
Joint Standing Committee on the National Disability Insurance Scheme

NDIS Quality and Safeguards Commission

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List of Recommendations

Recommendation 1

- 3.95** The committee recommends that the NDIS Quality and Safeguards Commission develop an overarching communications and engagement strategy for building visibility of its work among providers and people with disabilities and engaging in capacity-building activities with participants and providers. The strategy should specifically include: children and young people, Aboriginal and Torres Strait Islander people with a disability, and NDIS participants living in residential aged care.

Recommendation 2

- 3.100** The committee recommends that the NDIS Quality and Safeguards Commission develop information sharing protocols with states and territories, and, as appropriate, publish these protocols on its website. Information sharing protocols should cover general information sharing and information sharing in relation to specific areas such as worker screening, restrictive practices and residential settings. Where arrangements are already in place, the committee recommends the Commission review these agreements to ensure appropriate clarity around two-way information sharing and to ensure that privacy safeguards are in place.

Recommendation 3

- 3.104** The committee recommends that the NDIS Quality and Safeguards Commission and National Disability Insurance Agency together develop and publish protocols for coordination and engagement to ensure consistent messaging and clear division of responsibilities.

Recommendation 4

- 4.100** The committee recommends that the Commission review its approach to publishing information on compliance activities to ensure that:
- information on compliance activities is easily accessible to providers, as well as participants and their families and advocates; and
 - sufficient detail regarding breaches and compliance activity is provided to allow providers and participants to understand the nature of relevant breaches in order to improve provider practice and build confidence in the Commission's compliance activities.

Recommendation 5

4.108 The committee recommends that the NDIS Quality and Safeguards Commission review its compliance and enforcement model to determine how to incorporate increased proactive approaches, in particular, regular, face-to-face contact with vulnerable participants and visits to service providers sites. The review should expressly consider:

- the current use of the Commission's monitoring and investigation powers under the *Regulatory Powers (Standard Provisions Act) 2014*; and
- the role of Community Visitor Schemes in assisting the Commission to carry out its functions.

Recommendation 6

4.109 The committee recommends that the Australian Government revisit its 2018 review into community visitor schemes and explore amendments to the *National Disability Insurance Scheme Act 2013* to establish a national community visitor scheme to be overseen by the NDIS Quality and Safeguards Commission.

Recommendation 7

4.110 Unless and until the *National Disability Insurance Scheme Act 2013* is amended to establish a national community visitor scheme, the committee recommends that:

- the Australian Government consider expanding the functions of the NDIS Quality and Safeguards Commission to include coordination and support for state and territory-based Community Visitor Schemes to report on matters affecting NDIS participants; and
- the Australian Government through the Disability Reform Council, ensure that federal, state and territory governments work together to ensure that each jurisdiction has a community visitor scheme that can report to the NDIS Quality and Safeguards Commission on risks to NDIS participants.

Recommendation 8

4.112 The committee recommends that the NDIS Quality and Safeguards Commission urgently review agreements with state and territory bodies responsible for Community Visitor Schemes to ensure there are clear protocols in place regarding:

- the scope and authority to oversee the provision of NDIS services; and
- two-way data and information sharing between Community Visitors and the Commission.

Recommendation 9

5.92 The committee recommends that the Australian Government conduct a review of provider registration requirements, with a view to removing unnecessary burden while preserving quality and safety. The review should consider:

- the adequacy of the current graded requirements for small providers and providers which have met quality and safeguarding provisions as part of other registration processes
- the classification of certain supports as 'high-risk' for the purposes of requiring registration (for example, early childhood supports)
- the impact of registration requirements in specific areas of workforce shortages, such as behaviour support, and other allied health, and in regional rural and remote areas; and
- the adequacy of guidance for providers about the registration process.

Recommendation 10

5.93 The committee recommends that the Australian Government review the costs of registration audits for providers, with specific reference to the cost implications for smaller providers and providers in regional, rural and remote locations.

Recommendation 11

5.94 Following the above review, the committee recommends that the NDIS Quality and Safeguards Commission, in consultation with providers and auditing bodies, establish and publish clear guidelines for determining registration audit costs.

Recommendation 12

5.97 The committee recommends that the Australian Government develop a strategy for increasing the number of people with disability who are involved in registration auditing. This strategy should be co-designed with people with disabilities, their families and advocates, and the disability sector.

Recommendation 13

5.116 The committee recommends that the NDIS Quality and Safeguards Commission, within 3 years of the commencement of the national worker screening arrangements, evaluate:

- the adequacy and effectiveness of these arrangements in promoting safety and quality for NDIS participants, in particular, NDIS participants who receive supports from unregistered providers; and

- the impact of worker screening arrangements on the NDIS provider market.

Recommendation 14

5.118 The committee recommends that the NDIS Quality and Safeguards Commission work with states and territories to resolve delays in NDIS worker screening including by promoting consistency across jurisdictions in relation to the ability of workers to commence work under supervision once their employer has endorsed their screening application.

Recommendation 15

6.80 The committee recommends that the NDIS Quality and Safeguards Commission progress as a matter of urgency the work of its new Complaints Function Advisory Committee to remove barriers to accessing the complaints process for participants, including specific barriers faced by participants who are Aboriginal and Torres Strait Islander people with disabilities, and participants with intellectual disabilities or cognitive impairments. In particular, the committee recommends that the Commission consider measures to simplify the complaints process.

Recommendation 16

6.83 The committee recommends that the Commission work with the new Complaints Function Advisory Committee to establish and publish formal guidance and protocols with respect to:

- informing complainants of the progress of their complaints
- the role of advocates in the complaints process
- timeframes for responding to complaints; and
- review and verification of evidence from providers who are the subject of a complaint, including the circumstances in which it is appropriate to provide information from a provider to a complainant for comment.

Recommendation 17

6.85 The committee recommends that the Australian Government allocate specific funding to advocacy organisations to assist complainants in their dealings with the NDIS Quality and Safeguards Commission. This funding should be in addition to existing funding provided through the National Disability Advocacy Program.

Recommendation 18

6.86 The committee recommends that the Commission establish appropriate referral pathways with advocacy organisations, Community Legal Centres

and State and Territory Legal Aid Commissions to ensure participants who are particularly vulnerable are supported through complaint and investigation processes. This process should be developed through a co-design process with people with disability, their families and representative bodies and advocacy organisations.

Recommendation 19

- 7.36 The committee recommends that the Quality and Safeguards Commissioner consider making rules under the *National Disability Insurance Scheme Act 2013* to provide for incident reporting to identify systemic quality and safeguarding issues.

Recommendation 20

- 8.63 The committee recommends that the NDIS Quality and Safeguards Commission work with State, Territory and Commonwealth governments as a matter of urgency to develop a specific strategy to increase the number of behaviour support practitioners. This strategy should include specific measures to:

- incentivise entry into behaviour support provision by practitioners and NDIS providers; and
- increase the ability of suitably qualified and experienced allied health providers to offer behaviour support where appropriate.

Recommendation 21

- 8.67 The committee recommends that the NDIS Quality and Safeguards Commission formally include clinical oversight bodies for the health and mental health sectors in its national coordination work for the reduction and elimination of restrictive practices.

Recommendation 22

- 8.68 The committee recommends that the NDIS Quality and Safeguards Commission develop a framework that clarifies the responsibilities of Commonwealth, State and Territory bodies involved in regulating restrictive practices at the interface between the NDIS and the health and mental health sectors. This framework should encourage all relevant sectors to work together on how they might better support people with disability and include specific reference to the prescription of medications that may be classified as restrictive.

Recommendation 23

8.69 The committee recommends that the framework mentioned in Recommendation 22 include a protocol around information sharing on restrictive practices between the NDIS Quality and Safeguards Commission and State and Territory bodies.

Recommendation 24

9.43 The committee recommends that the Australian Government review the NDIS Quality and Safeguards Commission's current staffing levels and provide additional resources for increased staff numbers if necessary.

Recommendation 25

9.44 The committee recommends that the Australian Government ensure that it is adequately resourcing the NDIS Quality and Safeguards Commission so that the Commission is able to investigate complaints thoroughly and promptly, and initiate its own investigations.

Recommendation 26

9.47 The committee recommends that the Australian Government ensure that the NDIS Quality and Safeguards Commission has adequate and appropriate training in place for staff, including in the following areas as appropriate:

- awareness of disability types
- awareness of disability service provision
- awareness of the Commission's role and responsibilities
- understanding of the NDIS Code of Conduct; and
- understanding of the key issues for Aboriginal and Torres Strait Islander peoples with disability.

Recommendation 27

9.50 The committee recommends that the Australian Government review the NDIS Quality and Safeguards Commission's current ICT systems and replace or update them if necessary to ensure that they are fit-for-purpose.

Recommendation 28

10.94 The committee recommends that the Australian Government give specific consideration to the following matters in its review of the *NDIS Quality and Safeguarding Framework*:

- clarifying the safeguarding responsibilities of Commonwealth, state and territory bodies at the interfaces of NDIS and mainstream services; and

- the needs of people with disability in forensic detention, including the role of the NDIS safeguarding system in ensuring the rights of people with disability in these settings are upheld.

Recommendation 29

10.101 The committee recommends that the Australian Government specifically consider the following in its review of the *NDIS Quality and Safeguarding Framework*:

- how to improve access to and strengthen natural safeguards for all people with disability; and
- the impact of NDIS pricing on the quality and safety of NDIS supports.

Recommendation 30

10.104 The committee recommends that the NDIS Quality and Safeguards Commission develop resources and training materials that emphasise the systemic factors that increase risks to the safety of people with disabilities, including by emphasising the importance of social inclusion and individual and systemic attitudes towards disability.

Executive summary

The establishment of the NDIS Quality and Safeguards Commission (the Commission) to provide centralised oversight of safeguarding for the NDIS was an important step towards improving safeguards and quality of service provision for people with disability in Australia, and especially for NDIS participants who may face increased risks of being subject to abuse, exploitation, or neglect.

The committee decided to conduct an inquiry into the Commission after issues with the oversight and regulation of disability service providers, including by the Commission, emerged in light of media attention and subsequent inquiries into the tragic death of Ms Ann-Marie Smith.

This inquiry provided the opportunity for people with disability, families and carers, disability service providers, representative organisations, and other key stakeholders to share their views regarding the effectiveness of the Commission in ensuring safe, quality services for people with disability.

The inquiry has identified areas in which the Commission's approach to its work could be improved, in particular, by incorporating more proactive engagement with participants and the sector and increasing its proactive compliance and enforcement measures. In addition, gaps persist in safeguarding arrangements for NDIS participants and people with a disability more broadly, particularly in the areas where NDIS services interface with services provided by state and territory governments or other areas of the federal system.

Much of the evidence presented to the inquiry was based on experiences with the Commission during the periods in which jurisdictions were transitioning to the Commission's oversight, or in which the Commission had only recently commenced operations. Nevertheless, the committee considers that this evidence provides important insight into the work of the Commission and the experiences of people with disability, their families and advocates, and the disability sector in dealing with the Commission over this time.

The report is divided into 11 chapters and makes 30 recommendations. Chapters 1 and 2 set out background to this inquiry and for the establishment and current operations of the Commission.

Chapter 3 discusses the evidence received in relation to the Commission's communication and engagement with participants, people with disability, providers, and other interested parties, such as advocates and family members. A wide range of voices called for more proactive engagement across the sector, noting the important

role for the Commission in building capacity in participants and providers to understand the rights and obligations involved in receiving and providing supports under the NDIS. The committee makes 3 recommendations in this chapter, including calling for the Commission to develop an overarching communications and engagement strategy for building visibility of its work among people with disabilities and providers.

Chapter 4 explores the Commission's approach to compliance and enforcement. Evidence to the inquiry indicated that the Commission's enforcement powers appear adequate, however, there was consensus from a range of submitters and witnesses across the disability sector, along with people with disability and their families, that the Commission should be more proactive in the exercise of its compliance and enforcement powers. The committee makes 5 recommendations in relation to incorporating more proactive approaches to compliance and enforcement and improving the transparency and visibility of the Commission's compliance activity.

Chapter 5 discusses the Commission's functions with respect to registration of NDIS providers and worker screening. The committee heard that registration poses significant administrative and cost burdens on some providers, including costs associated with audits. National worker screening arrangements commenced during the inquiry, and submitters raised concerns about delays in processing applications, and ensuring that the process would be understood. The committee makes 6 recommendations including that the Commission undertake reviews of provider registration requirements, and the new national worker screening arrangements.

Chapter 6 examines complaints handling by the Commission. The committee heard that many participants and people with a disability face barriers in accessing the Commission's complaints process, and that, for those who are able to access it, the complaints process can be frustrating and drawn out. The committee makes 4 recommendations relating to assisting complainants to access and progress through the complaints process, including through facilitating access to external advocacy organisations to assist people with disability to make complaints.

Chapter 7 considers the Commission's approach to reportable incidents. Evidence to the inquiry suggested that some aspects of the reportable incidents framework should be addressed to strike the right balance of ensuring the Commission is notified of serious incidents while ensuring providers are not subjected to unnecessary burdens and understand their obligations. The committee makes 1 recommendation relating to allowing the Commission's incident reporting mechanism to identify systemic quality and safeguarding issues.

Chapter 8 discusses the Commission's functions with respect to behaviour support and national coordination of efforts to reduce and eliminate the use of restrictive

practices by NDIS providers. Imposition of restrictive practices presents the risk of systemic and serious incursions on the rights of people with a disability, and the committee is concerned by the high prevalence of unauthorised use of restrictive practices by NDIS providers. The committee makes 4 recommendations in this chapter relating to increasing the number of practitioners who provide behaviour support, formal inclusion of clinical oversight bodies in national coordination work, clarifying responsibilities for regulating restrictive practices at the interface of health and mental health sectors, and information sharing.

Chapter 9 considers the staffing and resourcing of the Commission. The issues raised in evidence can be summarised as being caused by insufficient staff numbers; insufficient training for staff; inefficient ICT systems; and poor communication within the Commission. The committee also notes that during the inquiry the Commission has received increased funding and significantly increased its staffing levels. The committee makes 4 recommendations in this chapter, relating to reviewing staffing levels, ensuring appropriate resourcing for the Commission, staff training, and ensuring ICT resources are adequate.

Chapter 10 examines evidence received in relation to the Commission's broader oversight roles and managing systemic risks to NDIS participants and other people with disabilities. The committee makes 3 recommendations including in relation to matters for consideration in the upcoming review of the *NDIS Quality and Safeguarding Framework*, and in relation to developing training materials emphasising the systemic factors that increase risks to safety of people with disabilities.

Chapter 11 sets out concluding comments from the committee.

As noted throughout this report, since the inquiry began in mid-2020 the Commission has adopted a range of measures to improve its practice and processes. The committee welcomes these changes and was pleased to note the Commission's willingness to listen to people with disability, their advocates and the sector and to adapt processes in response over the course of the inquiry.

It is nevertheless clear that safeguarding gaps continue to exist for people with disability, and that work by the Commission and all Australian governments needs to continue to identify safeguarding gaps and quickly address them. The review of the *NDIS Quality and Safeguarding Framework* is crucial in this respect, and, in addition to its specific recommendations, the committee urges the Government to carefully consider all matters raised in this report in that review.

The committee thanks all those who contributed to the inquiry, particularly participants, their family members and advocates who gave the inquiry first-hand information about their experiences with the Commission.

Chapter 1

Introduction

- 1.1 The Joint Standing Committee on the National Disability Insurance Scheme (the committee) was established by resolution of the House of Representatives on 4 July 2019¹ and by the Senate on 22 July 2019.² The committee is composed of five members and five senators, and is tasked with reviewing:
- (a) the implementation, performance and governance of the National Disability Insurance Scheme (NDIS);
 - (b) the administration and expenditure of the NDIS; and
 - (c) such other matters in relation to the NDIS as may be referred to it by either House of the Parliament.
- 1.2 The committee is required to present an annual report to the Parliament on the activities of the committee during the year, in addition to reporting on any other matters it considers relevant.
- 1.3 The committee is also able to inquire into specific aspects of the NDIS. On 23 June 2020, the committee decided to conduct an inquiry into the NDIS Quality and Safeguards Commission (Commission), with particular reference to:
- (a) The monitoring, investigation and enforcement powers available to the Commission, and how those powers are exercised in practice;
 - (b) The effectiveness of the Commission in responding to concerns, complaints and reportable incidents – including allegations of abuse and neglect of NDIS participants;
 - (c) The adequacy and effectiveness of the NDIS Code of Conduct and the NDIS Practice Standards;
 - (d) The adequacy and effectiveness of provider registration and worker screening arrangements, including the level of transparency and public access to information regarding the decisions and actions taken by the Commission;
 - (e) The effectiveness of communication and engagement between the Commission and state and territory authorities;
 - (f) The human and financial resources available to the Commission, and whether these resources are adequate for the Commission to properly execute its functions;

¹ *House of Representatives Votes and Proceedings*, No. 3, 4 July 2019, pp. 55–56.

² *Journals of the Senate*, No. 4, 22 July 2019, pp. 134–135.

- (g) Management of the transition period, including impacts on other commonwealth and state-based oversight, safeguarding, and community engagement programs; and
- (h) Any related matters.

Conduct of the inquiry

- 1.4 In accordance with usual practice, the committee advertised the inquiry on its webpage, and invited relevant stakeholders to make a submission to the inquiry by 31 July 2020. The committee later granted a number of extensions of time to submit on request by stakeholders.
- 1.5 The committee received 75 public submissions, which are listed in Appendix 2 and are available on the committee's webpage.³
- 1.6 The committee held a number of public hearings dedicated to the inquiry into the Commission, as follows:
 - 29 September 2020 via teleconference
 - 13 October 2020 via teleconference
 - 17 November 2020 via teleconference; and
 - 20 May 2021 in Canberra.
- 1.7 Witnesses who appeared at the hearings are listed in Appendix 3.
- 1.8 Matters relating to the Commission were also discussed during a number the committee's other public hearings held in 2019, 2020 and 2021, as well as during Senate Estimates and other committee inquiries.
- 1.9 Transcripts from all the committee's hearings for the 46th Parliament, along with answers to questions on notice, are available on the committee's webpage.

Background to the inquiry

- 1.10 On 6 April 2020, Ms Ann-Marie Smith tragically died in her home in Adelaide, South Australia. Ms Smith was an NDIS participant. Inquiries into Ms Smith's circumstances have asserted that Ms Smith's death followed a prolonged period of neglect, during which Ms Smith had been living in 'squalid and appalling circumstances'.⁴
- 1.11 Early media attention concerning Ms Smith's case highlighted a number of issues with the oversight and regulation of disability service providers,

³ Joint Standing Commission on the NDIS, *Inquiry into the NDIS Quality and Safeguards Commission*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/QS_Commission.

⁴ The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020*: Report to the Commissioner of the NDIS Quality and Safeguards Commission, 31 August 2020, p. 4.

including by the Commission.⁵ Many of these were reflected in subsequent inquiry reports.⁶

- 1.12 In light of these matters, the committee decided to conduct an inquiry into the Commission. This inquiry provided the opportunity for people with disability, families and carers, disability service providers, representative organisations and other key stakeholders to share their views regarding the effectiveness of the Commission in ensuring safe, quality services for people with disability.

Timing of the inquiry

- 1.13 At the time this inquiry commenced (23 June 2020), the Commission had been operating in New South Wales and South Australia for approximately two years, and in the Australian Capital Territory, Northern Territory, Queensland, Tasmania and Victoria for approximately one year.⁷

- 1.14 The committee acknowledges that the Commission has only been operating in Western Australia from 1 December 2020.⁸ The committee further notes that the transition to full oversight by the Commission was delayed in certain areas. For example, in July 2020 the Victorian Office of the Public Advocate stated:

The NDIS Quality and Safeguards Commission (NDIS Commission) commenced operation in Victoria on 1 July 2019, however the transition to full scheme safeguarding arrangements is behind schedule and not yet complete (in large part due to delays [associated with arrangements for Specialist Disability Accommodation]). Consequently, OPA's observations of, and interactions with, the NDIS Commission are limited. In addition, the COVID-19 pandemic and its related restrictions have forced the sector, and the NDIS Commission, to operate in unusual circumstances.⁹

⁵ See, for example, Luke Henriques-Gomes, 'The death of Ann Marie Smith: a shocking case of neglect, or a failure of the system', *The Guardian*, 31 May 2020, <https://www.theguardian.com/australia-news/2020/may/31/the-death-of-ann-marie-smith-a-shocking-case-of-neglect-or-a-failure-of-the-system> (accessed 18 December 2020).

⁶ Inquiries into the circumstances surrounding Ms Smith's death are discussed in Chapter 2.

⁷ NDIS Quality and Safeguards Commission, *NDIS Commission start dates*, <https://www.ndiscommission.gov.au/about/start-dates> (accessed 4 January 2021). The Commission commenced operating in NSW and SA on 1 July 2018. The Commission commenced operating in the ACT, the NT, Victoria, Queensland and Tasmania on 1 July 2019.

⁸ NDIS Quality and Safeguards Commission, *NDIS Commission start dates*. The Commission was due to start operating in WA from 1 July 2020. However, this was delayed owing to the challenges of responding to the COVID-19 pandemic. See NDIS Quality and Safeguards Commission, *Submission 42*, p. 8.

⁹ Office of the Public Advocate (Victoria), *Submission 11*, p. 6. In its submission, the Vic OPA recommended that the committee conduct a follow-up inquiry on the Commission in 2021.

- 1.15 Nevertheless, the committee considered it timely to undertake an inquiry into the Commission, starting 23 June 2020. At the date of tabling this report, the inquiry has continued for approximately 17 months. This has allowed interested or concerned stakeholders to provide evidence to the committee regarding the operations of the Commission since its establishment.
- 1.16 Noting that full transition to Commission oversight was completed during this inquiry, the committee recognises that much of the evidence presented to the inquiry was based on experiences with the Commission during the periods in which jurisdictions were transitioning to the Commission's oversight, or in which the Commission had only recently commenced operations. Nevertheless, the committee considers that this evidence provides important insight into the work of the Commission and the experiences of people with disability, their families and advocates, and the disability sector in dealing with the Commission over this time. The committee has also endeavoured to acknowledge changes in the Commission's policies or practices where the committee is aware that changes have been implemented.

Structure of the report

- 1.17 The report is divided into 11 chapters:
- Chapter 1 (this chapter) provides general information about the inquiry.
 - Chapter 2 provides background to the NDIS and the Commission, as well as other relevant inquiries.
 - Chapter 3 discusses communication and engagement activities of the Commission.
 - Chapter 4 looks into the Commission's compliance and enforcement activities.
 - Chapter 5 reviews the Commission's role in regulating NDIS providers through its registration function and in overseeing national worker screening.
 - Chapter 6 discusses the Commission's approach to complaints handling.
 - Chapter 7 considers the Commission's reportable incidents function.
 - Chapter 8 provides an overview of the Commission's behaviour support function and discusses the Commission's work regulating restrictive practices.
 - Chapter 9 discusses staffing and resources of the Commission.
 - Chapter 10 considers the Commission's market oversight function and calls for the Commission to play a greater role in overseeing and monitoring other systemic quality and safeguarding issues facing people with disabilities.
 - Chapter 11 provides some concluding remarks of the committee in relation to this inquiry.

Notes on terminology and references

- 1.18 References to submissions are to individual submissions to the committee's inquiry into the NDIS Quality and Safeguards Commission, unless otherwise indicated. References to Committee Hansard are to official transcripts, unless otherwise indicated.
- 1.19 The committee acknowledges that there are a variety of terms used to reflect the diversity of Aboriginal and Torres Strait Islander cultures and identities.¹⁰ In this report, the term 'Aboriginal and Torres Strait Islander peoples' is used, with respect.
- 1.20 The committee also notes that some submitters and witnesses may refer to NDIS participants and other people with disability as 'clients' of particular services. This report may use the term 'client' when quoting from a submission or a hearing transcript. Otherwise, the report uses the terms 'participant', 'person with disability' and 'people with disability', with respect.

Acknowledgements

- 1.21 The committee thanks all those who contributed to the inquiry by lodging submissions, providing additional information or expressing their views via correspondence. The committee would also like to thank those who gave their time to attend the committee's public hearings.
- 1.22 In particular, the committee acknowledges the people with disability, their families and carers who shared their experiences. The testimony of people with lived experience is crucial to identifying issues with the NDIS and improving the operation of the scheme.
- 1.23 The committee also acknowledges the cooperation of the Commission throughout the inquiry.

¹⁰ Reconciliation Australia, *RAP good practice guide: Demonstrating inclusive and respectful language*, <https://www.reconciliation.org.au/wp-content/uploads/2021/10/inclusive-and-respectful-language.pdf> (accessed 19 November 2021).

Chapter 2

Background

- 2.1 This chapter provides a brief background of the NDIS Quality and Safeguards Commission (Commission), and a high-level overview of its functions and regulatory approach. The chapter also discusses the *NDIS Quality and Safeguarding Framework*.
- 2.2 The chapter concludes by commenting on the broader concept of safety for people with a disability, including the factors that may increase the risk that a person with disability may be subject to exploitation, abuse or neglect, and the importance of natural supports and community inclusion for supporting safety.

National Disability Insurance Scheme

- 2.3 The NDIS is an insurance-based model for funding and supports for people with disability, families and carers. It replaces the previous state-based system of block funding with a 'fee-for-service', market-based approach.
- 2.4 The main component of the NDIS is individualised packages of supports for eligible people with disability. The scheme is based on the premise that people with disability each have different support needs and should be able to exercise choice and control in relation to their supports.

National Disability Insurance Scheme Act 2013

- 2.5 The NDIS is established under the *National Disability Insurance Scheme Act 2013* (NDIS Act). The Act sets out the objectives of the NDIS, which include:
- supporting the independence and social and economic participation of people with disability
 - providing reasonable and necessary supports, including early intervention supports, for NDIS participants
 - enabling people with disability to exercise choice and control in the pursuit of their goals and in the planning and delivery of their supports
 - facilitating the development of a nationally consistent approach to accessing, planning and funding of supports for people with disability; and
 - promoting the provision of high quality and innovative supports.¹
- 2.6 The NDIS Act further provides for how a person may become a participant in the NDIS; how plans are prepared and reviewed; how the NDIA approves

¹ *National Disability Insurance Scheme Act 2013*, section 3. Other relevant objectives include protecting people with disability from harm and giving effect to Australia's human rights obligations relating to people with disability.

funding; how an entity can become a registered provider of supports; and the processes for reviewing decisions.²

National Disability Insurance Agency

- 2.7 The National Disability Insurance Agency (NDIA) is the independent statutory agency responsible for the governance and administration of the NDIS. Its core functions include delivering the NDIS in a way that maximises choice and control for participants and promotes access to high quality supports, and managing, advising and reporting on the financial sustainability of the NDIS.³

National rollout of the NDIS

- 2.8 The NDIS became operational on 1 July 2013 with the commencement of trial sites. National rollout of the scheme began on a geographic and age basis from July 2014, with the majority of jurisdictions beginning transition on 1 July 2016. The transition to full scheme was guided by bilateral agreements between Commonwealth, state and territory governments.
- 2.9 National geographical rollout of the NDIS was completed on 1 July 2020, with Christmas Island and the Cocos (Keeling) Islands joining the scheme. As at 30 September 2021, the NDIS was providing services to 484,700 participants across Australia.⁴

NDIS Quality and Safeguards Commission

- 2.10 The NDIS Quality and Safeguards Commission (the Commission) is an independent agency established to improve the quality and safety of NDIS supports and services. Among other matters, the Commission is tasked with regulating NDIS providers, resolving problems and identifying areas for improvement.
- 2.11 The committee focused its inquiries on the operation of the Commission since its commencement, which was staggered across jurisdictions over the following dates:
- From 1 July 2018 in New South Wales and South Australia
 - From 1 July 2019 in the ACT, the Northern Territory, Queensland, Tasmania and Victoria; and
 - From 1 December 2020 in Western Australia.
- 2.12 During the transition phase, prior to the Commission commencing operations in a jurisdiction, the NDIA was responsible for registering providers operating

² *National Disability Insurance Scheme Act 2013*, Chapters 3 and 4.

³ *National Disability Insurance Scheme Act 2013*, section 118. See also Chapter 6, Parts 1, 2, 3, and 4. These provisions relate to the Chief Executive Officer of the NDIA, the NDIA's Board, the Independent Advisory Council and Actuaries.

⁴ National Disability Insurance Agency, *Quarterly Report*, 30 September 2021.

in that jurisdiction and the jurisdiction's existing quality and safeguards systems applied to NDIS participants, providers of supports and services, and their workers.⁵

Establishment and background

2.13 The Commission was established on 1 July 2018 under amendments to the NDIS Act passed in December 2017 (see Chapter 6A).⁶ This followed several inquiries that examined the safeguarding arrangements for disability services.⁷ In particular, in December 2016 the (then) COAG Disability Reform Council (DRC) agreed on the *NDIS Quality and Safeguarding Framework* to set out a nationally consistent approach to NDIS safeguards.⁸ The Commission is intended to give effect to several elements of the Framework.⁹

NDIS Quality and Safeguarding Framework

2.14 The *NDIS Quality and Safeguarding Framework* (the Framework) was released by the DRC in February 2017. The framework is a high-level policy which seeks to establish nationally consistent protections for participants in the NDIS by setting out their rights to safe, high-quality services.¹⁰

2.15 The framework replaced the existing state-based quality and safeguarding measures which were considered no longer applicable in the new market-based system of the NDIS. Based on the UN Convention on the Rights of Persons with Disabilities, the National Disability Strategy 2010–2020, and the NDIS Act, the framework consists of developmental, preventative, and corrective measures which are targeted at individuals, the workforce, and providers.¹¹

2.16 Under the framework, responsibility for safeguarding is shared across the whole range of NDIS stakeholders, as a continuum starting with participant capacity, through to the planning process and corrective regulation in the form of

⁵ NDIS Quality and Safeguards Commission, *Submission 42*, p. 8.

⁶ See, National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017.

⁷ Explanatory memorandum to the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017, p. ii.

⁸ The NDIS Quality and Safeguarding Framework is available at: <https://www.dss.gov.au/disability-and-carers/programs-services/for-people-with-disability/ndis-quality-and-safeguarding-framework> (accessed 24 September 2020). See also NDIS Quality and Safeguards Commission, *Why we exist*, www.ndiscommission.gov.au/about/why-we-exist (accessed 24 September 2020).

⁹ Explanatory memorandum to the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017, p. ii.

¹⁰ Department of Social Services, *NDIS Quality and Safeguarding Framework*, December 2016, p. 4.

¹¹ Department of Social Services, *NDIS Quality and Safeguarding Framework*, December 2016, p. 13.

monitoring and responding to complaints and incidents.¹² Under these arrangements, the Commonwealth is responsible for the following national regulatory functions:

- provider registration including quality assurance
- a complaint handling system
- serious incident notification
- restrictive practice oversight; and
- investigation and enforcement.¹³

2.17 The National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 amended the NDIS Act to provide the legislative foundation to give effect to the Commonwealth's regulatory responsibilities under the framework. These amendments established the Commission, and vested responsibility for the Commonwealth's regulatory functions under the Framework in the Commissioner.

2.18 At the time of the release of the framework, the Department of Social Services noted that, once capability had grown and the NDIS market had become more established, the framework would need to be reviewed to ensure it remains fit for purpose. The committee understands that a review of the Framework will commence in late 2021.¹⁴

Functions of the Commission

2.19 As set out in the NDIS Act, the Commission's functions include:

- **core functions** (section 181E), which include the following:
 - to uphold the rights of, and promote the health, safety and wellbeing of, people with disability receiving supports or services
 - to develop a nationally consistent approach to managing quality and safeguards for people with disability receiving supports or services
 - to promote the provision of advice, information, education and training to NDIS providers and people with disability
 - to secure compliance with this Act through effective compliance and enforcement arrangements, and
 - provide market and regulatory oversight

¹² See, The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020: Report to the Commissioner of the NDIS Quality and Safeguards Commission*, 31 August 2020, p. 44.

¹³ Department of Social Services, *Summary of the NDIS Quality and Safeguarding Framework*, January 2017, p. 1.

¹⁴ NDIS Quality and Safeguards Commission, *Corporate Plan 2020-2021*, August 2021, p. 14.

- **registration and reportable incident functions** (section 181F), such as monitoring the compliance of registered providers with their conditions of registration.
- **complaints functions** (section 181G), such as the investigation, management, conciliation and resolution of complaints; and
- **the behaviour support function** (section 181H), which is to provide leadership in relation to behaviour support, and in the reduction and elimination of the use of restrictive practices, by NDIS providers.

Regulatory Approach

2.20 The Commission told the committee that its regulatory approach is founded in the UN Convention on the Rights of Persons with Disabilities (UNCRPD), the Framework and the Act noting that, under the Act, the Commission 'is responsible for implementing a regulatory environment that promotes the rights of people with disability and strengthens the NDIS market'.¹⁵

2.21 The Commission further explained that its regulatory approach is informed by six core regulatory functions, drawn from its functions set out in the Act:

- Registration
- Education and communication
- Behaviour support
- Complaints and incidents
- Compliance and enforcement
- Market and regulatory oversight and risk.

2.22 The below figure was provided to illustrate Commission's regulatory approach:

¹⁵ NDIS Quality and Safeguards Commission, *Submission 42*, p. 15.

Figure 2.1 NDIS Commission's regulatory approach

Source: NDIS Quality and Safeguards Commission, *Submission 42*, p. 16.

Registration function

2.23 Under its registration function, the NDIS Commission assesses whether organisations, practitioners and key personnel in organisations that provide services and supports are suitable to deliver supports and services in the NDIS. The Commission explained that the registration function involves:

- (a) determining the registration of providers to deliver services and supports to people with disability under the NDIS according to legislative and other regulatory requirements;
- (b) supporting providers to undertake the registration process, including facilitating access to suitably qualified auditors to undertake assessments against practice standards; and
- (c) monitoring registered providers' compliance with conditions of registration.¹⁶

2.24 The National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018 (Practice Standards) set out the requirements that

¹⁶ NDIS Quality and Safeguards Commission, *Submission 42*, p. 17.

providers need to meet to be registered as a provider and to deliver specialist supports in the NDIS.

Education and communication

2.25 According to the Commission, under its education and communication function, the Commission aims to build capacity in participants and providers to understand:

- the rights of participants
- obligations of providers; and
- the role and function of the Commission.¹⁷

2.26 The Commission noted that this function involves:

- (a) commenting on observed practice and inquiring into matters that may require attention
- (d) providing best-practice guides and training, including publishing guidance materials with examples of good and poor practice
- (e) delivering targeted education campaigns that build the capability of service providers and behaviour support practitioners in identified focus areas
- (f) delivering targeted engagement and communications campaigns that build the knowledge and awareness of participants, providers and behaviour support practitioners
- (g) building provider capability to prevent and respond to serious incidents and complaints through education and engagement, and
- (h) supporting providers to adopt best-practice approaches to positive behaviour support and ensuring they have access to specialist expertise, guidance and educational resources.¹⁸

Behaviour support function

2.27 Under the Act, the Commission's role includes working with practitioners and providers to implement strategies that reduce the occurrence and impact of behaviours of concern and reduce and eliminate the use of restrictive practices.

2.28 In its initial submission, provided to the committee in August 2020, the Commission noted that, when fully implemented, the behaviour support function would involve:

- (a) developing and maintaining the Behaviour Support Capability Framework which will ensure that high-quality practitioners deliver behaviour supports by assessing providers and practitioners against the capability domains

¹⁷ NDIS Quality and Safeguards Commission, *Submission 42*, p. 18.

¹⁸ NDIS Quality and Safeguards Commission, *Submission 42*, p. 18.

- (b) overseeing behaviour support practitioners and implementing providers who use behaviour support strategies and restrictive practices
- (c) providing best-practice advice to practitioners, providers, participants, families, and carers
- (d) receiving and reviewing provider reports on the use of restrictive practices;
- (e) responding to the unauthorised use of restrictive practices through monitoring reportable incidents, and
- (f) reporting publicly on the level of use of restrictive practices and effectiveness of reduction strategies.¹⁹

Complaints and incidents

2.29 The Commission noted that complaints management and resolution is one of its core functions. Relevantly, the Commission's complaints functions include:

- the investigation, management, conciliation and resolution of complaints;
- educating people about, and developing resources relating to, best practice in the handling of complaints;
- building the capability of people with disability to pursue complaints in relation to the provision of supports or services by NDIS providers;
- building the capability of providers to develop a culture of learning and innovation to deliver high quality supports and services, prevent incidents and respond to complaints; and
- collecting, correlating, analysing and disseminating information relating to complaints arising out of, or in connection with, the provision of supports or services by NDIS providers.²⁰

2.30 'Reportable incidents' are intended to cover serious incidents and allegations, including abuse and neglect of a person with a disability. They are defined in the NDIS Act and include:

- the death, serious injury or 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; or
- unauthorised use of restrictive practices.²¹

2.31 Functions of the Commission relating to reportable incidents involve:

¹⁹ NDIS Quality and Safeguards Commission, *Submission 42*, pp. 18–19.

²⁰ NDIS Quality and Safeguards Commission, *Submission 42*, pp. 19–20. See also *National Disability Insurance Scheme Act 2013*, section 181G.

²¹ NDIS Quality and Safeguards Commission, *Submission 42*, pp. 32–33.

- (a) responding to, investigating and overseeing the management of reportable incidents, taking regulatory action where appropriate and referring matters to other relevant authorities when required
- (b) receiving and assessing reportable incidents, managing notifications of reportable incidents from providers, and referring matters to other relevant authorities as required
- (c) reviewing and sharing reportable incident data to identify systemic issues to be addressed and driving improvement actions through provider reporting on reportable incidents and compliance activity
- (d) reporting publicly on the level of reportable incidents and prevention strategies; and
- (e) overseeing the use of restrictive practices through provider reporting.²²

Compliance and enforcement

2.32 The Commission's compliance and enforcement functions include:

- (a) determining and taking the most appropriate regulatory response to non-compliance and/or emerging issues that require proactive compliance monitoring
- (b) determining levels of provider compliance with conditions of registration (if registered), NDIS Practice Standards, the NDIS Code of Conduct and other quality and safeguard requirements when they apply
- (c) using information-gathering powers to investigate instances of potential noncompliance
- (d) determining and taking the most appropriate regulatory response to non-compliance
- (e) exercising influence, authority and statutory tools to compel compliance with conditions of registration (if registered), NDIS Practice Standards, the NDIS Code of Conduct and other quality and safeguard requirements; and
- (f) taking protective and punitive action in serious cases of persistent and high-risk non-compliance.²³

2.33 The Commission monitors NDIS provider and worker compliance with the NDIS Code of Conduct and, if registered, conditions of registration through audits, reports of reportable incidents and complaints. The Commission has a range of compliance and enforcement actions available to use against providers to secure compliance, including powers to 'ban' a provider from the NDIS market.

2.34 The Commission noted that its compliance and enforcement function is 'focussed on preventing poor service delivery and protecting participants from

²² NDIS Quality and Safeguards Commission, *Submission 42*, p. 19.

²³ NDIS Quality and Safeguards Commission, *Submission 42*, p. 20.

harm', and that compliance and enforcement action more broadly ensures public confidence in the NDIS.²⁴

Market and regulatory oversight and risk

2.35 In its initial submission the Commission noted that it was 'establishing its processes and systems' in order to be able to 'identify, categorise, assess and manage systemic risks to protect and prevent people with disability from experiencing harm that arises from poor-quality or unsafe supports or services provided under the NDIS'.²⁵

2.36 The Commission considered that its market and regulatory oversight and risk function would involve:

- (a) identifying, monitoring and responding to intelligence on emerging risks based on a range of data sources, including compliance data, data collected through complaints, reportable incidents and restrictive practices reporting, and data collected through external stakeholders, such as NDIA, other regulators, and state and territory governments
- (b) determining the most appropriate proactive and reactive regulatory responses that are proportionate to the level of risk identified across the NDIS system
- (c) monitoring changes in the NDIS market which may indicate emerging risk and monitoring and mitigating the risks of unplanned service withdrawal; and
- (d) identifying gaps in the market for disability support services.²⁶

Code of Conduct and Practice Standards

2.37 The NDIS Code of Conduct and the Practice Standards together set out minimum and nationally applicable expectations for conduct and practice in the NDIS.²⁷ As noted above, the Commission monitors NDIS provider and worker compliance with the NDIS Code of Conduct, and, where applicable, relevant practice standards.

2.38 The NDIS Code of Conduct is established in the National Disability Insurance Scheme (Code of Conduct) Rules 2018 to set minimum expectations and conduct expected of all NDIS providers and workers employed or otherwise engaged by NDIS providers. The code applies to:

- registered and unregistered NDIS providers and their employees
- providers delivering information, linkages, and capacity building activities

²⁴ NDIS Quality and Safeguards Commission, *Submission 42*, p. 21.

²⁵ NDIS Quality and Safeguards Commission, *Submission 42*, p. 21.

²⁶ NDIS Quality and Safeguards Commission, *Submission 42*, p. 21.

²⁷ NDIS Quality and Safeguards Commission, *Submission 42*, p. 16.

- providers delivering Commonwealth Continuity of Support Programme services for people over the age of 65
 - NDIS Commission employees (in addition to the Australian Public Service Code of Conduct).²⁸
- 2.39 The Code of Conduct requires workers and providers who deliver NDIS supports to:
- act with respect for individual rights to freedom of expression, self-determination, and decision-making in accordance with relevant laws and conventions
 - respect the privacy of people with disability
 - provide supports and services in a safe and competent manner with care and skill
 - act with integrity, honesty, and transparency
 - promptly take steps to raise and act on concerns about matters that might have an impact on the quality and safety of supports provided to people with disability
 - take all reasonable steps to prevent and respond to all forms of violence, exploitation, neglect, and abuse of people with disability
 - take all reasonable steps to prevent and respond to sexual misconduct.²⁹
- 2.40 The NDIS Practice Standards are set out in the National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018. They are a modular set of standards developed to provide for additional quality and competency standards for registered NDIS providers proportionate to both the risk of providing different services, and the scale of an organisation.
- 2.41 The standards consist of a core module and specific practice standard modules relating to particular supports. The core module contains standards relating to:
- the rights of participants and responsibilities of providers
 - provider governance and operational management; and
 - the provision of supports.
- 2.42 Specific practice standard modules apply to:
- high intensity daily personal activities
 - specialist behaviour support
 - implementing behaviour support plans
 - early childhood supports
 - specialised support coordination, and

²⁸ NDIS Quality and Safeguards Commission, *NDIS Code of Conduct (NDIS Providers)*, www.ndiscommission.gov.au/providers/ndis-code-conduct (accessed 17 September 2021).

²⁹ NDIS Quality and Safeguards Commission, *NDIS Code of Conduct (NDIS Providers)*, www.ndiscommission.gov.au/providers/ndis-code-conduct (accessed 17 September 2021).

- specialist disability accommodation.³⁰
- 2.43 Providers who provide or are seeking registration to provide higher-risk, more complex supports must gain third party quality assurance certification audits against the relevant practice standards. Providers who provide supports that are considered lower risk or who are already subject to professional regulation (for example, through the Australian Health Practitioners Regulation Agency) may access a 'lighter touch' verification process.³¹

Powers of the Commission

- 2.44 The Commission has a range of compliance and enforcement powers under the NDIS Act and the *Regulatory Powers (Standard Provisions Act) 2014*. Inspectors and investigators appointed by the Commissioner have, respectively, monitoring powers and investigation powers that can be used to determine whether the requirements of the NDIS Act are being met.³²
- 2.45 The Commissioner may enforce civil penalties under the NDIS Act, including for: providing support under a participant's plan without being registered (where registration was required to provide that support); failing to comply with a condition of registration; contravening the NDIS Code of Conduct; or failing to comply with a compliance notice or banning order. The Commissioner also has sanction powers, including:
- applying conditions to registration, suspending registration, or revoking registration
 - issuing compliance notices, infringement notices, or banning orders, and
 - applying for injunctions or accepting enforceable undertakings.³³
- 2.46 The Commission publishes the NDIS Provider Register, which lists any regulatory action taken against a provider, including whether registration is subject to a condition or is suspended.³⁴
- 2.47 Discussion of evidence received in relation to the powers of the commission is contained in Chapter 4.

³⁰ The committee also notes that new NDIS Practice Standards relating to mealtime management, severe dysphagia management and emergency and disaster management commenced on 15 November 2021. See NDIS Quality and Safeguards Commission, *Changes to the National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018 and National Disability Insurance Scheme (Quality Indicators) Guidelines 2018*, November 2021, <https://www.ndiscommission.gov.au/practicestandards> (accessed 17 November 2021).

³¹ NDIS Quality and Safeguards Commission, *Submission 42*, p. 24.

³² NDIS Quality and Safeguards Commission, *Submission 42*, p. 13. See Appendix 1 for further detail.

³³ NDIS Quality and Safeguards Commission, *Submission 42*, p. 14.

³⁴ NDIS Quality and Safeguards Commission, *Submission 42*, p. 15.

Structure and Staffing

2.48 The powers exercised by the Commission are vested under the Act in the Commissioner. In exercising their powers, the Commissioner is supported by office holders responsible for specific core functions under the Act:

- Registrar – oversees registration of providers
- Senior Practitioner – oversees activities for behavioural support function
- Complaints Commissioner – oversees complaints function³⁵

2.49 The Commissioner is also supported by staff of the Commission. Further discussion of staffing and resources for the Commission is contained in Chapter 9.

Committee's previous comments regarding the Commission

2.50 The committee has observed the progressive implementation of the Commission's work as it has commenced its operations across jurisdictions.

2.51 The committee noted the release of the *NDIS Quality and Safeguarding Framework* in its 2017 Progress report, including that the National Disability Insurance Scheme Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017 had been introduced into the Parliament that year to give effect to the Commonwealth's regulatory responsibilities under the framework, including providing for the establishment of the Commission.³⁶

2.52 In 2019, the committee considered evidence that the impact of regulatory requirements imposed on providers seeking to register with the Commission was driving some providers to choose not to be registered, and recommended:

the NDIS Quality and Safeguards Commission urgently review the impact of its regulatory requirements on sole providers and small to medium sized businesses providing disability services and report to the parliament on its findings.³⁷

2.53 In its 2020 General issues report, the committee noted that this inquiry had been established, and highlighted issues raised in submissions to the General Issues inquiry that also appeared in submissions to this inquiry, such as:

- oversight of service quality and safety
- the role of the Commission in providing advice and recommendations to the NDIA about matters impacting the health, safety and wellbeing of participants with psychosocial disability
- registration, auditing and reporting obligations for registered providers

³⁵ NDIS Quality and Safeguards Commission, *Who We Are*, www.ndiscommission.gov.au/about/who-we-are (accessed 15 September 2021).

³⁶ Joint Standing Committee on the NDIS, *Progress report*, September 2017, pp. 27–30, 33.

³⁷ Joint Standing Committee on the NDIS, *Progress report*, March 2019, pp. 61–62.

- oversight of unregistered providers
- the application and operation of worker screening arrangements; and
- the application of the NDIS Code of Conduct.³⁸

2.54 The 2020 General issues report also discussed experiences of people with disability during the COVID-19 pandemic, and how the NDIA and the Commission responded to COVID-19. Evidence received during this inquiry in relation to the COVID-19 pandemic was also considered in that report.³⁹

2.55 In its inquiry into Supported Independent Living, the committee considered that the Commission had a significant role to play in supporting the rights of NDIS participants in supported independent living settings, and made five recommendations in relation to the Commission:

Recommendation 22

5.61 The committee recommends that the National Disability Insurance Scheme Quality and Safeguards Commission implement additional oversight measures for participants in group living arrangements.

Recommendation 23

5.75 The committee recommends that the National Disability Insurance Scheme Quality and Safeguards Commission develop clear policies and guidance on vacancy management, with a focus on ensuring compatibility between tenants in shared accommodation and ensuring participant involvement in the vacancy management process.

Recommendation 25

5.119 The committee recommends that the National Disability Insurance Agency, with the National Disability Insurance Scheme Quality and Safeguards Commission, implement a mechanism to ensure participants accessing Supported Independent Living are able to change providers without compromising housing security or suffering other adverse consequences.

Recommendation 43

8.69 The committee recommends that the National Disability Insurance Agency, with the Quality and Safeguards Commission, develop and publish service standards specifically for the delivery of Supported Independent Living services.

Recommendation 44

8.70 The committee recommends that the National Disability Insurance Agency and the Quality and Safeguards Commission take a more active role in monitoring the quality of services in residences where Supported

³⁸ Joint Standing Committee on the NDIS, *General Issues report*, December 2020, p. 8.

³⁹ Joint Standing Committee on the NDIS, *General Issues report*, December 2020, pp. 46–69.

Independent Living is delivered, to ensure that participants and advocates can readily identify and address concerns with service quality.⁴⁰

Inquiries relating to Ms Ann-Marie Smith

- 2.56 On 6 April 2020, Ms Ann-Marie Smith tragically died in her home in Adelaide, South Australia. Ms Smith was an NDIS participant. Reports have asserted that Ms Smith's death followed a prolonged period of neglect, and that Ms Smith had been left in 'squalid and appalling circumstances'.⁴¹
- 2.57 The committee is aware of several inquiries that relate to Ms Smith that have considered ways in which NDIS quality and safeguarding measures should be improved, including the following:
- On 21 May 2020 the South Australian Minister for Human Services, the Hon Michelle Lensink MLC, established the Safeguarding Task Force 'with responsibility to examine and report quickly on gaps and areas that need strengthening in safeguarding arrangements for people with disabilities living in [South Australia]'. The task force delivered an interim report to the relevant minister on 15 June 2020 and a final report on 31 July 2020. The South Australian Government published the final report on 3 August 2020 and accepted all 7 recommendations.⁴²
 - In May 2020 the then Quality and Safeguards Commissioner, Mr Graeme Head AO, appointed the Hon Alan Robertson SC to review issues relating to Ms Smith's death.⁴³ Mr Robertson's report (the Robertson Review), dated 31 August 2020, was released on 4 September 2020.⁴⁴
- 2.58 The inquiries relating to Ms Smith's death identified a number of gaps in the policy and legal framework for NDIS supports and services. The Safeguarding Task Force identified 14 'safeguarding gaps' covering matters such as the scope of the Framework and its application to unregistered providers; conflicts of

⁴⁰ Joint Standing Committee on the NDIS, *Report into Supported Independent Living*, May 2020, pp. x–xiii.

⁴¹ The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020: Report to the Commissioner of the NDIS Quality and Safeguards Commission*, 31 August 2020, p. 4.

⁴² Safeguarding Task Force, *Report*, 31 July 2020, and The Hon Michelle Lensink MLC, 'Safeguarding gaps actioned as final report handed down', *Media release*, 3 August 2020, <https://www.premier.sa.gov.au/news/media-releases/news/safeguardinggaps-actioned-as-final-report-handed-down> (accessed 12 November 2020).

⁴³ NDIS Quality and Safeguards Commission, 'Robertson Report released: Independent Review into NDIS Commission oversight and the death of Ann-Marie Smith', *Media release*, 4 September 2020, <https://www.ndiscommission.gov.au/media-release/2256> (accessed 12 November 2020).

⁴⁴ The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020: Report to the Commissioner of the NDIS Quality and Safeguards Commission*, 31 August 2020.

interest where a support coordinator also delivers NDIS supports; and a lack investment in and access to advocacy to assist people with disability to navigate services systems.⁴⁵

2.59 The Robertson Review examined issues surrounding the death of Ms Smith, in particular the systems and processes of the NDIS Commission in its regulation of the NDIS provider involved. Mr Robertson made 10 recommendations, including in relation to:

- processes to ensure the identification by the Commission of people with disability who are vulnerable to harm or neglect
- requirements related to the provision of services to people with disability who may experience vulnerability
- more proactive monitoring by the Commission, including through the establishment of a community visitor scheme by the Commission, and face-to-face visits
- amendment of definitions in the NDIS Act
- information sharing between the Commission and the NDIA, and between these and state and territory bodies; and
- strengthening the Commission's powers to ban a person from working in the disability sector.⁴⁶

Legislative responses to the death of Ms Ann-Marie Smith

2.60 The Government introduced 2 bills to amend the NDIS Act in response to the Robertson Review. The National Disability Insurance Scheme Amendment (Strengthening Banning Orders) Bill 2020 broadened the circumstances in which the Commissioner may make a banning order against a provider or worker, and received royal assent in November 2020. The National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021 passed both houses on 21 October 2021. That bill addressed 6 of the 10 recommendations from the Robertson Review, making amendments to the Act in relation to:

- information sharing, including to lower the threshold with which information can be shared and used by the NDIA and the Commission
- reportable incidents
- broadening the scope of persons who may be subject to a banning order
- compliance notices; and

⁴⁵ Safeguarding Task Force, *Report*, 31 July 2020, p. 18.

⁴⁶ The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020: Report to the Commissioner of the NDIS Quality and Safeguards Commission*, 31 August 2020, pp. 7–8.

- review of decisions.⁴⁷
- 2.61 In a submission to the Senate Community Affairs References Standing Committee inquiry into the bill, the Department of Social Services noted that the Commission had also implemented operational changes in response to recommendations (2) and (3) of the Robertson Review.⁴⁸ These recommendations were in relation to ensuring that vulnerable NDIS participants do not have a sole carer providing services in the participant's own home and ensuring that there is a specific person with overall responsibility for the safety and wellbeing of each vulnerable participant.

