



Our ref: DHS/20/05703  
Your ref: 8165952

Ms Nat Cook MP  
Member for Hurtle Vale  
PO Box 158  
WOODCROFT SA 5162

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Riverside Building  
North Terrace  
Adelaide SA 5000

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Sent by email: [shadowhumanservices@parliament.sa.gov.au](mailto:shadowhumanservices@parliament.sa.gov.au)

Dear Ms Cook

I refer to your application under the *Freedom of Information Act 1991* (the Act), received by the Department of Human Services (DHS) on 20 May 2020 seeking access to:

*Since 19 March 2018, copies of any and all documents (including but not limited to physical, electronic or written briefs, internal discussion papers, minutes, emails, diary entries, and any other correspondence) from the Principal Community Visitor or Department of Human Services to Minister Lensink, her staff and/or the Premier relating to the Community Visitor Scheme's powers.*

Unfortunately, DHS was unable to make a determination on your application within the 30 days, therefore it is considered to be a 'deemed refusal' under section 19(2)(b) of the Act. However, DHS has continued to process your application outside of this timeframe. Section 19(2)(a) of the Act provides that an agency can release documents outside of the thirty-day timeframe, and this is still taken to be a determination under the Act.

### Determination

Nineteen documents were located that fit within the scope of your request and I have determined as follows:

- three documents are to be released in full
- eight documents are to be released in part, and
- access is refused to eight documents.

Please find enclosed a copy of the documents released, and a document schedule containing a brief description of each document and determination in summary form.

### Released in full

Documents 7, 16 and 18 contain no exempt material and are being released in full.

### Released in part

Documents 5, 6, 15 and 17 contain the mobile phone numbers of staff, personal information that I consider would be unreasonable to disclose and have determined to be exempt under clause 6(1) of Schedule 1 of the Act.

Document 8 contains information that would disclose deliberations of Cabinet and I have determined this information to be exempt under clause 1(1)(e) of Schedule 1 of the Act.

In accordance with section 20(4), I am releasing these documents to you in part after exempt information has been removed. Information not relevant to your application has also been removed from documents 8, 9, 11, 15 and 19.

### Refused in full

The release of documents 1 – 4 and 10 would infringe the privilege of Parliament; I have determined these to be exempt under clause 17(c) of Schedule 1 of the Act.

Documents 13 and 14 relate to the Community Visitor Schemes Review conducted by the Department of Social Services for the Disability Reform Council, Council of Australian Governments. These documents were distributed confidentially by the Disability Reform Council Secretariat to all states and territories, and contain information relating to, and provided by, those states and territories. The release of these documents would not only divulge confidential intergovernmental information but could also reasonably be expected to damage intergovernmental relations between DHS and the Commonwealth, and between DHS and other states territories.

I acknowledge that there are public interest factors favouring disclosure of this report including the meeting of the objective of general objects of the Act (openness and transparency) and enhancing public participation in government process. However, I consider that the public interest in ensuring both the efficient operation of government and that established confidential communication practices can continue carry the greater weight. I have therefore determined the documents to be exempt pursuant to clause 5(1)(a)(i) and (ii) of Schedule 1 of the Act.

Document 12 is publicly available on the Department for Social Services website and I have therefore refused access to this document in accordance with section 20(1)(b) of the Act.

## **Exemption clauses**

### Clause 1 – Cabinet documents

(1) *A document is an exempt document –*

...

(e) *if it contains matter the disclosure of which would disclose information concerning any deliberation or decision of Cabinet*

Clause 5 – Documents affecting inter-governmental or local governmental relations

- (1) A document is an exempt document if it contains matter—
- (a) the disclosure of which—
    - (i) could reasonably be expected to cause damage to intergovernmental relations; or
    - (ii) would divulge information from a confidential intergovernmental communication; and
  - (b) the disclosure of which would, on balance, be contrary to the public interest.

Clause 6 – Documents affecting personal affairs

- (1) A document is an exempt document if it contains matter the disclosure of which would involve the unreasonable disclosure of information concerning the personal affairs of any person (living or dead).

If you are dissatisfied with my determination, you can seek an internal review by writing to the Chief Executive, DHS, as the Principal Officer of the agency. Your request should be sent within 30 days of your receipt of this letter.

In accordance with the requirements of Premier and Cabinet Circular PC045, details of your FOI application, and the documents to which you are given access, will be published on the agency's disclosure log. A copy of PC045 can be found at <http://dpc.sa.gov.au/what-we-do/services-for-government/premier-and-cabinet-circulars>.

If you have any questions in relation to this matter, please contact Fiona Braendler, Senior FOI Officer, on telephone 8413 9094 or by email at [DHSFreedomofInformation@sa.gov.au](mailto:DHSFreedomofInformation@sa.gov.au). If you disagree with publication, you will need to advise the Senior FOI Officer within two weeks of the date of this determination.

Yours sincerely



Sally McInnes  
**ACCREDITED FOI OFFICER**

1 / 9 / 2020



### SCHEDULE OF DOCUMENTS – DHS/20/05703

Freedom of information application from Nat Cook MP seeking access to:

Since 19 March 2018, copies of any and all documents (including but not limited to physical, electronic or written briefs, internal discussion papers, minutes, emails, diary entries, and any other correspondence) from the Principal Community Visitor or Department of Human Services to Minister Lensink, her staff and/or the Premier relating to the Community Visitor Scheme's powers.

No	Author	Addressee	Date	Description of document	Determination	Exemptions
1.	Strategy and Partnerships, NDIS Reform		25/10/2018	Parliamentary Briefing Note – Community Visitor Scheme – Disability	Refused in full	Clause 17(c) – Parliamentary privilege
2.	Strategy and Partnerships, NDIS Reform		21/01/2019	Parliamentary Briefing Note – Community Visitor Scheme – Disability	Refused in full	Clause 17(c) – Parliamentary privilege
3.	Strategy and Partnerships, Disability and Reform		10/04/2019	Parliamentary Briefing Note – Community Visitor Scheme – Disability	Refused in full	Clause 17(c) – Parliamentary privilege
4.	Strategy and Partnerships		23/05/2019	Parliamentary Briefing Note – Community Visitor Scheme – Disability	Refused in full	Clause 17(c) – Parliamentary privilege
5.	Maurice Corcoran, Principal Community Visitor	James Pratt, Adviser and Janette Hancock, Chief of Staff, Office of Minister for Human Services	27/05/2019	Email – Lauren Novak from the Advertiser phoned re changes to the CVS	Released in part	Clause 6(1) – personal affairs
6.	Nancy Rogers, Director, Office of the Chief Executive	Janette Hancock	29/05/2019	Email – Update on commitment by other State Governments to their respective community Visitor Schemes	Released in part	Clause 6(1) – personal affairs
7.				Attachment to document 6 – Community Visitor Schemes in other jurisdictions	Released in full	No exempt material
8.	Isabella Dow, Chief Strategy Officer, Strategy and Partnerships	Minister for Human Services	6/09/2019	Briefing – Correspondence from Delphine Stagg OAM, Chair SA Council on Intellectual Disabilities Inc	Released in part	Clause 1(1)(e) – deliberations of Cabinet Information not in scope removed
9.				Attachment to document 8 – Draft letter to Delphine Stagg	Released in part	Information not in scope removed
10.	Strategy and Partnerships, Disability and Reform		23/09/2019	Parliamentary Briefing Note – Community Visitor Scheme – Principal Community Visitor Annual Report 2018-19	Refused in full	Clause 17(c) – Parliamentary privilege

