic change, disseminate best practice principles to service providers, and promote public awareness of disability and particular groups such as particular groups such as women, children, LGBTI people, Aboriginal and Torres Strait Islander people, and people from CALD backgrounds.⁶⁹

There are a number of systemic advocacy mechanisms operating across the jurisdictions in both government and non-government sectors. These include independent statutory appointees such as the Public Advocate, which in many jurisdictions monitors systemic issues affecting people with disability and promotes their rights and interests,⁷⁰ and non-government disabled people's organisations, some of which are funded by the Commonwealth to undertake systemic advocacy work separate to their individual advocacy functions.⁷¹

The role of systemic advocates is recognised in the Safeguarding Framework as a preventative measure that plays an important role in identifying and addressing system-level issues of violence, neglect and abuse.⁷² These organisations sit outside of the Safeguarding Framework to ensure that they are able to maintain their independence as their role may involve challenging the NDIS.⁷³ However, steps need to be taken to ensure that systemic advocacy organisations are not side-lined as a result, and retain sufficient funding to do their work.

In relation to independent individual and systemic advocacy, the Productivity Commission has recommended that Australian, state and territory governments should continue to fund disability advocacy organisations: 'State and Territory Governments should fund disability advocacy to 2019-20 by an amount that at least matches the per capita contribution of disability advocacy funding announced by the Australian Government'.⁷⁴ The issue of funding for all systemic advocacy organisations should be monitored by both Commonwealth and state and territory governments.

Both independent individual and systemic advocacy play a critical role in ensuring independent oversight of institutional settings, and contribute significantly to preventing and addressing violence against people with disability in these contexts. Commonwealth, state and territory systems must take steps to ensure that independent individual and systemic advocacy organisations have the necessary powers and are adequately funded to undertake their work within the Safeguarding Framework.

Mainstream services and independent oversight

Independent oversight mechanisms ensure that service systems are transparent and accountable when issues of violence, abuse and neglect arise.

Consistent with views expressed regarding the disability sector, both government and advocacy stakeholders across the different services sectors in all jurisdictions overwhelmingly supported independent oversight of mainstream services. In particular, community visitor programs and independent advocates were viewed as critical in order to effectively prevent and address violence against people with disability in institutional settings within the mainstream service sectors, such as justice and health.

Stakeholders said that these services have limited funding, impacting their ability to provide effective support to people with disability in mainstream services.

Mainstream service sectors have not been designed specifically to cater to the needs of people with disability. They are therefore less likely to have the necessary systems in place to effectively communicate with and support people with disability, particularly those with complex support needs. Community visitors and individual advocates are therefore arguably just as or more important in this context.

On 21 December 2017, the Australian Government ratified OPCAT, which requires independent inspections of all places of detention in Australia. The Subcommittee on Prevention of Torture has interpreted OPCAT's scope broadly, noting that coverage of OPCAT extends to many places where people may be deprived of their liberty, including mainstream sectors like prisons, mental health and social care institutions.⁷⁵ It therefore may provide another independent oversight framework for identifying and combating violence and other forms of ill treatment in any setting where a person is deprived of their liberty, including in certain institutional settings in the disability and mainstream sectors.

3.5 Robust preventative and response mechanisms

Violence against people with disability in institutional settings is a complex and multifaceted issue. To effectively reduce violence against people with disability in institutional settings, quality, safeguarding and oversight systems must both address the underlying causes of violence, and take appropriate measures in response to instances of violence that occur.

The Safeguarding Framework takes a three-tiered approach to quality and safeguarding in relation to people with disability, disability service workers, and disability service providers, focusing on: education and capacity development; prevention; and correction. The three elements of the Framework are designed to work together to create a whole-of-system approach to quality and safeguarding that is 'mutually supporting and reinforcing',⁷⁶ so as to integrate and balance preventative and response mechanisms.

For example, the NDIS Complaints Commissioner is able to share information with the NDIS Registrar and worker screening units to inform a risk assessment for a prospective worker. Further to that, the serious incident framework provides that when notification of a reportable incident is received, the NDIS Complaints Commissioner will work with the provider to build capacity and prevent future incidents of the relevant behaviour.⁷⁷ These examples demonstrate a purported balance and integration of preventative and reactive mechanisms, in that while complaints are predominantly corrective, they also present an opportunity to improve practice and prevent future incidents of abuse.

The effectiveness of the preventative and response mechanisms of the Safeguarding Framework are analysed below.

Preventative measures under the Safeguarding Framework

Education and capacity building

The first approach taken by the Safeguarding Framework to the prevention of violence, abuse and neglect is education and capacity building of people with disability, workers and service providers. Knowledge and education empowers people with disability to increase their safety in institutional environments, through increased awareness of their rights and how to raise issues of concern.⁷⁸ The education and capacity building should focus on the rights of people with disability, what constitutes violence, required standards of service provision, and resource options when these standards are not met. This information should also be provided to the families and carers of people with disability, so that they can support the person with disability to identify and prevent violence, abuse and neglect where required.⁷⁹

The NDIS Commission will focus on development and education as well as compliance and monitoring, and will work with people with disability, NDIS providers and workers to improve their skills and knowledge.⁸⁰ The ILC Framework will also aim to build peoples' knowledge and confidence to raise issues of concern.⁸¹

Stakeholders expressed concern that, based on the progress of the roll-out to date, the Safeguarding Framework appears to focus more on the corrective and regulatory elements rather than educative and capacity-building aspect. There is limited information available in relation to the education and capacity-building functions of the NDIS Commission and how they will be carried out in practice. Uncertainty also exists in relation to the capacity-building and preventative activities which will be funded by the NDIA under the ILC Framework, as limited information has been made available about this to date, and the majority of ILC Framework funding has not been distributed.

With the limited information available as to how the education and capacity-building elements of the Safeguarding Framework will operate, a disconnect currently exists between what the Safeguarding Framework purports to do, and what government and non-government stakeholders currently understand. It is not clear as to whether the education and capacity building elements of the Safeguarding Framework to prevent violence against people with disability in institutional settings are adequate or effective.

It is important that these elements of the Safeguarding Framework are further developed and are a focus of the NDIS Commission. Changing community attitudes towards people with disability, reforming the culture within relevant institutional settings, and strengthening people with disability's awareness of their rights, is a critical element to reducing violence, abuse and neglect perpetrated against people with disability.

Worker screening, provider registration and restrictive practices

The NDIS Commission will also have responsibility for regulation of worker screening, provider registration and regulating the use of restrictive practices.

Worker screening: Worker screening plays an important role in preventing and reducing the risk of unsafe workers, volunteers and contractors being engaged to provide support to people with disability. State and territory worker screening ranges from criminal record checks by prospective employers, to risk-based worker screening and disability sector worker exclusion lists.⁸²

Under the Safeguarding Framework, the NDIS Registrar will have responsibility for a national NDIS worker screening system that will be implemented through worker screening units managed by states and territories.⁸³ This nationally consistent approach to worker screening will be applicable across jurisdictions and consider a broad range of factors that extend beyond criminal record checks including: current or pending charges; Apprehended Violence Orders; Child Protection Orders and child protection information; international police checks; and workplace misconduct, which comes to light through complaints and serious incident reporting.⁸⁴

People working with people with disability who will be subject to the screening process include those who have significant contact with people with disability as a part of their work or role, including, for example 'employees, agents, volunteers, contractors, and sub-contractors'.⁸⁵

A nationally consistent worker screening process that considers a broad range of factors is far more likely to prevent violence against people with disability in NDIS-funded institutional settings than the ad hoc worker screening that is currently undertaken. Research suggests that some jurisdictions will have to 'step up' to meet these more robust screening requirements.⁸⁶

However, the system outlined above will only apply to registered providers. This creates a risk as people with disability can choose to use their NDIS funding to contract non-registered providers in some circumstances.

Attempts have been made in the design of the Safeguarding Framework to manage these risks. For example, supports deemed to be 'high risk', such as restrictive practices and disability accommodation, can only be provided by registered providers. NDIS participants who choose to self-manage their funding will have the associated risks explained to them by the NDIA. In addition, unregistered providers will be subject to the NDIS Code of Conduct, bringing them within the NDIS Commission's complaint jurisdiction.

However, the system described above, as it will relate to workers, appears to come into operation mostly after behaviours of concern occur, shifting the focus to correction rather than prevention of behaviours such as violence, abuse and neglect. This potentially places people with disability at risk of being subject to these behaviours by unregistered providers. In addition, in order for corrective mechanisms such as complaints systems to operate effectively, a person with a disability must have the knowledge, capacity and resilience to raise a complaint. This is a known barrier to people with disability reporting instances of violence, abuse and neglect.

The effectiveness of the worker screening system, including the decision not to apply the worker screening mechanisms to unregistered providers, should be closely monitored to ensure that the system takes all necessary steps to limit the risk that people with disability will be subject to violence, abuse and neglect by NDIS workers.

Provider registration: Robust provider registration processes can prevent incidents of violence, abuse and neglect by ensuring that services are delivered in a safe environment, by well-trained service providers with internal systems in place to prevent and address these behaviours.

The Safeguarding Framework will establish a nationally-consistent provider registration scheme, overseen by the NDIS Registrar. As part of the scheme, all providers (registered and non-registered) will be required to comply with an NDIS Code of Conduct. Additional registration requirements will be placed on a provider based on a risk assessment of the supports they provide.⁸⁷

As identified with worker screening above, one potential issue of concern is that NDIS-funded supports may be sought from non-registered providers who also do not have to comply with the worker screening or reportable incidents schemes. In addition, low-risk providers face less stringent registration requirements, yet there is no guarantee that a low-risk support provider, for example a gardener or cleaner,⁸⁸ will not perpetrate violence against people with disability.

The effectiveness of the provider registration system as a mechanism to prevent violence against people with disability in institutional settings must be closely monitored during implementation of the Safeguarding Framework to ensure that the system takes all steps to reduce the risk that people with disability will be subject to violence, abuse and neglect by all NDIS providers.

Restrictive practices: 'Restrictive practices' is a term used to describe a number of behaviour management and/or treatment options often used on people with disability in institutional settings. Restrictive practices include seclusion, chemical restraint, mechanical restraint, physical restraint, psycho-social restraint, environmental restraints, and consequence driven practices.⁸⁹ These practices have the ability to significantly infringe the rights of people with disability,⁹⁰ and can also amount to a form of lawful violence against people with disability.⁹¹ Restrictive practices may 'constitute humiliation and punishment' and may result in 'deprivation of liberty, prevent freedom of movement, alter thought and thought processes, and deprive persons of their property and access to their children'.⁹² It is therefore important that the use of restrictive practices be eliminated wherever possible, and where they continue to be used they must be effectively regulated.

The NDIS Commission establishes the NDIS Senior Practitioner to oversee the regulation of restrictive practices nationally. In line with Australia's international obligations, the Safeguarding Framework aims to reduce, over time, the use of restrictive practices within the NDIS in the majority of cases. It aims to do this through creating frameworks through which service providers can understand and more effectively respond to a person with disability's needs.⁹³

Under the Safeguarding Framework, the NDIS Senior Practitioner will have responsibility for education and standard setting at a national level. However, state and territories will continue to set legislative requirements for the use and authorisation of restrictive practices.⁹⁴ Authorisation for the use of restrictive practices in a state and territory disability service provision context is provided in legislation and/or policy documents, and the level of protection provided varies greatly between the jurisdictions. Until reform is implemented at the state and territory level concerning the authorisation of restrictive practices, this inconsistency of protection will continue to exist for people with disability during transition, and after full roll-out of the NDIS. In addition, the gradual change model employed by the NDIS Commission towards the creation of nationally-consistent frameworks around the use of restrictive practices (outlined in Appendix 6), has caused uncertainty in states and territories in relation to the method for approval required for the use of restrictive practices, the approving entity, and who is responsible for acting in response to an inappropriate or unplanned use of a restrictive practice.

An additional concern expressed during consultations related to what national consistency will eventually look like in relation to the authorisation, use and follow-up of restrictive practices. In some jurisdictions such as Queensland, the use of restrictive practices is highly regulated with significant external oversight mechanisms in place.⁹⁵ A concern exists within some jurisdictions that the Safeguarding Framework may result in a downgrading of protections for people with disability in relation to the authorisation of restrictive practices.

The national consistency provided for by the behaviour support function of the NDIS Commission is a positive step in relation to the regulation of restrictive practices. The Safeguarding Framework and relevant documentation notes that, in line with Australia's human rights obligations, the system aims to reduce the use of restrictive practices over time. This must be the primary consideration under the Framework. Where restrictive practices are used, strict authorisation procedures should be in place, and their use continually monitored. In developing nationally-consistent approaches to authorisation, the Commonwealth, state and territory governments should base the new system on the jurisdictions which currently offer the most extensive protections to people with disability.