Safety for people with disability

Safeguarding and choice and control

- 2.62 The *NDIS Quality and Safeguarding Framework* (Framework) emphasises building capacity in NDIS participants to participate in the NDIS market and supporting people with disability to make their own connections, noting that 'the actions people take themselves—or that their family, friends and others around them take—are likely to be the most important component of the quality and safeguarding system'.⁴⁹
- 2.63 A central foundation of the NDIS is that it is intended to be rights respecting, promoting choice and control for people with disabilities to pursue their goals and in the planning and delivery of their supports. The market-based system established by the NDIS is intended to promote this choice and control, by offering people with disability a wide range of providers from which to seek support. Having choice and control includes having the right to make decisions about your own life and circumstances, even if those decisions carry risk. This concept is referred to in the Framework as the 'dignity of risk'.
- 2.64 The 'dignity of risk', as described in the Framework, includes:
- supporting people to take informed risks to improve the quality of their lives;
 - working with participants to define acceptable levels of risk in delivering supports to achieve goals; and

⁴⁷ Senate Community Affairs References Committee, *National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021 [Provisions]*, August 2021, pp. 4–5.

⁴⁸ Senate Community Affairs References Committee, *National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021 [Provisions]*, August 2021, p. 3.

⁴⁹ Department of Social Services, *NDIS Quality and Safeguarding Framework*, December 2016, p. 7.

- supporting participants in positive risk-taking, including recognising when the risk is something the participant can decide on.⁵⁰
- 2.65 The Framework emphasises that an approach to safeguarding that respects the dignity of risk must weigh strategies for reducing harm against the likelihood of harm occurring and its severity, and the impact this will have on choice and control. However, participants also come into the scheme at 'varying stages of readiness to take control of their supports', and some participants will be unable or unwilling to exercise choice.⁵¹

'Vulnerability'

- 2.66 As risks inherent in the NDIS market are heightened for people who have limited ability to exercise choice and control, ensuring the safety and wellbeing of these participants must be core to the NDIS safeguarding approach.
- 2.67 It is also important to recognise that 'vulnerability' and being 'at risk' are not inherent in a person's impairment or disability. Environmental and systemic forces create the context which can cause a person with a disability to be at risk to violence, abuse or neglect. As also noted in the Robertson report, 'being vulnerable, or being at risk of harm or neglect, is not static' and people with disability may become vulnerable or cease to be vulnerable over time, or at a point in time.⁵²
- 2.68 The regulatory system envisaged by the Framework is intended to be 'risk responsive and person centred', recognising that risk can be affected by the 'extent to which the participant is at heightened risk of abuse and neglect, and the potential risk associated with the particular type of support'. Proportionality is incorporated in this approach through recognising that 'risk of harm is experienced differently by individuals, and that regulatory tools for mitigating risk must be responsive'.⁵³
- 2.69 The Framework identifies risks at the individual level to include a range of personal characteristics, and the level of social isolation of the person. Risks based on types of support include the effects of the support, level of personal contact involved, and the environment in which the support occurs.⁵⁴

⁵⁰ Department of Social Services, *NDIS Quality and Safeguarding Framework*, December 2016, pp. 11–12.

⁵¹ Department of Social Services, *NDIS Quality and Safeguarding Framework*, December 2016, p. 12.

⁵² The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020: Report to the Commissioner of the NDIS Quality and Safeguards Commission*, 31 August 2020, p. 38.

⁵³ Department of Social Services, *NDIS Quality and Safeguarding Framework*, December 2016, p. 13.

⁵⁴ Department of Social Services, *NDIS Quality and Safeguarding Framework*, December 2016, p. 29.

- 2.70 The Framework highlights a role for the NDIA in identifying participants who are less equipped to exercise choice and control, noting the ways in which NDIA's planning, implementation and review processes can contribute to safeguarding:

Effective planning is a key element of quality support in a person-centred system. Participants should be supported to identify and manage risk as they interact with the NDIS through access to the level of assistance they need to develop and implement their plans.

Individual planning, implementation and review processes should also include formal safeguards. These should be proportionate to the level of risk the participant faces, based on their capacity, their natural support network and the supports available to them, as well as the level of risk they choose to accept.⁵⁵

- 2.71 However, a key concern of the inquiries responding to the death of Ms Ann-Marie Smith was that participants who were at heightened risk of abuse and neglect were not being routinely identified by the NDIA and provided with appropriate supports to make decisions and implement their plans. Both the South Australian Safeguarding Taskforce and the Robertson Review considered that, in the case of Ms Smith, there had been a failure in the NDIA's processes to identify that Ms Smith's circumstances significantly increased her vulnerability to abuse and neglect.⁵⁶ The Robertson Review considered that '[t]he NDIA should develop and refine a concept of vulnerability and apply a qualitative assessment to identify such vulnerability as part of the planning process',⁵⁷ and further recommended:

The Commission should act to identify earlier those people with disability who are vulnerable to harm or neglect. Every stage of decision-making, including corrective regulation, should be alive to factors indicating that a participant may be vulnerable to harm or neglect. (Although not within my terms of reference, the NDIA should also so act in the planning process and continually.) The Commission and the NDIA should have a freer and two-way flow of information for this purpose.⁵⁸

⁵⁵ Department of Social Services, *NDIS Quality and Safeguarding Framework*, December 2016, p. 29.

⁵⁶ Safeguarding Task Force, *Report*, 31 July 2020, p. 11. The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020: Report to the Commissioner of the NDIS Quality and Safeguards Commission*, 31 August 2020, pp. 43–49.

⁵⁷ The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020: Report to the Commissioner of the NDIS Quality and Safeguards Commission*, 31 August 2020, p. 47.

⁵⁸ The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020: Report to the Commissioner of the NDIS Quality and Safeguards Commission*, 31 August 2020, p. 68. Amendments to the NDIS Act to increase information sharing between the NDIA and Commission were passed by

- 2.72 Both of these inquiries also highlighted that social isolation or lack of connections to the community may increase the risk of a person with disability being subject to violence, abuse or neglect.⁵⁹

Natural supports

- 2.73 'Strengthening natural supports' is included as a developmental measure in the Framework, which notes:

Natural supports (family, friends and community connections) provide an important informal safeguard for people with disability. A person with disability who has a supportive network of family and community members and is included in their community will be better protected by these natural safeguards than they could by any safety net built by governments.⁶⁰

- 2.74 However, the Framework recognises that not all participants will have the same access to natural safeguards:

...some people with disability, particularly those exiting institutional environments, will not have strong existing networks. Others will have ageing carers and so need to identify additional supports. Carers may also need supports to maintain their role, and mainstream services and community organisations may need support to effectively include people with disability.⁶¹

- 2.75 Activities identified in the Framework to support this measure include activities funded through the Information, Linkages and Capacity building program, and supporting the development and maintenance of these supports through participants' individual packages.⁶²
- 2.76 Chapter 10 includes discussion around the ways in which the Commission might support work to improve natural safeguards for participants.

both houses of Parliament in October 2021, see National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021.

⁵⁹ See Safeguarding Task Force, *Report*, 31 July 2020, pp. 21–22; The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020: Report to the Commissioner of the NDIS Quality and Safeguards Commission*, 31 August 2020, p. 69.

⁶⁰ Department of Social Services, *NDIS Quality and Safeguarding Framework*, December 2016, p. 27.

⁶¹ Department of Social Services, *NDIS Quality and Safeguarding Framework*, December 2016, p. 27.

⁶² Department of Social Services, *NDIS Quality and Safeguarding Framework*, December 2016, p. 28.

Chapter 3

Communication and engagement

- 3.1 This chapter outlines the evidence provided in relation to the Commission's approach to communication, engagement and education across stakeholders in the NDIS, including people with disabilities, providers, advocates, states and territories, and the NDIA.
- 3.2 A wide range of voices called for more proactive engagement across the sector, noting the important role the Commission has to play in building capacity in participants and providers to understand the rights and obligations involved in receiving and providing supports under the NDIS. Many submitters still considered that the Commission's role is not well understood, especially among people with disabilities.

Educative and capacity-building functions

- 3.3 Capacity building for participants is a key component of the *NDIS Quality and Safeguarding Framework* (Framework), and includes providing accessible information on how the NDIS functions, participant rights, and relevant complaints processes to NDIS participants.¹ Another core component of the Framework is building provider capacity and supporting best practice delivery of services and supports.² Consistent with the Framework, the Commission's Compliance and Enforcement Policy states that the Commission's primary approach to achieving compliance and building the capacity of the sector is educating, advising and encouraging providers and staff to identify and understand their obligations and improve their practices.³
- 3.4 Evidence before the committee, however, indicated that the Commission must do more to build the capacity of the sector through proactive education and outreach. In this respect the committee heard that there is low visibility in the disability sector on the Commission and its role and functions, and that low levels of awareness have a direct impact on the Commission's ability to ensure quality and safety. Also of concern was that the Commission may not be making sufficient efforts to educate participants about rights and obligations, or to inform participants about the complaints and other redress mechanisms that may be available.⁴

¹ Department of Social Services, *NDIS Quality and Safeguards Framework*, December 2016, p. 1.

² Department of Social Services, *NDIS Quality and Safeguards Framework*, December 2016, p. 1.

³ NDIS Quality and Safeguards Commission, *Compliance and Enforcement Policy*, June 2019, p. 4.

⁴ See, for example, Office of the Public Advocate (Victoria), *Submission 11*, p. 9; Leighton Jay, Jessica Quilty and Ann Drieberg, *Submission 40*, p. 10; Mr Tim Chate, Solicitor,

- 3.5 A key concern for some submitters was the inability of some in the sector to obtain a holistic understanding of the Commission's role and functions. Purpose at Work explained this issue as follows:

As in the case of the parable of the blindfolded person and the elephant, each person typically only senses part of the Commission and its work. The publicly available information about its operations is limited to its public presentations (which often repeat already available information without adding insight), its annual Corporate Plans, its Annual Reports, its policy statements, and media releases. While there have been a number of media reports that have been critical of the Commission's work, assessing the fairness of these criticisms requires detailed knowledge of the facts, [which] are not always in the public domain.⁵

- 3.6 Submitters and witnesses asserted that the Commission should proactively engage with the sector to increase awareness of its role and functions, and to help ensure people with disability have the confidence—and the capacity—to raise concerns as to the quality and safety of services and supports.⁶

Participant education and outreach

- 3.7 The committee heard that many participants may still be unaware of the Commission and lack an understanding of its role and functions. Submitters and witnesses called for increased outreach and education for participants around the Commission's functions and processes, particularly in relation to complaints.⁷
- 3.8 Aged and Disability Advocacy Australia (ADA Australia) noted that— notwithstanding the limited time the Commission has been in operation—there are low levels of understanding within the disability sector as to the Commission's role and relevance. According to ADA Australia, this is symptomatic of a broader lack of understanding about the complaints mechanisms available to participants and how they can be utilised. ADA Australia emphasised that the Commission must find more effective ways of explaining its functions and becoming 'relevant' to participants.⁸

Intellectual Disability Rights Service, *Committee Hansard*, 13 October 2020, p. 10; Ms Romola Hollywood, Director, Policy and Advocacy, People with Disability Australia, *Committee Hansard*, 13 October 2020, pp. 3–4.

⁵ Purpose at Work, *Submission 16*, pp. 1–2. Purpose at Work indicated that this lack of visibility around the Commission and its work makes it difficult to assess whether the Commission is performing its functions effectively. To address this issue, Purpose at Work recommended that the Commission communicate the range of work it is undertaking or planning, and the implications of that work, to the sector.

⁶ See, for example, Disability Services Commissioner, *Submission 13*, p. 5;

⁷ See, for example, Mr Thomas Ballantyne, Australian Lawyers Alliance, *Committee Hansard*, 29 September 2020, p. 17.

⁸ Aged and Disability Advocacy Australia, *Submission 35*, p. 10.

- 3.9 Ms Kirsten Deane, then Campaign Director, Every Australian Counts (EAC), also raised concern that while the Commission 'broadcast[s]' its role through its website, it has not taken the steps necessary to raise awareness of its role and functions within the sector. Ms Deane stated:

[I]t is...very clear that many people with disability and their families don't know that the Commission exists, what it does or how its work relates to them. The Commission needs to do a lot more to explain what it does do, how it does it and its relevant to people's lives, and it needs to be much more than simply fact sheets on a website. It needs to get out and talk to people where they are in simple, plain, everyday language that makes sense to them.⁹

- 3.10 Ms Georgi Hadden, an NDIS participant, noted that it is particularly important for the Commission to proactively engage with the sector as providers may not give sufficient, relevant information to people with disability in their care. Ms Hadden stated:

[T]here is nothing in these homes or services that makes obvious where to go for a complaint. I stumbled across the [Quality and Safeguards Commission] by accident when it first came out. I would become obsessed with a particular topic and I would study the whole lot. In service A, I was saying to the staff, 'You do realise there is now a set of standards that you guys need to follow, and if you're seeing this abuse you have the responsibility to report it.' No service mentions quality and safeguard.¹⁰

- 3.11 VALID (Victorian Advocacy League For Individuals With Disability) observed that there would be value in the Commission 'going out and getting to know' people with intellectual disability and their families, as well as advocates and service providers. VALID stated that the visibility of the Commission is a key factor in whether or not people feel confident making a complaint, asserting that the Commission 'needs to be seen in the places where people are most likely to be abused and neglected'.¹¹

- 3.12 Some submitters indicated that the lower levels of awareness within the sector of the Commission, its role and functions are symptomatic of more general difficulties in understanding a complex disability policy environment. In this respect, ADA Australia stated:

Finding...better ways to demystify and make the disability landscape less complex is a necessary part of the empowerment process. It begins with accurate information that promotes understanding and hopefully ends in

⁹ Ms Kirsten Deane, Campaign Director, Every Australian Counts, *Committee Hansard*, 29 September 2020, p. 1.

¹⁰ Ms Georgi Hadden, Private Capacity, *Committee Hansard*, 17 November 2020, p. 3. Concerns associated with the complaints process—including lack of useful information about how to make a complaint—are discussed in Chapter 6.

¹¹ VALID, *Submission 33*, p. 3.

fewer people with disability being exposed to violence, abuse, neglect and exploitation because they're empowered to act to stop it from happening.¹²

- 3.13 The Queenslanders with Disability Network (QDN) asserted that limited effective engagement with the disability sector during the establishment of the Commission has meant that the role and responsibilities of the Commission are 'broadly unknown' by many people with disability. QDN noted that its members' knowledge of the Commission varies, ranging from not knowing the Commission exists, to significant misunderstanding as to the Commission's role and functions, to a lack of awareness of the rights of people with disability to report improper actions by service providers.¹³

Educating participants on rights and on mechanisms for redress

- 3.14 The committee heard that the Commission must ensure that participants understand their rights with respect to the services and supports they receive, and are aware of relevant complaints and redress mechanisms. Submitters and witnesses highlighted the importance of participants being able to recognise violence, abuse, exploitation and neglect; understanding the mechanisms for reporting such conduct; and having the confidence to make a complaint.¹⁴

- 3.15 ADA noted that disability advocates who have supported people with disability have been 'struck by just how little information is available' about the NDIA's complaints process, stating:

[E]ven for people for whom the written word is an acceptable means of accessing information, there's little available. For people who learn via other modes of information exchange, there's even less available.¹⁵

- 3.16 According to ADA Australia, a part of any empowerment process is ensuring clients understand rights, mechanisms for raising concerns and the protections in place that help ensure there will be no retaliatory action. ADA Australia noted that while this empowerment is an integral part of the advocate role, it is not the role of an advocate to inform, educate and empower entire populations about complaints mechanisms of agencies. Rather, agencies have an obligation and a responsibility to inform and educate service users about these matters.¹⁶
- 3.17 VALID noted that participants and families have called for plain information on: how to spot good and bad practice; what the Code of Conduct 'looks like in action'; where restrictive practices occur and why; and 'problem' providers.

¹² Aged and Disability Advocacy Australia, *Submission 35*, pp. 9–10.

¹³ Queenslanders with Disability Network, *Submission 48*, pp. 4–5.

¹⁴ Some submitters and witnesses also emphasised that the Framework highlights the importance of empowering participants to make informed choices and equipping participants to raise issues and make complaints. See, for example, Multiple Sclerosis (MS) Australia, *Submission 15*, pp. 5–6.

¹⁵ Aged and Disability Advocacy Australia, *Submission 35*, p. 9.

¹⁶ Aged and Disability Advocacy Australia, *Submission 35*, p. 3.

VALID emphasised that participants are entitled to receive the information they want and need about the Commission's work in an accessible format, so that they can make informed decisions about their supports.¹⁷

3.18 QDN stated that an important piece of work for the Commission is to ensure that all participants understand their rights under the Code of Conduct.¹⁸

3.19 Family Advocacy asserted that there is 'much more for the Commission to do' to comprehensively support and educate people with developmental disability to enable them to engage with the Commission to make a complaint, and to help them access and understand the safeguarding and protection that the Commission is able to provide.¹⁹

Supporting Aboriginal and Torres Strait Islander participants

3.20 Other submitters emphasised the importance of proactive engagement with Aboriginal and Torres Strait Islander communities, noting that many Aboriginal and Torres Strait Islander peoples with disability may not be aware of their rights and entitlements and may not understand terms such as abuse, violence and exploitation.²⁰

3.21 Mr Damien Griffis, Chief Executive Officer, First Peoples Disability Network (FPDN), emphasised the importance of a proactive, outreach-based approach, that recognised that some communities may lack access to the internet or to phone or email communication and may have a well-founded mistrust of the government. Mr Griffis explained:

[In Aboriginal and Torres Strait Islander Communities] even the word 'disability' is often problematic, and 'Commission' is a term that would have negative connotations in some parts of the country.

That's not to say that this is insurmountable; it's just about the way you describe something and how you build confidence amongst community so that people can see value in the Commission...It's really important for people in our communities to know what it does, but it's about doing that in a way that's accessible and doesn't feel threatening, and the best way to do that is to sit down and yarn with people directly.²¹

3.22 FPDN expressed concern that the Commission did not have an established mechanism to engage with Aboriginal and Torres Strait Islander peoples with

¹⁷ VALID, *Submission 33*, p. 3.

¹⁸ Queenslander with Disability Network, *Submission 48*, p. 7.

¹⁹ Family Advocacy, *Submission 57*, pp. 11–12. Family Advocacy acknowledged that more resourcing may be required.

²⁰ See, for example, Mr Damien Griffis, Chief Executive Officer, First Peoples Disability Network, *Committee Hansard*, 29 September 2020, p. 13.

²¹ Mr Damien Griffis, Chief Executive Officer, First Peoples Disability Network, *Committee Hansard*, 29 September 2020, pp. 11–12.

disability, nor a strategy to increase engagement based on an understanding of disability in an Aboriginal and Torres Strait Islander context.²² FPDN also emphasised the importance of providing information about rights and entitlements to Aboriginal and Torres Strait Islander peoples with disability in a culturally appropriate manner.²³

- 3.23 Drawing on their knowledge of Commission initiatives conducted during the COVID-19 pandemic, the FPDN also expressed concern in relation to strategies and other initiatives that cast Aboriginal and Torres Strait Islander peoples as inherently 'vulnerable', stating:

We understand that during the COVID19 pandemic the NDIA initiated a 'vulnerability strategy' with welfare checks conducted by the NDIA. This included individuals in 'indigenous communities'. First Nations people with disability are not inherently 'vulnerable', in fact cultural strengths in our communities protect people with disability and this needs to be recognised and respected by the NDIA and the Commission.²⁴

Potential solutions

- 3.24 Some submitters and witnesses suggested means by which the Commission could improve its outreach to participants, and help ensure participants, their families and supporters understanding their rights and are empowered to raise issues associated with the quality and safety of supports and services.²⁵
- 3.25 For example, the QDN submitted that the Commission should develop and implement a strategic engagement plan with a focus on increasing awareness of the Commission, its role and intersections with the rights of people with disability to receive safe and quality services. The engagement plan should be co-designed with people with disability, families and advocacy organisations, should be made public, and should include key performance indicators against which the Commission is required to publicly report.²⁶
- 3.26 ADA Australia noted that it has designed a 'Self-Advocacy Toolkit' to support people with disability by providing accurate information about their rights as recipients and the simple actions they can take to exercise choice and control over the way their care is provided. According to ADA Australia, this toolkit will go some way to addressing identified needs for information and education about rights and complaints mechanisms.²⁷

²² First Peoples Disability Network, *Submission 49*, p. 3.

²³ Mr Damien Griffis, Chief Executive Officer, First Peoples Disability Network, *Committee Hansard*, 29 September 2020, p. 14.

²⁴ First Peoples Disability Network, *Submission 49*, p. 3.

²⁵ See, for example, Disability Services Commissioner, *Submission 13*, p. 3;

²⁶ Queenslanders with Disability Network, *Submission 48*, p. 5.

²⁷ Aged and Disability Advocacy Australia, *Submission 35*, p. 5.

Provider education and outreach

- 3.27 The committee heard that the Commission has not been fully effective in terms of education and outreach to service providers. Submitters and witnesses indicated that this has led to providers failing to fully understand and comply with their obligations, and to difficulties for providers seeking to understand and address issues with the quality and safety of their supports and services.
- 3.28 For example, Cara, a service provider in South Australia, observed that although the Commission's compliance framework states that 'the primary approach to achieving ongoing compliance and building the capacity of the sector is to educate, advise and encourage' providers, this approach is not taken in practice. According to Cara, the primary approach appears to be desktop investigation following a Reportable Incident and issuing compliance notices. Cara stated that this is a 'reactive' approach to customer safeguarding rather than a proactive and preventative approach.²⁸
- 3.29 Mr David Moody, then CEO of National Disability Services (NDS), called for an escalation of the Commission's educative functions. Mr Moody stated that these functions are 'tremendously critical'—particularly for new providers to the sector.²⁹ Ms Phillippa Angley, NDS Head of Policy, stated that escalation of the Commission's educative role should be complemented by education from state and territory governments, particularly regarding restrictive practices and associated approval processes.³⁰
- 3.30 The Victorian Disability Services Commissioner (DSC) encouraged the Commission to facilitate localised community engagement programs. In this respect the DSC noted that—at its peak—it interacted with 800 providers, and it took many years for those providers to build feedback systems, incorporate staff training about complaints into their programs, and work with clients to encourage them to speak up. The DSC noted that the Commission will likely have many more providers with which to interact, with many of those providers new to the sector.³¹

Training

- 3.31 The committee heard that the Commission has an important role to play in developing training for the disability sector. Submitters provided examples of specific areas of safety concerns that should be addressed, as well as training in

²⁸ Cara, *Submission 31*, p. 2.

²⁹ Mr David Moody, Chief Executive Officer, National Disability Services, *Committee Hansard*, 13 October 2020, p. 19.

³⁰ Ms Phillippa Angley, Head of Policy, National Disability Services, *Committee Hansard*, 13 October 2020, p. 19. Issues associated with restrictive practices are discussed in Chapter 8.

³¹ Victorian Disability Services Commissioner, *Submission 13*, p. 5.

broader concepts to support the safety and dignity of people with disability, including social inclusion and avoiding bias.³²

- 3.32 For example, Speech Pathology Australia (SPA) considered that specific areas of training for support workers should include ensuring safe eating and drinking for participants, training regarding ableism, different forms of communication, and how to enable communication access for people with complex communication needs.³³
- 3.33 Stride Mental Health (Stride) indicated that additional resources and modules to assist NDIS workers and providers to understand and implement the Code of Conduct would be useful, as would additional training on matters such as Reportable Incidents and the Practice Standards.³⁴
- 3.34 The committee further heard praise from some submitters about training developed to date, such as the NDIS Worker Orientation Module 'Quality, Safety and You'. Stride noted the success of this training in improving workers' and providers' understanding of the Code of Conduct.³⁵ The Victorian Disability Services Commissioner also considered that the design and production of the module were 'of excellent quality', noting that the training had gained extensive national reach and 'puts the voices of people with disability forward'. The Victorian Disability Services Commissioner further encouraged the Commission to 'continue to emphasise and develop these kinds of educative programs'.³⁶

Overall communication approach

- 3.35 Submitters raised specific concerns in relation the accessibility of the Commission's communication materials. The committee heard that often the materials were hard to find and difficult for people with disability to understand. The committee also heard that the Commission needed to improve coordination and communication with state and territory bodies involved in providing services to people with disability, as well as with the NDIA.

Communication materials and website

- 3.36 SPA stated that the Commission's website is difficult to use, and that documents and pathways are often altered or moved. This makes it challenging to find required documents or items and necessitates 'constant re-learning'. In addition, SPA asserted that the website is not accessible for consumers, creating barriers

³² See, for example, Family Advocacy, *Submission 57*, pp. 14 and 20.

³³ Speech Pathology Australia, *Submission 25*, p. 19.

³⁴ Stride Mental Health, *Submission 21*, p. 7.

³⁵ Stride Mental Health, *Submission 21*, p. 7.

³⁶ Victorian Disability Services Commissioner, *Submission 13*, p. 4.

to people with disability or complex communication needs seeking to make complaints or provide feedback.³⁷

- 3.37 These concerns were echoed by the Australian Physiotherapy Association (APA), who noted reports from their members that information on the website is difficult and time consuming to obtain or locate—thereby risking important information being missed. The APA also raised concerns that ongoing changes and updates to the website and information mean it is very difficult to keep track of new information and reforms.³⁸ The APA recommended that the Commission collate and streamline their communication materials and use simple and sequential messaging to alert providers of changes to standards and regulatory requirements.³⁹
- 3.38 Ms Kirsten Deane, then Campaign Manager, EAC, noted that much of the information on the Commission's website 'still relies on the same kind of bureaucratic jargon that the NDIS also use', asserting that the Commission needs to communicate in a 'very simple, plain way' to ensure that its role and functions are understood by people with disability and their families.⁴⁰ Concerns about accessibility also included concerns that, in general, the Commission's material is not easy to understand, and that this is particularly the case for Aboriginal and Torres Strait Islander people with disability.⁴¹
- 3.39 Consultants specialising in the NDIS Leighton Jay, Jessica Quilty and Ann Driberg observed that prior to rollout of the Commission, there was significant co-design to develop and articulate a 'revolutionary' Quality and Safeguarding Framework. The Framework and its core components are not easily accessible and have been 'out of sight and out of mind' in the Commission's work. As an illustration, Jay, Quilty and Driberg noted that the Commission's website does not include a clear articulation of the Framework, despite it being referenced numerous times. The consultants recommended that the Commission publish the Framework in an easily accessed and prominent place on its website.⁴²

³⁷ Speech Pathology Australia, *Submission 25*, p. 16.

³⁸ Australian Physiotherapy Association, *Submission 53*, p. 6.

³⁹ Australian Physiotherapy Association, *Submission 53*, p. 6.

⁴⁰ Ms Kirsten Deane, Campaign Director, Every Australian Counts, *Committee Hansard*, 29 September 2020, p. 3.

⁴¹ See, for example, Mr Damien Griffis, Chief Executive Officer, First Peoples Disability Network, *Committee Hansard*, 29 September 2020, p. 11.

⁴² Leighton Jay, Jessica Quilty and Ann Driberg, *Submission 40*, pp. 4, 6.

Communication with service providers

- 3.40 Submitters and witnesses expressed mixed views about the quality and effectiveness of the Commission's communication with service providers, with some providers expressing concern that the Commission failed to inform providers when changes were made to legislation or other requirements,⁴³ and others reporting more positive experiences.
- 3.41 For example, Connectability stated that communication 'has been an issue since ...implementation of the...Commission in 2018' and provided an example of an instance where changes to the Practice Guides regarding the definition of sexual misconduct were not communicated to providers.⁴⁴
- 3.42 SPA gave a similar example, noting that the Commission changed its rules around reportable incidents, introducing a process that was time-limited, but this was not conveyed to providers, despite the Commission having the power to subsequently fine providers for not following the new timelines. Instead, information was simply placed on the Commission's website, with no notification. SPA stated:
- This places an unreasonable onus upon providers to constantly monitor a large, unwieldy and complex website in case something is changed or updated. Whilst 'provider alert' emails have been used, these are infrequent; prior to the COVID-19 crisis this was only provided bi-monthly and did not include all of the changes that were made to various processes but were more general in nature.⁴⁵
- 3.43 By contrast, Multiple Sclerosis (MS) Australia observed that its organisations across Australia have had positive interactions and experiences with the Commission and are generally very satisfied with its operations to date.⁴⁶ Indeed, MS Australia observed that there is more work to be done by peak organisations in informing their own communities about the aims and objectives of the Commission, its independence, and its role to 'improve the quality and safety of NDIS supports and services'.⁴⁷
- 3.44 At the committee's hearing in October 2020, NDS noted that the Commission engages with them through multiple forums, and that the organisation was pleased with the lines of open communication that had been established.⁴⁸

⁴³ Speech Pathology Australia, *Submission 25*, p. 19.

⁴⁴ Connectability Australia, *Submission 2*, [p. 2]. See also Ms Donna Vallette, Compliance and Quality Manager, Connectability Australia, *Committee Hansard*, 13 October 2020, pp. 24–25.

⁴⁵ Speech Pathology Australia, *Submission 25*, p. 16.

⁴⁶ Multiple Sclerosis Australia, *Submission 15*, p. 4.

⁴⁷ Multiple Sclerosis Australia, *Submission 15*, p. 6.

⁴⁸ Mr David Moody, Chief Executive Officer, National Disability Services, *Committee Hansard*, 13 October 2020, p. 19.

However, in their submission, NDS raised concerns about the Commission's approach to contacting providers in relation to complaints.⁴⁹

- 3.45 The APA observed that, at present, there is no mechanism or capacity to ensure timeliness from the Commission on behalf of providers. According to the APA, this is a particular problem when providers require a timely response to requests.⁵⁰
- 3.46 Both APA and SPA also called for enhanced consultation and engagement with the allied health sector—in particular with peak bodies—to ensure improved information-sharing between the Commission, allied health peak bodies and other regulatory bodies.⁵¹

Proposed improvements

- 3.47 SPA emphasised that the Commission's rules and processes should be made clear to providers, with greater transparency and communication on proposed changes and time and opportunities to provide feedback. According to SPA, a specific team or direct phone line for providers to call and receive advice regarding compliance or registration, with trained responders who know the latest rules, should also be established.⁵²
- 3.48 According to the NSW Department of Communities and Justice (DCJ), additional resources should be allocated to improving the communication and implementation of complaint and investigation outcomes because poor communication causes confusion about how to proceed with services and delays to participants receiving appropriate supports.⁵³ The DCJ recommended that proactive and robust tracking systems be developed to ensure regular updates are provided and agency contacts are retained. In addition, the DCJ recommended permitting changes to referring parties during an investigatory process. For example, where a support coordinator is the referring party, the process should allow the relevant participant's new support coordinator to follow up on investigation outcomes.⁵⁴
- 3.49 Brain Injury South Australia (BISA) asserted that interactions with the Commission need to be 'positive and engaging', so services know that the

⁴⁹ National Disability Services, *Submission 27*, [p. 2]. Chapter 6 of this report discusses the Commission's approach to complaints.

⁵⁰ Australian Physiotherapy Association, *Submission 53*, p. 7.

⁵¹ Australian Physiotherapy Association, *Submission 53*, p. 6; Speech Pathology Australia, *Submission 25*, p. 17; Allied Health Professions Australia, *Submission 54*, [p. 4].

⁵² Speech Pathology Australia, *Submission 25*, p. 17. SPA asserted that such a team and/or phone line should be made available to all providers, including those who are not under the Commission's jurisdiction.

⁵³ NSW Department of Communities and Justice, *Submission 28*, pp. 1–2.

⁵⁴ NSW Department of Communities and Justice, *Submission 28*, p. 5.

Commission is there to build and monitor quality, and that the Commission should not only contact services when there is a complaint. In this regard, BISA stated that 'respect is built for a scrutinizing and compliance focussed agency when services feel supported in what they are trying to achieve for their participants'.⁵⁵

3.50 The APA recommended that the Commission establish and publish specific KPI's related to NDIS provider responsiveness, including the length of time taken to:

- acknowledge a received request
- acknowledge a received provider registration application
- process a registration application
- respond to a reported incident; and
- respond to general enquiries or requests for information.⁵⁶

Communication with people with disability

3.51 In addition to the concerns about education and outreach to participants mentioned above,⁵⁷ the committee also heard that the Commission's approach to communicating with people with disability needs to be clearer and better tailored to this audience. For example, Allied Health Professions Australia (AHPA) argued that there is a strong need for clearer consumer guidance in relation to complaints handling and the role of individual bodies and regulators in that process, stating:

Consumers and/or participants should have a clear understanding of how and where to raise issues, and confidence in how those issues will be addressed rather than feeling they need to take a scattergun approach by sending their complaints via any avenue they have identified.⁵⁸

3.52 Children and Young People with Disability Australia (CYDA) expressed concern that the Commission's external communications work focusses on informing providers rather than people with disability and their families, carers and advocates. CYDA stated that there is a 'strong need' for the Commission to undertake more assertive outreach and proactive community education around its role and powers. According to CYDA, this could include providing examples of what an individual is likely to expect if they make a complaint or report to the Commission.⁵⁹

⁵⁵ Brain Injury South Australia, *Submission 10*, [p. 3].

⁵⁶ Australian Physiotherapy Association, *Submission 53*, p. 7.

⁵⁷ See, for example, Every Australian Counts, *Submission 63*, p. 6.

⁵⁸ Allied Health Professions Australia, *Submission 54*, p. 5.

⁵⁹ Children and Young People with Disability Australia, *Submission 50*, p. 3.

- 3.53 QDN similarly observed that its members have identified that the Commission's external communication is 'overly bureaucratic', and primarily tailored to meet the needs of service providers. QDN recommended that the Commission consult directly with people with disability to redevelop their external communication materials to ensure they are accessible—including a focus on simplified messaging and Easy English.⁶⁰
- 3.54 An NDIS participant noted that dealing with the Commission has been 'time consuming, frustrating, vexing, and very upsetting'. In this respect, the submitter asserted that the Commission appears not to be trained in dealing with disabled people who need to be treated sensitively.⁶¹
- 3.55 Physical Disability Australia (PDA) noted that the Commission has entered into an agreement with National Disability Services to raise awareness of their work with disability service providers. However, PDA was not aware of any similar engagement with the disability community. PDA stated:

Given that the Royal Commission into Violence, Abuse, Neglect and Exploitation has entered into an agreement with the Australian Federation of Disability Organisations to promote the engagement of people with disability in their inquiries, it would be good to see the [Quality and Safeguards Commission] similarly engage with the representative peak organisations of their principal stakeholders.⁶²

Communication with specific cohorts and communities

- 3.56 The committee also heard that the Commission must undertake further work to tailor its communication approaches to specific groups of people with disability, including, in particular, Aboriginal and Torres Strait Islander peoples with disability.
- 3.57 FPDN stated that the Commission does not have an established mechanism to engage with Aboriginal and Torres Strait Islander peoples with disability, nor a strategy to increase engagement based on an understanding of disability in context. Moreover, there appear to be no measures in place which demonstrate a commitment to outreach and education to ensure people with disability understand, and can access the protection, safeguarding and culturally appropriate response functions the Commission is meant to provide.⁶³
- 3.58 In addition, the FPDN indicated that the means by which the Commission communicates with participants and providers (mostly by telephone and email) is inaccessible for many Aboriginal and Torres Strait Islander peoples with disability. Moreover, terminology used by the Commission is confusing and

⁶⁰ Queenslanders with Disability Network, *Submission 48*, p. 5.

⁶¹ Name withheld, *Submission 74*, p. 1.

⁶² Physical Disability Australia, *Submission 45*, [p. 4].

⁶³ First Peoples Disability Network, *Submission 49*, p. 3.

inaccessible, and there has been little investment in culturally appropriate outreach and education programs co-designed by Aboriginal and Torres Strait Islander peoples and representative organisations.⁶⁴

- 3.59 The CEO of the FPDN stated that there needs to be the establishment of a First Peoples advisory committee, to provide advice to the Commission on engagement with Aboriginal and Torres Strait Islander communities.⁶⁵
- 3.60 VALID emphasised that the Commission must engage with people with intellectual disabilities and their advocacy organisations to co-design new ways of working with and learning from people who use specialist services.⁶⁶

Communication with State and Territory bodies

- 3.61 Submitters and witnesses expressed mixed views regarding the effectiveness of the Commission's communication with state and territory bodies.

Views expressed by State Governments and State bodies⁶⁷

- 3.62 The Northern Territory Office of the Public Guardian (NT OPG) noted that its experience of communication and engagement with the Commission has been positive, noting that the Commission had conducted information sessions with NT OPG staff, and demonstrated an 'overall willingness and responsiveness' to address inquiries.⁶⁸
- 3.63 The NT OPG also stated that it advocates for a 'high level of transparency and public access to decisions taken by the Commission', asserting that this is essential to maintaining participant confidence and ensuring continuous improvement in service quality. Further, data on the work of the Commission should be publicly available, and specific to individual states and territories.⁶⁹
- 3.64 The Victorian Disability Services Commissioner observed that communication and engagement between its office and the Victorian office of the NDIS Commission has been 'very effective so far', with the Commission open to receiving referrals and collaborative in its approach to ascertaining the agency

⁶⁴ First Peoples Disability Network, *Submission 49*, p. 3.

⁶⁵ Mr Damien Griffis, Chief Executive Officer, First Peoples Disability Network, *Committee Hansard*, 29 September 2020, p. 11.

⁶⁶ VALID, *Submission 33*, p. 4.

⁶⁷ The committee only received evidence from the Northern Territory, Victoria, Australian Capital Territory, Tasmania and New South Wales in relation to this matter. See, Northern Territory Office of the Public Guardian, *Submission 32*, Disability Services Commissioner, Victoria, *Submission 13*, ACT Government, *Submission 52*, Tasmanian Government, *Submission 67*, NSW Department of Communities and Justice, *Submission 28*. See also, Dr Colleen Pearce, Public Advocate, Office of the Public Advocate, Victoria, *Committee Hansard*, 20 May 2021, pp. 1–10.

⁶⁸ Northern Territory Office of the Public Guardian, *Submission 32*, [p. 6].

⁶⁹ Northern Territory Office of the Public Guardian, *Submission 32*, [p. 5].

best-placed to deal with issues.⁷⁰ However, the Victorian Public Advocate noted that, despite there being an otherwise good relationship, shortcomings in information sharing arrangements meant that her office has been unable to follow-up on incidents referred to the Commission.⁷¹

- 3.65 The ACT Government reported that there is little engagement from the Commission at the local level—including with Government and with disability service providers. Moreover, the Commission is not involved in the local ACT Governance arrangements with the NDIA, and there appears to be little transparency of operations of the Commission at a jurisdictional level.⁷²
- 3.66 The ACT Office for Disability has reported that it has no 'line of sight' of any decisions or actions taken by the Commission about ACT providers. Moreover, the Office reports that it has not been consulted at any stage by the Commission or made aware of any action including those actions that could impact on service delivery for NDIS participants. The ACT Government emphasised that it was a recognised expectation that during the establishment of the Commission and through transition that the mutual objectives of the Commission and the ACT Government would be supported via open, proactive exchange of information.⁷³
- 3.67 At the time of providing their submission, the Tasmanian Government stated that, in regard to worker screening, communications could be improved—particularly those relating to providing information and technical detail for integrating with the Worker Screening National Clearance Database.⁷⁴
- 3.68 The NSW Government called for increased communication between the Commission and state authorities in relation to restrictive practices.⁷⁵

Views expressed by the disability sector

- 3.69 Providers, peak bodies and other actors in the disability sector held less favourable views about the effectiveness of communication between the Commission and States and territories. In particular were concerns in relation to information sharing between the Commission and State authorities, and

⁷⁰ Disability Services Commissioner, Victoria, *Submission 13*, p. 4.

⁷¹ Dr Colleen Pearce, Public Advocate, Office of the Public Advocate, Victoria, *Committee Hansard*, 20 May 2021, pp. 8–9.

⁷² ACT Government, *Submission 52*, p. 4.

⁷³ ACT Government, *Submission 52*, p. 4.

⁷⁴ Tasmanian Government, *Submission 67*, p. 6.

⁷⁵ NSW Department of Communities and Justice, *Submission 28*, pp. 4–6.

concerns about both double handling and areas where responsibility for following through on a matter is unclear.⁷⁶

- 3.70 Cara described communication between the Commission and state and territory bodies as 'ineffective', as the Commission frequently requests information from providers that would be better obtained directly from State authorities in areas such as health or child protection. This is due to a lack of protocols for information-sharing between the Commission and state authorities.⁷⁷
- 3.71 Autism Spectrum Australia (Aspect) similarly noted that communication and engagement between the Commission and State and Territory authorities had been 'incredibly complicated and, historically, very limited', and that there had been a number of disagreements between the Commission and State and Territory authorities on several key matters.⁷⁸
- 3.72 Due to a lack of communication and engagement between the Commission and state and territory authorities, there has been a large amount of administrative 'double handling'.⁷⁹ To address these issues, Aspect recommended that:
- the Commission collaborate with relevant state authorities to streamline systems and provide consistency for providers across state boundaries;
 - there be clear and consistent messaging from all relevant bodies;
 - there be agreed terms and language used by all relevant bodies; and
 - there be a focus on the reduction of red tape and duplicated reporting.⁸⁰
- 3.73 Other submitters suggested increased use of liaison roles and processes in all jurisdictions,⁸¹ and improved engagement between the Commission and state and territory authorities in relation to state-based projects that relate to the Commission's work.⁸²
- 3.74 The Parliament also passed amendments to support information sharing by the Commission in October 2021. The National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021 that broadened circumstances in which information, including information about a

⁷⁶ See, for example, Stride Mental Health, *Submission 21*, pp. 8–9. Stride recommended that collaboration between the Commission and State and Territory authorities be improved to reduce administrative costs for the NDIS and providers.

⁷⁷ Cara, *Submission 31*, p. 5. See also Community and Public Sector Union, *Submission 39*, p. 9.

⁷⁸ Autism Spectrum Australia, *Submission 9*, [pp. 3–4].

⁷⁹ Autism Spectrum Australia, *Submission 9*, [p. 4]. Aspect provided an example of a requirement to submit behaviour support plans in two different systems and in different formats to meet both Commission and State requirements.

⁸⁰ Autism Spectrum Australia, *Submission 9*, [p. 4].

⁸¹ See, for example, Anglicare SA, *Submission 18*, [p. 2]; Community and Public Sector Union, *Submission 39*, p. 15.

⁸² Allied Health Professions Australia, *Submission 54*, [p. 8].

participant can be recorded used and shared, as part of the government's legislative response to the Robertson Review.

- 3.75 While submissions to this inquiry were supportive of the principle of increased information sharing, concerns were raised in relation to the information sharing provisions in the bill that these provisions may infringe on the privacy of participants, and applicants to the worker screening process.⁸³

Communication and coordination with the NDIA

- 3.76 The committee heard from a range of submitters who were concerned about the communication and coordination between the Commission and NDIA, including concerns about ensuring consistent messaging from the NDIA and Commission, that there remain gaps in the division of responsibility between the two bodies, and that the Commission should play a greater role in influencing the practices of the NDIA.
- 3.77 Consultants Leighton Jay, Jessica Quilty and Ann Driberg stated that there 'undoubtedly needs to be a strong relationship and consistent messaging' between the NDIA and the Commission. The committee heard that there are 'numerous examples' of mixed or contradictory messages coming directly or indirectly from the two organisations, asserting that this issue needs to be monitored and actively addressed.⁸⁴
- 3.78 The committee also heard from a submitter assisting an NDIS participant as a friend and advocate about their concern that the Commission failed to engage with the NDIA on safeguarding issues that are within the responsibility of the NDIA, such as whether a participant's plan is appropriate.⁸⁵
- 3.79 NDS indicated that the COVID-19 pandemic has highlighted gaps in the division of responsibility between the Commission and the NDIA, with adverse consequences for participants. NDS considered that these gaps were exacerbated by failures by the Commission and the NDIA to coordinate effectively with other service sectors, including the health sector.⁸⁶
- 3.80 VALID stated that the Commission needs a 'more direct role' in influencing the operational practices of the NDIA and local area coordinators that put participants at risk of abuse, neglect, or exploitation. According to VALID, these practices 'create the ideal conditions for the abuse, neglect and exploitation that the NDIS Commission seeks to eliminate', and include:

⁸³ Senate Community Affairs References Committee, *National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021 [Provisions]*, August 2021, pp. 9–11.

⁸⁴ Leighton Jay, Jessica Quilty and Ann Driberg, *Submission 40*, p. 13.

⁸⁵ Name withheld, *Submission 58*, p. 4.

⁸⁶ National Disability Services, *Submission 27*, [pp. 7–8].

- participants with intellectual disability often being excluded from planning meetings, which allows decisions to be made against their wishes and interests in their absence;
 - underfunding of support coordination in plans, leading to a reliance on service providers to act as 'last resort substitute decision-makers'; and
 - 'consistent' denial of funding for independent decision-making supports for people with no family and just one service provider 24/7.⁸⁷
- 3.81 AHPA also observed that while the Commission does not have a regulatory role in relation to the NDIA, it is well-positioned to identify systemic failures in the planning process through its work responding to complaints and feedback from participants. Identified failures may then be used as the basis for engagement with the NDIA to support improvements in the training and guidance provided to planners.⁸⁸

Commission view

Overall communication and engagement activities

- 3.82 In September 2021, the Commission provided an update to the committee in relation to its communication and engagement activities. The Commission noted that it had undertaken a range of participant facing work including:
- the establishment of a new National Engagement Team
 - the release of a quarterly e-newsletter for participants
 - ongoing distribution of information packs to existing and new participants in the NDIS, including the publication in 2021 of a Participant Information Pack and an Easy Read Participant Welcome Pack created specifically for Aboriginal and Torres Strait Islander people.⁸⁹
 - developing a National Engagement Plan 2021 and an Aboriginal and Torres Strait Islander Engagement Plan 2021 'to set out its approaches, priorities and messages to participants and their representatives';⁹⁰ and
 - engaging in collaborative work with the NDIA to promote awareness of its role, including partnering with the NDIA to visit remote communities and Specialist Disability Accommodation and Specialist Independent Living Forums 'to improve engagement with participants who are hard to reach'.⁹¹
- 3.83 The Commission's recent engagement work with providers included:
- continuing to publish provider alerts

⁸⁷ VALID, *Submission 33*, p. 4.

⁸⁸ Allied Health Professions Australia, *Submission 54*, [pp. 5–6].

⁸⁹ NDIS Quality and Safeguards Commission, *Supplementary Submission 42.2*, p. 9.

⁹⁰ NDIS Quality and Safeguards Commission, *Supplementary Submission 42.2*, p. 9.

⁹¹ NDIS Quality and Safeguards Commission, *Supplementary Submission 42.2*, p. 10.

- continuing to offer the Worker Orientation Module training through its website
- developing a 'New Worker - NDIS Induction' e-learning program
- developing new training modules to sit alongside the Worker Orientation Module.⁹²

3.84 Further engagement highlighted by the Commission included:

- the work of its two consultative committees, the Disability Sector Consultative Committee and the Industry Consultative Committee, which meet every quarter
- convening Disability Advocacy Forums (most recently in 2021)
- social media engagement
- redevelopment of the Commission's website (expected early 2022) and updates to the Feedback and Complaints webpage, and
- developing the next iteration of its 'If you need to speak up, speak to us' information campaign.⁹³

3.85 In mid-2021, the Commission released the Workforce Capability Framework, which is intended to 'translate the NDIS Commission's principles, Practice Standards and Code of Conduct into clear and observable behaviours that service providers and workers should demonstrate when delivering services to people with disability'.⁹⁴ The document is written from the perspective of an NDIS participant, and describes core and additional capabilities that workers need to deliver basic and more complex supports. The Workforce Capability Framework is available as an interactive website and an accessible PDF. The Commission is undertaking an 18-month project to implement the Framework, including developing a range of tools to support implementation, set to be completed in December 2022.⁹⁵

States and territories

3.86 In its initial submission the Commission expressed an intention to source information from Australian government agencies 'to improve the quality of supports and to ensure safe environments for all NDIS participants', noting that high-level information sharing principles had been agreed with states and territories. The Commission explained that the information sharing principles

⁹² NDIS Quality and Safeguards Commission, *Supplementary Submission 42.2*, p. 11.

⁹³ NDIS Quality and Safeguards Commission, *Supplementary Submission 42.2*, pp. 11–12.

⁹⁴ NDIS Quality and Safeguards Commission, *NDIS Workforce Capability Framework*, <https://www.ndiscommission.gov.au/workers/ndis-workforce-capability-framework> (accessed 5 October 2021).

⁹⁵ NDIS Quality and Safeguards Commission, *NDIS Workforce Capability Framework*, <https://www.ndiscommission.gov.au/workers/ndis-workforce-capability-framework> (accessed 5 October 2021).

'underpin specific agency-to-agency information sharing agreements that the NDIS Commission is settling with relevant organisations around the country', and that the Commission had identified 134 individual organisations with which it would enter into formal agreements.⁹⁶

- 3.87 In September 2020, the then Commissioner provided information about information sharing arrangements with states and territories to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability:

So we've got, in that case, a very high-level set of principles, and then we've gone through a very arduous process of working between the Commission and not a kind of central function in a State Government, but with individual agencies, Public Guardians, Police Forces, a range of other human service and law enforcement agencies so that there's a specific protocol about how we work with that agency to share information.

And I guess the focus there has been to concentrate on how it is that information sharing is intended to produce outcomes for people with disability rather than focusing on this as just an elaborate administrative process.⁹⁷

- 3.88 The Commission provided these principles to the committee in an attachment to its initial submission to the inquiry. The four principles are that:

Principle one:

- All parties commit to working together to support the lawful exchange of information necessary for the NDIS Commission and state or territory bodies to effectively regulate NDIS providers and ensure the health, safety and wellbeing of NDIS participants including through:
 - good faith negotiations
 - open and honest identification of information about risk
 - operational implications including existing working arrangements with other regulatory bodies
 - timely and accurate exchange of information.

Principle two:

- The transition of quality and safeguarding functions to the NDIS Commission provides all parties with an opportunity to review interactions between existing and future service systems to ensure consistent quality and safeguarding arrangements for NDIS participants and providers into the future, including:
 - early advice and raising potential gaps, opportunities or concerns

⁹⁶ NDIS Quality and Safeguards Commission, *Submission 42*, p. 22.

⁹⁷ Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Public hearing 6: Psychotropic medication, behaviour support and behaviours of concern, Transcript Day 1 – 22 September 2020*, p. 366.

- relevant bodies have the opportunity to contribute to the transition process
- taking a whole-of-government approach to work together and effectively across organisational boundaries
- the ongoing and proactive sharing of information held by the NDIS Commission, that is appropriate and relevant to share with state and territory agencies.

Principle three:

- All parties commit to achieving clarity in the transition of roles and responsibilities to ensure that people with disability receiving supports or services under the NDIS are not disadvantaged throughout the process.

Principle four:

- All parties commit to working collaboratively to mitigate and respond to known, emerging and unexpected risks to NDIS participants and providers including through:
 - early advice about concerns
 - effective and timely communication and exchange of information between relevant bodies.⁹⁸

NDIA

3.89 With respect to the Commission's engagement with the NDIA, the then Commissioner noted that the Commission does not regulate the NDIA, and that complaints about planning are a matter for the Agency. However, a 'warm referral' process is in place if a complainant wishes to raise an issue with the Agency.⁹⁹

Committee view

3.90 The Commission has a key role to play in building capacity in all stakeholders in the NDIS to understand their rights and responsibilities under the new system. Noting that the NDIS remains a relatively new system, and the systemic disadvantages faced by people with disability, it is also crucial that the Commission takes a proactive approach to engaging with participants to ensure they understand the supports and protections available to them. Likewise, the committee considers that proactive communication and outreach from the Commission to NDIS providers is also crucial to ensuring providers deliver supports that are safe and of appropriate quality.

⁹⁸ NDIS Quality and Safeguards Commission, *Submission 42*, Attachment D (Information sharing principles).

⁹⁹ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 28.

- 3.91 While there have been shortcomings in the Commission's approach to engagement during the process of becoming fully established, the committee is pleased to see the work undertaken by the Commission to identify and address many of these concerns. The committee welcomes the steps the Commission has taken so far and offers some further suggestions around systems and approaches that can build and strengthen the Commission's work in this area.

Engagement Plans and Strategies

- 3.92 Evidence presented to the committee demonstrated a need for the Commission to develop an overarching strategy for building visibility of its work among providers and people with disabilities and engaging in capacity-building activities with participants and providers. The committee supports this approach and considers that such a strategy should emphasise a proactive role for the Commission, especially in this early phase of its work. At the time of drafting, the Commission has not published the National Engagement Plan 2021 and Aboriginal and Torres Strait Islander Engagement Plan 2021, which were highlighted by the Commission in the information provided to the committee in September 2021; it is therefore unclear whether these documents meet the committee's expectations in this regard. The committee looks forward to reviewing these documents when they are released.
- 3.93 Individual sectors that rely on the Commission's safeguarding work should also be specifically included in any overarching strategy. In this respect, the committee welcomes the development of the Aboriginal and Torres Strait Islander Engagement Plan 2021. However, the Commission should also clearly articulate how other cohorts of people with a disability are included in its communication plans and strategies, including children and young people, NDIS participants in residential aged care and people in various levels of supported accommodation. Noting the recent project for implementation of the NDIS Workforce Capability Framework, the Commission should also articulate how the Framework fits into the Commission's overall communication and engagement strategy.
- 3.94 Finally, it is not clear to the committee what process was undertaken to develop the Commission's National Engagement Plan 2021. The committee expects that any overarching strategy developed by the Commission should be developed through extensive consultation with the disability sector and co-designed with people with disability, their families, and disability advocacy organisations.