### SCHEDULE OF DOCUMENTS – DHS/20/05703

No	Author	Addressee	Date	Description of document	Determination	Exemptions
11.	Jo Tilbrook, Principal Project Officer, Disability and Reform Services	Minister for Human Services	12/12/2019	Briefing – Email from Disability Reform Council (DRC) Secretariat – Out-of-session Circulation of DRC Agenda Paper Relating to the Review of Community Visitor Schemes (Please note attachments 1, 2B, 2C and 3 are not in scope)	Released in part	Information not in scope removed
12.				Attachment 2A to document 11 – Independent Review of CVS – Final Report	Refused in full	Section 20(1)(b)
13.				Attachment 2A Part 2 to document 11 – Independent Review of CVS – Final Report Appendices	Refused in full	Clause 5(1)(a)(ii) – damage to intergovernmental relations
14.				Attachment 2D to document 11 – CVS Review – Summary of key stakeholder feedback	Refused in full	Clause 5(1)(a)(ii) – damage to intergovernmental relations
15.	Lois Boswell	Anne Gale, Principal Community Visitor cc Minister for Human Services	17/05/2020	Email – Community Visitor Scheme and NDIA provider conflicts of interest	Released in part	Clause 6(1) – personal affairs Information not in scope removed
16.	Lois Boswell	Minister for Human Services, Janette Hancock	19/05/2020	Email – CVS and private residents	Released in full	No exempt material
17.	Lois Boswell	Janette Hancock	20/05/2020	Email – Legal Advice regarding Community Visitors Scheme	Released in part	Clause 6(1) – personal affairs
18.				Attachment 1 to document 17 – Legal Advice	Released in full	No exempt material
19.				Attachment 2 to document 17 – draft briefing	Released in part	Information not in scope removed

**Braendler, Fiona (DHS)**

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**From:** Rogers, Nancy (DHS)  
**Sent:** Friday, 12 June 2020 3:00 PM  
**To:** DHS:Freedom of Information  
**Subject:** FW: Lauren Novak from the Advertiser phoned re changes to the CVS

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**From:** Corcoran, Maurice (DHS)  
**Sent:** Monday, 27 May 2019 1:38 PM  
**To:** Pratt, James (DHS) ; Hancock, Janette (DHS)  
**Cc:** Mitra, Gerrie (DHS) ; Rogers, Nancy (DHS)  
**Subject:** Lauren Novak from the Advertiser phoned re changes to the CVS

James,

I just received a call from Lauren Novak, she indicated that she been contacted from a community source about the changes to the CVS. She also said that she has spoken to the Minister Lensink's office (I assume you and/or Janette) re these changes and that they had confirmed that our Regulations under the DSA no longer enabled us to visit Disability NGOs and/or SRFs as individuals in these are funded via the NDIS. That they will now be subject to the NDIS Quality and Safeguards Commission (NDIS QSC) who have a range of quality checks such as audits, registration and complaints handling and will visit these if concerns are raised through a combination of these.

She said she wanted to confirm this directly with me and I was able to do this and explained the DSA was a funding Act but that there were also the coercive powers of unannounced visits and Right of entry that were in the Provider panel funding agreements between the State and NGOs and these are no longer in place. I did mention that the government and department were also exploring possible options of the CVS being able to visit those under guardianship to assist the Public Advocate but that this was just at a very early stage of exploring and there would need to be significant work undertaken to enable this to occur. She said that this had also been relayed via the Minister's office and asked how many are under the guardianship and I said that she should direct that question to the Public advocate but I thought it was around 640.

She asked me what was happening in other States and I explained that they were under different legislation and departments, e.g. the Public Advocate in Victoria where amendments were made to the Residential Tenancies Act, in NSW – the disability visitor scheme will report under the new Disability and Aging Commissioner and Qld under the Guardian and that they were all continuing and would be referring issues of concern to the NDIS QSC.

She asked me whether there was any difference between our CVS visits and the NDIS QSC and I suggested that, in my view we applied more Community Values and scrutiny such as how would you want this service to be for a loved one (a family member) and how would you want them communicated to or responded to by staff and we were proactive and trying to get to all houses rather than just those where concerns or information gathering suggests there could be a problem. However, the QSC is in the very early stages of operating and have significantly more resources than the CVS.

She asked about whether funding would be affected and I said that we are eagerly awaiting the budget.

She asked me how I felt about the change and I said that this has been difficult for us as we, our CVs and staff have committed an enormous amount of time and energy to the integrity of what we do over the past 6 years and families and clients have valued what we do as have the NGOs. We are hopeful that the CVS will continue to build upon this foundation in some form or another.


She did seem to have a good grasp of what has caused this change and the impact of this transitional phase. At no time did I pick up any concerns about trying to sensationalise this nor trying to discover individuals who may be affected.

Her words were to just put out to the public what is happening and why.  
She thinks it might be in tomorrow's or Wednesday's paper.

Regards Maurice-

MAURICE CORCORAN AM Principal Community Visitor

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1800 606 302 [maurice.corcoran@sa.gov.au](mailto:maurice.corcoran@sa.gov.au)   
[www.communityvisitorscheme.sa.gov.au](http://www.communityvisitorscheme.sa.gov.au)

South Australian  
Community Visitor Scheme  
GPO Box 292  
ADELAIDE SA 5001



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**Braendler, Fiona (DHS)**

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**From:** Rogers, Nancy (DHS)  
**Sent:** Friday, 12 June 2020 3:01 PM  
**To:** DHS:Freedom of Information  
**Subject:** FW: CONFIDENTIAL FW: Update on Commitment by other State Governments to their respective community Visitor Schemes  
**Attachments:** CVS jurisdictions.docx  
**Importance:** High

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**From:** Rogers, Nancy (DHS)  
**Sent:** Wednesday, 29 May 2019 2:45 PM  
**To:** Hancock, Janette (DHS)  
**Cc:** McGeachie, Michelle (DHS) ; Mitra, Gerrie (DHS) ; Boswell, Lois (DHS)  
**Subject:** FW: CONFIDENTIAL FW: Update on Commitment by other State Governments to their respective community Visitor Schemes  
**Importance:** High

Hi Janette

As discussed, here is the summary work that has been done to date about interstate CVS schemes. We can't comment on their interoperability with Commonwealth legislation, but I think for them all it is a question  
Regards

**Nancy Rogers**  
**Director, Office of the Chief Executive**  
**Department of Human Services**

Phone 841 38125  
Mobile Clause 6(1)



	NSW	VIC	ACT	QLD	NT
<b>Legislation</b>	<a href="#">Community Services (Complaints Reviews and Monitoring) Act 1993</a> <ul style="list-style-type: none"> <li>Part 2, Section 8</li> </ul>	<a href="#">Disability Act 2006</a> Also: <i>Mental Health Act; Supported Residential Services (Private Proprietors) Act</i>	<a href="#">Official Visitor Act 2012</a> <a href="#">Children and Young People Act 2008</a> <a href="#">Mental Health (Treatment and Care) Act 1994</a> <a href="#">Corrections Management Act 2007</a> <a href="#">Disability Services Act 1991</a> <a href="#">Housing Assistance Act 2007</a>	<a href="#">Public Guardian Act 2014</a> <ul style="list-style-type: none"> <li>Part 6</li> </ul>	<a href="#">Disability Services Act</a> <a href="#">Mental Health and Related Services Act</a>
<b>Scope</b>	(6) In this section: visitable service means: (a) an accommodation service where a person using the service is in the full-time care of the service provider, or (b) an assisted boarding house, or (c) a service prescribed by the regulations as a visitable service.	Disability accommodation services, supported residential services and mental health facilities	Visitable place includes: detention facilities; therapeutic protection places; places of care; a mental health facility; correctional centres and places outside correctional centres where detainees are directed to work or participate in activities; a place in a correctional centre where a detainee is receiving treatment or care for mental dysfunction or mental illness; a Territory operated disability accommodation for respite or long-term residential purposes; and a multiple occupancy supported accommodation facility for homeless people provided by an entity funded by the Territory.  Disability: accommodation services visitable place— (a) means accommodation provided to an entitled person for respite or long-term residential purposes; and (i) accommodation that is owned, rented or operated by a specialist disability service provider; and(ii) accommodation at which a specialist disability service provider provides a specialist disability service; and(iii) a residential aged-care facility that accommodates the entitled person	Visitable site means— [s 40] (a) an authorised mental health service under the Mental Health Act 2016 that provides inpatient services; or (b) the forensic disability service; or (c) a place, other than a private dwelling house, that is prescribed under a regulation  Consumer means— (a) for a visitable site that is an authorised mental health service under the Mental Health Act 2016—any person who lives or receives services at the visitable site; or (b) for a visitable site that is the forensic disability service—any person who lives or receives services at the visitable site; or (c) for another visitable site—an adult, with impaired capacity for a personal matter or a financial matter or with an impairment, who lives or receives services at the visitable site.	Mental health facilities  Disability: Secure care facilities:  Appropriate Places: residences for persons placed on a supervision order made by the Courts under the Criminal Code (other than Secure Care)  Other Residential Facilities: where a person with a disability may live and receive treatment and care, administered by the Department of Health
<b>Powers</b>	In carrying out their role, Official Community Visitors (OCV) may enter and inspect a visitable service at any reasonable time; talk privately with residents and staff at the visitable location; inspect any documents relating to the operation of the service	Div 7, 149 – visits to accommodation services: visit any premises at which a disability service provider is providing a residential service with or without any previous notice at the times and periods that the community visitor thinks fit.  Inspect any document/medical record/part of the premise; see any resident  <i>*Each Act gives the CVS the same powers for their respective services</i>	The official visitor may— (a) investigate the complaint; and(b) visit the place where the service is provided.(3) However, the official visitor may only visit a place mentioned in subsection (1)— (a) if the entitled person consents to the visit; and (b) at a reasonable time, unless the owner of, or entity operating, the place otherwise consents; and (c) either—(i) after giving the owner of, or entity operating, the place reasonable notice; or(ii) without giving notice if the official visitor reasonably believes that an entitled person at the place is at risk of harm	Do all things necessary or convenient to be done to perform the visitor's functions, including: visit without notice, require the production of information. Is subject to the direction of the Public Guardian in exercising powers	A community visitor may at any reasonable time (without notice) exercise the following powers: (a) enter a residential facility; (b) visit and communicate with residents of a residential facility; (c) inspect a residential facility and any documents relating to residents of the facility made or kept for this Act.
<b>Office</b>	The Ombudsman oversees and coordinates the scheme, but OCVs are independent.	Office of the Public Advocate	Public Trustee and Guardian	Public Guardian	Principal Community Visitor is also the Anti-Discrimination Commissioner
<b>Questions/comment</b>	NDIS funded services? Understand likely to move from Ombudsman to Disability and Ageing Commissioner	Funding confirmed Scope to remain the same		Funding confirmed	Scope to continue unchanged