Response measures under the Safeguarding Framework

Complaints: The Safeguarding Framework will be the first time that a single independent oversight body has responsibility for complaints across the disability sector. The NDIS Complaints Commissioner will receive and respond to complaints, including complaints of violence, abuse and neglect committed by all NDIS providers.⁹⁶ The Safeguarding Framework also requires all NDIS providers to have internal complaints management systems.⁹⁷

The NDIS Commission's complaint process is set out in the NDIS Commission Rules and Guidelines.⁹⁸ They provide complaints powers to the NDIS Commissioner as the sole statutory appointee within the NDIS Commission. The NDIS Commissioner has broad powers to receive information in relation to a complaint.⁹⁹ Response options available to the NDIS Commissioner include: requiring the NDIS provider to undertake a resolution process in relation to the complaint, conducting a conciliation, requiring the NDIS provider to undertake remedial action or 'any other action the NDIS Commissioner considers appropriate in the circumstances'.¹⁰⁰ What is meant by 'remedial action' is not defined, nor is guidance provided in relation to what 'any other action' may constitute. Without this clarification it is difficult to assess whether the response options available are sufficient in relation to instances of violence, abuse and neglect.

The Safeguarding Framework policy documentation states that the NDIS Complaints Commissioner can refer allegations of provider misconduct to the NDIS Registrar for action. It goes on to state that the NDIS Registrar will have a range of powers which can be exercised, including: education and encouragement to improve practice, imposing additional reporting requirements on a provider, conciliation and dispute resolution, issuing of written warnings, imposition of a requirement to take certain action, suspension of registration, cancellation of registration, and referral to a court in regards to a civil or criminal penalty.¹⁰¹

Stakeholders expressed concern that the NDIS Commission can decide to refer a complaint back to the service provider for resolution. If improperly used, such a referral has the potential to significantly reduce the effectiveness of the complaints process and increase the risk that the person lodging the complaint will face reprisals and their safety will not be secured. The Commission notes that, under the NDIS Commission Rules and Guidelines, referring a complaint back to the provider is one action available to the NDIS Commissioner when considered to be appropriate.¹⁰² The NDIS Commission should consider the provision of further guidance, outlining that such an approach is not appropriate in relation to instances of violence, abuse and neglect.

Furthermore, concerns were raised by state and territory oversight bodies that the working details of a critical function of the NDIS Commission, such as the complaint mechanism, is not enshrined in legislation. The New South Wales Ombudsman and Victorian Office of the Public Advocate assert that the responsibilities of the NDIS Commission should be legislated in relation to complaints, and that it is not appropriate for these matters to be delegated to the NDIS Commission Rules and Guidelines.¹⁰³ As discussed above in relation to the incorporation of human rights into the actions of the NDIS Commission, there are both advantages and disadvantages to having the detail of the complaints mechanism included in the NDIS Commission Rules and Guidelines. Implementation of the complaints mechanisms should be monitored, to ensure that it is robust, and effectively prevents and provides redress for instances of violence, abuse and neglect.

Overall, the Commission welcomes the requirement that providers maintain internal complaints systems, and the mechanisms established within the NDIS Commission itself. Implementation of these mechanisms should be closely monitored during implementation to ensure their effectiveness.

Incident Reporting: Reportable incidents include instances of violence, abuse and neglect, and any unplanned or unauthorised uses of restrictive practices.

The NDIS Commission Rules and Guidelines require NDIS providers to establish an incident management reporting system, and report certain 'reportable incidents' to the NDIS Commission. The NDIS Commission then has power to take a variety of actions in response to reportable incidents as required.¹⁰⁴ Response options include referring the incident to another appropriate body, requiring the provider to undertake remedial action 'including remedial action to ensure the health, safety and wellbeing of persons with disability affected by the incident'; and undertaking an investigation.¹⁰⁵

Overall, the Commission welcomes the requirement that providers maintain incident-reporting systems, and the mechanisms established within the NDIS Commission itself. Some concern exists regarding the articulation of incident reporting requirements being delegated to the NDIS Commission Rules and Guidelines.¹⁰⁶ This is of particular importance because there are concerns that underreporting by providers is already an issue, so measures regarding incident reporting should be clearly articulated in a new system with new providers.¹⁰⁷ In addition, the incident reporting mechanisms do not apply to unregistered NDIS providers. People with disability who experience violence, abuse and neglect from unregistered providers will bear the responsibility of raising these issues with the NDIS Commission through the complaints process.

The success of the incident reporting mechanisms in identifying and addressing instances of violence, abuse and neglect should be monitored during implementation.

3.6 Accessibility

People with disability can face significant barriers when attempting to access quality, safeguarding and oversight mechanisms. Many of these barriers are increased for people with disability who have experienced, or who are vulnerable to experiencing, violence. To effectively prevent and address violence in institutional settings, a quality, safeguarding and oversight system must target these barriers and be accessible to people with disability.

The Safeguarding Framework is not yet operational at the time of writing. However, examination of the Safeguarding Framework's overarching policy documentation and the NDIS Commission Rules and Guidelines indicates that, in many respects, the Safeguarding Framework has been designed to be accessible for people with disability.

The Safeguarding Framework acknowledges that people with disability, particularly in the case of people who have experienced violence, abuse or neglect, can face significant barriers in accessing quality, safeguarding and oversight mechanisms.¹⁰⁸ It then sets out a variety of measures that the Safeguarding Framework will implement in an attempt to ensure its accessibility to people with disability.

For example, the capacity building aspects of the Safeguarding Framework aim to build the knowledge of people with disability of how to raise issues of concern and how to make complaints.¹⁰⁹ Information will be made available in different accessible formats, delivered through a variety of channels, and tailored to reach people who may not otherwise engage with the system.¹¹⁰

The Safeguarding Framework also attempts to establish a complaint system that is accessible and easy to navigate. The NDIS Commission Rules and Guidelines stipulate that NDIS providers must have easily accessible complaint management systems, and must provide accessible information to NDIS participants about how to complain to providers and the NDIS Commission.¹¹¹

The NDIS Commission has itself stated that it will take a ‘no wrong door’ approach to complaints,¹¹² assisting people with disability who approach the NDIS Commission to raise their concern appropriately within the NDIS Commission, or externally where required. As of 1 July 2018, the NDIS Commission will also be the primary complaints body within the specialist disability sector nationally. These factors have the potential to significantly simplify complaints in comparison to the different and fragmented systems that currently exist in the jurisdictions, making the Safeguarding Framework more accessible to people with disability.

In addition, the complaint mechanisms under the Safeguarding Framework attempt to address some of the other known barriers to people with disability making a complaint, by enabling families and carers, workers, and other people within the community to make complaints to ensure that people with disability are able to raise issues of concern where they may not want to do so themselves.¹¹³ Whistle-blower protections will also be put in place to protect people with disability, family members, friends, carers, and independent advocates raising a complaint.¹¹⁴

Intersectionality

One issue that is not at present addressed in detail in the Safeguarding Framework is intersectionality. The Safeguarding Framework policy documentation draws on the work of the *2015 Senate and Community Affairs Reference Committee report* and identifies certain groups of people who may be at greater risk of experiencing violence, abuse and neglect including: women, children, Aboriginal and Torres Strait Island people, and people from culturally and linguistically diverse backgrounds with a disability.¹¹⁵

The diversity of experience of people with disability where it relates to an increased risk of violence, abuse and neglect is broadly acknowledged.¹¹⁶ In outlining the preventative domain of the framework, the Safeguarding Framework acknowledges sector support for a ‘risk-based and person-centred approach’ that recognises ‘gendered violence and the heightened vulnerability of women and girls with disability to exploitation, violence and abuse’. It also refers to the need to ‘ensure access to culturally appropriate information and supports for Aboriginal and Torres Strait Islander and culturally and linguistically diverse populations’, and recognises the ‘particular needs of children with disability and their families.’¹¹⁷ The NDIS Commission Rules and Guidelines state that NDIS providers should provide culturally appropriate supports,¹¹⁸ and specific NDIS Commission Rules and Guidelines are set out for providing supports to children.¹¹⁹

However, the information provided in the Safeguarding Framework is otherwise very limited in relation to issues of intersectionality. There is also very limited information publicly available as to how intersectional experiences will be accounted for in the workings of the NDIS Commission, and whether it will do anything to target the particular needs of women, children, LGBTI people, Aboriginal and Torres Strait Islander people, and people from culturally and linguistically diverse backgrounds.

The Commission understands that new guidance is in development that may address this issue. For example, the currently available draft guidance on the NDIS Code of Conduct for providers and workers acknowledge the different backgrounds and characteristics of people with disability, and that these factors can affect how people interact with NDIS supports and services. NDIS providers and workers must consider these factors, and should discuss with people with disability their preferences regarding how supports are delivered, and provide inclusive and culturally appropriate services.¹²⁰

On its face, the Safeguarding Framework addresses many elements of an accessible system identified in Chapter 2. This is reflective of the fact that the Safeguarding Framework is a purpose-built, quality, safeguarding and oversight system specifically for people with disability. However, concerns exist in relation to how the particular needs of women, children, LGBTI people, Aboriginal and Torres Strait Islander people, and people from culturally and linguistically diverse backgrounds with disability will be implemented in practice. These groups may be at a greater risk of experiencing violence, abuse and neglect in institutional settings, and face additional barriers when attempting to access quality, safeguarding and oversight mechanisms. It is therefore critical that consideration is given to how to ensure that these groups can access quality, safeguarding and oversight systems provided by the NDIS Commission.

The Commission understands that the practicality of addressing these, and other issues, may be worked through once the NDIS Commission has commenced operation. It is suggested that these issues are monitored during the transition phase to ensure that the system is accessible in practice for all NDIS participants.

Mainstream services and accessibility

The NDIS will not provide direct services and support for all people with disability, and irrespective of NDIS eligibility, people with disability will always need to access mainstream services in their everyday lives, or may have additional needs that are not met under the NDIS.

The Commission's definition of mainstream services in this report encompasses a number of large service sectors who provide services to people with disability and the broader community.

The National Disability Strategy outlines the need for all mainstream services to be accessible to people with disability:

a key imperative is for the broader community and mainstream services and facilities that are part of ordinary Australian life to be available and fully accessible for people with disability.¹²¹

This view was reflected by some Commonwealth Government stakeholders during consultations, who stated that it is the responsibility of mainstream services sectors to ensure that they are accessible to people with disability, and that this responsibility should not fall on the disability sector.

The different aims and objectives of the mainstream service sectors mean that accessibility may be achieved in very different ways. However, there is a need for all mainstream services sectors to ensure that they are accessible, responsive to and inclusive of, people with disability. To be effective, mainstream mechanisms should have knowledge of disability issues and how to appropriately communicate and engage with people with disability, including people with disability who have experienced, or are at risk of experiencing, violence.

As in the disability sector, the barriers to accessibility arising in mainstream settings can be institutional or personal, or a combination of both. The Commission has not undertaken a comprehensive review of the accessibility of the relevant mechanisms in the mainstream sectors, however initial research indicates that these barriers are often increased when a person with disability is attempting to access a mainstream service system that is not designed to effectively communicate with and provide support to people with disability.¹²²

This was supported during consultations, with a number of stakeholders saying that many mainstream service providers have not established complaint-handling policies and procedures that are accessible to people with disability, culturally appropriate and able to be customised to the particular needs of the service recipient.

Stakeholders also expressed the view that a lack of identification of disability in some mainstream service sectors also contributes to their lack of accessibility. This can affect the quality, safeguarding and oversight frameworks that are present in the mainstream service sectors, as well as the level of support and assistance provided when people with disability attempt to utilise these mechanisms.

The consequence of a lack of accessible quality, safeguarding and oversight functions is that people with disability or their families fail, or delay, to report or complain about issues of concern, ultimately contributing to ineffectual institutional responses to prevent and address violence against people with disability in mainstream institutional settings.

The ILC Framework will go some way to addressing this, as it will undertake capacity-building work with mainstream services to increase their accessibility to people with disability.¹²³ Under the ILC Framework, local area coordinators will both work with mainstream services and with people with disability directly on how to access these services, including people who are not eligible for the NDIS.¹²⁴ However, the majority of the ILC Framework funding has not yet been distributed so it is unclear exactly what this capacity building work will entail.

It is likely that more work will need to be done towards implementation of the National Disability Strategy, and ensuring that mainstream services are accessible to people with disability. This will assist in ensuring that all people with disability, both within and outside of the NDIS, have access to effective quality, safeguarding and oversight mechanisms.

3.7 Continuous system improvement through data

For measures to prevent and address violence to function effectively, they must be based on comprehensive and nationally consistent data.

The NDIS Commission is the first national quality and safeguarding mechanism for disability service provision. Where data collection has been inconsistent and ad hoc across the different jurisdictions to date, the NDIS Commission has the potential to provide for the collection of nationally-consistent data in relation to instances of violence, abuse and neglect perpetrated in the context of NDIS-funded supports. This presents an opportunity to collect data that is based on uniform definitions, thereby enabling comparison across jurisdictions.¹²⁵

The broad reach of the NDIS Commission across the disability sector means that this has the potential to significantly improve the understanding of violence against people with disability in institutional settings in Australia as a whole, and enable the development of more effective interventions to prevent and address this critical problem. During consultations, Commonwealth Government stakeholders confirmed that the information gathered by the NDIS Commission is intended to be used to inform improvements and reforms within the sector.

The collection of nationally-consistent data by the NDIS Commission will provide for the creation of more meaningful benchmarks, enabling governments and the disability sector to monitor the instances of violence, abuse and neglect of people with disability in institutional settings, address this problem at a systemic level, and measure progress.