Recommendation 1

- 3.95 The committee recommends that the NDIS Quality and Safeguards Commission develop an overarching communications and engagement strategy for building visibility of its work among providers and people with disabilities and engaging in capacity-building activities with participants and providers. The strategy should specifically include: children and young**

people, Aboriginal and Torres Strait Islander people with a disability, and NDIS participants living in residential aged care.

Communication with states and territories

- 3.96 The committee also remains concerned that inadequate communication between the Commission and state and territory governments and organisations appears to be causing confusion for both participants and providers, despite some state bodies reporting satisfaction with the Commission's approach.
- 3.97 These concerns extend to the lack of clarity around information sharing between the Commission and state and territory authorities. It is especially concerning to the committee that some jurisdictions have reported that they do not have adequate information to enable them to assess whether the Commission's actions will impact service levels for people with disability in their jurisdiction. The need for clear and comprehensive information sharing arrangements is increased for areas of the Commission's work that intersect with state and territory responsibilities, such as worker screening and restrictive practices. While the committee acknowledges that the Commission appears to be working towards developing arrangements with state and territory bodies, the adequacy of these arrangements is yet to be demonstrated and understanding and awareness of any arrangements in the disability sector appears limited.
- 3.98 The committee is also keenly aware of the importance of ensuring the privacy and confidentiality of the personal information of people with disability. In this regard, the committee notes that significant concerns were raised by people with disability and their advocates in relation to recent legislation that amended provisions in the Act governing information sharing by the Commission.¹⁰⁰
- 3.99 The committee therefore considers that, where not already in place, information sharing protocols should be developed with states and territories, covering the overall approach to information sharing between the Commission and states and territories, including two-way information sharing with appropriate safeguards to ensure the appropriate balance is maintained between upholding both the privacy and safety of people with disability. Additional specific protocols should also be in place to cover areas of intersecting state, territory, and Commission responsibility, such as worker screening, restrictive practices and residential settings. To increase confidence and clarity for the wider disability sector and for people with disabilities, to the extent possible, these information sharing protocols should also be made publicly available.

¹⁰⁰ See, Senate Community Affairs References Standing Committee, *National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021 [Provisions]*, August 2021, pp. 9–11. The committee notes that the National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021 finally passed both Houses of Parliament on 21 October 2021.

Recommendation 2

3.100 The committee recommends that the NDIS Quality and Safeguards Commission develop information sharing protocols with states and territories, and, as appropriate, publish these protocols on its website. Information sharing protocols should cover general information sharing and information sharing in relation to specific areas such as worker screening, restrictive practices and residential settings. Where arrangements are already in place, the committee recommends the Commission review these agreements to ensure appropriate clarity around two-way information sharing and to ensure that privacy safeguards are in place.

Engagement with the NDIA

3.101 The committee notes that coordination and engagement with the National Disability Insurance Agency (NDIA) is integral to the Commission's role as a safeguarding body. Both the Commission and the NDIA are responsible for ensuring that current and potential participants are informed about the NDIS and their rights when receiving supports through the scheme. The NDIA also has an important safeguarding role through its planning processes.¹⁰¹

3.102 In addition, a core function of the Commission is to provide advice and recommendations to the NDIA and its Board in relation to the performance of the NDIA's functions, and the Commission's market oversight function also includes monitoring risks based on data collected from the NDIA.

3.103 The committee also considers that increased clarity about the division of responsibility between the Commission and the NDIA will assist in the goal of increasing understanding by participants and providers about the role and functions of the Commission.

Recommendation 3

3.104 The committee recommends that the NDIS Quality and Safeguards Commission and National Disability Insurance Agency together develop and publish protocols for coordination and engagement to ensure consistent messaging and clear division of responsibilities.

¹⁰¹ See, Department of Social Services, *NDIS Quality and Safeguarding Framework*, December 2016, pp. 29–30.

Chapter 4

Compliance and enforcement

- 4.1 This chapter discusses evidence received during the inquiry in relation to the Commission's compliance and enforcement powers. While evidence suggests that these powers appear adequate, there was consensus from a range of submitters and witnesses across the disability sector, along with people with disability and their families, that the Commission should be more proactive in the exercise of its compliance and enforcement powers.
- 4.2 The role of community visitors was also raised by a range of submitters and witnesses as being key to an effective proactive monitoring and enforcement model for the Commission, with suggestions for increased coordination and support from the Commission with existing state- and territory-based schemes and for a national scheme to be established within the Commission.

The Commission's approach to compliance and enforcement

- 4.3 The NDIS Act provides the Commissioner with a broad range of compliance and enforcement powers, including:
- Monitoring and investigation
 - Compliance notices
 - Enforceable undertakings
 - Infringement notices
 - Injunctions
 - Civil penalties
 - Suspension and revocations
 - Banning orders¹
- 4.4 However, the Commission's Compliance and Enforcement Policy states that the Commission's primary approach to achieving compliance and building the capacity of the sector is educating, advising and encouraging providers and staff to identify and understand their obligations and improve their practices.² Further discussion about the Commission's educative and capacity building work is contained in Chapter 3.
- 4.5 During one of the committee's public hearings, the then Commissioner described the system as follows:

¹ NDIS Quality and Safeguards Commission, *Submission 42*, p. 13. People appointed by the Commissioner as inspectors and investigators have—respectively—access to monitoring and investigation powers under the *Regulatory Powers (Standard Provisions) Act 2014*, as enlivened by the NDIS Act. For further detail, see appendix 1.

² NDIS Quality and Safeguards Commission, *Compliance and Enforcement Policy*, June 2019, p. 4.

The system is being designed to allow for a focus on prevention, development and taking of corrective action, and it's being designed to use regulatory mechanisms to drive continuous improvement in quality while also allowing the commission to respond to complaints to how incidents are managed and to the very specific issues raised by the continued use of restrictive practices.

The commission regulates all NDIS providers and registers some, and these are subject to all of the registration requirements set out in the act and the rules; for instance, the need to be routinely audited against the purpose built practice standards, the need to have mechanisms in place to manage complaints from people with disability, the need to report certain matters to the commission and the need to comply with worker screening arrangements.³

- 4.6 The Commission provided a 'regulatory pyramid', below, to illustrate how it works to uphold participant choice and control and to support a responsive and effective NDIS market.⁴

**Figure 4.1 NDIS Quality and Safeguards Commission
'Compliance Pyramid'⁵**



³ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 27.

⁴ NDIS Quality and Safeguards Commission, *Submission 42*, Attachment 1, p. 111.

⁵ Source: NDIS Quality and Safeguards Commission, *Compliance and Enforcement Strategy*, July 2019, p. 4. The pyramid is adapted from Ayres and Braithwaite, 'Responsive Regulation: Transcending the Deregulation Debate', 1992, Oxford University Press.

Adequacy of enforcement powers

- 4.7 The Commission has a broad suite of legislative powers to ensure the quality and safety of supports and services—including by enforcing compliance with the Code of Conduct and Practice Standards. The Commission may also enforce compliance via registration, including by imposing conditions on registered providers, and suspending or cancelling registration.
- 4.8 The majority of submitters and witnesses who commented on the adequacy of the Commission's powers indicated that the Commission's powers appear sufficient to enable it to effectively perform its functions.⁶ However, the committee heard that there may be scope to strengthen, clarify and rationalise the Commission's powers and to remove impediments to their exercise. This may enable better responses to allegations of misconduct and enhance the Commission's ability to ensure the quality and safety of services.⁷
- 4.9 Concerns raised by witnesses and submitters included that:
- the Commission may lack legislative 'teeth' to have a positive impact on the quality of services and supports;⁸
 - the Commission should have a power to prevent service providers from withdrawing services until other satisfactory arrangements are in place;⁹
 - legislative restrictions on the ability to delegate compliance and enforcement functions may increase administrative burdens;¹⁰
 - the evidence requirements associated with banning orders, suspensions and cancellations (of registration) may be too high for the Commission to meet within its existing resources;¹¹ and
 - limitations on periods for investigating complaints and incidents and issue infringements may lead to rates of enforcement action.¹²

Exercise of the Commission's powers in practice

- 4.10 Several submitters and witnesses expressed concern that the Commission has been unwilling or unable to make effective use of its powers in practice.¹³

⁶ See, for example, Victorian Disability Services Commissioner, *Submission 13*, pp. 2–3; National Disability Services, *Submission 27*, [p. 1].

⁷ See, for example, Purpose at Work, *Submission 16*, p. 5; Australian Services Union, *Submission 47*, p. 3.

⁸ Australian Lawyers Alliance, *Submission 4*, p. 7.

⁹ Mr Tim Chate, Solicitor, Intellectual Disability Rights Service, *Committee Hansard*, 13 October 2020, p. 11.

¹⁰ Louise Butler and Kai Sinor, *Submission 46*, pp. 1–2.

¹¹ Physical Disability Australia, *Submission 45*, [p. 1].

¹² Community and Public Sector Union, *Submission 39*, p. 4.

¹³ See, for example, Autism Spectrum Australia, *Submission 9*, [p. 1]; Cara, *Submission 31*, p. 2;

- 4.11 Ms Kirsten Deane, then Campaign Director, Every Australian Counts (EAC), stated that it is 'very clear' from the stories and experiences of EAC members that many people with disability do not consider that the Commission is using the powers at its disposal in an effective manner. Further, the Commission may need a more diverse range of options to ensure the quality and safety of services.¹⁴
- 4.12 Other submitters also reported dissatisfaction by participants with the Commission's processes, with some stating that this stems in part from the Commission's 'hands off' approach to regulation. For example, the Intellectual Disability Rights Service (IRDS) noted that one of its clients had made a complaint to the Commission, only to be told that the Commission 'educate[s] rather than regulate[s]'. The client also asserted that the Commission 'too readily refers problems away'.¹⁵
- 4.13 The First Peoples Disability Network (FPDN) similarly stated that if complaints are made to the Commission, they are dealt with from a 'service quality and regulatory perspective', rather than the Commission using the extent of its powers to take affirmative action to initiate investigations or ban providers where abuse, neglect and violence are identified.¹⁶
- 4.14 Family Advocacy also expressed concern at the low rates of compliance action by the Commission in 2018 relative to the number of reports of serious misconduct:
- The Committee's Progress Report 2019 revealed [that] in 2018, of the 1,459 reports almost 500 were related to the abuse and neglect of...participants. Yet the NDIA...only revoked 316 provider registrations: 88 voluntary revocations due to a change in the business or personal circumstance of the provider; 39 revocations due to compliance action undertaken against the provider; and 189 other revocations.¹⁷
- 4.15 The committee heard that the Commission may be reticent to take legal action against providers for breach unless a case was certain to win,¹⁸ noting the burdens and costs associated with court processes required to obtain a civil

¹⁴ Ms Kirsten Deane, Campaign Director, Every Australian Counts, *Committee Hansard*, 29 September 2020, pp. 1–2. See also Australian Lawyers Alliance, *Submission 4*, p. 7.

¹⁵ Intellectual Disability Rights Service, *Submission 29*, pp. 5–6. The IRDS emphasised that the Commission must be a 'proactive and effective regulator'.

¹⁶ First Peoples Disability Network, *Submission 49*, p. 2. The FPDN referred to NDIS Quality and Safeguards Commission, *Activity Report: 1 July 2019 to 31 December 2019*, <https://www.ndiscommission.gov.au/document/1921> (accessed 2 February 2021).

¹⁷ Family Advocacy, *Submission 57*, p. 7; See also First Peoples Disability Network, *Submission 49*, pp. 1–2.

¹⁸ Community and Public Sector Union, *Submission 39*, p. 4.

penalty or injunction against a provider.¹⁹ In this respect, the CPSU observed that the Commission generally issues infringement notices rather than fining providers directly.²⁰

- 4.16 Some submitters and witnesses also indicated that the Commission's use of the tools at its disposal has been inconsistent. For example, Autism Spectrum Australia (Aspect) noted that at times the Commission has been 'heavy handed' in terms of compliance, while at other times the Commission has been slow to respond or has stated that relevant provider should resolve the identified issue.²¹
- 4.17 Cara noted that, in practice, the Commission's approach to issuing compliance notices does not accord with the approach in the Commission's compliance and enforcement policy. Cara noted that the Commission has provided written communication identifying 'themes' of concern, but without actions or timeframes required of the provider to remedy.²²
- 4.18 The committee also heard some evidence to suggest that perceptions of the Commission as being unwilling or unable to use its powers may result from low levels of awareness around the Commission's role and functions. For example, Purpose at Work stated:

The public will not see every action that a regulator takes or is contemplating taking, or that the regulator might be gathering the necessary evidence in order to take action. If there are contemporaneous criminal investigations, the public is unlikely to appreciate that the Commission can prejudice criminal investigations and proceedings. However, if the Commission does not appear publicly to be using its powers to the fullest extent, it will be inappropriately accused – as some have done already – of being a toothless tiger.²³

'Following up' with providers

- 4.19 The committee heard there were particular concerns regarding a perceived failure by the Commission to follow-through on adverse findings or enforcement actions against providers.
- 4.20 For example, a particular concern for the Australian Lawyers Alliance (ALA) was whether there are mechanisms for the Commission to ensure that actions or behaviours change where an adverse finding is made against a provider, and to

¹⁹ Intellectual Disability Rights Service, *Submission 39*, p. 4.

²⁰ Community and Public Sector Union, *Submission 39*, p. 4.

²¹ Autism Spectrum Australia, *Submission 9*, [p. 1].

²² Cara, *Submission 31*, p. 2. The *Compliance and Enforcement Policy* states that a compliance notice must set out the relevant compliance or suspected non-compliance, together with the action to be taken by the provider. It must also set out a reasonable time for the provider to remedy action. See NDIS Quality and Safeguards Commission, *Compliance and Enforcement Policy*, June 2019, p. 5.

²³ Purpose at Work, *Submission 16*, p. 7.

ensure that such changes lead to new expectations and norms of behaviour in the industry.²⁴ At one of the committee's public hearings, Mr Thomas Ballantyne, a representative of the ALA, stated:

[I]t's not clear to me whether there's any policy or clear structure for returning to that provider to ensure that changes have been made. This is particularly relevant in the context of non-registered providers who aren't subject to the same auditing requirements. It's not enough just to make a finding. There needs to be ongoing training, there needs to be ongoing auditing and there needs to be ongoing transparency about what the Commission is doing to ensure that the behaviours have changed.²⁵

- 4.21 Villamanta Disability Rights Legal Service asserted that the most significant source of dissatisfaction with the Commission is its limited focus on outcomes, noting that for many complainants 'it feels like the Commission is just using complaints to collect data'.²⁶
- 4.22 Ms Kirsten Deane, then Campaign Director, EAC, noted that people often make complaints not to resolve an issue for themselves, but to improve the quality of services for others. The committee heard that this requires greater 'follow up' of complaints and investigations with service providers to reassure complainants that improvements will be made.²⁷
- 4.23 The Australian Association of Social Workers (AASW) submitted that the Commission's response to concerns, complaints and reportable incidents must improve—especially follow-ups to non-compliance notices. According to the AASW, some providers—particularly in Supported Independent Living settings—'do not take non-compliance notices seriously enough'. The AASW stated that there needs to be strengthening of enforcement in this area.²⁸

Commission view

- 4.24 During one of the committee's public hearings, then Commissioner described how the Commission uses its enforcement powers and functions:

[W]e have a significant number of investigations underway. We've certainly sought monitoring warrants, but we've also revoked registrations...issued banning orders and suspended registrations. We've recently issued a further infringement notice, and we use compliance notices increasingly to deal with a wide range of issues. There are a number of compliance notices in force for significant providers—that have often a very broad scope of

²⁴ Australian Lawyers Alliance, *Submission 4*, p. 7.

²⁵ Mr Thomas Ballantyne, Australian Lawyers Alliance, *Committee Hansard*, 29 September 2020, p. 16.

²⁶ Villamanta Disability Rights Legal Service, *Submission 43*, p. [2].

²⁷ Ms Kirsten Deane, Campaign Director, Every Australian Counts, *Committee Hansard*, 29 September 2020, pp. 1–2.

²⁸ Australian Association of Social Workers, *Submission 24*, p. 5; See also, Leadership Plus, *Submission 26*, p. 5; Queensland Advocacy Incorporated, *Submission 64*, pp. 8–9.

activities—where we determine that there has been some kind of a breach, and our investigation of those matters suggests that there are actions required to ensure that the provider is complying with a set of obligations.

When we issue a compliance notice we then monitor compliance with that notice. A failure to comply with that may result in an infringement notice or, in fact, it could result in us seeking civil penalties from a court. There are matters before the commission where we are actively considering enforcement measures beyond infringement notices or compliance notices.²⁹

- 4.25 The then Commissioner also gave an example of compliance activity that it was undertaking in relation to the unauthorised use of restrictive practices, noting that this activity had been driven by both reporting obligations and views from the sector about the factors driving the volume of unauthorised restrictive practices. The committee heard that the compliance activity:

has two phases in each jurisdiction. The first is a requirement to respond to a notice from us to provide information around each use of that unauthorised restrictive practice and why it is unauthorised. The second phase of that action is to determine what formal compliance action we take in respect of providers who for whom there is no legitimate reason for those practices not to be authorised. That process will result in, in New South Wales and South Australia, activity through October [2020] now that they've responded to the information element of the process, with the process kicking off in the next five jurisdictions in October [2020].³⁰

- 4.26 The then Commissioner explained that this example illustrated how different parts of the system can work to improve quality:

So that's an example of where we've seen a trend, where we've used the powers of the commission to understand what is happening there and where we're using the compliance and enforcement tools available to us to formally require action that is specifically directed to two particular providers. We will monitor compliance with those notices and take enforcement action where necessary.³¹

- 4.27 In its most recent Activity report, the Commission provided an update on this compliance work in relation to restrictive practices:

The NDIS Commission is continuing to focus compliance activity on the unauthorised use of restrictive practices. The compliance activity is directed at ensuring more participants who are subject to restrictive practices have the benefit of behaviour support plans and authorisation, regulated through the NDIS Commission's behaviour support function. The behaviour support

²⁹ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 29.

³⁰ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, pp. 30–31.

³¹ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 31.

function focuses on positive behaviour support and behaviour support planning to reduce and eliminate the use of restrictive practices.

To inform ongoing compliance action, the NDIS Commission is undertaking detailed analysis of the use of URPs and behaviour support planning rates.

This analysis will be published by the end of 2021.³²

Investigating potential non-compliance

4.28 The Commission's approach to investigating complaints and reports indicating non-compliance by providers was raised as a concern for a number of submitters, with reports of long delays in the time taken by the Commission to investigate and resolve matters. The committee also heard that requests by the Commission for information from providers to assist investigations can increase administrative burden and impose costs on providers.

4.29 Cara observed that there appears to be no set timeframes for the Commission to respond to or investigate complaints. Indeed, it was aware of cases where a complaint made to the Commission had taken over six months to be addressed, despite responses from Cara being provided in short timeframes when requested by the Commission.³³ Cara further noted that:

The Commission does not appear to be sufficiently resourced to allow for an investigation at the request of a provider or participant, and requires providers to undertake an investigation internally, or appoint an external investigator at the provider's discretion. Both alternatives lack the independence sought from a Commission-led investigation, and increase the administrative burden on providers operating in a price-capped environment.³⁴

4.30 The CPSU reported that its members cite high workloads due to lack of resources, and a lack of appropriate training, as barriers to the Commission responding effectively to complaints and reportable incidents. For example, one staff member of the Commission stated that:

Staff numbers are so low in the reportable incidents and complaints teams that they are unable to make a proper assessment of the incoming interactions from the public and then matters get missed or get transferred to compliance and or investigations months after incidents take place missing the key time windows for gathering evidence.³⁵

Time taken to complete investigations

³² NDIS Quality and Safeguards Commission, *Activity Report: 1 July 2020 to 30 June 2021*, September 2021, p. 7.

³³ Cara, *Submission 31*, p. 3.

³⁴ Cara, *Submission 31*, p. 2. Chapter 9 includes further discussion around resourcing for the Commission.

³⁵ Community and Public Sector Union, *Submission 39*, p. 4.

- 4.31 Several submitters and witnesses expressed concerns about the time taken for the Commission to complete an investigation once it is initiated following a complaint or incident report. The committee also heard that the Commission rarely provides updates on the progress of investigations—either on request by an interested party or on its own initiative.³⁶
- 4.32 Leadership Plus observed that it lodged a complaint with the Commission concerning injuries sustained by a participant due to ‘rough handling’ by support workers. However, the Commission failed to act over a period of more than 5 months—despite repeat contact by Leadership Plus. Leadership Plus submitted that this demonstrates that the Commission is not acting to protect people with disability or to regulate service providers.³⁷
- 4.33 Stride Mental Health (Stride) stated that the most significant impact on the safety of participants, quality of supports and the wellbeing of the disability workforce is the timeframes in which the Commission responds to complaints and reportable incidents, with the Commission sometimes taking up to a year before an investigation is finalised.³⁸
- 4.34 In July 2020, The Junction Works (TJW) noted that it reported an incident involving harm to an NDIS participant on 13 March 2019. This resulted in an investigation being opened by the Commission. TJW expressed concern that the investigation remained open for 500 days at the date of their submission. Moreover, the relevant Senior Investigator was unable to provide a timeframe for completing the investigation despite numerous requests from TJW.³⁹
- 4.35 The committee also heard from individual participants and their families in relation their frustration about the time taken for the Commission to investigate complaints, with one individual stating that ‘[the] conclusion is that the whole system is premised on most people giving up in disgust’.⁴⁰

Third party costs and requests for additional information

- 4.36 Some submitters noted that administrative issues associated with the investigative process delay findings and implementation of improvements, while also imposing time and cost burdens on providers and other third parties.
- 4.37 For example, Stride noted that it has received ‘repetitive requests’ for information that has already been supplied to the Commission, as well as requests for information that is not held by community-based providers and should be supplied by a treating clinician. Stride recommended that

³⁶ See, for example, Connectability Australia, *Submission 2*, [p. 1].

³⁷ Leadership Plus, *Submission 26*, pp. 3–4.

³⁸ Stride Mental Health, *Submission 21*, p. 6.

³⁹ The Junction Works, *Submission 8*, p. 2.

⁴⁰ See, for example, Mr Adam Johnston, *Submission 69*, p. 1; Mr Kevin Danher, *Submission 70*, p. 2.

Commission streamline the investigative process—including requests for further information—in the best interests of participants and providers.⁴¹

- 4.38 MHCT report that some of its members have also suggested that some information requested from providers by the Commission could easily be collected using data and information already held by the NDIA. It asserted that sourcing the relevant information directly from the NDIA would be preferable to requesting the information directly from providers. Further, the MHCT noted that the Commission sometimes requests information that is not available to a provider—such as the medications used by a participant.⁴²
- 4.39 The Australian Medical Association raised concerns in relation to the time and resources invested by medical practices to provide clinical records to the Commission for the purposes of investigations, noting that medical practices were expected to bear these costs.⁴³

Ensuring compliance by unregistered providers

- 4.40 Several stakeholders expressed concern that unregistered providers are not subject to the stringent quality and safety obligations imposed on registered providers and—partially as a consequence—fewer enforcement powers are available to the Commission in relation to this cohort.⁴⁴
- 4.41 For example, the Community and Public Sector Union (CPSU) asserted that whether a provider is registered impacts the Commission’s ability to protect participants, noting that unregistered providers ‘can only be dealt with using the Code of Conduct’.⁴⁵
- 4.42 Cara observed that there are areas which are considered ‘out of jurisdiction’ for the Commission which may have a very significant impact on participants. According to Cara, these include actions by providers who are not registered, and family-related incidents that are observed by a provider.⁴⁶
- 4.43 Mr Thomas Ballantyne, ALA, also expressed concerns relating to unregistered providers, noting that it may be difficult for participants to locate information on unregistered providers via the Commission’s portal, or otherwise to assure themselves that the provider and its staff are suitable. Mr Ballantyne considered that the Commission’s approach appeared to push responsibility for ensuring

⁴¹ Stride Mental Health, *Submission 21*, p. 6.

⁴² Mental Health Council of Tasmania, *Submission 23*, p. 5.

⁴³ Australian Medical Association, *Submission 30*, p. 1.

⁴⁴ See, for example, First People’s Disability Network, *Submission 49*, p. 1.

⁴⁵ Community and Public Sector Union, *Submission 39*, p. 8.

⁴⁶ Cara, *Submission 31*, pp. 6–7. Cara recommended that Commission investigation and enforcement powers be extended to all NDIS-funded participants. It also recommended that the Commission’s monitoring, investigation, and enforcement powers be extended to all providers of NDIS supports.

that a non-registered provider is appropriately qualified or skilled entirely back onto the participant.⁴⁷

- 4.44 Mr Ballantyne also acknowledged that there would be considerable difficulties associated with requiring all providers to register. However, he indicated that the need to address the risks of not subjecting providers to appropriate oversight may outweigh the administrative or compliance burdens associated with registration. Moreover, this issue might be managed by ensuring that registration requirements are not unduly onerous or costly.⁴⁸

NDIS Code of Conduct

- 4.45 A key aspect of the Commission's compliance function is the NDIS Code of Conduct (Code), which sets minimum expectations and conduct expected of all NDIS providers and workers.⁴⁹ The Code is intended to promote the delivery of safe and ethical services to NDIS participants by both preventing and correcting poor conduct by providers and workers. Its preventive effect operates by providing a mechanism for taking action against providers who engage in unacceptable conduct in the NDIS market.⁵⁰
- 4.46 The committee heard that, while there is general support for the Code,⁵¹ some improvements may be needed, including around some of the language used and in relation to guidance documents for interpreting the Code.

Specific criticisms of the Code

- 4.47 Some submitters argued that the Code should be strengthened to assist in preventing violence, abuse and neglect of people with disabilities. For example, the Code may offer too much discretion in its interpretation by providers, and that language used in the code should be strengthened and clarified.⁵²
- 4.48 The Victorian Office of the Public Advocate (Vic OPA) considered some provisions of the Code to be inadequate in affirming the safety and wellbeing of participants—particularly those most at risk of neglect or abuse and those for whom a complaints-based system is insufficient. The Vic OPA also stated that the guidance accompanying the Code of Conduct offers ‘too great a liberty’ to

⁴⁷ Mr Tom Ballantyne, Australian Lawyers Alliance, *Committee Hansard*, 29 September 2020, p. 17.

⁴⁸ Mr Tom Ballantyne, Australian Lawyers Alliance, *Committee Hansard*, 29 September 2020, pp. 20–21. Concerns around the costs and burdens of provider registration are discussed in more detail in Chapter 5.

⁴⁹ NDIS Quality and Safeguards Commission, *Submission 42*, p. 23. See Chapter 2 for a detailed discussion.

⁵⁰ NDIS Quality and Safeguards Commission, *Submission 42*, p. 23.

⁵¹ See, for example, Disability Services Commissioner, *Submission 13*, p. 3; Connectability Australia, *Submission 2*, [p. 2].

⁵² See, for example, Office of the Public Advocate (Victoria), *Submission 11*, p. 13.

providers in determining the extent of the policies, systems and procedures that they must put in place to eliminate abuse, and recommended that the Code be amended to articulate a stronger stance on preventing and responding to abuse within disability services.⁵³

- 4.49 Concerns about the language in the Code were also raised by Physical Disabilities Australia (PDA) who noted that the language in relation to preventing and responding to threats of violence, abuse and neglect remains nebulous and may be inconsistent. In this respect, PDA stated that it is possible that acting to comply with one part of the Code may inadvertently result in contravention of another. For example:

Clauses (f) and (g) [of the Code] require 'Code-covered' people to "take all reasonable steps to prevent and respond to": "all forms of violence against, and exploitation, neglect and abuse of, people with disability"; and "sexual misconduct" respectively.

The 'prevention' aspect of these clauses potentially work against clauses (a) and (b), requiring 'Code-covered' people to "respect" the "individual rights to freedom of expression, self-determination and decision-making" capacity; and "privacy" of people with disability respectively.

In certain social situations, for example, a support worker may feel obliged to intervene if he or she feels the...participant they are working for is in danger and act in accordance with clauses (f) and/or (g) of the [Code]. Meanwhile the...participant may feel clauses (a) and/or (b) are being violated.⁵⁴

- 4.50 Other specific concerns raised about the code included:

- That it is 'inappropriate' for the Code to apply to unregistered providers who may be unaware of the code and its application⁵⁵
- That the Code provides insufficient guidance around how to practically work towards the goal of reducing or eliminating the use of restrictive practices⁵⁶
- The Code (and accompanying guidance) should be better aligned with principles of trauma-informed and recovery-oriented practice to further support the needs of people with psychosocial disability;⁵⁷ and
- The Code does not appear to apply to a provider's Board of Directors.⁵⁸

⁵³ Office of the Public Advocate (Victoria), *Submission 11*, p. 13.

⁵⁴ Physical Disability Australia, *Submission 45*, [p. 3].

⁵⁵ Physical Disability Australia, *Submission 45*, [p. 3].

⁵⁶ Office of the Public Advocate (Victoria), *Submission 11*, p. 14.

⁵⁷ Office of the Public Advocate (Victoria), *Submission 11*, p. 14. Further discussion of evidence received in relation to restrictive practices is contained in Chapter 8.

⁵⁸ Purpose at Work, *Submission 16*, p. 6.

Understanding the Code

- 4.51 Some submitters also considered that guidance accompanying the code for both workers and providers should be strengthened to ensure key principles are upheld and key concepts understood.
- 4.52 The Mental Health Coordinating Council (MHCC) suggested that the Guidance for providers and workers which accompanies the Code should:
- reflect a best-practice approach to working with people with psychosocial disability by including trauma-informed recovery principles
 - introduce the concept of ‘will and preference’ so as to distinguish between supported decision making and substitute decision making
 - define a range of terms in the glossary including: ‘capacity’; ‘psychosocial disability’; supported decision-making’; ‘Guardianship’ and ‘Guardianship Order’; and ‘Financial Management Order’; and
 - provide an explanation for the legal framework relating to Guardianship Orders.⁵⁹
- 4.53 In addition, the MHCC indicated that some scenarios included in the Guidance may benefit from review.⁶⁰
- 4.54 The Vic OPA observed that the Code of Conduct should guide workers and providers on how and when to respond to abuse and pointed to its own *Interagency Guideline for Addressing Violence, Neglect and Abuse* (IGUANA) as a useful basis on which to base potential amendments to the guidance accompanying the Code.⁶¹

Publishing compliance and enforcement outcomes

- 4.55 Evidence before the committee also indicated that increasing transparency in how the Commission exercises its powers—for example, by making compliance outcomes publicly available—may help assure the sector that the Commission is accountable for the exercise of its powers and functions. Moreover, increased transparency may enable greater levels of choice and control for people with

⁵⁹ Mental Health Coordinating Council, *Submission 20*, p. 5.

⁶⁰ Mental Health Coordinating Council, *Submission 20*, p. 5. In some cases, this is because the scenario uses terms which are not defined elsewhere in the Guidance or the Code. In others, this is because certain descriptions of people with disability may be considered to be stigmatising or judgmental.

⁶¹ Office of the Public Advocate (Victoria), *Submission 11*, p. 13. See also, Office of the Public Advocate (Victoria), *Interagency Guideline for Addressing Violence, Neglect and Abuse* (IGUANA), 2013, available at <https://www.publicadvocate.vic.gov.au/opa-s-work/our-organisation/policies-plans-and-protocols/interagency-guideline-for-addressing-violence-neglect-and-abuse-iguana> (accessed 26 October 2021).

disability over the services and supports they receive.⁶² These matters were summarised by Mr Thomas Ballantyne, ALA, as follows:

We know from other schemes and other experiences that transparency is essential not only for the effective operation of the scheme but also to maintain the trust of participants. If participants don't trust the regulatory system, they are less likely to engage with it. If they don't engage with it, the efficacy and the safeguards that are provided are completely undermined.⁶³

- 4.56 NDS noted that while actions resulting in penalties are summarised on the Commission's website, the available information is not sufficient to help drive improvement across the sector.⁶⁴ Mr David Moody, then NDS Chief Executive Officer (CEO), elaborated on the information that should be published as follows:

I'd like to see information about the nature of [a] breach, as proven, in more detail; descriptors in regard to the nature of NDIS participants' disability, while making sure that we continue to de-identify them; information in regard to the nature of the support that was provided, or was not provided, as the case may be; information as to for how long the alleged breach occurred and in what circumstances; and the actions taken by the commission and any penalties that might have attached thereto.⁶⁵

- 4.57 Physical Disability Australia (PDA) noted that the extent to which the Commission takes action in relation to complaints is unclear from the Commission's activity reports. PDA was able to locate a 'woefully short' list of people and organisations that had been subject to sanctions via the Commission's website and reported that even this list lacked detail regarding why particular actions were taken and required an 'extensive search' to locate.⁶⁶ Mr Simon Burchill, PDA Manager, stated that information should be made available on the extent to which complaints and allegations of misconduct have resulted in compliance action.⁶⁷
- 4.58 The Vic OPA were also of the view that the information on the NDIS website in relation to providers and banning orders is neither accessible nor user-friendly, and that information on the Commission's activities published in annual reports is 'superficial' and includes little qualitative analysis. In a market-driven

⁶² See, for example, Office of the Public Advocate (Victoria), *Submission 11*, p. 17; Kai Sinor and Louise Butler, *Submission 46*, p. 6.

⁶³ Mr Thomas Ballantyne, Australian Lawyers Alliance, *Committee Hansard*, 29 September 2020, p. 15.

⁶⁴ National Disability Services, *Submission 27*, [p. 1].

⁶⁵ Mr David Moody, Chief Executive Officer, National Disability Services, *Committee Hansard*, 13 October 2020, pp. 17–18. See also Mr Tom Ballantyne, Australian Lawyers Alliance, *Committee Hansard*, 29 September 2020, p. 16.

⁶⁶ Physical Disability Australia, *Submission 45*, [p. 2].

⁶⁷ Mr Simon Burchill, Manager, Physical Disability Australia, *Committee Hansard*, 13 October 2020, p. 14.

environment, the publication of information on providers—including complaints made against them—should be ‘an indispensable mechanism to equip participants with the tools and knowledge to make [them] informed purchasers and consumers of...supports’.⁶⁸ The Vic OPA also considered that the Commission should publish data on ‘thematic’ safeguarding issues, and the actions that it has taken in relation to these matters.⁶⁹

- 4.59 A number of submitters also emphasised the importance of ensuring information published about compliance activity is accessible to participants. For example, Every Australian Counts noted in relation to the register of deregistered and banned maintained on the Commission's website:

...while that language may make sense to lawyers or people who work at the Commission, it's a bit of a mouthful for everyone else. We really want participants and their families to be checking that list. Particularly self-managed or plan managed participants who can use unregistered providers. They need to know. But how can they check a list if they don't even know it exists? Or can't find it on the website? Or know why they should check it in the first place?⁷⁰

- 4.60 QAI similarly expressed concern that it is particularly difficult to locate the NDIS provider register (including compliance and banning orders) via the Commission's website, stating that it is ‘difficult to comprehend how the Commission expects participants to check service providers compliance status when the information is not linked to the NDIS participant tab on the website’.⁷¹
- 4.61 In addition, QAI expressed concern that the Commission is failing to provide transparent information about registered providers who have changed their name since the inception of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability to ‘save face’ while stories of abuse, neglect and exploitation are reported.⁷²

Commission view

- 4.62 At a public hearing in September 2020, the former Commissioner agreed that information about compliance and enforcement was not easily accessible on the

⁶⁸ Office of the Public Advocate (Victoria), *Submission 11*, p. 17.

⁶⁹ Office of the Public Advocate (Victoria), *Submission 11*, pp. 17–18. Thematic safeguarding issues identified by the Victorian Public Advocate included: numbers of incident reports and data on compliance with incident reporting requirements; uses of restrictive practices; the prevalence of violence and abuse occurring in services; and deaths in services. According to the Victorian Public Advocate, this data should include national-, State- and Territory-level figures, and year-to-year comparisons.

⁷⁰ Every Australian Counts, *Submission 63*, p. 6.

⁷¹ Queensland Advocacy Incorporated, *Submission 64*, p. [12]; Australian Association of Social Workers, *Submission 24*, p. 4.

⁷² Queensland Advocacy Incorporated, *Submission 64*, p. [12].

Commission's website and noted that planning had been initiated to refresh the website.⁷³ The then Commissioner also stated that the Commission was increasingly reporting on specific activities and outcomes, and disseminating information through its consultative committees:

The commission is reporting more frequently on specific activities it's taking as well as its regular reporting, and we do increasingly push a lot of information out through our consultative committees as well. But I would accept the point, particularly given the level of concern and interest in these sorts of issues, that the commission can do more work in publicising these sorts of activities. In addition to continuing the outreach work that we've done, we have had a very strong focus in the first two years of the organisation's life on speaking to a wide range of organisations that represent people with disability as well as to provider organisations.⁷⁴

- 4.63 In September 2021, the Commission informed the committee that its website was being redeveloped, with the new website expected to be launched in early 2022.⁷⁵

Proactive monitoring and enforcement

- 4.64 A core concern for several submitters and witnesses was that the Commission takes a reactive rather than proactive approach to compliance and enforcement. The Commission was perceived as relying heavily on complaints and reportable incidents to initiate investigations and compliance processes, rather than proactively monitoring the quality and safety of services and supports. The committee heard that this approach is not effective in terms of ensuring the quality and safety of services and supports or building the capacity of the sector. Moreover, this reactive approach places a heavy burden participants, families and supporters.⁷⁶
- 4.65 Ms Kirsten Deane, then Campaign Director, EAC, also raised concern that the Commission's system is 'reactive, not proactive', and relies on people coming forward to make complaints. Against the background of the COVID-19 pandemic, Ms Deane stated:

I don't see them [the Commission] reaching out the other way. They have been very clear with providers about their set of expectations around

⁷³ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 30.

⁷⁴ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 31.

⁷⁵ NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 12.

⁷⁶ See, for example, Office of the Public Advocate (Victoria), *Submission 11*, p. 7; Disability Services Commissioner, *Submission 13*, p. 3; Prader-Willi Syndrome Australia, *Submission 12*, pp. 2–3; Northern Territory Office of the Public Guardian, *Submission 32*, [p. 4]; Community and Public Sector Union, *Submission 39*, p. 14; Leighton Jay, Jessica Quilty, Ann Driberg, *Submission 40*, p. 9; Family Advocacy, *Submission 57*, p. 7.

COVID in particular, but again that's a very different thing from reaching out to people with disability and asking whether they feel comfortable enough to make a complaint. That's not how this system works. They rely on people with disability and their families coming forward to make a complaint. They're not reaching out to them.⁷⁷

- 4.66 Ms Romola Hollywood, then Director of Advocacy and Research, People with Disability Australia, similarly noted that the Commission is 'heavily reliant' on receiving complaints before acting on reports of violence, abuse, neglect and exploitation. Moreover, the Commission's apparent failure to proactively monitor or conduct 'spot checks' on providers may have a chilling effect on participants' willingness to make complaints. Ms Hollywood argued that the Commission should carry out 'own motion' investigations—including checks on providers where people are at high risk of abuse due to isolation and investigations where there has been a significant underspend on supports.⁷⁸
- 4.67 The FPDN submitted that the Commission functions as a 'passive regulatory body focussed on service quality' and does not proactively initiate rights-based monitoring or outreach, take self-directed action in relation to unlawful practices, or challenge the systemic drivers of abuse or violence.⁷⁹ Mr Damian Griffiths, CEO, FPDN, elaborated:

There's too much sitting behind a desk, to be frank. It needs to be about getting out and about. And why can't there be a function like the community visitor schemes that happen in other jurisdictions. A similar function to that, we think, would have similar value.⁸⁰

- 4.68 The NSW Department of Communities and Justice (DCJ) called for more responsive monitoring of NDIS participants—particularly those with a high degree of vulnerability (for example, those who pose a high risk of harm or who have more complex needs). The DCJ noted that many participants who are referred to its Community Safety Program have sufficient funding in their plans, but funding is under-utilised or exhausted without provision of relevant service. According to the DCJ, this indicates that there are insufficient mechanisms in place to identify services that are not providing appropriate support⁸¹

⁷⁷ Ms Kirsten Deane, Campaign Director, Every Australian Counts, *Committee Hansard*, 29 September 2020, p. 8.

⁷⁸ Ms Romola Hollywood, Director, Advocacy and Research, People with Disability Australia, *Committee Hansard*, 13 October 2020, p. 2. Ms Hollywood acknowledged that the Commission must have sufficient resources to carry out such investigations and inquiries. Staffing and resources issues are discussed in Chapter 9.

⁷⁹ First Peoples Disability Network, *Submission 49*, p. 2.

⁸⁰ Mr Damien Griffiths, Chief Executive Officer, First Peoples Disability Network, *Committee Hansard*, 29 September 2020, p. 10. Community visitor schemes are discussed in more detail below.

⁸¹ NSW Department of Communities and Justice, *Submission 28*, p. 3. To address these issues, the DCJ recommended that a system be developed for 'flagging' clients with a heightened risk profile, as well as increased oversight of supports and services for people with disability who have behaviours

- 4.69 A number of submitters emphasised the importance of proactive monitoring to ensure the safety of people with disability receiving accommodation supports through the NDIS. For example, the Community and Public Sector Union (CPSU) concluded that the Commission's monitoring and investigation powers are not being fully utilised because the Commission does not proactively visit disability accommodation services, and instead relies on complaints and reportable incidents and concerns arising from auditing and compliance activities. The CPSU asserted that a combination of reactive and proactive approaches is needed.⁸²
- 4.70 Prader-Willi Syndrome Australia (PWSA) recommended more monitoring and investigation of supported independent living (SIL) services in supported disability accommodation settings, noting the specific vulnerabilities of people with Prader-Willi Syndrome and challenges for this cohort in holding providers accountable for unsafe and poor quality services. PWSA indicated that—as part of this process—the Commission should investigate the appropriateness of SIL quotes and rosters of care, and should ensure that SIL service provision is underpinned by a balanced service agreement.⁸³
- 4.71 The ALA noted that since the establishment of the Commission, it has been concerned as to whether the Commission has the legislative 'teeth' to have a positive impact on the quality of services and supports.⁸⁴ Mr Thomas Ballantyne, on behalf of the ALA, elaborated on this matter at one of the committee's public hearings, stating:

Section 55A [of the NDIS Act] holds that, if the Commissioner reasonably believes that a person has information about certain matters, they can compel the person to provide the information.

But what happens before that? How does the commissioner ever get to the point where they reasonably believe that something is going wrong? To me, from reading the act, there's not that sense of the commissioner having the power to get out there of its own volition to be proactive, to launch investigations and to deliver a comprehensive regulatory function. Now,

of concern which have led to contact with the justice system. These issues are discussed further in Chapters 8 and 10 relating to restrictive practices and systemic issues.

⁸² Community and Public Sector Union, *Submission 39*, p. 3. The CPSU noted that staffing pressures resulted in inadequate numbers of provider and participant home visits. This was exacerbated by the lack of other resources such as fleet cars. Issues associated with staffing and resources are discussed in Chapter 9.

⁸³ Prader-Willi Syndrome Australia, *Submission 12*, p. 3. See also Queensland Advocacy Incorporated, *Submission 64*, pp. [8–9].

⁸⁴ Australian Lawyers Alliance, *Submission 4*, p. 7.

that doesn't have to be in the act specifically, but it does have to be clearly one of their functions.⁸⁵

- 4.72 In his report to the Commissioner, the Hon Alan Robertson noted the limitations of relying on standard setting and auditing for ensuring the safety of vulnerable participants. Mr Robertson recommended that the Commission conduct occasional visits 'to assess the safety and wellbeing of individual NDIS participants, whether or not a complaint has been made or a "reportable incident notified"'. Mr Robertson further recommended that the Commission 'should miss no opportunity for face-to-face assessment of vulnerable participants'.⁸⁶

Community Visitor Schemes

- 4.73 According to the 2018 *Community Visitor Schemes Review* (CVS Review) final report, community visitor schemes provide independent oversight of institutions, including facilities and residences where disability supports are delivered. Visitors are appointed by statute, and have wide powers to visit, inspect and report on the experience of residents. In 2018, there were six Community Visitor Schemes for disability services in Australia; one in each State and Territory except Western Australia and Tasmania. Those States operate similar oversight mechanisms under relevant disability and mental health legislation.⁸⁷
- 4.74 The committee heard that the Commission's capacity to monitor the quality and safety of services and supports could be enhanced via community visitor schemes. Several submitters and witnesses noted that this may be achieved by enhancing and building links with state-based programs, while others called for the establishment of a program within the Commission.

Strengthening existing Community Visitor Schemes

- 4.75 The committee heard that there were opportunities to improve the Commission's processes for engaging with existing community visitor programs to increase the Commission's ability to monitor service delivery and ensure that the experiences of people with disability can be heard and rapidly acted upon, such that violence, abuse and neglect do not occur.⁸⁸ However, a

⁸⁵ Mr Tom Ballantyne, Australian Lawyers Alliance, *Committee Hansard*, 29 September 2020, pp. 18–19.

⁸⁶ The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020: Report to the Commissioner of the NDIS Quality and Safeguards Commission*, 31 August 2020, p. 75. See, Chapter 2 in relation to language around 'vulnerability' and factors that increase the risk that a participant will be subject to harm or neglect.

⁸⁷ Department of Social Services, *Community Visitor Schemes Review*, December 2018, pp. 17–19.

⁸⁸ See, for example, Only About Quality, *Submission 7*, p. 4; Family Advocacy, *Submission 57*, p. 13.

number of submitters also highlighted ways in which existing state and territory based schemes could be strengthened or expanded.

4.76 Advocacy for Inclusion (AFI) noted that, according to the CVS Review, there are 'strong arguments' that protections offered by the Commission could be enhanced by the inclusion of official visitors to disability services as a function. AFI noted that these arguments include:

- Strong internal links with key areas of risk (such as restrictive practices) which could facilitate the dissemination of information and expertise.
- Direct flows of information from local sites to the Commission and from the Commission should there be trends/patterns of concern that need investigation.
- The simplicity offered by a single national scheme for providers, NDIS participants and members of the public.
- The ability to set a common philosophy of practice, standards and follow through. Driving national consistency of approaches to safeguarding requires investment and focus which may not be achieved if commitment is variable across jurisdictions.⁸⁹

4.77 The Vic OPA also observed that the CVS Review recommended that Community Visitor Programs be retained at NDIS full scheme, as follows:

- [T]he role of Community Visitors should continue to be provided by state and territory-based schemes where they exist.
- [T]o support Community Visitors schemes' interface with the NDIS Commission, the following matters should be agreed between the NDIS Commission and states and territories:
 - authority of Community Visitors to enter the premises of NDIS providers;
 - data and information sharing;
 - compulsory reporting to the NDIS Commission on alleged reportable incidents and failure to adhere to incident management processes;
 - reporting on patterns of concern to the NDIS Commission and State and Territory agencies;
 - role of Community Visitors Scheme in relation to restrictive practices monitoring and reporting.⁹⁰

4.78 The Vic OPA recommended amendments to the NDIS Act to include reference to legislation authorising Victorian and other Community Visitor Programs as a key component of safeguarding arrangements in respect of NDIS services. Amendments should complement State laws by specifying that:

⁸⁹ Advocacy for Inclusion, *Submission 65*, p. 17, citing Department of Social Services, *Community Visitor Schemes Review*, December 2018.

⁹⁰ Office of the Public Advocate (Victoria), *Submission 11*, p. 21.

- Community Visitors are entitled to copies of a participant's plan; provider incident reports; and any documentation related to the participant's tenancy arrangements.
 - Community Visitors and other comparable entities appointed under state and territory legislation are entitled to share information as necessary to advocate for participants and raise concerns with complaints bodies.⁹¹
- 4.79 Concerns about information sharing and coordination with community visitor schemes were shared by the ACT Government which noted that responses received from ACT Official Visitors indicate that neither the Commission nor the NDIA is willing to pursue issues raised by Official Visitors unless Official Visitors undertake the groundwork to gather all of the necessary evidence.⁹² The ACT Government also noted concerns that, at the time of their submission, an information sharing agreement between the Commission and Official Visitors in relation to complaints was yet to be finalised. Additionally, according to Official Visitors, the draft agreement was 'very one-sided', with an emphasis on information being provided to the Commission but with little surety that information would be provided back to the Official Visitors.⁹³
- 4.80 Some submitters suggested that there had been a weakening and separation of state-based schemes during the transition to the NDIS and the Commission. For example, Cara stated that with the transition to the NDIS, many state-based Community Visitor Schemes have 'eroded', and each state and territory has implemented different arrangements. In relation to South Australia:
- On transition to Commonwealth governed arrangements, the scope of the South Australian Community Visitor Scheme was reduced to visit people "living in state-run disability accommodation" ...This effectively removed the structure of independent visiting and safeguarding for people receiving services from non-government organisations.⁹⁴
- 4.81 Also in relation to South Australia, JFA Purple Orange stated that ways to strengthen the formal mandates of local community safeguards such as Community Visitors Schemes should be considered. JFA recommended that Community Visitors Schemes and similar initiatives be re-designed through consultation with people with disability and expanded to include an extension

⁹¹ Office of the Public Advocate (Victoria), *Submission 11*, p. 22.

⁹² ACT Government, *Submission 52*, p. 2. According to the ACT Government, Official Visitors have noted that it is their legislative role to refer matters on to organisations that are better resourced than the Official Visitors scheme, if issues are unable to be resolved 'on the ground'.

⁹³ ACT Government, *Submission 52*, p. 2.

⁹⁴ Cara, *Submission 31*, p. 6.

of mandate pertaining to visitable places, unplanned checks and audits and private dwellings.⁹⁵

- 4.82 The Northern Territory Office of the Public Guardian (NT OPG) observed that the Northern Territory's Community Visitor Scheme has limited scope and is only mandated to protect the rights of people receiving treatment from mental health services or disability secure care. The NT OPG advocated for the expansion of the scheme to include all service providers, asserting that this would provide an independent voice for participants to make complaints to their provider or to the Commission.⁹⁶
- 4.83 The Vic OPA noted that in Victoria, Community Visitors are limited to visiting Short-Term Accommodation and Assistance and SDA-enrolled dwellings, and only if certain conditions are met. This is of concern, as only around 6 per cent of participants are—or will be—eligible to access SDA. The Vic OPA indicated that this remit should be expanded.⁹⁷
- 4.84 State and territory schemes also provide oversight of mental health and other facilities as well as disability services. The CVS review noted that NDIS supports are only one aspect of the supports that a person with disability may receive, and recommended retention of the current arrangements with a view to ensuring a holistic approach to looking at a person's circumstances, for example to review NDIS supports received and also a person's access to health and mental health care and housing support.⁹⁸

Developing a Community Visitor Scheme for the Commission

- 4.85 Some submitters and witnesses considered the Commission should establish its own Community Visitor Scheme to improve the Commission's capacity to monitor the quality and safety of services and supports. This may be in addition or as an alternative to state- and territory-based arrangements.
- 4.86 For example, the Intellectual Disability Rights Service (IDRS) observed that the NSW Community Visitors Program is operated by the Ageing and Disability Commission, noting that this leaves resources 'spread thinly'. According to the IDRS, this arrangement is unsatisfactory due to unnecessary information barriers between the Commission and the people it should be protecting from abuse and neglect—many of whom cannot speak out. Consequently, the IDRS

⁹⁵ JFA Purple Orange, *Submission 19*, p. 12; see also Mr Robbi Williams, Chief Executive Officer, JFA Purple Orange, *Committee Hansard*, 29 September 2020, p. 24.

⁹⁶ Northern Territory Office of the Public Guardian, *Submission 32*, [p. 4].

⁹⁷ Office of the Public Advocate (Victoria), *Submission 11*, p. 22.

⁹⁸ Department of Social Services, *Community Visitor Schemes Review*, December 2018, p. 46.

asserted that the Commission should have a Community Visitor Program to inspect group homes, meet residents, and report.⁹⁹

- 4.87 Stride Mental Health (Stride) noted that Community Visitor Programs remain largely State-based, asserting that this results in sporadic visits and to reports being given to the relevant provider but not to the NDIA or the Commission.¹⁰⁰
- 4.88 EAC submitted that there is support from people with disability and their families for the Commission to initiate its own investigations without needing to wait for an individual complaint. In particular, there is support for the idea of the Commission carrying out unannounced visits or 'spot checks' where there are concerns. EAC expressed concern that despite commitments by the (former) Disability Reform Council, the idea of a national community visitors scheme 'appears to have stalled'.¹⁰¹
- 4.89 The South Australian Public Advocate drew the committee's attention to the July 2020 Safeguarding Taskforce Report.¹⁰² The Taskforce was established in May 2020 to consider the systemic safeguarding gaps of the NDIS, the Commission and the state in response to the death of Ms Ann-Marie Smith. The taskforce identified 14 safeguarding gaps including that:
- The commencement of the NDIS Quality and Safeguards Commission on 1 July 2018 in South Australia has created issues with the scope of the Community Visitor Scheme.¹⁰³
- 4.90 The Taskforce emphasised the merit in having a broadly empowered community visitor scheme (CVS) through which visitors can visit potentially vulnerable people in 'all group homes, all supported residential facilities and all day options programs, whether state-run or NGO-run'.¹⁰⁴ The Taskforce further considered that the 'cleanest and best way to achieve this would be for the Commission to add a national CVS to its suite of functions', and explained:
- The Commission should be making many more unannounced visits to service sites and needs to improve their responsiveness to notifications of adverse events or participants at risk. The CVS as part of the Commission's range of functions would be a vehicle to achieve these tasks and it is hoped

⁹⁹ Intellectual Disability Rights Service, *Submission 29*, p. 9. The IDRS indicated that this need is especially pronounced in congregate living arrangements. See also Mr Tim Chate, Solicitor, Intellectual Disability Rights Service, *Committee Hansard*, 13 October 2020, p. 11.