19MDIS/0370




**Government of South Australia**  
Department of Human Services

**TO MINISTER FOR HUMAN SERVICES**

**RE: CORRESPONDENCE FROM DELPHINE STAGG OAM, CHAIR SA COUNCIL ON INTELLECTUAL DISABILITIES INC**

**Decision/action required by: N/A**

Recommendation	Response
1. That you approve and sign the attached correspondence to Delphine Stagg OAM	Approved / Not Approved / Noted

<b>Comments:</b> ..... ..... ..... ..... ..... ..... ..... .....	 Hon Michelle Lensink MLC 26 / 9 / 2019
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## PURPOSE

To provide a draft response letter to Delphine Stagg OAM, Chair of South Australian Council on Intellectual Disabilities Inc. (SACID), regarding her concerns about the Community Visitor Scheme (CVS) Out of scope

## KEY POINTS

- Ms Stagg expresses concern that the CVS will no longer visit services for people with disabilities in South Australia, other than those administered by DHS.

- Out of scope

## RISKS/SENSITIVITIES

The future role of the CVS is still subject to discussions between DHS, the Attorney-General's Department (AGD) and the Department for Health and Wellbeing (SA Health), as well as national developments.

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## DISCUSSION

Out of scope

In her letter to you dated 15 August 2019, Ms Stagg stresses the importance of the CVS and her concern that vulnerable South Australians will be left without an important safeguard. Ms Stagg is also concerned that the NDIS Quality and Safeguarding Commission does not do announced or unannounced visits, which was a function of the CVS.

Under legislation, the CVS role is limited to services either provided or funded by State Government. With the exception of Accommodation Services, which is provided by the State Government and funded through an in-kind arrangement between the State and Commonwealth Governments, all services for clients are now being funded by the Commonwealth Government through the NDIS.

As the CVS no longer has legislative authority to perform its role in relation to services funded and delivered through the NDIS, the future role and scope of the CVS is being considered by DHS, AGD and SA Health. Work had been undertaken to delegate powers from the Public Advocate to the Principal Community Visitor (PCV), to extend the role of the Community Visitor to include visiting people under the guardianship of the Public Advocate who receive services funded through the NDIS, however this is on hold given the resignation of the PCV. Broader consideration will now be given to the role of the PCV.

Additionally, the Commonwealth coordinated a national review of community visitor schemes. The final report will be presented to the Disability Reform Council at a date yet to be determined. DHS is continuing to advocate for national consistency in approaches to quality and safeguarding, including community visitor schemes.

The NDIS Quality and Safeguards Commission is now legally responsible for the quality and safety of NDIS funded services and the safeguarding of NDIS participants. The role and approach of the Quality and Safeguards Commission is continuing to evolve and clarify.

DHS will continue to work with AGD and SA Health on the future role of CVS, and the appropriate legislative arrangements, including consideration of the broader issues of advocacy for vulnerable adults and statutory responsibilities in this space.

Clause 1(1)(e) - Cabinet

As an immediate action, given the resignation of the current Principal Community Visitor Mr Maurice Corcoran, the Minister for Health and Wellbeing will be appointing Ms Anne Gale, the Public Advocate, as acting Principal Community Visitor from 14 September until such time as a Principal Community Visitor is appointed.

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Out of scope

**BUDGET**

Is there a budget impact

No

**Disability and Reform****Director**

Michelle McGeachie


 3.9.19  
 signature
**A/Group Executive Director**

Nick Ashley


 4.9.19  
 signature
**A/Chief Executive**

Lois Boswell


 6.9.19  
 signature
**ATTACHMENTS**

1. Draft letter to Delphine Stagg OAM

**Contact Officer:**
 Isabella Dow, Chief Strategy Officer, Strategy and Partnerships  
 8425 4281 / isabella.dow@sa.gov.au

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**Government  
of South Australia**  
Minister for Human Services

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Adelaide SA 5001  
DX 115  
Tel 08 8463 6560  
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19MDIS/0370

Ms Delphine Stagg OAM  
South Australian Council on Intellectual Disability  
302 South Road  
HILTON SA 5033

Dear Ms Stagg

Thank you for your letter regarding the Community Visitor Scheme (CVS).

I appreciate your concern that vulnerable South Australians should be appropriately safeguarded. Under legislation, the CVS's role in disability is limited to services either provided or funded by State Government. As services are now being funded through the National Disability Insurance Scheme (NDIS), the CVS no longer has legislative authority to perform its functions beyond the department's Accommodation Services. The State Government is actively considering the future role of the CVS. This involves working through complex legislative and governance arrangements, at a State and Commonwealth level.

As you would know, the NDIS Quality and Safeguards Commission is now legally responsible for the quality and safety of NDIS funded services and the safeguarding of NDIS participants. The Commission's role is continuing to evolve and clarify, and the State Government is liaising with the Commission during this time of transition. Additionally, the Commonwealth Government has coordinated a national review of community visitor schemes and a final report is expected later this year. The State Government continues to advocate for national consistency in approaches to quality and safeguarding, including community visitor schemes.

Out of scope

A large rectangular area of the document is redacted with a solid grey block, covering several lines of text.

Yours sincerely

**Hon Michelle Lensink MLC**  
MINISTER FOR HUMAN SERVICES

/ / 2019





19MDIS/0544



**Government of South Australia**  
Department of Human Services


**TO MINISTER FOR HUMAN SERVICES**

**RE: EMAIL FROM DISABILITY REFORM COUNCIL (DRC) SECRETARIAT – OUT-OF-SESSION CIRCULATION OF DRC AGENDA PAPER RELATING TO THE REVIEW OF COMMUNITY VISITOR SCHEMES**

**Decision/action required by: 20 / 12 / 2019**

**Reason:** Response due to DRC Secretariat

Recommendation	Response
1. That you note the information in the briefing.	Approved / Not Approved / <u>Noted</u>
2. That you provide the proposed response to the Disability Reform Council Secretariat regarding the Review of the Community Visitor Scheme.	<u>Approved</u> / Not Approved / Noted

Comments:	
..... ..... ..... ..... ..... ..... ..... .....	 <b>Hon Michelle Lensink MLC</b> 10 / 1 / 2019 2020