The NDIS Commissioner's core functions¹²⁶ include to 'engage in, promote and coordinate the sharing of information to achieve the objects of this Act'.¹²⁷ In relation to the NDIS Commission's complaint functions, behaviour support functions and registration and reportable incident functions, the *NDIS Commission Act* provides for the NDIS Commissioner to collect, correlate, analyse and disseminate information or data.¹²⁸

It is unclear at this time as to whether the data will be disaggregated by factors such as gender identity, sexual orientation, race and/or ethnic origin, age, type of disability, and place of residence to ensure that quality, safeguarding and oversight systems take into account the holistic experiences of people with disability.¹²⁹ There is also limited information available as to how and with whom this information or data will be shared.

In order to inform the development of targeted interventions to prevent and address violence across the different jurisdictions, data collected by the NDIS Commission should wherever possible be made publicly available to inform policy and service system reform. Furthermore, to ensure that interventions to prevent and address violence can be effectively targeted, data must be disaggregated to fully encapsulate people with disability's intersectional experiences of violence.

Mainstream services and data collection

As within the disability sector, inconsistent definitions are used to describe incidents of violence, abuse and neglect across the mainstream service sectors.

The Commission heard that this has two potentially negative consequences for people with disability. First, the lack of consistent data between the sectors makes identification and comparison of rates of violence, abuse and neglect within mainstreams services difficult. It also increases the difficulty in information sharing between sectors to plan effective systems to prevent and address violence in institutional settings.

Secondly, the different terminology used for forms of violence, abuse and neglect impact the level of recourse available to someone who is subject to these behaviours. This leads to different levels of recourse being available to people with disability subject to the same behaviours across the service sectors.

The ability of the NDIS Commission data to facilitate national cooperation would also be enhanced if the definitions used to collect and collate data were developed in consultation with other relevant service sectors, such as health and mental health, so that data can be meaningfully analysed across the relevant service delivery sectors.

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- 123 Australian Government Department of Social Services 'NDIS Quality and Safeguarding Framework' (Policy Framework Report, 9 December 2016) 25. At <https://www.dss.gov.au/disability-and-carers/programs-services/for-people-with-disability/ndis-quality-and-safeguarding-framework-0> (viewed 15 February 2018).
- 124 Australian Government Department of Social Services 'NDIS Quality and Safeguarding Framework' (Policy Framework Report, 9 December 2016) 26. At <https://www.dss.gov.au/disability-and-carers/programs-services/for-people-with-disability/ndis-quality-and-safeguarding-framework-0> (viewed 15 February 2018).
- 125 OPCAT also establishes a system of oversight undertaken by independent international and national bodies to places where people are deprived of their liberty. In its report the Australian Human Rights Commission has proposed that the Australian Government commit to the development of national standards as part of this system that govern how detention inspections should take place, including collection and analysis of data related to detention to provide for good practice and national consistency. Australian Human Rights Commission, 'OPCAT in Australia, Consultation Paper: Stage 2' (Consultation paper, June 2018), 15. At <https://www.humanrights.gov.au/our-work/rights-and-freedoms/publications/opcat-australia-consultation-paper-stage-2> (viewed 22 June 2018).
- 126 *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and other Measures) Act 2017* (Cth) s 181E. At <https://www.legislation.gov.au/Details/C2017A00131> (viewed 13 June 2018).
- 127 *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and other Measures) Act 2017* (Cth) s 181E(h). At <https://www.legislation.gov.au/Details/C2017A00131> (viewed 13 June 2018).
- 128 *National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and other Measures) Act 2017* (Cth) s 181F(g), s 181G(e), s 181H(d) (ii). At <https://www.legislation.gov.au/Details/C2017A00131> (viewed 13 June 2018).
- 129 Community Affairs References Committee, The Australian Senate, *Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability* (2015) 282. At https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Community_Affairs/Violence_abuse_neglect (viewed 13 June 2018).

Chapter 4 – Recommendations

4.1 Summary

The Commission has made four recommendations, which focus on the incorporation of the identified essential elements of an effective quality, safeguarding and oversight system in the disability and mainstream sectors, and issues in relation to transition to the NDIS.

The Commission's recommendations are based on an independent assessment of the quality, safeguarding and oversight mechanisms that exist to prevent and address violence against people with disability in institutional settings. In making its recommendations, the Commission has drawn on evidence gathered in national consultations undertaken with government, disabled people's organisations, disability advocacy organisations, industry and academia, supplemented by independent research.

4.2 Recommendations

The Commission acknowledges that the Commonwealth and state and territory governments have worked collaboratively for a number of years to develop and implement the NDIS, and are continuing to do so during transition.

Consultations conducted for this project highlighted that there are a number of concerns relating to quality, safeguarding and oversight mechanisms in transition as well as the information available to key stakeholders about the operation of the new quality, safeguarding and oversight landscape in practice.

Recommendation 1: Quality, safeguarding and oversight mechanisms in the disability and mainstream sectors should incorporate and implement the essential elements of a quality, safeguarding and oversight system identified in Chapter 2 of this report.

The six essential elements of an effective quality, safeguarding and oversight system identified through this research are:

1. a human rights-based approach
2. a connected and integrated system
3. independent oversight and monitoring
4. robust prevention and response elements
5. accessibility for people with disability
6. continuous systems improvement through data.

These elements should be implemented to ensure that these systems uphold the rights of people with disability, and effectively prevent and address violence against people with disability in institutional settings.

The NDIS Commission and Safeguarding Framework

The Commission acknowledges that many of the identified essential elements are incorporated into the Safeguarding Framework through legislation and policy. However, uncertainty remains as to the degree to which the Safeguarding Framework and NDIS Commission will incorporate these principles throughout implementation.

The Safeguarding Framework clearly enumerates human rights as one of its foundational principles, and human rights are incorporated into the design of all the elements of the Safeguarding Framework and NDIS Commission. The Commission recommends that human rights remains a priority in practical implementation.

Similarly, the establishment of the NDIS Commission as an external authority independent from the NDIA and service delivery is a crucial step to achieving the essential element of independent oversight and monitoring, as well as creating a connected and integrated system. To supplement the NDIS Commission and ensure independent oversight and monitoring in both disability and mainstream sectors, it is recommended that the Commonwealth and state and territory governments consider the inclusion of community visitors in the Safeguarding Framework, and take steps to ensure that independent individual and systemic advocacy organisations have adequate powers and funding.

The elements of the Safeguarding Framework are designed to work together to create a whole-of-system approach to quality and safeguarding that integrates and balances preventative and response mechanisms. However this report has identified elements of both the preventative and response mechanisms that should be strengthened and monitored throughout implementation.

Examination of the Safeguarding Framework's overarching policy documentation and the NDIS Commission Rules and Guidelines indicates that in many respects, the Safeguarding Framework has been designed to be accessible for people with disability. It is recommended that the NDIS Commission ensure that intersectionality is prioritised during implementation to ensure that the NDIS Commission is accessible to all NDIS participants.

Finally, the NDIS Commission has the potential to collect nationally-consistent data to ensure continuous system improvement. It is recommended that collated data be made publicly available where possible to inform policy and service system reform, and be disaggregated to fully encapsulate intersectional experiences of violence against people with disability in institutional settings.

State and territory 'providers of last resort'

While the focus of the analysis in this report is on the NDIS quality, safeguarding and oversight mechanisms, some jurisdictions have confirmed that if required they will maintain state and territory service provision and become 'providers of last resort' for people with disability who are not eligible for the NDIS. Many states and territories are still confirming whether, and to what extent, this will be required. However, where this is the case, state and territory governments should ensure that the associated quality, safeguarding and oversight they provide upholds the rights of people with disability, and effectively prevents and addresses violence in institutional settings. It is recommended that state and territory quality, safeguarding and oversight systems ensure that they implement the essential elements of a quality, safeguarding and oversight system identified in Chapter 2 of this report.

Mainstream service sectors

In addition, quality, safeguarding and oversight mechanisms in the mainstream service sectors should implement the essential elements identified in Chapter 2, and ensure that they are adequate, accessible, and responsive to and inclusive of people with disability.

Mainstream services are designed to cater to everyone, and as such are often based on different service models than disability-specific services. Mainstream services may not be designed specifically to accommodate the multifaceted needs of people with disability, nor are they generally co-designed with people with disability.

The NDIS will not provide direct services to all people with disability, and irrespective of NDIS eligibility, people with disability will need to access mainstream services in their everyday lives, or may have additional needs that are not met under the NDIS.

The Commission acknowledges that mainstream services and associated quality, safeguarding and oversight mechanisms are complex, broad and significantly varied. This report does not examine mainstream services in detail, and as such this issue will warrant further investigation once the NDIS reaches full roll-out.

Recommendation 2: The Commonwealth and state and territory governments should increase collaborative efforts to ensure that relevant quality, safeguarding and oversight mechanisms can operate effectively during transition to the NDIS in order to ensure that people with disability have continuing access to effective quality, safeguarding and oversight mechanisms during transition.

The disability sector is currently undergoing significant reform and is a landscape that is constantly shifting in accordance with the staggered roll-out of the NDIS. The Commission acknowledges that a plethora of issues will inevitably arise in circumstances where a fragmented state and territory system transitions to a national Commonwealth system.

The roll-out of the NDIS and the Safeguarding Framework is necessarily complex. Commonwealth, state and territory governments have worked together over a number of years to develop a national system, which is complex and will take time to finalise. However, this does not mean that this process should have a negative effect on people with disability and their engagement with quality, safeguarding and oversight mechanisms.

The Commission heard in consultations that whilst relevant stakeholders anticipated ‘teething’ issues, the transition to date has not been smooth. The majority of quality, safeguarding and oversight bodies consulted did not know how the Safeguarding Framework would individually affect their functions, and highlighted significant uncertainty regarding lines of accountability and responsibility during the transition to the NDIS. Some of the organisations that were unclear about their functions during consultations in April 2018 are in states that are due to reach full roll-out on 1 July 2018.

This uncertainty has the potential to impact the operation of state and territory quality, safeguarding and oversight mechanisms and people with disability’s ability to access them, potentially leading to people with disability being delayed or denied access to corrective mechanisms.

It is essential that states and territories do not withdraw relevant quality, safeguarding and oversight mechanisms until the NDIS is fully rolled out in their jurisdiction. In some instances this approach may lead to duplication of relevant mechanisms in the short term. However, a time-limited duplication is preferable to people with disability not having access to relevant systems.

As noted above, many of the issues discussed above are the subject of live negotiations between the Commonwealth and states and territories. However it is the Commission’s view that a significant level of uncertainty in relation to how these key issues will be resolved during transition remains.

Until ambiguities are resolved, state and territory governments will not know what quality, safeguarding and oversight mechanisms they need to maintain to ensure that effective protections are available to prevent and address violence for all people with disability in institutional settings. In addition, these entities will not have clarity about how they should operate during the transition period.

Recommendation 3: The Commonwealth Government and the NDIS Commission should increase publicly available information about the operation of current and future quality, safeguarding and oversight mechanisms, and effectively disseminate this information to key stakeholders.

Given the number of complex issues and questions that arise in the process of transitioning a fragmented state and territory quality, safeguarding and oversight system to a national system, it is imperative that communication and information is available and regularly disseminated amongst relevant stakeholders.

In the consultations conducted by the Commission it became apparent that a disconnect exists between how Commonwealth Government departments and agencies, state and territory governments and oversight entities, and the disability advocacy sector, understand the operation of the Safeguarding Framework. Stakeholders also reported uncertainty regarding the interface between the federal and state and territory systems.

This can be attributed to the lack of disseminated information regarding the Safeguarding Framework and the NDIS Commission. This lack of information exacerbates uncertainty and misgivings felt by some stakeholders regarding the transition to a federal quality, safeguarding and oversight system, and limits the advocacy sector's ability to support people with disability who need to access these mechanisms.

The perceptions held by some state and territory stakeholders regarding the Safeguarding Framework's capacity to deliver on human rights principles and foster cross-jurisdictional cooperation differed greatly from that of the Commonwealth Government. These concerns could be alleviated by increased communications from the Commonwealth Government about the operation of the NDIS and NDIS Commission, and how these mechanisms will work with state and territory quality, safeguarding and oversight entities where required. The Commission acknowledges that this work has already commenced with the release of the NDIS Commission Rules and Guidelines in May 2018, and recommends that the amount of publicly available information on transition issues be further increased with the commencement of the NDIS Commission.

Recommendation 4: The NDIS Commission should work with the Commission within 18 months of the release of this report to identify the extent to which the essential elements identified in Chapter 2 have been implemented through the Safeguarding Framework and NDIS Commission, and whether recommendations 2 and 3 have been addressed.

The Commission acknowledges that the Commonwealth and state and territory governments have undertaken a significant amount of work to develop and implement the NDIS, the NDIS Commission and the Safeguarding Framework, and that the work is ongoing until the NDIS is fully rolled out in 2020.

Many of the identified essential elements of a quality, safeguarding and oversight system are incorporated into the Safeguarding Framework. However, uncertainty remains as to the degree to which these elements will be implemented in practice. The NDIS Commission should prioritise implementation of these elements in its operations.