¹⁰⁰ Stride Mental Health, *Submission 21*, p. 8.

¹⁰¹ Every Australian Counts, *Submission 63*, p. 8

¹⁰² South Australian Public Advocate, *Submission 72*, p. 1.

¹⁰³ South Australian Public Advocate, *Submission 73*, Attachment 1 (*Safeguarding Taskforce Report*, July 2020), p. 19.

¹⁰⁴ South Australian Public Advocate, *Submission 73*, Attachment 1 (*Safeguarding Taskforce Report*, July 2020), p. 18.

that this will soon be recognised at a national level through reviews currently underway.¹⁰⁵

4.91 In the report of the Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith the Hon Alan Robertson SC made the following recommendation:

(4) Consideration should be given to the Commission establishing its own equivalent to State and Territory based Community Visitor Schemes to provide for individual face-to-face contact with vulnerable NDIS participants. Such contact is also important in emphasising the personal values necessarily involved in providing services to individuals with disability. The NDIS Act should be amended to provide explicitly for this function. Until that happens, the Commission should continue to support the State and Territory Community Visitor Schemes and any doubt about State and Territory powers under those schemes in relation to NDIS participants should be resolved between the law officers of the Commonwealth and of these States and Territories. The State and Territory Community Visitor Schemes will of course continue to apply directly in relation to those with disability who are not NDIS participants.¹⁰⁶

4.92 In making this recommendation, Mr Robertson noted that 2 states do not currently have a Community Visitor Scheme, in addition to noting variation between the states and territories that do have such schemes. Mr Robertson considered that, in these circumstances, there was advantage in having a 'national and uniform' Community Visitor Scheme as a function of the Commission.¹⁰⁷

Other compliance and enforcement matters

4.93 Submitters and witnesses suggested a range of other measures that the Commission should adopt or support to increase its proactive monitoring of providers and the operation of the NDIS market more generally, as well as to more broadly enhance its compliance and enforcement activities. Matters related to calls for broader Commission oversight are discussed further in Chapter 10.

4.94 Suggestions offered included:

- that the Commission should undertake more 'own-motion' inquiries;¹⁰⁸

¹⁰⁵ South Australian Public Advocate, *Submission* 73, Attachment 1 (*Safeguarding Taskforce Report*, July 2020), p. 18.

¹⁰⁶ The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020: Report to the Commissioner of the NDIS Quality and Safeguards Commission*, 31 August 2020, p. 7.

¹⁰⁷ The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020: Report to the Commissioner of the NDIS Quality and Safeguards Commission*, 31 August 2020, p. 72.

¹⁰⁸ People with Disability Australia, *Submission* 60, p. 3.

- that the Commission should take a more proactive role in monitoring risks associated with over- and under-servicing;¹⁰⁹
- that the NDIA require all service agreements to include mandatory requirements that the participant be contacted during the agreement, as agreed by the participants;¹¹⁰ and
- greater whistle-blower protections to encourage staff working for providers to report incidents and to ensure that participants are kept safe and investigations occur.¹¹¹

Commission view

4.95 In response to questions in relation to investigations undertaken by the Commission, the then Commissioner explained that an investigation by the Commission may be prompted by a range of considerations:

Sometimes an investigation will have attached to it both matters that we've observed through complaints, matters that we've observed through reportable incidents, or matters that we're concerned about through our own interaction with providers through an aspect of their registration process. ...For instance, if I look at the example that I gave of the compliance action in relation to reportable incidents that is underway at the moment, obviously providers in New South Wales and South Australia have already had a notice to give information to us about these matters. We do a number of things then. Firstly, we look at whether or not all of the providers complied with the notice, and, if they didn't, what action should be taken.

The exercise as a whole started with the reportable incidents we have received, but there are a range of things that flow from that. We may, once we've been through the second stage of that process, decide to examine matters in some providers through a formal investigation. That's not triggered by a specific report of a reportable incident but triggered by the fact that we've decided to do a system-wide compliance activity on this very important issue of the unauthorised use of restrictive practices.¹¹²

4.96 The Commissioner also noted that there are provisions in the NDIS Act which operate to protect complainants by allowing the Commission to take action where a complainant is or may be subject to reprisal.¹¹³

¹⁰⁹ Prader-Willi-Syndrome Australia, *Submission 12*, p. 3. PWSA indicated that 'under-servicing' refers generally to a lack of supports and oversight—including via informal supports. 'Over-servicing' appears to refer to delivery of and billing for services above and beyond those which are included in a participant's plan, and which the participant may not need.

¹¹⁰ Spinal Cord Injuries Australia, *Submission 56*, pp. 3–4. Service agreements are contracts between the participant and provider relating to the provision of supports and services.

¹¹¹ Community and Public Sector Union, *Submission 39*, p. 3.

¹¹² Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 32.

¹¹³ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 31.

4.97 The Commission informed the committee in September 2021 that it had commenced its first own-motion inquiry into aspects of supported accommodation in the NDIS and had published information about this inquiry and about own-motion inquiries in general, on its website.¹¹⁴

4.98 In relation to community visitors schemes, in response to questions on notice, the Commission stated.w

The role of community visitors is recognised within the NDIS Quality and Safeguarding Framework as promoting and protecting the rights and wellbeing of people with disability and providing an early warning and escalation pathway for safeguarding issues to be addressed.

The Community Visitor Scheme (CVS) Review published in December 2018 considered the role of community visiting in the context of the NDIS. It concluded the contribution of CVSs should be formally recognised within the NDIS Framework and continue to be provided by states and territories.

The decision for establishing a nationally administered CVS is a decision for all Australian Governments to consider.¹¹⁵

Committee view

Publishing compliance and enforcement outcomes

4.99 Evidence to the inquiry emphasised that publishing outcomes of the Commission's compliance and enforcement activity can play an important role in educating both providers and participants about the Commission's work and functions and clarifying the obligations on providers (and rights of participants). The committee welcomes the advice that the Commission is updating its website and encourages the Commission to take the evidence set out in this chapter into account implementing those updates. The committee also considers that the Commission should more broadly review the information that it collects and publishes about compliance activity to assist in its educative and capacity building roles. The committee is strongly of the view that increasing the visibility and transparency of compliance and enforcement activities is important for accountability purposes and to build confidence in the Commission's work.

Recommendation 4

4.100 The committee recommends that the Commission review its approach to publishing information on compliance activities to ensure that:

- **information on compliance activities is easily accessible to providers, as well as participants and their families and advocates; and**

¹¹⁴ NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 8.

¹¹⁵ NDIS Quality and Safeguards Commission, answers to written questions on notice, 6 October 2020 (received 26 October 2020), p. [9].

- **sufficient detail regarding breaches and compliance activity is provided to allow providers and participants to understand the nature of relevant breaches in order to improve provider practice and build confidence in the Commission's compliance activities.**

The need for a more proactive approach to monitoring and enforcement

- 4.101 Among views provided by submitters and witnesses over the course of the inquiry, there is clear consensus that the Commission should take a more proactive approach to its compliance and enforcement activities. The Commission also has compliance and enforcement powers available to it to carry out proactive monitoring and enforcement activities, including monitoring and investigation powers as set out in the *Regulatory Powers (Standard Provisions) Act 2014*. While recognising the efforts taken in the four years since establishment to build the Commission's compliance and enforcement capacity, the committee is of the view that the significant risks faced by people with disabilities mean that it is inappropriate for the Commission to be a merely reactive body.
- 4.102 In particular, the committee is of the view that the Commission should consider measures to ensure it has regular, face-to-face contact with vulnerable participants. This may be achieved through conducting occasional visits, as recommended by several submitters to the inquiry and in the Robertson report. Community visitors can also assist the Commission by conducting face-to-face assessments of vulnerable participants and referring concerns to the appropriate authority. This is discussed further below.
- 4.103 The Commission should also be adequately funded to carry out and support proactive monitoring and enforcement.

Community visitor schemes

- 4.104 It is clear to the committee that Community Visitor Schemes (CVS) play an important role in the NDIS safeguarding system. These visitors are able to act as 'eyes and ears' of a system that currently relies heavily on responding to complaints, incident reports and audits to ensure safety and quality of supports. The NDIS is responsible for caring for and supporting people with disability who may be some of the most vulnerable people in our society. Many NDIS participants may also experience severe barriers in speaking up, making a complaint or advocating for themselves. In this context, the role community visitors can play in the NDIS safeguarding system is particularly important.
- 4.105 The committee considers that a national CVS overseen by the Commission is the best way to achieve this. However, there are compelling arguments both for a CVS being established as a national scheme overseen by the Commission, and for the NDIS safeguarding system to better support existing state- and territory-based CVS's. A national scheme would provide the benefit of nationally

consistent arrangements with clear scope to monitor for matters that are within the Commission's jurisdiction, and coverage of participants in all states and territories. Arguments for retaining state-based schemes to oversee NDIS services include that state-based schemes are able to look at the range of services that a person with disability might receive and can therefore give a more holistic picture of a person's experiences.

- 4.106 Regardless of whether the Commission has its own scheme, or if it continues and strengthens arrangements with state-based schemes, there will need to be different agreements with states and territories regarding areas of interface in the provision of support to people with disabilities. Likewise, the committee heard strong arguments for legislative recognition for community visitor schemes in the NDIS Act, whether this is to recognise the role of existing schemes, or by creation of a new national scheme.
- 4.107 The committee is particularly concerned that there are still two jurisdictions that do not operate community visitor schemes to oversee the provision of services to people with disability. It is unclear if there is any planning on the part of the Western Australian or Tasmanian governments to introduce such schemes. In the absence of full coverage of state- and territory-based schemes, the committee considers that it may be appropriate for the Commonwealth to establish a community visitor scheme to support the Commission to proactively monitor the provision of NDIS services to people with disability who are at increased risk of experiencing violence, abuse or neglect in all states and territories. Such a scheme could supplement state- and territory-based schemes where these exist.

Recommendation 5

- 4.108 **The committee recommends that the NDIS Quality and Safeguards Commission review its compliance and enforcement model to determine how to incorporate increased proactive approaches, in particular, regular, face-to-face contact with vulnerable participants and visits to service providers sites. The review should expressly consider:**
- **the current use of the Commission's monitoring and investigation powers under the *Regulatory Powers (Standard Provisions Act) 2014*; and**
 - **the role of Community Visitor Schemes in assisting the Commission to carry out its functions.**

Recommendation 6

- 4.109 **The committee recommends that the Australian Government revisit its 2018 review into community visitor schemes and explore amendments to the *National Disability Insurance Scheme Act 2013* to establish a national community visitor scheme to be overseen by the NDIS Quality and Safeguards Commission.**

Recommendation 7

4.110 Unless and until the *National Disability Insurance Scheme Act 2013* is amended to establish a national community visitor scheme, the committee recommends that:

- **the Australian Government consider expanding the functions of the NDIS Quality and Safeguards Commission to include coordination and support for state and territory-based Community Visitor Schemes to report on matters affecting NDIS participants; and**
- **the Australian Government through the Disability Reform Council, ensure that federal, state and territory governments work together to ensure that each jurisdiction has a community visitor scheme that can report to the NDIS Quality and Safeguards Commission on risks to NDIS participants.**

4.111 During this inquiry, the committee also heard that current arrangements between the Commission and some state and territory bodies with responsibility for Community Visitors Schemes needed improvement, particularly in relation to the types of incidents that might be reported, authority to enter premises, and two way information sharing. Recognising that the establishment of a national CVS or amendments to legislation to recognise state and territory schemes may take some time, the committee considers that, in the interim, these current arrangements warrant review.

Recommendation 8

4.112 The committee recommends that the NDIS Quality and Safeguards Commission urgently review agreements with state and territory bodies responsible for Community Visitor Schemes to ensure there are clear protocols in place regarding:

- **the scope and authority to oversee the provision of NDIS services; and**
- **two-way data and information sharing between Community Visitors and the Commission.**

Chapter 5

Registration and worker screening

- 5.1 This chapter outlines evidence provided to the committee in relation to the Commission's process for registering providers of NDIS supports and overseeing worker screening arrangements for registered providers. In relation to the registration process, key concerns raised by submitters and witnesses included that:
- elements of the Practice Standards against which providers must be assessed for registration (and associated guidance materials) may benefit from review to ensure they are fit for purpose; and
 - the registration itself poses significant administrative and cost burdens on some providers, not least of which are costs associated with audits.
- 5.2 In relation to worker screening, key concerns included:
- that the new process may not be well understood;
 - delays associated with the new national worker screening arrangements; and
 - whether unregistered providers should be subject to worker screening requirements.

Overview of registration process

- 5.3 The Commission's registration process is intended to be proportionate to risk according to the types of supports offered and size and scale of the provider, and whether the provider is already subject to professional regulation.
- 5.4 Providers seeking registration with the Commission (or renewal of registration) must be audited against the Practice Standards that apply to the supports that they propose to deliver. The Practice Standards consist of:
- High-level outcomes, which are focused on participants; and
 - A series of 'quality indicators' for each outcome that auditors use to assess compliance with the Practice Standards.¹
- 5.5 There are two types of audit, and the audit required depends on the type of supports offered and whether the provider is an individual, partnership or body corporate. 'Verification' audits are a lighter touch desktop audit, while

¹ The Practice Standards are set out in Rules made under the NDIS Act: National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018. The associated quality indicators are set out in non-legislative Guidelines: National Disability Insurance Scheme (Quality Indicators) Guidelines 2018.

'certification' audits are a more detailed process. Audits must be undertaken by a quality auditor approved by the Commission.²

- 5.6 Providers seeking initial or renewed registration must use the online application portal on the Commission's website to provide information about the organisation, select the registration groups that will determine which NDIS Practice Standards apply, and complete a self-assessment against the relevant Practice Standards.
- 5.7 Once the initial application is submitted, the Commission will tell the provider what type of audit is required. The provider must then engage an approved auditor to undertake the required audit. The auditor submits the outcome of the audit to the Commission, which then undertakes a suitability assessment. Once this is completed, the Commission will contact the provider to let them know if the application is successful and the reasons why or why not.
- 5.8 The registration process applies for both new entrants to the NDIS market and for providers that were previously registered by the NDIA, who are required to renew their registration with the Commission within timeframes recommended by the states and territories.³

NDIS Practice Standards

- 5.9 The committee heard a range of concerns about the practice standards. Key areas of concern included that the overall approach of the standards is difficult to apply in practice and that not all providers may understand their obligations under the Practice Standards.

Practical efficacy of Practice Standards

- 5.10 Submitters queried whether the Practice Standards were a practical tool for providers. For example, Stride Mental Health stated that the level of detail within the Practice Standards presents challenges to small business and sole traders, and that such providers may lack the resources and financial support to implement and apply the Standards.⁴
- 5.11 Ms Jade McEwen, a PhD candidate with the Living with Disability Research Centre, raised a number of concerns about the efficacy of the Practice Standards. Ms McEwen observed that the Practice Standards are written in high level abstract concepts, with 'little attention paid to what these concepts actually look like in practice'. As an example, Ms McEwen observed:

² The Commission has produced non-legislative Guidelines that set out requirements for the conduct of audits: National Disability Insurance Scheme (Approved Quality Auditors Scheme) Guidelines 2018.

³ See NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 13; see also, Australian Association of Social Workers, *Submission 24*, p. 6.

⁴ Stride Mental Health, *Submission 21*, p. 7.

[U]nder the outcome area 'Privacy and Dignity' within the Core Module section of the standards, it states 'Each participant accesses supports that respect and protect their dignity and right to privacy'...However, no further information is provided about what 'respecting an individual's privacy or dignity' actually looks like in practice. Consequently, service providers and the review bodies responsible for monitoring compliance with the standards, have no practical guidance about how 'good' or 'poor' service quality presents.⁵

- 5.12 Ms McEwen further observed that the Practice Standards fail to recognise diversity among people with disability, or the fact that 'good support' looks different for different groups.⁶
- 5.13 Ms McEwen suggested that the general nature of the Practice Standards, coupled with the focus in the Standards on procedures and records, is likely to result in providers focusing on paperwork rather than staff practice when practice is a more reliable way of determining service quality.⁷
- 5.14 Anglicare SA recommended that greater consideration be given to an increased focus on 'effectiveness' as a measure of quality. If reporting were extended to evaluate customer experience and outcomes—with a particular focus on goal attainment—this would elevate the benefits of the NDIS as a consumer-driven scheme that still achieved necessary levels of safeguarding.⁸
- 5.15 Purpose at Work queried the level of consultation that was undertaken to develop the Practice Standards, noting that the Department of Social Services may have ignored advice on issues such as how to safeguard the health needs of people who are unable to attend to their needs and lack natural supports in their life.⁹

Understanding the practice standards

- 5.16 In addition to concerns regarding the efficacy of the Practice Standards, the committee heard that the standards were not always well understood by providers.¹⁰

⁵ Ms Jade McEwen, *Submission 36*, p. 1. See also Community and Public Sector Union, *Submission 39*, p. 8. The CPSU were concerned that the standards 'were not prescriptive enough' and that the Commission lacked requisite internal capacity to effectively enforce the standards. See further, The Summer Foundation, *Submission 51*, pp. 13–14, with respect to Specialist Disability Accommodation Practice Standards.

⁶ Ms Jade McEwen, *Submission 36*, p. 2. See also The Summer Foundation, *Submission 51*, pp. 14–16, which raised concerns that the human rights of SDA tenants and associated obligations of providers are not clearly identified and defined in the SDA Practice Standards.

⁷ Ms Jade McEwen, *Submission 36*, p. 2.

⁸ Anglicare SA, *Submission 18*, [p. 2].

⁹ Purpose at Work, *Submission 16*, p. 2.

¹⁰ See, for example, Northern Territory Office of the Public Guardian, *Submission 32*, [p. 5].

- 5.17 Consultants Leighton Jay, Jessica Quilty and Ann Driberg called for more capacity building investment to assist providers and staff to understand the Practice Standards. The consultants described compliance with the Standards as perfunctory and noted that there is little attempt made to embed the 'spirit' of the Standards in organisational culture. For example, some providers have effectively 'outsourced' their quality compliance to other organisations.¹¹
- 5.18 These consultants also observed that while there is guidance available on implementing the Code of Conduct, there is none on the Practice Standards, and as a consequence there is a growing market in workshops and private training for providers. To address this, the Commission could use its powers to 'demystify, educate and build the capacity of providers', to enable providers to improve their quality management systems. A workers' orientation model for Practice Standards would accomplish this outcome.¹²

Concerns about specific elements of the NDIS Practice Standards

Specialist Disability Accommodation

- 5.19 Particular concerns were raised in relation to Practice Standards relevant to providing Specialist Disability Accommodation (SDA). The Victorian Office of the Public Advocate expressed concern that although the Practice Standards provide that each participant accessing SDA must be able to exercise choice and control and must be supported by effective tenancy management, the Practice Standards do not appear to contain further specification as to what 'effective tenancy management' should entail. By contrast, guidelines prepared by Department of Health and Human Services in Victoria provide for matters such as mandatory advertising times and considerations in relation to resident compatibility.¹³
- 5.20 The Summer Foundation observed that the SDA Practice Standards 'do not provide adequate guidance about the standard of policies and procedures that an SDA provider must achieve to realise performance outcomes', leaving providers to determine for themselves how to comply with the Standards, which in turn leads to inconsistency across the sector and to poor performance outcomes.¹⁴

¹¹ Leighton Jay, Jessica Quilty, Ann Driberg, *Submission 40*, p. 11. Jay, Quilty and Driberg emphasised that understanding relevant quality standards—as well as simply complying with them—is critically important to building a culture that takes quality and safeguarding seriously.

¹² Leighton Jay, Jessica Quilty, Ann Driberg, *Submission 40*, p. 11. See also Northern Territory Office of the Public Guardian, *Submission 32*, [p. 5].

¹³ Office of the Public Advocate (Victoria), *Submission 11*, p. 14.

¹⁴ The Summer Foundation, *Submission 51*, p. 9.

5.21 The committee also heard that the practice standards should do more to address conflicts of interest in Supported Independent Living and other settings¹⁵ and to create awareness of best practice approaches in the provision of support to people living in group homes.¹⁶

Other specific concerns

5.22 Specific concerns were also raised in relation to the following elements of the practice standards:

- Language and drafting: including that the Standards should use the term 'person-centred and directed', rather than 'person-centred';¹⁷
- That there are unresolved tensions between requirements that providers respect the principle of 'dignity of risk' and participants' choices ensuring providers maintain appropriate risk management and uphold their duty of care to participants;¹⁸
- Medication; including in relation to workers supporting participants' requests for medical review with health professionals,¹⁹ and in relation to interfaces with treating doctors and other prescribing health practitioners;²⁰
- Restrictive practices and behaviour support;²¹
- Waste management and infection control;²²
- Addressing violence, abuse, neglect and exploitation, particularly for people who live in their own homes;²³

¹⁵ Office of the Public Advocate (Victoria), *Submission 11*, p. 14; The Summer Foundation, *Submission 51*, pp. 12–13.

¹⁶ Professor Christine Bigby, *Submission 6*, p. 1.

¹⁷ Mental Health Coordinating Council, *Submission 20*, p. 4.

¹⁸ Purpose at Work, *Submission 16*, p. 6.

¹⁹ Mental Health Coordinating Council, *Submission 20*, p. 4.

²⁰ Dr Jennifer Torr, *Submission 44*, [p. 2].

²¹ Mental Health Coordinating Council, *Submission 20*, p. 4.

²² MJD Foundation, *Submission 1*, [p. 2]. The committee also notes that new NDIS Practice Standards and amendments to quality indicators relating to emergency and disaster management commenced on 15 November 2021. The amendments sought to consolidate the advice issued by the NDIS Quality and Safeguards Commissioner during the COVID-19 pandemic and provide stronger guidance about what NDIS providers should have in place to prepare, prevent, manage and respond to emergency and disaster situations. See NDIS Quality and Safeguards Commission, *Changes to the National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018 and National Disability Insurance Scheme (Quality Indicators) Guidelines 2018*, November 2021, <https://www.ndiscommission.gov.au/practicestandards> (accessed 17 November 2021).

²³ Only About Quality (OAQ), *Submission 7*, pp. 3–4.

- Supporting people with a psychosocial disability;²⁴ and
- The classification of early childhood supports as 'high-risk' under the registration framework.²⁵

The registration process

5.23 The committee heard a range of concerns in relation to the overall registration process. These include concerns about the administrative burdens placed on providers, and concerns about duplication of requirements for some cohorts of practitioners or organisation and practitioners working in multiple schemes. Submitters also raised issues in relation to:

- the time taken by the Commission to review registration applications;
- the provision of information about the registration process
- the online portal used to submit registration applications; and
- difficulties experienced by providers in regional, rural and remote locations when undergoing the registration process.

Administrative burden and cost of registration

5.24 The time, administrative burden, and cost of registration with the Commission were of significant concern to a range of submitters to the inquiry. In particular, the committee heard that the burden and cost of registration was a disincentive to smaller providers obtaining registration with the Commission, and that this contributes to the problem of thin markets, especially in rural, regional and remote areas.

5.25 For example, according to Speech Pathology Australia (SPA), many speech pathologists are choosing not to register with the Commission due to the onerous registration and auditing requirements, and because a number of the compliance requirements are perceived as irrelevant or at least inappropriate for an already well-regulated profession. SPA highlighted the results of a 2019 survey to illustrate this concern:

Of those members who completed our [National Quality and Safeguarding Framework] survey in April 2019 and stated that they were currently unregistered, 23 per cent were formerly registered with the NDIS and when asked 'why did you cease your registration?' 88 per cent of this group said it was due to auditing cost; 70 per cent reported concerns about auditing requirements and almost 65 per cent said it was due to the administrative burden. Almost 53 per cent of those who were formerly registered said there was nothing that would make them decide to re-register.

...103 of the survey respondents who were registered providers responded to a question about whether they would re-register under the Quality and

²⁴ See, Stride Mental Health, *Submission 21*, p. 7; National Disability Services, *Submission 27*, [p. 3]; Mental Illness Fellowship of Australia, *Submission 37*, p. 4; Services for Australian Rural and Remote Allied Health, *Submission 66*, pp. 8-9.

²⁵ Speech Pathology Australia, *Submission 25*, pp. 9, 11.

Safeguarding Commission. Thirteen percent of these 103 respondents said that they had decided not to re-register. 36 per cent indicated they had commenced formal re-registration, but felt they were unlikely to complete the process and a further 10 per cent indicated that they would have to drop some support groups from their registration. This represents a potential market loss of almost 60 percent. Of those who reported they would need to drop supports, 100 per cent identified this would be Early Childhood Supports.²⁶

5.26 The Mental Health Council of Tasmania (MHCT) raised similar concerns that the registration process requires a significant time and cost investment, with some members in larger organisations indicating that it can take up to three full-time equivalent staff to complete the registration process.²⁷ The Australian Physiotherapy Association also observed that its members have described the registration and auditing processes as costly and time consuming—particularly the auditing process. This is a significant problem for smaller providers who have fewer resources, and providers operating in regional, rural and remote locations.²⁸

5.27 Autism Spectrum Australia (Aspect) observed that many providers appear to be encouraging participants to utilise plan management or to self-manage their plans, noting that providers which deliver services to plan-managed or self-managed participants may be able to undertake a verification audit to register, rather than the more onerous certification process. According to Aspect:

[This] means that participants being provided with the exact same service may have different levels of protection depending on how their plan is managed. This means that larger organisations have to follow higher standards of practice, which smaller organisations do not. This leads to inconsistency in implementation of disability practice standards and codes across the disability sector.²⁹

5.28 The parents of a young NDIS participant similarly observed that the current system is set up for institutions and large services and does not accommodate a family-centred model for the provision of behaviour support. According to the submitter, onerous registration hurdles and outdated paper-based safeguards appear to ‘force’ the use of large and unsuitable organisations.³⁰

²⁶ Speech Pathology Australia, *Submission 25*, pp. 10–11.

²⁷ Mental Health Council of Tasmania, *Submission 23*, p. 7.

²⁸ Australian Physiotherapy Association, *Submission 53*, pp. 5–6; See also Assistive Technology Suppliers Australia, *Submission 3*, p. 6.

²⁹ Autism Spectrum Australia, *Submission 9*, [p. 2]. Aspect recommended consistency for providers across the sector, with additional support and guidance as needed for smaller organisations.

³⁰ Name withheld, *Submission 55*, pp. 1, 3.

Registration with the Commission and registration with other professional bodies

- 5.29 The committee also heard that, particularly for allied health practitioners, the burden of registration adds additional workload to providers who have already gone through other accreditation processes.³¹
- 5.30 For example, Occupational Therapy Australia (OTA) noted that to become a registered occupational therapist, an individual must complete an accredited undergraduate degree and meet all registration requirements set by the Australian Health Practitioner Regulation Agency. OTA stated that the Commission's requirements are unnecessary and duplicative.³²
- 5.31 The Australian Association of Social Workers (AASW) expressed its general support for the safety and quality assurance measures associated with registration. However, AASW submitted that its members should not be required to complete the additional registration requirements imposed by the NDIS in relation to support coordination as workers are bound by the AASW Code of Ethics.³³
- 5.32 Brain Injury South Australia (BISA) observed that the Commission's registration system appears to have been established in isolation to other service standards established in the disability sector, leading to audit requirements being duplicated for some organisations. BISA suggested merging standards to be selectively applied, according to the services being provided.³⁴

Registration in multiple schemes

- 5.33 Similar concerns were raised in relation to potential duplication in requiring separate registration processes for different schemes. In this regard, submitters proposed that work to align registration across the schemes would be valuable in promoting innovation and national consistency.
- 5.34 Exercise and Sports Science Australia (ESSA) observed that many allied health providers deliver supports via multiple compensatory schemes, each with their own compliance requirements. The regulatory burden of maintaining compliance across multiple, varying schemes can be 'overwhelming and costly', and recommended that the Commission work closely with stakeholders such as the Aged Care Quality and Safety Commission and the Australian Safety and

³¹ See, for example, Speech Pathology Australia, *Submission 25*, pp. 8–9; Services for Australian Rural and Remote Allied Health, *Submission 66*, p. 9; and Mental Health Community Coalition ACT, *Submission 14*, p. 4.

³² Occupational Therapy Australia, *Submission 22*, [p. 4]. OTA also highlighted its submission to the committee's inquiry into the NDIS Workforce, in which it stated that concerns associated with duplicative registration processes are not limited to occupational therapists but are experienced across all allied health professions. See also Allied Health Professions Australia, *Submission 56*, [p. 6].

³³ Australian Association of Social Workers, *Submission 24*, p. 7.

³⁴ Brain Injury South Australia, *Submission 10*, [p. 5].

Quality Health Care Commission to ensure a streamlining of quality standards and introduce mutual recognition across relevant schemes.³⁵

- 5.35 The Australian Physiotherapy Association (APA) also indicated that there is considerable overlap between the Commission's registration requirements and those required under other regulatory frameworks.³⁶
- 5.36 The Queensland Department of Communities, Disability Services and Seniors considered that there is an opportunity for the Commission to proactively consider the intersection of the *NDIS Quality and Safeguarding Framework* with other regulatory systems and work collaboratively with those systems to minimise duplication and create streamlined processes for providers that encourage entry into the NDIS market.³⁷ The Tasmanian Government similarly encouraged strategies to mutually recognise similar certification processes, minimising the need for providers to undertake multiple regulatory or administrative processes.³⁸

Registration in regional, rural and remote areas

- 5.37 Concerns regarding the difficulties associated with registration were exacerbated for providers and practitioners operating in regional, rural and remote areas. A number of submitters expressed concern that such disincentives to registration will increase shortages in the NDIS workforce in these areas.
- 5.38 ESSA observed that it is not unusual for a smaller allied health practice to be the only practice servicing a large rural or remote community covering a large geographic area or with the potential to provide therapy under higher risk groups such as Early Intervention.³⁹ ESSA expressed concern that high costs create disincentives to registration in rural and remote areas, stating:

AEPs [Accredited Exercise Physiologists] located in rural and remote communities have reported quotes between \$6000 and \$16,000 for auditing fees, with many suggesting these costs are not financially viable given the small number of NDIS participants they service.

AEPs have noted costs associated with auditor travel and accommodation have a significant impact on the price of audits conducted in rural and remote locations. In response to this concern, many AEPs have reported they are considering not registering as a provider or de-registering and only providing services to plan managed and self-managed NDIS participants.⁴⁰

³⁵ Exercise and Sports Science Australia, *Submission 38*, p. 7. See also Tasmanian Government, *Submission 67*, p. 4.

³⁶ Australian Physiotherapy Association, *Submission 53*, p. 5.

³⁷ Queensland Department of Communities, Disability Services and Seniors, *Submission 61*, p. 8.

³⁸ Tasmanian Government, *Submission 67*, p. 4.

³⁹ Exercise and Sports Science Australia, *Submission 38*, pp. 5–6.

⁴⁰ Exercise and Sports Science Australia, *Submission 38*, p. 6.

- 5.39 Allied Health Professions Australia (AHPA) raised similar concerns, noting that higher costs of registration often have significant adverse impacts on participants' access to supports. In this respect, AHPA stated:

[T]here are significant inequities that arise from a two-tier system of registered and unregistered providers. Any system that creates significant cost barriers to registration, and then limits the number of providers that a person with disability that is being NDIA-managed can access, is ultimately disadvantaging the participant, not the provider.

...While in some cases these inequities may be addressed by sufficient availability of services, it fails in any case where demand is not matched by the availability of registered providers. In such a case, participants may be forced to self-manage or plan-manage in order to access providers or risk missing out on services.⁴¹

- 5.40 SPA suggested that a review of the costs of auditing be undertaken to allow for regulation of the market and costs to providers, particularly in rural and remote areas. Incentives may be required for rural and remote areas to cover the additional costs of travel. Alternatively, or in addition, the auditing process itself could be reviewed to determine if onsite auditing remains necessary.⁴²

Length of time to consider applications

- 5.41 The length of time required to complete the registration process was raised as a significant concern.
- 5.42 MHCT observed that it may take the Commission up to 6 months to process and finalise a provider's registration, with limited opportunity for organisations to address any concerns or rectify any issues identified by the Commission before a decision is made.⁴³ Other submitters recounted significant delays experienced in the registration process, and lack of communication from the Commission as to the reasons for the delay.⁴⁴
- 5.43 Connectability Australia raised concern that there does not appear to be a set timeframe for the Commission to complete the registration process, despite the fact that providers must adhere to strict guidelines to maintain their registration.⁴⁵

⁴¹ Allied Health Professions Australia, *Submission 54*, [p. 7]. See also, Australian Physiotherapy Association, *Submission 53*, p. 6.

⁴² Speech Pathology Australia, *Submission 25*, pp. 11–12.

⁴³ Mental Health Council of Tasmania, *Submission 23*, p. 7.

⁴⁴ See, Autism Spectrum Australia, *Submission 9*, [p. 3]; Stride Mental Health, *Submission 21*, p. 9; Cara, *Submission 31*, pp. 4–5; Brain Injury South Australia, *Submission 10*, [p. 2]; The Junction Works, *Submission 8*, p. 2.

⁴⁵ Connectability Australia, *Submission 2*, [p. 2].

- 5.44 National Disability Services (NDS) indicated that delays in completing the registration process may be driven by delays in the lodgement of audit reports with the Commission after the report is completed. For example, NDS noted that in a recent meeting of 19 NSW-based providers, none had received notification of registration renewal despite audits having been conducted up to six months previously. NDS asserted that such delays most impact providers seeking registration for the first time and those seeking to register for new registration groups.⁴⁶
- 5.45 MS Australia stated that there is a perception that the provider registration team is 'extremely busy', which may impact on the time taken to complete the registration process. Further, delays can have a negative flow-on effect on the cash flow of providers, as a provider cannot claim for services until registered.⁴⁷
- 5.46 Cara also expressed concern that the delay in renewal means that there will be two and a half years between audits at a minimum, stating that this 'devalues the audit process, and does not appear to provide adequate customer safeguarding or quality control'.⁴⁸ Cara recommended that timeframes are set for the Commission to process registration renewals, and that audit timeframes be set from the date of the previous audit.

Communication and information about registration

- 5.47 Submitters called for improved information and communication from the Commission about the registration process, with respect to the progress of applications, registration requirements, template resources and advice on engaging auditors.
- 5.48 The APA noted that minimal supports and guidance available for smaller providers to navigate and complete the provider registration process.⁴⁹ Meanwhile, ESSA indicated that there is uncertainty among allied health professionals as to where to find information about registration, and that it has received requests for assistance from people who found the NDIA and the Commission's websites unclear and hard to navigate.⁵⁰ According to ESSA, this issue could easily be addressed if the NDIA and the Commission worked

⁴⁶ National Disability Services, *Submission 27*, [p. 3]. See also Ms Phillippa Angley, Head of Policy, National Disability Services, *Committee Hansard*, 13 October 2020, pp. 18–19.

⁴⁷ Multiple Sclerosis Australia, *Submission 15*, pp. 4–5. Specific concerns with the audit process are also discussed below.

⁴⁸ Cara, *Submission 31*, pp. 4–5.

⁴⁹ Australian Physiotherapy Association, *Submission 53*, p. 6.

⁵⁰ Exercise and Sports Science Australia, *Submission 38*, p. 6.

collaboratively to develop a range of clear and accessible resources to support new entrants to the NDIS market.⁵¹

5.49 ESSA also recommended that the Commission's website provide access to resources and information:

- to help providers in the development of their policies and procedures in accordance with the NDIS Act and associated rules, such as sample policy and procedure templates;⁵² and
- detailed information about selecting an approved quality auditor.⁵³

5.50 BISA noted that while it continuously develops its processes and systems, levels of communication and engagement by the Commission are not sufficient to enable it to ensure it is always meeting prescribed standards. This potentially increases risks for participants and frustrates planning and resource allocation for the audit process.⁵⁴

5.51 The AASW observed that difficulties associated with provider registration are compounded by disparities between the requirements in different states as the implementation of the NDIS unfolds. According to the AASW, there are 'wide variations' in the requirements within states, with social workers contacting the AASW to point out that the information provided on registering for some services does not include their state, and they have been unable to obtain a definitive answer when they contacted the NDIA directly.⁵⁵

5.52 Concerns about communication around registration extended to concerns around coordination with the NDIA. AHPA observed what appears to be a lack of coordination in relation to the regulatory intention of the Commission and the structuring of plans by the NDIA, and provided the following example concerning allied health supports for children with disability:

In discussions with the NDIS Commission, it was made clear that in its role as regulator, the NDIS Commission took the position that allied health supports for any age group were therapeutic supports...[which] left providers needing to undertake only a 'verification' level audit, a desktop process with lower costs and administrative requirements.

Unfortunately, engagement with practitioners...showed that plans were not being structured this way and that the NDIS was often developing plans so that all supports were funded under the Early Childhood Early Intervention support category...with the result that providers are forced into the more

⁵¹ Exercise and Sports Science Australia, *Submission 38*, p. 6.

⁵² Exercise and Sports Science Australia, *Submission 38*, p. 6. ESSA also recommended the Commission promote established resources such as the AHPA Allied Health NDIS registration website.

⁵³ Exercise and Sports Science Australia, *Submission 38*, pp. 6–7. ESSA also recommended that there be transparent information available to providers about auditing fees.

⁵⁴ Brain Injury South Australia, *Submission 10*, [p. 3].

⁵⁵ Australian Association of Social Workers, *Submission 24*, p. 6.

expensive and onerous certification process, or simply choose not to register which impacts the availability of services for participants.⁵⁶

5.53 Recommendations to improve information and communication around the registration process included:

- Collaboration between the NDIA and the Commission to develop a range of clear and accessible resources to support new entrants to the NDIS market⁵⁷
- Improved access to resources and information on the Commission's website including:
 - Information to help providers in the development of their policies and procedures in accordance with the NDIS Act and associated rules, such as sample policy and procedure templates;⁵⁸ and
 - detailed information about selecting an approved quality auditor.⁵⁹
- Regular provision of a summary of audit findings—including a focus on what types of non-compliance were being identified;⁶⁰ and
- Consideration of the impacts on providers of undertaking registration and engagement by the Commission with providers to make the registration process more efficient and cost-effective.⁶¹

Registration portal

5.54 The online application portal was a source of frustration for a range of submitters, who noted a range of technical difficulties, including:

- that the portal is complex and 'not user friendly'⁶²
- systems within the portal do not interface with each other, (appearing to result in requiring providers to input the same information in multiple places)⁶³
- certain documents are not able to be uploaded in draft form, or for evidence purposes⁶⁴

⁵⁶ Allied Health Professions Australia, *Submission 54*, [pp. 7–8].

⁵⁷ Exercise and Sports Science Australia, *Submission 38*, p. 6.

⁵⁸ Exercise and Sports Science Australia, *Submission 38*, p. 6. ESSA recommended the Commission promote established resources such as the AHPA Allied Health NDIS registration website.

⁵⁹ Exercise and Sports Science Australia, *Submission 38*, pp. 6–7. ESSA also recommended that there be transparent information available to providers about auditing fees.

⁶⁰ National Disability Services, *Submission 27*, [p. 1].

⁶¹ Stride Mental Health, *Submission 21*, p. 8.

⁶² Connectability Australia, *Submission 2*, [p. 2].

⁶³ Connectability Australia, *Submission 2*, [pp. 2, 3]; Autism Spectrum Australia, *Submission 9*, [p. 5].

⁶⁴ Anglicare SA, *Submission 18*, [pp. 2–3].

- reports or data run from the portal need to be manipulated and re-written to create meaningful data⁶⁵
- there limited explanation within the portal explaining where things are, or the process for using particular aspects of the portal; ⁶⁶ and
- instances where changes in legislation were not reflected in the portal process.⁶⁷

Audits

5.55 Concerns in relation to the audit process focussed on the high costs of auditing and the efficacy of audit practice.

Cost of audits

- 5.56 The committee heard that the cost of undergoing an audit was excessive, and, for some small providers, prohibitive.⁶⁸ Submitters also noted that the already significant direct financial costs charged by approved auditors are exacerbated by the costs to organisations to prepare for an audit and not being able to work with clients during visits by auditors.⁶⁹
- 5.57 SPA stated that audit costs are not viable for many speech pathology practices which are small or sole trader organisations. The costs can be indirect, related to the time required to prepare for and undergo the audit, and direct costs reported as between \$7,000 to \$30,000. ⁷⁰
- 5.58 OTA asserted that despite certain improvements to the (re)registration process, auditing requirements remain ‘unnecessarily expensive’, and that the Commission’s approved panel of auditors is ‘anti-competitive’. ⁷¹
- 5.59 According to a number of submitters, the high costs of audits are attributable in part to the small number of approved auditors. In this respect, OTA noted that the number of approved auditors reduced from 16 to 15 in the 18 months to July 2020. OTA also expressed concern that auditors are based in metropolitan areas, which means that providers in regional, rural and remote areas must bear the

⁶⁵ Autism Spectrum Australia, *Submission 9*, [p. 5].

⁶⁶ Speech Pathology Australia, *Submission 25*, p. 16.

⁶⁷ Speech Pathology Australia, *Submission 25*, p. 16.

⁶⁸ See, for example, Exercise and Sports Science Australia, *Submission 38*, p. 5; National Disability Services, *Submission 27*, [p. 3].

⁶⁹ See, for example, Stride Mental Health, *Submission 21*, p. 7.

⁷⁰ Speech Pathology Australia, *Submission 25*, pp. 8–9; See also Australian Association of Social Workers, *Submission 24*, p. 6 with respect to the behaviour support workforce.

⁷¹ Occupational Therapy Australia, *Submission 22*, [p. 3].

additional costs of visiting auditors' travel and accommodation.⁷² SPA also noted an overall lack of registered auditors and that auditors are not present in all states and territories.⁷³

- 5.60 AASW raised concerns both about the cost of audits associated with registration, and 'wide variability in the prices that members are quoted for these audits'. AASW observed that this variability 'inevitably leads to doubt as to the basis on which the rate for the audit was set'.⁷⁴
- 5.61 The Tasmanian Government noted that there are limited Tasmania-based auditors, which results in additional financial impost associated with travel-related expenses for Tasmanian providers. According to the Tasmanian Government, while there is a collaborative effort by providers and sector peak bodies to minimise costs and coordinate audits, an opportunity exists to grow the capacity of locally based auditors.⁷⁵
- 5.62 SPA observed that there is little if any regulation of auditors by the Commission after they are approved. Regarding the importance of ensuring auditors are subject to additional regulation, SPA stated:

[T]here is wide variation between the charges of different auditors, but there have also been reports of variability in regard to their expectations of the audits themselves. One of the more common examples of this inconsistency is what types of NDIS clients are counted when a provider is audited. Some auditors have said that all types of NDIS participants, regardless of how they are managed count as NDIS clients, others state that only agency and plan managed do, and some say that it is only NDIA managed that are relevant.

Whilst this may seem inconsequential, it is the number of these clients that determines how many files the auditors will request to see, and indeed the scale of the audit as a whole, with less than 25 NDIS clients being the apparent limit for a smaller audit, and anything beyond that increasing the cost of audit significantly.⁷⁶

- 5.63 The Mental Health Community Coalition ACT further recommended reviewing the availability of auditing agencies and audit processes to ensure viable price points for small providers and sole traders.⁷⁷

⁷² Occupational Therapy Australia, *Submission 22*, [p. 2]; See also Speech Pathology Australia, *Submission 25*, p. 10. SPA noted that this is a particular concern as regards certification, which requires two auditors to conduct two separate on-site audits.

⁷³ Speech Pathology Australia, *Submission 25*, p. 10.

⁷⁴ Australian Association of Social Workers, *Submission 24*, p. 6.

⁷⁵ Tasmanian Government, *Submission 67*, p. 4.

⁷⁶ Speech Pathology Australia, *Submission 25*, p. 22. SPA also asserted that there is no feedback process, or avenue for providers to complain to the Commission regarding the behaviour of auditors.

⁷⁷ Mental Health Community Coalition ACT, *Submission 14*, pp. 5–6.

Audit practice

- 5.64 Submitters raised concern that the audit approach taken by Commission approved auditors may not sufficiently ensure against potential abuse and neglect of people with disability, noting a reliance on formal practice over the quality of supports provided.
- 5.65 For example, PhD candidate Ms Jade McEwen raised concern that audit processes focus heavily on policies and procedures of organisations and queried whether these match the expectations set out in the Practice Standards. In this respect, Ms McEwen noted that research suggests policies and procedures do not necessarily represent staff actions or the adequacy of the support that is *actually* provided to people with disability. Ms McEwen stated that consideration should be given to revising the audit process to adopt methods known to be more adequate for monitoring service quality—such as observation and interview.⁷⁸
- 5.66 In addition, Ms McEwen indicated that current accepted audit systems only consult with a small number of service users. This approach is inadequate for making accurate determinations about the quality of supports for people with intellectual disability, due to the high prevalence of acquiescence among this cohort. Significantly larger cohorts of service users should be engaged in the evaluation of supports, to enhance the accuracy of findings and minimise the risk of inaccurate data.⁷⁹
- 5.67 The Australian Federation of Disability Organisations (AFDO) noted that the National Disability Insurance Scheme (Approved Quality Auditors Scheme) Guidelines 2018 make provision for consumer technical experts—that is, people with disability who have training, qualifications and skills in auditing—to be included in audit teams.⁸⁰ AFDO highlighted positive experiences in overseas jurisdictions where people with disability have acted as auditors of disability services, noting that this approach ‘parachutes’ people with disability into the very heart of upholding disability rights and standards, by giving them the mechanism by which to undertake this work.⁸¹
- 5.68 AFDO stated that operationalising the community technical provisions in the NDIS legislation will enable people with disability to be trained to act as auditors and partner with Auditing agencies to audit NDIS Registered Providers, which will provide significant outcomes for people with disability and the NDIS.⁸²

⁷⁸ Ms Jade McEwen, *Submission 36*, p. 3.

⁷⁹ Ms Jade McEwen, *Submission 36*, p. 3.

⁸⁰ Australian Federation of Disability Organisations, *Submission 71*, p. 13.

⁸¹ Australian Federation of Disability Organisations, *Submission 71*, p. 13.

⁸² Australian Federation of Disability Organisations, *Submission 71*, p. 14.

5.69 Purpose at Work recommended that the Guidelines governing audits be clarified to:

- specify that an audit judgement is against the Standards and/or Outcomes, rather than the specific indicators;⁸³ and
- adopt a less stringent standard for acceptable risk.⁸⁴

5.70 Additional suggestions for improvements in audit practice included:

- Requiring providers to demonstrate feedback and complaints compliance⁸⁵
- Obtaining actual numbers of participants being supported by any registered organisation from the Commission the day before an audit commences⁸⁶
- Implementing ‘spot checks’ of organisations, including on the organisation’s head office and in homes where supports are provided⁸⁷
- Checking on an organisation’s procedures for senior staff to regularly visit participants in their homes (rather than relying on reports)⁸⁸
- Ensure auditors have appropriate skills and experience⁸⁹
- Developing protocols for Auditors to liaise with Government agencies such as the Community Visitor Program when risks for individual participants are alleged or known;⁹⁰ and
- identifying new metrics for assessing provider performance, including by trusting standards imposed by existing professional organisations.⁹¹

Strength of the registration process

5.71 The committee also heard that the registration process overall may need strengthening, including in relation to the scope of providers that are required to register with the Commission, and around the strength of standards to be met by providers undergoing the less strict verification, rather than certification audits.

5.72 Spinal Cord Injuries Australia (SCIA) submitted that the jurisdiction of the Commission should be expanded to require all support workers to be registered, with details maintained on a central database. As an example of why there is a need for such a measure, SCIA stated:

⁸³ Purpose at Work, *Submission 16*, p. 7.

⁸⁴ Purpose at Work, *Submission 16*, p. 7.

⁸⁵ Disability Services Commissioner, *Submission 13*, p. 4.

⁸⁶ Only About Quality, *Submission 7*, p. 5.

⁸⁷ Only About Quality, *Submission 7*, p. 5.

⁸⁸ Only About Quality, *Submission 7*, p. 5.

⁸⁹ National Disability Services, *Submission 27*, [pp. 3–4].

⁹⁰ Only About Quality, *Submission 7*, p. 5.

⁹¹ Mental Health Community Coalition ACT, *Submission 14*, pp. 5–6.

SCIA provided individual advocacy for a participant to lodge a complaint at the Commission against a support worker, and it was an extremely disappointing outcome when the Commission could not take action against the support worker due to the support worker not being registered with the Commission.⁹²

- 5.73 The Victorian Office of the Public Advocate (Vic OPA) were concerned that the NDIS Act only requires providers to register if they are delivering 'high risk' supports, or if they are delivering supports to agency-managed participants,⁹³ and observed that these arrangements centre around the level of risk attributed to the service provided, rather than the level of risk associated with the participant and their circumstances. This may mean that some participants at risk of abuse, neglect and exploitation may be able to receive services from providers that are not required to register.⁹⁴
- 5.74 Noting that the *NDIS Quality and Safeguarding Framework* suggests that registration is to be complemented with a formal participant risk assessment during plan development, Vic OPA suggested that this may not be occurring in practice. Consequently, the Vic OPA recommended that the NDIA develop an operational protocol for planners and LACs to incorporate a 'formal and holistic assessment of participant risk'.⁹⁵
- 5.75 The Community and Public Sector Union (CPSU) noted that its members had expressed concern that some providers have been registered despite breaches of the NDIS Act and auditors deeming them unsuitable.⁹⁶
- 5.76 With respect to the verification process, Connectability Australia observed that the verification process is not sufficiently robust, especially for sole traders delivering support coordination services.⁹⁷
- 5.77 The Australian Lawyers Alliance highlighted that the regulation of providers is increasingly complex with the rise of platform-based providers, noting that the Commission has a 'difficult task' in ensuring the accountability and quality

⁹² Spinal Cord Injuries Australia, *Submission 56*, p. [3]. Further discussion regarding the Commission's jurisdiction is in Chapter 10.

⁹³ Office of the Public Advocate (Victoria), *Submission 11*, p. 15.

⁹⁴ Office of the Public Advocate (Victoria), *Submission 11*, p. 15.

⁹⁵ Office of the Public Advocate (Victoria), *Submission 11*, p. 15. The Vic OPA noted that similar recommendations had been made by the Australian Law Reform Commission in its *Elder Abuse* report, and via the South Australian Safeguarding Taskforce.

⁹⁶ Community and Public Sector Union, *Submission 39*, p. 8.

⁹⁷ Connectability, *Submission 2*, p. [2].

control of work standards when dealing with outsourced, contracted-out service provision.⁹⁸

Commission view

Practice standards and audit process

5.78 In September 2020 the then Commissioner defended the efficacy of the practice standards and the associated audit process, stating:

The practice standards are framed in terms of outcomes for people with disability, and there's an accompanying set of quality indicators that point to the evidence that those auditors need to look at in determining whether or not a provider has complied with those standards. So the auditing process is quite central in understanding what practice is happening and also in ensuring that providers are changing their practices to deliver better quality outcomes.⁹⁹

5.79 The Commissioner also noted that many providers were still going through the process of re-registration, and the Commission was continuing to work with providers to address issues identified during the associated audit.¹⁰⁰

5.80 With respect to concerns raised in relation to the Practice Standards for Specialised Disability Accommodation, in September 2021 the Commission advised that it had commenced an own motion inquiry into supported disability accommodation.¹⁰¹ Among a range of matters, the inquiry's terms of reference require the identification of models of best practice for consideration by the Commission that may inform future amendments to relevant practice standards and quality indicators.¹⁰²

5.81 The Commission also released the *NDIS Workforce Capability Framework* in October 2021. The Commission described the document as articulating:

...the Australian Government's expectations about the attitudes, skills and knowledge of all workers funded under the NDIS [and]... translates the NDIS principles, Practice Standards and Code of Conduct into observable

⁹⁸ Australian Lawyers Alliance, *Submission 4*, p. 10. See also, Mr Tom Ballantyne, Australian Lawyers Alliance, *Committee Hansard*, 29 September 2020, p. 16.

⁹⁹ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 30.

¹⁰⁰ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 30.

¹⁰¹ NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 8.

¹⁰² NDIS Quality and Safeguards Commission, *Inquiry into aspects of supported accommodation in the NDIS*, August 2021, (accessed 28 September 2021) available at: <https://www.ndiscommission.gov.au/sites/default/files/documents/2021-08/ndis-commission-supported-accommodation-inquiry-tors.pdf>.

behaviours that service providers and workers should demonstrate when delivering services to people with disability.¹⁰³

- 5.82 At the time of drafting, it was not mandatory for providers to use the Framework.

