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Senator the Hon Marielle Smith
Legislation Committee Chair
Senate Standing Committees on Community Affairs
Parliament House
Canberra ACT 2600

By email: community.affairs.sen@aph.gov.au

Dear Senator Smith

Review of the Disability Services and Inclusion Bill 2023 and Disability Services and Inclusion (Consequential Amendments and Transitional Provisions) Bill 2023

Thank you for the opportunity to comment on the Disability Services and Inclusion Bill 2023 (DSI Bill) and its counterpart the Disability Services and Inclusion (Consequential Amendments and Transitional Provisions) Bill 2023.

I have examined the Bills from the perspective of two of my statutory roles: the Commonwealth Ombudsman; and the Commonwealth National Preventive Mechanism (NPM) under the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (OPCAT) for places of detention within the Commonwealth's jurisdiction.

The purpose of the Office of the Commonwealth Ombudsman (OCO) is to:

- provide assurance that the agencies and entities we oversee act with integrity and treat people fairly; and
- influence systemic improvement in government administration.

We aim to achieve our purpose by:

- independent and impartial review of complaints and disclosures about government administrative action
- influencing government agencies to be accountable, lawful, fair, transparent, and responsive
- assisting people to resolve complaints about government administrative action; and
- providing a level of assurance that law enforcement, integrity and regulatory agencies are complying with legal requirements when using covert, intrusive and coercive powers.

The DSI Bill does not appear to not make sufficient provision for robust and independent oversight. Section 15 of the DSI Bill would require recipients of Commonwealth funding that deliver 'eligible activities' (as defined by s13 of the DSI Bill) to establish complaints management and incident reporting systems. The requirement is currently provided for as a 'statutory funding condition'. As such, the details of how the systems would be overseen and consequences for breaches would be set out in departmental guidance, individual funding agreements, or in delegated legislation. This approach increases the risk of inconsistent and non-transparent oversight mechanisms that, while tailored to each provider, could generate confusion for users of the services

who may seek to escalate a complaint, and may impair the ability of the department to understand and analyse compliance issues across a range of providers.

The DSI Bill is otherwise silent on how complaints and incident reporting systems would be overseen. Paragraphs 72 and 75 of the Explanatory Memorandum to the DSI Bill indicate that oversight of complaints and incident management systems would be undertaken by the Department of Social Services and further detail, if necessary, could be provided through the rules made under ss 15(4)(d) and 15(b) of the DSI Bill.

Consideration should be given to enshrining the requirements for complaints and incident management systems and for oversight of these systems in the DSI Bill. This could include mechanisms to collect data and verify the effectiveness of the systems such as annual reporting on the volume of complaints and incidents reported, resolution rates, the size of any backlogs, as well as thematic reporting on systemic issues.

At a minimum, prescribing requirements for complaints and incident management by service providers and consequences for breaches would deliver a more consistent approach to handling complaint handling across the programs funded by the framework. This would be consistent with key recommendations of the Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability (Disability Royal Commission) Final Report targeted at delivering simpler and more independent complaint reporting.

As Commonwealth NPM, I monitor the treatment of people and the conditions of their detention and make recommendations for improvement. This includes places of immigration detention and places of detention under control of the Australian Federal Police and the Australian Defence Force. As the NPM Coordinator, my Office is tasked with coordinating the Australian NPM to collect and share information, facilitate collaboration and provide secretariat support for the preparation of consolidated reports on NPM activities.

Section 13 of the DSI Bill sets out 'eligible activities' which could be funded via the framework. I support the wide scope of matters intended to be captured by the definition of 'eligible activities' in s13(1) of the DSI Bill and I also recognise s13(2) provides an instrument-making power, enabling the responsible Minister to expand the scope of activities captured by the DSI Bill.

I recommend the framework explicitly refer to the provision of disability support services in circumstances where people are deprived of their liberty. This is especially important given the significant representation of people with disability in all types of places of detention. This could be achieved by express indication that 'eligible activities' can include supports or services provided to people in places where they are deprived of their liberty – such as, but not restricted to, correctional facilities and immigration detention facilities. This would be consistent with key recommendations of the Disability Royal Commission's Final Report in relation to Australia's commitment to and implementation of OPCAT.

Yours sincerely

Iain Anderson
Commonwealth Ombudsman

Influencing systemic improvement in public administration