Consultations conducted by the Commission highlighted a significant amount of uncertainty among some Commonwealth Government agencies, state and territory government and the disability advocacy sector in relation to the operation of the NDIS Commission and its impact on state and territory quality, safeguarding and oversight mechanisms. These uncertainties can be attributed firstly to the ongoing nature of the transition – some issues are simply yet to be decided on and relevant policies and guidance documents have not been finalised. Secondly, they can also be attributed to a lack of communication of publicly available information on key decisions or policies. Key stakeholders consistently reported a lack of knowledge relating to the future of quality, safeguarding and oversight mechanisms across all jurisdictions.

To ensure that these issues of transition do not become issues of permanence, it is recommended that within 18 months of the release of this report, the NDIS Commission work collaboratively with the Commission to identify whether the key findings and recommendations made in this report have been addressed and where further work is required.



Appendices

Appendix 1 – Glossary and acronyms

The Commission was guided by the following key definitions when undertaking the project.

Key terms

Term	Description
Community/ Official Visitor programs	Programs that visit and monitor residential disability, mental health, child protection facilities, and/or correctional facilities. These programs run in most jurisdictions but vary significantly.
Disability	<p>The Commission draws on the characterisation of disability in the <i>Convention on the Rights of Persons with Disability</i>, which views disability as:</p> <p style="padding-left: 40px;">the result of the interaction between people living with impairments and an environment filled with physical, attitudinal, communication and social barriers. It therefore carries the implication that the physical, attitudinal, communication and social environment must change to enable people living with impairments to participate in society on an equal basis with others.¹</p> <p>The Commission also draws on the protections and definitions provided in the <i>Disability Discrimination Act 1992</i> (Cth).</p>
Disability Advocacy Organisations	Organisations that advocate for and promote the rights of people with disability.
Disabled People's Organisations	Organisations for people with disability that are led by people with disability.
Individual advocacy	Services that represent the rights and interests of people with disability.
Information, Linkages and Capacity Building (ILC) Framework	A component of the NDIS that connects people with disability, their family and carer with disability, community and mainstream supports by providing information, linkages and referrals.
Institutional settings	<p>Settings where people receive a disability service or support. Broadly, these include: residential institutions; boarding houses; group homes; workplaces; respite care services; day centres; recreation programs; mental health facilities; hostels; supported accommodation; prisons; out-of-home care; in-home care provided by a service provider; hospitals; juvenile justice facilities; disability services; education institutions; and aged care facilities.</p> <p>For the purposes of this project, institutional settings do not include disability supports or assistance provided by a family member.</p>
Mainstream Services	Government services provided to the general community. These services include health, mental health, education, justice, child protection and aged care.
National Disability Insurance Agency (NDIA)	The NDIA is the Commonwealth Government agency that administers the NDIS.
National Disability Insurance Scheme (NDIS)	A social insurance model of disability service provision funding whereby eligible ² people with disability receive funding on an individual basis to access disability supports. The NDIS is administered by the NDIA.
NDIS Quality and Safeguarding Framework (Safeguarding Framework)	The NDIS Quality and Safeguarding Framework outlines a national system of quality and safeguarding that will apply to all NDIS to promote safety and reduce the risk of harm for participants of the NDIS.

Term	Description
NDIS Quality and Safeguards Commission (NDIS Commission)	The NDIS Commission is an independent Commonwealth body that is responsible for implementing the Safeguarding Framework and overseeing the delivery of services under the NDIS.
<i>National Disability Insurance Scheme Act 2013</i> (Cth) (NDIS Act)	The legislation establishing the NDIS.
<i>National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act (2017)</i> (Cth) (NDIS Commission Act)	The legislation establishing the NDIS Quality and Safeguards Commission.
The NDIS Quality and Safeguards Commission Rules, Explanatory Statements and NDIS (Quality Indicators) Guidelines (NDIS Commission Rules and Guidelines)	Legislative instruments made under the <i>National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Act 2017</i> (Cth). <i>National Disability Insurance Scheme (Code of Conduct) Rules 2018</i> [F2018L00629] <i>National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018</i> [F2018L00631] <i>National Disability Insurance Scheme (Quality Indicators) Guidelines 2018 (Notifiable Instrument)</i> [F2018N00041] <i>National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018</i> [F2018L00632] <i>National Disability Insurance Scheme (Specialist Disability Accommodation Conditions) Rules 2018</i> [F2018L00627] <i>National Disability Insurance Scheme Amendment (Specialist Disability Accommodation – Participating Jurisdictions) Rule 2018</i> [F2018L00626] <i>National Disability Insurance Scheme NDIS (Quality and Safeguards Commission and Other Measures) Transitional Rules 2018</i> [F2018L00630] <i>National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018</i> [F2018L00633] <i>National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018</i> [F2018L00634] <i>National Disability Insurance Scheme (Provider Definition) Rules 2018</i> [F2018L00628] <i>National Disability Insurance Scheme (Protection and Disclosure of Information – Commissioner) Rules 2018</i> [F2018L00635]
Provider of last resort	State and territory governments that maintain disability service delivery for people who are not eligible for the NDIS.
Restrictive practices	Authorised, disability specific interventions that restrict the rights and freedoms of a person with disability.
Systemic advocacy	A form of advocacy where government and/ or non-government organisations work with people with disability, the disability sector and government organisations to change laws, policies and social norms that are harmful to people with disability.
Violence	Violence is considered broadly to include: physical and sexual violence and abuse; physical neglect; emotional abuse and neglect; manipulation; restrictive practices; forced medical treatments and interventions; humiliation and harassment; financial abuse; violations of privacy; passive neglect; and wilful deprivation.

Acronyms

AHRC	Australian Human Rights Commission
AHPRA	Australian Health Practitioner Regulation Agency
CALD	Culturally and linguistically diverse
CAT	<i>Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment</i>
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination against Women</i>
CERD	<i>International Convention on the Elimination of All Forms of Racial Discrimination</i>
CRC	<i>Convention on the Rights of the Child</i>
CRPD	<i>Convention on the Rights of Persons with Disabilities</i>
ICCPR	<i>International Covenant on Civil and Political Rights</i>
ICESCR	<i>International Covenant on Economic, Social and Cultural Rights</i>
ILC	Information, Linkages and Capacity Building
LGBTI	Lesbian, gay, bisexual, transgender and intersex
NDAP	National Disability Advocacy Program
NDIA	National Disability Insurance Agency
NDIS	National Disability Insurance Scheme
NDS	National Disability Strategy
NHRI	National Human Rights Institution
OPCAT	<i>Optional Protocol to the Convention Against Torture</i>
UN	United Nations
UNDRIP	<i>United Nations Declaration on the Rights of Indigenous Peoples</i>

Appendix 1: Endnotes

- 1 People with Disability Australia, *The Social Model of Disability* (2017). At <http://www.pwd.org.au/student-section/the-social-model-of-disability.html> (viewed 13 June 2018).
- 2 The eligibility criteria are discussed on page 23.

Appendix 2 – Literature review

Introduction

For the purposes of this project, the Commission reviewed literature relating to the nature and prevalence of violence against people with disability as well as the issue of violence, abuse and neglect in institutional settings and the experiences of people with disability. State, territory and federal government agencies have also conducted reviews and evaluations of quality, safeguarding and oversight mechanisms on a state, territory and federal level. In very recent years, the Commonwealth Department of Social Services, the NDIA and other federal agencies have released information and reports specifically relating to the NDIS and the NDIS Safeguarding Framework.

The literature review highlights that there has been a large interest in recent years amongst academics, disabled people's organisations and disability advocacy organisations, disability services providers, and government organisations in contributing to the conversation around violence against people with disability in institutional settings.

The type of information that is most lacking in the public arena is formal quantitative data sets that give statistical insight into the experience of violence against people with disability in institutional settings.

Literature and data on violence against people with disability

There is limited data available on the issue of violence against people with disability in Australia. The Australian Bureau of Statistics has data sets publicly available that outline the number of people with disability in Australia,¹ what percentage of those people have a 'profound or severe limitation',² and the types of disability people have.³ However, the ABS has not released data on issues of violence against people with disability. Furthermore, because people with disability face barriers to reporting, it is generally accepted that reporting data does not account for the actual experiences of violence of people with disability.⁴

Despite the lack of publicly available data, the issue of violence against people with disability has been explored and recognised by the disability sector, disability advocates, and academic researchers as an urgent issue that requires immediate attention. This has been highlighted in a number of significant papers and reports published over the last decade that are highly relevant to this project. To address the data issues outlined above, these reports tend to rely on quantitative research, consultations and interviews with people with disability, staff members, carers, family members and friends.

Significant reports that relate broadly to the issue of violence against people with disability include: the National Disability Services (NDS) report, ***Zero Tolerance – Speaking up about safety: Perspective of people with disability on personal safety at home, in the community and in disability services*** (2014–2016),⁵ and Samantha Connor and Ben Keely's report, ***Behind Closed Doors: Preventing Violence, Neglect and Abuse against West Australian's with Disability*** (2015).⁶

The NDS *Zero Tolerance* report and the *Behind Closed Doors* report were both developed through consultations with people with disability. The concerns expressed by people with disability in consultations are important in contributing to the broader community's understanding of the experience of violence for people with disability and in giving people with disability an empowering voice in relation to issues of violence affecting them.

Zero Tolerance outlines the findings from a national initiative to consult with a broad range of people with disability around ways to prevent and address violence against people with disability by promoting personal safety in their lives.⁷ Common themes contributing to violence highlighted in the report include access to individual level safeguards including family and friends, the importance of listening to people with disability in creating healthy service cultures, and the power imbalance between service staff and people with disability.⁸

Behind Closed Doors also explores the power dynamics at play when people with disability experience violence, abuse and neglect, particularly in Western Australian institutional settings.⁹ The issue of segregation and isolation in institutional settings contributing to a violent environment is one of the main findings in the report.¹⁰ Other findings include people with disability experiencing difficulty communicating and identifying abuse, toxic staff culture in some institutions, and mainstream services being unable to accommodate and support people with disability.¹¹

Noting the particular intersection of gender and disability in relation to violence, there are a number of reports that focus on issues of violence as it relates to women with disability. Perhaps the most significant work being: Women with Disability Australia, *Stop the Violence: Report of the Proceedings and Outcomes National Symposium on Violence Against Women and Girls with Disabilities* (2013);¹² Delanie Woodlock et al, *Voices Against Violence – Paper One: Summary Report and Recommendations* (2014),¹³ Carolyn Frohmader et al, *Preventing Violence against Women and Girls with Disabilities: integrating a Human Rights Perspective* (2015),¹⁴ ANROWS, *Women, disability and violence: Barriers to accessing justice: Final Report* (2018).¹⁵ Also noting the intersection of childhood and disability and its relationship to violence, the report by Sally Robinson et al, *Preventing abuse and promoting personal safety in young people with disability* (2017)¹⁶ is a significant contribution to understanding violence against children and young people with disability in Australia.

The *Stop the Violence* report describes the events and outcomes of a National Symposium on Violence Against Women and Girls with Disabilities, part of the Stop the Violence project funded by the Commonwealth Department of Social Services and implemented by Women with Disabilities Australia,¹⁷ potentially the first of its kind in Australia.¹⁸ Issues highlighted in the discussions that are relevant to this project include: women with disability experience higher rates and multiple forms of violence;¹⁹ there are further issues that arise for women with disability whose experience intersects with their race, culture, age or other factors;²⁰ and the lack of data collection on violence against women with disability, particularly in indigenous communities.²¹ Of further relevance is the report's discussion of the experience of women of violence in particular institutional settings, like prisons and residential care facilities.²² Outcome areas of the symposium include information, education and capacity building;²³ legislation, national agreement and policy framework reform;²⁴ evidence gathering;²⁵ and utilising the lived experience and expertise of women with disability.²⁶

The *Voices Against Violence* report explores the nature of violence against women with disability in Victoria.²⁷ Findings include that women with disability experience high levels of family and sexual violence, experience gender-based and disability-based violence, experience a wide range of violence from many perpetrators in a variety of settings, and the intersection of disability and gender-based violence increases the risk of violence for woman and girls.²⁸ *Preventing Violence against Women and Girls* offers a detailed account of the intersection between gender and disability, how this affects women and girls in Australia in relation to their experience of violence, and how these issues have largely been ignored in Australian policy frameworks and discourse on the topic of violence against women.²⁹ *Women, disability and violence: Barriers to accessing justice* reports findings from consultations with women with disability who had experienced violence and barriers to accessing justice. The report's findings relating to preventing and addressing violence and barriers to justice include listening to and respecting women with disability, ensuring women with disability have economic and housing security, empowering women through legal capacity, cross-sectoral knowledge and capacity building and breaking down siloes between sectors.³⁰

Preventing abuse and promoting personal safety in young people with disability, acknowledges the breadth of research in relation to violence against people with disability over the past decade and contributes to the sector by filling a gap in relation to understanding the experiences of children and young people with disability.³¹ The report draws on consultations with children and young people with disability to distinguish what it means for them to be safe.³² Findings relating to young people with disability's experience of staying safe include: young people often minimise the risk of physical harm by excluding themselves from the community, young people experience emotional and psychological harm and have issues forming meaningful relationships, young people do not always have their access needs met, and young people want to be empowered to use their own strategies for staying safe.³³

Overall, issues relating to violence against people with disability, women with disability, and children with disability have been subject to extensive, focused research in recent years. The Commission notes that the issue of violence against Aboriginal and Torres Strait Islander people with disability and people with disability who come from culturally and linguistically diverse (CALD) backgrounds has not been subjected to the same academic scrutiny. This issue is of great concern to disabled people's organisations and disability advocacy organisations and is consistently cited in submissions to government inquiries on the topic.