Registration timeframes

- 5.83 In September 2021, the Commission provided further information about the timeframes for deciding applications for registration, noting that registration processing times are:

dependent on a number of factors including the volume of applications submitted to the NDIS Commission, factors that rely on the actions of providers and auditors, and any issues arising from the provider's audit or suitability assessment of the provider or its key personnel.¹⁰⁴

- 5.84 Factors relying on actions of providers and auditors included whether the application required following up by the Commission due to incomplete information being provided, or in relation to issues raised through an audit or suitability assessment. The Commission may also hold an application 'where it is aware that another regulatory body may be considering action against a provider or its key personnel that would also influence the NDIS Commission's consideration of the provider's suitability'.¹⁰⁵
- 5.85 The Commission stated that it 'routinely monitors application processing times', and noted that an increase in processing times in 2020 was due to a number of reasons including, in particular, the substantial volume of applications received (alongside a high volume of applications for variations to existing registrations), and impacts of the COVID-19 pandemic, including rescheduling or delaying audits. The Commission highlighted that the substantial increase in the volume of applications received was in part due to changes to the rules governing provider registration – both in terms of providers who had waited to submit applications while the rules were being amended and because changes to the rules allowed more providers to undergo the less onerous verification audit process, making registration more attractive to some providers.¹⁰⁶
- 5.86 The Commission also listed a number of actions taken to support more timely assessment of applications including:
- adjustments to assessment processes;

¹⁰³ NDIS Quality and Safeguards Commission, *NDIS Workforce Capability Framework*, <https://www.ndiscommission.gov.au/workers/ndis-workforce-capability-framework> (accessed 25 October 2021).

¹⁰⁴ NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 14.

¹⁰⁵ NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 14.

¹⁰⁶ NDIS Quality and Safeguards Commission, *Submission 42.2*, pp. 14–15.

- employing additional staff and engaging extra resources to process a backlog of delayed applications;
- enhancing the online application form – including to better guide applicants to provide required information and documents at the time of applying for registration; and
- further enhancements to its operating system which it intends to release later in 2021.¹⁰⁷

Accounting for oversight by other regulatory bodies

5.87 In its initial submission, the Commission noted that its registration process sets out different requirements to that imposed, for example, by the Australian Health Practitioner Regulation Agency:

The Health Practitioner Regulation National Law essentially establishes ‘protected titles’ to ensure that only registered health practitioners who are suitably trained and qualified are able to use those titles. The registration process assesses the qualifications, experience, criminal history and professional indemnity insurance arrangements of individual practitioners. It does not register or regulate corporate entities established by health practitioners, nor does it consider the activities of the practitioner outside the health context, and particularly the ability of the practitioner to work with a person with a disability to achieve their personal outcomes and goals within the context of the NDIS.

The NDIS Commission’s provider registration process is proportionate, applying regulation commensurate to risk. For individual practitioners where there are existing regulatory arrangements such as through AHPRA, recognition of this is embedded in the registration design. If a provider seeking registration with the NDIS Commission is associated with a corporate entity, the NDIS registration process also:

- (i) applies the NDIS Practice Standards – outlined in Part 6 of the National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018 – which enable an assessment of the systems in place to deliver services to prevent harm and promote the rights of NDIS participants to receive safe and quality supports; and
- (ii) includes a suitability assessment of key personnel (defined in section 11A of the NDIS Act).¹⁰⁸

¹⁰⁷ NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 15.

¹⁰⁸ NDIS Quality and Safeguards Commission, *Submission 42*, p. 27.

Committee view

- 5.88 The committee acknowledges the concerns and suggestions raised by submitters and witnesses in relation to the Commission's registration process, including that the Practice Standards may benefit from review to ensure they are fit for purpose and that registration with the Commission can impose significant administrative and cost burdens on some providers.
- 5.89 The committee welcomes the range of measures taken by the Commission to improve registration processing times, in particular the increased levels of staff to support this process. The committee has more to say about staffing levels of the Commission in Chapter 9. The committee also welcomes the Commission's advice that it continues to improve on the online application form for registration and its operating system. The committee hopes this will lead to reduced administrative burden and frustration for providers, many of whom raised concerns in relation to these systems as they were initially set up by the Commission.
- 5.90 The committee considers that the Commission is making a sincere and concerted effort to listen and respond to concerns raised by providers about the registration process. However, the committee remains concerned that a number of issues raised in relation to the costs associated with the registration process do not appear to have been addressed, in particular in relation to the cost of conducting audits. It appears the correct balance is yet to be struck between ensuring appropriate quality of supports through the registration process and ensuring that the process does not continue to be a disincentive to providers registering with the Commission.
- 5.91 This issue has added urgency considering the significant concerns about thin markets for particular allied health supports and in general for regional, rural and remote areas. The committee therefore considers a review of the provider registration process is required to ensure it does not impose unnecessary burden on current and prospective NDIS providers, while also ensuring quality and safety of services provided.

Recommendation 9

- 5.92 **The committee recommends that the Australian Government conduct a review of provider registration requirements, with a view to removing unnecessary burden while preserving quality and safety. The review should consider:**
- **the adequacy of the current graded requirements for small providers and providers which have met quality and safeguarding provisions as part of other registration processes**
 - **the classification of certain supports as 'high-risk' for the purposes of requiring registration (for example, early childhood supports)**

- the impact of registration requirements in specific areas of workforce shortages, such as behaviour support, and other allied health, and in regional rural and remote areas; and
- the adequacy of guidance for providers about the registration process.

Recommendation 10

5.93 The committee recommends that the Australian Government review the costs of registration audits for providers, with specific reference to the cost implications for smaller providers and providers in regional, rural and remote locations.

Recommendation 11

5.94 Following the above review, the committee recommends that the NDIS Quality and Safeguards Commission, in consultation with providers and auditing bodies, establish and publish clear guidelines for determining registration audit costs.

5.95 The committee further notes that these issues were the subject of recommendations made by the committee in 2019.¹⁰⁹ The committee also continues to consider these matters in relation to its ongoing inquiry into the NDIS workforce.

5.96 The committee also considers there is particular value in the Commission implementing measures to support people with disability being more involved in the auditing process.

Recommendation 12

5.97 The committee recommends that the Australian Government develop a strategy for increasing the number of people with disability who are involved in registration auditing. This strategy should be co-designed with people with disabilities, their families and advocates, and the disability sector.

Worker screening

5.98 The bulk of evidence received during the committee's inquiry in relation to worker screening discussed arrangements during the phased establishment of the Commission, noting the anticipated commencement of a national worker screening model from February 2021. As a result, a number of the issues outlined in evidence may have been superseded by the new national arrangements. Nevertheless, the committee briefly outlines key concerns that arose from the evidence received.

Implementing and understanding the new national model

¹⁰⁹ Joint Standing Committee on the NDIS, *Progress Report*, March 2019, pp. 61–62.

5.99 A number of submitters raised concerns about delays in implementing the national model,¹¹⁰ while others commented on difficulties that had arisen with respect to interim worker screening arrangements, such as perceived poor communication between state and federal bodies.¹¹¹ Cara, for example, recommended that national worker screening arrangements be expedited to provide consistent worker screening and clearance across jurisdictions, and information-sharing protocols be established between the Commission and worker screening units.¹¹²

5.100 Submitters also emphasised the importance of providing clear information about the new model. For example, Queenslanders with Disability Network (QDN) noted that there was currently 'limited knowledge and significant misunderstanding around what worker screening means for people with disability and their support workers' and expressed strong support for a communication strategy around why worker screening is important, and what the move to a nationally consistent framework means for people with disability.¹¹³ QDN indicated that such a strategy should include:

- developing resources with tips on how people with disability should approach having a conversation with their support workers about applying for worker screening;
- alternative processes for applying for a worker screening check for people who do not have digital access and skills or for those who have poor literacy skills;
- developing specific communications strategies for Aboriginal and Torres Strait Islander and Culturally and Linguistically Diverse people with disability, their families and providers; and
- information sessions for NDIS participants in the lead up to the start of the new worker screening system starting.¹¹⁴

5.101 Following the implementation of the national worker screening model, the committee heard from providers that the screening process took considerable time to conduct, apparently even for workers who did not have direct client-facing responsibilities.¹¹⁵

¹¹⁰ See, for example, Autism Spectrum Australia, *Submission 9*, [p. 3]; Cara, *Submission 31*, p. 5; Stride Mental Health, *Submission 21*, p. 8; Physical Disability Australia, *Submission 45*, [p. 3]; Australian Services Union, *Submission 47*, p. 4.

¹¹¹ See, for example, Cara, *Submission 31*, p. 5; Community and Public Sector Union, *Submission 39*, p. 8.

¹¹² Cara, *Submission 31*, p. 5.

¹¹³ Queenslanders with Disability Network, *Submission 48*, p. 6.

¹¹⁴ Queenslanders with Disability Network, *Submission 48*, p. 6.

¹¹⁵ Ms Kerrie Mahon, Chief Executive Officer, Montrose Therapy and Respite Services, *Committee Hansard*, 29 June 2021, p. 10.

5.102 At a public hearing in Caloundra in June 2021, Ms Kerrie Mahon, from Montrose Therapy and Respite Services told the committee that the process 'is highly protracted and has caused disruption to our services, to the point that it's caused stability issues for our organisation and affected participants'. Ms Mahon went on to explain that the issues with worker screening in Queensland in part arose from the lack of pre-emptive screening before a person is employed by a provider and recommended that there be an option for individual workers to apply for screening independent of being employed.¹¹⁶

Unregistered providers

5.103 A significant concern raised in submissions was in relation to the absence of worker screening for unregistered providers. With the exception of standard police checks, providers who do not seek registration with the Commission are not required to undertake worker screening.¹¹⁷ A number of submitters, however, considered this to be a gap in safeguarding the rights of people with disabilities, and considered that screening should be undertaken for all workers.¹¹⁸

5.104 Mr David Moody, then Chief Executive Officer, National Disability Services (NDS), expressed concern that the absence of worker clearances for all workers (whether engaged by a registered or non-registered provider) places additional weight on the Code of Conduct to deliver appropriate supports. Mr Moody stated that all workers delivering face-to-face supports should be required to hold a worker clearance, stating:

People with disabilities should be able to have confidence, whether they're receiving support from registered or unregistered providers, that workers directly responsible for providing the support have been appropriately screened.¹¹⁹

5.105 Mr Moody acknowledged that extending worker screening requirements to unregistered providers will not, on its own, end exploitation and neglect in the disability sector, and that other mechanisms may be needed to ensure the quality and safety of supports. He also acknowledged the importance of

¹¹⁶ Ms Kerrie Mahon, Chief Executive Officer, Montrose Therapy and Respite Services, *Committee Hansard*, 29 June 2021, p. 2.

¹¹⁷ NDIS Quality and Safeguards Commission, *Worker screening requirements (registered NDIS providers)* <https://www.ndiscommission.gov.au/providers/worker-screening>, (accessed 25 October 2022).

¹¹⁸ See, for example, Leighton Jay, Jessica Quilty, Ann Driberg, *Submission 40*, p. 11; Australian Services Union, *Submission 47*, p. 4. The ASU further considered that screening should extend to any volunteers and contractors who deliver NDIS services that require contact with participants. See also Spinal Cord Injuries Australia, *Submission 56*, [p. 3]; The Junction Works, *Submission 8*, p. 5.

¹¹⁹ Mr David Moody, Chief Executive Officer, National Disability Services, *Committee Hansard*, 13 October 2020, p. 18. This point was also made in NDS' submission. See National Disability Services, *Submission 27*, [p. 2].

maintaining choice and control for participants, families and carers. However, Mr Moody asserted that registration—when appropriately applied—enhances the likelihood that workers will have appropriate qualifications, values and behaviours, and will be vetted for criminal history.¹²⁰

5.106 Some submitters also queried the adequacy of the processes for police checks to ensure safety and quality of supports. For example, Spinal Cord Injuries Australia (SCIA) stated that police checks should be required annually due to the nature of personal care work and a large transient support worker labour force. SCIA further stated that to ensure the quality and safety of services and supports, the Commission should have the power to set guidelines for service providers about the types, levels, frequency and historic timeframe of any criminal or reportable activity a support worker may have been involved in to be considered for employment with the sector,¹²¹ and that the Commission should have the power to review and make recommendations about the effectiveness of police checks.¹²²

5.107 Another submitter, 121 Care, recommended that providers be able to request an investigation by the Commission in relation to workers who have been terminated in situations that would not be captured in a police check, for example ‘crossing professional boundaries’.¹²³

Other concerns about worker screening

5.108 Additional concerns raised prior to the introduction of the new screening process included:

- that the intentions for a national worker screening database may not be sufficient to ensure effective screening of workers who operate across funding schemes and under multiple regulators¹²⁴
- the effectiveness of worker screening arrangements for ensuring quality and safety in services provided by subcontracted workers¹²⁵
- the need for stringent mechanisms are required to ensure proper experience and qualifications of staff and providers involved in the delivery of Supported Independent Living supports;¹²⁶ and

¹²⁰ Mr David Moody, Chief Executive Officer, National Disability Services, *Committee Hansard*, 13 October 2020, pp. 22–23.

¹²¹ Spinal Cord Injuries Australia, *Submission 56*, [p. 5].

¹²² Spinal Cord Injuries Australia, *Submission 56*, [p. 5].

¹²³ 121 Care, *Submission 41*, [p. 3].

¹²⁴ Allied Health Professions Australia, *Submission 54*, [p. 8].

¹²⁵ Australian Association of Social Workers, *Submission 24*, p. 5.

¹²⁶ Australian Association of Social Workers, *Submission 24*, p. 5.

- calls for increased regulation over the movements of employees who move freely between organisations.¹²⁷

Commission view

5.109 Since the National Standard for NDIS worker screening commenced in February 2021, the Commission has provided information to providers and participants about the new model on its website. This information highlights that self-managed participants are able to ask workers providing NDIS supports and services to them to demonstrate they have a clearance, or to ask them to obtain a clearance by undergoing an NDIS Worker Screening Check.¹²⁸

5.110 In relation to the Commission's oversight of unregistered providers, during one of the committee's public hearings, the former Commissioner stated:

We do also regulate unregistered providers, which are required to comply with the code of conduct, and we work to support people with disability and ensure their rights are upheld. We do this by educating and informing people with disability about their rights and the obligations of providers by responding to complaints, by overseeing the management of incidents by providers, by educating workers about the rights of people with disability by taking compliance and enforcement action, by playing a leadership role in the national approach to reducing and eliminating restrictive practices and also by playing a significant role in the national approach to worker screening.¹²⁹

5.111 The Commission also provided information to the committee with respect to the requirement for employers to verify a worker's application for an NDIS worker screening check (which results in workers being unable to pre-emptively apply for a worker screening check):

Employers may factor into their recruitment processes time for prospective employees to apply for and receive an outcome of their application for an NDIS Worker Screening Check. Further, employers have flexibility in relying on acceptable checks under transitional arrangements where possible, rather than requiring all prospective employees to apply for an NDIS Worker Screening Check and obtain an NDIS Worker Screening Clearance.

The policy framework covered in the [*Intergovernmental Agreement for Nationally Consistent Worker Screening for the NDIS*] concerning verification has been implemented by the Commonwealth, states and territories and has the effect of ensuring that NDIS Worker Screening is not extended to other sectors and those not involved in the delivery of NDIS supports and

¹²⁷ Advocacy for Inclusion, *Submission 65*, pp. 7–8.

¹²⁸ NDIS Quality and Safeguards Commission, *Worker Screening (self-managed participants)*, <https://www.ndiscommission.gov.au/participants/worker-screening-self-managed-participants>, (accessed 25 October 2021).

¹²⁹ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 27.

services. Further, NDIS Worker Screening was designed to provide an additional preventative safeguarding measure for NDIS participants and therefore may not be fit for purpose if it were to be extended in an uncontrolled manner.¹³⁰

5.112 The Commission also noted that the Rules and some states and territories provide for exceptions which would allow a worker without a worker screening check to commence in a role that would otherwise require one, such as when a worker holds an acceptable check under transitional arrangements, or if the worker has submitted an application and is appropriately supervised. However, these exceptions vary across the states and territories, and workers in the process of obtaining an NDIS worker screening clearance are unable to commence in a relevant role in Queensland, Victoria and South Australia.¹³¹

5.113 The Commission flagged continuing work in relation to implementing national worker screening in its current Corporate Plan, including:

- work with the Department of Health, the Department of Social Services, the Aged Care Quality and Safety Commission and the Department of Veteran Affairs on aligning worker screening arrangements across care sectors to the NDIS;¹³² and
- supporting the operation of the NDIS Worker Screening Check, including maintaining the NDIS Worker Screening Database and providing information to state and territory worker screening units in accordance with information sharing protocols.¹³³

Committee view

5.114 The committee welcomes the implementation of the National Standard for worker screening and notes the significant benefits that will flow from the new national approach. The committee anticipates that a number of concerns raised by submitters about the operation of worker screening during the transition phase will be addressed by the adoption of this model. However, noting the early stage of this model, and the range of concerns raised in evidence to the inquiry, the committee considers it would be appropriate to review the National Standard for worker screening after a sustained period of operation, to evaluate its contribution to ensuring quality and safety of NDIS supports and its impact on the NDIS provider market. The committee further considers that the concerns in relation to arrangements for unregistered providers should be considered by the Commission in this review.

¹³⁰ NDIS Quality and Safeguards Commission, correspondence received 23 July 2021, p. 3.

¹³¹ NDIS Quality and Safeguards Commission, correspondence received 23 July 2021, p. 3.

¹³² NDIS Quality and Safeguards Commission, *Corporate Plan 2021-2022*, August 2021, p. 11.

¹³³ NDIS Quality and Safeguards Commission, *Corporate Plan 2021-2022*, August 2021, p. 13.

5.115 The committee will also continue to monitor the implementation of the National Standard for worker screening, including through its current inquiry into the NDIS workforce.

Recommendation 13

5.116 The committee recommends that the NDIS Quality and Safeguards Commission, within 3 years of the commencement of the national worker screening arrangements, evaluate:

- **the adequacy and effectiveness of these arrangements in promoting safety and quality for NDIS participants, in particular, NDIS participants who receive supports from unregistered providers; and**
- **the impact of worker screening arrangements on the NDIS provider market.**

5.117 The committee heard that there have been significant delays in the new worker screening processes in some jurisdictions. Evidence to the committee suggested that the inability of prospective workers to obtain screening prior to being employed appears to be a significant factor in delays in the screening process in at least some states, and that these delays are causing disruption for providers and participants. While the committee notes that provision has been made in some states for workers to commence in a role while their check is being assessed, the lack of uniformity in approaches remains of concern.

Recommendation 14

5.118 The committee recommends that the NDIS Quality and Safeguards Commission work with states and territories to resolve delays in NDIS worker screening including by promoting consistency across jurisdictions in relation to the ability of workers to commence work under supervision once their employer has endorsed their screening application.

Chapter 6

Complaints handling

- 6.1 This chapter discusses the evidence received during the inquiry in relation to the Commission's complaints handling processes, including requirements that providers have internal complaints handling processes.
- 6.2 Key concerns in relation to complaints handling included:
- that the Commission's complaints process is difficult to access, due to complexity and lack of clarity in the way it operates, as well as significant barriers faced by participants; and
 - that the process is frustrating for parties, including due to a lack of information provided by the Commission regarding to timeframes for resolution or progress of a complaint, confusion about the Commission's referral process, and perceptions from participants that the Commission's processes favour providers.

Complaints handling

- 6.3 The Commission has a broad remit in relation to complaints regarding NDIS providers within its jurisdiction.¹ Guidance issued by the Commission states that a 'complaint' is:
- ...an expression of dissatisfaction made to or about an organisation, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.²
- 6.4 Complaints management and resolution is primarily governed by the NDIS Act and the National Disability Insurance Scheme (Complaints Management and Resolution) Rules 2018 (Complaints Rules). In addition, the Commission has published guidance for providers to support best practice in the handling of complaints.³
- 6.5 The NDIS Act includes requirements in relation to internal complaints management systems for registered providers,⁴ and this chapter outlines some of the evidence received in relation to these systems. However, a key area of

¹ NDIS Quality and Safeguards Commission, *Submission 42*, p. 30.

² NDIS Quality and Safeguards Commission, *Complaints Management and Resolution Guidance*, September 2019, p. 8. The guidance further states that a complaint may be made about any NDIS provider and/or its workers, regardless of whether the provider is registered.

³ See, NDIS Quality and Safeguards Commission, *Complaints Management and Resolution Guidance*, September 2019, p. 8.

⁴ *National Disability Insurance Scheme Act 2013*, sections 73W and 73X.

concern for stakeholders was the handling of complaints by the Commission. This reflects commentary by the Commonwealth Ombudsman which observed that approximately 80 per cent of the complaints it receives about the Commission relate to how the Commission handles complaints.⁵ Key issues included the accessibility of the complaints process; lack of dedicated support for people with disability; and the Commission's communication with complainants.

Internal complaints mechanisms

- 6.6 The committee heard concerns in relation to how providers make use of their internal complaints systems to address complaints and support complainants. For example, Mr Tim Chate, a solicitor with the Intellectual Disability Rights Service, emphasised that internal dispute resolution mechanisms are only effective if the provider is 'professional...morally good [and] motivated', stating that: 'if you've got a service provider that's being difficult and just doesn't want to provide...services then [the system] doesn't work'.⁶
- 6.7 The Australian Services Union submitted that workers who report a concern, complaint or reportable incident to key personnel within a provider are rarely advised of the outcome of the report they have made. This leaves workers in the situation of not knowing if they should take further action or if the issue they have raised has been addressed.⁷
- 6.8 The committee also heard that complaints may be escalated to the Commission without sufficient attempts being made to resolve the complaint through the provider's internal complaints resolution process. For example, Brain Injury South Australia noted that while the Practice Standards require a provider to have a complaints management and resolution system in place, these systems are frequently under-utilised.⁸

Access to the Commission's complaints processes

- 6.9 Several submitters and witnesses expressed concerns regarding access to the Commission's complaints process for people with disability, their families and supporters, and also for advocates and providers.⁹ Evidence suggested that:

⁵ Commonwealth Ombudsman, *Submission 17*, p. 2. This is notwithstanding the Ombudsman's statement that—as at 30 July 2020—it was satisfied that the Commission generally responds appropriately to complaints.

⁶ Mr Tim Chate, Solicitor, Intellectual Disability Rights Service, *Committee Hansard*, 13 October 2020, p. 10. See also, Intellectual Disability Rights Service, *Submission 29*, p. 6.

⁷ Australian Services Union, *Submission 47*, p. 3.

⁸ Brain Injury South Australia, *Submission 10*, [p. 1]. See also NDIS Quality and Safeguards Commission, *NDIS Practice Standards*, January 2020, p. 10.

⁹ It is noted that many of the concerns about the complaints process may stem from a failure by the Commission to communicate effectively with participants and the broader disability sector about

- there is insufficient clarity around how the complaints process operates
- people with disability face challenges in making complaints, including due to power asymmetries, the complexity of the process, and fear of reprisal from service providers; and
- complainants should be supported to access external support when making a complaint.

Complexity of the complaints process

- 6.10 The committee heard that the complaints process is complex and that it is unclear how the process operates in practice. This may be creating difficulty for potential complainants in accessing the Commission's complaints mechanisms.
- 6.11 The Queenslanders with Disability Network (QDN) reported 'general confusion' around the complaints process, including whether they can make a complaint to the Commission; when and how to make a complaint; who may make a complaint; how a complaint is investigated; outcomes from a complaint; and what communication to expect during and after an investigation.¹⁰
- 6.12 Aged and Disability Advocacy Australia (ADA Australia) noted that it is often difficult for complainants to identify the person or agency responsible for service delivery who should be the subject of a complaint, due to the mix of registered and unregistered providers providing supports and the use of sub-contracting arrangements.¹¹ There is also lack of clarity in terms of:
- the agency to which complaints should be directed (for example, whether a complaint should be made to the provider, the NDIA or the Commission)
 - the agency that will be addressing the complaint, and the pathway through which the complaint will travel
 - the person who will contact a complainant as part of the resolution process;
 - the point of contact with respect to the progress of a complaint
 - how to escalate a complaint if there is a change of circumstances or a greater perception of risk
 - avenues of appeal; and
 - the availability of free disability advocacy.¹²
- 6.13 ADA Australia suggested that providing relevant information in the form of a diagram or flow-chart, or using audio-visual materials, might help to facilitate greater understanding and access. In addition, more should be done to promote

the Commission's role and responsibilities; participants' rights; and the availability of complaints and redress mechanisms. These matters are discussed in more detail in Chapter 3.

¹⁰ Queenslanders with Disability Network, *Submission 48*, p. 7.

¹¹ Aged and Disability Care Australia, *Submission 35*, p. 12.

¹² Aged and Disability Advocacy Australia, *Submission 35*, p. 2.

complaints processes within the disability sector and to raise awareness about protections in place.¹³

- 6.14 Another submitter who sought to raise a complaint on behalf of a friend who is an NDIS participant observed that they had found the process of lodging a complaint over the phone to be ‘incredibly confusing and difficult’. This is notwithstanding that the submitter is an experienced informal advocate. The submitter said that they were ‘very distressed’ by the complexity and confusion of the complaints process and wondered how a person with disability would be able to navigate the process. The submitter was also concerned that opportunities to lodge a complaint may be limited for many people with disability, which would mean that it would not be safe for them to wait for a response from the Commission when seeking to complain.¹⁴

Clarifying who can make a complaint

- 6.15 The committee heard that it is sometimes unclear who may make a complaint to the Commission regarding the quality and safety of supports and services—despite the Commission’s stated policy that anyone may make a complaint. Further, participants and providers had received inconsistent advice from the Commission in relation to this matter.
- 6.16 For example, Anglicare SA submitted that in some cases where a staff member has made a complaint to the Commission about another provider, the Commission has advised that the participant to whom the complaint relates (or their nominee) must make the complaint—rather than Anglicare SA—due to potential conflicts of interest. This may have adverse consequences for participants, who are often unwilling or unable to make a complaint—for example due to fear about potential impacts on their supports and services.¹⁵
- 6.17 Ms Kirsten Deane, then Campaign Director, Every Australian Counts (EAC), indicated there is some confusion about whether it is possible for third parties to make complaints. In addition, the Commission may not be consistent in terms of whether it decides to investigate a complaint from a third party, and there is not clear guidance on this matter.¹⁶
- 6.18 The Victorian Office of the Public Advocate (Vic OPA) recommended that the Commission encourage individuals and organisations with significant concerns about the wellbeing of a participant to communicate those concerns to the

¹³ Aged and Disability Advocacy Australia, *Submission 35*, pp. 2–3.

¹⁴ Name withheld, *Submission 58*, p. 6.

¹⁵ Anglicare SA, *Submission 18*, [p. 2].

¹⁶ Ms Kirsten Deane, Campaign Director, Every Australian Counts, *Committee Hansard*, 29 September 2020, p. 2.

Commission. The Commission should then provide meaningful feedback to any such individual or organisation where:

- the Commission, on reasonable grounds, considers the individual or organisation to be playing a positive role in the participant's life; and
- the provision of such information would assist the individual or organisation to promote and protect the rights and wellbeing of the participant.¹⁷

Difficulties for participants

6.19 Several submitters and witnesses noted that NDIS participants face numerous difficulties in making complaints. In addition to the complexity of the complaints process, the committee heard that participants experience power asymmetries in their interactions with providers and the Commission and may also fear reprisals from service providers. As also discussed in Chapter 3, many participants experience difficulty obtaining clear information about rights and responsibilities under the NDIS.¹⁸

6.20 The Australian Lawyers Alliance (ALA) asserted that the Commission has an important role to play in ensuring complainants are well-supported during the complaints process and called for consideration of whether the current requirements of the Commission relating to complaints enable or hinder fair process. Factors which may make the complaints process less accessible for participants include:

- the 'well-documented' power asymmetry in the complaints process, which may lead to participants struggling to be heard, understood and believed;
- fear that making a complaint will lead to worsened service provision, due to retribution;
- making a complaint may be a source of re-traumatisation;
- complainants are often unaware of their rights.¹⁹

6.21 In addition, the administration and bureaucracy associated with the complaints process may also compound these difficulties. Mr Thomas Ballantyne, a representative of the ALA, submitted: 'we can't have paperwork being a reason that someone doesn't want to go to the Commission'.²⁰

¹⁷ Office of the Public Advocate (Victoria), *Submission 11*, p. 11.

¹⁸ See, for example, Multiple Sclerosis (MS) Australia, *Submission 15*, p. 5; Australian Association of Social Workers, *Submission 24*, p. 4; VALID, *Submission 33*, p. 3. Aged and Disability Advocacy Australia, *Submission 35*, pp. 2-3; Every Australian Counts, *Submission 63*, p. 7.

¹⁹ Australian Lawyers Alliance, *Submission 4*, p. 8.

²⁰ Mr Thomas Ballantyne, Australian Lawyers Alliance, *Committee Hansard*, 29 September 2020, p. 17.

Power asymmetries and fear of reprisals

- 6.22 Stride Mental Health (Stride) stated that the complaints process would benefit from consideration of the risk of retribution and vulnerability that participants experience, which can prevent complaints being made. Stride noted that this is particularly pronounced for participants in supported accommodation who may face homelessness as a result of making a complaint.²¹
- 6.23 Ms Romola Hollywood, then Director, Advocacy and Research, People with Disability Australia (PWDA) noted that there are 'many barriers' facing people with disability seeking to make complaints. For people with disability who live in closed settings, it is difficult or even frightening to make a complaint, and a person may only be able to make a complaint through the worker or service provider who might be the subject of the complaint.²²
- 6.24 VALID emphasised that people with intellectual disability do not feel safe to complain, as they are justifiably concerned about disapproval or retaliation from those they rely on for support. Moreover, a person with intellectual disability may have previously made a complaint and found the process to be daunting or pointless. VALID emphasized that people with intellectual disability will only make complaints if to do so is 'straightforward and absolutely safe'.²³
- 6.25 Ms Georgi Hadden, a participant, also spoke to the committee about the difficulties that she had faced in making a complaint, with a focus on fear of reprisal from service providers. Ms Hadden stated:
- In my situation, because I was vocal in speaking out, not just on me but on other people, the consequences of that were having my assistance cancelled for three days, where I could not access the food or I couldn't access my medication, despite what you read, because I don't have memory... For three days I was refused medication. One worker in Service A told me that management had told them to tell Georgi that they had lost the key.²⁴
- 6.26 Additional power asymmetries were reported by participants who felt the Commission's processes favour providers, which is discussed further below.

Challenges for particular cohorts

- 6.27 The committee heard that difficulties making complaints are magnified for certain cohorts, including people with communication difficulties, Aboriginal

²¹ Stride Mental Health, *Submission 21*, p. 6. Stride emphasised that participants should continue to be encouraged and supported to make complaints.

²² Ms Romola Hollywood, Director, Advocacy and Research, People with Disability Australia, *Committee Hansard*, 13 October 2020, p. 2. See also Multiple Sclerosis Australia, *Submission 15*, p. 5; Intellectual Disability Rights Service, *Submission 29*, p. 5;

²³ VALID, *Submission 33*, p. 3.

²⁴ Ms Georgi Hadden, Private Capacity, *Committee Hansard*, 17 November 2020, p. 3.

and Torres Strait Islander people with a disability, and people with disability from culturally and linguistically diverse backgrounds.²⁵

- 6.28 Speech Pathology Australia (SPA) observed that people with communication disabilities often face significant barriers to being able to report abuse, neglect or mistreatment, because they are not provided with the opportunity, time or means to do so in a way that ‘fits’ their communication abilities. People with cognitive disabilities also face additional challenges making complaints, as they often have a limited understanding of their rights, which increases their vulnerability.²⁶
- 6.29 The First Peoples Disability Network (FPDN) stated that making a complaint to the Commission is particularly difficult for Aboriginal and Torres Strait Islander peoples with disability, owing to a lack of trust in government institutions and concerns over disruptions to services and supports. This issue was of particular concern given the lack of culturally safe and appropriate services:

[E]ven for those First People with disability located in metropolitan areas, there is a lack of culturally appropriate disability support. Where services may be limited, making a complaint may risk ongoing service for an individual or create service issues within the wider community.

For many First People with disability, the NDIS may be the first time they have had access to any form of formal disability support, leading to a reluctance to raise issues or concern for fear of losing what they may have only recently gained.²⁷

External support for people engaging with the Commission

Importance of independent advocacy and specialist legal assistance

- 6.30 Several submitters and witnesses stressed the importance of ensuring people with disability making or considering a complaint to the Commission have access to independent advocacy and specialist legal assistance.²⁸ The committee heard that advocacy and other support services are often under-resourced and may lack the capacity to assist people with disability in their dealings with the Commission. Submitters and witnesses called for increased funding for advocacy and other critical services, to help ensure people with disability have

²⁵ See, for example, Australian Association of Social Workers, *Submission 24*, p. 4; Spinal Cord Injuries Australia, *Submission 56*, [p. 3].

²⁶ Speech Pathology Australia, *Submission 25*, pp. 18–19. The issue of educating participants about their rights is also address in Chapter 3.

²⁷ First Peoples Disability Network, *Submission 49*, p. 3. See also Mr Patrick McGee, National Manager, Policy, Advocacy and Research, Australian Federation of Disability Organisations, *Committee Hansard*, 17 November 2020, p. 4.

²⁸ See, for example, VALID, *Submission 32*, p. 3; Family Advocacy, *Submission 57*, p. 12; Ms Romola Hollywood, Director, Policy and Advocacy, People with Disability Australia, *Committee Hansard*, 13 October 2020, p. 4.

the necessary support to engage with the Commission on issues regarding the quality and safety of their supports.²⁹

- 6.31 Spinal Cord Injuries Australia (SCIA) emphasised that people with disability who have been subject to neglect or abuse must have access to advocacy support to assist with preparing and lodging complaints and with mediation processes. There is also a need for greater and more certain funding for advocacy, as the advocacy sector plays a 'vital role' in ensuring safety in the lives of people with disability by providing them with 'a voice to empower change where there are perceived barriers, physical and attitudinal'.³⁰
- 6.32 ALA expressed concern that there is a high level of unmet legal need amongst people with disability, noting that the legal system is inaccessible for people with disability and may produce unjust outcomes.³¹ Specialist legal services also remain under-resourced and struggle to meet growing demand. The ALA noted a 2014 survey of community legal centres across Australia, which reported that only half had processes in place to ensure that legal services were directed towards people with disability.³² The ALA argued that specialist legal services should be appropriately resourced and expanded, with increased funding for community legal services and Legal Aid lawyers with disability expertise.³³
- 6.33 The Vic OPA stressed the importance of independent advocates, representative bodies and consumer organisations in assisting participants with complaints, noting that the *NDIS Quality and Safeguarding Framework* recognises the role of formal advocacy and the importance of critical services being sufficiently resourced. The Vic OPA also raised concern that many advocacy bodies report operating with limited resources and increased demand.³⁴

²⁹ See, for example, Ms Kirsten Deane, Campaign Director, Every Australian Counts, *Committee Hansard*, 29 September 2020, p. 5.

³⁰ Spinal Cord Injuries Australia, *Submission 35*, [p. 7]. SCIA indicated that the Department of Social Services should increase the recurrent National Disability Advocacy Program (NDAP) funding to address unmet need for advocacy.

³¹ Australian Lawyers Alliance, *Submission 4*, p. 8.

³² Australian Lawyers Alliance, *Submission 4*, p. 9. The ALA cited Law Council of Australia, *The Justice Project Final Report—Part 1—People with Disability*, August 2018, p. 13.

³³ Australian Lawyers Alliance, *Submission 4*, p. 9.

³⁴ Office of the Public Advocate (Victoria), *Submission 11*, p. 7. The Vic OPA noted that Government is leading a 'national demand and gap analysis of independent disability advocacy and decision-making supports', asserting that this work must be promptly progressed.

The Commission's relationship with advocacy organisations

- 6.34 Submitters and witnesses called for the Commission to work more effectively with advocacy organisations in order to ensure that people with disability understand their rights and are able to engage effectively with Commission processes. The committee heard that this must include clarifying the role of advocates; strengthening links with advocacy organisations; and making increased efforts to ensure participants have advocacy support in place at the commencement of the complaints process.³⁵
- 6.35 The Vic OPA suggested that the Commission is failing to recognise the role of advocates in supporting participants, noting that in one example:
- [A] participant with a cognitive impairment was supported by a funded disability advocacy organisation to make a complaint to the NDIS Commission about financial exploitation by a registered service provider. The NDIS Commission in turn indicated it could only receive the referral with the consent of the participant, who, due to the nature of their impairment, could not consent. The NDIS Commission did eventually accept the complaint but excluded the advocate from the complaints process, depriving the participant from that necessary support.³⁶
- 6.36 VALID (Victorian Advocacy League For Individuals With Disability) noted that the Commission lacks guidance on how advocates can support participants in complaints processes,³⁷ and called for the Commission to quickly establish a formal protocol with advocacy organisations that clarifies the role of advocates in the Commission's complaints and investigatory processes and includes specific processes for the involvement of advocates for people who are unable to provide consent.³⁸
- 6.37 Ms Kirsten Deane, then Campaign Director for EAC, argued for a 'much closer relationship' between the Commission and advocacy bodies, to ensure people with disability understand their rights and are able to complain; and to ensure that they are effectively supported through the complaints process. Ms Deane also emphasised that the Commission must refer complainants to advocacy bodies where it is appropriate to do so.³⁹
- 6.38 QAI similarly recommended that the Commission establish referral pathways with National Disability Advocacy Program (NDAP) providers, independent state-funded disability advocacy organisations, Community Legal Centres and

³⁵ See, for example, Aged and Disability Advocacy Australia, *Submission 35*, pp. 12–13; Queensland Advocacy Incorporated, *Submission 64*, pp. 9–10; VALID, *Submission 33*, p. 5.

³⁶ Office of the Public Advocate (Victoria), *Submission 11*, p. 10.

³⁷ VALID, *Submission 33*, p. 5.

³⁸ VALID, *Submission 33*, p. 5.

³⁹ Ms Kirsten Deane, Campaign Director, Every Australian Counts, *Committee Hansard*, 29 September 2020, p. 4. See also Queensland Advocacy Incorporated, *Submission 64*, pp. 9–10.

State Legal Aid Commissions to ensure participants who are particularly vulnerable are supported through complaint and investigation processes.⁴⁰

- 6.39 Mr Thomas Ballantyne, ALA, suggested that there may be merit in establishing specialist legal or advocacy services for the Commission, similar to the services that exist for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability:

I note that with the royal commission, for example, there is a system for people getting advice from legal aid before they give evidence, and in some cases other firms, and there's resourcing directed at that. If you think about it, it's actually quite a similar situation, in terms of bringing your experience to the Royal Commission, as it would be bringing it to the [Quality and Safeguards] Commission, so ensuring...that support network is very important.⁴¹

Commission position

- 6.40 During one of the committee's public hearings, the then Commissioner emphasised that 'anyone can lodge a complaint', and that the Commission receives complaints from 'people with disability, from family members, from workers, from advocates and from a range of others'. While the Commission also seeks to determine the extent to which the person with disability wants an issue to be raised if a complaint is made of their behalf, the then Commissioner clarified that 'whoever makes the complaint would be classified as the complainant' and the Commission will work with the complainant.⁴²
- 6.41 The then Commissioner also acknowledged that it is difficult for many people with disability, their friends and families to make complaints, and explained that the Commission is working to make the complaints process more accessible:

The Commission has done quite a lot of work in terms of its own approach to how it works with people who are anxious or distressed when they make a complaint, and we've actively encouraged people to make complaints. We are seeing an uplift in the number of complaints that we're handling, which is encouraging, and that a reasonable proportion of those complaints are from people with disability, members of family or close friends. We are going to have to continue to reassure people that it's okay to complain.⁴³

- 6.42 With regard to encouraging complainants to seek support and assistance from advocacy organisations, the then Commissioner stated:

⁴⁰ Queensland Advocacy Incorporated, *Submission 64*, pp. 9-10.

⁴¹ Mr Tom Ballantyne, Australian Lawyers Alliance, *Committee Hansard*, 29 September 2020, p. 18.

⁴² Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 28.

⁴³ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 31.

We...provide people with information about what the commission does and how it deals with matters, but we also make people aware of what individual and systemic advocacy is and how it can be accessed...[T]he specifics of what we would say to somebody would depend on the circumstances that they were dealing with and the assessment of the complaints officer about how best to support that person.⁴⁴

6.43 In response to a question on notice, the Commission noted that its Complaints Management and Resolution Guidance document, which is available on the Commission website, states that:

- advocates can make complaints;
- the NDIS Commission will work with NDIS participants, their representatives (including advocates) and providers to resolve complaints; and
- the NDIS Commission provides information about the use of independent advocates.⁴⁵

6.44 Standard letter templates used by Complaints officers also include optional language to suggest that the recipient 'consider obtaining an advocate' and explains how to find one using the Disability Advocacy Finder tool, with the link to this tool included in the correspondence.⁴⁶

6.45 The then Commissioner also stated that the Commission is 'very committed' to working with advocates, noting that the Commission facilitated national workshops for advocates in July 2018 and July 2019 which were valuable for both the Commission and for advocates. The Commission's intention is to continue to run 'quite specific targeted consultation' with advocacy organisations.⁴⁷

General concerns about the Commission's complaints process

6.46 The committee also heard that people with disability, their friends and advocates, and providers had encountered other difficulties once engaged in the complaints process. The committee heard that initial responses to a complainant or provider were of variable quality, and that the Commission's referral processes could be clarified. A range of other concerns were also identified, including allegations that the Commission's processes prefer providers.

⁴⁴ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 33.

⁴⁵ NDIS Quality and Safeguards Commission, answers to questions on notice, 29 September 2020 (received 26 October 2020), p. [5]. The Commission's Complaints Management and Resolution Guidance document is available at www.ndiscommission.gov.au/document/581.

⁴⁶ NDIS Quality and Safeguards Commission, answers to questions on notice, 29 September 2020 (received 26 October 2020), p. [5].

⁴⁷ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 29.

Initial responses by the Commission

Information for complainants

- 6.47 The committee heard that complainants had experienced inconsistent responses from the Commission in relation to complaints, and that, to build trust in its systems, the Commission should do more to explain to participants how a complaint will be investigated, including following up to advise on the progress of a complaint as well as communicating the outcomes and findings when an investigation is finalised.⁴⁸
- 6.48 Villamanta Disability Rights Legal Service (Villamanta) indicated that the Commission has been effective at acknowledging receipt of complaints.⁴⁹ However, Villamanta submitted that the quality of responses is variable, stating that where a person attempts to make a complaint, the Commission ‘appears to ...[try] to set expectations about what it can and cannot do’. This discourages prospective complainants and negatively colours perceptions of the complaints process.⁵⁰
- 6.49 Villamanta also observed that there is a ‘failure to provide...expectations or timeframes in writing’ at the commencement of a complaint. This lack of written correspondence leaves complainants with uncertainty as to what to expect and when to expect it, as they must rely on conversations with case managers rather than clear documentation from the Commission.⁵¹
- 6.50 The Northern Territory Office of the Public Guardian (NT OPG) stated that the certainty and timeliness of the Commission’s initial responses to complaints and reportable incidents ‘requires improvement’, stating:

After a concern, complaint or reportable incident has been made to the Commission, the Commission’s assessment of risk and proposed plan or investigation to address the concern or complaint has, at times, been unclear to the Office of the Public Guardian, the participant and their family. This uncertainty creates confusion and risk for all stakeholders including the NDIS participant and the NDIS service provider.⁵²

⁴⁸ See, for example, Queenslanders with Disability Network, *Submission 48*, p. 7; Leadership Plus, *Submission 26*, pp. 6–7; Aged and Disability Advocacy Australia, *Submission 35*, p. 3.

⁴⁹ Villamanta Disability Rights Legal Service, answers to questions on notice, 2 May 2021 (received 4 June 2021), p. 5.

⁵⁰ Villamanta Disability Rights Legal Service, *Submission 43*, [pp. 1–2].

⁵¹ Villamanta Disability Rights Legal Service, *Submission 43*, [p. 2]. Villamanta also observed that even where timeframes for resolving complaints are provided, they are not enforced.

⁵² Northern Territory Office of the Public Guardian, *Submission 32*, [p. 4]. The NT OPG asserted that this confusion is of particular concern in relation to immediate safety issues where there may be conflicting views between the provider and the NT OPG.

- 6.51 Some providers reported positive experiences engaging with the Commission's complaints processes. For example, the Mental Illness Fellowship of Australia (MIFA) noted that the Commission had responded positively to one of its members regarding a complaint process initiated by a participant. MIFA observed that the provider involved in the process found that the Commission sought to understand the different perspectives involved in the complaints, and that staff of the Commission were polite and courteous. The Commission provided timely information about next steps in the process and advised on when the organisation could expect a response.⁵³
- 6.52 However, the committee also heard that the Commission's processes lack meaningful engagement with providers. For example, Autism Spectrum Australia (Aspect) noted that there is limited communication 'back' to providers who make initial complaints, which causes concern for providers as they do not know whether the people with disability they support are safe.⁵⁴

Notifying providers of complaints

- 6.53 National Disability Services (NDS) observed that where a participant raises a complaint directly with the Commission, the provider that is the subject of the complaint may not be notified until some months have passed, making it difficult to investigate the root cause of the complaint:

[F]or example, a provider has reported to NDS that a complaint made in January was only notified to the provider in September. The provider was unaware there was a complaint for this duration and was providing services throughout this time.⁵⁵

- 6.54 NDS also urged the Commission, when responding to a complaint, to initially approach relevant staff by email where possible—so that there is a record of engagement between the parties. According to NDS, phone calls to frontline staff can be made at unsuitable times and may be confusing to the individual. In addition, staff may be confused about whether they are under investigation for a serious matter or whether the inquiry is more exploratory in nature. Additionally, if a provider has no knowledge of the contact, they are not in a position to support the staff member being questioned.⁵⁶
- 6.55 Cara similarly indicated that the Commission can be slow to contact providers to address issues. Cara provided an example to illustrate these concerns:

⁵³ Mental Illness Fellowship of Australia, *Submission 37*, p. 3.

⁵⁴ Autism Spectrum Australia, *Submission 9*, [p. 2]. Aspect recommended reciprocal communications and support for providers, as well as the Commission developing timelines for communication back to providers.

⁵⁵ National Disability Services, *Submission 27*, [p. 2].

⁵⁶ National Disability Services, *Submission 27*, [p. 2].

Cara...received a "Compliance Warning" letter in March 2020, following a complaint originally made to the Commission between September 2018 and January 2019. The initial complaint remained unresolved by the Commission in August 2019, and passed to the Compliance Team of the Commission for further action.

Throughout this period, Cara remained willing to resolve the complaint, and responded to each request for further information as received from the Commission. The powers available to the Commission in this matter appear to have been exercised incorrectly, and Cara is still unaware if the original complaint of 2018 has been resolved to the satisfaction of the participant.⁵⁷

The Commission's referral process

6.56 Some submitters and witnesses indicated that the Commission's referral processes require improvement to ensure complaints are directed to the relevant authority and to assure complainants that their concerns will be addressed.⁵⁸

6.57 For example, Ms Romola Hollywood, then Director, Policy and Advocacy, PWDA expressed support for the Commission's 'no wrong door' policy. However, greater consideration should be given to how the Commission's referral process operates in practice, as confusion as to which agency is responsible for a matter may lead to delays in investigative processes and to important issues being neglected.⁵⁹

6.58 The Vic OPA noted that while there have been improvements in information-sharing arrangements between the Commission and state-based authorities such as Public Advocates, privacy obligations in the NDIS Act and associated Rules continue to stymie effective referrals and limit the role advocates are able to play in the complaints process. The Vic OPA stated:

In some instances, the NDIS Commission has been unable to update [the Office of the Public Advocate] on the progress of its work in relation to a referral, thereby diminishing [the Office of the Public Advocate's] ability to undertake a more targeted advocacy response. The information sharing schedules cannot overcome legislative restrictions on the...Commission when it comes to sharing information. Ultimately, it is participants who are disadvantaged.⁶⁰

6.59 A submitter who had complained on behalf of a participant considered that if a complaint needs to be transferred within the Commission to an officer in a

⁵⁷ Cara, *Submission 31*, p. 2. The committee notes that this incident occurred in March 2020.

⁵⁸ See, for example, Leadership Plus, *Submission 26*, p. 3.

⁵⁹ Ms Romola Hollywood, Director, Policy and Advocacy, People with Disability Australia, *Committee Hansard*, 13 October 2020, p. 3.

⁶⁰ Office of the Public Advocate (Victoria), *Submission 11*, p. 10. The committee notes that recent amendments to the NDIS Act make additional provision for information to be shared between the Commission and a state and territory. See, National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021, Explanatory Memorandum, pp. 6–7.

particular jurisdiction, there should be a process of ‘warm referral’ or ‘warm transfer’, so that the person lodging a complaint does not have to tell their story over again.⁶¹

6.60 The committee also heard that there is a lack of overall coordination across regulatory frameworks that affect allied health practitioners, which can cause confusion in relation to the appropriate body responsible for different types of complaints.⁶²

6.61 Other concerns regarding the overall complaints process included:

- that it is difficult for complainants to track the progress of complaints and that the Commission does not inform complainants of progress⁶³
- the time taken for the Commission to resolve complaints and complete investigations⁶⁴
- poor or no communication in relation to the outcome of complaints;⁶⁵ and
- concern over the Commission's use of mediation in the complaints process.⁶⁶

Allegations that the Commission's processes favour providers

6.62 Several submitters and witnesses expressed concern that the Commission often appears biased in favour of service providers and may not give sufficient attention to complaints made by participants.

6.63 For example, ADA Australia considered that the Commission is sometimes ‘too willing’ to accept the word of the provider and ‘not dig deep enough’ into the facts underpinning a matter. In the absence of transparency, it may appear to a complainant that the Commission has ‘willingly accepted whatever a provider told them’ in its eagerness to close a case, and has failed to provide the complainant with the protections that were implied or promised.⁶⁷

⁶¹ Name withheld, *Submission 58*, pp. 5-6. In September 2020 the then Commissioner noted that the Commission has a warm referral process for complaints that are out of scope for the Commission. See Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 28.

⁶² Allied Health Professions Australia, *Submission 54*, p. [4].

⁶³ Villamanta Disability Rights Legal Service, answers to questions on notice, 2 May 2021 (received 4 June 2021), p. 6; Aged and Disability Advocacy Australia, *Submission 35*, p. 3.

⁶⁴ Cara, *Submission 31*, p. 3. Further discussion in relation to the Commission's investigation processes is contained in Chapter 4.

⁶⁵ 121 Care, *Submission 41*, [p. 3]. 121

⁶⁶ Intellectual Disability Rights Service, *Submission 29*, p. 6.

⁶⁷ Aged and Disability Advocacy Australia, *Submission 35*, p. 11. See also ACT Government, *Submission 52*, p. 3.

- 6.64 QDN noted that among its members who are aware of the Commission, there is an ‘overwhelming’ view that the Commission works closely with providers but is inaccessible to people with disability. QDN stated:

[S]ome QDN members believe the Commission’s work is largely focused on supporting service providers to meet their obligations and didn’t see the Commission had a role in supporting people with disability to uphold their rights, including navigating complaints processes and as a result that people with disability were missing out.⁶⁸

- 6.65 Villamanta observed that it has heard that the Commission takes the work of a provider more seriously than they do the person with a disability. In this respect, Villamanta stated:

Complainants do not consider this a fair process at all. If a service provider provides a response, there is an expectation that the Commission will provide this response to the complainant so they can comment on it.⁶⁹

- 6.66 Ms Georgi Hadden, a participant, stated that when she had made a complaint about the treatment she had received from a provider, she was questioned on the provider’s response to the complaint ‘as if I [Ms Hadden] needed to be accountable’. Ms Hadden indicated that the Commission had not given adequate consideration to evidence that she and her support worker had provided,⁷⁰ and raised concern in relation to how information is provided to participants and providers, stating:

I asked to see what these services were saying about me and I was told that it was confidential information and they would have to ask permission of the services. If they denied that permission then I would have to go down the line of freedom of information and filling out the paperwork. I said: ‘But that makes no sense I have handed you evidence which you have freely given to these people, the perpetrators. I’m here, feeling interrogated, and you will not tell me and give me everything.’⁷¹

- 6.67 Dr John Franklin, a consultant clinical psychologist supporting Ms Hadden, also provided an account of Ms Hadden’s experience with the Commission.

⁶⁸ Queenslanders with Disability Network, *Submission 48*, p. 5.

⁶⁹ Villamanta Disability Rights Legal Service, *Submission 43*, [p. 2].

⁷⁰ Ms Georgi Hadden, Private Capacity, *Committee Hansard*, 17 November 2020, p. 2.

⁷¹ Ms Georgi Hadden, Private Capacity, *Committee Hansard*, 17 November 2020, p. 2. See also Mr Patrick McGee, National Manager, Policy, Advocacy and Research, Australian Federation of Disability Organisations, *Committee Hansard*, 17 November 2020, p. 4. Mr McGee noted that some people and organisations have expressed concern over the Commission’s apparent desire to prioritise confidentiality over protection, noting that this may come at the expense of individuals’ safety. See also Villamanta Disability Rights Legal Service, *Submission 43*, [p. 2]. The Villamanta DRLS stated that there appears to be a view by the Commission that not all documents provided by service providers can be shared with complainants, noting that this lack of transparency can allow staff to give incorrect accounts of events which go unchallenged as the complainant is unable to review all the materials provided.