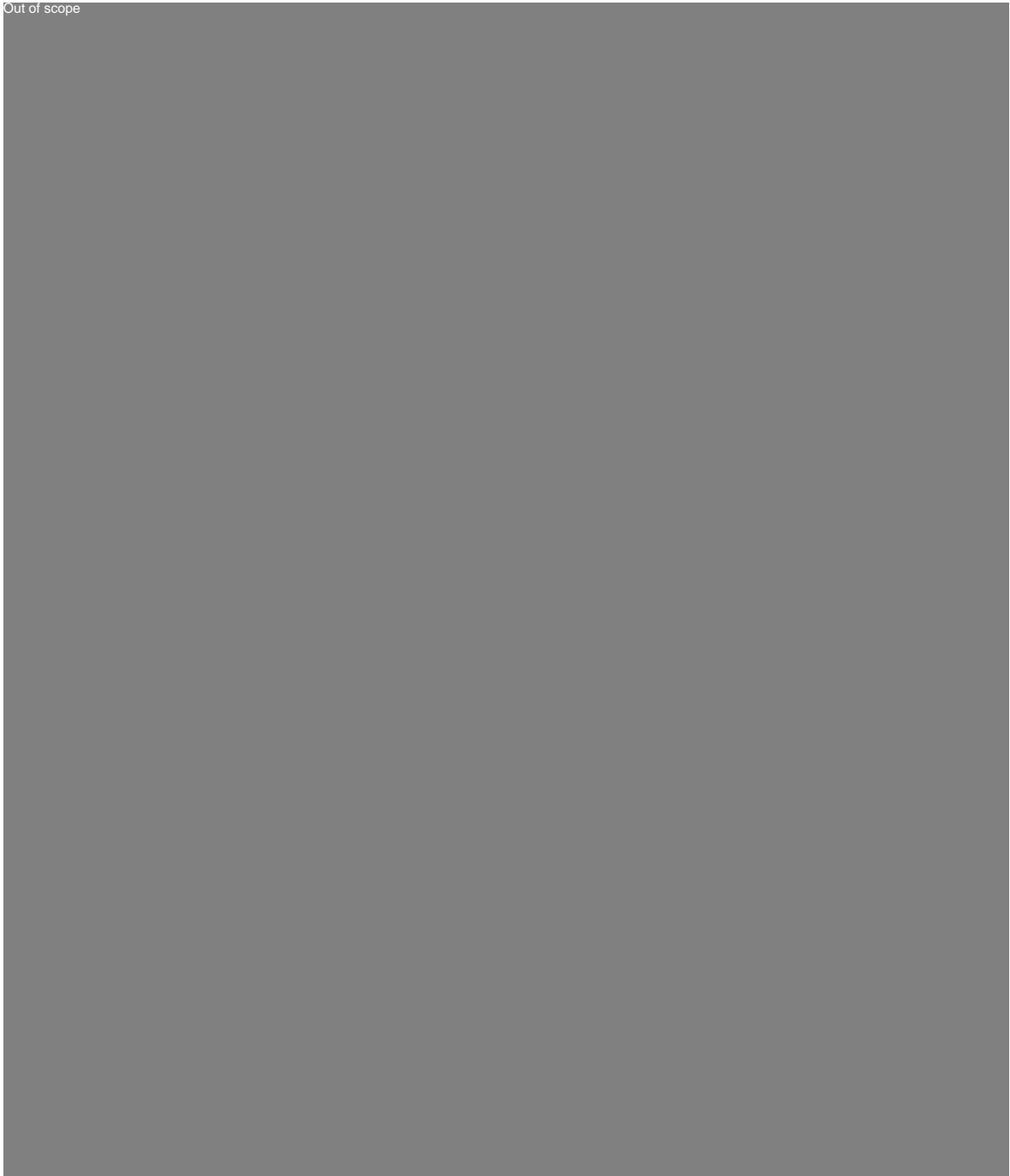
Out of scope

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Page 1

Out of scope



The legal structure of CVSs differ in each state and territory. In some other jurisdictions, the Disability CVS already has extensive legal powers, and the interoperability of these powers with Commonwealth legislation relating to the NDIS is a matter for each jurisdiction to determine.

DHS has received Crown advice which indicates significant risk that any State legislation purporting to create a Disability CVS with coercive powers to enter properties operated by registered NDIS providers would be inconsistent with the NDIS Act and invalid.

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As you have previously been advised, under existing South Australian legislation, the Disability CVS now only has functions in relation to DHS Accommodation Services.

Out of scope

Recently, the role of the CVS was extended (via instruments of delegation) to include visiting the approximately 550 people under the guardianship of the Public Advocate who receive services funded through the NDIS. This means vulnerable people will continue to have important safeguards in place.

The CVS in SA will continue to have important legislative responsibilities relating to mental health, and also visiting people with disability under delegation from the Public Advocate.

Out of scope

## BUDGET

Are there financial implications

No

<b>Division</b>	Disability and Reform Services		
<b>Director Strategy and Partnerships</b>	Michelle McGeachie	...../...../.....	<b>signature</b>
<b>Group Executive Director</b>	Gerrie Mitra	...../...../.....	<b>signature</b>
<b>Chief Executive</b>	Tony Harrison	...../...../.....	<b>signature</b> <b>date</b>

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## ATTACHMENTS

1. Draft letter to the DRC Secretariat.
2. DRC OOS Paper.
  - 2 A - Independent Review of CVS Final Report.
  - 2 A - Part 2 Independent Review of CVS - Final Report Appendices.
  - 2 B - CVS Review - Proposed Responses and Action Plan.
  - 2 C - CVS Review - Stakeholders who received the Final Report.
  - 2 D - CVS Review - Summary of key stakeholder feedback.
3. Request from the DRC Secretariat

<b>Contact Officer:</b>	Jo Tilbrook, Principal Project Officer 8415 4273 / <a href="mailto:Jo.Tilbrook@sa.gov.au">Jo.Tilbrook@sa.gov.au</a>
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**Braendler, Fiona (DHS)**

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**From:** Boswell, Lois (DHS)  
**Sent:** Sunday, 17 May 2020 5:02 PM  
**To:** Gale, Anne (AGD)  
**Cc:** Michelle.Lensink@parliament.sa.gov.au; Kilvert, Adam (AGD); Caudrey, David (AGD); Carney, Jodeen (AGD)  
**Subject:** Re: Community Visitor Scheme and NDIA provider conflicts of interest

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

Thanks Anne and David  
 These are all good points and similar to our thinking as well  
 Lois

**Lois Boswell**  
**Deputy Chief Executive**  
 Department of Human Services  
 Riverside Centre, North Tce, Adelaide  
 Ph: (08) 841 54306 Mob : [REDACTED] [lois.boswell@sa.gov.au](mailto:lois.boswell@sa.gov.au)  
 Sent from my iPhone

On 17 May 2020, at 4:24 pm, Gale, Anne (AGD) wrote:

Hi all  
 David has put together some comments below and I can confirm that the CVS only visits Mental Health treatment centres and state funded disability services (now that is DHS Disability Accommodation Services). We have commenced visiting Public Advocate clients also. The CVS doesn't visit private homes. If a person sought to see the Community Visitor in their home and invited them, then that could be arranged but private homes are not part of scheduled visits.

Out of scope

[REDACTED]

Regards, Anne  
 Anne Gale

Public Advocate  
 Office of the Public Advocate  
 Level 8 Chesser House  
 95 Grenfell Street, Adelaide, SA 5000

t 08 8342 8200 f 08 8342 8250  
[anne.gale@sa.gov.au](mailto:anne.gale@sa.gov.au)

[www.opa.sa.gov.au](http://www.opa.sa.gov.au) | GPO Box 464, Adelaide, SA 5001



---

**From:** Caudrey, David (AGD)


**Sent:** Sunday, 17 May 2020 1:28 PM

**To:** Gale, Anne (AGD)

**Subject:** RE: Community Visitor Scheme and NDIA provider conflicts of interest


Hello Anne,

Out of scope

A large rectangular area of the email body is redacted with a solid grey block.

Fourth, the CVS has never visited people in their own homes. The proposition that the CVS visit all grouped arrangements (grouped accommodation and day programs) with a focus on use of restrictive practices has merit as an additional safeguard. To this can be added a focus on abuse and neglect. To extend to visiting people in their own homes has merit but needs to be carefully considered. It would need to be an option that can be exercised by the individual (i.e. inviting the community visitor into their home). Where the person is under guardianship then the guardian could give consent for this to happen.

Out of scope

A large rectangular area of the email body is redacted with a solid grey block.

These are my first thoughts.