Previous reports looking into the issue of violence, abuse and neglect in institutional settings and the experiences of people with disability

There have been a number of significant reports conducted on a state, territory and federal level on the topic of violence, abuse and neglect in institutional settings and the experiences of people with disability that are highly relevant to the Commission's project.

In 2015, the Senate Community Affairs References Committee released its report on its ***Inquiry into Violence, abuse and neglect against people with disability in institutional and residential settings, including the gender and age related dimensions, and the particular situation of Aboriginal and Torres Strait Islander people with disability, and culturally and linguistically diverse people with disability.***³⁴

The inquiry received 161 submissions from government organisations, disabled people's organisations and disability advocacy organisations, disability service providers and individuals.³⁵ The report consolidates these submissions with work previously done relating to violence against people with disability. The resulting report provides an overview of aspects of disability service provision and oversight across all jurisdictions in relation to the experience of violence of people with disability interfacing with those institutions. The report outlines: the legal frameworks that apply to people with disability experiencing violence;³⁶ the lived experience of violence, abuse and neglect;³⁷ issues concerning disability specific interventions;³⁸ reporting and investigating;³⁹ access to justice issues;⁴⁰ the role of disability advocacy;⁴¹ risk factors and causes of violence;⁴² and specific concerns around the NDIS.⁴³ Of further relevance to this research are the Senate's headline recommendations, which include the establishment of a national disability complaints mechanism and national workforce and workplace regulations.⁴⁴

Similarly, the 2016 Victorian Senate Family and Community Development Committee's ***Inquiry into abuse in disability services*** report looks into people with disability's experience of abuse in disability services and evaluates the oversight systems in place to prevent and address violence in those contexts.⁴⁵ It also addresses the significant changes to the disability oversight landscape to come with the roll-out of the NDIS. The report has further relevance to this project in its recommendations which include: changes to reporting requirements and mechanisms, and the development of reliable data on violence against people with disability in institutions.⁴⁶

The 2015 Victorian Ombudsman inquiry into ***Reporting and investigation of allegations of abuse in the disability sector*** is divided into two phases.⁴⁷ The report focuses on the adequacy of reporting and investigating processes regarding allegations of violence against people with disability across the disability sector in Victoria.⁴⁸ Phase 1 looks into the effectiveness of statutory oversight mechanisms that review incidents and reports on bad incident management. Phase 2 examines the process of incident reporting and management in further detail.⁴⁹ The result is a comprehensive examination of a complex system of mechanisms, how those mechanisms perform, work together and relate to one another, and a series of recommendations looking forward.⁵⁰ Relevant to this project are the recommendations from Phase 1 that the fragmented Victorian system of oversight be changed to promote consistency, mandatory reporting and a single point of oversight accountability; that independent advocacy be fully funded; that the NDIS be used as an opportunity to strengthen, rethink and build on the Victorian system.⁵¹ Of further relevance are the Phase 2 conclusions that the incident reporting system 'failed at every level', that the disability sector harboured a culture of fear, the process for reporting is confusing, and restates the finding from Phase 1 that advocacy services should be better funded.⁵²

The 2016 Royal Commission into Institutional Responses to Child Sexual Abuse funded a subsidiary project looking specifically at ***Disability and child sexual abuse in institutional contexts.***⁵³ The report looks into the specific issues facing children with disability in relation to the experience of sexual abuse in institutional contexts and recognises that children with disability are likely to be at a heightened risk of sexual abuse in the institutional contexts they might encounter.⁵⁴ The report outlines understandings of disability broadly, sexual abuse risk factors for children with disability in institutions, and key factors in preventing sexual abuse against children with disability in institutions. The key messages from the report relevant to this project include: recognising and realising the rights of people with disability; collecting data on the prevalence of sexual abuse against people with disability; employing evidence informed approaches to prevention; and incorporating disability awareness into mainstream services that deal with children.⁵⁵

The 2014 Australian Law Reform Commission report ***Equality, Capacity and Disability in Commonwealth Laws*** is an inquiry into the issue of supported decision making for people with disability in Australia, with a focus on ensuring that people with disability have equal rights to make decisions in relation to their own life.⁵⁶ This report is relevant to the NDIS and aligned with this project in that it promotes a social model of disability and moves away from a medical or charitable model.⁵⁷ In relation to the NDIS and this project, the report also recommends that a national decision-making model, incorporating elements of human rights, safeguards and supported decision making, be applied to the NDIS.⁵⁸

The 2017 Australian Law Reform Commission report ***Elder Abuse – A National Legal Response*** explores the issue of elder abuse in Australia.⁵⁹ The report defines elder abuse, its risk factors and its relationship to family and institutional violence.⁶⁰ Relevant to this project, the report discusses safeguards within the aged care context and proposes methods of enhancing those safeguards.⁶¹

The 2018 Human Rights Watch report ***“I Needed Help, Instead I Was Punished” Abuse and Neglect of Prisoners with Disabilities in Australia*** examines the experiences of people with disability in prisons in Western Australia and Queensland, particularly in relation to violence, abuse and neglect in correctional institutions.⁶² The report is highly relevant to this project in that it outlines the types of abuse that prisoners with disability are subjected to in prisons, including prison-specific violence like inhumane use of solitary confinement. It is of further relevance in its recommendations that: state and territory governments should ensure that there is independent oversight of decisions affecting and complaints made by prisoners with disability; and ensure that prisoners are properly screened for disability before entering a correctional facility.⁶³

The 2017 ***Royal Commission into the Protection and Detention of Children in the Northern Territory***⁶⁴ is divided into six volumes. The report outlines the Royal Commission’s inquiry into the systems of youth justice and protection in the Northern Territory and examines systemic failures that the inquiry revealed.⁶⁵ Of specific relevance to this project are the experiences of children with disability in care and detention. Such issues include: the high rates of disability in some areas of the Northern Territory and the impact of disability on systems;⁶⁶ the relationship between socio-economic status, health and disability;⁶⁷ mental health issues amongst young people;⁶⁸ and the under-identification of disability such as Foetal Alcohol Spectrum Disorder.⁶⁹ The Royal Commission also made relevant recommendations that youth justice officers demonstrate an understanding of disability.⁷⁰

Overall, these reports provide valuable insight into the experience of violence for people with disability in a variety of institutional contexts. As many of these reports involved a process of receiving submissions and engaging in consultations with the disability sector and people with disability, they hold a significant amount of sector knowledge.

Reviews, evaluations and reports on quality, safeguarding and oversight mechanisms (more broadly)

In most jurisdictions, various government agencies and oversight bodies have released reports evaluating the quality, safeguarding and oversight mechanisms at a state, territory and federal level. These reports outline the types of issues present across mainstream health, mental health, aged care, education and justice; and also the pre-NDIS disability service sector.

The Commission’s report ***Equal before the Law: towards disability justice strategies*** (2014),⁷¹ examines and evaluates the extent to which people with disability enjoy equality within the Australian legal system.⁷² This work is relevant to the current project in that it explores system failings that create situations where people with disability may be at risk of violence and recommends that each Australian jurisdiction develop an holistic, overarching response to the issues.⁷³

The Queensland Office of the Public Advocate has completed a number of reports within its systemic advocacy functions that review quality, safeguarding and oversight systems in the Queensland disability service provision context. Perhaps the most significant of these include: ***Upholding the right to life and health: A review of the deaths in care of people with disability in Queensland*** (2016);⁷⁴ ***People with intellectual disability or cognitive impairment residing long-term in health care facilities: Addressing the barriers to deinstitutionalisation*** (2013);⁷⁵ ***Decision-making support and Queensland’s guardianship system*** (2016);⁷⁶ and ***Inquiry into the use of electronic monitoring at disability accommodation sites in Queensland*** (2014).⁷⁷

The *right to life and health* report reviews the deaths of 73 people with disability who died while receiving care in Queensland between 2009 and 2014.⁷⁸ This report is relevant to the Commission’s project in that it identifies risk factors and vulnerabilities of people with disability in relation to deaths in care. It relates the finding that both mainstream health services and disability-specific services require reform to gain the capacity to better address the health and disability needs of people in care.⁷⁹ It points out that, with the introduction of the NDIS, there must be deliberate strategies in place to address to prevent the deaths of people with disability in care.⁸⁰ Of particular relevance to this report is the finding that health care and disability service provision in Queensland needs to be better coordinated and integrated, and that health care needs to be more accessible to people with disability.⁸¹

Barriers to deinstitutionalisation examines the deinstitutionalisation of people with intellectual disability or cognitive impairment who reside in long-stay health care facilities in Queensland.⁸² This report is significant in its consideration of how people with disability are institutionalised with a mainstream health context. The report makes recommendations that there should be better datasets relating to these people and that their needs should be considered in the context of the NDIS.⁸³

Decision-making support and Queensland’s guardianship system provides an evaluation of Queensland’s guardianship system and the causal relationship between complicated health, disability and aged care systems and the consequent pressure placed on the guardianship system in Queensland.⁸⁴ It is relevant for this project in that it exemplifies the impact of complex social service systems on the efficacy and accessibility of quality, safeguarding and oversight mechanisms.

The *electronic monitoring inquiry* report examines the use of electronic monitoring of people with disability at disability accommodation sites in Queensland.⁸⁵ It looks at: balancing the interests of enabling service provider staff to keep people with disability safe in their care, with upholding the rights of people with disability to privacy.⁸⁶ This is relevant to the project in terms of promoting quality, safeguarding and oversight systems that enhance the human rights of people with disability.

The New South Wales Ombudsman has published the following relevant reports: ***Joint Protocol to reduce the contact of people with disability in supported accommodation with the criminal justice system*** (2017);⁸⁷ and ***Strengthening the oversight of workplace child abuse allegations: A Special report to Parliament*** (2016).⁸⁸

The *Joint Protocol* was formulated by the New South Wales Ombudsman to address the issue of overrepresentation of people with disability in the criminal justice system.⁸⁹ It is of significant interest in the context of the project because it outlines a formal structure for cross-sectoral and cross-jurisdictional cooperation in reducing the contact of people with disability in support accommodation settings with criminal justice.⁹⁰ The *Special Report* describes the New South Wales system of reportable incidents, albeit in relation to child abuse reporting, and evaluates the aspects of an effective system of reporting.⁹¹

In Victoria, the Victorian Equal Opportunity and Human Rights Commission has also reported on Victorian mechanisms. These include ***Held Back: the experiences of students with disabilities in Victorian schools*** (2012),⁹² and ***Beyond Doubt: the experiences of people with disabilities reporting crime – Summary report*** (2014).⁹³ In addition, the Victorian Mental Health Complaints Commission produced ***The right to be safe: Ensuring Sexual Safety in Acute Mental Health Inpatient units: sexual safety project report*** (2018).⁹⁴

The *Held Back* report examines the issues within the Victorian education system that are denying people with disability a good education.⁹⁵ The report identifies systemic and school level barriers to a good education for people with disability and presents recommendations for fostering inclusive and accessible learning environments.⁹⁶ The report also makes some relevant recommendations concerning the regulation of the use of restrictive practices in Victorian schools including: moving the oversight of restrictive practices in schools to the office of the Senior Practitioner in the Department of Health and Human Services so that oversight is independent of the Department of Education;⁹⁷ and bringing independence and data collection principles into the complaints handling process.⁹⁸

The *Beyond Doubt* report evaluates the issues faced by people with disability in accessing the Victorian justice system.⁹⁹ Relevant recommendations include: a range of measures to make the justice system more accessible to people with disability;¹⁰⁰ cross-sectoral cooperation between the Department of Justice and other government agencies to properly evaluate trends and data;¹⁰¹ and the implementation of stricter worker screening measures.¹⁰²

The Mental Health Complaint Commission's *sexual safety project* report takes a close look at the issue of sexual safety in acute mental health inpatient treatment facilities in Victoria.¹⁰³ This report is of interest for the Commission's project in that it makes a targeted evaluation of a specific type of violence in a specific institutional setting. Of further interest in relation to this project is the overarching recommendation that the Department of Health and Human Services develop a comprehensive sexual safety strategy that reflects the principles of human rights; the prevention of violence; trauma informed care, and supported decision making; understanding diversity; and utilising the lived experience of people who have accessed such facilities and experienced sexual violence.¹⁰⁴

In South Australia, the South Australian Social Inclusion Board has produced the ***Strong Voices: A Blueprint to Enhance Life and Claim the rights of People with Disability in South Australia (2012–2020)*** report (2011).¹⁰⁵ The report outlines a long-term plan for reforming how people with disability, their family and carers are supported in the South Australian service provision context. Recommendations that are relevant to this project include: various practical initiatives around creating an accessible and inclusive community;¹⁰⁶ broadening the mandate of complaints handling bodies;¹⁰⁷ and establishing a community visitors scheme.¹⁰⁸

The Commissioner for Children and Young People Western Australia has produced the ***Oversight of services for children and young people in WA*** (2017) report.¹⁰⁹ This report is highly relevant to the Commission's project in that it maps, examines and evaluates the independent oversight of services provided to children and young people in Western Australia.¹¹⁰ Relevant recommendations to this project include the recommendation that 'a robust comprehensive system of oversight for all children and young people with disability be established' including independent advocacy, monitoring of policy and the practical application of policy, and monitoring outcomes.¹¹¹

Overall, there is a large and growing body of evidence produced by government bodies and oversight agencies that review, examine and evaluate the efficacy of quality, safeguarding and oversight systems across the different jurisdictions.