Dr Franklin considered that the experience indicated a bias in favour of service providers, and outlined weaknesses of the Commission's response to complaints:

- The service provider is free to choose who undertakes the investigation. This is not at arm's length and is open to accusations of lack of independence, mutual financial benefit, and undue influence.
- The Commission does not require to receive a copy of the investigation and is thus not in a position to determine the adequacy of how it was conducted nor the accuracy of any summary provided.
- The response of the service provider is not provided to the complainant for comment. Not only is this inequitable, in that the service provider gets to see the complaint, whilst the complainant is not afforded the same access. No reaction is sought from the complainant as to the accuracy or sufficiency of the provider's response.
- No attempt is made by the Commission to obtain detailed independent witness statements, examine any additional evidence submitted or available, or examine inconsistencies.
- Considerable barriers are placed in the way of the complainant obtaining access to the processes of the Commission, the correspondence with the service provider or the substance or adequacy of any investigation.⁷²

6.68 Another submitter who had made complaints on behalf of a participant noted that their dealings with the Commission had indicated that the Commission does not put the person with disability first, but rather appears to act in the interests of service providers. As an example, the submitter noted that they had made two complaints to the Commission regarding the quality and safety of their friend's supports and living conditions. In closing an investigation into the first complaint, the Commission advised that the relevant service provider had provided 'a reasonable explanation and response to all of the complaint issues', and that the provider 'shared [the submitter's] concerns'.⁷³

6.69 However, no information was provided as to what actions had been taken by the service provider to address the submitter's concerns. Moreover, according to the submitter it was clear from what occurred between the lodging of the first complaint (January 2020) and the lodging of the second (June 2020) that no action had been taken by the service provider, and the health and wellbeing of the submitter's friend had 'deteriorated significantly'.⁷⁴

6.70 Ms Kirsten Deane, then Campaign Director, EAC, observed that:

The overwhelming feedback we receive is that the commission appears to be weighted in favour of providers. People really feel that the odds are stacked against people with disability and their families and they don't

⁷² Ms Georgi Hadden, *Submission 68.1*, pp. 1–2.

⁷³ Name withheld, *Submission 58*, p. 4.

⁷⁴ Name withheld, *Submission 58*, p. 8.

really feel that the commission is in their corner. They feel the commission too often accepts the explanations of service providers without thorough investigation. This leaves people with a terrible 'what is the point?' feeling. They feel like they're going through a 'tick and flick' exercise with very little change as the end result.⁷⁵

- 6.71 By contrast, 121 Care stated that its experience is that 'allegations are truth until a [p]rovider can prove otherwise', and that the complaints process is biased in favour of participants. 121 Care stated that this is a 'particularly concerning attitude' when vexatious or malicious accusations are made.⁷⁶

Commission view

- 6.72 In May 2021 the then Commissioner told the committee that the Commission had been 'alive' to feedback and evidence provided during the inquiry about aspects of the complaints process that may require addressing.

We held a national forum with advocates about three weeks ago where they talked about what advocates had been saying about the process and where we presented the initiatives that I've just referred to around process adjustment. That was a very good and constructive discussion...

The way we handle complaints is set out in the rules. Our policies and procedures give guidance to staff on how to meet our obligations under the rules. If we're getting feedback that there's unsatisfactory performance in relation to that then I'll look at it. I would say that there are often issues...about information sharing. There are arrangements in the statute around, in a sense, who has standing in a matter. So we have an obligation to a complainant around a particular matter, but there are also statutory imitations imposed on us under section 67 of the act on what we can release to whom. Those arrangements, I think, have caused some frustration for some state based office holders who would like more information from the commission on certain matters.⁷⁷

- 6.73 The then Commissioner also noted that the Commission had 'been through a comprehensive review of all of our processes and procedures in complaints management'. In September 2021, the Commission outlined six key elements of changes to the Commission's complaints management processes:

⁷⁵ Ms Kirsten Deane, Campaign Director, Every Australian Counts, *Committee Hansard*, 29 September 2020, p. 2. Ms Deane further noted that people with disability have told EAC that they feel providers are not genuinely being held to account, and that the current regulatory system 'isn't really producing better quality services'. See also Every Australian Counts, *Submission 63*, pp. 9–10. See also Family Advocacy, *Submission 57*, p. 7.

⁷⁶ 121 Care, *Submission 41*, [p. 2]. 121 Care emphasised that it is imperative that procedural fairness principles are applied consistently and with integrity, noting that complaint outcomes can have a significant effect on the provider and staff involved.

⁷⁷ Mr Graeme Head, AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 20 May 2021, p. 29.

- significantly increased staffing (as a result of budget increases announced in the 2020-21 Budget)
- significantly revised policies and procedures, including the provision of consolidated guidance in the form of a complaints manual
- a revised approach to intake assessment and streaming of complaints received by the NDIS Commission
- intensive training of staff on the new policies, procedures and changes to the intake model
- a new internal quality assurance process (in the form of a Quality Assurance Framework); and
- a new external assurance and advisory mechanism.⁷⁸

6.74 The Commission noted that its new complaints approach 'is intended to enable NDIS Commission complaints officers to respond more quickly to complaints by making earlier decisions about the types of actions that are most likely to be effective in resolving the relevant complaint'.⁷⁹ The Commission also noted that this model will include greater use of early resolution techniques and appropriate and timely referrals to other bodies. The Commission is further focussing on training its officers in conciliation and reconciliation to complement this approach.

6.75 The Commission's new 'external assurance and advisory mechanism' is in the form of a Complaints Function Advisory Committee.⁸⁰ The Advisory Committee members will provide input, guidance and recommendations on:

- the efficacy of the NDIS Commission's complaints function
- ways to improve the handling and resolution of complaints in accordance with the NDIS Act and the Complaints Rules
- the removal of barriers which impact on the ability of a person to raise a complaint
- systemic data gathered through the complaints function; and
- ways to enhance outcomes being achieved through having a national complaints mechanism.⁸¹

⁷⁸ NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 3. The Commission noted that a number of these changes also apply to how it oversees providers' response to reportable incidents, which are discussed below.

⁷⁹ NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 4.

⁸⁰ At the time of drafting it did not appear that Advisory committee members had been appointed. However, the Commission stated that it will 'ensure that the Advisory Committee includes members with lived experience of disability, strong experience in advocacy and a contemporary understanding of disability-related issues and effective approaches to complaints about the quality and safety of supports and services'. NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 5.

⁸¹ NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 5.

Committee view

- 6.76 While the committee notes that the Commission has a wide range of functions, it is through making a complaint that a person with a disability is most likely to engage directly with the Commission and to form a view of its effectiveness in supporting the safety and quality of supports for NDIS participants. To encourage trust in the Commission's work it is therefore crucial that participants feel that this mechanism is accessible and that they are supported to make complaints.
- 6.77 The committee welcomes the reforms to the Commission's complaints process. The committee further welcomes the Commission's advice that it is alive to, and seeking to be responsive to, feedback received about the complaints process, including information provided to the committee through this inquiry. It is especially encouraging to hear that the Commission has developed additional complaints-handling guidance and protocols and is making efforts to ensure adequate training for its complaints officers. The committee urges the Commission to continue to improve these documents and ensure that staff are trained to follow them.
- 6.78 However, the committee notes that these efforts alone will not address the significant barriers to making a complaint that still exist for many participants. Noting the volume of poor experiences in making complaints reported to this inquiry, significant work will be required by the Commission to build trust with participants to ensure they can make effective use of the complaints system.
- 6.79 As also discussed in Chapter 3, this work should include proactive engagement with participants, their families and advocates to provide clear and accessible advice about making a complaint. The Commission must also ensure its complaints process is genuinely accessible to people with disabilities, for example, people who use different forms of communication. Any improvements should be developed through co-design so information and processes make sense to those who use them.

Recommendation 15

- 6.80 **The committee recommends that the NDIS Quality and Safeguards Commission progress as a matter of urgency the work of its new Complaints Function Advisory Committee to remove barriers to accessing the complaints process for participants, including specific barriers faced by participants who are Aboriginal and Torres Strait Islander people with disabilities, and participants with intellectual disabilities or cognitive impairments. In particular, the committee recommends that the Commission consider measures to simplify the complaints process.**
- 6.81 The committee is also especially concerned to hear the experiences of participants who have experienced of apparent asymmetry in the provision of

complaints information and whose experiences with the Commission led them to view the complaints process as favouring providers. It is crucial that participants are able to trust that the Commission is a body that supports them and will uphold their rights. This includes upholding participants' rights to receive NDIS services that are safe and of high quality, and also upholding rights to dignity and self-determination, by supporting participants speak up when their rights are not upheld.

- 6.82 The specific examples of providers' responses to complaints not being given to the person who complained should be reviewed by the Commission, with a view to ensuring that complainants feel heard and supported throughout this process. The new advisory committee established by the Commission may be an appropriate body to undertake this review, ensuring that any responses adopted by the Commission are developed through appropriate co-design and consultation.

Recommendation 16

- 6.83 The committee recommends that the Commission work with the new Complaints Function Advisory Committee to establish and publish formal guidance and protocols with respect to:

- **informing complainants of the progress of their complaints**
- **the role of advocates in the complaints process**
- **timeframes for responding to complaints; and**
- **review and verification of evidence from providers who are the subject of a complaint, including the circumstances in which it is appropriate to provide information from a provider to a complainant for comment.**

- 6.84 The committee also considers that immediate measures to support participants should be taken in the form of increasing access to independent advocates who can support them through the complaints process. In order to achieve this there would need to be a funding commitment from the government, and a clear and consistent process for taking complaints from third parties such as advocates.

Recommendation 17

- 6.85 The committee recommends that the Australian Government allocate specific funding to advocacy organisations to assist complainants in their dealings with the NDIS Quality and Safeguards Commission. This funding should be in addition to existing funding provided through the National Disability Advocacy Program.

Recommendation 18

- 6.86 The committee recommends that the Commission establish appropriate referral pathways with advocacy organisations, Community Legal Centres

and State and Territory Legal Aid Commissions to ensure participants who are particularly vulnerable are supported through complaint and investigation processes. This process should be developed through a co-design process with people with disability, their families and representative bodies and advocacy organisations.

Chapter 7

Reportable incidents

- 7.1 This chapter sets out the evidence received in relation to the Commission's handling of reportable incidents.
- 7.2 Key concerns in relation to reportable incidents included:
- that the reportable incidents framework should be strengthened; and
 - that providers may need more support to comply with reportable incident requirements.

Reportable incidents

- 7.3 Registered NDIS providers must maintain internal incident reporting systems, to ensure incidents are recorded and that providers take action to prevent recurrent incidents.¹
- 7.4 Registered providers must also report particular serious incidents or allegations to the Commission if these occur in connection with the provision of NDIS supports or services.² These are:
- the death of a person with disability; or
 - serious injury of a person with disability; or
 - abuse or neglect of a person with disability; or
 - unlawful sexual or physical contact with, or assault of, a person with disability; or
 - 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.
- 7.5 The requirements in relation to timeframes for reporting and the types of information that must be provided to the Commission are set out in Rules made under the NDIS Act.³
- 7.6 In its submission, the Commission noted that it reviews data about reportable incidents to identify 'systemic issues to be addressed, and report publicly on the trends and patterns in reportable incidents, and best practice strategies to improve the quality of supports and services and prevent harm to people with

¹ NDIS Quality and Safeguards Commission, *Submission 42*, p. 32.

² NDIS Quality and Safeguards Commission, *Submission 42*, p. 32. This requirement is pursuant to section 73Z of the NDIS Act.

³ National Disability Insurance Scheme (Incident Management and Reportable Incidents) Rules 2018.

disability'.⁴ The Commission publishes data on reportable incidents in its activity reports.⁵

Does the framework provide strong enough protections?

7.7 The committee heard that the reportable incidents framework may need additional measures to enable it to provide strong enough protections to ensure safe supports for people with disability. These included:

- enabling the identification of systemic issues through reporting
- expanding the types of incidents that must be reported
- ensuring providers' internal systems are equipped to highlight serious incidents; and
- requiring unregistered providers to report serious incidents.

7.8 The Victorian Office of the Public Advocate (Vic OPA) observed that reporting of incidents is not required to the same extent as has been implemented in Victoria. In particular, the Vic OPA noted that the Victorian framework (which in July 2020 was administered by the Victorian Department of Health and Human Services) defines 'major impact' incidents to include 'a pattern of incidents related to one client which, when taken together, meet the [required] level of harm to a client. This may be the case even if each individual incident is a non-major impact incident'. The Vic OPA recommended that a similar provision be added to the provisions in the NDIS Act and Rules governing reportable incidents.⁶

7.9 Stride Mental Health (Stride) indicated that the Reportable Incidents framework should be broadened so as to encourage the reporting of additional incidents and thereby increase the Commission's ability to protect vulnerable participants and to improve the quality and safety of supports and services. Examples include:

- all participant deaths;
- where a participant has made a police report in relation to a matter, but the matter does not meet the current Reportable Incident criteria; and
- critical incidents relating to the provision of psychosocial supports, such as where suicidal ideation or non-suicidal self-injury is observed.⁷

7.10 The Queensland Public Advocate (Qld PA) noted that the Commission requires service providers to have an incident management system in place for

⁴ NDIS Quality and Safeguards Commission, *Submission 42*, p. 33.

⁵ See, for example, NDIS Quality and Safeguards Commission, *12-month activity report: July 2020 – June 2021*, September 2021, www.ndiscommission.gov.au/document/3281, (accessed 26 October 2021).

⁶ Office of the Public Advocate (Victoria), *Submission 11*, p. 11.

⁷ Stride Mental Health, *Submission 21*, pp. 5–6

identifying, assessing, recording and reporting incidents, and acknowledged that such a system will provide a great deal of information which will assist in safeguarding participants. However, incident management systems currently are not able to identify and report on 'red flags' for risk. The Qld PA submitted that auditing and monitoring processes should be reviewed to identify particular issues that may be 'red flags' which would trigger interventions, such as checking a person's access to health services, and ensuring that providers introduce systems of oversight and reporting of incidents of neglect or harm.⁸

- 7.11 The Vic OPA further submitted that community visitors be given access to providers' incident reports to assist in performing their quality assurance role and to enable community visitors to provide advice and guidance to providers on ways to improve their reporting practices.⁹
- 7.12 The committee also heard that it was 'problematic' that incident reporting is only mandatory for registered providers.¹⁰ For example the Vic OPA was concerned that unregistered providers may not understand when they have implemented a restrictive practice and how to report its use.¹¹
- 7.13 Stride observed that not requiring unregistered providers to identify and report incidents is a potential gap for vulnerable cohorts, and that this is of increased significance due to increasing numbers of plan managed and self-managed participants. Stride recommended that the framework be expanded to include both registered and unregistered providers.¹²

Commission approach to reportable incidents

- 7.14 The committee heard that the Commission's approach to reportable incidents demonstrated shortcomings similar to the issues with its approach to complaints. These included shortcomings in the Commission's approach to communicating with participants and providers about incidents.
- 7.15 Cara observed that while the best measure of the impact of an incident is often gained directly from the participant, the Commission may not contact participants or nominees following an incident. According to Cara, the Commission relies on evidence supplied by providers—even if this it is less effective to take this approach than to contact the participant or their nominee directly. Moreover, there appears to be little correlation between the nature of

⁸ Queensland Public Advocate, *Submission 59*, p. 2.

⁹ Office of the Public Advocate (Victoria), *Submission 11*, p. 12.

¹⁰ Office of the Public Advocate (Victoria), *Submission 11*, p. 11.

¹¹ Office of the Public Advocate (Victoria), *Submission 11*, p. 14.

¹² Stride Mental Health, *Submission 21* p. 5.

an incident, the impact on the participant, and the evidence sought by the Commission to justify the provider's actions.¹³

- 7.16 Autism Spectrum Australia (Aspect) submitted that in some cases, reportable incidents have not been investigated for months, and escalation of action to service providers has taken up to nine months. In addition, investigations into reportable incidents seem to be 'focused on documents and compliance rather than providing practical, on the ground support to providers'.¹⁴
- 7.17 The committee also heard varying reports in relation to the approach of Commission staff who work with reportable incidents. For example, CPSU reported that Commission staff who manage reportable incidents were expected to work on matters that required training and experience that had not been provided.¹⁵ Cara noted that it has received highly variable responses from the Commission in relation to reportable incidents, which suggest only limited understanding among the Commission's staff of matters such as industrial requirements and procedural fairness principles.¹⁶
- 7.18 However, Connectability Australia (Connectability) stated that, on the whole, the Reportable Incident division is 'helpful and knowledgeable...[with] relevant sector experience'.¹⁷
- 7.19 The Junction Works Limited (TJW) noted an instance where a junior officer from the Commission called and spoke to one of their staff in a threatening tone, asserting that TJW should have lodged a report in relation to a reportable incident relating to the neglect of a participant. However, according to TJW there was no neglect to report, and the staff member from the Commission had made assumptions based on potentially faulty third party information. The officer from the Commission also required TJW to lodge an incident via the Commission's portal without first seeking information from TJW about the actual event.¹⁸
- 7.20 To address incidents such as this, TJW recommended that:

¹³ Cara, *Submission 31*, p. 3. Cara recommended that the Commission contact participants to confirm the impact of incidents.

¹⁴ Autism Spectrum Australia, *Submission 9*, [p. 2]. According to Aspect, the responses from the Commission seem to prioritise 'catching providers out' rather than working proactively to improve the sector and the quality of care for people with disability. Further discussion in relation to the Commission's approach to investigations is included in Chapter 4.

¹⁵ Community and Public Sector Union, *Submission 39*, p. 11.

¹⁶ Cara, *Submission 31*, p. 2. Cara recommended that Commission staff receive training in industrial relations and procedural fairness principles.

¹⁷ Connectability Australia, *Submission 2*, [p. 1].

¹⁸ The Junction Works Limited, *Submission 8*, p. 4.

- the Commission seek clarifying information from providers prior to presenting third party information
- Commission staff take a collaborative position with providers to ensure that communication channels remain constructive
- the Commission establish a set of definitions around what it considers to be 'serious injury', 'abuse' and 'neglect'; and
- the Commission establish a triage process to enable providers to know whether an incident reaches the 'reportable' threshold.¹⁹

Are providers supported to comply with the framework?

7.21 The committee heard that providers continue to face difficulty understanding the reportable incidents framework, including understanding which incidents must be reported, and that reporting requirements impose a significant administrative burden.

7.22 The types of issues reported were summarized by the Tasmanian Government:

- The Commission is often reluctant to provide specific advice when requested (for example, a query around whether a particular event was a reportable incident) preferring to refer to generic information available on the Commission's website
- The lodging of notifications is, at times, cumbersome and time consuming.
- Providers have reported significant delays in receiving advice from the Commission about reportable incidents; and
- Where incidents occur outside of NDIS support hours, further clarity is required on the role of the provider and the Commission.²⁰

Clarity as to the incidents that must be reported

7.23 The committee heard that there is a lack of clarity and consistency as to what is deemed an 'incident' within the Reportable Incidents framework, and as to when an incident reaches the threshold of being a 'Reportable Incident'. Submitters and witnesses indicated that this can cause confusion for providers, and limits the Commission's ability to effectively address issues associated with the quality and safety of supports and services.

7.24 For example, Stride observed that the Reportable Incidents Guidance requires the death of a participant to be reported by registered providers where the death occurs 'in connection with NDIS supports'. According to Stride, the NDIS workforce has frequently queried the definition of 'in connection with' and has expressed concern that deciding whether the death of a participant meets this

¹⁹ The Junction Works Limited, *Submission 8*, p. 4.

²⁰ Tasmanian Government, *Submission 67*, pp. 3–4.

definition can be difficult. This is of particular concern to providers, which often have little information as to the circumstances of the death.²¹

7.25 Stride asserted that the Commission has provided conflicting information following the submission of incidents that are deemed 'reportable' under the Reportable Incidents Guidance. Stride noted that the Commission has provided feedback that all incidents that occur outside of direct NDIS support are 'out of jurisdiction'. According to Stride, this conflicts with guidance on the Commission's website stating that Reportable Incidents include incidents that:

- may not have occurred during provision of supports or services;
- arise out of the provision, alteration or withdrawal of supports or services;
- may not have occurred during the provision of supports but which are connected because they arose out of the provision of supports or services.²²

7.26 The Mental Health Community Coalition ACT noted that providers have raised concern that there is a lack of clarity and consistency around what is deemed an 'incident'. It stated that the guidelines on the Commission's website lack clarity around what is a reportable incident. Moreover, when contacting the Commission and talking to someone in person, 'the answer changes, depending on who you talk to'.²³

7.27 Consultants Leighton Jay, Jessica Quilty and Ann Driberg stated that the Commission's effectiveness depends on providers reporting as required. However, given how convoluted existing guidance material and definitions are, this cannot be assured. For example, language around reportable incidents is unnecessarily complicated.²⁴

Administrative and technical issues

7.28 Cara submitted that the Commission's approach to reportable incidents 'suffers from inefficiency and duplication'. For example, some reportable incidents require immediate notification (in 24 hours), followed by further notification in five days. However, the Commission often contacts providers after an immediate notification requesting information that would be answered in the follow-up process. According to Cara, this approach causes 'significant

²¹ Stride Mental Health, *Submission 21*, p. 5.

²² Stride Mental Health, *Submission 21*, p. 6. See also, NDIS Quality and Safeguards Commission, *Reportable Incidents Guidance*, June 2019, <https://www.ndiscommission.gov.au/document/596> (accessed 3 November 2021).

²³ Mental Health Community Coalition ACT, *Submission 14*, p. 2. See also, Multiple Sclerosis Australia, *Submission 15*, p. 4.

²⁴ Leighton Jay, Jessica Quilty, Ann Driberg, *Submission 40*, p. 10

duplication and administrative burden', as the same data is often requested by phone and in writing.²⁵

- 7.29 Cara also observed that the sharing of data and the requirement to manually enter data into the portal creates unnecessary administrative burden for providers. Cara suggested technological improvements that would allow data to be exported or imported directly to the Commission from providers and alleviate the need for manual data entry and reduce the duplication of entering data into provider Incident Management Systems and the Commission portal.²⁶
- 7.30 Connectability noted that when Reportable Incidents are closed, there is no notification sent to the provider, nor is there a closure date that is displayed on the portal, which means the provider only learns when reportable incidents are closed by checking the portal.²⁷

Commission view

- 7.31 The Commission told the committee in September 2021 that incident management and reporting was one of its priorities for compliance and enforcement in 2020-21. Specifically, the Commission had commenced compliance activity in relation to:
- providers that were reporting the repeated unauthorised use of restrictive practices;²⁸ and
 - educating registered NDIS providers and assessing their compliance with their obligations under the National Disability Insurance Scheme (Incident Management and Reportable Incident) Rules 2018.²⁹
- 7.32 The Commission also outlined a range of changes to complaints management and stated that a number of these also apply to how the Commission oversees providers' responses to reportable incidents. These changes are also outlined above and include:
- increased staffing (focussed on additional reportable incidents and complaints officers)
 - revised policies and procedures, including a reportable incidents manual
 - a revised approach to intake assessment and streaming of complaints and reportable incidents
 - intensive training of staff on the new policies, procedures and changes to the intake model; and

²⁵ Cara, *Submission 31*, p. 3. See also Mental Health Council of Tasmania, *Submission 23*, p. 5.

²⁶ Cara, *Submission 31*, p. 4.

²⁷ Connectability Australia, *Submission 2*, [p. 2]. See also Ms Donna Vallette, Compliance and Quality Manager, Connectability Australia, *Committee Hansard*, 13 October 2020, p. 25.

²⁸ This compliance activity is outlined in more detail in Chapter 8.

²⁹ NDIS Quality and Safeguards Commission, *Submission 42.2*, pp. 6–7.

- a new internal quality assurance process.³⁰

7.33 Recent amendments to the NDIS Act have also provided for the scope of the reportable incident framework to be expanded by allowing rules to prescribe other circumstances in which reportable incidents may have occurred which must be notified to the Commission.³¹

Committee view

7.34 Evidence to the inquiry suggests that there are still aspects of the reportable incidents framework to be addressed in order to strike the right balance of ensuring the Commission is notified of serious incidents while ensuring providers are not subjected to unnecessary burdens and understand their obligations.

7.35 The committee considers that the reporting of serious incidents to the Commission could also be a valuable tool for monitoring systemic quality and safeguarding issues. The recent amendments to the NDIS Act that will allow Rules to specify additional types of incidents that must be notified to the Commission may allow these types of incidents to be captured going forward. The committee also notes that such a mechanism would be consistent with the Commission's recent compliance activity in relation to the use of unauthorised restrictive practices, which was informed by the incident reporting mechanism.

Recommendation 19

7.36 **The committee recommends that the Quality and Safeguards Commissioner consider making rules under the *National Disability Insurance Scheme Act 2013* to provide for incident reporting to identify systemic quality and safeguarding issues.**

7.37 Concerns raised by providers in relation to reportable incidents echoed the more general concerns of providers about the Commission's approach to communication, and the committee refers in particular to its recommendations in Chapter 3 to ensure effective communication with providers.

7.38 The committee also welcomes the work that the Commission has undertaken to improve its policies and procedures in this area, and the education activities undertaken in relation to the rules governing reportable incidents. The Commission's evidence did not indicate, however, that the guidance for providers relating to the reportable incidents framework had been reviewed or updated, which was a significant concern outlined by some providers. In this respect, the committee notes that the Commission will be updating its website

³⁰ NDIS Quality and Safeguards Commission, *Submission 42.2*, pp. 3–4.

³¹ National Disability Insurance Scheme Amendment (Improving Supports for At Risk Participants) Bill 2021, Schedule 1, item 24.

over the coming 12 months and encourages it to ensure that reportable incidents guidance is clarified and made more accessible in the course of this work.

Chapter 8

Behaviour support and restrictive practices

- 8.1 This chapter discusses the evidence received during the inquiry in relation to the Commission's behaviour support function and regulation of restrictive practices.
- 8.2 Key concerns raised in evidence included:
- concerns regarding difficulties in obtaining behaviour support plans, which can lead to increased compliance and reporting burdens on providers offering behaviour support services; and
 - concerns that there needs to be more coordination across jurisdictions and service systems in relation to the regulation of restrictive practices.

The Commission's behaviour support function

- 8.3 Section 181H of the *National Disability Insurance Scheme Act 2013* (NDIS Act) sets out the Commission's behaviour support function. In accordance with this function, the Commission has responsibilities to 'provide leadership in relation to behaviour support, and in the reduction and elimination of the use of restrictive practices, by NDIS providers'.
- 8.4 At one of the committee's public hearings, Ms Romola Hollywood, then with People with Disability Australia, outlined some of the concerns held by people with disability and their representatives with respect to the use of restrictive practices:
- ...restrictive practices can encompass a range of restrictions to behaviour. It can involve physical and chemical restraints. It can also be the way in which the environment is designed to restrict a person's movement or engagement with others. The concern is that restrictive practices are overused and that often it's a quick way of managing behaviour. The challenge with restrictive practices is that they should be used only as an absolute last resort and, where this occurs, people with disabilities should be provided with processes of consent and there should also be rigorous review processes in place.¹

Key concepts

- 8.5 The Commonwealth and state and territory governments have committed to taking a national approach to reducing and eliminating the use of restrictive practices by disability services providers, under the *National Framework for*

¹ Ms Romola Hollywood, Director, Policy and Advocacy, People with Disability Australia, *Committee Hansard*, 13 October 2020, p. 6.

Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector (National Framework).²

- 8.6 Restrictive practices are defined in the NDIS Act to mean any practice or intervention that has the effect of restricting the rights or freedom of movement of a person with disability.³ These interventions are most likely to be used in the context of providing support to people with disability who display 'behaviours of concern'.
- 8.7 The National Framework describes 'behaviours of concern' as 'behaviours of such intensity, frequency or duration that the physical safety of the person or others is likely to be placed in serious jeopardy, or behaviour which is likely to seriously limit the use of, or result in, the person being denied access to ordinary community facilities'.⁴ The National Framework sets out an approach to increasingly provide individualised 'behaviour support' for people with disability, 'with the overall objective of reducing the occurrence and impact of challenging behaviour and the use of restrictive practices'.⁵
- 8.8 Under the *NDIS Quality and Safeguarding Framework*, the Commonwealth has a national function of providing oversight over restrictive practices, which the NDIS Act vests in the Commission. The NDIS Act and Rules made under the Act also impose conditions of registration on NDIS providers delivering specialist behaviour support services and providers implementing behaviour support plans that contain regulated restrictive practices.
- 8.9 The Quality and Safeguarding Framework provides the following descriptions of concepts in the regulation of restrictive practices: 'Positive behaviour support', 'Positive behaviour support plan' (PBSP) and 'Positive behaviour support practitioner':

² See, Department of Social Services, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, 2014, www.dss.gov.au/our-responsibilities/disability-and-carers/publications-articles/policy-research/national-framework-for-reducing-and-eliminating-the-use-of-restrictive-practices-in-the-disability-service-sector (accessed 19 October 2021).

³ See, NDIS Act, section 9.

⁴ Department of Social Services, *NDIS Quality and Safeguarding Framework*, 9 December 2016, p. 98. The committee also notes that appropriateness of the terms 'restrictive practices', 'challenging behaviours' and 'behaviours of concern' have been questioned in other forums. See, for example, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Overview of responses to the Restrictive practices issues paper*, May 2020, p. 4 and *Public Hearing Report: Public hearing 6 Psychotropic medication, behaviour support and behaviours of concern*, June 2021, pp. 9–11.

⁵ Department of Social Services, *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*, 2014, p. 4.

Positive behaviour support

A range of proactive strategies implemented to identify and address the underlying causes of behaviours of concern through an individual functional behavioural assessment and development of a positive behaviour support plan. Positive behaviour support strategies may include implementing changes to the environment and psychological interventions such as cognitive behavioural therapy.

Positive behaviour support plan

A positive behaviour support plan for a person with an intellectual or cognitive disability is a plan that describes the strategies to be used to:

- (a) meet that person's needs
- (b) support that person's development of skills
- (c) maximise opportunities through which that person can improve their quality of life
- (d) reduce the intensity, frequency and duration of behaviour that causes harm to the person or others.

The plan should also specify the conditions under which restrictive practices (if required) may be used.

Positive behaviour support practitioner

Someone who has been approved as an NDIS registered provider to provide complex behaviour supports to NDIS participants. Will have to demonstrate the ability to meet competency requirements relating to the development, implementation, review and monitoring of the positive behaviour support plan.⁶

8.10 States and territories retain responsibility for authorising restrictive practices in their jurisdictions, the use of which is then regulated by the Commission. This is recognised in the National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018, which impose conditions of registration on NDIS providers in relation to the use of 'regulated restrictive practices'. Regulated restrictive practices are defined in these rules and include the use of seclusion, as well as chemical, mechanical, physical and environmental restraint.⁷ The Rules set conditions requiring that:

- restrictive practices are not to be used if they are prohibited in the relevant state or territory;
- the use of restrictive practices is undertaken in accordance with state and territory authorisation processes and a PBSP; and
- providers report the use of a restrictive practice to the Commissioner.

⁶ Department of Social Services, *NDIS Quality and Safeguarding Framework*, 9 December 2016, pp. 98–101.

⁷ See, National Disability Insurance Scheme (Restrictive Practices and Behaviour Support) Rules 2018, section 6.

- 8.11 National oversight of restrictive practices by the Commission is a function separate to the Commission's role in monitoring reportable incidents, which includes reporting on the unauthorised use of restrictive practices. However, incident reporting informs the Commission's oversight of this area.⁸ The vast majority of reportable incidents received by the Commission since its establishment have been in relation to the unauthorised use of restrictive practices.⁹ For example, during the period 1 July 2020 to 30 June 2021, of 1,044,851 reportable incidents notified to the Commission, 1,032,064 incidents involved the unauthorised use of restrictive practices on people with disability.¹⁰

Evidence received regarding behaviour support and restrictive practices

- 8.12 Submitters were on the whole supportive of the transition to national oversight by the Commission for behaviour support and restrictive practices. For example, according to the Northern Territory Office of the Public Guardian (NT OPG), the regulation of restrictive practices in the Northern Territory was 'minimal' prior to the operation of the Commission and the commencement of the *NDIS Authorisations Act 2019* (NT). The NT OPG welcomed the Commission's monitoring of the use of restrictive practices by service providers and its enforcement powers regarding the unauthorised use of restrictive practices.¹¹
- 8.13 The committee heard, however, that some participants had faced difficulties or delays in obtaining PBSPs, which both affected the quality of services received by the participants, and frequently led to considerable administrative burdens for providers. Submitters and witnesses also raised concerns about the lack of progress towards a consistent national approach to restrictive practices across jurisdictions, and complexities in coordination between NDIS service provision and other systems such as the health and mental health systems.

Difficulties obtaining and amending behaviour support plans

- 8.14 Submitters expressed a range of concerns with respect to difficulties in obtaining PBSPs for participants including that there is a shortage of behaviour support practitioners, and that delays may occur when requesting approval through other systems or in delayed or inadequate funding through NDIS plans.

⁸ Reportable incidents are discussed in Chapter 7.

⁹ See, NDIS Quality and Safeguards Commission, *Activity Reports*, <https://www.ndiscommission.gov.au/resources/activity-reports> (accessed 19 October 2021).

¹⁰ NDIS Quality and Safeguards Commission, *12-monthly activity report: July 2020 - June 2021*, September 2021, www.ndiscommission.gov.au/document/3281, p. 5 (accessed 22 November 2021). The report notes that, in total, 7,862 participants were subject to unauthorised restrictive practices, and 788 providers implemented unauthorised restrictive practices during this period.

¹¹ Northern Territory Office of the Public Guardian, *Submission 32*, [p. 4].

Shortage of behaviour support practitioners

- 8.15 As noted above, Rules made under the NDIS Act require that providers implementing regulated restrictive practices must do so in accordance with a PBSP. These plans must be developed by a behaviour support practitioner, who is a person that the Commission considers suitable to undertake behaviour support assessments and to develop PBSPs that may contain the use of restrictive practices.¹² During the transition period, the Commission provided for a process to provisionally determine suitability of behaviour support practitioners who had been notified to the Commission by behaviour support providers. From 1 January 2021, the Commission commenced assessing practitioners against its new *Positive Behaviour Support Capability Framework*.¹³
- 8.16 The committee heard that, despite the provisional suitability assessments conducted by the Commission, there is a shortage of behaviour support practitioners who can develop PBSPs for participants who needed them. Submitters and witnesses noted that this impacts providers and participants in a number of ways, including through increased risk for participants, and increased reporting requirements for providers.
- 8.17 For example, National Disability Services (NDS) stated that there is a shortage of behaviour support practitioners to meet demand for their critical services. Moreover, problems with PBSPs may be exacerbated by NDIA processes, including a lack of funding available in plans for behaviour support:
- If a provider has to use a restrictive practice on a participant who does not have a BSP in place, the development of one is initiated. This requires an allocation of funding in a plan.
- The participant will, in this instance, need to request a plan review, which involves a delay. Once funding has been secured, there will be another delay while waiting for an appointment with a behaviour support practitioner and the development of a BSP (which may then require the training of the staff who will implement it).
- Until this happens, every single use of a restrictive practice must be reported (once a BSP is in place, the use of authorised restrictive practices is done monthly).¹⁴
- 8.18 The Mental Health Community Coalition ACT (MHCC ACT) also stated that a lack of registered specialist behaviour support providers makes it difficult to

¹² See, NDIS Quality and Safeguards Commission, *Behaviour support*, www.ndiscommission.gov.au/providers/behaviour-support (accessed 19 October 2021).

¹³ NDIS Quality and Safeguards Commission, *The Positive Behaviour Support Capability Framework*, July 2019, www.ndiscommission.gov.au/pbscapabilityframework (accessed 19 October 2021).

¹⁴ National Disability Services, *Submission 27*, [p. 5]. See also Anglicare SA, *Submission 18*, [p. 2], Advocacy for Inclusion, *Submission 65*, p. 22.

quickly obtain PBSPs for participants and this can put participants, carers and providers at risk.¹⁵

- 8.19 The Mental Health Council Tasmania (MHCT) similarly indicated that there is a shortage of behavioural support practitioners in Tasmania, which contributes to lengthy approval timeframes for PBSPs. The MCHT expressed concern that, while waiting for a PBSP to be approved, NDIS providers must ‘continue to weigh up duty of care to the NDIS participant versus the NDIS participant’s choice and control’.¹⁶

- 8.20 Connectability Australia (Connectability) reported issues arising from practitioners failing to update PBSPs due to unmanageable caseloads:

We have seen an increase in the number of unauthorised restrictive practices as a result of a medication change and the Practitioner has advised that ‘they don’t have time to update the plan within the time frame’ so ‘we will just have to report it to the Commission.’ This has occurred on a couple of occasions and mostly from Practitioners who are employed by large organisations as they say their caseload is too big and they don’t have enough time to deal with the paperwork.¹⁷

- 8.21 Speech Pathology Australia (SPA) noted that a potential driver of the shortage of behaviour support practitioners is the fact that behaviour support requires registration with the Commission. Moreover, because behaviour support is classified as ‘high risk’, registration would require a more onerous certification audit. Some speech pathologists who have experience in behaviour support, and who may have provided such support under state-based systems, may not be able to register with the Commission due to higher audit costs and because they may not meet the specific competencies required by the Commission.¹⁸

- 8.22 The Queensland Department of Communities, Disability Services and Seniors (DCDSS) observed that the behaviour support market in Queensland is generally struggling to meet demand and there is an insufficient number of providers outside government with the expertise to deliver behaviour support services, particularly those of a more complex nature. Further, while the inclusion of aged care providers within the scope of the Commission’s jurisdiction from December 2020 is a ‘welcome reform’, this will potentially further increase the number of PBSPs that are required to be prepared and increase demand within the sector.¹⁹

¹⁵ Mental Health Community Coalition ACT, *Submission 14*, p. 3

¹⁶ Mental Health Council of Tasmania, *Submission 23*, [p. 6]. See also, Tasmanian Government, *Submission 67*, p. 2.

¹⁷ Connectability Australia, *Submission 2*, [p. 3].

¹⁸ Speech Pathology Australia, *Submission 25*, p. 15.

¹⁹ Queensland Department of Communities, Disability Services and Seniors, *Submission 61*, p. 8.

8.23 DCDSS submitted that the following urgent action was required to ensure an adequate number of qualified behaviour support practitioners within the sector:

- assess the skills and experience of providers against the competency framework, to provide states and territories with data in relation to the level of market capacity and capability within their jurisdiction
- develop and implement a comprehensive education and training program to increase capability in relation to the use of behaviour supports and ensure the reduction and elimination of the use of restrictive practices remains a primary goal
- develop the capacity to provide granular data in relation to the use of restrictive practices at a state level by type of restrictive practice to enable systemic identification of issues and areas for reform and compliance activity; and
- develop a targeted strategy to incentivise providers to enter and actively engage in the behaviour support market.²⁰

Reporting and compliance burdens

8.24 The committee heard that the reporting and compliance burdens for providers implementing restrictive practices are high. This was particularly the case where the participant did not have a PBSP in place.

8.25 Dr Jennifer Torr observed that complying with the reporting requirements associated with restrictive practices via the portal is ‘apparently laborious and time consuming’, for example, data must be re-entered every time the dose of a restrictive medication is changed.²¹

8.26 Anglicare SA stated that it ‘could be questioned’ whether the administrative burdens placed on providers through the Commission’s processes result in a commensurate increase in safeguarding of people with disability, particularly in relation to the reporting of applications of restrictive practices and the repetitive details required in behaviour support plans and incident reports.²²

8.27 Cara provided an example of the compliance burden associated with reporting on the use and administration of behaviour-altering medications which may be prescribed to address anxiety and anxiety-related behaviours:

If the medication is not mentioned in an existing [Positive Behaviour Support Plan (PBSP)], which is likely, or the participant does not have a PBSP as one was not previously required, the support provider is required to report to the Commission an Unauthorised Restrictive Practice at each administration of the medication until it is included in a PBSP. The participant may not have funding for a Positive Behaviour Support

²⁰ Queensland Department of Communities, Disability Services and Seniors, *Submission 61*, p. 7.

²¹ Dr Jennifer Torr, *Submission 44*, [p. 2].

²² Anglicare SA, *Submission 18*, [p. 1].

practitioner to write the PBSP, or if funding is available, may not contract a practitioner to develop their PBSP.

Nevertheless, the service provider is required to continue reporting an Unauthorised Restrictive Practice indefinitely until the medication and its administration is included in a PBSP, over which the service provider may not have purview. If the medication is taken daily, the Commission requires service providers to report an Unauthorised Restrictive Practice daily. The same scenario exists for other types of restrictive practices also.²³

- 8.28 The MHCT observed that the burden of reporting restrictive practices falls to the relevant provider, and in some cases may be on a daily basis. The MHCT indicated that this is the case even in less significant restrictive practices, and where the practice is in accordance with an agreed health management plan. For example:

As part of supporting [a] participant's physical health, the [participant] has a diabetes management plan in place which has been agreed by the participant and by his Mental Health Case Manager, GP and family, where a can of soft drink is provided at agreed intervals throughout the day.

...[U]nder the NDIS practice standards, because there is not a Behaviour Support Plan in place yet (awaiting availability of practitioners) this is classified as a restrictive practice [and must be reported].²⁴

- 8.29 Connectability noted that restrictive practice is an area that has required a 'massive' documentation increase for providers with the introduction of the Commission. According to Connectability, this has led to some clinicians declining to provide services where a participant has a restrictive practice in their plan—on the basis that the work would be too time- consuming and their costs would not be covered.²⁵

Restrictive practices and Practice standards

- 8.30 The committee heard that registration requirements for specialist behaviour support practitioners and service providers implementing PBSPs are complex, and that compliance with requirements in the practice standards raised additional complexities.²⁶
- 8.31 The MHCT observed that there is 'some incongruence' in terms of how NDIS providers align their organisational duty of care to the standards relating specifically to choice and control, noting that this a particular concern with regard to participants with psychosocial disability. There may be incongruences

²³ Cara, *Submission 31*, p. 8.

²⁴ Mental Health Council of Tasmania, *Submission 23*, [p. 7].

²⁵ Connectability Australia, *Submission 2*, [pp. 3–4].

²⁶ See, for example, Mental Health Coordinating Commission, *Submission 20*, p. 3.

between the state and federal legislation as regards restrictive practices—causing further ambiguity for providers.²⁷

- 8.32 The MHCT indicated that in some cases, it may be necessary to implement restrictive practices as part of a duty of care to the participant and on the advice of a medical professional. Generally, a PBSP would provide the necessary documentation to fulfil the NDIS practice standards. However, in some jurisdictions such as Tasmania, obtaining a PBSP is a lengthy process, and in the interim providers must continue to weigh up their duty of care to the participant against the participant's choice and control.²⁸
- 8.33 The MHCT recommended that there be an exploration of ways to support NDIS providers in reducing the burden of reporting on restrictive practices as it relates to the duty of care to a participant on a case-by-case basis, and in recognition of state and federal legislation.²⁹
- 8.34 Autism Asperger's Advocacy Australia (A4) expressed 'major concerns' about the registration process for behaviour support, stating that it would be interested to know how the Commission ensures service quality or standards for the behaviour support providers that the NDIS endorses or promotes.³⁰
- 8.35 In this respect, A4 also expressed concern that there is 'no real progress, nor discernible effort', toward developing appropriate registration for behavioural clinicians or to promote awareness of quality behaviour support across the disability sector and the community more broadly.³¹

Information available to providers and others

- 8.36 The committee heard that providers and others would like to receive more guidance on behaviour support from the Commission. For example, Anglicare SA observed that if the Behaviour Support newsletter was provided more regularly, this would be an efficient means of delivering information and advice to the sector and reducing the need for individual provider contact.³²
- 8.37 The MHCC ACT noted that providers find information on restrictive practices to be complex, and subject to change. MHCC ACT considered that providers are therefore facing difficulties in understanding their obligations, and that this

²⁷ Mental Health Council of Tasmania, *Submission 23*, p. 6.

²⁸ Mental Health Council of Tasmania, *Submission 23*, pp. 6–7.

²⁹ Mental Health Council of Tasmania, *Submission 23*, pp. 7.

³⁰ Autism Aspergers Advocacy Australia (A4), *Submission 62*, p. 2.

³¹ Autism Aspergers Advocacy Australia (A4), *Submission 62*, p. 2.

³² Anglicare SA, *Submission 18*, [p. 2]. The committee notes that in 2020 the Commission released one behaviour support provider newsletter (December 2020), and 2 in 2021, (April and July 2021). See, NDIS Quality and Safeguards Commission, *Provider newsletters and alerts*, www.ndiscommission.gov.au/news-media/provider-newsletters (accessed 3 November 2021).

allows for misunderstandings and leads to risks for participants, carers and providers.³³

Coordination across jurisdictions and service systems

State and territory governments

8.38 The committee heard that the retention of the role of state and territory governments in authorising the use of restrictive practices in their jurisdictions has caused additional complexities for providers and participants. A number of submitters called for more consistency across jurisdictions for the regulation of restrictive practices.³⁴

8.39 Stride Mental Health (Stride) observed that as the authorisation process for restrictive practices remains State-based, providers are subject to increased administrative burden, and must undergo additional training, where they operate across multiple jurisdictions. Stride asserted that the NDIS cost model allows little to no funding to be attributed to meeting the administrative and training requirements associated with restrictive practices, stating that this ultimately puts participants at risk.³⁵

8.40 Consultants Leighton Jay, Jessica Quilty and Ann Drieberg highlighted issues associated with differing definitions for restrictive practices across jurisdictions, and the lack of a coordinated national approach, stating:

The [Queensland] definitions are slightly different and don't apply to locking gates and doors in response to a skills deficit. [Western Australia] and [New South Wales] refer to a concept of 'non-intentional risk' as not requiring RP authorisation. None of these are exceptions from the Commission though. The States and Territories create confusion when they say they don't regulate but you need to check the Commission on your responsibilities there.³⁶

8.41 The consultants also noted that there is 'almost no guidance' from the Commission about restrictive practices despite there being a senior practitioner who provides oversight in this area. Moreover, while some jurisdictions have

³³ Mental Health Community Coalition ACT, *Submission 14*, p. 3. The MHCC ACT recommended more clarity on the requirements for providers when having to deal with restrictive practices.

³⁴ See, for example, People With Disability Australia, *Submission 60*, p. [4].

³⁵ Stride Mental Health, *Submission 21*, p. 8.

³⁶ Leighton Jay, Jessica Quilty and Ann Drieberg, *Submission 40*, p. 12; See also Tasmanian Government, *Submission 67*, p. 2. The Tasmanian Government also noted that it has commenced preparatory work to enable a comprehensive review of the Tasmanian *Disability Services Act 2011* during 2021-22. This will provide the mechanism to consider the alignment between Tasmanian legislative requirements and definitions with the NDIS as they relate to restrictive practices in Tasmania, including chemical restraint.

developed their own fact sheets, it is unclear whether these are reliable as they do not come directly from the Commission.³⁷

- 8.42 The Tasmanian Government raised similar concerns and noted that, since July 2019 (start of Commission operations in Tasmania), providers have indicated that there is some confusion in relation to the interface between national and state requirements, and that there has been an associated increase in, and duplication of, reporting requirements.³⁸

Information sharing and communication

- 8.43 The NSW Department of Communities and Justice (DCJ) called for better communication between the Commission and state authorities to ensure approaches to restrictive practice are aligned, particularly regarding lawful orders that constitute restrictive practices. The DCJ provided a case study to illustrate that inadequate policy and procedural guidance is available to inform providers' approaches to lawful orders that constitute restrictive practice:

Mr B is a 35-year-old man with a cognitive impairment relating to a traumatic brain injury that occurred when he was 17. Mr B has a diagnosis of substance use disorder and is currently under conditions from the Mental Health Review Tribunal relating to four counts of aggravated sexual assault. Mr B's conditions include the requirement for him to access the community only with support staff or family members.

Mr B's core support provider was not registered to implement restrictive practices and queried whether this requirement constituted an environmental restraint. Clarification was sought with the Commission, including the need for the provider to be registered and whether they would be considered to be implementing the practice.

The Commission responded that it does constitute an environmental restraint and that the provider would require registration. The NSW Central Restrictive Practices Team provided conflicting advice that the core support provider is not responsible for, or implementing, the environmental restraint and therefore does not require registration.³⁹

- 8.44 The ACT Government observed that it is unable to provide support or adequate safeguards in authorising restrictive practices as it does not have sight of the unauthorised restrictive practices being reported for Territory citizens. In this respect, the ACT Government noted that the Commission retains vital intelligence for jurisdictions on emergency uses of restrictive practices and other trend data which would support a closer working relationship between the ACT and the Commission to achieve common goals.⁴⁰

³⁷ Leighton Jay, Jessica Quilty, Ann Drieberg, *Submission 40*, p. 13.

³⁸ Tasmanian Government, *Submission 67*, p. 2.

³⁹ NSW Department of Communities and Justice, *Submission 28*, pp. 4–5.

⁴⁰ ACT Government, *Submission 52*, pp. 3–4.

Engagement with other sectors

8.45 The committee also heard that further coordination is necessary between the Commission and other service sectors that administer restrictive practices, as well as the health sector in relation to engaging with practitioners who prescribe medications that may be classified as restrictive.

8.46 For example, the Royal Australian and New Zealand College of Psychiatrists (RANZCP) submitted that there is a 'disconnect' between the health and disability sectors, which has resulted in NDIS participants receiving behaviour supports being supported and regulated separately from the mental health sector. The RANZCP indicated that this may create difficulties in terms of access to medication for people with disability—for example, in cases where regulatory requirements result in medications being delayed or ceased.⁴¹

8.47 The committee also heard that the Commission had failed to communicate with general practitioners in relation to changes to the regulation of restrictive practices. Connectability noted:

We have had a lot of issues with GPs giving a diagnosis that said it was intellectual delay and, therefore, it was deemed a restrictive practice. I did actually ask someone at the commission, 'Did you have any consultation with the GPs over what was coming in regard to the changes in legislation?' The answer I got then was no. We do have... some GPs and practitioners who will refuse to engage with anyone who has a restrictive practice. There's even one GP who flat out refused to acknowledge that the commission was there and that there were restrictive practices in place. I think for us education with the GPs could have been a bit better.⁴²

8.48 Dr Jennifer Torr, a consultant psychiatrist, similarly expressed concern that the restrictive practice framework operates in parallel to, and disconnected from, the health and mental health sectors. According to Dr Torr, this creates various difficulties associated with the management of medication in the restrictive practice framework. Dr Torr identified the following key issues:

- Medications designated as restrictive practices by the Commission may not be restrictive when considered from a medical or clinical standpoint, as they are used to treat a condition rather than to control behaviour.
- The Commission may not accept diagnoses provided by GPs.
- The Commission appears to designate any use of an 'off-label' medication as a restrictive practice. However, clinicians often use 'off-label' medications in the normal course of treatment.
- There is an inherent pressure for medications classed as restrictive to be ceased. This may create safety issues for people with disability who are using the medications as part of a course of treatment.

⁴¹ Royal Australian and New Zealand College of Psychiatrists, *Submission 4*, [p. 2].

⁴² Ms Donna Vallette, Compliance and Quality Manager, Connectability Australia, *Committee Hansard*, 13 October 2020, p. 25.

- The restrictive practices framework does not capture excessive prescribing.⁴³
- 8.49 Concerns were also raised that classification of some medications as restrictive may lead to some participants being unable to obtain medication due to reporting and other bureaucratic requirements. Specific examples were raised in relation to medications for people with Autism Spectrum Disorder,⁴⁴ and for children with neurodevelopmental conditions.⁴⁵
- 8.50 Proposed solutions to these issues included:
- that the Commission should engage with a standing committee of medical experts on issues associated with the management of medication in the restrictive practices framework⁴⁶
 - the development of a framework for the interface between the Commission and the health and mental health sectors⁴⁷
 - greater collaboration between the NDIA, the Commission and the Health sector (and other key stakeholders) to help inform approaches to care for children with neurodevelopmental and behavioural concerns;⁴⁸ and
 - management and treatment of behaviour supports in partnership with the mental health system.⁴⁹

Other matters

- 8.51 Other concerns raised in relation to the Commission's regulation of behavioural support and restrictive practices included:
- that there is poor understanding in the sector about behaviour support requirements, behaviours of concern, and how communication difficulties may contribute to behaviours of concern⁵⁰
 - delayed and poor communication from the Commission in relation to restrictive practices during the transition period⁵¹ and

⁴³ Dr Jennifer Torr, *Submission 44*, [p. 4].

⁴⁴ Royal Australian and New Zealand College of Psychiatrists, *Submission 34*, [p. 1].

⁴⁵ Neurodevelopmental and Behavioural Paediatric Society of Australasia, *Submission 72*, p. 1.

⁴⁶ Dr Jennifer Torr, *Submission 44*, [p. 4].

⁴⁷ Dr Jennifer Torr, *Submission 44*, [p. 4]; and Royal Australian and New Zealand College of Psychiatrists, *Submission 4*, [p. 2].

⁴⁸ Neurodevelopmental and Behavioural Paediatric Society of Australasia, *Submission 72*, p. 1.