Cheers,

David

---

**From:** Boswell, Lois (DHS) <[Lois.Boswell@sa.gov.au](mailto:Lois.Boswell@sa.gov.au)>

**Sent:** Sunday, 17 May 2020 11:10 AM

**To:** Lensink, Michelle <[Michelle.Lensink@parliament.sa.gov.au](mailto:Michelle.Lensink@parliament.sa.gov.au)>

**Cc:** DHS:Minister for Human Services <[DHSMinisterforHumanServices@sa.gov.au](mailto:DHSMinisterforHumanServices@sa.gov.au)>; Caudrey, David (AGD) <[David.Caudrey@sa.gov.au](mailto:David.Caudrey@sa.gov.au)>; Mitra, Gerrie (DHS) <[Gerrie.Mitra@sa.gov.au](mailto:Gerrie.Mitra@sa.gov.au)>; Hancock, Janette (DHS) <[Janette.Hancock@sa.gov.au](mailto:Janette.Hancock@sa.gov.au)>; Maddeford, Selena (DHS) <[Selena.Maddeford@sa.gov.au](mailto:Selena.Maddeford@sa.gov.au)>

**Subject:** Re: Community Visitor Scheme and NDIA provider conflicts of interest

Thank you - will do

**Lois Boswell**

**Acting Chief Executive**

Department of Human Services

Riverside Centre, North Tce, Adelaide

Ph: (08) 841 54306 Mob: [REDACTED] Clause 6(1)

[lois.boswell@sa.gov.au](mailto:lois.boswell@sa.gov.au)

Sent from my iPhone

On 17 May 2020, at 10:36 am, Lensink, Michelle  
<[Michelle.Lensink@parliament.sa.gov.au](mailto:Michelle.Lensink@parliament.sa.gov.au)> wrote:

Hi Everyone,

I would appreciate advice on Sam's suggestions. Clearly it would require changes from the Commonwealth as well.

David – would you mind forwarding to Ann pls as I don't know if I have the correct email for her on this system.

With best wishes, Michelle Lensink

---

**From:** Sam Paor | The Growing Space <[Sam@thegrowingspace.com.au](mailto:Sam@thegrowingspace.com.au)>

**Sent:** Friday, 15 May 2020 7:51 PM

**To:** Lensink, Michelle <[Michelle.Lensink@parliament.sa.gov.au](mailto:Michelle.Lensink@parliament.sa.gov.au)>

**Subject:** Community Visitor Scheme and NDIA provider conflicts of interest

Dear Minister Lensink,

In light of the tragic and needless recent death of Ann Smith here in South Australia, I'm writing to urge your support to

a) reinstate (and expand) the Community Visitor scheme for South Australia to any home of a person with an NDIS plan with more than a certain amount of hours of funded core supports, and who has been flagged as having certain vulnerabilities.

Out of scope

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

There are so many systemic changes needed here, but community visitors with expanded reach and reinstatement in serving disabled people needs to be very high on the government's agenda.

Out of scope

[REDACTED]

Thank you,

Cheers,  
--Sam

Clause 6(1)

[Sam@thegrowingspace.com.au](mailto:Sam@thegrowingspace.com.au)

[TheGrowingSpace.com.au](http://TheGrowingSpace.com.au) 1300 4769 77 (1300 GROW SP)

[Facebook.com/TheGrowingSpaceAustralia](https://Facebook.com/TheGrowingSpaceAustralia)

FREE: SA Health COVID19 Mental Health Hotline 8am-8pm every day ph: 1800 632 753

FREE: Daily Check-in phone calls from the Red Cross - ph: 1800 188 071 to register

FREE: COVID-19 resources in Easy English and more for disabled people and families at [TheGrowingSpace.com.au/covid19](http://TheGrowingSpace.com.au/covid19)

NDIS Plan CORE support funding can now be used for Support Coordination needs, even if there's no Support Coordination in the plan.

Our website has loads of useful NDIS info at

[www.TheGrowingSpace.com.au/library](http://www.TheGrowingSpace.com.au/library) (subscription can usually be claimed from NDIS plans)

ABN: 83125164114

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**Braendler, Fiona (DHS)**

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**From:** Boswell, Lois (DHS)  
**Sent:** Tuesday, 19 May 2020 9:55 AM  
**To:** Lensink, Michelle (DHS); Hancock, Janette (DHS)  
**Subject:** FW: CVS and private residents

FYI

**From:** Rana, Leanne (DHS) <[Leanne.Rana2@sa.gov.au](mailto:Leanne.Rana2@sa.gov.au)>  
**Sent:** Tuesday, 19 May 2020 9:21 AM  
**To:** Gale, Anne (AGD) <[Anne.Gale@sa.gov.au](mailto:Anne.Gale@sa.gov.au)>  
**Subject:** RE: CVS and private residents  
**Importance:** High

Hi again Anne.....further to my email below, I have checked with Kate and Michelle and they are both also of the understanding that the CVS has only ever visited disability accommodation sites within the NGO and government sector.

Kind regards,  
 Leanne

LEANNE RANA **CVS Coordinator / Projects | A/Office Manager**

☎ 1800 606 302 ✉ [leanne.rana2@sa.gov.au](mailto:leanne.rana2@sa.gov.au) 🌐 [www.communityvisitorscheme.sa.gov.au](http://www.communityvisitorscheme.sa.gov.au)

South Australian  
 Community Visitor Scheme  
 Level 7, 108 North Terrace  
 GPO Box 292  
 ADELAIDE SA 5001



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**From:** Rana, Leanne (DHS)  
**Sent:** Tuesday, 19 May 2020 9:17 AM  
**To:** Gale, Anne (AGD) <[Anne.Gale@sa.gov.au](mailto:Anne.Gale@sa.gov.au)>  
**Subject:** RE: CVS and private residents  
**Importance:** High

Good morning Anne,

The CVS has never had scope to go into 'private homes' as far as I know.

The CVS has done visits in the past to clients who rent/lease homes from NGO's, as well as those in state-run disability homes. SRF's and Day Option programs were also visited by CVS up until May 2019.

Since the inception of visits to OPA clients, this has allowed CVS to potentially go into 'private homes', however since visits began to OPA clients in November 2019, the CVS has not conducted any visits to clients in private homes. The visits to OPA clients were in homes where service providers were either NGO's or Disability SA accommodation. With the cessation of visits due to COVID-19, this has remained the same ie no CVS visits to private homes.

I am currently checking with Michelle and Kate to see if they have any further information.

Kind regards,  
Leanne

LEANNE RANA CVS Coordinator / Projects | A/Office Manager

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1800 606 302 [leanne.rana2@sa.gov.au](mailto:leanne.rana2@sa.gov.au) [www.communityvisitorscheme.sa.gov.au](http://www.communityvisitorscheme.sa.gov.au)

South Australian  
Community Visitor Scheme  
Level 7, 108 North Terrace  
GPO Box 292  
ADELAIDE SA 5001



---

**From:** Gale, Anne (AGD) <[Anne.Gale@sa.gov.au](mailto:Anne.Gale@sa.gov.au)>  
**Sent:** Tuesday, 19 May 2020 8:53 AM  
**To:** Rana, Leanne (DHS) <[Leanne.Rana2@sa.gov.au](mailto:Leanne.Rana2@sa.gov.au)>  
**Subject:** CVS and private residents

Hi Leanne

Can you advise how many visits CVS has done to private homes in recent years as soon as possible. Thanks Anne

ANNE GALE Acting Principal Community Visitor

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1800 606 302 [anne.gale@sa.gov.au](mailto:anne.gale@sa.gov.au) [www.communityvisitorscheme.sa.gov.au](http://www.communityvisitorscheme.sa.gov.au)

South Australian  
Community Visitor Scheme  
GPO Box 292  
ADELAIDE SA 5001



**Braendler, Fiona (DHS)**

---

**From:** Boswell, Lois (DHS)  
**Sent:** Wednesday, 20 May 2020 11:38 AM  
**To:** Hancock, Janette (DHS)  
**Subject:** FW: Legal Advice regarding Community Visitors Scheme  
**Attachments:** Att\_1 Advice to DCSI (A18825337).pdf; 18TDHS 344 brief\_final (A18806565).docx

March 2018 advice

**Ms Lois Boswell** *LLB MAppSci GAICD*

**Acting Chief Executive**

Department of Human Services | Government of South Australia  
 Level 8 Riverside Centre, North Terrace, Adelaide SA 5000 |  
 GPO Box 292, Adelaide SA 5001  
 Ph: (08) 841 54306 Mob : [REDACTED] | [lois.boswell@sa.gov.au](mailto:lois.boswell@sa.gov.au)