Information relevant to the NDIS and the Safeguarding Framework

The most significant documents relating to the NDIS and the Safeguarding Framework for this project include discussion papers, reports and frameworks created by the Commonwealth Department of Social Services: the **NDIS Quality and Safeguarding Framework** (2016),¹¹² **NDIS Code of Conduct Discussion Paper** (2017)¹¹³ and the **Consultation report on the National Disability Insurance Scheme Quality and Safeguarding Framework** (2015).¹¹⁴

The Productivity Commission has also released a number of reports at different stages of the development of the NDIS: the **Disability Care and Support inquiry** report (volumes 1 and 2) (2011);¹¹⁵ and the **National Disability Insurance Scheme (NDIS) Costs** report (2017).¹¹⁶

The National Disability Insurance Agency released the **NDIS Information, Linkages and Capacity Building Framework** (2016).¹¹⁷ The Senate Community Affairs Legislation Committee report on the **National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 [Provisions]** (2017),¹¹⁸ and the Commonwealth Ombudsman **Administration of reviews under the National Disability Insurance Scheme Act 2013 report** (2018)¹¹⁹ were also highly relevant to this project.

The Safeguarding Framework is an extremely important document for the context of this project and has been described at length in Appendix 5. The document is significant in that it sets out the quality, safeguarding and oversight system that will be rolled out with the NDIS. It is the subject of some analysis in this project report.

The Commonwealth Department of Social Services' *Consultation Report on the NDIS Quality and Safeguarding Framework* sets out the findings of the Department of Social Services' 2015 consultations on the development of NDIS quality and safeguarding.¹²⁰ This consultation report is highly relevant to the Commission's project because it highlights sector concerns about what should be included in an NDIS Safeguarding Framework. The consultations highlighted a number of overarching considerations for the framework that are relevant for this project including: incorporating a human rights framework;¹²¹ integrating a risk based and person-centred approach;¹²² information accessibility;¹²³ advocacy;¹²⁴ and building mainstream service capacity.¹²⁵ The report also outlines the preferred options, for various quality, safeguarding and oversight mechanisms including provider registration; worker screening; complaints handling and oversight; self-managed supports; and restrictive practices.¹²⁶

The Commonwealth Department of Social Services *NDIS Code of Conduct Discussion Paper* outlines the role of the NDIS Code of Conduct within the Safeguarding Framework.¹²⁷ This document is important in the context of the Commission's project because it represents one of the Safeguarding Framework's primary engagements with human rights.¹²⁸ The Code of Conduct Rules were registered on 18 May 2018.

The Productivity Commission's 2011 *Disability Care and Support inquiry* report highlights key issues with the state and territory systems for providing disability support services in the pre-NDIS environment and makes the case for whole system reform and the establishment of a National Disability Insurance Scheme. Key problems identified with the system include that the system: is inequitable, underfunded and fragmented; lacks early intervention; lacks clear responsibilities; disempowers people with disability and devalues families and carers; and has poor information management mechanisms.¹²⁹ Volume 1 of the report also discusses the role of the community;¹³⁰ issues about decision-making;¹³¹ governance of the NDIS;¹³² and how to make sure the delivery of service supports is accessible for people with disability.¹³³ Volume 2 outlines relevant issues relating to disability within the Indigenous community;¹³⁴ data collection issues;¹³⁵ and workforce issues.¹³⁶ The report makes a series of recommendations that are relevant to this project including: ensuring that 'individuals do not fall 'between the cracks' of health, mental health and aged care sectors';¹³⁷ supporting 'consumer decision making';¹³⁸ that governments address barriers to service delivery in the NDIS for Indigenous people with a disability;¹³⁹ and the establishment of robust data systems.¹⁴⁰

The Productivity Commission's 2017 *NDIS Costs* report reviews NDIS costs and looks at the sustainability of costs associated with the scheme alongside the impact of the scheme on people with disability and the broader community.¹⁴¹ The report describes how the scheme is tracking;¹⁴² the economics and benefits of the scheme;¹⁴³ broadening the eligibility criteria;¹⁴⁴ how the scheme interfaces with mainstream supports;¹⁴⁵ provider and workforce readiness;¹⁴⁶ scheme governance;¹⁴⁷ and issues concerning data and evidence building.¹⁴⁸ Key recommendations of relevance to this project include: increasing funding for ILC;¹⁴⁹ clarifying the role of support coordinators to participants and the community;¹⁵⁰ ensuring accessible information about providers and participant satisfaction with those providers;¹⁵¹ the Australian, state and territory governments should continue to fund disability advocacy organisations to 2019–2020;¹⁵² the Safeguarding Framework should be examined as part of the five year review in 2023;¹⁵³ and the Australian Government should commit to fund the Australian Bureau of Statistics Survey of Disability, Ageing and Carers so that it can be conducted on an ongoing basis every three years.¹⁵⁴

The NDIS Information, Linkages and Capacity Building Framework is a significant policy document, developed by the NDIA. It describes the secondary function of the NDIA, which is to implement the ILC Framework by providing funding grants to prospective ILC service providers. The paper outlines: the functions of the ILC framework;¹⁵⁵ who will have access to the ILC Framework;¹⁵⁶ the five streams of the ILC Framework;¹⁵⁷ and implementation principles and considerations for the NDIA.¹⁵⁸

The *Senate report on the NDIS Quality and Safeguards Commission Bill* explores key issues identified in submissions made to the Senate Community Affairs Legislation Committee in relation to the proposed Bill.¹⁵⁹ This report is highly relevant to the Commission's project in that it outlines issues with the Bill (now the *NDIS Commission Act*) as perceived by key disability organisations in Australia. Concerns of interest highlighted in the report include that the law delegates significant matters to secondary legislation, rules, and standards, rather than including them in the primary legislation.¹⁶⁰ Furthermore, submitters expressed concern that significant documents such as the NDIS Commission Rules and Guidelines, Practice Standards and Code of Conduct, were omitted from the Bill.¹⁶¹ There were also concerns expressed regarding: the independence of the Complaints Commissioner,¹⁶² provider registration,¹⁶³ worker screening,¹⁶⁴ independent advocacy,¹⁶⁵ and restrictive practices.¹⁶⁶

The Commonwealth Ombudsman's *Administration of reviews* report outlines and evaluates the complaints received by the Office of the Commonwealth Ombudsman between July 2016 and January 2018 in relation to the NDIA's administration of reviews under the *NDIS Act*.¹⁶⁷ The report utilises information gathered from complaints made to the Commonwealth Ombudsman about the NDIA. The report is targeted and direct in its observations that the NDIA is experiencing issues of delays in completing reviews and is not always communicating effectively with participants.¹⁶⁸ This is relevant to the Commission's project in that the report is in and of itself an example of independent oversight at work. It is also an example of government agencies working together; in this case to improve the system by which people with disability can access their right of review within the NDIS.¹⁶⁹

This collection of papers, reports, reviews and inquiries are highly significant documents in the context of this project. They reflect the development of government thinking brought about by a series of consultation processes on the topic of quality, safeguarding and oversight in the NDIS.

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- 3 Australian Bureau of Statistics, *Disability, Ageing and Carers, Australia: Summary of Findings, 2015* (18 October 2016). At <http://www.abs.gov.au/ausstats/abs@.nsf/0/C258C88A7AA5A87ECA2568A9001393E8?OpenDocument> (viewed 13 June 2018).
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- 10 Samantha Connor and Ben Keely, 'Behind Closed Doors Preventing Violence, Neglect and Abuse against West Australian's with Disability' (Report, People with Disabilities WA and Developmental Disability WA, 2015) 8. At <http://www.inclusionwa.org.au/blog/behind-closed-doors-preventing-violence-neglect-and-abuse-against-west-australians-with-disability> (viewed 13 June 2018).
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Appendix 3 – Members of Expert Reference Group

Expert Reference Group

The Expert Reference Group for this project consisted of representatives from the following organisations:

Organisation	Representative
National Ethnic Disability Alliance	Dwayne Cranfield (Chief Executive Officer)
Women with Disabilities Australia	Carolyn Frohmader (Executive Director)
Children and Young People with Disability Australia	Stephanie Gotlib (Chief Executive Officer)
First Peoples Disability Network Australia	Damian Griffis (Chief Executive Officer)
People with Disability Australia	Therese Sands (Co-Chief Executive Officer)
Mental Health Australia	Frank Quinlan (Chief Executive Officer)
Southern Cross University	Associate Professor Sally Robinson
National Disability Services	Gordon Duff (General Manager – Sector Development and Research)
Commonwealth Department of Social Services	Bruce Smith (Branch Manager – NDIS Market Reform Group)

Appendix 4 – Mapping of existing quality, safeguarding and oversight functions

Please note that the contents included in this section are based on publicly available information and information gathered from consultations in April 2018.

Furthermore, the mechanisms included in these tables are specific to the provision of specialist disability services. Similar mechanisms that are relevant for mainstream services — such as health, mental health, aged care, education, child protection, and justice discussed in Chapter 1 — are not included in these tables.

Table 1 – Complaints

This table maps complaints mechanisms that people with disability can access to make a complaint of violence, abuse and neglect.

Juris	Mechanism	Functions/ Powers	Transition	Impact with roll-out of NDIS
Cth	Commonwealth Department of Social Services (DSS)	People with disability can raise a complaint for internal review that relates to concerns about services or decisions of DSS or a DSS-funded service provider. ¹	The organisation will retain jurisdiction during transition to the NDIS.	None.
Cth	Commonwealth Ombudsman	People with disability can make a complaint in relation to concerns about Commonwealth Government departments and agencies to an external oversight body. ²	The organisation will retain jurisdiction during transition to the NDIS.	Gained oversight of NDIA and NDIS Commission.
Cth	NDIS Quality and Safeguards Commission	People with disability will be able to raise complaints to an independent Commonwealth body established to provide oversight of the NDIS and implement the NDIS Quality and Safeguarding Framework. ³	The NDIS Commission will be established in early 2018, and is expected to commence operations in each state and territory by 1 July 2020. ⁴	N/A – NDIS Commission created by <i>The National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017</i> . ⁵
Cth	National Disability Insurance Agency (NDIA)	People with disability can raise a complaint about the actions of the agency for internal review by the agency. ⁶	N/A	N/A
Cth	Australian Human Rights Commission	People can raise complaints relating to allegations of discrimination under the <i>Disability Discrimination Act 1992</i> (Cth). ⁷	The organisation will retain jurisdiction during transition to the NDIS.	None.

Juris	Mechanism	Functions/ Powers	Transition	Impact with roll-out of NDIS
Cth	National Disability Abuse and Neglect Hotline	DSS administers a national hotline service designed to enable the reporting of abuse and neglect of people with disability in Commonwealth, state and territory funded disability services. This service facilitates appropriate referrals. ⁸	Unknown.	Unknown.
Cth	Complaints Resolution and Referral Service (CRRS)	DSS administers this complaints resolution and referral service for people with disability who use Disability Employment Services (DES), Australian Disability Enterprises (ADE) and/or Disability Advocacy Services. ⁹	Unknown.	DES will not fall within the jurisdiction of the NDIS Commission. ADE will fall within jurisdiction of the NDIS Commission.
NSW	The Department of Family & Community Services (FACS)	People with disability can raise a complaint for internal review that relates to social housing, child protection, assisted boarding houses and privacy. ¹⁰	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, complaint jurisdiction will move to the NDIS Commission.
NSW	NSW Ombudsman	People with disability can raise a complaint concerning NSW State government departments. ¹¹ The Ombudsman also investigates incidents of abuse or neglect of people in disability-supported accommodation, monitor service providers and has a death review function. ¹²	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, the Ombudsman will not have oversight of disability services.
NSW	Anti-Discrimination Board (ADB)	People with disability can utilise the complaint handling, investigation and conciliation functions of the ADB if they have a complaint regarding discrimination. ¹³	The organisation will retain jurisdiction during transition to the NDIS.	None.
VIC	Department of Health and Human Services (DHHS)	People with disability can raise a complaint for internal review that relates to any service provided, contracted or funded by the department. ¹⁴	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, complaint jurisdiction will move to the NDIS Commission.