⁴⁹ Royal Australian and New Zealand College of Psychiatrists, *Submission 4*, [p. 2].

⁵⁰ See, Mental Health Coordinating Council, *Submission 20*, p. 3; Autism Spectrum Australia, *Submission 9*, [p. 2], Speech Pathology Australia, *Submission 25*, p. 15.

⁵¹ Leadership Plus, *Submission 26*, p. 4; Stride Mental Health, *Submission 21*, p. 10; National Disability Services, *Submission 27*, [p. 4].

- concerns that the Commission's behaviour support safeguards do not accommodate family centred approaches.⁵²

8.52 Additional concerns were raised in relation to the Commission's approach to its behaviour support function and whether this approach focusses too heavily on regulating instead of eliminating restrictive practices. For example, the First Peoples Disability Network stated that the Commission's remit means that it 'does not challenge or move to eliminate the systemic drivers of significant human rights breaches', but instead monitors compliance while states and territories continue to authorise restrictive practices, despite international calls for the practices to be eliminated.⁵³

8.53 Similar concerns were raised by Dr Astrid Bergen, a practitioner who had been involved in developing the Commission's competency framework for behaviour support specialists:

Sometimes I think the Quality and Safeguards Commission focuses a lot on the application of restrictive practices. The flip side of it is how you build people's capacity to use more proactive, humane strategies with clients. It's a double-sided coin, and you need to be looking in both directions. From a behaviour support specialist's point of view, they will check my behaviour support programs and I will get queries from them around them. They are looking at how services are being delivered, in my experience.⁵⁴

Commission view

8.54 In its initial submission, the Commission outlined its work with respect to restrictive practices since commencing operations:

The NDIS Commission has, as part of its behaviour support functions in section 181H of the NDIS Act, a role in assisting the States and Territories to develop a regulatory framework, including nationally consistent minimum standards in relation to restrictive practices.

The NDIS Commission has led work to support the achievement of national consistency as a priority. A set of draft principles for nationally consistent regulation of the use of restrictive practices has been developed and is now supported by all states and territories with the exception of Queensland, which has supported in principle. States and territories have completed assessments of their systems against those draft principles and, by the end of this calendar year [2020], will have completed roadmaps to achieve the application of those principles in each jurisdiction.⁵⁵

8.55 The Commission also noted that it had commenced compliance activity in relation to high numbers of reports of unauthorised use of restrictive practices, which, in the period 1 July to 31 December 2019 accounted for approximately 94

⁵² Name withheld, *Submission 55*, pp. 1–3.

⁵³ First Peoples Disability Network, *Submission 49*, p. 2.

⁵⁴ Dr Astrid Bergen, Private Capacity, *Committee Hansard*, 20 May 2021, p. 22.

⁵⁵ NDIS Quality and Safeguards Commission, *Submission 42*, p. 36.

per cent of reports of reportable incidents. The Commission noted that, as part of the compliance exercise, it was seeking to understand factors including drivers behind the significant and increasing reporting of the unauthorised use of restrictive practices in jurisdictions where the Commission had been operating for two years, which, according to the Commission, meant providers had been given 'ample opportunity' to comply with new requirements.⁵⁶ Noting anecdotal reports of challenges faced by providers associated with sourcing behaviour support and lack of funding in participants plans, the Commission was seeking to 'determine whether these or other matters are creating genuine impediments to compliance' and, if so, the Commission was keen to 'work to address these issues so that there is rapid and full compliance with these obligations on the part of registered providers'.⁵⁷

8.56 In September 2021, the Commission provided an update on this compliance activity:

The NDIS Commission assessed compliance with obligations imposed on registered NDIS providers under the NDIS (Restrictive Practices and Behaviour Support) Rules 2018 by requiring 509 registered NDIS providers that were reporting the repeated unauthorised use of restrictive practices to provide information and demonstrate compliance with the Rules. The information obtained is continuing to inform the NDIS Commission's compliance activity in relation to unauthorised uses of restrictive practice. As at 30 June 2021, this activity has resulted in the issuing of:

- five compliance notices;
- four infringement notices;
- 42 remedial action instructions;
- 30 education letters; and
- 91 warning letters.⁵⁸

8.57 The Commission is also undertaking analysis of the use of unauthorised restrictive practices and behaviour support planning rates, which is due to be published at the end of 2021.⁵⁹

8.58 In May 2021 the then Commissioner also reflected on the national leadership work undertaken in the area of restrictive practices:

the commission has undertaken a very significant role in working with state and territory governments... which has been about working with the states and territories to achieve the intended goal of behaviour support systems that relate to the authorisation of restrictive practices in states and territories being consistent with a set of national principles that have been agreed by

⁵⁶ NDIS Quality and Safeguards Commission, *Submission 42*, p. 33.

⁵⁷ NDIS Quality and Safeguards Commission, *Submission 42*, p. 33.

⁵⁸ NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 7.

⁵⁹ NDIS Quality and Safeguards Commission, *12-monthly activity report: July 2020 - June 2021*, September 2021, www.ndiscommission.gov.au/document/3281 p. 7 (accessed 3 November 2021).

disability ministers so that the emphasis in restrictive practices is on not just the better management of those practices but the stated aspiration of all Australian governments, which is to reduce and ultimately eliminate the use of those practices.⁶⁰

Committee view

- 8.59 The committee notes that the regulation of restrictive practices and behaviour support is a complex area of the Commission's work involving coordination between different regulatory schemes and across different service sectors. This complexity is compounded by factors affecting the broader NDIS such as workforce shortages. Nevertheless, the imposition of restrictive practices presents the risk of systemic and serious incursions on the rights of people with a disability.
- 8.60 The committee is deeply concerned by the prevalence of unauthorised use of restrictive practices by NDIS providers, noting that over 1 million such incidents were reported to the Commission during the most recent reporting period, and that this affected 7,862 participants. While welcoming the significant actions already undertaken by the Commission, the committee is of the view that the Commission must play a more assertive role in upholding and protecting the rights of people with disability who may be subjected to restrictive practices. As also discussed in Chapter 4, this should occur through increased proactive compliance and enforcement activity, as well as further education for providers regarding the use of restrictive practices on people with disability.

Behaviour support practitioners

- 8.61 The committee is further concerned that a shortage of behaviour support practitioners is resulting in delays or an inability to put in place appropriate behaviour support plans for NDIS participants who are currently subject to repeated instances of unauthorised restrictive practices. Of related concern are reports that some participants are not receiving appropriate plan funding for behaviour supports. The committee therefore considers that a specific strategy needs to be in place to increase the availability of behaviour support services for NDIS participants.
- 8.62 The committee notes that shortages in the NDIS workforce are widespread, and that their drivers and the potential solutions are often complex and will require coordination between a range of stakeholders. However, the committee considers that the Commission's functions in relation to behaviour support mean that it is likely still the most appropriate body to lead work to increase the behaviour support workforce. In making this assessment, the committee notes the substantial work already undertaken by the Commission in this area,

⁶⁰ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 20 May 2021, pp. 23–24.

including the development of the *Positive Behaviour Support Capability Framework* and tools for assessment of behaviour support plans, in addition to the Commission's ongoing compliance work in this area. The committee also continues to review these matters in its Inquiry into the NDIS Workforce.⁶¹

Recommendation 20

8.63 The committee recommends that the NDIS Quality and Safeguards Commission work with State, Territory and Commonwealth governments as a matter of urgency to develop a specific strategy to increase the number of behaviour support practitioners. This strategy should include specific measures to:

- **incentivise entry into behaviour support provision by practitioners and NDIS providers; and**
- **increase the ability of suitably qualified and experienced allied health providers to offer behaviour support where appropriate.**

Coordination between states and territories and other sectors

8.64 While full operation of the Commission only commenced in December 2020, evidence to the inquiry nevertheless highlighted that work to ensure national consistency in the regulation and elimination of the use of restrictive practices must be given appropriate priority by the Commission. A concerted effort will be required from all stakeholders to coordinate a cohesive and comprehensive national approach. This approach will also require clear communication and a commitment to information sharing between the states, territories and the Commission. The Commission's leadership role in this area requires it to undertake proactive coordination with the states and territories and to actively work with the disability community to enable the full realisation of the aims of the *National Framework for Reducing and Eliminating the Use of Restrictive Practices in the Disability Service Sector*.

8.65 The Commonwealth Government should also ensure that the Commission is adequately funded to progress this work in addition to its other functions and has more to say about the Commission's funding and resources in Chapter 9.

8.66 The committee also notes that states and territories regulate restrictive practices in a range of circumstances in addition to the provision of support to people with disability through the NDIS, and that, even in the context of NDIS supports, where medications are considered restrictive, this can involve overlap with the health, mental health and disability sectors. Evidence provided to the committee indicates that the Commission's work should extend to facilitate greater coordination between sectors involved in the administration of

⁶¹ See, Joint Standing Committee on the NDIS, *NDIS Workforce Interim Report*, December 2020.

restrictive practice, particularly the role of medical practitioners and the health and mental health sectors.

Recommendation 21

- 8.67 The committee recommends that the NDIS Quality and Safeguards Commission formally include clinical oversight bodies for the health and mental health sectors in its national coordination work for the reduction and elimination of restrictive practices.**

Recommendation 22

- 8.68 The committee recommends that the NDIS Quality and Safeguards Commission develop a framework that clarifies the responsibilities of Commonwealth, State and Territory bodies involved in regulating restrictive practices at the interface between the NDIS and the health and mental health sectors. This framework should encourage all relevant sectors to work together on how they might better support people with disability and include specific reference to the prescription of medications that may be classified as restrictive.**

Recommendation 23

- 8.69 The committee recommends that the framework mentioned in Recommendation 22 include a protocol around information sharing on restrictive practices between the NDIS Quality and Safeguards Commission and State and Territory bodies.**
- 8.70 The committee further recognises that the use of restrictive practices impacts the lives of people with disability within and outside of the NDIS. In this regard, the committee notes that the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) is also reviewing the issue, particularly in relation to the use of chemical restraints. The committee also notes that the NDIS Quality and Safeguards Commission has been assisting the Disability Royal Commission including by providing written and oral evidence. The committee will continue to monitor the work of the Disability Royal Commission and review its recommendations and findings in relation to restrictive practices and other matters relevant to the work of the Commission through the committee's ongoing inquiries.

Chapter 9

Staffing and resources

9.1 This chapter examines some of the key issues raised in evidence concerning staffing and internal resourcing for the Quality and Safeguards Commission (the Commission). These issues included:

- staffing levels
- staff expertise and training
- ICT issues; and
- constraints on the ability of the Commission to conduct own-motion investigations.

9.2 In mid-2020, multiple submitters and witnesses argued that there may not be sufficient resourcing or staff for the Commission to effectively carry out its work.¹ Issues pointed to as proof of insufficient resourcing included:

- limited internal communication between different divisions of the Commission, indicating that often one part of the Commission may be unaware of issues and situations in another²
- significant delays in initial responses to or concluding complaints, suggesting systems and human resource constraints³
- the large number of reportable incidents that have not been closed, and the backlog of incidents⁴
- the length of time for registration renewal to be completed⁵
- the fact that the Commission may be heavily reliant on complaints to alert it to possible breaches, suggesting that it may lack funding to carry out 'own-motion' investigations;⁶ and

¹ For example, ACT Government, *Submission 52*, p. 5; Physical Disability Australia, *Submission 45*, [p. 4]; Ms Romola Hollywood, Director, Policy and Advocacy, People with Disability Australia, *Committee Hansard*, 13 October 2020, p. 6; Ms Jessica Degrassi, Positive Behaviour Support, Active Support and Safeguarding manager, Individual and Community Services, Autism Spectrum Australia, *Committee Hansard*, 17 November 2020, p. 13.

² Autism Spectrum Australia, *Submission 9*, [p. 4].

³ Northern Territory Office of the Public Guardian, *Submission 32*, [pp. 4, 6]. The Northern Territory Office of the Public Guardian also asserted that the human and financial resources available to the Commission in the Northern Territory should reflect the Territory's circumstances, including the geographic distribution of its population, the state's high level of cultural and linguistic diversity, and a substantial Aboriginal and Torres Strait Islander population.

⁴ Connectability Australia, *Submission 2*, [pp. 2–3].

⁵ Stride Mental Health, *Submission 21*, p. 9.

⁶ People with Disability Australia, *Submission 60*, pp. 5–6.

- some decisions may appear to be based only on a phone call to the provider concerned.⁷

9.3 Submitters pointed to the effects of under resourcing, with VALID, for example, describing the Commission as under-resourced, and unable to operate to its full potential without more staff and training. VALID also commented on the potential consequences of under-resourcing, stating:

Under-resourcing leads to a focus on process instead of rights and relationships. People with intellectual disabilities cannot rely on the NDIS Commission's safeguards if staff are not able to answer every call...if there isn't time to go out to meet the person face-to-face, or if investigations are put off for lack of investigators.

This under-resourcing is most evident where there is a lack of specialist expertise and appreciation of the time needed to work with people who have complex communication or behaviour support needs as they work through the complaints or investigation process.⁸

9.4 Similarly, the Australian Association of Social Workers (AASW) emphasised that for providers to be held accountable for meeting standards in the Code of Conduct and Practice Standards, the Commission must be adequately resourced. The AASW asserted that fraud is a major area of concern, stating:

In addition to major fraud cases that attract public attention, there are unethical financial practices, whether intentional or not, that require focus and a commitment from the Commission to address. This may include holding the NDIA to account in their activities in educating providers adequately.⁹

9.5 Cara suggested that the Commission does not appear to be sufficiently resourced to allow for an investigation at the request of a provider or participant, and it requires providers to undertake an investigation internally, or appoint an external investigator at the provider's discretion. Both of these approaches, it argued, lack the independence of a Commission-led investigation, and increase the administrative burden on providers operating in a price-capped environment. According to Cara, such delays also indicate that available human resources are inadequate for the Commission to execute its functions in a timely manner.¹⁰

⁷ Aged and Disability Advocacy (ADA) Australia, *Submission 35*, p. 11. ADA Australia argued that this approach leads to the Commission finding in favour of a provider, leading to disillusionment with the complaints process among participants and across the broader disability sector. For further discussion of this issues, see Chapter 4.

⁸ VALID, *Submission 33*, p. 3.

⁹ Australian Association of Social Workers, *Submission 24*, p. 7.

¹⁰ Cara, *Submission 31*, p. 2.

Staffing levels

- 9.6 The committee heard that the Commission does not have sufficient staff to effectively perform its functions. In particular, evidence indicated that the Commission may lack adequate numbers of ‘frontline’ staff—such as complaints officers and investigators—to respond to and investigate complaints and reportable incidents.
- 9.7 As of April 2021, the Commission had an Australian Public Service (APS) headcount of 315 as well as 174 labour hire staff, with a total of 489 staff. The number of temporary staff is expected to decrease as APS staff are employed.¹¹
- 9.8 The Community and Public Sector Union (CPSU) noted that in a survey of Commission staff in July 2020, 83 per cent of respondents reported that their current workload is affecting their ability to do their job. This was consistent with the 2019 APS Census of the Commission, in which just 22 per cent of staff disagreed or strongly disagreed that they had unrealistic time pressures.¹²
- 9.9 Representatives from the CPSU, in a hearing with the Senate Finance and Public Administration References Committee in July 2021, stated that after ‘a recent provisional improvement notice, the Commission was forced to openly accept that workloads are indeed a work health and safety issue’. They also flagged that ‘rather than hiring more permanent frontline staff, nearly half of the Commission is made up of executive level staff’ and suggested that this made the Commission ‘one of the most top-heavy organisations in the [Australian Public Service]’.¹³
- 9.10 Due to low staffing levels, the committee heard, officers within the Commission are obliged to deal with high caseloads. A reportable incidents officer may hold up to 120 matters, while a complaints officer may hold up to 60 matters. Members of the CPSU commented on the impact of understaffing as follows:

Frontline operation teams do not have adequate employee numbers to manage the volume of reportable incidents, complaints, or compliance activities currently within the Commission’s oversight. Participants are at risk due to the inability of the Commission Branch functions to perform thorough assessments to ensure the ongoing safeguarding of participants has occurred and NDIS providers are meeting legislative obligations.¹⁴

¹¹ NDIS Quality and Safeguards Commission, answers to questions on notice, 20 May 2021 (received 30 June 2021), [p. 2].

¹² Community and Public Sector Union, *Submission 39*, p. 9.

¹³ Representatives also raised concerns about the use of labour hire. See Ms Beth Vincent-Pietsch, Deputy Secretary, Community and Public Sector Union, PSY Group, *Proof Committee Hansard-Senate Finance and Public Administration References Committee*, 3 July 2021, p. 2.

¹⁴ Community and Public Sector Union, *Submission 39*, p. 4. The CPSU also contended that high workloads, along with demanding and often unrealistic expectations from senior management, are

- 9.11 According to the CPSU, the Average Staffing Level (ASL) cap has also limited the Commission's ability to engage permanent staff to meet these workloads, and has instead engaged staff on a contractual basis.¹⁵
- 9.12 In addition, the CPSU noted that while there have been assurances from the Commission that there would be more resources allocated to the 'front line', there has been little evidence of this in practice. Instead, resources have been directed to more senior (SES) positions. As a result, there is inadequate or no cover for staff absences, high staff turnover and a lack of staff mobility.¹⁶
- 9.13 Physical Disability Australia (PDA) suggested that information on the Commission's corporate structure and current and projected staffing levels is not easy to find on the Commission's website. According to PDA, without such details it is difficult to assess the overall adequacy of the Commission's resources — 'beyond feeling [they] should be significantly boosted'.¹⁷
- 9.14 The Northern Territory Office of the Public Guardian and Services for Australian Rural and Remote Allied Health called for 'the human and financial resources available to the Commission to reflect the circumstances of rural and remote Australia, including the Northern Territory and for Aboriginal and Torres Strait Islander communities'.¹⁸
- 9.15 Other issues raised about staffing included, for example, staff diversity, with the Chief Executive Officer of First Peoples Disability Network (FPDN) noting at the hearing on 29 September 2020 that of 194 staff, the Commission only had two staff who identified as Aboriginal and Torres Strait Islander peoples.¹⁹

Commission view

- 9.16 The Commission outlined in its initial submission recent funding it had been allocated from the Australian Government, including:

leading to high levels of stress and 'burnout'. For example, one complaints officer reported feeling 'inadequate and hopeless' due to high workloads and associated stress.

¹⁵ Community and Public Sector Union, *Submission 39*, p. 9. The CPSU recommended the removal of the Australian Staffing Level cap and increasing permanent staffing levels. According to the CPSU, the increase in staffing should include staff with clinical expertise who could provide advice and guidance on, for example, improving the Practice Standards.

¹⁶ Community and Public Sector Union, *Submission 39*, p. 9.

¹⁷ Physical Disability Australia, *Submission 45*, [p. 4].

¹⁸ Northern Territory Office of the Public Guardian, *Submission 32*, p. 6; Services for Australian Rural and Remote Allied Health, *Submission 66*, p. 10.

¹⁹ Mr Damien Griffis, Chief Executive Officer, First Peoples Disability Network (FPDN), *Committee Hansard*, 29 September 2020, pp. 10, 12. In its submission, the FPDN noted that it is not clear whether these staff members are Aboriginal and Torres Strait Islander peoples with disability. See First Peoples Disability Network, *Submission 49*, p. 3.

- \$220 million over four years in the 2019–20 Budget, from 2019–20 to 2022–23;
 - \$1.418 million per year in the 2019–20 Budget, for 2019–20 until 2021–22, to address work related to the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability; and
 - \$2.6 million, in the July 2020 Economic and Fiscal update, for 2019–20, and \$3.6 million for 2020–21, 'to recognise the NDIS Commission's additional support to individuals and service providers impacted by COVID-19'.²⁰
- 9.17 In a hearing with the Senate Finance and Public Administration References Committee, held in July 2021, Ms Samantha Taylor, the Acting NDIS Quality and Safeguards Commissioner, highlighted a recent staff increase in the Commission:
- We did have a budget uplift that came through in the last budget, only two years after our commencement, which increased our headcount by around 100 employees. We've been successful in onboarding the vast majority of those roles. That's enabled us to stabilise our workforce considerably over the labour arrangements that we had in place in our first couple of years of operation.²¹
- 9.18 In a supplementary submission provided in September 2021, the Commission noted that the increase in temporary staff numbers was partly because of 'otherwise unspent funds [that] permitted a short-term increase in capacity'. However, it informed the committee that the temporary staff numbers 'will reduce as current recruitment activity concludes and available funds are spent'.²² Further, the average staffing level (that is, the average number of full-time equivalent employees) is expected to reduce from 350 in 2020–21 to 342 in 2021–22, following the completion of transition of quality and safeguarding to the Commission in all states and territories.²³

Staff expertise and training

- 9.19 Some evidence concerned the expertise, knowledge and training of Commission staff, suggesting that Commission staff:
- may not be sufficiently trained in the Commission's role and responsibilities, or in how to carry out their functions (such as complaints handling and investigations);

²⁰ NDIS Quality and Safeguards Commission, *Submission 42*, p. 41.

²¹ Ms Samantha Taylor, Acting Commissioner, National Disability Insurance Scheme Quality and Safeguards Commission, *Proof Committee Hansard—Senate Finance and Public Administration References Committee*, 21 July 2021, p. 19.

²² NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 4.

²³ NDIS Quality and Safeguards Commission, answers to questions on notice, 20 May 2021 (received 30 June 2021), [p. 3].

- may lack an adequate understanding of disability and its manifestations; and
- may not have an adequate understanding of the NDIS Code of Conduct or other relevant guidelines.²⁴

9.20 Cara asserted that the focus on resolution of complaints appears to vary across complaints officers, stating that it has experienced 'high quality, solution focused complaint handling' in some cases, and 'low quality, general information gathering with a lack of clarity' in others.²⁵ Connectability similarly stated that its experience with the Commission in relation to complaints has been 'varied', noting that some complaints officers are knowledgeable and responsive while others lack a clear understanding of how to engage with providers. In this respect, Connectability stated:

One particular officer would ring and demand a return phone call immediately. This shows a total lack of understanding of how a disability service works and what we deal with on a day-to-day basis. All communication should in writing, rather than over the phone so there is a record of what is communicated.²⁶

9.21 The CPSU argued that while there is a triaging system for complaints, some teams within the Commission are not aware that the system exists. Moreover, little guidance is available as to which matters to deal with first, and there is no formal risk matrix to support staff to prioritise complaints in a consistent manner. The CPSU stated that its members have been asking for a formal risk matrix for 'some time':

Reportable Incident Officers have been requesting a formal risk matrix to support work prioritisation action for the last 2 years. Officers were told by SES staff that the Commission would not use a risk matrix in frontline incident management...[and] were advised that [they] were 'oversighting' provider conduct which did not require a matrix.²⁷

9.22 The CPSU further stated that for those who work in complaints, triage shifts are on top of normal caseloads, and result in a 'domino effect' — worsening already high workloads and causing delays. According to the CPSU, there has been no consistency to addressing this issue.²⁸

9.23 Evidence indicated that some staff of the Commission are also concerned that they do not receive the training necessary to enable effective job performance.

²⁴ For example, Leadership Plus, *Submission 26*, p. 2. Ms Jessica Degrassi from Autism Spectrum Australia also suggested that training and knowledge of staff within the Commission may be 'problematic'. *Committee Hansard*, 17 November 2020, p. 13.

²⁵ Cara, *Submission 31*, p. 3.

²⁶ Connectability Australia, *Submission 2*, [p. 1].

²⁷ Community and Public Sector Union, *Submission 39*, p. 12.

²⁸ Community and Public Sector Union, *Submission 39*, p. 12.

For example, the CPSU noted that in a recent survey of Commission staff who were CPSU members, 79.3 per cent of respondents did not believe that staff receive adequate training and guidance to enable them do their jobs effectively. Staff expressed frustration that ‘training was almost non-existent, and [staff] had to learn everything on the job’.²⁹

9.24 The CPSU also noted that staff are frequently expected to understand complex legislation, as well as medical, mental health and disability issues, to make the decisions which underpin their work.³⁰

9.25 According to the CPSU, this complexity is not reflected in the training that Commission staff receive. For example, one staff member stated that there is:

...[n]o training in relation to suicidal ideal, self-harm etc....No training to handle psychosocial disability despite complexity. When trying to review an incident when no apparent cause of death, need to look at suicidal ideation and whether provider should have mentioned it.³¹

Proposals for change

9.26 Suggestions from submitters to improve many of the issues outlined above focused on increased training. For example, the CPSU noted that its members were strongly of the view that more training is needed to ensure staff have the ability and the confidence to perform their roles effectively. In addition, there must be funding to enable better training and development.³²

9.27 Autism Spectrum Australia (Aspect) contended that Commission staff do not understand the realities of the disability service provision for providers and—more significantly—for people with disability. Aspect recommended increased training for Commission staff, including understanding of the Commission's role, and greater exposure to the realities of disability service provision.³³

9.28 The Chief Executive Officer of the FPDN suggested that all Commission staff, including senior executives, should undergo training to better understand key issues for Aboriginal and Torres Strait Islander peoples with disability.³⁴

²⁹ Community and Public Sector Union, *Submission 39*, p. 11.

³⁰ Community and Public Sector Union, *Submission 39*, p. 11. Members of the CPSU also indicated that enforcement of the Practice Standards may be limited by a lack of clinical expertise in the Commission—including the lack of clinical experts on staff.

³¹ Community and Public Sector Union, *Submission 39*, p. 11.

³² Community and Public Sector Union, *Submission 39*, p. 14.

³³ Autism Spectrum Australia, *Submission 9*, [p. 2].

³⁴ Mr Damien Griffis, Chief Executive Officer, First Peoples Disability Network Australia, *Committee Hansard*, 29 September 2020, p. 11.

- 9.29 The Junction Works Limited recommended that investigators be provided with training and information about how disability may impact a participant, and on the operations of the NDIS.³⁵

Commission view

- 9.30 In a supplementary submission provided to the committee in September 2021 the Commission highlighted actions that it had taken to improve its handling of complaints management, including:

- significantly increased funding for staffing (as outlined above), which has led to an additional 67 reportable incidents and complaints officers being employed in state and territory offices, and an additional 75 staff being employed temporarily in this area under labour hire arrangements
- significantly revised policies and procedures, in the form of a complaints manual and a reportable incidents manual, that 'better' emphasise, for example, 'the critical decision points in the complaints process and the tools that can assist officers to make those decisions'
- a revised approach to intake assessment and streaming of complaints, 'to enable NDIS Commission complaints officers to respond more quickly to complaints'
- intensive training for staff on the new policies, procedures and changes to the intake model, as well as external training for some officers in mediation skills and proposed external training in conciliation skills; and
- a new internal quality assurance process, including a Quality Assurance Framework for complaints handling.³⁶

ICT Systems

- 9.31 Other evidence raised concerns about the Commission's information, communication and technology (ICT) systems. For example, the CPSU noted that in a survey of Commission staff who were CPSU members, 69.8 per cent of respondents stated ICT infrastructure and systems limited their ability to effectively perform their role. CPSU members provided examples of issues with ICT systems affecting their work, including:

- the current system cannot identify the same provider if they use different trading names, previous contacts or even search for a particular address to identify the usual place of residence prior to death
- data entry requirements have led to multiple entries, sometimes incorrect with limited data analytics
- staff have to use multiple spreadsheets to manage caseloads, other datasets and undertake analysis

³⁵ The Junction Works Limited, *Submission 8*, p. 3.

³⁶ NDIS Quality and Safeguards Commission, *Submission 42.2*, pp. 3–5.

- complaints can only be examined on a case-by-case, meaning that staff may miss things as they are working in silos
 - difficulties with the system affecting workflow activities and making it harder to escalate matters
 - constant error messages and a lack of real-time data; and
 - staff needing to rely on work-arounds and spreadsheets.³⁷
- 9.32 The CPSU further elaborated that data analysis 'is a manual process as wider trends and data that sits between different teams cannot be accessed', but staff in the national and state offices do not have time to run multiple reports and analyse the results.³⁸
- 9.33 According to CPSU members who are Commission staff, another issue is that the ICT systems were built by the Department of Social Services (DSS). As at the date of the CPSU's submission, DSS continued to control data mechanisms and systems. There was a lack of real-time support for data, and changes had to be proposed to DSS six months in advance.³⁹
- 9.34 Ultimately, the CPSU asserted that there is an 'urgent need' to improve the tools that staff have available, stating:
- The Commission and DSS need to work together to ensure a more responsive and intuitive ICT system. This needs to involve staff and result in a system where staff have access to a more sophisticated case management package with increased functionality where modules can be integrated and analysis can be undertaken to identify trends and assist with cases.⁴⁰

Commission view

- 9.35 In September 2021, the Commission noted, in relation to its handling of provider registrations, that it had realised a revised online application form for provider registration in June 2021 and that further enhancements to the Commission's operation system were due to be released later in 2021, which were expected to improve information processing as part of the application process.⁴¹

³⁷ Community and Public Sector Union, *Submission 39*, p. 10. According to the CPSU, these findings accord with the 2019 APS Census of Commission staff, where just 41 per cent of respondents reported that their workgroup had the necessary tools and resources for effective performance (p. 9).

³⁸ Community and Public Sector Union, *Submission 39*, p. 10.

³⁹ Community and Public Sector Union, *Submission 39*, p. 10.

⁴⁰ Community and Public Sector Union, *Submission 39*, p. 14.

⁴¹ NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 15.

Constraints in conducting own-motion investigations

9.36 Other evidence pointed to constraints on the Commission's ability to launch investigations of its own accord, largely because of limited funding. People with Disability Australia (PWDA) argued that the Commission had a 'reactive rather than proactive approach'. It submitted that this had particularly become evident during the COVID-19 pandemic, when the Commission encouraged individuals to make their own complaints to address the issue of service providers not providing continuity of support. PWDA contended that:

This is problematic as many people with disability live in closed settings where it is difficult and often frightening to make a complaint... Relying on complaints is particularly problematic during the pandemic as people with disability have reduced access to visitors, including advocates who can help them make a complaint. Further, people with disability may not be in a safe situation to risk making a complaint when they may be reliant on this same person for supports.

The problematic nature of relying on complaints to trigger investigations was also recently highlighted by the tragic death of Ann Marie Smith... [I]f Ms Smith wanted to make a complaint to the NDIS Quality and Safeguarding Commission, in the absence of other visitors, it would need to be done through the very person who would be subject of the complaint.⁴²

9.37 PWDA called for the Australian Government to provide 'sufficient funding to the NDIS Quality and Safeguards Commission to enable it to carry out own-motion investigations' and 'properly protect people with disability'.⁴³ Chapter 4 of this report contains further discussion of calls for the Commission to take a more proactive approach to its compliance activities.

Commission view

9.38 The Commission informed the committee in September 2021 that it had commenced an own motion investigation into aspects of supported disability accommodation.⁴⁴

Other issues

9.39 Other key issues raised in evidence related to staffing and resourcing included:

⁴² People with Disability Australia, *Submission 60*, pp. 4–5. See also Ms Romola Hollywood, Director, Policy and Advocacy, People with Disability Australia, *Committee Hansard*, 13 October 2020, p. 3, who pointed to the importance of 'being able to conduct those own-motion investigations, particularly when we see what's happening with the Royal Commission, where they have broad powers to really investigate where there are systemic failings'.

⁴³ People with Disability Australia, *Submission 60*, p. 5.

⁴⁴ NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 8.

- a lack of structured risk assessment processes within the Commission and the absence of a clear strategy to understand when a matter should be escalated⁴⁵
- lack of national consistency in how complaints are triaged, with triage shifts resulting in additional delays to resolving complaints⁴⁶
- the need for the Commission to urgently establish consistent operating procedures and introduce formal risk matrixes and other supporting guidance to aid the prioritisation of work and manage workloads⁴⁷
- the need for the Commission to introduce 'more frequent and timely reporting around tighter performance measures'⁴⁸
- the effect of a hierarchical working culture at the Commission on its work, leading to lengthy processes and inconsistent advice⁴⁹
- internal 'siloeing' or limited communication between teams within the Commission, causing delays finalising or escalating matters and a lack of awareness of similar complaints dealt with in other units;⁵⁰ and
- reliance on verbal communication with the Commission, with decisions not communicated widely to all staff.⁵¹

Committee view

9.40 The issues raised in this inquiry concerning staffing and resourcing of the Commission can be summarised as being caused by insufficient staff numbers; insufficient training for staff; inefficient ICT systems; and poor communication within the Commission. However, the committee notes that submissions to the inquiry closed in July 2020, and that, since that time, the Commission has received increased funding and significantly increased its staffing levels. The committee welcomes the Commission's advice that it has undertaken reforms to its complaints processing practices, including training all staff on the new procedures. The committee also particularly welcomes the advice that the Commission has commenced an own motion investigation into aspects of supported accommodation in the NDIS and looks forward to learning more about this inquiry as it gets underway.

9.41 The committee is however concerned that the current increased staffing levels are anticipated to decrease slightly, despite the evidence suggesting that some of the issues raised about the work of the Commission can be traced to high staff

⁴⁵ Community and Public Sector Union, *Submission 39*, p. 12.

⁴⁶ Community and Public Sector Union, *Submission 39*, p. 12.

⁴⁷ Community and Public Sector Union, *Submission 39*, p. 14.

⁴⁸ Queenslanders with Disability Network, *Submission 48*, p. 8.

⁴⁹ Community and Public Sector Union, *Submission 39*, pp. 5, 6.

⁵⁰ Community and Public Sector Union, *Submission 39*, pp. 7–6.

⁵¹ Community and Public Sector Union, *Submission 39*, p. 7.

workloads and inadequate staff numbers. While it is encouraging that the Commission's overall staffing levels have increased, it is not yet clear whether the current staffing levels are adequate to resolve the concerns identified in relation to the early implementation of the Commission.

- 9.42 As such, the committee recommends that the Australian Government review the Commission's current staffing levels compared with its workload and wait times and ensure that it is providing the Commission with sufficient staff and resourcing to fulfil its functions. In particular, the Government should adequately resource the Commission so that it is able to investigate complaints thoroughly and promptly and initiate more of its own investigations, if needed. Resourcing should be sufficient to take account of the specific context of particular complaints, such as those in rural and remote areas.

Recommendation 24

- 9.43 **The committee recommends that the Australian Government review the NDIS Quality and Safeguards Commission's current staffing levels and provide additional resources for increased staff numbers if necessary.**

Recommendation 25

- 9.44 **The committee recommends that the Australian Government ensure that it is adequately resourcing the NDIS Quality and Safeguards Commission so that the Commission is able to investigate complaints thoroughly and promptly, and initiate its own investigations.**
- 9.45 The committee was concerned about the suggestion raised in multiple submissions that the Commission does not have adequate and appropriate training in place for staff, particularly in the following areas:
- awareness of disability types
 - awareness of disability service provision
 - awareness of the Commission's role and responsibilities
 - understanding of the NDIS Code of Conduct; and
 - understanding of the key issues for Aboriginal and Torres Strait Islander peoples with disability.
- 9.46 As a matter of urgency, the committee recommends that the Government ensure that Commission staff are receiving adequate training in the above areas, to ensure that the work of the Commission is not affected by limited staff knowledge of crucial aspects of their work.

Recommendation 26

- 9.47 **The committee recommends that the Australian Government ensure that the NDIS Quality and Safeguards Commission has adequate and appropriate training in place for staff, including in the following areas as appropriate:**

- awareness of disability types
- awareness of disability service provision
- awareness of the Commission's role and responsibilities
- understanding of the NDIS Code of Conduct; and
- understanding of the key issues for Aboriginal and Torres Strait Islander peoples with disability.

9.48 On the matter of 'siloing' and poor communication within the Commission, the committee considers that this is reflective of working culture, and the Government should ensure that management structures and communication across the Commission are effective and encourage efficiency.

9.49 Finally, regarding the issue of inefficient ICT systems, the committee notes with concern that ICT systems are central to both the efficiency and quality of work of Government agencies. While it appears that some work has been undertaken to review at least parts of the Commission's ICT systems in relation to the processing of provider registration applications, it is unclear if broader improvements are being undertaken or contemplated. If the current systems that the Commission is using are affecting the Commission's work and reputation, the committee considers that these should be changed or updated to ensure that they are fit-for-purpose.

Recommendation 27

9.50 The committee recommends that the Australian Government review the NDIS Quality and Safeguards Commission's current ICT systems and replace or update them if necessary to ensure that they are fit-for-purpose.

Chapter 10

Market oversight and systemic risk management

- 10.1 This chapter discusses evidence received during the inquiry that focussed on systemic risks within the NDIS market and provision of services to people with disability.
- 10.2 In some instances, the concerns identified were in relation to existing work of the Commission, such as:
- managing the transition of regulating the quality and safety of NDIS supports from states and territories to the Commission; and
 - data collection and reporting.
- 10.3 Some submitters and witnesses also considered that the Commission should expand its oversight role into areas including:
- managing quality and safety of supports at the interface of the NDIS and other service systems
 - influence on NDIS pricing; and
 - promoting measures to support NDIS participants' access to natural safeguards.

The Commission's market oversight function

- 10.4 Paragraph 181E(i) of the NDIS Act establishes the Commission's market oversight function, which is to:

provide NDIS market oversight, including:

- (i) by monitoring changes in the NDIS market which may indicate emerging risk; and
- (ii) by monitoring and mitigating the risks of unplanned service withdrawal.

- 10.5 In its initial submission, the Commission provided the following description of its market oversight function:

The NDIS Commission is establishing its processes and systems so that it will be able to identify, categorise, assess and manage systemic risks to protect and prevent people with disability from experiencing harm that arises from poor-quality or unsafe supports or services provided under the NDIS.

Its market and regulatory oversight and risk function will involve:

- (a) identifying, monitoring and responding to intelligence on emerging risks based on a range of data sources, including compliance data, data collected through complaints, reportable incidents and restrictive practices reporting, and data collected through external stakeholders, such as NDIA, other regulators, and state and territory governments;

- (b) determining the most appropriate proactive and reactive regulatory responses that are proportionate to the level of risk identified across the NDIS system;
- (c) monitoring changes in the NDIS market which may indicate emerging risk and monitoring and mitigating the risks of unplanned service withdrawal; and
- (d) identifying gaps in the market for disability support services.¹

10.6 The committee heard a range of views about the systemic oversight roles that are, or should be, undertaken by the Commission, which are discussed below.

Management of the transition to Commission oversight

10.7 Full transition to Commission oversight was completed during this inquiry, with the Commission commencing operation in Western Australia on 1 December 2020. Much of the evidence received was therefore based on experiences with the Commission during the periods in which jurisdictions were transitioning to the Commission's oversight, with many submitters expressing dissatisfaction of the Commission's processes during this period.

10.8 The Community and Public Sector Union (CPSU) raised concerns about the transition period, noting problems in jurisdictions where the Commission has been operational such as South Australia and New South Wales. CPSU members reported that the transition was 'policy on the run', where state and territory systems were phased out leading to the closure of community infrastructure. There were also inconsistencies between how transitions were managed in each state, a lack of clarity regarding processes and procedures, a lack of community engagement and insufficient engagement with state regulatory bodies.²

Impact of transition on providers

10.9 The Commission's communication with the disability sector was highlighted as particularly poor over this period, with submitters stating that there was significant confusion reported by providers about a range of aspects of the transition, including the responsibilities of the Commission compared to states and territories and the NDIA, and responsibilities of NDIS providers and service providers in other sectors.³

10.10 For example, Autism Spectrum Australia (Aspect) asserted that the transition period was generally managed poorly and was not communicated well across the sector, stating:

It was apparent in the first year of implementation that "the plane was being built whilst flying" and there were limited processes and procedures in place, as well as thought to how specific challenging situations would be

¹ NDIS Quality and Safeguards Commission, *Submission 42*, p. 21.

² Community and Public Sector Union, *Submission 39*, p. 13.

³ Stride Mental Health, *Submission 22*, p. 10.

managed (for example, people with disabilities attending service in one state/territory but living in another).⁴

10.11 Aspect stated that, in many cases, the sector has been left to discover information or updates on the Commission's website. Moreover, some regional and remote providers were, at the date of Aspect's submission, only just becoming aware of the Commission two years after its implementation. In addition, preparation for the disability sector in terms of meeting the Commission's requirements—and understanding how these requirements impact on service provision—was limited.⁵

10.12 Providers also reported that the administrative impact of the transition was significant, noting concerns about 'cumbersome' technology,⁶ and the workload associated with training staff, with little or no guidance from the Commission.⁷ For example National Disability Services observed that providers transitioning from state and territory quality systems have had very varied levels of knowledge and experience of the requirements to operate under the Commission, and that providers transitioning from 'less sophisticated' systems may have benefitted from greater assistance from the Commission.⁸

10.13 Providers also reported the significant impacts of new registration and auditing requirements, with Allied Health Professions Australia (AHPA) observing that 'one of the most frustrating aspects' of the transition process was the costs associated with re-registration with the Commission. In particular, AHPA reported that providers had undertaken multiple audits as part of the transition process, as some third party audits undertaken to meet the requirements of registration were not accepted by the Commission, requiring providers to undergo the Commission's registration renewal process including the associated audit.⁹

⁴ Autism Spectrum Australia, *Submission 9*, [p. 4].

⁵ Autism Spectrum Australia, *Submission 9*, [p. 1].

⁶ Stride Mental Health, *Submission 22*, p. 10.

⁷ Connectability Australia, *Submission 2*, [p. 3].

⁸ National Disability Services, *Submission 27*, [p. 4].

⁹ Allied Health Professions Australia, *Submission 54*, [p. 9]. AHPA also indicated that some practitioners had unnecessarily undergone the more stringent certification audit process during this period. Further discussion of the Commission's audit processes is contained in Chapter 5.

Confusion around oversight responsibilities

10.14 The committee also heard that the transition to Commission oversight had left some people with disability, advocates, and providers confused as to the correct point of contact for complaints and oversight, with submitters also expressing concern that the transition has left gaps in oversight.¹⁰

10.15 Brain Injury SA asserted that for people living with complex needs in the community, the transition to the NDIS has resulted in a loss of a single point of contact for safety, oversight and coordination when crises occur. Further, service providers do not know where to go when they are not coping with the complex needs of an individual, which may fluctuate in intensity resulting in periodic crisis.¹¹

10.16 The Victorian Disability Services Commissioner (DSC) also noted that the transfer of disability services from state to federal jurisdiction has caused some confusion about the appropriate body with which to raise complaints, leading to the DSC frequently receiving complaints that are within the jurisdiction of the Commission.¹²

10.17 The Junction Works Limited (TJW) expressed concern that the NSW Government is 'functionally withdrawn' from the role of providing 'stewardship' for people with disability in that state, including withdrawal from the provision of direct services:

[T]he three tranches of transference of government services has not been implemented successfully and is leading to a reduction in service capacity/availability to NSW residents with a disability, for instance the withdrawal/reduction of "in-home community support" by Australian Unity, and the diminishing clinical/allied health services being offered by The Benevolent Society. Furthermore those providers that acquired the supported accommodation from ADHC/FACS are struggling with the industrial and financial consequences of the transfer.¹³

10.18 The Victorian Office of the Public Advocate (Vic OPA) observed that, as at the date of its submission (July 2020), the rollout of the NDIS in Victoria remained 'very complicated, both at the policy and operational levels'. The Vic OPA highlighted a number of safeguards that should continue under the Commission arrangements, including:

- tenure rights of people with disability;

¹⁰ See, for example, Community and Public Sector Union, *Submission 39*, p. 13.

¹¹ Brain Injury South Australia, *Submission 10*, [p. 4].

¹² Disability Services Commissioner, *Submission 13*, p. 4. DSC reported that, in the 2019-2020 year, it made 32 formal written referrals to the Commission and had 199 inquiries where it provided the potential complainant with the Commission details.

¹³ The Junction Works Limited, *Submission 8*, p. 6.

- the authorisation of the use of restrictive practices, including the role of the Senior Practitioner under the *Disability Act 2006* (Vic); and
- the continuation of compulsory treatment of people with disability in relation to the risks they pose to others and the legal structure in the *Disability Act 2006* (Vic) authorising and monitoring this.¹⁴

Oversight of state and territory facilities

10.19 Oversight of state and territory facilities was of particular concern to a number of submitters. For example, TJW expressed concern that there is currently no government department or entity that has carriage of provider of last resort services, nor responsibility for monitoring when NSW providers are failing under inadequate pricing.¹⁵

10.20 Physical Disability Australia (PDA) also raised concern that the Commission has limited jurisdiction over state and territory health department facilities that continue to provide disability services under bilateral in-kind arrangements:

[These] facilities...tend to be archaic institutions [whose] residents have been long-term recipients of support under pre-NDIS arrangements. We understand that there are no reporting requirements with regard to reportable incidents and limited capacity for...service recipients to access the [Commission's] complaints processes.¹⁶

10.21 PDA would like the Commission take an active role in facilitating the transition of people with disability in state-run facilities to full NDIS participant status, where they can be assured of access to all reasonable and necessary supports to enable them to live an ordinary life.¹⁷

Positive experiences of the transition

10.22 The committee also heard that the transition had progressed appropriately in other jurisdictions, and that the transition to Commission oversight was welcomed. For example, the Northern Territory Office of the Public Guardian (NT OPG) observed that prior to the commencement of the Commission there was limited Territory-based oversight and safeguarding of disability service providers. According to the NT OPG:

The Office of the Public Guardian, NDIS participants and all key stakeholders in the disability sector welcome the work of the NDIS Commission in the Northern Territory. Anecdotal evidence is that NDIS

¹⁴ Office of the Public Advocate (Victoria), *Submission 11*, p. 19.

¹⁵ The Junction Works Limited, *Submission 8*, p. 6.

¹⁶ Physical Disability Australia, *Submission 45*, [p. 4].

¹⁷ Physical Disability Australia, *Submission 45*, [p. 4].

service providers are committed to the new framework of regulation, monitoring and compliance and have transitioned appropriately.¹⁸

- 10.23 In relation to the transition to national worker screening arrangements, the Mental Health Coordinating Council (MHCC) noted that it conducted a survey of its members in line with the terms of reference for this inquiry. Most survey participants agreed that the Interim Worker Screening Arrangements in NSW were fit for purpose, and that the Commission's requirements effectively mirror those that were in place under the NSW Disability Service Standards.¹⁹

Commission view

- 10.24 During one of the committee's public hearings, the then Commissioner observed that the transition to new quality and safeguarding arrangements has been different for each jurisdiction and has involved significant work to ensure that providers understand their obligations and are subject to appropriate oversight. The then Commissioner elaborated:

The commission has switched on each of its functions in each of the jurisdictions that have transitioned—New South Wales and South Australia on 1 July 2018 and everyone else bar WA from 1 July 2019. WA will be joining us on 1 December. That's involved transitioning around 20,000 providers; it's involved reaching out to participants in each jurisdiction for a range of mechanisms; it's involved reaching around a quarter of a million disability workers through the deployment of the worker orientation module; importantly, this year, it's involved being very actively a part of the response to COVID-19; it's involved doing significant work in behaviour support space, a great deal of which was outlined in detail by evidence that I and the commission's senior practitioner gave in the royal commission last week; and, importantly, it's involved in doing very significant work on capability development in the sector both generally and specifically in relation to behaviour support and the use of restrictive practices.²⁰

- 10.25 The then Commissioner also observed that a 'big focus' in the transition period has been educating people about their obligations, noting that there had been 'significantly improved compliance', in terms of reporting, in the six months to September 2020.²¹

¹⁸ Northern Territory Office of the Public Guardian, *Submission 32*, [p. 6]. The NT OPG also noted that the Commission has had a 'correspondingly positive' impact on the protection and promotion of the human rights of people with disability in the Northern Territory.

¹⁹ Mental Health Coordinating Council, *Submission 20*, p. 3.

²⁰ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, pp. 27–28.

²¹ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 28.

Interface with other service systems

10.26 As evidenced through the difficulties experienced during the transition period, there is a complex interface between the Commission's role and responsibilities with respect to ensuring the quality and safety of NDIS services and the roles and responsibilities of bodies providing services in other systems such as the health, mental health and justice systems. The committee heard that, even in jurisdictions where the Commission's role was more established, these complexities are still poorly understood, and may lead to gaps that expose NDIS participants and other people with disability to mistreatment, abuse and neglect.

10.27 During one of the committee's public hearings, Mr David Carey, Chief Executive Officer (CEO), Connectability Australia (Connectability) indicated that there are certain gaps between the Commission and mainstream service systems such as police and criminal justice. Mr Carey indicated that these gaps may make investigating or prosecuting abuse and neglect more difficult:

[I]f you're a member of the community, although that incident is reported to the police...the police are very reluctant to prosecute because, if someone lacks the intellectual capacity to be a witness in a court, then the police just see it as a resource wasted.

...in that case, justice is not served for people with disabilities. The NDIS Quality and Safeguards Commission has no interest in it because the legislation doesn't allow it to subpoena or ask for that information from the police. It's not their area. And the state commission only deals with family members who may abuse clients.

So, in terms of the general community, whose members also commit crimes against people with disabilities, there's no one stop where the entirety of the data can be viewed to see the scale of the problem and what resources may be required for education, an intervention or a pursuit of a criminal matter that can result in people with disabilities feeling safer in Australia.²²

10.28 Connectability also observed that a key area of concern relates to general practitioners (GPs), stating that one of its biggest 'stumbling block[s]' has been:

...[t]rying to educate and explain to GPs why we need...information [about the purpose for which medication was prescribed] on medication charts, when they [the GPs] had been prescribing medication for behaviour management for some people for years. The lack of consultation by the Q&S Commission in the areas of GP's is deeply concerning. We are two years on and still battling some GP's in this area, some have just refused to continue to support our people due to the paperwork required.²³

10.29 Children and Young People with Disability Australia (CYDA) raised concern about the inconsistencies and gaps between jurisdictions, systems and sectors,

²² Mr David Carey, Chief Executive Officer, Connectability Australia, *Committee Hansard*, 13 October 2020, p. 26.

²³ Connectability Australia, *Submission 2*, [p. 3].

and the potential adverse consequences for children and young people with disability. In particular, there is not harmonised legislation regarding safeguarding and protections for children and young people with disability, and there is 'significant variation' across jurisdictions with regards to complaints, reporting and investigation mechanisms. CYDA further stated:

We are concerned about the current lack of clarity and other issues around intersections between the NDIA, the NDIS Quality and Safeguards Commission, and other systems affecting children and young people with disability, including education, health, justice, and child protection.

Continuing interface issues for children and young people and their families/caregivers navigating these systems lead to poorer outcomes and can contribute to tragic outcomes for children who fall through the cracks between systems...²⁴

10.30 The Summer Foundation noted that the provision of support to NDIS participants in residential aged care (RAC) occurs under multiple oversight arrangements. Not only is this difficult and confusing for individuals, the Summer Foundation also submitted that providers commonly believe that, as they are not required to register as NDIS providers, they are therefore not bound by the NDIS Code of Conduct. This misunderstanding negatively impacts on the safeguarding protections available to NDIS participants in RAC.²⁵

10.31 TJW observed that there have been a number of areas where the intersection of the NSW State Government, the NDIA and the Commission have created unintended negative consequences for people with disability, families and providers. For example, TJW noted that, in NSW, the question of which department or agency is responsible for funding supports and services continues to present barriers to:

- accessing mainstream health and mental health services and accessing affordable psychiatric care; and
- education services, including the provision of transport to and from school for students attending Special Units within NSW schools.²⁶

10.32 The committee also heard that interface issues have caused confusion as to 'provider of last resort' arrangements.²⁷

People detained under forensic orders

10.33 During the inquiry, the committee heard that the cohort of people with disabilities in forensic detention are particularly affected by confusion around

²⁴ Children and Young People with Disability Australia, *Submission 50*, p. 3.

²⁵ The Summer Foundation, *Submission 51*, p. 7.

²⁶ The Junction Works Limited, *Submission 8*, pp. 5–6.

²⁷ See, for example, The Junction Works Limited, *Submission 8*, p. 6; Office of the Public Advocate (Victoria), *Submission 11*, p. 8; Advocacy for Inclusion, *Submission 65*, pp. 18–23.

the interface of NDIS service provision and the provision of 'mainstream' services by states and territories. Forensic or criminal orders may be imposed when a person is declared 'unfit to stand trial' due to cognitive or psychiatric impairments.²⁸

- 10.34 Mr Patrick McGee, National Manager, Policy, Advocacy and Research, Australian Federation of Disability Organisations, observed that the Commission does not have jurisdiction over forensic services, as these are administered by state and territory governments. Mr McGee indicated that this is of significant concern as people in forensic detention may have complex or multiple disabilities, and are particularly vulnerable to abuse, exploitation and neglect. Moreover, a substantial proportion of individuals in forensic detention are Aboriginal and Torres Strait Islander peoples with disability.²⁹
- 10.35 Mr McGee also submitted that state agencies—for example Directors of Public Prosecution—consider forensic orders to exist for the safety of the community and may not give sufficient consideration to the rights of people with disability to whom forensic orders are applied.³⁰
- 10.36 The committee held a hearing focussing on this issue in May 2021. Witnesses from a range of sectors including legal practitioners, advocacy organisations, public advocates and forensic care practitioners, as well as the Commission provided evidence about the safeguarding concerns for people held in forensic detention and the potential solutions that may be available through Commission oversight.
- 10.37 The committee heard that people are being held in forensic detention in the 'context of a fractured monitoring and oversight system whilst the state and territory disability programs had been absorbed into the National Disability Insurance Scheme.'³¹ Mr McGee explained further:

The reality is that there is a failure of understanding across all levels of government when it comes to forensic orders. The reality of the provision of disability forensic support is it occurs in the disability and health systems, not in the justice system. The orders start in the justice system and are

²⁸ For further information about background about forensic orders, see Community Affairs References Committee, *Indefinite detention of people with cognitive and psychiatric impairment in Australia*, November 2016, pp. 13-47.