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**From:** Rogers, Nancy (DHS)  
**Sent:** Sunday, 17 May 2020 3:50 PM  
**To:** Boswell, Lois (DHS)  
**Subject:** FW: Legal Advice regarding Community Visitors Scheme

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**From:** Bouyer, Cassandra (DHS) <[Cassandra.Bouyer@sa.gov.au](mailto:Cassandra.Bouyer@sa.gov.au)>  
**Sent:** Thursday, 7 June 2018 8:53 AM  
**To:** Boswell, Lois (DHS) <[Lois.Boswell@sa.gov.au](mailto:Lois.Boswell@sa.gov.au)>; Nowak, Zofia (DHS) <[Zofia.Nowak@sa.gov.au](mailto:Zofia.Nowak@sa.gov.au)>  
**Cc:** Ashley, Nick (DHS) <[Nick.Ashley@sa.gov.au](mailto:Nick.Ashley@sa.gov.au)>; Bull2, Peter (DHS) <[Peter.Bull@sa.gov.au](mailto:Peter.Bull@sa.gov.au)>; Rogers, Nancy (DHS) <[Nancy.Rogers@sa.gov.au](mailto:Nancy.Rogers@sa.gov.au)>  
**Subject:** RE: Legal Advice regarding Community Visitors Scheme

Good Morning Lois,

Please find legal advice and summary brief attached. Let me know if I can provide anything further.

Kind Regards

Cassie Bouyer

Manager, Market and Mainstream Interface

NDIS Implementation

NDIS Reform Division | Department of Human Services | Ph: (08) 8413 9057 | Disability SA PO Box 70 Rundle Mall, Adelaide SA 5000 |

I acknowledge the Kaurna people as the traditional custodians of the Adelaide Plains area where I live and work, and respect their spiritual relationship with country.



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**From:** Boswell, Lois (DHS)  
**Sent:** Wednesday, 6 June 2018 6:32 PM  
**To:** Nowak, Zofia (DHS)  
**Cc:** Bouyer, Cassandra (DHS); Ashley, Nick (DHS); Bull2, Peter (DHS); Rogers, Nancy (DHS)  
**Subject:** Legal Advice regarding Community Visitors Scheme

Hi Zofia

Could you please provide me with a copy of the legal advice about the Community Visitor Scheme  
The Minister has told the PCV that we have legal advice that the CVS model does not operate easily under the NDIS  
and she has asked me to talk to him about it.

Thank you

Lois

**Ms Lois Boswell** LLB MAppSci GAICD

**Deputy Chief Executive**

Department of Human Services | Government of South Australia

Level 8 Riverside Centre, North Terrace, Adelaide SA 5000 | GPO Box 292, Adelaide SA 5001

Ph: (08) 841 54306 Mob: [REDACTED] | [lois.boswell@sa.gov.au](mailto:lois.boswell@sa.gov.au)



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If calling please ask for:  
**Matthew Boisseau**

Telephone:  
**08 8207 1670**

Our Reference:  
CSO:M00170691FS06701576

Your Reference:  
OPC.DIS.CVS.002

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Adelaide SA 5001  
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Tel 08 8207 1510  
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14 March 2018

Ms Cassandra Bouyer  
Manager, Complex Needs and Safeguards, NDIS Implementation  
Department for Communities and Social Inclusion  
GPO Box 292  
ADELAIDE SA 5001

**By email: [cassandra.bouyer@sa.gov.au](mailto:cassandra.bouyer@sa.gov.au)**

Dear Ms Bouyer

**Re: Continuation of Community Visitor Scheme Under NDIS**

1. You have asked whether there is any constitutional or other legal barrier to the State legislating for a continuation of the Community Visitor Scheme currently established under the *Disability Services (Community Visitor Scheme) Regulations 2013* (SA) ("**the DSCVS Regulations**") to the *Disability Services Act 1993* (SA) ("**the DS Act**") following the commencement on 1 July 2018 of the *NDIS Amendment (Quality and Safeguards Commission and Other Measures) Bill 2017* (Cth) ("**the NDIS Safeguards Commission Bill**").

### **Summary of Advice**

2. In my view, following the commencement of the NDIS Safeguards Commission Bill on 1 July 2018, there is a significant risk that State legislation purporting to create a Community Visitors Scheme with coercive powers to enter properties operated by registered NDIS providers would be inconsistent with the NDIS Act and invalid.

### **The Community Visitor Scheme - existing legislation**

3. The position of the Principal Community Visitor and the other Community Visitors are established by Part 8 of the *Mental Health Act 2009* ("**the MH Act**"). That Part contains provisions aimed at protecting the rights of people with mental illness. To that end, the community visitors inspect treatment centres, refer matters of concern relating to the organisation or the delivery of mental health services to appropriate authorities and act as advocates for people with mental illness.
4. In the performance of their functions under the MH Act, community visitors may exercise coercive powers conferred by that Act and, as they have the status as inspectors under the *Health Care Act 2008*, by s88 of the latter Act. Those powers

include the power to enter the premises of treatment centres and, while on the premises, to:

- inspect the premises or any equipment or other thing on the premises;
  - require any person to produce any documents or records; and
  - examine any documents or records and take extracts from, or make copies of, any of them.
5. The community visitor scheme has been extended to “disability accommodation premises” and “day options program premises” by the DSCVS Regulations, which confer additional functions on community visitors in respect of residents (being people with disabilities residing at disability accommodation premises or receiving services at day options program premises). Disability accommodation premises are “*any premises at which a disability services provider is providing accommodation services to persons with disabilities*”.
  6. A day options program premises is a premises (not being a person’s residence) at which a daytime program is provided to a person with a disability for the purposes of developing life-skills, further learning or recreation.
  7. The functions conferred on community visitors under the DSCVS Regulations are
    - a. the *visiting* of these two types of premises to *inquire* into various matters including the appropriateness of the premises, whether the services are being provided in accordance with the Act, any cases of abuse or neglect, and any complaints made by an eligible person;
    - b. referring any matters of concern to the Minister; and
    - c. acting as an advocate for residents and persons attending day options programs.
  8. However, community visitors exercising their functions under the DSCVS Regulations in respect of disability accommodation premises do **not** have any coercive powers to, for example, enter premises, inspect documents or ask questions. They cannot use their powers under the MH Act or *Health Care Act 2008* in discharging their functions under the DSCVS Regulations.
  9. You have instructed that the success of the current Community Visitor Scheme operating under the DSCVS Regulations is dependent upon the terms of funding agreements between providers and the State. You have instructed that these funding agreements contain terms that providers will cooperate with community visitors and permit them access to premises, staff and documents as required.
  10. Under the NDIS, these contractual obligations on providers no longer exist. Any workable scheme for continuing the Community Visitor Scheme under the NDIS would require that community visitors be given comparable powers in respect of disability accommodation premises and day options premises as they currently have in respect of treatment centres under the MH Act. The advice that follows will address the question whether the South Australian Parliament would have the power to establish a Community Visitor Scheme under the NDIS that gave coercive powers

to community visitors to enter disability accommodation premises and day options premises.

**Does the South Australian Parliament have power to legislate to establish a Community Visitor Scheme under the NDIS?**

11. The primary barrier to the South Australian Parliament legislating to establish a Community Visitor Scheme operating following the commencement of the NDIS Safeguards Commission Bill is the risk that any State legislation would be invalid due to *inconsistency* with the NDIS Act.
12. The South Australian Parliament has plenary legislative power, subject to the limitations imposed by the *Commonwealth Constitution*.
13. One such limitation is s109 of the *Commonwealth Constitution*, which provides that:

**109 Inconsistency of laws**

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

14. Section 109 provides a source for resolving conflict between Commonwealth and State laws, which is resolved by maintaining the primacy of Commonwealth law and invalidating the inconsistent State law.
15. The fundamental question in considering the potential application of section 109 is whether the State law operates so as to “*alter, impair or detract from*” the Commonwealth law.<sup>1</sup> The answer to that question requires consideration of the subject matter, scope and purpose of the two laws.<sup>2</sup>
16. While an inability to obey both laws simultaneously (a direct inconsistency) is one means by which a State law may be invalidated under s109, a State law will also be invalid if it tries to regulate a field which the Commonwealth law implicitly requires will be free from any other regulation. This is referred to as the Commonwealth law implicitly “covering the field” of permissible regulation in an area, to the exclusion of State law.<sup>3</sup>

**Relevant Commonwealth Law - the NDIS Safeguards Commission Bill**

*Subject matter, scope and purpose*

17. The *National Disability Insurance Scheme Act 2013* (Cth) (“**the NDIS Act**”) establishes the National Disability Insurance Scheme.