Juris	Mechanism	Functions/ Powers	Transition	Impact with roll-out of NDIS
VIC	Victorian Ombudsman	People with disability can raise a complaint concerning administrative actions taken in Victorian Government departments, public statutory authorities and by officers of municipal councils. ¹⁵	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, the Ombudsman will not have oversight of disability services.
VIC	Disability Services Commissioner (DSC)	People with disability can raise a complaint concerning Victorian disability service providers. The complaint handling process involves assessments, conciliation and investigations. ¹⁶	The organisation will retain jurisdiction during transition to the NDIS. ¹⁷	Will not have oversight of disability services except for those provided by the Victorian Government as a provider of last resort
VIC	Victorian Equal Opportunity and Human Rights Commission	People with disability can raise a complaint concerning discrimination, sexual harassment, victimisation and racial or religious vilification. ¹⁸	The organisation will retain jurisdiction during transition to the NDIS.	None.
QLD	Department of Communities, Disability Services and Seniors	People with disability can raise a complaint for internal review that relates to the department's products, service or staff. ¹⁹	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, complaint jurisdiction will move to the NDIS Commission.
QLD	Office of the Queensland Ombudsman	People with disability can raise a complaint about the actions and decisions of state government departments and agencies, local councils and public universities. ²⁰	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, the Ombudsman will not have oversight of disability services.
QLD	Office of the Public Guardian (OPG)	People with disability can report abuse, violence and neglect to the OPG. The OPG also has a complaint handling and investigative function. ²¹	The organisation will retain jurisdiction during transition to the NDIS.	Unknown.
QLD	Anti-Discrimination Commission Queensland	People with disability can raise complaints under the Queensland <i>Anti-Discrimination Act 1991</i> . ²²	The organisation will retain jurisdiction during transition to the NDIS.	None.

Juris	Mechanism	Functions/ Powers	Transition	Impact with roll-out of NDIS
WA	Department of Communities – Disability Services	People with disability can raise a complaint for internal review that relates to a service provided by the department. ²³	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, complaint jurisdiction will move to the NDIS Commission.
WA	Ombudsman	People with disability can raise complaints about actions and decisions of public agencies to an external oversight body. ²⁴	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, the Ombudsman will not have oversight of disability services.
WA	Health and Disability Services Complaints Office (HaDSCO)	People with disability can raise complaints in relation to health, disability and mental health services in Western Australia and the Indian Ocean Territories. ²⁵	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, HaDSCO will not have oversight of disability services.
WA	Equal Opportunity Commission	People with disability can raise a complaint if they allege unlawful discrimination under the <i>Equal Opportunity Act (WA)</i> . ²⁶	The organisation will retain jurisdiction during transition to the NDIS.	None.
SA	Department of Human Services – Disability SA (DHS)	People with disability can raise a complaint for internal review that relates to a service provided by Disability SA. ²⁷	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, complaint jurisdiction will move to the NDIS Commission.
SA	Ombudsman	People with disability can raise a complaint about action and decisions of public agencies with an external oversight body. ²⁸	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, the Ombudsman will not have oversight of disability services.
SA	Health and Community Services Complaints Commission (HCSCC)	People with disability can raise a complaint relating to health or community service provision in South Australia. ²⁹	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, HCSCC will not have oversight of disability services.

Juris	Mechanism	Functions/ Powers	Transition	Impact with roll-out of NDIS
SA	Equal Opportunity Commission	People with disability can access the Commission's complaint handling & resolution function relating to discrimination/ harassment. ³⁰	The organisation will retain jurisdiction during transition to the NDIS.	None.
TAS	Department of Health and Human Services (DHHS)	People with disability can raise a complaint for internal review that relates to disability and community services. ³¹	The organisation will retain jurisdiction during transition to the NDIS. ³²	To the extent that disability services transition to the NDIS, complaint jurisdiction will move to the NDIS Commission.
TAS	Ombudsman Tasmania	People with disability can raise complaints about actions and decisions of public agencies for investigation by an external oversight agency. ³³	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, the Ombudsman will not have oversight of disability services.
TAS	Health Complaints Commission (HCC) (sits within the Office of the Ombudsman)	People with disability can raise complaints about action and decisions of public and private Community Service Organisations. ³⁴	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, HCC will not have oversight of disability services.
TAS	Equal Opportunity Tasmania – The Office of the Anti-Discrimination Commissioner	People with disability can raise complaints under the <i>Anti-Discrimination Act 1998</i> (Tas). ³⁵	The organisation will retain jurisdiction during transition to the NDIS.	None.
NT	Office of Disability (sits within Department of Health)	People with disability can raise a complaint for internal review that relates to unfair treatment by a government department or agency. ³⁶	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, complaint jurisdiction will move to the NDIS Commission.
NT	NT Ombudsman	People with disability can raise complaints about NT government departments, authorities and local government councils for investigation. ³⁷	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, the Ombudsman will not have oversight of disability services.

Juris	Mechanism	Functions/ Powers	Transition	Impact with roll-out of NDIS
NT	Health and Community Services Complaints Commission (HCSCC)	People with disability can raise a complaint with HCSCC about a disability service. ³⁸	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that the Office of Disability will no longer provide services, the Ombudsman will not have oversight of disability services.
NT	Anti-Discrimination Commission	People with disability can raise a complaint under the <i>Anti-Discrimination Act</i> . ³⁹	The organisation will retain jurisdiction during transition to the NDIS.	None.
ACT	Community Services Directorate – Office for Disability	People with disability can raise complaints for internal review with the Community Services Directorate internal complaints handling procedures. ⁴⁰	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, complaint jurisdiction will move to the NDIS Commission.
ACT	Ombudsman	People with disability can raise complaints about Australian Capital Territory government services for investigation by an external oversight agency. ⁴¹	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, the Ombudsman will not have oversight of disability services.
ACT	ACT Human Rights Commission – Disability and Community Services Commissioner	People with disability can raise a complaint in relation to disability service provision or discrimination. ⁴²	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, the Disability and Community Services Commissioner will not have oversight of disability services.
ACT	The Office of the Human Services Registrar	People with disability can raise a complaint in relation to specialist disability service provision.	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, complaint jurisdiction will move to the NDIS Commission.

Table 2 – Critical incidents

This table outlines reporting mechanisms that are used by providers to report when violence, abuse and neglect occur in a disability service provision setting.

Juris	Mechanism	Functions/ Powers	Transition	Impact with roll-out of NDIS
NSW	NSW Ombudsman	The Ombudsman administers the Reportable Incidents Scheme regarding people with disability who live in supported group accommodation. The Scheme scrutinises the systems of FACS and funded service providers in 'preventing, handling and responding to reportable incidents'. ⁴³	The organisation will retain jurisdiction during transition to the NDIS. ⁴⁴	To the extent that disability services transition to the NDIS, disability critical incident reporting jurisdiction will move to the NDIS Commission.
VIC	Department of Health and Human Services (DHHS)	A DHHS policy document sets out the critical incident reporting requirements for services being either directly delivered or funded by DHHS. ⁴⁵	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, disability critical incident reporting jurisdiction will move to the NDIS Commission.
QLD	Department of Communities, Disability Services and Seniors	The department administers a critical incident reporting policy. Workers in disability, schools or health services are expected to be familiar with the policies. ⁴⁶	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, disability critical incident reporting jurisdiction will move to the NDIS Commission.
WA	Department of Communities – Disability Services	The department administers a critical incident reporting policy that defines a serious incident and provides instructions on reporting. These guidelines must be adhered to by funded services. ⁴⁷	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, disability critical incident reporting jurisdiction will move to the NDIS Commission.
SA	Department of Human Services (DHS) – Disability SA	DHS administers critical incident reporting policy. The policy applies to DHS and the sector. ⁴⁸	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, disability critical incident reporting jurisdiction will move to the NDIS Commission.

Juris	Mechanism	Functions/ Powers	Transition	Impact with roll-out of NDIS
TAS	Health and Human Services (DHHS)	DHHS administer a serious incident reporting policy. Organisations funded by DHHS must adhere to this policy. ⁴⁹	The organisation will retain jurisdiction during transition to the NDIS. ⁵⁰	To the extent that disability services transition to the NDIS, disability critical incident reporting jurisdiction will move to the NDIS Commission.
ACT	Community Services Directorate – Director-General	Funded specialist disability service providers must notify the director-general if there is a risk to the life, health or safety of a person they are providing a specialist disability service. ⁵¹	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, disability critical incident reporting jurisdiction will move to the NDIS Commission.
ACT	The Office of the Human Services Registrar (HSR)	The HSR receives and investigates reports of critical incidents.	The organisation will retain jurisdiction during transition to the NDIS.	To the extent that disability services transition to the NDIS, disability critical incident reporting jurisdiction will move to the NDIS Commission.

Table 3 – Community visitors

Juris	Mechanism	Functions/ Powers	Transition	Impact with roll-out of NDIS
NSW	Official Community Visitors (Coordinated by the NSW Ombudsman)	The Ombudsman coordinates the NSW Official Community Visitor program. Officials visit most government and non-government accommodation services for children, young people and people with a disability throughout NSW. There is also a visiting function in licensed boarding houses. ⁵²	The organisation will retain jurisdiction during transition to the NDIS.	Unknown, impact on disability specific jurisdiction will depend on the outcome of the review of community visitors programs in the disability sector.
VIC	Community Visitors (within Office of the Public Advocate)	Community Visitors visit Victorian disability accommodation services, supported residential services and mental health facilities. ⁵³	The organisation will retain jurisdiction during transition to the NDIS.	Unknown, impact on disability specific jurisdiction will depend on the outcome of the review of community visitors programs in the disability sector.
QLD	Office of the Public Guardian (OPG) Community Visitor Program	The OPG operates two community visitor programs. One for children and young people and one for adults. The children and young people community visitor program attends: out-of-home care, such as a foster home, the home of a kinship carer, a residential care facility, a youth detention or adult correctional centre, disability service or mental health facility. ⁵⁴ The adult program visits and monitors: Disability accommodation provided or funded by the Department of Communities, authorised mental health services and private hostels. ⁵⁵	The organisation will retain jurisdiction during transition to the NDIS.	Unknown, impact on disability specific jurisdiction will depend on the outcome of the review of community visitors programs in the disability sector.

Juris	Mechanism	Functions/ Powers	Transition	Impact with roll-out of NDIS
SA	Community Visitor Scheme (Independent statutory scheme)	Community visitors visit and inspect mental health facilities, emergency departments, disability accommodation, supported residential facilities and day options programs. Promotes complaint resolution and refers issues to relevant body. ⁵⁶	The organisation will retain jurisdiction during transition to the NDIS.	Unknown, impact on disability specific jurisdiction will depend on the outcome of the review of community visitors programs in the disability sector.
ACT	Official Visitors (within Office of the Public Trustee/Guardian)	People with disability who are eligible to receive Official Visitor monitoring and visitation services can also access their complaints handling service. Visitors can attend a range of institutions including places of care, mental health facilities, and disability accommodation. ⁵⁷	The organisation will retain jurisdiction during transition to the NDIS.	Unknown, impact on disability specific jurisdiction will depend on the outcome of the review of community visitors programs in the disability sector.

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Appendix 5 – List of organisations consulted

The Commonwealth

1. NDIS Quality and Safeguards Commission
2. Commonwealth Department of Social Services
3. Commonwealth Ombudsman
4. Mental Health Commission
5. National Disability Insurance Agency
6. Australian Health Practitioner Regulation Agency
7. National Disability Services
8. Disabled People's Organisations Australia
9. Children and Young People with Disability Australia
10. Women with Disabilities Australia
11. Australian Federation of Disability Organisations
12. National Ethnic Disability Alliance
13. First People's Disability Network
14. Mental Health Australia
15. Community Mental Health Australia
16. Inclusion Australia
17. Carers Australia
18. National Mental Health Consumer Carer Forum

New South Wales

19. Department of Family and Community Services
20. Advocate for Children and Young People
21. Office of the Children's Guardian
22. Department of Premier and Cabinet
23. Ombudsman
24. Mental Health Commission
25. Public Guardian
26. Anti-Discrimination Board
27. Mental Health Official Visitors
28. NSW Council for Intellectual Disability
29. Disability Advocacy Service
30. Physical Disability Council NSW
31. NSW Disability Advocacy Alliance (Stand By Me)
32. Intellectual Disability Rights Service
33. Community Disability Advocacy Alliance Hunter
34. Family Advocacy
35. Multicultural Disability Advocacy Association of NSW
36. Being – NSW Mental Health Consumers
37. Leanne Dowse (Associate Professor, Chair in Intellectual Disability Behaviour Support), University of New South Wales
38. Eileen Baldry (Professor of Criminology and Deputy Vice-Chancellor Inclusion and Diversity), University of New South Wales
39. Gwynnyth Llewellyn (Professor, Family and Disability Studies, Director, Centre for Disability Research and Policy, Head), The University of Sydney

Western Australia

40. Department of Communities
41. Ombudsman
42. Mental Health Commission
43. Health and Disability Services Complaints Office
44. Mental Health Advocacy Service
45. Equal Opportunity Commission
46. Commissioner for Children and Young People
47. People with Disabilities WA
48. Helping Minds
49. Ethnic Disability Advocacy Service

Northern Territory

50. Department of Health – Office of Disability
51. SAFE NT
52. Ombudsman
53. Office of the Public Guardian
54. Anti-Discrimination Commission
55. The Children’s Commissioner
56. Community Visitor Program
57. Health and Community Services Complaints Commission
58. Disability Advocacy Service
59. Autism NT

Tasmania

60. Department of Health and Human Services
61. Department of Justice
62. The Commissioner for Children and Young People
63. Office of the Public Guardian
64. Equal Opportunity Tasmania
65. Senior Practitioner
66. Guardianship and Administration Board
67. Mental Health Official Visitors
68. Advocacy Tasmania
69. Speak out

Australian Capital Territory

70. Community Services Office for Disability & Human Services Registrar
71. ACT Human Rights Commission
72. Commonwealth Ombudsman
73. Public Trustee/ Guardian
74. Children and Young People Commission & Public Advocate
75. Advocacy for Inclusion
76. ACT Disability, Aged care and Advocacy Services
77. Women with Disabilities ACT
78. People with Disabilities ACT
79. ACT Mental Health Consumer Network