²⁹ Mr Patrick McGee, National Manager, Policy, Advocacy and Research, Australian Federation of Disability Organisations, *Committee Hansard*, 17 November 2020, pp. 4-5.

³⁰ Mr Patrick McGee, National Manager, Policy, Advocacy and Research, Australian Federation of Disability Organisations, *Committee Hansard*, 17 November 2020, p. 4.

³¹ Australian Federation of Disability Organisations, *Submission 71*, p. 8.

managed by the justice system; the provision of the support that arises out of the orders comes in disability and health systems.³²

10.38 Witnesses therefore called for NDIS participants under forensic orders to be brought under the Commission's jurisdiction, arguing that there is a role for the Commission in receiving complaints from this cohort and ensuring adequate safeguards and that a participant's behaviours are supported to prevent their entry into the criminal justice system. Dr Colleen Pearce, Victorian Public Advocate, explained:

One of the biggest issues for people involved in, or at risk of involvement in, the criminal justice system—including those on forensic orders—is whether they receive adequate supports and assistance to find suitable accommodation. I would add to this their ability to access suitable and appropriate supports delivered by a trained and experienced workforce. There is a serious market failure, or risk of failure, for people who need appropriate accommodation and specialised supports.³³

10.39 Dr Pearce considered that the Commission's functions in relation to market oversight and behaviour support provided opportunities for the Commission to monitor the experiences of people in forensic detention and provide leadership, particularly around the use of restrictive practices.³⁴ Emily Piggot, representing Victorian Advocacy League for Individuals with Disability, also emphasised the Commission's behaviour support role, noting that some people may be subject to forensic orders because their behavioural support needs have never been met.³⁵

10.40 While the committee heard that people under forensic orders should be able to complain to the Commission,³⁶ there is an opportunity for the Commission to play a more proactive role to protect this cohort, with witnesses critical of the Commission's 'reliance on complaints to prompt regulatory actions'.³⁷ Witnesses emphasised the role that community visitors can play in monitoring forensic

³² Mr Patrick McGee, National Manager, Policy, Advocacy and Research, Australian Federation of Disability Organisations, *Committee Hansard*, 20 May 2021, p. 9.

³³ Dr Colleen Pearce, Public Advocate, Office of the Public Advocate, Victoria, *Committee Hansard*, 20 May 2021, p. 3.

³⁴ Dr Colleen Pearce, Public Advocate, Office of the Public Advocate, Victoria, *Committee Hansard*, 20 May 2021, p. 3.

³⁵ Emily Piggot, Advocacy Coordinator, Victorian Advocacy League for Individuals with Disability, *Committee Hansard*, 20 May 2021, p. 2.

³⁶ See, for example Mr Patrick McGee, National Manager, Policy, Advocacy and Research, Australian Federation of Disability Organisations, *Committee Hansard*, 20 May 2021, p. 7.

³⁷ Dr Colleen Pearce, Public Advocate, Office of the Public Advocate, Victoria, *Committee Hansard*, 20 May 2021, p. 3.

facilities, and argued for the role of community visitors schemes to be included in legislation, with accompanying information sharing provisions.³⁸

- 10.41 The committee also heard that the Commission should play a role in ensuring that there is adequate data collected about people under forensic orders.³⁹

Commission view

- 10.42 During the committee's public hearing in May 2021, the then Commissioner explained that the Commission had sought legal advice in relation to its functions and powers and maintained that the Commission possessed limited jurisdiction in relation to people detained under forensic orders. The then Commissioner explained that the Commission's processes for assessing quality of supports rely on audits against practice standards that relate to providers, and therefore could not be used in the context of non-NDIS supports, noting:

There are circumstances where an NDIS participant may be receiving NDIS supports from an NDIS provider, but they would not represent anything other than a very, very small proportion of the supports that are provided in these forensic settings; and, where somebody was receiving those supports and they were receiving them from an NDIS provider, our jurisdiction would be triggered.

...in a system where we don't have jurisdiction, we don't have the capacity to assess those services. So for instance, a public hospital or a public school where issues may arise—or, indeed, one of the settings you're talking about—are not subject to the registration requirements of the commission.⁴⁰

- 10.43 The then Commissioner did, however, recognise that there were significant questions to be considered in relation to NDIS participants subject to forensic orders. Mr Head highlighted that the upcoming review of the quality and safeguarding framework should test those questions, noting:

I do think, inevitably and appropriately, questions about whether or not there are aspects of the regulatory arrangements that need adjusting will be part of what that process looks like. That may also look at whether or not there are groups of people with disability who are at a higher risk of harm where the safeguarding arrangements in the framework are not necessarily focusing in on the right issues in the right ways.⁴¹

³⁸ Dr Colleen Pearce, Public Advocate, Office of the Public Advocate, Victoria, *Committee Hansard*, 20 May 2021, p. 6.

³⁹ Mr Patrick McGee, National Manager, Policy, Advocacy and Research, Australian Federation of Disability Organisations, *Committee Hansard*, 20 May 2021, p. 7.

⁴⁰ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 20 May 2021, p. 25.

⁴¹ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 20 May 2021, p. 26. Mr Head also drew the committee's attention to work being led by the Department of Social Services in relation to the way the NDIS interacts with mainstream services and systems.

Data collection and reporting

- 10.44 The committee heard that the Commission should play a greater role in facilitating data collection and reporting about safeguarding issues, as well as improving data collection and access to data about its activities.
- 10.45 The First Peoples Disability Network (FPDN) noted that the Commission's data regarding complaints and reportable incidents is ambiguous and not disaggregated. For example, it is not known how many complaints or notices of reportable incidents were raised by, or in relation to, Aboriginal and Torres Strait Islander peoples with disability.⁴²
- 10.46 In August 2020, Family Advocacy also expressed concern that the Commission's most recent activity report only provided data on total numbers of complaints and reportable incidents, without disaggregating this data by participant cohort.⁴³ Family Advocacy considered that disaggregated data, such as that provided in the NDIS Quarterly report, could be used to properly inform the Commission in order to improve its activities.⁴⁴
- 10.47 The Queensland Department of Communities, Disability Services and Seniors (DCDSS) echoed these concerns and stated that as the Commission continues to establish itself and mature in its functions and expertise, it will have the ability to collect, analyse and disaggregate data for systemic monitoring and quality improvement purposes at the jurisdictional and system level. According to DCDSS, this will provide an opportunity to identify modifiable risk factors in the lives of people with disability and identify areas of action required at both the individual and systemic level.⁴⁵
- 10.48 The committee also heard that the Commission should increase its data collection and reporting on workforce matters, including data about workforce shortages and impacts on access to services for participants,⁴⁶ as well as data to assist providers in planning and decisions to register to provide NDIS services.⁴⁷ The committee continues to consider these matters in its Inquiry into the NDIS Workforce.⁴⁸

⁴² First Peoples Disability Network, *Submission 49*, p. 2.

⁴³ Family Advocacy, *Submission 57*, p. 19.

⁴⁴ Family Advocacy, *Submission 57*, p. 19.

⁴⁵ Queensland Department of Communities, Disability Services and Seniors, *Submission 61*, p. 8.

⁴⁶ See, for example, Allied Health Professions Australia, *Submission 54*, [p. 10].

⁴⁷ Exercise and Sports Science Australia, *Submission 38*, p. 5.

⁴⁸ See, Joint Standing Committee on the National Disability Insurance Scheme, *Inquiry into the NDIS Workforce*, www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/workforce.

Commission view

10.49 At an early public hearing of the committee, the former Commissioner noted that the Commission had been working to improve its practices around data collection:

Some of the functions of the commission, through the modules of the commission's operating system that support those functions, allow us to capture all of the demographic information we might and to generate reports based on that... as with all areas of our operations, one of the big focuses for the commission has been to improve its data and analytics work. That's got two elements, really. One is refinement to various aspects of the operating system, and the other is having the organisational capability to analyse and present the information that comes out of that system in a way that's useful for different parts of our community.⁴⁹

10.50 In September 2021, the Commission also noted that it would be seeking advice from a new Complaints Function Advisory Committee in relation to systemic data gathered through the complaints function.⁵⁰

10.51 In response to findings of a research study that it had commissioned into deaths of people with disability, the Commission also noted that it was finalising a data analytics and reporting framework, to assist it to 'mature' its data collection systems and 'make best use of data for... quality and safeguarding activities, including... regulatory action'. The Commission noted that the commissioned research will enable it to establish a national baseline against which it would review data collected on the deaths of NDIS participants. The Commission anticipates working towards collecting, analysing and reporting data in order for it to be used by other agencies and researchers.⁵¹

Natural safeguards

10.52 A number of submitters emphasised the role of support networks and community inclusion to assist in ensuring people with disability are not subject to abuse or neglect. Some submitters also called for the Commission to take a role in leading work to increase the natural safeguards for people with disability, such as ensuring opportunities to develop social connections, inclusion in the community, and changing community attitudes toward disability.

⁴⁹ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 34.

⁵⁰ NDIS Quality and Safeguards Commission, *Submission 42.2*, p. 5.

⁵¹ NDIS Quality and Safeguards Commission, *Research: Causes and contributors to deaths of people with disability in Australia – NDIS Commission's response to recommendations*, (date unavailable) www.ndiscommission.gov.au/causes-and-contributors-deaths-people-disability (accessed 29 October 2021).

10.53 JFA Purple Orange highlighted the importance of natural safeguards in protecting people with disability from harm, noting that natural safeguards include caring relationships and opportunities for community participation. JFA Purple Orange emphasized that 'freely given relationships are the greatest protections or safeguards for people living with disability'.⁵² During one of the committee's hearings, Mr Robbi Williams, the CEO of JFA Purple Orange, elaborated:

[M]any people with disability in Australia have low social capital; they have a relatively low number of people in their lives who aren't paid to be there. When you have people in your life those people represent natural safeguards. If you know your neighbours, they are more likely to respond if they haven't seen you for a few days. Or if they hear something unusual in your property it is more likely to elicit a response. That's what happens when people know each other.⁵³

10.54 Consultants, Leighton Jay, Jessica Quilty and Ann Driberg noted that it is an 'established fact' that people with disability experience high levels of social isolation, including as a result of being 'largely segregated from opportunities to build and sustain friendships with non-disabled people, many of whom will be able to add "social capital" to their lives'.⁵⁴

10.55 The consultants submitted that service providers need investment to change their service models so that their services facilitate, rather than impede friendship-building, and so that providers routinely expect this work to be a critical aspect of workers' roles. According to Jay, Quilty and Driberg, the Commission should lead this initiative:

If the Commission does not see that leading this change is a critical part of their role and function, then we must ask whose role is it? We concede that it seems to be an unusual role for a regulatory body, but we can't escape the conclusion that both common sense and the [Quality and Safeguards Framework] demonstrate that it must be front and centre in their work.⁵⁵

10.56 The DCDSS observed that the South Australian Taskforce investigating the circumstances surrounding the death of Ms Ann-Marie Smith reinforced the value of community connections, finding that the best safeguard for any potentially vulnerable individual is to have people in their lives who are concerned with the person's wellbeing. The taskforce found that vulnerability is increased by social isolation, lack of proper care from service providers, a lack of external systems or checks through support or local area coordination, and

⁵² JFA Purple Orange, *Submission 19*, p. 9.

⁵³ Mr Robbi Williams, Chief Executive Officer, JFA Purple Orange, *Committee Hansard*, 29 September 2020, p. 23.

⁵⁴ Leighton Jay, Jessica Quilty and Ann Driberg, *Submission 40*, p. 7.

⁵⁵ Leighton Jay, Jessica Quilty and Ann Driberg, *Submission 40*, p. 8.

inadequate systems in place to vet the quality of services and to respond to concerns.⁵⁶

10.57 Speech Pathology Australia (SPA) criticised the ‘medicalisation’ of care of people with disability with high support needs, noting that this cohort often have support workers attending to physical needs but are not given adequate opportunities to socialise, or to leave the home in a way that would be typical of those without disability. This reflects an attitude among some support workers that communication needs and social interactions are ‘secondary’ to the rhythm of care, less important than physical care tasks, and—in some cases—seen as ‘pointless’.⁵⁷

10.58 Other submitters also emphasised the importance of changing attitudes to ensure the safety and wellbeing of people with disability. For example, Children and Young People with Disability Australia (CYDA) stated that:

[W]e will not see the reduction and prevention of violence, abuse and neglect against people with disability until there is a change in community attitudes towards disability, until people with disability are valued and included in the same ways as non-disabled people, and until there are effective mechanisms to support and enable the human rights of all people with disability to be upheld.⁵⁸

10.59 Ms Kirsten Deane, then Campaign Director, Every Australian Counts (EAC) expressed similar views, and called for the Commission to have a role in facilitating ‘a much bigger conversation’ around providing equity in opportunities and dismantling barriers preventing people with disability from being included in the community.⁵⁹

10.60 During one of the committee’s public hearings, Mr Robbi Williams, CEO, JFA Purple Orange, elaborated on how the Commission might assist in changing community attitudes toward disability, thereby helping to reduce instances of violence, abuse and exploitation:

[F]or any commission that is charged with upholding, or leading the upholding, of standards, whether they’re in regulations or legislation or otherwise, it seems naturally intuitive that they would also have a role in generating a proactive conversation about how people can not only work to those standards but exceed them.

It is important to contemplate a well-rounded role for any commission where it’s not just about leading mechanisms around compliance but also about leading conversation that lead to a deeper feel for the positive side of

⁵⁶ Queensland Department of Communities, Disability Services and Seniors, *Submission 61*, p. 6.

⁵⁷ Speech Pathology Australia, *Submission 25*, p. 19.

⁵⁸ Children and Young People with Disability Australia, *Submission 50*, p. 4.

⁵⁹ Ms Kirsten Deane, Campaign Director, Every Australian Counts, *Committee Hansard*, 29 September 2020, p. 3.

compliance—the positive outcomes that are the opposite of the things that compliance is trying to avoid happening.⁶⁰

- 10.61 Submitters and witnesses raised particular concern regarding the difficulties that people in group homes or supported independent living face in accessing natural safeguards. The committee heard that there should be progressive closure of group homes,⁶¹ and that actions by providers to limit a participant's access to their 'circle of support' should be classified as a restrictive practice.⁶²

NDIS pricing

- 10.62 A range of submitters held the view that the current NDIS pricing model did not adequately factor in quality and safeguarding measures, with some stating that the Commission should therefore play a role in influencing price setting.⁶³
- 10.63 For example, the Mental Health Community Coalition ACT (MHCC ACT) submitted that the NDIS Price Guide is not a reflection of the true cost of service delivery in the sector. MHCC ACT noted factors such as being unable to retain qualified staff due to low pay and poor conditions, and inadequate funding for supervision and staff development under the current pricing scheme.⁶⁴ MHCC ACT members considered that an investigation into the assumptions and models underpinning the NDIS pricing guide is needed, as is more transparency around who is consulted in price setting and item design in the guide. MHCC ACT members do not believe that the price guide reflects consultation with organisations aiming to offer best practice, evidence informed services.⁶⁵
- 10.64 TJW also expressed concern that current pricing arrangements are not adequate to ensure that workers and newer providers understand the importance of the Code of Conduct and Practice Standards. In this respect, TJW stated that the current NDIS pricing algorithm only factors in one day of training per staff member per year, and that it is not apparent that the NDIA identifies training in the Code of Conduct and Practice Standards as an area of their responsibility. TJW suggested that the Commission lobby the Commonwealth, the states and

⁶⁰ Mr Robbi Williams, Chief Executive Officer, JFA Purple Orange, *Committee Hansard*, 29 September 2020, p. 22.

⁶¹ Ms Romola Hollywood, Director, Policy and Advocacy, People with Disability Australia, *Committee Hansard*, 13 October 2020, p. 2.

⁶² Family Advocacy, *Submission 57*, p. 18.

⁶³ See, for example, Mental Illness Fellowship of Australia, *Submission 37*, p. 3; Stride Mental Health, *Submission 21*, p. 10.

⁶⁴ Mental Health Community Coalition ACT, *Submission 14*, pp. 2–3. The MHCC ACT noted that it had raised similar issues in its submission to the committee's inquiry into the NDIS Workforce.

⁶⁵ Mental Health Community Coalition ACT, *Submission 14*, p. 3. This committee continues to consider these matters in its inquiry into the NDIS Workforce. See, for example, Joint Standing Committee on the National Disability Insurance Scheme, *NDIS Workforce Interim Report*, December 2020, pp. 55–74.

territories for funding to specifically invest in the development of the disability workforce.⁶⁶

10.65 Purpose at Work raised similar concerns about the assumptions underpinning NDIS prices, stating that recent communications with the NDIA (via an FOI process) indicate that the agency did not properly consider the implications for quality and safeguarding of its most recent price changes. Moreover, the NDIA did not communicate with the Commission about the implications of its proposed decisions.⁶⁷

10.66 Purpose at Work recommended amendments to the NDIS Act to:

- mandate communication and liaison between the NDIA and the Commission when the NDIA is making policy and pricing decisions—particularly if those decisions may have significant impacts on the ability of providers and workers to meet their obligations regarding the quality and safety of services and supports; and
- require transparency about such communication and liaison, such as disclosure of this in the Commission’s Annual Report.⁶⁸

10.67 Stride Mental Health (Stride) asserted that the NDIA’s price limits incentivise providers to aim for the lowest cost when delivering services and supports, expressing concern that this comes at the cost of quality and safety. According to Stride, providers do not believe that the NDIA is appropriately balancing quality and safety in its pricing model.⁶⁹ Stride submitted that the NDIA pricing approach is 'driving the sector towards a highly casual workforce with less supervision, reduced training, and reduced quality and safety', noting that this poses a risk across all NDIS services but especially for participants with complex needs.⁷⁰

10.68 Submitters also expressed concern that NDIS pricing does not factor in a range of specific factors associated with ensuring quality of workforce such as supervision (including ensuring appropriate spans of control), professional development and screening for specialist support items, such as behaviour support.⁷¹

⁶⁶ The Junction Works Limited, *Submission 8*, p. 4.

⁶⁷ Purpose at Work, *Submission 16*, p. 4.

⁶⁸ Purpose at Work, *Submission 16*, p. 4.

⁶⁹ Stride Mental Health, *Submission 21*, p. 10.

⁷⁰ Stride Mental Health, *Submission 21*, p. 13. Similar concerns regarding the NDIA’s Cost Model for Disability Support Workers were raised during the committee’s inquiry into the NDIS Workforce. See, Joint Standing Committee on the NDIS, *NDIS Workforce Interim Report*, December 2020, pp. 55–74.

⁷¹ See, for example, Mental Health Council of Tasmania, *Submission 23*, p. 8; National Disability Services, *Submission 27*, [p. 5].

10.69 The committee also heard concerns from an NDIS participant that the pricing model provides no incentive to register as an NDIS provider and may have impacts on the quality of workers in the NDIS if registered providers 'can't make the NDIS work financially'.⁷²

Other systemic oversight matters

10.70 Submitters called for Commission oversight in a range of other areas that affect NDIS participants as well as people with disability more broadly. Some of these suggestions included that the Commission's jurisdiction should be expanded to oversee quality and safety for people with disability more generally, and to oversee the NDIA. A range of other specific suggestions were also submitted.

Expansion of the Commission's jurisdiction

10.71 Several stakeholders queried whether the Commission's current jurisdiction is sufficient to enable it to ensure quality and safety in supports and services. Concerns raised included: the Commission's ability to enforce compliance by unregistered providers; the potentially numerous issues that are 'out of scope' in terms of compliance and enforcement; and the question of how to ensure quality and safety for people with disability who are not NDIS participants.⁷³

Quality and safety for people with disability who are not participants

10.72 Some submitters and witnesses called for increased protections for people with disability who are not participants, and to whom the Commission's reach does not currently extend. Certain stakeholders called for the Commission's reach to be extended, while others called for a new oversight and safeguarding mechanism to be established to cover all people with disability in Australia.

10.73 For example, Physical Disability Australia (PDA) expressed its disappointment that Commission's jurisdiction is restricted to providers of NDIS supports, noting that NDIS participants represent only a small percentage of Australians with disability. PDA emphasised that people with disability who are over 65, as well as other people with disability who may not meet NDIS eligibility requirements, still require services and safe, quality supports.⁷⁴

10.74 The FPDN similarly noted that the Commission has little if any mandate in relation to people with disability who are not NDIS participants. The FPDN

⁷² Name withheld, *Submission 74*, p. 6.

⁷³ See, for example, Purpose at Work, *Submission 16*, p. 2; Aged and Disability Advocacy Australia, *Submission 35*, p. 12; Leighton Jay, Jessica Quilty, Ann Drieberg, *Submission 40*, p. 12; First Peoples Disability Network, *Submission 49*, p. 1. These issues were of greater concern in the context of providers increasingly choosing not to register due to high costs and onerous processes associated with registration. These issues are discussed further in Chapter 5.

⁷⁴ Physical Disability Australia, *Submission 45*, [p. 5]. See also Family Advocacy, *Submission 57*, p. 4.

expressed concern that oversight of quality and safety for this cohort may fall to mainstream service systems, leading to gaps and inconsistencies.⁷⁵

- 10.75 Ms Romola Hollywood, then Director, Policy and Advocacy, People with Disability Australia, called for a wider oversight and safeguarding mechanism covering people with disability in all contexts and settings, stating:

The NDIS Quality and Safeguards Commission has very important work to do. However, it only provides protection to NDIS participants, who constitute around 10 per cent of people with disability in Australia. The remaining 90 per cent of people with disability receive protection through other regulatory and policy frameworks, which, as we are beginning to see through the disability royal commission, are often not sufficient.⁷⁶

- 10.76 Ms Hollywood asserted that a national, independent mechanism should be established under purpose-built legislation, with powers to investigate and enforce findings relating to violence, abuse and neglect of people with disability (either incorporated within or separate to the Commission).⁷⁷

Ensuring compliance by the NDIA

- 10.77 Some submitters and witnesses expressed concern that the Commission does not have jurisdiction to regulate the NDIS, its staff and contractors (including, for example, planners and Local Area Coordinators).

- 10.78 SPA observed that there have been ‘numerous examples’ of plan managers informing NDIS participants that they are able to purchase pieces of equipment, despite the equipment not being recommended by a speech pathologist and not fitting with the NDIS rules concerning low cost, low risk assistive technology. According to SPA, the Commission does not accept such complaints about plan managers. This leaves providers and families with nowhere to provide feedback.⁷⁸

- 10.79 Purpose at Work stated that although providers and workers are subject to the Practice Standards, there are not equivalent standards for the NDIA, its staff and agents. Purpose at Work recommended:

⁷⁵ First Peoples Disability Network, *Submission 49*, p. 1.

⁷⁶ Ms Romola Hollywood, Director, Policy and Advocacy, People with Disability Australia, *Committee Hansard*, 13 October 2020, p. 1. Ms Hollywood also noted that the United Nations Committee on the Rights of Persons with Disabilities has expressed concern about the lack of oversight, complaint and redress mechanisms for non-NDIS participants, and recommended the establishment of an accessible oversight, complaint and redress mechanism for all people with disability in all settings.

⁷⁷ Ms Romola Hollywood, Director, Policy and Advocacy, People with Disability Australia, *Committee Hansard*, 13 October 2020, p. 2.

⁷⁸ Speech Pathology Australia, *Submission 25*, p. 20.

- amending the NDIS Act to give the Commission jurisdiction over the NDIA, and to require the Commission to publish Practice Standards and Quality Indicators for NDIA staff and subcontractors, and
- that the Commission should audit the NDIA for compliance with the Standards, with power to issue penalties and other sanctions for breach.⁷⁹

Other suggestions for Commission oversight of systemic issues

10.80 The committee also heard a range of general and specific suggestions for matters that the Commission should oversee. Suggestions included:

- the establishment of a register of sex offenders with disability who have been found guilty of physical or sexual abuse of other people with disability;⁸⁰
- reviewing deaths of people with disability;⁸¹
- greater focus on the quality of supports and services provided under the NDIS;⁸²
- thematic issues facing the NDIS as a whole, such as eligibility for the scheme, and tensions between cost containment and service quality;⁸³ and
- greater incorporation of human rights principles in the quality and safeguarding system.⁸⁴

Commission view

10.81 At one of the committee's public hearings, the then Commissioner emphasised that the establishment of the Commission represents a 'fundamental change' to the way that quality and safeguarding is approached for the NDIS:

Prior to the commission's commencement, people with disability receiving supports from the NDIS had their safeguarding arrangements dealt with through a wide range of different approaches in states and territories. Some of those arrangements were significantly less comprehensive than what is part of the NDIS arrangements, and many were expressed as obligations of

⁷⁹ Purpose at Work, *Submission 16*, p. 3. As an example of NDIA practices and processes being inconsistent with Practice Standards, Purpose at Work highlighted the NDIA's decision to set the span of control for supervisors at 15:1, notwithstanding that Quality Indicators require timely supervision, support and resources be available to workers—commensurate with the scope and complexity of the supports delivered. The committee also notes that legislation was introduced into the Parliament in October 2021 to adopt a 'Participant Service Guarantee' that will legislate timeframes and engagement principles for how the NDIA undertakes key administrative processes. See, National Disability Insurance Scheme Amendment (Participant Service Guarantee and Other Measures) Bill 2021.

⁸⁰ Spinal Cord Injuries Australia, *Submission 56*, [p. 6].

⁸¹ Disability Services Commissioner, *Submission 13*, p. 5.

⁸² Australian Services Union, *Submission 47*, pp. 5–7.

⁸³ Services for Australian Rural and Remote Allied Health, *Submission 66*, p. 8.

⁸⁴ Children and Young People with Disability Australia, *Submission 50*, p. 4.

funding arrangements rather than set out in legislation. The NDIS arrangements provide for a single consistent approach across the country once fully rolled out, and that approach is a quality and safeguarding system legislated in the NDIS Act and underpinned by the Convention on the Rights of Persons with Disability for all Australians who are NDIS participants.⁸⁵

10.82 With respect to suggestions for Commission involvement in broader safeguarding issues for people with disability, in its initial submission, the Commission noted that, as part of its education and engagement work, it was developing a range of resources in response to a review it had commissioned into causes of deaths of people with disability: the *Scoping review into the causes and contributors to deaths of people with disability in Australia*, undertaken by Professor Julian Trollor.⁸⁶ The Commission noted that these resources would 'deal with issues connected to the preventable deaths of people with disability', and that these included resources dealing with mealtime management that would complement changes to the Practice Standards.⁸⁷

10.83 At one of the committee's public hearings, the then Commissioner emphasised the Commission's work in this area has been directed to educating providers about their obligations, while working within its current jurisdiction:

there's a range of work that we do which is about making disability support providers aware... that people with disability have support needs that those providers are responsible for, that they're connected to a whole raft of other things.

Part of the focus of the commission in its early life has not just been on transition management or, indeed, educating people about their responsibilities; it's been on doing substantive work to address some of these questions. Professor Trollor's work identified poor oral health, lack of access to health assessments and those sorts of things—which are all the subject of

⁸⁵ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 29 September 2020, p. 27.

⁸⁶ Dr Carmela Salomon and Professor Julian Trollor, *A scoping review of causes and contributors to deaths of people with disability in Australia* (2019), <https://www.ndiscommission.gov.au/document/1881> (accessed 29 October 2021).

⁸⁷ NDIS Quality and Safeguards Commission, *Submission 42*, p. 41. See also NDIS Quality and Safeguards Commission, *Research: Causes and contributors to deaths of people with disability in Australia – NDIS Commission's response to recommendations*, <https://www.ndiscommission.gov.au/causes-and-contributors-deaths-people-disability> (accessed 29 October 2021). Changes to Practice Standards in relation to mealtime management and severe dysphagia commenced on 15 November 2021. See NDIS Quality and Safeguards Commission, *Changes to the National Disability Insurance Scheme (Provider Registration and Practice Standards) Rules 2018 and National Disability Insurance Scheme (Quality Indicators) Guidelines 2018*, November 2021, <https://www.ndiscommission.gov.au/practicestandards> (accessed 17 November 2021).

work that we're doing, but work that we're doing without acting beyond power in terms of our regulatory functions.⁸⁸

10.84 In its most recent corporate plan, the Commission reflected on its evolving operating context, noting that, while the transition from state-based regulation to the national model for overseeing quality and safeguarding for NDIS supports has been completed, the Commission:

...still must continue to build its own knowledge and capability, develop engagement and communication approaches to meet the needs of the people with disability it serves, build its regulatory and data capability, improve its systems and processes, and settle its structure.⁸⁹

10.85 The Commission also noted that the policy settings within which it operates are evolving and highlighted that a review of the *NDIS Quality and Safeguarding Framework* is 'imminent'.⁹⁰

Committee view

Management of the transition period

10.86 The committee notes that the transition to Commission oversight caused a range of difficulties for the disability sector, particularly in relation to oversight responsibilities. These difficulties appear to have been increased by poor communication from the Commission during the transition period.

10.87 However, the committee welcomes the Commission's responsiveness to feedback and the evidence presented during this inquiry and notes the range of measures that the Commission has undertaken to improve its practices, including with respect to the management of complaints, and communication with the sector. The committee encourages the Commission to continue to listen to and work with people with disabilities, their families and advocates, and the disability sector to continue to refine and improve these practices.

Interfaces with other service systems

10.88 Approaches to safeguarding need to consider the whole of life experiences of a person with disability, including all the services with which they interact. The committee notes the complexity of the interfaces between the NDIS and mainstream services accessed by people with disability. It is clear that, at this early stage of the Commission's operation and implementation of the *NDIS Quality and Safeguarding Framework*, these interfaces remain poorly understood,

⁸⁸ Mr Graeme Head AO, Commissioner, NDIS Quality and Safeguards Commission, *Committee Hansard*, 20 May 2021, p. 24.

⁸⁹ NDIS Quality and Safeguards Commission, *Corporate Plan 2021–2022*, (August 2021), p. 14 <https://www.ndiscommission.gov.au/document/3291> (accessed 29 October 2021).

⁹⁰ NDIS Quality and Safeguards Commission, *Corporate Plan 2021–2022*, (August 2021), p. 14.

and responsibilities of state, territory and federal bodies are inadequately defined.

- 10.89 In relation to the experiences of people with disability subject to forensic or other orders, the committee notes the Commission's advice that it considers its jurisdiction to extend only to overseeing or monitoring NDIS supports administered to a person in custody. However, the committee considers that the broader safeguarding concerns raised in the evidence in relation to this matter are relevant to the functions of the Commission, including those in relation to behaviour support and market oversight.
- 10.90 The committee has also commented in multiple reports with respect to the provision of NDIS supports to people in custody and in the criminal justice system.⁹¹ People with disability in the criminal justice system often face significant impediments to accessing the NDIS and receiving appropriate support. This can lead to significant adverse consequences, especially if a person continues to be held in custody because they are not receiving appropriate support to return to living in the community. Previous recommendations made by the committee in relation to these matters, including that a dedicated unit be created within the NDIA to support participants in the criminal justice system, have not been supported by the Government.⁹²
- 10.91 The experiences of people with disability in forensic and criminal justice settings is also an area of significant interest for the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission). The Disability Royal Commission has held hearings to explore these experiences in detail, and, in particular, experiences of Aboriginal and Torres Strait Islander people with disability, who are overrepresented in the criminal justice system.⁹³
- 10.92 The provision of safe and high-quality support to people with disability in forensic settings is an area of complex systems interfaces that needs far greater coordination, cooperation, and leadership to ensure the rights and safety of disabled people are upheld and protected. The committee recognises that the Commission must act within its authority, and that the Commission views this

⁹¹ See, for example, Joint Standing Committee on the National Disability Insurance Scheme, *Provision of Services under the NDIS for People with Psychosocial Disabilities Related to a Mental Health Condition*, August 2017; NDIS Planning Final Report, December 2020, *General Issues Report*, December 2020.

⁹² Joint Standing Committee on the National Disability Insurance Scheme, *NDIS Planning Final Report*, December 2020, p. 101.

⁹³ See, for example, Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability, *Public hearing 11: The experiences of people with cognitive disability in the criminal justice system*, 16–25 February 2021, and *Public hearing 15: People with cognitive disability and the criminal justice system: NDIS interface*, 12–13 August 2021, <https://disability.royalcommission.gov.au/public-hearings> (accessed 22 November 2021).

as limited to overseeing the provision of NDIS supports to people in custodial settings. However, the committee is concerned that the oversight of the Commission in criminal justice settings may be artificially limited due to the underfunding or under-utilisation of plans, or barriers to accessing the NDIS faced by people with disability in these circumstances. The committee recognises that the invidious position of people in forensic detention has arisen through deep structural failures in the broader criminal justice system as well as NDIS implementation. However, it is also clear that the *NDIS Quality and Safeguarding Framework*, a document intended to guide the multi-system and multi-jurisdictional approach to safeguarding the rights of people with disability, has not been adequate to ensure rights are upheld in this instance. The committee considers that these interface questions should receive careful and thorough consideration in the upcoming review of the Framework.

10.93 The committee will also continue to review and take evidence regarding the interfaces of NDIS service provision with non-NDIS services, including in the justice system, in relation to its Inquiry into Current Scheme Implementation and Forecasting for the NDIS.⁹⁴

Recommendation 28

10.94 The committee recommends that the Australian Government give specific consideration to the following matters in its review of the *NDIS Quality and Safeguarding Framework*:

- clarifying the safeguarding responsibilities of Commonwealth, state and territory bodies at the interfaces of NDIS and mainstream services; and
- the needs of people with disability in forensic detention, including the role of the NDIS safeguarding system in ensuring the rights of people with disability in these settings are upheld.

Data collection and reporting

10.95 The committee notes the range of suggestions offered by submitters and witnesses in relation to the opportunities for the Commission to improve its data collection and reporting practices, and to collect data on systemic safeguarding issues.

10.96 The committee also welcomes the information that the Commission is developing a data analytics and reporting framework, and that it recognises the value in making data available in a manner that is useful for other agencies and broader research. The committee looks forward to reviewing this document

⁹⁴ See, Joint Standing Committee on the National Disability Insurance Scheme, *Current Scheme Implementation and Forecasting for the NDIS*, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/National_Disability_Insurance_Scheme/ImplementationForecast.

when it is finalised and encourages the Commission to share and invite feedback on the framework from the disability sector, as well as people with disability, their families and advocates.

- 10.97 The committee further encourages the Commission to actively work with the disability sector and other agencies to explore the ways in which the Commission can support increased data collection and reporting to improve understanding of quality and safeguarding issues for people with disability.

General Commission oversight and safeguarding

- 10.98 Submitters and witnesses took the opportunity of this inquiry into the Commission to raise a number of matters that affect the safety of NDIS participants and the quality of the services they receive. In particular, access to natural safeguards and the role that the pricing of NDIS services can play in ensuring the safety and quality of these services were raised for consideration by the committee.
- 10.99 The *NDIS Quality and Safeguarding Framework* also acknowledges the importance of natural safeguards, noting that activities to support this would be funded through the Information, Linkages and Capacity Building program, as well as through individual plans.⁹⁵
- 10.100 The committee did not receive specific evidence from the Commission regarding natural safeguards or NDIS pricing. However, the committee recognises that these factors are also important to quality and safeguarding in the NDIS. Noting the upcoming review of the Framework, the committee considers it would be appropriate for these matters to be considered as part of this review, with specific reference to the role of the Commission in providing national leadership on quality and safeguarding matters for people with disability. The committee will also continue to consider matters relevant to NDIS pricing in its current NDIS workforce inquiry.

Recommendation 29

- 10.101 **The committee recommends that the Australian Government specifically consider the following in its review of the *NDIS Quality and Safeguarding Framework*:**

- **how to improve access to and strengthen natural safeguards for all people with disability; and**
- **the impact of NDIS pricing on the quality and safety of NDIS supports.**

- 10.102 The committee welcomes the work that the Commission has undertaken to understand the causes and contributors of deaths among people with disability. The committee considers that this is an important step towards building the

⁹⁵ Department of Social Services, *NDIS Quality and Safeguarding Framework*, pp. 26–29.

Commission's capacity to identify systemic risks to people with disability and to take and support action to address these risks.

10.103 As discussed in Chapter 3, the Commission is also well-placed to develop whole-of-sector training materials that increase understanding of disability and how to provide safe and quality supports to people with disability. The evidence to this inquiry also emphasised the systemic causes of risk to the safety of people with disabilities, including lack of inclusion in the community, and the significance of attitudes towards disability. The committee welcomes the Commission's advice that it continues to develop resource materials for the sector and considers that the Commission should emphasise systemic factors in future resources and specific training modules.

Recommendation 30

10.104 The committee recommends that the NDIS Quality and Safeguards Commission develop resources and training materials that emphasise the systemic factors that increase risks to the safety of people with disabilities, including by emphasising the importance of social inclusion and individual and systemic attitudes towards disability.

Chapter 11

Concluding comments

- 11.1 The commencement of the Commission marked an important point in the progress of respect for and upholding of the rights of people with disability in Australia. The NDIS has been life-changing for many people with disabilities, and its rights-based principles of upholding choice and control are fundamental to ensuring that people with disabilities are centred and respected in the NDIS system, and able to make choices about their own lives. Alongside on these principles, however, are the risks that come with having the freedom to choose how you will be supported and by whom. While the committee recognises that disability does not, of itself, mean that a person is vulnerable or at-risk, vulnerable people with disability continue to be significantly more likely to be subject to violence, or to be abused, neglected or exploited.
- 11.2 Safety for people with disability also encompasses much more than regulating the provision of disability supports. During this inquiry the committee has heard evidence regarding the performance of the Commission to date, and suggestions of ways to improve the effectiveness of the Commission's work. However, the committee recognises measures to ensure that people with disability are included in their communities may have a far greater impact on the safety of people with disability than the regulatory oversight work of the Commission.
- 11.3 The move to centralised oversight of safeguarding for the NDIS is an important step towards improving safeguards for people with disability in general, and vulnerable NDIS participants in particular. The committee considers that establishing the Commission as a national oversight body was a fundamental first step in the creation of a supportive and effective safeguarding system for the NDIS, and that the overall structure and powers of the Commission appear, for the most part, to equip it with the tools necessary to carry out its functions.
- 11.4 This inquiry has, however, identified various ways in which the Commission's approach to its work could be improved, in particular with respect to proactive engagement with participants and the sector, and increasing its proactive compliance and enforcement measures. In addition, gaps persist in safeguarding arrangements for NDIS participants and people with a disability more broadly, particularly in the areas where NDIS services interface with services provided by state and territory governments or other areas of the federal system.
- 11.5 The committee also recognises that this inquiry has been conducted early in the implementation of the Commission. Over the course of the inquiry the Commission has demonstrated that it is open to change and continuing to listen

to people with disability, their advocates and the sector and to adapting its processes in response. Nevertheless, it is clear that work by the Commission and all Australian governments needs to continue to identify safeguarding gaps and quickly address them. The review of the *NDIS Quality and Safeguarding Framework* is crucial to this work, and, in addition to its specific recommendations, the committee urges the Government to carefully consider all matters raised in this report in that review.

- 11.6 The urgency of this work is clear, with the death of Ms Ann-Marie Smith being just one devastating example of the consequences for people with disability when the safeguarding system fails them. As described by the Hon Alan Robertson SC in his report on the circumstances surrounding the death of Ms Smith, the safety and well-being of individual participants in the NDIS is the object of the entire system.¹ It is crucial to continue to build on the NDIS safeguarding system to ensure that participants are supported to be safe and live with dignity.
- 11.7 The committee will continue to monitor the work of the Commission and may take up particular elements of the Commission's work in future inquiries.

Hon Kevin Andrews MP
Chair

Senator Carol Brown
Deputy Chair

¹ The Hon Alan Robertson SC, *Independent review of the adequacy of the regulation of the supports and services provided to Ms Ann-Marie Smith, an NDIS participant, who died on 6 April 2020: Report to the Commissioner of the NDIS Quality and Safeguards Commission*, 31 August 2020, p. 71.

Appendix 1

Compliance and enforcement powers of the Commission under the Regulatory Powers (Standard Provisions) Act 2014

The NDIS Quality and Safeguards Commission has monitoring, compliance, investigation and enforcement powers which are comparable to other Commonwealth regulators. As noted in the Commission's initial submission to the inquiry, some of its powers are conferred by provisions of the *National Disability Insurance Scheme Act 2013* (NDIS Act) operating in conjunction with the *Regulatory Powers (Standard Provisions) Act 2014* (Regulatory Powers Act). The Regulatory Powers Act sets out uniform regulatory powers and arrangements for Commonwealth bodies that, must be 'triggered' by another Act in order to be available to those bodies.¹

Monitoring and investigation under the Regulatory Powers Act

People appointed by the Commissioner as inspectors and investigators have—respectively—access to monitoring and investigation powers under the Regulatory Powers Act, as enlivened by the NDIS Act.

Under the Regulatory Powers Act, inspectors may enter premises and exercise monitoring powers for the purposes of determining whether a provision of the NDIS Act that is subject to monitoring has been, or is being, complied with; or for the purpose of determining whether information subject to monitoring is correct.²

Investigators may enter premises and exercise investigation powers if they suspect on reasonable grounds that there may be evidential material on the premises.³

Inspectors and investigators may only enter premises if the occupier has consented to the entry, or if the entry is made under a warrant.⁴

All provisions of Part 3A of Chapter 4 in the NDIS Act are subject to monitoring. The civil penalty provisions in that Part, and offences against the *Crimes Act 1914* or the

¹ NDIS Quality and Safeguards Commission, *Submission 42*, p. 15.

² Regulatory Powers Act, section 18.

³ Regulatory Powers Act, section 48.

⁴ Regulatory Powers Act, sections 18 and 48. In circumstances where consent from the occupier is not obtained, an inspector must apply for a monitoring warrant, while an investigator must apply for an investigation warrant. The process for applying for monitoring and investigation warrants is set out, respectively, in Parts 2 and 3 of the Regulatory Powers Act.

Criminal Code relating to that Part, are also subject to investigation. Relevantly, Part 3A of Chapter 4 of the NDIS Act sets out the obligations of NDIS providers, including: compliance with the conditions of registration; compliance with the Code of Conduct; reporting requirements; the prohibition on unregistered providers delivering certain supports; and the prohibition on causing detriment to another person (or threatening to do so).⁵

The ‘monitoring powers’ inspectors may exercise under the Regulatory Powers Act are as follows:

- The power to search the premises and any thing on the premises;
- The power to examine or observe any activity conducted on the premises;
- The power to inspect, examine, take measurements of or conduct tests on any thing on the premises;
- The power to make any still or moving image or any recording of the premises or any thing on the premises;
- The power inspect any document on the premises;
- The power to take extracts from, or make copies of, any such document;
- The power to take onto the premises such equipment and materials as are required for the purpose of exercising powers in relation to the premises;
- The power to use electronic equipment, and secure electronic equipment on the premises for a period of 24 hours (subject to extension); and
- The power secure evidence of a contravention of a provision subject to monitoring, for a period not exceeding 24 hours (subject to extension).⁶

The ‘investigation powers’ investigators may exercise under the Regulatory Powers Act are similar. However, it should be noted that these powers vary based on whether entry to the premises is by consent of the occupier or under a warrant. Moreover, the investigation powers are exercised for the purpose of finding and inspecting evidential material.⁷

Inspectors and investigators exercising powers or functions pursuant to the Regulatory Powers Act may be assisted by other persons. Such other persons may exercise monitoring and investigation powers, so long as they comply with directions given by the inspector or investigator. In addition, the exercise of powers or functions by a person assisting an inspector or investigator is taken to be an exercise of powers or functions by the inspector or investigator.⁸

⁵ See NDIS Act, Chapter 4, Part 3A, in particular sections 73B, 73J, 73Q, 73R, 73V and 73ZC.

⁶ Regulatory Powers Act, sections 19, 20(1), 20(4), 21(2) and 22(1). Inspectors may also ask questions and seek the production of documents under section 24.

⁷ Regulatory Powers Act, sections 49, 50(1), 50(2), 51(2) and 52. Investigators may also ask questions and seek the production of documents under section 54.

⁸ Regulatory Powers Act, sections 23 and 53.

Civil penalties enforceable under the Regulatory Powers Act

The following provisions of the NDIS Act are civil penalty provisions:

- Section 73B: providing certain supports under a participant's plan without being registered to provide that support.
- Section 73D: knowingly providing false or misleading information in an application for registration.
- Section 73J: failing to comply with a condition of registration.
- Section 73V: contravening the NDIS Code of Conduct.
- Section 73ZC: causing detriment or threatening to cause detriment to another person because of the person making a protected disclosure of information.
- Section 73ZM: failing to comply with a compliance notice.
- Section 73ZN: breaching a banning order.

Each of these provisions is enforceable under the Regulatory Powers Act. In effect, this means that the Commissioner may apply to specified courts for the person or entity which contravened the provision to pay a pecuniary penalty.⁹ Penalties amounts range from 60 penalty units (\$13, 3201) to 1,000 penalty units (\$222,000).¹⁰

Other enforcement provisions

Other sanction powers available to the Commissioner, through the Regulatory Powers Act include:

- infringement notices (see section 73ZL of the NDIS Act and Part 5 of the Regulatory Powers Act)
- enforceable undertakings (see section 73ZP of the NDIS Act and Part 6 of the Regulatory Powers Act); and
- injunctions (see section 73QZ of the NDIS Act and Part 7 of the Regulatory Powers Act).

⁹ Regulatory Powers Act, section 82.

¹⁰ A penalty of 60 penalty units may apply where a person provides false or misleading information in, or in connection with, an application for registration. A penalty of 1,000 penalty units may apply where a person causes, or threatens to cause, detriment to another person. Pursuant to section 4AA of the *Crimes Act 1914*, as at November 2021, a penalty unit was set at \$222.

Appendix 2

Submissions and Additional Information

- 1 MJD Foundation
- 2 Connectability Australia
- 3 Assistive Technology Suppliers Australia
- 4 Australian Lawyers Alliance
- 5 Department of Health
- 6 Professor Christine Bigby
- 7 Only About Quality
- 8 The Junction Works Limited
 - Attachment 1
- 9 Autism Spectrum Australia
- 10 Brain Injury SA
- 11 Office of the Public Advocate (Victoria)
- 12 Prader-Willi Syndrome Australia Ltd
- 13 Disability Services Commissioner
- 14 MHCC ACT
- 15 Multiple Sclerosis Australia
- 16 Purpose at Work
- 17 Commonwealth Ombudsman
- 18 AnglicareSA
- 19 JFA Purple Orange
- 20 Mental Health Coordinating Council
- 21 Stride Mental Health
- 22 Occupational Therapy Australia
- 23 Mental Health Council of Tasmania (MHCT)
- 24 Australian Association of Social Workers
- 25 Speech Pathology Australia
- 26 Leadership Plus Inc
- 27 National Disability Services
- 28 NSW Department of Communities and Justice
- 29 Intellectual Disability Rights Service
 - 29.1 Supplementary to submission 29
- 30 Australian Medical Association
- 31 Cara
- 32 Northern Territory Office of the Public Guardian
- 33 VALID
- 34 Royal Australian and New Zealand College of Psychiatrists (RANZCP)
- 35 Aged and Disability Advocacy Australia (ADA Australia)
- 36 Mrs Jade McEwen

- 37 Mental Illness Fellowship Australia
- 38 Exercise & Sports Science Australia
- 39 Community and Public Sector Union
- 40 Leighton Jay, Jessica Quilty, Ann Drieberg
- 41 121 Care Inc
- 42 NDIS Quality and Safeguards Commission
 - 42.1 Supplementary to submission 42
 - 42.2 Supplementary to submission 42
 - Attachment 1
- 43 Villamanta Disability Rights Legal Service Inc.
- 44 Dr Jennifer Torr
- 45 Physical Disability Australia
- 46 Louise Butler and Kai Sinor
- 47 Australian Services Union
- 48 Queenslanders with Disability Network Ltd (QDN)
- 49 First Peoples Disability Network (Australia)
- 50 Children and Young People with Disability Australia
- 51 Summer Foundation
- 52 ACT Government
- 53 Australian Physiotherapy Association
- 54 Allied Health Professions Australia
- 55 *Name Withheld*
- 56 Spinal Cord Injuries Australia
- 57 Family Advocacy
- 58 *Name Withheld*
- 59 Public Advocate Queensland
 - Attachment 1
 - Attachment 2
- 60 People with Disability Australia
 - Attachment 1
 - Attachment 2
- 61 Queensland Department of Communities, Disability Services and Seniors
- 62 Autism Aspergers Advocacy Australia (A4)
- 63 Every Australian Counts
- 64 Queensland Advocacy Incorporated
 - Attachment 1
 - Attachment 2
 - Attachment 3
 - Attachment 4
 - Attachment 5
 - Attachment 6
- 65 Advocacy for Inclusion

- 66 Services for Australian Rural and Remote Allied Health
- 67 Tasmanian Government
 - Attachment 1
- 68 Ms Georgi Hadden
 - 68.1 Supplementary to submission 68
- 69 Mr Adam Johnston
- 70 Mr Kevin Danher
- 71 Australian Federation of Disability Organisations
- 72 Neurodevelopmental and Behavioural Society of Australasia (NBPSA)
 - Attachment 1
 - Attachment 2
- 73 South Australian Public Advocate
 - Attachment 1
 - Attachment 2
- 74 *Name Withheld*
- 75 Victorian Legal Aid

Additional Information

- 1 Correspondence from the NDIS Quality and Safeguards Commission – response to certain evidence given during a public hearing on 28 June 2021

Answer to Question on Notice

- 1 NDIS Quality and Safeguards Commission, answers to written questions on notice, 13 July 2020 (received 26 August 2020).
- 2 NDIS Quality and Safeguards Commission, answers to written questions on notice, 27 August 2020 (received 13 October 2020).
- 3 NDIS Quality and Safeguards Commission, answers to questions on notice, 29 September 2020 (received 26 October 2020).
- 4 NDIS Quality and Safeguards Commission, answers to written questions on notice, 6 October 2020 (received 26 October 2020).
- 5 Australian Lawyers Alliance, answers to questions on notice, 6 October 2020 (received 8 November 2020).
- 6 National Disability Services, answers to questions on notice, 13 October 2020 (received 26 October 2020).
- 7 NDIS Quality and Safeguards Commission, answers to questions on notice, 20 May 2021 (received 30 June 2021).
- 8 Villamanta Disability Rights Legal Service Inc., answers to questions on notice, 20 May 2021 (received 04 June 2021).
- 9 Office of the Public Advocate, Victoria, answers to questions on notice, 20 May 2021 (received 15 June 2021).

Appendix 3

Public Hearings

Tuesday, 29 September 2020

via teleconference

Every Australian Counts

- Ms Kirsten Deane, Campaign Director

First Peoples Disability Network (Australia)

- Mr Damian Griffis, Chief Executive Officer

Australian Lawyers Alliance

- Mr Thomas Ballantyne

JFA Purple Orange

- Mr Robbi Williams, Chief Executive Officer

NDIS Quality and Safeguards Commission

- Mr Graeme Head AO, Commissioner

Tuesday, 13 October 2020

via teleconference

People with Disability Australia

- Ms Romola Hollywood, Director Policy and Advocacy

Intellectual Disability Rights Service

- Mr Tim Chate, Solicitor

Physical Disability Australia

- Mr Simon Burchill, Manager

National Disability Services

- Mr David Moody, Chief Executive Officer
- Ms Philippa Anglely, Head of Policy

Connectability Australia

- Mr David Carey, Chief Executive Officer
- Ms Donna Vallette, Compliance and Quality Manager

Tuesday, 17 November 2020

via videoconference and teleconference

Ms Georgi Hadden, Private capacity

Australian Federation of Disability Organisations

- Mr Ross Joyce, Chief Executive Officer
- Mr Patrick McGee, National Manager – Policy, Advocacy & Research

Autism Spectrum Australia

- Ms Rachel Kerslake, Executive Manager – Individual and Community Services
- Ms Karen Dhu, Manager – Quality
- Ms Jessica Degrassi, PBS, Active Support & Safeguarding Manager, Individual & Community Services

Stride Mental Health

- Mrs Juliet Middleton, General Manager – Service Delivery

Thursday, 20 May 2021

Main Committee Room

Parliament House

Canberra

(and via teleconference/videoconference)

Australian Federation of Disability Organisations

- Mr Patrick McGee, National Manager - Systemic Advocacy, Insight and Research

Office of the Public Advocate (Victoria)

- Dr Colleen Pearce, Public Advocate

VALID

- Ms Emily Piggott, Advocacy Coordinator

Northern Territory Legal Aid Commission

- Mr Russell Goldflam, Policy Officer

Equality Lawyers

- Ms Natalie Wade, Founder and Principal Lawyer

Villamanta Disability Rights Legal Service

- Ms Naomi Anderson, Lawyer

Forensicare

- Dr Danny Sullivan, Executive Director of Clinical Services

Dr Astrid Birgden, Private capacity

NDIS Quality and Safeguards Commission

- Mr Graeme Head, Commissioner AO
- Ms Samantha Taylor, Registrar