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<sup>1</sup> *Bell Group N.V. (In Liquidation) v State of Western Australia* [2016] HCA 21, [51] (the majority).

<sup>2</sup> *Western Australia v The Commonwealth (Native Title Act Case)* (1995) 183 CLR 373, 465 (majority).

<sup>3</sup> *Momcilovic v The Queen* (2011) 245 CLR 1, [244] (Gummow J).



18. A primary objective of the NDIS Act is to “facilitate the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability”.<sup>4</sup>
19. The NDIS is a market-based system whereby people with a disability will choose their own service providers. Government funding does not go directly to a service provider, but rather to the person with the disability. The relationship between a client and a disability service provider is a contractual one.<sup>5</sup>
20. The NDIS Safeguards Commission Bill, upon its commencement on 1 July 2018, will establish an NDIS Quality and Safeguards Commission. The Commission will be presided over by the Commissioner.
21. The Commissioner’s core functions include to “develop a nationally consistent approach to managing quality and safeguards for people with disability receiving supports or services, including those received under the National Disability Insurance Scheme”. The Commissioner has responsibility for:
  - a. receiving, processing and determining applications to be a registered NDIS provider;<sup>6</sup>
  - b. compliance, monitoring and investigation of breaches of the Act, and breaches of the NDIS Code of Conduct and NDIS Practice Standards;
  - c. managing the notification and management of reportable incidents;
  - d. the investigation, management, conciliation and resolution of complaints under the NDIS rules,<sup>7</sup> including “to build the capability of people with disability to pursue complaints in relation to the provision of supports or services by NDIS providers”<sup>8</sup>
22. The conditions under which a person is registered as a registered NDIS provider include requirements:
  - a. To comply with the NDIS Code of Conduct;<sup>9</sup>
  - b. To comply with the NDIS Practice Standards;
  - c. To comply with record-keeping requirements;
  - d. To maintain a complaints management and resolution system;

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<sup>4</sup> NDIS Act s 3(1)(f).

<sup>5</sup> I note that, at least to some degree, it appears that State regulators will have a role to play under the NDIS: one form of complaint mechanism available to a client who is unhappy with the services being provided by their disability service provider will be pursuant to the *Australian Consumer Law* that applies in each State and Territory and is enforced by State and Territory regulators such as Consumer and Business Services.

<sup>6</sup> NDIS Act s 73C

<sup>7</sup> NDIS Act s 181G

<sup>8</sup> NDIS Act s 181G(c)

<sup>9</sup> Breach of the NDIS Code of Conduct is also an offence: s 73V(3).

- e. To comply with the NDIS rules relating to complaints;
  - f. To maintain an incident management system;
  - g. To comply with the NDIS rules regarding incidents;
  - h. To provide the Commissioner any information specified in a request made by the Commissioner.<sup>10</sup>
23. The conditions include under s 73F(2)(a) a condition that the person “comply with all applicable requirements imposed by a law of the Commonwealth or a law of the State or Territory in which the person or entity operates as a registered NDIS provide”. In my view, this subsection does not contemplate that the State could impose a parallel regulatory framework for the purpose of regulating NDIS providers. The intention would be to ensure that a registered NDIS provider complies with State legislative requirements relating to, for example, appropriate use of restraints in patients. The question of whether specific State legislation is capable of operating concurrently with the Commonwealth NDIS Act is not answered by noting that a condition of registration is that providers comply with all State legislation. This condition must be read as requiring compliance with all *valid* State legislation.
24. The Commissioner is empowered to suspend registration,<sup>11</sup> and revoke registration<sup>12</sup> of a person as an NDIS provider where the person has contravened the NDIS Act, or the Commissioner is satisfied that they or their staff are no longer suitable to provide supports.
25. Division 8 of Part 3A of the NDIS Act will provide a range of investigatory and enforcement powers to inspectors and investigators appointed by the Commission. Inspectors and investigators will either be employees of the Commission, persons assisting the Commission (potentially including officers or employees of a State authority whose services have been made available to the Commissioner), and persons contractually engaged by the Commission.<sup>13</sup>
26. These investigatory and enforcement powers are found in the *Regulatory Powers (Standard Provisions) Act 2014* (Cth) (“**the RP Act**”), which is picked up and applied by the NDIS Act. The RP Act creates a uniform and comprehensive scheme of investigation and enforcement powers, with a distinction created between “monitoring powers” (powers whose purpose is to monitor whether the provisions of Part 3A have been complied with) that will be exercised by *inspectors* and “investigation powers” (powers whose purpose is to investigate a suspected breach of a civil penalty provision contained within Part 3A) that will be exercised by *investigators*.
27. An inspector will have the power to enter premises and exercise monitoring powers. However, an inspector can only enter premises if the occupier consents to the entry, or if the inspector obtains a *monitoring warrant*.<sup>14</sup> Once within the premises, an inspector has a range of general monitoring powers, including a power to search

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<sup>10</sup> NDIS Act s 73F(2)(i)

<sup>11</sup> NDIS Act s 73N.

<sup>12</sup> NDIS Act s 73O.

<sup>13</sup> NDIS Act s 181W

<sup>14</sup> RP Act s 18.

premises, observe activity conducting on premises, and inspect and copy documents.<sup>15</sup> If entry occurs with consent, an inspector also has power to ask questions of the occupier. Only if entering under a monitoring warrant, the inspector has the power to “require any person on the premises” to answer questions.<sup>16</sup>

28. A monitoring warrant can be obtained if an inspector applies to a Magistrate and satisfies the Magistrate that it is reasonably necessary to have access to the premises for the purpose of monitoring whether the provisions of Part 3A have been complied with.<sup>17</sup>
29. The details of the remaining provisions of the NDIS Act as it picks up the RP Act are of less relevance to the continuation of the Community Visitors Scheme. However, the overall effect of the legislation is to create a comprehensive regulatory scheme permitting investigators to gather evidence of suspected contraventions through the exercise of investigation powers, as well as providing the Commissioner with powers to issue compliance notices, banning notices and injunctions to require compliance with the terms of the NDIS Act. Entry to premises by investigators is also only permitted by consent or by warrant.
30. The NDIS Act does not deal directly with complaints, only requiring an NDIS provider to maintain a complaints management and resolution system complying with the requirements of the NDIS Rules. The details of the complaints management and resolution system, including the details of the Commissioner’s functions relating to the investigation, management, conciliation and resolution of complaints, and the “roles, rights and responsibilities of people with disability, complainants, NDIS providers and other persons in relation to the management and resolution of complaints” has been left to the NDIS Rules.<sup>18</sup>
31. Insofar as complaints are concerned, however, s 73ZA of the NDIS Act will protect certain disclosures about improper conduct by NDIS providers made by identified people to the Commissioner from civil or criminal liability. The persons whose disclosures are protected under s 73ZA(1) are listed as the staff of NDIS providers, and “a person with disability who is receiving a support or service from the NDIS provider, or a nominee, family member, carer or significant other of that person”. It is unlikely that a community visitor established under State legislation would fall within any of the defined categories.

*Provisions overriding, or providing for concurrent operation of State laws*

32. One factor relevant to determining the intention of the Commonwealth legislature as to whether its enactment is to exhaustively define the law governing a particular area is whether the Commonwealth Act expressly provides a statement of legislative intention regarding whether State laws are intended to be able to operate concurrently with it. Such statements of legislative intention have been held by the

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<sup>15</sup> RP Act s 19.

<sup>16</sup> RP Act s 24(3).

<sup>17</sup> RP Act s 32.

<sup>18</sup> NDIS Act s 73X(2)(b).