South Australia

80. Department of Human Services
81. Ombudsman
82. Mental Health Commission
83. Health and Community Services Complaints Commission
84. Public Advocate/ Guardian
85. Equal Opportunity Commission
86. South Australian Community Visitor Scheme
87. Commission for Children and Young People
88. JFA Purple Orange
89. Disability Advocacy and Complaints Service of SA Inc.
90. Disability Rights Advocacy Service
91. Independent Advocacy SA
92. SA Council on Intellectual Disability

Victoria

93. Department of Health and Human Services
94. Department of Justice and Regulation – Working with Children Check Unit
95. Ombudsman
96. Disability Services Commission
97. Mental Health Complaints Commission
98. The Commission for Children and Young People
99. Office of the Public Advocate
100. Victorian Equal Opportunity and Human Rights Commission
101. Office of Professional Practice Senior Practitioner
102. Women with Disabilities Victoria
103. Villamanta Disability Rights Legal Service
104. Disability Advocacy Resource Unit
105. Communication Rights Australia
106. Mental Health Awareness Council

Queensland

107. Department of Communities, Disability Services and Seniors
108. Department of Justice and Attorney General
109. Queensland Ombudsman
110. Mental Health Commission
111. Family and Child Commission
112. Office of the Public Guardian
113. Office of the Public Advocate
114. Anti-Discrimination Commission
115. Aged and Disability Advocacy Australia
116. Queensland Advocacy Incorporated
117. Queenslanders with Disability Network
118. Community Resource Unit
119. WWILD – Sexual Violence Prevention Association
120. AMPARO
121. Speaking Up For You

Appendix 6 – The NDIS Quality and Safeguarding Framework

The Safeguarding Framework is a purpose-built quality and safeguarding system for participants of the NDIS. The Framework was developed following extensive consultation with Commonwealth, state and territory governments, and the disability advocacy sector.

The Safeguarding Framework adopts a three-tiered approach to quality and safeguarding, focusing on capacity development, prevention, and correction, in relation to people with disability, disability service workers, and disability service providers. The three domains are designed to work together to create a whole system approach that is ‘mutually supporting and reinforcing’.¹

The principles which underpin the Safeguarding Framework are human rights, choice and control, national consistency, proportionality, presumption of capacity, minimisation of red tape, and efficiency and effectiveness.²

The NDIS Commission will primarily have responsibility for the corrective, and some of the preventative aspects of the framework, where there is a focus on system regulation. For example, complaints, serious incident reporting, worker screening, service provider registration, and the regulation of the use of restrictive practices.³

The next section of this chapter explores the corrective and preventative aspects of the Safeguarding Framework in more detail. Noting that the Safeguarding Framework is not yet up and running, this information is drawn from the information that has been published on the proposed operation of the Safeguarding Framework at the time of writing. This includes the NDIS Commission Rules and Guidelines, and the Safeguarding Framework policy documentation.

The NDIS Commission Rules and Guidelines are legislative instruments which set out the roles and responsibilities of NDIS Providers and the NDIS Commission in relation to certain topics. The relevant policy documentation gives an overview of the proposed operation of the whole Safeguarding Framework. It therefore provides information on a broader range of topics than the NDIS Commission Rules and Guidelines, however it is not legally binding.

Complaints

The Safeguarding Framework aims to create a complaints system that gives participants the confidence to complain, and ensures that workers and providers of poor practice are rectified.⁴ The Safeguarding Framework complaint system is structured to ensure effective operation of the NDIS market, and that actions taken in relation to individual complaints also contribute to driving change across the entire system.⁵

The NDIS Commission is the sole organisation with responsibility for complaints in the NDIS. This is the first time that a single, independent external complaints body has existed in the disability sector. This has the potential to simplify the complaints systems in the sector. The NDIS Commission will provide a point of escalation for complaints that are not able to be resolved at the provider level, identify individual workers and providers that pose a risk to participants, and identify systemic issues that need to be addressed across the NDIS.⁶

The complaints process will be overseen by the NDIS Complaints Commissioner. The Commissioner’s jurisdiction will focus on complaints about a perceived breach of the NDIS Code of Conduct, as well as issues including service quality and violence, abuse and neglect.⁷ The Commissioner will be able to receive complaints from any person, including people with disability accessing a service, their family and friends, carers, workers, advocates and community visitors.⁸ Whistle-blower protection will be put in place to protect people with disability and workers raising a complaint.⁹

Complaints can be made about registered and unregistered providers who are providing NDIS funded supports, as well as ILC Framework providers and government funded advocacy services.¹⁰ Information gathered from the complaints process will be used to identify systemic issues and feed into system improvement measures.

People with disability who are receiving NDIS funding, but who are self-managing their NDIS plans, will be able to bring complaints to the NDIS Commission, even where their chosen provider is not NDIS-registered.¹¹

The NDIS Commission has broad powers to receive information in relation to a complaint.¹² Response options available include: requiring the NDIS provider to undertake a resolution process in relation to the complaint; conducting a conciliation; requiring the NDIS provider to undertake remedial action; or ‘any other action the NDIS Commissioner considers appropriate in the circumstances’.¹³ All complaints will be handled by the NDIS Complaints Commissioner, though they may be referred internally depending on the nature of the complaint. Complaints may also be referred to other agencies where required. This will help to ensure a ‘no wrong door’ policy is implemented within the NDIS Commission. When this happens the Commission will maintain oversight of the complaints process, and coordinate a multi-agency response where required.¹⁴

Reportable incidents

Reportable incidents under the Safeguarding Framework include incidents that threaten someone's safety,¹⁵ and have been defined as including:

- the death of a person with disability
- serious injury of a person with disability
- abuse or neglect of a person with disability
- unlawful sexual or physical contact with, or assault of, a person with disability
- sexual misconduct committed against, or in the presence of, a person with disability, including grooming of the person for sexual activity
- or the use of a restrictive practice in relation to a person with disability, other than where the use is in accordance with an authorisation (however described) of a state or territory in relation to the person.¹⁶

Reflecting the approach to complaints described above, the approach that the Safeguarding Framework takes to reportable incidents is focused on the providers' responsibilities and actions of the NDIS Commission. Providers must ensure they have systems in place to prevent and act upon reportable incidents to insure the safety of people accessing their services.¹⁷ All registered providers will then be required to report reportable incidents to the NDIS Complaints Commissioner.¹⁸ This information will again be shared with relevant positions within the NDIS Commission mechanisms as required to address the concern raised.¹⁹

When notification of a serious incident is received, the NDIS Complaints Commissioner will work with the provider to build capacity and prevent future incidents of the relevant behaviour, and refer the complaint to the worker screening units, the NDIS Registrar, the NDIS Senior Practitioner, and relevant external authorities if needed. The Complaints Commissioner has the authority to 'recommend compliance action to the NDIS Registrar when required'.²⁰ As with complaints, the Complaints Commissioner will coordinate responses to reportable incidents.²¹

Worker screening

The Safeguarding Framework notes that, while not sufficient to prevent violence, abuse and neglect on its own, effective worker screening that takes into account a broad range of information about a potential worker is a key element of a quality and safeguarding system and provides an indication of the risk posed by employing a particular individual.²²

Under the Safeguarding Framework, a national worker screening system will be developed and overseen by the NDIS Registrar, and implemented by the states and territories. People working with people with disability who will be subject to the screening process include those who have significant contact with people with disability as a part of their work or role, including, for example 'employees, agents, volunteers, contractors, and sub-contractors'.²³

The worker screening process will consider a potential worker's convictions, including spent and quashed convictions; other police/ court information, such as current or pending charges; Apprehended Violence Orders, Child Protection Orders and child protection information; international police checks for those who have worked overseas, when feasible; and workplace misconduct, which comes to light through complaints and serious incident reporting.²⁴ Once a worker is screened, any additional information about their conduct coming through the Safeguarding Framework system will be monitored, and may trigger a new assessment of a workers clearance where required.²⁵

Restrictive practices

'Restrictive practice' means any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability.²⁶ Restrictive practices include: seclusion; chemical restraint; mechanical restraint; physical restraint; and environmental restraint.²⁷ These practices have the ability to significantly infringe the rights of people with disability and may constitute violence, abuse or neglect. It is therefore important that their use be effectively regulated.

In line with Australia's international obligations,²⁸ the Safeguarding Framework aims to reduce, over time, the use of restrictive practices within the NDIS in the majority of cases. It aims to do this through creating frameworks through which service providers can understand and more effectively respond to a person with disability's needs.²⁹

In 2014, all state and territories agreed to implementation of the National Framework for Reducing and Eliminating the use of Restrictive Practices in the Disability Service Sector. However, state and territory implementation of the framework has been undertaken in different ways, is based on differing definitions of what constitutes restrictive practices, and includes differing reporting requirements around the use of restrictive practices.³⁰ Acknowledging the complexity of restrictive practices legislation and practice across the jurisdictions, the Safeguarding Framework sets out a plan to gradually create a nationally-consistent approach to the authorisation and use of restrictive practices, and reduce their use over time.

The *NDIS (Restrictive Practices and Behaviour Support) Rules 2018*³¹ give effect to a number of the elements outlined in the Safeguarding Framework. People with disability who have behaviour support needs and may require the use of restrictive practices will be identified during the NDIS planning process, and allocated funding to be assessed by a ‘behaviour support practitioner’ who will draft a behaviour support plan in consultation with the person with disability, their family, carers, guardian or other relevant person.³² States and territories remain responsible for any policy and/or legislation concerning authorisation of and consent to the use of restrictive practices.³³ These requirements will differ until states and territories review and amend their current laws in an effort to reach national consistency overtime.

Other requirements under the *NDIS (Restrictive Practices and Behaviour Support) Rules 2018* include:

- requiring that a person subject to restrictive practices has a behaviour support plan that includes evidence-based, person-centred and proactive strategies that address the person with disability’s needs and the functions of their behaviour
- specifying that restrictive practices must be authorised where the state or territory has an authorisation process
- requiring that a restrictive practice only be used as a last resort in response to risk of harm to the person with disability or others, after the provider has explored and applied evidence-based, person-centred and proactive strategies
- specifying that a restrictive practice must be the least restrictive response possible in the circumstances to ensure the safety of the person or others.³⁴

Providers implementing behaviour support plans containing a restrictive practice must report monthly to the Commission on the use of restrictive practices under those plans.³⁵ Providers must also comply with the relevant reportable incident requirements (for example, report to the Commission within five days where authorisation is required for the use of a restrictive practice but has not been obtained).³⁶

Behaviour support practitioners must oversee implementation and regular review of behaviour support plans (at a minimum every 12 months) and will be expected to monitor progress and quality of life outcomes for the person with disability and review plans with a view to reducing and eliminating restrictive practices.³⁷

The restrictive practices system within the NDIS Commission will be overseen by the NDIS Senior Practitioner. The NDIS Senior Practitioner will have a systemic policy and capacity building role in communicating best practice, working with relevant providers to improve their practice, receiving and reporting on provider use of Restrictive Practices, following up on serious incident reports, and referring providers to the NDIS Registrar for noncompliance where required.³⁸

Provider registration

To ensure the quality of NDIS-funded supports, and the safety of NDIS participants, the Safeguarding Framework includes a national provider registration scheme. Such a system is a preventative risk management tool, and will contribute to addressing the power imbalance between service providers and people with disability.

Prior to the Safeguarding Framework, states and territories had varied registration systems, often reflected in funding agreements. All jurisdictions also agreed to comply with the National Standards for Disability Services, although compliance is achieved differently across the jurisdictions.³⁹

As part of the scheme, all providers (registered and non-registered) will be required to comply with an NDIS Code of Conduct. Additional registration requirements will be placed on a provider based on a risk assessment of the supports they provide.⁴⁰ An NDIS Provider Register will be made publicly available.⁴¹

The NDIS Registrar will oversee the scheme and have a range of powers which can be exercised in response to a complaint or information of provider misconduct received through the NDIS Commission. These include: education and encouragement to improve practice; imposing additional reporting requirements on a provider; conciliation and dispute resolution; issuing of written warnings; imposition of a requirement to take certain action; suspension of registration; cancellation of registration; and referral to a court in regards to a civil or criminal penalty.⁴² The power utilised will depend on the seriousness of the issue, and the likelihood of a repeat occurrence.⁴³

Information, Linkages and Capacity Building Framework

The ILC Framework commenced roll-out in 2018.

The ILC Framework is a funding scheme, which focuses on community inclusion through personal and community capacity building.⁴⁴ This capacity-building function is implemented by the NDIA through ILC Framework funding grants provided to organisations to carry out community activities.⁴⁵

The ILC Framework is intended to align with the National Disability Strategy and reinforces a person-centred approach to the Australian model of disability insurance. While the Safeguarding Framework is only available to those who are eligible for the NDIS, ILC is designed to benefit all people with disability, their families and carers and the broader community.⁴⁶

The ILC provides five streams of support to people with disability, their families and carers, and community and mainstream services:

1. information, linkages and referrals
2. capacity building for mainstream services
3. community awareness and capacity building
4. individual capacity building
5. local area coordination.⁴⁷

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