High Court to be instructive of Parliament's intention, but not decisive about whether or not the two laws are inconsistent.<sup>19</sup>

33. Section 58 of the NDIS Act overrides the effect of State or Territory laws to the extent that they would prevent a person from providing information, documents or evidence to the Agency or the Commissioner or an officer thereof for the purposes of the NDIS Act. There are no other provisions that operate to expressly override the effect of State or Territory laws.
34. Section 207 of the NDIS Act provides for the general concurrent operation of State laws, "to the extent that that law is capable of operating concurrently with this Act". The regulations are able to prescribe "kinds of laws" "as examples of laws" that are capable of operating concurrently with this Act. This appears to be a novel mechanism, the constitutional validity of which in my view is highly doubtful. I doubt very much that the executive government, through the making of delegated legislation, could in any way change the answer to the legal question of whether a State law was capable of operating concurrently with the NDIS Act. I doubt that just because such a regulation could be disallowed by Parliament, a Court would be willing to treat it as representing the intention of the Parliament as to the scope of operation of the NDIS Act. If the Commonwealth by regulation prescribed State laws establishing Community Visitor Schemes as laws of a type it regards as capable of operating concurrently with the NDIS Act, I do not think this would be able to make an otherwise invalid State law valid.

### Conclusion

35. The NDIS Act, upon the commencement of the NDIS Safeguards Commission Bill, will contain a comprehensive scheme governing the monitoring and investigation of breaches of the NDIS Act, and the making of complaints and reporting of incidents in relation to the operations of registered providers. The scope of the field of operation of the NDIS Act is indicated by one of the core functions of the new NDIS Commissioner: to "develop a **nationally consistent** approach to managing quality and safeguards for people with disability receiving supports or services, including those received under the National Disability Insurance Scheme". This reference to national consistency is echoed in the legislative purposes of the NDIS Act itself.
36. In circumstances where a nationally consistent legislative scheme is an objective of the Commonwealth law, the High Court has tended to be more willing to infer an intention on the part of the Commonwealth to cover the field.<sup>20</sup>
37. The NDIS Act, through its application of the RP Act, carefully confines the powers of inspectors to enter premises regulated under the NDIS Act and places the coercive exercise of an inspectors' monitoring powers under the supervision of the judiciary. In my view, the nature of a Community Visitors Scheme is highly similar to the scheme for monitoring conducted by inspectors established under the NDIS Act and RP Act. It is difficult to see a basis to treat community visitors as operating within a distinct "field" that the Commonwealth Act has implicitly left open to State regulation. A community visitor, like an inspector, has the fundamental function of entering

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<sup>19</sup> *Momcilovic v The Queen* (2011) 245 CLR 1, [104], [111]-[112] (French CJ), [271]-[272] (Gummow J), [315]-[316] (Hayne J), [474] (Heydon J), [654] (Crennan and Kiefel JJ).

<sup>20</sup> eg *Hutchinson 3G Australia v City of Mitcham* [2006] HCA 12, [111].

premises and monitoring compliance with the legislation. While a community visitor has the additional function of acting as an advocate for patients, this does not change the fundamental nature of their role.

38. The NDIS Act, upon the commencement of the NDIS Safeguards Commission Bill, appears to evince an intention to “cover the field” in relation to legislation empowering individuals to inspect NDIS premises for the purposes of monitoring compliance with the NDIS Act. In my view, there is a significant risk that State legislation purporting to establish a Community Visitors Scheme with application to NDIS premises would be inconsistent with the NDIS Act and invalid to the extent of the inconsistency.<sup>21</sup>
39. In my view, any Community Visitors Scheme operating under the NDIS would require legislative amendment to the NDIS Act. This could potentially involve:
- a. making community visitors inspectors under the RP Act; or
  - b. providing for a stand-alone advocacy function for community visitors with the necessary power to enter facilities for this purpose; and, in either case,
  - c. providing community visitors with protections from civil and criminal liability under s 73ZA of the NDIS Act;
40. I hope that this advice assists. As I will soon be moving to a different area of the Crown Solicitor’s Office, please feel free to contact Jane Cox of this office on 8204 8655 should you have any queries or wish to discuss this matter further.

Yours faithfully

CROWN SOLICITOR

Per:



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<sup>21</sup> I should note that, because of the limited nature of the functions of a community visitor, it may be unlikely that any constitutional challenge would be brought to a State law that did purport to establish a Community Visitors Scheme. It is, however, not entirely implausible that an NDIS provider who is either criminally charged with breaching the NDIS Act or who loses their NDIS provider registration and consequentially suffers financial loss - where a breach originally came to light due to the entry by a community visitor - might seek to challenge the validity of the Community Visitors Scheme as a means to argue that the evidence underlying the charges is unlawfully obtained.



**TO MINISTER FOR HUMAN SERVICES**

**RE: INDEPENDENT REVIEW OF COMMUNITY VISITOR SCHEMES UNDER THE NATIONAL DISABILITY INSURANCE SCHEME**

**Decision/action required by:...../...../.....**

**Reason:.....**

Recommendation	Response
1. That you note the content of this brief regarding an independent review of Community Visitor schemes under the National Disability Insurance Scheme.	Approved / Not Approved / Noted
2. That you note the intended input from Department of Human Services into the review.	Approved / Not Approved / Noted

<b>Comments:</b> ..... ..... ..... ..... ..... ..... ..... .....	<p style="text-align: center;">-----  <b>Hon Michelle Lensink MLC</b>  / / 2018</p>
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## KEY POINTS

- Out of scope [Redacted]
- Out of scope [Redacted]
- Out of scope [Redacted]

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## DISCUSSION

Out of scope



### **South Australian Crown Solicitors Office advice regarding Community Visitor legislation under the NDIS**

DHS has recently sought advice from the Crown Solicitor Office (CSO) about the ability for the State to continue to legislate for a Community Visitor scheme to visit and inspect providers of NDIS funded supports given there will no longer be a funding relationship between the State and disability providers.

The Summary of Advice received from CSO is that:

*“... following the commencement of the NDIS Safeguards Commission Bill on 1 July 2018, there is significant risk that State legislation purporting to create a Community Visitor Scheme with coercive powers to enter properties operated by registered NDIS providers would be inconsistent with the NDIS Act and invalid.”*

The detailed basis for this advice is set out within attachment 1. However, the main points of note are:

- The positions of Principal Community Visitor and community visitor are established by the *Mental Health Act 2009* (the MH Act). In order to give community visitors the power to perform the functions as described within the MH Act, they have the status of Inspectors under the *Health Care Act 2008* (HC Act).
- Community visitors have been extended to certain areas within the disability sector by Disability Services Community Visitor Scheme Regulations (DSCVS Regulations) under the *Disability Services Act 1993*. However, community visitors exercising their functions under the DSCVS Regulations do not have any coercive powers to enter premises, inspect documents or ask questions. They cannot use the powers under the MH Act or HC Act. DHS currently uses contractual obligations on providers to

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allow the coercive powers. These obligations will not exist under a fully rolled out NDIS.

- A primary objective of the *National Disability Insurance Scheme Act 2013* (NDIS Act) is to “facilitate the development of a nationally consistent approach to the access to, and the planning and funding of, supports for people with disability”. The NDIS Act also provides for one of the core functions of the NDIS Quality and Safeguards Commission to “develop a nationally consistent approach to managing quality and safeguards for people with disability receiving supports or services, including those received under the NDIS”.
- Additionally, the NDIS Act provides the Commission a range of investigatory and enforcement powers, including the power to appoint inspectors and investigators. Inspectors and investigators have similar powers to that of a community visitor.

CSO advice, therefore, concludes that circumstances where a nationally consistent legislative scheme is an objective of the Commonwealth law, the High Court has tended to be more willing to infer an intention on the part of the Commonwealth to cover the field.

Out of scope



## BUDGET

Are there financial implications

Yes

Out of scope



Is there a budget impact

Yes

Chief Financial Officer noted:.....

MEDIA/SENSITIVE:

No

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<b>Division</b>	NDIS Reform		
<b>A/Director</b>	Cassie Bouyer	.....	...../...../.....
		<b>signature</b>	
<b>Executive Director</b>	Nick Ashley	.....	...../...../.....
		<b>signature</b>	
<b>Deputy Chief Executive</b>	Lois Boswell	.....	...../...../.....
		<b>signature</b>	

## ATTACHMENTS

1. CSO Advice regarding a Community Visitor Scheme under the NDIS
2. Scope of the independent review into role of Community Visitor schemes under the NDIS
3. Email from Carolyn Graham, Assistant Director – Advocacy and Access Section, dated 07 May 2018

<b>Contact Officer:</b> Cassie Bouyer, Manager Complex Needs and Safeguards 8413 9057 / Cassandra.Bouyer@sa.gov.au
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